ANNUAL REPORT

AND

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

MARYLAND

1969

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 Superseded by Carroll.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Plater I of St. Mary's County (Prot.), appears as acting Attorney General, for the crown, as early as 23 April 1691; superseded by Wynne.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
Edward F. Borgerding.....Assistant Attorney General, CHIEF, CRIMINAL DIVISION
Fred Oken.....Assistant Attorney General, CHIEF, CIVIL DIVISION
Jon F. Oster.....First Assistant Attorney General

ASSISTANT ATTORNEYS GENERAL

CIVIL DIVISION—

Thomas N. Biddison, Jr.
William E. Brannan
Estelle A. Fishbein (Mrs.)
Henry J. Frankel
Martin B. Greenfeld
Stanford D. Hess
Dickee M. Howard (Miss)
Henry R. Lord
Richard G. McCauley
Donald Needle
Joseph R. Raymond
Wilbur E. Simmons, Jr.

CRIMINAL DIVISION—

James L. Bundy
Robert A. DiCicco
John J. Garrity
H. Edgar Lentz
Alfred J. O'Ferrall, III
Gilbert Rosenthal
Francis X. Pugh
Clarence Sharp
T. Joseph Touhey
James F. Truitt

BALTIMORE CITY POLICE DEPARTMENT—Headquarters—

Bernard L. Silbert

CONSUMER PROTECTION AND ANTITRUST DIVISIONS—

Norman Polovoy.....Assistant Attorney General, CHIEF, CONSUMER PROTECTION DIVISION
John Ruth.....Assistant Attorney General and Investigator

SECURITIES DIVISION—

Philip Z. Altfeld, Securities Commissioner
Fred G. O'Fiesh, Assistant Securities Commissioner
Dickee M. Howard (Miss), Assistant Attorney General

SPECIAL ATTORNEYS

DEPARTMENTS—

Accident Fund, State

J. Howard Holzer
Charles R. Goldsborough
Edward Glusing
G. Darrell Russell, Jr.

Comptroller of the Treasury
William J. Rubin—Retail Sales Tax Division

Education
Frank J. Blair
Malcolm Kitt

Employment Security
Louis B. Price

Health and Mental Hygiene
Louis E. Schmidt
Edward R. Jeunette
Donald Noren
George Cavanaugh
Martin A. Ferris, III

Home Improvement Commission
James Ehrhart

Insurance
Murray K. Josephson

Motor Vehicles
N. Barton Benson

Natural Resources
Richard C. Rice
Edward S. Digges
Thomas M. Downs

Public Improvements
Allan S. Levy

Retirement Systems, State
Gerard H. Kessler

Roads Commission, State
Joseph D. Buscher—Special Attorney in Charge
Nolan H. Rogers—Administrative Special Attorney

Special Attorneys—
Eli Baer
Joseph J. Bonner
Richard T. Brice, IV
Guy J. Cicone
Walter W. Claggett
Herbert L. Cohen
James E. Fannon, Jr.
Charles C. Grice
Joseph A. Mattingly
Richard M. Pollitt
Norman Polski
Earl I. Rosenthal
John J. Schuchman
James F. Sfekas
Clater W. Smith, Jr.
Frank W. Wilson

Social Services
J. Michael McWilliams

Workmen's Compensation Commission

Subsequent Injury Fund
Albert A. Levin

Uninsured Employers Fund
William R. Lavasseur

ANNUAL REPORT FOR 1969

January 1, 1970

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, 1969 and ending December 31, 1969.

The total number of cases in courts of various jurisdictions has continued to increase. The Court of Special Appeals showed for its September Term, 1969, an increase of approximately 19% in the number of criminal appeals docketed. There was also an 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		61*
*(includes Petitions for Certiorari)		
United States Court of Appeals for the Fourth Circuit		140
United States District Court for the District of Maryland		235
Court of Appeals of Maryland— September Term, 1969		
Civil Appeals	37	
Criminal Appeals	16	
Post Conviction	1	
Miscellaneous Docket (Petitions for Certiorari)	280	
Total		334
Court of Special Appeals of Maryland— September Term, 1969		
Criminal Appeals Docketed	593	
Post Conviction	190	
Defective Delinquent	20	
Total		803
Cases in Lower Courts		72
Maryland Tax Court Cases	284 Closed in 1969 424 Filed in 1969	
Department of Employment Security	61 Circuit Courts and Baltimore City	
State Accident Fund	284 Circuit Courts and Baltimore City	

In June, 1969, the Consumer Protection Division celebrated its second anniversary. During this period of time, it has seen its caseload reach its present total of approximately 1,500 complaints, inquiries and requests for assistance each week from Maryland citizens throughout the State.

In an effort to handle this tremendous caseload, the Division was able to participate in a federally sponsored work-study program under which outstanding students from Johns Hopkins University and the University of Maryland Law School work in the Division during the summer vacation months as well as on a part-time basis throughout the school term. The use of these students not only helps the Division handle its ever-growing caseload, but also has the important secondary benefit of bringing into State service for the very first time, bright, capable and energetic college students with the hope that many of them, as a result of their experience in the Division, will elect to make careers in State service.

The Division's primary function is still to obtain recoveries and settlements on behalf of consumers who have been victimized by various acts of consumer fraud and deception. During its 2½ year history, it has been instrumental in obtaining for Maryland citizens over $1,500,000 in monetary recoveries, refunds, replacements of merchandise and cancellation of contracts.

During 1969, my office recommended and supported a number of consumer protection bills in the General Assembly, the most important of which was the bill which outlawed the deceptive selling practice commonly known as referral selling. Another important consumer bill enacted during the 1969 session gave greater protection to tenants with respect to the prompt recovery of their security deposits. In addition, legislation was also enacted outlawing games of chance in retailing establishments. The new legislation has been of significant benefit to all Maryland consumers and places our State among the leaders in sound and progressive consumer legislation.

We also worked closely with the State's Attorneys of Maryland in advocating new legislation in the field of criminal law, and various members of our staff appeared before Committees of the General Assembly to testify on legislation affecting the departments they represent.

During 1969, the Special Attorneys appointed to the Departments of Health and Mental Hygiene, Motor Vehicles, Social Services and Forests and Parks were involved in 249 civil cases in the Circuit Courts of the State. The Special Attorneys representing the Uninsured Employers' Fund of the Workmen's Compensation Commission appeared in 280 scheduled cases in 1969 before the Commission. 18 of the cases decided by the Commission were appealed. The Special Attorneys representing the Subsequent Injury Fund of the Workmen's Compensation Commission appeared in 241 cases before the Commission during 1969, and 27 of the cases decided by the Commission were appealed.

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.

There was a Special Session of the General Assembly held on January 6, 1969, for a vote on whether to sustain or override 37 bills vetoed by the Governor following adjournment of the 1968 Regular Session. Of these 37, 31 received the necessary three-fifths approval of both Houses required to override the Governor's veto as provided by Section 17 of Article II of the Maryland Constitution. The Regular Session of the General Assembly convened on January 15, 1969, and adjourned on March 25, 1969. The

Annapolis Office of the Attorney General during both of these Sessions was in charge of Mr. James F. Truitt, Jr., 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 February of 1969, Mr. Sweeney, Mr. Norman Polovoy, Chief of the Consumer Protection Division, and I attended the Mid-Winter Meeting of the National Association of Attorneys General in Washington, D.C. and in June I participated in the Annual Meeting of the National Association of Attorneys General held at St. Thomas, Virgin Islands. In the early part of July, I attended the Maryland Bar Association Convention in Atlantic City, New Jersey, and in November I was invited to testify before the Florida Legislature on the subject of Insurance.

A detailed Financial Statement of the State Law Department for the fiscal year beginning July 1, 1968, and ending June 30, 1969, is included herewith.

It is evident from this report that the activities of this office continue to increase. We are living in an era when citizen involvement with his government is at an all time high, and it has become commonplace for citizens, individually or in concert with others, to challenge government actions in both state and federal courts. This increased citizen activity has brought about a corresponding increase in the demands upon this office, as well as on other agencies of State government. Our work, however, continues to be interesting and challenging, and we look forward with anticipation to the years ahead.

I hope this report of our activities for the year 1969 meets with your approval.

Sincerely,

FRANCIS B. BURCH,
Attorney General.

Financial Statement of the State Law Department for the Fiscal Year Beginning July 1, 1968 and Ending June 30, 1969

Appropriations and Budget Credits

Program .01	$622,854.03
Program .02	1,338.00
Program .03	868.00
Program .04	63,871.00
Program .05	63,940.00
	$752,871.03

Program .01

Legal Counsel and Advice:	
Appropriation	$622,812.00
Appearance Fees	278.50
Budget Credits	42.03
	$623,132.53
Appearance Fees turned into State Treasury	278.50
Net Appropriation plus budget credits	$622,854.03

Salaries:		
Attorney General	$ 20,000.00	
Deputy Attorney General	21,241.00	
Assistant Attorney General III (3)	48,269.00	
Assistant Attorney General II (14)	179,720.00	
Special Attorney IV (Part Salary)	7,150.00	
Special Attorney III (3)	26,338.00	
Administrative Assistant, State Law Department	12,536.00	
Administrative Assistant II	9,141.00	
Accounting Associate II	9,307.00	
Stenographer, Law and Legislative (12)	86,637.00	
Secretary II	108.00	
Salaries		$420,447.00

Expenses (Exclusive of Salaries):		
Technical and Special Fees	——	
Communications	$ 25,869.00	
Travel	11,448.00	
Motor Vehicle Operation and Maintenance	4,122.00	
Contractual Services	83,998.00	
Supplies and Materials	5,308.00	
Equipment—Replacement	441.00	
Equipment—Additional	6,998.00	
Fixed Charges	61,446.00	
Total Operation Expenses	$199,630.00	
Salaries	420,447.00	
Total Expenditures		$620,077.00
Original General Fund Appropriation		$595,293.00
Transfer of General Fund Appropriation		27,519.00
Total General Fund Appropriation		$622,812.00
Less: General Fund Reversion		2,735.00
Net General Fund Expenditure		$620,077.00

Program .02

Subversive Activities Control:		
Appropriation		$ 1,338.00
Expenses:		
Contractual Services	$ 1,261.00	
Total Expenditures		$ 1,261.00
Original General Fund Appropriation		$ 8,688.00
Transfer of General Fund Appropriation		—7,350.00
Total General Fund Appropriation		$ 1,338.00
Less: General Fund Reversion		77.00
Net General Fund Expenditure		$ 1,261.00

Program .03

Sundry Claims Board:		
Appropriation		$ 868.00
Expenses:		
Contractual Services	$ 868.00	
Total Expenditures		$ 868.00
Original General Fund Appropriation		$ 5,000.00
Transfer of General Fund Appropriation		—4,132.00
Total General Fund Appropriation		$ 868.00
Less: General Fund Reversion		none
Net General Fund Expenditure		$ 868.00

Program .04

Division of Securities:		
Appropriation		$ 63,871.00
Salaries:		
Securities Commissioner	$ 12,450.00	
Assistant Securities Commissioner	17,138.00	
Assistant Attorney General II	14,300.00	
Stenographer, Law and Legislative	2,484.00	
Secretary II	5,614.00	
Salaries	$ 51,986.00	
Expenses (Exclusive of Salaries):		
Communications	$ 1,795.00	
Travel	1,310.00	
Contractual Services	3,037.00	
Supplies and Materials	2,388.00	
Equipment—Additional	1,775.00	
Fixed Charges	741.00	
Total Operation Expenses	$ 11,046.00	
Salaries	51,986.00	
Total Expenditures		$ 63,032.00

Original General Fund Appropriation		$ 64,071.00
Transfer of General Fund Appropriation		—200.00
Total General Fund Appropriation		$ 63,871.00
Less: General Fund Reversion		839.00
Net General Fund Expenditure		$ 63,032.00

Program .05

Division of Consumer Protection:		
Appropriation		$ 63,940.00
Appearance Fees		—9.00
		$ 63,949.00
Appearance Fees turned into State Treasury		—9.00
Net Appropriation		$ 63,940.00
Salaries:		
Assistant Attorney General III	$ 17,600.00	
Assistant Attorney General II	11,459.00	
Investigator, Consumer Protection	7,383.00	
Stenographer, Law and Legislative	6,855.00	
Secretary II	5,617.00	
Salaries	$ 48,914.00	
Expenses (Exclusive of Salaries):		
Communications	$ 2,082.00	
Travel	3,333.00	
Contractual Services	1,175.00	
Supplies and Materials	995.00	
Equipment—Additional	1,013.00	
Fixed Charges	5,720.00	
Total Operation Expenses	$ 14,318.00	
Salaries	48,914.00	
Total Expenditures		$ 63,232.00

Original General Fund Appropriation	$ 64,921.00
Transfer of General Fund Appropriation	—990.00
Total General Fund Appropriation	$ 63,931.00
Less: General Fund Reversion	699.00
Net General Fund Expenditure	$ 63,232.00

SUMMARY

Total Net Appropriations and Budget Credits		
Program .01	$622,854.03	
Program .02	1,338.00	
Program .03	868.00	
Program .04	63,871.00	
Program .05	63,940.00	
Total		$752,871.03
Total Expenditures		
Program .01	$620,077.00	
Program .02	1,261.00	
Program .03	868.00	
Program .04	63,032.00	
Program .05	63,232.00	
	$748,470.00	
Budget Credits	51.03	
	$748,521.03	
Total Reversion to State Treasury	4,350.00	
Total		$752,871.03

OFFICIAL OPINIONS

of the

ATTORNEY GENERAL of MARYLAND

BANK COMMISSIONER—BANKS OTHER THAN MUTUAL SAVINGS BANKS MAY ISSUE STOCK OPTIONS SUBJECT TO CERTAIN RESTRICTIONS.

February 7, 1969.

Mr. William A. Graham.

You have asked our opinion as to whether state banks (other than mutual savings banks) under your jurisdiction may adopt employee stock option plans under which, as an incentive to continued employment and maximum exertion, participants are afforded options to purchase authorized but unissued stock at a fixed price.

We find no Maryland authority directly governing the right of state banks to embark upon such programs. We find, however, that in 22 Opinions of the Attorney General 142, 145 (1937) we ruled that state banks might validly secure present increases in authorized capital to cover issuance of additional shares of stock at future times for limited purposes. Article 23, Section 22 (a), makes clear with respect to corporations under the general corporation law that future services "may constitute payment for warrants or options * * * if performed prior to the issuance by the corporation of the shares." While Article 11 does not contain a similar provision expressly applicable to banks, we consider that the same rule applies as to them, since Article 23, Section 22 (a) appears to constitute a codification of the common-law rule. See *McQuillen v. National Cash Register Co.*, 27 F. Supp. 639 (D. Md. 1939), affd. 112 F. 2d 877 (4th Cir.), cert. den. 311 U. S. 695, 729; Brune, *Maryland Corporation Law*, Section 182 n. 47. Moreover, "in matters of corporate government not specifically covered by the Banking Law, it would seem that the corporation law may be applied, unless its application is expressly, excluded". Brune, *supra*, Section 6; 32 Opinions of the Attorney General 76 (1947). We thus find no obstacle in

the laws relating to stock issuance by banks to increases in authorized capital designed to accommodate future issue of stock under an employee stock option plan where the increase in capital is out of surplus, as required by Article 11, Section 68, and the necessary amendment to the article of incorporation has been approved by two-thirds vote of the shareholders and by the Bank Commissioner pursuant to Article 11, Sections 30 and 68.

We likewise perceive no legal provision related to the fiduciary responsibilities of bank employees which would render institution of such plans inappropriate. In that connection we note that stock option plans are expressly authorized by Paragraph 5015 of the Manual for National Banks issued by the Comptroller of the Currency pursuant to statutory authorization. See CCH Federal Banking Law Reporter, ¶ 59.813. Issuance of stock options by national banks is subject to certain restrictions, outlined in regulations contained at 12 C.F.R. Sections 13.1 and 14.2. These provisions require the approval of the plan by the Comptroller of the Currency, and the submission to the Comptroller of a statement including the shareholders' meeting notice and proxy statement, the number of shares authorized and unissued allocated to the plan, and any necessary amendments to the articles of incorporation creating authorized but unissued stock and eliminating preemptive rights of reserved shares. The plans are subject to three added restrictions:

> (1) That the plan be governed by a committee, none of whose members may participate in it.
>
> (2) That the number of shares allocable to any person be reasonable in light of the purpose of the plan and the needs of the bank.
>
> (3) That the number of shares subject to the plan is not unreasonable in relation to the bank's capital structure and anticipated growth.

Limitations on stock issuance similar to the second and third limitations of the Comptroller appear to have been

imposed by common law in Maryland. Brune, *Maryland Corporation Law,* Section 182 at n. 49; *First Mortgage Bond Homestead Assn. v. Baker,* 157 Md. 309, 319-21. We think it clear that the broad standards of Article 11, Section 30 made applicable here by Article 11, Section 68 authorize the Commissioner, in passing on amendments to articles of incorporation increasing authorized capital stock for the purposes of a stock option plan, to apply standards similar to those applied by the Comptroller of the Currency. Cf. 22 Opinions of the Attorney General 142, 145-46 (1937).

It would also seem clear that capital stock allocated to a stock option plan but unissued would not be counted as part of bank capital for purposes of the statutory provisions relating to permissible investment in banking premises (Article 11, Section 71), permitted indebtedness and lending limits (Article 11, Sections 31 and 91) and branches (Article 11, Sections 28 and 53). Compare 12 C.F.R. Section 14.2 and Article 11, Section 70.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Asst. Attorney General.*

BANKS AND BANKING—BANK COMMISSIONER—AN INDIVIDUAL LENDING HIS OWN CAPITAL ON MORTGAGES WHO DOES NOT BORROW OR ACCEPT DEPOSITS FROM OTHERS TO DO SO CANNOT BE DEEMED A MORTGAGE BANKER OR MORTGAGE BROKER WITHIN THE PROVISIONS OF ARTICLE 11, SECTION 61 (A).

February 21, 1969.

Mr. William A. Graham.

You have asked our opinion as to whether an individual loaning money from his own funds on first mortgages on real estate is a mortgage broker or mortgage banker required to be licensed under the provisions of Article 11, Section 61A as enacted by Chapter 478 of the Acts of 1968.

The Act in question provides no definition of mortgage broker or mortgage banker. We think it apparent that an individual lending his own funds cannot be deemed a mortgage broker. *Richmond v. Blake*, 132 U. S. 592 (1890). We are left, then, with the question whether such a person can be deemed a mortgage banker.

We do not find in the Maryland Code any definition of the term, "mortgage banker". Accordingly we must look to the common law in order to ascertain the meaning of the term "otherwise defined as a mortgage banker" as used in the statute. We have examined and found inapplicable the definitions contained in Article 66, Section 41 relating to secondary mortgage loans and in Article 49, Section 5 (b) relating to loans not secured by a mortgage or deed of trust on real property. We also find no definition of the term "banker" in the banking laws which would advance our inquiry. Article 11, Section 63 defines "banking institutions" to mean, "incorporated banks, savings institutions, and trust companies", but the use of the term "any person, firm, partnerships, corporations, or associations" in Article 11, Section 61 (a) makes clear that in it, as at common law, the definition of "banker" was not limited to corporations.

We accordingly must have recourse to common law cases defining the term "banker". The most instructive such case appears to be the case of *Auten v. United States National Bank of New York*, 174 U. S. 125 (1899). That case involved a suit on a note endorsed by a bank cashier on behalf of a bank. It was claimed "that borrowing is out of the usual course of legitimate banking business; and one who loans must at his peril see that the officer or agent who offers to borrow for a bank has special authority to do so" (174 U. S. at 141). In rejecting these contentions and discussing the pertinent history, the Court observed:

> "A banker, Macleod says, is a trader who buys money, or money and debts, by creating other debts, which he does with his credit—exchanging for a debt payable in the future one payable on demand. This, he says, is the essential definition of banking. 'The first business of a banker is not to lend money *to* others but to collect money *from* others.' Macleod, Banking, vol. 1, 2d ed., pp. 109, 110. And Gilbart defines a banker to be 'a dealer in capital, or more properly a dealer in money. He is an intermediate party between the borrower and the lender. He borrows of one party and lends to another.' Gilbart, Banking, vol. 1, p. 2.
>
> "The very first banking in England was pure borrowing. It consisted in receiving money in exchange for which promissory notes were given payable to bearer on demand, and so essentially was this banking as then understood, that the monopoly given to the Bank of England was secured by prohibiting any partnership of more than six persons 'to borrow, owe, or take up any sum or sums of money on their bills or notes payable at demand.' And it had effect until 1772 (about thirty years), when the monopoly was evaded by the introduction of the deposit system. The relations created are the same as those created by the issue of notes. In both a debt is created —the evidence only is different. In one case it is

> a credit on the banker's books; in the other his written promise to pay. In the one case he discharges it by paying the orders (checks) of his creditor; in the other by redeeming his promises. These are the only differences. There may be others of advantage and ultimate effect, but with them we are not concerned."

A similar definition of banking was applied by the Supreme Court in the earlier case of *Selden v. Equitable Trust Company,* 94 U. S. 419 (1877). That case presented a problem very similar to that involved here. A Federal statute, Revised Statutes § 3407, now 26 U.S.C.A. § 4882, imposed a federal tax on persons or organizations defined as bankers. The Court was confronted with the question whether a corporation which invested its own capital in mortgages on real estate, and which did not receive deposits, issue notes, make discounts, or borrow money was subject to the tax. The statute in question applied by its terms to:

> "Every incorporated or other bank, and every person, firm or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid, or remitted upon draft, check or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or for sale. . . ."

In holding that the corporation lending its capital on mortgages was not a banker, notwithstanding the last clause of this statute and the fact that the corporation sold stocks and bonds in order to make mortgage loans, the Court stated:

> ". . . In no proper sense can it be understood that one receives his own stocks and bonds, or bills, or notes, for discount or for sale. He receives the

bonds, bills or notes belonging to him, as evidences of debt, though he may sell them afterwards. Nobody would understand that to be banking business. But when a corporation or natural person receives from another person, for discount, bills of exchange or promissory notes belonging to that other, he is acting as a banker; and when a customer brings bonds, bullion or stocks for sale, and they are received for the purpose for which they are brought, that is, to be sold, the case is presented which we think was contemplated by the statute. In common understanding, he who receives goods for sale is one who receives them as an agent for a principal who is the owner. He is not one who buys and sells on his own account.

"The Equitable Trust Company lent its own money, taking bonds and mortgages therefor. Those bonds it sold with a guaranty. It sold only its own property, not that received from other owners for sale. Such a business, in our opinion, did not constitute the Corporation a banker, as defined by the revenue laws."

Other cases are to similar effect. See *Meadowcraft v. People,* 163 Ill. 56, 45 N.E. 303 (1896), and *Deposit Bank of Carlyle v. Fleming,* 44 S.W. 961 (Ky. 1898) which define the term "banker" as a "dealer in capital—an intermediate party between the borrower and the lender, who borrows of one party and lends to another." See 9 C.J.S. *Banks and Banking,* § 1 (b); 1 Zollmann, *Banks and Banking,* § 1; 1 Michie, *Banks and Banking,* § 2.

It is, therefore, clear that an individual lending his own capital on mortgages who does not borrow or accept deposits from others to do so cannot be deemed a mortgage banker or mortgage broker within the provisions of Article 11, Section 61 (a).

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Asst. Attorney General.*

BANKS AND BANKING—BANK COMMISSIONER—SECONDARY MORTGAGE LOAN LAW—REGULATION FORBIDDING DISCOUNTING OF INTEREST TO BE TAKEN IN ADVANCE NOT INVALID.

June 13, 1969.

Mr. William A. Graham.

You have forwarded to this office a communication questioning the validity of Regulation 13 promulgated by you pursuant to the authority vested in you by Article 66, Section 70 of the Secondary Mortgage Loan Law, adopted by Chapter 390 of the Acts of 1967. Regulation 13 reads as follows:

> "A lender may exact from the borrower an amount of interest which may be taken in advance, as determined by the following formula:
>
> $$I = \frac{.12A\ (P+1)}{2N}$$
>
> I= interest taken in advance
>
> A= amount of predetermined proceeds
>
> P= number of payment periods contained in the contract
>
> N= number of payment periods to the nearest whole number, in any one calendar year.
>
> a. Interest tables made available by various publishers may be used by a licensee, however, the accuracy of such table is the licensee's responsibility."

As you note in your original letter of inquiry, this Regulation was submitted by you and approved by this office by letter dated November 8, 1967, prior to its promulga-

tion, following publication and conduct of the hearings required by the Administrative Procedure Act. Under these circumstances we should be reluctant to now disapprove the Regulation which you have promulgated. However, because of your renewed request, we have reviewed the question in detail and in so doing have considered all available indicia of legislative intent, including the Journals of the 1967 General Assembly which have only recently become available.

The persons questioning the validity of the Regulation contend that it improperly prohibits the discounting of interest on loans made pursuant to the Secondary Mortgage Loan Law. Article 66, Section 61 (a) of the Code, which the Regulation implements, provides, in pertinent part:

> "A lender may make a secondary mortgage loan in such an amount that the net proceeds thereof shall equal a predetermined sum, and may take interest in advance upon the full amount of such loan for the period from the making of the loan to the date of maturity of the final installment. The total interest, however, shall not exceed the amount that would accrue throughout the term of the loan, if charged at the rate of twelve percent per annum at the end of each installment period upon the descending balance."

It is contended that the statute should be read as though the words "of the full amount of the loan" appeared after the phrase "descending balance" and that, as construed by the regulation, the statute has been interpreted as though the words inserted after "descending balance" were "of the predetermined sum".

The effect of acceptance of the position urged by the parties making inquiry would be to permit the discounting of interest under the statute; the effect of the position taken by the regulation is to forbid the discounting of interest.

The ambiguity in the statute giving rise to this controversy has been noted by the commentators. Joseph, *Interest and Usury, Maryland State Law Association Continuing Legal Education Reference Handbook* (1968) at 102 observes that, "The General Assembly probably intended to limit the true interest (figured on the descending *principal* balance from time to time) to 12% per annum, plus a 2% loan origination fee, but this is not altogether clear in the law". Smith, *Limits on Interest Rates in Maryland,* 27 Md. L. Rev. 252-253, 268-269 (1967) observes:

> "The new Secondary Mortgage Loan Law allows a loan origination fee of no greater than two per cent of the net proceeds of the loan and seems to set the interest rate at twelve per cent on the declining balance from time to time due. Thus it was probably intended to limit the true interest to a little more than twelve per cent. However, there is some possibility that interest may be discounted, the net proceeds due being after interest, so that the true allowable interest rate may be much higher. Under this possibility, a loan of $1,000 for five years would first be computed to bear $334.66 interest on the declining balance at twelve per cent. Discounting, the net proceeds payable would be $665.34. Then a two per cent origination fee of $13.31 could be deducted, leaving $652.03 for the borrower, who signs a note for $1,000. The true annual interest rate would then be more than eighteen per cent. The ambiguous Section 61 (a) reads as follows:
>
> > 'A Lender may make a secondary mortgage loan in such an amount that the net proceeds thereof shall equal a predetermined sum, and may take interest in advance upon the full amount of such loan for the period from the making of the loan to the date of maturity of the final installment. The total interest, how-

> ever, shall not exceed the amount that would accrue throughout the term of the loan, if charged at the rate of 12 per cent per annum at the end of each installment period upon the descending balance.'
>
> As the legislature did specify that the origination fee is to be charged on the 'net proceeds of the loan,' but spoke only of the 'descending balance' when fixing the base for the twelve per cent interest rate, it is not clear that the twelve per cent is to be computed on the descending balance of the net proceeds. The first sentence certainly indicates that the loan may be drawn up in an add-on or discount form, so that the balance which would literally be due on the loan from month to month would include both principal and interest. The legislature has presented another difficult problem to the courts. Even if interest may be charged on interest by the discount method, the 18.3% thus allowable on a five year loan is perhaps reasonable. But for ten years, the amount advanced against a $1,000 note would be only $272.19, with true interest far exceeding the Small Loan Act limits."

It is against this background that we must undertake to determine the validity of the contentions made to you. The chief such contention is that the Maryland Act was modeled after the New Jersey Secondary Mortgage Loan Law; that Section 21 of the New Jersey statute, N.J.S.A. 17: 11A-21 expressly prohibits discounting of interest, and that the omission of a similar express prohibition in the Maryland statute indicates that discounting was intended to be permitted in this State.

Section 21 of the New Jersey Secondary Mortgage Loan Law of 1965 reads as follows:

> "A licensee may make a secondary mortgage loan in such an amount that the net proceeds

thereof shall equal a predetermined sum, and may take interest in advance upon the full amount of such loan for the period from the making of the loan to the date of maturity of the final installment. The full amount of such loan shall not exceed the aggregate of the net proceeds and the amount of interest which may be taken in advance, as determined by the application of the formula,

$$\frac{I = .14\ A\ (P + I)}{2N}$$

in which 'I' represents the amount of interest which may be taken in advance; 'A' represents the amount of the predetermined net proceeds; 'I' represents the number of payment periods contained in the period from the date of the making of the loan to and including the date of maturity of the final installment; and 'N' represents, to the nearest whole number, the number of payment periods contained in a calendar year."

An identical provision save that the permissible interest rate was designated as 12% rather than 14% was contained in House Bill 259 which was enacted by the General Assembly of 1966. House Bill 259 was vetoed by Governor Tawes on the advice of the State Bank Commissioner for a number of reasons, one of which was that "the rate of interest taken in connection with other charges permitted could provide for a very high yield to the lender" (Veto Message, Laws of Maryland, 1966 at pp. 1440-41).

Following the veto of House Bill 259 by Governor Tawes, the Legislative Council took under advisement the subject of secondary mortgage legislation and considered House Bill 259 together with "a number of amendments to it (received) at different times from the Bank Commissioner's office". Maryland Legislative Council, Report to the General Assembly of 1967 at p. 345. The Legislative Council Committee took no action; however, in due course, an amended version of House Bill 259 embodying the

present language was introduced as Senate Bill 566 at the 1967 Session and was duly enacted.

In comparing the provisions of the New Jersey legislation and of House Bill 259 with the provisions of the Secondary Mortgage Loan Law enacted in Maryland by Chapter 390 of the Acts of 1967, we are drawn to a conclusion diametrically opposite from that asserted in the letter of inquiry addressed to you. It seems clear that the New Jersey legislation, like the Maryland Act here controlling, far from clearly prohibiting the discounting of interest, can be read as permitting it, inasmuch as it allows interest to be taken in advance on the "full amount of the loan" and defines "full amount" to mean net proceeds plus interest taken in advance. We are advised that the New Jersey authorities charged with administration of the law have, like your inquirer, construed it to prohibit discounting.* The 1967 Maryland statute appears to have undertaken to severely limit allowable interest rates and practices in accordance with the recommendation of the veto message. Viewed against this background, it would appear that the language of the second sentence of Article 66, Section 61 (a) requiring that the total interest be calculated upon the descending balance is nothing more than a shorthand statement of the formula set out in the New Jersey Act, in the 1966 Maryland bill, and in your regulation. Further, we are impressed by two other indicia of legislative intent. Article 66, Section 65 (a) requires the lender to furnish to the borrower a statement which shall "show the rate of interest in terms of the equivalent percent per annum of the descending balances, as if computed according to the actuarial method". We think it apparent that the words "descending balances" were used in the same sense in this section as in Section 61 (a). The reference to "the actuarial method" appears to be a reference to the method prescribed by the then pending Federal Truth in Lending bill, see Smith, *Limits on Interest Rates in Maryland, supra,* 27 Md. L. Rev. at 254. "The actuarial method" for computing interest contained in the then

pending truth in lending bill was that defined in *Story v. Livingston*, 38 U. S. 359, 370 (1839) which, of course, relates to declining principal balances.

A second and in our view even more persuasive indication that the words "descending balance" refer to descending principal balance is the fact that Article 66, Section 64 contains limitations on refinancing which are not contained either in the New Jersey legislation or in House Bill 259 of 1966. Limitations on refinancing of this character are, as we recently had occasion to note in several opinions relating to the Uniform Small Loan Law, included in consumer loan legislation in order to prevent the collection of interest on interest. The enactment of Article 66, Section 64 would be difficult to explain if, as your inquirer suggests, Article 66, Section 61 (a) was intended to allow the discounting of interest.

In addition to the inferences sought to be drawn from the New Jersey legislation, reliance is also placed on 42 Opinions of the Attorney General 68 (1957) and on the opinion of the Court of Appeals of Maryland in *Crest Investment Trust, Inc. v. Cohen*, 245 Md. 639 (1967), both of which construed the ambiguous language of Article 58A, Section 22 of the Code as it then stood as permitting discounting. Cf. also 49 Opinions of the Attorney General 298 (1963). The various possible interpretations which can be placed upon the *Crest* opinion are ably discussed in Smith, *supra* at 261-267. In light of that discussion, we think it sufficient to say that each of the lending statutes stands on its own bottom and must be read in the context of the prior history of the legislation and the entire statutory scheme involved. In light of the particular structure and purposes of the Secondary Mortgage Loan Law and its history, we cannot say that the interpretation which you have accepted is clearly invalid, and we should be particularly reluctant to invalidate the interpretation contained in your regulation in view of the role which your office played in the drafting and development of the 1967 Act and your detailed familiarity with its intent and provisions.

Accordingly, we can advise you that after detailed consideration of the question, we have found no reason to alter the approval of Regulation 13 expressed in our letter to you of November 8, 1967.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Asst. Attorney General.*

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*We are advised that the interpretation placed by the New Jersey authorities on Section 21 has not been a subject of dispute, but that their view that N. J. Stat. 17A-11-22 (4) limits attorneys' fees to 5% of net proceeds despite the reference to "full amount of the loan" in that section is currently the subject of litigation in the New Jersey courts, and that a new secondary mortgage loan law which would resolve these and other ambiguities has passed the New Jersey Senate and is currently under consideration by the New Jersey House.

BANKS AND BANKING—INTEREST—ALLOWABLE INTEREST RATE ON PURCHASE MONEY SECOND MORTGAGES GRANTED BY BUILDERS IS THE SAME AS THE RATE ON PURCHASE MONEY FIRST MORTGAGES GRANTED BY THEM, AS SET OUT IN ARTICLE 49, SECTION 3 OF THE CODE.

July 14, 1969.

Mr. William A. Graham.

You have asked our opinion as to the applicability of the Secondary Mortgage Loan Law, Article 66, Section 40 to purchase money second mortgages given by builders and developers of new homes.

In our opinion of May 22, 1968 to the Honorable Steny H. Hoyer, we observed with respect to the applicability of the interest and usury provisions of Chapter 453 of the Laws of 1968, Article 49 of the Maryland Code, to purchase money mortgages given by builders that "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 find no basis on which to distinguish between Article 49, Section 5 and Article 66, Section 40 in this respect. It would appear to follow, therefore, that a builder granting purchase money secondary mortgages is not subject to the licensing requirements of the Secondary Mortgage Loan Law, and is likewise not entitled to charge the interest rates authorized by that statute which limits to licensees and regulated financial institutions the right to charge the allowable interest rate. Since Article 49, Section 1 (a) makes clear that the general provisions of Article 49, Section 3 apply to "time price differentials", it follows that the allowable interest rates on purchase money secondary mortgages granted by builders are the same as the allowable rates on purchase money first mortgages granted by them, namely, the rates provided for in Article 49, Section 3.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Asst. Attorney General.*

BANKS AND BANKING—INTEREST—JUNIOR LIEN ON REAL ESTATE SUPPLEMENTARY TO OTHER COLLATERAL—INTEREST RATE CONTROLLED BY ARTICLE 49, SECTION 3 OF CODE.

July 14, 1969.

Mr. William A. Graham.

You have asked our opinion as to the applicability of the Secondary Mortgage Loan Law to a situation in which the holder of a junior lien on real estate receives from a borrower collateral, such as corporate stock, as additional security for making a loan. You inquire whether the lender accepting such additional collateral is entitled to the benefit of the interest rates provided for under the Secondary Mortgage Loan Law. You further inquire as to the effect of a decision that the Secondary Mortgage interest rates are inapplicable upon existing loans secured by collateral additional to a junior lien on real estate.

We are of the opinion that the interest rates provided in the Secondary Mortgage Loan Law are inapplicable where a loan is secured not merely by a junior lien on real estate but by additional collateral.

In such a case it becomes necessary to reconcile the provisions of the Secondary Mortgage Loan Law (Article 66, Section 40) with the general Interest and Usury provisions of Article 49. Article 49, Section 5 (a) allows the charging of twelve percent interest 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". Article 49, Section 3 limits the allowable interest rate to eight percent in connection with other loans. Article 66, Section 40 defines a secondary mortgage loan as "a loan secured in whole or in part by [a junior lien]". We think it apparent that the words "in part" are intended to apply to a situation where the junior lien is sufficient to secure only part of the loan, insofar as the interest rate provisions of the Secondary Mortgage Loan Law are

concerned, and that the words "in part" do not apply to a situation in which a loan is fully secured by other collateral to which the junior lien is merely supplementary. The authorization of a higher rate in the Secondary Mortgage Loan Law is designed to compensate lenders for the greater risk entailed in making loans which are effectively unsecured save for a junior lien on real property. It would be anomalous if taking of a secondary mortgage loan as *additional security* to other collateral such as stocks and bonds were to automatically entitle a lender to a higher rate. Article 49, Section 5 (a) makes clear that where loans are fully secured by negotiable stocks, bonds, or bank deposits, the allowable interest rates are those set out in Article 49, Section 3. The presence of a supplementary junior lien on real estate should not affect this result. Where the security for a loan is partially made up of stocks and bonds, not sufficient in themselves to fully secure the loan, and partially of a secondary mortgage, a different result might obtain. In such a case it may be that the allowable interest rate is that defined by Article 49, Section 5 (a) rather than that defined by the Secondary Mortgage Loan Law, or it may be that the applicable rate is that defined by Article 49, Section 3. Determination of this question will depend in part on whether the words "a mortgage or deed of trust on real property" in Article 49, Section 5 (a) are read as including secondary mortgages. In view of the similarity of the interest rates allowable under the Secondary Mortgage Loan Law and Article 49, Section 5 (a), the question may, in practice, prove to be of limited importance and we are therefore unwilling to pass upon it in the abstract in the absence of particular facts relating to a particular transaction.

In our opinion to you of November 21, 1968, we took the view that the provisions of Chapter 453 of the Acts of 1968 did not operate to repeal the interest provisions of the Secondary Mortgage Loan Law since "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 Loan, in which the lender is in a position of exposure greater than that of the ordinary mortgage lender".

In short, our answer to your inquiry is that where a junior lien on real estate is merely supplementary to other collateral, the interest rates set forth in the Secondary Mortgage Loan Law are inapplicable and those of Article 49, Section 3 control. Where a loan is partially secured by a junior lien on real estate and is partially secured by stocks, bonds or cash, a determination as to whether the provisions of Article 49, Section 3 or Article 49, Section 5 (a) control will depend upon the facts of a particular case and no general answer is possible in the absence of such facts.

We further note that this opinion deals only with the applicability of the interest rate provisions of the Secondary Mortgage Loan Law. Because of the presence of closely related statutes dealing with interest rates, the conclusions reached as to the scope of the interest rate provisions of the Secondary Mortgage Loan Law are not necessarily the same which would be reached if the sole question at issue related to the licensing provisions of the Secondary Mortgage Loan Law or the provisions of that law relating to forms of statements to be given to borrowers, which may apply where the interest rates do not. Compare our opinion to you of November 21, 1968, and see *Oxford Consumer Discount Co. v. Stefanelli*, 102 N.J. Super. 549, 246 A. 2d 460 (1968).

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Asst. Attorney General.*

BANKS AND BANKING—LOANS—INTEREST CHARGEABLE—SECONDARY MORTGAGES—ADDITIONAL COLLATERAL—ARTICLE 49, SECTION 5 (A), ARTICLE 66, SECTION 40 (A).

August 8, 1969.

Mr. William A. Graham.

You have requested our opinion as to the applicability of Section 5 of Article 49 of the Annotated Code of Maryland (1968 Supplement) to a loan secured by additional collateral of a value equal to or exceeding the amount of a loan, which is also secured by either a first or second mortgage.

In our opinion to you of July 14, 1969, we stated that the interest rates provided in the Secondary Mortgage Loan Law are inapplicable where a loan is secured not merely by a junior lien on real estate, but by additional collateral.

Article 49, Section 5 (a) of the Code provides:

> "(a) 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 percent (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 percent 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 percent per annum simple interest rate is exceeded, such excess shall be refunded to the borrower or credited on any balance owing to the borrower."

In order to determine the applicability of Section 5 (a) to a loan secured by a mortgage, a determination must be made as to whether the word "mortgage", as used in this section, encompasses secondary mortgages, as well as what is commonly referred to as a "first mortgage".

Article 66, Section 40 (a) of the Code, in defining a secondary mortgage loan states:

> "Secondary mortgage loan means a loan secured in whole or in part by mortgage, deed of trust, security agreement or other lien on real estate situate in this State which property is subject to the lien of one or more prior encumbrances, other than a ground rent or other leasehold interest, having thereon a dwelling designed principally as a residence with accommodations for not more than four families. For the purpose of this subtitle, any person who ordinarily requires the signing of a confessed judgment note or consent judgment for the purposes of acquiring a lien on any real estate described herein or who requires a sale and leaseback of such property for such purposes shall be deemed to have made a loan secured by a lien on the real estate situate in this State. 'Secondary mortgage loan' shall not mean a loan to any corporation unless the lender required the borrower to incorporate as a condition for obtaining the loan."

This section must be taken into consideration in the construction of Article 49, Section 5 (a) because all provisions of law bearing on the construction of a statute must be given meaning. To construe "mortgage" as used in Section 5 (a) to mean a secondary as well as a first mortgage would render Article 66, Section 40 (a) almost meaningless.

As to the legal rate of interest chargeable upon a loan secured by a secondary mortgage only, the Legislature has specifically provided by virtue of Article 66, Section 61 (a) of the Code that:

> "(a) A lender may make a secondary mortgage loan in such an amount that the net proceeds thereof shall equal a predetermined sum, and may take interest in advance upon the full amount of such loan for the period from the making of the loan to the date of maturity of the final installment. The total interest, however, shall not exceed the amount that would accrue throughout the term of the loan, if charged at the rate of twelve percent per annum at the end of each installment period upon the descending balance. The secondary mortgage loan between the borrower and lender shall be amortized in equal or substantially equal monthly installments without a balloon payment at maturity, except that payment on such a loan may be reduced or suspended until the first lien or encumbrance is wholly or partially satisfied."

In view of the foregoing specific statutory provisions respecting secondary mortgages and loans secured by a secondary mortgage, we believe that a junior lien on real estate should not be considered a "mortgage" for the purposes of Section 5 (a), but that the word "mortgage" as used in this section means a "first mortgage" on real estate.

The language of Section 5 (a) specifically provides that the interest designated therein may be ". . . charged on loans . . . *not fully secured* by negotiable stocks, bonds, or bank deposits . . ." (Emphasis added). Thus, in a situation where a loan is partially secured by a junior lien on real estate, and additional collateral in the nature of stocks, bonds, or bank deposits is taken, which equals or exceeds the amount of the loan, the loan is fully secured by said collateral and the junior lien is immaterial in determining whether the provisions of Article 49, Section 5 (a) of the Code apply. It is clear that under these circumstances the

legal rate of interest provided for in Section 3 of Article 49 would be applicable.

In a case wherein a junior lien on real estate is taken, in addition to other collateral in the nature of stocks, bonds or bank deposits, which other collateral items do *not* fully, in and of themselves, equal or exceed the value of the loan, then the provisions of Article 49, Section 5 (a) would be applicable.

In a case where other collateral, not in the nature of negotiable stocks, bonds or bank deposits, is taken, as additional collateral on a loan secured by a junior lien on real estate, it is our opinion that the provisions of Article 49, Section 5 (a) of the Code are applicable, whether or not said additional collateral is equal to, or exceeds the amount of the loan.

Likewise, where a junior lien on real estate is taken, and collateral is also taken, not in the nature of stocks, bonds or bank deposits, whether said collateral equals or exceeds the amount of the loan, it is our opinion that the provisions of Article 49, Section 5 (a) of the Annotated Code of Maryland would apply to such a transaction.

FRANCIS B. BURCH, *Attorney General.*

STANFORD D. HESS, *Asst. Attorney General.*

BANKS AND BANKING—INTERPRETATION OF ARTICLE 11, SECTION 196—VALIDITY OF INDUSTRIAL FINANCE AND SMALL LOAN TO SAME PARTY BY SAME LICENSEE—POWER OF BANK COMMISSIONER TO PROHIBIT COLLECTION OF INDUSTRIAL FINANCE LOAN AND TO ORDER RETURN OF MONEY ALREADY PAID ON VOID LOANS.

September 17, 1969.

Mr. William A. Graham.

You have inquired whether a Maryland lending institution may make two loans, one an Industrial Finance Loan under the Maryland Industrial Finance Law, and the other a small loan under the Uniform Small Loan Law, to the same person. You further inquire on what process a borrower may rely, in order to recoup any money which has been paid by him, to the lending institution, in the event such a dual transaction is void.

We assume the applicability to this situation of Article 11, Section 196 which states:

> "(B) Prohibited loans.—No licensee shall:
>
> "(2) Divide into separate parts any contract made for the purpose of or with the effect of obtaining charges in excess of those authorized by this subtitle; and in the case of any licensee also holding a license under the provisions of Article 58A of the Annotated Code of Maryland, any loan made to any one borrower by any such licensee shall be made either entirely under and subject to the provisions of this subtitle or entirely under and subject to the provisions of Article 58A.
>
> "(C) Penalties.—In addition to the interest, charges and fees specifically provided for in this article, no further or other amount whatsoever shall be directly or indirectly charged, contracted for, or received. If any amount in excess of the charges permitted by this article is charged, con-

> tracted for, or received, except as the result of an accidental or bona fide error of computation, the contract of loan shall be void, and the licensee shall have no right to collect or receive any principal, interest, charges, or recompense whatsoever; and the licensee and the several members, officers, directors, agents, and employees thereof who shall have wilfully and knowingly participated in such violation, shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than five hundred dollars ($500) or by imprisonment of not more than six (6) months or by both such fine and imprisonment in the discretion of the court."

It is our opinion that the law is very clear in this respect, and that in the situation you describe, involving a licensee who holds both a license under the provisions of Article 58A of the Code and one under the Industrial Finance Act, which makes two loans to the same borrower, one under the provisions of each Act, the loan is void, and the licensee cannot collect or receive any principal, interest, charges or recompense whatsoever. See 31 Opinions of the Attorney General 168.

In answer to your inquiry as to what process is to be followed by you, after discovery of situations wherein two loans are made to the same person under both Article 58A and the Industrial Finance Act, we refer you to Article 11, Section 188 (d) of the Annotated Code of Maryland, involving your power to command a licensee to "cease and desist" from any violation of the Industrial Finance Act. We believe that under the authority of this section, you may order a licensee to refrain from collecting any further amounts, whatsoever, on a loan transaction which is void, whether or not said transaction was void *ab initio*, or became void pursuant to some action of the licensee subsequent to the making of the loan.

We find no authority in this subtitle which would authorize you, as Bank Commissioner, to order any licensee under

the Industrial Finance Act to return any money which it has collected pursuant to a loan which is void. In this regard your authority differs from that of the Administrator of Loan Laws, in that Article 58A allows the Administrator to order that any money collected, pursuant to a void loan, not be "retained" by the licensee, but be returned to the borrower. See our opinion to the Administrator of Loan Laws of September 4, 1969. (54 Opinions of the Attorney General 281). See also the Municipal Court of Appeals for the District of Columbia opinion in *Credit Finance Service v. Able,* 227 A 2d 396 (1956) where the borrower recouped payments made on a void loan by judicial action, at a time when the Maryland Small Loan Act did not *specifically* prevent a lender from "retaining" monies repaid on a void loan.

We find no authority in the Industrial Finance Act which empowers you to order that money paid on a void loan may not be retained by the lending institution, and thus believe that the disposition of these funds is a matter which must be decided by a Court of Law, in an action instituted by the aggrieved party.

FRANCIS B. BURCH, *Attorney General.*

STANFORD D. HESS, *Asst. Attorney General.*

BANKS AND BANKING—SMALL LOAN VALIDITY OF WHEN MADE ALONG WITH AN INDUSTRIAL FINANCE LOAN BY SAME LICENSEE—INDUSTRIAL FINANCE AND SMALL LOAN, VALIDITY OF CONSOLIDATION OF.

November 3, 1969.

Mr. William A. Graham.

Your recent letter directs our attention to an industrial finance loan, which was created by the consolidation of an industrial finance loan and a small loan. You ask whether such loan would be valid, if at some time previous to the consolidation of the two loans, the industrial finance loan became void, by virtue of the lender's making of two loans to the same borrower. See our letter to you dated September 17, 1969, wherein we held the industrial loan void under such circumstances. You now inquire as to the validity of a new contract of loan combining the original industrial finance loan and a small loan.

In order that your inquiry be properly answered, it is necessary to determine the validity of the small loan in the situation you describe. Again we direct your attention to Article 11, Section 196 which states:

> "(B) Prohibited loans.—No licensee shall:
>
> "(2) Divide into separate parts any contract made for the purpose of or with the effect of obtaining charges in excess of those authorized by this subtitle; and in the case of any licensee also holding a license under the provisions of Article 58A of the Annotated Code of Maryland, any loan made to any one borrower by any such licensee shall be made either entirely under and subject to the provisions of this subtitle or entirely under and subject to the provisions of Article 58A.
>
> "(C) Penalties.—In addition to the interest,

charges and fees specifically provided for in this article, no further or other amount whatsoever shall be directly or indirectly charged, contracted for, or received. If any amount in excess of the charges permitted by this article is charged, contracted for, or received, except as the result of an accidental or bona fide error of computation, the contract of loan shall be void, and the licensee shall have no right to collect or receive any principal, interest, charges, or recompense whatsoever; and the licensee and the several members, officers, directors, agents, and employees thereof who shall have wilfully and knowingly participated in such violation, shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than five hundred dollars ($500) or by imprisonment of not more than six (6) months or by both such fine and imprisonment in the discretion of the court."

In our opinion, Article 11, Section 196 (2) prohibits a lender who is licensed under both the Industrial Finance Loan Law and the Small Loan Law from making an industrial loan and a small loan simultaneously to the same borrower.

In such event both the small loan and the industrial finance loan are void *ab initio,* and the licensee has no right to collect or receive any principal, interest, charges or recompense whatsoever.

It is our further opinion that the subsequent signing of a contract of loan by the borrower, acknowledging an obligation to repay loans which were void *ab initio* is a nullity, and should be considered as a further attempt by the lender to circumvent the laws of this State.

FRANCIS B. BURCH, *Attorney General.*

STANFORD D. HESS, *Asst. Attorney General.*

BANKS AND BANKING—POWER TO ESTABLISH FOREIGN BRANCHES—NECESSITY OF PRIOR APPROVAL OF BANK COMMISSIONER—SUPERVISION OF BANK COMMISSIONER OVER RECORDS OF FOREIGN BRANCHES—INTERPRETATION OF ARTICLE 11, SECTION 65 OF THE ANNOTATED CODE OF MARYLAND.

December 4, 1969.

Mr. William A. Graham.

Your recent letter inquires whether banks organized under Maryland law may establish branches in foreign countries. A legislative grant of power to establish branch banks within this State appears in Article 11, Section 65 of the Annotated Code of Maryland (1968 Replacement Volume), which provides:

> "Any bank or trust company, organized under the laws of this State, is specifically granted the power and authority to establish and operate a branch or branches in the city or county in which it is located or at any point within the State, after having first obtained the approval of the Bank Commissioner, which approval may be given or withheld in his discretion, and shall not be given until he shall have ascertained to his satisfaction that the public convenience and advantage will be promoted by the opening of any such branch or branches, and that said bank or trust company has complied with the other terms and conditions prescribed by this article * * *."

Some states, notably Hawaii and New York, have expressly provided by statute for the establishment of foreign branches by certain classes of banks. There is no such express authority in Maryland.

By act of the Legislature, corporations chartered in Maryland are authorized to carry on their business in any foreign country. See Article 23, Section 9 (a) (4) of the

Annotated Code of Maryland (1966 Replacement Volume), which provides:

> "(a) Every corporation of this State shall have the following general powers, except where special provisions of law relating to corporations of that particular class are inconsistent herewith:
>
> * * *
>
> "(4) To transact its business, carry on its operations and exercise the powers granted by this article in any state, territory, district, or possession of the United States, and in any foreign country."

Maryland banks may be chartered in three ways: (1) by act of the Legislature; (2) by incorporation as provided in Article 11 of the Maryland Code or (3) by incorporation under the provisions of both Article 11 and Article 23.

A bank chartered by an act of the Legislature, which charter provides that the bank may open foreign branches clearly has a legally sufficient authorization to do so. A similar power extends to banks incorporated under *both* Article 11 and Article 23, on the authority contained in the latter article for Maryland corporations to do business in foreign countries. The approval of the Bank Commissioner is not a precondition for the establishment of such foreign branches in view of Article 11, Section 65, requiring such approval only with respect to branches within this State.

As to Maryland banks, chartered under Article 11 only, we believe that they are not authorized to establish branches in foreign countries, because the statute does not exhibit any intent for such authorization. Had the Legislature intended banks chartered under Article 11 to have the power to set up foreign branches, in our opinion, the statute would have reflected such intention. To the contrary, banks chartered under Article 11 alone are in terms granted power to establish branches *within the State* as provided in Section 65. We recognize that it is incongruous for banks chartered by act of the Legislature or incor-

porated under Article 11 and Article 23 to have the power to establish foreign branches while identical banking institutions chartered under Article 11 alone are denied similar powers. We cannot explain the incongruity except to say that the answer lies somewhere in the origin of Article 11, Section 65 that caused it to evolve in its present form. An appropriate amendment of the section is the prerogative of the Legislature.

In connection with the views herein expressed that banks chartered by legislative act may open foreign branches when the act so provides, and those incorporated under Article 11 and Article 23 may do so on the authority of the latter Article, we would add that such foreign branches are subject to the supervision of your office and they must comply with all requirements of law intended for the protection of the public to the same extent as branch banks operated within this State.

FRANCIS B. BURCH, *Attorney General.*

STANFORD D. HESS, *Asst. Attorney General.*

BUDGET

CONSTITUTION ART. III, SEC. 52 (3); ART. VI, SEC. 2—BUDGET—GOVERNOR'S REPORT ON "PRECEDING FISCAL YEAR"—THE RESULT OF THE BUDGET BASED UPON REVENUE ESTIMATES FOR A FISCAL PERIOD MUST BE REPORTED WITH RELATION TO THE SAME FISCAL PREDICATES AND CANNOT BE EXPANDED RETROACTIVELY BEYOND THE ORIGINAL FISCAL PERIOD—COMPTROLLER'S BOOKKEEPING FORMULA MUST CONFORM TO THE DESIGN AND REVENUE DETAILS OF THE BUDGET AS ADOPTED.

January 9, 1969.

Honorable Louis L. Goldstein.

You have recently proposed a plan which, if adopted, would serve to adjust the bookkeeping formula by which this State accounts for its revenue receipts so that funds not previously anticipated for fiscal 1969 (July 1, 1968 to June 30, 1969) would be newly credited to that year and suffice to resolve the expected budget deficit. You have asked that we review the proposal and advise whether there is any legal impediment to its adoption.

As explained by the materials you sent us, two tax revenues, Income Taxes and Retail Sales and Use Taxes, would be involved. These two sources are expected to produce approximately $79,000,000.00 which would normally be projected for expenditure in the 1970 fiscal year budget. State Income Taxes for the fourth fiscal quarter, April to June, 1969 ($66,000,000.00) withheld by employers and remittable on the 31st of July 1969 would be made payable at an earlier date by proposed statutory amendment. Sales and Use Taxes collected by vendors etc. for the month of June 1969 ($13,000,000.00) and due to be remitted July 21, 1969 would be treated, like the Income Taxes, as funds "in transit" as of June 30, 1969. Treating the revenues as if received because they would be caused to be "in transit"

during fiscal 1969, they would be employed to cure the expected deficit of approximately $35,000,000.00 in the 1969 budget.

We think that the plan is not in accord with either the terms or the spirit of the constitutional budget making processes and that it ought not be followed as proposed.

Our first concern is with the provisions of the Budget Amendment contained in the Maryland Constitution, Article III, Section 52, subsection (3). Subsection 3 requires that the Governor submit to the General Assembly a Budget "for the next ensuing fiscal year". The Governor must supply with each budget a "complete plan of proposed expenditures and estimated revenues for said fiscal year" and "show the estimated surplus *or deficit of revenues* at the end of the preceding fiscal year." There must be a statement showing "(a) the revenues and expenditures for the preceding fiscal year; (b) the *current* assets, liabilities, reserves and surplus or *deficit* of the State; (c) the debts and funds of the State; (d) an estimate of the State's financial condition as of the beginning and end of the preceding fiscal year; (e) any explanation the Governor may desire to make as to the important features of the Budget and any suggestions as to methods for reduction or increase of the State's revenue."

As you well know, each budget, prior to and including the one for 1969, with its accompanying estimate of revenues for the fiscal year for which appropriations have been made, has been enacted on the assumption that the revenues which your plan would affect were not part of the expected revenues for that year. Thus the 1969 Budget is predicated upon the assumption that the tax income, the actual collection of which you plan to accelerate, would be part of the collections to support the 1970 Budget. In reporting the "estimated surplus or deficit of revenues at the end of the preceding fiscal year" (in this case fiscal 1969) the Governor must exclude the April-June 1969 Income Taxes and the Retail Sales and Use Taxes for the month of June 1969. In short, we think that he must report

the result of the preceding year's budget in the same terms and on the same fiscal year income predicates upon which that budget was passed. Of course, unforeseen income or income derived by interim tax measures and actually collected in the fiscal year even though not contemplated in the original revenue estimates must be reported. However, such "unexpected income" is not the issue here. If the plan were adopted as proposed, the effect would be not only to cure the expected deficit but to create a surplus both of which would be artificial in relation to the budget as enacted, neither of which properly could be reported to the Legislature with due regard for the concept of the budget as enacted.

Few if any provisions of the Constitution even approach in importance the sections dealing with the expenditures and indebtedness of the State. The "fiscal year" determinations required of the Governor and the Legislature by the Budget Amendment must be adhered to with the strictest fidelity. The accounting for actual revenue receipts so that they apply to funds previously appropriated on the expectation of their collection must be dealt with in the clearest terms so that there is presented to the Legislature a complete and accurate picture of the condition of the State as produced by the budget for the current fiscal year. As we understand the terms and theory of the Budget Amendment, therefore, the proposal does not provide a legitimate means by which the Governor might avoid reporting the deficit which will occur. Previous opinions of this office on similar problems have hewed precisely to the language and intent of the Budget Amendment (37 Opinions of the Attorney General 121; 42 Opinions of the Attorney General 92) and we feel obliged to follow the same restraints in this instance.

We believe, however, that the substance of your plan might accomplish the desired result by careful implementation in accordance with the Budget Amendment as applied to the fiscal year 1970. The Legislature is at liberty to amend the Income and Sales and Use tax laws so that revenues for fiscal 1970 might be increased through the

acceleration of "due" dates. We suggest that appropriate amendments for 1970 could legitimately cause income taxes for the April-June quarter 1970 and the sales and use taxes for June 1970 to be includible in the revenue estimates upon which the 1970 budget may be passed. This, coming after the April-June collections for 1969 under present law, and accelerated collections being prospectively subject to appropriation in the fiscal year of collection, would supply sufficient estimated monies to pay the 1969 deficit and the regular 1970 appropriations. The 1969 deficit could therefore be dealt with by appropriation in the 1970 budget. If the plan should produce a surplus of funds such a surplus would be real and could be treated in a regular manner.

The Governor has the general authority quoted above to make suggestions as to methods for reduction or increase in the State's revenue. If as part of the budget message the Governor should suggest to the Legislature the amendments of the tax laws which you propose in the fashion which we have suggested and if he should further base the State's revenues projected to support the 1970 Budget on a fiscal basis which includes the collections anticipated by the amended laws, then the alteration in accounting might be made effective. This would depend, of course, on the willingness of the Legislature to pass the Budget on the same premise upon which it might be submitted by the Governor. We do not believe, however, that the alteration procedure can be accomplished unilaterally by any officer of the State or except as part of the combined process required to effectuate the enactment of the Executive Budget.

We concur in your judgment that you are not at liberty to credit the revenues of the State in a fashion different from that on which the estimates of revenue are made according to laws either in force or anticipated therein and actually enacted. We think specifically that your office as defined in the Constitution, Article VI, Section 2, covering "the general superintendence of the fiscal affairs of

the State" and having committed to it the decision "on forms of keeping and stating accounts" is imposed with duties which follow from and are largely dictated by the form of presentation and passage of the budget and that your accounts of revenues and expenditures must be in keeping with the circumstances of the budget and its collateral supporting documents.

If, as the consideration of methods to treat the deficit progresses, the Governor should decide to adopt the substance of your proposal in the manner we have indicated it can legally be accomplished, we would be prepared to draft and forward to you the appropriate amendatory legislation promptly on your request so that your presentation of the matter in final form will be complete. Further consideration of the revenues producible under the plan might result in a judgment that the State's needs do not require both amendments. Because of the projected growth in State revenues, the income taxes withheld by employers for the fourth fiscal quarter in the 1970 fiscal year (April to June, 1970), might suffice to cure the existing deficit for the 1969 fiscal year and the projected deficit for the 1970 fiscal year. In fact, it is conceivable that it might even produce a greater amount of funds than the amount projected in your plan.

To summarize, then, it is our opinion that the Governor in presenting the Budget for the 1970 fiscal year to the Legislature can predicate the Budget on an estimate of revenues for a fiscal year which would embrace five fiscal quarters of income taxes withheld by employers and thirteen months of revenue from sales and use tax receipts. Thus, the State would be funding its operations over a twelve month accounting period with income taxes withheld by employers for fifteen months and sales and use tax receipts for thirteen months. You understand, of course, that the extra quarter of income taxes withheld by employers and the extra month of sales and use tax receipts would not be available for the following fiscal year and the Budget presented by the Governor for the following

fiscal year would have to be predicated upon revenues for four quarters of income taxes withheld by employers and twelve months of sales and use tax receipts. Thus the projected revenues for the 1971 fiscal year, even with the normal annual growth in State revenue, would be considerably less than the revenues available for the 1970 fiscal year. We point this fact out because we deem it important to all who must consider the merits of your plan.

FRANCIS B. BURCH, *Attorney General.*

THOMAS A. GARLAND, *Asst. Attorney General.*

JON F. OSTER, *Asst. Attorney General.*

CHARITABLE ORGANIZATIONS

BOY SCOUT COUNCIL IS A CHARITABLE ORGANIZATION UNDER THE TERMS OF THE CHARITABLE ORGANIZATIONS SUBTITLE, SECTIONS 103A THROUGH 103E OF ARTICLE 41 OF THE CODE, AND, SINCE OTHERWISE NOT EXEMPTED UNDER THE SUBTITLE, MUST FILE WITH THE SECRETARY OF STATE AND KEEP RECORDS AS REQUIRED THEREIN.

May 2, 1969.

Honorable Blair Lee, III.

You ask whether the Potomac Council Boy Scouts of America is a charitable organization within the meaning of Section 103A of Article 41 of the Annotated Code of Maryland. If it is, it must file with your department the information required by Section 103B of the Article prior to soliciting contributions, file the reports required by Section 103C, and maintain the records required by Section 103D.

A corporate affiliate of the Boy Scouts of America, a national corporation established under Title 36 of the United States Code, the Potomac Council received $44,444 through the County United Fund and a total of $3,735 from private solicitations, $1,810 of which were received from contributors in West Virginia, and $1,925 from persons in Garrett County, Maryland, during the calendar year 1968. Solicitations from private sources were made by unpaid volunteer collectors; however, the Potomac Council does use some portion of its contributions to pay the salary of an executive secretary and other staff members.

In our opinion the Potomac Council Boy Scouts of America is a charitable organization within the meaning of Section 103A of Article 41 of the Annotated Code and is subject to the filing and record keeping requirements of the charitable organizations subtitle of Article 41.

Charitable organizations are defined in Section 103A to mean any "benevolent, philanthropic, patriotic, or eleemosy-

nary" organization or association. The Potomac Council argues it is not a "patriotic" organization in that, although the instilling of patriotism is one of the purposes of scouting, its chief concern is the development of character in youths through group and outdoor activities, such as hiking and camping. We need not decide whether the Potomac Council Boy Scouts is a "patriotic" organization since, in our view, it clearly is a "benevolent", "philanthropic", or "eleemosynary" organization within the meaning of the definition set forth in Section 103A.

"Benevolent", "philanthropic", and "eleemosynary" in their popular meaning are all terms of broad generality interchangeable with "charitable" and designating acts or gifts prompted by good will or kind feelings towards others. See *Black's Law Dictionary* (4th Edition); 15 Am. Jur., *Charities*, §§ 4, 61, 145; 5 Words and Phrases pp. 497-507. Moreover, in popular usage these terms are broader in meaning and less precise than the concept of "charitable purposes" utilized in the field of trust law to designate a gift or devise, which, although made for the benefit of an indefinite number of persons, is for a sufficiently definite purpose so that a trust thereof may be administered. See 15 Am. Jur. 2d §§ 3, 4.

In *Tillinghast v. Council at Narragansett Pier,* 133 A. 662 (R.I. 1926), it was held that a gift in trust to a local Council of the Boy Scouts of America was a gift for charitable purposes under state trust law. In our opinion the educational and character building activities of the Potomac Council Boy Scouts, identical to those of the Council involved in the *Tillinghast* case, would, *a fortiori,* fall under the broader and more expansive notion of benevolent and philanthropic purposes used in the definition of charitable organizations in Section 103A of Article 41. Cf. 25 Opinions of the Attorney General 632 (District of Columbia Council Boy Scouts characterized as "educational or benevolent institution" for purposes of application of tax exemption statute of Article 81).

A broad interpretation of the organizations to which the

subtitle applies appears justified by the statutory purpose. The filing and reporting requirements are intended to provide a measure of public scrutiny to the disposition of funds by persons and organizations which, in many instances, would otherwise remain unaccountable. Any organization, therefore, which solicits contributions for purposes which to the mind of a layman would be considered charitable or philanthropic should, in our opinion, file the information and make the reports provided for unless otherwise exempted.

Section 103D of Article 41 exempts certain specified organizations, none of which includes the Potomac Council Boy Scouts. It further relieves a charitable organization from accounting for funds received from solicitations made by a United Fund organization to the extent that said United Fund files the required reports under the subtitle. We understand that this is the case with respect to $44,444 of the monies received by the Boy Scout organization in 1968. Moreover, Section 103D exempts an organization which does not receive other contributions from private sources in excess of $2,500 in a calendar year, provided volunteer fund raisers are used and no part of the assets or income of the organization is paid to any officer or member. Although less than $2,500 of the private solicitations of the organization was received from Maryland sources in 1968, some portion of the income of the Potomac Council Boy Scouts was used to pay the salaries of an executive secretary and other staff members and, therefore, the organization is not exempted under this provision.

For the reasons given, it is our opinion that the Potomac Council Boy Scouts of America must register with your department as a charitable organization under Sections 103A-103D of Article 41.

FRANCIS B. BURCH, *Attorney General.*

ANTHONY M. CAREY, *Asst. Attorney General.*

CLERKS OF COURT

POWER OF CLERK TO REJECT FINANCING STATEMENT BECAUSE OF DEBTOR'S CARBON SIGNATURE—PROPRIETY OF PRESENTING CARBON COPY OF ORIGINAL FINANCING STATEMENT FOR RECORD—FEE FOR FILING OF CONTINUATION STATEMENT.

March 7, 1969.

Mr. I. Theodore Phoebus, Clerk.

In your letter of February 6 you ask whether it is proper to charge a fee for the filing of a continuation statement under the provisions of the Uniform Commercial Code (Article 95B of the Annotated Code of Maryland). Under Article 36, Section 12 (c) (8) you are entitled to charge a minimum of $3.00 per page for recording "any instrument among the financing statement records." It is our opinion that it would be proper for you to assess this charge for the filing of continuation statements. You should also be aware that, under this same subsection, there is an additional charge of $1.00 per name for each name to be indexed on said instrument.

You also ask whether you should accept for record a carbon copy of a financing statement if the signatures which appear upon it are only carbon copies of the original signatures. Under Article 17, Section 50 of the Annotated Code of Maryland you are required to accept for record all documents which affect title or any interest in personal property. In order to determine whether a financing statement is valid under the conditions you describe, we have examined the relevant provisions of Article 95B dealing with the Uniform Commercial Code, the apposite sections of which are Sections 1-201 (39) and 9-402 (1) and (6). Reading these sections together, they require that a financing statement be "signed by the debtor", which means the affixing of "any symbol executed or adopted by a party with present intention to authenticate a writing."

Subsection 5 of Section 9-402 permits substantial compliance with the requirements "even though [the financing statement] contains minor errors which are not seriously

misleading." The Court of Appeals of Maryland has stated that the signature requirements of the Uniform Commercial Code are "to be liberally construed" in order to promote simplification and modernization of the laws of commercial transactions. *Plemens v. Didde-Glaser,* 244 Md. 556, 562 (1966).

The answer to this question then turns upon whether the carbon copy signature of the debtor was "executed or adopted" by him with the present intention of authenticating this copy. We are of the opinion that the debtor was on actual or constructive notice of the fact that he was signing more than one copy when he signed the original financing statement and, for this reason, we believe that he presumptively intended his carbon signature to authenticate that copy. For this reason, it is our opinion that the financing statement in question does affect title to property under Article 17, Section 50 and must be received by you for the record. This rule would be different if the copies offered for record were xeroxed or duplicated copies. The same presumption does not arise in this instance because it is quite likely that the debtor would have no knowledge of the fact that such copies were being made from an original. In that event, you should require the debtor to authenticate his duplicated signature in some manner before accepting a document for record. See *Note,* 47 *B.U.L. Rev.* 292 (footnote 44) (1967) for a collection of or generally relevant Attorney General's opinions from other jurisdictions; see generally, 1 *Gilmore, Security Interests in Personal Property* §§ 10.2 and 15.3 (1965).

We have also determined that the document in question cannot be rejected by you on the ground that it was not an original typewritten copy. The provisions of Article 17, Sections 51 and 52, and Article 95B, Section 9-402 (6) require that a document be "wholly typewritten" or "typewritten on a printed form." . . . There is no requirement that the document be an original typewritten one.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Asst. Attorney General.*

CONSTABLES

CONSTABLES SERVING PAPERS—CECIL COUNTY.

June 12, 1969.

Mrs. Nancy Brown Burkheimer
and
Mr. Richard D. Mackie.

We have your letter requesting our opinion as to the constitutionality of Chapter 527 of the Acts of 1969. Chapter 527 added the following language to Section 108 (7) of Article 52 of the Annotated Code of Maryland:

> "Each trial magistrate in Cecil County may appoint one constable who is required to serve all civil and criminal processes issued by the magistrate. The constable shall receive three dollars for each paper served in lieu of an annual salary."

The question arises as to whether these constables could be legally appointed and validly act due to certain language contained in Section 37 (g) of Article 87 of the Code. Reference to that section will show that part of it contains the following language:

> ". . . The deputy sheriffs shall perform all the duties heretofore performed by, the constable to the trial magistrates' courts of Cecil County. From and after the appointment of one or more of such deputy sheriffs, any references to constables, as applied to Cecil County, in any law shall be construed to apply to deputy sheriffs. . . ."

We do find a conflict in the above-quoted language in Section 37 (g) of Article 87 and the amendment to Section 108 (7) of Article 52, but the conflict is irreconcilable only to the extent that the above-quoted language in Section 37 (g) of Article 87 is obviously no longer applicable because of the subsequent enactment of Chapter 527. As the Court

of Appeals stated in *Pennsylvania Railroad Co. v. Green, Inc.*, 171 Md. 63, 68, 187 Atl. 877 (1936),

"It is a well-settled principle of law that: 'When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first.' " See also *Bell v. State*, 236 Md. 356, 204 A. 2d 54 (1964); *Ulman v. State*, 137 Md. 642, 645, and cases cited, 113 Atl. 124 (1921); *Beall v. Southern Md. Agri. Asso.*, 136 Md. 305, 311-312, and cases cited, 110 Atl. 502 (1920).

The "extent of the repugnancy" is clearly that the trial magistrates may now appoint constables to perform the duties (i.e., serving civil and criminal processes) that the deputy sheriffs were performing prior to the enactment of Chapter 527. Therefore, there is a repeal by implication *pro tanto* of the two quoted sentences previously referred to in Section 37 (g) of Article 87.

The only remaining question is whether the newly enacted Chapter 527 repeals Section 37 (g) of Article 87 *in toto*. This could be done only by the common law doctrine of repeal by implication which takes place "when a subsequently enacted law contains provisions contrary to those of existing law but no provisions expressly repealing them." Crawford, *Statutory Construction*, § 137. In regard to this type of repeal, the Court of Appeals in *Pressman v. Elgin*, 187 Md. 446, 450, 50 A. 2d 560 (1947), held:

> "The law does not favor repeals by implications, unless there is a manifest inconsistency between the earlier and later statutes, or unless their provisions are so repugnant and irreconcilable that they cannot stand together."

See also *Buchholtz v. Hill*, 178 Md. 280, 288, 13 A. 2d 348 (1940); *Green v. State*, 170 Md. 134, 140, 183 Atl. 526 (1936).

We find no "manifest inconsistency" in the statutes and therefore no repeal *in toto*. The remainder of Section 37 (g) deals generally with the office of the Sheriff in Cecil County and can easily "stand together" with the rest of Section 108 (7) which provides for the number and salaries of the trial magistrates in Cecil County.

Therefore, under the provisions of Chapter 527 of the Acts of 1969, Trial Magistrates of Cecil County may appoint constables to serve all civil and criminal processes issued by them.

FRANCIS B. BURCH, *Attorney General.*

JAMES F. TRUITT, JR., *Asst. Attorney General.*

PROVISIONS OF ARTICLE III, SECTION 17 OF THE CONSTITUTION OF MARYLAND WHICH DEBAR SENATORS OR DELEGATES FROM BEING ELIGIBLE FOR ANY OFFICE CREATED, OR THE SALARY OF WHICH HAS BEEN INCREASED DURING THE TERM FOR WHICH SAID SENATOR OR DELEGATE WAS ELECTED, DO NOT PREVENT SENATORS OR DELEGATES OF THE 1966 GENERAL ASSEMBLY FROM BEING ELIGIBLE TO FILL VACANCY IN OFFICE OF GOVERNOR OCCURRING ON 1/7/69, AS 1967 SALARY INCREASE FOR GOVERNOR WAS BROUGHT ABOUT BY A PREDECESSOR GENERAL ASSEMBLY AND BY VOTE OF PEOPLE OF MARYLAND.

January 3, 1969.

Honorable Leonard S. Jacobson.

By hand-delivered letter of December 31, 1968, you have requested our opinion concerning the eligibility of the members of the General Assembly to fill the vacancy in the office of Governor which will occur upon the expected resignation of Governor Spiro T. Agnew on January 7, 1969.

You call to our attention the fact that the salary for the office of Governor of Maryland was increased from $15,000.00 to $25,000.00 per year, effective the fourth Wednesday in January in the year 1967.

You inquire whether this salary increase serves to debar the members of the General Assembly from election to the office of Governor, because of the provisions of Article III, Section 17 of the Constitution of Maryland, which section states in its entirety:

> "No Senator or Delegate, after qualifying as such, notwithstanding he may thereafter resign, shall during the whole period of time, for which he was elected, be eligible to any office, which shall have been created, or the salary, or profits of

which shall have been increased, during such term."

In answering your inquiry we have carefully reviewed the Constitution of Maryland and pertinent decisions of the Court of Appeals of Maryland, the Supreme Court of the United States and those of the highest courts of other States having similar constitutional provisions. We have further reviewed and analyzed the Acts of the General Assembly of Maryland for the year 1965, and all other legislative acts in any way pertinent to the question at hand.

From our study and examination of those sources we advise you that Section 17 of Article III does not proscribe the election of a member of the General Assembly to the impending vacancy in the office of Governor. Our reasons for this conclusion are several, and we will set them out in detail, because of the importance of the question.

In our discussion we will refer to the present General Assembly as the General Assembly of 1966, and to the predecessor Assembly, as the General Assembly of 1962, for it was in those years, respectively, that the members of the General Assembly were elected for four-year terms.

The increased salary for the Governor of Maryland, to which you make reference, was proposed by the General Assembly of 1962, by Chapter 641 of the Acts of 1965. The proposal to amend the Constitution was passed by the General Assembly of 1962 on March 29, 1965, and was approved by the Governor on May 4, 1965—although, under the Constitution of Maryland, no such approval by the Executive is required for a proposed constitutional amendment.

At the general election of November 8, 1966, the constitutional amendment was presented to the people of Maryland, and was adopted by them, having received a majority of the votes cast on the question.

On December 6, 1966, the Honorable J. Millard Tawes, Governor, issued a proclamation stating that the constitu-

tional amendment had, in fact, been adopted. Under well-settled Maryland law, that amendment became part of our Constitution as of the date of the Governor's proclamation. Constitution of Maryland, Article XIV, Section 1, *Worman v. Hagan*, 78 Md. 152.

Sections 2 and 6 of Article III of the Maryland Constitution provide that Senators and Delegates shall serve a term of four years from the date of their election. The 1966 General Assembly was elected on November 8, 1966, so there is little doubt that the constitutional amendment increasing the salary of the Governor became effective during the term of the 1966 Assembly. We believe that it is equally obvious, however, that the change in the salary of the Governor was not brought about by any act of the incumbent Legislature, but was, in fact, increased by the complementary actions of the 1962 Assembly at its 1965 Session, and by the affirmative vote of the electorate of Maryland on November 8, 1966. Every act necessary for the increased salary of the Governor was completely performed by the time the persons elected to the General Assembly on November 8, 1966 qualified for their offices by taking the prescribed oath on January 18, 1967.

Not only did the 1966 General Assembly perform no act relating to this constitutional amendment, but the people, having amended the organic law of the State so as to provide for a specific salary for the chief executive, no action of the Legislature thereafter could have validly negated the action of the electorate, either to increase or diminish that salary.

Indeed, the sole function of the 1966 General Assembly regarding the increased salary of the Governor was to approve the budget for fiscal 1968 presented to it by the Governor, which included monies for that increased salary —but this legislative action involved no discretionary act on the part of the General Assembly, as both the Governor and the General Assembly are expressly required by the provisions of Section 52 of Article III of the Constitution to make provision in the budget, *inter alia*, for salaries set forth in the Constitution of Maryland.

Article III, Section 52 (4) (e) requires the Governor to include in the budget submitted to the Legislature ". . . salaries payable by the State and under the Constitution and laws of the State;". Section 52 (6) forbids the Legislature to delete or diminish such an item, by stipulating that "The General Assembly shall not amend the Budget Bill so as to affect . . . the payment of any salaries required to be paid by the State of Maryland by the Constitution thereof; . . .".

The unmistakably mandatory nature of these provisions makes it clear beyond contradiction, therefore, that the action of the 1966 Assembly, in approving in 1967 the budget containing an increased salary for the Governor, was purely ministerial, and could not be considered an action on the part of that Assembly which increased the salary for that Governor.

In fact, even if the budget for the fiscal year 1968 enacted by the 1967 Session of the General Assembly had not provided the funds necessary for the increased salary of the Governor, the Governor would have been nonetheless entitled to the increased compensation brought about by the passage of the amendment to Section 21 of Article II, by virtue of the decision of the Court of Appeals of Maryland in *Thomas v. Owens,* 4 Md. 189 (1853).

In *Thomas,* the Court held that where the Constitution provides for the payment of a salary fixed in it, such language is an appropriation by the supreme law of the State, and no legislative act making an appropriation for such salary is necessary. The Court, in *Thomas,* considered Section 20 of Article III of the Constitution of 1851, which section is substantially the same as the present Section 32 of Article III of the Constitution of 1867. The Court said:

> "* * * It is said, that inasmuch as the 20th Section of the Third Article of the Constitution declares 'no money shall be drawn from the Treasury of the State, except in accordance with an appropriation made by law;' that an *Act of Assembly* must precede the withdrawal and, inasmuch as

none such has been passed . . . there is, therefore, no appropriation *by law* for that time. To this reasoning we cannot yield our consent.

* * *

"Now what could have been the purpose of the clause in the constitution to which we have referred? It was obviously inserted to prevent the expenditure of the people's treasure *without their consent*, either as expressed by themselves in the organic law, or by their representatives in constitutional acts of legislation.

"* * * the question is: Have the people given their consent to the payment of the salary of the Comptroller? That they have done so is palpably manifest. They have said he 'shall receive an annual salary of two thousand, five hundred dollars.' They have not merely said he may *claim* such a sum, but, emphatically, that he 'shall *receive*' it. It is impossible for human language to be less ambiguous or more positive. The people, in their *organic* law,—which is paramount to all other law—have not only given their *consent*, but they have imperatively issued their commands that the particular officer '*shall receive*' it. How is their will obeyed if it be within the power of the Treasurer, or any one else, to withhold it from caprice, unfaithfulness to duty, or from mistaken judgment? To allow of such a power in that officer would be to put him above the constitution, whose creature he is. It would be to invest him with authority to annul the sovereign will; in fact, to stop the wheels of government and reduce things into the wildest confusion. The constitution has said the officer '*shall receive*' his salary, and this *fiat* of the supreme will is not to be nullified by the mere *ipse dixit* of a mere *ministerial* officer, for such, and none other, is the Treasurer."

The decision of the court in *Thomas* and the language of the Constitution of Maryland in Article III, Section 52,

lead us inescapably to the conclusion that when the General Assembly of 1966 adopted the budgets for fiscal years 1968 and 1969, including therein the increased compensation for the Governor, they were merely performing the act required of them by their predecessor legislature and the electorate of Maryland. It is likewise clear that the adoption of that budget did not, under any sensible interpretation of the phrase, bring about an increase in the salary of the Governor.[1]

The mere fact that the salary increase for the Governor of Maryland became effective during the term of the 1966 General Assembly does not disqualify the members of that body from succeeding to the office by reason of Article III, Section 17. Such a holding would be to torture logic, for the intent and purpose of Section 17, as construed by the Court of Appeals of Maryland, is directly to the contrary.

The provisions of Section 17 of Article III of the Constitution first appeared in the organic law of this State in our first Constitution. In that document, there was an even broader prohibition than the present one, for under Section 37 of that Constitution no senator or delegate was permitted to be appointed to or assume *any* other office during the term for which he had been elected, without regard to whether that office had been created, or the salary thereof increased, during his term. By an amendment of 1837, that section of the Constitution of 1776 was amended to what is substantially its present form, and that language, with minor variations, was continued in the Constitutions of 1851, 1864 and of 1867.

Indeed, the philosophy inherent in the present prohibition of Section 17 did not originate in any Constitution of this State, but has been a principle of sound and democratic government for so long a period that its origins are obscured in the mists of time. A similar prohibition exists in Section 6 of Article I of the Constitution of the United States, and substantially the same provision exists in the Constitution of each of the other States of this Union.

The decisions of the Court of Appeals of Maryland and of other courts which have considered similar provisions leave no doubt as to the evils sought to be avoided. Simply stated, the courts have held that constitutional provisions of this nature have been enacted to insure against a legislator creating an office for his own benefit, or increasing the profits of an office which he might shortly thereafter fill.

In 1923 the Court of Appeals construed Section 17 of Article III of the Constitution, in the case of *Westernport v. Green,* 144 Md. 85. In *Westernport,* the Court quoted from the debates of the Constitutional Convention of 1864, at which time this provision was under discussion. The court set out, with obvious approval, the following statement of Delegate Stockbridge (p. 88):

> "* * * it will prohibit any person, being a member of either branch of the General Assembly, *from legislating to create any office, or to increase the salaries or profits of any office, in order that he may be benefited by it*; while it will not restrain the Executive from appointing a man to a position for which he may happen to be particularly qualified, and which may have previously existed, in which a vacancy may have occurred." (emphasis added)

In *Westernport* the Court further said:

> "* * * It was the obvious intent of the Constitutional provision . . . to protect the members of the Legislature from the influence, upon their judgment and conduct, of any personal interest in the creation of new offices or the increase of the salaries or emoluments of any offices previously created * * *."

Story on the Constitution, Section 867, states: "The reason for excluding persons from offices who have been concerned in creating them or increasing their emoluments, is to take away, as far as possible, any improper bias in the vote of the representatives and to secure to the constituents some solemn pledge of his disinterestedness."

Generally, constitutional provisions of this nature have been attributed to three main purposes.

> "(1) To prevent any member of the legislature from being appointed to any office which is made available to his appointment by the action of the legislature of which he is a member. *State ex rel. Jugler v. Grover,* 125 P. 2d 807.
>
> "(2) To preserve a pure public policy and to prevent one who has been concerned in creating an office or in increasing its emoluments from aspiring to such office not only while he is an incumbent of the office which created the other office or increased its emoluments, but for a definite time.—*State ex rel. Pennick v. Hall,* 173 P. 2d 153, 26 Wash. 2d 172.
>
> "(3) To remove the temptation on the part of the legislators to raise the salary of public officers or create public offices and get themselves appointed thereto.—*State ex rel. Hawthorne v. Wiseheart,* 28 So. 2d 589, 158 Fla. 267."

See also *Kimble v. Bender,* 173 Md. 608 (1938) ; 40 Opinions of the Attorney General 184; 47 Opinions of the Attorney General 63 and 42 Am. Jur., *Public Officers,* Section 68.

In *Westernport v. Green, supra,* the Court made one further comment which we believe is of paramount importance on the question you raise. The Court said:

> *"The ineligibility to which the Constitution refers, in the section cited, was evidently designed to be produced only by action in which the legislators to be affected by the provision could have participated. If the Legislature of which they were members made no provision for the creation of an office, or the increase of the salary of one, with respect to which their eligibility might be questioned, there would be no reason to apply to them the constitutional disqualification."* (Emphasis supplied)

Under the rationale of all of these cases, and particularly in light of the comment of the Court in *Westernport*, immediately above quoted, we find it inconceivable that any court of this State, reviewing the instant circumstances and considering the language, intent and purpose of Section 17 of Article III, could hold that a member of the 1966 General Assembly is disqualified from succeeding to the vacancy in the office of Governor.

The members of the 1966 General Assembly did not initiate the salary increase of the Governor of Maryland; this was done by their predecessors in 1965. The 1966 Session of the General Assembly did not adopt the proposed constitutional amendment; this was done by the people of Maryland in the General Election of November 8, 1966. There was no legislative action pending before any member of the 1966 General Assembly relating to the increased salary of the Governor on which his judgment and conduct might have been influenced, or on which he might have been swayed by personal interest—for all that was required to be done to increase the salary of the Governor had been done before the 1966 General Assembly assumed office. As we have noted hereinabove, had the 1966 General Assembly declined or refused to approve the budget for 1968, containing the increased salary for the Governor, it would have directly defied the provisions of Section 52 of Article III of the Constitution of Maryland; and the Governor would nonetheless have been entitled to withdraw from the Treasury of this State his increased salary upon demand therefor to the Treasurer of Maryland. See *Thomas v. Owens, Supra.*[2]

There is yet another reason why we believe that the members of the 1966 General Assembly are not debarred from succeeding to the pending vacancy in the office of Governor. The salary of the Governor was increased by a constitutional amendment. Neither the 1966 General Assembly, nor any legislature can amend the Constitution of Maryland. By virtue of Article XIV of the Maryland Constitution, that document may only be amended by the

people of Maryland. It was the people of Maryland who amended Section 21 of Article II, and thereby increased the salary of the Governor. It is true that the General Assembly of 1962, at its 1965 Session, proposed the constitutional amendment, but we believe there is a substantial difference between a legislative action, proposing or making possible an increased salary for an office, and a situation where the legislature, on its own, without participation by the electorate or any other outside force, brings about a salary increase.

Our views on this point are supported by the decision of the Court of Appeals of Maryland in *Westernport v. Green, Supra.* In *Westernport,* the facts, briefly summarized, were as follows: The General Assembly, at its Session of 1922, amended the Charter of the town of Westernport. Prior to this legislative act, the Charter of Westernport had provided that the clerk be elected by the voters of the town, and that he should receive such compensation as the Mayor and Commissioners might direct. The amendment provided that the clerk should be appointed by the Mayor and Commissioners, and continued the proviso that his compensation should be prescribed by the Mayor and Commissioners. A member of the House of Delegates who was in office at the time the Charter of Westernport was amended by the Legislature was appointed to the position of Town Clerk, and the salary of the office was thereupon increased. Mandamus was brought to remove him from office on the ground that the Charter Amendment had (a) created the office of clerk and/or (b) increased the salary thereof. The Court of Appeals dismissed the contention that the Charter amendment had created the office, on the ground that the office had previously existed and only the mode of filling it had been changed. The Court of Appeals also held that the Legislature had not increased the salary of the office, as that increase was granted by the Mayor and Town Commissioners, and the legislative act in amending the Charter had only made such a salary increase possible.

By analogy, we believe that it follows that the General

Assembly of 1962, by virtue of the passage of Chapter 641 in the 1965 Session, did not increase the salary of the Governor of Maryland, but only made it possible for the people of Maryland to effect such an increase.

Although it is not necessary to our opinion, we believe that *Westernport* may very well support the proposition that Section 17 of Article III operates only to bar a legislator from accepting, during the whole term for which he was elected, an office created by the Legislature alone, or an office for which the salary has been increased by the Legislature alone, and is not applicable to a situation where the office was created or the salary increased by the electorate, or where it was brought about by forces other than the Legislature. This thesis draws strong support from a summary of cases in 42 Am. Jur., Public Officers, Section 68, which states:

> "§ 68.—Office of Which Emoluments are Increased.—Members of state legislatures may be prohibited by express constitutional or statutory provisions from accepting or holding any office the emoluments of which have been increased by the legislature during their term of membership. *The ineligibility thus declared is evidently designed to be produced only by action in which the legislature to be affected by the provision participates. If the increase in the emoluments is not effected by a statute enacted by the legislature, but by the act of some other body or officer, the prohibition does not apply. . . .*"

See also *Board of Supervisors of Elections of Anne Arundel County v. Attorney General*, 246 Md. 417, where the Court held that the electorate, by voting at the polls in favor of a constitutional convention, created the office of delegate to such convention, and that the office of delegate to the convention was not created by the Legislature, which had passed the Enabling Act putting on the ballot the question of whether or not a constitutional convention should be called.

SUMMARY

We have discussed in considerable detail two reasons for our view that the members of the General Assembly of 1966 are not debarred from filling the impending vacancy in the office of Governor. For your convenience, we briefly summarize our views.

First, the Maryland Court of Appeals in *Westernport,* and a score of other courts throughout the nation, have held that the sole purpose and intent of Section 17 of Article III of the Maryland Constitution and similar provisions is to proscribe a legislator from legislating to create any office, or to increase the salaries or profits of any office, in order that he might benefit by such legislation. Additionally, in *Westernport,* the Court specifically said that if the legislature of which he was a member made no provision for the creation of an office, or the increase of the salary of one, there would be no reason to apply to such a legislator the constitutional disqualification.

We find the record clear beyond any doubt that the 1966 General Assembly in no way acted upon any measure that would bring about an increase in the salary of the office of Governor. That Assembly, therefore, could not have violated the spirit and intent of the constitutional provision.

Every action in any way material to bringing about the salary increase was taken prior to the time that the members of the 1966 General Assembly assumed their legislative duties. The fact that the Governor performed his purely ministerial duty in proclaiming the amendment adopted, after the 1966 General Assembly had been elected to office, and the fact that the 1966 General Assembly, in its 1967 Session, further performed the purely ministerial duty of approving a budget containing the increased salary, could in no way, logically or otherwise, bring them within the disqualification of Section 17.

To hold to the contrary, we believe, would require a doctrinaire hide-bound and tormented construction of the literal words of the Constitution of Maryland, and would

fly in the face of liberal interpretations rendered on such provisions by all courts in recent years. Such a construction would also be directly contrary to the liberal construction which the Supreme Court of the United States, the lower Federal courts, and the courts of the States have given to constitutional and statutory provisions dealing with the right to vote, the right to hold public office, and the right to equal representation in elective bodies.

Secondly, and completely independent of the first reason hereinabove stated, we believe that the Court of Appeals in *Westernport v. Green, Supra,* has strongly indicated that the disqualification provisions of Section 17 are not applicable to an office created, or the salary of which has been increased, by a force or body outside of the General Assembly. Assuming, *arguendo,* that some action of the 1966 General Assembly had helped to bring about the salary increase, we read *Westernport,* and other cases throughout the country as discussed hereinabove, to hold that Section 17 is inapplicable because the salary increase was, in fact, *created* by the people of Maryland by amending the Constitution at the election of November 8, 1966.

The cases that we have cited in this opinion universally hold that constitutional provisions of the nature under discussion herein are uniformly strictly construed in favor of the eligibility of the individuals who seek the public office in question. The courts have established a presumption in favor of the eligibility of anyone who has been elected or appointed to a public office, and before the removal of such a person from an office can be effected by a mandamus, his constitutional or statutory disqualification must be clearly apparent. We find no such disqualification to exist in the present circumstances, apparent or otherwise.

It would make a mockery of the long-standing presumption referred to, to hold that a member of the 1966 General Assembly is ineligible to succeed to the pending vacancy in the office of Governor by virtue of a salary increase *proposed* by the predecessor 1962 General Assembly, and *adopted* by the people of Maryland at the *same time* the

present assemblymen were elected and before they even as much as took their oath of office.

It is, therefore, our opinion that no member of the 1966 General Assembly is disqualified from filling a vacancy in the office of Governor under the provisions of Section 17 of Article III of the Constitution of Maryland.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

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[1]*Thomas v. Owens* was decided in 1853, under the Constitution of 1851, some sixty-three years before the Budget Amendment to the Constitution of 1867 (Sec. 52 of Article III) was adopted in 1916. Perhaps the foremost purpose of the 1916 Budget Amendment was to assure a balanced budget for this state. Admittedly, if the rule of the *Thomas* case still prevails in Maryland, an unbalanced budget could occur, as *Thomas* would require the payment of a salary set out in the Constitution, even if that salary was not included in the budget. The possibility of an unbalanced budget, however, does not persuade us that *Thomas* is not still the law in this State, for we believe that the Court of Appeals would refuse to sanction an action of the General Assembly which completely and explicitly defied the will of the people as expressed in the Constitution, merely because the correction of such legislative disobedience would result in an imbalance in the budget.

[2]In *State ex rel. West v. Gray*, 74 So. 2d 114 (1954) the Supreme Court of Florida considered a case in which the facts were startingly similar. This case, however, was decided on grounds not applicable to the instant situation.

In *West v. Gray* the Court dealt with a situation where the salary of the Governor of Florida was increased by the General Assembly. Shortly thereafter, and during the term of that same Assembly, the Governor died. A state Senator announced his candidacy to fill the vacancy at a special election provided under Florida law. The Supreme Court of Florida held that the Senator was not disqualified under a Florida constitutional provision similar to Article III, Section 17 of the Maryland Constitution. The Court gave two reasons for finding the Senator not to be disqualified. One, the Court said that at the time of the salary increase there could have been no temptation on the part of the Senator to increase the salary of the Governor for his own benefit, as the Assembly could not have known that the Governor would die in office. Two, the Court noted that there would be a public election to fill the vacancy in the office of Governor and that the people of Florida, therefore, in passing upon the

Senator's candidacy, would be able to judge for themselves whether or not he had disqualified himself from the office of Governor by reason of the salary increase given to the Governor by the Assembly of which he was a member. See also *State ex rel. Fraser v. Gay*, 28 So. 2d 901, and *Shields v. Toronto*, 395 P. 2d 829.

We also note that Article I, Sec. 6, Clause 2 of the Federal Constitution contains a similar provision relating to appointments of Senators and Representatives to civil offices "the emoluments whereof shall have been increased" "during the time for which [the Senator or Representative] was elected." It is noted in Corwin (ed.). The Constitution of the United States of America: Analysis and Interpretation (U. S. Govt. Printing Office, 1964), at 132-33, that "the first clause became a subject of discussion in 1937, when Justice Black was appointed to the Supreme Court by reason of the fact that Congress had recently improved the financial position of Justices retiring at seventy and the term for which Mr. Black had been elected to the Senate from Alabama in 1932 had still some time to run. The appointment was defended by the argument that inasmuch as Mr. Black was only fifty-one years old at the time and so would be ineligible for the 'increased emolument' for nineteen years, it was not *as to him* an increased emolument." The Supreme Court subsequently declined to pass on the validity of Justice Black's appointment. *Ex Parte Albert Levitt*, 302 U.S. 633 (1937).

CONSTITUTIONAL LAW—EMERGENCY LEGISLATION: UNDER PROVISIONS OF ARTICLE XVI, SECTION 2 OF MARYLAND CONSTITUTION, LEGISLATURE, AND LEGISLATURE ALONE, MAY DETERMINE WHETHER PENDING BILL IS AN EMERGENCY MEASURE, NECESSARY FOR IMMEDIATE PRESERVATION OF PUBLIC HEALTH OR SAFETY—CONSTITUTION HAVING DELEGATED SUCH DETERMINATION TO LEGISLATURE, THE COURTS WILL NOT REVIEW SUCH A LEGISLATIVE FINDING.

January 29, 1969.

Honorable Thomas M. Anderson, Jr.

We have your letter of January 28th in which you ask our opinion on a bill now pending before the Senate of Maryland. The bill in question is Senate Bill 137 (S/B 137), which would amend Section 1-1 (a) (11) of the Election Code, Article 33 of the Annotated Code of Maryland.

Briefly summarized, the present law, Article 33, Section 2-1, requires the Governor to appoint biennially to each of the Boards of Supervisors of Elections in this State two persons who are members of the "majority party" and one person who is a member of the "principal minority party". Our present law, Section 1-1 (a) (11), defines "majority party" as the party whose candidate for Governor received the highest number of votes in the last preceding general election. The "principal minority party" is defined as the party whose candidate for Governor received the second highest number of votes at such election.

Senate Bill 137 would amend those definitions. Under the terms of this Bill, the "majority party" would be defined as the political party to which the incumbent Governor belongs, and the "principal minority party" would mean the other of the two principal political parties in this State. The Bill makes other provisions, not important to this opinion, for a situation where an incumbent Governor is not a member of either of the two principal political parties.

As presently drawn, S/B 137 is an emergency measure,

to be effective from the date of its passage, as Section 2 thereof provides:

> "*And be it further enacted,* That this Act is hereby declared to be an emergency measure and necessary for the immediate preservation of the public health and safety and having been passed by a yea and nay vote supported by three-fifths of all the members elected to each of the two houses of the General Assembly, the same shall take effect from the date of its passage."

You advise us that you have doubts as to the constitutionality of enacting this measure as an "emergency" law. You question whether this Bill is, in fact, "a true emergency measure and necessary for the immediate preservation of the public health or safety as specified in Article XVI, Section 2 of the Constitution". You also ask whether S/B 137, if enacted as emergency legislation, would violate the provisions of Section 2 of Article XVI ". . . that no measure creating or abolishing any office, or changing the salary, term or duty of any officer, or granting any franchise or special privilege, or creating any vested right or interest, shall be enacted as an emergency law."

We have carefully reviewed the provisions of S/B 137 and, after examination of Article XVI, Section 2, and the decisions of the Court of Appeals of Maryland interpreting that constitutional provision, we advise you of our opinion that this Bill, as written, does not violate the provisions of the Maryland Constitution regarding emergency legislation.

Turning first to the question of whether a bona fide emergency exists, we find that in Maryland this is solely a question for legislative determination. There is a difference of opinion on this point in the highest courts of several of the states, as some have held that the mere legislative declaration of an emergency satisfies the constitutional requirement, while others have held that such a legislative declaration of an emergency is reviewable by the courts. Arizona, Colorado, Ohio, Oklahoma, Oregon, South

Dakota, Arkansas, Indiana and Kentucky, *inter alia,* have held that the declaration of an emergency is *not* subject to judicial review. *Orme v. Salt River Valley Water Users,* 217 P. 935; *Van Kleeck v. Raner,* 156 P. 1108; *State v. Kennedy,* 9 N.E. 2d 278; *Oklahoma City v. Shields,* 100 P. 559; *Kadderly v. Portland,* 74 P. 710; 75 P. 222; *Labin v. Bacon,* 85 N.W. 605; *State v. Moore,* 145 S.W. 199; *Gentile v. State,* 29 Ind. 409; *Hill v. Taylor,* 95 S.W. (2) 566.

Missouri, Montana, New Mexico, Michigan, Washington, Florida and Illinois have held to the contrary, however, taking the view that the legislative declaration of an emergency is reviewable by the courts of those States. *State v. Sullivan,* 224 S.W. 327; *State v. Stewart,* 187 P. 641; *Todd v. Tierney,* 27 P. 2d 991; *Attorney General ex rel. Lindsay,* 145 N.W. 98; *State v. Meath,* 147 P. 11; *Amos v. Conkling,* 126 So. 283; *Graham v. Dye,* 139 N.E. 390.

The Court of Appeals of Maryland, in a long line of cases, has made it abundantly clear that we hold to the view of those states wherein the Legislature, and the Legislature alone, is competent to declare a measure before it "an emergency law and necessary for the immediate preservation of the public health or safety". The supremacy of the Legislature in this field has been recognized by the Court of Appeals of Maryand for so long, and reiterated so recently, that we find the matter to be entirely free from doubt.

The leading Maryland case on point is that of *Culp v. Chestertown,* 154 Md. 620. In *Culp* the Court struck down a public local law on grounds not pertinent here. In that case, however, the Court had occasion to pass on the question of the Legislature's right to make a bill before it an emergency measure, under the provisions of Article XVI of the Constitution. The Court said, at 623,

> "[I]f the legislation does come within the provisions of Article 16 of the Constitution, in that event the question of whether or not an emergency in fact exists is a question for the Legislature, and its determination is final and not subject to review by the courts."

In *Wash. Sub. San. Comm. v. Buckley,* 197 Md. 203, the Court said, at 207-208

> "In the referendum amendment to the Constitution, Article XVI, Sec. 2, it is provided that no law shall take effect until June 1, after the session, 'unless it contain a Section *declaring* such law an emergency law', etc. The referendum amendment permits an act containing such a provision to go into effect at once, and it says in effect, even if a referendum is asked for, until and unless the vote at the polls is adverse. We have held in a number of cases that, under these circumstances and under this wording of the Constitution, the courts have no power to pass upon the question whether there is an emergency if the Legislature has made the necessary declaration. In other words, it is the *declaration* of an emergency which produces the effect of putting the act in force at once, and not the actual question whether or not an emergency exists. . . . *Gebhardt v. Hill,* 189 Md. 135 . . . *Hammond v. Lancaster,* 194 Md. 462,".

In *Washington,* the Court noted that generally a legislative finding of an emergency, such as that set out in Article XI, Section 7 of the Constitution, is reviewable *"except where the power to determine the question is specifically granted, as in Article 16, § 2, * * *"* of the Constitution. 197 Md. 203, 209. See also *Norris v. Baltimore,* 172 Md. 667. The doctrine that it is the Legislature, and the Legislature alone, when operating under the provisions of Article XVI, Section 2 of the Constitution, that may determine whether a measure before it is "an emergency law and necessary for the immediate preservation of the public health or safety" was restated as recently as 1964, in *Yorkdale Corp. v. Powell,* 237 Md. 121.

In 1949, the Honorable Hall Hammond, then Attorney General of Maryland, now Chief Judge of the Maryland Court of Appeals, delivered an opinion to Dr. Horace E. Flack, Secretary and Director of Research. In that Opinion,

34 Opinions of the Attorney General 130, Attorney General Hammond stated as follows, on the point now before us:

> "In construing Article XVI, Section 2 of the Maryland Constitution, the Court of Appeals has consistently held that a legislative declaration of emergency is conclusive and not reviewable. *Culp v. Chestertown,* 154 Md. 620, 623; *Norris v. Baltimore,* 172 Md. 667, 686. The language of Section 2 is as follows:
>
> > '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, . . .' (Emphasis supplied.)
>
> The words compel the result. To comply literally with the provision, it is necessary not that there *be* an emergency, but only that the Act contain a section *declaring* it to be an emergency law. Such was the express reasoning of *Culp v. Chestertown, supra,* 154 Md. at 623-624."

We adopt herein Attorney General Hammond's summary of the Maryland law, which we find as pertinent now as when written in 1949:

> Under the doctrine of separation of powers, to comply with the provisions of Article XVI of the Constitution of Maryland concerning emergency legislation, it is not necessary that there *be* an emergency, but only that the Act contain a section *declaring* it to be an emergency law, and such a legislative declaration of emergency is not reviewable by the courts of this State.

Similarly, we find nothing in S/B 137 which would violate the provisions of Article XVI, Section 2 which prohibits enactment, as an emergency law, of any measure "creating or abolishing any office, or changing the salary,

term or duty of any officer, or granting any franchise or special privilege, or creating any vested right or interest".

Senate Bill 137 does not create the office of member of the Board of Supervisors of Elections—that office now exists under Maryland law and has, in fact, existed for many, many years. S/B 137 does not abolish that office, nor does it change the salary, or the term, or the duties of any of those officers who are members of the Boards of Supervisors of Elections in this State. It gives no franchise or special privilege to any individual or group of individuals; nor does it create any vested right or interest of any nature. The changes in Maryland law which will be brought about by this Bill refer only to the political affiliation of those persons who may be named by the Chief Executive as members of election boards from the period dating from the first Monday in June, 1969 and for two years thereafter. S/B 137 has absolutely no effect on those persons now serving as members of Boards of Supervisors of Elections. Under Article XVII, Section 8 of the Maryland Constitution, those individuals hold office for a term of two years, dating from the first Monday in June. They will be as fully entitled to complete their terms of office if this Bill is enacted, as they would be if this Bill had never been introduced.

We have examined carefully the case of *Dorsey v. Petrott,* 178 Md. 230, cited by you in your letter to us. We have also carefully considered *Hammond v. Lancaster, supra,* and *Bowman v. Harford County,* 166 Md. 296, in which cases the Court of Appeals considered the provisions of Article XVI, Section 2 which you call to our attention. We find nothing in any of these cases, or in any sources available to us, which could lead us to the conclusion that S/B 137, if enacted into law, would, in any way, violate the provisions of Article XVI, or any other article of the Constitution of Maryland.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

CONSTITUTIONAL LAW—ARTICLE 35 OF DECLARATION OF RIGHTS—DEPUTY SHERIFF IS A COMMON LAW OFFICE AND IS NOT AN OFFICE OF PROFIT CREATED BY CONSTITUTION OR LAWS OF THIS STATE—ONLY THOSE POSITIONS TO WHICH THERE IS ATTACHED A SALARY, FEE, OR COMPENSATION CAN BE OFFICES OF PROFIT WITHIN THE MEANING OF ARTICLE 35.

February 7, 1969.

David M. Williams, Esq.

We have your letter of February 4, 1969 in which you ask our assistance in determining several legal questions now pending before you. First, you have asked our views as to whether two County Commissioners of St. Mary's County have vacated their position by virtue of the fact that they have accepted appointment as Deputy Sheriffs of that County.

Your question arises by virtue of Article 35 of the Declaration of Rights of the Maryland Constitution. That article states, in its entirety:

> "That no person shall hold, at the same time, more than one office of profit, created by the Constitution or Laws of this State; nor shall any person in public trust receive any present from any foreign Prince or State, or from the United States, or any of them, without the approbation of this State. The position of Notary Public shall not be considered an office of profit within the meaning of this Article. (1964, ch. 129, ratified Nov. 3, 1964.)"

At the outset, we note that it is beyond dispute that the position of County Commissioner is an office of profit within the meaning of Article 35. *Hetrich v. County Commrs.*, 222 Md. 304 (1960); *Howard County v. Westphal*, 232, 334 (1963); 6 Opinions of the Attorney General 226

(1921); 13 Opinions of the Attorney General 214 (1928); 48 Opinions of the Attorney General 323 (1963).

It is also well settled law in this and other jurisdictions that the holder of one office of profit vacates that office by the acceptance of another office of profit. *Truitt v. Collins*, 122 Md. 526 (1914); *Moser v. Bd. of County Commrs.*, 235 Md. 279 (1964), and cases cited. This proposition has frequently been restated by the Attorneys General of Maryland. 50 Opinions of the Attorney General 57 (1965); 48 Opinions of the Attorney General 193 (1963); *inter alia.*

The question before us, therefore, is whether the position of Deputy Sheriff is an "office of profit" within the meaning of Article 35. If it is, it would appear that the two individuals in question have vacated the office of County Commissioner by their acceptance of the position of Deputy Sheriff.

The Deputy Sheriffs in question were appointed under the provisions of Section 185 (c) of the Public Laws of St. Mary's County, according to the information furnished us by you. That section reads, in its entirety:

> "Notwithstanding the provisions of subsection (a) of this Section, the sheriff may appoint such additional deputies as he may deem necessary, *such deputies to serve at the pleasure of the Sheriff and without compensation.*" (Emphasis supplied.)

We have carefully examined the decisions of the Maryland Court of Appeals on the question you present, and the decisions of courts of other jurisdictions. We have also reviewed all Opinions of the Attorneys General of Maryland on the question of what constitutes an "office of profit".

We find that the Court of Appeals of Maryland has specifically held that the position of Deputy Sheriff is not an ". . . office of profit, created by the Constitution or Laws of this State . . ." We also find it to be well settled law in this State that *no* position is an office of profit under Article 35 unless there is a salary, compensation, or fee attached thereto.

In 1880, in *Turner v. Holtzman,* 54 Md. 148, 159, the Court of Appeals held that the position of Deputy Sheriff in this State was not an office ". . . created either by the Constitution or statute law of this State . . .", basing its opinion on the fact that a Deputy Sheriff was a common law officer, rather than a constitutional or statutory one. That decision, of almost 90 years ago, is still the controlling law in this State. See the opinion of Attorney General Walsh, to that same effect, relying on *Turner,* 27 Opinions of the Attorney General 287 (1942).

We believe that *Turner* is completely dispositive of the question now before us, but, for your convenience, we point out that there is ample other authority which supports the proposition that the office of Deputy Sheriff, as it exists under the laws of your County, is not an office of profit within the prohibitions of Article 35.

Section 185 (c) provides, by its very terms, that Deputy Sheriffs appointed pursuant to its authority shall serve "without compensation". The leading authority in this Country on public offices and public officers holds that an office of profit is one to which a salary, fee or compensation is attached. Mechen, *Public Officers,* Book I, Chap. 1, § 13 (1890 Ed.). That this proposition is the law in Maryland is recognized by the decision of the Court of Appeals in *Moser v. Bd. of County Commrs., supra,* wherein the Court said, at 283:

> "* * * In addition to these tests, it should not be overlooked, since a notary public is entitled to fees for services rendered, that an office to which fees, a salary or other compensation is attached, is ordinarily an office of profit. *Mechen on Public Offices and Officers,* § 13. The amount received is immaterial. It is the presumably adequate compensation derived from the office that fixes the character of the office as one of profit."

The same principal is implicitly recognized in *Truitt v. Collins, supra,* wherein the Court held that a member of

the Board of Supervisors of Elections of Worcester County vacated said office by the acceptance of the position of Councilman of the municipal corporation of Snow Hill, to which position a salary was attached.

For more than 40 years the attorneys general of Maryland have consistently held that any position to which no salary, compensation, or fee is attached is not an office of profit, within the meaning of Article 35. See the opinion of Attorney General Thomas Robinson, 11 Opinions of the Attorney General 236 (1926). See also 23 Opinions of the Attorney General 379 (1938) in which Attorney General Herbert O'Conor held that acceptance by the Register of Wills of the position of Town Commissioner of Upper Marlboro did not violate the provisions of Article 35, because no salary was attached to the position of Town Commissioner. It was solely the absence of a salary for that office which distinguished the holding of General O'Conor from that of the Court of Appeals in *Truitt*.

Similarly, Attorney General William C. Walsh held in 24 Opinions of the Attorney General 618 (1939) that a Town Commissioner serving without compensation did not hold an office of profit, as contemplated by Article 35. See also the opinion of Attorney General Edward D. E. Rollins in 39 Opinions of the Attorney General 130 (1954).

In addition to the opinions of the attorneys general hereinabove cited, there have been frequent unpublished opinions reiterating the proposition that a position is not an office of profit within the meaning of Article 35, if no salary, compensation, or fee is attached thereto. For example, we so held in an informal opinion addressed to Louis N. Phipps, Clerk of the Circuit Court for Anne Arundel County, on June 25, 1963.

Because we believe that it is beyond question that the two County Commissioners of St. Mary's County have not vacated their offices as such by virtue of their acceptance of the position of Deputy Sheriff, we see no need to respond to your second question, concerning the validity of the

actions of the Commissioners in question, if they had vacated their offices.

Your third question is whether there is a ". . . conflict of interest by virtue of the fact that the two members of the Board, also being special Deputy Sheriffs, approved or participated in approving the budget for the Sheriff of St. Mary's County, Maryland."

In view of the fact that the two Commissioners received no compensation as Deputy Sheriffs, we find no conflict of interest existing by virtue of the fact that as County Commissioners they approved the budget for the Sheriff of St. Mary's County.

Before closing, we wish to emphasize that in our comments on the legality of the service of the County Commissioners as Deputy Sheriffs, we in no way pass on the wisdom or desirability of such dual service, nor do we express an opinion on the desirability of the position of "honorary" Deputy Sheriff.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

CONSTITUTIONAL LAW—PROPOSED CONSTITUTIONAL AMENDMENTS DO NOT REQUIRE REINTRODUCTION OR REAPPROVAL OF GENERAL ASSEMBLY IF SPECIAL ELECTION FOR RATIFICATION OF SUCH AMENDMENTS HELD TO BE UNCONSTITUTIONAL — EFFECT OF JUDICIAL FINDING THAT STATUTE IS UNCONSTITUTIONAL.

August 27, 1969.

Honorable Isaiah Dixon, Jr.

We are in receipt of your letter of July 2, 1969, concerning the amendments to the Constitution of the State of Maryland which were proposed by the General Assembly during its regular session in 1969. As you are aware, the General Assembly proposed eight amendments to the State Constitution. These amendments may now be found in Chapters 784 to 791, inclusive, of the Laws of Maryland of 1969. Each proposed amendment, with the exception of Chapter 784, provides in the second section thereof that the proposed amendment will be submitted to the voters "at the next ensuing general election to be held in this State". The second section of Chapter 784 provides that the proposed amendment shall be submitted to the voters of the State "at the next general election to be held in this State in November, 1970".

During its regular session in 1969, the General Assembly also passed an act, which became Chapter 76 of the Laws of Maryland of 1969, providing for an election to be held on November 4, 1969, to permit the voters of the State to adopt or reject the proposed constitutional amendments which had been approved during the 1969 session. However, in the case of *Cohen v. Governor of Maryland, et al.*, 255 Md. 5 (1969), the Court of Appeals of Maryland held that Chapter 76 of the Laws of Maryland of 1969 was unconstitutional on the basis that it violated Article XIV, Section 1, of the Constitution of Maryland, which provides that proposed constitutional amendments be submitted to the voters of the State for adoption or rejection at "the next ensuing general election".

In view of this legislative history and the decision of the Court of Appeals in the *Cohen* case, you have requested our opinion as to whether the proposed amendments which were approved by the General Assembly during its regular session in 1969, "require reintroduction in the next session of the General Assembly, since the 'legislative intent' has been disturbed?".

We are of the opinion that the proposed amendments will not require reintroduction. When the Court of Appeals in the *Cohen* case declared that Chapter 76 was unconstitutional, the legal effect was the same as if the act had never been passed by the General Assembly. As stated in 16 Am. Jur. 2d, *Constitutional Law,* Section 177:

> "The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed. *Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.*" (Emphasis added.)

Cf., 16 C.J.S., *Constitutional Law,* Section 101.

Since the situation must now be viewed as if Chapter 76 had never been enacted by the General Assembly, the provisions of each of the proposed amendments that they be submitted to the voters "at the next ensuing general election" or "at the general election to be held in this State in November, 1970", are now controlling. Thus the proposed amendments should be submitted to the electorate at the general election to be held in November, 1970, as the next ensuing general election, in the same manner as if the General Assembly had not enacted Chapter 76. *Cf., Warfield v. Vandiver,* 101 Md. 78, 127 (1905), in which the Court of Appeals held that it was not even necessary for the General Assembly to provide for the submission of

proposed constitutional amendments to the voters in the bill proposing the amendments, as "the Code would supply all the details and machinery needed to place the amendment on the official ballot at the next general election".

We see no evidence of a "legislative intent" that the proposed constitutional amendments be submitted to the voters at the election provided for by Chapter 76 or not at all. On the contrary the proposed amendments simply provide for submission to the voters at the next ensuing general election without any reference to Chapter 76 or the election called for therein. On the question of legislative intent in proposing the constitutional amendments, it is significant that Chapter 784 specifically provides that the constitutional amendment proposed therein be submitted to the electorate at the general election to be held in November, 1970. It seems obvious that Chapter 76 was in the nature of an afterthought, to present the proposed constitutional amendments to the voters of the State with as little delay as possible. There is nothing to indicate that approval of the proposed amendments by the General Assembly was conditioned or predicated upon the passage of Chapter 76 or the holding of the election provided for therein.

We are, therefore, of the opinion that the constitutional amendments proposed by the General Assembly during its 1969 regular session will not require reintroduction or reapproval by the General Assembly during its regular session in 1970, prior to submission to the electorate at the general election to be held in November, 1970.

FRANCIS B. BURCH, *Attorney General.*

WILBUR E. SIMMONS, JR., *Asst. Attorney General.*

COUNTIES—COUNTY COMMISSIONERS—EFFECT ON SALARY AND OFFICE WHEN REPLACED BY COUNTY COUNCIL PURSUANT TO ADOPTION OF CHARTER IN HOWARD COUNTY.

April 16, 1969.

Mr. Alva S. Baker, Chairman.

In your recent letter you request our advice concerning the proper salary to be paid the County Commissioners who became Councilmen pursuant to the adoption of a Home Rule Charter for Howard County. The governing Charter provision is Article XI, Section 1103:

> "*Method of Selection of First Council.* In order that this Charter may become operative promptly after it becomes law, the following procedure shall govern the method of selection of the first Council:
>
> (a) *The existing County Commissioners.* The County Commissioners in office at the effective date of this Charter shall continue to hold office and exercise and perform their present powers and duties until the additional members provided for in Section 1103 (b) are elected and take office. At such time, the existing County Commissioners become Councilmen and the office of County Commissioner shall cease to exist in Howard County."

The specific fact situation you relate is:

> "The County Commissioners of Howard County were elected, under the County Commissioner form of government, in November, 1966 and sworn in in January, 1967, to serve a four year term. In January, 1969, Howard County adopted a Charter form of government under which the present County Commissioners were automatically

> put on the County Council under the Charter form of government. The salary of the County Commissioners was $6,000 per year and the salary of the Council Member is $3,600 per year."

Determinative of the issue of the proper compensation to be paid the County Commissioners, now Council Members, is the construction of Article III, Section 35 of the Maryland Constitution which provides, in part, that the salary or compensation of any public officer shall not be increased or diminished during his term in public office as comprehended by this Article. *Howard County Comm. v. Westphal,* 232 Md. 334; *Hetrich v. County Commissioners of Anne Arundel County,* 222 Md. 304; *Pressman v. D'Alesandro,* 211 Md. 50; 6 Opinions of the Attorney General 118; 7 Opinions of the Attorney General 520; 13 Opinions of the Attorney General 214 and 42 Opinions of the Attorney General 146.

A somewhat similar factual situation was at issue in Montgomery County when, in 1948, a Charter was adopted. The County Commissioners, who were to be displaced before the completion of their term by a County Council, sought an injunction to prohibit a special election of the Council. The Commissioners contended that the provisions of the Charter respecting the special election were invalid for a number of reasons including the fact that they violated Article XVII of the Maryland Constitution, which provides for general elections every four years, by shortening the terms of the present County Commissioners to a period of less than four years. The case came before the Court of Appeals as *County Commissioners v. Supervisors of Elections,* 192 Md. 196. The Court's ruling on the cited issue was (p. 213):

> "With respect to the contention that the Charter unlawfully shortens the terms of the present County Commissioners, it need only be said that *the Commissioners hold their offices subject to the possibility that they may be ousted under the provisions of the Home Rule Amendment providing*

> *for the adoption of a charter.* Cf. *Brown v. Brooke,* 95 Md. 738, 54 A. 416. Questions as to whether their offices continue, and whether they are due their salaries after the establishment of the County Council, are not now before us, and it is therefore not necessary to make any decision or express any view upon these points. Related points were considered in *Woelfel v. State,* 177 Md. 494, 9 A. 2d 826, and *Calvert County Com'rs v. Monnett,* 164 Md. 101, 164 A. 155, 86 A.L.R. 1258." (Emphasis supplied)

We are now asked to express a view on the questions left open by the Court of Appeals—whether, under this set of facts, the office and salary of a County Commissioner continues to the end of the elective term.

Pursuant to Article XI, Section 1103 (b) of the Charter, the office of County Commissioner ceases to exist upon the election of the County Council. The provision eliminating the sovereignty of the office would also, of necessity, apply to the emoluments pertaining thereto.

Under the provisions of the Home Rule Amendment, Article XI, Section 1, the Charter becomes the law of the County, subject only to the Constitution and Public General Laws of the State. Therefore, the provision of Article XI of the Charter abolishing the office of County Commissioner becomes law unless it is in conflict with the Constitution. The question is thereby directly presented as to whether this provision is in conflict with that part of Article III, Section 35 which provides that the salary or compensation of any public officer shall not be increased or diminished during his term in office. The key to resolving this question is the proper interpretation of the phrase "term in office".

The term in office of the Howard County Commissioners at the time of their election in November 1966, was four years. This four year term was required by the Quadrennial Elections Amendment to the Constitution, Article

XVII, Sections 1 and 3 which provides in part: ". . . all county officers elected by qualified voters, shall hold office for terms of four years". The Court of Appeals in *County Commissioners v. Supervisors of Elections, Supra,* held that the election of a County Council to replace the County Commissioners before the expiration of their term, pursuant to the Home Rule Amendment, did not violate Article XVII. The Court thereby recognized that the term of office of the incumbent Commissioners could be terminated by adoption of the Charter.

The four year term of office being constitutionally abrogated within the context of Article XVII, it is also abrogated for purposes of Article III, Section 35. The term of office for the purpose of Section 35 cannot be longer than the term of office recognized by the governing law creating the office. There is no conflict between the Charter provision abolishing the office of County Commissioner and Section 35.

Our conclusion that the phrase "term of office" within the context of Article III, Section 35 means more than an inflexible four year standard is supported by the holding of the Court of Appeals in Comptroller of the *State of Maryland v. Klein,* 215 Md. 427. The Court held that this language referred to the term of the incumbent rather than a fixed term of years, and therefore a "term of office" for the purpose of Section 35 can be terminated by replacing the incumbent before the end of an appointed or elected term.

A finding that the office of County Commissioner, with its attendant compensation, extended to the expiration of the elected term, would create a real problem under the facts here. The three County Commissioners upon their assumption of the office of County Council, pursuant to the Charter, would be in violation of Article 35 of the Declaration of Rights which proscribes the holding of more than one office of profit at the same time.

The two cases cited by the Court of Appeals in *County Commissioners v. Supervisors of Elections, Supra,* as bear-

ing on the issues presented here are readily distinguishable. In the case of *Calvert County Com'rs v. Monnett*, 164 Md. 101, where the Legislature had reduced the compensation of a County Treasurer, after his election and qualification, the Court of Appeals held that the act was ineffective against him, though it would affect his successor. In *Woelfel v. State*, 177 Md. 494, legislation passed subsequent to the effective date of the appointment of a Justice of the Peace which substantially decreased his powers and compensation, was held to be violative of Article III, Section 35, as to the salary diminution. The Court held that Appellant had been appointed and qualified for a term of two years before the legislation became effective, and the Legislature had no powers to reduce his compensation, citing *Calvert County Com'rs v. Monnett*. Both these cases deal with legislative attempts to reduce salaries of officers who continue in office, and Section 35 is clearly apposite. The facts here are different, in that, pursuant to Article XI of the Charter, the office of County Commissioner ceases to exist upon the election of the County Council.

In summary, it is our opinion that the County Commissioners can be constitutionally ousted pursuant to the Home Rule Amendment. Their term of office, and the office itself, is terminated in accordance with the Charter provisions. Article III, Section 35 is, therefore, not applicable. There is no increase or diminishment of compensation during a term of office, as the term has been constitutionally brought to an end. Accordingly, the Howard County Commissioners would no longer be entitled to their salary as Commissioners once their functions were superseded by the County Council's taking office pursuant to the Charter. They would be entitled only to the salary for their new office as County Councilmen upon the Council's assuming power pursuant to Article XI of the Charter.

FRANCIS B. BURCH, *Attorney General.*

THOMAS N. BIDDISON, JR., *Asst. Attorney General.*

COUNTIES—ELECTIONS—COUNTY COMMISSIONERS—TERMS OF INCUMBENT COUNTY COMMISSIONERS MAY NOT BE EXTENDED BY PUBLIC LOCAL LAW—LENGTH OF TERMS AND DATE OF ELECTION ESTABLISHED BY MARYLAND CONSTITUTION.

September 4, 1969.

Honorable Meyer M. Emanuel, Jr.

In your letter of July 15 you asked this office to advise you as to the legality of your proposed procedure for handling the transition from the County Commissioner form of government to the charter form of government in Prince George's County in the event that the County's proposed charter is ratified by the voters of that County at the general election to be held on November 3, 1970.

You suggest that the terms of the five incumbent County Commissioners, elected for four year terms in November 1966, be extended so that no successor County Commissioners be elected at the November 1970 general election. You point out that the first draft of the proposed charter calls for a special election to be held January 26, 1971 to elect the nine County Councilmen in the event the charter is ratified and you further suggest that this could also be the date upon which to elect five County Commissioners in the event the charter is not ratified. In either event, the incumbent County Commissioners would continue to hold office until either the successor County Commissioners or County Councilmen were duly elected and qualified. You propose that this be accomplished by means of a public local law passed by the General Assembly at its 1970 session.

Under Article VII, Section 1 of the Maryland Constitution, County Commissioners are to be elected for a term "not exceeding four years" at the quadrennial general election. To the same effect, see *Code of Public Local Laws of Prince George's County*, Section 18-1 (a). Also relevant is the language of Article XVII, Sections 1, 2 and 3 which

states that all county officers shall hold office for terms of four years and shall stand for election at the quadrennial general election. Your proposal would not only extend the terms of the incumbent County Commissioners past four years [see *Buckler v. Bowen*, 198 Md. 357, 365 (1951)] but would also run afoul of the requirement that county officials, which term certainly includes County Commissioners, must stand for election at the quadrennial general election.

There is precedent both for the proposition that the terms of County Commissioners may be shortened by the provisions of a ratified county charter and for the proposition that a special election for the election of County Councilmen, provided for by said charter, need not be held on the date set out in Article VII, Section 1 and Article XVII, Section 2 of the Maryland Constitution. In *County Commissioners v. Supervisors of Elections*, 192 Md. 196 (1949), the shortening of terms for the previously elected County Commissioners of Montgomery County by the newly ratified Montgomery County Charter was approved by the Court of Appeals for the following reasons (at page 213):

> "With respect to the contention that the Charter unlawfully shortens the terms of the present County Commissioners, it need only be said that the Commissioners hold their offices subject to the possibility that they may be ousted *under the provisions of the Home Rule Amendment providing for the adoption of a charter.*" (Emphasis supplied)

The constitutional explanation given for this conclusion is that:

> "*. . . the power of the people of the County to create and adopt the form of government described in the Charter,* and to elect its legislative body, does not depend on any legislative grant from the General Assembly, but *is derived from Article XI-A of the Constitution itself* * * *." (Emphasis supplied)

This case would sanction a procedure in Prince George's County whereby the election for the five County Commissioners would be held as usual at the general election on November 3, 1970; the five Commissioners would be duly elected for four year terms; the charter would be adopted by the voters of Prince George's County at the same election; included in that charter would be a provision stating that at a special election to be held on January 26, 1971 to elect nine County Councilmen who, upon election and qualification, would replace the five county commissioners elected for four year terms only a short time before.

In a later related case the Court of Appeals held, however, that once the charter government took effect the provisions of Article XVII must be strictly complied with. *Ames v. Supervisors of Elections*, 195 Md. 543 (1950). See also *Tyler v. Bd. of Supervisors*, 213 Md. 37 (1957) and *Connor v. Bd. of Supervisors*, 212 Md. 379 (1957) relating to similar transitional problems which arose at the time of the adoption of a charter form of government in Baltimore County.

The feature which distinguishes your proposal from the procedure approved by the Court of Appeals with respect to Montgomery County is that the terms of the incumbent County Commissioners would not be extended by the provisions of a validly ratified charter but rather by a public local law. From the language of the *County Commissioners* opinion quoted above, it is seen that the source of a validly adopted charter is the provisions of Article XI-A of the Maryland Constitution. Because this Article is of co-equal stature with the language of Article VII, Section 1 and Article XVII, Sections 1, 2 and 3 of the Maryland Constitution (establishing four year terms for County Commissioners and requiring that they be elected at the quadrennial general election), the Sections must be read together and, hence, in the proper case, a term of office may be shortened and the date of a certain election may fail to conform to the constitutional mandate.

In the proposal you present, however, the election which

you seek to avoid by public local law is constitutionally required to be held at exactly the same time as the election at which the proposed charter is either ratified or rejected by the voters of Prince George's County. Because by Article XI-A, Section 1 the charter does not become effective until "from and after the thirtieth day from the date of such election", it can hardly be argued that the charter itself has extended the terms of office in question. Nor does the general case law dealing with public officers holding over and *de facto* officers apply to a situation where a constitutionally required election is voided upon the authority of a public local law. See *Reed v. Pres. of North East*, 226 Md. 229 (1961); *Benson v. Mellor*, 152 Md. 481 (1927).

Although the transitional problems created by the possibility of charter government in Prince George's County have given rise to your inquiry, the inescapable fact remains that, in the last analysis, it is a public local law which will extend the terms of the incumbent County Commissioners past the constitutionally required four years, and it is also a public local law that will abolish the constitutionally required quadrennial election of County Commissioners. A public local law must fall when it is in direct conflict with clear constitutional language on the same subject.

Furthermore, it is interesting by way of comparison to note that there are presently five charter counties in Maryland (Montgomery, Baltimore, Anne Arundel, Wicomico and Howard) and that in none of these counties was the transition from the county commissioner form of government to the charter form of government handled in the way which you suggest. In Montgomery, Baltimore and Anne Arundel counties the uncompleted terms of the incumbent County Commissioners were shortened by charter and a special election was held approximately six weeks after the effective date of the new charter. In Wicomico County the incumbent County Commissioners were carried forward by charter as members of the new County Council. In Howard County, three incumbent County Commissioners were carried forward as members of the new five man

County Council and a special election was held to elect the remaining two members of the County Council and a county executive. The experience in other counties is, of course, not dispositive of the question you raise but does demonstrate that the procedure you suggest is without precedent in this State.

For all of these reasons, it is our conclusion that your proposed legislation is constitutionally defective and, therefore, cannot accomplish the purposes you seek.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Asst. Attorney General.*

CORRECTIONAL SERVICES

DEPARTMENT OF CORRECTIONAL SERVICES—INSTITUTIONAL HOSPITAL — CONFINEMENT OF PRISONERS, PRIOR TO TRIAL AND SENTENCE, TO HOSPITAL FACILITIES OF DEPARTMENT OF CORRECTIONAL SERVICES IS IMPROPER EVEN UNDER COURT ORDER—FUNCTION OF DEPARTMENT BEGINS AFTER SENTENCE—DEPARTMENT MUST RESPECT COURT ORDER UNTIL PROPERLY SET ASIDE AND MUST USE DUE CARE TO TREAT AN ARRESTEE IMPROPERLY COMMITTED IN THE SAME FASHION AS OTHER PRISONERS PROPERLY COMMITTED.

February 4, 1969.

Mr. Frederick E. Terrinoni.

You have asked our opinion regarding the obligations of the Department of Correctional Services with respect to persons sent to the institutional hospital at the Maryland Penitentiary when they have not been convicted of a crime but are wounded during arrest or become ill as prisoners prior to conviction. You cite one example in which such a patient was sent to you on a court order prior to trial or conviction. You ask whether the court order was legal, whether it is incumbent upon you to respect the court order and what is the Department's responsibility with regard to the individual.

We shall answer your questions in the order posed.

1. It would be beyond the authority of the court. As you are well aware, under Maryland Code Article 27, Section 690 judges in criminal cases are required to commit sentenced prisoners to the custody of the Commissioner of Correctional Services for imprisonment. Thereafter, all such persons are within the jurisdiction of the Department and are subject to the rules and regulations of the Department. It is the function of the Department of Correctional Services to deal with the incarceration of persons convicted of crime and not with those merely accused. The institu-

tional hospital is not a general purpose hospital but serves a particular function within the scope of the authority of the Department. Since the function of the Department does not come into play until after conviction and sentence, the employment of the institutional hospital facilities for the treatment of persons awaiting trial is not justified. We have been unable to find any provision of law which authorizes a judge, even of *nisi prius* rank, to order your Department to accept a person who has not been convicted of a crime and sentenced either for general custody or hospital treatment.

Under Maryland Rule 777 the power of the trial courts prior to conviction would appear to be limited to admitting a defendant to bail. If he is to remain in custody, the proper place of confinement while awaiting trial would be a county or Baltimore City facility. There are provisions for the commitment of certain persons to State hospitals or institutions maintained by counties or Baltimore City, such as those in Article 52, Section 13 of the Maryland Code relating to the commitment of alcoholics and persons addicted to narcotics, the commitment of habitual drunkards under Article 43, Section 16 of the Maryland Code, and insane persons under Article 59, Section 7 of the Maryland Code, but there is no provision that we can find for the simple medical treatment of a physically ill or wounded arrestee which would justify the confinement of such a person under the jurisdiction of your Department.

2. We think that it is incumbent upon you to respect a court order by accepting the person sent to you even though the order might be invalid. In such a case, upon notification from you that a prisoner has been sent to you under such an order prior to conviction, we would promptly move to have the order rescinded by application to the judge who signed it. If that were not successful and the problem continued, we could undertake to clarify your position by other appropriate judicial proceedings. We cannot advise you, however, to ignore a court order.

3. The Department's responsibility to those over whom

it has custodial control would be to use due care, and any person who is taken into the institution even under a court order which might later prove to be invalid would be entitled to the same care as any prisoner properly under your control.

FRANCIS B. BURCH, *Attorney General.*

THOMAS A. GARLAND, *Asst. Attorney General.*

COURTS

MUNICIPAL COURT OF BALTIMORE CITY—LEGAL AUTHORITY OF JUDGES TO CHANGE VERDICTS AFTER THEY ARE INITIALLY RENDERED.

December 8, 1969.

Honorable Marvin Mandel.

We have your recent letter requesting our opinion "concerning the legal authority of judges of the Municipal Court of Baltimore City to change the nature of verdicts after they are initially rendered." You ask, for example, "if at the termination of a trial for driving under the influence of alcohol, a Municipal Court judge renders a 'guilty' verdict, does the law allow the judge, twenty days later, to change the verdict to 'not guilty' or 'probation without verdict'?"

The powers and jurisdiction of the judges of the Municipal Court of Baltimore City are set forth in Article 26 of the Annotated Code of Maryland (1966 Replacement Volume). The Municipal Court of Baltimore City is a court of limited jurisdiction and a creature of statute, and is, therefore possessed only of the powers granted by the statute. See 24 C.J.S. *Criminal Law* § 1605 (1), pp. 637-638.

This office has ruled on at least two occasions, 39 Opinions of the Attorney General 206 and 40 Opinions of the Attorney General 635, that trial magistrates may not reopen a case once judgment has been entered, and the Court of Appeals has set this matter to rest in the case of *Good v. State,* 240 Md. 1. See also 24 C.J.S. *Criminal Law* § 1587, p. 588, and *State v. Seitz,* 14 A. 2d 710. In *Good,* the Court of Appeals noted that the Legislature, in creating the People's Court for Prince George's County, gave the judges the power to suspend or reduce the sentence and/or costs in any case within a statutory period after judgment has been pronounced. The Court, however, held that the judges

of the People's Court for Prince George's County are without power to vacate a judgment of conviction, once entered, and to grant a new trial, stating at pp. 10-12:

> "It is clear, therefore, that while the People's Court for Prince George's County was created under constitutional authority, its jurisdiction and powers are purely statutory. And it is conceded in the case before us that the Legislature has made no specific grant of power to the People's Court for Prince George's County, or to the trial magistrates or justices of the peace of the State, to vacate or set aside a judgment of conviction and to grant a new trial, or to permit an appeal after the statutory period has elapsed. However, the appellant argues that language in Art. 52, Sec. 13 (a), to the effect that trial magistrates 'have power * * * to do all acts which may be necessary for the exercise of their said jurisdiction, and may pronounce judgment and sentence in all such cases coming before them, in the same manner, and to the same extent as the circuit courts for said counties could, if such cases had been tried before said courts * * *', constitutes a sufficient basis for the finding of such power. But the same theory was considered and rejected in *State v. Jacob*, 234 Md. 452, 455-457, 199 A. 2d 803 (1964). *In that case then Chief Judge Brune, for the Court, concluded that the quoted phraseology did not confer upon the trial magistrates of Anne Arundel County the power to grant probation without verdict. The decision was based largely upon the fact that 'when the Legislature has wished to confer upon justices of the peace or trial magistrates the power to grant probation without verdict, it has done so specifically.'* Similarly, in the instant case, although the Legislature gave to the judges of the People's Court for Prince George's County the power to suspend or reduce sentences within ten (now thirty) days

after their imposition, as previously noted, it has not seen fit to confer upon them the power to grant new trials or to permit belated appeals. *Indeed, this Court held more than a century ago that because of such a lack of statutory authority, justices of the peace had no authority to strike out their own judgment, once entered, and grant a new trial. Frazier v. Griffie,* 8 Md. 50, 55 (1855). The rule is thus stated by a respected Maryland author: 'It is the general rule that Justices have the power to strike out judgments only in jurisdictions where they may grant new trials. Justices in Maryland have no power to grant new trials, and their judgments once entered, are final, unless appealed from.' Thomas, *Procedure in Justice Cases* (2nd ed.), Sec. 78. See also *State v. Stoesser,* 183 A. 2d 824 (Del. Super. 1962). And the same lack of statutory authority has over the years prevented belated appeals from justices of the peace, trial magistrates, and the people's courts.

* * *

"We conclude that we must hold, as we do upon the basis of the authorities cited, and particularly upon the rationale of *State v. Jacob, supra,* that in the absence of a specific statutory grant of authority, the judges of the People's Court for Prince George's County are without power to vacate a judgment of conviction, once entered, and to grant a new trial, or to authorize the taking of an appeal from their judgments subsequent to the statutory ten day period." (Emphasis supplied)

Therefore, it would seem abundantly clear that trial magistrates and judges of the various People's Courts have no power to change a disposition once entered. This is equally true of the Municipal Court of Baltimore City, because no broader powers have been conferred upon that tribunal by Article 26 than have been granted to other courts of limited jurisdiction by Article 52. Furthermore,

it is well to note that the Municipal Court of Baltimore City was created by an amendment to the Constitution which was ratified on November 8, 1960, and its jurisdiction supplants that formerly held by justices of the peace and trial magistrates in Baltimore City. See M.L.E. *Justices of the Peace* § 10, p. 508; Article IV, Section 41C of the Constitution of Maryland, and Section 109 (d) of Article 26 of the Annotated Code of Maryland. In addition, there would appear to be a good practical reason for this lack of power of a Municipal Court judge to change a verdict once entered, since there is an absolute right of appeal from a judgment rendered in the court, (Article 5, Sections 43-48) and such appeals are held *de novo*.

We have also considered whether Rule 764 (b) of the Maryland Rules of Procedure is applicable to the present question, and have concluded that it is not, for Rule 764 (b) provides, in part, that "the court shall have revisory power and control over" a judgment entered for 90 days after imposition and that after such period has expired the court "shall have such revisory power and control only in case of fraud, mistake or irregularity." Rule 5 (i), however, does not include the Municipal Court of Baltimore City within the definition of "Court"; and the rule further provides that "Court" shall not mean the Supreme Bench of Baltimore City, any People's Court or trial magistrate, except as expressly otherwise provided or may result from necessary implication. Therefore, it is clear that Rule 764 (b), which makes no mention of the Municipal Court of Baltimore City, has no application to this situation.

It should be pointed out that Section 113 (f) of Article 26 does give a Municipal Court judge power to "reduce" a sentence within thirty (30) days after imposition of sentence, and the judges are empowered to place a person on probation without finding a verdict under Section 114 (a) (2) of Article 26. The question then becomes whether the changing of a "guilty" verdict to "not guilty" or "probation without verdict" could be construed as a "reduction" of sentence. It is clear from a close reading of the *Good* case, *supra*, that such a construction would be incorrect.

In *Green v. Sklar*, 74 N.E. 595, 188 Mass. 363 (1905), the Supreme Judicial Court of Massachusetts stated at p. 596 that "the word 'reduce', in its ordinary signification, does not mean to cancel, destroy or bring to naught, but to diminish, lower, or bring to an inferior state." Obviously, the "changing" of a "guilty" verdict to "not guilty" or "probation without verdict" would not be reducing the sentence but would be first, changing or striking out the verdict, and secondly, eliminating, not reducing the sentence. Furthermore, "probation without verdict", by its very definition, avoids any finding of guilt, and since there is no sentence involved in this verdict, it could not possibly be successfully argued that changing the verdict from "not guilty" to "probation without verdict" is a reduction of sentence. See *Skinker v. State*, 239 Md. 234; M.L.E. *Criminal Law* § 518, p. 142; and 17 Md. L. Rev. 309, 316, 322 (1957).

It is, therefore, our opinion that if a Municipal Court judge of Baltimore City rendered a guilty verdict for driving under the influence of alcohol, he has no lawful authority to change the verdict to "not guilty" or "probation without verdict" twenty days later.

FRANCIS B. BURCH, *Attorney General.*

JAMES F. TRUITT, JR., *Asst. Attorney General.*

COURTS — PEOPLE'S COURT — ANNE ARUNDEL COUNTY — BUDGET CONTROL OF JUDICIAL REQUEST FOR ADMINISTRATIVE FUNDS.

May 15, 1969.

Honorable Thomas J. Curley.

We have received your inquiry with respect to the annual operating budget of the People's Court of Anne Arundel County. Essentially you pose two questions for our consideration:

1. Does the Executive Branch of the Anne Arundel County Government have any right to propose to the County Council a budget for the operation of the People's Court?

2. What limitations are there on the County Council's action in either meeting or denying budgetary requests by the People's Court of Anne Arundel County?

The Charter for Anne Arundel County explicitly provides that the budgetary requests of the courts be submitted to the Executive Branch and that they may be modified by the County Executive.

Article VII, Section 702 (a) provides:

> "The term 'County government' shall include all offices, courts, departments, institutions, corporations, boards, commissions, agencies and their officers, agents and employees who receive or disburse County funds."

Section 704, entitled Formulation of Current Expense Budget, provides:

> "Not less than one hundred twenty days prior to the end of each fiscal year, the head of each office, department, institution, board, commission, and other agency of the County government shall furnish to the Budget Officer annual work programs setting forth the nature, volume, cost and other

> factors concerning the work to be performed and the estimates of the revenues and expenditures of their several operations for the ensuing fiscal year. Estimated revenues shall be detailed as to source, and estimated expenditures as to program or project. All such estimates shall be submitted in such form and with such other supporting data as the Director of Administration with the assistance of the Budget Officer and he may hold such hearings as he shall deem appropriate. The current expense budget shall be compiled therefrom for transmission to the County Executive. The County Executive may amend the budget proposals, except for the budget request of the legislative branch and shall cause to be prepared the County budget as set forth in Section 706 of this Article along with his budget message."

Section 706, entitled Submission and Contents of the County Budget, provides:

> "Section 706. Not later than sixty days prior to the end of the fiscal year the County Executive shall submit to the County Council the proposed
>
> County budget for the ensuing fiscal year."

Section 709 sets forth what action the County Council may take on the proposed budget. It provides essentially that the Council may delete or decrease items in the budget but may not increase them. Section 715, entitled Appropriation, Control and Certification of Funds, provides in part:

> ". . . No office, department, institution, board, commission or other agency of the County government shall during any fiscal year expend, or contract to expend, any money or incur any liability, or enter into any contract which by its terms involves the expenditure of money, for any purpose in excess of the amounts appropriated or allotted for the same general classification of expenditure in the budget for such fiscal year, or in

> any supplemental appropriation as hereinabove provided; and no such payment shall be made nor any obligation or liability incurred, except for small purchases in an amount less than Fifty Dollars ($50.00), unless the Comptroller shall first certify that the funds for the designated purpose are available. Any contract, verbal or written, made in violation of this section shall be null and void, and if any officer, agent or employee of the County shall knowingly violate this provision, he shall be personally liable and such action shall be cause after public hearing for his removal from office by the County Executive or by majority vote of the County Council, notwithstanding the provisions of Article VIII of this Charter."

The provisions of Section 704 requiring submission of a budget to the Executive Department by agencies of the County Government, clearly apply to the People's Court as, by definition set forth in Section 702 (a), the courts are included within the "County Government". Accordingly, the answer to your first question is that the budget requests of the People's Court must be submitted to the Executive Department in accordance with Section 709 of the Charter.

The answer to your second question cannot be so readily resolved by reference to the statutory law. Article 52, Section 98B (c) provides:

> "The County Commissioners of Anne Arundel County are authorized and directed to annually appropriate an amount sufficient for the proper and effective administration of the People's Court."

Pursuant to the adoption of the Charter, the County Commissioners were replaced by the County Council, and the same directive would apply to them by virtue of Section 306 of the Charter which provides:

> "The County Council shall also have and may exercise all legislative powers heretofore vested

> in the County Commissioners of Anne Arundel County."

The budgetary procedure set forth in the Charter is the means for complying with the mandate of Article 52, Section 98B (c). The only statutory limitation imposed on the power of the County Executive and the County Council to delete or decrease items in the budget submitted by the People's Court is that sufficient funds must remain "for the proper and effective administration of the People's Court."

Case law in other jurisdictions has recognized a limitation on budgetary control over the judiciary which is inherent in our democratic system with its separation of powers between the executive, legislative, and judiciary. The basic premise of these cases is that the courts must be free of executive and legislative control and that this independence cannot be jeopardized by arbitrary control over court finances. The test is whether the requested funds are necessary for the proper and efficient operation of such court. See *In re Appointment of Clerk of Court of Appeals,* 297 S.W. 2d 764 (Ky. 1957); *Carlson v. State,* 220 N.E. 2d 532 (Ind. 1966); *State v. Pfeiffer,* 126 N.E. 2d 57 (Ohio 1955).

Article 8 of the Declaration of Rights of the Maryland Constitution recognizes the Separation of Powers concept. Article IV, Section 9 of the Maryland Constitution, provides:

> "The Judge, or Judges of any Court, may appoint such officers for their respective Courts as may be found necessary; and such officers of the Courts in the City of Baltimore shall be appointed by the Judges of the Supreme Bench of Baltimore City. It shall be the duty of the General Assembly to prescribe, by Law, a fixed compensation for all such officers; and said Judge or Judges shall, from time to time, investigate the expenses, costs and charges of their respective courts, with a view to a change or reduction thereof, and report the

result of such investigation to the General Assembly for its action."

The Court of Appeals noted in *Prince George's County Commissioners v. Mitchell,* 97 Md. 330, that even without the cited section the judges would have the power to appoint such officers as are necessary for the proper conduct of the business of their respective courts.

The constitutional standard of funding for the Courts so as to preserve the integrity of the separation of powers system is, therefore, essentially the same as the statutory standard set forth in Article 52, Section 98B, i.e., sufficient funds as are necessary for proper and effective administration.

You have cited three specific items which have been deleted from your budget request, the rental for a copy machine, two air conditioners for the court rooms, and travel, subsistence, and lodging funds for the Judges and Court personnel to attend professional meetings and functions. The necessity of these items for the proper and effective administration of your Court is a factual issue which we are not in a position to resolve. The cases cited from other jurisdictions recognize that the courts have a right to institute an action of mandamus to compel the legislative body to provide the necessary funds. A factual determination as to "necessity" can be made at that time.

FRANCIS B. BURCH, *Attorney General.*

THOMAS N. BIDDISON, JR., *Asst. Attorney General.*

EDUCATION

UNIVERSITY OF MARYLAND—TEMPORARY SUSPENSION OF STUDENT PENDING A HEARING—POWER TO MAINTAIN ORDER AND PROTECT UNIVERSITY PROPERTY.

January 23, 1969.

Dr. Wilson H. Elkins.

You have requested our opinion as to whether the University of Maryland may suspend a student, pending a hearing, under circumstances warranting disciplinary action.

After reviewing the pertinent law and precedents, we conclude that the University may impose a temporary suspension on a student pending a hearing on charges of misconduct, particularly where the hearing is scheduled to take place in a reasonably short period of time.

Generally, the maintenance of discipline and the establishment and enforcement of standards of behavior in a University is a task committed to its faculty and officers, and the courts will not interfere unless University officials abuse their discretion or act arbitrarily. *Woods v. Simpson,* 146 Md. 547 (1924). Although recent years have seen much in the way of development of the law with regard to the relationship between students and university, there remains agreement that a university is substantially free to reach its own definitions of what shall constitute acceptable conduct on campus and to expel, suspend, or otherwise discipline students who engage in conduct disruptive to the functioning of the university. *Goldberg v. Regents of the University of California,* 248 Cal. App. 2d 867, 57 Cal. Rep. 463 (1967). Moreover, a college or university may establish rules which it judges to be reasonably necessary to maintain order and propriety, and to achieve its educational objectives, and the university may enforce such rules by dismissal of students violating them regardless of the outcome of any criminal proceedings arising from the same conduct. *Goldberg v. Regents of the University of Cali-*

fornia, supra. Indeed, dismissal may be undertaken even prior to the completion of the judicial proceedings issuing out of the conduct in question.

While the courts have recognized that a state college or university must necessarily possess a wide latitude in disciplining its students, they have also agreed that such power is not unlimited in that disciplinary rules must not only be fair and reasonable, but must be applied in a fair and reasonable manner. *Knight v. State Board of Education,* 200 F. Supp. 174 (M.D. Tenn. 1961). Moreover, the terms "fair" and "reasonable" have been placed in the context of the due process requirements of the Fourteenth Amendment to the United States Constitution. The general rule which may be distilled from the now multitudinous decisions in this area is that due process requires at least notice and an opportunity for a hearing before a student at a state tax-supported college is suspended or expelled for misconduct. *Dixon v. Alabama State Board of Education,* 294 F. 2d 150 (5 Cir. 1961), *cert. den.* 368 U.S. 930 (1962); *Esteban v. Central Missouri State College,* 277 F. Supp. 649 (W.D. Mo. 1967); *State ex rel. Sherman v. Hyman,* 180 Tenn. 99, 171, S.W. 2d 822 (1942), *cert. den.* 319 U.S. 748 (1943).

We believe it significant, however, that the above-cited cases requiring a hearing prior to suspension all deal with either expulsion or an indefinite or long-term suspension which amounts to a deprivation of the right to attend a university for a substantial period of time. A distinction may validly be made between disciplinary action involving final or long-term separation from the academic community, and a short-term suspension pending a hearing of the student's misconduct. Such a distinction was made by the United States Court of Appeals for the Second Circuit in *Madera v. Board of Education of City of New York,* 386 F. 2d 778 (2 Cir. 1967), where the plaintiff, a 14-year-old junior high school student, had been suspended from school as a consequence of behavioral difficulties by the principal who was authorized to suspend a child from classes for a

period of no more than five days. The Court noted that, "Generally, the principal tries to meet with the parents of the child to try to solve the problem before the suspension, but sometimes the situation requires an immediate suspension with a later conference before the child is returned to school . . ." (at page 781). The Court took notice of the several cases holding that any action that would effectively deny an education must meet with the minimal standards of due process, but distinguished them from situations involving temporary suspensions:

> ". . . These cases, however, involved an expulsion from school. The result of an action by the educators in an expulsion case would have been the drastic and complete termination of the educational experience in that particular institution. But no case has yet to go so far as to hold that various trial type hearing requirements apply to such proceedings as in the present case . . ." (at page 784).

The Court, citing as authority *Opp Cotton Mills v. Administrator,* 312 U.S. 126, 61 S. Ct. 524, 85 L. Ed. 624 (1941), held that the demands of "due process" do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding, as long as the requisite hearing is held before the final order becomes effective. We believe it highly significant that the fact situation before the Court involved a short-term suspension of a student from a public, tax-supported school, and that the Court particularly distinguished the situation before it from suspensions which involve a termination or substantial interruption of the educational process. A distinction between final and temporary suspensions of students also appears to be suggested in the recent decision of the United States District Court for the Western District of Missouri in *Scoggin v. Lincoln University,* 37 U.S. Law Week 2187 (decided 9/19/68). The Court stated:

> "In severe cases of student discipline for alleged

> misconduct, *such as final expulsion, indefinite or long-term suspension, dismissal with deferred leave to reapply,* the institution is obligated to give to the student minimal procedural requirements of due process of law . . ." (Emphasis supplied).

We find the reasoning of the Court in the *Madera* case to be most persuasive. Albeit not binding upon the courts in this jurisdiction, the case does lend support to our view that a short-term suspension of a student charged with misconduct is permissible where he will be afforded an opportunity for a hearing before a final decision of disciplinary action is made.

We believe, too, that the University's power to temporarily suspend a student pending a hearing may be further justified on the grounds that the University has the power and obligation to protect itself, its student body, and its faculty from those whose conduct threatens University property or the continuance of its educational tasks. If a student is charged with serious misconduct and refuses to cease his acts, even while awaiting a hearing, the University may have no other immediate means of protecting itself (short, perhaps, of bringing criminal charges). Our view in this regard is reinforced by the recent holding in *Esteban v. Central Missouri State College*, 37 U.S. Law Week 2201 (U.S.D.C. W.D. Mo. Sept. 25, 1968), where the Court upheld the suspension by a public college of students who violated its rules by participating in unruly and unlawful demonstrations which resulted in destruction of school property. To the plaintiff's contention that the right to participate in unruly demonstrations was protected by the First Amendment's guarantee of free speech and assembly, the Court replied:

> ". . . Certainly the regulation concerning mass demonstrations, [is] reasonably interpreted . . . and applied by the college in the instant case to a participant in student mass demonstrations involving unlawful conduct such as the illegal blocking of a public highway and street, and the de-

> struction of school property, [and] is relevant to a lawful mission of the educational institution. *Neither the First Amendment nor any other provision of the Constitution prohibits any educational institution from protecting itself against conduct that would damage or destroy it or its property in toto or in part.*" (Emphasis supplied)

We do not here presume to delineate the types of misconduct which may warrant the University to impose a temporary suspension on a student pending a hearing. That decision must rest with the University's administrative officers and may well require a case-by-case determination. To avoid charges of arbitrary action, we trust that the University will impose a temporary suspension on a student awaiting a hearing only for good cause, based on strong evidence of acts of misconduct posing a threat to University property, to the well-being of the student body, or to the stability and continued functioning of the University's educational life. We are confident that the University, cognizant of the academic and other disadvantages borne by a student even temporarily suspended from school, will make an effort to expedite the hearing process.

FRANCIS B. BURCH, *Attorney General.*

ESTELLE A. FISHBEIN, *Asst. Attorney General.*

EDUCATION—UNIVERSITY OF MARYLAND—TUITION—CLASSIFICATION AS "RESIDENT" OR "NON-RESIDENT".

January 28, 1969.

Dr. Wilson H. Elkins.

You have requested our review of the policy of the Board of Regents under which students are classified as "residents" or "non-residents", with the consequence that non-resident students must pay a higher tuition fee than that applicable to students who are residents of the State.

It appears that the Board of Regents of the University of Maryland has adopted a policy under which students are classified as either residents or non-residents of the State for purposes of assessing tuition. The Board has established the following criteria to be used in making a determination of residency:

> "Students who are minors are considered to be resident students if at the time of their registration their parents have been domiciled in the State of Maryland for at least six months.
>
> "The status of the residence of a student is determined at the time of his first registration in the University and may not thereafter be changed by him unless, in the case of a minor, his parents move to and become legal residents of Maryland by maintaining such residence for at least six months. Conversely, a student retains his status as a resident for a period not to exceed six months from the date his parents remove their domicile from the State of Maryland, after which date the student pays non-resident fees. However, the right of the minor student to change from a non-resident status to resident status must be established by him prior to the registration period set for any semester.

> "Adult students are considered to be residents if at the time of their registration they have been domiciled in Maryland for at least six months provided such residence has not been acquired while attending any school or college in Maryland or elsewhere. Time spent on active duty in the armed services while stationed in Maryland will not be considered as satisfying the six months period referred to above except in those cases in which the adult was domiciled in Maryland for at least six months prior to his entrance into the armed service and was not enrolled in any school during that period.
>
> "The word 'domicile' as used in this regulation shall mean the permanent place of abode. For the purpose of this rule only one domicile may be maintained."

To answer the inquiry requires a consideration of two questions: First, does the Board of Regents have authority to establish rules and policy regarding the tuition structure of the University? Secondly, may the University or Board of Regents constitutionally differentiate between residents and non-residents of the State in determining tuition fees?

With regard to the first question, it appears that there is no statute in Maryland dealing with the tuition structure at the University of Maryland. However, Article 77, Section 249 (e) of the Annotated Code of Maryland (The "Autonomy Act") provides, in pertinent part,

> "Notwithstanding any other provision of law to the contrary, the Board of Regents shall exercise with reference to the University of Maryland, and with reference to every department of same, all the powers, rights, and privileges that go with the responsibility of management . . ."

The establishment, assessment, and collection of tuition fees thus appears to be a proper exercise of the managerial

prerogatives of the Board of Regents. We must hold, therefore, that the Board of Regents acted within its statutory authority when, by adoption of a resolution at a formal meeting, it formulated a policy prescribing the classification of students into "resident" and "non-resident" categories for tuition purposes, and establishing the criteria to be used in determining who is a resident of the State for such purposes. Indeed, even prior to the passage of the Autonomy Act this office held that the question of what constitutes "residence" for purposes of admission to the University might be regulated by a rule of the Board of Regents. 15 Opinions of the Attorney General, 351 (1930). That opinion stated,

> ". . . that the Board of Regents may establish such rules with regard to tuition, either resident or non-resident, as it may see fit, provided that the catalogue states the tuition which is payable. Furthermore, the catalogue may define 'residence' in such manner as the Board of Regents shall determine . . ."

Granted that the Board of Regents has authority to prescribe tuition rates, the question remains as to whether the Board has exercised its authority in an unconstitutional manner by establishing different tuition rates for residents and non-residents.

Although the constitutionality of the Regents' action in establishing different tuition rates has not been examined by the Maryland or federal courts, the question has received judicial scrutiny in several other jurisdictions. In the earliest case, *Bryan v. Regents of University of California,* 205 P. 1071 (Cal. 1922), the Supreme Court of California upheld the non-resident classification established by the California legislature and by rule of the Regents of the University of California which required that a non-resident of the State must complete one year of residency within California before being eligible for the tuition rate charged resident students. The Court reasoned that as classification could be made for voting purposes, so the State might

similarly use a method of classification to govern admission to the State university. The Court found sufficient justification to warrant the advantageous treatment accorded residents:

> "There seems to be no good reason for holding that the Legislature may not make a similar classification in fixing the privilege for attendance upon the state university. It would be impossible for the state university to provide educational opportunities for all the citizens of the state. These facilities are necessarily limited. . . . This expenditure is a heavy burden upon the taxpayers of the state. Taxes are payable annually and the requirement that a student shall maintain a residence in the state of California during one taxation period as an evidence of the bona fides of his intention to remain a permanent resident of the state and that he is not temporarily residing within the state for the mere purpose of securing the advantages of the university, cannot be held to be an unreasonable exercise of discretion by the Legislature or by the respondent. . . ."

In *Newman v. Graham,* 349 P. 2d 716 (Idaho, 1960), the Idaho Supreme Court considered a regulation of the State Board of Education which had established six months as the required period of domicile within the state prior to enrollment at an institution of higher learning in Idaho, as the point of distinction between a resident and non-resident for purposes of tuition. The student involved was a mature veteran who had surrendered his pre-war domicile in Vermont and moved to Idaho in September 1957. The Court interpreted the regulation as precluding a student from making a showing of a change of domicile during the period of his attendance at any institution of higher learning in Idaho. The Court noted (at pages 718, 719),

> "Under the interpretation placed upon the foregoing quoted regulation by the Board it would necessarily follow that a student who is a non-

> resident of the State at the time of initial enrollment at the College would, if he attends each regular term, retain such status throughout his entire college career irrespective of the fact that he may have become a bona fide resident and domiciled more than six months in the State during the intervening time. Under such interpretation it does not afford any opportunity to show a change of residential or domiciliary status and does in effect deny equality of opportunity to persons in the same class who are similarly situated and for that reason it is an unreasonable regulation. The authority of the Board, through its authorized agency or representative, to inquire into and ascertain an applicant's residential or domiciliary status is unquestioned. *It is the denial to the applicant of an opportunity to be heard in the matter, within a reasonable time, that constitutes the objectionable feature of the regulation here considered.*" (Emphasis supplied)

As it had been stipulated that the student had continuously resided and been domiciled in the State for a year before his registration in the University, whereas the regulation itself only required prior residence of six months, the Court held that the University's action in imposing the higher tuition rate was arbitrary and capricious.

In *Landwehr v. The Regents of the University of Colorado,* 396 P. 2d 451 (Colo. 1964), the Supreme Court of Colorado reviewed a tuition classification law adopted by the State legislature in order that the state-supported institutions of higher education apply uniform rules in determining whether students shall be classified as in-state or out-of-state students for tuition purposes. The statute provided that an "in-state student" shall mean one who has been domiciled in Colorado for at least one year immediately preceding registration at any college in Colorado, and that attendance at a college in Colorado "shall not alone

be sufficient to qualify for domicile in Colorado." The statute further provided that,

> ". . . An emancipated minor or adult student who has registered for more than five hours per term shall not qualify for a change in his classification for tuition purposes unless he shall have completed twelve continuous months of residence while not attending an institution of higher learning in the state or while serving in the armed forces." (at page 452)

The Court noted that only those classifications which are arbitrary and unreasonable and which have no reasonable relation to the object with which the statute deals, offend the provision of the Fourteenth Amendment to the United States Constitution which prohibits the states from making or enforcing laws denying any person the equal protection of the laws. The Court sustained the constitutionality of the Colorado statute with the following language:

> "The classification of students applying for admission to the tax-supported University of Colorado into 'in-state' and 'out-of-state' groups is a matter for legislative determination. It is our considered view that this classification is not arbitrary or unreasonable and is not so lacking in a foundation as to contravene the constitutional provisions upon which Landwehr relies. . . ." (at page 453)

Most recently, in *Clarke v. Redeker*, 259 F. Supp. 117 (S.D. Iowa 1966), the Court reviewed a rule of the Iowa State Board of Regents to the effect that a student who had not been a resident of Iowa for one year prior to registration at the University of Iowa must be classified as a non-resident and charged a higher tuition rate. The rules further prescribed that as long as a non-resident continues at the University he is presumed to continue his non-resident status for tuition purposes. The rules distinguished between minors and students over the age of twenty-one

and, with regard to the latter, provided the following definition:

> "A resident student twenty-one years of age or over is (1) one whose parents were residents of the state at the time he reached his majority and who has not acquired a domicile in another state or (2) who, while an adult, has established a bona fide residence in the State of Iowa by residing in the state for at least twelve consecutive months immediately preceding registration. Bona fide residence in Iowa means that the student is not in the state primarily to attend a college; that he is in the state for purposes other than to attempt to qualify for residence status."

The plaintiff contended, among other things, that it was a violation of the equal protection and privileges and immunities clauses of the Fourteenth Amendment to the United States Constitution for a state operated University to charge a higher rate of tuition to a non-resident student than to a resident student. The Court, however, dismissed plaintiff's contentions, and pointed out that the Fourteenth Amendment does not prohibit classifications by the states.

> ". . . Any classification by a state which is not palpably arbitrary and is reasonably based on a substantial difference or distinction, is not a violation of the equal protection clause so long as the classification is rationally related to a legitimate state object or purpose. In this instance then, the Court must determine whether the classification of students as residents or non-residents for the purpose of paying tuition is reasonable and whether that classification is rationally related to a legitimate object of the State of Iowa." (at page 122)

The Court in *Clarke v. Redeker, supra,* paid particular attention to that portion of the Iowa tuition regulations which provided that,

> "A student from another state who has enrolled for a full program, or substantially a full program, in any type of educational institution will be presumed to be in Iowa primarily for educational purposes, and will be considered not to have established residence in Iowa. Continued residence in Iowa during vacation periods or occasional periods of interruption to the course of study does not of itself overcome the presumption."

The Court noted that the tuition regulations were not set up "in terms of an absolute classification" since in the event that appropriate facts and circumstances arise subsequent to a student's classification as a non-resident, there is nothing in the regulations to prevent the student's reclassification as a resident. In the opinion of the Court, the classification of non-residency placed on a student from another state ". . . constitutes only a presumption which may be overcome by an appropriate showing of change in circumstances." (at page 123)

Although not involving classification of students for tuition purposes, we believe *Carrington v. Rash*, 380 U.S. 89, 85 S. Ct. 775, 13 L. Ed. 2d 675 (1965), is relevant to this discussion. In that case the United States Supreme Court struck down a provision in the Constitution of the State of Texas prohibiting any member of the Armed Forces who moves his home to Texas during the course of his military duty from ever voting in a State election "so long as he or she is a member of the Armed Forces." The Court held that although Texas had the right to impose reasonable residence requirements as a prerequisite to the right to vote, the constitutional provision amounted to an absolute denial of the right to vote to all servicemen falling within its terms. Because the affected servicemen were not afforded the opportunity to controvert the assumption of non-residence, the provision was declared to be a discrimination which violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Court stated,

". . . We stress—and this is a theme to be reiterated—that Texas has the right to require that all military personnel enrolled to vote be bona fide residents of the community. But if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation. . . ."

* * *

". . . By forbidding a soldier ever to controvert the presumption of non-residence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment. . . ."

Based on the precedents in other jurisdictions, we are of the opinion that the classification of students by the University of Maryland into residents and non-residents for purposes of assessing tuition does not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. None of the courts reviewing tuition regulations or statutes has found the differentiation between residents and non-residents to be an unreasonable or arbitrary classification. It is our view that the classification embodied in the present regulation, as well as the imposition on non-residents of a higher tuition fee, is reasonably related to a legitimate object of the State. The regulation is obviously designed to give preferential tuition treatment to legitimate State domiciliaries and their children, who have contributed through taxation to the construction and maintenance of the University.

It is further our opinion that the portion of the University regulations, which provide that a student must have been domiciled in this State for at least six months prior to registration at the University in order to qualify as a resident for tuition purposes, is a reasonable requirement. Some guideline is obviously necessary to enable University officials to apply a uniform standard to all students. We note that the six month requirement of domicile is less than that required by many other state universities and

does not seem to be a harsh requirement or one which would impose a hardship on any of the State's domiciliaries applying for admission. Again, none of the cases cited herein would seem to cast doubt on the validity of such requirement. Moreover, the requirement that the requisite six months residence be established without reference to a period of residence in the State while a student or member of the armed services, appears to be similar to the requirements of the colleges examined in *Landwehr v. The Regents of the University of Colorado, supra,* and *Clarke v. Redeker, supra.* Neither court found the requirement objectionable. In our view, the presence of an individual in the State because of attendance at a college in the State, or as the result of his being stationed here while on active duty in the armed services, would not be persuasive of a present intention to abandon a former domicile and to establish a new domicile in this State.

The decided cases, however, appear to be in disagreement on the question of whether a rule which makes it impossible for a student to show a change of status to that of a resident under any circumstances would violate the equal protection clause of the Fourteenth Amendment. We note that the present regulation of the Board of Regents permits a minor student to show a change in residential status, but apparently does not permit this in the case of an adult. The Supreme Court of Colorado in the *Landwehr* case, *supra,* found nothing constitutionally fatal in a regulation which precluded any showing of a change in status short of residence for twelve continuous months while not attending a college or serving in the armed services. On the other hand, the Idaho Supreme Court in *Newman v. Graham, supra,* held invalid a tuition regulation specifically because it failed to afford an applicant an opportunity to demonstrate a change in status. The United States District Court for the Southern District of Iowa, in *Clarke v. Redeker, supra,* upheld the validity of a tuition regulation on the finding that although it contained a presumption of non-residency with regard to students coming from out-of-state, it permitted the presumption to be overcome by

an appropriate showing of a change in circumstances. Finally, the United States Supreme Court, in another context, has indicated that an individual must be given an opportunity to controvert an assumption of non-residence. *Carrington v. Rash, supra.* Because of the division in the case law on this point, we are not inclined to advise you that the lack of a provision permitting an adult student to show a change in residential status would necessarily prove fatal in a judicial review of the Regents' resolution. The Board of Regents, however, may wish to review the judicial developments in this area in deciding on whether any policy revisions are warranted.

We would suggest, moreover, that the present resolution on tuition is in need of amplification insofar as minors are concerned. The resolution states that the residence of minors will be determined in accordance with the residence of their parents. However, the resolution is silent with regard to the minor whose parents are deceased, or the minor who is emancipated. We believe the question of the emancipated and orphaned minor warrants future consideration by the Board of Regents.

FRANCIS B. BURCH, *Attorney General.*

ESTELLE A. FISHBEIN, *Asst. Attorney General.*

EDUCATION—COUNTY SCHOOL BUDGET—NOT TO BE REDUCED AFTER COUNTY COMMISSIONERS HAVE UNCONDITIONALLY LEVIED SCHOOL PROPERTY TAX.

February 11, 1969.

Mr. J. Jerome Framptom, Jr.

You advise us of the following circumstances which occurred in Frederick County. By June 1, 1968, the County Commissioners had adopted the school board budget and had established the county property tax rate for the fiscal year commencing July 1, 1968. In June, 1968, the County Commissioners were advised that their revenue projections from the 50% surtax were overly optimistic and, as a result, they made further cuts in the school board budget, as well as in the budgets of most, if not all, county agencies. The county school board had protested these post-June 1 cuts to the County Commissioners, but without success. The county school board has sought advice from the State Board of Education, which, in turn, requests our opinion as to the legality of the school budget cuts made subsequent to June 1, 1968.

Article 77, Section 68 of the Annotated Code of Maryland (1965 Replacement Volume, 1968 Supplement) outlines the extent of the counties' obligations to fund the operations of the public schools. Section 68 requires the county school board to submit its budget to the county commissioners not less than twenty days before "the usual date for levying county taxes". The budget must contain certain details, including "the amount that will be needed to be raised by local taxation", all of which was done here. Section 68 also provides, *inter alia,* as follows:

> ". . . The board of *county commissioners are* hereby authorized, empowered, directed, and *required to levy and collect such tax upon the assessable property of the county as will produce the amount requested to be raised by local taxation in*

the annual budget of the county board of education. The amount requested in the annual budget of the county board of education for current repairs, furniture in old buildings, maintenance and support of the schools, for the succeeding school year, and to be raised by local taxation shall not hereafter in any year be less than a minimum tax, levied and collected, of 30 cents on each one hundred dollars ($100) of the assessable property in the county. Provided, further, that *the total amount requested for any one school year* by the county board of education for permanent improvements and repairs, current repairs, furniture in old buildings, maintenance and support of the schools *shall not exceed a tax levied and collected of 40 cents on each one hundred dollars ($100) of the assessable property in the county, unless the board of county commissioners shall approve and sanction such additional tax.* Provided, also, that if the total amount requested for any one school year by the county board of education be raised by local taxation exceeds a tax levied and collected of 40 cents on each one hundred dollars ($100) of the assessable property in the county and such additional tax is not approved and sanctioned by the board of county commissioners, the county commissioners shall indicate in writing what item or items of the annual budget of the county board of education have been denied in whole or in part, and the reason for the denial in whole or in part of the respective items. *Taxes so levied and collected shall be separately indicated on tax bills and tax receipts,* and shall be known as the county school tax except that such indication on tax bills is not required in Queen Anne's County, where a statement showing the expenditures from such taxes in percentages shall be sent to the taxpayers of the county. *Taxes so levied* shall be collected as other taxes and *shall be paid*

> *monthly to the treasurer of the county board of education* in as nearly equal amounts as possible, beginning on or before the tenth of October of each year and continuing up to and including June; . . ." (Emphasis supplied)

The statutory procedure is abundantly clear. The amount of money needed to support the school budget is to be raised solely from the county property tax. If the total amount requested by the school board exceeds 40 cents on each $100 of the assessable property of the county, the County Commissioners may approve and sanction such additional tax. Once the additional tax is approved and the levy is unconditionally made, the school board has a vested right in that money. What was stated in *School Commissioners v. Gantt,* 73 Md. 521, 525 (1891), is applicable here.

> ". . . It is equally clear that when more than ten cents [the then current rate] on the hundred dollars is required, the County Commissioners have, under the Local Code, Art. 2, Sec. 123, a discretion to levy not exceeding ten cents additional. *But when the levy is actually made, and unconditionally made, the statutes are explicit in declaring that no part of the sum levied for the use of the public schools shall be used for any other purpose, and that the amount so levied in each year shall be paid by the treasurer to the School Board in equal quarterly instalments.* These clear and minute provisions plainly mean that the gross amount levied for the schools shall be paid to the School Board; and, of course, therefore, they necessarily *exclude the right of the county commissioners, after they have made the levy, to diminish that amount by subsequently applying any part of it to any other use or purpose* . . ." (Emphasis supplied)

The property tax necessary to support the approved school budget was levied by June 1, 1968, as, indeed, the County Commissioners were required to do by Section

8-3 of the Frederick County Code. Under Article 77, Section 68 the County Commissioners were then required to collect the school tax so levied as a separate part of the property tax and remit all of the moneys so collected to the county school board. This was not done as required by law, and it is our opinion that the County Commissioners have no right to withhold any part of the proceeds of the property tax attributable to the school budget approved prior to June 1, 1968.

It should be noted that the attempt of the County Commissioners to further reduce the school budget after June 1, 1968, was occasioned by a revised estimate of surtax revenues. The amount of the surtax revenues is immaterial because the school budget is to be funded solely from the property tax. We need not decide whether the County Commissioners, in light of the surtax revision, could have revised its property tax levy after June 1, 1968, so as to reduce that portion of the property tax attributable to the school tax. The property tax, part of which was specifically earmarked for the school tax, was levied on June 1 and was never changed thereafter. Since the school tax was unconditionally levied, and never changed, the dictates of Section 68 must be followed.

The County Commissioners apparently rely on Section 8-19 of the Frederick County Code to justify its budget reductions subsequent to June 1, 1968. Section 8-19 provides, in part, as follows:

> ". . . In case of any deficiency in revenues and taxation to meet the amounts provided in the estimates, there shall be a prorata abatement of all appropriations, except for the payment of the state taxes, the principal and interest of the county debt and salaries and obligations fixed by law. . . ."

This contention can be answered in several ways. First, there is no claimed deficiency in the revenue and taxation from the property tax, which is the source of funding the school budget. The shortage in revenues emanated from the

surtax which, as heretofore noted, is not relevant. Second, the county board of education is not part of the executive branch of the county government nor an agency under its control, nor is it subject to the charter budgetary requirements of a county. *Bd. of Ed. v. Montgomery County,* 237 Md. 191, 197 (1964); *Anne Arundel County v. Board,* 248 Md. 512, 524 (1968); *Montgomery County v. Yost,* 223 Md. 150, 157 (1960). While it is true that Frederick County is not a charter county and we are dealing here with a public local law rather than a charter budgetary provision, we think that the Court of Appeals has made it clear that the mandates of Article 77, Section 68 are paramount in determining the school budget procedures of all the counties. Moreover, Section 8-19 of the Frederick County Code expressly excepts from budgetary abatement the "obligations fixed by law". The provisions of Article 77, Section 68, in our view, are obligations fixed by law.

Accordingly, we are of the opinion that the Board of Education of Frederick County may compel the County Commissioners to remit all property taxes attributable to the school budget that was approved prior to June 1, 1968.

FRANCIS B. BURCH, *Attorney General.*

MARTIN B. GREENFELD, *Asst. Attorney General.*

EDUCATION—VALIDITY OF REGULATION AUTHORIZING STATE COLLEGE OFFICIALS TO INSPECT THE LIVING QUARTERS OF STUDENTS ON CAMPUS.

March 17, 1969.

Honorable John J. Bishop, Jr.

You have inquired whether the authorities at Towson State College have the right to inspect the living quarters of any student, without the student's consent, even though the student is paying rent for those quarters.

A regulation of Towson State College provides that the College reserves the right to inspect the living quarters of any student at any time. A similar provision is also contained in the contract the student signs for his dormitory room.

A landlord may enter the leased premises if permitted by the terms of the lease. *Miller v. State,* 174 Md. 362, 368, 198 Atl. 710 (1938). Therefore, if the relationship of the student and the College regarding living quarters were merely that of tenant and landlord, then the College has the unquestioned right to inspect. However, it is not necessary to justify such an inspection based upon the terms of the "lease", since we view the relationship of the College to the student as being more encompassing than that of a landlord to a tenant. A dormitory student does not have the full and unrestricted rights of a lodger. *Englehart v. Serena,* 318 Mo. 263, 300 S.W. 268, 271 (1927).

That school authorities and students have a distinct relationship was recognized in *People v. Overton,* 229 N.E. 2d 596, 273 N.Y.S. 2d 143 (1967). In that case the local police obtained a warrant to search the locker of a high school student and presented the warrant to the vice-principal, who opened the locker, which was found to contain four marijuana cigarettes. The warrant, as it turned out, was defective, but the Court of Appeals, in upholding the conviction of the student, held that the vice-principal had the

authority to consent to the search on the basis that school authorities have an obligation to maintain discipline over students. The dissenting opinion in that case also conceded that the principal of a high school had supervisory power to inspect the locker. The *Overton* case was reversed and remanded by the Supreme Court of the United States, 89 S. Ct. 252 (1968), on the ground that the principal may have consented to the search only because of the invalid search warrant presented by the police and, if that were true, then the principal did not voluntarily consent to the search. Significantly, the Supreme Court's action did not question the power of the principal to search the locker without the student's consent.

The need to maintain discipline may well be greater for high school students than for college students. (*Overton* emphasizes the "susceptibility to suggestion of students of high school age".) However, the basic rationale for exercising some measure of discipline and control over students, as enunciated in the *Overton* case, is nonetheless applicable to college students, although perhaps to a lesser degree in certain circumstances.

A college regulation similar to the one in effect at Towson State College was put to issue in *Moore v. Student Affairs Committee of Troy State Univ.*, 284 F. Supp. 725 (M.D. Ala., 1968). That case involved the propriety of a search of a student's room on the University campus. The search was undertaken by the Dean of Men at the request of the local police, who had information that narcotics were in the student's room. The search was not in vain and, as a result, the student was suspended. In upholding the validity of the University regulation of inspection, the United States District Court stated as follows (284 F. Supp. at 729-731):

> "College students who reside in dormitories have a special relationship with the college involved. Insofar as the Fourth Amendment affects that relationship, it does not depend on either a general theory of the right of privacy or on traditional property concepts. The college does not stand,

strictly speaking, *in loco parentis* to its students, nor is their relationship purely contractual in the traditional sense. The relationship grows out of the peculiar and sometimes the seemingly competing interests of college and student. A student naturally has the right to be free of unreasonable search and seizures, and a tax-supported public college may not compel a 'waiver' of that right as a condition precedent to admission. The college, on the other hand, has an 'affirmative obligation' to promulgate and to enforce reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process. The validity of the regulation authorizing search of dormitories thus does not depend on whether a student 'waives' his right to Fourth Amendment protection or on whether he has 'contracted' it away; rather, its validity is determined by whether the regulation is a reasonable exercise of the college's supervisory duty. In other words, if the regulation—or, in the absence of a regulation, the action of the college authorities—is necessary in aid of the basic responsibility of the institution regarding discipline and the maintenance of an 'education atmosphere', then it will be presumed facially reasonable despite the fact that it may infringe to some extent on the outer bounds of the Fourth Amendment rights of students."

* * *

". . . The student is subject only to reasonable rules and regulations, but his rights must yield to the extent that they would interfere with the institution's fundamental duty to operate the school *as an educational institution.* A reasonable right of inspection is necessary to the institution's performance of that duty even though it may infringe on the outer boundaries of a dormitory student's Fourth Amendment rights. . . ."

* * *

> ". . . It is settled law that the Fourth Amendment does not prohibit reasonable searches when the search is conducted by a superior charged with a responsibility of maintaining discipline and order or of maintaining security. A student who lives in a dormitory on campus which he 'rents' from the school waives objection to any reasonable searches conducted pursuant to reasonable and necessary regulations such as this one."

We believe that the statement quoted above is sound. College officials periodically inspect dormitory rooms to assure that sanitary conditions exist. Inspections would be similarly justified if a student possessed a deadly weapon or narcotics. Such conditions interfere with proper discipline and the operation of the educational institution, as well as the welfare of the other students. *Cf. Miller v. Concordia Teachers College of Seward, Neb.*, 296 F. 2d 100, 105 (8th Cir., 1961). There is a fundamental duty of educators to "maintain appropriate discipline. A reasonable right of inspection of school property and premises—even though it may have been set aside for the exclusive use of a particular student—is necessary to carry out that duty." *Moore v. Student Affairs Committee of Troy State Univ., supra,* at p. 730, fn. 10.

As the court decisions cited above indicate, the regulation permitting the right to inspection, although reasonable, possibly could be unreasonably applied. Since no specific act of inspection by college officials has been presented to us, we shall not undertake to rule on what actions may constitute an unreasonable application of this regulation. We state only that the regulation is, on its face, reasonable.

FRANCIS B. BURCH, *Attorney General.*

MARTIN B. GREENFELD, *Asst. Attorney General.*

EDUCATION — STATE COLLEGES, GIFTS TO — SOLICITATION, RECEIPT AND EXPENDITURE OF SUCH GIFTS.

April 21, 1969.

Dr. Martin D. Jenkins.

In view of the recent passage of House Bill 929 now [Chapter 378, Acts of 1969] by the General Assembly, you have raised several questions relating to the solicitation of gifts by Morgan State College and the Board of Trustees of the State Colleges, and the expenditure of the proceeds thereof.

1. Can the College organize a separate foundation to solicit and receive gifts and grants?

House Bill 929, if signed by the Governor, will add the following subsection to the powers of the Board of Trustees of the State Colleges.

> "(h) In order to encourage and facilitate fund-raising programs and contributions from private sources for the use and benefit of the State colleges, the board of trustees of the State colleges, with the approval of the Governor, is hereby empowered to receive any gift, donation or grant made to the State colleges by any individual, association, foundation, society or corporation or from the United States government, or any authorized branch, board, commission, bureau, agency, division, subdivision or department thereof. Any such funds accepted by the board of trustees of the State colleges shall be deposited in a non-budgeted account under the State Treasury Department. Those funds may be invested as desired by the board of trustees of the State colleges within the limits permitted by State law."

As can be seen, the purpose of this statute is to "encourage and facilitate fund-raising programs and contributions

from private sources for the use and benefit of the State colleges". There is, however, no authority in this statute or any other statute permitting the College to organize a "separate foundation" as a State agency for this purpose. The same result could be achieved, however, by the College and/or the Board of Trustees engaging in fund-raising efforts either unilaterally or in cooperation with a private foundation which is independent of the College.

2. Does the Board of Trustees have full control over the expenditures?

Article 15A, Section 5 of the Annotated Code of Maryland (1968 Replacement Volume) provides as follows:

> "Any funds derived from a gift or legacy, coming into the hands of any department, board, commission, officer or institution of the State, may be expended in accordance with the terms of such gift or legacy, provided that the Governor shall have previously assented to the acceptance of such gift or legacy."

Our office has stated previously that, under this section, a gift, when accepted by the Governor, "may only be used for the purposes specifically stated in the particular gift". 40 Opinions of the Attorney General 306, 308 (1954). Therefore, the Board of Trustees has control of the nature of the expenditure provided that it is consistent with the terms of the gift. The expenditure, however, would still be subject to other general requirements of the law. For example, if the gift were used to purchase materials, supplies or equipment, the purchasing *procedures* of Article 15A, Section 29 of the Annotated Code of Maryland should be followed, but the judgment as to the necessity or wisdom of the purchase is vested solely in the Board of Trustees, subject, of course, to any conditions placed on the gift by the donor.

3. May the Budget Bureau or some other State agency decide that income from gifts and grants might be used to replace expenditures in the normal operating budget of the College?

House Bill 929 provides that the gifts are to be deposited in a "non-budgeted account". Consequently, these gifts are not to be deemed a substitute for items appropriated to the College by the General Assembly in the annual budget.

4. May the income be used for current expenses or must it be placed in an endowment?

House Bill 929 permits the Board of Trustees to invest the gift proceeds as permitted by State law. Unless there is some restriction or mandatory directive attached to the gift itself, the income may either be expended or retained, in the discretion of the Board of Trustees.

FRANCIS B. BURCH, *Attorney General.*

MARTIN B. GREENFELD, *Asst. Attorney General.*

EDUCATION—TEACHERS—ATTAINING TENURE AT THE STATE COLLEGES.

May 6, 1969.

Mr. Edmund C. Mester.

You have requested our opinion on several matters relating to the tenure of faculty members of the State colleges. Before answering your specific questions, it is appropriate to make some general comment on tenure rights. Article 77, Section 165 (d) of the Annotated Code of Maryland (1965 Replacement Volume) authorizes the Board of Trustees of the State Colleges "to fix the . . . tenure of all teachers". Since nothing in this statute sets forth any conditions for the attainment of tenure, we have ruled previously that tenure can be attained only in accordance with the conditions imposed by the Board of Trustees. 46 Opinions of the Attorney General 74 (1961). These conditions are found in the standard Faculty Member's Contract, which is executed by the Board of Trustees and the faculty member. Under this contract a faculty member is employed to teach at a specified State college. After three or five years, depending upon his prior teaching experience, he achieves continuous tenure, and his employment thereafter cannot be terminated by the Board except for cause and after a proper hearing. The contract further permits the faculty member to "terminate an existing appointment" by giving a specified notice.

Your first and fourth questions are whether an administrator, who previously had tenure before becoming an administrator, automatically regains tenure if he returns to full-time teaching. Since the conditions of attaining tenure arise from the contract of employment, we are of the opinion that tenure rights can exist only during the time the contract is in force. Therefore, if a faculty member chooses to terminate the contract in order to take an administrative post, his tenure rights under that contract likewise terminate. Consequently, when an administrator returns to teaching, he must execute a new faculty mem-

ber's contract, which, as noted before, provides for a three- or five-year probationary period. This is not to say that the Board of Trustees is precluded from waiving the probationary period in such circumstances. Since the conditions of tenure are imposed by the Board, that body can, if it chooses, revise the employment contract so as to modify the requirements for attainment of tenure.

Your second question is whether a faculty member who has achieved tenure at one State college can retain tenure if he transfers to another State college. As previously stated, the contract is for employment at a specified State college. Therefore, the faculty member achieves tenure only at that institution. If he desires to transfer, he must execute a new employment contract, which would result in his tenure being lost. Again, it should be pointed out that the Board of Trustees has the power to permit transfers among the State colleges under its control without loss of tenure.

Your third question is whether teachers who have attained tenure in a laboratory school program retain tenure upon transfer to positions in the Education Department of the same State college. The contract not only employs the teacher at a specified State college but also states that the employment is "subject to assignment by the president of said college or transfer to some other teaching position within the college". Since the faculty member is merely being transferred to another teaching position within the college, no new employment contract need be executed. Consequently, the tenure rights attained under the original contract are retained in these circumstances. It should be noted that on December 19, 1968, we advised that a teacher with tenure in the laboratory school program could be dismissed, tenure notwithstanding, if that program were discontinued at the college. While adhering to that opinion, we also conclude that tenure rights will not be lost if the college is able to, and in fact does, reassign the teacher to a position in another department.

FRANCIS B. BURCH, *Attorney General.*

MARTIN B. GREENFELD, *Asst. Attorney General.*

EDUCATION—PUBLIC SCHOOLS MUST PROVIDE KINDERGARTENS FOR 5-YEAR-OLDS—STATUTE APPLICABLE TO BUDGETS ADOPTED AFTER EFFECTIVE DATE OF STATUTE.

July 14, 1969.

Dr. James A. Sensenbaugh.

You have requested our opinion whether, in view of recent legislation enacted by the General Assembly, the county boards of education will be required to admit all five-year-old children who apply for kindergarten programs in the fall of 1969.

Chapter 405, Acts of 1969, generally revised the public school laws contained in Article 77 of the Annotated Code of Maryland. As of July 1, 1969, the effective date of this law, Section 73 of Article 77 provides as follows:

> "73. Required school year for public schools, admission of pupils.
>
> All persons between the ages of five and twenty years shall be admitted free of charge to the public schools of the State. All such public schools under the jurisdiction of boards of education shall be kept open for not less than one hundred eighty (180) actual school days during a ten-month period of each school year."

One suggested interpretation of this law is that, if a public school provides classes for five-year-olds, namely, kindergartens, then in that event such children shall be admitted to such classes free of charge. We are inclined to reject that interpretation, since no public school system that has heretofore provided kindergartens in this State charged any tuition fee for several years prior to the enactment of this law. Moreover, and more importantly, the law is couched in mandatory terms and says that children five years of age "*shall* be admitted . . . to the public schools" (emphasis supplied). This statutory language appears to leave no discretion in the school authorities as to the

admission of five-year-olds. (It is not to be inferred, however, that all five-year-olds must attend public school, since Chapter 405 also provides for *compulsory* attendance in the public schools for children only between the ages of 6 and 16. See Chapter 405, Acts of 1969, enumerating Article 77, Section 92, which also became effective July 1, 1969.) In our opinion the new Section 73 only requires that a five-year-old child who desires to attend the public schools shall be so admitted.

In this framework, however, two possible interpretations of the law suggest themselves. One is that, if a public school does not provide kindergartens, then a five-year-old child must be admitted to the first grade. The alternative is to construe the law as mandating the establishment of kindergartens for five-year-olds. In attempting to resolve the problem, we deem it germane to allude to the existing educational policies in the State.

Bylaw 711:1 of the State Board of Education provides as follows:

> "Every child admitted to the first grade in a public elementary school in a Maryland county shall be at least six years of age on or before December 31 of the year in which he applies for entrance."

This bylaw was adopted by the State Board pursuant to the authority conferred to it by the former Section 21 of Article 77 of the Annotated Code of Maryland (1965 Replacement Volume), which section is, with minor variations, also contained in Chapter 405 and, as of July 1, 1969, became known as Section 6 of Article 77. Both the old and new sections provide that the State Board of Education "shall determine the educational policies of the State . . . [and] shall enact bylaws for the administration of the public school system, which, when enacted and published, shall have the force of law".

Since the State Board of Education cannot determine purely legal questions, *Wilson v. Board of Education,* 234

Md. 561, 565 (1964), and cases therein cited, a bylaw of the Board obviously cannot be contrary to or inconsistent with statute. Subject to this limitation, the State Board has the "last word on any matter concerning educational policy or the administration of the system of public education", *Wilson v. Board of Education, supra,* at p. 565, and bylaws in this area have "the force of law". *Bernstein v. Bd. of Education,* 245 Md. 464, 471 (1967). Clearly, Bylaw 711:1 deals with "educational policy or the administration of the system of public education".

An interpretation of new Section 73 requiring five-year-olds to be admitted to the first grade when no kindergartens are available would necessarily result in the repeal of the State Board bylaw. On the other hand, by interpreting the new Section 73 as mandating the establishment of kindergartens for five-year-olds, Section 73 and the State Board bylaw both can be given effect. This latter interpretation is in accord with the elemental principle of statutory construction that, if a subsequent statute can be reconciled with an earlier one by any reasonable construction, such construction should be adopted so as to avoid a repeal by implication. *Montgomery County v. Bigelow,* 196 Md. 413, 423 (1950); 41 Opinions of the Attorney General 100, 103 (1956). We are of the opinion that this principle of statutory construction is equally applicable in attempting to reconcile a statute and a bylaw of the State Board of Education, since the latter has the "force of law".

We recognize that this issue is not free from doubt. However, we do not believe the Legislature intended to abolish a long-standing educational policy that places a minimum age requirement of 6 years on children entering the first grade. Consequently, we must conclude that, in the absence of any legislative history to the contrary, the new law is more logically construed as requiring public schools to establish kindergarten programs for five-year-old children.

A more perplexing question arises as to the date of implementation of this new law. As has been mentioned

before, Section 73 did not become effective until July 1, 1969. Prior to that date, the school budgets for all counties for the fiscal year 1969-70 had already been approved by the local fiscal authorities and the deadline for the levy of county taxes to finance these budgets had already expired. We are apprised of the fact that some counties have not included kindergarten programs in some, or all, of their elementary schools. In several instances, no request for funds for kindergartens was made by county educational officials. Indeed, they were not required to do so at the time the budgets were finalized, since the law then in force only required that persons *six* years of age or older be admitted to the public schools. See Section 130 of Article 77 of the Annotated Code of Maryland (1965 Replacement Volume), the predecessor of the new Section 73. It is obvious, therefore, that in these instances compliance with the new school law, which became effective after the adoption of the school budget and the date for the levying of county taxes, may well be rendered impossible because of these budgetary limitations. While it is true that this new law was signed by the Governor on May 2, 1969, which was prior to the date that the county fiscal authorities rendered final decisions on the school budgets and on the levying of the taxes for the ensuing fiscal year, it must be recognized that school budgets had been in preparation long prior to that date. If the Legislature had intended to thrust such an additional financial burden on some counties for fiscal 1969-70, we firmly believe that this legislation would have been enacted as an emergency bill so that it could have taken effect prior to the final establishment of the school budgets for the next fiscal year. Our research discloses that no attempt was made to enact this measure as an emergency bill. Since the law did not become effective until July 1, 1969, we feel it more reasonable to assume that the Legislature intended to mandate kindergartens only in school budgets adopted *after* the effective date of that law.

We are not unmindful of the fact that in at least one situation the Court of Appeals of Maryland has required a

county to provide additional funds to a local school board even after the adoption of a school budget and after the date of finality for the levying of taxes. See *Anne Arundel County v. Board,* 248 Md. 512, 516 (1968), which affirmed a trial court's order that Anne Arundel County pay a mandatory budget item to the local school board and "to increase the tax levy rate in Anne Arundel County to insure the financing of the same if necessary". However, there are significant differences between that case and the present problem before us. The mandated item involved in the *Anne Arundel* case had been in the law for many years prior to the county's refusal to make this particular appropriation; here, the mandated item did not become effective until after the school budgets had been adopted. Moreover, the amount of money involved in Anne Arundel was $54,000 of additional funds; here, according to estimates supplied us by the State Department of Education, it will take more than $8,000,000 in State and county funds over and above the amounts already budgeted to fully implement Section 73 by the fall of 1969. This figure is exclusive of construction costs and, of course, does not take into account the obvious administrative difficulties of programming and staffing in such a short period of time. We cannot believe that the legislature intended to create such a budgetary and administrative crisis.

In view of the foregoing, we must conclude that, where funds for that purpose have not been budgeted for fiscal 1969-70, the implementation of kindergartens may necessarily be delayed until fiscal 1970-71, but that every county in the State must, at that time, provide a full kindergarten system for all five-year-olds desiring to enter such a school.

FRANCIS B. BURCH, *Attorney General.*

MARTIN B. GREENFELD, *Asst. Attorney General.*

EDUCATION—PROVIDING FREE LUNCHES FOR STUDENTS IN PUBLIC AS WELL AS NONPUBLIC SCHOOLS DOES NOT VIOLATE FIRST AMENDMENT TO CONSTITUTION OF THE UNITED STATES.

October 3, 1969.

Honorable Gerald J. Curran.

You have asked our opinion as to the constitutionality of legislation that would "provide funds for school lunches to children attending nonpublic schools". Although not stated in your letter, we shall assume, for purposes of this opinion, that such legislation would be so drafted as to apply to public and nonpublic school students alike. In this context there is no doubt that such legislation is constitutionally permissible.

In *Everson v. Board of Education,* 330 U.S. 1 (1947), the Supreme Court of the United States held that the First Amendment to the Constitution of the United States does not prohibit State funds from being used to pay the bus fares of parochial school pupils "as a part of a general program under which it pays the fares of pupils attending public and other schools"; 330 U.S., at p. 17. The Court noted that the legislation "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools"; 330 U.S., at p. 18.

Everson has since been followed consistently by the Supreme Court and was applied recently in *Board of Education v. Allen,* 392 U.S. 236 (1968), which upheld a New York statute requiring local school authorities to lend textbooks free of charge to all students in grades 7 through 12, including students attending private parochial schools. Three justices vigorously dissented in that case, claiming that it was an improper extension of the *Everson* decision. However, it is significant to note that even the dissenting opinions sanctioned the use of State funds for a school lunch

program. The dissent of Mr. Justice Black (who was also the author of the *Everson* opinion) stated in part as follows:

> ". . . That law [in the *Everson* case] did not attempt to deny the benefit of its general terms to children of any faith going to any legally authorized school. Thus, it was treated in the same way as a general law paying the streetcar fare of all school children, or *a law providing midday lunches for all children or all school children, . . .*" (Emphasis supplied.) 392 U.S., at p. 252.

Mr. Justice Douglas' dissent said this:

> "Whatever may be said of Everson, there is nothing ideological about a bus. There is nothing ideological about a *school lunch,* or a public nurse, or a scholarship. . . ." (Emphasis supplied.) 392 U.S., at p. 257.

As can be seen, even the Supreme Court justices who would not have extended the rationale of *Everson* to the area of textbooks would have nevertheless applied the *Everson* principle to the area of school lunches.

We think it is abundantly clear that the proposed legislation would no more impinge upon the establishment of religion clause of the First Amendment than the legislation upheld by the Supreme Court in the *Everson* and *Allen* cases.

FRANCIS B. BURCH, *Attorney General.*

MARTIN B. GREENFELD, *Asst. Attorney General.*

ELECTIONS

CONSTITUTIONAL LAW—THE "GENERAL ELECTION" REFERRED TO IN ARTICLE XIV, SECTION 1 OF CONSTITUTION AT WHICH CONSTITUTIONAL AMENDMENTS MUST BE SUBMITTED TO ELECTORATE DOES NOT MEAN MERELY THE BIENNIAL OR QUADRENNIAL GENERAL ELECTION FOR STATE AND FEDERAL OFFICERS, BUT HAS THE BROADER MEANING OF BEING ANY ELECTION ESTABLISHED BY LAW TO BE HELD THROUGHOUT THE STATE, AT WHICH ALL PERSONS QUALIFIED TO VOTE ARE ENTITLED TO VOTE.

February 7, 1969.

Honorable Marvin Mandel.

By letter of January 28th, you have asked our opinion on the following question:

> "If the General Assembly at this session provides for a Statewide election to be held in November 1969, at which election the qualified voters of the State will have an opportunity to adopt or reject any Constitutional amendments which may be passed by the General Assembly during the session now being held, would such election be consistent with the Maryland Constitution?"

We are pleased to submit to you our views thereon.

The Constitution of Maryland, Article XIV, Section 1, states:

> "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 the members elected to each of the two Houses, by yeas and nays, to be entered on the Journals with the proposed Amendment. 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 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 * * *." (Emphasis supplied.)

We must decide, therefore, whether an election established by law for November, 1969 will satisfy the above mandate that constitutional amendments be voted upon at the "next ensuing general election" after having been proposed by the General Assembly.

Although the Constitution of Maryland, in Article XVII, deals in some detail with the time of elections for State and county officers, neither Article XVII, nor Article XIV defines the phrase, "general election". Article 33, Section 1-1(a)(8) of the Annotated Code of Maryland (1968 Cum. Supp.) does define the phrase "general election" as follows:

> " 'General election' means 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."

This definition is not determinative of the question you propound, however, as we are not limited in interpreting the Constitution to a *statutory* definition of the phrase in question.

An examination of the case law in Maryland and else-

where throughout the Country reveals that there is a division of authority as to the precise meaning of the phrase "general election". The highest courts of the States of Iowa, Oklahoma, and California, *inter alia,* have held that phrase to mean a regularly established date for an election of state or federal officers.

The Court of Appeals of Maryland, however, appears to have given that phrase a broader definition. In *Mackin v. State,* 62 Md. 244 (1884), the Court considered the following set of facts:

Chapter 92 of the Acts of 1882 provided that the question of whether liquor could be sold in Harford County should be submitted to the registered voters of the State ". . . at the general election to be held on the first Tuesday after the first Monday in November, 1882". That election was not the quadrennial election for Governor and members of the House of Delegates, required by the Constitution, but was, instead, the biennial election of members of Congress. Objection was made on the ground that the phrase "general election" meant only the election for members of the House of Delegates and Governor of Maryland.

The Court took a different view, and said, at 246:

> "It is objected that there was no *'general election'* at the time designated. It may not have been a 'general election' in the sense in which the Constitution uses those words with reference to the election of members of the House of Delegates; but *it was a general election in the sense of being general throughout the State,* for both members of Congress and Judges. It was that election which was meant, for the time for it is specially designated, so that objection cannot be sustained." (Emphasis supplied.)

See also *Downs v. State,* 78 Md. 128 (1893).

It would appear, from an examination of *Mackin,* that our Court has avoided a narrow interpretation of the phrase "general election", and it can well be argued from that

decision that the constitutional phrase "next ensuing general election" as used in Article XIV means an election held throughout the State. This view, we believe, is borne out by a comparison of the present Constitution with its predecessor document, that of 1864. The Constitution of 1964 provided, in Article XI, Section 1, that constitutional amendments should be submitted to the qualified electorate of the State for their confirmation or rejection ". . . [at] the next election for members of the General Assembly . . .". The Constitution of 1851 was similarly restrictive, and perhaps even more so, for it provided, in Article XI, that amendments to the Constitution should be made by taking a call for a new convention for altering the document ". . . at the next general election of delegates".

Our present Constitution, we believe, confirms the view that a "general election" within the meaning of Article XIV, is not necessarily the recurring biennial or quadrennial elections for State or federal officers contemplated by our Election Code. Thus, Article III, Section 49 of the Constitution gives to the General Assembly ". . . power to regulate by law . . . [the] time, place and manner of holding elections in this State . . .". Nothing in that provision places limits upon the time when elections can be held.

Article XV, Section 7 specifies: "All general elections in this State shall be held on the Tuesday next after the first Monday in the month of November, in the year in which they shall occur." While the particular day in the year for holding general elections is specified, there is no restriction concerning the particular years for holding "general elections". In fact, the particular language employed in this provision carries the inference that there should be no restriction as to years.

Article XVI, Section 2, in dealing with petitions to refer all laws capable of referendum to a vote of the people, specifies that they should be voted on ". . . at the next ensuing election held throughout the State for Members of the House of Representatives of the United States." If the phrase "general election" in the Constitution contemplates

only the regularly scheduled biennial elections (at every one of which members of the House of Representatives are elected), then there is no need for this Section to specify which election throughout the State should be the one for voting on ordinary laws. The use of different language to refer to the regularly scheduled biennial election indicates that such election is not entirely synonymous with "general election".

Similarly, the so-called "Quadrennial Elections Amendment," Article XVII of the Constitution, providing that all "State officers" and "county officers" should be elected every fourth year and at the same time for holding congressional elections, does not employ the phrase "general election" as synonymous with either the regular quadrennial, or biennial elections. More important, the "Quadrennial Elections Amendment" is limited, by its express language, to elections of persons. See *Co. Commrs. v. Supervisors of Elec.*, 192 Md. 196, 212, wherein the Court of Appeals points out that the Quadrennial Elections Amendment was designed to regulate general elections ". . . for the purpose of selecting officers . . .". If the Constitution, taken as a whole, contemplated that elections for voting on constitutional amendments should also always be held at the regularly scheduled biennial or quadrennial elections, it would seem that Article XVII would refer to such elections.

Although *Mackin v. State, supra,* is not exactly on the point we now discuss, the decision of the Court of Appeals of Maryland in *Mackin* has been cited frequently by courts of other states as authority for the proposition that a general election is one that is held throughout the entire state. The Supreme Court of New Mexico relied on *Mackin* for such a definition in *Territority v. Ricordati,* 132 P. 1139 (1913). Indeed, *Mackin* and *Downs* were the sole authority relied upon by the New Mexico Court for this proposition.

Even more on point, we believe, is the decision in *State ex rel. Diederichs v. State Highway Comm.,* 296 P. 1033 (1931), wherein the Supreme Court of Montana interpreted

the phrase "general election" as used in the Constitution of that State. The Court said, at 1036, that "[w]e think the 'general election' named means a state-wide election at which all of the people entitled to vote may vote on a question affecting them as a whole". See also, *Arps v. State Highway Comm.*, 300 P. 549 (1931), where the Montana Court again held that the phrase "general election", within the constitutional provision requiring a submission of legislation to the electorate, meant a statewide election at which all the people are entitled to vote. To that same effect, see *Pioneer Motors v. State Highway Comm.*, 165 P. 2d 796 (1946), and *Aycock v. Georgia ex rel. Boykin*, 193 S.E. 580 (1937).

In *Bayless v. Kornegay*, 21 P. 2d 481, 482 (1933), the Supreme Court of Oklahoma interpreted the constitutional phrase "general election" as one ". . . held throughout the state at the time provided and fixed for the purpose authorized . . .". See also *Kessler v. Fritchman*, 119 P. 692.

A case very much on point is that of *Bethune v. Funk*, 166 P. 931, decided by the Supreme Court of Oregon in 1917. In *Bethune*, the Court defined a "general election" as one . . . "held in [the] entire territory pursuant to an enactment specifying a single day for the ratification or rejection of one or more measures submitted to the people by the Legislative Assembly, and not for the election of any officer". 166 P. 932.

In another case completely analogous to the present question, *In re. Opinions of the Justices*, 172 S.E. 475 (1933), the members of the Supreme Court of North Carolina gave an opinion to the Governor of that State. One of the justices, speaking for himself in that case, but whose comments were adopted by a unanimous court in a subsequent proceeding on the same question (*In re. Opinions of the Justices*, 181 S.E. 557 (1933)), said, at 480:

> "The Constitution does not define a general election either in terms or by implication. Hence this field has been left exclusively to legislative judgment and discretion. The term 'general election'

> implies and imports upon its face an election throughout the entire state, called and conducted in accordance with legislative fiat. Time is not of the essence of the power. Consequently, the lawmakers can select any day on the calendar so far as constitutional inhibition or regulation is concerned. The same idea was expressed by the Oregon Court in Norton v. Coos County, 113 Or. 618, 233 P. 864, 866, in these words: 'The principle is that, if an election occurs throughout the state uniformly by direct operation of law, it is a general election'."

This North Carolina case is of considerable importance on the question now at hand, because the facts are strikingly similar. The Constitution of North Carolina, like that of Maryland, provided that constitutional amendment should be voted upon by the electorate at the next general election. The North Carolina Legislature had provided for a special "general election", to be held in November, 1933, for consideration of the amendment, rather than waiting for the regular general election of 1934. This is exactly the procedure you contemplate being followed by the General Assembly of Maryland, and the approval of this procedure by the Supreme Court of North Carolina is, therefore, particularly relevant.

We believe that the cases above cited strongly support the proposition that the constitutional phrase "general election", dealing with an amendment to such a document, is not limited to the biennial or quadrennial election for officers of state and federal government; but that that phrase has the much broader meaning of being an election held throughout the State, at which all of the persons qualified in said State to vote, are entitled to vote, and that such a general election can be one specially ordained by statute.

From all of the foregoing, we conclude that it would be consistent with, and not contradictory to, Article XIV, Section 1 of the Constitution, for a constitutional amendment proposed by the General Assembly to be voted upon

at a general election established by law for some time other than the regular general election contemplated by our present election law. To comply with Article XV, Section 7, such an election must be set for the Tuesday next after the first Monday in November. We see no reason why such an election may not be held on November 4, 1969, as is proposed. This date, we might add, would provide ample opportunity, between the enactment of the bill setting up the election and the date of said election, for a final decision in any court action that might be instituted testing the validity of such a specially set general election. Since our Court of Appeals has never had before it the exact question we discuss herein, such a court test might very well be desirable.

In the event no such court decision should be requested, or given, prior to such election, we say without hesitation that any amendments adopted at such an election would be valid, and free from successful attack subsequent to such election. It is well settled law in this and other jurisdictions that election results will not be set aside after the fact, except for a grave showing of fraud. Further, the Court of Appeals of Maryland, in *Board v. Attorney General,* 246 Md. 417, 432-434 (1967), has left no doubt that once the people have spoken on a constitutional amendment, their voices shall prevail and no minor irregularity in the manner in which that voice was uttered shall be sufficient to alter the result.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

ELECTIONS — VOTING MACHINES — MULTI-VOTING DEVICE, WHEREBY PERSON MAY SIMULTANEOUSLY VOTE FOR OR AGAINST A NUMBER OF QUESTIONS APPEARING ON THE BALLOT DOES NOT VIOLATE MARYLAND ELECTION LAWS, IF VOTERS MAY ALSO EXERCISE OPTION OF VOTING INDEPENDENTLY ON EACH OF THE SEVERAL QUESTIONS.

April 7, 1969.

Mr. William J. Evans.

We have your recent letter in which you ask our advice on several questions pertaining to the form and arrangement of the ballot for the special election to be held in Baltimore City on May 13, 1969. This election, authorized by Chapter 6, Laws of Maryland, 1969, will be held for the purpose of asking the approval of the electorate for an increase in the allowable rate of interest on bond issues previously authorized by the voters.

You advise us, after consultation with bond counsel for the City, that it will be necessary for the individual voters to vote affirmatively or negatively on each of 39 separate issues. You advise further that there is a device on each voting machine which would permit a voter to cast his vote simultaneously either for, or against, the interest rate increase on all 39 issues. Before leaving the booth, the voter may change that vote as it applies to one or more questions, individually. Notwithstanding the presence on the machine of the multiple voting device, a voter choosing to do so may vote separately on each of the 39 questions, in the customary manner. You ask us if this procedure is permissible under Maryland law. Our answer is in the affirmative.

We have carefully examined the provisions of Article 33 of the Annotated Code of Maryland, entitled "Elections", and the decisions of the Court of Appeals of Maryland on cases involving elections. We find no prohibition of any kind against the utilization of the device which you describe.

We have also examined relevant cases from other jurisdictions, and we are unable to discover any cases wherein

the procedure you outlined has been voided by the courts therein. In several jurisdictions the courts have struck down a technique whereby two or more questions were submitted to the voters jointly, in a manner where the voters could not vote separately on each such issue. See *Leavenworth v. Wilson,* 76 P. 400 (Kan.); *Stern v. Fargo,* 122 N.W. 403 (N.D.); *Henderson v. Dawson County,* 286 P. 125 (Mont.). Obviously, however, the arrangement found defective in these cases is materially different from the arrangement about which you ask our opinion, as in those cases the voter was unable to vote independently for any one of the several questions, but was compelled to vote for or against them as a bloc.

The arrangement which you describe is quite similar to that before the Nebraska Court in *Thompson v. Winnett,* 110 N.W. 113. In that case the court was concerned with a statute that allowed electors to vote, in one action, for all amendments endorsed by a political party. The Constitution of Nebraska provides:

> "When more than one amendment is submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately." 110 N.W. 1118.

The Nebraska Court found that the statute did not violate the constitutional provision, as long as the voter was not compelled to vote the straight ticket. See also *Ohio ex rel. Sheets v. Laylin,* 68 N.E. 574.

We fail to see how the practice you suggest could in any way violate the election laws of this State. You would give to every voter the chance to vote separately on each of the 39 questions before him, but you would also give to those desiring to do so the chance to vote on the 39 questions in one operation. We believe that this suggested procedure will fully protect the rights of every elector, and yet facilitate and expedite the voting process; and we know of no reason why it may not be utilized.

You also ask our opinion about the manner in which the

questions should be arranged on the voting machines. Because of the unusually large number of questions to be presented to the voters at this election, you find it necessary to make some departure from the previous practice of presenting questions to the voters. You advise us of your intention to set out separately across the top of the voting machine, on a horizontal line, each of the 39 questions to be voted upon, numbered in sequence. Beneath each question, and separated from it by several inches, would appear the corresponding number, with a lever, appropriately marked, to be depressed by those favoring the amendment. On the line immediately beneath that, there would be a lever, appropriately marked, to be depressed by those opposing the amendment.

Article 33, Section 16-6 of the Code provides, in pertinent part:

> "A constitutional amendment, or any question to be submitted to the popular vote, shall be printed on the ballots . . . and in the absence of some other provisions shall be accompanied by the words 'For' and 'Against'."

We believe that the method of ballot arrangement which you describe fully complies with this provision of the law, and we have no hesitancy in saying that you may utilize that method.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

ELECTIONS—JUDGES—ELECTION—WHEN NEW JUDGESHIP IS CREATED, VACANCY OCCURS UPON THE EFFECTIVE DATE OF THE LEGISLATIVE ENACTMENT—ONE YEAR PROVISION OF ARTICLE IV, SECTION 5 OF MARYLAND CONSTITUTION IS MEASURED FROM THAT DATE RATHER THAN FROM DATE OF APPOINTMENT OR QUALIFICATION OF JUDGE.

October 9, 1969.

Thomas V. Miller, Esquire.

In your letter of September 8 you raise a question, at the request of the Chairman of the Prince George's County Delegation, relating to the three new circuit court judgeships for Prince George's County established by Chapter 83 of the Laws of Maryland of 1969. These new judgeships have not as yet been filled by the Governor and you ask, in the event that the appointments are not made until after November 3, 1969, whether the appointees must stand for election at the general election to be held on November 3, 1970.

The relevant constitutional language is found in Article IV, Section 5 of the Maryland Constitution which reads in its entirety as follows:

> "*Upon every occurrence or recurrence of a vacancy through* death, resignation, removal, disqualification by reason of age or otherwise, or expiration of the term of fifteen years of any judge, or *creation of the office of any judge,* or in any other way, *the Governor shall appoint a person duly qualified to fill said office, who shall hold the same until the election and qualification of his successor*; except that when a vacancy shall exist in the office of Chief Judge of the Supreme Bench of Baltimore City, the Governor may designate an Associate Judge of said Supreme Bench as Chief Judge of said Supreme Bench, and such appointee as Chief Judge shall hold such office for

> the residue of the term for which he was last elected an Associate Judge of said Supreme Bench. *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. Except in case of reappointment of a judge upon expiration of his term of fifteen years, no person shall be appointed who will become disqualified by reason of age and thereby unable to continue to hold office until the prescribed time when his successor would have been elected." (Emphasis supplied)

It is apparent from this that the answer to your question requires a determination of when the vacancies in question actually occurred.

The italicized language in the first sentence of Section 5, quoted above, makes it clear that it is the creation of the *office* of judge that gives rise to the vacancy under the facts at hand. The offices in question were created by Chapter 83 of the Laws of Maryland of 1969, the date of their creation being July 1, 1969, the effective date of that Chapter. The language of the constitutional provision is unambiguous and the construction given to it in related cases has been consistent.

In *Hillman v. Boone*, 190 Md. 606, 609 (1948), the Court of Appeals found that the recurrence of a vacancy took place upon Judge McWilliams' resignation on March 1, 1948, and for this reason, it was not necessary for his successor, Judge Anderson, to run in the 1948 general election. In the opinion the Court stated (at page 610) that the vacancy took place at "the point of time" of the prior resignation and that it was "ignoring such accidents as delays in appointment [etc.]". In 43 Opinions of the Attorney General 213 (1958) this office determined that the vacancy in the office of judge of the Circuit Court for

Queen Anne's County took place when the then incumbent, Judge Horney, was sworn in on November 5, 1957 as an Associate Judge of the Court of Appeals. His successor, Judge Keating, was not appointed until ten days later, but the determinative date of the vacancy was found to be November 5, 1957.

Both the *Hillman* case and the opinion of this office make it clear that a vacancy occurs at that moment in time when any of the seven alternative methods for creating a vacancy, delineated in Section 5, in fact take place. It is for this reason that we are of the opinion that when the General Assembly by statute establishes a new judgeship the vacancy must be held to have occurred upon the effective date of that statute.

Having established that the vacancies in question occurred on July 1, 1969, it remains for us to decide when the appointees to these vacancies must stand for election. The language of the second sentence of Article IV, Section 5, italicized above, provides the answer. The appointees must stand for election at the first biennial general election for congressmen after the expiration of one year after July 1, 1969. This election, of course, is the general election to be held on November 3, 1970.

In reaching this conclusion we are not unmindful of one of the underlying purposes of Article IV, Section 5 of the Maryland Constitution, as stated by the Court of Appeals, namely, that "the electorate at every election are given, approximately, at least one year and less than three of experience with an appointed sitting judge." *Hillman v. Boone, supra,* at p. 610; see also Dixon, "Judicial Administration in Maryland", 16 *U. Md. L. Rev.* 95, 118 (1956). If the appointments are delayed more than another several weeks this general principle will obviously not be complied with.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Asst. Attorney General.*

ELECTIONS—CANDIDATES FOR PUBLIC OFFICE—CONSTITUTIONALITY OF NON-SUBVERSIVE AFFIDAVIT REQUIRED OF SAME BY ARTICLE 85A, SECTION 15—NO LONGER CONSTITUTIONALLY PERMISSIBLE IN LIGHT OF SUPREME COURT RULINGS.

November 21, 1969.

Mr. Willard A. Morris.

You have recently asked this office to review the continued validity of the affidavit required by Article 85A, Section 15 of the Maryland Code of candidates for public office in light of the relevant decisions of the United States Supreme Court.

Section 15 of Article 85A requires a candidate to file with his certificate of nomination "an affidavit that he or she is not a subversive person as defined in this article." The section further states that no certificate of nomination may be received by any Board of Supervisors of Elections or by the Secretary of State unless accompanied by said affidavit. The phrase "subversive person" is defined in Section 1 of the same Article as follows:

> " 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization."

All of the relevant sections of Article 85A have remained unamended since that Article was originally adopted by Chapter 86 of the Laws of Maryland of 1949.

The precise point about which you make inquiry was ruled upon by the United States Supreme Court in *Gerende v. Board of Supervisors of Elections of Baltimore City,* 341 U.S. 56 (1951). There the Court upheld the Board's right to deny a place on the municipal ballot to a candidate who refused to file the affidavit required by Section 15. The Court, in a *per curiam* decision, relied heavily upon the assurance given by Attorney General Hall Hammond during oral argument that election officials had been advised by him to require a narrowly worded oath inquiring only into the candidate's present intention to (or membership in an organization engaged in an effort to) "overthrow the government by force or violence". Six years later this office advised election officials of the continued validity of the *Gerende* doctrine. See 42 Opinions of the Attorney General 195 (1957).

By Sections 11 and 13 of the same Article (Article 85A), employees of the State and its political subdivisions are required to sign written statements that they are not subversive persons. In *Elfbrandt v. Russell,* 384 U.S. 11 (1966), the Supreme Court struck down the Arizona loyalty oath as unconstitutional because it found the "membership" provisions made possible "guilt by association". Continuing its efforts to comply with the Supreme Court decisions, this office advised the Governor, the Secretary of State and the Commissioner of Personnel, in light of the *Elfbrandt* decision and less than one month after it was rendered, to require an even more narrowly drawn loyalty statement, to read as follows:

> "I, ... do hereby certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.
>
> "I further certify that I understand the aforegoing statement is made subject to the penalties

> of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."

This exact oath was adopted by the Board of Regents of the University of Maryland, pursuant to Article 85A, Section 11, and was required of teachers at that institution. In *Whitehill v. Elkins,* 389 U.S. 54 (1967), the Supreme Court determined that the constitutionality of this narrow language depended upon the definition of the phrase "subversive person", contained in Section 1, even though that phrase was not mentioned in the statement. The Court reasoned that since the oath was authorized by Article 85A, the Board of Regents must have intended the broadest possible coverage. The Court then examined the definition (quoted *supra*) and found that, particularly because of the "alteration" clause and "membership" clause, it lacked "precision and clarity" and suffered from "overbreadth". As a result, the Court found that the University of Maryland was acting unconstitutionally in requiring the written statement in question from its teachers.

The opinion in *Whitehill* purports to leave standing the principle of the *Gerende* case but there is no way that these two decisions may be harmonized or reconciled. The result in *Whitehill* did not turn upon a teacher's constitutional right to be protected from inquiries such as the one which the University of Maryland was carrying on. Rather, the decision is squarely based upon the Court's finding that the definition of the phrase "subversive person", contained in Article 85A, Section 1, was too broad and vague to be properly applied. Because this tainted definition is referred to specifically in Article 85A, Section 15 relating to affidavits of candidates for public office, the same result must necessarily follow.

The dissenting opinion of Mr. Justice Harlan in *Whitehill* (at p. 62) recognizes the inevitability of this conclusion:

> "[Maryland] will also be entitled to feel baffled by an opinion which, while recognizing the continuing authority of Gerende, undertakes to bypass that

> decision by a process of reasoning that defies analysis."

Indeed, on the day after the *Whitehill* decision was rendered, this office advised the Commissioner of Personnel that the loyalty oath "shall no longer be required" of any State employees.

Since the definition of the phrase "subversive person" has not been amended by the General Assembly of Maryland since the *Whitehill* decision, the affidavit based upon this definition set out in Article 85A, Section 15 may not constitutionally be required by boards registering candidates for public office in this State.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Asst. Attorney General.*

EMPLOYEES, STATE

COMMISSIONER OF PERSONNEL—PATUXENT INSTITUTION—STATE EMPLOYEES—HOURS WORKED—WHAT CONSTITUTES COMPENSABLE OVERTIME ACTIVITY.

January 15, 1969.

Mr. Henry G. Bosz.

Your predecessor, Mr. Davis, had requested our opinion concerning a matter which is the basis of a grievance filed by an employee of the Patuxent Institution. The facts, which are undisputed, are as follows: Patuxent requires that all correctional officers be present for roll call, in uniform, 15 minutes before the hour for beginning their shift. Since these officers are not permitted to wear their uniforms to and from work, an additional 7½ minutes are utilized in changing from street clothing to uniforms before roll call, and another 7½ minutes in changing from uniforms back to street clothing after their shift has been completed. The purpose of the daily roll call is to assign personnel to specific posts, to promulgate any special directions or orders, and to determine the duty strength of the shift prior to going on duty. Patuxent informs the correctional personnel of the need for this roll call both at the time of employment and during the pre-service training period, and also explains that uniforms may not be worn to work. The complaint asks that these correctional officers, who work a 40 hour work week, excluding this roll call and uniform change time, be paid overtime compensation for this extra half-hour per day.

Section 76 (a) of Article 100 of the Annotated Code of Maryland (1964 Replacement Volume) provides:

> "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."

Rule 42E3 of the State Employees Personnel Rules provides in pertinent part:

"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.

c. Compensatory leave should be given within 7 days and must be given no later than 30 days after it is earned."

The legal issue which is raised by this complaint is whether this preliminary and postliminary activity required by the employer must be included in the determination of the number of hours worked.

The position of the institution is that since this policy of requiring correctional officers to report, in uniform, for roll call 15 minutes before the start of the shift is made known to employees when employment is initiated, that this constitutes a condition of employment accepted by these employees when they accept employment with the institution. The position of the complaining party, on the other hand, is that he begins working as soon as he is no longer free to act as he pleases, and is under the supervision or control of his employer. Therefore, in determining the number of hours worked in a week, one must add the extra half-hour per day to the regular 40 hours worked.

Although this does not conclude the matter, we are of the opinion that the Maryland Courts would not accept the notion that the employees having accepted employment are precluded from challenging the legality of the rule. As has often been noted, an employee cannot contract away rights given him by statute since the matter is affected with a public interest. See for example Section 90 of Article 100, Annotated Code of Maryland, and *Walling v. Richmond Screw Anchor Co.*, 59 F. Supp. 291 (E.D. N.Y. 1945), aff'd 154 F. 2d 780, *cert. den.* 328 U.S. 870.

One of the difficulties raised by this issue is the dearth of any legal authority in Maryland on the question of what constitutes the workday. (Maryland's Minimum Wage Law, Article 100, Sections 81-93, Annotated Code of Maryland, contains no overtime compensation provision and, therefore, no provisions describing hours worked.) However, there is no lack of authority in the Federal field in light of the extensive Federal wage and hour laws, and specifically the Fair Labor Standards Act, 29 U.S.C.A. §§ 201-219, and the Portal to Portal Act,* 29 U.S.C.A. §§ 251-262. To the extent deemed applicable, we turn then to a consideration of the Federal authorities.

The Wage and Hour Division of the U. S. Department of Labor has defined the workday as "the period between the commencement and completion on the same workday of an

employee's principal activity or activities". 29 Code Fed. Regs. § 790.6 (b). And § 254 of 29 U.S.C.A. (part of the Portal to Portal Act) provides that overtime compensation need not be paid by employers with certain exceptions not relevant here, for "activities which are preliminary to or postliminary to . . . [the employee's] principal activity or activities which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases such principal activity or activities." However, it has almost uniformly been held by the Federal courts that activities performed either before or after a regular work shift are compensable under the Portal to Portal Act if the activities are an integral and indispensable part of the principal activities for which employees are employed. See *Steiner v. Mitchell,* 350 U.S. 247 (1956); *Wirtz v. Sherman Enterprises, Inc.,* 229 F. Supp. 746 (D. Md. 1964). Finally, it should be noted that the doctrine of *de minimus non curat lex,* which means that the law will not be concerned with trifles, is particularly applicable to certain types of complaints raised in this field. See *E. I. Du-Pont De Nemours & Co. v. Harrup,* 227 F. 2d 133 (4 Cir. 1955); *Frank v. Wilson & Co.,* 172 F. 2d 712, *cert. den.* 337 U.S. 918 (1949).

We believe these principles may fairly be applied to the issue raised here.

In *McComb v. C. A. Swanson & Sons,* 77 F. Supp. 716 (D. Neb. 1948), the District Court in Nebraska, in a case similar to the present one, held that the employee's preliminary and postliminary activities in changing to and from uniforms came within the *de minimus* doctrine and was, therefore, not compensable. And in *Steiner v. Mitchell, supra,* the Supreme Court recognized that ordinarily showering and changing clothes are excluded from compensable work time under the Fair Labor Standards Act as amended by the Portal to Portal Act. Compare, Wage and Hour Interpretative Bulletin, 29 Code Fed. Regs. 785.26, 790.8 (c). See also 29 U.S.C.A. § 203 (o). However, in *Baker v.*

California Shipbuilding Corp., 73 F. Supp. 322 (S.D. Cal. 1947), decided two weeks prior to the effective date of the Portal to Portal Act, the California District Court held that guards and firemen who were required to report for roll call prior to their shift were entitled to compensation for that time under the Fair Labor Standards Act. See also *Yellow Truck & Coach Mfg. Co. v. Edmondson*, 155 F. 2d 367 (6 Cir. 1946), also decided prior to the passage of the Portal to Portal Act.

We think a similar result would be reached today under the Portal to Portal Act. In *U. S. Steel v. Burkett*, 192 F. 2d 489 (4 Cir. 1951), the Court of Appeals for the Fourth Circuit held that non-exempt employees who were required to report 30 minutes prior to shift-time to discuss work problems with employees on the prior shift and to remain 10 minutes after the end of the shift to pass out gate passes were engaged in compensable activities. See *Mitchell v. King Packing Co.*, 350 U.S. 260 (1956) where the Supreme Court found that knife-sharpening activities by workmen employed with a meat packing company were compensable. See also *U. S. Cartridge Co. v. Powell*, 185 F. 2d 67 (8 Cir. 1950), modified in 186 F. 2d 611 (1951).

Applying these principles, we conclude, with respect to employees covered by Section 76 (a) of Article 100, that: (1) an employee is not precluded from raising the issue because he accepted employment with the institution; (2) that the time spent in changing clothes is not compensable because it is not an integral and indispensable part of the principal activity of the correctional officers and may be considered as *de minimus*, and (3) the 15 minutes taken for roll call and last-minute instructions is an integral and indispensable part of the principal activity of the correctional officers and must be considered as part of the workday.

We recognize that these matters may cause some budgetary or administrative adjustments. In this regard, we

call your attention to the provisions of Rule 42E3a (2), which authorize compensatory leave if the agency does not have funds available for overtime payments in cash.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Asst. Attorney General.*

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*Passed in 1947 to change authoritative judicial construction of the Fair Labor Standards Act deemed inconsistent with Congressional intent.

GAMING

GAMING ESTABLISHMENTS—ARTICLE 27, SECTION 255 OF THE MARYLAND CODE PERMITS CERTAIN BONA FIDE, NON-PROFIT ORGANIZATIONS TO CONDUCT "A CARNIVAL, BAZAAR, OR RAFFLE" FOR THEIR "EXCLUSIVE BENEFIT" IN CERTAIN COUNTIES—THIS SECTION CONTEMPLATES THE HOLDING OF OCCASIONAL EVENTS FOR THE ORGANIZATIONS LEGITIMATE PURPOSES, FULLY MANAGED AND OPERATED BY BONA FIDE MEMBERS OF THE SPONSORING ORGANIZATION AND DOES NOT CONTEMPLATE THE MAINTENANCE OF PERMANENT OR SEMI-PERMANENT GAMING ESTABLISHMENTS TO SERVICE SUCH ORGANIZATIONS.

September 9, 1969.

Mr. Francis C. Garner, Sheriff.

By Chapter 617 of the Laws of Maryland of 1969, several counties, including Charles County, were included specifically within the provisions of Article 27, Section 255 of the Maryland Code exempting certain activities from the prohibitions of the State gaming statute. Basically, this section permits "any volunteer fire company or bona fide fraternal, civic, war veterans', religious or charitable organization" in the specified counties "to conduct or hold a carnival, bazaar, or raffle" for its "exclusive benefit" provided that these events are "managed . . . personally through the members" and that no individual may benefit financially from the event or be paid any of the proceeds of it. You ask our guidance in the administration of this section of the law.

The basic gaming prohibitions are contained in Article 27, Sections 237-246A of the Maryland Code, while the exemptions (of which this section is one) are contained in Sections 247-261B. These exemptions must, of course, be strictly construed because they represent deviations from the generally applicable State law. The purpose of Section

255 is obviously to permit a bona fide organization to raise money for its legitimate purposes by holding an occasional carnival, bazaar or raffle. By use of the phrase "carnival, bazaar, or raffle" the statute clearly contemplates an occasional fund-raising event held on a non-recurring basis. The anticipated informal nature of these events is demonstrated by the requirement that the exclusive financial benefit must be to the exempt organization and that management and operation of the event be handled personally by bona fide members of the sponsoring organization.

We find nothing to support the proposition that the Legislature ever intended, by its passage of this statute, to permit a permanent or semi-permanent gaming establishment to exist in this State, either as an adjunct to a restaurant, bar, or similar facility, or as an independent entity. It is our view that any attempt to establish such a gaming house in your County would violate the laws of this State, and that you should act accordingly.

FRANCIS B. BURCH, *Attorney General.*

GENERAL ASSEMBLY

PRESIDENT OF THE SENATE AND SPEAKER OF THE HOUSE OF DELEGATES CONTINUE TO HOLD THEIR OFFICES AFTER ADJOURNMENT "WITHOUT DAY" OF THE GENERAL ASSEMBLY.

January 3, 1969.

Honorable Thomas V. Miller, Jr.

You have asked our opinion as to whether the offices of the President of the Senate and Speaker of the House of Delegates exist between the sessions of the Maryland General Assembly. Your inquiry is founded on the fact that the House and Senate are adjourned each session "without day" and the fact that the offices of Speaker of the House and President of the Senate are filled each year by the respective bodies.

It has long been clearly established that the Speaker of the House and the President of the Senate continue to serve notwithstanding an intervening adjournment of the Legislature. Article III, Section 30 of the Constitution contemplates such continued service by providing that "every bill, when passed by the General Assembly * * * shall be presented to the Governor who, if he approves it, shall sign the same in the presence of the presiding officers and Chief Clerks of the Senate and House of Delegates". The Court of Appeals has held on more than one occasion that a bill signed by the Governor following adjournment of the General Assembly in the presence of the Speaker of the House and President of the Senate is valid. In *Lankford v. Somerset County,* 73 Md. 105, 112 (1890), the Court of Appeals expressly rejected the contention that "these officers had no power to present (a) bill to the Governor after the General Assembly had adjourned". See also *Johnson v. Luers,* 129 Md. 521 (1916). Additionally, Article II, Section 7 provides:

"In case of any vacancy in the office of Gover-

> nor, 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."

Dr. Everstine, in his definitive work on *The Legislative Process in Maryland,* 10 Md. Law Rev. 91, 120-21, has observed:

> "It makes an interesting *query,* too, to speculate on what would happen if either the President of the Senate or the Speaker of the House should die or resign after the Legislature had adjourned and while bills are still pending to be signed. These positions are elective ones, and it presumably would require that the Legislature be recalled into session in order to elect new presiding officers to be present at the ceremony of signing."

It is clear that the President of the Senate and Speaker of the House continue to serve after adjournment for the purpose of presenting bills to the Governor. The practice of the Legislature in other respects has also recognized the continuing service of the President of the Senate and Speaker of the House of Delegates. Thus, it was thought necessary to enact a statute, Article 40, Section 4 of the Maryland Code (enacted by Chapter 61 of the Acts of 1868 immediately after ratification of the Constitution of 1867) to excuse the officers of the preceding General Assembly from attendance at meetings of a newly convened assembly. We further note that Article 40, Section 2 of the Code provides for quarterly payments of salaries to the presiding

officers of each House on the first day of January, April, July and October of each year, a provision inconsistent with the view that the officers serve as such only when the Legislature is in session.

Finally we note that Article 40, Section 27 of the Maryland Code makes the President of the Senate and Speaker of the House, respectively, Chairman and vice-Chairman of the Legislative Council, "until the beginning of the next regular session", and further gives these officers the power to appoint members to the Council during the recess of the General Assembly.

It is, therefore, in our view, entirely clear that the President of the Senate and Speaker of the House of Delegates continue to hold their offices between sessions of the Maryland General Assembly.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Asst. Attorney General.*

GENERAL ASSEMBLY—CONSTITUTIONAL LAW—POWER OF GENERAL ASSEMBLY TO RECONSIDER AND AMEND PREVIOUSLY ADOPTED BILLS PROPOSING CONSTITUTIONAL AMENDMENTS—POWER OF GENERAL ASSEMBLY TO PROPOSE CONFLICTING CONSTITUTIONAL AMENDMENTS FOR SUBMISSION TO ELECTORATE AS ALTERNATE MEASURES —SUGGESTED PROCEDURE FOR SUBSTITUTING PROPOSED CONSTITUTIONAL AMENDMENTS IN LIEU OF PREVIOUSLY PROPOSED AMENDMENTS.

September 15, 1969.

Dr. Carl N. Everstine.

During its regular session in 1969 the General Assembly of Maryland proposed eight amendments to the State Constitution. These amendments may now be found in Chapters 784 to 791, inclusive, of the Laws of Maryland of 1969. During the same session the General Assembly also passed an act, which became Chapter 76 of the Laws of Maryland of 1969, providing for an election to be held on November 4, 1969, to permit the voters of the State to adopt or reject the proposed constitutional amendments. However, in the case of *Cohen v. Governor of Maryland, et al.,* 255 Md. 5 (1969), the Court of Appeals of Maryland held that Chapter 76 of the Laws of Maryland of 1969 was unconstitutional, on the basis that it conflicted with the requirements of Article XIV, Section 1, of the Constitution of Maryland, which provides for the submission of proposed constitutional amendments to the electorate at "the next ensuing general election". Therefore, as matters now stand, the constitutional amendments proposed by the General Assembly during its regular session in 1969 will not be submitted to the voters of this State for adoption or rejection until the general election to be held in November, 1970.

With this background in mind you have asked our opinion as to two questions. First, may the General Assembly, when it convenes in January for its 1970 regular session, reconsider and amend the proposed constitutional amendments

which were approved by the General Assembly during its regular session in 1969, to the end that the proposed amendments may be submitted to the voters at the general election in November in an amended form, rather than as originally proposed? Second, may the General Assembly, at its regular session in 1970, propose amendments to the State Constitution which deal with the same subject matter as the proposed amendments which were approved at the 1969 session, but in a different and presumably conflicting manner, so that alternative constitutional amendments would be submitted to the electorate at the general election in November? In connection with the latter question you have suggested that the amendment to be proposed at the 1970 session would contain an additional provision whereby it would prevail over the amendment proposed during the 1969 session in the event that both proposed amendments were to be ratified by the electorate. We shall consider these questions in the order which you have presented them to us.

I

Article XIV, Section 1, of the Constitution of Maryland provides the following procedure for amending the Constitution:

> "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 the members elected to each of the two Houses, by yeas and nays, to be entered on the Journals with the proposed Amendment. 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 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. The votes cast for and against said proposed amendment or amendments, severally, shall be returned to the Governor, in the manner prescribed in other cases, and if it shall appear to the Governor that a majority of the votes cast at said election on said amendment or amendments, severally, were cast in favor thereof, the Governor shall, by his proclamation, declare the said amendment or amendments having received said majority of votes, to have been adopted by the people of Maryland as part of the Constitution thereof, and thenceforth said amendment or amendments shall be part of the said Constitution. When two or more amendments shall be submitted in manner aforesaid, to the voters of this State at the same election, they shall be so submitted as that each amendment shall be voted on separately."

The inquiry as to whether the General Assembly may now amend the proposed amendments which were adopted during the 1969 session or whether the proposed amendments must be submitted to the voters for adoption or rejection in the same form as originally proposed, should be made against a background of certain basic and well established principles. In proposing amendments to the Constitution the General Assembly does not act in a legislative capacity. As stated in 16 Am. Jur. 2d, *Constitutional Law*, Section 32, page 205:

> "In submitting propositions for the amendment of the constitution, the legislature is not exercising its legislative power or any sovereignty of the people which has been entrusted to it, but is merely acting under a limited power which is conferred upon it by the people and which might with equal propriety have been conferred upon either house, the governor, a special commission, or any other body or tribunal."

Similarly, an amendment to the Constitution which has been proposed by the General Assembly is not a "law" and does not constitute legislation. A proposed amendment to the Constitution "is not legislation" and even after receiving the prescribed number of votes in both houses of the General Assembly, a proposed amendment "continues to be a *bill* and never becomes a *law*", *Warfield v. Vandiver*, 101 Md. 78, 113 (1905), (emphasis by Court). See also, *Hillman v. Stockett*, 183 Md. 641, 647 (1944); *Planning Commission v. Randall*, 209 Md. 18, 24 (1956); and *Board v. Attorney General*, 246 Md. 417, 429 (1967), which notes: "[t]his Court has recognized that laws and legislative actions relating to amendment or revision of the constitution differ greatly and significantly from one another". In addition, it should be kept in mind that a proposed amendment to the Constitution is completely inoperative and has no legal effect until such time as it may be duly ratified by the voters. As stated by the Court of Appeals in *Warfield v. Vandiver*, *supra*, at page 115, a proposed amendment to the Constitution "is wholly inoperative as a law or in any other way" unless and until the proposed amendment is adopted by the voters. *Cf.*, *Board v. Attorney General*, *supra*, at page 431, where it is said: "neither piecemeal amendments of the Constitution nor total amendment by way of adoption of the recommendations of the constitutional convention can take effect until the voters have given their approval". Thus it is only after the voters have given their approval to a proposed amendment and the Governor has issued his proclamation that the proposed amendment has received a majority of the votes cast, that the proposed amendment becomes a part of the Constitution and legally operative. *Worman v. Hagan*, 78 Md. 152, 166 (1893).

The question of whether state legislatures, once having approved a proposed constitutional amendment for submission to the electorate, may later reconsider and amend the proposed constitutional amendment, has arisen in various states under a variety of circumstances. In all of the cases which we have found dealing with this problem, the courts have held that state legislatures may reconsider and

amend proposed constitutional amendments prior to submission to the voters. A close examination of the cases concerned with the question of the power of a state legislature to reconsider and amend previously proposed constitutional amendments, reveals at least three lines of reasoning or rationale which have lead the courts to find that the legislature possesses the requisite authority.

First, it has been held that a state legislature may reconsider and amend a proposed constitutional amendment which has already been approved for submission to the voters, even though such reconsideration is not expressly provided for in the applicable constitution, on the basis that the right to reconsider is an inherent prerogative of a deliberative body. In *Doody v. State*, 171 So. 504 (Ala., 1936), a proposed constitutional amendment was passed by both houses of the state legislature by the required majority. After such passage the Governor suggested that the bill proposing the constitutional amendment should be changed. By resolution duly adopted by both houses of the legislature, the bill was recalled and the signature of the presiding officer of each house was erased. The bill was amended along the lines suggested by the Governor and repassed by a constitutional majority of both houses. The constitutional amendment was subsequently attacked on the basis "that the legislature lost control of the act after its first passage, and was without authority to order its recall and repassage to meet the suggestions of the Governor". The Court rejected this argument as being "too narrow a view of the legislative authority over its own procedure". Instead, the Court held that until the proposed amendment reached the office of the Secretary of State, who was the "proper custodian", and while the legislature was in session, the legislature had authority to recall the proposed amendment for further consideration, since "[a]s a deliberative body the Legislature had the right of reconsideration of the bill before it reached its final custodian, and while still in continuing session". The Court expressly stated that it did not express any opinion as to what the result would have been if the proposed constitutional amendment had reached the

office of the secretary of state before being recalled, but in the later case of *In Re Opinion of the Justices,* 39 So. 2d 665 (Ala., 1949), hereinafter discussed, recall was permitted even after the proposed amendment had reached the office of the secretary of state.

In the case of *Crawford v. Gilchrist,* 59 So. 963 (Fla. 1912), a proposed constitutional amendment was passed by both houses of the state legislature. On the day after the proposed amendment had been adopted a motion to reconsider was passed by the state senate, over the objection that once the proposed amendment had been agreed to by both houses of the legislature, the senate could not reconsider the vote whereby it ratified the proposed amendment. The motion to reconsider was held over and it did not appear that any further action respecting the proposed amendment or the motion to reconsider was ever taken. The question then arose as to whether the proposed amendment should be submitted to the voters. The Court held that the proposed amendment had not been finally "agreed to", within the meaning of the state constitution, in view of the motion to reconsider. The right of the senate to reconsider its action was upheld on the basis, *inter alia,* that "[a] right to reconsider action taken is an attribute of all deliberative bodies, and is not forbidden to the Legislature by the Constitution". The Court further stated, on page 969, that "[a]ll deliberative bodies, during their session, have a right to reconsider their proceedings as they deem proper, when not otherwise provided by law, and it is the final result only which is to be regarded as the thing done".

The second line of reasoning that has led courts to permit state legislatures to reconsider and amend proposed constitutional amendments prior to submission to the voters is based upon the constitutional or inherent power of legislatures to adopt rules for the regulation of their own proceedings. Several courts have taken the position that the power of the legislature to adopt rules for the conduct of its own proceedings applies not only to ordinary legislative matters, but to the proposal of constitutional amendments.

Hence, it has been held that proposed constitutional amendments are subject to the right of the legislature, in the exercise of its rule making power, to provide for reconsideration of action previously taken.

In *Crawford v. Gilchrist, supra,* the Supreme Court of Florida, in upholding the right of the state senate to reconsider a proposed constitutional amendment which had been approved by both houses of the legislature, reasoned as follows, at page 968:

> "The provision [in the Florida Constitution] that each House 'shall determine the rules of its proceedings' does not restrict the power given to the mere formulation of standing rules, or to the proceedings of the body in ordinary legislative matters; but in the absence of constitutional restraints, and when exercised by a majority of a constitutional quorum, such authority extends to the determination of the propriety and effect of any action as it is taken by the body as it proceeds in the exercise of any power, in the transaction of any business, or in the performance of any duty conferred upon it by the Constitution. *This, of course, includes authority, subject to the Constitution, to determine the rules of procedure to be observed in agreeing to proposed amendments to the Constitution, and embraces the right to determine the reconsideration of action taken, when no provision of the Constitution is thereby violated.*" (Emphasis added)

A similar approach was taken in *Jenkins v. Entzminger,* 135 So. 785 (Fla., 1931), which involved the question of whether a constitutional amendment was invalid on the basis that it was "not properly passed in the legislature". The proposed constitutional amendment in question had been approved by both houses of the legislature and had been referred to the "joint committee on enrolled bills". However, the bill was then recalled by the state senate and amended. The argument was made, on page 790, "that

the Legislature having once duly passed such bill through the House and Senate, and having referred the same to its joint committee on enrolled bills to be presented to the Governor, the Senate lost control of the measure, and that it was no longer within the power of the Senate to have such bill recalled from the joint committee on enrolled bills or to order the final vote on the passage of same reconsidered, or to have the bill placed back on second reading for the purpose of amendment, or thereafter to amend it". The Supreme Court of Florida quickly dismissed this argument on the basis of the *Crawford* case, *supra*, stating, on page 791, that "[t]his court has held that the Legislature has power to reconsider its action even on a constitutional amendment . . . and the Constitution itself expressly authorizes the Legislature to make its own rules of procedure". The holding in the *Jenkins* case was followed in *State v. Upper St. Johns River Nav. Dist.*, 135 So. 784 (Fla., 1931), decided the same day.

In the case of *In Re Opinion of the Justices*, 197 N.E. 95 (Mass., 1935), the Supreme Judicial Court of Massachusetts held that a proposed constitutional amendment was subject to the rules of the state legislature permitting reconsideration of matters previously adopted. In this case a proposed constitutional amendment was passed by the required majority of both houses of the legislature, meeting at a joint session, but thereafter a motion to reconsider the vote was made. The Court was faced with the question of whether the vote was subject to reconsideration, the argument being made that reconsideration was "without warrant within the Constitution". In holding that the vote was subject to reconsideration, the Court reasoned, on page 98:

> ". . . The joint session [of the legislature] by necessity possesses the ordinary prerogatives of a deliberative legislative body. One of these is to adopt rules for the regulation of its conduct. Reconsideration of votes is recognized practice in legislative bodies in this country. Concerning recon-

> sideration, a rule is generally formulated. Article 48 of the Amendments under 'The Initiative,' part 4, § 4, [which deals with proposed constitutional amendments] calls for 'Final legislative action' by the joint session in a specified way. It does not prevent the joint session from adopting rules to regulate procedure touching the matters to be considered. Neither its words nor its general purpose precludes the joint session from making a rule to permit and to govern reconsideration of votes taken by it."

See also *Opinion of the Justices*, 135 N.E. 2d 741, 746 (Mass., 1956), wherein the Court stated that "it was competent for the joint session to adopt the rule for reconsideration" in voting upon a proposed constitutional amendment.

Article III, Section 19, of the Maryland Constitution provides that each house of the General Assembly shall "determine the rules of its own proceedings". Applying the rationale of the cases previously discussed, such a constitutional grant of power would enable the General Assembly to make rules governing the proposal of constitutional amendments, as well as rules governing the passage of routine legislation, and would include the power to adopt a rule permitting reconsideration of a proposed constitutional amendment, as long as no other provision of the Constitution was violated. *Cf., Warehouse Co. v. Lumber Co.*, 118 Md. 135, 149 (1912), wherein the Court of Appeals, in ruling that the General Assembly, by joint action of both houses, could recall an enrolled bill from the Governor for reconsideration and amendment, noted that each house had the power to make its own rules, not in disregard of constitutional provisions, and to change and suspend such rules at will.

The third rationale which has been used to find that state legislatures may amend proposed constitutional amendments is based upon the proposition that such proposed amendments do not have the status of a "law" and are of

no legal effect prior to ratification by the electorate. *Cf., Warfield v. Vandiver, supra.* As stated in 16 C.J.S., *Constitutional Law,* Section 9, page 51, "[p]rior to ratification by the people, a proposed legislative amendment is of no effect whatever, and it may be amended before submission for ratification." This was the approach taken in the case of *In Re Opinion of the Justices,* 39 So. 2d 665 (Ala., 1949), previously mentioned, wherein a proposed constitutional amendment which had been adopted by both houses of the state legislature and delivered to the secretary of state, was held to be subject to recall for reconsideration and amendment. The Court, in holding that the legislature could reconsider the proposed amendment, stated, on page 668:

> ". . . We know of no reason why the Legislature, while still in session, could not recall H. 458 [the bill proposing the constitutional amendment] from the Secretary of State for further consideration and amendment. Whatever might be the situation where a statute is involved which has become a law, the reasons which there might control, do not here obtain. The recall and revision of a proposal to be ultimately considered and decided by the voters is different from the attempted recall of a statute which has become a law. An act or resolution proposing an amendment is 'wholly ineffectual' . . . until given life by the electorate."

Cf., Clements v. Powell, 116 S.E. 624 (Ga., 1923).

While the cases previously discussed herein have involved reconsideration and amendment of a proposed constitutional amendment while the legislature is still in session, whereas in the present inquiry the General Assembly would be amending a proposed constitutional amendment which it approved during a prior session, this distinction would not appear to be controlling. As long as the same legislative body initiates the reconsideration and amendment, the fact that it does so at a different session from that at which the proposed amendment was first passed, has not led the courts to a different result. In the case of *In Re Senate*

Concurrent Resolution No. 10, 328 P. 2d 103 (Col., 1958), the Supreme Court of Colorado was presented with the question of whether the state legislature had the authority at a special session to "change and amend" a proposed constitutional amendment which it had approved for submission to the electorate during its regular session. The Court held that the legislature could amend the proposed constitutional amendment at a special session to be called prior to the submission of the proposed amendment to the voters. Other cases have taken a similar approach. *Clements v. Powell, supra,* involved a constitutional amendment which had been originally proposed by the state legislature during its session in 1919, but which had been amended during the regular session in 1920, before being approved by the people. The Court found that it was the act as amended which was ratified by the people and as such became a part of the constitution. In the case of *Opinion of the Justices,* 155 So. 2d 329 (Ala., 1963), the Court was faced with the question of "the competence and power" of the legislature during a subsequent session to change the date for holding an election on a constitutional amendment which had been approved during a prior session. The original date for the election had been set forth as a part of the bill proposing the constitutional amendment. The Court ruled that since the legislature was the same body which had proposed the constitutional amendment, there was "no constitutional impediment" which would prevent the legislature, at its succeeding session, from changing the date for holding the election on the proposed amendment. The Court indicated, however, that their answer would "probably" be in the negative if a "different" legislature should attempt to change the date of the election.

In this connection, it is important to note that the General Assembly which will be convened in 1970 is the same body which approved the proposed constitutional amendments in 1969, no general election having intervened. While not in continuous session, the General Assembly is in continuous existence between general elections, in legal contemplation, and is subject to being called into session by the

Governor under Article II, Section 16, and Article III, Section 14, of the Constitution. *Cf.*, 41 Opinions of the Attorney General 216, 221 (1956); and *In Re Opinion of the Justices*, 197 N.E. 95, 99 (Mass., 1935), previously discussed, in which the Supreme Judicial Court of Massachusetts, viewed the "official life" of the state legislature as follows:

> "The official life of each branch of the General Court [Legislature] has been lengthened to two years instead of being limited to a single year, as it was before the adoption of Article 64 of the Amendments. The provision of that article, to the effect that the General Court shall assemble every year, does not break the continuity of its existence as a legislative body. It simply prescribes two sessions for each General Court. In this particular, each branch of the General Court resembles the House of Representatives of the Congress of the United States, which, although required to assemble at least once in every year, is a single continuous legislative body for the two years for which its members are chosen."

It must also be remembered that the status of the amendments proposed by the General Assembly in 1969 will not have changed between the 1969 session of the General Assembly and the 1970 session. The proposed amendments, not having been voted upon by the people, have been and will still be "wholly inoperative as a law as in any other way", *Warfield v. Vandiver, supra.* No rights of third persons have intervened and the proposed amendments have not been published pursuant to Article XIV, Section 1, of the Constitution.

After reviewing the cases previously discussed, the applicable provisions of the Maryland Constitution, and the other relevant considerations herein set forth, we are of the opinion that the General Assembly may, at its 1970 regular session, reconsider and amend the constitutional amendments which were proposed by the General Assembly

during its 1969 session. We would recommend, however, that each house of the General Assembly, before undertaking any such reconsideration, adopt a rule, pursuant to the rule making powers granted by Article III, Section 19, of the Maryland Constitution, specifically authorizing reconsideration and amendment under the present circumstances.

II

The second question posed by you relates to the power of the General Assembly to propose constitutional amendments during its 1970 session which would conflict with the provisions of the proposed amendments adopted during the 1969 session, with the result that alternative proposals dealing with the same subject would be presented to the voters at the 1970 general election.

In the case of *Hillman v. Stockett,* 183 Md. 641 (1944), the contention was made that two proposed constitutional amendments were "null and void because they were in conflict". The Court, however, refused to consider the problem of contradictory amendments in advance of the adoption of either proposal by the people, ruling on pages 647-648:

> "Petitioner also contended that Chapter 772 and Chapter 796 were both null and void because they were in conflict, and that the Court should so hold both proposals. It would seem obvious that this question was not before the Court. Neither of the proposals had been voted on, neither might be adopted by the voters, or one might be adopted, and the other might fail of adoption. The voters might conclude, as did the petitioner, that the two were contradictory, and, therefore, they might determine to adopt the one they preferred, and not to adopt the other. The Court could not anticipate the action of the people. It would be assuming powers, far beyond the scope of those given to the judiciary, were it to refuse to permit the people to choose between two contradictory pro-

> posals (if they were contradictory), by declaring both proposals void, in advance of the adoption of either. If two contradictory provisions are placed in the Constitution, it might then become the duty of the Court to construe them and to determine what they mean. Until that occasion arises, the Court has here only to do with proposals."

The Court of Appeals then went on to state, on page 648, that the General Assembly, if it so desired, could make contradictory proposals and let the people choose between them.

> ". . . There is nothing in the Constitution to prevent the Legislature from making as many proposals as it chooses, and from making such proposals contradictory, in order to let the people choose between them. The only requirement is that the proposals shall be made in the manner prescribed by the Constitution . . .".

We are, therefore, of the opinion that the General Assembly at its 1970 session may adopt proposed constitutional amendments dealing with the same subject matter as the proposed amendments which were adopted during the 1969 session, so that alternative proposals would be presented to the voters. Furthermore, we see no constitutional impediment to inserting a provision in the 1970 amendment to the effect that it would prevail over the provisions of the 1969 amendment in the event that both are ratified by the people. Such a provision in the 1970 amendment would seem to be the only way to avoid the constitutional dilemma which would be presented if conflicting amendments were adopted at the same time. *Cf.*, 1 Cooley, *Constitutional Limitations*, page 130, wherein it is suggested that if reconciliation of simultaneously adopted constitutional amendments "is impossible, then, it would seem, both must fall".

III

While the above discussion answers the questions which you have posed to us, we deem it advisable to add some

additional comments due to the importance of the subject matter now under discussion.

A simple recall or reconsideration of the proposed constitutional amendments, for the purpose of making changes therein, raises various potential problems. For example, may the recall or reconsideration be by a simple majority or will it require a three-fifths vote? Or suppose a proposed amendment was reconsidered but not amended and then failed to receive a three-fifths vote for readoption? What would then be the status of the proposed amendment? Because of these and other questions which may develop, we believe that if the General Assembly deems it desirable to propose a new amendment in lieu of an existing proposed amendment, then it would be best to do so by means of a bill, adopted by a three-fifths majority of both houses, setting forth the new proposed amendment with the usual provisions for placing it on the ballot, but with the following additional provisions:

(1) A provision reciting that the original proposed amendment is withdrawn and repealed to the same effect as if it had never been passed or adopted by the General Assembly;

(2) A recall and recision provision whereby the bill setting forth the original proposed amendment would be recalled from the present custodian thereof with the direction that such custodian return the bill to the clerk of the house where the bill originated for recision and cancellation by the clerk through the eradication of the signatures of the Speaker of the House and the President of the Senate;

(3) A provision that the new proposed amendment be placed on the ballot at the general election to be held in November, 1970, as a substitute for and in lieu of the original proposed amendment, and that the original proposed amendment not be placed on the ballot at such election;

(4) A provision stating that if it is determined by a court of competent jurisdiction that the repeal of the original proposed amendment as set forth in (1), the recall of the original proposed amendment as set forth in (2), and the substitution of proposed amendments as set forth in (3), are ineffective, for any reason whatsoever, with the result that the original proposed amendment must be submitted to the voters at the general election to be held in November of 1970, then both the original proposed amendment and the new proposed amendment should be put upon the ballot at the general election in November of 1970, as alternate measures to be voted on by the people, but that absent such a judicial determination only the new proposed amendment should be put upon the ballot;

(5) A provision that if both proposed amendments are submitted to the voters at the general election to be held in November of 1970, pursuant to (4), then the new proposed amendment will prevail over the original proposed amendment in the event that both are ratified by the people without regard to the respective margins by which both of said amendments are ratified, but if only one or the other of said amendments is ratified then the amendment which is approved shall be fully effective; and

(6) A severability clause, reciting that if the provisions set forth in (1), (2), or (3) above, or any combination thereof less than all three provisions, are declared invalid by a court of competent jurisdiction, such determination will not affect the validity of any other provision of the bill, and that if the provisions set forth in (1), (2), and (3) above are all declared invalid by a court of competent jurisdiction, such determination will not affect the validity of the provisions set forth in (4) and (5) above.

While we are of the opinion that the repeal, recall, and substitution, as set forth in (1), (2), and (3) above, would be valid and effective, for the reasons previously stated, we also believe that the provisions for putting both proposals on the ballot, as set forth in (4) and (5) above, would mitigate the effect of a judicial determination that the repeal, recall, and substitution of the original constitutional amendment was ineffective and would prevent the situation from arising whereby only the original (and presumably the less desirable in the judgment of the General Assembly) amendment would be presented to the voters. After the general election in November, 1970, any suit contesting the validity of a bill drawn in the above manner would be subject to dismissal on the basis of mootness or on the theory that the judiciary lacks the power to set aside a constitutional amendment which has been adopted by the people. On the latter point see *Renck v. Superior Court of Maricopa County,* 187 P. 2d 656, 658, 659 (Ariz., 1947), in which the Court said, in considering a constitutional amendment which had been adopted by the people after the filing of an initiative petition to place the question on the ballot:

> "There is no doubt that in this jurisdiction any citizen has the right and power to question the legal sufficiency of an initiative petition before it has been submitted to a vote. . . .
>
> * * *
>
> "Once, however, the subject matter of the petition has been placed upon the ballot and thence adopted at a regularly held election of the people, it is then too late to question the legal sufficiency of the petition. . . .
>
> * * *
>
> "For the courts of this state to assume the jurisdiction to set aside and declare void an amendment to the constitution adopted by the people and so declared by the Governor would be an invasion and usurpation by the judiciary of the legislative functions of the people."

Cf., Dutton v. Tawes, 225 Md. 484, 491-492 (1961), and *Lexington Park v. Robidoux,* 218 Md. 195, 200 (1958), both of which exhibit the general reluctance of the courts to set aside elections after they have been held unless there was some irregularity which frustrated or prevented "a full expression of the electors' intention or otherwise misled them". Also see 16 Am. Jur. 2d, *Constitutional Law,* Section 44 and 16 C.J.S., *Constitutional Law*, Section 7, page 34. In any event no authority has been found that would indicate that the courts would hold, after the general election in November of 1970, that the original proposed amendment should be placed on the ballot at the next ensuing general election, which would be in 1974, even if the bill recalling such proposed amendment were to be deemed invalid.

We also believe that it would be advisable to present the bill proposing the new constitutional amendment, as above described, to the Governor for his signature, as an added safeguard, so as to preclude any argument that the bill contained "legislation" which would require the signature of the Governor in order to be operative. *Cf., Warfield v. Vandiver, supra.*

Hopefully the procedure outlined above would avoid many of the problems which would undoubtedly arise with a simple recall or reconsideration of a proposed constitutional amendment prior to the time when a substitute measure had been agreed upon by the requisite majority of the members of the General Assembly.

FRANCIS B. BURCH, *Attorney General.*

WILBUR E. SIMMONS, JR., *Asst. Attorney General.*

Affirmed *Bourbon v. Governor*, 258 Md. 252, 265 A. 2d. 477.

GOVERNOR

CONSTITUTIONAL LAW—GOVERNOR—BILLS PASSED BY GENERAL ASSEMBLY MUST BE SIGNED PRIOR TO JUNE 1.

April 21, 1969.

Honorable Marvin Mandel.

You have asked whether there is a limitation of time for signing bills which were passed by the General Assembly at its 1969 session.

Article II, Section 17 of the Constitution of Maryland prescribes how a bill becomes a law. The Court of Appeals in *Robey v. Broersma,* 181 Md. 325 (1943) enunciated the requirements for effecting a valid law as follows:

> ". . . it is necessary in the first instance for the Legislature to pass the bill; to have it sealed with the Great Seal of the State; and to present it to the Governor. The duty of the Governor does not begin until it is so presented. *Hamilton v. State,* 61 Md. 14. After it has been presented to the Governor, there are three ways in which such a bill may become law: (1) by being signed by the Governor; (2) by being passed over his veto; (3) by his failure to return the bill within six days after its receipt by him unless the General Assembly has adjourned and thereby prevented its return. *Warfield v. Vandiver,* 101 Md. 78, 113, 60 A. 538; *Nowell v. Harrington,* 122 Md. 487, 89 A. 1098. * * *." *Robey v. Broersma, supra,* p. 339.

For almost eighty years the Court of Appeals has affirmed and reaffirmed that a bill can be presented to the Governor after the Legislature has adjourned. *Lankford v. Somerset Co.,* 73 Md. 105 (1890); *Johnson v. Luers,* 129 Md. 521 (1916); *Robey v. Broersma, supra*; *Richards Furniture v. Board,* 233 Md. 249 (1963).

Furthermore, there is no time limitation after the Legislature has adjourned in which a bill must be presented to the Governor.* Article 41, Section 45 of the Code provides that "every bill, when passed by the General Assembly . . . shall, as soon thereafter as practicable . . . be presented to the Governor for his approval", but the Court of Appeals has held that the terms "as soon thereafter as practicable" are of a relative and dependent character and as such furnish no definite and fixed rule but are controlled by the circumstances of the case. *Lankford v. Somerset Co., supra,* pp. 113-114. The Court of Appeals has also taken note of the fact that since it is the practice of the Legislature to postpone the passage of so many bills until the concluding days and concluding hours of the session, many practical difficulties would be encountered if the Governor were required to take action in any specified time. In discussing what constitutes "presentation" to the Governor in *Richards Furniture v. Board, supra,* the Court said at pages 261-262:

> ". . . Such a presentation to the Governor for his signature is a formal act and anticipates that the bill will be sealed with the great seal and actually and formally 'presented' to the Governor for his signature by the Secretary of the Senate or Chief Clerk of the House, who in the presence of the Governor, shall make a memorandum thereon in writing of the day and hour of its presentation, and sign the same. The mere informal receipt by the Governor's office of a bill for other purposes is not a requirement of law, and carries with it no legal significance such as to require action by the Governor in any specified time. If this were not true, many practical difficulties would be encountered on such occasions as when several hundred bills passed by the General Assembly are delivered to the Governor before he has had time carefully to consider them and to have the Attorney General pass upon their validity. . . ."

As a practical matter, formal presentation to the Governor

would appear to occur at the time he signs the bill into law, at which time the Secretary of the Senate and/or the Chief Clerk of the House are present with him, and make the required memorandum notation indicating the day and hour of the presentation. Any delivery of a bill to the staff of the Governor prior to the time for signing under the dictum of the *Richards* case would appear to be of no legal significance.

In 21 Opinions of the Attorney General 277, Attorney General Herbert R. O'Conor advised Governor Harry W. Nice that "unless a bill, intended to take effect on June 1st, is approved by you on or before that date, it does not become a law, but must be treated as a nullity." He observed in his opinion that a careful search of the session acts disclosed only one case where a bill was approved subsequent to June 1, namely Chapter 718 of the Acts of 1920, which was approved on June 17, 1920. It does not appear that a judicial review of the validity of that act was ever instituted. Attorney General O'Conor concluded that this instance was not controlling, in light of the long standing practice of having bills definitely acted upon by the Governor before June 1st, when, under the constitutional provision, laws are to become effective, and that thousands of bills had been acted upon with this apparent limitation in the mind of the Governor.

Attorney General O'Conor's opinion was based principally upon the concurring opinion of Judge William S. Bryan in the case of *Lankford v. Somerset County, supra*, where the view was expressed that if there was any limitation on the time within which the Governor had to sign bills presented to him it might be inferred from Section 31 of Article III of the Constitution of Maryland, which provides that "[n]o law * * * shall take effect, until the first day of June, next after the session * * * unless it be otherwise expressly declared therein." Judge Bryan reasoned that since the Legislature was obliged to adjourn about two months before the first of June the purpose of this clause was to postpone the commencement of the law to a later day in order that it would be known to the public, stating

that the mischief to be remedied was that a statute would go into effect before it became known to the public. Judge Bryan then stated:

> "No one imagined that their operation would ever be delayed later than the first of June; and therefore no notice was taken of the probability or possibility of such an occurrence. The evil was that they went into effect too soon. I think therefore that the time, when an Act of Assembly becomes a perfect and complete law, ought never to be postponed later than the first of June, unless a later day is expressly named therein. Consequently the Governor must sign it before that day if he intends to approve it." *Lankford v. Somerset County, supra,* 123.

In 1943, when Mr. O'Conor was Governor, and seven years after his opinion in 21 Opinions of the Attorney General 277, the Court of Appeals held in *Robey v. Broersma,* 181 Md. 325, that a statute, requiring payment of license fees by persons, firms or corporations offering merchandise for sale through coin operated vending machines, which by the terms thereof was to become effective May 1, 1941, became effective from the date the Governor affixed his signature even though that did not occur until May 26, 1941. While this opinion does not contradict Attorney General O'Conor's conclusion that a bill must be signed before June 1, it does dispel any doubt that a bill may be signed by the Governor after the date on which it is intended to go into effect. Judge Marbury for the Court stated in *Robey* that there was no constitutional or statutory limit within which a bill must be presented to the Governor, and that it was a practical question depending for its answer in each case upon the circumstances of that particular case. The *Robey* case was one of first impression in this State and probably one of first impression in this country (See 146 A.L.R. 693) and our Court of Appeals has continued to cite it with apparent approval. Its most recent citation was in 1963 in the case of *Richards Furniture v. Board, supra.*

We do not read *Robey* to contradict either the opinion of Attorney General O'Conor or the concurring opinion of Judge Bryan in *Lankford*. It must be remembered that *Robey* was concerned with an emergency bill to be effective May 1, that was in fact signed by the Governor on May 26. The Court of Appeals in *Robey*, therefore, was not dealing with a measure signed into law after June 1, so its opinion in that case is not in conflict with the reasoning of Judge Bryan and the conclusion of Attorney General O'Conor that a law must be signed prior to June 1.

Although the Court of Appeals has not spoken on this specific ground, we believe there is another compelling reason why a bill must be signed into law before June 1 in addition to the one advanced by Attorney General O'Conor. Article XVI, Section 2 of the Constitution provides that a law may be suspended by referendum "[i]f 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. . . ." Obviously, if the Governor were to sign a bill after the first day of June, that action would in effect nullify the constitutional right of referendum granted to the citizenry. We believe that if the Court of Appeals was presented with this particular question it would not permit the referendum device to be thus circumvented and would probably hold that the bill did not become law because it was not timely signed by the Governor.

Notwithstanding the fact, therefore, that there is no constitutional or statutory limitation setting out the time within which you must sign the bills passed by the 1969 General Assembly, we believe that to insure against the possibility of judicial invalidation, all such bills should be signed prior to the first day of June 1969.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

JON F. OSTER *Asst. Attorney General.*

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* Rule 59 of the Rules of the Senate and Rule 59 of the Rules of

the House of Delegates provide that bills may be presented to the Governor after the adjournment of the General Assembly no later than the first day of May. The question arises whether the validity of a bill could be assailed if it was presented to the Governor at a later date. It appears well established in Maryland, as well as elsewhere, that the non-observance by a House of one of its own rules in no way conflicts with the constitutional provisions or requirements in relation to the passage of laws and the courts will not inquire whether such rules have been observed in the passage of a law. *Baltimore Fid. Warehouse Co. v. Canton Lumber Co.*, 118 Md. 135, 149-150. See also *Richards Furniture v. Board*, 233 Md. 249, 261; Everstine, "The Legislative Process in Maryland", 10 Md. L. Rev. 91, 94-95; Sutherland, Statutory Construction (3rd Ed. Horack), Vol. 1, Sec. 604; 82 C.J.S., Statutes, Sec. 36, p. 59-60.

GOVERNOR—CONSTITUTION ARTICLE II, SECTION 20—FORFEITURES—GOVERNOR MAY DIRECT THE RETURN OF ALCOHOLIC BEVERAGES FORFEITED UNDER THE PROVISIONS OF ALCOHOLIC BEVERAGE LAWS.

August 6, 1969.

Honorable Marvin Mandel.

You have asked whether you are empowered to return to residents of Maryland alcoholic beverages which were purchased by them in United States possessions overseas and foreign countries and which were confiscated from them upon their return to Maryland by the Alcoholic Beverage Division of the Comptroller of the Treasury. The reason for the confiscation was that the importation of the alcoholic beverages exceeded the limitation provided in Article 2B, Section 3 (a) (2) (ii) of the Annotated Code of Maryland. Article 2B, Section 3 (f) (3) sets forth the procedure for the return of confiscated property to one claiming ownership or legal title, as follows:

> "Claim for Return of Confiscated Property. Any lawful lien holder, or other person showing a legal right, title or interest in confiscated property not destroyed as provided in this section, may within thirty (30) days of confiscation or, if the confiscated property is a vehicle, vessel or aircraft, within thirty (30) days of publication of notice, file a claim protesting such seizure with the Comptroller. When such a claim and protest is filed the circuit court for the county or City of Baltimore wherein the property was confiscated shall proceed in rem to hear and determine the question of forfeiture."

Thus the Legislature has specifically provided by statute that where a claim protesting the seizure is filed within 30 days, the circuit courts of the State shall determine questions of forfeiture under the alcoholic beverage laws

of this State. If a claim to the seized property is not filed within 30 days, then the confiscated property is deemed forfeited. See Section 3 (f) (1).

We do not read subsection 3 (f) (3) as in any way limiting the power of the Governor to remit fines or forfeitures first, because 3 (f) (3) simply provides a judicial review to determine whether there is to be a forfeiture after the seizure should the aggrieved party desire to contest the seizure and second, because we do not conceive that the Legislature can in any way limit the constitutional powers or prerogatives of the Governor.

Article II, Section 20, provides as follows:

> "He shall have power to grant reprieves and pardons, except in cases of impeachment, and in cases, in which he is prohibited by other Articles of this Constitution; and to remit fines and forfeitures for offences against the State; but shall not remit the principal or interest of any debt due the State, except, in cases of fines and forfeitures; and before granting a *nolle prosequi,* or pardon, he shall give notice, in one or more newspapers, of the application made for it, and of the day on, or after which, his decision will be given; and in every case, in which he exercises this power, he shall report to either Branch of the Legislature, whenever required, the petitions, recommendations and reasons, which influenced his decision."

The pertinent part of that section is the clause that provides that he "shall have power . . . to remit fines and forfeitures for offences against the State . . .". There can be little question but that the forfeiture here resulted from an "offence" against the State, for the seizure and the subsequent forfeiture occurred because of the violation of the provisions of Section 3 of Article 2B, to wit, the bringing of untaxed alcoholic beverages into the State of Maryland. Webster defines forfeit as follows: "to lose or lose the right to by some error, offense, or crime".

It would seem clear, therefore, that the forfeiture here in question falls within the provisions of Section 20 of Article II. Although we have found no decision by the Court of Appeals on this question, both Attorney General Herbert R. O'Conor and Attorney General Hall Hammond expressed the opinion that the authority conferred upon the Governor to remit fines or forfeitures is unrestricted and there is no limitation upon the exercise of his discretion. The unequivocal language of this provision, they have both said, is the highest authority in our State on the subject. See 20 Opinions of the Attorney General 365, 366, and 32 Opinions of the Attorney General 179, 180-181.

We concur with the view that Article II, Section 20 of the Constitution is the highest authority on the subject and gives unrestricted power to the Governor to remit any and all forfeitures. Accordingly, if you believe that equity and justice require the return of the property in question, you may direct the Alcoholic Beverage Division of the Comptroller of the Treasury to return any alcoholic beverages which have been confiscated and forfeited under the provisions of Article 2B.

FRANCIS B. BURCH, *Attorney General.*

JON F. OSTER, *Asst. Attorney General.*

HEALTH, STATE DEPARTMENT OF

UNLICENSED LABORATORIES—NO RIGHT TO INSPECT WITHOUT A SEARCH WARRANT.

January 24, 1969.

Dr. Robert L. Cavenaugh, Director.

This office acknowledges receipt of your recent inquiry wherein you pose a question pertinent to proposed revisions to "Regulations Governing Minimum Standards and Qualifications for Clinical Laboratories", heretofore adopted by the State Board of Health and Mental Hygiene, effective October 1, 1966.

Specifically, you refer us to the following proposed revision of those regulations, to be cited as paragraph 0301.d:

> "The Director, Bureau of Laboratories, Maryland State Department of Health, is responsible for:
>
> d. Inquiry as to the applicability of these regulations to unregistered activities concerning which there is reasonable information that these regulations should apply."

In your letter to us, you ask whether or not the above proposed regulatory provision requires the use of a search warrant to permit your Bureau to inquire into clandestine unregistered laboratories.

Article 43, Section 34 (a), Annotated Code of Maryland, 1968 Cumulative Supplement, requires the State Board of Health and Mental Hygiene to establish minimum standards and qualifications for laboratories in this State which make examinations in connection with the diagnosis and control of human diseases. No person, partnership, association or corporation may operate a laboratory without first obtaining a permit from the State. As the technical arm of the Board, the Bureau of Laboratories, State Department of Health, performs such requisite duties as promulgating

pertinent rules and regulations, issuing the required permits, and conducting periodic inspection of all licensed laboratories.

Under such a licensing statute, your right to enter and inspect such licensed premises at reasonable times is explicit, and there should be no question that it is consistent with the legislative intent to assure to the citizens of this State safe and reliable laboratory services. Such investigations are necessary in a modern urban civilization so as to prevent, for the benefit of the whole community, health hazards and unsafe conditions likely to cause sickness, disease, and other casualties.

However, it is our opinion that you may not enter, and conduct an inspection of, suspected clandestine unregistered laboratories without first obtaining a search warrant, unless the consent of the lawful occupant or owner is first obtained.

Notwithstanding the provisions of Article 43, Section 36 (b), which provides for a right of entry onto a place of business at reasonable hours, it would appear that to do so in a suspected clandestine, unregistered laboratory, without first obtaining a search warrant, as aforesaid, would flaunt the holding of *See v. City of Seattle* (1967) 387 U. S. 541, and the philosophy of *Camara v. City and County of San Francisco* (1967) 387 U. S. 523.

We do not believe that a reviewing court would sustain such a warrantless, nonconsentive search.

FRANCIS B. BURCH, *Attorney General.*

DONALD H. NOREN, *Spec. Asst. Attorney General.*

HEALTH, STATE DEPARTMENT OF—THE AMENDMENT OF SECTION 1 (D) OF ARTICLE 43 OF THE MARYLAND CODE BY CHAPTER 77 OF THE LAWS OF 1969 WITHDRAWS THE DEPUTY AND ASSISTANT COMMISSIONERS OF HEALTH FROM THE COVERAGE OF THE MERIT SYSTEM LAWS AS OF JULY 1, 1969—THE TERM "ASSISTANT COMMISSIONER" AS USED IN SAID AMENDED SECTION IS INTENDED TO DESIGNATE EACH OF THE FOUR PRINCIPAL PROGRAM DIRECTORS OF THE STATE DEPARTMENT OF HEALTH WHO UTILIZE THE INTERNAL TITLE "ASSISTANT COMMISSIONER".

May 14, 1969.

Mr. Henry Bosz.

You have forwarded a letter from William J. Peeples, Commissioner of the Department of Health, requesting our opinion as to the effect of House Bill 855 and Senate Bill 404 upon the employment status under the Merit System of the Deputy and Assistant Commissioners of Health.

House Bill 855 was signed by the Governor on April 23, 1969, is now Chapter 156 of the Laws of 1969, and is effective July 1, 1969. It amends various provisions of Article 41 of the Code and sets guidelines for the establishing of a limited number of principal departments within the executive branch of the State, each of which departments is to have responsibility for a broad functional area of State activity. Health and Mental Hygiene is specified as one of the broad functional areas that shall comprise a principal department.

Senate Bill 404 was signed by the Governor on April 9, 1969, is now Chapter 77 of the Laws of 1969, and is similarly effective on July 1 of this year. This bill repeals and re-enacts certain provisions and adds new sections to both Article 41 and Article 43 of the Maryland Code, and, in general, creates and structures the new Department of Health and Mental Hygiene as a principal department of the State. It provides for the appointment of a Secretary

of Health and Mental Hygiene to serve at the pleasure of the Governor and further provides that a State Department of Health shall be included within the Department of Health and Mental Hygiene.

Section 1 (d) of Article 43 of the Code is amended by this bill to provide for appointment by the Governor, upon the recommendation of the Secretary of Health and Mental Hygiene, of a Commissioner of the State Department of Health. This section further provides:

> "Deputy and Assistant Commissioners, as may be provided for in the budget, shall be appointed by the Secretary, with the advice of the Commissioner, and shall serve at the pleasure of the Secretary."

Currently both the 1968-69 and 1969-70 budgets provide for a Deputy Commisssioner of Health as does the Merit System classification list of the Commissioner of Personnel. The first question posed by Dr. Peeples' letter is whether, as of July 1, 1969, the effect of the above mentioned legislation is to eliminate the Merit System status of the Deputy Commissioner.

The same question is asked with respect to Assistant Commissioners of Health; however, another question concerning the Legislative intent in Senate Bill 404 must be answered first before the Merit System status of Assistant Commissioners need be determined. Neither the 1968-69 or 1969-70 budget nor the records of the Commissioner of Personnel reflect a title classification of "Assistant Commissioner of Health". This title, however, has been used within the Department of Health to designate four principal program directors, *i.e.*, the Director of Environmental Health, the Director of Administrative Services, the Director of Community Health Services, and the Director of Medical Care Services. Furthermore, on the organizational chart of the Department of Health there is no intervening position between the Deputy Director and the four named program directors. With respect to Assistant Commissioners, therefore, the first question posed is whether the Legislature

intended to cover the four above named program directors when it used the term "Assistant Commissioners" in Section 1 (d) of Article 43.

We are of the view that the Legislature did intend to designate the four named program directors of the Department of Health when it used the term "Assistant Commissioners" in its amendment of Section 1 (d) of Article 43 contained in Senate Bill 404. The statute makes little sense unless so construed. The four named program directors constitute the next echelon level after the Deputy in the organizational structure of the Department. They carry the internal title of "Assistant Commissioners". To construe the term "Assistant Commissioners" not to cover them is to find that the statute provides for appointments to nonexistent positions for which there is no logical need under the current organizational structure of the Department of Health. Statutes should not be construed to lead to an absurdity. *Gatewood v. State*, 244 Md. 609 (1966); *Sanza v. Md. Board of Censors*, 245 Md. 319 (1967).

Moreover, it is our opinion that as of July 1, 1969, the Deputy and Assistant Commissioners of Health are no longer under the Merit System but rather serve at the pleasure of the Secretary of Health and Mental Hygiene. Our opinion in this respect is based upon the language of Section 1 (d) which appears to us clear and explicit in its meaning.

House Bill 855 creates a new Section 11A of Article 41 which provides that "The heads of departments and offices, not recognized by law as principal departments, who are in the classified service or who hold their positions other than at the Governor's pleasure shall continue such status from the time their respective departments or offices are placed in a principal department, *until and unless such status is specifically changed by law*". (emphasis supplied) Assuming that the Deputy and four program directors of the Department of Health were the heads of departments or offices within the meaning of Section 11A, it seems apparent that Section 1 (d) of Article 43 has specifically changed their status, effective July 1, 1969. And, although Section 1 of Article 64A defines the classified service to

include all offices of profit or trust of any department, commission, board, or institution, other than those in the Military Forces and those enumerated in Section 3 of Article 64A, it is clear that this earlier statute must be found to be amended by implication by the clear expression of legislative intent contained in Section 1 (d) of Article 43. See *Bell v. State*, 236 Md. 356 (1964).

In summary, therefore, it is our opinion that the effect of House Bill 855 and Senate Bill 404, now respectively Chapter 156 and Chapter 77 of the Laws of 1969, is to remove both the present Deputy Commissioner of Health as well as the four program directors of the Department of Health who carry the internal title "Assistant Commissioner" from Merit System classification as of July 1, 1969, and place their appointment and removal at the pleasure of the Secretary of the newly formed Department of Health and Mental Hygiene.

FRANCIS B. BURCH, *Attorney General.*

ANTHONY M. CAREY, *Asst. Attorney General.*

HEALTH AND MENTAL HYGIENE, DEPARTMENT OF

SECRETARY OF HEALTH AND MENTAL HYGIENE—AUTHORITY TO TRANSFER FUNCTIONS, FUNDS, STAFF—AUTHORITY TO CONSOLIDATE SERVICES OF AGENCIES, ETC., WITHIN HIS JURISDICTION.

October 2, 1969.

Mr. Philip Greene.

This is to confirm your verbal inquiry to our office asking (1) whether the Secretary of Health and Mental Hygiene may transfer and reassign functions of the State Department of Juvenile Services in the same manner as he can the respective Departments of Health and Mental Hygiene, and (2) whether the Secretary of Health and Mental Hygiene may merge the supporting services, such as space, secretarial help, etc., of the various boards and commissions under his jurisdiction.

Article 41, Section 206, Annotated Code of Maryland, 1957 Edition (1965 Replacement Volume), was, by Chapter 77, Laws of Maryland, 1969, repealed and a new Section 206 enacted to stand in the place and stead of the section so repealed.

Among other things, the newly enacted statutory provisions, effective July 1, 1969, provide that the Secretary of Health and Mental Hygiene shall be responsible for the coordination and direction of all planning facilities within his Department as well as responsibility for budgeting of all of his office, as well as all departments and agencies within his jurisdiction. In addition, the Secretary shall keep fully apprised of plans, proposals and projects of those various departments and agencies and shall have the power to approve, disapprove or modify any plan, proposal or project of any such instrumentality. However, Section 206 (f) provides that the Secretary's power over plans, proposals, and projects does not include the power to dis-

approve or modify decisions or determinations rendered by the departments, agencies or units (except the Department of Health or Department of Mental Hygiene) pursuant to authority specifically delegated to them by law.

Section 206 (e) provides that the Secretary shall have such authority and powers over those enumerated agencies and departments as are or shall be granted by law. All authority and powers not so granted to the Secretary are reserved to the Departments or other units free of the Secretary's control.

The Legislature has specifically provided in Section 206 (i) for the right and authority of the Secretary to transfer functions, staff, and funds from the Department of Health or Department of Mental Hygiene to the Office of the Secretary.

It is clearly evident, however, that had the Legislature intended the above stated right and authority to be also granted to the Secretary for all other departments, agencies and commissions subject to his jurisdiction, it would have so provided. This it did not do. On the contrary, the fact that the Legislature delineated certain other general powers of the Secretary over such departments as the Department of Juvenile Services, as is more fully set forth hereinbelow, is further proof that the legislative intent was that such general powers not be used in the same unrestricted sense as the particular powers enumerated in Section 206 (i), aforesaid. See *20 MLE, Statutes, Section 88*; *Smith v. Higinbothom,* 187 Md. 115; *Delbrook Homes, Inc. v. Mayors,* 234, A. 2d 880; *Atlantic, Gulf and Pacific Company v. State Department of Assessments and Taxation,* 249 A. 2d 180.

We also point out that Sections 1, 2, 3 and 5 (a) of Article 52A of the Annotated Code of Maryland were also repealed and re-enacted by Chapter 77, aforesaid, with amendments, creating and establishing, as part of the Department of Health and Mental Hygiene, the State Department of Juvenile Services with powers, duties, and functions as provided in the newly enacted law.

Section 5 (a) thereof provides that the said Department shall be the central, coordinating administrative agency for juvenile investigation, probation and after-care services and for State juvenile, diagnostic training, detention, and rehabilitation institutions as the law provides. Newly added language to this section, also effective July 1, 1969, requires that the said Department of Juvenile Services shall carry out the policies of the Secretary of Health and Mental Hygiene with respect to these matters.

Thus, based upon the aforegoing, together with a detailed reading of Chapter 77, Laws of Maryland, 1969, it is our opinion that the Secretary of Health and Mental Hygiene may not transfer and reassign functions, staff and funds of the State Department of Juvenile Services, but that the Secretary:

1. Is responsible for the budget, and related policies, of the State Department of Juvenile Services.
2. Shall cause all plans, proposals and projects of the State Department of Juvenile Services to be forwarded to his office for review and approval, disapproval, or modification.
3. Shall set policy with regard to all matters involving juvenile, diagnostic, training, detention and rehabilitation institutions within the authority of the State Department of Juvenile Services to coordinate and administer.
4. Shall require at least an annual report to be filed with his office by the Director, State Department of Juvenile Services.

As to your second inquiry, it is equally evident that a primary objective of the Legislature was that the creation of the State Department of Health and Mental Hygiene, with an Office of the Secretary, be effected so as to consolidate a host of ministerial tasks, job assignments, office space, and other support services. Such consolidation is certainly in the public interest and, in this connection, the Secretary has been given a mandate not only to coordinate

and direct the planning facilities of his offices pursuant to Section 206 (f), but also to exercise budget control over all departments and other agencies within his jurisdiction, pursuant to Section 206 (g). Other general powers contained in the various related provisions of Section 206 express the manifest intent that the Secretary exercise such granted authority as will benefit the citizens of Maryland. Moreover, the many boards, agencies and commissions within the Secretary's sphere of jurisdiction, as are more fully enumerated in Chapter 77, as aforesaid, are given discretion to fix the times and places of their meetings, but remain, at the same time, subject to the Secretary's authority as to their activities. It follows, therefore, that the Secretary would greatly serve the public interest by effectuating the consolidation of those similar support services to which you have referred us.

FRANCIS B. BURCH, *Attorney General.*

DONALD H. NOREN, *Spec. Asst. Attorney General.*

HEALTH AND HIGHER EDUCATION FACILITIES AUTHORITY, MARYLAND

PARTICIPATION BY CERTAIN CHURCH-RELATED INSTITUTIONS IS PERMISSIBLE UNDER THE FIRST AMENDMENT.

October 6, 1969.

Honorable Blair Lee III.

You have asked our opinion as to the legal sufficiency of a proposed legislative bill creating the Maryland Health and Higher Education Facilities Authority ("the Authority"). Specifically, you wish to know the eligibility of church-related institutions as participants under this Act.

The stated purpose of the Act is to "provide a measure of assistance and an alternative method to enable [nonprofit] institutions for higher education and [nonprofit] hospitals in the State to provide the facilities and structures which are needed" for the expansion of such institutions, which purposes are declared to be "to the public benefit". To accomplish these purposes, the Authority is created as a "body politic and corporate", a "public instrumentality" and an "agency of the State". The members of the Authority are composed of the Comptroller and eight other residents of the State. The Authority is empowered to receive grants, gifts or loans from any source, public or private. In turn, the Authority is empowered to lend money to institutions for higher education and hospitals for construction of needed facilities. Alternatively, the Authority can issue revenue bonds, the proceeds of which are to be used for the construction of such facilities.

Since the statute expressly designates the Authority as a public corporation, its activities would presumably constitute State action. Therefore, the question arises, as stated in your letter, whether church-related institutions can be recipients of the benefits of this Act.

In *Truitt v. Board of Public Works*, 243 Md. 375 (1966),

the Court of Appeals upheld the constitutionality and validity of the Hospital Construction Loan Act of 1964, which Act authorized the loan of $50,000,000 by the State to voluntary, nonprofit hospitals. Three intended beneficiaries of that statute were church-affiliated hospitals. In holding that these church-connected hospitals could not be excluded as beneficiaries of the loans, the Court stated as follows (243 Md. at p. 404) :

> ". . . [W]e deem it of vital significance that admittedly each of the three hospitals here involved for some time has had a completely nonsectarian policy as to the admission and treatment of patients and the hiring of personnel, and that the remaining vestige of recording the religious affiliation or preference of patients on admission is for the convenience of the patients and their families, and is without significance to the hospitals. It is also agreed, as the record makes clear, that no attempt is made in any of the hospitals to promote a particular religious belief or religious belief in general among patients or to influence their religious beliefs in any manner."

The Court further noted that "the purposes and activities of the three hospitals are secular in nature", even though each hospital maintained a chapel on the premises; 243 Md. at p. 405.

Without further elaborating on that decision, it is clear that, at the very least, the proposed legislation may properly extend to any church-related hospital that is no more sectarian in nature than the hospitals approved in the *Truitt* decision.

In *Horace Mann League v. Board*, 242 Md. 645 (1966), *cert. den.* 17 L. Ed. 2d 195 [decided 22 days before the *Truitt* case], the Court of Appeals considered the validity of four separate statutes, each of which provided for a matching grant by the State to a particular church-affiliated college. The Court proceeded to examine the stated

purpose of each college, the college personnel, the college's relationship with religious organizations, the place of religion in the college's program, the result of the college program, and the work and image of the college in the community. The Court concluded that one college was not "sectarian in a legal sense under the First Amendment or to a degree that rendered the grant invalid thereunder"; 242 Md. at p. 675. The Court, however, concluded that the other three colleges were sectarian in a legal sense under the First Amendment and, therefore, could not constitutionally receive the grants provided in those statutes.

It would serve no useful purpose to set forth the criteria distinguishing the sectarian from the nonsectarian institutions. As was said in *Horace Mann* (242 Md. at p. 678):

> ". . . Whether or not an educational institution is sectarian in such a legal sense is a rather elusive matter, being somewhat ephemeral in nature. Hence we have deliberately made no attempt to enunciate a hard, fast and intractable rule in regard thereto, preferring, as indicated above, to decide each case upon the totality of its attendant circumstances."

As can be seen, the *Horace Mann* case precluded State grants to colleges that were "sectarian in a legal sense under the First Amendment". It may be that institutions for higher education that are "sectarian in a legal sense under the First Amendment" would also be barred from the benefits of the proposed legislation. However, it should be noted that cogent arguments could be made for the proposition that even sectarian institutions for higher education can participate in the proposed legislation. See, for example, the statement in the *Truitt* opinion that "if the Act prohibited loans to church-affiliated hospitals, serious constitutional questions would arise"; 243 Md. at p. 410. Moreover, there may be a significant distinction between the framework of the legislation in the *Horace Mann* case, which involved four separate statutes, and the legislation in

the *Truitt* case, which involved one encompassing statute, which is akin to the legislation now under consideration.

We wish to make it clear that we are not foreclosing the possibility that sectarian hospitals and institutions for higher education can participate in the benefits of this legislation. This area of constitutional law is in a state of flux at the present time, and there are several significant cases now pending in the courts which may bear definitively on the issue before us. For example, the Supreme Court of the United States is scheduled to hear, within the next few months, the case of *Walz v. New York City Tax Comm.*, No. 139, 1969 Term, which involves the validity of tax exemptions to religious organizations. Moreover, a three-judge Federal court has been convened to hear a case contesting the expenditure of Federal funds under the Elementary and Secondary Education Act of 1965 for purposes of financing instruction in and the purchase of textbooks for the use of parochial schools. See *Flast v. Cohen*, 392 U. S. 83 (1968), remanding the case to the United States District Court for the Southern District of New York for a hearing on the merits.

We conclude, therefore, that the proposed legislation is constitutional at least to the extent permitted by the *Horace Mann* and *Truitt* cases. Whether the legislation can also be applied to sectarian institutions will have to necessarily await a more definitive statement by the Supreme Court of the United States or the institution of a test case in the courts of Maryland, which will assuredly be required by bond counsel before the issuance of any revenue bonds on account of a sectarian institution.

FRANCIS B. BURCH, *Attorney General.*

MARTIN B. GREENFELD, *Asst. Attorney General.*

HUMAN RELATIONS, COMMISSION ON

RACIAL DESIGNATIONS—COMMISSIONER OF MOTOR VEHICLES AND CLERKS OF COURT ARE REQUIRED BY MARYLAND STATUTE TO ASCERTAIN RACE OR COLOR OF APPLICANT FOR DRIVER'S OR MARRIAGE LICENSES—QUESTION AS TO RACE OR COLOR WOULD APPEAR TO BE CONSTITUTIONAL WHERE INFORMATION REQUESTED IS SOLELY FOR PURPOSE OF PUBLIC STATISTICS, OR OTHER VALID PUBLIC PURPOSES—QUESTION AS TO COLOR MAY BE VALIDLY ANSWERED "WHITE", "BLACK", "RED", "YELLOW", OR "COLORED"—QUESTION AS TO RACE MAY BE VALIDLY ANSWERED "NEGROID," "MONGOLOID", OR "CAUCASOID".

July 24, 1969.

William H. Adkins, II, Chairman.

Prior to his resignation, former Executive Secretary Roscoe R. Nix requested our opinion as to whether racial designations on marriage and drivers' licenses are legal in Maryland. We are pleased to respond to that inquiry.

Article 66½, Section 86 (d) of the Annotated Code of Maryland (1967 Repl. Vol.) provides, in pertinent part, that an application for an operator's license ". . . shall require the full name, residence, address, race, color, sex, height, weight, and date of birth of the applicant . . .". Similarly, Article 62, Section 4 of the Code (1968 Repl. Vol.), relating to marriage licenses, provides, in pertinent part:

> "The license required by this article shall be in the following form, to wit: . . . . You are hereby authorized to join together in the holy state of matrimony according to the rules and ceremonies of your church, society or religious sect and the laws of this State, or according to the laws of this State, A. B., whose place of residence is ————; whose age is————; color————; and who is (state here whether single, widower,

> or divorced, as the case may be), and C.D, whose place of residence is————; color————; and who is (state here whether single, widow, or divorced, as the case may be), and who are ———— (state here also whether the contracting parties are in any way related). Given under my hand and seal of the Circuit Court for———— County (or the Court of Common Pleas of Baltimore City) at————this————day of———— A.D. one thousand nine hundred and————."

The short answer to Mr. Nix's inquiry, therefore, would be that racial designations on drivers' licenses and marriage licenses are legal, as they are required by statutes duly enacted by the General Assembly of Maryland, and until such time as those statutes might be repealed, or held by a court of competent jurisdiction to be unconstitutional, the clerks of the courts and the Commissioner of Motor Vehicles are required to elicit such information from applicants for such licenses.

It might be asked further, however, whether these practices and the statutes requiring them are constitutional. This is a question to which we are unable to supply a categorical answer. The Maryland Court of Appeals, in *First Continental v. Director*, 229 Md. 293, has held that it is not the function of the Attorney General to declare a statute unconstitutional, as this is a function of the courts alone. We do advise you, however, that there is a substantial body of law which, while fully recognizing the unconstitutionality of racial discrimination or differentiation generally, still permits designations as to race and color on official records. In *McLaughlin v. Florida*, 13 L. Ed. 2d 222, the Supreme Court held invalid a Florida statute making it a crime for a white person and a Negro of the opposite sex, not married to each other, to habitually live in and occupy the same room. In a concuring opinion in that case, Mr. Justice Stewart noted, at 232:

> "There might be limited room under the Equal Protection Clause for a civil law requiring the

> keeping of racially segregated public records for statistical or other valid public purposes. Cf. *Tancil v. Woolls,* 379 U. S. 19, 13 L. Ed. 2d 91, 85 S. Ct. 157."

The United States District Court for the Eastern District of Virginia, in *Hamm v. Virginia State Board of Elections,* 230 F. Supp. 156, held that Virginia constitutional and statutory provisions requiring the separation of white and colored on poll tax, residence-certificate and registration lists, and on assessment rolls, were invalid under the Equal Protection Clause. In that case the Court noted, however, at 158:

> "Of course, the designation of race, just as sex or religious denomination, may in certain records serve a useful purpose, and the procurement and compilation of such information by State authorities cannot be out-lawed per se. For example, the securing and chronicling of racial data for identification or statistical use violates no constitutional privilege. If the purpose is legitimate, the reason justifiable, then no infringement results. The infirmity of the provisions just mentioned lies in their mandate of *separation* of names by race."

It could very well be that a reviewing court, contemplating the statutes requiring racial designations on drivers' licenses and/or marriage licenses in Maryland, could find such information is validly required for statistical or identification purposes, and, therefore, not violative of any constitutional provisions. If it could be shown to the court, however, that the inclusion of racial designations on such licenses acted, in any way, to degrade a member of any race, or cause a distinction in the treatment of persons solely on the basis of their color, then such a court would, in all probability, strike down these statutes, as offending the Fourteenth Amendment to the Federal Constitution.

We have also been asked if questions relating to race or color, where required, must be answered as either "white",

or "colored". Please be advised that we are aware of no law requiring such restricted answers to the question of race or color.

In our view a validly posed question as to color may validly be answered by "white", "black", "red", "yellow", or "colored", as the applicant may choose. Similarly, valid questions as to race may, in our opinion, be validly answered with a response of "Negroid", "Mongoloid", or "Caucasoid", as the case may be.

I hope that this letter sufficiently responds to the questions posed by Mr. Nix.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

INDUSTRIAL DEVELOPMENT FINANCING AUTHORITY, MARYLAND

MAY GUARANTEE A MORTGAGE ON A PROJECT PREVIOUSLY CONSTRUCTED UNDER CONVENTIONAL FINANCING, EVEN THOUGH COUNTY OR MUNICIPALITY WOULD PURCHASE THE PROJECT FROM THE SAME INDUSTRIAL TENANT TO WHOM THE LEASE WOULD BE MADE BY THE COUNTY—MIDFA FINANCING APPLICABLE EVEN IF COUNTY OR MUNICIPALITY DOES NOT CONSTRUCT OR MAKE IMPROVEMENTS TO THE PROJECT AFTER PURCHASE.

October 15, 1969.

Mr. Leonard A. A. Siems, Chairman.

We are in receipt of your letter of September 24, 1969, in which you raised the question of whether a proposed financing arrangement would conform with the Maryland Industrial Development Authority Act, Article 41, Sections 266J through 266CC of the Annotated Code of Maryland (hereinafter referred to as the "Act").

As you are aware, a transaction involving mortgage insurance by the Maryland Industrial Development Financing Authority (MIDFA) usually proceeds along the following lines. An industrial tenant and a county (or municipality) enter into an agreement, as evidenced by a letter of intent from the industrial tenant to the county and a resolution by the county accepting the terms and conditions outlined in the letter of intent, whereby the county will acquire or construct an industrial project and lease such project to the industrial tenant. The acquisition or construction of the industrial project by the county is financed by a loan obtained by the county from a banking institution. The repayment of the loan is secured by a mortgage on the industrial project and the payment of the mortgage to the bank by the county is insured or guaranteed by MIDFA. The proceeds to pay off the mortgage

are obtained by the county from rentals under the lease agreement with the industrial tenant.

At the present time MIDFA is interested in issuing mortgage insurance on an industrial project to be constructed in Allegany County. However, due to a delay in the sale of State bonds, the reserve fund of MIDFA is insufficient to permit it to insure the mortgage on the project in the usual manner at this time. Therefore the parties to the proposed transaction have suggested the following procedure. The industrial tenant will acquire the property on which the project is to be constructed and will obtain a construction loan from the bank in a conventional manner. At the completion of the construction of the project, if MIDFA has received sufficient funds to permit it to insure payment of a permanent mortgage, then the county will acquire the project and the transaction will proceed in the usual manner. On the other hand, if when construction has been completed MIDFA still does not have a sufficient reserve fund to insure payment of the mortgage, then the bank and the industrial tenant will place a permanent mortgage on the project, in a conventional manner, with the understanding that upon receipt of funds by MIDFA from the sale of State bonds or otherwise, the county will purchase the project from the industrial tenant, using funds obtained under a new mortgage with the bank, and the county will then lease the project back to the industrial tenant. The mortgage by the county, which would in effect be the second permanent mortgage to be placed upon the project, although there would only be one outstanding mortgage at any given time, would be guaranteed by MIDFA.

You have asked for our opinion as to whether the above arrangement would be in conformity with the Act. After reviewing the various sections of the Act, we believe that the proposed arrangement would be permissible. There is no provision in the Act which would prohibit the county from purchasing the industrial project from the same party to whom the lease was to be made by the county. Nor is there any provision in the Act which would make MIDFA

financing applicable only if the county were to construct the project or make improvement after the acquisition of the project by the county. Section 266T of the Act permits the Authority to insure mortgage payments on "any industrial project". Section 266W authorizes the county to borrow money "for the purpose of defraying the cost of acquiring an industrial project either by purchase or construction . . .". In defining what is meant by "industrial project", Section 266L3 of the Act includes "a *former* industrial or manufacturing plant for the acquisition, rehabilitation, *or* improvement of which a mortgage loan is sought from the Authority" (emphasis added). Considering these provisions collectively, it seems clear that the proposed transaction is within the scope of the Act.

It might be argued that the proposed transaction, while within the letter of the Act, nevertheless violates the spirit of the Act, on the basis that the county would not be constructing a new plant nor rehabilitating an existing plant, or on the basis that the tenant of the county would be the same party as previously owned and occupied the industrial project. However, we do not believe that these objections are of merit in the present case, since the entire arrangement with the tenant, the county, and the bank would have proceeded in the usual manner were it not for the delay in the sale of State bonds to give MIDFA a sufficient reserve so as to enable it to insure payment of the mortgage.

While we are of the opinion that the proposed transaction is compatible with the Act, we also believe that we should point out to you that the transaction as above outlined does not involve a situation whereby MIDFA would be insuring an existing mortgage between the county and the bank. Under the arrangement which you have presented, the county would not acquire the industrial project until such time as funds became available to MIDFA, and at that time the existing mortgage arrangements between the bank and the tenant would be completely superseded by a new mortgage, between the bank and the county, which would be insured by MIDFA. Thus MIDFA would

be insuring a mortgage at the time when the mortgage was made, rather than guaranteeing an existing mortgage. The county would not acquire the project nor be a party to any mortgage until the time of the MIDFA guaranty. It would be beyond the scope of the Act either for the county to enter into a mortgage on the project prior to the time of the MIDFA guaranty (such a transaction would involve problems of a pledge of full faith and credit by the county) or for MIDFA to insure payment of a mortgage which had been entered into by the county at a prior date. Our opinion is limited to the specific factual situation in question and should not be considered as a precedent as to any other situation.

FRANCIS B. BURCH, *Attorney General.*

WILBUR E. SIMMONS, JR., *Asst. Attorney General.*

INSURANCE

AUTHORITY OF INSURANCE COMMISSIONER TO EXAMINE THE AFFAIRS OF AN ORGANIZATION SEEKING TO BECOME A DOMESTIC INSURER PRIOR TO THE FILING OF AN APPLICATION FOR A CERTIFICATE OF AUTHORITY.

January 3, 1969.

Mr. Newton I. Steers, Jr.

In your recent letter you request our opinion with respect to the scope of Section 31 (4) of Article 48A of the Annotated Code of Maryland. Section 31 provides in pertinent part:

> "For the purpose of ascertaining compliance with this article, the Commissioner may as often as he deems advisable examine the accounts, records, documents, and transactions, pertaining to or affecting its insurance affairs or proposed insurance affairs, of:
>
> * * *
>
> "(4) Any person engaged in or proposing to be engaged in or assisting in the promotion or formation of a domestic insurer or insurance holding corporation, or corporation to finance a domestic insurer or the production of its business."

You particularly direct our attention to the question as to whether or not you would have the authority under this provision, or any other applicable provision, to investigate the integrity of the principals of an organization which had publicly announced that it intended to become engaged in an insurance business in the State of Maryland but had not yet applied for a certificate of authority.

There can be no doubt that the Insurance Code does authorize you to concern yourself with the integrity and managerial ability of the principals running an insurance

company. Section 51 specifically provides in pertinent part that:

> "The Commissioner shall not grant or continue authority to engage in the insurance business in this State of any insurer *when contrary to public interest or when the principal management personnel of which is found by him to be untrustworthy or not of good character, or so lacking in insurance company managerial experience as to make the proposed operation hazardous to the insurance-buying public* or to its stockholders; or which he has good reason to believe is affiliated directly or indirectly through ownership, control, management, reinsurance transactions or other insurance or business relations, with any person or persons whose business operations, to the detriment of insurers, stockholders, or creditors are or have been marked by manipulation of assets, account, or reinsurance or by bad faith." (Emphasis supplied)

See also Sections 250 and 251 of the Insurance Code. The issue then is not whether you have authority to refuse a certificate of authority to a company where the management personnel are not of good character, but whether you may exercise your authority to inquire into these matters prior to the time the company applies to the Insurance Department for a certificate of authority to engage in an insurance business. Of course no member of the insurance-buying public can be insured unless the insurer begins to write insurance business, which it cannot do until it has received a certificate of authority from you. However, as you point out in your letter, by the time the certificate of authority is applied for, a great deal of money may have been raised from members of the public which may be endangered if no certificate of authority is granted.

While it is true that the primary thrust of the Insurance Code is to regulate insurers actually doing business in the State or insurers actually applying for a certificate of

authority to do business in the State, we believe no such limitation is contained in Section 31 either explicitly or implicitly. Indeed, by implication, the provision authorizes appropriate investigation without regard to an application for a certificate of authority since it includes within the Insurance Commissioner's jurisdiction, an insurance holding corporation, a corporation formed to finance a domestic insurer, and a corporation formed to finance the production of a domestic insurer's business. These corporations are not required to obtain a certificate of authority prior to doing business in the State. In light of Section 31 (4) we do not believe that such inquiries are necessarily prohibited until the organization submits an application to you for a certificate of authority. On the other hand, we point out that your investigation of the proposed insurance affairs of an organization as defined in Section 31 (4) is for the purpose of ascertaining whether the organization would comply with the Insurance Code and therefore must be reasonably directed towards such a determination. Since responsible management is one of the requirements for compliance, reasonable inquiries in this area would be authorized.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Asst. Attorney General.*

INSURANCE—INVESTMENTS OF INSURERS—USE OF SUBSIDIARY—INVESTMENT BY TITLE INSURER IN REAL ESTATE.

March 21, 1969.

Mr. Newton I. Steers, Jr.

In your recent letter you request our advice concerning the investment restriction provisions of the Insurance Code, Article 48A (Sections 97 to 107). Specifically, you ask our opinion as to whether a Maryland title insurance company which formed a subsidiary corporation for the sole purpose of holding title to the real estate which the insurer used as its principal office may consider the full value of its investment in the subsidiary as an admitted asset. The only asset of the subsidiary is the real estate which it owns. You refer to the fact that Section 104 (8) (i) authorizes an insurer (other than a life insurer) to invest in real estate "in which it has its principal office or offices". However, as you also point out, this authorization is restricted by Section 101 (2) of the Insurance Code to 10% of such insurer's total admitted assets. You have asked us to assume that the value of the real estate held by the subsidiary exceeds 10% of the insurer's total admitted assets.

With that assumption, and also assuming that the real estate was acquired after the adoption of Section 101 (2), we are of the opinion that the acquisition of the real estate would be contrary to Section 101 (2) and the insurer would not be entitled to list as an admitted asset the value of the real estate owned by its subsidiary which exceeded 10% of the insurer's total admitted assets.

You inform us that the insurer contends that it is exempted from the provisions of Section 101 (2), as well as the provisions of Section 84 (5)*, by the provision contained in Section 106 (4), which states:

> ". . . Nothing contained in this paragraph shall be deemed to prevent an investment in the stock, bonds or other securities of a corporation organ-

> ized exclusively to hold and operate real estate acquired by such insurer in accordance with and subject to the provisions of Section 104 . . ."

This argument misconceives the meaning and purpose of the quoted language. In the first place, the proviso quoted above specifically refers to the fact that nothing contained in the "paragraph" is to be considered as preventing an investment in a subsidiary which holds and operates real estate acquired by the insurer. We believe it to be clear that the word "paragraph" specifically refers to that paragraph in Section 106 which is numbered as subsection (4). It does not purport to negate the restrictions contained in Sections 101 (2) and 84 (5).

Secondly, the obvious purpose of the proviso is to make sure that the broad prohibition against investing in subsidiaries contained in Section 106 is not applied where the subsidiary is formed to hold and operate real estate which is acquired by the insurer in accordance with the terms of Section 104. It certainly is not intended to broaden or negate investment restriction provisions contained in other sections of the Code.

Consequently, we advise you that to the extent the subsidiary's value exceeds 10% of the insurer's total admitted assets, it may not be treated as an admitted asset.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Asst. Attorney General.*

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* Section 84 (5) provides: "The stock of a subsidiary of an insurer shall be valued on the basis of the value of only such of the assets of such subsidiary as would constitute authorized investments for the insurer if acquired or held directly by the insurer."

INSURANCE—APPLICABILITY OF STATUTE OF LIMITATIONS TO REVOCATION OR SUSPENSION PROCEEDINGS—EFFECT OF PENDING CIVIL LITIGATION ON ADMINISTRATIVE ACTION.

April 1, 1969.

Mr. Newton I. Steers, Jr.

You have requested our advice regarding the applicability of Maryland's Statute of Limitations to the institution of suspension or revocation of license proceedings against an agent or broker under the provisions of Section 175 of Article 48A of the Insurance Code. Your letter points out that by virtue of certain facts disclosed in a trial in the Federal District Court, it has come to your attention that a licensed agent may have made serious misrepresentations with respect to insurance coverage. These misrepresentations would have occurred in June of 1963, although they were not discovered until several years thereafter. Maryland's general Statute of Limitations is contained in Section 11 of Article 57 of the Annotated Code, and provides that, "No prosecution or suit shall be commenced for any fine, penalty or forfeiture, or any misdemeanor, except those punished by confinement in the penitentiary, unless within one year from the time of the offense committed."

We are of the opinion that this section is not applicable to proceedings instituted under Section 175 of the Insurance Code. In an opinion dated November 8, 1951 (36 Opinions of the Attorney General 97) Attorney General Hammond, now Chief Judge of the Court of Appeals of Maryland, reviewed the applicability of Section 11 of Article 57 to proceedings instituted to suspend or revoke the alcoholic beverage license held by an individual. Judge Hammond noted that Section 60 of Article 2B conferred no property rights on the holder of the license and concluded that the Statute of Limitations furnished no restriction upon the administrator's powers to suspend or revoke the license. Judge Hammond stated:

> "If a criminal proceeding is not undertaken within the time prescribed by the statute of limitations, the accused may interpose the statute as a defense, but in our opinion a hearing before an administrative board to determine whether a license shall be revoked or suspended is neither a prosecution nor a suit within the meaning of the statute of limitations."

We think the same reasoning is applicable here. As Judge Hammond noted, many grounds for the suspension or revocation of a license relate to criminal acts which might not be determined until after the passage of more than one year from the time the act was alleged to have occurred.

In light of our position on this matter, you need not be concerned with what action causes the statute of limitation to begin to run and what actions might toll the statute.

You also request our advice as to whether or not Section 175B of the Insurance Code is applicable to wrongs committed before the effective date of Chapter 407 of the Acts of 1967 which added Section 175B to the Code. Section 175B authorizes you to order restitution in addition to, or in lieu of, any other penalty for violation of the Code. It seems to us that a statute is to be construed as prospective only, unless there is a specifically stated intention that it be made retrospective in effect. Therefore, we believe that Section 175B should only be invoked for violations occurring subsequent to its effective date. You also ask us whether the pendency of a civil action precludes the filing of charges by the Insurance Department. We know of no provision which requires the Department to stay the filing of charges merely because civil litigation raising the same or similar issues is pending. It may be, however, that the Department, in its discretion, might want to wait until the outcome of the civil litigation before pressing its charges.

Your final question raises the issue of the effect of a final court decision on subsequently taken administrative action. You ask whether or not the Insurance Department would be bound by a finding of a Court in a civil action

where the same parties were involved and where the same factual situation was presented. This question has been the subject of much discussion. We believe that the better view is that if *res judicata* would be applicable in a subsequent judicial proceeding, it would also be applicable in a subsequent administrative proceeding. As Professor Cooper noted in his text on "State Administrative Law", "The 'res' has been 'adjudicated' for administrative as well as judicial purposes." (II Cooper, "State Administrative Law," p. 528) As Professor Cooper also points out, "if the subsequent proceeding before the administrative agency raises an issue which is in some respects different from that on which the Court passes, so that different rights are involved, the agency is not bound by the prior judicial determination." (p. 528) In this regard, you also raise the question as to the use to be made of testimony taken under oath in a prior civil proceeding. While the giving of prior testimony does not preclude subsequent testimony on the same issue, the previous testimony may, if inconsistent with the subsequent testimony, be used for impeachment purposes and may also be the basis upon which a perjury indictment may be sought if the circumstances so warrant.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Asst. Attorney General.*

INSURANCE—UNFAIR DISCRIMINATION—REBATES—REDUCED PREMIUMS FOR INSURER'S AGENTS CONSTITUTING UNLAWFUL TRADE PRACTICES.

April 7, 1969.

Mr. Newton I. Steers, Jr.

In your recent letter you request our opinion as to whether a domestic life insurance company may provide for a premium discount for all life and accident and health insurance purchased by its employees on their own lives and on the lives of their immediate families. You inform us that the insurer intends to have the discount apply only as long as the employee remains in the employ of the insurer. If the employee terminates his employment with the insurer, the discount would terminate. You inform us also that the insurer intends to place the regular annual premium on the face of the policy and to add a specific endorsement granting the reduced rate. We are also informed that the insurer intends to pay no commissions on the sale of these policies.

As you point out in your letter, Sections 223 and 224 of Article 48A of the Insurance Code raise questions as to the legality of this proposed program. Section 223 provides:

> "(a) No person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.
>
> (b) No person shall make or permit any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of health insurance or in the benefits payable thereunder, or in any of the terms, or conditions of such contract, or in any other manner whatever."

Section 224 provides:

> "Except as otherwise expressly provided by law, no person shall knowingly permit or offer to make or make any contract of life insurance, life annuity or health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or pay or allow, or give or offer to pay, allow, or give, directly or indirectly as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any paid employment or contract for services of any kind, or any valuable consideration or inducement whatever not specified in the contract; or directly or indirectly give, or sell, or purchase or offer or agree to give, sell, purchase, or allow as inducement to such insurance or annuity or in connection therewith, and whether or not to be specified in the policy or contract, any agreement of any form or nature promising returns and profits, or any stocks, bonds, or other securities, or interest present or contingent therein or as measured thereby, of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued or to accrue thereon; or offer, promise or give anything of value whatsoever not specified in the contract."

It seems clear to us that such favored treatment for one segment of the insurer's insureds would be prohibited by the terms of Section 223. As noted in 12 Appleman, *Insurance Law and Practice,* § 7017 (1968 Pocket Part), "A company cannot sell insurance to its agents at a lower rate than that charged to other policyholders". See *Ostheimer v. United States,* 160 F. Supp. 669, aff'd. 264 F. 2d 789, *cert. den.* 361 U. S. 818. Section 224 also seems clearly to prohibit the type of practice which the insurer is proposing.

The insurer's argument apparently is that, while the

prohibitions contained in Sections 223 and 224 are broad, they were not intended to cover a plan which gives favored treatment to the insurer's employees as a class, since this is merely a form of compensation. While that argument is not without force, the rules of statutory construction serve to negate it.

Section 225 describes six specific types of transactions which are explicitly excluded from the prohibitions contained in Sections 223 and 224, none of which is in any way related to this proposed program. The specification in a statute of exceptions to its operation tends to exclude other exceptions. 2 Sutherland, *Statutory Construction* (Third Ed.), Section 4915. Had the legislature in this instance intended other exceptions, it could easily have added them. As the Court of Appeals of Maryland noted in *State Ins. Commissioner v. Nationwide Mut. Ins. Co.*, 241 Md. 108, 117 (1966), where a statute expressly provides for certain exclusions, others should not lightly be read in by implication. See also *State Ins. Commissioner v. Baltimore Life Ins. Co.*, 248 Md. 120 (1967).

In light of the fact that the proposed program is clearly within the prohibitions contained in Sections 223 and 224 of the Unfair Trade Practices subtitle of the Insurance Code and in light of the fact that Section 225 contains exceptions to the applicability of Sections 223 and 224 which do not cover this proposed plan, we believe that it would be prohibited by the above-mentioned sections.* Consequently, we advise you that the adoption of a proposed discount in premium payments to employees of the insurer would be in violation of the Insurance Code.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Asst. Attorney General.*

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* See *Security Corp. v. Ins. Commissioner*, 231 Md. 571, 577 (1963), where the Court of Appeals indicated that requiring prepayment of premiums by some policyholders and not others was a form of discrimination.

INSURANCE—RESERVES—DOMESTIC LIFE INSURER—MEANING OF THE TERM "ENTIRE RESERVES."

April 8, 1969.

Mr. Newton I. Steers, Jr.

You have requested our opinion with respect to the definition of the term "entire reserves" as used in Section 96 of Article 48A. Section 96 describes the types of assets which may be held by a domestic life insurance company in order to satisfy its reserve requirements. The first paragraph of Section 96 provides as follows:

> "Every domestic life insurer must have and continually keep to the extent of an amount equal to its *entire reserves*, as required by this article, invested in any combination of the following types of assets subject to the limit, if any, set forth with regard to each type or class of investment:" (Emphasis supplied)

The question which you raise is what items are encompassed by the term "entire reserves", or put otherwise, does the term "entire reserves" mean the same as total liabilities? You point out that prior to the 1963 recodification of the Insurance Code the term "entire reserves" was defined as:

> "Net present value of all outstanding policies in force (less reinsurance); reserves for accidental death benefits and total and permanent disability benefits (less reinsurance); present value of supplementary contracts and including dividends left with the company to accumulate at interest; liability on policies cancelled and not included in 'net reserve' upon which a surrender value may be demanded, and policy claims and losses outstanding, and reserves for taxes and expenses due or accrued; less amount of net uncollected and deferred premiums." Section 28 (2) of Article 48A, Annotated Code of Maryland (1957 Edition).

The present Insurance Code does not contain a definition

of the items to be included in the term "entire reserves". Under the pre-1963 Insurance Code the net effect of the definition of entire reserves was to make it equivalent to the total liabilities of the insurer. You inquire then whether this is still the meaning of the term in the absence of a definition.

While the present Insurance Code does not define the term "entire reserves", it does set forth the items to be considered as liabilities. They are as set forth in Section 77:

> "(2) The amount, estimated consistent with the provisions of this article, necessary to pay all of its unpaid losses and claims incurred on or prior to the date of statement, whether reported or unreported, together with the expenses of adjustment or settlement thereof;
>
> (3) With reference to life and disability insurance and annuity contracts:
>
> (i) The amount of reserves on life insurance policies and annuity contracts in force, valued according to the tables of mortality, rates of interest, and methods adopted pursuant to this article which are applicable thereto,
>
> (ii) Reserves for disability benefits, for both active and disabled lives,
>
> (iii) Reserves for accidental death benefits, and
>
> (iv) Any additional reserves which may be reasonably required by the Commissioner on account of such insurance.
>
> (4) With reference to insurance other than specified in paragraph (3) of this section, the amount of reserves equal to the unearned portions of the gross premiums charged on policies in force, computed in accordance with this article;
>
> (5) Taxes, expenses and other obligations due or accrued at the date of the statement."

One might conclude on first reading that only those items coming within subsections 3 and 4[1] of Section 77 would be included within the term "entire reserves". However, a

review of other sections of the Code makes it clear that there is no general consistency in distinguishing between the terms reserves and liabilities. For example, Section 82 (2) refers to the power of the Insurance Commissioner to require an insurer to increase its "loss reserves". This has reference to the same item which is described in Section 77 (2) as "unpaid losses . . . incurred". See line 4 of the National Association of Insurance Commissioners, Annual Statement Form for Liabilities. Surplus and Other Funds, which describes this item as "Policy and contract claims". One might also consider the relationship of Section 79, dealing with health insurance policy reserves, and Section 77 (3), dealing with life and "disability" insurance reserves.

In defining the term "reserves", therefore, one must look beyond the literal language of Section 77 to an overall review of subtitle 5 of the Insurance Code, which deals with the nature and valuation of an insurer's assets and liabilities. In so doing we have concluded that the term "entire reserves" as used in Section 96 includes not only subsections 3 and 4 of Section 77, but also subsection 2 of Section 77, dealing with unpaid claims. See generally *State Ins. Comm'r. v. Baltimore Life Ins. Co.*, 248 Md. 120 (1967).

The remaining item (subsection 5 of Section 77) we do not believe is included within the term "entire reserves". In the first place we see no provision in the present Code which requires this to be considered as a technical insurance reserve. It is true that one might consider all liability items in a general sense as reserves created to pay that liability. However, we do not believe that the use of the term "reserves" can be construed as equivalent to total liabilities in the absence of a definitional provision such as was contained in the pre-1963 Code. In *Maryland Casualty Co. v. United States,* 251 U. S. 342 (1920), the Supreme Court had occasion to discuss the meaning of the term "reserves". While the issue before the Court was the deductibility of certain items for Federal tax purposes, the Court turned to the question of the meaning of the term "reserves" in the context of state insurance law. The Court noted at p. 350:

> "The term 'reserve' or 'reserves' has a special meaning in the law of insurance. While its scope varies under different laws, in general it means a sum of money, variously computed or estimated, which, with accretions from interest, is set aside, 'reserved,' as a fund with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims, and claims accrued, but contingent and indefinite as to amount or time of payment.
>
> "In this case, as we have seen, the term includes 'unearned premium reserve' to meet future liabilities on policies, 'liability reserve' to satisfy claims, indefinite in amount and as to time of payment, but accrued on liability and workmen's compensation policies, and 'reserve for loss claims' accrued on policies other than those provided for in the 'liability reserve,' but it has nowhere been held that 'reserve,' in this technical sense, must be maintained to provide for the ordinary running expenses of a business, definite in amount, and which must be currently paid by every company from its income if its business is to continue, such as taxes, salaries, reinsurance, and unpaid brokerage."

Our opinion in this regard is confirmed by the fact that the present Code eliminates the definition of "entire reserves" which previously included taxes and expenses. We do not feel justified in reinserting that which the Legislature has explicitly removed, especially where the technical meaning of the term is not so broad.[2]

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Asst. Attorney General.*

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[1] Subsection 4 is not generally applicable to life insurers.

[2] Indeed Section 77 (5) is somewhat broader than the corresponding provision contained in former Section 28 (2).

INSURANCE—EFFECT OF PROFESSIONAL SERVICE CORPORATION ACT ON INSURANCE COMMISSION'S LICENSING OF INSURANCE AGENTS OR BROKERS.

June 9, 1969.

Mr. Newton I. Steers, Jr.

In your letter of May 27, 1969, you have asked our opinion as to the effect of Senate Bill 149 on your Department's licensing of corporations as agents or brokers. You have specifically asked:

1. Does Senate Bill 149 affect the licensing of a corporation as an agent or a broker?

2. May an unlicensed person hold stock in a licensed insurance agency corporation?

3. If this statute is applicable to agency corporations as aforementioned, is there any grandfather clause applicable in this statute?

First, we must consider the governing law prior to the passage of Senate Bill 149 and then determine what change, if any, has been made. Article 48A, Section 167 provides that a license is required before any person can act or hold himself out as an insurance agent or broker. The general qualifications for licenses are set forth in Section 168, and (d) of that section provides that a license may be issued to a partnership or corporation:

> "(d) *Licenses issued to partnership or corporation.*—Licensees may conduct their insurance business affairs as a partnership or corporation provided that every individual who solicits, negotiates, or accepts insurance business from the public shall be qualified and licensed for the kinds of insurance business he does with the public.
>
> "If a partnership or corporation is primarily engaged in the insurance business, any such partnership or corporation agency may be issued

> appropriate agent or broker licenses and may be certified as a licensee under this subtitle to the supervisory officials of any state."

It is therefore clear that prior to the passage of Senate Bill 149 a corporation could be licensed as an insurance agent or broker.

Senate Bill 149 is titled "Professional Service Corporation Act". In Section 431 of the statute, "Professional Service" is defined as ". . . any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and which prior to the passage of this subtitle and by reason of law could not be performed by a corporation."

Section 432 provides: "This subtitle shall not apply to any individual or group of individuals within this state who, prior to the passage of this subtitle were permitted to organize a corporation and perform personal services to the public by means of a corporation, and this subtitle shall not apply to any corporations organized by these individuals or group of individuals prior to the passage of this subtitle; provided that these individuals or group of individuals or any such corporation may bring themselves and the corporation within the provisions of this subtitle by amending the articles of incorporation in a manner consistent with the provisions of this subtitle and by affirmatively stating in the amended articles of incorporation that the shareholders have elected to bring the corporation within the provisions of this subtitle."

The cited sections act to specifically exempt agents or brokers, licensed as a corporation, from the operation of the law. Section 432, however, does give an existing corporation or one to be formed the option to bring itself within the provisions of the law. Barring such an election, Senate Bill 149 has no effect on the current law. It would not affect the licensing of a corporation as an agent or broker, and an unlicensed person can hold stock in a licensed insurance agency corporation.

If there is an election pursuant to the provisions of Section 432 to bring the corporation within the purview of the statute, the answers to your questions must be different. The Professional Service Corporation Act does not contemplate the licensing of corporations as such. The Act provides that licensed individuals may combine to form a corporation and operate as a corporate entity, but there is no provision for licensing the corporation. Therefore, if a corporation of licensed agents or brokers is formed in accordance with Section 432, it could conduct its affairs in the corporate form without obtaining a corporate license. Accordingly, the Insurance Commission would not issue a license to a corporation of agents or brokers formed pursuant to Section 432.

If the corporation of agents or brokers is formed pursuant to the Act, Section 437 would prohibit an unlicensed person from holding stock in the "Professional Service Corporation", thereby created. Any violation of this provision would be within the scope of Article 23, rather than Article 48A.

There is no problem of a grandfather clause here because the statute does not apply to existing agency corporations. If the corporation licensed as an agent or broker desires to reform in accordance with the statute, they must comply with its provisions at the time of reforming.

In summary, the "Professional Service Corporation Act" should result in little change for the Insurance Commission. Corporations of agents and brokers formed or to be formed under the existing law are not affected unless they make an election pursuant to Section 432. If such an election is made there is no provision for licensing the corporation thereby formed. The Commission would continue to license the qualified individuals, and then they could form a corporation in accordance with the law, and conduct their business as a corporation subject to the provisions of Article 48A.

FRANCIS B. BURCH, *Attorney General.*

THOMAS N. BIDDISON, JR., *Asst. Attorney General.*

INSURANCE—CLIENTS' SECURITY TRUST FUND—TRUST FUND NOT SUBJECT TO REGULATION BY INSURANCE DEPARTMENT AS TRUST FUND DOES NOT WRITE "INSURANCE" NOR CONDUCT AN "INSURANCE BUSINESS" WITHIN MEANING OF INSURANCE CODE.

September 11, 1969.

Mr. Newton I. Steers, Jr.

In 1965, the General Assembly enacted enabling legislation authorizing the Court of Appeals to provide by rule for the creation of a Clients' Security Trust Fund of the Bar of Maryland (the "Trust Fund"). Article 10, Section 43, Annotated Code of Maryland (1968 Replacement Volume); Chapter 779 of the Laws of 1965. On March 28, 1966, the Court of Appeals promulgated the Clients' Security Fund Rules (the "Rules"), Volume 9A of the Code at page 87 (1968 Supp.), which authorized and created the Trust Fund. By Rule 2b of the Rules, seven trustees (the "Trustees") to be appointed by the Court of Appeals were charged with the responsibility of the operation and administration of the Trust Fund, the principal purpose of which is set forth in part c of Rule 2, as follows:

> "The purpose of the trust fund shall be to maintain the integrity and protect the good name of the legal profession by reimbursing, to the extent authorized by these rules and deemed proper and reasonable by the trustees, losses caused by defalcations of members of the Bar of the State of Maryland, acting either as attorneys or as fiduciaries (except to the extent to which they are bonded.)".

By your letter of August 21, 1969, you have inquired whether the Trust Fund is subject to the provisions of the Insurance Code, Article 48A of the Maryland Code. We are of the opinion that the Insurance Code has no application to the Trust Fund as presently constituted and accord-

ingly you have no responsibility in regard to its operation or administration.

Section 1 of the Insurance Code provides that no person shall engage in or transact an "insurance business" in Maryland, or act relative to a subject of "insurance", resident, located or to be performed in Maryland without complying with Article 48A. The words "insurance" and "insurance business" are defined in Sections 2 and 8 of the Insurance Code as follows:

> "Section 2. 'Insurance' defined.
>
> " 'Insurance' is a contract whereby one undertakes to indemnify another or pay or provide a specified or determinable amount or benefit upon determinable contingencies."
>
> "Section 8. 'Insurance business' defined.
>
> "The 'insurance business' includes the transaction of all matters pertaining to a contract of insurance, both prior to and subsequent to the effectuation of such a contract, and all matters arising out of such a contract or any claim thereunder."

Distilling the language of Sections 2 and 8, it seems clear that in order for any activity to come within the purview of Section 1 of the Insurance Code, the activity must at least (i) look to the effectuation of one or more contracts (ii) pursuant to which one undertakes to indemnify another or pay or provide a specified or determinable amount or benefit upon determinable contingencies.

Turning to the operation of the Trust Fund, we believe that no contract, express or implied, is effectuated under its operation under the applicable laws pertaining thereto. Like other contracts, there are certain requisite elements which are essential to the existence of an insurance contract including a promise to pay a fixed or ascertainable amount. 12 Appleman, *Insurance Law and Practice*, Section 7001 (1943, 1969 Supp.). But we are unable to find such a promise to pay a fixed or ascertainable amount and there-

fore conclude that to the extent that a claimant may have any rights in respect of the Trust Fund, these rights are statutory and not contractual. Our reasons follow.

In the first instance, the Court of Appeals provided by Rule 6 a. that each lawyer admitted to practice before that Court should, as a condition precedent to the practice of law, pay to the Treasurer of the Trust Fund a certain sum of money. But having thus provided for the funding of the Trust Fund res, the Court did not authorize any procedure whereby the Trust Fund would enter into a contract enforceable by any lawyer, or by a claimant as a third party beneficiary, for the payment of money. Clearly, no written contract is ever issued under the statutory procedure nor is there any conduct which indicates the presence of the contractual elements of offer or acceptance or the mutual exchange of promises or consideration. Moreover, any rights which a claimant or other person might believe to be enforceable, contractual or otherwise, would be manifestly illusory as by the express provisions of Rule 9 b, "No claimant or other person or organization has any right in the trust fund as beneficiary or otherwise." Corollarially, the provisions of the enabling statute, the Rules and the Regulations make it abundantly clear that as a threshold consideration the Trust Fund has no duty to pay any claimant any sum of money at all. Any payment is entirely discretionary. Thus, Section 43 (b) (1) of Article 10 provides *inter alia* that the Trustees shall have the authority to distribute trust funds "to the extent deemed proper and reasonable"; and Rule 9 a and Regulation 4 further provide as follows:

Rule 9

> "a. The trustees are invested with the power, which they shall exercise at their sole discretion, to determine whether a claim merits reimbursement from the trust fund, and if so, the amount of such reimbursement, the time, place, and manner of its payment, the conditions upon which payment shall be made, and the order in which pay-

ments shall be made. The trustees' powers under this rule may be exercised only by the affirmative vote of at least four trustees."

Regulation 4

"The Trustees will, after the end of the fiscal year, pass on all claims as soon as the Trustees consider that they have the necessary information on which to act. The Trustees shall have the discretion to allocate eligible claims as between fiscal years, without being controlled by the time of filing or the time when the claim arose. If funds available at the end of the year in question shall be inadequate to satisfy claims in full, allowances may be made on a pro rata basis. Any unpaid portion of allowed claims may in the Trustees' discretion be carried forward to the succeeding year in which event they shall be treated as subordinate to the claims of the current year then under consideration."

Not only is there an absence of any enforceable duty to pay a claimant at all, there is an absence of any undertaking, within the meaning of Section 2, to pay a "specified or determinable amount upon determinable contingencies". Certainly the applicable statutory provisions, Rules and Regulations do not specify any particular sum of money to be paid or any method by which a particular sum may be determined; indeed, the amount paid to a claimant in any instance cannot be determined in advance pursuant to any objective standard, flexible or inflexible, for the amount is wholly discretionary both as to the payment itself and as to the amount. Moreover, there is really no "determinable contingency" in the usual sense since even if there is in fact the occurrence of an event cognizable as a reimbursable event, and even if the claimant complies with all other provisions of the Rules and Regulations for presenting his claim for reimbursement, a contingency which determines that payment is due has not necessarily occurred because it is clearly within the discretion of the Trustees

to deny reimbursement in whole or in part under these circumstances.

We conclude therefore that the operation and administration of the Trust Fund do not include transactions pertaining to the business of insurance, that the Trust Fund enters into no contracts of insurance and, accordingly, the Trust Fund is not subject to the provisions of the Insurance Code.

FRANCIS B. BURCH, *Attorney General.*

RICHARD G. MCCAULEY, *Asst. Attorney General.*

INSURANCE—AGENT'S EXAMINATION—SCOPE—INSURANCE DEPARTMENT MAY NOT ISSUE LICENSE BASED UPON EXAMINATION ON ANY SUBJECT NARROWER IN SCOPE THAN "KIND" OF INSURANCE AS PROVIDED IN SECTION 176 (2)—AGENT'S LICENSE AND SOLICITATION—PICKING UP INSURANCE APPLICATION AND DELIVERING POLICIES NOT ACTIVITIES WHICH REQUIRE LICENSING AS AGENT—TIE-IN AND COMBINATION SALES—SALE OF DAILY NEWSPAPERS NOT PROHIBITED BY SECTION 224A (A) UNDER PROGRAM FOR ADVERTISING HEALTH INSURANCE IN NEWSPAPER—UNFAIR TRADE PRACTICES.

September 11, 1969.

Mr. Newton I. Steers, Jr.

In our prior opinion of August 16, 1965, we reviewed, and approved, a proposed program of Independence Life and Accident Insurance Company ("Independence") and the Baltimore News-American (the "American") for advertisement sale of accident and health insurance policies. This program is described with particularity in 50 Opinions of the Attorney General, beginning at page 252, to which reference is made. With regard to those aspects relevant to your present inquiry, it involved advertisement by Independence of such insurance in the American, which advertisements included an application which could be filled out by the subscriber and mailed to Independence's licensed agent and district manager, who occupied space rented by Independence from American in the latter's building. The American's newsboys would then collect the appropriate premium, ordinarily on a weekly basis, and deliver notices of cancellation or nonpayment, for which services they would receive payment from Independence of a certain sum per premium dollar collected. The newsboys do not solicit sales of these policies nor do they perform any other services except as previously described.

Independence now proposes that the duties of its resident agent and district manager be undertaken by several of the American's route supervisors subject to their prior

receipt of insurance agents' licenses limited solely to, and issued after examination exclusively upon, the particular accident and health policy that Independence now sells in conjunction with this program. Presumably, the proposed examinations to be given by the Insurance Department would include no questions concerning accident or health insurance generally or any aspect of the sale of insurance in this State other than the sale of the Independence policy in question.

Independence also now proposes to have the American newsboys pick up applications and deliver insurance policies, but without solicitation of any kind as previously was the case.

You have asked us to review this program in connection with the suggested modifications and generally to determine the permissibility of the Independence-American program in light of the 1968 amendment to Section 224A (a) of the Insurance Code.

We turn first to the question of whether the Insurance Department may issue an agent's license limited to the sale of Independence's health and accident policy and based upon an examination addressed solely to the applicant's knowledge of that policy and the laws related thereto. It is our opinion that such may not be done consistent with the applicable provisions of the Insurance Code, Article 48A of the Code.

Section 167 (a) provides that a person must be licensed to act or hold himself out as an agent, and part (b) thereof further provides that "No agent . . . shall solicit or take application for, negotiate, procure or place for others any kind of insurance for which he is not then qualified and licensed." Section 168 (a) states that, for the protection of the people of the State, the Commissioner shall issue such licenses only in compliance with the Insurance Code to persons, *inter alia*, who have passed an examination in accordance with the provisions thereof.

The nature of the examination required by Section 168

(a) is specified in Section 178, which provides, in relevant part, as follows:

> "Individual applicants for qualification as to life insurance, health insurance or annuities shall be required to comply with the requirements of this section.
>
> "(1) *Examination required.*—Each applicant shall be required to submit to a personal written examination to determine his competence with respect to life insurance, health insurance or annuities, and his familiarity with the pertinent provisions of the laws of this State, and shall pass the same to the satisfaction of the Commissioner.
>
> * * *
>
> "(3) *Scope, type, etc., of examinations; reexaminations.*—The Commissioner shall establish reasonable rules and regulations with respect to the scope, type, conduct and grading of such written examinations . . ."

Section 176 (2) qualifies the sections quoted above by stating that "No examination of an applicant shall be required as to any *kind* of insurance other than as requested by the applicant." (Emphasis supplied.)

While we think it clear that an insurance agent's license may be issued for a single "kind" of insurance, and that an examination may be limited to such "kind" of insurance upon request, we do not believe that an examination or a license may be given which is narrower in scope than any particular kind of insurance as defined in Sections 63 through 71 of the Insurance Code. In these sections the kinds of insurance referred to throughout the Insurance Code are set forth, among which is included the "kind" of insurance sold by Independence, namely, "health insurance". Section 66 defines this kind of insurance as follows:

> "Health insurance is insurance of human beings against bodily injury, disablement, or death by accident or accidental means, or the expense thereof, or against disablement or expense resulting

from sickness, or childbirth, or against expenses incurred in prevention of sickness, or dental care, and every insurance appertaining thereto. Health insurance does not include workmen's compensation insurance."

Not only is it clear from the plain words of the relevant licensing provisions that the smallest subject matter unit upon which an examination or license can be given is a "kind", the legislative history of several of the sections referred to above is persuasive that the General Assembly clearly intended that no other result should be achieved. Thus, when the Insurance Code was substantially amended and recodified in 1963 pursuant to Chapter 553 of the Laws of 1963, the italicized words appearing below were deleted from the enacted portions of Sections 176 and 178, as follows:

"176. Individual Qualifications; General.

* * *

"(b) Before any individual is eligible for a license, and before the Commissioner may issue a license to act as agent or broker as to life and health insurance or annuities, *or any subdivision thereof*, he shall, except as otherwise provided in this subtitle, meet the qualifications prescribed in Section 178.

"(c) Scope of qualification; specialties.

"(1) Any applicant may qualify as to any particular kind or kinds of insurance, *or subdivision thereof*, or any combination of kinds of insurance without regard to agent appointments then available to the applicant or to any combination of kinds of insurance business transacted by any insurer which desires a license for the applicant.

"(2) No examination of an applicant shall be required as to any kind of insurance *or subdivision thereof* other than as requested by the applicant.

* * *

"(d) An individual who meets the qualifica-

tions prescribed by this subtitle shall be eligible for a license as agent in the kind or kinds of insurance *or subdivisions thereof* for which the individual has qualified; and if qualified in the various kinds of insurance stated in Section 168 (c) the individual shall be eligible for license as a broker.

"178. Individual Qualifications; Life and Health Insurance.

"Individual applicants for qualification as to life insurance, health insurance or annuities, *or to any subdivision thereof*, shall be required to comply with the requirements of this section.

"(1) Each applicant shall be required to submit to a personal written examination to determine his competence with respect to life insurance, health insurance or annuities, *or any subdivision thereof*, and his familiarity with the pertinent provisions of the laws of this State, and shall pass the same to the satisfaction of the Commissioner."

The deletion of the words "or any subdivision thereof" clearly indicates that examinations and licenses are not to be based upon any subject matter narrower than any individual kind of insurance defined in Sections 63 to 71.

Accordingly, we think it is evident that the State Insurance Department may not examine an applicant for or issue an insurance agent's license based solely upon Independence's health and accident policy, but must examine the applicant with regard to health insurance generally no less broadly defined as in Section 66 and his familiarity with the pertinent provisions of the laws of this State, both as provided in Section 178 (1). We also believe that the rule-making power granted to the Commissioner under Section 178 (3) is limited by the provisions of Section 178 (1), which contains mandatory directions with regard to the matters upon which the examination must be based.

Your second inquiry relates to whether the American newsboys may enlarge their activities to include picking up applications and delivering the insurance policies issued by Independence. In our previous opinion dated August 17, 1965, we discussed the proper interpretation of Section 167 (a) in connection with collecting premiums and forwarding notices of cancellation, and there concluded that such acts were clerical in nature so as not to require licensing. We reach the same conclusion here with regard to the two proposed activities (see Section 166 (a) (1)) for, as the Court of Appeals in *State v. Geddes*, 127 Md. 166 (1915) stated with reference to Section 166 (b) relating to a broker's license but which is relevant here at 127 Md. 166 (1915) at 168:

> "* * * There may be and doubtless are many acts done in and about the making out, and delivering of policies, collecting premiums thereon, or giving notices in connection therewith of a purely clerical description, but so long as they do not relate to the negotiation of the contract, they do not come within the terms of the act."

And we do not regard the mere act of transmitting an application for insurance to Independence as being an act of solicitation for which an agent's license must be obtained.

Lastly, you inquire whether the Independence American program has been rendered unlawful by the 1968 Amendment to Section 224A (a), enacted as Chapter 716 of the Laws of 1968, which amended Section 224A (a) to delete the words appearing in the bracket portion below:

> "No insurer shall directly or indirectly, or by any of its agents or representatives, participate in any plan to offer or effect any kind or kinds of life insurance, health insurance, or annuities in this State as an inducement to, or in combination with, the purchase by the public of any goods, securities, commodities, services, or subscriptions to periodicals. [except upon the payment of a bona fide premium by the insured.]"

We do not believe that the 1968 amendment vitiated our prior approval of this program because, under our view, Section 224A (a) is not applicable to the sale and purchase of daily newspapers such as those which are sold by the American.

Although we are not aided by any Maryland authority providing construction of this section, we believe that newspapers published daily and on a continuing basis are not intended to be included within the proscription of Section 224A (a). While it is true that a newspaper technically may be "goods" under the Maryland Uniform Commercial Code since it is a movable thing identified at the time of sale (see Article 95B, Section 2-105 (1)—U.C.C.) or a commodity insofar as it may be a subject of commerce (see, e.g. Article 83, Section 102 (a)—Fair Trade Act), it would seem superfluous to include as a separate category the sale of periodicals which, under the foregoing view, must be both "goods" and "commodities". We do not believe that any redundancy was intended but rather that the General Assembly intended that there be a distinction between the sale of goods and commodities, on the one hand, and magazines and similar periodicals on the other based upon the ordinary and common usage of the words.

The words "goods" and "commodities", as used in common speech, are defined in the Random House Dictionary of the English Language (the Unabridged Edition, 1967) as follows:

> "Goods—possessions, esp. movable effects or personal chattels; articles of trade, wares, merchandise."
>
> "Commodity—something of use, advantage or value; an article of trade or commerce as distinguished from a service."

Generally speaking then, goods and commodities are articles of trade or commerce which the purchaser desires as having some intrinsic value or usefulness. A publication such as a newpaper is basically a form of communication, like a radio or television broadcast, and it is this communica-

tion which the purchaser desires to purchase, not the pulp paper itself. Indeed, after being read, the paper is of little further use to the subscriber.

If Section 224A (a) intended to distinguish between goods and commodities as distinguished from the sale of publications such as periodicals, as we believe to be the case, then we do not believe that a daily newspaper is a "periodical" within the ordinary meaning of this term.

Webster's New Twentieth Century Dictionary of the English Language (Unabridged, Second Edition, 1964) defines periodical as follows:

> "A publication appearing at regular intervals of more than one day, as a weekly magazine."

Perhaps the most widely accepted definition of the word "periodical" is found in the case of *Houghton v. Payne*, 194 U. S. 88 (1904) where the Supreme Court construed a federal statute pertaining to second class mail. Although the statute expressly included newspapers among the class of publications receiving second class classification, the Court observed that newspapers were not regarded as periodical publications in common speech, and went on to define periodicals, at 194 U. S. at 97, as follows:

> "A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature or some special branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel or essays upon subjects pertaining to general literature * * *."

See also, *Smith v. Hitchcock*, 226 U. S. 53, 60 (1912)

(Holmes, J.); *Dell Publishing Co. v. Summerfield,* 198 F. Supp. 843 (D. C. D. C. 1961).

We think, therefore, that a daily newspaper is not ordinarily included within the term "periodical", nor among the terms "goods" or "commodities", in accordance with the ordinary meaning of those terms as used in Section 224A (a). Accordingly, we are of the opinion that Section 224A (a) does not apply to a daily newspaper such as is published by the American.

In summary, we believe that insurance agents' examinations and licenses may not be limited to or based solely upon Independence's health and accident policy, that American's newsboys may collect applications and deliver the policies themselves without thereby being required to obtain an agent's license so long as their activities are limited to such acts and that the program was not rendered unlawful by the 1968 Amendment to Section 224A (a). In rendering this opinion, we assume that all features of the program remain exactly the same as described in our previous opinion of August 16, 1965 except to the extent of the modifications described herein.

FRANCIS B. BURCH, *Attorney General.*

RICHARD G. MCCAULEY, *Asst. Attorney General.*

JUDGES

JUDGES' PENSION PLAN—NEW PLAN ADOPTED BY CHAPTER 612 OF LAWS OF MARYLAND OF 1969—JUDGES IN OFFICE AS OF JUNE 30, 1969 MUST ELECT IN WRITING TO REMAIN IN EXISTING PLAN OR WILL BE DEEMED A MEMBER OF NEW PLAN—JUDGES OF COURT OF APPEALS AND CHIEF JUDGE OF COURT OF SPECIAL APPEALS MAY RECEIVE IN EXCESS OF $20,000 ANNUALLY WITHOUT SUPPLEMENTATION—JUDGES BECOMING MEMBERS OF NEW SYSTEM DO NOT LOSE WIDOWS' BENEFITS—JUDGES BECOMING MEMBERS OF NEW SYSTEM MUST CONTINUE TO CONTRIBUTE AS LONG AS THEY ARE IN ACTIVE SERVICE BUT MAY RETIRE IF QUALIFIED AFTER SINGLE CONTRIBUTION WITH FULL BENEFITS—PHRASE "FOR EACH YEAR OF SERVICE" DOES NOT PERMIT CREDIT FOR LESS THAN FULL YEAR.

June 17, 1969.

Frederick W. Invernizzi, Esq.

In your letter of May 21, 1969, you raise a number of questions which require construction of the new pension plan for State judges adopted at the recent session of the Maryland General Assembly (Chapter 612 of the Laws of Maryland of 1969). We will endeavor to group and discuss them in several general categories.

1. *Procedures for electing to remain under the existing plan or to join the new pension plan.*

Chapter 612 carries an effective date of July 1, 1969. Judges in office as of June 30, 1969 are offered the option of remaining under the existing pension plan or joining the new pension plan created by that Chapter. This option is available to all judges now sitting even though they be appointed or elected for an additional term after July 1, 1969. You raise certain technical questions about how this election is to be exercised.

Reading Section 49 (i) (2) of that Chapter together with Section 49 (i) (3), it is apparent that an election is required if a sitting judge desires to remain under the existing plan. Thus, judges who make no formal election to remain under the existing pension plan before (or within a reasonable time after) the effective date of Chapter 612 are "deemed to have elected" to join the new pension plan.

For this reason, it is our conclusion that no action need be taken by those sitting judges who desire to join the new pension plan. Any election by those contrary-minded, however, should be in writing and directed to your office. It would, of course, simplify the situation greatly if all sitting judges would notify you in writing as to their intention to either remain under the existing pension plan or join the new pension plan.

2. *Effect of new pension plan upon all judges of the Court of Appeals and the Chief Judge of the Court of Special Appeals.*

By Chapter 468 of the Laws of Maryland of 1968, effective July 1, 1969, the salary of the chief judge of the Court of Appeals was raised to $36,000.00, and the salary of the associate judges of that Court was raised to $35,000.00. The salary of the chief judge of the Court of Special Appeals, as of the same effective date, becomes $33,500.00. Under Section 49 (i) (1) of Chapter 612, judges electing to join the new pension plan would receive a maximum pension of 60% of salary after 16 years of service. Based on the new salary scale, the maximums for the three categories of judges mentioned above will be $21,600.00, $21,000.00 and $20,100.00 respectively.

In Section 49 (i) (5) the following language appears:

> "There shall be no local supplementation of pensions for judges who elect to receive a pension under this subsection in any amount that will make the total of the State and local pensions exceed $20,000.00."

It is apparent from this language that the General Assem-

bly was attempting to prevent the political subdivisions of the State from creating great imbalance in the new pension plan and, to control this, placed a ceiling upon the amount of supplementation of pensions that could be paid to any judge. This language does not mean that the judges under discussion, should they become members of the new pension plan, are prohibited from receiving the maximum pensions permitted them under Section 49 (i) (1) of Chapter 612. The language does mean, however, that these particular judges may not receive any local supplementation if the amount of such local supplementation would raise their pensions above the 60% of salary limit established in Section 49 (i) (1).

3. *Right to widows' benefits.*

You ask whether a judge who becomes a member of the new pension plan continues to be entitled to the benefits provided for his widow by Article 26, Section 50.

It is important to note that both the present pension plan and the new pension plan are embodied entirely within the nine subsections of Section 49 of Article 26. Section 49 continues to be titled "Pensions of Retired Judges", and nothing in either the title or the text of Chapter 612 indicates that the General Assembly intended in any way to divest judges joining the new pension plan of the benefits provided for widows. The legislation is entirely silent on this point.

Because there is no interdependency between Sections 49 and 50, the amendment to Section 49, effected by Chapter 612, does not diminish the scope of Section 50. For this reason, judges who become members of the new pension plan continue to possess the rights prescribed in Section 50 for their widows. This conclusion is not altered in any way by the language of the last sentence of Article 26, Section 50, (added by Chapter 3 of the Laws of Maryland of 1962) which was intended merely to provide retroactively to widows of judges dying prior to 1962 the benefits of the changes in the law made in that year.

4. *Effect of retirement after election to join the new pension system.*

Any circuit court judge of this State who is "in office as of June 30, 1969" may elect to join the new pension plan and hence receive a maximum pension from the State of $18,300.00 (60% of $30,500.00) per year after 16 years of service. If such a judge decides to terminate his active service upon reaching age sixty, after electing to join the new pension plan, having contributed for at least one pay period 6% of his pay for that period pursuant to Section 49 (i) (4), he may receive the full benefits of the new pension plan in accordance with Section 49 (i) (1) of Chapter 612. He may also receive supplementation (existing as of June 1, 1968) from a political subdivision as long as that supplementation does not provide a total pension in excess of $20,000.00. See Article 26, Section 49 (h) of the Maryland Code.

Also, a judge who becomes a member of the new pension plan and then terminates his active service upon reaching age sixty must calculate his compensable years of service in accordance with the language of Section 49 (i) (1). This language entitles the judge to 1/16th of 60% of his maximum salary "for each year of service" and does not permit credit for less than a full year of service. Cf. Article 26, Section 49 (a) of the Maryland Code.

Related to this is the requirement that a judge who becomes a member of the new pension system must continue to contribute 6% of his annual compensation during the entire course of his active service. Nothing in Chapter 612 would authorize him to cease his contributions upon attaining sixteen years of service, if still in active service.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Asst. Attorney General.*

JUDGES—REMOVAL OF—ARTICLE IV, SECTION 4 OF CONSTITUTION IMPOSES DULY UPON GOVERNOR TO REMOVE A MEMBER OF JUDICIARY FROM OFFICE, IF SUCH OFFICIAL IS CONVICTED OF HAVING COMMITTED A CRIME.

June 19, 1969.

The Honorable Marvin Mandel.

You have requested us to advise you as to your right or duty to remove a judge from office upon conviction of the crime of assault and battery.

You are advised that Article IV, Section 4 of the Maryland Constitution imposes a duty upon the Governor to remove such a convicted official from office.

With a knowledge born of experience, the framers of the first Constitution of Maryland provided, in Article 30 (now Article 33) of the Declarations of Rights:

> "That the independency and uprightness of Judges are essential to the impartial administration of Justice, and a great security to the rights and liberties of the People: Wherefore, the Judges shall not be removed, except in the manner, and for the causes provided in this Constitution * * *".

Although the framers of the Maryland Constitution provided an environment of political and economic independency to the members of its separate judiciary branch, in order to achieve governmental harmony and abort even the possibility of subservience, judicial tenure was, nevertheless, made directly dependent upon strict fidelity and exemplary conduct while in office.

In light of the protective intent to firmly assure security to its citizens from those members of the judiciary who breached their public trust, Article IV, Section 4 of the Constitution provided a mandate for removal from office in the wake of a judicial conviction or removal proceedings

conducted by the General Assembly in accordance with constitutional guidelines. Section 4 of Article IV provides:

> "Any Judge shall be removed from office by the Governor, on conviction in a Court of Law, of incompetency, of wilful neglect of duty, misbehavior in office, or any other crime, or on impeachment, according to this Constitution, or the Laws of the State; or on the address of the General Assembly, two-thirds of each House concurring in such address, and the accused having been notified of the charges against him, and having had opportunity of making his defence."

In *Cull v. Wheltle*, 114 Md. 58 (1910), the Court of Appeals had occasion to interpret the Maryland Constitution as it applied to the power of the Governor to suspend or remove public officials from office. In that case, all the members appointed by the Governor to serve on the Board of Police Commissioners of Baltimore City were later suspended by the Governor, pending the outcome of hearings on incompetency and misconduct charges against them. While holding that the Constitution did not provide the Chief Executive with the power of suspension pending the outcome of trial, the Court stated, at 82:

> "* * * [T]he Governor has no power to remove many of the most important officers until conviction in a Court of Law, or, in some instances, after action by the Legislature. That statement applies to Judges, Clerks of Courts, Registers of Wills, the Attorney General, State's Attorneys, Justices of the Peace, Constables, the Mayor of Baltimore and others . . . .
>
> "Important as are the duties of those officers, it could not be pretended that if any of them were indicted, even for serious crimes, the Governor could suspend them, prior to conviction, and then only by virtue of the express power conferred upon him * * *."[1]

In direct response to your inquiry, and in light of the clear language of Article IV, Section 4 of the Constitution, as reflected in *Cull v. Wheltle, supra,* it is our opinion that a constitutional duty is imposed upon the Governor of Maryland to remove a member of the judiciary from office, if such an individual has been convicted of having committed a crime.[2]

FRANCIS B. BURCH, *Attorney General.*

JOHN J. GARRITY, *Asst. Attorney General.*

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[1] See Opinion of Attorney General dated November 13, 1968 (53 Opinions of the Attorney General 143) advising Governor Spiro T. Agnew of the Chief Executive's lack of power to suspend a member of the People's Court for Prince George's County while under investigation for misconduct in office, based on holding in *Cull v. Wheltle, supra.*

[2] It is beyond question, we believe, that the commission of a crime, such as assault and battery, would operate to bring a convicted individual within the Article under consideration. We have not reached herein the question of whether a situation involving a judge convicted of a quasi-criminal offense, such as a traffic violation not involving a *mens rea* state of mind, would also fall within the purview of the Article.

JUDGES — PEOPLE'S COURT — PRINCE GEORGE'S COUNTY — APPOINTMENT AND TENURE OF OFFICE.

August 1, 1969.

The Honorable Marvin Mandel.

As Judge Richard E. Painter of the People's Court for Prince George's County, who was serving a four (4) year term has resigned from office, you have requested us to advise you as to the particular term a newly appointed judge would be entitled to serve, in light of the provision contained in Maryland Code (1968 Repl. Vol.), Article 52, Section 98A, which allows you, with the advice and consent of the Senate, to appoint three qualified individuals to ten (10) year term judgeships as of July 1, 1967.

Article IV, Section 41B of the Constitution of Maryland, empowered the General Assembly, so far as the question presented herein is concerned, to establish a People's Court in any county, and ". . . to prescribe and 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, except that the term of office or compensation of any Judge shall not be reduced during his continuance in office . . .".

Pursuant to the above constitutional empowering provision, the 1967 General Assembly provided, in Maryland Code (1968 Repl. Vol.), Article 52, Section 98A, "As of July 1, 1967, the Governor of Maryland, by and with the advice and consent of the Senate, shall appoint three judges of the People's Court of Prince George's County . . . for a term of ten years or until their successors are appointed and qualified." This statute had the effect of amending a prior Act, in relation to the People's Court of Prince George's County, by increasing the number of judges from two to three, and by increasing the tenure of office from four to ten years. Thus far, only two of the three judgeships carrying a ten year term of office have been filled.

In 1968, Governor Spiro T. Agnew nominated the Prince George's People's Court judges, who were then sitting, for appointment to fill two of the three ten year term judgeships; one of whom was the Honorable Richard E. Painter who then was serving a four year term of office that had commenced on January 1, 1966. Although the Senate failed to give its consent to the nomination of Judge Painter for a ten year term, because of the constitutional proscription against reducing the term of office of a judge during "his" continuance in office, Judge Painter was entitled to serve out his unexpired four year term until January 1, 1970.

The proscription against reducing a judge's term while in office is based on the rationale that a member of the judiciary should be provided with an environment of political and economic independence in order to achieve governmental harmony and abort even the possibility of subservience. In light of this protective intent, the right to remain in office is of a vested personal nature, and can only be divested upon resignation or removal from office in accordance with the provisions contained in Article IV, Section 4 of the Constitution of Maryland. (See Opinion dated June 19, 1969, 54 Opinions of the Attorney General 251, and *Cull v. Wheltle*, 114 Md. 58).

By virtue of the effective date of the new procedure with which to provide judges for the People's Court of Prince George's County, July 1, 1967, and because of the personal vested right which inured to Judge Painter entitling him to serve out his four year term even though not confirmed by the Senate for a ten year term, it is clear that you may not appoint an individual to complete the duration of Judge Painter's term of office, as that judgeship expired upon his resignation from office.

Therefore, it is our opinion that a nominee may be appointed only in accordance with Maryland Code (1968 Repl. Vol.), Article 52, Section 98A, to the vacant ten year term judgeship which commenced, "as of July 1, 1967." In the event you desire to fill such vacancy prior to the next session of the Senate, an interim appointment could be made

pursuant to Article II, Section 11 of the Constitution of Maryland. *Ash v. McVey,* 85 Md. 119, 36 A. 440. If the nominee is not confirmed by the Senate prior to the end of its session, the interim appointment would then expire. If the nominee is confirmed, he would then hold office for the duration of the statutory term of the ten year judgeship which expires on July 1, 1977, or when a successor is appointed and qualified.

FRANCIS B. BURCH, *Attorney General.*

JOHN J. GARRITY, *Asst. Attorney General.*

JURIES

JURY SELECTION PROCEDURE—EXCUSING JURORS FOR GOOD CAUSE UNDER AMENDMENT 1969 JURY SELECTION LAW.

May 19, 1969.

Honorable Dulany Foster.

In your recent inquiry you raise the question under the new jury selection statute, Chapter 408 of the Laws of 1969, as to whether the jury judge may exclude jurors from serving on the basis of excuses sufficient under Section 9 (Article 51) of the statute, which have been set forth in the juror qualification form, or whether it is necessary that the juror first be summoned in and present the excuse.

The newly adopted jury selection procedure is that a number of prospective jurors, names randomly selected from voter lists or other sources, are placed into a master jury wheel. A sufficient number of names of persons as are required for jury service are drawn from the master jury wheel. A jury qualification form is then sent to these persons to fill out and return. The names of persons not excluded by virtue of their answers to the form are placed in a qualified jury wheel from which sufficient names are to be drawn to comprise the required jury panels. These individuals are then summoned for jury service. Your question in this context is whether a person with a valid excuse set forth on the juror qualification form may be excused by the jury judge without first being summoned for jury service.

Section 9 (a) makes it clear that a person who has been summoned for jury service may be excused for good cause as there enumerated. Section 6 (a) makes it clear that the jury judge may exclude persons who are unqualified solely on the basis of information provided on the juror qualification form. The key issue to be resolved is whether the provisions of Section 6 also allow the jury judge to excuse a juror for some valid excuse set forth in the form.

Section 6 is entitled "Qualifications for Jury Service". Subsection (a) provides: "The jury judge may on his initiative or may upon recommendation of the clerk or jury commissioner, determine solely on the basis of information provided on the juror qualification form, interview with the prospective juror, and other competent evidence whether a person is unqualified for, *or to be excused from*, jury service . . .". (Emphasis supplied).

In determining whether the *"or to be excused from"* phrase merely sets forth what is to be done with unqualified jurors or whether it encompasses the power to rule on the validity of excuses, reference must be made to the statute.

Section 4 (b) (vi) which sets forth the requisite content of the "juror qualification form" provides among other things that the form shall elicit whether he should be excused from jury service. This apparently calls for information regarding excuses in the context of Section 9. There are also specific provisions to the effect that the form shall elicit grounds for disqualification as set forth in Section 6 (d).

Section 5 (a) provides in part: At the time of his appearance for jury service, *or "at the time of any interview before the jury judge, clerk, or jury commissioner* any person may be required to fill out another juror qualification form in the presence of the jury commissioner or the clerk of the court, at which time, in such cases as it appears warranted, the person may be questioned, but only with regard to his responses to questions contained on the form *and grounds for his excuse or disqualification.* Any information thus acquired by the clerk or jury commissioner may be noted on the juror qualification form and transmitted to the jury judge." (italicized material indicates amendments).

Sections 4 and 5 make it clear that the Legislature contemplated a preliminary determination as to excuses as well as grounds for disqualification. The amendments calling for an interview directed to grounds for excuse *or* disqualification compel this conclusion.

Having established that the statute provides for a preliminary inquiry into excuses as well as qualifications by means of the juror qualification form as well as an optional interview, we must again look to Section 6 (a) to determine its effect. The amendments and deletions to the bill are expletive of the legislative intent:

> "The jury judge *may* on his initiative or *may* upon recommendation of the clerk or jury commissioner determine solely on the basis of the information provided on the juror qualification form, *interview with the prospective juror,* and other competent evidence whether a person is unqualified for, or to be excused from jury service * * *."

The statute in its final form makes the preliminary determination discretionary rather than mandatory. The determination "whether a person is unqualified for, or to be excused from jury service" is to be made on preliminary information as to both qualifications and excuses. It is therefore our conclusion that the jury judge may dismiss a juror for a valid excuse prior to having the name placed in the qualified jury wheel. Section 7 (a) allows for such a preliminary determination as to excuses in providing that names of persons who have been excused shall not be placed in the qualified jury wheel.

In summary, it is our conclusion that the jury judge may determine, on the basis of answers in the juror qualification form and the optional interview, whether a juror should be excused for any of the valid excuses set forth in Section 9, without the juror being first summoned into court. A juror may also be excused by the court for good cause upon being summoned in pursuance to Section 9.

FRANCIS B. BURCH, *Attorney General.*

THOMAS N. BIDDISON, JR., *Asst. Attorney General.*

JURIES—JURY TRIAL—APPEAL FROM TRIAL MAGISTRATE—MOTOR VEHICLE CASES.

May 26, 1969.

Mr. T. Bryan McIntire.

Your letter of May 2, 1969, has been forwarded us for reply.

In your letter, you questioned as to "whether a motorist charged and convicted by a Trial Magistrate of a violation of Article 66½, Section 224 ("Following too closely") of the Annotated Code of Maryland (1967 Replacement Volume) has the right to have a jury trial on appeal before the Circuit Court?"

An examination of the applicable law leads us to the conclusion that a person convicted of a motor vehicle violation has the right to a jury trial from a conviction before a Trial Magistrate for the following reasons:

a. Code Article 52, Section 13 (Justices of the Peace—jurisdiction and general powers) provides a statutory vehicle whereby persons charged with various criminal offenses may elect to be tried before a Magistrate or before a Circuit Court of the respective county *except* motor vehicle cases, *unless* the statute defining them declares by a specific reference that this section shall not apply.

b. Code Article 66½, Section 325 (Appeals—right of appeal) provides that any person so convicted of any offense under this (motor vehicle) article would have the right to appeal from the judgement of . . . a Trial Magistrate . . . to a court of criminal jurisdiction . . . and such court shall have the case de novo.

c. Code Article 66½, Section 327 (Same—duty of Magistrate) provides that upon "appeal prayed",

the Magistrate shall endorse and transmit the papers reflecting said appeal to the proper court—

"It shall not be necessary in such cases for the grand jury to find either presentment or indictment nor shall formal pleadings be required, but the trial of all such cases on appeal shall be had upon the original papers transmitted to said court by the justice of the peace, committing magistrate or police justice aforesaid, the *defendant or traverser* upon such appeal *being entitled to have a jury trial.*"

d. It is a general rule of statutory construction that all statutes on the same subject must be harmonized as far as possible. Kelly v. Consolidated Gas, 153 Md. 523, 541; Applestein v. Mayor and City Council, 156 Md. 40. Where two or more statutes relating to the same subject are not irreconcilable, they should be construed together in harmony with the objects of legislation, and all the provisions of all the statutes should be given effect so far as reasonably possible, even though passed at different sessions of the legislature. Walsh v. Kuntz, 196 Md. 86, 93. The Court of Appeals has often held that the law does not favor repeals by implication unless there is a manifest inconsistency between a statute and a later one or unless their provisions are so repugnant and irreconcilable that they can not stand together. Buchholtz v. Hill, 178 Md. 280, and cases there cited.

Applying these rules of construction to the statutes cited, we believe that in Motor Vehicle cases:

(a) there is no right to demand a jury trial before a Trial Magistrate however;

(b) after a party has been tried by a Trial Magistrate and has suffered an adverse ruling, he may appeal to a criminal court, whereupon, he may request a jury trial *de novo* as a matter of law;

(c) the provisions of both sections of the code (Code Article 66½, Section 327 and Code Article 52, Section 15) will then be favorably and harmoniously reconciled.

For the heretofore stated reasons, we are of the opinion that the defendant may obtain a jury trial on appeal from conviction of a motor vehicle violation in your county.

FRANCIS B. BURCH, *Attorney General.*

BERNARD L. SILBERT, *Asst. Attorney General.*

JUVENILES

Separation of Alleged Delinquents—Construction of Facilities—Section 51 of Article 26.

July 23, 1969.

Mr. William J. Kunkel.

You have asked for our opinion as to whether Chapter 432 of the Laws of Maryland of 1969 Article 26, Section 51, requires the construction of a separate facility, for the detention of juveniles, physically unconnected with any facility which is used for the detention of adults or committed delinquents.

Chapter 432, (Section 70-12) provides, in pertinent part, that:

> "(a) A child alleged to be delinquent shall not be detained in a facility to which children who have been adjudicated delinquent may be committed, or in a jail or other facility for the detention of adults, unless (1) adequate facilities have not been established, and (2) it appears to the satisfaction of the court, or other person designated by the court, that public safety and protection reasonably require detention. No child shall ever be confined in a jail or other facility for the detention of adults, unless in a room or ward entirely separated from adults. After January 1, 1972 no child shall ever be detained in a jail or other facility for the detention of adults or in a facility to which delinquents have been committed."

The stated purposes of this statute, inter alia, are providing ". . . for the care, protection and wholesome mental and physical development of children . . ." and the removing ". . . from children committing delinquent acts the taint of criminality and the consequences of criminal behaviour . . .".

The act specifies that facilities for the detention of adults may be used until January 1, 1972, under the above enumerated conditions, and directs that "separate" facilities are to be established after that date for the detention of children alleged to be delinquent.

Nowhere in the act does it appear that the facility used to accomplish these purposes must be physically separated from facilities used for adults or delinquents. However, it must be noted that if the same facility is used for both adults and children, the portion used for the detention of juveniles must be individual, exclusive, not associated with, and operated in all respects separately from the portion of the physical facility used for adults or committed delinquents. All necessary measures must be taken to prevent any association or mingling of juveniles with adults or committed delinquents.

In our opinion, Chapter 432 of the Acts of 1969 does not require separate buildings and the construction of one physical facility for juveniles and adults and/or committed delinquents is authorized, provided that the juvenile facility meets the above requirements.

FRANCIS B. BURCH, *Attorney General.*

STANFORD D. HESS, *Asst. Attorney General.*

JUVENILE SERVICES, DEPARTMENT OF

ADMINISTRATION OF MEDICATION BY NON-PROFESSIONAL PERSONNEL.

July 24, 1969.

Mr. Richard A. Batterton, Director.

In your letter of June 5, 1969, you requested our opinion as to whether medication, prescribed by authorized medical personnel for children in juvenile facilities, may be administered by non-professional child-care personnel. We understand that you have withdrawn your second question inquiring about liability "for a mistake in administering medications".

Article 52A, Section 11 of the Annotated Code of Maryland (1968 Replacement Volume) states, in pertinent part:

> ". . . The State Department of Juvenile Services, . . . may establish, maintain, and operate facilities as may be needed properly to diagnose, care for, train, educate and rehabilitate children in and of these services . . ."

The words "care for" have a well defined meaning calling for attention, oversight and management, all of which imply continued personal contact. *Seaman v. State,* 140 N.E. 108 (1922) ; *Mansfield v. Hyde,* 245 P. 2d 577, 581.

Article 52A, Section 12 of the Annotated Code of Maryland (1968 Replacement Volume) states, in part:

> ". . . the Department by rules and regulations shall establish standards of care . . . and from time to time it shall order such changes in the policies, conduct, or management of the institutions and agencies as seems desirable in order to provide adequate care for the children . . ."

Thus, although the medical services contemplated herein are not specifically mentioned by the statute, the furnish-

ing of proper medical attention is required in compliance with the statutory mandate to provide adequate care for the children. The administering of professionally prescribed medication is a necessary part of medical service. We advise that medication may be routinely given to children by child-care personnel when prescribed by, and under the direction of, and with appropriate instructions from, a physician or some other authorized professional medical personnel.

FRANCIS B. BURCH, *Attorney General.*

STANFORD D. HESS, *Asst. Attorney General.*

JUVENILE SERVICES, DEPARTMENT OF—LEASE—INTERPRETATION OF CLAUSE RELATING TO ASSESSED VALUE WHERE VALUE HAS CHANGED DURING "BASE TAX" PERIOD.

November 17, 1969.

Mr. Murphy O. Donoho, Supervisor.

Your recent letter asked our opinion as to an interpretation of a lease agreement on property known as 227 St. Paul Place. Specifically you asked what amount the Department of Juvenile Services is obligated to pay, pursuant to Section 18 (a) (2) and (3) of said agreement, which states:

> "(a) (2) 'Base Taxes' shall mean the taxes payable on the basis of (i) the assessed value of the land and building as assessed in the fiscal year of 1968-1969, and (ii) the tax rates for a full year in effect at the time of such assessment.
>
> "(3) If the taxes in any calendar year, beginning with the year 1969-1970, shall be higher or lower than the base taxes, the rent to be paid by Lessee shall be increased or decreased for such year by adding to or subtracting from the rent reserved in this lease for such year 44.44 per cent of such increase or decrease in taxes."

You inform that the property in question underwent certain improvements during the year 1968-1969 which resulted in an increase in the assessed value of the land and building during said fiscal year. You further inform that the assessed value for the fiscal year 1969-1970 was the same as the final assessment on said property for the fiscal year 1968-1969.

We find that the tax rate in effect during the fiscal year 1968-1969 was $4.91 per One Hundred Dollars assessed value, and that this rate was increased to $5.14 per One Hundred Dollars assessed value for the year 1969-1970, making a total increase of $.23 per One Hundred Dollars assessed value.

It is our opinion that, under the fact situation you have described, and the formula set out in the lease agreement, the assessed value of the land and building for the fiscal year 1968-1969 is that amount which was the final assessment made on said property during said year.

Since the value of the land and building, as assessed for the fiscal year 1969-1970, is the same as the final assessment for the fiscal year 1968-1969 ($556,920), the increase in taxes for the purposes of this lease is calculated by taking the increase in the property tax rate from fiscal 1968-1969 to fiscal 1969-1970, times the assessed value of the land and improvements, as assessed for the fiscal year 1969-1970. We find this amount to be $1,270.71.

Since the Department of Juvenile Services is obligated to pay 44.44 per cent of such increase, it is our opinion that you are responsible for $564.70, being 44.44 per cent of the $1,270.71 increase in taxes on said property.

FRANCIS B. BURCH, *Attorney General.*

STANFORD D. HESS, *Asst. Attorney General.*

LABOR AND INDUSTRY, DEPARTMENT OF

UNAUTHORIZED OFFSETS FROM COMMISSIONS OF ROUTE SALESMEN OF BEVERAGE COMPANY FOR MISSING OR LOST BOTTLES ARE ILLEGAL DEDUCTIONS FROM WAGES OF EMPLOYEES WITHIN MEANING OF SECTION 94 OF ARTICLE 100, THE MARYLAND WAGE PAYMENT AND COLLECTION LAW, AND THE COMMISSIONER OF LABOR AND INDUSTRY IS PERMITTED TO SUE UNDER SAID SECTION ON BEHALF OF THE EMPLOYEES FOR THE AMOUNTS SO WITHHELD.

March 5, 1969.

Mr. Henry Miller.

You ask whether Section 94 of Article 100 of the Maryland Code, the Maryland Wage Payment and Collection Law, applies to deductions made by a beverage distributing company from payments to driver-salesmen for shortages in bottles returned by such salesmen at the end of a day and not accounted for by cash receipts.

These route-salesmen are paid a flat $60.00 weekly salary plus a commission for bottles sold and delivered. At the beginning of each day the drivers are checked out with a stock of beverage merchandise. At the end of the day the driver returns to the company either (a) unsold bottles, (b) cash receipts collected for bottles sold, (c) empty bottles retrieved from customers for which a driver is given a cash credit.

Where there is a discrepancy between the number of full bottles assigned to a driver at the beginning of a day and those either returned or accounted for by cash receipts, the company deducts from the commission paid to the driver the selling price of each such full bottle not accounted for. Such a discrepancy may arise in a number of ways (a) through loss or theft of full bottles from the driver's truck, (b) through loss or theft of cash receipts collected by the

driver, (c) through loss or theft of empty bottles collected by the driver-salesman.

The union contract between the company and the bargaining unit representing route-salesmen sets the base pay of drivers and specifies the commission to be paid on each case of bottles "delivered", but does not provide for the treatment of shortages. The route-salesmen have not, however, executed written authorizations consenting to company deduction of amounts for shortages from their commissions.

In the weekly payroll records for each employee the company enters under a column entitled "gross pay", a figure which includes not only the base salary and commission paid on delivered cases but also the sales price of all inventory not accounted for. F.I.C.A., Federal and State withholding tax, and group insurance premiums are deducted from this "gross pay" entry. The company then makes a further deduction from the employee's gross pay under a column labeled "loans", of the selling price of all such unaccounted for inventory for the particular week.

Specifically, you ask whether the company has, by making such deductions for shortages, withheld "any part of the wages or salaries of any employee . . . without the written and signed authorization of the employee . . ." within the meaning of Section 94 (c) of Article 100. If the deduction is such an unauthorized withholding of wages, then, as Commissioner of Labor and Industry, you are permitted under Section 94 (e) of Article 100 to institute proceedings on behalf of an employee to collect the monies unlawfully withheld. In our opinion the aforesaid deductions do constitute a withholding of a part of the "wages" of the driver-salesmen within the meaning of Section 94 (c) of Article 100.

We have little difficulty with the question of whether commissions paid to the route-salesmen constitute "wages" within the meaning of Section 94 of Article 100. Although Section 94 has not been judicially construed in this State, the weight of authority in Maryland and other jurisdic-

tions is to construe the term "wages" in other statutory contexts to include commissions. For example, in *Balto. Trust Co. v. Rowe*, 141 Md. 155 (1922), amounts due a salesman for commissions on sales were held to be "wages" under Section 15 of Article 15 of the Maryland Code, which section authorized a preferred claim against a company in receivership for money due and owing for "wages or salaries . . .". As the court pointed out on page 163:

> "* * * It is known by everybody that a large portion of salesmen are paid at least in part by commissions, and we would not be justified in holding that a salesman who only received a salary could have a priority under the statute, but one who received a salary plus commissions, or simply commissions for the same services, could not have the priority * * *."

Similarly, we find it difficult to imagine that the Legislature intended to exclude route-salesmen paid partially by commissions from the protection of this statute. See also, *Moore v. Heaney*, 14 Md. 558 (1860) (holding that 5% commission on cost plus construction contract was "wages" within meaning of attachment exemption statute); *Moorman Mfg. Co. v. Industrial Commission*, 5 N.W. 2d 743 (Wis. 1942) (salesmen's commissions held to be "wages" within meaning of State Workmen's Compensation Act); *Capital Life & Health Ins. Co. v. Bowers*, 186 F. 2d 943 (4th Cir. 1951) (commissions paid by insurance company to agents to collect weekly premiums on insurance policies held to be "wages" subject to tax imposed by Federal Insurance Contributions Act); Words and Phrases, *Wages*, pp. 67-69.

Even though commissions are wages within the meaning of Section 94, we still have the question whether the amounts here deducted are actual deductions from wages or simply one step in the accounting procedure whereby commissions are fixed. It is arguable that a driver-salesman's commission is not ascertained until the company is presented proof in the form of either money (or empties) or full bottles re-

turned indicating the number of delivered cases upon which commissions are due. The payroll records of the company, however, do not lend support to this interpretation.

In its weekly pay records kept for each employee, the company includes as part of a driver's gross pay, the selling price of all unaccounted for bottles. It withholds taxes from this gross pay figure and then makes a deduction for what are termed "loans" for the value of the missing inventory. It appears, therefore, that the company has regarded unaccounted for bottles as part of a driver's compensation, and the cash value (selling price) thereof as a loan to the driver, which is to be collected by an offset against his wages at the end of each week. Under these circumstances we do not see how these deductions can be considered anything except a deduction from the "wages" of an employee within the meaning of Section 94 (c) of Article 100. Of course, there would be no violation of the law if the driver-salesmen had executed (as they have not in the instant case) written authorizations consenting to deductions for shortages.

You advise that our opinion is supported by the past practice of your department in administering the provisions of Section 94 of Article 100. You state that on many previous occasions you have required employers to refund unauthorized deductions from the wages of employees, made for missing inventory or cash. For example, the Wage Payment and Collection Law has been applied by your department to a supermarket concern to require return of unauthorized deductions from the wages of a checkout clerk for cash receipts missing from a cash register under the control of the clerk. Similarly, you have applied the aforesaid law to require a moving van company to return to its drivers unconsented deductions from wages made where a driver failed to properly account for cash amounts received to cover truck operating expenses on long distance trips. Your administrative interpretation of the applicability of Section 94 of Article 100 to these analogous situations reinforces our opinion in the instant case. See *Smith v. Higinbothom*, 187 Md. 115 (1946).

We do not believe that possible past acquiescence of driver-salesmen in the company's practice of making deductions for shortages waives any refund claim they might have under the Maryland Wage Payment and Collection Law. In the first instance, no evidence has been brought to our attention that show employees intentionally relinquished a known right or that their conduct warrants an inference of such a relinquishment, assuming an employee's right to complain under Section 94 of Article 100 could be waived. *Gould v. Transamerican*, 224 Md. 285 (1961); *Food Fair v. Blumberg*, 234 Md. 521 (1964). Moreover, the State clearly has not waived its right to enforce a claim on behalf of driver-salesmen under Section 94 (e) of Article 100, even if in fact, as apparently is undecided in Maryland, there can be a waiver of a right by the State. *State v. Simms*, 234 Md. 237 (1964); see 92 C.J.S., *Waiver*, p. 1068.

We note, however, that enforcement of a claim under Section 94 (e) is not mandatory upon the Commissioner of Labor and Industry. Section 94 (e) states that you ". . . *may* institute proceedings on behalf of an employee to enforce compliance . . . and to collect any monies unlawfully withheld from such employees . . .". (emphasis supplied) It is possible, therefore, that circumstances surrounding the filing of a complaint under Section 94 (e) of Article 100 might in a given case dictate against the exercise of your discretionary authority to institute proceedings under the Wage Payment and Collection Law.

FRANCIS B. BURCH, *Attorney General.*

ANTHONY M. CAREY, *Assistant Attorney General.*

LABOR AND INDUSTRY, DEPARTMENT OF—THE AMENDMENT OF SECTION 162 OF ARTICLE 56 BY CHAPTER 431 OF THE LAWS OF 1969 EMPOWERS THE COMMISSIONER OF LABOR AND INDUSTRY TO LICENSE THEATRICAL EMPLOYMENT AGENCIES AS OF JULY 1, THE EFFECTIVE DATE OF THE ACT, EVEN THOUGH THE LICENSE YEAR RUNS FROM MAY 2 THROUGH MAY 1. NO PRORATION OF THE LICENSE FEE IS TO BE ALLOWED IN THE ABSENCE OF A PROVISION TO THAT EFFECT IN THE STATUTE.

June 3, 1969.

Mr. Kenneth Goldberg.

You request our opinion concerning newly enacted Chapter 431 of the Laws of 1969, which repealed and reenacted Sections 161-170 of Article 56 of the Annotated Code of Maryland, to provide a new scheme for the licensing, regulation, and inspection of private fee charging employment agencies. Section 162 of said article was amended to include, within the scope of the employment agencies licensed and regulated under the subtitle, theatrical employment agencies, which prior thereto had been excluded from the coverage of the subtitle.

Specifically, you ask whether the Commissioner of the Department of Labor and Industry may commence licensing theatrical employment agencies as of July 1, 1969, the effective day of the Act, or whether he must wait until May 2, 1970, in that Section 163 of the subtitle provides for the issuance of an annual license which ". . . irrespective of the date of issue shall expire on the first day of May next thereafter." Secondly, you ask whether, if theatrical employment agencies may be licensed commencing July 1, 1969, such agencies shall pay a prorated license fee or whether a full fee is due and owing regardless of the date of issue of the license.

In our opinion your agency may commence licensing theatrical employment agencies as of July 1, 1969. Section 162 of Article 56 was amended to bring within the defini-

tion of employment agencies covered by the Act theatrical employment agencies and we find no indication of legislative intent that such newly covered agencies should not commence to be licensed as of the effective date of the Act. The case of *Read Drug and Chemical Company v. Claypoole,* 165 Md. 250 (1933), is clearly inapposite. There, the Court of Appeals held that where a law was amended, effective June 1, imposing an additional license fee upon entities already required to pay a fee under the prior statute and the license year began on May 1, that the additional fee was not payable until the beginning of the license year next after the effective date of the Act, in the absence of an indication of legislative intent to the contrary. Here, however, the statute has been amended to bring within its purview entities which did not previously pay a license fee at all, and in our view the Legislature must be deemed to have intended licensing as of the effective date of the Act, in the absence of an indication of a contrary intent.

Secondly, we are of the view that no proration is to be permitted with respect to the license fee. It is well established that in the absence of language indicating a legislative intent to permit proration, a full fee is required for an annual license regardless of the date of issue. 53 C.J.S., *Licenses,* Section 48 (a) and cases cited therein; 46 Opinions of the Attorney General 136 (1961); and see, *e.g.,* Section 66 (a) of Article 2B of the Maryland Code (provision for pro rata license fee for alcoholic beverage licenses); Section 83 of Article 66½ (provision for payment of motor vehicle registration fee on a semi-annual basis).

FRANCIS B. BURCH, *Attorney General.*

ANTHONY M. CAREY, *Asst. Attorney General.*

LABOR AND INDUSTRY, DEPARTMENT OF—INTERPRETATION OF ARTICLE 89, SECTION 12—CONSENT ELECTION AGREEMENT—POWER OF COMMISSIONER OF LABOR AND INDUSTRY TO ORDER INTERVENTION OF A UNION NOT A PARTY THERETO.

November 18, 1969.

Mr. Henry Miller.

Your recent letter asked our opinion as to whether you, as Commissioner of Labor and Industry, have the power to order the placing of a union on a ballot, in a consent election between an employer and another union.

Article 89, Section 12 of the Annotated Code of Maryland (1964 Replacement Volume) provides:

> "Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of employees involved, with the approval of the Commissioner of the Department of Labor and Industry, may enter into a consent election agreement leading to a determination by the Commissioner or his duly authorized representatives of the facts ascertained after such consent election. Such agreement shall include a description of the appropriate unit, the time and place of holding the election, and the payroll to be used in determining what employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the Commissioner or his duly authorized representatives, and the rulings and determinations by the Commissioner or his duly authorized representatives of the results thereof shall be final, and the Commissioner or his duly authorized representatives shall issue to the parties a certification of the results of the election, includ-

ing certification of representatives where appropriate."

This section authorizes you to conduct an election only when called upon to do so by the parties involved, and does not allow for any independent action on your part, other than that specifically authorized in either the statute or the agreement.

It is our opinion that your only power, as concerns a consent election, is that which is given you by virtue of Article 89, Sections 12 and 13 of the Code, and by the agreement in each case. Neither of these sections, nor the agreement, authorizes you to independently place names on the ballot, other than those of the parties who originally invoked your jurisdiction. We, therefore, advise you that you have no authority to place on the ballot the name of an organization which is not a party to the agreement calling for the consent election.

However, should said election result in the rejection, by the employees voting therein, of the individual or labor organization involved, we see no reason why a consent election between the employer and any new proposed representative of the employees involved could not be conducted under your auspices.

FRANCIS B. BURCH, *Attorney General.*

STANFORD D. HESS, *Asst. Attorney General.*

LEGISLATIVE COUNCIL

CONSTITUTIONAL LAW — REQUIREMENT OF ARTICLE XIV, SECTION 1, OF THE CONSTITUTION THAT EACH AMENDMENT BE EMBRACED IN A SEPARATE BILL—ARTICLE III, SECTION 29 OF THE CONSTITUTION, REQUIRING THAT EACH LAW ENACTED BY THE GENERAL ASSEMBLY SHALL EMBRACE BUT ONE SUBJECT, NOT APPLICABLE TO BILL PROPOSING CONSTITUTIONAL AMENDMENT.

August 27, 1969.

Dr. Carl N. Everstine.

With your letter of July 16, 1969, you have forwarded a copy of Senate Bill No. 4 as proposed, but not passed, during the 1969 regular session of the General Assembly. The Special Committee on Constitutional Revision of the Legislative Council is now considering whether the Legislative Council should recommend passage during the 1970 regular session of the General Assembly of a bill with substantially identical provisions.

The bill in question involves the repeal or amendment of fourteen sections of the Constitution of Maryland to eliminate provisions deemed obsolete. The subject matters covered in the bill, as well as the provisions of the Constitution which will be amended or repealed, are as follows:

(1) Racial equality: Article 7 of the Declaration of Rights and Article III, Section 53, of the Constitution;

(2) Slavery: Article 24 of the Declaration of Rights and Article III, Section 37, of the Constitution;

(3) Religious freedom: Article 36 and Article 37 of the Declaration of Rights;

(4) Dueling: Article III, Section 41, of the Constitution;

(5) Quorum of Supreme Bench of Baltimore City: Article IV, Section 35, of the Constitution;

(6) Commissioner of the Land Office: Article V, Section 6, Article VII, Sections 4 and 5, and Article XV, Section 9, of the Constitution; and

(7) State Librarian: Article VII, Section 3, and Article XV, Section 9, of the Constitution.

You have asked our opinion as to whether the proposed bill would violate Article III, Section 29, of the Constitution, which requires that "each law enacted by the General Assembly shall embrace but one subject". Since the bill in question proposes amendments to the Constitution, the provisions of Article III, Section 29, are not applicable. A proposed amendment to the Constitution "continues to be a *bill* and never becomes a *law*", even though approved by the required majority of both houses of the General Assembly, *Warfield v. Vandiver*, 101 Md. 78, 113 (1905), (emphasis by Court). As stated in *Hillman v. Stockett*, 183 Md. 641, 647 (1944), "[t]he provisions of Section 29 of Article III have . . . to do only with laws and not with bills" and thus the requirements thereof "can never become operative upon a bill proposing a constitutional amendment". See also 9 Md. L. Rev. 197, 242 (1948) in which it is stated that the provisions of Section 29 of Article III of the Constitution "do not apply to bills proposing amendments to the Constitution".

However, while Article III, Section 29, is not applicable to bills proposing constitutional amendments, we believe that your point is well taken because its counterpart, namely, Article XIV, Section 1, of the Constitution, which sets forth the procedure to be followed to amend the Constitution, requires "that each Amendment shall be embraced in a separate bill". In *Hillman v. Stockett, supra*, the Court of Appeals construed the word "Amendment", as used in Article XIV, Section 1, to mean "a proposal of changes on a particular subject". Thus it was held that a bill proposing constitutional amendments could amend more than one section of the Constitution, so long as there was a single subject matter, such as, in the case then before the Court, the state judiciary.

Since the bill in question deals with such diverse subjects as religious freedom, dueling, and the Commissioner of Land Office, we are of the opinion that it would violate the provision of Article XIV, Section 1, of the Constitution requiring each amendment to be embraced in a separate bill. It would seem to us that the General Assembly, in order to effectuate all of the constitutional amendments encompassed in the proposed bill, would be required by Article XIV, Section 1, of the Constitution to propose at least seven amendments, a separate amendment being necessary for each of the subject matters previously outlined. We realize that implementation of this recommendation may cause inconvenience to both the General Assembly and to the voters of the State, but we see no alternative in light of the language of Article XIV, Section 1, of the Constitution, as interpreted by the Court of Appeals.

FRANCIS B. BURCH, *Attorney General.*

WILBUR E. SIMMONS, JR., *Asst. Attorney General.*

LOAN LAWS, ADMINISTRATOR OF

ARTICLE 58A, SECTION 16 (D), SMALL LOAN ACT, OVERCHARGE OF INTEREST; OTHER CHARGES; RETENTION OF MONIES COLLECTED ON VOID LOANS; TIME AT WHICH DETERMINATION AS TO VOIDNESS OF LOAN CAN BE MADE; POWER OF ADMINISTRATOR OF LOAN LAWS TO ORDER LICENSEE TO CEASE AND DESIST FROM COLLECTION OR RETENTION OF AMOUNT COLLECTED ON A VOID LOAN.

September 4, 1969.

Mr. F. Vernon Boozer.

Your letter of August 8, 1969, states that upon discovery of a loan overcharge, it has been the policy of your office to direct the licensee to credit the account in question with the amount of the overcharge. You now ask whether this is a proper practice, in view of Article 58A, Section 16 (d) of the Annotated Code of Maryland (1968 Cumulative Supplement), or whether when an overcharge of interest is discovered, you must require the loan company or licensee to void the contract of loan. You ask further at what point in time it can be determined that an overcharge has, in fact, been made.

We will answer your second question first.

Section 16 (d) of Article 58A provides:

> "If interest, or charges in excess of those permitted by this article shall be charged, contracted for, or received, the contract of loan shall be void and the licensee shall have no right to collect, retain or receive any principal, interest, charges or recompense whatsoever."

In answer to your inquiry concerning the point in time at which it can definitely be ascertained that an overcharge has been made on a particular loan, the above language of Section 16 (d) would seem to leave no doubt that this deter-

mination is required to be made when interest in excess of that permitted is "charged, contracted for, or received." There is nothing in this provision to indicate that a loan must be fully repaid, along with the interest contracted for, before a determination can be made that an overcharge has occurred. The Municipal Court of Appeals for the District of Columbia, in *Credit Finance Service, Inc., v. Able,* 127 A 2d 396 (1956), interpreting the Maryland Uniform Small Loan Act, stated at page 399:

> "Unlike some general usury laws this statute does not require that unlawful interest be actually paid and received in order to constitute a violation."

It is our opinion, therefore, that a usurious contract exists as soon as a licensee "contracts for" a loan which calls for interest or charges in excess of those permitted by law, and that there is no need to wait until any or all of the amount contracted for is repaid before making a determination as to the legality of the interest charged thereon.

We also point out that a loan may be valid when contracted for, but later become usurious if at a later date some excessive charge, late charges or similar collateral payments in excess of permissible legal limits, are assessed or levied against the borrower. Following the reasoning set out above, it is our opinion that such a contract becomes void when the additional collateral charge is billed to, or levied against, the borrower. See Section 16 (c) of Article 58A. See also *Fisher v. Bethesda Discount Corp.* 221 Md. 271 (1960).

In response to your inquiry as to whether you, as Administrator of Loan Laws, must void a loan where you find that interest in excess of that allowed by law has been charged, contracted for, or received, it is our opinion that the provisions of Article 58A act to void such a loan by operation of law, and that it is your duty to prohibit the collection of that loan. *Consumers Credit Service, Inc. v. Craig,* 75 A 2d 525 (MCDC, 1950); *Home Finance Co. v. Padgett,* 54 So. 2d 813 (La. 1951).

Even when such an overcharge is inadvertent, we have no hesitancy in saying that such loans are nonetheless void. The very issue was considered by the District of Columbia Municipal Court of Appeals in construing the Maryland Small Loan Act in *Credit Finance Service, Inc. v. Able, supra.* That case involved an overcharge of interest by a lender, through inadvertence. In answer to the question . . . "whether under the language of the statute . . . when the making of an illegal interest charge is brought to light, inadvertence may be regarded as a valid excuse," the Court stated:

> "Our decision is that under the Maryland statute, once an overcharge has been established, mistake or inadvertence is no defense. We base our decision on the considerations already stated and also on the following grounds:
>
> "(1) The statute, as appellant concedes, is remedial in purpose and must be given a liberal construction.
>
> "(2) This means that courts should extend their protection as far as they reasonably and practically can to borrowers in this class.
>
> "(3) It seems clear that it was the legislative intent to provide such protection by declaring void every contract under which unlawful interest is charged.
>
> "(4) The Maryland Legislature could have, but did not provide that good faith should be a valid defense and that overcharges made by mistake should not invalidate the contract.
>
> "(5) The Maryland Legislature, by making no exclusionary reference to inadvertent violations, has left to the courts no power to make exceptions in cases of this kind.
>
> "(6) If inadvertence were sanctioned as a defense, the purpose of the statute could easily be thwarted because, as appellees very properly sug-

gest, loan companies would seldom admit that their overcharges or errors were willful or intentional. Open admissions of usurious intent are among the rarest phenomena known in legal history.

"(7) This situation is, from the standpoint of public policy, analogous to that in which a price-control statute authorized a consumer's action for a fixed amount against a merchant who sold an article for even a few cents more than a prescribed price schedule. In such case it was held, 'Innocent non-conformity . . . is as damaging to . . . the public as guilty non-conformity,' and that courts have no discretion to excuse an innocent violation or to award a suing consumer any amount less than the law authorized him to claim. *Bowles v. American Stores, Inc.*, 78 U. S. App. D. C. 238, 139 F. 2d 377. In that situation the objective was protection of the consumer against inflation; in our case the concern of the law is protection of small-loan borrowers. Remedially, the result is the same; the violator, though guilty of no wrongful purpose, knows that he must make no overcharge, at the risk of suffering the loss fixed by law." 127 A 2d 398, 399.

"Inadvertent failures to comply with statutory requirements have been held as fatal to the validity of the contract of loan as intentional failures." 50 C.J.S., Money Lenders, Section 5.

The Courts of other states, in construing similar statutes have also ruled that an inadvertent error will void a loan. *Randisi v. Household Finance Corp.* 58 N.Y.S. 2d 406 (1945); *Rimpotti v. Household Finance Corporation,* 40 N.Y.S. 2d 171 (1943); revd. on other grounds, 42 N.Y.S. 2d, 922 (1943), reag. den. 43 N.Y.S. 2d 749 (1943); *Ryan v. Motor Credit Co.*, 23 A 2d 607, 613 (N.J. 1941), affirmed 28 A 2d 181 (1941); *Consolidated Plan of New Jersey, Inc., v. Shanholtz, et al,* 147 A 401 (N.J. 1929), affirmed 153 A 906 (1931); *Colonial Plan Co. v. Tartaglione, et al,* 147 A 880 (1929).

However, see *Bailey et al v. Williams,* 118 S.E. 354, (Ga. 1923), *Hennessey v. Personal Finance Corporation of New York,* 26 N.Y.S. 2d 1012 (1941) and *Cotton et al v. Commonwealth Loan Co.,* 190 N.E. 853 (Ind. 1934), where the Court held that an inadvertent error did not cause a loan to be void.

It should also be noted that in the case of *Fisher v. Bethesda Corp., supra,* the attorney for the finance company in his brief to the Court of Appeals of Maryland, argued that had the Maryland Small Loan Act contained a clause similar to Section 196 (c) of Article 11, forgiving clerical errors in the computation of interest, then the decision in the *Able* case would probably have been in favor of the finance company. This argument implies that the absence of such an exclusionary provision requires that a loan be void for an inadvertent interest overcharge.

Furthermore, the legislative history of the 1968 amendments to Article 58A gives proof that there is no discretion vested in the Administrator on this question. That amendment, H/B 13—Chapter 439 of the Acts of 1968, contained a provision that a loan would not be void if a licensee, as a result of clerical error or mistake, contracts for, charges or receives greater interest than that permitted by Article 58A, provided the overcharge was returned within fifteen days from the date the licensee discovers the clerical error or mistake. This language was stricken from the Bill prior to its passage, leading us to the inescapable conclusion that a usurious loan is void, without regard to the amount of the overcharge, or whether or not the overcharge was a deliberate act.

In 1960 this office set out these exact views in an opinion addressed to Carl F. Vohden, then Administrator of Loan Laws. Administrator Vohden informed this office that "[t]he case at hand involved a law student who borrowed for tuition purposes. Several weeks after the interest overcharge had been made the borrower brought the matter to the attention of the lender who corrected the overcharge with the explanation that an inadvertent error had been made . . ." . Administrator Vohden then asked if an "inad-

vertent" overcharge by a lender was sufficient to require the Administrator to void the loan. In response, dealing with Section 16 (b), the antecedent to the present Section 16 (d), we advised:

> ". . . I am of the opinion that the lender in question may not collect any further payments on the loan since the loan has become void because of the overcharge of interest." Citing *Fisher v. Bethesda Corp., supra.* 45 Opinions of the Attorney General, 177.

Your authority to issue cease and desist orders forbidding the collection of a usurious loan, we believe, is clearly set out in Section 11 of Article 58A, which provides, in pertinent part:

> "(a) The Administrator of Loan Laws, for the purpose of discovering violations of this article, may either personally or by any person designated by him, at any time and as often as he may desire, investigate the loans and business of every licensee and of every person, copartnership, and corporation by whom or for which any such loan shall be made, whether such person, copartnership or corporation shall act, or claim to act as principal, agent, or broker, or under or without the authority of this article; and for that purpose he shall have free access to the books, papers, records, safes and vaults of all such persons, copartnerships and corporations; he shall also have authority to examine, under oath, all persons whomsoever, whose testimony he may require, relative to such loans or business.
>
> * * *
>
> "(c) The Administrator of Loan Laws shall have, in addition to all other powers conferred upon him by this article, the power to issue orders directed to a licensee to cease and desist from a course of conduct if he shall find, after notice and hearing, that the court (sic) of conduct of

> the licensee results in an evasion or violation of any provision of this article, or of rules and regulations promulgated in pursuance thereof."

We believe that the language of this section is clear and unambiguous and constitutes a mandate that the Administrator require a licensee to cease and desist from any act or course of conduct constituting a violation of the provisions of Article 58A. It would make a mockery of the statute, in our opinion, and of the Legislature's attempt to regulate the small loan industry, to hold that the Administrator does not have the power to prohibit the collection of a usurious loan.

It would appear, therefore, that the policy of your office of simply directing that an overcharge of interest be credited to the account in question, is in derogation of the laws of Maryland and contrary to the 1960 Opinions of the Attorney General.

For your convenience, we will summarize our response to the two questions you propound:

1. We believe that a usurious contract exists as of the moment that a binding contract is entered into. Further, a contract valid when made becomes usurious, if at a later date some excessive charge, late charges, or similar collateral payments in excess of permissible legal limits, are assessed or levied against the borrower.

2. We believe that a usurious loan is void as a matter of law, and does not require a determination on your part to make it so. Your duties, under the Act, upon discovery that a void loan exists, are to insure that no principal, interest, or charges whatsoever, are collected, received or retained by the licensee. It is not sufficient for you to merely order that the overcharge be credited to the borrower's account.

You will note that Section 16 (d) of Article 58A provides that the "licensee shall have no right to collect, *retain* or receive any principal, interest, charges or recompense whatsoever" (Emphasis supplied) from a usurious contract.

The authorities are clear, that when a loan becomes void, a borrower, who has paid principal or interest on said void loan transaction may recover such sums from the lender. *Credit Finance Service, Inc. v. Able, supra; Hardman v. New Finance Co.,* 259 S.W. 2d 431 (Ky. 1953); *Rosenblum v. Family Finance Corp.,* 39 N.Y.S., 2d 230 (1942); *Robb v. Central Credit Corp.,* 100 N.W. 2d 57 (Neb. 1959); *Dougherty v. Commonwealth Co.,* 109 N.W. 2d 409 (Neb. 1961).

It should also be pointed out that Chapter 439 of the Acts of 1968 indicates that the word "retain" was specifically added to the section, thus indicating, in our opinion, the desire of the Legislature to allow a borrower, who has paid either principal, or interest to a lender under a usurious contract, to recover such sum when he discovers that the contract is void. Your power to compel a refund of monies paid under a void contract of loan, as your power to prohibit the collection of monies due under such a contract, is derived from the language of Section 11 (c), of Article 58A, which we have set out in toto above.

FRANCIS B. BURCH, *Attorney General.*

STANFORD D. HESS, *Asst. Attorney General.*

LOAN LAWS, ADMINISTRATOR OF — INTERPRETATION OF ARTICLE 83, SECTION 153D—COMPOUNDING OF SERVICE CHARGES—TIME PRICE SALES TRANSACTION AS GOVERNED BY GENERAL USURY LAWS—SERVICE CHARGE NOT CONSIDERED INTEREST.

September 18, 1969.

Mr. F. Vernon Boozer.

By letter dated August 11, 1969, you asked us to advise you as to our views on the practice of compounding service charges in connection with retail credit accounts. Your question, specifically, was whether, when a buyer misses a scheduled monthly payment, the seller may charge a service charge on the previous service charge. The example you cited was as follows:

Date	Amount Paid	Allotted To Service Charge	Allotted To Principal	Balance
Jan. 1	(purchase)			$100.00
Feb. 1	(no payment)	($1.50 added to balance)		101.50
March 1	$20.00	$1.52	$18.48	83.02

As you know, we wrote to Administrator Gerstung on December 4, 1968, on the subject. Thereafter, we recalled our opinion for further study and review, because of doubts which arose as to whether we had correctly interpreted the applicable statute in relation to the basic underlying transaction. Although the opinion was recalled, it was printed in error by the Daily Record of Baltimore City on January 17, 1969. A subsequent notice in the Daily Record pointed out that the opinion had been recalled and was not to be considered a subsisting opinion of this office.

We did not immediately thereafter restate our views on this question, primarily because we were advised that the Legislature planned to act on Section 153D (c) of Article 83 at its 1969 session in a manner which was expected to clear up any ambiguity in the matter. At that session, a bill was offered which would have amended Section 153D (c) to specifically prohibit the "compounding" of service charges on retail credit accounts. This amendment, however, failed of passage. See stricken language of Chapter 496, below.

Our restudy of the question, particularly when viewed in light of the refusal of the Legislature to specifically prohibit this practice, leads us to the conclusion that our original interpretation of legislative intent on this section of the law was in error.

The question before us, as noted above, is whether, under what is commonly referred to as a "revolving credit account", a service charge may be levied on that portion of the outstanding balance owed by a buyer, which represents previously assessed and unpaid service charges.

Article 83, Section 153D provides, in pertinent part:

> "(a) Notwithstanding the provisions of any other law, a seller, [or] *financial institution, or* [his successor in interest,] *a successor in interest,* under a retail credit account, may charge, collect and receive a service charge, however described, not to exceed the following:
>
> "(c) When the service charged is assessed on the [outstanding] ~~*unpaid*~~ balances from month to month, a service charge which shall not exceed the following rates computed on [the outstanding] ~~*such unpaid balances from month to month*~~ [:] ; ~~*excluding any unpaid accrued charges and any purchases made within thirty (30) days prior to the date the assessment is made:*~~ BALANCES FROM MONTH TO MONTH:" Chapter 496, Acts of 1969.

It is well settled that the transaction to which the service charge applies is not one involving a loan of money, but a time sale price, and thus is not subject to the general usury laws of Article 49, of the Annotated Code of Maryland, or the small loan regulations of Article 58A of the Code. *Financial Credit Corporation v. Williams,* 246 Md. 575 (1966); *Falcone v. Palmer,* 242 Md. 487 (1965), citing *Uni-Serv Corporation of Massachusetts v. Commissioner of Banks,* 207 N.E. 2d 906 (Mass. 1965).

In *Rothman v. Silver,* 245 Md. 292 (1966), the Court stated:

> "[T]he Legislature of Maryland recognized and gave approval to the general rule [that a bona fide sale of personalty at a deferred price greater than the cash price is not subject to the usury laws] when it passed the Retail Installment Sales Law, Code (1957) and Code (1965 Replacement Vol.), Art. 83, Sections 128 to 153 (which is not applicable here because the sales price was in excess of the $5,000 limit under the Sales Act). The Act permits finance charges and other charges far in excess of the rate of interest permitted on loans or for forbearance by Section 3 of Article 49 of the Code, . . ."

See also 48 Opinions of the Attorney General 260.

In our earlier withdrawn opinion of December 4, 1968, we stated, *inter alia,* that "The Retail Credit Accounts Law authorizes the imposition of *interest rates* in excess of those set forth in the general usury statute in 'revolving credit' transactions hitherto exempt from rate regulation by reason of the 'time sales' doctrine recognized in our opinion at 48 Opinions of the Attorney General 260 (1963)." (Emphasis supplied).

Our review of Sections 153A through H of Article 83 of the Maryland Code, however, convinces us that we were incorrect when we said that that section authorized the imposition of "interest rates" in excess of those set forth

in the general usury statute, for nowhere is the service charge characterized as interest. To hold that it is interest without an express statutory declaration or definition to that effect would require us to ignore the almost unanimous case law in Maryland and elsewhere that a service charge on a retail credit transaction is a time price charge and is not interest in the accepted sense of the term. It would also require us to ignore the impact and plain import of our prior opinion in 48 Opinions of the Attorney General 260.

It is our opinion, therefore, that the transactions herein involved are sales at higher prices, due to finance charges, and not loans, and that the prohibitions generally applicable to loans are not relevant to extensions of credit involving sales. It is our further opinion that the Legislature intended, by rejecting an amendment to the present law which would have eliminated the compounding of service charges, and by its use of the phrase "outstanding balance", to allow said practice of compounding of service charges to continue.

FRANCIS B. BURCH, *Attorney General.*

STANFORD D. HESS, *Asst. Attorney General.*

LOAN LAWS, ADMINISTRATOR OF—FEE FOR REPOSSESSION OF SECURITY ON SMALL LOAN AS VIOLATION OF ARTICLE 58A, SECTION 16 (C).

October 9, 1969.

Mr. F. Vernon Boozer.

You have requested our opinion as to whether a licensee under the Small Loan Laws, who charges a fee for the repossession of property pledged as security for a loan, has violated Article 58A, Section 16 (c) of the Annotated Code of Maryland (1968 Replacement Volume). You further inquire whether the loan is void if such repossession fee is charged by the lender.

Article 58A, Section 16 (c) states:

> "In addition to the interest and charges provided for by this Article, no further or other charge, or amount whatsoever for any examination, service, brokerage, commission or other thing, or otherwise, shall be directly or indirectly charged, contracted for or received."

The case of *Ideal Finance Association v. La Bonte, et al,* 180 A 300 (Conn., 1935) concerned a suit by a small loan licensee to recover the balance due on a joint loan to a husband and wife. At the time the defendants contracted for their loan, they executed and delivered a chattel mortgage to the plaintiff, which was never recorded nor used by the plaintiff. This mortgage contained an agreement to pay "any expense which the lender has incurred or contracted for in reclaiming said goods and chattels, including reasonable attorney's fees and costs, etc." The Court in its opinion, stated:

> "* * * At the time that the note in question was given, the amendment to the Small Loans Act adopted in 1933, Cum. Supp. Section 1084b, was in effect. This provided: 'In addition to the interest herein provided for, no further or other charge

> or amount for any examination, service, brokerage, commission or other thing, or otherwise, shall be directly or indirectly charged, contracted for or received. * * * If interest or any other charges in excess of those permitted by the revisions of this chapter shall be charged, contracted for or received, the contract of loan shall be void and the licensee shall have no right to collect or receive any principal, interest or charges. * * * No licensee shall grant any loan other than on personal security, except that an assignment or order for the payment of any salary or wages of the borrower may be taken as security in the manner provided by section 4080.' The Legislature, having forbidden any such loan upon other than personal security or the assignment of wages, and, in addition, having prohibited the making of charges, fees, and demands in addition to the interest provided for, the lender has undertaken to contract for that which under the statute renders the note void, *Consolidated Plan of New Jersey v. Shanholtz*, 147 A. 401, 402, 7 N.J. Misc. 876; *Seaboard Security Co. v. Jones*, 40 Ga. App. 710, 151 S.E. 412. The Small Loans Act prescribes certain regulations for those who conduct business under its provisions. Failure on the part of the lender to comply with these regulations renders the loan unenforceable. *Westville & Hamden Loan Co. v. Pasqual*, 109 Conn. 110, 114, 145 A. 758; *Nicotera Loan Corporation v. Gallagher*, 115 Conn. 102, 105, 160 A. 426; *Atta v. Bergin*, 120 Conn. 190, 180 A. 298. Upon proper pleadings, this defense would have been a bar to the action."

See also 143 A.L.R. 1328, and *Capital Loan and Savings Co. v. Diery, et al*, 16 N.E. 2d 451 (Ohio, 1938).

We note that the wording of the Connecticut statute is identical with section 16 (c) of Article 58A. In our view the Connecticut Court was correct in its holding, and it is, therefore, our opinion that since the Small Loan Law does

not authorize the charging of repossession fees, such fee is not permitted by this Article. It is our further opinion that the contract of loan is void for charging a fee not permitted by said Article, and the licensee has no right "to collect, retain or receive any principal, interest, charges or recompense whatsoever."

FRANCIS B. BURCH, *Attorney General.*

STANFORD D. HESS, *Asst. Attorney General.*

LOAN LAWS, ADMINISTRATOR OF—SMALL LOAN LAWS—COMPOUNDING OF INTEREST; REFINANCING OF LOANS; REBATE ON CREDIT LIFE INSURANCE PREMIUMS TO DISCHARGE INTEREST.

October 15, 1969.

Mr. F. Vernon Boozer.

Your letter of September 16, 1969, requests our opinion as to whether interest on a prior loan may be included in the principal balance of a new loan, under the Small Loan Laws. You again wrote our office on September 25, 1969, asking our opinion as to whether amounts due a borrower, in the form of a rebate on credit life insurance premiums for a prior loan, may be applied to discharge the interest due on said prior loan, where a new loan is made to pay off the prior loan.

We direct your attention to our letters, dated July 31, 1968, and August 13, 1968 (53 Opinions of the Attorney General 367 and 376, respectively) to your predecessor, Mr. Robert J. Gerstung, in which we stated that in our opinion the law does not permit the "refinancing" of a loan by the same licensee, where the proceeds of the new loan are used to discharge the principal and interest of a prior small loan.

We based our opinion, at that time, on the fact that a majority of the courts which have considered this question had come to a similar conclusion. We specifically direct your attention in this regard to *Madison Personal Loan v. Parker*, 124 F. 2d 143 (2nd Cir. 1941); *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); *Vaugh 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); *Vann v. Accounts Super-*

vision Co., 88 S. 2d 548 (Fla. 1956) cited in our previous opinion of July 31, 1968. Thus, we find the United States Court of Appeals for the Second Circuit, and the States of Georgia, Louisiana, Missouri, Pennsylvania and Florida to be in accord with our conclusion.

We also note that the legislative history of Article 58A, Section 16 and the opinion of this office in 19 Opinions of the Attorney General, 430 (1934), as more fully discussed in our prior opinions to you of July 31, 1968 and August 13, 1968, further support our conclusion.

We recognize that a contrary view was taken by the New York Court in *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) and the Main Court in *Beneficial Finance v. Fusco*, 160 Me. 273, 203 A 2d 457 (1964). It may well be that the *Fusco* case, *supra*, the most recent case on the subject, and decided in 1964, represents the more modern view. We believe, however, that if such a view is to be adopted in Maryland it can only be done by the Courts. We do not conceive it to be our prerogative to express an opinion which is not only against the weight of authority, but which would also, we think, be contrary to the most recent indication of legislative intent on the subject.

Therefore, until such a ruling is made by the Maryland Courts, we reaffirm the views stated in our previous letters to Mr. Gerstung, and advise you that in our opinion interest outstanding on a prior loan may not be incorporated into a new interest bearing loan without violating the prohibition against the compounding of interest.

You have also asked our opinion as to the use of proceeds, due a borrower, as a refund on credit life and disability insurance to pay the interest due on the prior loan. It is our opinion that this money, which indisputably is due the borrower in any event, may be used by the lender, at the direction of the borrower, to discharge all or part of the interest and principal of the first loan.

If the insurance refund is equal to, or exceeds the amount of interest owed by the borrower, and if said refund is used to satisfy that interest, then the new loan would not include interest due from the first loan, and thus there would be no compounding of interest involved.

FRANCIS B. BURCH, *Attorney General.*

STANFORD D. HESS, *Asst. Attorney General.*

LOAN LAWS, ADMINISTRATOR OF — SMALL LOAN — INTEREST AFTER JUDGMENT—INTERPRETATION OF ARTICLE 58A, SECTION 16 (A).

October 31, 1969.

Mr. F. Vernon Boozer.

Your recent letter states that an examination by your office of the records of a licensee disclosed interest charged at the small loan rate on an account that had been reduced to judgment. You ask us to advise you as to the legality of such charge.

We assume the applicability of Article 58A, Section 16(a) of the Annotated Code of Maryland (1968 Supplement), which provides, after establishing rates of interest on small loans:

> ". . . that the interest rate on any balance remaining unpaid six (6) months after the date of maturity of the contract as originally scheduled or as deferred, shall be reduced to six (6) per centum simple interest per annum on the unpaid balances."

This proviso was added by the 1968 Amendment to the law and it is now quite clear that, from and after six months from the date of maturity of the contract as originally scheduled or as deferred, the applicable rate of interest is limited to six percent simple interest per year. And this is the case whether the claim has been reduced to judgment or not.

The point has not been decided in any Maryland case. However, the Supreme Court of Georgia, in the case of *Hartsfield Co. v. Demos,* 162 S.E. 138 (Ga., 1931) answered the question you have posed to us. In that case, the lender appealed and the Court of Appeals certified the following question to the Supreme Court of Georgia:

> "Where a person, after having complied with the provisions of the act of August 17, 1920, en-

acted for the purpose of regulating the business of making loans in sums of $300 or less, and for other purposes (Ga. L. 1920, p. 215), and after obtaining a license to carry on the business of making loans according to the terms of such act, including the right to charge interest at a rate not to exceed 3½ per cent, per month, made a loan of $225, payable in installments of $2.25 per week, with interest from the date of the contract at the rate of 3½ per cent, per month, payable 'monthly on unpaid balances,' but where, by reason of an accelerating clause in the contract, the loan matured and suit was brought and judgment obtained for the amount of the indebtedness long before the expiration of the agreed period of 100 weeks: (a) was the lender entitled to have the judgment, as regards the principal, to bear interest at the contract rate of 3½ per cent, per month during the remaining portion of such period of 100 weeks; and (b) if so, should the judgment bear interest at this rate indefinitely; or (c) should the lender's right in this respect be limited to the period stated?"

In answering this question the Court stated:

"We are of the opinion that the lender, under the facts stated, was entitled to have his judgment, as regards the principal, to bear interest at the contract rate of 3½ per cent, per month, and the rate in this respect is not limited to any time short of the date of payment. If this contract had specified 8 per cent, per annum, the lender would have been entitled to recover up to the time of payment interest at this rate. And, under the statute as it stands in regard to small loans, the 3½ per cent, per month rate of interest stipulated is as lawful as 7 or 8 per cent per annum would be on other loans. If it was lawful for the borrower to contract to pay 3½ per cent, per month, then under the terms of the statute he must be held to

> the payment of interest at that rate. This statute may work great hardship in many cases. It may be that it ought to be changed; but that is a question for the Legislature. Under the law as it stands, we can only give the answer above set forth."

Although the Georgia court allowed interest, at the small loan rate, until the "time of payment" of the loan, our statute restricts the lender to a period not to exceed six months from the date of maturity of the contract as originally scheduled, or as deferred. Thus, a lender, who has elected to reduce a contract of loan to judgment, before the expiration of the contract period, may continue to receive the rate of interest legally contracted for until six months after the date of maturity of the contract as originally scheduled, or as deferred.

It is our further opinion that a loan reduced to judgment by a licensee does not operate to divest the borrower of the protection of the loan laws or to exempt the licensee from its legal duties in connection with the transaction. The lender is required to abide by the provisions of the small loan law, as regards the computation of interest and other charges, and may not avoid his duties and obligations to the borrower, or the jurisdiction of your office, by reduction of a loan obligation to judgment.

FRANCIS B. BURCH, *Attorney General.*

STANFORD D. HESS, *Asst. Attorney General.*

MARKET AUTHORITY, GREATER BALTIMORE CONSOLIDATED WHOLESALE FOOD

CONFLICT OF INTEREST — DIRECT FINANCIAL INTEREST — ARTICLE 19A.

January 17, 1969.

Mr. Joseph H. Rash.

In your letter of January 14, 1969 you request our written opinion as to whether a conflict of interest would exist with respect to a member of your Authority. The Authority member, is president and one-sixth owner of, a food warehouse firm (the Company). That firm is interested in obtaining space in the Food Market and at the present time contemplates the lease of land from the Authority. As we have discussed previously, it is our opinion that entering into a lease between the Authority and the Company for space in the Food Market would constitute a conflict of interest within the meaning of Article 19A of the Annotated Code of Maryland.

Section 1 of Article 19A provides in pertinent part:

> "*It shall be unlawful for any member*, agent or employee *of any* department, board, commission, *authority* or other public agency *of the State of Maryland to have any direct financial interest in any transaction in which such agency is or may be in any way concerned, in which he knows, or may reasonably be expected to know, that he has such a direct interest*;" (Emphasis supplied)

Certain exceptions are contained in the remainder of section 1 but are not applicable to this transaction. Section 6 of Article 19A defines "direct financial interest" as follows:

> "For the purpose of this article, *a person shall be deemed to have a direct financial interest in a*

transaction if such transaction is to be consummated between the public agency of which he is a member, agent or employee *and* such person himself, or his spouse, brother, sister or child, or between such public agency and *any firm, corporation or association in which he* or his spouse, brother, sister or child, either jointly or severally, *owns in total more than three percent of the invested capital or capital stock, or from which such person* or persons, either jointly or severally, are *receiving a total combined compensation of more than five thousand dollars per year.*" (Emphasis supplied)

Section 4 of Article 19A provides that anyone who violates the provisions of this article shall be deemed guilty of a misdemeanor and Section 5 of Article 19A provides that any transaction entered into in violation of this article may be set aside if certain conditions are met.

The Market Authority was established pursuant to Chapter 145 of the Laws of Maryland, 1967. Section 3 of that Act provides that the Food Market Authority is a body corporate and politic of the State of Maryland to be an instrumentality of the State. The member has been duly appointed and serves as a member of that Authority. In light of these facts, we must advise you that as a member of the Authority he would be subject to the restrictions contained in Article 19A.

We now turn to the question as to whether he has a direct financial interest in the proposed transaction between the Authority, of which he is a member, and the Company. You inform us that he is the president and one-sixth owner of that firm. As such he would certainly be a person having a direct financial interest since he owns more than three percent of the capital stock of that firm. While you have not indicated to us whether or not he receives compensation of more than five thousand dollars per year, we would assume that such is the case. Under Section 6 a person is deemed to have a direct financial interest when he either owns more

than three percent of the stock or receives compensation of more than five thousand dollars per year. If our assumption is correct that he earns more than five thousand dollars per year from the firm, he would meet both tests for having a direct financial interest. If we are incorrect in our assumption with respect to his compensation, he still would be deemed to have a direct financial interest because of his stock ownership.

Consequently, we confirm our previous advice to you that the member would be placed in a position of conflict were the Authority to enter into a lease agreement with the Company for space in the Food Market. Under the circumstances presented here where a direct financial interest is present, we do not believe it would be sufficient for the member merely to disqualify himself from participation in the transaction but that if the lease negotiations are to be seriously pursued, he should resign before any substantial decisions are presented for consideration. In this regard, any doubt as to the substantiality of negotiations must be resolved in favor of compliance with the law and early resignation by the member.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

MOTION PICTURES

STATE BOARD OF MOTION PICTURE CENSORS—LICENSES—BOARD MAY DENY LICENSE TO EXHIBIT FILM SHOWING HARD-CORE PORNOGRAPHY ENCASED IN OTHER MATERIAL.

July 8, 1969.

Mrs. Rosalyn Shecter.

At your request, I viewed the motion picture "I Am Curious (Yellow)" in connection with the pending application to the Maryland Board of Motion Picture Censors for a license to exhibit the film in Maryland. Although the film is being exhibited elsewhere and although courts have refused to sustain criminal charges for showing it, "I Am Curious (Yellow)" is, in my opinion, an obscene motion picture by the standards described in the cases decided by the United States Supreme Court and the Maryland Court of Appeals.

I believe that the film exhibits hard-core pornography in the sense meant by Supreme Court Justice Potter Stewart when he said that perhaps he could not define hard-core pornography, but that he knew it when he saw it. "I Am Curious (Yellow)" shows the performance of acts of sexual intercourse in many different postures, including perverted sex acts, as frankly and explicitly as hard-core stag smoker films that are sold and exhibited illicitly and clandestinely.

I am mindful of the rule enunciated by the Supreme Court that obscenity forfeits constitutional protection when it is utterly without redeeming social importance. I am also mindful of the fact that the hard-core pornography in "I Am Curious (Yellow)" is encased in material that may be said to have some artistic or other merit. However, freedom of expression under the First Amendment is not absolute, and I do not believe that hard-core pornography should be immunized against proscription by the simple device of trying to insulate it in non-obscene matter. To hold other-

wise would, as a practical matter, mean the utter nullification of the well established principle that hard-core pornography is not entitled to constitutional protection. In my opinion, the hard-core pornography in "I Am Curious (Yellow)" infects and contaminates the entire film, including anything in it that otherwise may be redemptive, and drains it of all social importance.

To give legal sanction to the public exhibition of this film would be unconditional surrender to claimants of the right to publicly exhibit hard-core obscenity. It would inevitably establish a trend in favor of the commercial exploitation of sex going far beyond anything to date. The impact of rampant hard-core pornography upon the entire community, and particularly upon the minds and morals of the young and the immature, could be disastrous to any meaningful standards of morality. I do not believe that the law requires such permissiveness.

For these reasons, I wish to advise that in my opinion if the Board should disapprove the application to license the film "I Am Curious (Yellow)", such action would be sustained by the courts.

FRANCIS B. BURCH, *Attorney General.*

MOTOR VEHICLES

REMISSION OF FINES AND COSTS BY CIRCUIT COURT WHEN APPEAL ABATED BY DEATH—EXECUTIVE POWER TO REMIT FINES.

April 28, 1969.

John L. Sanford, Jr., Esq.

Your letter of April 14, 1969, has been forwarded to us for reply.

The factual situation portrays one where the Defendant was tried before a Magistrate in Worcester County for a violation of the Motor Vehicle Laws of the State of Maryland. As a result of an adverse ruling whereby the defendant was fined $100.00 plus $4.00 Court costs, an appeal was taken by the Defendant to the Circuit Court of Worcester County. The cause of action having been assigned for trial, the Appellant died while his appeal was pending.

The question presented is whether or not fines and costs imposed in the Magistrate's Court, abate with the Appellant's death. As a jurisdictional issue the matter is wholly within the province of the Circuit Court to which the appeal was taken. Maryland Code Article 5, Section 30 (1966 Replacement Volume) provides that:

> "In the event an appeal is taken from a conviction for a violation of the motor vehicle laws, the Trial Magistrate shall transmit the fine, costs, or other monetary penalty levied . . . to the clerk of the circuit court to which said appeal is taken. * * *."

The same section further provides that in the event of an acquittal the entire fine shall be returned to the Appellant; while all levied fines shall be paid by the Clerk of the Circuit Court to the Department of Motor Vehicles. Should the Appellant dismiss his appeal before trial, the

said Clerk "shall pay the fine and costs, or other monetary penalty so deposited to the Department of Motor Vehicles."

Keeping in mind that the Defendant's conviction had not been finally adjudicated, the appeal in the instant case was abated by death. *Frank v. State*, 189 Md. 591-596. The effect of such abatement has been treated by various jurisdictions applying specific abatement statutes. Most of the Courts have recognized the rule that the death, pending appeal of a Defendant convicted of a crime abates not only the appeal but likewise any proceedings had in the prosecution from its inception. *State v. Kriechbaum,* 219 Iowa 457, 258 N.W. 110, 96 A.L.R. 1317 (1934). In *United States v. Dunne,* (1909 CA 9 Or.) 173 F 254, the Court held that the sentence of imprisonment and fine imposed in that case was an indivisible penal judgment and that one could not be said to perish with the Defendant while the other be kept alive as mandatory, the entire cause of action (including both sentence and fine) abated upon the death of the Defendant. More recently in the case of *United States v. Knetzer,* (1954 D.C., Ill.), 117 F. Supp. 917, the Defendant had been both sentenced, fined and admitted to bail pending appeal. While the appeal was pending the Defendant died. In considering the question of whether the forfeiture of bond should be declared against the sureties at the death of the principal, the Court held that the death of the Defendant abated the judgment and fine as part thereof.

The herein stated cases are illustrative of the following principles:

1. That the object of all criminal punishment is to punish the one who committed the crime or offense and not to punish those upon whom his estate is cast, by operation of law or otherwise. *State v. Furth,* (1914) 144 P. 907.

2. That while the obliterative effect of abatement *ab initio* necessarily left the guilt of the accused undetermined, the legal presumption of innocence persists in no less degree than before the criminal proceedings were initially instituted. *Bagley v. State* (1960), 122 So. 2d 789.

Based on the aforementioned authorities, it is our opinion that it would be within the province of the Circuit Court, on its own Motion or on the Motion of Counsel, to order that the sum of $104.00 be remitted to the Estate of the recently departed Defendant. Should the Court be at variance with our opinion, then we suggest that any interested party (Executor, Administrator or Trustee, etc.) seek executive redress pursuant to Article II, Section 20 of the Maryland Constitution which permits the Governor to—"remit fines and forfeitures for offenses against the State".

FRANCIS B. BURCH, *Attorney General.*

BERNARD L. SILBERT, *Asst. Attorney General.*

MOTOR VEHICLES—EXCISE TAX ON—NON-RESIDENT SERVICEMEN NOT EXEMPT UNDER SOLDIERS' AND SAILORS' RELIEF ACT.

June 30, 1969.

Mr. Ejner J. Johnson.

In your letter of June 15, 1969, you ask what application, if any, the opinion of the Supreme Court of the United States in the case of *Sullivan v. United States,* 23 L.Ed. 2d 182, filed May 26, 1969, has with respect to the exaction of excise taxes imposed by Article 66½, Section 29, Annotated Code of Maryland (1968 Supplement), from non-resident servicemen who are stationed in Maryland solely by reason of military service assignments.

The Supreme Court, in *Sullivan,* reversed the United States Court of Appeals for the Second Circuit[1] and held that Section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940[2] did not preclude the collection of sales and use taxes from servicemen stationed in Connecticut who are residents or domiciliaries of other states. The action had been instituted by the United States in federal court against the appropriate Connecticut officials on behalf of aggrieved servicemen. The District Court for Connecticut had entered a declaratory judgment that the federal statute prevented collection of the sales and use taxes from such servicemen.[3]

Maryland's three percent (3%) excise tax (sometimes referred to as titling tax) on motor vehicles is levied pursuant to Section 29, supra, which provides as follows:

> "(a) In addition to the charges prescribed by this article there is hereby levied and imposed an excise tax for the issuance of every original certificate of title for motor vehicles and commercial motor vehicles, in this State and for the issuance of every subsequent certificate of title for such motor vehicles and commercial motor vehicles

> in this State, . . . and the Department of Motor Vehicles shall collect said tax upon the issuance of every such certificate of title of a motor vehicle at the rate of three per centum of the fair market value of every such motor vehicle . . . ."

Certain exclusions and exemptions set out in the Section are not pertinent here. The 1969 General Assembly by Chapter 163[4] increased the titling tax to four percent, effective July 1, 1969.

The tax was first imposed in Maryland in 1935 at the rate of one percent and the proceeds were paid into a special account called the "State Emergency Relief Fund" (Chapter 539, Laws of 1935). Later, the Act was amended to provide that the proceeds be paid into the "State Fund for Aid to the Needy" (Chapter 3, Laws of 1936). In 1939, the levy was increased to 2 percent and was made payable to the general funds of the State (Chapter 277, Laws of 1939). By Chapter 560, Laws of 1947 (Section 25A of Article 66½, Annotated Code of Maryland, 1947 Supplement) the Legislature initiated the "Motor Vehicle Revenue Fund" and it was provided that revenues received by the Department of Motor Vehicles as titling taxes be remitted, without deduction, to the Comptroller for transfer to the State Roads Commission for debt service on any outstanding highway construction bonds and any balance to the construction fund provided by Section 32 of Article 89B. The 1964 General Assembly increased the excise tax to three percent (Chapter 84, Laws of 1964).

In *Sullivan*, supra, the Supreme Court concluded "that Congress did not intend to free servicemen stationed away from home from the sales or use taxes of the host State," but rather "that Congress intended the (Soldiers' and Sailors' Civil Relief Act) to cover only annually recurring taxes on property—the familiar ad valorem personal property tax." The Maryland Court of Appeals has held the excise tax to be an imposition on the privilege of using

the state road,[5] and its validity has been sustained by the Supreme Court of the United States.[6] Maryland's titling tax is not an annual ad valorem tax; it is assessed only upon the original or subsequent issuance of a Maryland motor vehicle title.

The Court, in *Sullivan,* distinguished between the sales tax imposed on the purchase of a motor vehicle in Connecticut by a non-resident serviceman, and the annual ad valorem tax of two percent of the fair market value levied by California on non-resident servicemen registering their cars in that State. In *California v. Buzard,* 382 U.S. 386, the Supreme Court held that non-resident servicemen were exempt from this annual tax under the Soldiers' and Sailors' Civil Relief Act. The Court noted in *Sullivan* that it had "held in Buzard that Section 514 exempted servicemen from the California tax on automobiles, not because it *was* an excise tax on use covered by subsection (2) (b) but rather because it was *not* such a tax." And in *Buzard,* the Supreme Court said "[t]he serviceman who has not registered his car and obtained license plates under the laws of his home state, whatever the reason, may be required by the host state to register and license the car under its laws."

On August 9, 1968, this office rendered an opinion to Joseph H. Manning, Director, Department of Chesapeake Bay Affairs (53 Opinions of the Attorney General 548), that the 3% excise tax imposed by Article 14B, Section 4E (b) could not be validly imposed upon non-resident servicemen for the issuance of a certificate of title for the sale, resale or transfer of a vessel. The language of Article 14B, Section 4E (b), dealing with the titling of vessels, is virtually identical with that of Article 66½, Section 29 (a) imposing an excise tax on motor vehicles. Our opinion to Mr. Manning was founded solely upon the *Sullivan* case based upon the decision of the Second Circuit Court of Appeals before its reversal by the Supreme Court.

For the foregoing reasons it is our opinion that the State of Maryland may exact an excise tax from non-

resident servicemen for the issuance of an original or subsequent certificate of title for a motor vehicle.

FRANCIS B. BURCH, *Attorney General.*

WILLIAM T. S. BRICKER, *Special Asst. Attorney General.*

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[1] 398 F. 2d 672
[2] 50 USC Appx 574
[3] 270 F. Supp. 236
[4] Senate Bill 1306
[5] *Elgin v. Greyhound* (1948) 192 Md. 303
[6] *Greyhound v. Brice* (1949) 339 U.S. 542

MOTOR VEHICLES—DEPARTMENT OF MOTOR VEHICLES IS AN AGENCY AS CONTEMPLATED WITHIN DEFINITION OUTLINED IN THE APA (ARTICLE 41, SECTION 244 OF THE MARYLAND CODE).

July 25, 1969.

Hon. John J. Bishop, Jr.

We have your letter of 17 July 1969 with regard to whether the Department of Motor Vehicles is an agency as defined under the Administrative Procedure Act, Article 41, Section 244.

Subsection (a) of Section 244, Article 41 (title "Executive Department", subtitle "Administrative Procedure Act") defines Agency as *any* State board, commission, department or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches and agencies specifically enumerated therein. The Department of Motor Vehicles is not listed among those exceptions. The Court of Appeals has said the Administrative Procedure Act shall apply to all State agencies except those expressly excluded. *Kaufman v. Taxicab Bureau,* 236 Md. 476 (1964).

The Department of Motor Vehicles as established by Article 66½ is a part of the executive branch and the Commissioner is specifically authorized by Section 10 (b) to adopt and enforce rules and regulations.

An article in XXIV Maryland Law Review 1 by Leonard E. Cohen discusses contested cases under the Administrative Procedure Act at page 8 and cites as an example the hearing procedures pertaining to the Motor Vehicle Code.

More importantly, Section 256, Article 41 sets out procedures for appeals of contested cases to the Court of Appeals, but specifically provides for no right of appeal to cases arising under Article 66½. Such an expression by the Legislature implies that those cases are otherwise gov-

erned by the Administrative Procedure Act, but precludes appeals from the law courts to our highest court, and for good reason in view of the fact that the Department conducts in excess of 20,000 contested hearings per year.

Further, the Court of Appeals has just granted a Petition for a Writ of Certiorari made by the Department from an adverse decision in the Baltimore City Court reversing an administrative decision at a contested license hearing, *Commissioner of Motor Vehicles v. Lee*, 254 Md. 279 (1969).

In the Court's opinion, Judge Barnes states,

> "An appeal was taken to the Baltimore City Court by Mr. Lee in accordance with Article 66½, Section 109 . . . See also Article 41, Section 255 designating the Baltimore City Court as a reviewing court for such an appeal."

Accordingly, for the reasons set forth above, we have no difficulty in concluding that the Department of Motor Vehicles is an agency as contemplated within the definition outlined in the Administrative Procedures Act.

FRANCIS B. BURCH, *Attorney General.*

WILLIAM T. S. BRICKER, *Spec. Asst. Attorney General.*

MOTOR VEHICLES—HAGERSTOWN JUNK YARD ORDINANCE—PROVISIONS OF RELATING TO DISPOSAL OF ABANDONED AND JUNKED AUTOMOBILES INVALID BECAUSE PREEMPTED BY STATE STATUTE—ORDINANCE OTHERWISE VALID.

November 4, 1969.

James F. Strine, Esq.

Your recent letter asks this office to pass an opinion upon the legality of Hagerstown's Junk Yard Ordinance in the light of Chapter 556 of the Laws of Maryland of 1969, which provides, *inter alia,* for the licensing of businesses concerned with the disposal of abandoned and junked automobiles.

The Hagerstown Junk Yard Ordinance was approved and reenacted by the County Commissioners of Washington County on September 22, 1964. It expresses an intent to protect the area and its residents from unwholesome conditions and safeguard the public health and welfare, etc. To that end, it closely regulates junk yards, prescribes conditions for their maintenance and licenses their operation. The storage and disposal of motor vehicles destined for junk or scrap represents only a part of the regulatory powers that are within the ambit of the ordinance, however. Also within its reach is "any business for the abandonment, storage, keeping, collecting or baling of paper, rags, scrap metals, other scrap or discarded materials, or for abandonment, demolition, dismantling, storage or salvaging of automobiles or other vehicles not in running condition or any type of machinery or parts thereof". Severability of the various sections of the ordinance is provided for in the event of a determination of partial invalidity.

Chapter 556, which has been codified as Article 66½, Section 71 of the Annotated Code of Maryland (1967 Replacement Volume, 1969 Supplement), provides, in pertinent part, for the licensing of "wreckers" and "scrap

processors" of automobiles. Qualifications for licensure are stated in the statute. Section 71 (a) (3) defines a scrap processor as an establishment "having facilities for processing iron, steel and nonferrous scrap metal and whose principal product is scrap iron, steel and nonferrous scrap for sale for resmelting purposes only which is licensed under the provisions of this section". A wrecker is defined in Section 71 (a) (4) as "every person, firm, or corporation engaged in the business of purchasing or otherwise acquiring vehicles for the benefit of the materials contained therein or parts thereof". The objects and purposes of Chapter 556 appear to be a valid exercise of the police power of the State and reasonably necessary for the adequate protection of the public welfare, health and safety. As such it is a constitutionally valid act of the legislature. Article 23 of the Declaration of Rights; *Pocomoke City v. Standard Oil Co.*, 162 Md. 368; *Benner v. Tribbitt*, 190 Md. 6.

As noted in your letter, Chapter 556 provides that the provisions of Section 71 shall supersede any local law inconsistent with it. The statute, Section 71 (p), also declares the legislative intent to be that the provisions of the subtitle regulating the disposal of motor vehicles shall be uniform throughout the State. The broad disparity between Section 71 and the motor vehicle provisions of the Hagerstown Junk Yard Ordinance is readily apparent. Additionally, the local ordinance goes counter to the declared legislative intent expressed in Section 71 (p) of uniformity throughout the State.

If there remains any lingering doubt as to the preemption of this particular field of legislation by the State, Article 66½, Section 1 makes it clear that the political subdivisions of this State are absolutely foreclosed from passing local laws upon any matters within the scope of the Motor Vehicle Code. The provisions of Article 66½ are declared in Section 1 to have Statewide effect and in part pertinent to the question at hand ". . . no city, county or other municipal subdivision of the State shall have the right to make or enforce any local law, ordinance or regu-

lation upon any subject for which provision is made in this article . . ." Also, "[t]he provisions of [Article 66½] are intended to be exclusive of all local and municipal legislation or regulations, upon the various subjects with which this article purports to deal, and all public local laws, ordinances and regulations inconsistent or identical therewith or equivalent thereto are hereby repealed; . . .". Accordingly, we believe that, insofar as the Hagerstown Junk Yard Ordinance has reference to motor vehicles, the ordinance is a nullity and the pertinent provisions of Chapter 556 have preempted such field of legislation. However, the provisions of the ordinance that do not pertain to motor vehicles remain unaffected by the chilling language of the State statute.

In summary, we believe that the provisions of the Hagerstown Junk Yard Ordinance are void as to any establishment engaged exclusively in the activities of a wrecker or scrap processor as defined in Chapter 556 of the Laws of Maryland of 1969, and codified in Article 66½, Section 71. Such businesses are subject to the operation of the State statute. As to any business operation handling or dealing in paper, rags, scrap, etc., in addition to engaging in activities within the purview of Chapter 556, however, the provisions of State law and the Hagerstown Junk Yard Ordinance apply, including the requirement of licensure by both State and local authorities, as provided in the respective laws.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Asst. Attorney General.*

NATURAL RESOURCES, DEPARTMENT OF

APPEAL—REVIEW OF DECISIONS DISCRETIONARY WITH SECRETARY OF NATURAL RESOURCES.

August 7, 1969.

Honorable J. Millard Tawes.

This is in response to your inquiry concerning the position you are to take as regards appealable decisions made by Departments under your jurisdiction. Specifically, you wish to know if such decisions must be heard and determined by you prior to being submitted to the Board of Review.

Chapter 154 of the 1969 Laws (House Bill No. 1311) creates the position of Secretary of Natural Resources with attendant widesweeping duties and responsibilities. A recitation of almost the entire Chapter would be necessary to enumerate all of your responsibilities and duties but see for example new Sections 232, 233, 234 and 235 of Article 41.

Chapter 154 also creates a Board of Review consisting of seven members which, in addition to other duties, is to function as an appellate body in certain instances.

> "In addition, the Board shall hear and determine appeals from those decisions of the Secretary or any departments or other agencies within the Department of Natural Resources which are subject to judicial review under Section 255 of this Article or under any other provisions of law. The Board shall also hear and determine appeals from those actions or failures to act by any departments or agencies within the Department of Natural Resources for which the Secretary, by regulations, provides for review by the Board. . . ." (Sec. 236 (c) supra).

> "Any person aggrieved by any decision or action or failure to act on the part of the Secretary or any department or other agency within the Department of Natural Resources for which an appeal to the Board of Review of the Department of Natural Resources is provided by Section 236 of this Article, and regulations adopted pursuant thereto, shall be entitled to appeal . . . ." (Sec. 237 supra).

Although it is clear that in certain instances your decision might be reviewable by the Board of Review, it is the opinion of this office that it does not necessarily follow that decisions made by Departments under your jurisdiction *must* be heard and determined by you prior to being submitted to the Board of Review since there is no such requirement in the law. This does not mean that you *may* not review such decisions prior to their being submitted to the Board of Review since it is clear that you have this discretionary power within your widesweeping duties and responsibilities.

FRANCIS B. BURCH, *Attorney General.*

RICHARD C. RICE, *Spec. Asst. Attorney General.*

NOTARIES PUBLIC

RESIDENT REQUIREMENT OF—MUST BE DOMICILED IN MARYLAND—OFFICIAL COURT REPORTERS EXCEPTED FROM RESIDENCE REQUIREMENT.

June 23, 1969.

Honorable Blair Lee, III.

A recent letter to your office seeks an explanation of residence as a qualification for the appointment of notaries public in Maryland, and you have asked us to delineate the nature of the requirement.

The controlling statute is Chapter 198 of the Laws of Maryland of 1969, which was passed as an emergency measure by the General Assembly and approved April 23, 1969. The Act repeals Section 1 of Article 68 of the Annotated Code of Maryland (1967 Replacement Volume, 1968 Supplement), title "Notaries Public", enacts new Section 1 and adds new Section 2, to said Article 68. Mandating the qualification of notaries public, Section 1 (b) provides:

> "Every person appointed shall be at least eighteen (18) years of age, of good moral character and integrity, a citizen of the United States, a resident in this State for a period of two (2) years prior to appointment, and a resident of the senatorial district and subdistrict from which he or she is appointed. The residence requirements shall not apply to persons having an appointment as an official court reporter by any court of any county or Baltimore City."

In the absence of legislative fiat to the contrary, residence should be equated to domicile. Such conclusion is supported by the opinion in *Walsh, Adm'r. v. Crouse,* 232 Md. 386, that a resident of Maryland for the purpose of the Unsatisfied Claim and Judgment Fund of the State of Maryland is "one who has acquired a domiciliary status, in the legal sense, in this State, as distinguished from one who has merely a temporary abode in Maryland", and *Royer v. Bd. of Elec. Sups.,* 231 Md. 561, holding that per-

sons living on the Perry Point federal reservation are not Maryland residents for voting purposes. In the *Walsh* case the court said: "The [Royer] case leaves no doubt that residents of Federal enclaves within the boundaries of Maryland are not residents of the State unless the Legislature has said they shall be so considered for a specific purpose." Article 68 does not define residence nor provide a different standard than domicile to satisfy the residence requirement for Maryland notaries public.

Domicile or residence in the legal sense means permanent residence, and domicile in Maryland connotes giving up domicile elsewhere. Mere residence here without intention to abandon an existing domicile and adopt a new domicile is insufficient to accomplish a change. Domicile continues until a new domicile is acquired and it is presumed unless the contrary is shown that the existing domicile is retained. *Walsh, Adm'r. v. Crouse, supra; Hall v. Morris,* 213 Md. 396. Military personnel, for example, changing station from time to time, have a legal compulsion to go where ordered. More than mere residence in accordance with a transfer under orders is required to effect a change of domicile. Restatement, *Conflict of Laws,* Section 21; 25 Am. Jur. 2d, *Domicile,* Section 39.

A notary public is a public official within the meaning of Article 35 of the Declaration of Rights. 48 Opinions of the Attorney General 323; also 48 Opinions of the Attorney General 193, and citations; 39 Am. Jur. 214. In statutory provisions for the qualification of public officials "residence" and "domicile" are generally held to be synonymous. 42 Am. Jur., *Public Officials,* Section 45. The provision of the Maryland statute that exempts court reporters from the residence requirement inferentially supports the view that as to other persons residence means domicile.

For the reasons stated we advise that Maryland notaries public are required to have domiciliary status in this State.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Asst. Attorney General.*

PLANNING DEPARTMENT

ZONING REGULATIONS—MAY BE APPLIED TO PIERS EXTENDING INTO NAVIGABLE WATERS.

July 17, 1969.

Mr. Richard A. Gucker.

Your recent letter calls to our attention that Calvert County, with the assistance of the Planning Department, is now in the process of amending its comprehensive zoning ordinance. Amendments have been proposed which would regulate the size, height, and location of "covered slips", which are defined to mean "a covered ramp extending out into the water to serve as a place for landing, repairing, or berthing a vessel and including covered piers, docks, wharves, and boat houses". You have requested our opinion as to whether Calvert County has the power to regulate, through zoning, "covered slips" to be erected over navigable waters.

The power of Calvert County to enact zoning regulations is derived from Article 66B, Section 21, which enables the legislative bodies of counties to regulate, *inter alia,* the height and size of "buildings and other structures". It seems obvious that a pier or a boat house would constitute a "building or other structure", and, therefore, absent other difficulties, the regulation of "covered slips" would be within the scope of the enabling legislation. *Cf., Feirn v. Village of Shorewood Hills,* 34 N.W. 2d 107, 109 (Wis., 1948).

The difficulty in the present inquiry is that, generally speaking, title to property covered by navigable waters is in the State, *Culley v. Hollis,* 180 Md. 372 (1942), and property belonging to the State and structures thereon are not subject to local zoning regulations on the theory that the enabling legislation will not be deemed to restrict the sovereignty of the State in the absence of statutory lan-

guage indicating the contrary, 35 Opinions of the Attorney General 273. However, when piers and similar structures are built out into navigable waters by riparian owners, pursuant to the permission granted to riparian owners by Article 54, Section 46, such structures become appurtenant or "incident" to the estate of the riparian owner. *Culley v. Hollis, supra; Hodson v. Nelson,* 122 Md. 330, 339 (1914); *Hess v. Muir,* 65 Md. 586, 598 (1886). As stated in Article 54, Section 46, "such improvements [e.g. wharves, piers, and landings] . . . shall pass to the successive owners of the land to which they are attached, as incident to their respective estates". Thus in the case of *West. Md. T. R. Co. v. Baltimore City,* 106 Md. 561 (1907), it was held that the City of Baltimore could impose a property tax on piers constructed from property within the boundaries of the City, even though the piers went out into the Patapsco River into territory normally subject to the jurisdiction of Baltimore County, the piers being incident to the estate of the riparian owner. After reviewing the entire question at length, the Court stated that "[o]ur conclusion is that the city's jurisdiction extends over piers constructed and located as these are for the purposes of taxation, police and fire protection, etc.", 106 Md. 561, 571.

At least one case has expressly recognized that zoning regulations may be applied to piers extending into navigable waters, on the basis that "to the extent that by zoning regulations a municipality may limit the uses to be made by property generally, it may also by zoning regulations limit the exercise of riparian rights". *Poneleit v. Dudas,* 106 A. 2d 479 (Conn., 1954). See also 3 Yokley, *Zoning Law and Practice,* Section 28-73, wherein the author, relying on the *Poneleit* case, concludes that "a municipality may, through its zoning regulations, limit the exercise of riparian rights".

Since the Maryland law is clear that wharves and piers constructed pursuant to the permission granted in Article 54, Section 46, are appurtenant and incident to the riparian land to which they are attached, we are of the opinion that such structures, though erected over navigable waters, are

subject to regulation by the County through the imposition of zoning restrictions. The proposed regulations for "covered slips" are within the scope of authority granted by Article 66B, Section 21, and may be enacted without improperly infringing upon the rights and sovereignty of the State.

FRANCIS B. BURCH, *Attorney General.*

WILBUR E. SIMMONS, JR., *Asst. Attorney General.*

POLICE—BALTIMORE CITY

TRESPASS—SHOPPING CENTERS—DEMONSTRATIONS UPON—FREEDOM OF EXPRESSION.

June 6, 1969.

Commissioner Donald D. Pomerleau.

We have at hand your letter of June 3, 1969 in which you inquire about the legality of the distribution of leaflets or handbills upon privately owned and operated shopping centers.

Specifically, you ask us whether the State Trespass Laws, (Article 27, Sections 576-577 of the Annotated Code, 1967 Replacement Volume) can legally be enforced by your department to cause the arrest or removal of persons distributing material on those portions of the shopping center premises customarily used by the people of the community as a public thoroughfare.

We believe that under two decisions of the Supreme Court of the United States, the State Trespass Laws are not applicable in such a situation, and that citizens are entitled to peacefully exercise their First Amendment rights on premises of the nature which you have described. In *Amalgamated Food Employees Union, Local 590, et al. v. The Logan Valley Shopping Center,* 391 U. S. 308, and *Marsh v. Alabama,* 326 U. S. 508, the Supreme Court noted that shopping centers today serve as community business blocks, and are generally accessible and open to the people in the area and those passing through.

The Court said, "the State could not delegate the power through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose general consonant with the use to which the property is put".

In *Marsh v. Alabama, supra,* members of Jehovah's Witnesses were distributing literature in the streets of a company owned town. An arrest was made and the conviction had for trespass under a statute quite similar to the Maryland State Law. In finding the activities of the defendant protected under the free speech provisions of the Constitution, the Supreme Court said . . . "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." In a concurring opinion, Mr. Justice Frankfurter said, at page 511, "The technical distinctions on which the finding of trespass so often depends are too tenuous to control decisions regarding the scope of the vital liberties guaranteed by the constitutions".

It is of interest, we believe, that on June 10, 1959 the late Judge Edwin Harlan of the Supreme Bench of Baltimore reached a similar decision in a case involving a picket who was arrested on the premises of the Mondawmin Shopping Center. Judge Harlan, in an exercise of judicial foresight, held that "when private property is open to the public as is the Mondawmin Shopping Center, then it must be compelled even more so to yield to other legitimate interests such as free speech and the right to picket".

We believe that these decisions make it manifest that the State Trespass Law cannot and should not be enforced against peaceful demonstrators who without obstructing traffic or interfering with the free passage of others are distributing literature or picketing on those portions of a shopping center enterprise which are customarily open to the public.

FRANCIS B. BURCH, *Attorney General.*

BERNARD L. SILBERT, *Asst. Attorney General.*

POLICE — ARREST — PERSONS SUSPECTED OF MENTAL DISORDER — EXAMINATION — DEPARTMENT OF MENTAL HYGIENE.

July 3, 1969.

Commissioner Donald D. Pomerleau.

Your letter of June 11, 1969, has been forwarded to us for reply.

You question as to whether or not persons arrested as "suspected mental", or as giving the impression upon arrest of manifesting such a mental condition that they could injure themselves or others, are required to be released upon bail pending the determination of that individual's competency.

First, we caution that any arrest be effectuated solely upon probable cause and not upon mere "suspicion". See *Randolph v. State,* 1 Md. App., 441, 444; see also *Chapter 561, Acts of Maryland 1969.* There is no such crime as "suspected mental", either in the laws of this state or in common law. It is not sufficient probable cause to take a person into custody merely because he may act different than a normal person. Secondly, any person detained is entitled to be released on bail (save in capital cases) pending litigation. *State v. Long and Nelson,* 1 Md. App., 326, 329; *Swift v. State,* 324 Md. 300, 305; see also *Chapter 557, Acts of Maryland 1969.*

The purpose of bail is solely to secure the appearance of the defendant at trial and should not be abused by the police to either arbitrarily detain the defendant or deny him of his freedom of movement, *Allegheny Mutual v. State,* 234 Md. 278.

On December 3, 1963, this office issued an opinion to the Trial Magistrate for Catonsville, Maryland, stating that no person may be committed to a mental institution by a Trial Magistrate or similar Judge unless the defendant has been charged with a violation of the laws of this state.

Since that time, *Code Article 59, Section 7-8 (1968 Replacement Volume)* has set forth the statutory standards required to detain any person charged with the commission of a crime and who may be incompetent to stand trial. Only the court, for good cause shown, may pass an order requesting an examination of the defendant by the Department of Mental Hygiene. During the period for which any person may be held for examination under this section, he may, at any time, question the legality of his detention by means of the writ of Habeas Corpus. The court, in its discretion, may require or permit the examination to be conducted on an outpatient basis and where such outpatient examination is authorized, shall set bail for the defendant or authorize his release upon recognizance.

Section 8(a), makes it incumbent for the Department of Mental Hygiene to submit a supplementary opinion stating whether any person found incompetent to stand trial would become, by reason of mental defect, a danger to himself or the safety or property of others, if he/she were permitted to become a free agent. If the court, after receipt of this report, shall find that the defendant is not by reason of mental disease or defect, a danger to himself or the safety of the person or property of others, it shall (save in capital cases) set bail for the defendant or authorize release on his own recognizance. In the event that a negative determination is made, the court may, in its discretion, order the defendant sent to a hospital or institution until such time as the court is satisfied that the defendant is competent to stand trial or has ceased to be, by reason of mental disease or defect, a danger to himself or to the safety of the person or property of others.

Section 8(b), gives the court the discretion to dismiss charges against the defendant, on its own motion, when it appears that so much time has elapsed since the finding of incompetency that it would be unjust to resume the criminal proceedings, provided that in capital cases ten (10) years have elapsed from the finding of incompetency, and in all other cases punishable by imprisonment in the penitentiary, the court may not dismiss the charges until

five (5) years have elapsed from the date of the finding of incompetency.

In our view, the law clearly places the authority to release or detain persons, *non compos mentis,* within the courts as set forth in Code Article 59, supra. Any other detention by a law enforcement agency, without judicial review, would be a violation of due process.

FRANCIS B. BURCH, *Attorney General.*

BERNARD L. SILBERT, *Asst. Attorney General.*

POLICE—POLICE COMMISSIONER—APPOINTMENT OF SPECIAL POLICE OFFICERS—QUALIFIED BY CLERK OF SUPERIOR COURT OF BALTIMORE CITY—OFFICE OF TRUST—CONFLICT OF INTEREST.

July 14, 1969.

Commissioner Donald D. Pomerleau.

We are in receipt of your request for an opinion of May 28, 1969, in which you ask:

(1) Whether Special Police Officers, appointed by the Police Commissioner of Baltimore City, are still required to take oath before the Clerk of the Superior Court of Baltimore City?

(2) Whether or not the appointment as a Special Police Officer is considered an office of profit within the Maryland Declaration of Rights, and if so, whether such an appointment would create a conflict of interest for a certain class of Municipal employees holding commissions as Special Police Officers?

In your letter you referred to the opinion of Attorney General Walsh, dated August 19, 1941, 26 Opinions of the Attorney General 291, wherein the Attorney General concluded that a Special Police Officer, appointed by the Police Commissioner of Baltimore City, held a position of trust or profit, not dissimilar from Special Policemen appointed by the Governor, and those Special Officers appointed by the Police Commissioner were required to "qualify in the office of the clerk of the Superior Court of Baltimore City". The appointive powers of the Commissioner, as set forth in Section 909, Charter and Public Laws of Baltimore City (1938), have been superseded by the Laws of Maryland of 1966, Chapter 203, Section 541 "Police Omnibus Act" (hereafter called the "Act"). The "Act" retains the appointive powers of the Police Commissioner, but excludes the appointees from pay stemming from the city or state, and places full responsibility for misconduct, negligent or

wrongful acts upon the corporation, association, firm, or person applying for such appointment. The powers to protect the public peace, prevent crime, arrest offenders, protect right and property in and upon such premises, are vested in a Special Police Officer as fully as a regular police officer.

Code Article 70, Section 7 of the Annotated Code of Maryland, requiring all other officers . . . "Appointed to any office of trust or profit under the Constitution and laws of the state" . . . to take and subscribe to said oath in the City of Baltimore before the clerk of the Superior Court, is still the law. Therefore, it is incumbent to determine whether or not "Special Officers", appointed by the Commissioner, hold an office of trust or profit.

The clear language of the "Act" points out that Special Police Officers serve without pay from the City or State Government, and by statutory definition, the commission of Special Police Officers would appear to not be one of profit. We, therefore, must determine if the commission is "one of trust".

In our opinion of April 24, 1964, 49 Opinions of the Attorney General 353, we considered the powers vested in Special Police Officers, as set forth under Article 23, Sections 342-348—title "Corporations", subtitle "Police"—Annotated Code of Maryland (1957 Edition). Under that law, we concluded that the power exercised by a Special Police Officer is one of Government and not of his private employer, subject to certain limitations. That opinion is bottomed on the language found on page 356:

> "Our legal system would abhor an unlimited conferral of police power upon persons having at least partial allegiance to a private master."

Such policemen are clothed with police power of the state only to the extent necessary for protection of the property or the business for which the appointment was made and for the preservation of peace and good order on the premises. There, the Special Police Officer has the authority to act as a regular police officer and his powers would be the

same. There are some situations, e.g., fresh pursuit, when Special Police Officers have the right to pursue and arrest an offender beyond the business premises—see 49 Opinions of the Attorney General 353, 359; cf. *Gattis v. State,* 204 Md. 589, 600-601.

The "Act" specifically limits the authority and jurisdiction of the Special Police Officer to the premises of the firm, corporation, association, or person for which he may have been appointed.

In this respect, the powers conferred by sovereign under the "Act" are not wholly unlike those conferred upon Special Policemen appointed by the Governor pursuant to Code Article 23, Section 64, as enacted by the General Assembly of Maryland during its 1969 term.

Generally speaking, a public office is an agency for this state and a person, whose duty it is to perform this agency, is a "Public Officer". The nature of the duties, the particular method in which they are performed, the end to be attained, the depository of the power conferred and the whole surroundings, must be all considered when the question as to whether a position is a public office or not, is to be solved. *School Commissioners v. Goldsborough,* 90 Md. 192, 206; *Howard County Commission v. Westphal,* 232 Md. 334, 340. Moreover, in determining the character of the position, the duty to take an oath is considered, in this state, to be of the greatest importance, *Truitt v. Collins,* 122 Md. 526, 531; *Moser v. Howard County Board,* 235 Md. 279, 284. A position is a public office when it is created by the law with duties cast upon the incumbent, which involve the exercise of some portion of the sovereign power and in the performance of which the public is concerned and which also are continuing in their nature and not occasional or intermittent, *Truitt v. Collins,* supra at page 531. See also *Loker v. State,* 2 Md. App. 1, 21.

Applying these standards, it is quite obvious that the Legislature intended Special Policemen to act for the protection of the property of the corporation or the persons employing them, and for the preservation of peace and good order on their respective premises.

In 20 Opinions of the Attorney General 367, it was held that Special Policemen had authority to enforce the traffic laws of the State of Maryland on a public highway which was adjacent to the property of the employer, and to make an arrest for any offense committed in their presence even though the offense occurred on public property.

In 26 Opinions of the Attorney General 286, it was held that guards at the Glenn L. Martin Co. could act to protect property of the company or of the federal government, which the company was testing, even though that property was located on the premises, which did not belong to the Glenn L. Martin Co.

In 40 Opinions of the Attorney General 309, it was held that the jurisdiction of the Special Policemen to act was limited to the county or the city for which their commission was issued.

For these reasons, we conclude: (a) that a Special Police Officer holds, at least, an office of trust in his exercise of sovereign power of arrest, if only limited to the property of his/her employer, and (b) holding such an office of trust, he/she shall be required to "take and subscribe the said oath in the City of Baltimore, before the clerk of the Superior Court", see Article 70, Section 7, supra.

As we said in paragraph 2, page 2, of this opinion, the "Act" specifically prohibits compensation from the sovereign. Therefore, we further conclude that the intent of Legislature is clear, that such a class of employees, as you described, would not hold an office of profit within the meaning of Article 35, Declaration of Rights, Maryland Constitution, and that their appointment as Special Police Officers would not create a conflict of interest. We caution, however, that the class of employees to which you refer are employees of the City of Baltimore and that any final ruling as regards their status, should be made by the City Solicitor's office.

FRANCIS B. BURCH, *Attorney General.*

BERNARD L. SILBERT, *Asst. Attorney General.*

POLICE—BALTIMORE CITY—DIPLOMATIC IMMUNITY—CONSULAR CORPS—PROSECUTION OF TRAFFIC OFFENSES.

August 29, 1969.

Commissioner Donald D. Pomerleau.

Your request for opinion, dated July 15, 1969, has been forwarded to us for reply.

You make inquiry as to whether or not persons operating vehicles of the "Consular Corps" enjoy diplomatic immunity from the prosecution of traffic offenses.

The entire question of diplomatic status is a political one and a matter of State; in this respect, the sole authority is the President of the United States and his duly authorized representative, the Secretary of State, whose findings must be accepted unquestioned, *Haley v. State*, 200 Md. 72, 84. Therefore, courts should refuse to look beyond the immunity determination made by the executive branch of the government, *Trost v. Tompkins*, 44 A 2d, 226.

Title 22, USCA, Sections 252, 254, specifically sets forth those classes of persons eligible for diplomatic immunity. Any request for such immunity must be obtained from the State Department, *Haley, supra* at P. 81. Diplomatic immunity will not apply to domestic servants as distinguished from diplomatic officers and members of their families, unless the name of such servant has been registered with the State Department and transmitted to the United States Marshal for the District of Columbia, who is responsible for posting the same. The list containing the names of domestic employees is known as the "White List", as distinguished from the "Blue List" containing the names of diplomatic officers and members of their immediate families, *Haley, supra* at P. 81.

It should be pointed out that diplomatic immunity does not extend to Consuls who are merely commercial representatives of foreign states, and whose work is extrinsic to

diplomatic functions, *Carrera v. Carrera,* 174 F 2d, 496; see also *Trost v. Tompkins, supra.*

Clearly then, a member of the diplomatic Consular Corps, or his servant, is exempt from prosecution only if: (a) he or she has been given such immunity or exemption by the State Department and (b) their names have been registered with the United States Marshal for the District of Columbia. In the absence of any specific request or confirmation for such exemption, it must be assumed that the representative of a foreign power is legally capable of becoming a responsible agent and thus be subject to prosecution for violations of the Maryland State Motor Vehicle Laws.

FRANCIS B. BURCH, *Attorney General.*

BERNARD L. SILBERT, *Asst. Attorney General.*

POLICE—BALTIMORE CITY—TRANSPORTATION—MENTALLY ILL PERSONS AND THOSE DECLARED INCOMPETENT—RESPONSIBILITY OF THE BALTIMORE CITY POLICE DEPARTMENT.

September 30, 1969.

Commissioner Donald D. Pomerleau.

We are in receipt of your request of September 4, 1969, in which you seek to ascertain the responsibility of the Baltimore City Police Department, when transporting or delivering persons who have been committed to mental hospitals by a court of competent jurisdiction. In your letter you state that there is, at the present time, a practice whereby members of your Department deliver mental patients to various State hospitals and obtain a receipt, thereby completing the transaction. Your Operations Bureau has prompted this request based on an inquiry made by the Sub-Committee on Transportation of the Mental Health Advisory Council to the Baltimore City Health Department. It appears that this Committee is seeking to employ a private corporation to perform the function of transporting persons who have been examined by competent doctors and certified as mentally ill at the Southwestern Police Station and the Pine Street Station.

We find no legal duty on the part of the Police Department to transport mental patients, insane persons, or lunatics to private carriers, hospitals, or other mental institutions. Indeed, this function is the direct responsibility of the State Department of Mental Hygiene which is charged with the maintenance, care, custody, and control of those persons who are mentally ill. See Art. 59, Sec. 3, 18 of the Annotated Code of Maryland (1968 Repl. Vol.).

We further conclude that your responsibility for the detention of a person certified as mentally ill should cease at the time of the execution of a valid commitment, and that the party so certified as mentally ill would then be in the constructive custody of the Department of Mental

Hygiene. In the event that a person, who has been certified as mentally ill should escape, it would then be incumbent upon the Superintendent of the institution to which the person has been committed to secure and apprehend the escapee pursuant to the authority as set forth in Art. 59, Sec. 30 of the Code; see also 39 Opinions of the Attorney General 215.

FRANCIS B. BURCH, *Attorney General.*

BERNARD L. SILBERT, *Asst. Attorney General.*

POLICE — POLICE COMMISSIONER — ENFORCEMENT OF CITY TRAFFIC ORDINANCES AND STATE MOTOR VEHICLE LAW—POINT SYSTEM—INTENT OF LEGISLATURE.

October 3, 1969.

Commissioner Donald D. Pomerleau.

Your letter of June 19, 1969, has been forwarded to us for reply.

You question as to whether or not "the Police Commissioner of Baltimore City has the discretionary power to instruct his officers to charge traffic violators under applicable sections of the Baltimore City Code, rather than for violations under Article 66½, of the Annotated Code of Maryland."

Under Chapter 203, Acts of Maryland, Section 527(a), 1966 "Police Omnibus Act", the Police Department is charged with maintaining the orderly flow of traffic on public streets and highways. Indeed, the problem of enforcement of the state and local traffic laws within the City of Baltimore is one that has been wholly delegated to your Department. We are not unmindful that by enforcing these laws the question will arise as to the placing of charges, where there is a violation of a Baltimore City ordinance and a comparable state law. Based on accompanying memoranda, it is our understanding that the current practice, in your Department, is to omit the specific violation from the summons, where such a conflict occurs, and permit the Clerk of the Traffic Court to specify the exact section of the law (the Clerk of the Traffic Court has utilized Code Article 66½, rather than the Baltimore City Code, Article 31) for the purpose of remitting any fines collected to the State Treasury. The Director of Finance of the City of Baltimore estimates that by charging defenders under local city ordinances rather than state law, the sum of $700,000.00 could be utilized by the City of Baltimore as collectible traffic fines.

In its opinion of May 5, 1969, the Baltimore City Law Department has suggested that the Baltimore City Police Department be required to charge offenders with violations of city ordinances rather than state laws in those cases which are within the city's jurisdiction, so that fines paid for such violations will be remitted to the city rather than to the state. That opinion was bottomed on a previous opinion of December 19, 1967, where it was the City Solicitor's conclusion that pursuant to Section 128(b) of Article 26 . . . Md. Code "Fines, Penalties, and Forfeitures in cases involving violations of the traffic ordinances of the Mayor and City Council of Baltimore, which includes violations of Administrative Regulation #7, promulgated by the Commissioner of Transit and Traffic, imposed by the Traffic Division of the Municipal Court of Baltimore City, in cases not involving violations of the motor vehicle laws of the State of Maryland, are properly remitted to the City of Baltimore whether such violations are moving violations or parking violations."

While we do not dispute the underpinnings of that opinion, we are of the opinion that Administrative Regulation #7, adopted by the Commissioner of Transit and Traffic, is regulatory only for the specific and limited movement of vehicular traffic in Baltimore City, but does not require that the Police Department enforce a local ordinance which may tend to be at variance with the state law. By example, Baltimore City Code, Article 31, Section 50, imposes a $2.00 fine for "crossing a funeral procession", whereas Code Article 66½, Section 193(f) inposes a $25.00 fine upon the conviction of the same offense. Perhaps, as an overriding consideration is the "point system", which states that "points shall be charged against the licensee after conviction of a violation of the motor vehicle laws of this state". See Code Article 66½, Section 114(a), (1967 Repl. Vol.). Obviously, those persons convicted under a local ordinance (such as the Baltimore City Code, Article 31, and Administrative Regulation #7) could not be charged with points. The failure to charge under state law, in such a case, would appear to frustrate the purpose of the "point system"

and indeed the intent of Legislature, which was to rid the State of Maryland of its incompetent drivers.

It is interesting to note that Article 66½, Section 187, which gives similar powers to regulate speed to Prince George's County, also contains the power of enforcement through the payment of fines in that County. This enforcement power is not included in Section 186. We take the view that since the Legislature consciously gave such a power to Prince George's County; they consciously withheld the power from Baltimore City, thereby manifesting a clear intention to deny Baltimore City the power of enforcement. The power of the municipality to levy and collect fines for violations of traffic regulations upon those persons operating motor vehicles on streets within the corporate limits of Baltimore City, which streets are not a part of the State or Federal highway system, could only be granted through legislation similar to that found in the 1968 Supplement of the Public Local Laws of Worcester County, Section 234 (51), whereby the governing authority of Pocomoke City has been given the power to adopt and *enforce*, within its corporate limits, speed and other regulations not in conflict with the laws of the State of Maryland or with the County Charter. Under Section 236, title "Enforcement", the County Council is empowered to provide that any violation thereof shall be a misdemeanor and shall have the power to affix thereto penalties of a fine (not exceeding $100.00) or imprisonment (not exceeding 30 days) or both such fine and imprisonment.

Until such time as the Maryland General Assembly grants the City of Baltimore such enforcement powers as heretofore described and enacts a law assessing violators of the motor vehicle law with points under the existing local ordinances, we suggest that the Baltimore City Police Department adhere to these recommendations:

> (a) in cases involving solely a violation of the city ordinance and where there is no comparable state law, the violator should be charged under the city ordinance, see Code Article 26, Section 128(b);

(b) in cases involving a violation of a comparable state law and a Baltimore City ordinance, the state law should prevail in order to conform with the intent of Legislature and thereby preserve the integrity of the "point system", see Code Article 66½, Sections 1 and 114(a), supra; and,

(c) in cases involving a violation upon a street within the corporate limits of Baltimore City, which street is a continuation of a state highway and is marked by state signs similar to those signs outside the city, any violation thereupon, should be charged under the state law rather than the city ordinance, see *Pressman v. Barnes*, 209 Md. 544, 559-660.

FRANCIS B. BURCH, *Attorney General.*

BERNARD L. SILBERT, *Asst. Attorney General.*

POLICE — POLICE COMMISSIONER OF BALTIMORE CITY — MOTOR VEHICLES—OPERATING MOTOR VEHICLE WHILE INTOXICATED, ETC. OR WHILE DRIVING ABILITY IS IMPAIRED BY CONSUMPTION OF ALCOHOL—OFFENDER SHOULD BE ARRESTED AND BOOKED, NOT ISSUED TRAFFIC SUMMONS—CHEMICAL TESTS, REQUIRED POLICE PROCEDURE BEFORE AND AFTER.

November 18, 1969.

Commissioner Donald D. Pomerleau.

Your recent letter raises several questions regarding enforcement of the law against driving under the influence of alcohol. We are asked first to prescribe the form of charge that should be brought against offending drivers. The primary statute is Article 66½, Section 206 of the Annotated Code of Maryland (1969 Supplement), effective July 1, 1969, which provides, in part:

> "(a) It shall be unlawful for any person to drive or attempt to drive or to be in actual physical control of any vehicle within this State while he is in an intoxicated condition, or under the influence of narcotic drugs.
>
> "(b) It shall be unlawful for any person to drive or attempt to drive or to be in actual physical control of any vehicle within this State while his driving ability is impaired by the consumption of alcohol."

We are informed that the Police Department's present practice is to issue a summons charging one or the other of the acts described in the above subsections and that this procedure has been unsatisfactory at times. Chemical tests administered subsequent to issuance of the summons have sometimes indicated that the wrong charge was brought, some offenders having been charged with the offense described in subsection (a) when they should have been charged under subsection (b), and vice versa. The

Department's understanding is stated to be that "the issuance of a traffic summons is a prerequisite to administering the chemical test" (for evidence of ingestion of alcohol), and you inquire "whether it would be possible to proceed with the chemical test prior to the issuance of the citation or whether the immediate issuance of the traffic summons is required upon stopping".

A review of current Maryland law, as well as other considerations, suggests a careful look at the practice of issuing a summons for driving under the influence of alcohol. For most violations of the Maryland Motor Vehicle Code a resident motorist may be issued a summons. He is technically under arrest but is permitted to leave the scene with the understanding that, by accepting the summons, he is required to appear in court on some certain day to answer the charge. Indeed, a summons in lieu of being taken into custody is a matter of right in some cases. See Article 66½, Section 321, which provides that a resident of Maryland arrested for a traffic violation, among other described offenses, may demand and receive a summons directing him to present himself in court at a later date to answer the charge, instead of being taken into custody forthwith. However, the statute provides, in terms, that the right to a traffic summons does not extend to persons arrested for driving under the influence of alcohol or narcotics; Article 66½, Section 324. While the statute does not bar the issuance of a summons, it strongly implies that a motorist reasonably believed to be driving under the influence of alcohol should be taken into custody. We believe that this was the intent of the Legislature; otherwise, there would have been no need to enact Section 324 providing that the right to a summons does not extend to persons suspected of driving under the influence.

The toll of automobile accidents due to alcohol is too well known to require comment. The statistics of death, personal injury and property damage unerringly point to alcohol as a deadly menace to highway safety and to motorists who drive while under its influence as serious violators of the law. Yet, in some respects the attitude stubbornly

persists that these offenses are not particularly serious. We believe that the practice of issuing a summons in drunk driving cases, instead of bringing a formal charge, is a manifestation of the failure to treat such cases with the gravity they deserve. The reaction to such procedure is a tendency to associate drunken driving with parking violations and other minor offenses that are chargeable by summons. So long as the charge of driving under the influence is handled as a minor offense, it will be so equated in the public mind. Drastic measures are in order, if necessary, to convince those who would drink and drive that happy motoring does not mean having a few drinks before climbing behind the wheel. The first step is to disabuse potential offenders of the concept that they face a minor charge if caught.

We believe that, if Police Department procedure is to reflect the intent of the Legislature, motorists suspected of driving under the influence of alcohol should be booked at the police station and a warrant of arrest containing appropriate charges of violation of Section 206 issued and executed. In Baltimore City the Municipal Court has jurisdiction over the trial of violations of the motor vehicle laws, including charges of driving under the influence of alcohol. Such offenses do not require the return of an indictment by the Grand Jury. *Smith v. Warden, Maryland House of Correction,* 208 Md. 672. Prosecution upon a warrant of arrest is authorized and, upon appeal from a conviction of a motor vehicle violation, the warrant is considered to be tantamount to an information or indictment. See Maryland Rule 702A, which provides that an indictment shall include a warrant issued by a justice of the peace where a jury trial was prayed before a trial magistrate or an appeal taken from the judgment of a trial magistrate.

The formulation of an appropriate charge for driving under the influence demands that the arrestee be clearly informed of his alleged violation so that he may be able to defend himself intelligently and understandingly, and also that he may be spared the jeopardy of a subsequent prosecution for the same offense. *Presley v. State,* 6 Md.

App. 419; *Butina v. State*, 4 Md. App. 312. This is an indispensable ingredient. Ordinarily, an indictment couched in the language of the statute will be legally sufficient. *State v. Petrushansky*, 183 Md. 67. However, where a statute prohibits the doing of two or more acts disjunctively, the Maryland Court of Appeals has held that it is improper to charge the performance of one *or* the other of the prohibited acts in the same count. *Bonneville v. State*, 206 Md. 302. Article 66½, Section 206 makes it unlawful for any person to drive while in an intoxicated condition or to drive or be in physical control of a motor vehicle while his driving ability is impaired by the consumption of alcohol. An offender may be charged with both driving while in an intoxicated condition *and* while his driving ability is impaired by alcohol, even though he may be guilty of but one of these acts. Under the *Bonneville* case, *supra*, he may not be charged with both acts disjunctively. He may be charged, however, with driving while in an intoxicated condition *and* driving with impaired driving ability due to consumption of alcohol. So alleged, it has been held that the charge is not duplicitous and legally sufficient proof of either of the prohibited acts would support a conviction. *Bonneville v. State, supra; Sturgill v. State*, 191 Md. 75; *Leon v. State*, 180 Md. 279; *Thomas v. State*, 173 Md. 676; *Stearns v. State*, 81 Md. 341.

In the alternative, instead of a conjunctive charge, separate charges may be brought for an alleged violation of Section 206. The acts that constitute such violation are described disjunctively in the title but are dealt with in separate subsections and have different penalties. Conviction for violation of the prohibition against driving in an intoxicated condition is punishable by imprisonment for up to one year and/or a fine of not more than $1,000; Section 206 (c). On the other hand, driving with ability to drive impaired by consumption of alcohol is punishable by a fine only of not more than $500 for a first offense; Section 206 (d). The penalties are more severe for second or subsequent offenses in each case. Separate penalties suggest different offenses in each case. We believe, therefore, that a suspected

offender may be charged separately with the acts described in Section 206 (a) and (b).

We now turn to the matter of when charges should be brought in view of the statutory provisions for suspects to be given a chemical test. These provisions appear in Article 66½, Section 92A and make it a condition precedent to the issuance or renewal of every Maryland driver's license on and after July 1, 1969, that the applicant consent to take a chemical test if stopped by a police officer upon reasonable grounds to believe that he was driving while in an intoxicated condition or while his driving ability was impaired by consumption of alcohol. Despite having given his consent in this manner, a suspected offender may not be compelled to take a chemical test. However, a refusing driver may be subject to an administrative penalty of suspension of driving privileges up to 60 days. The administrative order imposing a suspension of license may be issued by the Department of Motor Vehicles as prescribed in the statute upon the sworn statement of the police officer that the driver was charged and refused to take a chemical test.

You have inquired whether the above-described provisions of Section 92A apply to Maryland drivers whose licenses are not subject to renewal until after June, 1971. As that section applies only to applications for new licenses and for the renewal of existing licenses on and after July 1, 1969, drivers holding valid licenses on that date will not become subject to the provisions of Section 92A until such time as they apply for a renewal of licensure. As a practical matter, any such driver believed to have violated Section 206 may be detained and asked to take a chemical test. He may refuse without being subject to the administrative suspension of driving privileges. But, in the event of refusal of a chemical test, if the arresting officer reasonably believes such driver to have been under the influence, he should be forthwith charged conjunctively or separately (but not disjunctively) with the offenses described in Section 206. Charges, if any, against a consenting driver may abide the results of the chemical test. It should be remem-

bered that the chemical test required to be offered to the suspected motorist, if consented to, must be administered within two hours after he was first stopped; Article 35, Section 100 (a).

In summary, a suspected violator of Article 66½, Section 206 is not entitled to demand and receive a summons for such violation. A police officer having reasonable cause to believe that such offense has been committed should bring the offending driver to the police station under arrest. Whether or not the driver is subject to the provisions of Section 92A, he should be requested to take a chemical test. Every driver suspect has the right to refuse to do so and should be so advised. If not subject to the provisions of Section 92A, he should be charged immediately with the acts described in Section 206. Such acts may be conjunctively charged or separate charges may be brought and a warrant of arrest issued. If Section 92A is applicable, the police officer, upon requesting the driver to take a chemical test, should advise him of his options and of the administrative penalty that may be imposed for refusal. In the event of refusal, the arresting officer is required to file with the Department of Motor Vehicles within 48 hours a sworn report as required by the statute. Also, in the event of refusal, appropriate charges should then and there be placed and a warrant of arrest issued. Charges against a consenting driver may await the outcome of the chemical test. In the event the test results support the belief of the police officer that the offense of driving while intoxicated or while his driving ability was impaired by consumption of alcohol was committed, conjunctive or separate (but not disjunctive) charges should be promptly brought and an arrest warrant issued.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Asst. Attorney General.*

POLICE—MARYLAND STATE—TRAINING COMMISSION—POLICE TRAINING ACT REQUIRES APPLICANT FOR PERMANENT EMPLOYMENT AS POLICE OFFICER TO SUCCESSFULLY COMPLETE APPROVED TRAINING COURSE WITHIN ONE YEAR—TERMINATION OF EMPLOYMENT MANDATORY FOR FAILURE TO MEET MINIMUM COMMISSION STANDARDS WITHIN THE ONE-YEAR PERIOD—FOR FAILURE OR REFUSAL TO TERMINATE EMPLOYMENT OF UNQUALIFIED POLICE OFFICER, COMMISSION MAY BRING MANDAMUS ACTION AGAINST EMPLOYING AUTHORITY.

June 6, 1969.

Mr. Robert L. Van Wagoner.

Your recent letter makes inquiry regarding the manner of enforcement of the provisions of Article 41, Section 70A of the Annotated Code of Maryland (1965 Replacement Volume, 1968 Supplement), the Police Training Act of 1966 (the Act), and particularly subsection (e) providing for probationary appointment as a police officer for not exceeding one year for the purpose of employing a person seeking a permanent appointment to take an approved training course, and subsection (f) prohibiting the permanent appointment of any person who has not successfully completed an approved police training course or who has not been otherwise approved for such appointment by the Police Training Commission. You advise that a police officer with previous service in the Ocean City and Berlin Police Departments was appointed to the latter Department on October 21, 1967, and served until about July 1, 1968, when he was appointed to the Snow Hill Police Department, and you state that this officer is still employed by Snow Hill although he has failed to meet minimum Commission standards. We said earlier in reply to an inquiry from you that the officer in question was required to successfully complete the prescribed course of training within one year of his appointment to the Berlin Police Department. See our letter dated August 27, 1968.

You note that the sanctions described in the statute creating the State Aid for Police Protection Fund (Maryland Code Article 15A, Section 39), providing that the Fund benefits may be withheld from a political subdivision that fails to comply with the minimum standards of the Police Training Act for two successive years, would not be available in the Snow Hill case for another year and you ask how the Act may be enforced so as to effectuate the termination of a police officer after his failure to qualify for permanent appointment.

The mandate of the statute is plain that permanent appointment as a police officer is prohibited to any person who has not successfully completed the required training course or received Commission approval otherwise. The continued employment beyond the probationary period of one year of a person who fails to meet the minimum Commission standards is undoubtedly a violation of the statute by the Police Department and the local government employing such person. Such violation is not avoided by inability to secure a suitable replacement for the employee. Difficulty of compliance is ordinarily no excuse for a violation of law. The mandate of the statute requires the employer of the unqualified police officer to terminate his employment at the end of the probationary period, and it is therefore the clear duty of the responsible police or local government authority to take action accordingly.

An action in a court of law for a writ of mandamus will lie to compel the performance by public officials of a mandatory duty. The failure or refusal to terminate the employment of an unqualified police officer in accordance with the requirements of the Police Training Act constitutes a proper basis for the application by the Commission for the writ of mandamus to require the employing authority to comply with the mandate of the Act. See Annotations to Subtitle BE of the Maryland Rules, "Mandamus", and cases there cited.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Asst. Attorney General.*

PORT AUTHORITY, MARYLAND

WORLD TRADE CENTER — FINANCING — CONSTITUTIONAL DEBT LIMITATIONS—REVENUE BOND—SALE—LEASEBACK FINANCING—MORTGAGE—WITH OR WITHOUT EXCULPATORY CLAUSE—DISPOSAL OF PROPERTY BY MORTGAGE—LEASE OF AIR RIGHTS.

January 17, 1969.

Maryland Port Authority.

In connection with the proposed construction and development of the World Trade Center by the Maryland Port Authority, you have raised a number of questions concerning possible means of financing the Center. We understand that for some time you have been exploring various means of financing, and have now restricted your consideration to four possible plans. You have requested our opinion as to any possible legal impediments to using any one of them.

In the first instance, you are considering the use of revenue bonds for financing the project. It would appear that there can be no question about the use of such bonds for financing of the World Trade Center in the light of *Lerch v. Maryland Port Authority*, 240 Md. 438 (1965), a taxpayer's suit brought specifically to resolve questions concerning the use of revenue bond financing for development of the World Trade Center.

The second proposed plan of financing is by a sale-leaseback arrangement. This proposal would appear to pose the most serious legal questions of the various methods you have under consideration.

Although no definite plan of sale-leaseback financing has been settled upon, we understand that basically the plan will work by MPA conveying its interest in the World Trade Center development site to a third party, who would then actually build the World Trade Center Building and lease

it back to MPA. There are, obviously, many variations of this method which may be used, and the exact form of the method used will play an important part in determining the legality of the proposal. We understand that the sale-leaseback arrangement would also include an option to MPA at the end of the lease period to purchase the property and improvements.

The Maryland Court of Appeals has not as yet had the occasion to pass on a sale-leaseback arrangement, particularly in relation to the debt provisions of the Maryland Constitution. However, as you know, the City of Baltimore is contemplating constructing a warehouse for its use, and financing the same via a sale-leaseback arrangement. The legality of this plan is being tested in the case of *Hall v. Mayor and City Council of Baltimore*. The case was originally tried in the Circuit Court No. 2 of Baltimore City, and Carter, J., found that the proposal did not violate the debt limitations imposed by the Maryland Constitution upon the City of Baltimore. This issue is now pending before the Maryland Court of Appeals, and the decision in that case will obviously shed some light on the legality of similar proposals in the State of Maryland.

Other states have prior to this time considered sale-leaseback financing proposals, and the decisions have run all the way from outright approval of them, to outright rejection. It would seem that the legality of a sale-leaseback financing plan considered against constitutional debt limitation provisions will turn on a determination by the Court of whether or not the lease is in reality a bona fide lease transaction.[1] If a Court determines that the sale-leaseback is a bona fide lease arrangement, the proposal is generally held not to violate constitutional debt limitation provisions, but if the proposal is nothing more than an obvious ruse to get around the constitutional prohibition, it will be held to be in violation of the law.

The two extremes may be illustrated by cases from California and Arizona respectively.

In *Los Angeles v. Offner*, 19 Cal. 2d 483, 122 P. 2d 14

(1942) the City of Los Angeles proposed to lease City owned property to a developer for a period of 10 years at a rental of $1.00 a month. The developer was to construct an incinerator on the property within nine months thereafter, and simultaneously with the execution of that land lease, the developer and the City were to execute a lease to the City of the premises with the incinerator constructed thereon for a period 9 years and 9 months. The City was to pay a monthly rental to be determined by bids upon which the lease and sublease were to be awarded. The City was to be given an option to purchase the incinerator at certain periods during the lease, at not less than specified amounts. The land lease from the City was to run for a period of three months after the expiration of the incinerator lease and option, thus giving the developer time within which to remove the incinerator, a right expressly reserved to him in the event the City did not exercise its option to purchase the incinerator. The land lease and sublease to the City were attacked as violating the debt limitation provisions placed on the City of Los Angeles as being merely a subterfuge to avoid those limitations. The Supreme Court of California however held the transaction to be legal, and found that the transaction constituted in reality a lease with reasonable terms and an option to purchase. The rentals, said the Court, were for a definite amount, the minimum option price determined by competitive bidding, and in no event was the City to have the right to purchase the incinerator at less than its fair appraised value at the time it elected to purchase. Accordingly, the Court found that the transaction did not violate the constitutional debt limitation provisions.[2]

The Supreme Court of Arizona reached a contrary result in a sale-leaseback case in *City of Phoenix v. Phoenix Civic Auditorium and Convention Center Association, Inc.*, 408 P. 2d 818 (1965). There the City of Phoenix proposed to condemn land and lease it to a non-profit association. A civic auditorium was to be constructed on the property, and the land and auditorium was to be leased back to the City, for 35 years, the City to pay monthly rentals from general

funds, and at the end of the 35 year period, the City would receive the property.

On the facts referred to above, the Arizona Supreme Court found that the so-called lease agreement was nothing more than a purchase agreement. As such, it found that the agreement violated the Arizona debt limitation constitutional provisions. The court said:

> ". . . rent payments such as provided for in the instant case, are indistinguishable from annual debt service. It is clear that under the authorities discussed and cited herein the agreement between the City and the Association is in effect a purchase agreement for the property and the payments constitute a debt against the City which exceeds the constitutional debt limitations, and is in violation of the statutory budget limitation." *City of Phoenix v. Phoenix City Auditorium and Convention Center Association, Inc., supra,* p. 833.

Since the Maryland Court of Appeals has not as yet ruled on any case involving sale-leaseback financing, we cannot say with any degree of certainty whether such arrangements would be looked on favorably by this State's highest Court. Although the pending City of Baltimore case will cast some light on the disposition of the Court of Appeals towards such financing programs, the particular program proposed for MPA will have to be studied in light of its own provisions, and may, eventually, have to be scrutinized by the Maryland Court of Appeals.

The third possible financing method you propose is mortgage financing. In your communications to us, you have not detailed the methods of mortgage financing you are considering, and we have thus *sua sponte* considered two possible types of mortgage financing. In the first instance, we consider the "standard" form of mortgage financing, which includes not only a pledge of the property to secure the mortgage loan, but also an enforceable promise made by the mortgagor (in this case MPA) to repay the loan. In

this case, we believe that the promise of MPA to repay the loan would create a "debt" within the meaning of Section 34 of Article III of the Maryland Constitution, and would thus be prohibited. Under Section 34 of Article III, neither the General Assembly nor any agency of the State created by it may contract a debt which is not supported by the levy of an annual tax sufficient to pay that debt. In the mortgage situation we are here considering, no tax to support the repayment of the debt has been created, and since the promise to repay would constitute a debt, we believe that such contract would be unconstitutional.

The second possible method of financing the Center via a mortgage would be a mortgage which pledged the property obtained with the proceeds of the mortgage loan, but which did not contain a "personal covenant" on behalf of the Authority to repay the sum borrowed.[3]

In this situation, we believe that the mortgage would be a proper and constitutional means of financing the Center. *Lerch v. Maryland Port Authority, supra,* is authority for the proposition that a "purchase money mortgage" by which the facility procured from the funds obtained by the loan are pledged to secure the repayment of the loan, does not create a "debt" in the constitutional sense of Article 34, Section III. Further, this same case is support for the proposition that the transaction is not rendered unconstitutional by the fact that the State or an agency thereof has paid in cash some amount as equity for the mortgaged property.

As to the mortgage and a possible foreclosure thereof constituting a disposal of MPA property, we are of the opinion that the general powers of MPA to "convey or otherwise dispose of" its real property is broad enough to include a disposal by mortgage. See *Warden v. City of Grafton,* 125 W. Va. 658, 26 S.E. 2d 1 (1943); *Adams v. Memphis v. Little Rock R.R. Co.,* 42 Tenn. 645 (1865); *Platt v. Union Pacific R.R. Co.* 99 U.S. 48, 25 L. Ed. 424 (1879).

The fourth method of financing that you are considering is by a lease of air rights to allow a developer-contractor to build the tower of the Center. We understand that under this contemplated proposal the Authority would build the foundation and sub-structure of the Center up to approximately ground level, and would then lease the air rights above the foundation to a developer-contractor under an agreement by which the developer-contractor would be obligated to construct a facility based on the plans and specifications of the Authority. The Authority would then lease from the developer-contractor office space in the tower just as would other tenants. At the termination of the air rights lease, the property would revert to the unrestricted ownership of the Authority, together with the improvements constructed thereon.

Under the general grant of powers to the Authority contained in Section 5 of Article 62B, the Authority is given the power to lease, as lessor or lessee, port facilities within its territorial jurisdiction. The proposed World Trade Center is specifically defined to be a "port facility" by Paragraph (2) of Section g of Section 4 of Article 62B. It is our opinion that under this lease power of the Authority, it could finance development of the World Trade Center by leasing the air rights to a private developer-contractor and have that developer-contractor actually construct, lease and operate the Center.

In conclusion, we would point out that our opinions as expressed above, are based on rather general proposals for financing, and as the proposals become more firm, and definite provisions of the proposed financing are agreed upon, such proposals would have to be reviewed in detail and considered in their individual lights.

FRANCIS B. BURCH, *Attorney General.*

S. LEONARD ROTTMAN, *Asst. Attorney General.*

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[1] In this State a *bona fide* lease does not create a debt until the due date of the rent installment. *Real Estate Board of Baltimore v. Page*, 164 Md. 500 (1933). Thus, a real lease would not violate the

Maryland Constitution debt limitation provisions, but if the so-called lease is nothing more than a subterfuge for a plan of financing the purchase of a facility, a "debt" for the purchase is created and must meet constitutional standards.

[2] We understand that the transaction the City of Baltimore proposes to enter into for the financing of its contemplated warehouse closely parallels the transaction in the *Offner* case, and the City has relied on the authority of the Supreme Court of California in support of its contention that its proposal does not violate the Maryland Constitutional debt limitation provisions.

[3] We would urge that any such mortgage contain a clause specifically stating the obligation to repay the loan was only to be satisfied (1) out of revenues derived from the facility to be constructed, and (2) the proceeds of the sale of the facility itself in the event of a mortgage foreclosure, and that the loan was not the general obligation of the Authority or of the State, and that neither the faith and credit nor the taxing power of the State or any political subdivision thereof is pledged to the repayment of the sums advanced.

PORT AUTHORITY, MARYLAND—STATE GENERAL OBLIGATION BOND—LEGAL OBLIGATION TO REPAY—TERMINATION OF OBLIGATION.

June 9, 1969.

Mr. Robert R. Green.

You have asked our opinion as to when the obligation of the Maryland Port Authority stops with regard to the payment of sums to retire State bonds issued at the request of MPA pursuant to statutory authority. In your letter you say that upon issuance of the State bonds you thereby obligate yourself for certain debt service payments. You point out that payment for the indebtedness on the bonds is billed to you roughly one year in advance, and you make payment therefor to the State Treasurer and he deposits the sums received to the Annuity Bond Fund created for that purpose.

The statutory authority for the issuance of State bonds at the request of MPA is found in Sections 8, 8A and 8B of Article 62B of the Annotated Code of Maryland (1968 Replacement Volume). These acts are all similar in nature, and we will refer particularly to Section 8A for reference purposes in this letter.

We would first point out to you that under the statutory authority for issuance of the State bonds, the "obligation" of the Maryland Port Authority for the bonds is to the State of Maryland, and not directly to the bond holders. Since the bonds sold are general obligation bonds of the State of Maryland, the legal obligation to the bond holders for the payment of the bonds is on the State of Maryland. You point out in your letter that in the past the bonds sold always carried the name of the Maryland Port Authority on the bond certificate itself, but that this practice will be changed in the future. Although in the past the bonds carried the name of the Maryland Port Authority on their face, there was no legal significance to this, since the bonds

were, in fact, general obligations of the State of Maryland, and the designation on individual series of bonds of the agency of the State to be benefited by the proceeds of the sale was merely for internal State bookkeeping convenience. The new format in bonds to be issued in the future will not change the legal obligations to the bond holders in any respect.

Paragraph (f) of Section 8A sets out that payment of principal and interest on the bonds issued pursuant to that section is to come primarily from the proceeds of the tax imposed on certain corporations by the provisions of Section 288 (c) of Article 81.[1]

Paragraph (h) of Section 8A, in order to satisfy constitutional requirements, provides that a real property tax is to be assessed to pay in whole or in part, as necessary, the indebtedness on the bonds in the event that the corporate income tax collected is not sufficient in whole or in part to pay the indebtedness. Thus, if for any reason the corporate income tax is not sufficient to pay in whole or in part the bonded indebtedness, a property tax levy would have to be made to obtain the funds to pay the indebtedness.

Section 288 (c) of Article 81 imposes a corporate income tax for the benefit of the Maryland Port Authority. It is specifically provided by Section 288 (c) that the sums collected by this income tax are to be first set aside in an Annuity Bond Fund to provide so much as may be necessary to make payments of principal and interest on the bonds as may fall due in the year of the receipt of the tax, and *"in the next following year."* After application of the corporate income tax to the Annuity Bond Fund, any excess from the corporate income tax is to be paid into the Maryland Port Authority Fund, which is to be used for current expenses of the Authority.

It is significant that the proceeds from the corporate income tax are to be applied against the bond payments falling due in the year the tax is received and for the next succeeding year. It is obvious that the intent of the Legis-

lature was to fund payment of the bonds issued at the request of the Authority a year in advance from the corporate income tax. The purpose of this may readily be noted when you consider the provisions for collection of additional real property tax in the event the corporate income tax does not produce a sufficient yield to make payment in full on the bond indebtedness falling due. Unless a sum were set aside sufficiently in advance from the corporate income tax to pay the bond indebtedness, it would not be possible to know in adequate time whether or not it is necessary to impose the additional real property tax to make up any possible deficit on payment of the bonds. Thus, it may be seen that the practice of the office of the Comptroller in billing the Maryland Port Authority a year in advance for the retirement of bond indebtedness is based on statutory authority, which in turn, is based on the practical need to set the proper real property tax rate for each year.

In answer to your specific inquiry as to when exactly does the obligation of the Authority end, we believe that its obligation, if there is any real "obligation" in the legal sense at all, is to the State of Maryland, and that that obligation ends when the State Treasurer sets aside in the Annuity Bond Fund the sums necessary to make payments of principal and interest on the bonds for the year in which the funds were received and the next following year.

You have pointed out to us that on your Annual Statement you show the outstanding bond indebtedness on bonds issued by the State of Maryland for the Maryland Port Authority as a liability of the Authority, and do not reduce this amount until the bonds are actually redeemed. To offset the bond indebtedness, you show deposits to the Annuity Bond Fund as an asset. Since, as we have pointed out above, the obligation (if there is one legally at all) for the repayment of the bond indebtedness of the Authority actually runs to the State of Maryland, and that obligation is satisfied when you make payments to the Annuity Bond Fund,

this is not a technically correct showing of the financial position of the Authority at a given time.

FRANCIS B. BURCH, *Attorney General.*

S. LEONARD ROTTMAN, *Asst. Attorney General.*

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[1] As originally passed, Paragraph (f) of Section 8A, Article 62B, referred to the provisions of Section 288 (f) of Article 81. However, by amendment and recodification of Section 288 the paragraph reference should now be to Paragraph (c) and we shall so refer to it.

PSYCHOLOGISTS, STATE BOARD OF EXAMINERS OF

PSYCHOLOGISTS CANNOT PRACTICE THEIR PROFESSION AS A CORPORATE ENTITY.

March 17, 1969.

Dr. Julian Abrams, Secretary.

We have received your letter inquiring whether a psychologist can practice his profession as a corporate entity.

There are statutory provisions specifically forbidding certain occupations to carry on their business in a corporate form, e.g., lawyers, Article 27, Section 14; dentists, Article 32, Section 1; funeral directors, Article 43, Section 351. There is no specific proscription in the "Psychologists' Certification Act", Article 43, Sections 618-644, against a corporation practicing psychology. We must, therefore, look to the language of the statute to determine whether this is impliedly forbidden.

Article 43, Section 620 provides that: ". . . no individual shall represent himself as a psychologist within the meaning of this subtitle other than those certified registered under the provisions of this subtitle."

The term "represents himself to be a psychologist" is defined in Section 619 (c) of Article 43 as:

> "(c) A person 'represents himself to be a psychologist' when he holds himself out to the public by any title or description of services representing himself as a psychologist which incorporates the words 'psychological,' 'psychologists,' or 'psychology,' or when a person describes himself as above and under such title or description offers to render or renders services involving the application of principles, methods and procedures of the science and profession of psychology to individuals, corporations or the public for compensation, or other personal gain."

The qualifications of applicants for certification are set forth in Section 629 which provides:

"Application for examination for certification as a psychologist or for certification without examination as a psychologist shall be upon the forms prescribed by the Board. The Board shall certify as a psychologist any person who pays the prescribed fee, who passes a satisfactory examination in psychology, and who submits evidence verified by oath and satisfactory to the Board that he:

(1) Is at least twenty-one years of age;

(2) Is of good moral character;

(3) Is a citizen of the United States or has legally declared his intention of becoming such a citizen;

(4) Has received the doctoral degree based on a program of studies whose content was primarily psychological from an accredited educational institution having an appropriate graduate program, or a program of studies judged by the Board to be equivalent in both subject matter and extent of training;

(5) Has had at least two years of professional experience in psychology."

That it is impossible for a corporation to submit evidence of the qualifications required by Section 629 is manifest. Furthermore Section 634 provides for issuance of certification to individuals only. We conclude therefore that it is unlawful for a corporation to practice psychology or to engage in the business or profession of a psychologist.

We arrive now at the consideration of whether a certified Maryland psychologist may practice psychology through a corporation. On the authority of *Brooks v. State Board of Funeral Directors and Embalmers of Maryland*, 233 Md. 98, it is our opinion that he may not. The contention was made there that a corporation barred as such from the conduct of a business is not prohibited from conducting that business through licensed individuals. In rejecting the

contention, the Court of Appeals held that the prohibition of a statute against the conduct of a business by a corporation may not be circumvented by conducting such business through a licensed individual. Accordingly, where, as here, a statute does not allow for the conduct of a business by a corporation, the ban extends to such conduct through licensed individuals. In the question now being considered, we conclude that the practice of psychology being prohibited to corporations by the fact that they cannot be certified, psychological services may not be furnished by a corporation through the agency of licensed individuals.

This opinion is in accordance with a 1964 opinion of Thomas B. Finan, Attorney General, reported at 49 Opinions of the Attorney General 6, wherein it was held that a licensed architect may not practice through a corporation. It is also in accordance with a 1956 opinion of Norman P. Ramsey, Deputy Attorney General, at 41 Opinions of the Attorney General 308, wherein it was held that corporations could not practice professional engineering. In that opinion, this office held:

> "Further, it is our opinion that the Maryland Laws do not contain any provision authorizing the practice of professional engineering by corporations but only provides for licensing of individuals. (similar to statute at issue) It is the intent of the Maryland law that the practice of engineering shall be considered as a profession and hence such a practice cannot be within the powers of any corporate bodies."

In summary, our conclusions are that, in Maryland, a corporation may not lawfully be formed for the practice of psychology in that it cannot be certified as required by the "Psychologists' Certification Act", and that a certified psychologist may not practice psychology through the medium of a corporation.

FRANCIS B. BURCH, *Attorney General.*

THOMAS N. BIDDISON, JR., *Asst. Attorney General.*

PUBLIC IMPROVEMENTS, DEPARTMENT OF

LAND ACQUISITION DIVISION — IMPLEMENTATION OF IMPROVEMENTS (AUTHORIZED BY SECTION 9, CHAPTER 403, ACTS OF 1969, ARTICLE 78A, SECTION 19A, CODE) IS NOT CONTINGENT UPON SALE OF BONDS AUTHORIZED BY CHAPTER 403 CREATING A DEBT TO BE USED FOR THE PURPOSE OF PROVIDING RECREATION AND OPEN SPACE AREAS.

June 23, 1969.

Honorable Marvin Mandel.

You have asked us if you may proceed to appoint a chief of the Land Acquisition Division (hereinafter referred to as Division) of the Department of Public Improvements, and proceed to establish and implement such a division.

The Division was created by Chapter 403 of the Acts of 1969 (new Section 19A of Article 78A of the Maryland Code). Chapter 403 also authorized the creation of a State debt in the aggregate amount of $60,000,000., to be known as the "Outdoor Recreation Land Loan of 1969", or "Program Open Space", to be used for the purpose of assisting certain State agencies to provide outdoor recreation and open space areas in the State. It also provides for a State property transfer tax of ½ of 1 per cent on every written instrument conveying title to real property recorded in the State, the proceeds of which are to be used to pay the principal and interest on the certificates of indebtedness issued under the "Outdoor Recreation Land Loan of 1969", or "Program Open Space".

We have been advised that there has been some discussion among bond counsel as to whether the title to Chapter 403 (House Bill 29) satisfies the requirements of Section 29 of Article III of the Maryland Constitution for the purpose of authorizing the sale of general obligation bonds. In addition, the Board of Public Works, of which you are a member, announced on June 18, 1969 that it would post-

pone the bond sale scheduled for July 16, 1969, a part of which would include bonds to create the debt authorized by Chapter 403. The reason for the postponement of the sale of State bonds is that it would be impossible to sell such bonds in the current high interest market, in light of the State's five (5%) per cent limit on interest. In view of these two circumstances, you ask whether you may still proceed to implement the Division.

It is our opinion, for the reasons hereinafter stated, that you may proceed to establish the Division, even if that part of the Act which authorizes the debt should be declared judicially to be invalid for the purpose of authorizing the sale of general obligation bonds, and/or the debt is not immediately created.

First, while it should be observed that Chapter 403 contains no severability clause, we do not believe that this would be fatal to the implementation of the Division. The Court of Appeals has held that the severability clause "adds nothing to the general rule that courts try to uphold all parts of an act which can be put in force, even though other parts are invalid". *Bell v. Prince George's County,* 195 Md. 21, 32. In the case of *McKeldin v. Steedman,* 203 Md. 89, which involved the validity of Chapter 780 of the Acts of 1953, known as the "General Construction Loan of 1953", the Court of Appeals held that that part of the Act authorizing the creation of a State debt violated the budget amendment provision of the Maryland Constitution (Section 52, Article III). The Court, however, upheld the remainder of Chapter 780, even though the Act contained no severability clause, stating, at 103:

> "* * * The inclusion of a separability clause would have been a helpful indication of legislative intent, but such a clause is not indispensable if the requisite intent may be otherwise found.
>
> "There is first the rule consistently applied in this State that 'where a part of a statute may be clearly void and yet the remainder will carry out the legislative purpose, the unobjectionable part

> will be enforced.' . . . And this Court has held recently that this rule can be sufficient independently to save the valid portion of the Act * * *."

We believe that there are ample reasons to support the conclusion that it would be the legislative intention to carry out the remainder of Chapter 403, in the event that a part of the Act were declared invalid for the purpose of authorizing the sale of general obligation bonds.

In Chapter 162 of the Acts of 1969 (the Budget Bill for the fiscal year 1970), the Supplemental Budget specifically carries a General Fund Appropriation of $133,452.00 for the Division, and the sum of $20,000.00 is included therein for a Land Acquisition Chief. The appropriation, however, is contingent upon the enactment of House Bill 29. This was done, but the question arises whether it is implicit in that contingency that the Bill not only be enacted, but that every provision thereof be actually implemented. We do not think that this was the Legislature's intention and we believe that in finding such an intention we would, in effect, be engrafting an additional condition upon the expressed condition that the appropriation be contingent upon the enactment of House Bill 29.

One of the line appropriations of the Supplemental Budget for the Division is $35,000.00 for contractual services. We have been advised by the Assistant to the Director of the Department of Public Improvements that these funds would be used for appraisals and survey work and would necessarily have to be expended before the expenditure of any funds realized through the bond issue. In addition, a certain amount of time will have to be utilized in organizing the Division and preparing for the implementation of the program for open space. The Division will also be able to secure options for land to be acquired for the program for open space, which, historically, has been acquired for nominal sums and would not require any extensive funding. We point these facts out to you, because we believe that while the Division is directly related to "Program Open Space", it appears that it has a certain independent func-

tion of its own, and it is not necessarily inextricably integrated with Chapter 403 as a whole.

Accordingly, it is our opinion that you may proceed to establish the Land Acquisition Division of the Department of Public Improvements, and to appoint a chief thereof.

FRANCIS B. BURCH, *Attorney General.*

JON F. OSTER, *Asst. Attorney General.*

PUBLIC RECORDS

CONFIDENTIAL INFORMATION—MONIES PAID FROM STATE FUNDS FOR MEDICAL SERVICES OR PRESCRIPTIONS—NAMES OF PHYSICIANS AND/OR PHARMACISTS, AND THE AMOUNTS PAID TO THEM FROM SUCH FUNDS, ARE PUBLIC RECORD—NAMES OF PATIENTS RECEIVING SUCH SERVICES AND MEDICAL FILES PERTAINING TO SUCH PATIENTS ARE NOT PUBLIC RECORDS AND MAY NOT BE REVIEWED BY THE GENERAL PUBLIC.

March 13, 1969.

William J. Peeples, M.D.

We have your recent inquiry in which you ask whether information concerning amounts paid to providers of services in the Medical Assistance Program is confidential information, or whether such information is, on the contrary, public record.

Please be advised of our opinion that information of this nature is public record. Specifically, we believe the names of individuals or companies who provide drugs or services under the Program are matters of public record. Additionally, we believe that the amounts paid to such individuals or companies are matters of public record. Further, we believe that such items as the total number of patients seen by a doctor, or the total number of prescriptions filled by a pharmacist or a pharmaceutical company are public record.

The greatest of care must be shown, however, not to reveal the names of the individuals receiving medical care under the Program, or any of the personal medical information pertaining to such an individual. Information of this nature is highly confidential, and should only be released to the most responsible sources for official purposes only. For example, information of this nature might very well be legitimately reviewed by the General Assembly, a

committee thereof, or an officer of government, and can, of course, be subpoenaed by a court of competent jurisdiction for any purpose sufficient to such court. The general public, however, has no right to information of this nature.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

PUBLIC WORKS, BOARD OF

LAND PATENTS—PATENTEE NOT ENTITLED TO REIMBURSEMENT FROM STATE IF NO TITLE CONVEYED.

January 31, 1969.

Mr. Andrew Heubeck, Jr.

This is in reply to yours of January 20, 1969, concerning the matter of a land patent issued by the State of Maryland some time ago.

As we understand the situation, a party applied to the then Commissioner of the Land Office in the early part of 1965 for a patent to an allegedly vacant parcel of land in Prince George's County, Maryland. Pursuant to the usual procedure a warrant was issued, a certificate of survey was returned, the fair market value was paid to the Commissioner, and on May 3, 1966, a patent was issued by the State of Maryland to the applicant conveying its interest therein. The patent contains no covenant of title. No caveat was filed in the proceeding and we assume that the Commissioner acted in good faith and was not aware of any claim to the land other than that of the patent applicant.

In July of 1968, the patentee was informed by the Department of the Army, Corps of Engineers, that the patented land was not vacant and was in fact owned by the United States of America by virtue of a condemnation proceeding in the District Court of the United States for the District of Maryland. The patentee now feels he is entitled to a refund from the present Commissioner of Land Patents (successor to the Commissioner of the Land Office by virtue of Maryland constitutional amendment ratified in 1966). The question is whether or not the patentee is entitled as a matter of law to a refund of the money he paid the State for the land. We will assume for the purpose of this opinion that the title situation is as represented by the Corps of Engineers as the patentee is apparently conceding paramount title in the United States Government.

It is well established that in Maryland a land patent conveys only the interest of the State and nothing more:

> ". . . It is also settled that the legal effect of a patent is to transfer to the party in whose name it issues of the right which the State possessed in the land that it describes and no more." *McCeney v. Thibadeau* 215 Md. 77 at 79.

Also see *Linthicum v. Coan,* 64 Md. 439 and *Jay v. Van Bibber,* 94 Md. 688.

It also appears that once the patent issues the Commissioner has no authority to make a refund:

> ". . . When a patent is issued, the authority of the Land Office is understood to be at an end. The legal effect of a patent is to transfer to the party, in whose name it issues, all the right which the State possesses in the land which it describes, and no more. It is a title which enables the party to contend for the land which it conveys." *The Law and Rules of the Land Office of Maryland by John M. Brewer and Lewis Mayer, Attorneys at Law, Kelly Piet & Company 1871 p. 26.*

The patentee apparently seeks to treat the transaction as a typical contract for the sale of real property and in this connection we would point out two factors. First, a statement from M.L.E. "Covenants", Section 17, which reads as follows:

> "Generally covenants of title are not implied, and do not apply to land not included in the deed; in the absence of fraud or mistake, if a deed contains no covenants of title, all questions of title are at the risk of grantee, so that if the title fails, he is without remedy, either at law or in equity, against the grantor."

Second, there is a serious question as to whether such a contractual relationship ever existed:

> "The payment of composition money by the

> party applying for a patent, does not, as between him and the State, establish the relation of contracting parties. Strictly speaking, the payment is made as a part of the proceedings necessary to the final adjudication of the case, and as such, other things being equal secures nothing more than a right to be preferred when the patent is granted." *Brewer & Mayer supra p. 58.*

It, therefore, is the opinion of this office that there is no legal obligation on the part of the State of Maryland to reimburse the patentee the money he has paid for the land patent.

FRANCIS B. BURCH, *Attorney General.*

RICHARD C. RICE, *Special Asst. Attorney General.*

PUBLIC WORKS, BOARD OF—ANNUITY BOND FUND—INTEREST AND PRINCIPAL PAYMENTS DUE UNDER HOSPITAL CONSTRUCTION LOAN ACT THAT ARE PAYABLE INTO ANNUITY BOND FUND CANNOT BE SET OFF AGAINST MONEYS DUE FROM STATE GENERAL FUND APPROPRIATIONS.

February 19, 1969.

Mr. Andrew Heubeck, Jr.

We have your letter concerning the request of Dr. William J. Peeples, Commissioner of Health, to the Board of Public Works to permit the Trustees of the South Baltimore General Hospital to offset the amount of $83,606.00 against its interest payments in the amount of $326,972.00 due the State on May 15, 1969 under its Loan Agreement made pursuant to the Hospital Construction Loan Act of 1964.

The offsetting funds in the amount of $83,606.00 are for rate adjustments due the hospital under the Medical Assistance Program. The Department of Health has advised us that the rate adjustment results from the difference between the amounts actually paid the hospital on an interim payment rate for services rendered to Medical Assistance Program patients and the hospital's final certified costs for services rendered Medical Assistance Program patients as determined by Hospital Cost Analysis services. The State is required by the Federal Act that established the Medical Assistance Program to pay for inpatient hospital services at reasonable costs. Public Law 89-97, 89th Congress, H.R. 6675, July 30, 1965, (42 U.S.C.A. Section 1396(a), 1969 Cum. Supp.) This necessitates the cost adjustments between the State and the hospital at the end of the fiscal year. In the 1967 and 1968 fiscal years the cost to all hospitals for inpatient services exceeded the amounts appropriated out of general funds in the budget together with the federal grant which comprise the funds for the Medical Assistance Program.*

The Hospital Construction Loan Act was enacted by the

Legislature in 1964 and is set forth in Chapter 138 of the Laws for that year. This Act created a State debt of $50,000,000.00 for the purpose of aiding in the financing of certain loans to be made to voluntary non-profit hospitals for the construction, expansion, relocation, replacement or modernization of their hospital buildings, facilities and equipment. Certain amendments to Chapter 138 were made in Chapter 792 of the Laws of 1965. Section 5 of Chapter 792 provides that all payments of principal and interest received by the State on account of loans made to hospitals shall be placed in the Annuity Bond Fund and applied to the debt service requirements of the State. Chapter 138 provides that at the time the loan is made the hospital and the State shall enter into a written agreement setting forth in full the terms and conditions of the loan. Article 43, Section 568F(a) of the Code of Maryland. It also provides that the rate of interest applicable to the loan shall be established by the Board of Public Works at the time the loan funds are granted and that it shall be "the rate of interest borne by the issue of general credit obligations of the State last sold by the State prior to such grant of loan funds, plus an additional rate of interest equal to one-eighth of one percent per annum". Article 43, Section 568F(b) of the Code of Maryland. The Loan Agreement under which the South Baltimore General Hospital received its loan in the amount of $8,500,000.00 was executed on May 15, 1967. Subsequently on September 11, 1967 the Loan Agreement was increased from $8,500,000.00 to $9,600,000.00. Under the original Loan Agreement the Hospital covenanted to repay the principal amount of the loan together with the interest in accordance with a repayment schedule.

The legal concept of "offset", which is more commonly referred to as "set-off" was unknown to the common law and in actions at law the right existed only by virtue of some statute. *Ghingher v. Fanseen,* 166 Md. 519, 526. "A 'set-off' has been defined as the right which exists between two parties, each of whom under an independent contract owes an ascertained amount to the other, to set off their respective debts by way of mutual deduction, so that in any action

brought for the larger debt the residue only, after such deduction, may be recovered. The basic principle underlying the law of set-off is that a defendant has the right to set off against the plaintiff's demand or claim any claim or demand that he may have against the plaintiff extrinsic to the transaction out of which the plaintiff's claim arises, where the cross demands are mutual, arise out of the same right, and are due and payable." 20 M.L.E. Set-off and Counterclaim Section 2, pp. 39, 40. The doctrine of set-off is expressly permitted against the State by Article 95, Section 9 of the Code of Maryland.

An essential element of set-off is that it is limited to mutual debts of the same kind and quality. *Cockey v. Hospelhorn,* 178 Md. 80. A claim due a defendant in a representative capacity cannot be set off against an individual demand. Thus in *Hagerstown Bank & Trust Co. v. Trustees of College of St. James,* 167 Md. 646, the Court of Appeals held that a mortgagor could not set-off its mortgage debt with a bank against its private account with the bank when the bank had purchased the mortgage debt with trust funds of trust estates that the bank represented as trustee.

Although we have found no cases on point in Maryland it is well established in some states that money collected in payment of special assessments that support governmental bonds constitute trust funds. *First Nat. Bank & Trust Co. of Racine v. Village of Skokie,* 190 F. 2d 791, cert. den. 342 U.S. 909. It has been held that with respect to bond funds, a governmental body stands in the position of a trustee to the bondholders and is liable to them for the wrongful diversion of such funds. *City of Longview v. Longview Co.,* 150 P. 2d 395. It has also been held that a governmental body cannot increase its general fund with assessments or taxes which are collected for the benefit of bondholders. *Hart v. Central City,* 159 S.W. 2d 18.

The bonds that were sold under the Hospital Construction Loan Act of 1964 are supported by the State Property Tax. Sec. 6 of Chapter 138 of the Laws of 1964. The bonds are also supported by the principal and interest payments by the

Hospital to the State which are placed in the Annuity Bond Fund.

It is our opinion that the principal and interest payments that are due under the Loan Agreement and that are placed in the Annuity Bond Fund are trust funds for the bond holders and that the State is charged with the fiduciary duties and responsibilities of administering the funds in conformity with the Hospital Construction Loan Act of 1964, as amended. The Hospital Construction Loan Act, as heretofore pointed out, provides that the principal and interest payments be placed in the Annuity Bond Fund and applied to the debt service requirements of the State. Since the principal and interest payments are trust funds they cannot be used to set off claims against the State in its governmental capacity.

For the foregoing reasons it is our opinion that with respect to the principal and interest payments for the Hospital Construction Loan Funds the State is acting in a representative capacity and such payments cannot be set off against amounts which are due from the State in its governmental capacity from General Fund appropriations.

FRANCIS B. BURCH, *Attorney General.*

JON F. OSTER, *Asst. Attorney General.*

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*The Department of Health has advised us that its budget request for the 1970 fiscal year includes funds to pay the hospitals for the difference between the interim payment rate and the final verified costs for the 1967 and 1968 fiscal years.

PUBLIC WORKS, BOARD OF—BOARD OF PUBLIC WORKS MAY NOT GRANT AN AWARD OF MONEY PURSUANT TO A RESOLUTION OF THE GENERAL ASSEMBLY—COMPENSATION TO CITIZEN IMPRISONED IN EXCESS OF PERIOD OF TIME FOR WHICH HE HAD BEEN SENTENCED.

April 14, 1969.

The Honorable Marvin Mandel.

At your request, we have reviewed Senate Joint Resolution No. 26 which requests the Board of Public Works to provide compensation to a citizen who was imprisoned in excess of the period of time for which he had been sentenced.

In 1962 we rendered an opinion on a similar Resolution, SJR No. 2, 1962 Session of the General Assembly (47 Opinions of the Attorney General 28). At that time, we advised that the Resolution did not constitute proper authority for any award to the citizen by the Board of Public Works.

We are now advised by the Board of Public Works that resolutions of this nature are not considered as mandates for payment, but only as a charge or request from the General Assembly for investigation. It is the Board's present practice on such resolutions to investigate and determine if compensation is in order. If so, such compensation is included in the budget at the next ensuing session of the General Assembly. Legislative approval of such budget request would enable payment to be made to the named individual in full compliance with the constitutional requirement that the Legislature provide the funds from which payments of this nature are to be made.

In summary, we believe that, acting under SJR No. 26, the Board of Public Works can investigate the circumstances of the incarceration of Mr. Johnson, and include some sum of money in next year's budget for him; but that the Board may not pay any monies to Mr. Johnson until such time as such a budget request has been approved.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

PUBLIC WORKS, BOARD OF—RESTORATION OF PORT TOBACCO COURTHOUSE WAS UNDER CONTRACT WITHIN TIME REQUIRED BY CHAPTER 379, ACTS OF 1967.

June 10, 1969.

Mr. Andrew Heubeck, Jr.

Your recent letter refers to Chapter 743 of the Acts of 1965 (General Construction Loan of 1965), specifically, to Section 5 (c) (5), providing for an appropriation of $100,000 for the restoration of the old Courthouse at Port Tobacco contingent upon local sources raising $25,000 and Board of Public Works approval of an operational plan developed by the local historical societies, and directs our attention to Section 9, providing that the project shall be deemed abandoned unless contracted for within two years, and to Chapter 379 of the Acts of 1967, extending for an additional two years from April 14, 1967, the time for placing the project under contract. You ask us to pass an opinion as to compliance *vel non* with the aforesaid requirement for placing the project under contract within two years from April 14, 1967.

We understand the objective of the restoration to be the construction of a functional building that will be as near perfect a replica of the original Courthouse as possible. Records of the physical structure of the old Courthouse, particularly pictorial records, if they exist, are fragmented, incomplete and scattered. There is a continuing need to search for such records in order to attain the most faithful possible reconstruction of the original. Considerable manual probing of the site, as well as research and study in depth, are required.

You have sent us a copy of a letter, dated January 11, 1967, from James L. Barbour, a director of a concerned historical society, the Society for the Restoration of Port Tobacco, stating that the Society had selected an architect and approved a contract for his services. We note also that,

prior to September, 1967, the Society raised $25,000 in accordance with a requirement of Chapter 743 of the Acts of 1965.

We are advised, too, that, pursuant to an application made prior to May 15, 1967, for an advance of funds to conduct an archaeological investigation of the Courthouse area, the Board of Public Works approved on said date an allocation of $3,200 toward such survey and excavation of the site. According to a copy of a letter to you dated April 2, 1969, from Mr. Barbour, who is now the President of the Society for the Restoration of Port Tobacco, architectural survey work was contracted for and performed at the site between May 25, 1968, and October 13, 1968. The cost of the work included $3,233 for labor and the expense of making test borings and other expenses, and amounted to a total of $4,056.90 through March 31, 1969. Of these expenditures, the sum of $3,500 was paid from the funds allocated by the State and the balance from the Society's general fund.

It is clear that considerable work on a contract basis, including architectural surveys and other work, has been performed on the project within the period contemplated by Chapter 379 of the Acts of 1967, in addition to the raising of a $25,000 fund by the local group. This represents substantial progress toward the goal. We do not apprehend the mandate of the statute to require every aspect of the reconstruction to be under contract within the two-year period described in the 1967 Act. The nature of the project and its continuing need for investigation and research make such finality manifestly impracticable and probably undesirable as well.

We believe that the term "under contract" in the context of the restoration of the old Courthouse should be broadly construed. Its fair meaning should encompass any necessary work and services, including architectural services as well as actual construction. We believe further that the concern of the Legislature was for the work to be well begun within the statutory period and that the abandon-

ment provisions of Section 9 were intended to apply only for such inaction as would indicate a substantial failure of the project to go forward within the two-year period subsequent to April 14, 1967. In our opinion the restoration of the Port Tobacco Courthouse was under contract within the meaning of Chapter 379 of the Acts of 1967 and in compliance with the mandate of the statute.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Asst. Attorney General.*

REGISTERS OF WILLS

EXECUTORS AND ADMINISTRATORS—SUCCESSORS TO DECEASED EXECUTORS AND ADMINISTRATORS MAY CLAIM FULL COMMISSIONS UPON THE BALANCE OF THE ESTATE REMAINING IN THEIR HANDS, DESPITE THE FACT THAT THEIR PREDECESSORS ALSO RECEIVED FULL COMMISSIONS WITHOUT HAVING MADE DISTRIBUTION—POWER OF THE ORPHANS' COURT TO SET COMMISSIONS BASED UPON THE SERVICES PERFORMED BY THE SUCCESSOR EXECUTORS AND ADMINISTRATORS.

April 4, 1969.

Mrs. Madlyn E. Wooters.

In your recent letter you ask whether an Administrator d.b.n. who has assumed the administration of a partially administered estate, upon which full commissions have already been paid to his deceased predecessor despite the fact that no distribution was made, is entitled to claim commissions upon the entire net balance of the estate in his hands. You have indicated that in your opinion the Administrator d.b.n. can claim commissions only on the interest and commissions received since the first administration account, filed by the original Executor, was passed.

The answer to this question is found in Article 93, Section 81 of the Maryland Code and in *Lemmon v. Hall,* 20 Md. 168 (1863). In the *Lemmon* case the administratrix d.b.n. sought to recover the amount of the undistributed estate from the executor of the deceased administrator. The Court of Appeals upheld the claim of the administratrix d.b.n. and further decided that she was entitled to claim commissions upon the entire portion of the undistributed fund despite the fact that the first administrator had already been paid commissions, in part, on the same fund (p. 171, *supra*):

> ". . . The Acts of 1798, ch. 101, and 1820, ch. 174, contemplate the allowance of several commissions on the same assets when they have been admin-

> istered by different persons in part. They prescribe a *minimum* and *maximum* when there has been a complete administration, and provide for commissions in case of a partial administration. The allowance of the *maximum* in the case of a partial administration to the first administrator would not deprive the administrator d.b.n. of his right to the balance remaining in the hands of the first administrator as such, or his right to commission on the same."

The statute construed by the Court of Appeals in this case (Chapter 174 of the Laws of Maryland of 1820) is virtually identical to Article 93, Section 81 of the present Maryland Code.

The Court of Appeals has made it clear that this rule does not apply if the personal representative is claiming separate commissions because of his service to the estate in more than one capacity. This distinction is best demonstrated by *Renshaw v. Williams*, 75 Md. 498 (1892), in which an administrator *pendente lite*, who received a commission for service in this capacity, was prohibited from also receiving for service as executor a bequest of $5,000 in lieu of executor's commissions, which bequest plus the administrator's commission was "nearly double the sum which the highest rate of commissions allowed by law would have realized". The Court stated that a decision to the contrary would be "so repugnant to the policy of the law" as to be based upon incorrect principles. It is important to note that the Court in *Renshaw* (citing *Lemmon*) stated that:

> ". . . Had a different person been appointed administrator *pendente lite*, that person would have been entitled to fair and reasonable commissions for his service. . . ."

See *St. Mary's Orphan Asylum v. Hankey*, 137 Md. 569 (1920); *In re Estate of Baxley*, 47 Md. 555 (1878); *McPherson v. Israel*, 5 G. & J. 60 (1832); 1 Sykes, *Probate Law and Practice*, Section 487 (1956).

For these reasons, the Administrator d.b.n. is entitled to claim full commissions upon the balance of the estate remaining in his hands and is not restricted to a commission based upon accumulated income and interest. The Orphans' Court, of course, has the power "to allow such compensation as the services performed actually merit". *McPherson v. Israel, supra.*

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Asst. Attorney General.*

REGISTERS OF WILLS—FUNDS ON DEPOSIT IN EXCESS OF SEVEN YEARS—UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT SUPERSEDES ARTICLE 93, SECTION 300 WITH RESPECT TO DISPOSITION OF FUNDS.

July 22, 1969.

Mr. Pierce J. Lambdin, C.P.A.

You have asked whether Article 95C, Section 8 of the Code of Maryland controls funds on deposit in the registries of Orphans' Court accounts. You state that for a number of years the Registers of Wills, having such funds on deposit in excess of seven years, have been remitting them in accordance with the provisions of Article 93, Section 300 of the Code of Maryland, which provides in part as follows:

> ". . . the said fund or funds shall be and become payable to the county council or board of county commissioners of the several counties, or the mayor and city council of Baltimore City for the use of the public schools of the respective City of Baltimore, or the several counties, as the case may be. . . ."

Article 95C, Section 8 provides as follows:

> "All intangible personal property held for the owner by any court, public corporation, public authority or public officer of this State, or a political subdivision thereof that has remained unclaimed by the owner for more than seven years is presumed abandoned."

Article 95C, which is the Uniform Disposition of Unclaimed Property Act, was enacted by Chapter 611 of the Acts of 1966. Section 2 of the 1966 Act provides 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."

As we stated in our opinion to Frank W. Hales, Clerk for the Circuit Court of Worcester County, on March 18, 1968, (53 Opinions of the Attorney General 79), "the declared purpose of Chapter 611 of the Laws of 1966 was to provide a uniform procedure for the 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." We concluded in that instance that Article 95C superseded the provisions of Article 17, Section 44 of the Code with respect to the disposition of unclaimed funds deposited in the office of the Clerks of the Circuit Courts in connection with court proceedings.

It is likewise our opinion in the instant case that Article 95C, Section 8 controls the disposition of funds on deposit with the Registers of Wills and thus supersedes Article 93, Section 300. We note further that Chapter 3 of the Acts of 1969, which becomes effective January 1, 1970, repeals Article 93, Section 300.

FRANCIS B. BURCH, *Attorney General*

JON F. OSTER, *Asst. Attorney General.*

SHERIFFS

RESERVE DEPUTY CORPS—MARYLAND CONSTITUTION AND STATUTES PREVENT SHERIFF FROM MAINTAINING A VOLUNTEER CORPS OF DEPUTIZED CITIZENS—COMMON LAW POWER TO RAISE A POSSE COMITATUS DOES NOT AUTHORIZE THE MAINTENANCE OF A RESERVE DEPUTY CORPS OF VOLUNTEER DEPUTIZED CITIZENS.

September 5, 1969.

Honorable Pauline H. Menes.

You have recently asked this office to examine the composition and functions of the Prince George's County Sheriff's Reserve Corps, Inc., an organization of approximately 540 deputized Prince George's County males, in order to determine whether it is validly constituted under the applicable provisions of the Maryland Constitution and statutes.

This group was incorporated in accordance with Maryland law on June 26, 1968. Portions of its charter are relevant to your inquiry. Under Article III of the charter the relevant corporate purposes are described: the Corps is to "serve the residents of Prince George's County, Maryland, *as a volunteer branch of the Prince George's County Sheriff's department*"; "to provide the Sheriff with a trained, efficient complement of Reserve Deputy Sheriffs in various Reserve Units as integral working parts of the Sheriff's department who will serve as volunteers *under the Sheriff's jurisdiction*, without pay from Prince George's County or from the Sheriff, *in emergencies, disasters, civil disturbances, and other events, when called upon by the Sheriff of Prince George's County*"; and "to train and educate its members in law enforcement work, community relations, traffic control, first-aid services, search and rescue operations, communications and civil disturbance control". Under Article VII, categories and qualifications of members are to be defined in the bylaws but with the understanding that such members "shall be under the jurisdiction of the Sheriff" and that all members "must be approved and depu-

tized by the Sheriff" (emphasis supplied throughout). Under the bylaws an additional "objective" is set out in Section 4 (b) (intended specifically to be in addition to the corporate purposes); namely, to "assist in the preservation and protection of the peace, health and safety of the people of Prince George's County and their property".

Categories of members are established in Article II of the bylaws and are five in number: Active (115 members), Class A honorary (4 members), Class B honorary (53 members), Class C honorary (220 members), and Associate (150 members). The third and fourth categories have no vote in the affairs of the Corps, and the rank and file members are basically those in the first and second categories. These categories include the Sheriff, Undersheriffs (who are automatic members) and all United States male citizens between the ages of 21 and 45 who are residents of Prince George's County who meet certain general standards (of education, character, etc.) who have been deputized by the sheriff since the date of adoption of the bylaws. All holders of "current commissions as Deputy Sheriffs" on the date of adoption of the bylaws also may become automatic members upon payment of annual dues upon approval of a majority of the membership. Full-time paid Deputy Sheriffs become Class B honorary members, serve only "in an advisory capacity", pay no dues and have no vote. Another relevant part of the bylaws is Section 5 of Article II, which requires members of the Corps to serve a minimum of "five hours per week [of] duty within the Sheriff's Department to be performed in accordance with instructions from the Sheriff and/or the Undersheriffs." This "duty" consists in large measure of assisting the employees of the Sheriff's office in performing their statutorily assigned tasks, discussed below. In all events, the Sheriff has "absolute authority at all times."

Each member of the Corps is required by the bylaws to "attend training programs", may also be required to purchase "a complete uniform and [other] equipment" and is issued a badge and identification card. The badge is in the form of a five pointed metal star imprinted "Deputy Sheriff

of Prince George's County, Maryland". The identification card contains the photograph, thumbprint and description of its holder and states that he is a Deputy Sheriff of Prince George's County, Maryland, possessing "full authority under provisions enacted by law". The Sheriff may authorize a member to carry a firearm but otherwise he has no authority to do so. Dues of $10.00 per year are required of most categories of members who must also join the National Sheriffs Association and the Maryland State Sheriffs Association.

With this background, it is now appropriate to examine the applicable constitutional and statutory provisions as well as the case law relevant to this subject. The sheriff of each political subdivision of this State is an elected constitutional officer by virtue of Article IV, Section 44 of the Maryland Constitution.

In that section it is stated that each sheriff "shall . . . exercise such powers and perform such duties as now are or may hereafter be fixed by law." The Court of Appeals has determined that this language means that the powers and duties of sheriffs do not have a constitutional source, are not fixed and absolute and may be expanded or diminished by the General Assembly from time to time. In *Beasley v. Ridout,* 94 Md. 641 (1902), the court was urged to adopt the rule, recognized at that time in several other states [*State ex rel. Kennedy v. Brunst,* 26 Wis. 412, 7 Am. Rep. 84 (1870); *Virtue v. Essex Co.,* 50 Atl. 360 (N.J. 1901)], that the General Assembly lacked the power to deprive sheriffs of their common law powers and duties if they were constitutional officers. Judge Pearce, speaking for the majority, rejected this principle because of earlier Maryland precedent [*Mayor & City Council of Baltimore v. Board of Police,* 15 Md. 376 (1860)] and because of the clear authorization, in the constitutional language quoted above, of the General Assembly to determine the powers and duties of sheriffs as it saw fit.

The Court quoted with approval (at pp. 655-656) the following language from *State v. Dews,* R. M. Charlton's Rep. 397, 404 (Ga. 1835):

> "It is true that the appointment of Sheriff confers upon him the right to execute the duties of his office, but from the nature of the office those duties may be changed by law. It is, in this State, a purely ministerial office, whose function and province it is to execute duties prescribed by law. From the very nature of such an office its powers are the results of its duties. . . . Those duties are the mere creatures of law, and are, in their very essence, changeable by the law-making power; and his rights which are derivative only from those duties, cannot prevent their creation or change. His rights, which are the consequence of his duties, cannot intercept the authority of the Legislature to act on those duties."

See generally 1 *Anderson, Sheriffs,* Section 43 (1941).

The statutory powers and duties of the various sheriffs are delineated in Article 87 of the Maryland Code. Turning first to their general duties, all sheriffs must serve and return all writs and process directed to them according to the command contained therein (Section 5); they may accept bail bonds under certain circumstances (Section 6); they shall collect the fees of certain officers upon request (Section 27); they shall collect certain fines, costs and fees (Section 38); and they shall have custody of all persons committed by lawful authority (Sections 26 and 45).

In Article 87, Section 37 the General Assembly has undertaken to further particularize the rights and responsibilities of the sheriffs in each of the 24 subdivisions of the State. The relevant provision for Prince George's County is subsection (p) of Section 37. This subsection was amended by Chapter 364 of the Laws of Maryland of 1969 to increase the annual salary of the sheriff of Prince George's County from $6,000 to $12,000 (which salary raise becomes effective for the next term of office) and the subsection, as amended, now reads as follows:

> "The Sheriff of Prince George's County shall receive an annual salary of $12,000 per year, be

> provided with an automobile during his term as Sheriff for the use and work of his office within said County, maintenance for said automobile to be at the cost of the County, and up to $1,500 per year for expenses which must be submitted to the County Commissioners for approval and which are incurred for the use and work of his office. All full-time employees, including Deputy Sheriffs, jail guards, and jail matrons, appointed by the Sheriff or assigned to him by the County Commissioners for Prince George's County, shall be subject to said County's Merit System as to qualifications, compensation and other regulations, with the exception of one administrative aide, who may be appointed by the Sheriff. Deputy Sheriffs employed prior to, and still on duty as of June 1, 1967, shall be qualified and employed under said County's Merit System as to qualifications, compensation and other regulations."

Some additional clarification of the powers and duties of the Sheriff of Prince George's County is found in Sections 70-3 and 70-6 of the Public Local Laws of Prince George's County where he is required to "attend upon the Orphans' Court and to perform such duties as may be required of him upon request." Also, in amplification of Article 87, Section 5 of the Maryland Code, either the sheriff or "a deputy of said sheriff is required to serve all legal papers directed to him."

From this review of the relevant constitutional provisions, public general laws and public local laws applicable to Prince George's County, it is seen that the Sheriff's express powers do not include the right to assemble a volunteer force to assist him in meeting potential emergencies and in carrying out the statutory responsibility of his office.

On the other hand, it is interesting to note that the subsections of Article 87, Section 37 with respect to two counties (Anne Arundel and Howard) do specifically con-

tain similar authority (Subsections (a) and (m)). The provision for Anne Arundel County states that the sheriff may "in case of emergency" temporarily deputize "any able-bodied citizen to assist him in carrying out the duties of his office." In Howard County, the sheriff "may also appoint temporarily such additional deputy sheriffs as he may deem necessary for the public safety" with the understanding that they "shall not serve longer than the case actually warrants".

We have already seen that Maryland has adopted the narrow rule that sheriffs possess only those powers which are necessarily incident to the exercise of their statutory duties. It would be unduly restrictive, however, to find that the Sheriff of Prince George's County may not maintain his Reserve Corps *solely* because there is no express authorization for it in either the public general or public local laws. Even without such express authorization the Corps could be legally sustained if it were indispensable to the Sheriff's performance of his statutory duties as summarized *supra* (generally service of papers and custody of prisoners).

Reserve Corps members are required to perform five hours work per week in the Sheriff's office despite the fact that, for the fiscal year 1969-70, the County Commissioners of Prince George's County have authorized a staff of 5 undersheriffs, 48 full-time paid deputies, and 10 part-time paid deputies to do this work. There is no indication that this large staff lacks the capability to handle the work required of it. If indeed it did lack the capability, the appropriate solution would be for the General Assembly or County Commissioners to authorize the hiring of the necessary additional personnel.

But the corporate charter of the Reserve Corps makes it clear that its primary function is assisting in times of "emergencies, disasters, [and] civil disturbances". No constitutional or statutory basis exists for the Sheriff of Prince George's County taking action either individually or collectively in such instances in his official capacity.

The only Maryland authority which arguably would support this is found in *Turner v. Holtzman,* 54 Md. 148, 159-160 (1880). There the manager of a camp-meeting was deputized by the Sheriff of Baltimore County to keep the peace during said meeting. During the meeting he arrested a person for obstruction by stagecoach of the public thoroughfare abutting the meeting ground, an offense recognized at that time as a public nuisance. The Court of Appeals upheld the authority of the appellant to make this arrest, relying upon the sheriff's common-law authority to "raise the *posse comitatus* to aid him when necessary . . . [to keep] the peace within his county".

Assuming for the moment that this principle of *Turner* is still viable despite the restrictive language of *Beasley v. Ridout, supra,* decided twenty-two years later in 1902, the Reserve Corps cannot be sustained in reliance upon it. The *Turner* case involved the appointment of a special deputy sheriff for a specific and short period of time to deal with anticipated breaches of the peace arising out of an unusual and non-recurring event, namely, the camp-meeting. The assemblage of a *posse comitatus* (or the power and force of a county) is appropriate under such circumstances but only, as the leading treatise writer puts it, because of the "very exigencies of the situation". See 1 *Anderson, Sheriffs,* Section 141 (1941).

The Reserve Corps is a permanent, self-perpetuating group of 540 volunteer, yet nonetheless deputized, citizens. Although it perhaps stands ready to serve in the event of emergencies, it cannot be said to have been conceived because of the existence of a present emergency. Indeed, had it been so conceived, it would have been dissolved, as would the color of office of its members, when the particular emergency was abated.

Related to this is the point that "a mere volunteer cannot, of his own volition and without any lawful request or command, join the *posse comitatus* and act therein". 1 *Anderson, supra.* An examination of the charter and by-laws of the Reserve Corps reveals nothing which indicates

that its members are called to duty by the Sheriff. The admissions standards, coupled with the requirement of approval of the applicant by the Sheriff and by a majority of the membership, creates in essence a volunteer organization organized at least in part for social purposes ("to make available to the members a medium of good fellowship and to promote and aid in the enjoyment of worthwhile and interesting entertainment at a common meeting place where healthy and wholesome activities can be assured"). The questionable principle of the *Turner* case certainly cannot be contorted so as to transform the Reserve Corps into a *posse comitatus*.

This office discussed a very similar situation in 37 Opinions of the Attorney General 321 (1952). The Sheriff of Baltimore County sought to sustain the appointment of "special deputies" not authorized by statute on the basis of his alleged power to raise a *posse comitatus* in reliance upon *Turner v. Holtzman, supra*. In determining that such appointments were illegal and that the principles of *Turner* were inapplicable, Attorney General Hall Hammond and Deputy Attorney General J. Edgar Harvey made the following highly pertinent statement at p. 323:

> "On the other hand, if the 'Special Deputies', so called, are mere honorary members of your staff and serve without pay, we find no warrant in law for their appointment in the first instance and none for their retention. When the General Assembly enacted the statutory provisions referred to above and authorized the appointment of Deputy Sheriffs as therein specified, we think these provisions of law became exclusive and superseded the practice formerly prevailing. If this were not so, then Section 48 of Article 87, authorizing the appointment of three members of each fire company as Deputy Sheriffs may be read as authorizing the appointment of every member. To be sure, the Legislature did not express such an intent and we cannot infer it."

> "In your letter you state that the 'Special Deputies' are necessary for the protection of the public health, safety and general welfare, particularly when there are strikes or riots such as were had in 1944. A sufficient answer to this is found, we think, in the fact that no strikes or riots have occurred for eight years, or at least, you do not mention any others. If you are confronted with another emergency you may raise the posse comitatus, but as we observed above, the effect of that will not be to make Deputy Sheriffs of all the male inhabitants of Baltimore County."

This same reasoning requires the conclusion that the Sheriff of Prince George's County has neither constitutional, statutory nor implied power to maintain his standing Reserve Corps of volunteer deputy sheriffs.

Additional full-time or part-time deputy sheriffs, serving on a permanent, salaried basis, may, of course, be authorized by the General Assembly and the County Commissioners of Prince George's County. Furthermore, it is our opinion that there is nothing to prevent these legislative bodies from authorizing the Sheriff to deputize temporary additional men to meet specific emergencies when they arise and to serve only during such emergencies, as has already been done in Anne Arundel County and Howard County. See generally Article 87, Sections 49-53 of the Maryland Code relating to deputizing members of fire companies in certain counties.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Asst. Attorney General.*

SOCIAL SERVICES, DEPARTMENT OF

LOCAL SUB-DIVISION REQUIRED TO MAKE LEVY FOR PUBLIC WELFARE PROGRAMS—DEFICIENCY MAY BE WITHHELD BY COMPTROLLER — JAMES AMENDMENT LIMITING LOCAL LEVIES DOES NOT BAR AUDIT EXCEPTIONS BASED ON LOCAL EXPENSES UNAUTHORIZED BY STATE REGULATIONS.

February 21, 1969.

Mr. Raleigh C. Hobson, Director.

You have asked our opinion with reference to two questions involving the relationship of the State Department to local subdivisions. The first question relates to a situation arising in a county whose county council has declined to appropriate local funds for the local share of various public welfare programs as defined by Article 88A, Sections 56, 60(a) and 79 and Article 30, Section 27, up to the limit established by the James Amendment, Article 88A, Section 18(a).

You have indicated that because of the apparent disagreement with the purposes and/or method of administration of one or more of the welfare programs that a subdivision has declined to make the appropriations and levy sufficient to meet its required local contribution. You ask whether the Comptroller may withhold the deficiency from allocations of State aid to the subdivision in question.

It is well established that the local appropriations, as limited by the James Amendment, are mandatory. We so ruled in our Opinion at 28 Opinions of the Attorney General 178 (1943). There we stated, with respect to a provision identical in form to the statutory provisions to which we have previously alluded, that "It will be seen that the provisions . . . are in form mandatory and leave no discretion in the county commissioners or the mayor and city council to refrain from a levy of necessary . . . costs. It seems to be clearly established that where the law gives to one agency of the State the right to incur on behalf of, or direct the incurring of an obligation by, a local government

unit, such unit is required to provide funds for the payment of that obligation; if it refuses to do so mandamus will arise to compel an assessment and levy sufficient to provide the funds. See *Anne Arundel County v. Melvin*, 107 Md. 533 and *Potee v. County Commissioners*, 138 Md. 381." See 17 McQuillin, *Municipal Corporations*, Section 51.44. In the same opinion we noted the interrelationship of Federal, State and local contributions and observed that "Should one local unit refuse or neglect to pay the part and provide the money required of it in the overall plan, the entire program would be thrown out of balance."

We note further that Article 88A, Section 57 provides with respect to the allocation of funds for the AFDC Program, the apparent source of the present dispute, that "the State Department of Public Welfare shall allocate to each local unit such amounts, not in excess of the total amount available for such purpose, and upon such conditions as said State Department may prescribe".

We think it apparent that the absence from the existing statutes relating to local levies for welfare purposes of an authorization for the withholding of funds as express as that contained in former Article 88A, Section 38 relating to training schools for delinquent children does not mean that the State Department is limited to mandamus as its sole remedy. Former Article 88A, Section 38 provided with respect to local contributions for training schools that "Should any county . . . fail to levy a tax sufficient to pay said charges, the Comptroller shall enforce said obligation by an action of mandamus, the withholding of any monies due to said county or city, or by other appropriate action." The repeal of this provision by Chapter 126, Section 6 of the Acts of 1966 was attributable not to legislative repudiation of this form of remedy but rather to the transfer of all responsibility for training schools to the State Department of Juvenile Services and the abolition of local contributions for that purpose pursuant to the recommendations of the Rasin Commission.

In our view the supervisory powers of the State Department together with the provisions making levies mandatory,

the provisions of Article 88A, Section 57, and the rules of the State Department adopted pursuant to statute authorize the withholding of state allocations by the Comptroller where the required local levy has not been made. Cf. 41 Opinions of the Attorney General 164, 166-167 (1956).

In this connection we note that the Attorney General of Wisconsin, in applying similar statutory provisions, has addressed himself to the question: "If a county agency deliberately or through gross negligence deviates from state-wide standards in such a manner that the amount of aid granted is less than the proper amount, can the department properly take an audit exception with respect to the total amount of aid that was granted?"

In response to this question the Attorney General of Wisconsin ruled that:

> "In any case where valid minimum payments for security aids are fixed on a state-wide basis, the objective differs from the purpose of regulations fixing maximum amounts. The former are not for the protection of the public treasuries but for the purpose of establishing what is deemed to be a fair and stable social program, and are at least partially for the benefit of the persons whose circumstances bring them within the statutory definitions as eligible for aid. It is a general rule that statutory mandates cannot be waived by persons other than those for whose benefit they were intended. In any case where a county's payment of social security aids is less than the minimum specified in a valid statute or regulation of state-wide application, I believe it is incumbent upon your department to disallow *in toto* the entire claim of the county with respect to such aid. If a county were to be reimbursed by state and federal funds on the amount claimed, there would be no inducement for it to raise the grant to accord with established state-wide standards." See 1954 Opinions of the Attorney General of Wisconsin at 108, 113-114.

Accordingly our advice to you is that the Comptroller may enforce the required local contribution by withholding the unmatched state allocation to counties failing to make the required local levy, and that apart from such withholding, the obligation to make the required levy may be enforced by mandamus.

Your second inquiry relates to whether the James Amendment, Article 88A, Section 18(a) insulates a local subdivision from payment of audit exceptions where the local subdivision adopts a procedure at variance with, and resulting in greater cost than, a procedure required by state regulations. Your question relates to the situation arising where a subdivision is making the maximum levy authorized by the James Amendment, and where it may attempt to claim that its departures from state regulations are insulated from fiscal consequences by the James Amendment.

Article 88A, Section 3(b) provides unequivocally that:

> ". . . All of the activities of the local [welfare] departments in the counties and in Baltimore City, [which term includes the department of public welfare in Baltimore City, hereinafter provided for], which the State Department [of Public Welfare] finances, in whole or in part, shall be subject to the supervision, direction and control of the State Department [of Public Welfare]."

The provisions of Article 88A, Section 3 were enacted, among other reasons, in order to comply with the requirements of the various provisions of the Social Security Act making grant of Federal matching funds conditional upon adoption of a State Plan which "either provides for the establishment or designation of a single state agency to administer the plan, or provides for the establishment or designation of a single state agency to supervise the administration of the plan". (See, e.g., 42 U.S.C.A., Section 602 (a) (3), 42 U.S.C.A., Section 1382(a) (3)).

It is against this background that we must consider whether the James Amendment applies in this situation so as to insulate local departments of public welfare from

effective fiscal control by the State Department in their administration of disbursements of state and federal funds. We have had occasion previously to make clear that the provisions of the James Amendment are not absolute. In our Opinion at 49 Opinions of the Attorney General 549 (1964) we were confronted with the question whether payments and retirement expenses of employees of the Baltimore City Department of Public Welfare were chargeable to the City, notwithstanding the James Amendment, to the extent that such expenditures exceed the state pension rate. We concluded that, notwithstanding the James Amendment, other provisions of state law made it clear that the City was liable for the added retirement expenses in excess of the state pension rate. We stressed that this result was commanded by cannons of statutory construction demanding that conflicting provisions of legislation be reconciled where possible.

It must also be noted that the James Amendment by its own terms limits local contributions only "under the several public welfare programs and activities to which this section applies". The James Amendment was as a matter of history adopted as a *quid pro quo* for the subjection of local Departments of Public Welfare to uniform, state-defined needs and other standards. We therefore think it apparent that the "public welfare programs and activities" in question are the programs and activities as defined by state regulations and that local expenditures unauthorized by state regulations are not within even the literal terms of the James Amendment. In our opinion at 28 Opinions of the Attorney General 178, 179 (1943), we observed with respect to county levies for public welfare purposes that:

> ". . . The matter is important because public assistance is planned and carried out on a State wide basis with the financial help of the Federal government and of the State added to that provided by the local communities. Should one local unit refuse or neglect to pay the part and provide the money required of it in the over-all plan, the entire program would be thrown out of balance and a

> lower levy by a county would jeopardize the continuance of sound administration in that county."

We likewise consider it evident that the entire program would be thrown out of balance and state and federal funds devoted to improper local purposes, to the detriment of the required uniformity, if local subdivisions were held to be insulated by the James formula from the fiscal consequences of purposeful disregard of applicable state regulations.

We note that the conclusion which we here reach is in accord with the opinion of the Attorney General of Wisconsin dated May 6, 1954 which deals with similar problems. There it is observed:

> "Before undertaking discussion of your specific questions, it will be helpful to review the functions and duties of the department in connection with the administration of these social security aids. As pointed out in the opinion given to you on March 4, 1954, in connection with administration of aid to dependent children. sec. 46.206 (1), Stats., as created by ch. 513, Laws 1953, obligates the department to "supervise" the administration of old-age assistance, aid to dependent children, aid to the blind and aid to totally and permanently disabled persons. The opinion given in 39 O.A.G. 403 indicates that the supervisory and rule-making power of the department was intended by the legislature to be adequate to insure observance of statutory regulations and of valid state-wide standards established by the department."
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> * * *
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> "Your first question is: If a county agency deliberately or through gross negligence deviates from state-wide standards in such a manner that the amount of aid furnished is more than the proper amount, should the department take an audit exception with respect to (1) the excess amount granted or (2) the total amount of aid granted?
>
> * * *

> "Where the legislature fixes a specific maximum for the aid to be granted, one of its primary considerations is doubtless the protection of the public treasuries out of which aid is supplied to counties to administer the programs locally. There can be little question that it is the department's duty, in making audit adjustments, to disallow state aid for any portion of grants in excess of the maxima specified in the statutes or in valid rules promulgated pursuant to the statutes."

The opinion of the Attorney General of Wisconsin went so far as to hold that under certain circumstances, the total amount of aid granted a subdivision could be disallowed if this sanction was necessary to insure compliance. We, of course, do not go so far here. Our conclusion in summary is only that the deliberate or grossly negligent violation of state regulations subjects a violating subdivision to audit exceptions and charges based thereon notwithstanding the James Amendment. We believe it important to note that our ruling does not go so far as to hold that the inadvertent misapplication of state standards by a local department subjects that department to an audit exception. Where the local department is conscientiously endeavoring to implement the state regulations, errors in application to particular cases or even errors based on honest misunderstanding in construing regulations not constituting gross negligence would not operate to result in a chargeable audit exception.

Our conclusion as to your second question is, therefore, that the James Amendment would not bar audit exceptions and additional assessments based on them where the added expenditures would not result from implementation of the state programs subject to the James Amendment and where allowance of them would undermine the required uniformity of the state plan and the supervisory authority accorded the State Department by statute.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Asst. Attorney General.*

STATE'S ATTORNEYS

FUNCTIONS AND DUTIES OF STATE'S ATTORNEYS AND RESULTANT EFFECT ON COURT JURISDICTION AFTER MODIFICATION OF CRIMINAL CHARGES BY STATE'S ATTORNEY BEFORE AND AFTER INDICTMENT—PURPOSE OF PRELIMINARY HEARING AND FUNCTION OF COMMITTING MAGISTRATE AFTER FINDING OF PROBABLE CAUSE TO BIND ACCUSED OVER TO AWAIT POSSIBLE GRAND JURY ACTION RATHER THAN TO PRESENT CASE TO THAT BODY—PURPOSE OF GRAND JURY AND RELATIONSHIP TO CRIMINAL COURT OF BALTIMORE CITY.

December 30, 1969.

Honorable Charles E. Moylan, Jr., Esq.

You have requested our opinion as to the authority of the State's Attorney for Baltimore City to modify criminal charges at certain stages before trial, and as to the resultant effect such modification would have upon the jurisdiction of either the Municipal Court or Criminal Court of Baltimore City over the case. The first question, as posed by you, is as follows:

> *Whether, after a judge of the Municipal Court, sitting as a committing magistrate, has bound a person over to await action by the Grand Jury, the State's Attorney for Baltimore City may step in and decide to dismiss the charges in toto rather than have the case go to the Grand Jury?*

The above question, which holds the key to the answers of the remaining you have posed, requires a discussion of the powers and duties of a State's Attorney in relation to the institution of criminal proceedings, as well as a discussion of the purpose and effect of a preliminary hearing held by a committing magistrate.

State's Attorney

Article V, Section 9 of the Constitution of Maryland provides, in pertinent part, that "The State's Attorney shall

perform such duties . . . as shall be prescribed by law . . .". In addition to falling within the sphere of common law guidelines and duties, by virtue of Article 5 of the Declaration of Rights, which entitles Maryland inhabitants to the Common Law of England as it existed on July 4, 1776, Maryland State's Attorneys are required to "prosecute and defend, on the part of the State, all cases in which the State may be interested." Maryland Code (1968 Repl. Vol.) Article 10, Section 34.

As a result of being carved out of the Office of the Attorney General and made an independent Office with nearly exclusive jurisdiction over criminal matters within each county and in Baltimore City, by virtue of the Maryland Constitution of 1851, the common law and prescribed powers of a State's Attorney, are many and varied. Their evolvement may be traced through interpretations of the common law by the courts of Maryland and its sister states, and it may be said that the nature of each duty requires the exercise of grave discretion. *Hawkins v. State,* 81 Md. 306 (1895); 42 Am. Jur., *Prosecuting Attorneys,* Sections 2 and 14.

Consistent with the State's Attorney primary responsibility to vindicate wrongs perpetrated against the public, he "is vested at common law with the responsibility of determining whether or not a criminal accusation should be pressed to trial, and is expected to be impartial in abstaining from prosecuting, as well as in prosecuting." 3 Blackstone, Section 27. His quest is justice, and his burden is double in that he is bound to protect the innocent and to prosecute only those whom he reasonably believes to have committed wrongs. *Ginsberg v. United States,* 257 F. 2d 950, 70 A.L.R. 2d 548; *Macon v. Commonwealth of Virginia,* 187 Va. 363, 46 S.E. 2d 396.

It is clear then that the duty of the State's Attorney to prosecute "is not absolute, but qualified, requiring of him only the exercise of sound discretion, which permits him to refrain from prosecuting, or having commenced a prosecution, to enter a *nolle prosequi,* whenever he, in good faith

and without corrupt motives or influences, thinks that a prosecution would not serve the best interests of the state, or that, under the circumstances, a conviction could not be had, or that the guilt of the accused is doubtful or not capable of adequate proof." 155 A.L.R., Anno—*Criminal Prosecution—Discretion As To,* 11; Cf. *Dixon v. State of Maryland,* 261 F. Supp. 746, concerning the doctrine of sovereign immunity which was applied to State's Attorney.

Consistent with the State's Attorney's responsibility "to determine whether to prosecute, when to prosecute and on what charges to prosecute"[1] (*United States v. Shaw,* 226 A. 2d 366), it has been held in Maryland that even an action of mandamus will not lie to compel a prosecuting attorney to present a criminal case to the Grand Jury contrary to his personal judgment, since the acts of a State's Attorney are not purely ministerial, but involve the exercise of learning and discretion.[2] *Brack v. Wells,* 184 Md. 86; 27 C.J.S., *District and Pros. Attys.,* Section 14 (1).

It is also important to note that in addition to the State's Attorney being given a "broad discretion as to the cases he will prosecute" (*Ewell v. State,* 207 Md. 288), he may determine the manner in which his duty shall be performed, and such discretion cannot be interfered with by the courts unless he is proceeding, or is about to proceed, without or in excess of jurisdiction. *Application of Coleman,* 148 N.Y.S. 2d 753; *Commonwealth of Pennsylvania ex rel. Specter v. Martin,* 426 Pa. 102, 232 A. 2d 729. Except as ordained by law, in the performance of official acts, he may use his own discretion without obligation to follow the judgment of others. *United States v. Brokaw,* D. C. Ill., 60 F. Supp. 100.

In fact, as it is clearly established that it lies within the province of the State's Attorney to chart the course of a criminal prosecution, interference by a member of the judiciary with the performance of such duty should be sanctioned only under the most unusual and compelling circumstances. *People v. Hawkins,* 224 N.Y.S. 2d 457; 27 C.J.S., *District and Pros. Attys.,* Section 14 (1).

Preliminary Hearing

When a person has been accused of having committed an indictable offense, such an accused is entitled, in Maryland, to be put to trial for the same only upon the presentment or indictment by at least twelve out of twenty-three of his fellow citizens who constitute the Grand Jury. *In re Report of Grand Jury of Baltimore City,* 152 Md. 616, 137 A. 371; Declaration of Rights, Article 21; Maryland Code (1969 Cumulative Supplement), Article 51, Section 1.[3]

As we know, even though the Grand Jury of Baltimore City sits each court day during its four month term, the number of cases which are presented for indictment are so numerous, that there is a substantial waiting period before presentment. As a result, individuals who are charged by a warrant issued by a justice of the peace with having committed an indictable offense, must be bound over or detained to await the determination of the Grand Jury as to whether or not that body will present to the court a "True Bill of Indictment" against them, or whether that body will simply ignore returning an indictment.

A preliminary hearing therefore is a mere judicial inquiry held primarily for the benefit of an accused, to determine whether there is sufficient reasonable ground to justify detention of the person who has been accused. It accomplishes its primary purpose by ascertaining whether there is "probable cause" to believe that a crime has been committed and that the defendant committed it. Further purposes, although of a collateral nature, are to perpetuate testimony, to determine the amount of bail to be given by the prisoner in case he is held on a non-capital offense, to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the deprivation of his liberty if there is no probable cause for believing that he is guilty of the crime of which he has been charged. *Kardy v. Shook,* 237 Md. 524, 207 A. 2d 83; 21 Am. Jur. 2d, *Criminal Law,* Section 443; *Wampler v. Warden,* 231 Md. 639; Cf. 1 Stephen, History of the Criminal Law of England, pp. 216-233.

The remaining function of the committing magistrate, after making a determination that probable cause exists, is to merely detain or bind the accused over to await possible action by the Grand Jury, *rather than to present the case to that body.* This limited function of the committing magistrate, as a member of the judicial branch of government, is entirely consistent with Article 8 of the Maryland Declaration of Rights, which provides:

> "That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

It is crystal clear that if the substantive effect of the action of the committing magistrate in binding a person over to await action by the Grand Jury were to be construed as automatically requiring the Grand Jury to be presented with the case, the vital and sensitive screening function of the State's Attorney, pursuant to his duty to institute criminal proceedings, would be usurped in direct violation of the Maryland Declaration of Rights.

* * *

Specifically answering your first question, therefore, it is our opinion that the State's Attorney for Baltimore City not only has the right but he has the duty, in the exercise of his sound discretion, to refrain from prosecuting an individual if he is of the opinion that the prosecution would not serve the best interest of the State, or that, under the circumstances, a conviction could not be had, or that the guilt of the accused is doubtful or not capable of adequate proof. As it is his function to screen cases before presenting indictments to the Grand Jury for their endorsement, *(In re Grand Jury, supra)* he may, in the exercise of good conscience and free from corrupt influence, dismiss any or all criminal charges against an individual without first having to present the matters to the Grand Jury, even though an accused may have been detained by a committing magistrate to await action by that body.

Having answered the first question in the affirmative, we now proceed to your second question:

> *Whether, subsequent to a preliminary hearing but prior to the submission of an indictment to the Grand Jury, the State's Attorney of Baltimore City may dismiss the more major charges and send the remaining minor charges back to the Municipal Court for trial?*

Since in our opinion the State's Attorney may dismiss any or all criminal charges against an individual prior to submitting same to the Grand Jury, the issue left to be resolved is whether or not the remaining minor charges may be sent back to the Municipal Court for trial. Since the answer is dependent upon the jurisdiction of the Municipal Court over certain crimes, and the resultant posture of that jurisdiction once a case has been transferred to the Criminal Court of Baltimore City, we shall focus upon the area of law dealing with jurisdiction.

Under Article IV, Section 41C of the Constitution of Maryland, the Municipal Court of Baltimore City was created and given, in essence, the jurisdiction which had been vested in the Justices of the Peace of Baltimore City and Magistrates-at-Large. The Legislature was empowered therein to bestow "greater or lesser jurisdiction (which may be made exclusive as to any class or classes of cases), with such right of appeal therefrom" as it could prescribe from time to time by law. Pursuant to such empowering clause, the General Assembly enumerated certain misdemeanors over which the Municipal Court could maintain exclusive jurisdiction. The Legislature also increased the jurisdiction of that court to expressly include concurrent jurisdiction with that of the Criminal Court of Baltimore City over certain minor felonies. (See Maryland Code (1966 Repl. Vol.), Article 26, Sections 107-129).

The General Assembly also provided with respect to jurisdiction of the Municipal Court (Maryland Code (1966 Repl. Vol.), Article 26, Section 109 (c) (1)) that:

> "When any person is charged with an offense

> or offenses within the jurisdiction of the court, and also with an offense or offenses not within the jurisdiction of the court arising out of the same circumstances, said person shall be originally proceeded against in the Criminal Court of Baltimore and such court shall have jurisdiction over each such offense."

In the event that the combination of charges mentioned in the above section were brought before the Municipal Court, the Legislature provided that the court should follow the same procedure as applicable to cases beyond its jurisdiction. Thus, the Municipal Court Judge would be empowered to sit as a committing magistrate and bind the accused over for trial in the Criminal Court of Baltimore City, pursuant to Article 26, Section 115 of the same Act. Accordingly, although the Municipal Court had original and exclusive jurisdiction over certain offenses,[4]—it could effectively transfer these cases to the higher court which was then provided with concurrent jurisdiction by such action.[5]

In light of the above, it is our conclusion that if the State's Attorney for Baltimore City were to modify the charges against an accused, rather than to present them to the Grand Jury, by entering a *nolle prosequi* upon the warrant,[6] the remaining minor charges over which the Municipal Court had original and exclusive jurisdiction, could then be remanded to the Municipal Court by the Criminal Court of Baltimore City.

In examining the procedure by which jurisdiction would be retransferred, it is important not to overlook the fundamental principle of law recently enunciated by Judge Morton in *Gray v. State*, 6 Md. App. 677, "that once a court lawfully acquires jurisdiction over the person and the subject matter of the litigation, subsequent events will not ordinarily deprive the court of its jurisdiction, although had they existed at the time, they may have initially precluded the court's jurisdiction".

As a general rule, the exercise of concurrent jurisdiction is subject to the principle of "priority". According to this

principle, that court of concurrent jurisdiction which first exercises jurisdiction, acquires exclusive jurisdiction to further proceed in a case. In other words, once a court of concurrent jurisdiction has begun to exercise its jurisdiction over a case, its authority to deal with the action is exclusive until it is completely disposed of, or until it relinquishes jurisdiction in any legal way. *State v. Van Ness*, 109 Vt. 392, 199 A. 759, 117 A.L.R. 415; *State of New Jersey v. Josephs*, 79 Supr. 411, 191 A. 2d 775; 20 Am. Jur. 2d, *Courts*, Section 128.

As stated by the Supreme Court of Alaska in *Theodore v. State of Alaska*, 407 P. 2d 182:

> "The rule is a practical one which has developed out of the necessity of preventing irreconcilable conflict between courts of concurrent jurisdiction. It is a rule of comity and courtesy rather than of prohibition and has served as the practical means of resolving actual conflicts where each court was earnestly asserting its right to exercise its jurisdiction to the exclusion of the other. 'Interference' is the word commonly used in the appellate opinions to describe the proceedings of one or the other of the courts in conflict. On the other hand, where the court first acquiring jurisdiction consented to the exercise of jurisdiction by another court of concurrent jurisdiction, appellate courts seem invariably to have approved. Application of the rule is at all times subject to the interests of public justice and does not abridge the right of the state to elect where a prosecution shall be commenced or tried."

Therefore, pursuant to consent by the Criminal Court of Baltimore City, a case (over which the Municipal Court of Baltimore City would have had original and exclusive jurisdiction but for the inclusion of a charge beyond its jurisdiction arising out of the same circumstances) may be remanded to the lower court by the Criminal Court, after being requested to do so by the State's Attorney, upon the dismissal of the charge which initially prevented Municipal

Court jurisdiction from attaching, if such latter charge is dismissed before the State's Attorney submits same to the Grand Jury.

The final question you ask is:

> *Whether, after the Grand Jury has acted by formal indictment and the State's Attorney has nol-prossed certain counts and the remaining counts would fall within the jurisdiction of the Municipal Court, the remaining counts may be sent back to the Municipal Court for trial?*

To determine whether an accused may be brought to trial in the Municipal Court on an Indictment containing offenses within its jurisdiction, we must first look at the nature of the Grand Jury and the effect of a return of a True Bill Indictment by that body.

Normally, it is deemed to be the duty of a grand jury to guard the rights and liberties of the people; it has supervision of the enforcement of law and order, the preservation and protection of morals and social order, and the responsibility of bringing to light for examination, trial, and punishment all violence, outrages, and indecencies. They are watchmen stationed by the laws to survey the conduct of their fellow-citizens, and inquire where and by whom public authority has been violated or the laws infringed. The most valuable function of the Grand Jury is not only to examine into the commission of crimes, but to stand between the prosecutor and the accused; that is, to protect the citizen from being put on trial upon frivolous, unfounded, or false accusations, whether they come from the government or are prompted by partisan passion or private enmity. *Blaney v. State,* 74 Md. 153; *In re Report of Grand Jury of Baltimore City,* 152 Md. 616; *McNair's Petition,* 324 Pa. 48, 187 A. 498, 106 A.L.R. 1373; *Hoffman v. United States,* 341 U.S. 479, 95 L. Ed. 1118, 71 S. Ct. 814.

Most importantly, in relation to the question presented, it must be remembered that the Grand Jury *"is an adjunct or appendage of the court under whose supervision it is impaneled, and it has no existence aside from that court.*

It does not become, after it is summoned, impaneled, and sworn, an independent agency, as it were, in the judicial system, but remains an appendage of the court on which it is attending." (Emphasis supplied) 38 Am. Jur. 2d, *Grand Jury,* Section 1; 120 A.L.R. 437. The Grand Jury is regarded as an informing or accusing body rather than as a judicial tribunal. *Coblentz v. State,* 164 Md. 558, 166 A. 45, 88 A.L.R. 886. And however restricted the functions of grand juries may be in other parts of the nation, Maryland grand juries "have plenary inquisitorial powers, and may lawfully themselves, and upon their own motion, originate charges against offenders . . ." *Blaney v. State, supra.*

The actual inquisitorial function of the Grand Jury may be initiated by either an indictment or a presentment; an indictment being a charge made by the State's Attorney upon which he seeks the endorsement of the Grand Jury in form of a "True Bill", and a presentment being a charge based upon information furnished them from any other source. From this presentment, the State's Attorney prepares an indictment and returns it to the Grand Jury for the endorsement of "A True Bill". The effect of the return of "A True Bill" Indictment by a grand jury, was explicitly spelled out in 1927 by the learned Judge Digges in *In re Report of Grand Jury, supra,* and in fact supplies the short answer to the question you have presented. Judge Digges stated:

> "While it is true that the grand jury has and should have the fullest inquisitorial power, yet in the exercise of such power they are confined to an investigation of violations of the criminal law, with the single end in view that the accused may be brought to trial in the court whereof the grand jury is a part to answer and defend the charges preferred against him, and wherein he can obtain a copy of the accusation, be confronted with the witnesses against him, be represented by counsel, and submit the question of his guilt or innocence to a petit jury."

The expression of Judge Digges as to the function and

intent of the Grand Jury is entirely consistent with the nature of that body being an adjunct or appendage to the Criminal Court of Baltimore City. Furthermore, it has been repeatedly held by Maryland courts that a "jury trial, according to the course of the common law (Article 5, Maryland Declaration of Rights), necessarily includes indictment by the Grand Jury". *Heath v. State,* 198 Md. 455, 464; *Callan v. State,* 156 Md. 459, 464; *In re Report of Grand Jury, supra.*

Therefore, based upon the above analysis, it is our opinion that Municipal Court jurisdiction over an accused could not attach on the mere transfer of an indictment to that Court as the Grand Jury presents its indictments to the Criminal Court of Baltimore City for trial in the Criminal Court. However, based upon the jurisdictional principles previously discussed, as a criminal matter may be properly instituted in Municipal Court by a warrant or information if the offenses charged fall within that court's jurisdiction, the filing of an information in the Municipal Court by the State's Attorney over such charges, even though they had also been contained in counts of an indictment, would effectively operate to attach valid jurisdiction and thereby initiate criminal proceedings in Municipal Court provided that the accused had not been placed in prior jeopardy by having been brought to trial on the same offenses in the Criminal Court of Baltimore City.[7]

Based upon the foregoing conclusions, it is clearly evident that case backlogs, as well as circuity of jurisdiction, and duplicity of effort by the State's Attorney and his staff, would be effectively avoided if the State's Attorney were able to exercise his vital discretionary screening function of criminal charges at the Municipal Court level.

FRANCIS B. BURCH, *Attorney General.*

JOHN J. GARRITY, *Asst. Attorney General.*

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[1] See extensive list of citations on point in *United States v. Shaw, supra.*

[2] As Maryland grand juries are possessed with plenary inquisitorial

powers and may return presentments from evidence based upon their own knowledge, which may be derived from any source, including a court, if a justice of the peace refused the issuance of a warrant, and the citizen was further aggrieved by the refusal of the State's Attorney to present an indictment to the Grand Jury, the citizen could then apply directly to the foreman of the Grand Jury for permission to appear before that body. *In re Report of Grand Jury of Baltimore City*, 152 Md. 616; *Brack v. Wells, supra.*

[3] Maryland Rule 708 provides, "A person charged with the commission of a misdemeanor, before indictment by the grand jury, may be prosecuted upon an information filed by the State's Attorney. A person charged with the commission of a felony may not be prosecuted upon an information except pursuant to Rule 709 (Immediate Trial)". Rule 709 provides, in essence, that an accused may waive his right to action by the grand jury by petitioning for an immediate trial.

[4] The Legislature preserved, in the same Act, the power of the Grand Jury "to present any person for trial in the Criminal Court of Baltimore City as the result of an investigation initiated on its own motion. (See Maryland Code, Article 26, Section 109 (c) (3)).

[5] Although this Act is inconsistent with the general original jurisdiction of the Circuit Courts granted in Article 26, Section 30, the Municipal Court Act pre-empts by virtue of a "controlling" provision in Section 37 of Chapter 616, Acts 1961.

[6] Maryland Rule 711 provides that, "A nolle prosequi of an indictment may be entered by the State's Attorney only in open court". Maryland Rule 702 defines "Indictment" to "include an indictment, a criminal information, and a warrant issued by a justice of the peace where a jury trial was prayed before a trial magistrate or an appeal has been taken from a trial magistrate." It would, therefore, appear permissible for the State's Attorney to note a *nolle prosequi* on a warrant issued by a justice of the peace without having to do so in open court, if the Municipal Court judge sitting as a committing magistrate transferred a warrant to the Criminal Court of Baltimore City on the ground that the Municipal Court did not have jurisdiction over one of the several charges arising out of the same circumstances mentioned in Maryland Code, Article 26, Sec. 109 (c) (1).

[7] Although the better administrative practice would be to dismiss the indictment instrument before proceeding on an information in Municipal Court, even if the indictment were not dismissed, valid jurisdiction would attach in Municipal Court upon filing of the information. *State of New Jersey v. Josephs*, 79 N.J. Super 411, 191 A. 2d 775; 20 Am. Jur. 2d, *Courts*, Section 128. See *Boone v. State*, 3 Md. App. 11, for excellent discussion pertaining to principle of double jeopardy by Judge Orth who held that jeopardy does not attach if *nolle prosequi* is entered before trial.

TAXATION

INHERITANCE TAX—EXEMPT ORGANIZATIONS—SUBSTANTIAL ACTIVITIES CARRIED ON IN MARYLAND—RECIPROCAL EXEMPTION—NATIONAL HEADQUARTERS OF THE SALVATION ARMY—NATIONAL HEADQUARTERS OF THE DISABLED AMERICAN VETERANS.

February 28, 1969.

Mr. J. Asbury Holloway.

You have asked whether bequests to the National Headquarters of the Salvation Army and to the National Headquarters of the Disabled American Veterans are exempt from Maryland collateral inheritance taxation by the provisions of Article 81, Section 150 of the Annotated Code of Maryland.

With respect to The Salvation Army, this office has already determined that gifts to its Southern Territorial Headquarters (a Georgia corporation) are exempt from Maryland inheritance tax because a substantial part of its work and activities are carried on in Maryland (36 Opinions of the Attorney General 319). The gift now under consideration, however, was made to the National Headquarters of The Salvation Army (a New York corporation) which has advised us that the proceeds of the gift will be distributed nationally on a formula basis, with 16% of the gift allotted to the Southern Territorial Headquarters, part of which share will inure to the benefit of Maryland. It is our opinion that such a distribution does not establish that "a substantial part or all of the activities and work" of the National Headquarters of the Salvation Army of America are carried on in Maryland.

Hence, the reciprocity provisions of Section 150 (subsection iii), must be relied upon if the exemption is to be sustained. We have examined the provisions of the New York inheritance tax law to determine whether reciprocity exists. Article 10, Section 221 of the New York Code

exempts three separate general categories of charitable institutions. The most apposite category exempts institutions whose primary purpose is the "moral or mental improvement of men and women." There are also statutory exemptions for "religious, . . . charitable, missionary [and] benevolent" organizations. It is certain that the National Headquarters of The Salvation Army would be exempted under either of these two categories. Section 221 makes it clear that the New York exemption applies to all charitable corporations "wherever incorporated." For this reason, a reciprocal exemption does exist and the gift to the National Headquarters of The Salvation Army of America is exempted from Maryland collateral inheritance tax by the provisions of Article 81, Section 150.

The other organization about which you inquire is the National Headquarters of the Disabled American Veterans. This organization was chartered by the United States Congress in 1932 by Title 36, Section 90 of the United States Code. By ruling of the Commissioner of Internal Revenue, dated June 24, 1942, the Disabled American Veterans was exempted from the payment of federal income and employment tax. Furthermore, the "Cumulative List of Organizations Described in Section 170 (c) of the Internal Revenue Code of 1954" lists the Disabled American Veterans and "its Departments and chapters" as exempt organizations.

It is clear, then, that the laws of the United States, under which the National Headquarters of the Disabled American Veterans was "created or organized", exempts this organization from taxation. Exemptions created by a federal law apply, of course, with equal force to similar organizations which are organized under State law. Because the laws of the United States would provide an exemption to a similar organization incorporated in Maryland, it is our conclusion that the gift to the National Headquarters of the American Veterans is also exempt from Maryland collateral inheritance taxes.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—JOINT ACCOUNT OF HUSBAND, WIFE AND NEPHEW NOT IN TRUST FORM—DELIVERY OF PASSBOOK NECESSARY TO PERFECT GIFT TO NEPHEW—PRESUMPTION OF JOINT POSSESSION OF PASSBOOK AND MUTUAL ACCESS TO ACCOUNT IN HUSBAND AND WIFE—NEPHEW ACTING UNDER POWER OF ATTORNEY FROM HUSBAND MUST ACCOUNT TO PERSONAL REPRESENTATIVE OF HUSBAND'S ESTATE FOR AMOUNT WITHDRAWN FROM ACCOUNT DURING HUSBAND'S LIFETIME, LESS PROPER EXPENDITURES.

March 27, 1969.

Mrs. Madlyn E. Wooters.

You have advised us that an account was opened by X and Y, husband and wife, in their joint names, on April 28, 1958. You also stated that on June 20, 1964, the name of Z, a nephew of X and Y was added on the title of the account and on the passbook. The title of the account then read "X or Y or Z (nephew)."

X retained the passbook until sometime late in 1967, when his health and that of his wife began to fail. At that point he turned the passbook over to Z so that Z could take care of X and Y. On September 16, 1968, X gave Z a power of attorney to transact all of his business because of his deteriorating physical condition. Y had died the day before on September 15, 1968 and X died shortly thereafter on October 31, 1968. On October 1, 1968, Z withdrew the entire balance of $3,009.30 from the account in order to manage the affairs of X. You have asked what the Maryland inheritance tax consequences are under these circumstances.

We are of the opinion that Z had no joint interest in the savings account at the time of the withdrawal or at the time of either X or Y's death. The account in question is not in trust form and, thus, delivery with donative intent from X and Y to Z was required in order to give Z an interest after his name was added to the account in 1964. See

Milholland v. Whalen, 89 Md. 212, 215 (1899), and Katzenstein, "Joint Savings Bank Accounts in Maryland," 3 U.Md. L.Rev. 109, 126 (1939) for a discussion of this distinction. It is seen that the passbook was not delivered to Z until 1967 when its delivery was for the evident purpose of allowing Z to manage the funds of X and Y. See 26 Opinions of the Attorney General 432 and Letter from the State Law Department to Dorothy E. Connolly, Register of Wills for Queen Anne's County, dated September 30, 1964. (Interpreting an account opened in similar form in the same bank as the account in question.)

Upon the death of Y, the entire interest in the account passed by operation of law to X. No delivery was necessary to establish this right of survivorship because of the existence of the relationship of husband and wife and the presumption of their joint possession of the book and mutual access to the account. See 41 Am.Jur.2d "Husband and Wife", Section 80. Because Z was acting under the authority of a presumably valid power of attorney from X when he withdrew the balance from the bank account, he must now account to the personal representative of the estate of X for the unexpended balance in existence at the death of X. Z's power of attorney terminated, of course, by operation of law upon the death of X. Z cannot be held accountable to X's personal representative for proper expenditures made by him while operating under X's power of attorney.

The balance in the bank account on Y's death ($3,009.30), less Z's proper expenditures, must be included as an asset of X's estate and that part of it which is distributable in the administration account is subject to inheritance tax at the rate determined to be applicable under Sections 149 and 150 of Article 81 of the Maryland Code. No tax is due upon the interest passing to X upon the death of Y because of the exemption contained in Section 151 of the same Article.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Asst. Attorney General.*

TAXATION—RETAIL SALES TAX ACT—(1) DELETION OF EXEMPTION IN ACT FOR CERTAIN ADVERTISING SALES DOES NOT MAKE THOSE SALES SUBJECT TO SALES TAX—(2) ADVERTISING SALES CAN CONSTITUTIONALLY BE TAXED UNDER THE RETAIL SALES ACT PROVIDED ALL SEGMENTS OF THE ADVERTISING INDUSTRY ARE LIKEWISE TAXED.

March 19, 1969.

Honorable Marvin Mandel.

You have asked us whether the deletion of the exemption in Article 81, Section 326 (o) for "sales of advertising space in newspapers, periodicals, and billboard advertising space, and sales of radio advertising" constitutionally impairs House Bill 1305. It is our opinion, for the reasons hereinafter set forth, that House Bill 1305 as passed by the House of Delegates is not constitutionally impaired because of the deletion of this exemption.

The "exemption" for certain advertising sales of the advertising industry is contained in Section 326 (o) of Article 81 of the Annotated Code of Maryland. As we review that entire act (Chapter 281, Acts of 1947) we find that the exemption provided therein by virtue of the language of Section 326 (o) is superfluous, as nowhere in the Retail Sales Tax Act is there authority for applying that tax to the sale of advertising.

Article 81, Section 325 of the Code imposes the sales tax upon purchasers for the sale of certain tangible personal property at retail, and of certain selected services defined as "sales at retail" by Section 324 (f). Section 324 (f) states that a " *'Retail sale'* and *'sale at retail'* shall mean the sale in any quantity or quantities of any tangible personal property or service taxable under the terms of this subtitle . . . ." the advertising sales described in Section 326 (o) are not set forth in Section 324 (f). In other words, as we read Section 324 (f), we can find nothing therein which imposes a tax on the sale of the advertising sales exempted

in Section 326 (o). Subsection (2) of Section 324 (f) does impose a tax on "any production, fabrication or printing of tangible personal property on special order for a consideration", but it is our opinion that this language would not be broad enough to cover the advertising sales exempted in Section 326 (o).

On August 27, 1968 we advised Dr. Paul D. Cooper, Director of the Department of Fiscal Services, that there was no blanket constitutional prohibition to a sales tax on advertising. The likelihood of a sales tax on advertising being found unconstitutional exists when the sales tax is directed at the advertising industry alone or only at a certain segment of the advertising industry. In *Baltimore v. A. S. Abell Co.*, 218 Md. 273 (1958), two Baltimore City ordinances imposing a tax on gross sales and gross receipts from advertising were struck down as unconstitutional. In that case the Court of Appeals held that these taxes, as applied to newspapers, radio and television broadcasts and local purchasers of advertising, were so single in their nature, and the range of their impact was so narrow that their effect constituted a restraint upon the freedoms of speech and of the press guaranteed by the First and Fourteenth Amendments to the Federal Constitution and Article 40 of the Maryland Declaration of Rights. Consequently, even if the advertising sales exempted in Section 326 (o) *and those alone* are added to Section 324 (f) so as to eliminate any doubt that it is the intention of the Legislature to tax these sales, it is our opinion that the sales constitute too narrow a category and might well be considered discriminatory and therefore unconstitutional by a reviewing court for the reasons set forth in the *A. S. Abell* case. The Court of Appeals made it clear in the *A. S. Abell* case, however, that there was no blanket constitutional prohibition to taxes on advertising, saying:

> ". . . when the tax is imposed upon a business that enjoys one of the constitutional immunities of the First Amendment, it must be general in its nature and character and affect this business only inci-

dentally as is affects other businesses in their combined duty to support the government. . . ."

* * *

"We do not hold that every tax imposed upon the newspapers or the stations, or the producers of revenue to the newspapers and the stations, that may incidentally affect the power of such media to collect and disseminate news because of reduced revenue is violative of the freedoms guaranteed by the First Amendment; but we do hold that these particular taxes are so single in their nature and the range of their impact is so narrow—90% to 95% thereof falling upon the newspapers and the stations—that their effect makes them constitute a restraint upon the freedoms of speech and of the press guaranteed by the First and Fourteenth Amendments to the Federal Constitution and Article 40 of the Maryland Declaration of Rights . . . ." *Baltimore v. A. S. Abell Co.*, 218 Md. 273, 287, 288-289.

Lee Enterprises, Inc. v. Iowa State Tax Commission, 162 N.W. 2d 730 (Nov. 12, 1968) is a recent case of interest which deals with sales and use tax on advertising sales or services and distinguishes the *A. S. Abell* case. Iowa amended its sales and use tax to include as taxable the gross receipts from certain services which had not been listed or enumerated in its statute. Included among those services were: "* * * newspaper, directories, shopper's guides and newspapers whether or not circulated free or without charge to the public, magazine, radio, movie, and television advertising, to include such advertisement and service rendered, furnished, or performed by the state of Iowa, its boards and commissions or any installation thereof; outdoor and point-of-purchase performance advertising; * * * printing and binding; promotion and direct mail; * * *."

In a far ranging and comprehensive opinion dealing with a number of questions including the Due Process Clause, the Commerce Clause and the Equal Protection Clause

of the United States Constitution, a unanimous Iowa Supreme Court held that the Iowa Act did not impair or infringe freedom of speech or freedom of the press, did not single out the advertising industry from other businesses engaged in the sale of services, and did not treat advertisers unjustly or unfairly.

The Iowa Supreme Court specifically distinguished its sales and use tax law from the ordinances which were held unconstitutional in the *A. S. Abell* case as follows:

> ". . . This law, as amended, is of general application. It is not directed against newspapers, radio or television alone. It does not attempt to impose a tax upon advertising alone. It does include most business services rendered by the citizens of this state. We agree that the scope of the Act alone is sufficient to distinguish it from the situation in . . . Abell . . . ."
>
> "Here, none of those engaged in the service of advertising have been singled out for a tax not generally imposed on services of a like kind and character. It is clear the taxing of advertising media at the same rate as all other services enumerated was not a 'deliberate and calculated' device in the form of a tax to limit or curtail the circulation of information to the public, which is the general purpose of the constitutional guarantees." *Lee Enterprises, Inc. v. Iowa State Tax Com'n,* 162 N.W. 2d 730 at p. 755.

In summary, it is our opinion that the exemption for certain advertising sales contained in Section 326 (o) of Article 81 was superfluous and that the Retail Sales Tax Act, as presently constituted, even absent the exemption, does not impose the sales tax on these advertising sales. The imposition of the sales tax on these advertising sales alone might well be considered discriminatory and, therefore, held unconstitutional for the reasons set forth in the *A. S. Abell* case. Further, it is our opinion that the sales tax

could be imposed on sales of advertising if it was a comprehensive tax touching all segments of the advertising industry. We note, in this connection, that the Maryland sales tax presently covers a broad spectrum of business activity embracing such diverse enterprises as printing (Article 81, Section 324 (f) (2)), services in connection with the use of tools and machinery (Article 81, Section 324 (f) (6)), and telecommunication charges (Article 81, Section 324 (f) (7)). Since the Maryland sales tax does apply to such a broad spectrum of business enterprises, we believe that the Court of Appeals would most likely hold that advertising sales can constitutionally be taxed under the Retail Sales Tax Act, provided all segments of that industry are likewise taxed.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

JON F. OSTER, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—MARYLAND TRUST ASSETS OF DECEASED SETTLOR, A PUERTO RICO RESIDENT—EFFECT OF PROVISIONS OF ARTICLE 81, SECTION 174 OF THE MARYLAND CODE—TAXABLE BECAUSE PUERTO RICO LAW DOES NOT EXEMPT INTANGIBLE ASSETS OF NON-RESIDENTS NOR DOES IT PROVIDE A RECIPROCAL EXEMPTION FROM TAXATION TO RESIDENTS OF MARYLAND.

April 17, 1969.

Mr. Leroy C. Shaughnessy.

You have advised us in your recent letter that pursuant to a trust agreement, dated July 1, 1959, George M. Englar, Jr., a resident of Puerto Rico, established an irrevocable *inter vivos* trust with Maryland trustees, retaining in himself a life estate in the net income and providing that this income, after his death, be distributed to his wife (one-half) and to his descendants (one-half). The settlor died on September 6, 1968, while still a resident of Puerto Rico. By the terms of the trust instrument, it is to terminate twenty years after this date and the corpus is to be distributed at that time. It is stipulated by the trustees that these intangible assets of a non-resident settlor are taxable unless the provisions of Article 81, Section 174, relating to the reciprocity provisions of the laws of other states or countries, operate to exempt the trust from Maryland inheritance tax. For purposes of this opinion, we shall assume that Puerto Rico is a territory or possession of the United States within the meaning of Section 174, relied upon by the trustees. You have asked our opinion on this matter.

As applied to this fact situation, Section 174 provides that no Maryland inheritance or estate tax is due upon intangible personal property located in Maryland if the settlor was, at the time of his death, a resident of a state or territory which "did not impose a transfer tax or death tax of any character in respect of personal property of residents of [Maryland]," or if the laws of said state or

territory "contained a reciprocal exemption provision under which residents of Maryland are exempted from transfer taxes or death taxes of every character in respect of personal property . . . provided [that Maryland] allows a similar exemption" to residents of said state or territory. Tangible personal property situated in another state or country may be taxed there without destroying the reciprocal exemption.

We must first examine the tax law of Puerto Rico to determine whether its inheritance taxes apply to personal property of non-residents (except tangible personal property actually situate in Puerto Rico). Under Chapter 91, Section 883 of the Civil Code of Puerto Rico, an inheritance tax is imposed upon "the recipient of every taxable gift" in accordance with the tax rate schedule contained in Section 884. The phrase "taxable gift" is defined in Section 881 to mean the transfer of any property for less than its fair value, including life insurance policies, retirement benefits and transfers in trust, with an exclusion for certain charitable gifts and a flat exclusion up to certain fixed dollar amounts (Section 886). From a reading of these sections, it is apparent that Puerto Rico does impose an inheritance tax upon the personal property of non-residents.

An adjustment is provided in the law by Section 887 (a) which permits "a credit against [Puerto Rico inheritance tax in] the amount of any succession, inheritance, or transfer tax imposed by the Government of the United States of America or any other foreign government." The case law of Puerto Rico indicates that an inheritance tax imposed by a state of the United States is eligible for this credit. *Freeman v. Noguera,* 82 P.R.R. 298 (1961). This case also establishes the principle that Puerto Rico taxes intangible personal property situate therein, upholding specifically the Puerto Rican inheritance tax imposed upon the stock of a domestic corporation, owned by a citizen and resident of the State of Michigan. The taxpayer was allowed, however, a credit under Section 887 (a) for the amount of the federal estate tax and state inheritance tax

paid by his estate on said stock. The following language from the court's opinion in the *Freeman* case is particularly relevant:

> "The fact that the stock certificates are physically situated outside of Puerto Rico does not operate to impair the exercise of the local power to levy a tax. . . ."
>
> "Notwithstanding the lack of the express mention of non-residents . . . an examination of the entire Act taken as a whole reveals that the intention of the legislature was to include them among the persons compelled to pay the tax."

The allowance of a *credit* for state inheritance taxes on the personal property of a non-resident, against the assessment of Puerto Rican inheritance tax does not meet the statutory requirement of Section 174 of Article 81 (i.e., that Puerto Rico "not impose a transfer tax or death tax of any character" upon the personal property of non-residents).

We now turn to the alternative language dealing with reciprocity provisions contained in Section 174. An examination of the Puerto Rico inheritance tax law reveals no reciprocal exemption. We have already discussed the fact that an inheritance tax is imposed by Puerto Rico upon the personal property of non-residents, but that a credit is allowed for foreign death taxes paid by the estate upon the same property. This, in no sense, can be construed as a reciprocal exemption. In fact, quite the opposite is true, as it is anticipated under Puerto Rico law that both the situs of the personal property and the situs of the decedent's domicile are entitled to impose the tax.

We are of the opinion, therefore, that the Puerto Rico law does impose an inheritance tax upon the intangible personal property of its residents despite the fact that such intangible personal property is not situated there. Furthermore, it is clear from a reading of the Puerto Rico inheritance tax law that there is no reciprocal exemption con-

tained therein. For these reasons, the provisions of Article 81, Section 174 of the Maryland Code do not operate to exempt the Maryland trust assets from Maryland inheritance tax. See letter from State Law Department to Mr. Bernard F. Nossel, Chief Deputy Comptroller, dated February 21, 1968 (Great Britain) (53 Opinions of the Attorney General 496); 40 Opinions of the Attorney General 614 (1955) (Costa Rica); 35 Opinions of the Attorney General 292 (1950) (Austria).

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Asst. Attorney General.*

TAXATION — INHERITANCE TAX — PROPERTY PASSING BETWEEN HUSBAND AND WIFE AS JOINT TENANTS OR TENANTS BY THE ENTIRETIES IS EXEMPT FROM INHERITANCE TAX BY ARTICLE 81, SECTION 151 OF THE MARYLAND CODE — CHECKS ISSUED BY DECEASED JOINT OWNER PRIOR TO DATE OF DEATH BUT PAID BY BANK AFTER DATE OF DEATH OF SAID JOINT OWNER PROPERLY PAID IF BANK HAS COMPLIED WITH ARTICLE 95B, SECTION 4-405 OF THE MARYLAND CODE AND SURVIVING JOINT OWNER HAS NOT ORDERED BANK TO STOP PAYMENT PRIOR TO ACTUAL PAYMENT OF CHECKS—SURVIVING JOINT OWNER MAY NOT RECOVER FROM PROBATE ESTATE AMOUNT OF SUCH PROPERLY PAID CHECKS IN ORDER TO REIMBURSE HER JOINT BANK ACCOUNT—SURVIVING JOINT OWNER TAKES TITLE BY OPERATION OF LAW TO JOINT BANK ACCOUNT AT DATE OF DEATH OF DECEASED JOINT OWNER SUBJECT TO PAYMENT BY BANK OF ALL VALID OUTSTANDING CHECKS ISSUED BY DECEASED JOINT OWNER PRIOR TO DEATH.

June 9, 1969.

Mrs. Madlyn E. Wooters.

You have recently asked us to advise you on the propriety of certain proposed action of the executors of an estate. The executors have pointed out to you that the decedent, several days prior to his death on September 5, 1968, issued three checks on the joint checking account owned by him and his wife. These checks were in the amounts of $500.00, $4,175.50 and $73.00. The largest of the three checks was drawn to the order of the Internal Revenue Service for the third installment of their 1968 estimated federal income tax. All of these checks were paid by the bank, upon presentment, within seven days after the date of the decedent's death.

The widow claims that these checks were improperly paid by the bank because the joint checking account became her sole property, by operation of law, at the moment of her husband's death on September 5. She and her co-executor now ask that estate assets be used to reimburse

her for this wrongful payment in the total amount of $4,748.50. The amount in question would pass free of Maryland inheritance tax to the widow under the provisions of Article 81, Section 151 of the Maryland Code if properly part of the joint checking account, yet would be taxable at the applicable rates if properly passing through administration.

Article 95B, Section 4-405 of the Maryland Code controls, to a large extent, the result that must be reached by this office.

> "(1) A payor or collecting bank's authority to accept, pay or collect an item or to account for proceeds of its collection if otherwise effective is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes such authority to accept, pay, collect or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.
>
> "(2) *Even with knowledge a bank may for ten days after the date of death pay or certify checks drawn on or prior to that date unless ordered to stop payment by a person claiming an interest in the account.*" (Emphasis supplied)

This provision was adopted by the Maryland General Assembly in 1963 and by its terms protects banks which make payments on checks drawn prior to the death of the drawer and presented for payment after his death. The *italicized* language of this section is particularly relevant because it afforded a specific remedy to the widow in order to protect the fund which she is now seeking to recover from the estate.

As joint owner she was clearly a person with an "interest in the account" and she could have ordered the bank to

stop payment on the three outstanding checks in question. If the bank had received a timely stop-payment order from her, it would have acted improperly in subsequently paying these three checks. The bank would then have been responsible to the widow in the amount of the wrongfully paid checks and would have sought reimbursement from the payees, requiring them to present formal claims against the estate in order to receive payment. Under those circumstances, the checks would constitute mere evidence of the validity of the underlying debt asserted by the payees. But the widow did not elect to follow this statutory procedure. Whether or not the bank had knowledge of the death of the decedent, or at what time it gained this knowledge is of no consequence because the widow had not presented a stop-payment order to the bank prior to the date on which these three checks were paid.

Separate and apart from this failure to protect her rights under Article 95B, Section 4-405 is the fact that the widow, in her signature-card contract with the bank authorized it to "recognize [either] of the signatures subscribed below in the payment of funds or the transaction of any business for this account" and agreed that "payment to or on the check of either or the survivor shall be valid and discharge [the bank] from liability". At the time, then, that the deceased issued the three checks in question, they became an inchoate claim against the fund held in the joint account. The widow, at the time of her husband's death, took title to the entire fund as of that date, subject, however, to these outstanding checks which were later properly paid by the bank.

We conclude, therefore, that the claim of the widow for reimbursement from the estate of $4,748.50 should not be allowed and that distribution of this amount should be made in the ordinary course of administration in accordance with the provisions of the Last Will and Testament of the deceased.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Asst. Attorney General.*

TAXATION—RECORDATION TAX—ARTICLE 81, SECTION 277 (G) (2) DOES NOT EXEMPT MEMORANDA OF LEASES FROM TAX IF RECORDATION IS EFFECTED—A LEASE FOR A 15-YEAR TERM IS REQUIRED TO BE RECORDED BY ARTICLE 21, SECTION 1 (A) EVEN IF TERMINABLE BY THE TENANT ON 2 YEARS' NOTICE.

June 12, 1969.

Mr. Howard M. Smith, Clerk.

In your letter of May 26, 1969 you enclosed a Memorandum of Lease dated April 14, 1969 between a corporate Landlord and Tenant, which has recently been offered for record in your office. This document summarizes the terms of a lease between the same parties, dated July 1, 1968, for a two-story building located on a parcel of land in Rockville. The term of the lease is fifteen years with the right of the tenant to terminate it upon two years notice to the landlord. You ask whether this memorandum of lease is subject to the Maryland recordation tax contained in Article 81, Section 277 of the Maryland Code.

Under Section 277 (g) (2), added by Chapter 494 of the Laws of Maryland of 1968, a memorandum of lease is taxable if the unrecorded lease of which notice is given would be taxable if offered for record. In such event the tax is assessed upon the consideration supporting the original lease plus any additional consideration that may exist for the memorandum of lease. There can be no question but that the underlying lease, dated July 1, 1968, would be taxable if it were offered for record because of the language of Section 277 (a).

The only remaining question is whether an exemption from taxation is created by the last sentence of Section 277 (g) (2) which reads as follows:

> "Nothing in this subsection . . . shall be taken to apply to any lease not required by law to be recorded."

This language merely establishes that no recordation tax is due upon a lease not required to be recorded *unless* it is in fact offered for record or is publicized by another instrument offered for record.

Even if this language were construed broadly, however, the subject lease is required to be recorded by Article 21, Section 1 (a) and hence the exemption does not apply. That section exempts from the requirement of compulsory recordation "[leases] . . . for an initial term of not more than seven years" with renewal provisions for similar terms. The lease in question is clearly for a term of more than seven years (actually fifteen years) and the fact that the lease is terminable upon two years' notice does nothing to alter this conclusion. Cf. *Maryland Theatrical Corporation v. Manayunk Trust Company*, 157 Md. 602 (1929); *Sweeney v. Hagerstown Trust Company*, 144 Md. 612 (1924). The statute operates upon the facts apparent from the written instrument rather than upon future possibilities.

Because the lease in question is required to be recorded by Article 21, Section 1 (a) of the Maryland Code, the exemption contained in Article 81, Section 277 (g) (2) does not apply and you should receive a tax based upon the consideration contained in the original lease plus the consideration, if any, supporting the memorandum of lease offered for record. Furthermore, Article 21, Sections 1 (b) and (c) require you to examine the memorandum of lease and the original lease to see that the former is in proper statutory form and that it accurately summarizes the relevant terms of the latter.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Asst. Attorney General.*

TAXATION—TRANSFER TAX—TIMBER DEED—DOES NOT CONVEY TITLE TO REAL PROPERTY—STANDING TIMBER HELD TO BE PERSONALTY NOT REALTY.

June 13, 1969.

Mr. Joseph W. T. Smith, Clerk.

In your letter of May 19, you enclosed a copy of a Timber Deed by which X sold to Y "all the merchantable pine timber now standing or growing upon a tract containing approximately thirty acres" with the right "to cut and remove said trees at any time before one year from the date hereof". You ask whether a deed in this form would be subject to the State property transfer tax created by Section 10 of Chapter 403 of the Laws of Maryland of 1969. This tax becomes effective July 1, 1969 and is assessed at the rate of ½ of 1% upon the actual consideration paid for the conveyance of title and is imposed "upon *every written instrument conveying title to real property* offered for record and recorded in the State. . . ." (Emphasis supplied)

The question that must be answered is whether a timber deed, such as the one described above, conveys title to real property. The character of standing and cut timber was thoroughly discussed in the case of *Smith v. Bryan,* 5 Md. 141 (1853), in which it was held that a sale of standing timber was "a sale of goods only" and that the timber so sold thereafter retained its character of goods and chattels. This has continued to be the rule in Maryland and the reason for the rule was explained by Judge McSherry in *Leonard v. Medford,* 85 Md. 666, 672 (1897):

> "* * * In transaction of [this] kind . . ., it is obvious that the *intention* of the parties to the contract—the owner of the timber, on the one side, and the purchaser of it, on the other—was not to deal with interest in the *land* upon which the timber stood, but respectively, to sell and acquire the *product* of the soil and nothing more. . . ."

See also *Wimbrow v. Morris*, 118 Md. 91 (1912). For a discussion of the split of authority on this subject in other jurisdictions see 2 *Tiffany, Real Property* (3rd Ed. 1939), Section 595.

Maryland law clearly established, then, that both standing and cut timber, pursuant to a timber deed, is construed to be personalty rather than realty and, for this reason, the new State property transfer tax should not be assessed against timber deeds of this nature.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Asst. Attorney General.*

TAXATION—STATE PROPERTY TRANSFER TAX—CLERKS OF CIRCUIT COURT AND CLERK OF SUPERIOR COURT OF BALTIMORE CITY ENTITLED TO RECEIVE COMMISSION FOR COLLECTION AS PROVIDED IN ARTICLE 36, SECTION 12 (D) (1) OF CODE.

July 23, 1969.

Mr. Bernard F. Nossel.

You have asked whether or not the Clerks of Court may retain a commission on the State property transfer tax which they collect and remit to the State. You have also asked that if our answer is in the affirmative, what are the applicable rates of the commission.

The State property transfer tax was created by Section 10 of Chapter 403 of the Laws of 1969. It is levied at the rate of ½ of 1 percent of the actual consideration paid for the conveyance of title to real property and is collected by the Clerks of the Circuit Courts of the counties and the Clerk of the Superior Court of Baltimore City. The proceeds of the tax are paid to the State Comptroller. No provision is made in Section 10 of Chapter 403 for the retention of a commission by the clerks. However, Article 36, Section 12 (d) (1) of the Annotated Code of Maryland (1968 Cum. Supp.) provides that "[f]or receiving, collecting and paying over all public money" the clerks shall be entitled to receive five percent, except the Clerk of the Circuit Court for Montgomery County who shall receive a three percent commission. In view of this provision, which expressly pertains to the collection of "all public money", it is our opinion that the clerks should retain a commission of five percent (3% in Montgomery County) on all money collected on the State property transfer tax.

FRANCIS B. BURCH, *Attorney General.*

JON F. OSTER, *Asst. Attorney General.*

TAXATION—TRANSFER TAX—INSTRUMENTS WHICH RESERVE GROUND RENTS IN THE OWNER OF THE FEE SIMPLE—NOT SUBJECT TO TAX BECAUSE NO CONVEYANCE OF TITLE.

August 6, 1969.

Mr. Robert H. Bouse, Clerk.

In your letter of July 29 you ask whether the new State transfer tax (Article 81, Section 278A established by Chapter 403 of the Laws of Maryland of 1969, effective July 1, 1969) should be collected upon instruments the effect of which is to reserve ground rents in the owner of the fee simple. In the usual case, the leasehold interest in fee simple property is leased to a straw party by the owner and simultaneously the straw party, by a deed of assignment, assigns the same leasehold interest to the actual purchaser. The effect of this is, of course, to reserve in the original owner an annual ground rent as described in the lease and assignment. You ask whether this latter interest is taxable.

The new transfer tax is imposed "upon every written instrument conveying title to real property offered for record and recorded" and is assessed at the rate of ½ of 1% of the "actual consideration paid for the conveyance of title". See Article 81, Section 278A (a) and (b). An instrument the effect of which is to reserve a ground rent in the grantor does not convey title. The effect of the straw conveyance is only to permit the grantor to retain a lesser interest (a reversion in fee) in property which he had previously owned absolutely in fee simple. Hence, title to the ground rent has not passed. See generally *Heritage Realty v. City of Baltimore,* 252 Md. 1, 3-5 (1969).

The intent of the statute in this regard is made clear by Subsection (c) where the technique for computing consideration upon the *sale* ("transfer") from one owner to another of a ground rent previously created is set out. Subsection (c), therefore, does not deal with the creation of

reserved ground rents but only with their future transfer. Specific statutory language (such as is contained in Article 81, Section 277 (f) relating to the State recordation tax) would be needed to make transactions of this sort taxable. See 24 Opinions of the Attorney General 991 (1939); cf. 22 Opinions of the Attorney General 712 (1937).

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Asst. Attorney General.*

TAXATION—ESTATE TAX—PAYMENT MUST BE MADE ON THE DUE DATE OF THE ENTIRE AMOUNT OF THE FEDERAL CREDIT IF NO MARYLAND INHERITANCE TAXES HAVE BEEN PAID AT THAT TIME—IN THE EVENT THAT FULL PAYMENT IS NOT MADE, INTEREST AT 6% PER ANNUM IS CALCULATED UPON THE UNPAID AMOUNT FROM THE DUE DATE UNTIL EITHER THE DATE OF PAYMENT OF THE MARYLAND ESTATE TAX OR THE DATE OF PAYMENT OF MARYLAND INHERITANCE TAXES EXHAUSTING THE FEDERAL CREDIT.

August 29, 1969.

Mr. Bernard F. Nossel.

In your recent letter you state that a decedent died on January 8, 1967 and that the Maryland estate tax return form was not filed by the administrators until more than six months after the due date, which due date by statute is set at fifteen months after the date of death of the decedent. See Article 62A, Section 3 of the Maryland Code. You also point out that while the administrators calculated the portion of the Federal credit allocable to Maryland ($37,575.38), they paid no estate tax with this return indicating as an explanation that Maryland inheritance taxes, although unpaid, were "to be determined" and were "in process of preparation". You question the propriety of this action of the administrators and ask our opinion upon it.

The Maryland estate tax is defined as the excess of the Federal credit for State taxes allowable to Maryland over the aggregate of inheritance taxes "paid by or out of" the Maryland estate of the decedent. Article 62A, Section 2. It is clear from this language that unless there has been an actual payment of State inheritance taxes, the Maryland estate tax (to be paid on or before the due date) then becomes the *entire amount* of the Federal credit. This is confirmed by the following language from a recent opinion of this office [44 Opinions of the Attorney General 382, 385 (1959)]:

> "In the case here discussed, the amount of the inheritance tax is not yet known, and since the Maryland estate tax is presently due, the full amount of the Federal credit is to be paid."

That opinion goes on to point out that a refund of overpaid Maryland estate tax will arise at that point in time "when the inheritance tax is ultimately paid" so that "any payment of inheritance taxes operates to reduce the estate tax." See also 39 Opinions of the Attorney General 284 (1954) and this office's letter to you dated January 22, 1969.

In conclusion, therefore, the administrators should have paid a Maryland estate tax of $37,575.38 at the time they filed their Maryland estate tax form. Because this form was filed late, interest on this amount of tax should also be added at the rate of 6% per annum, calculated from the due date, April 8, 1968, until the date of either payment of the Maryland estate tax or the exhaustion of the Federal credit by the payment of Maryland inheritance taxes in a like or excess amount.

A corollary question, not raised in this particular estate, is whether interest should be assessed when a Maryland estate tax return is filed late but upon the face of the return, when filed, are figures indicating that the amount of Maryland inheritance tax paid exceeds the Federal credit creating a situation in which no Maryland estate tax is due. In some instances, however, further investigation establishes that these inheritance taxes were not paid until after the due date for the Maryland estate tax. Interest should then be assessed at the rate of 6% per annum for that period of time between the due date for the Maryland estate tax return and the date upon which the Maryland inheritance taxes, which eliminated the Maryland estate tax, were actually paid, assessed upon, in all likelihood, the full amount of the Federal credit.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Asst. Attorney General.*

TESTAMENTARY LAW

PRIORITY OF CREDITORS UNDER ARTICLE 93, SECTION 6 (B) OF THE MARYLAND CODE—STATUS OF JUDGMENT RECOVERED BY FORMER WIFE OF DECEDENT FOR SUPPORT PAYMENTS FOR MINOR CHILDREN ACCRUING PRIOR TO DEATH OF DECEDENT WHEN SUIT WAS INSTITUTED AND JUDGMENT RECOVERED AFTER DEATH OF DECEDENT—NOT ENTITLED TO PRIORITY OVER "ALL OTHER JUST CLAIMS" OF ESTATE BECAUSE JUDGMENT RECOVERED AFTER DEATH OF DECEDENT IS NOT A CLAIM "FOUNDED ON [A] JUDGMENT [OR A] DECREE".

June 24, 1969.

Mr. George M. Nutwell.

You have advised me that a decedent died on June 24, 1966 and that a dispute has now arisen on the priority of claims against his estate in which the claims exceed the assets. The uncertainty surrounds the priority to be given a judgment against the executors in the amount of $16,705.00 recovered in the Circuit Court for Anne Arundel County by the deceased's former wife, on June 14, 1968. This judgment is for "arrears in support payments" for the deceased's two minor sons and included no award for payments accruing after the date of death. The suit was filed on January 4, 1967, more than six months after the death of the deceased.

By way of background, the claimant was divorced from the deceased on April 12, 1961 and by the terms of the divorce decree, the deceased was "charged generally with the support of the minor children". In accordance with their agreement of February 1, 1961, he was required to pay $62.50 a week for the support of each of the two minor sons. On July 13, 1962 this was amended after a contempt hearing; the deceased's estranged wife was awarded $1,375.00 in arrearages and the support payments were reduced to $35.00 a week per child. Another contempt hearing was held on December 12, 1963 but apparently did not result in a final decision. The attorney for the claimant and her two minor children asserts that since she now holds a judgment in the amount of $16,705.00 she is entitled under

Article 93, Section 6(b) to priority over "all other just claims" because hers is a claim "founded on [a] judgment [or] decree." You now ask whether, under these circumstances, this priority should be granted or whether the claim of the claimant, on behalf of her children, must be paid on a pro rata basis with the claims of other creditors of the estate.

It is interesting, by way of background, to review the general principles applicable to priorities of judgments. By statute (Article 26, Section 20 of the Maryland Code) and by rule (Rule 620 of the Maryland Rules of Procedure) a judgment constitutes a lien upon the real estate of the judgment debtor lying in the county where the judgment was entered and upon all leasehold interests and interests for terms of years of the judgment debtor (except for certain short-term leases). In these instances, the judgment becomes a lien for priority purposes as of the date of the judgment. The rule is different with respect to the personal property of a debtor. The date on which the judgment is obtained in this instance is of no significance from the standpoint of priorities. The priority attaches in a judgment against the personalty of the debtor at "the time of the delivery of the writ [of *fieri facias*] to the Constable" rather than upon the date of the levy. *Harris, Trustee v. Max Kohner, Inc.*, 230 Md. 349, 355 (1963). In short, specific further action must be taken by a judgment creditor in order to gain priority with respect to personalty of a debtor.

In the absence of Article 93, Section 6(b), then, the fact that the claimant obtained a judgment against the trustees on June 14, 1968 would be, of itself, of no significance with respect to the personalty of the estate unless she had placed a writ of *fieri facias* in the hands of a sheriff for execution. The question now before us is how this result is altered by the language of Article 93, Section 6(b).

There are no Maryland cases which shed light upon the status of a judgment obtained after the date of death of the decedent. This subject has been treated exhaustively, however, in *Annotation*, "Rank of Creditor's Claim against

Decedent's Estate or His Rights in Respect of Property of Estate as Affected by Reduction of His Claim to Judgment against Executor or Administrator, or Levy of Attachment or Execution." 121 A.L.R. 656 (1939). This annotation reaches the conclusion that the majority of states do not permit a general creditor to increase his priority by obtaining a judgment against the decedent's personal representative after his death. This principle is enunciated in *In re Landis,* 137 A. 2d 635 (N.J. 1958), where the court stated at page 637 that "judgments to be preferred must be actually entered of record during the lifetime of the defendant." To the same effect is *In re Collins' Estate,* 286 N.Y.S. 506 (Surr. Ct., King's Cty. 1936), where the following statement appears at pages 508-509:

> "The objectant possesses a claim which was reduced to judgment subsequent to the death. He is, of course, not entitled to a preference by reason of the recovery of his judgment over other creditors of the deceased and is merely in the position of one whose claim has been proved."

See also *Am. Jur. 2d,* "Executors and Administrators" Section 475 and *C.J.S.,* "Executors and Administrators" Section 463.

We are of the opinion, therefore, that even though the claimant, for the benefit of her two minor sons, possesses a judgment against the executors in the amount of $16,705.00, this judgment is not entitled to priority under Article 93, Section 6(b) over "all other just claims against the estate". The suit was instituted more than six months after the decedent's death. The judgment was obtained nearly two years after his death. The court's order specifically establishes that the damages awarded accrued prior to the decedent's death. Section 6(b) was not intended to afford judgments of this sort priority status and, for this reason, the claimant must share generally with the other bona-fide creditors of this estate.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Asst. Attorney General.*

TRIAL MAGISTRATES

JUSTICES OF PEACE—SALARY INCREASE WHILE IN OFFICE.

July 1, 1969.

Honorable William H. McGrath.

You have asked our opinion on the constitutionality of Senate Bill 312, Chapter 216 of the Acts of the General Assembly, 1969, which amended Maryland Code (1968 Replacement Volume), Article 52, Section 97 (f) by establishing a basic annual salary of $5,300 to be paid Committing Magistrates of the People's Court of Prince George's County.

You have advised us, in particular, that, as the bill would have the effect of increasing the annual salary of incumbent Committing Magistrates, a question has been raised regarding the legislative power to do so in light of the provision contained in the Maryland Constitution prohibiting an increase or decrease in salary of any public officer during his term in office. As the Maryland Constitution has been amended to empower the legislature to alter, from time to time, the salaries of People's Court personnel, with the exception that salaries of judges may not be decreased while they are serving a term of office, it is our opinion that Senate Bill 312 is constitutional as applied to incumbent Committing Magistrates in Prince George's County as such class of justices has been expressly authorized by law to be included within the People's Court system for that county.

Although Article III, Section 35 of the Maryland Constitution prohibits the General Assembly from increasing or decreasing the salary or compensation of any public officer during his term of office, Article IV, Section 42 of the Maryland Constitution authorizes the Governor, with the advice and consent of the Senate, to appoint such number of justices of the peace as may be prescribed by law and provides that those so appointed shall have such jurisdiction, duties and compensation as may be fixed by law.

By constitutional amendment, ratified in 1940, Section 41B of Article IV vests power in the Legislature to establish a People's Court in any county and to fix the number, qualifications, tenure and method of selection of judges, their powers, duties and compensation, "except that the term of office or compensation of any Judge shall not be reduced during his continuance in office"; the jurisdiction of the Court and right to appeal therefrom; and the number, qualifications, tenure, method of selection, duties and compensation of the constables, clerks and other employees for such Court. The last sentence of Section 41B relieves the Governor of the necessity of having to appoint a particular number of justices of the peace as was required under Section 42, upon implementation of Section 41B in any county. In order to afford meaning to this last sentence, justices of the peace must be considered as included within the framework of People's Courts when reading the entire section as a whole which authorized the Legislature to determine the "number" of judges and other personnel.

According to *Cole v. Secretary of State*, 249 Md. 425, 240 A. 2d 272 (1968), when analyzing Article IV, Sections 41B and 42 of the Constitution, "The effect of the two sections, read together, is to accord a county, if so authorized by the Legislature, the option of substituting a People's Court for a system of Justices of the Peace, Constables and Magistrates."

By virtue of utilizing its empowering provision under the constitutional amendment, the Legislature established the People's Court for Prince George's County in Chapter 695 of the Acts of 1961, as codified in Maryland Code (1968 Replacement Volume) Article 52, Sections 25B, 97 (f), 98A, 99, 119 (k) and 125A. Commenting on these sections, with the exception of Section 97 (f), the Court of Appeals stated in *Good v. State*, 240 Md. 1, 212 A. 2d 487 (1965):

> "Chapter 675 invested the Judges of the People's Court of Prince George's County with all the authority, powers and civil and criminal jurisdiction theretofore vested in the justices of the peace

designated as trial magistrates and other justices of the peace of the county."

By virtue of Chapter 447 of the Acts of 1965 [codified as Maryland Code (1968 Replacement Volume) Article 52, Section 97 (f)], the "Committing Magistrates of the People's Court of Prince George's County", who were once designated as justices of the peace, at large, were placed under the direct administrative supervision of the judges of the People's Court for that county. That Act also directed that such justices conform to the practices and procedures as prescribed by the judges of the People's Court for Prince George's County.

As a further aid in construing the official character of the Committing Magistrates for Prince George's County, which could be changed according to Article IV, Section 1 of the Maryland Constitution by the General Assembly, similar statutes may be examined. As an indication of that class of magistrates currently considered to be an integral part of the personnel of the People's Court system in Montgomery County, Maryland Code (1968 Replacement Volume) Article 52, Section 97 (h) provides:

> "In Montgomery County, the County Council for said county shall appoint, with the advice and consent of the chief judge of the People's Court for Montgomery County, no more than thirty (30) *employees* of the People's Court for Montgomery County who shall be designated as committing magistrates in said county and who shall have all the powers and jurisdiction now or hereafter prescribed by law in justices of the peace or committing magistrates. . . . In the conduct and administration of their affairs they shall conform to such practices and procedures, consistent with law, as are prescribed by the judges of the People's Court with the approval of the judges thereof. . . ." (Emphasis supplied)

When the above constitutional amendments and statutes are read together, they not only harmonize, but evidence

a clear legislative intent to construct the framework of a People's Court system for Prince George's County within which committing magistrates were to be included as part of the court personnel.

As the Maryland Constitution, by virtue of Article IV, Sections 41B and 42 authorized the legislature to establish a People's Court system and provided for the compensation of its personnel, with the only restriction being not to diminish the salary of a judge while in office, it is our opinion that the Maryland legislature constitutionally acted within the scope of its power when enacting Senate Bill 312, Chapter 216 of the Acts of the General Assembly, 1969, which has the effect of allowing an incumbent Committing Magistrate to receive an increase in annual salary during his term of office.

FRANCIS B. BURCH, *Attorney General.*

JOHN J. GARRITY, *Asst. Attorney General.*

UNSATISFIED CLAIM AND JUDGMENT FUND

INTERPRETATION OF ARTICLE 66½, SECTION 174 (A) (1)—REQUISITES FOR RESTORATION OR ISSUANCE OF LICENSES—METHOD AND TIME OF COMPUTING INTEREST ON JUDGMENTS.

September 16, 1969.

Mr. John H. Calhoun, Manager.

You have asked our opinion concerning the interpretation of Article 66½, Section 174 (a) (1) of the Annotated Code of Maryland (1967 Replacement Volume), which provides:

> "(a) Requisites for restoration or issuance of licenses.—Where the license or driving privileges of any person, or the registration of a motor vehicle registered in his name, have been suspended or revoked under the Motor Vehicle Financial Responsibility Law of this State, and the Treasurer has paid from the fund any amount in settlement of a claim or towards satisfaction of a judgment against that person, the suspension or revocation shall not be removed, nor the license, privileges, or registration, restored, nor shall any new license or privileges be issued or granted to, or registration be permitted to be made by, that person until he has—
>
> "(1) Repaid in full to the Treasurer the amount so paid by him in the case of amounts of one thousand dollars ($1,000) or less, or repaid in full to the Treasurer in the case of amounts exceeding one thousand dollars ($1,000), a sum to be set by the Board, but never less than 50% of the amount so paid by the Treasurer, together with interest thereon at four per centum (4%) per annum from the date of such settlement or assignment of judgment, or has undertaken in writing, in the manner provided in Section 161, to repay to the Treasurer the sum to be paid under a settle-

ment, or has obtained a court order permitting payment of the amount of his indebtedness to the fund to be made in installments;"

Specifically you have posed five questions involving this and other sections of the Fund statute. These are:

1. Should judgments and notes held by the Fund for interest at the rate of 4% be computed on the declining balance method or may interest be posted annually?
2. Under Article 66½, Section 166, should the 4% interest be computed from the date of entry of the judgment on the court docket, from the date of assignment to the Fund, or from the date the Fund makes payment?
3. Under Article 66½, Section 161, which deals with settlements, should the interest thereon be computed from the date the confessed judgment note is notarized or from the date the Fund makes payment?
4. Under Article 66½, Section 174, which deals with the compromise repayment of judgments, must the Board insist on payment of interest in full or may the interest be compromised?
5. In settlements where the Fund has ultimately reduced the confessed judgment note to a judgment, what is the correct amount of interest to be charged?

The first question deals with the *method* of computing the interest. At present the Fund posts interest annually on the sum due and owing as of November 30. The Statute, Article 66½, Section 174 (a) (1), provides that interest is to be collected at the rate of 4% per annum.

Where the language of the statute is plain, the statute will be enforced as written. In an earlier opinion we defined "Regular Interest" as meaning interest at the rate of 4% per annum compounded annually, 42 Opinions of the Attorney General 444 (1957). And in *Rothman v. Silver*, 245 Md. 292, 226 A. 2d 308 (1966), the Court of

Appeals held that the phrase "interest at 6% per year" meant that interest was to be computed for each year rather than computed on declining balances. Therefore, the Board's present method of computing interest is in compliance with the Statute.

Questions two and three deal with the *time* of computing interest. The statute, Article 66½, Section 166, provides that before the Treasurer (on behalf of the Fund Board) makes payment, the applicant must assign the Judgment to the Board, which thereafter is deemed to have all the rights of the judgment creditor under the judgment. One of those rights is, of course, the right to collect interest on the judgment. Maryland Rule 642 provides as follows:

> "A judgment by confession or by default shall be so entered as to carry interest from the time the judgment was rendered. A judgment on verdict shall be so entered as to carry interest from the date on which the verdict was rendered. A judgment *nisi* entered by the court following a special verdict pursuant to Rule 560 (Special Verdict) or trial by the court without a jury pursuant to Rule 564 (Trial by the Court) shall be so entered as to carry interest from the date of the entry of judgment, *nisi.*"

Therefore interest on cases founded upon judgments should be computed from the date of judgment in accordance with the mandate of Maryland Rule 642.

In the situations in which cases are settled under Article 66½, Section 161, we feel the interest should be computed from the date payment is made on behalf of the Fund Board, since there has been no settlement until payment is made.

Question four deals with compromise repayments. We believe that in cases of compromise repayments the amount of interest may also be compromised. The pertinent portion of Article 66½, Section 174 (a) (1) reads as follows:

> ". . . or repaid in full to the Treasurer in the case of amounts exceeding one thousand dollars ($1,000), a sum to be set by the Board, but never less than 50% of the amount so paid by the Treasurer, *together with* interest thereon at four per centum (4%) per annum. . . ." (Emphasis supplied)

The key words "together with" have been held to mean "in union with", "along with", or "in company or mixture with", 41A Words and Phrases, page 456.

We feel that the legislative intent regarding compromise repayments has been clearly expressed and that the entire amount to be repaid, including interest, may be compromised in accordance with the statute.

In question five you ask the correct amount of interest to be charged in cases of settlement where the Fund has ultimately reduced the confessed judgment note to a judgment. Article 66½, Section 166 gives the Fund Board "all the rights of the judgment creditor" upon assignment of the judgment from the claimant to the Fund Board. One of the rights of the judgment creditor is the right to collect interest which, at the time of the enactment of Section 166 in 1957, was six per centum (6%), Article 49, Section 1.

But Article 66½, Section 174 (a) (1) clearly indicates that in the repayment by uninsured defendants, the rate of interest to be charged is 4% per annum. In the absence of a judicial decision interpreting the obvious dichotomy between Article 66½, Section 161, and Section 174 (a) (1), we are unable to state with any absolute legal certainty that the rate of interest should be limited to 4%. We feel that until the point is determined judicially or the Legislature clarifies the matter, you may continue to handle these cases as you have in the past, *i.e.*, charging interest at the rate of 4% until the note is reduced to judgment.

FRANCIS B. BURCH, *Attorney General.*

WILLIAM E. BRANNAN, *Asst. Attorney General.*

UNSATISFIED CLAIM AND JUDGMENT FUND—INTERPRETATION OF ARTICLE 66½, SECTION 174—SUSPENSION OF DRIVER'S LICENSE AND REGISTRATION PLATES WHEN FINANCIAL RESPONSIBILITY LAW IS NOT COMPLIED WITH.

December 12, 1969.

John H. Calhoun, Esq.

You have asked us to give an interpretation of Article 66½, Section 174 (c) of the Annotated Code of Maryland.

This subsection is part of Section 174, which deals with the restoration of license or driving privileges as well as the restoration of motor vehicle registration.

Simply stated, your question is whether the Unsatisfied Claim and Judgment Fund can properly request the Financial Responsibility Section of the Department of Motor Vehicles to pick up both the driver's license and registration plates of operators and owners even though, under the provisions of the Financial Responsibility Law, that individual may not have lost both his driver's license and registration plates.

Under Article 66½, Section 122, the Financial Responsibility Section suspends the license of each operator and the registration of each owner where they are uninsured and fail to satisfy the Financial Responsibility requirements. Where judgments have not been satisfied, a similar action is taken by the Department of Motor Vehicles in accordance with Article 66½, Section 119.

If the uninsured motorist is both the owner and operator of the motor vehicle at the time of the uninsured's accident, there is no problem; in that case he loses his license and driving privileges as well as his registration tags.

However, where the operator and owner are not the same, a different situation arises. We feel that, if the uninsured operator is not the owner, then he loses only his license and driving privileges. If he is the owner and not

the operator, he loses only the registration tags for that vehicle. We think that a reading of the entire Section 174 leads to this inescapable conclusion.

In Section 174 (a) the legislature stated, ". . . the suspension or revocation shall not be removed, nor the license, privileges, or registration, restored, nor shall any new license or privileges be issued or granted to, or registration be permitted to be made by, that person until he has . . .".

Section 174 (b) states, ". . . and in such case such person's driver's license, or his driving privileges, or registration certificates, if the same have been suspended or revoked, or have expired, may be restored or renewed."

Section 174 (c) continues to say, ". . . suspend such person's driver's license, or driving privileges or registration certificates until the amount of his indebtedness to the fund has been repaid in full . . .".

We think the word "or" is the key word interpreting this legislation. "Or" is generally used in the disjunctive sense rather than the conjunctive sense, and we believe that it was so used by the Legislature when this statute was enacted.

Therefore, it is our opinion that the Unsatisfied Claim and Judgment Fund should not request the Financial Responsibility Section to pick up both the driver's license and tags unless the individual has lost both of them under the provisions of Article 66½, Section 122.

FRANCIS B. BURCH, *Attorney General.*

WILLIAM E. BRANNAN, *Asst. Attorney General.*

N. BARTON BENSON, JR., *Spec. Asst. Attorney General.*

WATERS OF THE STATE

WATER RESOURCES, DEPARTMENT OF OR ITS AGENTS—MUST FIRST OBTAIN A WARRANT BEFORE MAKING A SEARCH OF PRIVATE PROPERTY FOR THE PURPOSE OF INSPECTING CONDITIONS RELATING TO THE POLLUTION OF WATER, UNLESS THE CONSENT OF THE PROPERTY OWNER IS OBTAINED, OR UNLESS AN EMERGENCY SITUATION EXISTS.

January 21, 1969.

Mr. Paul W. McKee, Director.

You have recently requested our opinion as to the constitutionality of the right-of-entry provision of the Water Resources Law. The pertinent provision which is contained in Section 24 (b) of Article 96A of the Annotated Code of Maryland (1957 Edition, as amended), provides:

> "The Department or any agent authorized by it to represent the Department shall have the right to enter at all reasonable times in or upon any private or public property for the purpose of inspecting and investigating conditions relating to the pollution of any waters of the State."[1]

In *Camara v. Municipal Court*, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 and *See v. Seattle*, 387 U.S. 541, 18 L. Ed. 2d 943, 85 S. Ct. 1737, the Supreme Court of the United States re-examined administrative inspection programs in light of Fourth Amendment rights as those rights are enforced against the States through the Fourteenth Amendment.

In *Camara*, the appellant refused to permit a warrantless inspection of his residence by San Francisco housing inspectors acting pursuant to the following Code provision:

> "Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon pre-

> sentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

The Fourth Amendment provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Court recognized that the basic purpose of the Fourth Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by government."

In translating the abstract prohibition against "unreasonable searches and seizures" into workable guidelines, the Court has consistently followed the governing principle that except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant. *Stoner v. California,* 376 U.S. 483; *U. S. v. Jeffers,* 342 U.S. 48; *McDonald v. U. S.,* 355 U.S. 451. However in *Frank v. Maryland,* 359 U.S. 360, the Court upheld the conviction of one who refused to permit a warrantless inspection of a private premises for the purpose of locating and abating a suspected public nuisance. In *Camara,* the Court expressly overruled *Frank* to the extent that it sanctioned such warrantless inspections.

In speaking for the *Camara* majority, Mr. Justice White stated:

> ". . . administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional

> safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank v. Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections."

In *See*, the appellant refused to permit a representative of the City of Seattle Fire Department to enter and inspect his locked commercial warehouse without a warrant. After he refused the inspector access, the appellant was convicted of violating the following Code provision:

> "*Inspection of Building and Premises.* It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards."

The only question presented in *See* was whether *Camara* applies to similar inspections of commercial structures which are not used as private residences.

In *Go-Bout Importing Co. v. U. S.*, 282 U.S. 344; *Amos v. U.S.*, 255 U.S. 313, and *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385, the Court had previously refused to uphold otherwise unreasonable criminal investigative searches merely because commercial rather than residential properties were the object of the police intrusions.

In speaking for the *See* majority, Mr. Justice White stated:

> ". . . we see no justification for so relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimum physical standards for commercial premises. As we explained in *Camara*, a

search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant."

The Court concluded that:

". . . administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure. We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product. Any constitutional challenge to such programs can only be resolved, as many have been in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness. We hold only that the basic component of a reasonable search under the Fourth Amendment—that it not be enforced without a suitable warrant procedure—is applicable in this context, as in others, to business as well as to residential premises * * *."

As the Court pointed out in *Camara,* most individuals allow inspections of their property without a warrant. As a practical matter, therefore, warrants should normally be sought only after entry is refused.

Similarly, the requirement of a warrant procedure does

not suggest any change in a procedure of authorizing entry, but not entry by force, to inspect.

Likewise, in light of the emphasis given the controlling standard of reasonableness, nothing in *Camara* and *See* is intended to prevent prompt inspections, even without a warrant, in emergency situations. *North American Cold Storage Co. v. City of Chicago,* 211 U.S. 306; *Jacobson v. Massachusetts,* 197 U.S. 11; *Kroplin v. Truax,* 119 Ohio St. 610, 165 N.E. 498.

Our conclusion from the above is that the subject provision of Section 24 (b) of Article 96A would not be constitutionally sustainable.

FRANCIS B. BURCH, *Attorney General.*

THOMAS M. DOWNS, *Spec. Asst. Attorney General.*

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[1] Section 27 of Article 96A provides: "Any person found guilty of violating any duly authorized rule, regulation or order of the Department shall be deemed guilty of a misdemeanor and upon conviction thereof, each violation shall be punished by fine of not more than five hundred dollars ($500.00) and costs of prosecution, or by imprisonment in the discretion of the court. Each day, upon which a violation of the provisions of this subtitle shall occur, may be deemed a separate and additional violation for the purpose of this subtitle. It shall be the duty of the Attorney General of the State of Maryland to take charge of and prosecute all cases arising under the provisions of this subtitle, including the recovery of penalties.

WATERS OF THE STATE—MARYLAND PORT AUTHORITY—SUPPLEMENTAL OPINION TO 52 O.A.G. 324—CONCLUSION IN 52 O.A.G. 324 DEALING WITH THE EXTENT OF THE RIGHTS GRANTED RIPARIAN OWNERS UNDER THE ACT OF 1862 LIMITED TO THE EXERCISE OF THOSE RIGHTS IN THE HARBOR OF BALTIMORE BY THE MARYLAND PORT AUTHORITY.

November 28, 1969.

Mr. Joseph L. Stanton.

By opinion dated August 4, 1967, now reported in 52 Opinions of the Attorney General 324, I advised you that the Maryland Port Authority may make improvements into the waters for purposes of expanding and improving Port facilities. My conclusion, in part, was based upon Sections 45 and 46 of Article 54 of the Annotated Code of Maryland (1964 Repl. Vol.), which is often referred to as the Act of 1862, and the cases of *Goodsell v. Lawson,* 42 Md. 348 (1875) and *Hodson v. Nelson,* 122 Md. 330 (1914). I cited the *Goodsell* case in connection with holding by the Court of Appeals that when improvements are made by filling in the waters in front of a riparian owner's land, such improvements belong to him as an incident of his estate, and I cited the *Hodson* case in connection with the holding by the Court of Appeals that the title to the land under water is in the State until the riparian owner exercises his right to reclaim such land by making improvements into the water in front of his original land.

I further noted in my opinion that this office had previously questioned the propriety of filling riparian land for a purpose that was not incidental to or connected with the riparian use of the property in 50 Opinions of the Attorney General 452. I then stated at page 327 that the objections which were raised in 50 Opinions of the Attorney General 452 were not applicable to your opinion request for two reasons. First, I observed that the professed purpose of the Authority in purchasing the property, which was the

subject of your opinion request, was to add additional pier space to existing property. Such an improvement would clearly be incidental to or connected with the riparian use of the property. Second, I referred to the legislative intent in establishing the Authority and setting out its purposes and functions, which is a program of long range port development.

However, at page 329 I stated by way of conclusion that there was a right to fill the water in front of a riparian owner's property under the applicable laws to the specific question. Any statements in that conclusion which might appear to have general applicability were not intended as such, but were intended solely to relate to the specific circumstances and facts there in question, namely, the rights of a riparian owner in the area of the Baltimore harbor. These rights, as they apply to the Baltimore harbor area, have been defined for over two hundred years in light of a unique public purpose to be attained and thus historically they have acquired a statutory and case background which does not have general application.

The reason for this supplementation to my Opinion of August 4, 1967, is to make clear that insofar as it dealt with the extent of the rights granted riparian owners under the Act of 1862 it was limited to the exercise of those rights in the harbor of Baltimore by the Authority for the specific property in question and it was not intended as an explanation of the rights granted riparian owners in general under the Act of 1862.

FRANCIS B. BURCH, *Attorney General.*

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