

a Jew," and the 1867 Constitution erased any distinction between Christian and Jew, the requirement now being only a "belief in the existence of God." The 1867 Constitution also was the first in Maryland to deny the legislature the power to prescribe other tests; it was the "Reconstruction Convention" of 1867 which voiced solid opposition to the so-called "loyalty oaths."¹²⁴

Article 37, however, was still not fully in line with the third clause of Article VI of the federal Constitution (prohibiting *any* religious tests for government officers). Thus, in 1961 the Supreme Court found Maryland's Article 37 to be unconstitutional.¹²⁵

Article 38

Once called the second most important provision of the Declaration of Rights,¹²⁶ Article 38 has engendered a great deal of litigation. The Article is analogous to the old British mortmain statutes, designed to prevent the Church from accumulating property in perpetuity.¹²⁷ Every transfer of property

¹²⁴ NILES, *supra* note 90 at 55. See also *Brice v. Davidson*, 91 Md. 681, 690, 48 A.52 (1900). The legislature has prescribed as a form of oath: "In the presence of Almighty God, I do solemnly promise or declare . . ." Md. CODE ANN., art. 1, §10 (1957).

¹²⁵ *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680 (1961). See APPENDIX III, VI (notes 9, 12).

¹²⁶ NILES, *supra* note 90 at 56-57. Only one other state, Mississippi, has a similar constitutional provision. (MISS. CONST. art. XIV, §270).

¹²⁷ *Vansant v. Roberts*, 3 Md. 119, 128 (1852). Foreign religious corporations are not included within the scope of this Article. A gift to a minister as an individual (and not as a cleric) does not violate the Article. *Church Extension v. Smith*, 56 Md. 362, 391 (1881). Any deed of under five acres does not need the legislature's sanction. *Zion Church v. Hilken*, 84 Md. 170, 35 A.9 (1896).

to a clergyman or religious institution was voided unless expressly sanctioned by the General Assembly. With the exception of several minor changes in language, Article 38 (in 1776, Article 34; in 1851, Article 35) remained intact until 1948, when it was virtually repealed. After having been twice rejected by the voters (in 1942¹²⁸ and 1944¹²⁹), a proviso clause was inserted in 1948 to negate the requirement of legislative sanction, thereby making gifts to the church valid.¹³⁰

Article 39

Article 39 prescribes the manner in which oaths are to be administered. Its language in the present (1867) Constitution is identical to the two immediate predecessors, the Constitutions of 1864 and 1851 (Articles 36). The only difference between these and the corresponding provision of the 1776 Declaration of Rights (Article 26) is that the latter contained additional clauses which, first, allowed certain denominations such as the Quakers to make a "solemn affirmation" in place of the oath and, second, excluded the same sects from acting as witnesses in cases involving capital offenses. Various acts of 1795 and 1798 amended the Constitution to remove these disabilities.¹³¹

While the validity of Article 39 under the federal Constitution has never been specifically tested, the recent Supreme Court cases yield a strong implication of that provision's unconstitutionality.

THE RECENT CASES

A series of cases originating in Maryland and involving the interpretation of

¹²⁸ Md. Laws of 1941, ch. 716.

¹²⁹ Md. Laws of 1943, ch. 320.

¹³⁰ See APPENDIX IV, VI (note 7).

¹³¹ NILES, *supra* note 90 at 375. See APPENDIX V, VI (note 13).