ANNUAL REPORT

AND

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

MARYLAND

1970

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 Superseded by Carroll.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Plater I of St. Mary's County (Prot.), appears as acting Attorney General, for the crown, as early as 23 April 1691; superseded by Wynne.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

[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, 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
Henry R. Lord
Richard G. McCauley
Donald Needle
Wilbur E. Simmons, Jr.

CRIMINAL DIVISION—

James L. Bundy
Robert A. DiCicco
H. Edgar Lentz
James G. Klair
Alfred J. O'Ferrall, III
Gilbert Rosenthal
Francis X. Pugh
Clarence W. Sharp
John P. Stafford, Jr.
Donald R. Stutman
T. Joseph Touhey
James F. Truitt

BALTIMORE CITY POLICE DEPARTMENT—Headquarters—

Bernard L. Silbert

CONSUMER PROTECTION AND ANTITRUST DIVISIONS—

Norman Polovoy.....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 J. Glusing, Jr.
G. Darryl 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
Lee Stuart Thomson

Home Improvement Commission—
James Ehrhart

Insurance—
Murray K. Josephson

Motor Vehicles—
N. Barton Benson

General Services—
Allan S. Levy

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

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 C. Cicone
Walter W. Claggett
Herbert L. Cohen
James E. Fannon, Jr.
Thomas S. Glass
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 and Uninsured Employers Fund
Albert A. Levin
William H. Kable
W. Kennedy Boone, III
William R. Levasseur

ANNUAL REPORT FOR 1970

January 1, 1971

Honorable Marvin Mandel
Governor of Maryland
State House
Annapolis, Maryland

DEAR GOVERNOR MANDEL:

I am submitting to you the report of the proceedings and activities of the State Law Department for the period beginning January 1, 1970 and ending December 31, 1970, as provided by Section 10 of Article 32A of the Annotated Code of Maryland (1971 Replacement Volume).

The volume of work of the State Law Department in writing opinions and briefs, preparation of pleadings, appearances in court and approval of legislation continues to grow with the expansion of the role of State Government in providing for the needs of our citizens. In addition, citizen interest in State Government has become more involved and this increased activity results in increased demands upon the Department.

The 1970 substantial progress was made in revamping the structure of the Executive Department by combining many of the State boards and agencies under major departments headed by secretaries responsible to you for all matters assigned to their respective departments. As legal advisor to these departments I was charged by law with the responsibility for assigning an Assistant Attorney General to each department and designating one Assistant Attorney General as counsel to the department. Thus, there has been

a significant increase in the number of assistants serving outside of the State Law Department.

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

Supreme Court of the United States		51*
*(includes Petitions for Certiorari)		
United States Court of Appeals for the Fourth Circuit		110
United States District Court for the District of Maryland		198
Court of Appeals of Maryland—		
September Term, 1970		
Civil Appeals	25	
Criminal Appeals	23	
Post conviction	2	
Miscellaneous Docket (Petitions for Certiorari)	325	
Total		375
Court of Special Appeals of Maryland—		
September Term, 1970		
Criminal Appeals Docketed	593	
Post Conviction	3	
Total		596
Cases in Lower Courts		84
Maryland Tax Court Cases	539 Closed in 1970 573 Filed in 1970	
Department of Employment Security	58 Circuit Courts and Baltimore City	
State Accident Fund	274 Circuit Courts and Baltimore City	

This summary of the Department's case load does not include the litigation activity of many of the Special Assistant

Attorneys General and Special Attorneys who are assigned to departments and agencies other than the State Law Department. The extent of their activity during 1970 is illustrated by the statistics for the following departments and agencies: The Special Attorneys for the Department of Health and Mental Hygiene were involved in 95 civil cases in the Circuit Courts of the State and 4 cases in the United States District Court for the District of Maryland. The Special Attorneys representing the Uninsured Employers' Fund of the Workmen's Compensation Commission appeared in 492 scheduled cases before the Commission and 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 462 cases, 37 of which were appealed, and the Special Attorney representing the Department of Motor Vehicles was involved in 144 civil cases in the Circuit Courts of the State.

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 General Services and/or the Department of Budget and Procurement were examined by this Department for legal sufficiency, as well as deeds and agreements submitted by the Board of Public Works, and similar documents submitted by other departments in which the State had an interest. All rules and regulations were required to be approved by the Department as to legality before being filed with the State departments indicated by statute.

The regular session of the General Assembly convened on January 21, 1970 and adjourned on March 31, 1970. The Annapolis office of the Attorney General during the Session was in the charge of Mr. James F. Truitt, Jr. although Deputy Attorney General Robert F. Sweeney and I, together with one or more of my staff were available to advise and consult with members of the General Assembly and other officials of State Government having an interest in proposed legislation.

In January 1970 I attended the Maryland State's Attorneys Association Conference in Baltimore together with Mr. Edward F. Borgerding, Chief of the Criminal Division, and other members of the Criminal Division. In February of 1970 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. In April I attended the Executive Committee Meeting of the National Association of Attorneys General in San Francisco, California, and with Mr. Borgerding attended the Conference of Southern Attorneys General in Gatlinburg, Tennessee. In June, together with Assistant Attorney General Alfred J. O'Ferrall I attended the 64th Annual Meeting of the National Association of Attorneys General in St. Charles, Illinois, at which I was elected President of the Association for a period of one year. In July I attended the United States Attorney General's Conference of Chief Law Enforcement Executives in Williamsburg, Virginia, and in September I attended a meeting of the Executive Committee of the Council of State Governments in Atlanta, Georgia. In the middle of November I hosted an Executive Committee Meeting of the National Association of Attorneys General in Baltimore and in the latter part of November Mr. Polovoy and I attended a meeting of the Governing Board of the Council of State Governments in Las Vegas, Nevada. In December I participated in a meeting of the Committee on the Office of Attorney General, a committee of the National Association of Attorneys General, in Denver, Colorado.

The Consumer Protection Division was three years old on June 1, 1970. Complaints, inquiries and requests for assistance number approximately 2,000 per year and come from citizens throughout the entire State. In August 1970, the Division embarked upon a comprehensive program of studying antitrust problems in Maryland which led to the preparation of a model antitrust bill which was subsequently presented to the Legislative Council.

The Division has expanded its federally sponsored work-study program, increasing the number of students from the

University of Maryland School of Law, the University of Baltimore School of Law, Johns Hopkins University and Morgan State College, who help the Division handle its case load. I continue to be impressed with these hardworking students who handle many of the day-to-day problems of the Division, and I have had the satisfaction of seeing several of them, as a result of their experience in the Division, decide to make careers in State government service.

Several significant laws were enacted by the Maryland Legislature in 1970 which directly affected the Maryland consumer. One was the Home Solicitation Sales Act which provided a 72 hour cancellation right in cases where a consumer credit contract was solicited at the residence of the buyer. Another law enacted by the Legislature, which had as its objective verification of automobile mileage, made illegal the turning back of the automobile's odometer.

We have continued to work with the State's Attorneys of Maryland in reviewing developments in the field of criminal law and in advocating new legislation to combat and control criminal activity.

In the Civil Division, several of the Assistants have worked with special committees and committees of the General Assembly in helping to prepare and implement legislation that affects the departments which they represent.

A detailed financial statement of the State Law Department for the fiscal year beginning July 1, 1969 and ending June 30, 1970, is included herewith.

The work of this office continues to be challenging and interesting. There are many perfunctory legal duties that must be performed, but more and more I find that our work is directly involved with the forces of social change ranging from civil rights and consumerism to the problems of pollution and conservation. Finally, I wish to express my appreciation to you for your courtesy and cooperation during the past year.

Sincerely,

Francis B. Burch,
Attorney General.

Financial Statement Of The State Law Department
For The Fiscal Year Beginning July 1, 1969
And Ending June 30, 1970

Appropriations and Budget Credits

Program .01	$784,436.54
Program .02	1,048.00
Program .03	1,370.00
Program .04	68,705.00
Program .05	94,585.48
	$950,145.02

Program .01

Legal Counsel and Advice:	
Appropriation	$781,529.00
Appearance Fees	250.50
Budget Credits	2,907.54
	$784,687.04
Appearance Fees turned into State Treasury	250.50
Net Appropriation plus budget credits	$784,436.54

Salaries:		
Attorney General	$ 20,000.00	
Deputy Attorney General	26,986.00	
Assistant Attorney General III (3)	46,166.00	
Assistant Attorney General II (15)	249,002.00	
Special Attorney IV (Part salary)	8,387.00	
Special Attorney III (4)	55,456.00	
Administrative Assistant, State Law Department	13,417.00	

Administrative Assistant II (4)	25,414.00	
Stenographer, Law and Legislative (13)	111,178.00	
Salaries	$556,006.00	
Expenses (Exclusive of Salaries):		
Technical and Special Fees	$ ——	
Communications	28,298.00	
Travel	12,315.00	
Motor Vehicle Operation and Maintenance	3,927.00	
Contractual Services	85,283.00	
Supplies and Materials	5,233.00	
Equipment—Replacement	5,452.00	
Equipment—Additional	12,796.00	
Fixed Charges	70,281.00	
Total Operation Expenses	$223,585.00	
Salaries	556,006.00	
Total Expenditures		$779,591.00
Original General Fund Appropriation		$676,258.00
Transfer of General Fund Appropriation		105,271.00
Total General Fund Appropriation		$781,529.00
Less: General Fund Reversion		1,938.00
Net General Fund Expenditure		$779,591.00

Program .02

Subversive Activities Control: Appropriation	$ 1,048.00

Expenses:		
Contractual Services	$ 1,040.00	
Total Expenditures		$ 1,040.00
Original General Fund Appropriation		$ 1,538.00
Transfer of General Fund Appropriation		—490.00
Total General Fund Appropriation		$ 1,048.00
Less: General Fund Reversion		8.00
Net General Fund Expenditure		$ 1,040.00

Program .03

Sundry Claims Board:		
Appropriation		$ 1,370.00
Expenses:		
Contractual Services	$ 1,370.00	
Total Expenditures		$ 1,370.00
Original General Fund Appropriation		$ 2,000.00
Transfer of General Fund Appropriation		$ —630.00
Total General Fund Appropriation		$ 1,370.00
Less: General Fund Reversion		none
Net General Fund Expenditure		$ 1,370.00

Program .04

Division of Securities:		
Appropriation		$ 68,705.00
Salaries:		
Securities Commissioner	$ 13,100.00	

Assistant Securities Commissioner	18,710.00	
Assistant Attorney General II	16,772.00	
Stenographer, Law and Legislative	6,870.00	
Secretary II	5,183.00	
Salaries	$ 60,635.00	
Expenses (Exclusive of Salaries):		
Communications	$ 2,169.00	
Travel	828.00	
Contractual Services	1,830.00	
Supplies and Materials	1,625.00	
Equipment—Additional	835.00	
Fixed Charges	641.00	
Total Operation Expenses	$ 7,928.00	
Salaries	60,635.00	
Total Expenditures		$ 68,563.00
Original General Fund Appropriation		$ 65,618.00
Transfer of General Fund Appropriation		3,087.00
Total General Fund Appropriation		$ 68,705.00
Less: General Fund Reversion		142.00
Net General Fund Expenditure		$ 68,563.00

Program .05

Division of Consumer Protection:		
Appropriation		$ 94,553.00
Budget Credits		32.48
Appropriation plus Budget Credits		$ 94,585.48

Salaries:		
Chief, Consumer Protection Division	$ 21,500.00	
Assistant Attorney General II	16,561.00	
Investigator, Consumer Protection (2)	13,029.00	
Stenographer, Law and Legislative	7,564.00	
Secretary II (2)	11,693.00	
Salaries	$ 70,347.00	
Expenses (Exclusive of Salaries):		
Communications	$ 3,360.00	
Travel	3,226.00	
Motor Vehicle Operation and Maintenance	913.00	
Contractual Services	3,568.00	
Supplies and Materials	606.00	
Equipment—Additional	3,167.00	
Fixed Charges	9,066.00	
Total Operation Expenses	$ 23,906.00	
Salaries	70,347.00	
Total Expenditures		$ 94,253.00
Original General Fund Appropriation		$ 90,584.00
Transfer of General Fund Appropriation		3,969.00
Total General Fund Appropriation		$ 94,553.00
Less: General Fund Reversion		300.00
Net General Fund Expenditure		$ 94,253.00

SUMMARY

Total Net Appropriations and Budget Credits		
Program .01	$ 784,436.54	
Program .02	1,048.00	
Program .03	1,370.00	
Program .04	68,705.00	
Program .05	94,585.48	
Total		$ 950,145.02
Total Expenditures		
Program .01	$ 779,591.00	
Program .02	1,040.00	
Program .03	1,370.00	
Program .04	68,563.00	
Program .05	94,253.00	
	$ 944,817.00	
Budget Credits	2,940.02	
	$ 947,757.02	
Total Reversion to State Treasury	2,388.00	
		$ 950,145.02

OFFICIAL OPINIONS

of the

ATTORNEY GENERAL of MARYLAND

ALCOHOLIC BEVERAGES

RULES AND REGULATIONS—BALTIMORE CITY LIQUOR BOARD HAS POWER TO PASS RULE PROHIBITING CREDIT IN CERTAIN CLASSES OF LICENSEES AND SUCH RULE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

September 16, 1970.

Mr. James L. McCully, Chairman.

We have your letter of August 6, 1970, requesting our opinion as to the legal sufficiency of proposed Rule 4.22 of the Board of License Commissioners for Baltimore City. The proposed rule provides as follows:

> "No licensee shall sell or charge any alcoholic beverage on credit, credit card, running account, or any other method of delayed payment except in the case of a bona fide restaurant Class 'B', package goods establishment Class 'A', or bona fide Club Class 'C'. Such exception shall be withdrawn in the event of abuse of the privilege."

The legality of proposed Rule 4.22 rests upon whether the Board is vested with the legal power to pass such a rule and whether the rule is compatible with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Section 184 of Article 2B of the Annotated Code of Maryland provides for the various boards of license commissioners to have full power and authority to adopt such reasonable rules and regulations as they may deem necessary to enable them effectively to discharge the duties imposed upon them by Article 2B. In Section 1 of Article 2B the Legislature has declared as the policy of the State that it is necessary to regulate and control the manufacture, sale, distribution, transportation and storage of alcoholic beverages within this State. It has further declared its intent that the various local boards of license commissioners be empowered with sufficient authority to admin-

ister the provisions of Article 2B and that the restrictions, regulations, provisions and penalties contained in Article 2B are for the "protection, health, welfare and safety of the people of this State." The licensing authorities have been vested with broad discretion to administer the alcoholic beverage law, an enactment passed by the Legislature in the exercise of the police power of the State. Accordingly, we believe that the Board may promulgate a rule limiting the use of credit in the sale of alcoholic beverages upon a finding that credit sales have created unwholesome or undesirable conditions in certain areas of the alcoholic beverage business contrary to the welfare of the public.

The second facet of consideration is whether the proposed rule makes a reasonable classification. In *McGowan v. Maryland,* 366 U.S. 420 (1961), the United States Supreme Court upheld a Maryland statute which exempted certain retailers from a Sunday closing law and held that the Fourteenth Amendment permitted the States wide discretion in enacting laws which affect some groups of citizens differently than others. The Supreme Court stated that the constitutional safeguard of the Fourteenth Amendment is offended only when the classification rests on grounds that are wholly irrelevant to the achievement of the State's objective and that there is a presumption of constitutionality in enacted legislation notwithstanding the fact that in practice such legislation may result in some inequality. Thus, a statutory discrimination will not be struck down if justified by the facts.

The broad police powers of the State in the area of alcoholic beverages and the State's duty to preserve the health, safety and welfare of its citizens support and sustain the power of the Board of License Commissioners as the State's delegated agency to promulgate a rule prohibiting sales on credit by certain classes of licensees while authorizing such sales by others. Thus, we believe that the proposed Rule does not offend the Equal Protection Clause of the Fourteenth Amendment if the facts support a conclusion that the classification made by the Board is reasonable.

There have been instances where a state or a liquor board has imposed restrictions on the giving of credit by wholesalers. In *Press Liquors v. Weakley,* 317 F. 2d 135 (U.S.C.D. D.C., 1963) (reversed on other grounds), the United States Court of Appeals for the District of Columbia upheld a regulation of the Alcoholic Beverages Control Board of the District of Columbia prescribing the terms upon which credit could be extended to retailers by wholesalers and manufacturers, and in *Weisberg v. Taylor,* 100 N.E. 2d 748 (S.C. Ill. 1951) the Supreme Court of Illinois upheld an Illinois statute which imposed credit restrictions on beer dealers without imposition of similar restrictions on dealers of other alcoholic beverages in light of certain recurring evils peculiar to the beer industry.

The provision of the proposed regulation, that the credit privilege "shall be withdrawn in the event of abuse of the privilege", gives us some difficulty in that it does not appear to sufficiently inform the licensees affected by the regulation of the standards to which they will be held accountable. There are no guidelines or criteria by which these licensees may know with certainty when they have offended the provision against "abuse" or what they must do to avoid violation of the proposed rule. On the face of the regulation "abuse" is whatever the Board, in its collective wisdom, may determine it to be. The Board has wide discretion in the formulation of rules and regulations, but the failure to provide any guidelines by which conduct intended to be proscribed may be measured raises the possibility that the provision may be overbroad. However, in view of the fact that the license law is an exercise of the police power of the State, great flexibility is necessarily conferred upon the administrative officers who are charged with the duty to carry out the legislative intent. We suggest that the proposed rule be administered so as to clearly inform licensees suspected of credit abuse within the meaning of the regulation of the facts upon which the charges are based and afford them the opportunity to show cause why the credit privilege should not be withdrawn for violation of the rule.

Accordingly, it is our opinion, for the reasons stated hereinabove, that the Board of License Commissioners for Baltimore City is empowered to promulgate proposed Rule 4.22 and that such rule will not offend the Equal Protection Clause of the Fourteenth Amendment if the Board finds that the facts reasonably justify the promulgation of the Rule after the Board has given due notice of its intended action, and afforded interested persons the opportunity to submit their views at a hearing.

FRANCIS B. BURCH, *Attorney General.*

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

BANKS AND BANKING

BANK COMMISSIONER—INTERPRETATION OF ARTICLE 11, SECTIONS 71 AND 72—LENDING INSTITUTION'S RIGHT TO PARTICIPATE IN A LIMITED PARTNERSHIP.

January 14, 1970.

Mr. William Graham.

We have your recent letter requesting our advice with respect to the interpretation of Section 71 of Article 11 of the Annotated Code of Maryland (1968 Replacement Volume); and whether the participation of a trust company, operating under State law, in a limited partnership proposed to be formed between it and certain individuals, would bring the trust company into violation of Article 11, Section 72 of the Annotated Code of Maryland (1968 Replacement Volume), which prohibits banking institutions from having affiliates or closely allied corporations. Particularly, the questions with which you are concerned, involve the following facts:

The bank has entered into a limited partnership agreement with three individuals. The bank and one of the individuals are limited partners, while the two other individuals are general partners. The limited partnership has been formed for the stated purpose of leasing certain property and constructing a banking and office building thereon, and for the purpose of operating and managing said building. The three individuals had negotiated the basic terms of the land lease prior to the time at which it was agreed that the bank would become a limited partner in the venture. The partnership is to continue until October 15, 1993, but will be dissolved and terminated prior to such date in the event that the partnership disposes of substantially all of its interests in the property heretofore referred to. The division of the profits and losses of the partnership are to be in proportion to the respective original capital contributions of the partners, provided that the limited partners

shall not be liable for losses of the partnership in excess of their capital contribution. On this basis, the bank has a 51% interest in profits and losses, the individual limited partner has a 15% interest therein, and the two general partners each have a 17% interest.

Paragraph 11 of the Limited Partnership Agreement provides that, "The Limited Partners shall take no part in the conduct or control of the Partnership's business and shall have no right or authority to act for or bind the Partnership." None of the three individual partners is an officer, director or employee of the bank.

The partnership proposes to enter into a lease for the premises (on which the building is to be constructed) for a term of sixty years, with the right of the partnership, upon expiration of the forty-fifth year, to renew such lease for an additional term of forty-five years, upon the condition that the partnership demolish the then existing improvements and erect thereon comparable new improvements. In the event that such option to renew is not exercised, upon the expiration of the initial sixty-year term of the lease, the partnership has the option to renew the lease for an additional sixty-year term.

The bank proposes to enter into a sublease with the partnership for an initial thirty-year term, renewable for three additional five-year terms. The premises covered by the sublease consists of major portions of the first and second floors of the building, together with a drive-in banking facility and certain designated parking areas. It is proposed that the bank will guarantee, under certain circumstances, payment of 75% of the rental under the lease. In the event a payment is required pursuant to such guarantee, which is not reimbursed within 30 days, at the election of the bank, the partnership will assign its interests in the lease to the bank, which event will cause a dissolution of the partnership.

The bank has agreed to provide construction financing for the building, to be secured by a Deed of Trust on the

leasehold interest of the partnership, including improvements, payable over a 30-year period.

Section 71, of Article 11 of the Code provides:

> "(a) In General.—A bank or trust company may purchase, hold and convey real estate for the following purposes only:
>
> "(b) Necessary for convenient transaction of business; limitation.—First. Such as shall be necessary for the convenient transaction of its business, including, with its banking offices, other apartments in the same building, or on adjoining land, to rent as a source of income, and a plot whereon parking accommodations are, or are to be, provided, with or without charge, primarily for its customers, provided, however, that not more than fifty (50%) percent of its unimpaired capital and surplus may be invested in its banking building, offices, furniture and fixtures by any bank or trust company; . . ."

Taking first the question of whether the proposed sublease between the partnership and the bank is violative of Article 11, Section 71 of the Code, we find that the provisions of the sub-lease do not call for anything which is prohibited by Article 11, Section 71 of the Code.

Turning next to the question of whether the actions of the bank are violative of Article 11, Section 71 because of the bank's dual capacity as a limited partner in a partnership formed to construct an office building in which it will maintain branch banks, and as the lending institution which will provide the construction financing for the building, we believe that this arrangement falls within the recognized limits of this Section, provided that not more than 50% of the bank's unimpaired capital and surplus are invested in said venture.

However, we note that should the sub-lease expire after the initial term, without a renewal by the bank, then the

participation of the bank in the partnership would present legal problems in light of Article 11, Section 71 in that the bank would have an interest in an office building in which it did not maintain a branch for the carrying on of its banking business.

You have also asked our opinion as to whether the above arrangement is violative of Article 11, Section 72 of the Annotated Code of Maryland (1968 Replacement Volume).

Article 11, Section 72 provides, in part:

> "It shall be unlawful for any banking institution doing business under this article to have any affiliate, affiliates or closely allied corporation or corporations, subject to the exceptions hereinafter provided.
>
> "The terms 'affiliate' and 'closely allied corporation' as used in this section shall be construed to include any corporation, business trusts, association, or other similar organization:
>
> "(1) Which a banking institution controls by one of the following methods:
>
> "(i) Owns or controls, directly or indirectly, either a majority of the voting shares or more than 50 per centum of the number of shares voted for the election of its directors, trustees, or other persons exercising similar functions at the preceding election, or controls in any manner the election of a majority of its directors, trustees or other persons exercising similar functions; or
>
> "(ii) Controls, directly or indirectly, through stock ownership or in any other manner, by the shareholders of such banking institution who own or control either a majority of the shares of such banking institution or more than 50 per centum of the number of shares voted for the election of directors of such banking institution at the preceding election, or by trustees for the benefit of

the shareholders of any such banking institution; or

"(iii) A majority of its directors, trustees or other persons exercising similar functions are directors of any such banking institution; or

"(2) Which controls one or more banking institutions by one of the following methods:

"(i) Owns or controls, directly or indirectly, either a majority of the voting shares of one or more banking institutions or more than 50 per centum of the number of shares voted for the election of the directors, trustees, or other persons exercising similar functions of one or more banking institutions at the preceding election; or

"(ii) Controls in any manner the election of a majority of directors, trustees, or other persons exercising similar functions of one or more banking institutions; or

"(iii) For the benefit of whose shareholders all or substantially all the capital stock of one or more banking institutions is held by trustees."

In our opinion to your office in 26 Opinions of the Attorney General, 58, (1941) we interpreted Article 11, Section 72 of the Code to prohibit the fact situation presented therein, because we found that the same group of individuals who controlled the corporation with which the trust company desired to become affiliated, also controlled the last meeting of the trust company's stockholders. We said at that time that this was clearly one of the situations at which the statutory prohibition was aimed.

In 41 Opinions of the Attorney General 91 (1956) we passed on the propriety of an arrangement whereby certain officers of a trust company had acquired title to a tract of land. It was proposed that a corporation be formed to take title to the land, erect thereon a building and secure

the necessary financing. The corporation intended to sell stock to raise the additional capital needed to construct the building. This stock was first to be offered to the trust company's stockholders, and if all the shares were not sold, then the remaining shares were to be offered to the public. In addition, the transaction contemplated that the stock would be issued subject to an option to the trust company to purchase the stock at a price slightly above par, at any time after five years from the issuance of the stock.

We held that the above described fact situation was of a nature that pointed irresistibly to a conclusion that the trust company was seeking to create a corporate entity over which it exercised dominion and control, either directly or indirectly, in a manner prohibited by the Code.

By a letter to you of June 26, 1969, we noted our opinion as to the validity of a joint venture agreement between a Maryland banking association and a Maryland corporation engaged in real estate development. Each party was to have a fifty per cent interest in the joint venture and a fifty per cent investment in it. Two representatives of each of the interested parties were to run the joint venture. The bank was to lease a portion of the property as a branch banking facility.

We held that this arrangement did not contravene Article 11, Section 72 since the bank controlled only one-half, and not more than fifty per cent, of the management of the joint venture, and there were no facts which would go to establish any indirect control by the bank of the directors of the co-venture. We, however, stated that "(i)f, however, it should develop that the bank secures a dominant influence over its co-ventures, whether as an owner or creditor of it or by reason of the ownership by bank officers or directors of a substantial interest in the co-venture, a different situation would, of course, be presented."

After reviewing the above cited opinions and the applicable provisions, it is our opinion that the present contemplated arrangement, which we are here asked to review, is not prohibited by the provisions of Section 72 of the

Code. Although the bank herein has a 51% interest in the profits and losses of the partnership, Paragraph 11 of the Limited Partnership Agreement specifically prohibits the bank from exercising any control over the partnership business. We also note that none of the three individual partners is an officer, director or employee of the bank. See our opinions in 26 Opinions of the Attorney General 58 and 41 Opinions of the Attorney General 91.

It should be pointed out that the bank has not entered into a general partnership agreement, but simply has agreed to become a "limited partner" for the purposes of sharing in the profits and losses of the venture to the extent of its interest.

Assuming that the limited partnership agreement is in conformity with the requirements of Article 73 of the Annotated Code of Maryland (1968 Replacement Volume) entitled "Partnerships-Limited," the agreement prohibits the bank from exercising any control over the partnership business. Thus, the bank has nothing more than an "investment" in the joint venture or limited partnership, *In Re Panitz & Co.*, 270 F. Supp. 448 (D.C., Md. 1967), affirmed 385 F. 2d 835 (4th Cir. 1968).

Of course, if the partnership arrangement herein involved were to be changed, so that the bank became a general partner in the partnership controlling this transaction, our opinion concerning the situation, at that time, might be different from our present position.

Finally, we wish to comment on whether the relationship of the bank as lender of the construction financing creates the sort of "control over the venture" that is contemplated by Article 11, Section 72 (1) (i). We find that the Construction Agreement is of a type normally used in providing construction financing and that the terms thereof do not provide for the control prohibited by the Act.

FRANCIS B. BURCH, *Attorney General.*

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

BANK COMMISSIONERS—ARTICLE 11, SECTION 80, INTERPRETATION THEREOF—ACQUISITION BY A BANK OF ITS OWN STOCK UNDER CERTAIN CIRCUMSTANCES.

September 30, 1970.

Mr. William A. Graham.

Your recent letter refers to a proposed transaction between two state banks, involving the acquisition by Bank A of its own shares of stock, which stock will be used to purchase Bank B. Specifically, you ask whether the purchasing bank "can acquire, on a temporary basis, part of their own stock in order to completely accomplish this plan (of acquisition)."

Article 11, Section 80 of the Annotated Code of Maryland (1968 Replacement Volume) states:

> "No bank or trust company shall hereafter make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and the stock so purchased or acquired shall, within twelve months from the time of its purchase or acquisition, unless the time be further extended by the Bank Commissioner, be sold or disposed of at public or private sale; or, in default thereof, the said bank or trust company shall be regarded as conducting its business in an unauthorized manner, and the Bank Commissioner may take possession of any such institution as receiver in the manner provided by Section 11 of this article; provided, however, that nothing contained in this section shall apply to any shares of capital stock pledged to any bank or trust company prior to April 21, 1933. For the purposes of this section the term 'bank' shall include savings institutions having a capital stock."

We understand that the acquiring state bank (Bank A) has reached an agreement with another state bank (Bank B) whereby Bank A will acquire all of the assets and assume all of the liabilities of Bank B, in exchange for a certain number of shares of Bank A stock. The Bank A stock will be existing stock which the bank proposes to secure from one or more of its present stockholders. Bank A intends to obtain an option from the existing stockholders for the requisite shares, but will not purchase said shares until the time of delivery of said shares is made to Bank B. Thus, Bank A will have title for only that period of time necessary to physically transfer the shares.

Bank B, and its principal stockholders, will make certain warranties to Bank A concerning Bank B's loan accounts, and to secure such warranties will deliver to an escrow agent, appointed by Bank A, a specified number of shares of Bank A stock, which stock had been exchanged for Bank B's assets. If the warranties are fulfilled, the stock will be released to Bank B at the end of two years. To the extent the warranties are breached and Bank A suffers a loss, the escrowed stock will be sold and the proceeds used to compensate Bank A for its loss.

You now ask our opinion as to whether the above outlined transaction would violate the provisions of Article 11, Section 80 of the Code, quoted heretofore.

Article 11, Section 80 of the Code was passed to insure that state banks remain on a sound financial basis, and to prohibit manipulation by the bank of its own stock. Since the plan of acquisition of Bank B would be subject to the approval of your department, pursuant to the provisions of Article 11, we believe that the proposed acquisition by Bank A of its own shares of stock, for the sole purpose of transferring said shares to Bank B, as the means of acquiring said bank, to effect the merger of the two institutions, casts Bank A in the role of a conduit, by which the proposed acquisition may be accomplished, and that such a transaction would not be violative of the spirit and intent of Article 11, Section 80 of the Code.

However, our approval of this transaction is based upon the condition that the option held by Bank A be exercised simultaneously with the transfer of the purchased stock to Bank B, thus assuring that Bank A has title to the purchased stock for no more than the instant necessary to effect the transfer.

FRANCIS B. BURCH, *Attorney General.*

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

BANKS AND BANKING—INTEREST AND USURY, CHAPTER 453, ACTS OF 1968; CODE ARTICLE 49—APPLICABILITY TO LAND SALES; USURY, TIME PRICE SALES.

December 10, 1970.

Mr. William A. Graham.

Your recent letter asks us to pass upon the legality of certain practices of a Maryland corporation in connection with its sales of land. You have indicated that if the buyer elects not to pay the full purchase price, in cash, the parties enter into a "Contract for Deed", which sets out the cash price of the property, the deposit, down payment, and, if the buyer so desires, the amount financed, finance charge, and the total deferred payment price. The seller then conveys the property to the buyer by a fee simple deed. At the same time, the buyer executes to the seller a Deed of Trust and a negotiable Deed of Trust Note, which evidence the total amount owed by the buyer to the seller. Said Deed of Trust specifically states that the ". . . (g)rantor is justly indebted to . . ." the corporation for a certain sum.

Your specific inquiry is whether the described transaction is subject to the interest and usury laws of Maryland (Chapter 453 of the Acts of 1968), codified as Article 49 of the Annotated Code of Maryland (1968 Replacement Volume), so as to restrict the seller to a rate of interest not in excess of the maximum rate provided in Article 49, Section 3 thereof.

As early as 1856 the Maryland Court of Appeals held that a seller could lawfully establish one price for a cash sale and a higher price for a sale on credit, and that the price differential between such cash and credit price was not limited by the provisions of the usury statute and that, in effect, the usury law did not apply to such time price sales.

One of the distinguishing characteristics of a time price sale is that it arises not from a loan of money but a contract

of sale. *Bute v. Bidgood,* 7 B & C 453, 108 Eng. Dep. 702 (1827). The Maryland Court of Appeals, in the case of *Williams v. Reynolds,* 10 Md. 57 (1856) when confronted with the question of whether a contract of sale of a negotiable note was usurious, as a loan of money, stated at 65:

> "To render a contract usurious there must be a loan, either express or implied, and an understanding that the money loaned is to be returned. This is elementary law. In *l'Bouvier's Institutes,* 299, usury is defined as 'the illegal profit which is required by the lender of a sum of money, from the borrower, for its use. To constitute a usurious contract, the following circumstances are requisite; 1, a loan of money; 2, an agreement that the money lent shall be returned at all events; 3, that more than legal interest shall be paid. There must be a loan of money in contemplation of the parties, and if there be a loan, however disguised, it is sufficient; but a bona fide sale of a bill of exchange or promissory note is not usurious, although it may be sold below its value."

The Court in *Williams, supra,* went on to say, at page 65, that even though the note is discounted at a rate in excess of the legal rate of interest, the transaction will still not be considered usurious unless the taint of usury was attached to the original transaction. See also 35 Opinions of the Attorney General 112 (1950). In addition, the Court stated at 67:

> "Although the transfer of a note is inquirable into, that is, whether it be a bona fide sale, or merely a device to evade the statute of usury, and the question submitted to a jury where there are circumstances independent of the transfer to excite suspicion of an intent to evade the statute, yet, there always must be some evidence to justify the court in submitting such inquiry, for, prima facie, the transaction is bona fide."

As we stated in 35 Opinions of the Attorney General

112, 118 (1950), "In such a scrutiny, your Department is the jury about which the Court of Appeals speaks".

The case of *Bailey v. Poe*, 142 Md. 57 (1923), involved a transaction whereby plaintiff, for a nominal consideration, transferred property to defendants subject to a bank mortgage, with an agreement that should the property be sold, defendants were to receive a named sum, was held not to involve a usurious loan, but a sale. The Court stated at 69:

> "The only question to be decided is, was the transaction above outlined a sale or a loan? So far as its form goes, it could be either, and the determination of the question is a matter of intention. *Hopper v. Smyser*, 90 Md. 381.
>
> "The law is well settled, the only difficulty being in its application to the facts of each case. 'The question in all such cases is, what is the real substance of the transaction, and not what color or form it has assumed.' *Rouskulp v. Hershner*, 49 Md. 524."
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> * * *
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> "The character of the transaction must in every case depend on the inquiry, whether the contract is a security for the re-payment of money. If it is, the parties are in the relation of mortgagor and mortgagee; but if it is not, the transaction must take the stamp of a conditional sale. *Hicks v. Hicks*, 5 G & J at p. 86."

In addition, the court noted that it was significant that the owner of the property was not allowed by the buyer to write a clause in the agreement allowing an option to repurchase the property during the life of the agreement.

In *Falcone v. Palmer Ford, Inc.* 242 Md. 487 (1965) the Court of Appeals cited *Hogg v. Ruffner*, 66 U.S. (1 Black) 115, 17 L. Ed. 38 (1861) which recognized the application of the time-price sales doctrine to sales of land; and reaffirmed its decision in *Williams, supra*, that the sale of the paper evidencing a valid time price sale, at a discount, did not constitute usury.

Rothman v. Silver, 245 Md. 292 (1967) held at 299:

> "Maryland, both judicially and legislatively, has agreed that a bona fide sale of goods on credit at a price which is greater than the cash price by an amount in excess of the legal rate of interest on the cash price is not subject to the usury laws because it is not a loan of money but a sale."

In *Rothman,* the Court again cited, with approval, *Hogg, supra,* thus implying that a valid time price sale of realty would be treated the same as a sale of goods as regards the usury statute. See also 15 A.L.R. 3rd, 1065, 1121.

When the *Rothman* case was decided, Article 49, Section 1 (a), defined interest as follows:

> "The term interest as used in this article means any compensation paid by a borrower to a lender for the use of forbearance of money. . ."

Chapter 453 of the Laws of 1968 substantially changed this statutory definition. It amended Article 49, Section 1 (a) in pertinent part, as follows:

> "(a) The term interest as used in this article means any compensation imposed directly or indirectly by a lender for the extension of credit for the use or forbearance of money, including but not limited to loan fees, service and carrying charges, discounts, interest, time-price differentials, investigators' fees and any amount payable under a point, discount, origination fee or other system of additional services except as specifically provided in this section. It is the intention of this article to prohibit 'discounting' or 'add on' or devices of a similar nature."

You now ask our opinion whether such time price sales of land as heretofore noted are subject to Article 49, in view of the passage of Chapter 453 expanding the definition of interest to include time price differential.

In the subject transactions, the seller offers real estate at a cash price that is due and payable simultaneously with the tender of a deed to the property. It also makes an offer at a higher deferred payment price, allowing the buyer to decline to pay cash and agree to time payments at the higher price. In either case title is conveyed to the buyer by deed upon his acceptance of the offer. The differential between the cash and credit price is clearly in consideration of the seller's extension of the time in which the buyer must pay the balance of the purchase price. The tangible instruments of this extension are the deed of trust and the note that the seller takes back upon the conveyance of title. It is implicit in the buyer's election between cash and credit that there is a request for, and a promise of, an extension of time within which to pay the balance of the purchase price. The seller's price for his willingness to wait for payment that is due upon transfer of title is the difference between the cash payment and the time payment.

In 53 Opinions of the Attorney General 58 (November 21, 1968), we stated, in reviewing Chapter 453:

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

"We think that the terminology used is limited to the actual lending of money which is specifically dealt with in the Act and that references to service and carrying charges, time-price differentials, investigators' fees and add on devices were intended to cause the definition of 'interest', as applied to loan situations, to embrace every conceivable compensation to lenders who had previously disguised interest charges by the use of nomenclature more appropriate to the laws relating to charges on time sales and regulated loans under the Small Loan Law or the Industrial Finance Law. It seems to be a hallmark of a usurer to disguise the reality by the employment of inapt but impressive verbiage, and such a practice is particularly effective when the terminology seized upon is legitimate in itself even though it is correctly applied to different situations.

* * *

"There is also no conflict with the acts regulating retail sales since the original evil which gave rise to those acts came into being because of the distinction between a loan of money and the charging of interest thereon as opposed to a sale situation in which the price of goods may be greater for a delayed payment than for spot cash. See *Rothman v. Silver*, 245 Md. 292; *Falcone v. Palmer Ford, Inc.*, 242 Md. 487. There would still appear to be a distinction between sales and loans, the effect of the Act being merely to make clear that a lender may not charge interest in the guise of a time-price differential, etc., and there being no effect on bona fide vendors."

In 53 Opinions of the Attorney General 345 (May 22, 1968), in response to an inquiry as to whether Article 49, Section 5 (b), applied to builders who take back purchase money mortgages or deeds of trust for that part of the purchase price on sales of real estate, we said:

> "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.
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> * * *
>
> "We feel that, while there may be circumstances in which a practice might arise of using land installment contracts to mask usurious loans, it is not proper to anticipate such conditions for the purpose of construing Chapter 453 to apply to sales situations as well as to the loan situations clearly intended to be covered. Any abuse of the interest and usury laws by devices intended to obscure usury would be open to review in the courts."

On July 14, 1969, in response to your request for our opinion as to the applicability of the Secondary Mortgage Loan Law to purchase money second mortgages given by builders or developers of new homes, we stated:

> "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." 54 Opinions of the Attorney General (1969).

Since a seller is not a lender, then to the extent that the opinion of July 14, 1969 is inconsistent with the view set forth in our opinion in 53 Opinions of the Attorney General 345, *supra,* that there "would appear to be a distinction between sales and loans", the same is hereby overruled. (But see *Billingsley v. Mitchell,* 257 Md. 301 (1970) as to the distinction between a mortgage and Deed of Trust transaction). Specifically, we hold that a valid time price

sale of goods or realty was not intended to be made subject to the provisions of Article 49 by the addition of the term "time price differential" to Section 1 (a) thereof. This does not mean, however, that if the transaction is simply described as a time sale, but appears in reality to be a "disguised" loan, designed to circumvent the usury laws, it is thus exempt from the usury laws. In such a case you may, of course, look through the tangible instruments evidencing said transaction to determine its true nature.

A review of the aforementioned cases leads us to the opinion that valid sales of land enjoy the same exemption from the operation of the usury statute as do valid sales of goods. However, in determining whether such a sale is valid, the Maryland courts have not adopted the same criteria as the courts in other states (See, for instance, *State of Wisconsin v. J. C. Penney Co.*, 179 N. W. 2d 641 (Wis. 1970)), but have maintained that one may look through the form of the transaction to determine if a true time price sale had taken place; and that if there were insufficient disclosure of two prices (cash price and credit price) or that the sale was in fact a loan of money, then the transaction becomes subject to Article 49 and the rates and penalties provided therein.

Therefore, should you find that the seller in this instance is, in fact, engaged in a loan transaction in the guise of a time-price sale or has made insufficient disclosure of a cash and credit price, then it is our opinion that the transaction would be subject to the provisions of Article 49 and the penalties contained therein.

We feel constrained to comment that we have encountered considerable difficulty in determining the legislative intent regarding factual situations of the nature described hereinabove, because the several statutes regulating land transactions are ambiguous and even somewhat contradictory. We believe that it might be in order for you to suggest to the General Assembly that it consider amendments to the

law to clarify this situation. If you so desire, we would be most willing to assist you in drafting legislation to accomplish that purpose.

FRANCIS B. BURCH, *Attorney General.*

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

BANKS AND BANKING—MARYLAND INDUSTRIAL FINANCE ACT ARTICLE 11, SECTION 196 (A) (4) TEMPORARY DISABILITY INSURANCE, RIGHT OF LICENSEE TO COLLECT PREMIUMS FOR.

December 21, 1970.

Mr. William A. Graham.

Your letter of November 24, 1970, directs our attention to our opinion dated December 12, 1966, contained in 51 Opinions of the Attorney General 31 (1966). In that opinion, we held that a licensee under the Maryland Industrial Finance Act was prohibited from collecting a premium for Credit Disability Insurance unless the disability insurance was part of a life insurance contract on the loan involved. In addition, we held that the disability insured against must be "total and permanent", based on our reading of Section 196 (A) (4) of Article 11 and Sections 63 and 66 of Article 48A of the Annotated Code of Maryland (1968 Replacement Volume).

You now ask us whether you are correct in prohibiting the writing of temporary disability insurance by licensees under the Industrial Finance Act, in view of our previous opinion.

Neither Article 11, Section 196 (A) (4) or Article 48A, Sections 63 and 66 has been amended since our opinion in 1966 to your predecessor Herbert R. O'Conor, Jr. We affirm our aforesaid opinion of December 12, 1966, that "temporary disability" insurance may not be written in conjunction with a loan under the Industrial Finance Act, and we advise you in accordance with said opinion that licensees under said act are not authorized and may not lawfully collect premiums for such temporary disability insurance coverage.

FRANCIS B. BURCH, *Attorney General.*

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

CLERKS OF COURT

TESTAMENTARY LAW—STATEMENT OF ADMINISTRATIVE PROVISIONS AND FIDUCIARY POWERS—PROCEDURES GENERALLY RELATING TO THE RECORDATION OF THESE STATEMENTS UNDER ARTICLE 93, SECTION 4-107.

March 5, 1970.

Mr. Robert H. Bouse, Clerk.

Article 93, Section 4-107 of the Maryland Code was adopted by the General Assembly as part of Chapter 3 of the Laws of Maryland of 1969 and became effective on January 1, 1970. This section permits administrative provisions and fiduciary powers, which have been recorded in the record offices of the circuit courts of the counties and of the Superior Court of Baltimore City, to be incorporated by docket and folio reference into wills or trust instruments. A number of attorneys have indicated to you that they wish to utilize this new statutory procedure and you have asked our advice on how the recordation of these instruments should be handled by your office.

Under Article 17, Sections 1 and 50 you are required to file all instruments affecting the title to or an interest in land among the land records and all instruments affecting the title to or an interest in personal property among the chattel records of your office. The instruments which are permitted to be recorded by new Section 4-107 do not fall in either of these categories and, to avoid any confusion, we believe it would be advisable for you to maintain a separate set of records entitled "Fiduciary Powers Docket".

Because these fiduciary powers do not affect the title to or an interest in real property they are also not covered by the provisions of Article 21, Sections 1 (a) and 29 which require certain instruments to be executed and acknowledged prior to recordation. Although not expressly required by the new statute, each statement of administrative provi-

sions and fiduciary powers should be accompanied by an affidavit or statement affirming that these powers have been adopted by the person or firm offering them for record and that the person or firm wishes to have them recorded.

The charges which may be assessed by your office for the recordation of fiduciary powers are $3.00 per page, or each portion thereof, with an additional charge of $1.00 for indexing the name of the person or firm whose powers are being recorded. See Article 36, Sections 12 (c) (2)-(3) and (d) (3). These instruments are, of course, exempt from the State recordation and transfer tax because they do not affect the title to or interest in real or personal property. See Article 81, Sections 277 and 278A.

FRANCIS B. BURCH, *Attorney General.*

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

COMPTROLLER OF THE TREASURY

COMPTROLLER AUTHORIZED TO TRANSFER FUNDS COLLECTED FROM THE STATE TAX ON THE TRANSFER OF PROPERTY TO SPECIAL FUND PROVIDED IN THE OUTDOOR RECREATION LAND LOAN OF 1969 FOR THE ACQUISITION AND DEVELOPMENT OF OUTDOOR RECREATION LAND AND OPEN SPACE AREAS AFTER DEDUCTING THE AMOUNT NECESSARY TO PROVIDE DEBT SERVICE ON BONDS SOLD FOR THE OUTDOOR RECREATION LAND LOAN.

May 15, 1970.

Mr. Michael J. Potthast, Chief.

We have your letter asking whether the Comptroller is authorized to transfer the funds collected from the State tax on the transfer of property (Article 81, Section 278A, Annotated Code of Maryland, 1969 Replacement Volume) to the special fund provided in Chapter 403 of the Acts of 1969 for the acquisition and development of outdoor recreation land and open space areas after deducting the amount necessary to provide debt service on the bonds that have been sold under the provisions of Chapter 403. In the alternative, you ask whether the entire proceeds of the tax on the transfer of property must be accumulated until such time as the total amount of bonds authorized under Chapter 403, which is $60,000,000, has been issued.

Chapter 403 of the Acts of 1969 authorizes the creation of a State debt in the amount of $60,000,000, to be known as the "Outdoor Recreation Land Loan of 1969", for the purpose of funding a statewide program for the acquisition and development of outdoor recreation and open space areas, to be known as "Program Open Space". In its present context Chapter 403 limits the program to the acquisition and development of projects identified in the State Planning Department's "Maryland Outdoor Recreation and Open Space Plan" and the Department of Forests and Parks

"Master Plan for Outdoor Recreation, 1967-1976". Section 5 (d) of Chapter 403 of the Acts of 1969.

Chapter 403 also enacted a State tax on the transfer of property, effective July 1, 1969, of ½ of 1 percent on every written instrument conveying title to real property recorded in the State. The proceeds from the tax are to be used to pay the principal and interest of the bonds issued under Chapter 403 and any excess is to be made available for the funding of projects for the acquisition and development of recreation land and open space.

Chapter 403 was amended by Senate Bill 4 of the Special Session of the General Assembly of December 1969 to correct certain erroneous wording and to clarify certain provisions of Chapter 403. The last paragraph of Section 7 of Chapter 403, as amended by Senate Bill 4, now reads as follows:

> "Until all of the bonds or Certificates of Indebtedness issued under the provisions of this Act and the interest thereon, shall be paid or provision of such payment shall be made, the proceeds of so much of the tax on written instruments as imposed by Section 278A of Article 81 of the Annotated Code of Maryland as set forth in Section 10 of this Act, received in each year as is required to make the principal and interest payments due in that year (to the extent not previously set aside) and in the next succeeding year shall be set aside by the State Comptroller and transferred to the Annuity Bond Fund for the purpose of making such principal and interest payments. The balance of the proceeds of such tax, if any, shall remain in the special fund account on the books of the State Comptroller, provided, however, that if the State Comptroller determines at any time or from time to time that a portion thereof will not be required for the payment of the principal of or interest on the bonds or Certificates of Indebtedness issued under the provi-

> sions of this Act, he shall certify the amount of such portion, which shall thereby be made available for the funding of projects for the acquisition and development of recreation land and open space, as provided under 'Program Open Space.' Any proceeds of such tax which may for any reason not be expended or applied as herein provided, shall be transferred to the Annuity Bond Fund and shall be applied to the debt service requirements of the State."

This section directs the Comptroller to withhold the proceeds from so much of the tax as is required to service the principal and interest payments due in the current year and the next succeeding year on the bonds or certificates of indebtedness that have been issued. The balance of the proceeds from the tax is to remain in the special fund account. However, if the Comptroller determines that a portion of the proceeds of the tax will not be required for the principal and interest payments on the bonds *issued*, he is to certify the amount of such portion "which shall thereby be made available for the funding of projects for the acquisition and development of recreation land and open space, as provided under 'Program Open Space' ".

We believe that the use of the word "issued" by the Legislature clearly indicates that the Comptroller does not have to withhold all of the proceeds of the tax but only that amount necessary to provide debt service for bonds that have been sold and issued.

We note further that the last sentence of Section 7 provides that if for any reason any of the proceeds of the tax have not been required for the payment of principal and interest on the bonds that have been issued or have not been applied to the funding of outdoor recreation land or open space projects, then such proceeds are to be transferred to the Annuity Bond Fund and applied to the debt service requirements of the State. This provision also indicates to us that the Comptroller does not have to retain all proceeds

of the tax until such time as the total amount of the bonds authorized under Chapter 403 have been issued.

Furthermore, we believe that, if the proceeds of the tax were to be so accumulated, such a procedure would run counter to (1) the legislative objective to expedite the acquisition of outdoor recreation and open space areas and accelerate their development (see Section 357B (a) of Article 66C as enacted by House Bill 739 of the Acts of 1970) and (2) the fiscal goal of keeping capital expenditures on a pay-as-you-go basis as much as possible, thus reducing the amount of bonds that will have to be issued and the consequent interest charges that will have to be paid by the State.

In order to achieve the rapid acquisition and development of recreation land and open space areas, the Legislature realized it would have to authorize the sale of bonds because the proceeds of the tax on the transfer of property would not be initially sufficient to fund the program. See Report of the Legislative Council Committee on Recreational Areas, which appears in Volume 2 of the Report of the Legislative Council to the General Assembly of 1969, at page 477 (November, 1968). Section 11 of Chapter 403 allocated $9,500,000 for specific projects for the fiscal year 1970, and House Bill 740 of the 1970 legislative session adds a new Section 11A to Chapter 403, which allocates $9,300,000 for the fiscal year 1971.

In conclusion, it is our opinion that you need retain only the amount of the proceeds of the tax as is necessary to service the principal and interest debt for the bonds that are now issued for the current fiscal year and the next succeeding year. Excess proceeds should be transferred to the special fund provided in Chapter 403 for the acquisition and development of projects set forth in Sections 11 and 11A of Chapter 403. The extent to which Chapter 403 continues to be amended by the Legislature, adding other projects for acquisition and development, will determine the amount of bonds which will have to be issued in the future. In the event that the proceeds of the tax are sufficient

to service the debt for the bonds that have been issued and to fund the acquisition of the projects set forth in Chapter 403 as amended from time to time, it will not be necessary to issue additional bonds. In the event that the proceeds of the tax exceed the amount necessary to service the debt on the outstanding bonds, and all of the projects set forth in Chapter 403 as amended from time to time have been acquired and developed, then such excess proceeds are to be transferred to the Annuity Bond Fund for the general debt service requirements of the State.

FRANCIS B. BURCH, *Attorney General.*

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

CORRECTIONAL SERVICES

CONSTITUTIONALITY OF CERTAIN RULES AND REGULATIONS.

August 4, 1970.

Mr. James M. Panopoulos.

In your letter of June 26, 1970, you advised this office that certain of your employees have objected to Departmental Rules Nos. 6, 7, 15 and 20, which appear in the Division's "Handbook of Information and Rules for Correctional Employees", on the ground that these rules violate their constitutional rights. You have asked this office to render an opinion concerning the legality of these four rules.

The rules objected to by said employees state:

> 6. Contraband: contraband is defined as any article which is NOT officially authorized by the institution head or which is brought into the institution other than through proper channels. Employees are forbidden to bring contraband into the institution. Employees are obligated to be alert to detect contraband articles and to report their presence to their superiors.
>
> 7. Personal Search: all employees are subject to personal search at any time; the institution head or higher official in the Department may, for cogent reasons, authorize the search of an employee and/or his personal belongings, while the employee is on duty. Refusal of an employee to be searched may constitute grounds for disciplinary action.
>
> 15. Contacts Between Employees and Families or Friends of Inmates or Former Inmates: such contacts are strictly prohibited except as required in the performance of daily duties. Employees are not authorized to visit the homes of inmates or the homes of relatives, wives, or known friends of inmates unless specifically authorized to do so by the institution head.

> 20. Employee Contact with the Public and with the Press: employees shall not divulge to the general public or to representatives of the press any information concerning the institution, its activities, employees or inmates without the express approval of the institution head. Employees whose duties involve contact with the public are expected to be courteous and to conduct themselves in a businesslike and dignified manner.

There is no question that the Commissioner has the power and authority to formulate rules and regulations relating to the conduct and discipline of the employees of his department. See Article 27, Section 676 of the Annotated Code of Maryland, as repealed and re-enacted by Chapter 401 of the Acts of 1970. As long as said rules and regulations are reasonable and not inconsistent with law, they are of legal sufficiency and valid; and they are binding upon said employees insofar as their activities and conduct in the employment of the Division are concerned.

This rulemaking authority of the State agency was recognized by the courts for many years, even though said rules had the tendency of subordinating the constitutional rights of said employees. The Supreme Court in 1951 held in *Adler v. Board of Education,* 342 U. S. 485, 96 L. Ed. 517, that persons "have no right to work for the State in the school system on their own terms. . . . They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and work elsewhere. Has the State thus deprived them of any right of free speech or assembly? We think not." However, in 1967 this Court, in striking down the same law under attack in *Adler, supra,* held, in *Keyishian v. Board of Regents,* 385 U. S. 589, 17 L. Ed. 2d 629, that, even though the State has a legitimate interest in protecting its educational system from subversion, it cannot stifle fundamental personal liberties when the end can be more narrowly achieved. The Supreme Court, hold-

ing that the statutory employment disqualifications involved therein were vague and ambiguous, further rejected the doctrine that "public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action".

In *Pickering v. Board of Education,* 391 U. S. 563, 20 L. Ed. 2d 811, the Supreme Court ruled that a public school teacher could not be dismissed for publicly criticizing the Board of Education and the Superintendent of Schools for the manner in which they handled past proposals to raise revenue for the schools. The Board had found that the publication was detrimental to the efficient operation and administration of the schools and that the interest of the school system required the teacher's dismissal. The Court held that, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his rights to speak on issues of public importance may not furnish the basis for his dismissal from public employment.

Nor was this principle confined to the educational system. In *Garrity v. State of New Jersey,* 385 U. S. 493, 17 L. Ed. 2d 562, decided January 16, 1967, the Supreme Court held that admissions made by police officers under threat of loss of position with the police department were involuntary and, therefore, inadmissible in subsequent criminal action. New Jersey statutorily provided that any person holding public office who refused to testify upon matters relating to that office in any criminal proceeding was subject to removal and forfeiture of pension.

The Maryland Court of Appeals in *Brukiewa v. Police Commissioner,* The Daily Record, April 18, 1970 (257 Md. 36), reviewed the police department's prohibition against a member of the department to publicly criticize or ridicule the official action of any member of the police department. In applying the *Pickering* principle, the Court held:

> ". . . In deciding the case as we have [that the statements did not go beyond the bounds of per-

> missible free speech and, therefore, the State could not discipline him for what he had said], we have assumed that on their face the rules and regulations are valid except to the extent that they inhibit or hamper the right of free speech guaranteed by the First Amendment . . . Our holding in the case is no more than a determination that the State did not show that Brukiewa's statements hurt or imperiled the discipline or operation of the police department . . ."

Nevertheless, in spite of the broad scope of these rulings, the Supreme Court has not foreclosed the possibility that a State agency might promulgate an enforceable rule which restricts the constitutional rights of a public employee. In *Pickering, supra,* at 818, n. 3, the Court recognized that:

> "It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases."

It is interesting to note that the Court in *Pickering, supra,* placed great stress on the distant relationship of the teacher to the board and superintendent and pointed out that:

> ". . . The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus, no question of maintain-

> ing either discipline by immediate superiors or harmony among coworkers is presented here . . ."

The statements were not shown to have, in any way, either impeded the teacher's proper performance of his duties in the classroom, or interfered with the regular operation of the schools generally.

In *Bates v. Little Rock,* 361 U. S. 516, 4 L. Ed. 2d 480, the Supreme Court held, at 486, that "where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling". In that instance the Court held, at 487, that it is "the duty of this court to determine whether the action bears a reasonable relationship with the achievement of the governmental purpose asserted as its justification". Furthermore, in restricting the interference on First Amendment rights, the Supreme Court in *N.A.A.C.P. v. Button,* 371 U. S. 415, 9 L. Ed. 2d 405, said that "broad prophylactic rules in the areas of free expression are suspect" and declared a need for "precision of regulation" in this area. In *Keyishian, supra,* the Court, in quoting from the latter case, said: "Government may regulate in the area only with narrow specificity."

With the aforegoing as background, it is the opinion of this office that said rules are valid, subject to the comments hereinafter made.

The Commissioner of Correction (formerly known as Commissioner of Correctional Services), by virtue of Article 27, Section 674, *et seq.,* as repealed and re-enacted by Chapter 401 of the Acts of 1970, is in active charge of the Division of Correction (formerly known as the Department of Correctional Services) and its institutions and agencies. He is empowered to adopt and promulgate rules and regulations for the discipline and conduct of the prisoners, and for the duties, discipline and conduct of the officers and employees of said institutions and agencies. Pursuant to said duties and authority, he has promulgated the aforementioned "Handbook", which recites the general objectives of the Division of Correction as follows:

"1. To protect society by providing adequate custody of inmates and proper security within the institutions under its jurisdiction.

2. To attempt to rehabilitate inmates so that, upon release from confinement, they will be self-respecting, law abiding citizens with a capacity of self-support.

3. To provide for the daily needs of inmates."

In order to understand the purposes of Rules 6, 7, 15 and 20, one must keep foremost in his mind the sensitive field of endeavor, the various types of people under the Commissioner's jurisdiction and the problems related thereto. While we think that the rule pertaining to "contraband" (6) could be more specific and enumerate the prohibited articles (but not limited to said enumeration), we think that no constitutional right is violated thereby and that said rule is valid.

The rules applicable to "personal search" (7) and association (15) may encroach upon the employee's constitutional rights; but we think that, because the rule is limited to employment and duty, the Commissioner's interest in detecting the commission of crime within the institutions, maintaining the security of the institutions and maintaining safe and proper relations between employees and inmates is so compelling that the rights of the employees must be subordinated. We believe that the action bears a reasonable relation to the purposes and justifies its existence.

For these reasons, we also believe that Rule 15 is valid with a reservation relating to "former inmates". We believe that this rule could be clarified to relate to "known" former inmates if this association should be prohibited at all. An undue burden falls upon an employee who is held accountable for associating with former inmates if such fact is unknown to such employee.

Rule 20 does not violate First Amendment rights. We believe this rule encompasses one of those situations recog-

nized by the Supreme Court in *Pickering, supra.* The rule does not prohibit criticism, or ridicule, or other public statements; but does confine itself to divulging "information concerning the institution, its activities, employees or inmates without the express approval of the institution head". For this reason we believe that the rule meets the burden of "narrow specificity" laid down in *Button* and *Keyishian, supra.*

For the reasons set forth above, we believe that said rules are reasonable and not inconsistent with law; and are, therefore, valid.

FRANCIS B. BURCH, *Attorney General.*

HENRY J. FRANKEL, *Asst. Attorney General.*

COURTS

PEOPLE'S COURTS—FACTORS TO BE CONSIDERED IN THE SETTING OF BAIL IN CRIMINAL CASES.

January 12, 1970.

Honorable J. Willard Nalls, Jr.

You have requested our opinion as to the proper basis upon which bail may be set for defendants in criminal cases.

Mr. Chief Justice Vinson of the Supreme Court, speaking of the right to bail in the case of *Stack v. Boyle,* 342 U.S. 1 (1951), pointed out:

> "The traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See *Hudson v. Parker,* 156 U.S. 277, 285, 39 L. Ed. 424, 426, 15 S. Ct. 450 (1095). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.
>
> "The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Ex parte Miburn, 9 Pet. 704, 710, 9 L. Ed. 280, 282 (1835) . . ."

In this State, prior to conviction, an accused who is charged with an offense, the maximum punishment for which is other than capital, shall be entitled to be admitted to bail. In a capital case an accused may be admitted to bail in the discretion of the Court. See *Fisher v. Ball, Sheriff of Prince George's County,* 212 Md. 517; Maryland Rule 777 a.

The Court of Appeals of Maryland, so far as our research

has revealed, has not specifically delineated any precise standards to be applied by the judges of this State in the granting of bail to an accused. That Court has stated that the "basic purpose" which underlies the granting of bail is "to insure the presence for trial of an accused party." *Allegheny Mutual Casualty Co. v. State,* 234 Md. 275. Yet, in *Fisher v. Ball, supra,* the Court specifically declined to express an opinion as to the type of evidence which may be relevant when release on bail is sought before trial.

There are, however, numerous decisions from other jurisdictions which we feel are apposite and which indicate the existence of numerous relevant factors that have been considered by other courts. Many of these authorities are reviewed in the annotation entitled: *"Factors in Fixing Amount of Bail in Criminal Cases."* 72 A.L.R., 801. The factors therein discussed at length are:

(1) ability of the accused to give bail,
(2) nature of the offense,
(3) penalty for the offense charged,
(4) character and reputation of the accused,
(5) health of the accused,
(6) character and strength of the evidence,
(7) probability of the accused appearing at trial,
(8) forfeiture of other bonds,
(9) whether the accused was under bond in other cases, and
(10) whether the accused was a fugitive from justice when arrested.

Orfield, in his work on "Criminal Procedure from Arrest to Appeal" comments as follows:

> "The Eighth Amendment provides that 'excessive bail shall not be required.' This implies and safeguards the right to bail at least before trial. Its purpose is to prevent the practical denial of bail by fixing the amount so unreasonably high that it cannot be given. Mere inability to procure

> bail does not of itself make the amount excessive. "Bail is excessive only if the amount required is unnecessary to secure the compliance of the defendant with the conditions of the bail bond. The wide discretionary power vested in the magistrate is shown by the fact that he may at any time require additional security or may revise its amount.
>
> "If the discretion is to be exercised rightly, there should be a careful consideration of the character, previous record, and economic circumstances of the defendant, nature of the crime charged, the weight of the evidence against the defendant, and the severity of its penalty."

In *People ex rel Rothensies v. Searles,* 229 App. Div. 603, 243 N. Y. Supp. 15, the following analysis was made:

> "The purpose of requiring the defendant to give bail after arrest is to secure his presence at the trial. The amount necessary for that purpose is a question of sound discretion and judgment, depending upon several primary conditions that may be present in any particular case. The nature of the offense, the penalty which may be imposed, the probability of the willing appearance of the defendant or his flight to avoid punishment, the pecuniary and social condition of defendant, and his general reputation and character, and the apparent nature and strength of the proof as bearing on the probability of his conviction,—all these are elements which may properly be taken into consideration by the court in determining the amount of bail."

We are unable to perceive any valid reasons why the salutary considerations above set forth would be inapplicable in this State. Indeed, Article 27, Section 638A of the Annotated Code of Maryland states that when "from all the circumstances" a judge is of the opinion that an accused

person will appear for trial, the person may be released on his own recognizance. It is also specified in that statute that a liberal construction is to be applied so as to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of an accused person in a criminal case. That provision reads:

> "(a) *May be released before or after conviction; failure to appear.*—When from all the circumstances the court is of the opinion that any accused person in a criminal case will appear as required for trial either before or after his conviction, the person may be released on his own recognizance. A failure to appear as required by such recognizance shall be subject to the penalty provided in Section 12B of this Article.
>
> "(b) *Liberal construction of section; purpose.*—This section shall be liberally construed to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of an accused person in a criminal case either before or after trial of the case.
>
> "(c) *Application of section.*—The provisions of this section shall be applicable to any criminal case or offense except a case where death or life imprisonment without parole is a possible punishment before any judge of any circuit court in the counties or any judge of the criminal courts of Baltimore City, any people's court judge with criminal jurisdiction, any of the judges of the Municipal Court of Baltimore City, or any trial magistrate. The provisions of this section shall apply to all persons regardless of age."

Section 12B of Article 27, referred to in the above provision, sets forth the criminal sanctions of fine or imprisonment which may be imposed upon forfeiture of bail or recognizance.

See Chapter 557 of the Acts of 1969 adding a new

Section 616½ to Article 27 of the Maryland Code, providing that persons charged with committing certain specified offenses during the time that person was already released on bail or recognizance shall be ineligible for release on the subsequent charge unless it is shown that the applicant "would not pose a danger to any other person or to the community, and would appear at the time set for trial." See also Article 59, Section 8 setting forth the procedure to be followed and the test to be applied for possible release upon bail or recognizance when one charged with a criminal offense is found not competent to stand trial.

FRANCIS B. BURCH, *Attorney General.*

DONALD NEEDLE, *Asst. Attorney General.*

COURTS—MUNICIPAL COURT OF BALTIMORE CITY—CHANGING JUDGMENTS SAME DAY.

January 26, 1970.

Honorable Charles E. Moylan, Jr.

This is in reply to your recent inquiry concerning our opinion of December 8, 1969 (54 Opinions of the Attorney General 90), regarding the legality of judges of the Municipal Court of Baltimore City changing judgments after they are initially rendered. Specifically, you ask whether a Municipal Court judge can change a judgment one day after it is rendered or even on the same day.

The question of changing judgments once rendered was presented to the Supreme Court of California in *Blake v. Municipal Court,* 300 P. 2d 755 (1956), which held at p. 757:

> "[1, 2] It is well settled that where an order or judgment correctly records the completed judicial action of a court, the court can thereafter vacate, modify or supersede it only in the manner provided by law and where the law makes no provision for such action an order attempting to vacate, modify or supersede it is void and of no effect. The rule is frequently stated that a clerical error or misprision may always be corrected by the court but judicial action may not be."

See also *In Re Doane's Estate,* 396 P. 2d 581, 41 Cal. Rept. 165 (1964); *Uhl v. Johnson,* 297 P. 2d 493 (1956); and *Gill v. Epstein,* 401 P. 2d 397, 44 Cal. Rept. 45 (1965).

While your question is one that could encompass a multitude of situations, we believe it is apparent from our prior opinion that a Municipal Court judge cannot change a judgment, once rendered, even on the same day. In our opinion of December 8, 1969, the *Good* case, 240 Md. 1, was cited, which held 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 and to grant a new trial. From the holding in the *Good* case, because the Municipal Court of Baltimore City is also a creature of statute with no broader powers than have been conferred upon other courts of limited jurisdiction, and because of the other authorities and reasons we cited, it was our opinion that a Municipal Court Judge of Baltimore City could not change a rendered judgment twenty days later.

The question then becomes: when is a judgment final and not subject to change by the Municipal Court judge? It is clear that the court's "judgment" is what the court pronounces; its "rendition" is a judicial act by which the court settles and declares the decision of the law upon matters at issue, and its "entry" is the ministerial act by which enduring evidence of the judicial act is afforded. See *Cleburne Nat. Bank v. Bowers,* Tex. Civil App., 113 S.W. 2d 578, 579; *Deck v. Deck,* 20 S.E. 2d 1, 5, 193 Ga. 739. Because the entry of the judgment is considered a mere ministerial act, it has been held that failure of a minute entry to correctly or fully recite what the court judicially determined does not annul the court's act, which remains the judgment of the court notwithstanding its imperfect record. See *Panhandle Construction Company v. Lindsey,* 72 S.W. 2d 1068, 1072, 123 Tex. 613. Therefore, it follows, *a fortiori,* that once a judgment has been rendered it is final and beyond change. See also *State v. Lindsay,* 146 Atl. 290 (1929); and *Hazzard v. Alexander,* 178 Atl. 873 (1935).

The Supreme Court of Illinois in *People v. Fagerholm,* 161 N.E. 2d 20, 17 Ill. 2d 131 (1959), held at p. 23 that:

> "In final analysis then, there are at least three essential elements that must coincide in order to have a rendition: namely, the decision must be expressed publicly, in words, and at the situs of the proceeding."

We are of the opinion, therefore, that when a judge in the Municipal Court of Baltimore City renders his decision,

either in writing, or orally, or both, at the conclusion of a case, that decision cannot be changed by him. It would appear to us further that a case is "concluded" when the succeeding case is called for trial, or, if the last case on the docket, then when court is adjourned for that session.

FRANCIS B. BURCH, *Attorney General.*

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

COURTS — ADMINISTRATIVE OFFICE OF THE — RECORDS — COURTS — CLERKS OF COURT — HALL OF RECORDS — PRESENTLY NO AUTHORITY TO DESTROY NONCURRENT CASE FILES OF COURTS OF RECORD—DESTRUCTION OF SUCH RECORDS REQUIRES LEGISLATIVE SANCTION.

February 18, 1970.

Mr. James D. Thomas.

Your recent letter indicates that the destruction of the court files in certain categories of noncurrent cases is under consideration by the judges of the Seventh Judicial Circuit of Maryland. You state that the types of cases involved are:

1. Criminal appeals over five years old;
2. Civil cases over thirteen years old, except any case that involves chain of title to real estate;
3. Divorce cases, except where there is support money involved; and
4. Juvenile cases after the child reaches his majority.

Your letter to this office makes inquiry regarding the authority that is necessary to accomplish the destruction of these files.

Article 17, Section 1 of the Annotated Code of Maryland (1966 Replacement Volume), title "Clerks of Court", subtitle "General Duties of Clerks", provides as to the custody of records that:

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

This provision, which plainly delineates the duty of the clerks to file papers, keep them current and preserve them, is nowhere complemented by any concomitant provision as to how long they are required to preserve records in their custody. Nor does Article 17 contain any provision whatever regarding the destruction or disposal of such records.

Article 26 of the Maryland Code, title "Courts", has no

specific provision for the disposal of closed or noncurrent court files which may be a hindrance to the conduct of the business of the courts or their efficient operation. Article 26, Section 17 requires the judges to make such inspection of court records as may be necessary from time to time to assure the performance by the clerks of court of their duties to keep proper records as required by law. The judges are also authorized to determine the necessity of replacing worn out records and arrange for the substitution of records found to be worn out.

We are unable to say that the foregoing statutory provisions authorize either the circuit courts or the clerks to dispose of records. We believe that such authority requires a more specific mandate than anything contained in the statute. Nor does it appear that the Maryland Court of Appeals has been vested with authority to make rules regarding the disposal of court files. The rule-making power of the Court of Appeals in connection with the operation of the several courts of record throughout the State is directed to rules governing practice and procedure; Article 26, Section 25. It appears to us, therefore, that the statutory jurisdiction of courts and clerks over court files does not extend beyond the custody and preservation of such records.

The disposition and/or destruction of public records is generally provided for in Article 54 of the Maryland Code (1968 Replacement Volume), title "Hall of Records". Section 7 provides that every public official in Maryland who has custody of public records is authorized in his discretion to turn over any records not in current use to the Hall of Records Commission for preservation. The statute further provides in Section 8 that, if the Commission declines to accept any records offered by their custodian, upon the written approval of the Board of Public Works such records may be destroyed. There are exceptions, however, to the types of records that may be thus destroyed. Among those that may not be done away with if not accepted by the Hall of Records are "the records of any court of record in this State"; Section 7(d).

The substance of Article 54, Sections 7 and 8, as applied to noncurrent case files of courts of record, is, therefore, that such records may be offered to the Hall of Records and, if accepted, will be preserved among the archives under the jurisdiction of the Hall of Records Commission. However, should the Commission decline to accept any such proffered records, there is no authority either for their destruction or disposal otherwise. We have said on two previous occasions that, in the absence of specific authority, the permanent elimination of original records requires legislative sanction. Answering an inquiry as to the authority of the State Industrial Accident Commission to order the destruction of files of outdated claims, we said that the most liberal interpretation of the statutory authority of the Accident Commission could not be said to extend to the power to destroy old files and that, until such time as the Legislature vested a specific power to do so, they must be retained. 25 Opinions of the Attorney General 713. We advised the Department of Health to the same effect in response to a question regarding permanent disposal of an accumulation of records of vital statistics over a period of many years. We said that, absent clear statutory authority, the power to destroy such records required action by the General Assembly. 31 Opinions of the Attorney General 124.

The mandate of Article 54 excepting the files of courts of record from prescribed procedures for the destruction of records, together with the absence of any statutory authority conferred upon either the courts or the clerks, persuades us that the destruction of court files requires legislative sanction. We believe that such files must be retained (unless offered to and accepted by the Hall of Records) until the General Assembly specifically authorizes their destruction. In the event of application to the Legislature for such statutory authority, the possibility should be explored of devising and implementing a uniform procedure for courts of record throughout the State.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Asst. Attorney General.*

COURTS—JURISDICTION OF MUNICIPAL COURT OF BALTIMORE CITY TO EXECUTE JUDGMENT AND SENTENCE IN CRIMINAL CASE WHEN APPEAL DISMISSED FOR FAILURE OF APPELLANT TO APPEAR IN CRIMINAL COURT OF BALTIMORE TO PROSECUTE APPEAL BY TRIAL DE NOVO.

April 23, 1970.

The Honorable I. Sewell Lamdin.

You have requested our advice concerning who has jurisdiction over a defendant after he has appealed a decision of the Municipal Court of Baltimore City to the Supreme Bench of Baltimore City. You have pointed out that the Municipal Court takes the position that, ". . . Once an Appeal is entered, it is to be tried *de novo* and we lose jurisdiction. The Supreme Bench takes the position that when the defendant does not appear for trial on the Appeal, they dismiss the Appeal, and it is then our problem to locate the man and either collect the fine (if one is due) or issue a warrant for the apprehension of the defendant and turn him over to the proper penal institution to begin serving his sentence when he is apprehended."

The question may be otherwise stated as follows:

> When an appeal, which has been taken from a judgment of the Municipal Court of Baltimore City, is dismissed by the Criminal Court of Baltimore City due to the failure of a defendant to prosecute a trial *de novo* on such appeal, may the case be validly returned to the Municipal Court for execution of its judgment?

In the first instance, it is well established that once an appeal is perfected from a judgment of the Municipal Court of Baltimore City, jurisdiction over the case attaches in the Criminal Court of Baltimore City affording a defendant a new trial on the merits, pursuant to Maryland Code (1968 Repl. Vol.), Article 5, Section 43. Whether or not the Criminal Court retains or loses jurisdiction over the matter when the appeal is dismissed because of the defendant's

failure to appear for trial *de novo,* is dependent upon the nature of its jurisdiction, and the effect an appeal has upon the execution of judgment.

Nature of Jurisdiction

Maryland Code (1968 Repl. Vol.), Article 5, Section 43 provides, in pertinent part:

> "A defendant in a criminal or traffic action in the Municipal Court of Baltimore City may appeal to the Criminal Court of Baltimore from any conviction or sentence, including suspension of a license to operate a motor vehicle, imposed by the Municipal Court of Baltimore City. On such appeal the action against such defendant so appealing shall be tried de novo in the same manner as if said action had originally been instituted in the Criminal Court of Baltimore but without the necessity of presentment or indictment by the grand jury. . . ."

The Maryland Court of Appeals has repeatedly held that a circuit court in hearing appeals from trial magistrate courts, does not act in the exercise of its ordinarily common law jurisdiction, but as a court of special jurisdiction. *Robb v. State,* 190 Md. 641, 60 A. 2d 211 (1948) ; *Rayner v. State,* 52 Md. 368 (1879). Since a trial *de novo,* is afforded a defendant on appeal, the trial itself serves as the method of review of the lower court's judgment, and the decision of the circuit court, when it functions in such instance as a court of last resort, has a binding effect. Hence, the jurisdiction the circuit court exercises in hearing *de novo* trials, is said to be of an *appellate nature. Harding v. State,* 250 Md. 188, 242 A. 2d 135 (1968) ; *Montgomery Ward and Company v. Herrmann,* 190 Md. 405, 58 A. 2d 677 (1948) ; *Main v. Fessler,* 89 Md. 468, 43 A. 917 (1899).

Once a *de novo* trial has commenced, the Criminal Court of Baltimore, pursuant to Article 5, Section 43, must try the case and pronounce judgment, as if it had originated in that court. On the other hand, it has been held that where an appeal has been dismissed because an appellant failed

to appear for his trial *de novo,* it is proper for the superior court to return it to the inferior court for execution of the judgment. *City of St. Paul v. Parker,* 268 Minn. 569, 128 N.W. 2d 96 (1964), 22 C.J.S., *Criminal Law,* Section 402 (2).

There is no Maryland case law dealing with the effect of a dismissal of appeal before a trial *de novo* has been held, but the holdings in *United Ry. Co. v. Corbin,* 109 Md. 52 (1908), and *Tiller v. Elfenbein,* 205 Md. 14 (1953), directly support the proposition that the lower court is revested with jurisdiction upon dismissal of appeal. (Also see Maryland Rules 877 and 1077).

After the Criminal Court has either dismissed or adjudicated a case on appeal from the Municipal Court, and has issued a mandate to return the case to the lower court, or exercises similar inherent power of jurisdiction, its jurisdiction over the matter on appeal is exhausted. 20 Am. Jur. 2d, *Courts,* 100.

In connection with the revesting of jurisdiction principle, it is essential to realize that a court that has jurisdiction to make a decision, also has the power to enforce it by making such orders and issuing such writs as are necessary to carry its "re-vitalized" judgment or decree into effect after an appeal. In other words, the power of a court to execute a judgment is not exhausted by the mere entering of a judgment, but continues until that judgment is either vacated or satisfied.[1] 20 Am. Jur. 2d, *Courts,* Section 101; *Central National Bank v. Stevens,* 169 U.S. 432, 18 S. Ct. 403, 42 L. Ed. 807 (1898). Thus, it is fundamentally necessary that a lower court be allowed to execute judgment after the dismissal of an appeal, if such judgment is revived by operation of law.

Effect of Appeal on Execution of Judgment

As the perfecting of a *de novo* appeal from the Municipal Court of Baltimore City entitles a defendant to remain on bail (Article 5, Section 47), the judgment of Municipal Court is effectively stayed, or suspended, until there has been a final decision rendered in the trial *de novo* and a

new judgment entered thereon. At that point, the prior judgment and sentence is vacated by operation of law. If a *de novo* appeal is dismissed, however, the suspended judgment and sentence appealed from is restored to full force and effect, 4 Am. Jur. 2d, *Appeal and Error,* 358; *Steaff v. Hewitt,* 1 Ohio 511; *Cotofan v. Steiner,* 78 Ohio L. Abs. 139, 144 N.E. 2d 329 (1957); *Alabama Power Co. v. Thompson,* 250 Ala. 7, 32 S. 2d 795, 9 A.L.R. 2d 974 (1947).

Unlike a normal bond on appeal to the Court of Special Appeals, a bond on a *de novo* appeal operates to insure the appellant's *presence* in Criminal Court for his *de novo* appeal trial. Since that bond is returnable to the Criminal Court, it has jurisdiction to increase or reduce the bond pending the appellate trial (Article 5, Section 47), as well as power to revoke, discharge, forfeit such bond, or declare an absent appellant to be in contempt of court, pursuant to Maryland Code (1967 Repl. Vol.), Article 27, Section 12B.[2] Also, in the exercise of such jurisdiction, the Criminal Court would have inherent power to issue a bench warrant in order to avoid an abuse of process and to aid the orderly administration of justice. 20 Am. Jur. 2d, *Courts,* Section 79; *Reid v. Prentice Hall,* (C.A. 6 Ohio) 261 F. 2d 700 (1958); *Joseph Bancroft and Sons Co. v. Shelley Kniting, Inc.,* (D.C. Pa.) 245 F. Supp. 523 (1965); 8 C.J.S., *Bail,* Section 88 (b); *Daniels v. State,* 171 Tex. Cr. R. 596, 352 S.W. 2d 267 (1961); *State ex rel. Corbin v. Superior Court,* 2 Ariz. App. 257, 407 P. 2d 938 (1965). Although, if the Criminal Court chooses such course of action against an absconding appellant, a bench warrant would be based on the separate offense of "bail jumping" over which it possessed original common law jurisdiction, rather than the lower court's judgment.

Conclusion

Based upon an analysis of the above principles, it would appear that when an appellant fails to appear in the Criminal Court of Baltimore to prosecute his appeal from the Municipal Court of Baltimore City by virtue of a trial *de novo,* the dismissal of such appeal has the effect of

restoring the suspended judgment of the Municipal Court to full force and effect by operation of law. As such judgment of the lower court is restored, the case should be returned to that court in order to allow execution of sentence upon the judgment.

As an aid to the orderly administration of justice, and to prevent an abuse of the appellate process in its court by an absconding appellant, the Criminal Court of Baltimore could properly forfeit the dishonored bond and issue a bench warrant for the arrest of such an individual based upon the separate and distinct offense from that which was the subject of the appeal from the Municipal Court of Baltimore City.

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[1] Maryland Code (1966 Repl. Vol.), Article 26, Section 126 provides, in essence, that the Chief Clerk of the Municipal Court of Baltimore City shall be responsible for the collection, custody, accounting and remittance of all fines, penalties, forfeitures, fees and costs levied by that court. Article 26, Section 119 provides, "It shall be the duty of the officers of police, policemen and detectives appointed by the police commissioner of Baltimore City, to serve and execute any and all writs, warrants, subpoenas, summonses, show-cause orders, processes and *commitments*, which may be issued by the court". (Emphasis supplied).

[2] Although the special appellate jurisdiction over the particular judgment and sentence appealed from would be exhausted by the Criminal Court when the appeal is dismissed and the matter is effectively re-transferred to the Municipal Court by communicating such order to its Clerk by mandate or other instrument evidencing the order of dismissal, original common law jurisdiction would attach in the Criminal Court to conduct new proceedings in relation to bond forfeiture or contempt proceedings as the failure to honor the tenor of one's bond to appear in the Criminal Court would be an entirely separate and distinct criminal offense under Maryland Code (1967 Repl. Vol.), Article 27, Section 12B which could subject an absconding appellant to a maximum fine of Five Thousand Dollars or imprisonment for a period of five years if admitted to bail or recognizance on a felony charge, or a maximum of One Thousand Dollars fine or imprisonment of one year in connection with a misdemeanor charge.

CRIMINAL LAW

PENALTY PRESCRIBED BY STATUTE MUST NOT BE VAGUE OR UNCERTAIN.

February 11, 1970.

Honorable Walter S. Orlinsky.

You advised us that you plan to introduce legislation dealing with gambling and narcotics, the penalty structure to provide, *inter alia*:

> ". . . and mandatorily fined without limitation an amount sufficient to exhaust the assets utilized in and the profits obtained by the illegal activity."

You requested our opinion whether such language is in any way constitutionally prohibited in the State of Maryland.

The only specific provisions of our State Constitution relating to criminal penalties, found in the Declaration of Rights, are not directly applicable. Excessive fines are prohibited by Article 25. Cruel and unusual punishment is prohibited by Articles 16 and 25. These articles have been interpreted as proscribing punishment which is "grossly and inordinately disproportionate to the offense", *Mitchell v. State*, 82 Md. 527, or which constitutes "barbarous punishment by torture", *Delnegro v. State*, 198 Md. 80.

More relevant to your inquiry is the requirement that a criminal statute be sufficiently certain and explicit so as to enable a person to ascertain with a fair degree of precision what it prohibits and what conduct on his part will render him liable to its penalties. If a criminal statute is not sufficiently certain, it violates the constitutional guarantees of due process, both under the Fourteenth Amendment to the United States Constitution; *Connally v. General Construction Co.*, 269 U.S. 385; *Lanzetta v. New Jersey*, 306 U.S. 451; and under Article 23 of the Maryland Declaration of Rights, *State v. Magaha*, 182 Md. 122; *McGowan v.*

State, 220 Md. 117. This requirement of certainty and definiteness applies also with respect to the punishment imposed under a penal statute. *Smith v. United States,* 145 F.2d 643 (10th Cir. 1944), cert. den. 65 S.Ct. 563; *Contreras v. United States,* 213 F.2d 96 (5th Cir. 1954); *Holmes v. United States,* 267 F. 529 (5th Cir. 1920); *Haas v. Jennings,* 166 *N.E.* 357 (Ohio, 1929); 22 C.J.S., *Criminal Law,* Section 25.

It is our opinion that the penalty provision, as presently drafted, might well be unconstitutional for failure to meet the requirements of certainty and definiteness. For example, it is unclear whether the assets to be "exhausted" apply only to the assets owned by the defendant or to assets owned by others but employed in the illegal activity; whether the "profits" referred to are those obtained only by the defendant or by others engaged in the same illegal activity; or how the profits are to be computed or determined by the courts.

On this general subject we think it appropriate to call to your attention Article 38, Section 4, Annotated Code of Maryland, which sets a maximum confinement of ninety days for nonpayment of a fine; Article 27, Sections 639 and 643, authorizing the courts to suspend a sentence or impose a penalty less than the minimum prescribed by law; and *Kelly v. Schoonfield,* 285 F. Supp. 732 (D. Md. 1968), and *Morris v. Schoonfield,* 301 F. Supp. 158 (D.Md. 1969), suggesting a constitutional problem where imprisonment for nonpayment of a fine exceeds, in length of time, the maximum imprisonment which could have been imposed for the offense.

We are aware that S. 30, now before the Federal Congress, contains a somewhat analogous effort to remove profit from certain criminal activity. Among other things, Section 1962 of that bill would make it unlawful for any person to invest income received from racketeering or illegal debt collection in any enterprise engaged in or affecting interstate commerce. Under Section 1963 any interest obtained by any such investment will be subject to seizure and forfeiture. We are not in a position to render any view as to the constitu-

tionality of the pending federal bill, but merely point out that there are substantial differences between the measures under consideration there and the device you propose.

FRANCIS B. BURCH, *Attorney General.*

FRANCIS X. PUGH, *Asst. Attorney General.*

EDUCATION, STATE DEPARTMENT OF

EDUCATION — CONSTITUTIONAL LAW — CONSTITUTIONALITY OF HOUSE BILL 203, THE "ELEMENTARY AND SECONDARY EDUCATION ASSISTANCE ACT," PROVIDING FOR CERTAIN TYPES OF STATE AID TO NONPROFIT, NONPUBLIC SCHOOLS.

March 3, 1970.

Honorable Gerald J. Curran.

You have asked this office to pass an opinion upon the constitutionality of House Bill 203, titled the "Elementary and Secondary Education Assistance Act" (the "Act").

House Bill 203 provides for the establishment of a fund to be expended for secular educational services in nonprofit, nonpublic elementary and secondary schools in Maryland, such services to be limited to the payment of the salaries of teachers of mathematics, modern foreign languages, physical science and physical education courses and the loan of textbooks and instructional materials to students for use in these courses. The Elementary and Secondary Education Assistance Fund (the "Fund") would be administered and controlled by the State Department of Education, and eligibility for financial aid would be subject to the following conditions:

1. The textbooks and instructional materials to be provided are to be only such as are approved by the State Department of Education.

2. Any participation by a nonpublic school is to be contingent upon the attainment of a satisfactory level of pupil performance.

3. Teachers of secular subjects are to be certified by the State Department of Education as provided in the Act.

4. The eligibility of nonpublic schools to participate in the program is to be contingent upon adherence to a policy

of enrollment of academically qualified students without regard to race, religion, creed or national origin.

5. Eligibility of any nonpublic school is also made dependent upon a minimum enrollment of more than 60 students.

6. The State Department of Education, by setting an authorized teacher-pupil ratio, is to determine the number of teachers in any one school whose salaries are to be paid by the Fund.

7. Teachers of "any subject matter expressing religious teaching" or teachers "who instruct in religion or denominational tenets or doctrine" are to be ineligible for Fund payment of their salaries or any portion thereof.

8. Schools whose curriculum is specifically designed to educate students to become ministers of religion or for religious vocation are to be ineligible.

The administration of the Act and formulation of policy to effectuate its purposes are vested in the State Superintendent of Schools, and the bill also directs the Superintendent to do all things necessary to provide secular educational services to the nonprofit, nonpublic elementary and secondary schools of the State. Since nonprofit, nonpublic schools include parochial schools, House Bill 203 raises constitutional issues, including the question whether the Bill violates the First Amendment to the United States Constitution which prohibits the passage of any law respecting the establishment or free exercise of religion.

There is, of course, no simple, absolute answer to the question of whether House Bill 203 violates the First Amendment, because law is not an exact science. In rendering our opinion on this question, therefore, as in every question presented to us, we can but examine the pertinent statute and the constitutional provision involved and, by a review of cases considering similar questions, venture our view as to the probable outcome when a court considers the question now under discussion.

It is well settled that the Fourteenth Amendment makes the First Amendment binding upon the states. The test to be applied to a statute to determine whether it violates the establishment of religion clause of the First Amendment, and upon which House Bill 203 must stand or fall, was enunciated by the United States Supreme Court in *Everson v. Board of Education*, 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504 (1947), and also in *Board of Education v. Allen*, 392 U.S. 236, 20 L. Ed. 2d 1060, 88 S. Ct. 1923 (1968):

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say, that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. . . ."

The New York law to which the *Allen* case is addressed authorizes local school boards to lend textbooks to all 7th through 12th grade children enrolled in public or private schools. Because the law authorizes its benefits to be conferred upon students attending parochial schools, a suit was filed alleging the statute to be unconstitutional as "a law respecting an establishment of religion or the free exercise thereof". Holding the New York statute to be valid, the United States Supreme Court concluded that it passed the test of constitutionality because it has "a secular legislative purpose and a primary effect that neither advances nor inhibits religion". Among the reasons advanced for its holding, the Court cited the following:

1. The law makes available to all children the benefits of a general program to lend free school books.

2. Ownership of the books remains, at least technically, in the state.

3. No funds are furnished to parochial schools, the financial benefit being to parents and children.

It was pointed out by the Supreme Court that the New York statute does not authorize the loan of religious books, a significant matter in the light of the mandate of House Bill 203 that only secular books and instructional materials are to be provided under the Act. The Supreme Court recognized that parochial schools have two objectives, one of which is to instruct in religious matters and the other to provide secular education; also, that parochial schools, among other private schools, are an important element in supplying high-quality secular education and thereby make a valuable contribution to the maintenance of adequate levels of experience and competence in the field of national education. Cited with approval was its earlier decision in the *Everson* case, supra, upholding a New Jersey law providing for the reimbursement to parents of parochial students of the expense of bussing their children to school as part of a general program to pay the bus fares of children attending public and other schools. The expenditure of public funds for such purpose was held by the Supreme Court not to constitute an invalid form of establishment of religion in violation of the First Amendment.

It is noteworthy that no part of the Fund to be established by House Bill 203 is to be paid to any school under any provision of the bill. The services of teachers are to be furnished pursuant to contracts to be agreed upon between the Department of Education and the teachers themselves. These teacher contracts necessarily will include salary terms, and payment to the teachers will be made directly to them without disbursement of Fund money to any school. The fact that there is no distribution of State funds to parochial schools provided for in House Bill 203 is an important distinction between it and the State law which was declared to be in violation of the First Amendment to the United States Constitution by the Maryland Court of Appeals, in a 4 to 3 decision, in *Horace Mann League v. Board,* 242 Md. 645 (1966). The *Horace Mann* case challenged the validity of a State law making direct grants of $2.5 million of State funds to four colleges for the construction of buildings. The Court of Appeals indicated that,

if a statute primarily has a secular purpose which could not reasonably be achieved without incidental benefits to religious organizations, the establishment of religion clause is not violated by such statute. The Court went on to say that each statute has to be separately examined to determine whether its purpose, as gauged from its legislative history or in its operative effect, is to give State aid to the advancement of religion.

A contention that the statute at issue in the *Horace Mann* case was repugnant to the Maryland Constitution, as well as to the United States Constitution, was rejected by the Court of Appeals, the opinion pointing out that the First Amendment does not appear in the Maryland Constitution and that no Maryland case denies the power of the Legislature to grant funds to a private institution to be spent for a public use. The opinion added that there is no doubt that State grants to private institutions in aid of education are expenditures for public purposes.

Upon the authority of *Horace Mann League v. Board* and cases cited therein, 242 Md. 684-690, we believe that House Bill 203 is not in violation of the Maryland Constitution.

The furnishing of textbooks and other instructional materials to nonprofit, nonpublic schools in accordance with House Bill 203 appears to be not materially different from nor any more extensive than a similar form of State aid found constitutionally permissible in *Board of Education v. Allen, supra.* Like the New York statute, House Bill 203 contemplates the free of charge use of State-approved, State-owned educational material of a purely secular nature by parochial school students. The State now furnishes to public school students everywhere in the State the same or similar material to that intended to be provided under House Bill 203 to parochial school students. All religiously-oriented educational material is specifically barred by House Bill 203, and the thrust of the bill is stated to be the support of the purely secular educational functions of nonprofit, nonpublic elementary and secondary schools. The advancement or propagation of religion is plainly dis-

claimed and it is averred that the State assistance to be provided by the bill is aimed at the maintenance of first-quality educational facilities and opportunities for all children. In further emphasis of its secular purpose, House Bill 203 bars aid to any nonpublic school which does not have a policy of enrollment of all qualified students regardless of race, religion, creed or national origin and also bars payment of any part of the salary of a teacher whose regular teaching duties include a religious subject or religious doctrine. Barred from participation in the program advanced by House Bill 203 is any school whose curriculum is directed to the preparation of students for religious ministry or other religious vocation.

Under the laws of the State of New Hampshire, the state legislature may solicit the opinion of the New Hampshire Supreme Court regarding the constitutionality of pending legislation. On July 1, 1969, the New Hampshire Senate propounded to their high court questions relating to the constitutionality of several bills pending before it. The questions were answered preliminarily on July 2, 1969, and a formal *Opinion of the Justices* was filed on October 31, 1969; 258 A. 2d 343. The bills and the opinions of the Justices as to each may be briefly summarized as follows:

Senate Bill 319—To permit a $50.00 tax exemption to persons having one or more children enrolled in a nonpublic school (found to be in violation of the First Amendment).

Senate Bill 320—To include in the base for computing foundation aid the number of children attending nonpublic schools (declared constitutional).

Senate Bill 325—To authorize a school board in its discretion to provide transportation for nonpublic school pupils under circumstances described in the bill (constitutionality considered uncertain because susceptible of discriminatory application).

Senate Bill 326—To authorize the furnishing of certain enumerated services to school children generally sim-

ilar to the services of a school physician, school nurse, school guidance services and the like (considered to be constitutional under the theory of the *Allen* and *Everson* cases, *supra*).

Senate Bill 327—To provide for the free loan or sale at cost of textbooks on secular subjects to pupils enrolled in nonpublic schools (considered constitutional also on the authority of *Everson* and *Allen, supra*).

In explanation of their resolution of these constitutional questions the Justices adverted to an earlier opinion holding invalid a statute providing for direct and unrestricted grants of public funds to nonpublic schools, including parochial schools, for purposes not limited to secular education; *Opinions of the Justices*, 108 N.H. 268, 233 A. 2d 832. The Justices went on to point out that, since that opinion, the United States Supreme Court decided the case of *Board of Education v. Allen, supra,* upholding a New York law requiring local public school authorities to lend textbooks free of charge to students, including private school students, in grades 7 through 12. The New Hampshire Supreme Court, conforming its views to the opinion of the United States Supreme Court in the *Allen* case, said, among other things, that the extension of benefits to all citizens without regard to religious affiliation is not constitutionally defective because some children are aided in attending parochial schools who might not do so otherwise. Noting that the New Hampshire Constitution, like the First Amendment to the United States Constitution, bars aid to sectarian activities of religious institutions, the New Hampshire high court added: "It is our opinion that, since secular education serves a public purpose, it may be supported by tax money if safeguards are provided to prevent more than incidental and indirect benefit to a religious sect or denomination. We are also of the opinion . . . that members of the public are not prohibited from receiving public benefits because of their religious beliefs or because they happen to attend a parochial school." The court then went on to apply to the bills which were the subject of the questions

propounded by the Senate the test laid down in the *Allen* case, which we have set forth above.

A Pennsylvania statute providing public aid to nonpublic schools was held not to offend the First Amendment in a United States District Court case decided November 28, 1969. This case also adverted to the constitutional standard delineated in the *Allen* case, noting that "the line between state neutrality to religion and state support of religion is not easy to locate" and that "the problem, like many problems in constitutional law, is one of degree". The three-judge federal panel, in a 2 to 1 decision, ruled state subsidy payments to private schools to be in the public interest because "a crisis exists in elementary and secondary education in Pennsylvania due to rapid increases in costs and school population and subsequent demands for more teachers and facilities". *Lemon v. Kurtzman,* U.S.D.C. E.D. Pa., Civil Action No. 69-1206. It is significant that the Pennsylvania statute upheld by the District Court is identical to House Bill 203 in most of its provisions and goes substantially further in an important respect. The Pennsylvania law provides for teacher contracts to be entered into between the State and the schools, whereas House Bill 203 calls for contracts to be agreed upon between the State Superintendent of Schools and the teachers themselves. The reach of House Bill 203 in this aspect is clearly more restricted and less vulnerable from a constitutional standpoint.

In summary, *Horace Mann League v. Board, supra,* dealing as it does with a law providing for direct grants to educational institutions, does not, in our opinion, invalidate the educational assistance program set out in House Bill 203. We believe further that House Bill 203 may reasonably be said to pass the two-part test laid down by the United States Supreme Court in the *Allen* case. The bill contains a forthright expression of legislative intent to accomplish a secular purpose and a declaration of policy to the same effect. The fact of a secular legislative purpose is readily apparent in the light of the several affirmative provisions

to that effect contained in the bill. As to the second part of the *Allen* test, that constitutional considerations bar a statute from having the primary effect of advancing religion, we perceive no difference in principle between the bussing of parochial and public school students alike at public expense which was deemed constitutionally permissible in *Everson,* the loan of textbooks that won constitutional endorsement in *Allen* and the provisions for furnishing textbooks and educational material of a secular nature and the teaching of certain secular subjects at public expense in nonprofit, nonpublic schools as contained in House Bill 203.

For all of the reasons we have stated, we advise you of our opinion that House Bill 203, in its present form, does not violate either the Constitution of Maryland or the First Amendment to the Constitution of the United States.

ROBERT F. SWEENEY, *Deputy Attorney General.*

FRED OKEN, *Asst. Attorney General.*

EDUCATION

STATE COLLEGES—INSPECTION OF SCHOOL BUSES BY BALTIMORE COUNTY OFFICIALS.

March 31, 1970.

Mr. Wayne N. Schelle.

You have asked our advice as to whether the buses owned and operated by *Towson State College* are subject to inspection by Baltimore County under Section 31-12 of the Baltimore County Code.

Section 31-12 of the Baltimore County Code, which provides for county inspection of school buses, defines that term as follows:

> "(a) (1) School bus means any bus used for transportation of *children* to and from *public,* private or parochial *schools* in the county, falling within the definition of school buses contained in *Article 66½, section 255,* of the Annotated Code of Maryland, 1957, but not including county-owned school buses or county-chartered school buses." (Emphasis supplied.)

It should be noted that this county inspection law does not apply to all school buses that may come within the definition of Article 66½, Section 255 of the Annotated Code of Maryland.* Rather, the county law is limited only to those school buses, as defined by State law, that transport "children to and from public . . . schools in the county". Section 31-12 is one of twelve sections in the Baltimore County Code included in Title 31, which is entitled "Schools", and the term "public schools" as used therein clearly applies only to public schools under the control of the Baltimore County Board of Education. For example, Section 31-1 requires the county to make an "annual levy for the support of the public schools". The

county does not, of course, make any annual levy for the support of Towson State College, since it is not considered a "public school" in this context. Section 31-2 requires the county to pay the proceeds of this annual levy to "the board of education of the county for school purposes". The county board of education does not have any control over Towson State College, nor does that board give any financial support to the College. (Full control over the College is vested exclusively in the Board of Trustees of the State Colleges in Article 77A, Section 11, whereas the jurisdiction of the county board over the establishment of public schools is contained in Article 77, Section 42.) Section 31-3 pertains to kindergartens; Section 31-4 to evening schools; Section 31-5 through Section 31-9 to the powers of the county board of education; and Sections 31-10 and 31-11 to private schools. It would be incongruous to construe the term "public schools" as used in Section 31-12 in a substantially broader context than that identical term is used in the rest of Title 31.

Moreover, Section 31-12(a) (1) applies only to buses that transport *children* to and from public schools. If the Baltimore County Council intended Section 31-12 to apply to college students, such intention would have been manifested by appropriate language. The word "children", used in the context of schools, would normally denote pupils at the elementary and secondary levels only and does not ordinarily refer to college students. In this regard, contrast the broader language of the State Motor Vehicle Law, Article 66½, Section 255, which defines a school bus as one transporting "children, *students,* or teachers" (emphasis supplied).

Therefore, we are of the opinion that Section 31-12 of the Baltimore County Code does not apply to buses operated by Towson State College to transport its students. Conse-

quently, such buses are not subject to inspection by the county authorities.

FRANCIS B. BURCH, *Attorney General.*

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

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* Article 66½, Section 255 of the Annotated Code of Maryland defines a school bus as: "A motor vehicle having a seating capacity of ten (10) or more persons and transporting children, students, or teachers to and from schools or to and from any school activity and not operating under the jurisdiction of the Public Service Commission, Washington Metropolitan Area Transit Commission and/or not operated by a public service corporation furnishing mass transportation in a town of a population of more than fifty thousand (50,000) inhabitants."

EDUCATION—STATE COLLEGES—BOARD OF VISITORS—DUTIES AND RESPONSIBILITIES.

April 6, 1970.

Mr. Edmund C. Mester.

You have asked us to outline the duties and responsibilities of the recently appointed Boards of Visitors for the State colleges, with particular reference to the role of these Boards in the selection of college presidents.

Article 77A, Section 12-1(g) of the Annotated Code of Maryland (1969 Replacement Volume) states as follows:

> "*Duties and Responsibilities.*—Each board of visitors has the following duties and responsibilities:
>
> (1) Assist the president in the determination of the goals of the college and in the evaluation of progress toward such goals.
>
> (2) Review budget proposals as developed by the president, make recommendations, and advise and assist in the preparation of the annual budget.
>
> (3) Advise and assist the president in the development of college facilities.
>
> (4) Assist in the conduct and development of community related programs.
>
> (5) Assume leadership in the development of community and private support for the college.
>
> (6) Carry out such other responsibilities as delegated to it by the board of trustees of the State colleges or the college president."

The duties of each Board of Visitors, as enumerated above, are self-explanatory. As can be seen, these duties are primarily in the nature of an advisory capacity and, therefore, do not displace the statutory powers that provide (1) that

each "president shall be the head of his respective college and shall be responsible for the discipline and successful conduct of his college and for the administration and supervision of all its departments" [Article 77A, Section 12(e)] and (2) that the Board of Trustees of the State Colleges "shall exercise direction and control" of the State colleges [Article 77A, Section 11(a)] and shall have "all the powers, rights and privileges attending the responsibility of their management" [Article 77A, Section 12(a)]. Within the context that the ultimate responsibility for the conduct of each State college is still vested in the president of the college, subject to the control of the Board of Trustees, the Boards of Visitors are free to and, indeed, are required to perform their enumerated statutory duties and responsibilities.

Regarding the role of a Board of Visitors in selecting a college president, Article 77A, Section 12-1(h) provides as follows:

> "The board of trustees of the State colleges shall consult with the board of visitors for any college whenever the board of trustees is selecting a president for the college."

On November 5, 1969, we advised the Board of Trustees committee for the selection of a new president for Salisbury State College as follows:

> ". . . [T]he statute does not give very much guidance as to the precise scope of the role of the Board of Visitors. The primary definition of the word 'consult' in Webster's Seventh New Collegiate Dictionary is as follows: 'to ask the advice or opinion of'.
>
> "Minimum legal compliance with the statute, in accordance with the cited definition, would be satisfied by your committee's submitting the name of the final candidate to the Board of Visitors for their recommendation as to approval or disapproval. However, the statute does not preclude

your committee from involving the Board of Visitors more actively in the selection process. The extent of the involvement will be a matter of policy for your committee to determine. It should be noted, of course, that any participation by the Board of Visitors or its representatives is only in an advisory capacity. The final decision rests exclusively with the Board of Trustees of the State Colleges."

Within the limits outlined above, therefore, each Board of Visitors should proceed to perform the duties enumerated by law.

FRANCIS B. BURCH, *Attorney General.*

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

EDUCATION—UNIVERSITY OF MARYLAND—TEMPORARY SUSPENSION OF STUDENT PRIOR TO HEARING—AUTHORITY OF PRESIDENT TO DELEGATE TO CHANCELLORS POWER TO IMPOSE TEMPORARY SUSPENSION AND POWER TO DEVISE HEARING METHODS.

September 1, 1970.

Dr. Wilson H. Elkins.

Your letter of August 10, 1970, inquires whether the President of the University of Maryland has the power of temporary suspension prior to a hearing and, if so, whether he may delegate this authority to the Chancellors of the campuses of the University.

In our letter to you of January 23, 1969, we advised you that the University of Maryland may impose a temporary suspension upon a student, pending a hearing on charges of serious misconduct. Subsequent to the rendering of that opinion, several cases have been reported in which this question has been given consideration. We believe a brief review of them would be of interest to you.

In *Barker v. Hardway,* 283 F. Supp. 228, affirmed 399 F. 2d 638, cert. den. 89 S. Ct. 1009 (1969), certain students were mailed suspension letters after they had been identified as participants in a violent and unruly demonstration which posed an imminent threat of danger to the president of a State college and others in his party. The college administration had been unable to locate the students in their scheduled classes or at their places of residence. The letters sent the students advised them of the reasons for their suspension, of the availability of an appeal hearing, and how to request such a hearing. The Court found that the college president's action in issuing the suspension orders, with the right of the student to appeal that order, "was clearly within the recognized limits of his authority as the administrative head of the college." 283 F. Supp. at 236.

In *Powe v. Miles*, 407 F. 2d 73 (1968), the United States Court of Appeals for the Second Circuit reviewed the guidelines for demonstrations promulgated by Alfred University which gave to the dean of students the authority to make an on-the-spot determination whether a given demonstration breached the guidelines, and which provided for the immediate suspension of demonstrators who did not obey the dean's requests to adhere to the guidelines. The reasonableness of the dean's action was made subject to later review. The Court voiced its approval of the University's guidelines and held that they did not constitute an unreasonable prior restraint on the right of expression.

In *Scoggin v. Lincoln University*, 291 F. Supp. 161, 172 (D. Mo. 1968), the Court noted the right of the University, in appropriate violent circumstances, to order the temporary removal of students who persisted in their efforts to induce chaos in the academic community.

Similarly, the Court in *Stricklin v. Regents of the University of Wisconsin*, 297 F. Supp. 416 (D. Wisc. 1969), held that the University may impose an interim suspension where the appropriate University authority has reasonable cause to believe that the continued presence of an accused student on campus, pending a full hearing on the student's allegedly violent conduct, would represent a danger to the University Community. The Court also held that a preliminary hearing should be held prior to the imposition of an interim suspension unless it would be impossible or unreasonably difficult to do so.

Accordingly, we believe that the case law continues to support the conclusion reached by our prior opinion. The University clearly has the authority to order the temporary or interim suspension of a student, and his consequent removal from the campus, where his conduct indicates that his presence on the campus constitutes a threat to the peace, safety, or order of the University community. Such an interim suspension may continue at the University's discretion until a determination is reached after a full hearing on the charges of misconduct. The University may

wish to offer a student under an interim suspension the opportunity to appeal to the appropriate University authority in order that he might demonstrate, for example, that an error in identification was made or that his continued presence would not pose a threat to the University community. The provision of such an opportunity to appeal an order of interim suspension would ensure that a student would not be unfairly barred from campus and would satisfy the requirements of due process.

We believe that the President of the University may delegate the authority to impose an interim suspension to the Chancellors of the several campuses of the University. The Chancellors are the chief administrative officers of the campuses and are in charge of the day-to-day management of the academic, administrative, and student disciplinary problems of the campuses. It would certainly appear to be appropriate to empower the Chancellors to impose an interim suspension when in their discretion it is warranted, in order that they might deal quickly and effectively with a campus emergency.

Your letter further inquires whether the President has the authority to delegate to the Chancellors the power to devise a method of hearing cases of alleged misconduct, and specifically cases dealing with disruption and violence. Where the Board of Regents has approved a particular procedure to handle problems of student discipline, such procedure is binding and remains in force until revoked or replaced by subsequent action of the Board of Regents. The President, therefore, would not himself have any authority to devise or order the use of any other method of handling cases of student misconduct, nor would he have the authority to delegate the power to devise a different system to the Chancellor of a campus where a system approved by the Board of Regents is in force.

Where, however, a campus is not operating under a disciplinary system approved by the Board of Regents, the President may delegate to the Chancellor of that campus the authority to devise a procedure to handle charges of

student misconduct. Needless to say, any system devised by either the Chancellor, the President of the University, or the Board of Regents must accord the accused student the protections of due process.

FRANCIS B. BURCH, *Attorney General.*

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

EDUCATION—UNIVERSITY OF MARYLAND—STUDENT ACTIVITIES FEES—BOARD OF REGENTS HAS AUTHORITY TO IMPOSE GENERAL GUIDELINES AND RESTRICTIONS.

October 21, 1970.

Mr. George D. Webb, II.

Reference is made to your letter of October 6, 1970, requesting our opinion as to what authority, if any, the administration or Board of Regents of the University of Maryland has over the use or allocation of student activities fees.

The monies in question are derived from a mandatory fee imposed upon all students enrolled at the University of Maryland. The fees are deposited in the State Treasury, in a special fund account for the purpose of financing self-supporting activities. Authorization to maintain the special fund account appears in Item 13.05.00.14 of the Annual Budget for the State of Maryland as enacted from year to year by the General Assembly and as set forth in the General Sessions Laws. It is our opinion that the fees constitute State funds although they may be used only to support student activities at the University and may not be invaded for general educational or operational expenses of the University. *City of Morgantown v. Ducker,* 168 S.E. 2d 298 (W. Va. 1969).

We can find nothing in the law or in the budget which prohibits or restricts the University from assuming direct responsibility for the allocation of funds derived from student activity fees. The present budgetary appropriation is for the general category "student activities", with the only explanation appearing in the Maryland State Budget as follows: "This includes the Student Government Association which publishes a newspaper and a yearbook and supports such activities as the theatre, radio station, orchestra, glee club and chorus from a special student fee and other income." Beyond this general guideline, we believe it

to be a matter for University discretion as to what specific allocations will be made.

It appears to have been the general practice of the University to permit the Student Government Association full freedom in deciding allocations of funds to various student activities. There is, however, nothing to preclude the Board of Regents from revoking this rather broad delegation of power and requiring approval of the Student Government Association's budget by the Board itself or by a designated member of the University Administration. To do so would be within the authority granted the Board of Regents to exercise with respect to the University ". . . all the powers, rights, and privileges that go with the responsibility of management . . ." Article 77A, Section 15, Annotated Code of Maryland.

Additionally, we believe that the Board has authority to impose general guidelines and restrictions which would govern the allocation of the student activities fund. Such guidelines might include prohibitions to restrict the use of funds for certain general categories of activities which the Board did not deem to be in the best interest of student life or which are unrelated to the welfare of the student community.

There is a considerable body of law, however, to the effect that where the Board of Regents or appropriate University officer has approved an allocation of funds from the special fund account for student activities, it may not arbitrarily cut off funds in a particular instance where to do so would constitute an infringement upon an individual's civil rights. For example, while the Board may generally forbid the expenditure of funds to pay stipends to outside speakers, once an allocation is made to the Student Government Association for stipends to outside speakers, the University may not intervene to prevent the appearance of a particular speaker. *Stacy v. Williams,* 306 F. Supp. 963 (D. Miss. 1969); *Brooks v. Auburn University,* 296 F. Supp. 188 (D. Ala. 1969). Similarly, once an allocation is made for publications, the University may not impose pre-censor-

ship of a publication. *Korn v. Elkins,* United States District Court for the District of Maryland, decided September 17, 1970, Civil Action No. 70-47-N; *Hammond v. Antonelli,* 308 F. Supp. 1329 (D. Mass. 1970). As it is difficult to conjure up hypothetical situations to which these general principles may be applied, we suggest that the guidance of this office be sought on a case by case basis as the need arises.

We wish further to add that as the fees in question constitute State funds just as all other monies collected by State agencies, they are subject to audit and supervision by the Comptroller both before and after allocation and expenditure, and regardless of who exercises the power of allocation.

FRANCIS B. BURCH, *Attorney General.*

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

ELECTIONS

FINAL DATE ESTABLISHED BY ARTICLE 33, SECTION 3-8 (B) FOR CHANGING PARTY AFFILIATION MAY NOT BE EXTENDED BY LOCAL BOARDS.

March 23, 1970.

Mr. Willard A. Morris.

At the request of the Honorable Blair Lee III, Secretary of State, we prepared on August 26, 1969, a table of the relevant dates for the primary and general elections to be held this year. In that letter we advised Mr. Lee, among other things, that the final date for changing one's party affiliation on the permanent voter registration records was March 16, 1970. This date was arrived at by a reference to Article 33, Sections 1-1(c) and 3-8(b), the latter of which reads as follows:

> "Voters already registered as declines who wish to affiliate with a party, or voters who wish to change their party affiliation, or voters who wish to change from affiliation with a party to registration as a decline, may do so at any time prior to six months before any election."

The date of the primary election will be September 15, 1970, by virtue of Article 33, Section 5-2(a). Furthermore, there can be no doubt that the phrase "any election" in Section 3-8(b) includes the primary election. See *Lee v. Sec. of State & Mahoney,* 251 Md. 134, 138 (1968). You now ask whether this final date is mandatory or whether local election boards in each subdivision have the power to extend this date for reasons found satisfactory to them.

With reference first to the statute quoted above, the word "may" in the final phrase cannot be construed so as to render discretionary the language of the balance of the statute. That word means only that a registrant, prior to the final date established by the section, is given *the option*

of making a change in registration. If, indeed, there could be any doubt on this point, it has been finally laid to rest by the decision of the Court of Appeals of Maryland in *Lee v. Sec. of State & Mahoney, supra.* In that case the final closing date under Section 3-8(b) was March 10, 1968; yet, on April 26, 1968, the Board of Supervisors of Elections of Baltimore County "reopened [its registration records] . . . for the sole purpose of allowing [George P.] Mahoney to change his registration from Democrat to decline" (p. 136). On these facts the court concluded, at p. 138, that:

> ". . . The Board had no right to permit Mahoney to change his registration from Democrat to decline within six months of the primary election of September 10, 1968, and it erred in so doing. [citation]"

More recently, the United States District Court for the District of Maryland had an opportunity to review the Maryland election laws in *Barnhart v. Governor of Maryland*, 311 F. Supp. 814 (D.C. Md., February 17, 1970). At pp. 11 and 24-25 of its opinion a three-judge court found insubstantial a constitutional attack upon Section 3-8(b) and went on to determine that the abstention doctrine could not be applied because the March 16th date represented an absolute deadline which could not be extended.

It is our opinion, therefore, that the language of Section 3-8(b) is mandatory, that this conclusion is fully supported by the applicable case law and that local boards lack the power to extend this date.

FRANCIS B. BURCH, *Attorney General.*

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

ELECTIONS—MUNICIPAL ELECTIONS—MUNICIPALITIES ARE GENERALLY NOT SUBJECT TO THE CONSTITUTIONAL AND STATUTORY REQUIREMENTS FOR VOTER QUALIFICATION—MUNICIPALITIES MAY PERMIT PERSONS WHO ARE NOT CITIZENS OF THE UNITED STATES TO VOTE IN LOCAL ELECTIONS.

May 25, 1970.

The Honorable Pauline H. Menes.

In your recent letter you asked whether the United States citizenship requirement for voters, found in Article I, Section 1 of the Maryland Constitution and in Article 33, Section 3-4(b)(1) of the Maryland Code, would prohibit the Town of Greenbelt from amending its local election laws so as to permit persons to vote in municipal elections who are not citizens of the United States.

The decision of the Court of Appeals of Maryland in *Hanna v. Young,* 84 Md. 179 (1896), establishes the limits of the constitutional section in question. The Court made the following statement at pp. 182-183:

> ". . . The Constitution of this State provides for the creation of certain offices, State and county, which are filled, either by election or by appointment; and we regard it as an unreasonable inference to suppose that municipal elections held within the State (outside the corporate [sic] limits of Baltimore City), can be properly termed elections under the Constitution, such as State and county elections; or that the framers of the Constitution ever contemplated that Art. I, Sec. 1, of that instrument was intended to apply to municipal elections, such as the one now under consideration, which is the mere creature of statutory enactment. . . ."

Having found that the provisions of the Constitution did not apply to municipal elections, except in Baltimore City,

the Court went on to state that such elections were "the mere creature of legislative sanction and the subject of statutory regulation". See also *Jackson v. Norris,* 173 Md. 579, 604 (1937).

The remaining question is whether the General Assembly has sought to apply these qualifications to municipal elections. In Article 33, Section 1-1(a)(6) it is specifically stated that municipal elections, other than those in Baltimore City, are excluded from the coverage of the State election laws "unless otherwise specifically provided for in this article". Nothing in Article 33 would indicate that the requirement of United States citizenship found in Section 3-4(b)(1) was intended to be applied to municipal elections.

Along the same lines, qualifications for elective franchise other than those prescribed in the Maryland Constitution have been adopted by the municipalities of Rockville and Ocean City. By amendment to Section 48-5 of its charter in 1967, the City of Rockville permitted persons 18 years of age or older to vote in local elections. Cf. Article I, Section 1 of the Maryland Constitution; Article 33, Section 3-4(b)(2) of the Maryland Code. By Section 175(a) of its charter, the Town of Ocean City permits non-resident owners of real estate to vote in local elections. Cf. Article I, Section 1 of the Maryland Constitution; Article 33, Section 3-4(b)(4) of the Maryland Code. This latter provision was approved in 52 Opinions of the Attorney General 68 (1967).

Under all of these circumstances, we are of the view that the Town of Greenbelt, by appropriate legislative action, may extend the franchise in municipal elections to persons who are not citizens of the United States.

FRANCIS B. BURCH, *Attorney General.*

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

ELECTIONS—PROPER ARRANGEMENT OF PRIMARY ELECTION BALLOT IN BALTIMORE CITY FOR 1970 ELECTION—FINAL DATE FOR FILING CERTIFICATES OF CANDIDACY FOR ASSOCIATE JUDGE OF PEOPLE'S COURT OF BALTIMORE CITY ESTABLISHED BY ARTICLE IV, SECTION 41A(3) OF MARYLAND CONSTITUTION RATHER THAN ARTICLE 33, SECTION 4A-3 OF MARYLAND CODE.

August 6, 1970.

Mrs. Betty M. Silbert, President.

On the afternoon of August 4, we received from your office the proposed ballot arrangement for each of the six legislative districts of Baltimore City for the forthcoming primary election to be held on September 15. The purpose of this letter is to provide you with our comments as to the legal sufficiency of this ballot arrangement when measured by the provisions of Article 33, Section 16-5 of the Annotated Code of Maryland, 1969 Replacement Volume, and the case law construing the provisions of this section. Our specific comments are as follows:

1. The titles of offices listed horizontally across the top of the ballot are in the order required by Section 16-5(c). The only questionable part of this arrangement is the placement of candidates for associate judges of the Municipal Court and associate judge of the People's Court. We believe that you correctly included these offices within the grouping under subsection (4) of that section ("offices for which the voters of . . . Baltimore City may vote, including, but not limited to . . . .") rather than subsection (2) ("the courts of Baltimore City") as that latter phrase seems to contemplate circuit courts rather than courts of limited jurisdiction.

Related to the provisions of Section 16-5(c) are those of Section 16-5(f) which require for every office that there be "an appropriate direction or instruction to the voter informing him of the number of persons [i.e. one or more] for whom he may lawfully vote for the particular office men-

tioned immediately above . . . ." We note that in many instances this requirement has not been met on these ballots.

A total of nine offices have been left off the ballot entirely while many more do not appear in one or the other party primary. In approving these omissions we are relying on your representation that no contests exist for any of these offices. See Section 5-3(c).

2. Five rows, of the ten vertical rows available, have been assigned to candidates in the Democratic primary election, three rows have been assigned to candidates in the Republican primary election and two rows have been assigned to carry the headings and party designation of the offices. This arrangement is in conformity with the requirements outlined in 48 Opinions of the Attorney General 150, 154 (1963), which read as follows:

> "Since the office of Mayor is the first office to be listed on the ballot, it should be the primary factor in determining the number of rows to be allocated to each political party. . . ."

This is so because there are five Democratic candidates for Governor and three Republican candidates for that office in this primary election.

3. In the First Legislative District, the arrangement on the Democratic ballot for House of Delegates should be 5-4-4-4 rather than 5-5-4-3. This is so because of the requirement established in *Resnick v. Board of Elections*, 244 Md. 55, 62 (1966) that "[w]hen more than one column is used, each vertical column shall contain, as far as possible, an equal number of names." See also 48 Opinions of the Attorney General 150, 158 (1963):

> "With respect to the candidates for nomination to the office of President of the City Council in the Democratic Primary, since there are more than five candidates for this office they must be placed in two adjacent columns. Except for the requirement relating to equality of columns, these candidates

> would be placed five in one column and two in the next; however, in view of this requirement, the candidates should be placed four in the first column and three in the second, each column to run vertically and the names to be placed in alphabetical order."

Along these lines, in the same District the candidates for the Democratic State Central Committee should be arranged 4-4-4-4 rather than 5-5-3-3, and in the Fourth District 4-4-4-4 rather than 5-5-3-3. Also in the Fourth District the Democratic candidates for the House of Delegates should be arranged 5-4-4-4-4 rather than 5-5-5-3-3.

A similar problem was handled correctly by the Board in its proposed arrangement in the Democratic primary for House of Delegates for the Fifth Legislative District (5-5-5-4-4 rather than 5-5-5-5-3) thus avoiding a drop-off of two names in the fifth column. Other examples of proper handling of a related problem on these ballots are the proposed arrangements for associate judges of the Municipal Court (4-3 rather than 5-2), for the State Senate in the Democratic primary for the Second Legislative District (4-4 rather than 5-3) and for State Senate in the Democratic primary for the Third Legislative District (3-3 rather than 5-1).

Assuming that all candidates who have filed valid and timely certificates of candidacy (and who did not file valid and timely certificates of withdrawal) have been listed by you on the proposed ballots, we find that the placement of the names of all other candidates is in complete conformity with the statutory requirements.

4. It is our understanding that you placed the names of the candidates for Republican State Central Committee for all districts in columns 28 and 29 rather than in columns 30 and 31 (which latter arrangement would have placed them under the first two columns of the candidates for Democratic State Central Committee) because the Republican candidates for this party office run from single-member subdistricts while the Democratic candidates run from multimember districts. Your decision in this matter avoided the

necessity of adding "Harrisburg channels" to columns 30 and 31 in the Republican primary, a result which would have been entirely unsatisfactory based upon past experience. In light of this we feel that your action in this regard was entirely proper.

5. There are several omissions on the proposed ballots which you have delivered to this office. In the First Legislative District you have inadvertently omitted the Democratic candidates for associate judge of the People's Court, for Clerk of the Court of Common Pleas and for Clerk of the Circuit Court No. 2 as well as the Republican candidates for United States Senator. In the Fourth Legislative District you have not included the Democratic candidates for Clerk of the Circuit Court No. 2. On a related point, we note that in the Second, Fourth, and Fifth Legislative Districts you have identified a Republican candidate for United States Senator as "Davidson" when, as we understand it, the name should be "Dawson" as is properly shown on the ballot for the Third and Sixth Legislative Districts.

Lastly, in the Fifth Legislative District, candidate Alperstein appears out of alphabetical order before candidate Allen in the list of candidates for the Democratic State Central Committee.

* * *

These ballots should not be printed until you have received from the State Administrator of Election Laws a certified final list of those candidates who by law are required to file their certificates of candidacy and of withdrawal with his office. See Article 33, Section 4A-2, 1969 Cumulative Supplement. On this point, we note for example that candidate Miller is listed on the ballots for the Second and Third Legislative Districts as a Democratic candidate for Congress (Fourth District) yet we are advised by the State Administrator that Miller filed a timely and valid certificate of withdrawal and, therefore, his name should not appear on these ballots.

Finally, while for all other State offices the time for filing certificates of candidacy expired on July 6 (see Article

33, Section 4A-3 of the Maryland Code and Article IV, Section 41C (b) (3) of the Maryland Constitution), this is not so for the office of associate judge of the People's Court of Baltimore City. The filing date for that single office is established by Article IV, Section 41A (3) which reads as follows:

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

This means that the deadline for filing certificates of candidacy for this office will not expire for another nine days. This office, therefore, cannot finally certify the candidates and ballot arrangement for the office of associate judge of the People's Court of Baltimore City until that deadline has passed.

You should be aware of Article 33, Sections 16-4 (b), 16-7 (d), 27-4 (a) and 27-6 (b). Taken together, these sections require that a sample of the various ballots, not necessarily printed, must be prepared by the Board and made available for inspection by candidates and representatives of parties participating in the primary election not less than twenty days before said election, that specimen ballots must be posted at each polling place on the morning of the primary election, that applications for absentee ballots shall be received no later than ten days before the primary election and that the absentee ballots must be sent out by the Board "as soon as practicable thereafter".

FRANCIS B. BURCH, *Attorney General.*

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

ELECTIONS — FAIR ELECTION PRACTICES CODE — WHETHER MARYLAND LAW MAY REACH POLITICAL COMMITTEE BASED IN DISTRICT OF COLUMBIA—SAME PERSON MAY SERVE AS TREASURER FOR SEVERAL CANDIDATES OR POLITICAL COMMITTEES — APPOINTMENT OF STEERING COMMITTEE AND TREASURER FOR POLITICAL COMMITTEE NECESSARY PREREQUISITE TO DISBURSEMENT OF FUNDS BY SAID COMMITTEE—PERMISSIBLE EXPENDITURES BY CAMPAIGN TREASURER.

August 24, 1970.

The Honorable Blair Lee III.

At your request this office has reviewed the demand made upon you by Peter James, candidate for the Republican nomination for Governor at the forthcoming primary election, that you initiate injunctive relief pursuant to Article 33, Section 26-21 of the Maryland Code because of alleged violations of the Fair Election Practices code of the same Article by the steering committee and treasurer of the "Blair for Governor Committee". Mr. James alleges that the Blair for Governor Committee is sponsoring a fund-raising ball at the Washington Hilton Hotel at the invitation of Vice President and Mrs. Agnew on September 18, tickets to which are being sold at the rate of $500 each; that payments were made by that Committee to the hotel to secure the reservations and that payment has also been made by the Committee for engraved invitations to the ball. Mr. James alleges that both of these financial transactions took place prior to the appointment of Alvin B. Krongard as treasurer for the Blair for Governor Committee on August 14. Mr. Krongard had already been appointed, however, on June 29 as treasurer for C. Stanley Blair, Republican candidate for Governor. The acts which Mr. James seeks to reach by way of injunction are the two disbursements of funds referred to above which allegedly took place prior to the August 14 appointment.

Answering first your specific question, we see no possible

basis for injunctive relief based upon the facts as presented by Mr. James. The statute authorizing you to seek injunctive relief for violations of the Fair Election Practices code was added by Chapter 559 of the Laws of Maryland of 1969 and has never been construed by either the courts of Maryland or this office. A basic prerequisite to the right to receive any injunction of this type, however, is that there be a present wrong or omission which may be the subject of either affirmative or negative relief from the courts. See Rule BB70 (a) of the Maryland Rules of Procedure. As was stated by the Court of Appeals of Maryland in *Carpenters v. Roofers,* 181 Md. 280, 282 (1943), "wrongs already perpetrated cannot be corrected by injunction". Even if we were to find that a cognizable wrong had been committed, injunctive relief would be inappropriate for the very reason that there is no possibility that the isolated incidents about which Mr. James complains will ever recur because, since August 14, the Blair for Governor Committee has had a duly filed treasurer. There are certain portions of the Fair Election Practices code (namely, *inter alia,* Section 26-16 (a) (6) relating to political coercion of employees by employers and Section 26-16 (a) (7) relating to distribution of unauthorized literature) which are particularly susceptible of injunctive relief because of the possibility of these violations being continuing in nature. We are confident that you will bring such violations to our attention if and when you become aware of them. The alleged violations charged by Mr. James, however, do not fall within this category.

Although you did not specifically raise this in your request to us, we deem it appropriate to give you our views on the question of the criminal charges made by Mr. James. The criminal sanctions to the Fair Election Practices code exist separate and apart from your right to seek an injunction and are specified in Sections 26-16 (b) and 26-20 of Article 33. If we were to find evidence of criminal violations likely to lead to prosecution, we would present this forthwith to the State's Attorney of the appropriate political subdivision of the State so that indictments could be sought by him. There is no question, on the facts presented, but

that the Blair for Governor Committee is a "political committee" within the definition contained in Section 1-1 (a) (14) of Article 33 and, as such, if properly subject to the Maryland law, must appoint and maintain a steering committee and a treasurer in accordance with Section 26-4 (a)*. However, because the headquarters of the Blair for Governor Committee are at the Washington Hilton Hotel, the invitations to the ball were mailed from Washington, the ticket requests and contributions will come by return envelope to the Washington headquarters and the fund-raising event itself will be held in Washington, we have grave doubts that a committee limited, as Mr. James suggests, to the sponsoring of this single event is in any way subject to the criminal laws of the State of Maryland. It is true that the Committee, perhaps out of an abundance of caution, did file its steering committee and treasurer with the State Administrator of Election Laws on August 14, after Mr. James' charges were brought to light. We do not believe, however, that the Committee should be penalized for attempting to comply with Maryland law particularly when it is quite likely that the Committee would have remained beyond the reach of the law's application had it not chosen to do so.

On the other hand, assuming for purposes of this opinion that the Committee is subject to these requirements of the Maryland Fair Election Practices code, we are not persuaded that any violation of the statute has taken place. Mr. James urges that Mr. Krongard and the steering committee have run afoul of Section 26-4 (a), which prohibits a treasurer and a steering committee from disbursing money for the purposes of a political committee prior to the appointment of a treasurer and steering committee. Even if Mr. James were able to establish that payments for engraved invitations and payments to secure reservations at the Washington Hilton Hotel did take place prior to Mr. Krongard's August 14 appointment, he has offered no evidence that the subject payments were not made perfectly properly in accordance with the provisions of Section 26-10 (a), which authorize a campaign treasurer to "pay all law-

ful expenses" of a campaign, specifically including the hiring of halls and music, renting of rooms and headquarters, and printing and postage expenses. We assume that the expenditures by Mr. Krongard were made pursuant to this express authorization.

For all of these reasons, we do not believe that an injunction lies based upon the facts presented by Mr. James, nor do we feel that any criminal violations have been established. We think it is appropriate, however, to remind both of Mr. Blair's treasurers that the treasurer of the Blair for Governor Committee must comply with the reporting requirements of Section 26-4 (b) and the campaign treasurer must comply with the reporting requirements of Section 26-11 (a) (1) with specific incorporation to be made in the latter report of the contributions and expenditures of the Blair for Governor Committee.

FRANCIS B. BURCH, *Attorney General.*

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

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*Section 26-3 (c) makes it clear that it is entirely proper for Mr. Krongard to serve as both the treasurer for candidate Blair and as treasurer for the Blair for Governor Committee.

ELECTIONS—FILING DEADLINE FOR THE OFFICE OF ASSOCIATE JUDGE OF PEOPLE'S COURT OF BALTIMORE CITY ESTABLISHED BY MARYLAND CONSTITUTION RATHER THAN BY STATUTE—CANDIDATE MAY PERFECT DEFECTIVE CERTIFICATE OF CANDIDACY AT ANY TIME PRIOR TO FILING DEADLINE — DEFECTIVE APPOINTMENT OF TREASURER AND IMPROPER FILING FEE.

August 24, 1970.

Mrs. Betty M. Silbert, President.

You forwarded to this office a letter received from The Honorable Carl W. Bacharach, an incumbent associate judge of the People's Court of Baltimore City, who is seeking re-election this year. Judge Bacharach is opposed in the Democratic primary election to be held on September 15 by Alan M. Wolf and DeHaven L. Smith, both of whom filed their certificates of candidacy for this office with you on July 6. The filing fee for the office of associate judge of the People's Court of Baltimore City is $150.00 and is set by the provisions of the first sentence of Article 33, Section 4A-6(a) of the Maryland Code. The deadline for filing certificates of candidacy for this office ("not later than thirty days before the date of the applicable election") is established by Article IV, Section 41A(3) of the Maryland Constitution and has recently expired (August 17). Judge Bacharach urges that both candidates Wolf and Smith be found by your Board to be ineligible as candidates for nomination at the September 15 election because of alleged defects in their respective certificates of candidacy.

Both candidates offered checks in the proper amount for the required filing fee when they presented their certificates of candidacy to your office on July 6. Both of these checks were deposited in the ordinary course of business by the Board with the Department of Finance, Bureau of Collections of the Mayor and City Council of Baltimore City which then in turn forwarded the same for collection to the drawee banks. You have advised us that both checks

were returned to the City marked "Not Sufficient Funds", that these checks were apparently presented without success a second time to the banks in question and that on July 24 your Acting Chief Clerk was notified by telephone by a representative of the Department of Finance that these two checks had not been honored. On July 28 the Acting Chief Clerk notified both candidates of the fact that their checks had not been honored by the drawees and both candidates came forthwith to your office and paid the required filing fees in cash, which cash was immediately deposited with the Department of Finance of Baltimore City.

We find that the action of candidates Wolf and Smith, in presenting checks to cover their filing fees without first making sure that sufficient funds were on deposit in their accounts, while irresponsible on their part, may not be held to have disqualified them as candidates for nomination. As soon as both candidates had been advised of their delinquencies, and more than two weeks prior to the deadline for filing certificates of candidacy, cash money in the appropriate amount was tendered to your office by the candidates. If these delinquencies had remained uncured until *after* the filing deadline, it is quite likely that the result would be entirely different (see *Secretary of State v. McGucken*, 244 Md. 70 (1966) and *Andrews v. Secretary of State,* 235 Md. 106 (1964)), but we see no objection to perfecting an otherwise defective certificate of candidacy prior to the filing deadline.

Judge Bacharach's second allegation is somewhat similar to the first. With his certificate of candidacy, candidate Wolf filed the form required by Article 33, Section 26-3(b), which appoints the treasurer of the candidate and also reflects the fact that the named treasurer has accepted this appointment. The form as filed by candidate Wolf showed Selma Greene as the named treasurer, and this appointment was accepted by Selma Greene in writing on the form filed. The name of Selma Greene in that part of the form designating the treasurer however was stricken out and the name of Albert Sattler was inserted in its place. Albert

Sattler's signature did not appear on the acceptance thus creating a defective certificate of candidacy. See Article 33, Section 26-3(a) which reads as follows (as well as the statutory form in Section 26-3(b)):

> "Each candidate for nomination for, or election to, public or party office, upon or before, and as a condition precedent to qualifying as such candidate, shall appoint one campaign treasurer and shall file the name and address of the campaign treasurer with the board or with the State Administrative Board of Election Laws as provided in subsection (c) of this section. Every treasurer so appointed shall accept such appointment in writing, prior to the filing thereof. The board or the State Administrative Board of Election Laws shall not accept any certificate of candidacy unless the name of the treasurer has been filed with it as provided in this subsection."

Once again, the defect was cured by candidate Wolf by letter under affidavit with enclosures received by the Board on August 3. Candidate Wolf filed, at that time on the appropriate form, the appointment of Philip Fiorello as treasurer and Mr. Fiorello's signature appeared at the bottom of the form accepting this appointment. In the covering letter, entitled "change of treasurer", candidate Wolf referred to Mr. Sattler as "his former treasurer" and to Mr. Fiorello as "his new treasurer". This defect in candidate Wolf's filing was corrected by him more than two weeks prior to the closing date for the filing of certificates of candidacy. Perhaps your Board could be faulted for accepting the defective form in the first instance (see the third sentence of Section 26-3(a), quoted above), but it is certain that candidate Wolf's certificate was corrected well within the constitutional time limit.

A recent opinion of the Circuit Court of Howard County (*Laupert v. Board of Election Supervisors of Howard County*, No. A-4878 LAW) illustrates the fact that otherwise defective certificates of candidacy can be cured before

the final date for filing certificates of candidacy. There, a candidate for sheriff filed his certificate of candidacy approximately two weeks before the filing deadline but did not file the form appointing his treasurer and indicating the acceptance of that treasurer. This was not done by the candidate until after the filing deadline had passed. In an opinion dated August 4, 1970 the Honorable T. Hunt Mayfield disqualified the plaintiff as a candidate by pointing out that *once the deadline for filing certificates of candidacy had passed* the plaintiff could no longer cure existing defects in his certificate of candidacy.

We are of the opinion, therefore, that the reasons asserted by Judge Bacharach for disqualifying candidates Wolf and Smith from participating in the September 15 primary election are legally insufficient. We express no opinion on the result which would be reached if the deadline for filing certificates of candidacy had expired on July 6 as it did for all other State offices. See Article 33, Section 4A-3. The deadline for filing certificates of candidacy for the single office of Associate Judge of the People's Court of Baltimore City, however, is set by Article IV, Section 41A(3) of the Maryland Constitution and cannot be affected in any way by the above-cited statutory deadline and, therefore, afforded the candidates in question an additional nearly six weeks to insure that their certificates of candidacy were in full compliance with the law.

FRANCIS B. BURCH, *Attorney General.*

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

ELECTIONS—UNOPPOSED PRIMARY ELECTION CANDIDATES NOT REQUIRED TO FILE TREASURER'S REPORT SEVEN DAYS PRIOR TO AND THIRTY DAYS AFTER SAID PRIMARY.

September 2, 1970.

Mr. Willard A. Morris.

You have asked us to review our opinion, dated August 24, 1966 (51 Opinions of the Attorney General 81), in which Thomas B. Finan, Attorney General, and Edward L. Blanton, Jr., Assistant Attorney General, reached the conclusion that candidates "unopposed in the Primary" are "not required to file the election reports prior to and following the Primary Election". You do not question the correctness of this opinion but point out that Chapter 392 of the Laws of Maryland of 1967 repealed and re-enacted the entire election code (Article 33 of the Annotated Code of Maryland).

The 1966 opinion was based upon a reading of then Article 33, Section 64(e) which reads as follows:

> "Whenever only one candidate of any such political party for such public office or position has so qualified to have his name so placed upon the official primary election ballot at the expiration of the time allowed, a certificate of nomination or selection shall in like manner be issued to him forthwith. His name and the name of the position for which he is a candidate shall be omitted from the said official ballot, so that the official ballot of such political party shall contain only the names of such candidates for positions, offices, or delegates where there are qualified contestants for such positions."

Virtually identical language to old Section 64(e) now appears in the current law in Sections 5-3(c) and 8-1(a)(1). Because there has been no change in the applicable law, we reaffirm our earlier opinion.

FRANCIS B. BURCH, *Attorney General.*

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

ELECTIONS — REPORTING REQUIREMENTS OF CAMPAIGN TREASURERS — FUNDS RECEIVED FROM OUT-OF-STATE POLITICAL COMMITTEES—WHETHER CONTRIBUTION OF $51.00 OR MORE MUST BE ITEMIZED OR MAY BE SHOWN AS A LUMP-SUM TRANSFER.

September 4, 1970.

Mr. Willard A. Morris.

In your letter of August 25 you ask this office to outline for you the interrelationship of the financial reporting requirements of campaign treasurers and of treasurers for political committees (both local and out-of-state) under the Fair Election Practices code of the Maryland law.

When a campaign treasurer receives a lump-sum transfer of funds from the treasurer of a political committee (and that contribution is in the amount of $51.00 or more), the former must issue a campaign contribution receipt to the latter in the manner provided by Article 33, Section 26-7 (b) (1) of the Maryland Code. He must then retain a copy of this receipt with his books and records and "report the information therein" in his statement of contributions and expenditures (Section 26-7(b) (3)). This statement, in proper form, must be filed no later than noon on the seventh day preceding (and on the thirtieth day after) any election. An example of this procedure, as it might appear on the receipt and on the report of the campaign treasurer, would be:

Date: August 15, 1970

Received from: X, Committee treasurer (address)

Name of organization: Concerned Citizens for Candidate Y

Contribution: $5,000.00[1]

Signed by: Z, Campaign treasurer

This is so because of the language of Section 26-7(b)(1) which states that a campaign treasurer shall give a receipt "to each . . . treasurer of a committee . . . making a contribution of . . . fifty-one dollars ($51.00) or more" and of Section 26-11(a)(1) requiring said campaign treasurer to report "all contributions received. . . ."

As a corollary to this, however, are the code sections requiring reports by the treasurers of the political committees themselves. Each such treasurer must file two reports: first, a statement of contributions and expenditures is required by Section 26-4(b) to be reported "to the treasurer appointed by the candidate being so aided, which statement shall be included in, or attached to, the statement . . . reported by the treasurer of the candidate"; second, such a statement is required by Sections 26-11(c) and (d) to be filed in the same manner and at the same time as is the statement of a campaign treasurer.[2] Following out the example used earlier, assume that the $5,000.00 fund transferred from the committee treasurer to the campaign treasurer is composed of fifty individual contributions, each of $100.00. A campaign contribution receipt revealing the name and address of each of the fifty contributors must be retained by the committee treasurer with his books and records and this same data must be delineated on the statements of contributions and expenditures. Each of the fifty entries would contain the following information:

Date: August 1, 1970

Received from: A (address)

Name of candidate: Y

Contribution: $100.00

Signed by: X, Committee treasurer

Again, see Sections 26-7(b)(1) and 26-7(b)(3).

With respect to political committees subject to Maryland law, therefore, an interested person may determine either

from the attachments to the candidate's statement or from the committee's independently filed statement, the identity and address of all persons making a contribution in the amount of $51.00 or more. A question arises though with respect to out-of-state political committees, beyond the reach of Maryland law, which raise money outside the state and then transfer the net fund as a lump-sum contribution to the campaign treasurer. Such a committee could not be required to appoint and maintain a steering committee and treasurer in Maryland (Section 26-4(a)) nor could it be required to file the more detailed statement of contributions and expenditures discussed above. As a result of a strict reading of the law, the only such statement which would be filed in that instance would be the more general report of the campaign treasurer, which, as pointed out above, would not disclose the identity of the out-of-state contributors to the political committee.

The Fair Election Practices code is a criminal statute (Sections 26-16(b) and 26-20) and, as such, we believe would be strictly construed by the courts when determining whether a violation of any of its provisions had taken place. For this reason, we do not believe that a campaign treasurer may be coerced by the provisions of this statute into disclosing in his report the identity of each contributor of $51.00 or more if such contribution is received as part of a lump-sum distribution from the treasurer of an out-of-state political committee. We suggest to all candidates, however, that the spirit of the law would require just such a disclosure and that there is no logical basis for the dichotomy which appears in the statute. It is hoped that candidates in the 1970 primary and general election will comply with what we have determined to be the spirit of the law, and we urge that your office consider suggesting curative legislation at the 1971 session of the General Assembly in order to make it perfectly clear that a campaign treasurer must report the identity of all out-of-state contributors of $51.00 or more regardless of whether these contributions

are received directly by said treasurer or are forwarded to him by the treasurer of an out-of-state committee.

FRANCIS B. BURCH, *Attorney General.*

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

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[1] The prohibition contained in Section 26-9(b) against contributions by "any individual or corporation" greater than $2,500.00 in any election does not restrict such a transfer by an unincorporated political committee, when composed of numerous small contributions all of which are within the $2,500.00 limit.

[2] To be filed either with the State Administrative Board of Election Laws or with the local election board of that subdivision "in which the greatest number of its members or contributors . . . reside" (with a duplicate copy to the State Board), depending upon whether said committee is one "which continues in existence from year to year."

ELECTIONS—CONSTITUTIONALITY OF REQUIRING SIGNATORY TO A PETITION TO FORM A NEW POLITICAL PARTY TO AGREE TO AFFILIATE WITH THE NEW PARTY FOR PURPOSES OF VOTER REGISTRATION—CONSTITUTIONALITY OF PROHIBITING CHANGE IN VOTER REGISTRATION FOR LIMITED PERIOD OF TIME.

October 21, 1970.

The Honorable Martin S. Becker.

This office recently prepared and submitted to the Subcommittee on Elections of the Legislative Council a proposed statutory scheme to regulate the formation and organization of new political parties. Basically speaking, we proposed that new political parties be initiated, for purposes of the election code (Article 33 of the Annotated Code of Maryland), by the filing of a petition for the formation of a political party with the State Administrative Board of Election Laws. The form of the petition and the procedure to be followed were basically the same as that now provided for the nomination of candidates by petition. It was suggested that the petition bear the signatures of at least 10,000 qualified voters of the State as a condition precedent to the formation of a new party.

During discussion of this proposal, your subcommittee raised the point that if a signatory to a petition to form a new political party was allowed to remain affiliated with an existing party, then conceivably he would be in a position to participate in the choice of candidates for two separate parties (*e.g.* at a convention of the "new" party and at the primary election for candidates of the "old" party). Your subcommittee has therefore posed the following questions. First, could the signatories to the petition to form a new political party be required to affiliate with the political party sought to be formed by the petition. It has been suggested that signatories to the petition should be required to agree, when signing the petition, to affiliate themselves with the new political party for purposes of voter registration, the

change in registration to become effective automatically upon the determination that the petition had been duly filed in the manner required to form a new party for purposes of the election code. If the petition was not sufficient for any reason, then the signatories would retain the voter registration status that they had when they signed the petition. Second, you have inquired as to whether a signatory to the petition could be prohibited from revoking the conditional change in party affiliation after having signed the petition. We will consider these questions in reverse order.

In the case of *Hennegan v. Geartner*, 186 Md. 551, the Court of Appeals was faced with the question of whether the General Assembly could prohibit a voter from changing his party affiliation within six months preceding an election. It was contended that this prohibition "was unconstitutional, a denial of due process, and of the privileges guaranteed by Article 23 of the Declaration of Rights of the Constitution of this State, and by the 14th Amendment to the Constitution of the United States, and a denial of his rights under Article 7 of the Declaration of Rights of this State". The Court of Appeals held that the prohibition was not unreasonable nor arbitrary so as to violate the Federal or State Constitutions, saying, on pages 558-560:

> ". . . The direct primary is a creature of the Legislature, designed for the purpose of permitting the members of a party to select their candidates under official supervision and control. According to its history and interpretation in this State, it is substituted for conventions or meetings of voters. Such conventions or meetings were always restricted to those belonging to the parties by whom they were held, and so the direct and official primary is so restricted.
>
> "The Legislature is not classifying voters. It is exercising its inherent power to safeguard elections, and is regulating elections as it is authorized by the Constitution. *There is no fundamental right in any voter to participate in the primaries or*

conventions of parties other than the one to which he belongs. Neither Article 7 of the Declaration of Rights nor Section 1 of Article 1 of the Constitution have any such implication.

* * * *

". . . The Maryland electoral system is predicated historically upon the right of each party to nominate its own candidates. The Legislature is within its powers in passing any reasonable provision, which it thinks will effectuate and carry out that system. It has put political proselytes on six months' probation. There is nothing unreasonable or arbitrary in the provision complained of." (Emphasis added.)

Also bearing on the question under consideration, though not controlling, is *Sterling v. Jones,* 87 Md. 141, wherein the Court of Appeals held that persons signing a nominating petition could not file a paper withdrawing their signatures after the petition had been filed with the supervisors of elections, as the applicable statute did not authorize the withdrawal of names from a petition for nomination. In addition, see 48 Opinions of the Attorney General 166, wherein this office took the position that signatures on a referendum petition could not be withdrawn by the signatory, at least after the petition had been submitted to the Secretary of State.

In view of the *Hennegan* case, *supra,* we are of the opinion that the General Assembly could prohibit a voter from revoking his conditional change in party affiliation made upon the signing of a petition for the formation of a new political party. However, we further believe that this prohibition would have to be limited to some reasonable period of time, such as six months. Thus, if the proposal of this office is amended in the manner suggested by your subcommittee, then we would recommend a further amendment to require that the petition to form a new political party must be filed within six months from the date of the first signature appended to the petition. If the General Assembly can

validly prohibit a voter from changing his party affiliation within six months prior to an election, then it would clearly seem to follow that the General Assembly could prohibit a change within six months after agreement to affiliate with a new party. In both cases the General Assembly would be acting in a reasonable manner to effectuate the "Maryland electoral system", which restricts voters to the primaries or conventions of parties to which they belong.

Turning to your other question, we believe that the General Assembly could require a person to conditionally change his party affiliation upon the signing of a petition to form a new political party, the new affiliation to be that of the political party sought to be formed. As stated in the *Hennegan* case, *supra*, "[t]here is no fundamental right in any voter to participate in the primaries or conventions of parties other than the one to which he belongs". If a signatory to a petition to form a new political party were allowed to remain affiliated with an existing party, then he could be in a position to participate in the choice of candidates for two separate parties. This would clearly be contrary to the "Maryland electoral system", as stated in the *Hennegan* case, *supra*.

We believe that we should add several comments. If the proposal of this office is amended along the lines suggested by your subcommittee, then consideration should be given to Article 33, Section 3-8(b), which now prohibits a change in party affiliation six months before a primary election. If this section were allowed to stand as written, a voter would not be able to sign a petition for the formation of a political party within six months prior to a primary election, if such signing involved a change in party affiliation. It also seems to us that a conditional change in party affiliation may cause administrative problems. Signatories to the petition to form a new political party would be changing party affiliation without notice to any election board and presumably the records of the boards would not reflect the new affiliation until some time after the petition had been filed and approved. During that period when signatures were being

gathered on the petition and verified, it would be difficult to determine the exact party affiliation of any given voter. *Cf.*, Article 33, Section 3-9, which provides for a change in party affiliation upon "written notice" to the election board or upon personal application at the board. Lastly, it should be kept in mind that under the proposal of this office a "new" party could only get a candidate on the ballot at the general election by a regular nominating petition signed by the usual number of voters (unless ten percent or more of the registered voters in the State were affiliated with the party, in which event it would be required to nominate candidates at a primary election in which only voters affiliated with the new party could participate). Maryland law may permit a registered voter who is affiliated with a particular party to sign a nomination petition for an "independent" candidate yet still participate in the primary election of the party with which he is affiliated. In 53 Opinions of the Attorney General 214, we took the position (which we hereby reaffirm) that a signer to a nominating petition should be disqualified from voting for candidates for the same office in the primary election, but directed that such double participation in the nominating process be permitted because of practical problems. We noted, at page 218, that "[w]e will recommend to the General Assembly that that body direct its attention to this situation and resolve the doubts that now exist, by the enactment of a law which will categorically state whether individuals who have signed a nominating petition may also participate in a political party primary for the same". The General Assembly, however, has chosen not to heed this plea. Thus the "double participation" problem raised by your subcommittee may not be as unique as would first appear.

FRANCIS B. BURCH, *Attorney General.*

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

ELECTIONS—NEW RESIDENCE REQUIREMENTS ADOPTED BY CONSTITUTIONAL AMENDMENT AT 1970 GENERAL ELECTION—STUDENTS AT A COLLEGE ARE PRESUMED TO MAINTAIN THEIR FORMER RESIDENCE IN THE ABSENCE OF EXTRINSIC PROOF TO THE CONTRARY.

December 4, 1970.

Mr. Willard A. Morris.

A special election is scheduled to take place in Prince George's County on January 26, 1971 at which the voters of that County will elect a County Executive and six additional members of the County Council. By virtue of the Voting Rights Act Amendments of 1970 (Public Law 91-285, 91st Cong., 2nd Sess., H.R. 4249) all persons of the age of 18 or over shall not, by reason of age, be denied the right to vote in any election held on or after January 1, 1971. You have advised this office that a large number of students, 18 years of age and older, at the University of Maryland, College Park campus are attempting to register to vote in Prince George's County in order to be able to participate in the upcoming election. In the great majority of cases these students are presently living in dormitories at the College Park campus and are only resident in Prince George's County during the academic year, returning to their homes elsewhere in Maryland or in other states when school is out of session. Under these circumstances, you ask whether the Board of Supervisors of Elections for Prince George's County is constitutionally required to register these persons to vote, assuming the only possible disqualifying fact to be their lack of residence in Prince George's County.

At the November 3, 1970 general election the voters of Maryland approved new language of Article I, Section 1 of the Maryland Constitution, pertinent parts of which are set out below:

> "All elections shall be by ballot; and every citizen of the United States, of the age of twenty-one

> years, or upwards, who has been a resident of the State for six months, and of the Legislative District of Baltimore City, or of the county, in which he may offer to vote, as of the time for the closing of registration next preceding the election, shall be entitled to vote, in the ward or election district, in which he resides, at all elections hereafter to be held in this State. A person, who shall have acquired a residence in such county or city, entitling him to vote at any such election, shall be entitled to vote in the election district from which he removed, until he shall have acquired a residence in the part of the county, or city, to which he has removed . . . ."

This new language became effective at the time of a proclamation by Governor Mandel on November 25, 1970 (see Article XVI, Section 1 of the Maryland Constitution), and hence controls in the fact situation you now present. You will note that generally a person must have been a resident of the State of Maryland for six months and of the county "in which he may offer to vote" as of the time of close of registration prior to the election (December 28, 1970). The question thus becomes whether the class of persons you describe are "residents" of Prince George's County for voting purposes.

This subject was discussed by the Court of Appeals of Maryland in *Shaeffer v. Gilbert*, 73 Md. 66 (1890). There the Court stated that "mere residence at the college for the purpose of pursuing his studies would not, in itself, be sufficient to prove that he meant to abandon his original residence or to prove that he meant to make his actual home in [the county where the college is located]". The Court found that there was a legal presumption "[i]n the absence of other proof" that once a student's studies were completed, he intended to return to his former residence and that for this reason he could not be deemed to be a resident at the college. It was emphasized, however, that this presumption could be rebutted by a showing of "a *bona fide*

intention on the part of the [student] to abandon his former residence, and to make [the location of the college] his actual home and place of residence". See also *Gallagher v. Board of Elections*, 219 Md. 192 (1959); *Rasin v. Leaverton*, 181 Md. 91 (1942); *Howard v. Skinner*, 87 Md. 556 (1898); see generally *Annotation*, "Residence Or Domicil Of Students Or Teachers For Purpose Of Voting", 98 A.L.R. 2d 488 (1964). The distinction drawn in *Shaeffer* has been recognized in prior opinions of this office (43 Opinions of the Attorney General 171 (1958)) and appears to be completely consistent with the prevailing federal constitutional standards. See *Carrington v. Rash*, 380 U.S. 89 (1965). These same thoughts were also expressed in a letter from Attorney General Thomas B. Finan to the counsel for the City of College Park, dated July 14, 1966.

Our conclusion, therefore, is that students residing in dormitories at the College Park campus of the University of Maryland are presumed not to be residents of Prince George's County, but that this presumption may be rebutted by a proper showing to the contrary through extrinsic evidence, examples of which would be the permanent address given by the student at the time of his annual registration with the University, and the permanent address shown on his draft card, automobile insurance and driver's license.

FRANCIS B. BURCH, *Attorney General.*

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

ETHICS, BOARD OF

REGIONAL PLANNING COUNCIL—CONFLICT OF INTEREST—COUNCIL IS STATE AGENCY AND MEMBERS ARE SUBJECT TO STATE CONFLICT OF INTEREST LAWS.

January 26, 1970.

Honorable Reuben Oppenheimer.

You have asked this office to pass an opinion as to whether the members of the Regional Planning Council are subject to the provisions of Article 41, Section 14A and of Article 19A of the Annotated Code of Maryland (1969 Supplement). Article 41, Section 14A provides that the Governor shall promulgate a code of ethics "for all executive branch officers and employees". Article 19A provides a conflicts of interest law applicable to "any officer, employee, or agent of any department, board, commission, authority or other public agency of the State of Maryland". Section 3 of Article 19A provides that Section 1 thereof shall not apply to officers, employees or agents of State agencies or to particular transactions of such officers, employees or agents that have been exempted by written order of the Board of Ethics or by specific provision of the Code of Ethics promulgated by the Governor pursuant to Section 14A of Article 41. Accordingly, it must be determined whether the Regional Planning Council is a State agency and whether its members are executive branch officers of State government.

In establishing the Regional Planning Council, the declared policy and intent of the General Assembly is stated, in part, as follows:

> ". . . [T]he regional planning agency will serve as a consultative and coordinating agency (1) seeking to harmonize and advance its planning activities with the planning activities of the State and of the counties and municipalities within the metropolitan area [defined as comprising the counties of Anne Arundel, Baltimore, Carroll, Harford

> and Howard and the City of Baltimore], (2) rendering planning assistance, (3) stimulating public interest and participation in planning for the development of the area, (4) serving as the referral agency for problems affecting more than one unit of government, and (5) reviewing local government programs and grant-in-aid requests when required by law." Article 78D, Section 1 of the Annotated Code of Maryland (1969 Replacement Volume).

The membership of the Regional Planning Council ("the Council") includes three representatives from the City of Baltimore and three from each of the said counties in the metropolitan area, representatives from the State Department of Planning, the State Roads Commission, the Metropolitan Transit Authority and the Maryland Port Authority, as well as four persons appointed by the Governor. The representatives from the aforesaid counties and the City of Baltimore are all selected locally and are not appointed by the Governor. Article 78D, Section 4. The Council is funded partially by the State and partially by the local subdivisions comprising the metropolitan area. Article 78D, Section 18.

Article 78D, Section 10 provides that all the employees of the Council "shall be subject generally to the provisions and restrictions of Article 64A of the Annotated Code of Maryland, title 'Merit System' ". The Director, three section or department heads, and counsel or consultants retained by the Council are specifically excepted from Merit System membership. Article 64A, creating the "classified service", applies to "all offices of profit or trust and all places of employment . . . in the service of any State officer, department, commission, board or institution", with certain enumerated exceptions not germane here. Since the Merit System normally applies only to employees of State agencies, the Legislature's action in subjecting the Council's employees to the Merit System, except those specifically excepted, suggests that the Legislature considered the Council to be a State agency.

Article 41, Section 3 places all the executive and administrative departments of State government into one of the "principal departments" of the State government, and Section 3A provides that each "principal department shall be headed by a secretary who shall be appointed by the Governor". Section 3D provides that:

> "All interstate, regional, and other intergovernmental units in which the State is a participant shall be assigned to the jurisdiction of the appropriate secretary. Unless otherwise provided by law, the secretary or his designee, subject to the Governor's approval, shall represent the State in such units and shall coordinate the State's participation in such units."

Since the regional and intergovernmental units in which the State participates are assigned to the "jurisdiction" of the appropriate secretary (who is a State officer in charge of executive departments of State government), we think that this indicates that the Legislature considered such units (of which the Council is one) to be State agencies.

The jurisdiction of the Council transcends purely local considerations. The declaration of legislative policy stated in Article 78D, Section 1 recognizes that sixty-five percent of the population of Maryland resides within the geographical area of the Regional Council and that during the ten years preceding the enactment of the statute the population of the area increased by one-third. Section 24 of Article 78D declares said article to be necessary for the welfare of a large portion of the State and its people and that it should be liberally construed to effectuate its purposes. Consistent with the mandate for liberal construction, we believe the Regional Planning Council to be a State agency, a part of the executive branch of State government, and that its members are subject to the provisions of Article 41, Section 14A and Article 19A.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Asst. Attorney General.*

GENERAL SERVICES

SECRETARY OF GENERAL SERVICES; CHAPTER 97, LAWS OF 1970; CHAPTER 156, LAWS OF 1969—SECRETARY HAS POWER TO TRANSFER, REASSIGN AND/OR MERGE EMPLOYEES AND APPROPRIATED FUNDS AMONG AND WITHIN CONSTITUENT AGENCIES TO THE OFFICE OF THE SECRETARY, SUBJECT TO COMPLIANCE WITH APPROPRIATE BUDGETARY AND MERIT SYSTEM LAWS, AND SUBJECT FURTHER TO PRIOR CONSENT OF THE GOVERNOR IN THE CASE OF REORGANIZATIONS.

December 10, 1970.

The Honorable George R. Lewis.

By your letter of November 20, 1970, you have requested our opinion with respect to the power of the Secretary of General Services to transfer, merge and/or reassign services, positions and/or appropriated funds within the Department of General Services. Your inquiry requires an examination of the general reorganization act for State Government enacted in 1969 as Chapter 156 of the laws of that year, codified in Article 41, Sections 1 through 15C ("the 1969 Act"), and the legislation creating the Department of General Services, Chapter 97 of the Laws of 1970 ("the 1970 Act"), which took effect on August 1, 1970.

The 1969 Act is an enabling act and provides the superstructure of reorganization for the executive and administrative departments of State government. This act provides generally for the consolidation of the various executive and administrative departments, boards, commissions and other units of the executive branch of State government into not more than twenty principal departments, as may be prescribed by law. Article 41, Section 2.

The 1970 Act created the Department of General Services (the "Department") as a principal department of State government under the direction of the Secretary of General Services (the "Secretary"), who is appointed by the Gover-

nor with the advice and consent of the Senate. By the terms of the 1970 Act, the Department of Public Improvements, the Bureau of Control Standards and Maps and the Advisory Board of that Bureau were abolished, and their functions and duties were transferred to the Department under the supervision of the Secretary. Article 41, Sections 231D and E. The Purchasing Bureau, formerly part of the Department of Budget and Procurement, and the powers and duties of the Director of that Bureau, were transferred to the Department and Secretary, respectively, subject to the prerogative of the Secretary to delegate these and other powers, duties or functions to the Chief of the Purchasing Division. Article 41, Section 231F. Concurrently, the Board of Architectural Review, the Offices of the Superintendent of Annapolis and Baltimore Public Buildings and Grounds, the Hall of Records Commission, the War Memorial Commission, the Washington Cemetery Board of Trustees, and a new Commission on Artistic Property (hereinafter, with the aforesaid Department of Public Improvements and the Purchasing Bureau, collectively referred to as "Constituent Agencies") were placed under the direction of the Secretary.

With this background, we turn now to your inquiry. As we view it, the general question posed by you necessarily includes several more specific questions, including (i) whether the Secretary has power to transfer, merge or reassign positions or employees within a Constituent Agency, among Constituent Agencies, and/or between one or more Constituent Agencies and the Office of the Secretary; and (ii) whether the Secretary has power to transfer appropriated funds within a Constituent Agency, among Constituent Agencies, and/or between one or more Constituent Agencies and the Office of the Secretary.

In responding to these specific questions, we turn first to the provisions of the 1969 Act. This act provides the Secretary with certain broad general powers which are to be read in *pari materia* with the provisions of the 1970 Act. Pursuant to Section 3A of Article 41, it is provided that the Secretary:

(i) shall be responsible for the efficient and orderly administration of the Department;

(ii) shall be responsible for the comprehensive planning of programs and services within his jurisdiction;

(iii) shall be responsible for reviewing and approving the plans of all Constituent Agencies within his jurisdiction;

(iv) shall be responsible for the budget of his office;

(v) shall be responsible for the budgets of all Constituent Agencies within his jurisdiction;

(vi) shall be responsible for the organization of his office;

(vii) shall be responsible for recommending to the Governor changes in the organization and placement of units of the State government within his jurisdiction;

(viii) shall have authority to appoint officers and employees in his office as provided in the budget;

(ix) may review any personnel action taken by any Constituent Agency; and

(x) shall have such assistants, employees and professional consultants as may be provided in the budget within his assigned jurisdiction.

In addition to the above broad powers and duties, the Secretary, by Section 12 of Article 41, was made responsible, under the direction of the Governor,

> ". . . for the coordination of programs and activities within and between principal departments for the elimination and prevention of duplication and overlapping of programs, activities and services within and among their respective departments. They shall be responsible for proposing, for the Governor's approval, plans for centralizing and coordinating administrative staff and clerical services within and among the divisions and departments within their jurisdiction, to the end that such services can be more efficiently and effectively conducted."

The 1970 Act creating the Department did not by its terms constrict or otherwise limit the general powers granted to the Secretary in the 1969 Act except in particulars not relevant to the issues here involved. Specifically, the 1970 Act provided that the Constituent Agencies should report to the Secretary and that the Secretary should be responsible for planning activities of the Department, with power to review, approve, disapprove or modify any plan, proposal or project of any Constituent Agency. Article 41, Section 231C(e) and (d). The Secretary also was charged with responsibility for the budget of his office and for that of each Constituent Agency within his jurisdiction. Article 41, Section 231C(a).

In our prior opinion of August 11, 1970, addressed to the Secretary of Personnel, we had occasion to consider the precise questions here in issue in the context of the law applicable to that department. 55 Opinions of the Attorney General 280 (1970). There we reviewed both the 1969 Act and the 1970 statutes creating and reorganizing the Department of Personnel, and concluded as follows:

> "We think that the obvious intent of the General Assembly in enacting the 1969 Act was to eliminate the process of proliferation of agencies, the fragmentation of functions, and the diffusion of responsibility existing in State government. In our opinion, this intent was made fully operative in the express provisions of that Act. We are also of the opinion that, except to the extent that it may have specifically narrowed the powers granted to the Secretary under the 1969 Act . . . the General Assembly otherwise manifested no intent in the 1970 Act to preclude the Secretary . . . from appropriately transferring, merging or reassigning positions, employees or funds so as to more efficiently carry out the functions of his office and those of the Constituent Agencies within his jurisdiction. To the extent that the specific power to so transfer, merge or reassign may not have been expressly conferred in each of the specific situations con-

> cerning which you inquire, we think that such power necessarily must be implied as essential to the full and adequate exercise of the powers and duties expressly provided therein. See, *Huffman v. State Roads Commission*, 152 Md. 566 (1927)."

We are of the opinion that the powers of the Secretary and Department of General Services are cut from the same cloth and are no less broad.

We hasten to point out, however, as we did in our aforesaid prior opinion, that:

> "In construing the powers of the Secretary, we think that it is necessary to distinguish between transfers, mergers or reassignments of positions or employees which are in the nature of reorganizations and those which are not. With regard to plans of reorganization, we think that it is clear that, while the Secretary need not receive the approval of any of the Constituent Agencies, the express provisions of Section 3A of Article 41 enacted in the 1969 Act would require the Secretary to recommend to, and receive the approval of, the Governor before such reorganization could be effected. On the other hand, where such changes are not in the nature of a reorganization, the Secretary has the power to initiate the same without leave of the Constituent Agencies and without the requirement that he submit the same to and receive the approval of the Governor. In both instances, however, the provisions of Article 64A (the Merit System Law) and the rules and regulations promulgated thereunder must be adhered to in carrying out such administrative changes.
>
> "With regard to the transfer of appropriated funds incident to a plan of reorganization, or for any reason other than in connection with such a reorganization, we think that the Secretary . . . does have the power to initiate such transfers. But this power is not without limitation, however,

since we are of the opinion that in order to effect such transfers, the Secretary must comply with the appropriate budgetary procedures as outlined in Article 15A of the Maryland Code.

"Section 8(a) of Article 15A provides that the items and amounts making up the appropriation in any budget bill shall represent the initial plan of disbursement and apportionment of the appropriations of which they are part; and that each appropriation shall be paid out only in accordance with the schedule therefor, unless such schedule be amended, within the limits of such appropriation, by appropriate amendment of the budget. Such an amendment may be accomplished by Senate or House resolution (Article 15A, Section 8(b), (c)), or by amendment of the schedule by the Governor (Article 15A, Section 8(d)). Recommendations for amendment of the budget must first be submitted by the Secretary . . . to the Director of Budget . . . [and Fiscal Planning], who shall endorse his recommendation to the Governor thereon. Article 15A, Section 27.

"It can thus be seen that transfers, mergers or reassignments in the nature of reorganizations and all reallocation of funds within the Department . . . must receive the approval of the Governor. This is consistent with Section 15C of Article 41, which places ultimate responsibility in the Governor for the reorganization of State government."

In summary, then, we conclude that, subject to compliance with Article 64A (the Merit System Law) and the appropriate budgetary procedures set forth in Article 15A of the Maryland Code, and except as otherwise expressly provided in the 1970 Act, the Secretary of General Services, without the approval of any Constituent Agency, may (i) transfer, merge or reassign positions or employees within a Constituent Agency, among Constituent Agencies, and/or between one or more Constituent Agencies and the Office

of the Secretary, but only with the approval of the Governor of the State of Maryland in the case of changes in the organization and placement of units of governments within the Secretary's jurisdiction, and (ii) transfer appropriated funds within a Constituent Agency, among Constituent Agencies, and/or between one or more Constituent Agencies and the Office of the Secretary.

FRANCIS B. BURCH, *Attorney General.*

RICHARD G. MCCAULEY, *Asst. Attorney General.*

GOVERNOR

CONSTITUTIONALITY AND LEGAL EFFECT OF HOUSE BILL #489 OF THE 1970 REGULAR SESSION OF THE GENERAL ASSEMBLY (REMOVING VARIOUS RESTRICTIONS UPON THE PERFORMANCE OF ABORTIONS) AND SENATE BILL #257 OF THE 1970 REGULAR SESSION OF THE GENERAL ASSEMBLY (RELATING TO THE PRACTICE OF MEDICINE) —ABORTIONS—REGULATION OF PRACTICE OF MEDICINE —TITLE TO LEGISLATIVE ACTS—CONTINGENT EFFECTIVE DATES IN LEGISLATIVE ENACTMENTS—RULES OF STATUTORY CONSTRUCTION—STATUTES IN PARI MATERIA —APPLICATION OF "VOID FOR VAGUENESS RULE"—REQUIREMENT THAT LEGISLATIVE ENACTMENTS EMBRACE BUT ONE SUBJECT—RENUMBERING OF CODE PROVISIONS —COMMON LAW MISDEMEANOR OF CAUSING A MISCARRIAGE—PROBLEM OF WHEN AN INFANT IS "BORN ALIVE" SO AS TO BE CAPABLE OF BEING VICTIM OF HOMICIDE—CONTROL OF ABORTIONS THROUGH ADMINISTRATIVE RULES AND REGULATIONS—POWER OF ADMINISTRATIVE AGENCIES TO ADOPT AND ENFORCE RULES AND REGULATIONS—STANDARDS TO GUIDE ACTION OF ADMINISTRATIVE AGENCIES — REGULATORY OR STATUTORY DISCRIMINATION AGAINST NON-RESIDENTS — CONSTITUTIONALITY OF PRESENT MARYLAND ABORTION LAW—PERFORMANCE OF ABORTIONS IN NON-ACCREDITED HOSPITALS—PARENTAL CONSENT AND KNOWLEDGE AS PREREQUISITE TO PERFORMING AN ABORTION ON MINOR FEMALE—MISCELLANEOUS CRIMINAL PROVISIONS RELATING TO ABORTIONS—COMPILATION OF STATISTICS UNDER RULES AND REGULATIONS OF THE SECRETARY OF HEALTH AND MENTAL HYGIENE—CONSENT OF FATHER AS A PREREQUISITE TO ABORTION—PENALTIES FOR PERFORMANCE OF ABORTION WITHOUT CONSENT OF FEMALE.

May 13, 1970.

The Honorable Marvin Mandel.

At your request, we have reviewed House Bill No. 489* (hereinafter referred to as the "Abortion Bill") and Senate

Bill No. 257* (hereinafter referred to as the "Medical Practices Bill") as passed by the General Assembly of Maryland at its 1970 Regular Session. Since both bills, particularly the Abortion Bill, are highly controversial issues, numerous questions have arisen with regard to their constitutionality and legal effect. You have asked us, as a part of a detailed study of the bills, to give our opinion with regard to each of these questions and to answer additional related questions. For ease of reference, we will take up, in numerical fashion, all of the questions which have been brought to our attention. At the conclusion, we will give our overall analysis as to the constitutionality and legal effect of the bills.

The Abortion Bill, in Section 1, repeals Article 43, Sections 149E and 149G, leaving in effect only Section 149F of the present law relating to abortions. This latter section permits a person to refuse to perform or participate in or submit to an abortion and allows a hospital to prohibit the performance of abortions within its facilities. Section 2 of the Abortion Bill provides that the bill shall not be interpreted or construed to revive any provisions of the common law superseded specifically or by implication by Article 43, Sections 149E and 149G. The third and final section of the Abortion Bill provides that the bill "shall take effect concurrently with the taking effect of a public general law which specifies that the termination, attempt at termination or assistance in the termination or attempt at termination of a human pregnancy constitutes the practice of medicine and that such acts may only be performed by licensed physicians within licensed hospitals".

The Medical Practices Bill repeals Sections 119 through 149D of Article 43 and enacts in lieu thereof new Sections 119 through 146A, "to stand in the place of the sections repealed". The Medical Practices Bill also purports to renumber Sections 149E through 149G of Article 43, dealing with abortion, as Sections 137 through 139, and to renumber Sections 149H through 149S of Article 43, relating to the Anatomical Gift Act, as Sections 140 through 151. In Section 119(f)(4) of the bill "assisting, attempting, in-

ducing, or causing by any means whatsoever the termination of a human pregnancy" is expressly made the "practice of medicine." Section 130(h)(3) of the bill makes the performance of an abortion outside a licensed hospital "unprofessional conduct" which would subject a physician to disciplinary action. Both of these references to abortion or termination of a pregnancy were added by amendments to the Medical Practices Bill during the course of passage through the Legislature.

FIRST. Does the title of the Abortion Bill comply with Article III, Section 29, of the Constitution of Maryland, which provides, inter alia, that "every Law enacted by the General Assembly shall embrace but one subject and that shall be described in its title"?

The title of the Abortion Bill states: "AN ACT to repeal Sections 149E, ~~149F~~ and 149G of Article 43 of the Annotated Code of Maryland (1969 Supplement), title 'Health,' subtitle 'Practitioners of Medicine,' subheading 'Abortion,' repealing IN PART the abortion laws of the State AND STATING THE EFFECT THEREOF ON THE COMMON LAW."

This title would appear to be unsatisfactory in two respects. First, the title is ambiguous when it provides "stating the effect thereof on the common law", since it is not clear whether "thereof" refers to the partial repeal of the abortion laws or the abortion laws themselves. A reading of Section 2 of the bill indicates that the former construction was intended. Second, the title does not reveal that the Act is to become effective concurrently with the taking effect of a general public law which specifies that termination of a human pregnancy constitutes the practice of medicine and that such acts may only be performed by licensed physicians within licensed hospitals (Section 3). Since this effective date provision is highly unusual, it could be argued that mention of the effective date clause should have been made in the title of the bill.

However, while we believe that the title to the Abortion Bill is unsatisfactory for the reasons noted above, the title

is not clearly defective from a constitutional viewpoint. The provisions of Article III, Section 29, of the Constitution of Maryland are to be liberally construed and legislative acts will be upheld unless there is a clear violation of the constitutional provisions. *Oursler v. Tawes,* 178 Md. 471; *Hitchins v. Cumberland,* 177 Md. 72. A reasonable doubt is sufficient to sustain the title to an act. *McBriety v. Baltimore,* 219 Md. 223. Only the purpose of the act must be described in the title; not the means or procedure by which the purpose is to be carried into effect. *Neuenschwander v. Washington Suburban Sanitary Comm.,* 187 Md. 67. See generally 9 Md. L.R. 197, "Titles of Legislative Acts". We are therefore of the opinion that the title of the Abortion Bill is not in violation of Article III, Section 29, of the Constitution of Maryland.

SECOND. What is the legal effect of Section 2 of the Abortion Bill, which provides that "this Act shall not be interpreted or construed to revive any provisions of the common law superseded specifically or by implication by the provisions herein repealed"?

While this section is somewhat ambiguous in that it does not specify what provisions of the common law were superseded, specifically or by implication, by the provisions of the abortion laws which are being repealed, we do not believe that this ambiguity causes any serious problem or raises any constitutional defect. It is our opinion that the effect of Section 2 of the Abortion Bill would be to prevent a revival of the common law misdemeanor of causing an abortion or miscarriage after a fetus had quickened. See *Worthington v. The State,* 92 Md. 222, 237; *Clark and Marshall, Crimes* (7th Ed., 1967), Secs. 10.00, 11.06; *Perkins on Criminal Law* (2nd Ed.), pp. 29-30.

THIRD. May the General Assembly make one bill effective upon the effective date of another bill, as in Section 3 of the Abortion Bill, which provides that the bill "shall take effect concurrently with the taking effect of a public general law" which specifies certain matters?

We believe that this question must be answered in the affirmative. The Constitution of Maryland, Article III, Section 31, merely provides that a law shall take effect on the first day of June after the legislative session at which it was passed, "unless it be otherwise expressly declared therein". See also Article XVI, Section 2, of the Constitution of Maryland. It is generally held that a statute may provide that it will become effective upon the happening of a specified condition or contingency, absent constitutional provisions to the contrary. See Sutherland, *Statutory Construction,* Sec. 1610; 82 C.J.S., *Statutes,* Sec. 410; 50 Am. Jur., *Statutes,* Sec. 496, *et seq.* Maryland cases have recognized that a law may be made effective upon "the happening of a future contingent event". *Gibson v. State,* 204 Md. 423, 433; *State v. Kirkley,* 29 Md. 85, 109. It is therefore our opinion that Section 3 of the Abortion Bill is not invalid insofar as it provides that the Abortion Bill will become effective upon the effective date of another public general law.

FOURTH. Does Section 3 of the Abortion Bill sufficiently "tie in" with the Medical Practices Bill so as to make the Abortion Bill effective as of the effective date of the Medical Practices Bill, assuming that both bills are signed into law?

Section 3 of the Abortion Bill provides that it shall become effective upon the taking effect of a public general law which "specifies": (1) that "the termination, attempt at termination or assistance in the termination or attempt at termination of a human pregnancy constitutes the practice of medicine"; and (2) that "such acts may only be performed by licensed physicians within licensed hospitals". The Medical Practices Bill, which would appear to be the only law which could possibly activate the Abortion Bill, clearly meets the first requirement, since it provides, in Section 119(f)(4), that "the practice of medicine" includes "assisting, attempting, inducing, or causing by any means whatsoever the termination of a human pregnancy". While the language used in the Medical Practices Bill is not iden-

tical to the language used in the Abortion Bill, we have no doubt that the Medical Practices Bill sufficiently complies with the first requirement of Section 3 of the Abortion Bill.

It has been argued, however, that the Medical Practices Bill does not clearly *specify* that abortions may only be performed by licensed physicians within licensed hospitals, so as to meet the second requirement of Section 3 of the Abortion Bill. Instead, so the argument goes, the Medical Practices Bill simply provides, in Section 130 (h) (3), that a physician may be reprimanded, placed on probation, or suffer his license to be revoked or suspended for performing an abortion outside a licensed hospital. The basis for the disciplinary action against the physician would be that an abortion outside a licensed hospital constitutes "unprofessional conduct". The Medical Practices Bill would also permit charges against a physician for performing an abortion outside a licensed hospital to be dismissed, apparently in the discretion of the Commission on Medical Discipline, which is created by Section 130 of the Medical Practices Bill. Undoubtedly the Commission would dismiss any charges of unprofessional conduct against a physician for performing an abortion outside a licensed hospital if such an abortion were required by a medical emergency, *e.g.* to save the life of the mother. Thus, it is argued that the Medical Practices Bill does not sufficiently "specify" that abortions "may only be performed by licensed physicians within licensed hospitals", with the result that the Abortion Bill would not become effective even if it were signed into law along with the Medical Practices Bill.

It seems to us that the second requirement in Section 3 of the Abortion Bill may be broken down into two subparts: first, that abortions may only be performed by licensed physicians; and, second, that abortions, when performed by licensed physicians, shall take place only within licensed hospitals. Upon close analysis of the Medical Practices Bill, we believe that the Medical Practices Bill effectively provides that abortions may only be performed by licensed physicians, since such operations are expressly

constituted "the practice of medicine". Performance by someone other than a physician could result in criminal penalties. Whether the Medical Practices Bill, when considered realistically, specifies that abortions may only be performed by physicians within licensed hospitals, since a physician runs the risk of losing his license if he undertakes such an operation outside of a licensed hospital, presents a more difficult question.

We do not believe that there is any definite formula which can be applied in answering the question above posed. A case which bears closely on point is *Johnson v. Washington,* 60 P. 2d 681 (Wash.), annotated in 106 A.L.R. 237. In this case a state unemployment compensation act was to take effect when the "Wagner-Doughton Bill" was enacted by Congress. Congress subsequently passed the Social Security Act of 1935, which, though having the same purpose as the Wagner-Doughton Bill, differed therefrom in various particulars. The question was then presented as to whether the state act became effective. The five judges who concurred in the majority opinion held that the state act did not become effective, after reasoning as follows:

> "The Legislature, then, acted in contemplation of a particular piece of federal legislation which it seemed probable would be passed by the Congress, and if the act finally passed by the Congress differs materially from that upon which the state Legislature based its action, it must be held that the state statute has never become operative.
>
> "It is impossible to pronounce any formula by which all similar questions can be decided. It would, doubtless, be agreed that some immaterial amendment to the bill would be held unimportant, and, on the other hand, that some essential departure from the terms of the proposed legislation upon which the state Legislature based its action would prevent the state act from becoming effective. Between the two extremes lies much room for difference of opinion, but it must always be re-

> membered that the underwriting of legislation to be enacted in the future is dangerous, and that a state Legislature in particular must be held to the exercise of its important functions upon knowledge of existing facts and not upon expectations. If, as clearly shown by the act in question, the state Legislature intended that its act should become operative only upon the enactment by the Congress of a particular bill, in our opinion it cannot be held that the state act became operative upon the enactment by the Congress of a statute differing in important and material particulars from the bill which the Legislature had in contemplation."

Three of the four dissenting judges, after examining the "legislative intent", felt that the state act did become effective, since the Social Security Act was "to all intents and purposes" the Wagner-Doughton Bill, and "[t]o say that these slight differences between the two acts are sufficient to hold that the legislative intent did not comprehend the Social Security Act, as finally enacted, is to charge the Legislature with making a fetish of a name and indulging in a futility when it passed Chapter 145 [the state act]". The other dissenting judge felt that "there can be no doubt that the Legislature intended the act to dovetail into legislation of similar import then under consideration by Congress" and therefore dissented.

See also, generally, *Gaulden v. Kirk,* 47 So. 2d 567 (Fla.); *Cooley's Constitutional Limitations* (7th Ed.), p. 165; *State v. Liedtke,* 4 N.W. 72, 80 (Nebr.). *Cf., Redwood v. Lane,* 194 Md. 91, wherein the Court of Appeals struck down a bill as violative of Article III, Section 28, of the Constitution of Maryland, which requires the recordation of yeas and nays on the final passage of a bill by each House of the General Assembly, when the Senate Journal erroneously referred to the final vote on "House Bill 442" whereas the bill intended to be passed was "Senate Bill 442". The Court quoted, at pp. 100-101, prior cases to the effect that "'"when the Constitution of a state contains a provision

that no bill shall pass unless the yeas and nays are entered on the journal, such provision is mandatory and not directory, and must be enforced by the courts, and where it appears by an inspection of the journals that such mandatory provision has not been obeyed or complied with, the courts should not hesitate in declaring the act invalid." ' "

On the other hand, where there is ambiguity as there would appear to be in this instance, then under the accepted rules of construction the courts would most likely resolve the ambiguity in such a manner as would permit the Abortion Bill to be carried into effect. To borrow from the language of the Court of Appeals in *Domain v. Bosley,* 242 Md. 1, 7, "we have said many times, and it seems to be a rule of universal recognition, the cardinal rule of statutory construction is that the courts should ascertain the legislative intent *and place that intent into effect*", (emphasis added). "[W]hen the words of a statute are of doubtful meaning, the Court, in determining legislative intent, will consider not only their usual and literal meanings, but their meaning and effect considered in the light of the setting, the objectives and purposes of the enactment; and the consequences that may result from one meaning rather than another, with the real legislative intent prevailing over literal intent," *Height v. State,* 225 Md. 251, 257, (citations omitted). See also *Pressman v. Barnes,* 209 Md. 544, and cases collected in 20 M.L.E., *Statutes,* Secs. 84-86.

We believe that a court would hold that the intention of the Legislature in passing the Abortion Bill and the Medical Practices Bill is relatively clear. The general purpose of the two bills is to remove the existing restrictions upon the performance of abortions and to make abortions a medical question, rather than a legal question, to be determined by a physician and his patient. The only restrictions upon the performance of abortions were to be that such operations must be performed by a licensed physician within the confines of a licensed hospital.

We also believe that a Court would say that insofar as the subject of abortions is concerned, the provisions of

the Abortion Bill and the related provisions of the Medical Practices Bill are *in pari materia.* It has often been said that acts *in pari materia* should be construed so as to make each other fully effective. As stated in Crawford, *Statutory Construction,* Sec. 231:

> "Statutes *in pari materia,* that is, those which relate to the same matter or subject, although some may be special and some general, in the event one of them is ambiguous or uncertain, are to be construed together, even if the various statutes . . . do not refer to each other expressly. . . .
>
> "The rule which thus allows the court to resort to statutes *in pari materia* finds its justification in the assumption that statutes relating to the same subject matter were enacted in accord with the same legislative policy; that together they constitute a harmonious or uniform system of law; and that, therefore, in order to maintain this harmony, every statute treating the same subject matter should be considered. As a result, statutes *in pari materia* should not only be considered but also *construed to be in harmony with each other in order that each may be fully effective.* They are to be construed together as if they constituted one act. Moreover, this rule is especially applicable where the several statutes are not only *in pari materia* but have been enacted on the same day, or during the same legislative session." (Emphasis added.)

The propriety of considering statutes *in pari materia* when both were passed at the same session of the Legislature is also commented upon in Sutherland, *Statutory Construction,* Sec. 5202 (3rd Ed.), as follows:

> "However, application of the rule that statutes *in pari materia* should be construed together is most justified in the case of statutes relating to the same subject matter that were passed at the same session of the Legislature, especially if they

> were passed or approved or take effect on the same day, . . . In these situations the probability that acts relating to the same subject matter were actuated by the same policy is very high, for . . . they were enacted by the same men . . .".

See also *Domain v. Bosley, supra,* at page 7, "[a]dditionally, all statutes forming a part of a general system should be considered together"; *Height v. State, supra,* at page 257, "[a]ll parts and sections of Article 31B [defective delinquents] must be read and considered together in arriving at the true intention of the Legislature, as they form part of a general system"; *State v. Petrushansky,* 183 Md. 67, 71, "[t]he proper rule of construction is that all parts of such an article of the Code as this is [Article 2B, relating to alcoholic beverages] must be read together as they form part of a general system"; and *Hagerstown v. Littleton,* 143 Md. 591.

After considering all of the factors hereinabove discussed relating to the question of whether or not the Abortion Bill would be rendered effective by the provisions of the Medical Practices Bill, we find the question to be so fraught with doubt that even the co-authors of this opinion are unable to agree on a prediction as to how this question would be resolved by the Court of Appeals of Maryland. Using the language of the Supreme Court of Washington in the *Johnson* case, *supra,* the present inquiry presents a case "between the two extremes" within which "lies much room for difference of opinion".

With regard to the question of whether a physician could be convicted under the existing abortion laws if the pending Abortion Bill was signed into law but later held to be legally ineffective, see the discussion in the answer to Question Fifth herein, where it is suggested that a conviction under the existing abortion laws would be prohibited under the rationale of the "void for vagueness" rule.

It should also be noted that the question of whether the Abortion Bill will become effective may also have a bearing on the civil liability of a physician for the performance of

an abortion, at least in those cases where the abortion performed would be illegal under the existing abortion law but permissible under the terms of the Abortion Bill. There is a conflict of authority on the question of whether a woman or her representative can bring a civil action for injuries or death resulting from the performance of an illegal abortion, even though the operation has been consented to by the woman. Anno., 21 A.L.R. 2d 369, "Right of Action for Injury to or Death of Woman Who Consented to Abortion"; 1 Am. Jur. 2d, *Abortion,* Sec. 37; 1 C.J.S., *Abortion,* Secs. 41-43. There seems to be no case in Maryland dealing with the right to bring a civil action because of injuries or death sustained as a result of the performance of an illegal abortion. See comment in 1 M.L.E., *Abortion,* Sec. 2. Maryland does recognize, of course, the right of a husband to bring an action for loss of consortium by reason of physical injuries to his wife as a result of negligence of a third person. See, for example, *Nicholson v. Blanchette,* 239 Md. 168. Maryland has also recognized, however, that a married woman may consent to a surgical operation and that the additional consent of her husband is not necessary, *State v. Housekeeper,* 70 Md. 162. It would seem that the civil liability of the physician, if any, is directly related to whether the physician is negligent in performing the illegal abortion. While the violation of a criminal statute is not considered to be negligence *per se* in Maryland, it is to be considered as evidence of negligence. *Alston v. Forsythe,* 226 Md. 121; *McLhinney v. Lansdell Corp. of Md.* 254 Md. 7.

FIFTH. Is Section 3 of the Abortion Bill so vague as to render the bill unconstitutional under the "void for vagueness" rule?

It has been suggested that if the Abortion Bill and the Medical Practices Bill were both signed into law, a physician would be unable to clearly ascertain whether the Abortion Bill was effective so as to relieve him of criminal liability under the present abortion laws. It is true that the application of a penal statute "should not be a matter

of uncertainty and conjecture" and that "a statute which prohibits the doing of an act in terms so vague that persons of ordinary intelligence must necessarily guess at its meaning and differ as to its application violates the constitutional guarantee of due process of law", *Blum v. Engelman,* 190 Md. 109, 113. See also *Glickfield v. State,* 203 Md. 400, 404, (indictment for bribery); *Martin v. State,* 203 Md. 66, 77, (indictment for being a rogue and vagabond); 16 Am. Jur. 2d, *Constitutional Law,* Sec. 552; 16A C.J.S., *Constitutional Law,* Sec. 580. This principle, which is sometimes referred to as the "void for vagueness" rule, has been applied in numerous criminal cases to strike down a statute which either forbids or requires the doing of a particular act. The basis for the rule is that if the statute is so vague that a reasonable person could not tell what was required of him, then a conviction for violation of the statute would be unconstitutional, *i.e.* a taking of his property or liberty without due process of law.

It is our opinion that the Abortion Bill is not unconstitutional under the "void for vagueness" rule, since we do not believe that the rule applies to a nonpenal statute such as the Abortion Bill. This bill, if signed into law, would not forbid or require a physician to do anything; there would be no taking of a physician's liberty or property through an attempted "enforcement" of the bill and the "void for vagueness" rule would therefore have no application. It would appear to us that if the "void for vagueness" rule were to be applied in the present situation, the result would not be that the Abortion Bill would be rendered invalid, but that a prosecution under the existing abortion laws would be prohibited. The vagueness, if any, is not as to what would be required or prohibited under the Abortion Bill; the vagueness would be as to whether the existing abortion law would still prohibit certain action.

SIXTH. Is the title to the Medical Practices Bill unconstitutional under Article III, Section 29, of the Constitution of Maryland, which requires that the subject of every law

enacted by the General Assembly "shall be described in its title"?

The title to the Medical Practices Bill provides as follows: "AN ACT to repeal Sections 119 through 149D, inclusive, of Article 43 of the Annotated Code of Maryland (1957 Edition, 1965 Replacement Volume and 1969 Supplement), title 'Health,' subtitle 'Practitioners of Medicine,' and to enact new Sections 119 through 136A, inclusive, in lieu thereof, to stand in the place of the sections repealed, and to renumber Sections 149E through 149G of the same article, ~~and~~ title, subtitle, SUBHEADING 'Abortion' as Sections 137 through 139; and to renumber Sections 149H through 149S of the same article and title, subtitle 'Anatomical Gift Act,' as Sections 140 through 151 of this article, generally revising the law concerning medical practices in the State, and providing for the recodification of the ~~subtitles~~ SUBHEADING 'Abortion' and THE SUBTITLE 'Uniform Anatomical Gift Act.' "

The title to the Medical Practices Bill simply refers to the sections of Article 43 that are being repealed and the new sections which are being added in lieu thereof, with the terse comment that the effect is to generally revise the law concerning medical practices in the State. While it would clearly appear that the title to the Medical Practices Bill gives virtually no notice to either the General Assembly or to the public of the actual contents of the bill, it is our opinion that the title is not constitutionally defective. The law with regard to the titling of legislative acts was well summarized in *Bell v. Prince George's County*, 195 Md. 21, 28-29, where the court stated:

> "The cases may be generally divided into those in which it is claimed the title is not sufficiently descriptive, and those in which it is contended that the title is misleading. Most of the cases come within the first class, and it has been generally held that any substantial compliance will result in sustaining the act. In the second class, however, where there is an apparent opportunity for mis-

> leading the members of the General Assembly and the public, the Court has not hesitated to strike down many acts."

See also *State v. Norris,* 70 Md. 91; *McBriety v. Baltimore,* 219 Md. 223; *Beshore v. Town of Bel Air,* 237 Md. 398; and the previous discussion herein concerning the title to the Abortion Bill. It is our opinion that the shortcomings of the title of the Medical Practices Bill, if any, fall within the "not sufficiently descriptive" class, rather than in the "misleading" class, with the result that any substantial compliance with the constitutional requirements would sustain the Act.

Several cases have recognized that titles to amendatory bills are constitutionally adequate if they do no more than refer to the Code section which is the subject of the Act. See, for example, *County Commissioners v. Meekins,* 50 Md. 28; *Pressman v. Tax Commission,* 204 Md. 78; and 9 Md. L.R. 197 "Titles of Legislative Acts". The reason for the courts' willingness to uphold titles which do no more than refer to Code sections is that the legislators and the public are presumed to know the former provisions of the law which is being amended and verbal description is, therefore, not required. *Shipley v. State,* 201 Md. 96, 104.

The title of the Medical Practices Bill, however, is not limited to a declaration of the sections which are to be repealed and the new sections to stand in their stead. The title goes on to summarize the effect of the changes by saying "generally revising the law concerning medical practices in the State." The question then becomes whether this additional language adequately describes the effect of the substantive changes brought about by the proposed statute. The principle stated in *Jacobs v. Klawans,* 225 Md. 147, 155, fairly summarizes the position of the Court of Appeals on this point:

> "This Court has stated on numerous occasions that Section 29, of Article III, does not require the title of an act to contain an abstract of the body of the statute, nor to mention or indicate each

> provision in it. . . . We hold that when the title to an amendatory act states the article and section of the Code which the statute is amending and gives a brief description of the general subject matter of the amendatory portion of the statute, as was done in the title here involved, it informs and apprises the legislators and public of the general nature of the subject-matter of the statute so that, if interested, they will examine the body of the act for its detailed provisions, and renders it free from constitutional objection."

This was stated another way in *Allied American Company v. Commissioner*, 219 Md. 607, 615, where the court, quoting the Supreme Court of New Jersey, stated:

> "A title to an act need not be an index to all that it contains and need not set forth all of its exclusions or conditions. It is a label and need only set forth its object, not its product."

Applying the principles discussed in the preceding paragraphs to the title of the Medical Practices Bill, it is our opinion that the bill is not unconstitutional under the provisions of Article III, Section 29, of the Constitution of Maryland. While we would have preferred that the title be more descriptive so as to give real notice of the contents of the bill, we find no constitutional defect.

SEVENTH. Is the Medical Practices Bill unconstitutional under the provisions of Article III, Section 29, of the Constitution of Maryland, which require that the subject of every law enacted by the General Assembly shall be described in its title, on the basis that the bill "creates" several crimes without making reference thereto in the title?

As part of the general title problem discussed in the answer to Question Sixth herein, it has been suggested that the title to the Medical Practices Bill is defective under Article III, Section 29, of the Constitution of Maryland in that the bill "creates" several crimes without making refer-

ence thereto in the title of the bill. Section 136 of the Medical Practices Bill provides:

> "(a) Any person, firm, or corporation is guilty of a misdemeanor upon conviction of the following and shall be fined not less than one hundred dollars or more than five thousand dollars, or imprisoned for not less than one year or more than five years, or both:
>
> (1) The registration as a physician with the Board when he is not a physician; or
>
> (2) The presentation of any false information to the Board;
>
> (3) The practice of medicine contrary to Section 122 of this act; [prohibiting practice of medicine by nonlicensed persons] or
>
> (4) Any violation of provisions of Section 133 of this article [treatment of cancer by nonlicensed physician].
>
> "(b) A person is guilty of a misdemeanor upon conviction of the following and shall be fined not less than twenty-five dollars nor more than five hundred dollars:
>
> (1) The failure to register as required by Section 128 of this article; [requiring registration by physicians] or
>
> (2) Violating any of the provisions of Section 134 of this article [disclosure of confidential records]."

It would seem that the crimes mentioned in Section 136 (a) (2), (3), (4) and 136(b) (2) are crimes under the present Medical Practices Act, although the present Act does not contain a separate section for criminal penalties. Although it is not entirely clear, the crime mentioned in Section 136(a) (1) would seem to be a crime under the present Article 43, Section 136, and the crime mentioned

in 136(b)(1) would seem to be a crime under the present Article 43, Section 133. It would therefore appear that the new Medical Practices Bill does not create a "new" crime.

While the "practice of medicine" is expressly defined so as to include abortions, whereas the present definition in Article 43, Section 139, does not make express reference to abortions, it has been judicially determined that the performing of an abortion is the "practice of medicine" under the present law, on the basis that pregnancy is an "ailment". *Rock v. State*, 6 Md. App. 618.

We have found no authority which would suggest that an Act containing criminal provisions, whether the crime be "new" or a recodification of a pre-existing crime, must make express reference thereto in its title in order to be constitutional. Instead, whether a statute which contains criminal penalties is sufficiently titled under Article III, Section 29, of the Constitution of Maryland turns upon the general principles applicable to the titling of all legislative Acts, although obviously special care should be taken if the Act involves criminal provisions. Applying the general principles applicable to the titling of legislative Acts as discussed in the answer to Question Sixth hereof, we are of the opinion that the title to the Medical Practices Bill is not constitutionally defective for failure to make express reference to the criminal provisions contained in Section 136 thereof.

EIGHTH. Is the Medical Practices Bill unconstitutional under the provisions of Article III, Section 29, of the Constitution of Maryland, which provide that every law enacted by the General Assembly "shall embrace but one subject"?

It may be questioned whether the Medical Practices Bill embraces more than one subject, since it deals with the law concerning the practice of medicine in this State and also provides for a recodification of the law relating to abortions and the Anatomical Gift Act. It is our opinion, however, that the bill would not be invalid on the basis that

it embraced more than one subject in violation of Article III, Section 29, since "if several sections of the law refer to and are *germane* to the same subject-matter, which is described in its title, it is considered as embracing but a single subject, and as satisfying the requirements of the Constitution in this respect", *Baltimore v. Reitz*, 50 Md. 574, 579 (emphasis by Court). See also *Beshore v. Town of Bel Air*, 237 Md. 398, 412-413; and *Panitz v. Comptroller*, 247 Md. 501, 511-512. In the present case the various portions of the bill are germane in the sense that they all relate to the subject of "Health", which is the title of Article 43.

NINTH. Does the Medical Practices Bill properly renumber the provisions of Article 43 relating to abortion and the provisions of Article 43 relating to the Anatomical Gift Act?

In the title to the new Medical Practices Act it is stated that Sections 149E through 149G of Article 43, relating to abortion, are to be renumbered as Sections 137 through 139 of Article 43, and that Sections 149H through 149S of Article 43, relating to the Anatomical Gift Act, are to be renumbered as Sections 140 through 151 of Article 43.

The attempted renumbering of the above sections causes two problems. First, there is no section in the body of the bill which purports to renumber the enumerated sections in the manner mentioned in the title other than Section 1, the "Be it enacted" clause, wherein reference is made to the old and new section numbers. Section 1 of the bill would seem to indicate that there should be a separate section in the body of the bill renumbering the enumerated sections, since Section 1 refers to all of the changes mentioned in the title and provides "all to read as follows". This raises a question of whether the provisions of the bill relating to abortion and the Anatomical Gift Act are unconstitutional under the provisions of Article III, Section 29, of the Constitution of Maryland, which provide that "no Law, nor section of Law, shall be revived, or amended by reference

to its title, or section only". However, it is our opinion that since the bill only purports to renumber the sections, not to "revive" nor "amend" them, there would be no violation of the constitutional provision. This provision of the Constitution was inserted to prevent fraudulent legislation and to guard against the repeal or revival of laws through mistake or accident. *Davis v. State,* 7 Md. 151. The "renumbering" provisions in the new Medical Practices Bill would not frustrate this purpose. In our opinion the reference to the old and new section numbers in the "Be it enacted" clause would be sufficient to effectively renumber the sections of the Code which are enumerated.

Second, the last two sections of the Anatomical Gift Act are to be renumbered as Sections 150 and 151 of Article 43. This would result in an overlapping since Article 43 already contains a Section 150 and 151 (relating to the State Board of Veterinary Medical Examiners). While unsatisfactory from a sense of maintaining the Code in an orderly state, we are of the opinion that the overlapping in section numbers would not cause the bill to be void. *Cf., Leonardo v. County Comm.,* 214 Md. 287, which involved a statute which left a gap in the numerical sequence of sections in the Code caused by the adding of new and the removing of old sections.

The problems with the renumbering of the sections of Article 43 dealing with abortions and the Anatomical Gift Act would appear to be clearly severable from the provisions of the new Medical Practices Act relating to the practice of medicine. Thus, even if the latter sections of the bill were deemed invalid, such would not affect the provisions of the bill dealing with the practice of medicine. The general rule that "it is not necessary, or proper, to strike down an entire Act because one provision is void, 'unless the provisions are so connected together in subject-matter, meaning or purpose, that it cannot be presumed the Legislature would have passed the one without the other' ", *Somerset Co. v. Pocomoke Bridge Co.,* 109 Md. 1, 8, would be controlling. See also *Davis v. State,* 7 Md. 151, 160, and *Painter v. Mattfeldt,* 119 Md. 466, 474-475.

TENTH. Assuming that the Abortion Bill is constitutional, could a physician, acting under the new Abortion Bill, abort a pregnancy at any time up until the time the child was "born alive" without incurring criminal liability?

In order to answer this question it is first necessary to examine the common law relating to abortion and homicide. At common law the killing of an unborn child was not homicide. In order to be the victim of a homicide the infant had to be "born alive". Just what constitutes being "born alive" is a difficult legal and medical question. It is often said that the infant must have an independent existence or a separate circulation or be fully expelled from the body of the mother. There is a conflict of authority as to the necessity of the umbilical cord being severed. See *Morgan v. State,* 256 S.W. 433 (Tenn.), in which it was said that the umbilical cord must have been severed before an infant could be the subject of murder, and *Jackson v. Commonwealth,* 96 S.W. 2d, 1014 (Ky.), wherein it was held that it was murder to kill an infant after it had been expelled from the body of its mother even though it was still connected by the umbilical cord (but *cf.* Article 43, Section 14 (a) (4) of the Annotated Code of Maryland wherein a "live birth" is deemed to occur, for the purpose of a birth certificate, regardless of whether the umbilical cord has been cut).

The difficulty of determining when a child has been "born alive" is illustrated in 40 Am. Jur. 2d, *Homicide,* Sec. 434, which provides:

> "Independent existence of the infant is not established merely by proof that the child breathed, since it may have breathed and yet died before the process of birth was completed. It has been held that where a child is born alive, and the umbilical cord is not severed, and independent circulation has not been established, independent life is impossible, and such a child is not the subject of murder. Other authorities hold, however, that if a child is fully brought forth from the body of its

> mother and is killed while still connected by the umbilical cord, it is murder. Proof of the establishment in the infant of an independent circulation separate from its mother has been regarded by a number of courts as the conclusive test of whether the infant was born alive. However, it has been stated that, medically as well as legally, there is no satisfactory answer to the question as to when an independent circulation exists."

Prior to the time when a child was "born alive", the causing of a miscarriage was a misdemeanor at common law, but only if the child had "quickened". After a child had quickened in the womb, "it is within the protection of the criminal law and it is a common law misdemeanor for the mother to destroy it by the use of drugs or instruments, so that it is born dead, or for another person to destroy it, either with or without her consent", *Clark and Marshall, Crimes,* (7th Ed., 1967), Sec. 11.06. If the child had not quickened, the causing of a miscarriage would not constitute a crime at common law. "At common law a woman who takes drugs or uses an instrument upon herself and so causes a miscarriage before she is quick with child, is not guilty of any crime of which criminal law takes cognizance", *Clark and Marshall, Crimes, supra.* It has also been stated that "the rule is similar where a physician or other person procures a miscarriage with the woman's consent, but if the action is taken without the woman's consent, the physician or other person is guilty of assault and battery upon the woman", *Clark and Marshall, Crimes, supra.* For further reference, see *Perkins on Criminal Law,* (2d Ed.), pp. 29-30, 140; *Wharton on Homicide* (3rd Ed., 1907), Secs. 13, 372 and 374; *Warren on Homicide* (Permanent Ed., 1939), Sec. 55; *Miller on Criminal Law* (1934), Sec. 82; *Annotation,* "Corpus Delicti In Prosecution For Killing Of Newborn Child", 159 A.L.R. 523; 40 Am. Jur. 2d, *Homicide,* Secs. 9, 434; and 40 C.J.S., *Homicide,* Sec. 2.

There seems to be no Maryland case law which would be helpful in establishing the test for when a child is "born

alive". Nor have any Maryland cases been found which directly deal with the common law misdemeanor of causing an abortion after quickening. *Cf., Worthington v. The State,* 92 Md. 222, 237, wherein the Court, in a case involving a prosecution for the death of a mother during an abortion, noted that "[t]he crime of abortion is a misdemeanor only at common law and our statute [Article 27, Section 3, the old Maryland Abortion Law], while broadening the scope of the common law, and increasing the punishment, still leaves the crime a misdemeanor". It is clear, however, that murder is still a common law crime in Maryland although it has been statutorily classified. *Stansbury v. State,* 218 Md. 255; *Webb v. State,* 201 Md. 158; *Hanon v. State,* 63 Md. 123; Article 27, Secs. 407-414.

As previously concluded, in the answer to Question Second hereof, we are of the opinion that the legal effect of Section 2 of the Abortion Bill is to effectively eliminate the common law crime of causing a misdemeanor after a fetus had quickened. Therefore, if the law relating to abortions is completely repealed, which would be the result if the Abortion Bill was signed into law, then it would be our opinion that a physician could abort a pregnancy at any time up until the time the child was "born alive" without incurring criminal liability. Presumably the only crime which any other person, such as the mother, would commit for aborting a pregnancy at any time prior to the child's being "born alive", would be the unlawful practice of medicine, punishable under the Medical Practices Bill. To our knowledge no other state in the country now permits the performance of an abortion after the early stages of pregnancy, except when necessary to save the life of the mother.

In a particularly macabre case we would not be overly surprised if a court found some way in which to criminally punish a physician, even if it required a finding that the Abortion Bill was unconstitutional, at least in part (*e.g.* Section 2), but we cannot say that this would necessarily, or even probably, be the result.

ELEVENTH. May abortions be legally controlled through administrative rules and regulations prohibiting such operations after a certain period of gestation or after "quickening"?

It has been suggested that an abortion after a certain period of gestation or after quickening of the fetus may be regulated by the adoption of rules and regulations by an appropriate administrative body. This suggestion has been made in response to objections to the Abortion Bill based upon a lack of a statutory time limit of gestation beyond which abortions may not be performed. Unlike the present provisions of Section 149E(b)(1) of Article 43, which prohibits an abortion after twenty-six weeks of gestation have passed (except in a case of termination of pregnancy to save the life of the mother or where the fetus is dead), the present Abortion Bill would permit abortions without regard to the period of gestation.

In answering the question which has been posed, it is necessary to determine whether any existing or proposed administrative body would have the statutory authority to effectively promulgate a rule or regulation prohibiting abortions after a certain period of gestation or after quickening. The only administrative bodies or officers with possible jurisdiction in this area would be the Maryland State Board of Medical Examiners, the Commission on Medical Discipline of Maryland, the Secretary of Health and Mental Hygiene, and the Medical and Chirurgical Faculty of the State of Maryland (although this organization is not an administrative body of state government).

Under the new Medical Practices Bill the State Board of Medical Examiners would be given the authority to "promulgate rules and regulations necessary to give effect to" the bill. This grant of power would not appear to be broad enough to give the Board the authority to adopt a rule prohibiting abortions after a certain period of gestation or after the fetus had quickened, as such a rule would not be "necessary to give effect to" the Medical Practices Bill. "[R]ules and regulations adopted by an administrative

agency, to be valid, must be reasonable and consistent with the letter and policy of the statute under which the agency acts", *Comptroller v. Rockhill, Inc.*, 205 Md. 226, 233. See also 2 Am. Jur. 2d, *Administrative Law*, Sec. 300. We are therefore of the opinion that the Maryland State Board of Medical Examiners would not have the requisite statutory authority to adopt a rule prohibiting the performance of abortions after a certain period of gestation or after the fetus had quickened.

The Commission on Medical Discipline of Maryland would be given authority by the Medical Practices Bill to "adopt and promulgate rules and regulations for its own government and for the proper supervision and control of the professional conduct of all persons under its jurisdiction". It could be argued that a rule prohibiting abortions after a certain period of gestation or after a fetus had quickened would be a regulation controlling the "professional conduct" of physicians. However, to sustain this argument it would have to be shown that "professional conduct", as that expression is used in the bill, extends to medical treatment as well as ethical conduct of physicians. From our reading of the bill it would seem that the powers of the Commission relate only to the investigation and handling of charges of "unprofessional conduct" against a physician. The Commission is not given the power to determine what is a proper course of treatment for a patient, at least in the absence of a showing that a particular treatment or operation would constitute professional incompetency. The acts of a physician which constitute "unprofessional conduct", subjecting a physician to disciplinary action, are expressly enumerated in Section 130(h) of the bill. It should also be noted that the Commission is created under the title of "Discipline of Physicians"; presumably only regulations dealing with disciplinary action for "unprofessional conduct" would be within the Commission's rule-making power.

It has been suggested that the Commission could adopt a rule declaring that abortions after a certain period of gestation or after quickening would constitute "professional

incompetency", the Commission being entitled to discipline physicians for "professional incompetency" under Section 130(h)(18) of the bill. However, the performance of an abortion after a certain period of gestation or after quickening could not arbitrarily and unreasonably be made "professional incompetency", if in fact there was no reasonable basis to justify such a position. The Commission cannot arbitrarily designate certain acts as "professional incompetency" when there is no basis in fact for such a view. *Comptroller v. Rockhill, Inc., supra.* While more dangerous from a medical viewpoint, it has not been shown to our satisfaction that it would be medical or professional incompetency to perform an abortion after quickening; indeed, the opposite would appear to be the case since abortions are permitted under present law after twenty-six weeks of gestation when necessary to save the life of the mother. Nor do we think that the suggested rule could be sustained under Section 130(h)(8), which permits the Commission to discipline physicians for "immoral conduct", as has also been suggested.

Applying the doctrine that rules and regulations of an administrative agency must be "consistent with the letter and policy of the statute under which the agency acts", *Comptroller v. Rockhill, Inc., supra,* we are of the opinion that it would be beyond the statutory authority of the Commission to adopt a rule prohibiting abortions after a certain period of gestation or after the fetus had quickened, at least in the absence of a showing that the performance of an abortion after a certain period of gestation or after the fetus had quickened would, in the ordinary case, be medical or professional incompetence. *Cf.*, The Administrative Procedure Act, Article 41, Section 249(b), which provides that a court may declare a rule invalid if it "exceeds the statutory authority of the agency".

While various statutes give the Secretary of Health and Mental Hygiene rule-making powers (*e.g.* Article 43, Section 562, granting "full power and authority to promulgate reasonable regulations classifying hospitals prescribing minimum standards of safety and sanitation in the physical

plant and in the diagnostic, therapeutic, and laboratory facilities and equipment of each hospital and related institution"), no statute has been found which would give the Secretary the authority to promulgate a rule prohibiting abortions after a certain period of gestation or after the fetus had quickened. The Secretary has control over hospitals (and physicians would be required, under the new Medical Practices Bill, to give abortions in licensed hospitals or else face unprofessional conduct charges), but the Secretary cannot dictate what treatment will be given or operations performed in a hospital. The control by the Secretary only relates to the physical plant and facilities of hospitals. We are therefore of the opinion that the Secretary would not have the statutory authority to adopt the suggested rule now under discussion.

The Medical and Chirurgical Faculty of the State of Maryland, which is not an administrative agency of state government, but a private medical organization, has not been given any statutory authority to adopt rules and regulations which would have the force of law or be legally binding on physicians. While the Faculty may, as a practical matter, exert a great deal of control over physicians, its lack of statutory authority to promulgate binding regulations leads us to the inevitable conclusion that if the Faculty were to adopt a rule prohibiting abortions after a certain period of gestation or after the fetus had quickened, such a rule would not have the requisite legal effect.

We are therefore of the opinion that no administrative agency or officer has sufficient statutory authority to adopt a regulation *having the force of law,* which would prohibit the performance of an abortion after a certain period of gestation or after a fetus had quickened. The same would be true of the Medical and Chirurgical Faculty of the State of Maryland. The only body which could arguably have such a power is the Commission on Medical Discipline of Maryland. Thus, we will take up the following questions with regard to the Commission, even though we are of the opinion that the Commission's rule-making powers would

be strictly limited to an interpretation of those matters constituting "unprofessional conduct" which are enumerated in Section 130(h) of the Medical Practices Bill.

TWELFTH. Assuming that the Commission on Medical Discipline of Maryland would have statutory authority under the new Medical Practices Bill to adopt a rule and regulation prohibiting abortions after a certain period of gestation or after the fetus had quickened, is there any manner in which the Commission could lawfully enforce its regulation?

Assuming that the Commission is given statutory authority under the new Medical Practices Bill to validly adopt a rule prohibiting abortions after a certain period of gestation or after the fetus had quickened, we are of the opinion that the Commission could not lawfully enforce such a rule. The Commission is given the authority to "reprimand a physician or place him on probation, revoke or suspend his license, or dismiss the charges against the physician" only for eighteen acts which are expressly enumerated in Section 130(h) of the bill as constituting "unprofessional conduct". A violation of Commission rules and regulations is not one of the acts constituting "unprofessional conduct" which would subject a physician to disciplinary action. *Cf.*, Article 43, Section 565A, making it a crime for a person to violate certain regulations of the Secretary of Health and Mental Hygiene and Section 1F(d) of Article 43 giving the Secretary the power "to enforce rules and regulations promulgated by the Department of Health and Mental Hygiene". Of course, if the rule of the Commission could be construed as an interpretation of one of the eighteen acts which are said to constitute "unprofessional conduct", then the rule could be enforced, at least indirectly, by bringing charges based upon one of the listed acts of "unprofessional conduct". But, for the reasons previously stated, we are of the opinion that a rule prohibiting abortions after a certain period of gestation could not be justified as an interpretation of any of the enumerated acts of "unprofessional conduct". A rule such as that suggested would seem to us to

be in the nature of a legislative rule rather than an interpretive rule. See *Comptroller v. Rockhill, Inc., supra.*

Nor would the Commission have the implied power to adopt on its own penalties for violation of its rules. As stated in 1 Am. Jur. 2d, *Administrative Law,* Sec. 127:

> "Administrative agencies may be empowered to enact rules and regulations having the force and effect of law, but any criminal or penal sanction for the violation of such rules and regulations is a legislative function and must come from the Legislature itself. Administrative agencies may not initiate such sanctions."

See also *Anno.,* 79 L. Ed. 474, 491-492, "Permissible Limits of Delegation of Legislative Power".

A license of a physician to practice medicine has sometimes been deemed a property right and it has been stated that "a State cannot exclude a person from the practice of law or from any other occupation [*e.g.* the practice of medicine] in a manner or for reasons contravening the due process or equal protection clauses of the Fourteenth Amendment" of the Federal Constitution. See generally *Konigsberg v. State Bar of California,* 353 U. S. 252, 1 L. Ed. 2d, 810, and 366 U.S. 36, 6 L. Ed. 2d, 105; *Schware v. Board of Bar Examiners,* 353 U.S. 232, 1 L. Ed. 2d, 796, 64 A.L.R. 2d, 288; *Anno.,* "Denial of Medical or Legal Professional License as Violating Due Process-Federal Cases", 6 L. Ed. 2d, 1328; 70 C.J.S., *Physicians and Surgeons,* Sec. 16.

We are therefore of the opinion that the Commission would not have the power to enforce a regulation prohibiting a physician from performing an abortion after a certain period of gestation or after a fetus had quickened, at least in the absence of a clear showing that such action would constitute professional incompetency, even assuming that the regulation was within the statutory rule-making power of the Commission and that such power had been constitutionally conferred.

THIRTEENTH. Is the grant of power to the Commission on Medical Discipline of Maryland to promulgate rules and regulations, as contained in the Medical Practices Bill, unconstitutional for failure to provide standards to guide the action of the Commission?

It has been suggested that the grant of rule-making power to the Commission does not provide sufficient standards to guide the action of the Commission and therefore constitutes an unconstitutional delegation of legislative power to an administrative body. As stated in *Anno.*, "Delegation of Legislative Power", 79 L. Ed. 474, 487:

> "Clearly the legislative body must declare the policy of the law and fix some kind of legal principles which are to control in given cases. It must provide some standard for the guidance of the executive or administrative body or officer empowered to execute the law. This principle is implicit in the general rule prohibiting the delegation of legislative power . . .".

See generally, 1 Am. Jur. 2d, *Administrative Law*, Sec. 114.

It may be fairly said that in recent times the "standards" requirement has been greatly relaxed. As stated by the Court of Appeals in the case of *Pressman v. Barnes*, 209 Md. 544, 555:

> "Generally, a statute or ordinance vesting discretion in administrative officials without fixing any standards for their guidance is an unconstitutional delegation of legislative power. But we also hold, as a qualification of the general rule, that where the discretion to be exercised relates to police regulations for the protection of public morals, health, safety, or general welfare, and it is impracticable to fix standards without destroying the flexibility necessary to enable the administrative officials to carry out the legislative will, legislation delegating such discretion without such restrictions may be valid. It is recognized that it

> would not always be possible for Legislature or City Council to deal directly with the multitude of details in the complex situations upon which it operates. The modern tendency of the courts is toward greater liberality in permitting grants of discretion to administrative officials in order to facilitate the administration of the laws as the complexity of governmental and economic conditions increases." (Citations omitted.)

It is our opinion that the Medical Practices Bill does provide a sufficient standard, in that the rule-making power of the Commission is limited by the requirement that the rules of the Commission must be for "the proper supervision and control of the professional conduct of all persons under its jurisdiction". It would appear to us that this standard would limit the exercise of the power granted to the Commission in such a manner as to prevent a finding of an unconstitutional delegation of legislative powers to an administrative body. Even if the standard enumerated in the statute were deemed insufficient, the present inquiry would seem to fall within the qualification to the general rule noted by the Court of Appeals in *Pressman v. Barnes, supra. Cf.*, 1 Am. Jur. 2d, *Administrative Law*, Sec. 115. We are therefore of the opinion that the grant of rule-making power to the Commission is constitutional and that the Commission may lawfully promulgate rules relating to the "professional conduct" of physicians.

FOURTEENTH. Assuming requisite statutory authority, may the Commission on Medical Discipline of Maryland adopt a rule prohibiting the performance of abortions on nonresidents?

Assuming that the Commission on Medical Discipline of Maryland has the requisite statutory authority to adopt a rule prohibiting the performing of abortions on nonresidents, which, for the same reasons stated in the answer to Question Eleventh, we do not believe to be the case, a constitutional question would be presented as to whether such a regulation would violate the equal protection clause or the

privileges and immunities clause of the Fourteenth Amendment of the Federal Constitution. This is a complex constitutional problem and involves the distinction between state citizenship and residency in a state. Without prolonging this question, we are of the opinion that a regulation discriminating against nonresidents, including nonresident citizens of this state, would be valid only if based upon a "valid independent reason" or "rational considerations". See *Gaddis v. Wyman,* 304 F. Supp. 717, aff'd 38 L.W. 3311; *Douglas v. New York, N.H. & H.R. Co.,* 279 U.S. 377, 73 L. Ed. 747; *Travis v. Yale & T. Mfg. Co.,* 252 U.S. 60, 64 L. Ed. 460; 16 Am. Jur. 2d, *Constitutional Law,* Sec. 474; 16A C.J.S., *Constitutional Law,* Sec. 470. No reason or consideration has been brought to our attention which would, in our opinion, be sufficient to justify the distinction between residents and nonresidents, especially in view of the fact that the "abortion mill" fear has been largely eliminated by the recent adoption of liberal abortion laws in other states, such as New York. We are therefore of the opinion, at least at this time, that a regulation discriminating between residents and nonresidents with regard to the performance of abortions would be deemed unconstitutional. Of course, the same question would be presented if the residency requirement were imposed by statute or by regulation of some administrative body other than the Commission.

As a practical matter, the real problem with a regulation of the Commission prohibiting the performance of an abortion on nonresidents, is that the Commission would apparently lack the power to enforce such a regulation for the reasons stated in the answer to Question Thirteenth hereof.

FIFTEENTH. Is the present Maryland abortion law, Article 43, Sections 149E-149G, unconstitutional?

At least three recent cases have held abortion laws, similar to the Maryland abortion law prior to 1968 (Article 27, Section 3) to be unconstitutional. In *People v. Belous,* 458 P. 2d 194 (Cal., 1969), cert. den. 38 L.W. 3320, the Supreme Court of California held invalid a statute making

it a crime for a person to perform an abortion unless the abortion was necessary to save the mother's life. The basis for the holding was two-fold: first, the Court felt that the expression "necessary to preserve" was unconstitutionally vague; and, second, the Court held that the statute was a violation of "the fundamental constitutional right of a woman to choose whether to bear children" and her right of privacy or liberty in matters relating to marriage, family and sex. In *United States v. Vuitch,* 305 F. Supp. 1032 (D.C.D.C., 1969), which is now on appeal to the Supreme Court of the United States, it was held that the District of Columbia abortion statute prohibiting all abortions except those "necessary for the preservation of the mother's life or health", was unconstitutional on the basis that the phrase "necessary for the preservation of the mother's life or health" failed "to give that certainty which due process of law considers essential in criminal statute" and on the theory that the "right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in the early stages of pregnancy". In *Babbitz v. McCann,* 306 F. Supp. 400 (E.D. Wis.), a three-judge Federal Court held that a Wisconsin statute, which made it unlawful to perform an abortion unless necessary to save the life of the mother, was a violation of the mother's right of privacy in home, sex and marriage. The Court did not rest its decision on the vagueness point.

The California case of *People v. Belous, supra,* involved a statute very similar to Maryland's pre-1968 abortion law (Art. 27, Sec. 3). After the performance of the abortion which was involved in the *Belous* case, California amended its abortion law so as to permit abortions "if there is a substantial risk that the continuance of the pregnancy would gravely impair the physical or mental health of the mother", or if the pregnancy resulted from rape or incest. Thus, the new California statute, referred to as the Therapeutic Abortion Act, is similar to the present Maryland abortion law which was passed in 1968, with the exception that Maryland law would also permit an abortion if there

was a substantial risk that the child would be born with grave and permanent physical deformity or mental retardation (Art. 43, Secs. 149E-149G). In the *Belous* case it was contended that the new California law was unconstitutional because "it contains uncertainties similar to those in the repealed statute, because it infringes on the woman's right to choose whether to bear children, and because the Act does not expressly permit an abortion where there is a likelihood that a deformed child will be born". The Supreme Court of California, in footnote 15 on page 206 of 458 P. 2d, refused to rule upon the validity of the new law, since the Act was adopted after the abortion in the case before the court.

It should also be noted that a case is now pending in the Court of Special Appeals of Maryland, *Lashley v. State*, 10 Md. App. 136, which questions the constitutionality of the Maryland abortion law as it existed prior to the 1968 Act.

As a result of the recent court decisions noted above, it may well be contended that a state cannot regulate abortions other than to provide that (1) an abortion must be performed by a licensed physician and (2) the abortion may not be performed after the fetus has quickened. Each of the cases reviewed herein seem to recognize these restrictions as valid exercises of the police power of the state. For a very comprehensive law review article on this subject, see 46 N.C.L.R. 730, "Federal Constitutional Limitations On The Enforcement And Administration Of State Abortion Statutes".

At least until such time as the Supreme Court and the Court of Special Appeals of Maryland have addressed themselves to the question of the validity of laws prohibiting abortions except under certain circumstances, we are of the opinion that the present Maryland abortion law is constitutional. We agree with the dissenting judges in the *Belous* case that language such as that used in the present Maryland abortion law is not unconstitutionally vague. We are further of the opinion that the right of privacy in

matters of sex and family, as enunciated by the Supreme Court in *Griswold v. Connecticut,* 381 U.S. 479, 14 L. Ed. 2d 510, should not be extended to the field of abortions.

SIXTEENTH. Is the Medical Practices Bill so worded as to make natural childbirth the "practice of medicine"?

It has been suggested that since Section 119(f)(4) of the Medical Practices Bill defines the practice of medicine as "assisting, attempting, inducing, or causing by any means whatsoever the termination of a human pregnancy" without a proviso excepting a termination of pregnancy by birth, such as now provided in Article 43, Section 149E, a natural birth at the end of a full term pregnancy would constitute the "practice of medicine". We simply cannot believe that any court would construe Section 119(f)(4) of the Medical Practices Bill to reach such an absurd result. "In construing statutes, results that are unreasonable or inconsistent with common sense should be avoided, whenever possible", *Height v. State,* 225 Md. 251, 259. See also Sutherland, *Statutory Construction,* Sec. 5505, wherein it is said that a statute should be construed in such a manner as would not "defeat the policy of the legislation and lend itself to absurdity". We are of the opinion that a natural childbirth would not constitute the practice of medicine under the Medical Practices Bill.

SEVENTEENTH. Is the Abortion Bill unconstitutional under the due process clause or equal protection clause of the Fourteenth Amendment of the Federal Constitution or under Article 23 of the Maryland Declaration of Rights?

The Fourteenth Amendment to the Constitution of the United States provides that:

> "All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In determining whether the Abortion Bill would be unconstitutional under the Fourteenth Amendment, a two-part inquiry is necessary. First, is an unborn infant a "person" within the meaning of the Fourteenth Amendment? Second, would the Abortion Bill constitute "state action" prohibited by the Fourteenth Amendment, even if an unborn infant were to be considered a "person"?

In various contexts the law has recognized and extended its protection to an unborn infant. For purposes of inheritance the rights of an unborn infant have been recognized, at least when it is subsequently born alive. For example, in *Crisfield v. Storr,* 36 Md. 129, 145, an infant *en ventre sa mere* was deemed *in esse* for the purpose of taking a remainder. See also Art. 93, Sec. 3-107, which permits a child conceived before a decedent's death but born thereafter to inherit as if it had been born during the lifetime of the decedent. The law of torts has also given a certain legal status to unborn children. In *Damasiewicz v. Gorsuch,* 197 Md. 417, it was held that a child suffering prenatal injuries, when *en ventre sa mere,* could maintain an action for injuries after it was born. *State v. Sherman,* 234 Md. 179, went even further and held that an action could be brought by the personal representative of a viable child suffering prenatal injuries, while *en ventre sa mere,* even though the child was subsequently delivered stillborn, on the basis that when viable the infant was a "person" as that term is used in the Lord Campbell's Act and under Code provisions providing that letters of administration may be granted for any "person" who shall die intestate. The Court of Appeals expressly drew the line "at the point where the common law concept of viability is in effect", while recognizing that other cases have gone so far as to permit recovery for injuries to a child *en ventre sa mere* even before the child is viable. Other cases have recognized that a woman may be compelled to have blood transfusions to protect the life of an unborn child, even over the objec-

tions of the woman based on religious convictions. *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson,* 201 A. 2d 537 (N.J.), cert. den. 377 U.S. 985; *Application of President of Georgetown University Hospital,* 331 Fed. 2d 1000 (D.C. Cir.), cert. den. 377 U.S. 978. In *Roeder v. State,* 4 Md. App. 705, 709, involving a prosecution for abortion under Art. 27, Sec. 3 (the old abortion law), it was stated that "pregnancy and life are simultaneous with the act of conception . . .". The same statement was made in *Vios v. State,* 5 Md. App. 200. See also Md. Rule 275 permitting the appointment of an attorney to appear in an action in equity on behalf of an unborn child.

While the above authorities, especially the *Sherman* case and the blood transfusion cases, could reasonably lead to a conclusion that a fetus, at least after viability, is a "person" within the meaning of the Fourteenth Amendment, we do not deem it necessary to decide this question in the present inquiry, since we are of the opinion, for the reasons to be hereinafter stated, that the Abortion Bill does not constitute state action within the scope of the Fourteenth Amendment. We do note, however, that if a fetus were to be deemed a person within a constitutional sense, an extremely difficult problem would be presented in balancing the rights of the fetus against the rights of the mother, especially in those situations where it would be necessary to abort the viable fetus in order to save the life of the mother. We further note that if a fetus, at least when viable, is to be considered a person in a constitutional sense, then in an appropriate case the physician who performs an abortion may be criminally liable under 42 U.S.C.A. 1985 (3), for depriving the fetus of equal protection of laws, or under 18 U.S.C.A. 241, for depriving the fetus of the free exercise or enjoyment of rights secured by the Constitution of the United States, even if the Abortion Bill became law. See also *McIver v. Russell,* 264 F. Supp. 22 (D.C. Md.), which discusses, *inter alia,* civil liability under Article 23 of the Maryland Declaration of Rights.

The Fourteenth Amendment only protects individuals against state action, not from wrongs performed by individuals. As stated by the Supreme Court of the United States in *United States v. Guest,* 383 U.S. 745, 755, 16 L. Ed. 2d 239, 247-248:

> "It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority. The Equal Protection Clause 'does not . . . add any thing to the rights which one citizen has under the Constitution against another.' United States v. Cruikshank, 92 U.S. 542, 554-555, 23 L. Ed. 588, 592. As Mr. Justice Douglas more recently put it, 'The Fourteenth Amendment protects the individual against *state action,* not against wrongs done by *individuals.*' United States v. Williams, 341 U.S. 70, 92, 95 L. Ed. 758, 772, 71 S. Ct. 581 (dissenting opinion). This has been the view of the Court from the beginning. United States v. Cruikshank, supra; United States v. Harris, 106 U.S. 629, 27 L. Ed. 290, 1 S. Ct. 601; Civil Rights Cases, 109 U.S. 3, 27 L. Ed. 836, 3 S. Ct. 18; Hodges v. United States, 203 U.S. 1, 51 L. Ed. 65, 27 S. Ct. 6; United States v. Powell, 212 U.S. 564, 53 L. Ed. 653, 29 S. Ct. 690. It remains the Court's view today. See, e.g., Evans v. Newton, 382 U.S. 296, 15 L. Ed. 2d 373, 86 S. Ct. 486; United States v. Price, 383 U.S. 787, 16 L. Ed. 2d 267, 86 S. Ct. 1152." (Emphasis by Court.)

It has been recognized, however, that the involvement of the state need not be exclusive or direct. State action within the meaning of the Fourteenth Amendment may be found even though the participation of the state was peripheral or where the action of the state was one of several joint forces leading to a constitutional violation. *United States v. Guest, supra.* As stated in *Reitman v. Mulkey,* 387 U.S. 369, 378, 18 L. Ed. 2d 830, 836:

> "This Court has never attempted the 'impossible task' of formulating an infallible test for determining whether the State 'in any of its manifestations' has become significantly involved in private discriminations. 'Only by sifting facts and weighing circumstances' on a case-by-case basis can a 'non-obvious involvement of the State in private conduct be attributed its true significance'."

See also *Griffin v. County Board of Prince Edward County,* 377 U.S. 218, 12 L. Ed. 2d 256; *Poindexter v. Louisiana Financial Assistance Commission,* 275 F. Supp. 833, aff'd 389 U.S. 581.

While realizing that we are delving into a very gray area where there is no "infallible test", we are of the opinion that the Abortion Bill would not constitute state action within the meaning of the Fourteenth Amendment. The Abortion Bill merely undertakes to repeal the existing limited statutory restrictions with regard to the performance of abortions. If there is any deprivation of life or liberty without due process of law in a constitutional sense, it would not be through the action of the State, but through the action of the doctor performing the abortion, and possibly the mother upon whom the abortion was performed. The Abortion Bill does not require the performance of any abortion; it merely places the State in a neutral position. Even *Reitman v. Mulkey, supra,* in which the Supreme Court accepted the decision of a state court that a repeal of statutes prohibiting racial discrimination through a constitutional amendment "would involve the State in private racial discriminations to an unconstitutional degree", recognized that the state could take a neutral position and rejected the notion that the state was required to have a statute prohibiting racial discrimination.

After considering all aspects of this inquiry and the fact that the Abortion Bill does no more than repeal the existing regulations on abortion, which are already of a limited nature, we are unable to conclude that the Abortion Bill would constitute state action which would be prohibited

by the Fourteenth Amendment, even assuming that a fetus was a "person" in a constitutional sense and that an abortion could be deemed a taking of life or liberty without due process within the meaning of the Fourteenth Amendment. It is therefore our conclusion that the Abortion Bill is not unconstitutional under the due process or equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Were we to say otherwise, then it would seem that the present law relating to abortions (and perhaps even the common law) would be unconstitutional, since "the protection of the law" is not extended to the fetus in the various situations under which abortions are now permitted.

We are further of the opinion that the same result would follow under Article 23 of the Maryland Declaration of Rights, which provides "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the Law of the land". While the Declaration of Rights does not expressly provide that it is directed against state action, it has been so construed. See *Ulman v. Baltimore*, 72 Md. 587, 593, " '[d]ue process of law' is not confined to judicial proceedings but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative or executive in its nature"; *Monticello v. Balto. City*, 90 Md. 416, 428. Numerous cases have equated "due process of law" as used in the Federal Constitution with the expression "Law of the land" used in the Maryland Declaration of Rights. *Oursler v. Tawes*, 178 Md. 471; *Raymond v. State*, 192 Md. 602; *Home Utilities Co., Inc. v. Revere Copper and Brass, Inc.*, 209 Md. 610; *McIver v. Russell*, 264 F. Supp. 22 (D.C. Md.); *Sanner v. Trustees*, 278 F. Supp. 138 (D.C. Md.). Since the Abortion Bill does not itself deprive anyone of his life or liberty nor require that such be done, we are of the opinion that the bill is not in violation of Article 23 of the Maryland Declaration of Rights.

EIGHTEENTH. If the Abortion Bill and Medical Practices Bill are signed into law, could abortions be performed in nonaccredited hospitals?

This question must be answered in the affirmative. The Medical Practices Bill would only require a doctor to perform an abortion in a licensed hospital. The requirement that a hospital in which an abortion may be performed must be accredited by the Joint Committee for Accreditation of Hospitals, as well as licensed by the State Board of Health and Mental Hygiene, as now set forth in Article 43, Sec. 149E, would be eliminated under the terms of the Abortion Bill. Therefore abortions could be performed in any hospital which had obtained a license from the Secretary of Health and Mental Hygiene, regardless of accreditation.

The statutory provisions controlling state licensing of hospitals are found in Article 43, Secs. 556-568. We are informed that the requisites for state licensing are less stringent than the requirements for accreditation by the Joint Commission for Accreditation of Hospitals. We also note that Article 43, Sec. 556(c) would permit the licensing of "special hospitals" which provide "specialized services, such as obstetrical".

NINETEENTH. Under the provisions of the Abortion Bill and the Medical Practices Bill, would parental consent or knowledge be a prerequisite for the performance of an abortion on a minor female?

Section 135(a) of the Medical Practices Bill provides:

> "The consent to the provision of medical or surgical care or services by a hospital, public clinic, or the performance of medical or surgical care or services by a physician, licensed to practice medicine, when executed by a minor who is or professes to be married, or by a female minor who is or professes to be pregnant, or by a minor who is or professes to be afflicted with a venereal disease, shall be valid and binding as if the minor

had achieved his or her majority, as the case may be; that is, a minor who is or professes to be married, or a female minor who is, or professes to be pregnant, or a minor who is or professes to be afflicted with a venereal disease, shall be deemed to have and shall have the same legal capacity to act, and the same legal obligations with regard to the giving of such consent to a hospital or clinical care or services or medical or surgical care or services to be provided by a physician licensed to practice medicine, as a person of full legal age and capacity, the infancy of the said minor and any contrary provisions of law notwithstanding; and the consent shall not be subject to later disaffirmance by reason of minority; and the consent of no other person or persons (including, but not limited to a spouse, parent, custodian, or guardian) shall be necessary in order to authorize the hospital or clinical care or services or medical or surgical care or services to be provided by a physician licensed to practice medicine to the minor or minor's child."

Under the above provisions it is clear that a minor who professed to be pregnant could legally consent to "medical or surgical care or services", such as an abortion. Consent of the parents of the minor would not be required.

Insofar as notice to or knowledge of the parents is concerned, Section 135(b) of the Medical Practices Bill provides:

"Upon the advice and direction of a treating physician or if more than one, any one of them, member of the medical staff of a hospital, public clinic, or physician licensed to practice medicine may, but shall not be obligated to, inform the spouse, parent, custodian, or guardian of a minor in the circumstances enumerated in subsection (a) hereof, as to the treatment given or needed, and the information may be given to or withheld from the spouse, parent, custodian, or guardian with-

> out the consent of the minor patient and over the express refusal of the minor patient providing the information; the providing or withholding of the information rests in the sole discretion of a member of the medical staff of the hospital or public clinic or the physician licensed to practice medicine, as the case may be. If the minor is found not to be pregnant or not afflicted with a venereal disease, no information with respect to any appointment, examination, test, or other medical procedure shall be given to the spouse, parent, custodian, or guardian of the minor."

Under the above statutory provisions it is obvious that there is no requirement that the parent of a minor female must be informed that an abortion is going to be or has been performed. The dissemination of information to the parent is left to the discretion of the treating physician.

It should be noted, however, that the provisions of Section 135 of the Medical Practices Bill are not new. Essentially the same provisions are now found in Article 43, Section 149D of the Code.

Therefore, in answer to the question which has been posed, parental consent or knowledge would not be a prerequisite for the performance of an abortion on a minor female.

TWENTIETH. If the Abortion Bill and Medical Practices Bill are signed into law, will there be any criminal penalties for performance of the acts now declared unlawful by Article 43, Section 149G(a)?

Article 43, Section 149G(a), makes the following acts unlawful:

> "(a) A person is guilty of a misdemeanor if he
>
> (1) Sells or gives, or causes to be sold or given, any drug, medicine, preparation, instrument, or device for the purpose of causing, inducing, or obtaining a termination of human pregnancy other

than by a licensed physician in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene; or

(2) Gives advice, counsel, or information for the purpose of causing, inducing, or obtaining a termination of human pregnancy other than by such physician in such hospital; or

(3) Knowingly assists or causes by any means whatsoever the obtaining or performing of a termination of human pregnancy other than by such physician in such a hospital."

The above provisions would be repealed under the terms of the Abortion Bill.

While it would appear that some of the acts now prohibited by Article 43, Section 149G(a), would no longer be criminal if the Abortion Bill were signed into law, other criminal provisions of the Code would partially fill the void. Some of the acts now prohibited by Article 43, Section 149G(a) would also constitute the practice of medicine under Section 119(f)(4) of the Medical Practices Bill, which makes "assisting, attempting, inducing, or causing by any means whatsoever the termination of a human pregnancy" the practice of medicine. Under Article 27, Secs. 307-313, it is unlawful to dispense "dangerous drugs" without a prescription of a practitioner licensed by law to administer such drugs. It should also be noted that Federal law prohibits the mailing of "every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for . . . producing abortion", 18 U.S.C.A., Sec. 1461. The importation of "any drug or medicine or any article whatever for . . . causing unlawful abortion" is prohibited by 19 U.S.C.A., Sec. 1305.

It is therefore our opinion that some of the acts now prohibited under Article 43, Section 149G(a), would no longer be criminal if the Abortion Bill were signed into

law. Other prohibited acts, however, would continue to be unlawful under other provisions of state and federal law. Whether a particular act would continue to be criminal would necessarily depend upon the facts presented. A complete answer to the question posed cannot be stated in the abstract; each case would turn upon its particular facts.

TWENTY-FIRST. If the Abortion Bill is signed into law, can the Secretary of Health and Mental Hygiene require hospitals to compile and/or submit statistics with regard to performance of abortions?

Section 149E(c) of Article 43, which would be repealed by the Abortion Bill, provides as follows:

> "The hospital abortion review authority shall keep written records of all requests for authorization and its action thereon. An annual report of the therapeutic abortions performed in Maryland shall be made by the director of the hospital and its governing board. Such reports shall include the number of requests, authorizations and performances, the grounds upon which such authorizations were granted, and the procedures employed to cause the abortions and such reports shall be forwarded to the joint commission on accreditation of hospitals and the State Board of Health and Mental Hygiene for the purpose of insuring that adequate and proper procedures are being followed in accredited hospitals. Such information, which is not subject to the physician-patient privilege, may be made available to the public. Said reports shall not include the names of the patients aborted."

While the above statutory provision has the advantage of specificity, we are of the opinion that essentially the same statistics could be required under the provisions of Article 43, Sec. 14, relating to the maintenance of "vital records". Article 43, Sec. 14(b)(2), authorizes the Secretary of Health and Mental Hygiene to adopt and promul-

gate rules and regulations to govern the registration of "fetal deaths". A "fetal death" is defined in Article 43, Sec. 14(a)(5), to mean "death prior to the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy". The recordation of fetal deaths after twenty weeks of gestation is specifically governed by Article 43, Sec. 21. It would seem to us that an abortion would fall within the definition of a "fetal death", so that registration could be required under rules and regulations of the Secretary of Health and Mental Hygiene for abortions prior to twenty weeks of gestation, and under Art. 43, Sec. 21, for abortions after the twentieth week of gestation.

TWENTY-SECOND. Is the Abortion Bill unconstitutional for failing to require the consent of the father of an unborn fetus?

We are of the opinion that this question must be answered in the negative. No authority has been brought to our attention nor has any been found during our research, which would give the father a sufficient interest or right in the unborn fetus to enable him to prohibit the performance of an abortion. Even if such a right of the father were to be recognized, the Abortion Bill would not deprive the father of this right. As stated in the answer to Question Seventeenth herein, the Abortion Bill merely repeals existing limitations on the performance of abortions; it does not require that abortions be performed in any instance.

It should also be noted that the present laws governing abortions do not require the consent of a father as a condition precedent to such an operation. This is in accord with the general view that the consent of a husband is not necessary to justify a surgical operation upon a married woman. *State v. Housekeeper,* 70 Md. 163. See also the discussion in answer to Question Nineteenth herein, which is equally applicable to the spouse of a minor female.

TWENTY-THIRD. If the Abortion Bill is signed into law, could a doctor destroy a fetus against the will of the

mother or without her consent without risk of civil or criminal penalties?

We are of the opinion that if a physician performed an abortion on a mother without her consent he would be subject to the same criminal and civil actions as he would be for the performance of any operation upon a patient without their consent. With regard to the civil liability of a physician for performing an operation without the consent of the patient, see *State v. Housekeeper*, 70 Md. 163; 70 C.J.S., *Physicians and Surgeons*, Sec. 48(g); 41 Am. Jur., *Physicians and Surgeons*, Secs. 108-111. Also see *Clark and Marshall, Crimes* (7th Ed. 1967), Sec. 1106, wherein it is suggested that if a physician procures a miscarriage without the consent of the woman he is guilty of an assault and battery upon the woman.

Because of the extraordinary length of this opinion, we will briefly summarize the more important points discussed herein.

1. After considering all of the questions which have been raised with regard to the titles of the Abortion Bill and the Medical Practices Bill, it is our opinion that such defects as exist in the titles to both bills are not sufficient to render them unconstitutional.

2. The Abortion Bill repeals the common law misdemeanor of causing a miscarriage after quickening of the fetus. In addition, the Abortion Bill repeals various crimes related to the subject of abortions (*e.g.*, selling or giving a drug or device for the purpose of causing or inducing an abortion, or the giving of advice or information by a non-physician for the purpose of causing or inducing an abortion), but other criminal provisions under state and federal law would partially fill this void.

3. A physician acting under the Abortion Bill could abort a pregnancy at any time up until the time the child was "born alive" without incurring any criminal liability, regardless of whether the fetus had quickened or was viable at the time of the abortion. Only after being "born

alive" could a child be the victim of a homicide. What constitutes being "born alive" is a difficult legal and medical question, which has not been answered in any definitive manner by the Maryland courts. According to some authorities in order for a child to have been "born alive" the umbilical cord must have been severed.

4. Notwithstanding serious questions as to the constitutionality of the Abortion Bill which arise because of a body of law indicating that an unborn child is a legal person with standing under the Fourteenth Amendment to the United States Constitution, at least after viability, we believe that the Abortion Bill, if it becomes legally effective, would not violate the Federal Constitution, as the bill does not constitute "state action" within the prohibition of the Fourteenth Amendment. The Abortion Bill merely undertakes to repeal the existing limited statutory restrictions with regard to the performance of abortions. If there is any deprivation of life or liberty without due process of law in a constitutional sense, it would not be through the action of the State, but through the action of the doctor performing the abortion, and possibly the mother upon whom the abortion was performed. The Abortion Bill does not require the performance of any abortion; it merely places the State in a neutral position. For the same reasons the Abortion Bill would not be unconstitutional under Article 23 of the Maryland Declaration of Rights.

5. The performance of abortions after quickening of the fetus or after the fetus is viable may not be effectively and lawfully regulated by administrative rules and regulations. A rule prohibiting abortions after a certain period of gestation (*e.g.* twenty or twenty-six weeks), is beyond the statutory rule-making power of the Maryland State Board of Medical Examiners, the Commission on Medical Discipline of Maryland, and the Secretary of Health and Mental Hygiene. Even if adopted such a rule could not be legally enforced. Nor does the Medical and Chirurgical Faculty of the State of Maryland have the power to adopt a regulation having the force of law which would prohibit the performance of an abortion after a certain period of gestation.

6. We find the question of whether the Abortion Bill would be rendered effective and legally operative by the provisions of the Medical Practices Bill to be so fraught with doubt that even the co-authors of this opinion are unable to agree on a prediction as to how the question would be resolved by the courts.

7. The Abortion Bill contains no residency requirements. We do not believe that residency requirements could be imposed by administrative rules and regulations.

8. It is our opinion that the *present* Maryland abortion law is constitutional. We note, however, that cases are now pending in the Special Court of Appeals of Maryland and in the Supreme Court of the United States which raise the question of the extent to which the state may constitutionally control the performance of abortions.

9. Under the terms of the Abortion Bill, abortions could be performed by physicians in nonaccredited hospitals, as long as the hospital is licensed by the Secretary of Health and Mental Hygiene.

10. Under the Abortion Bill and Medical Practices Bill, a minor female can legally consent to the performance of an abortion without parental consent or knowledge. In this respect, however, the bills merely restate the present law.

11. Under the Abortion Bill and Medical Practices Bill, a married female can legally consent to the performance of an abortion without the consent or knowledge of her husband. Again, however, the bills merely restate the present law in this respect. No constitutional rights of the husband would be violated by these provisions.

FRANCIS B. BURCH, *Attorney General.*

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

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* House Bill No. 489 ("Abortion Bill") was vetoed by the Governor; Senate Bill No. 257 ("Medical Practices Bill") was signed into law by the Governor and is now Chapter 736 of the Laws of Maryland of 1970.

HUMAN RELATIONS COMMISSION

COMMISSION HAS IMPLIED POWER TO ENTER INTO CONTRACT TO FURTHER OBJECTS AND PURPOSES FOR WHICH IT WAS CONSTITUTED.

January 6, 1970.

Mr. William H. Adkins, II

We have your letter of December 17, 1969, in which you inquire whether, budget and appropriation considerations aside, it is permissible for the Commission on Human Relations (the "Commission") to enter into a contract with Baltimore Neighborhoods, Inc. ("BNI") to perform the general type of services for the Commission as described below for a fee. In our opinion, the Commission may do so.

You have advised that BNI is a private non-profit corporation concerned primarily with the creation of a Metropolitan open housing market in the Baltimore area. It is presently an applicant for a foundation grant, together with the Greater Baltimore Housing Development Corporation and the Baltimore Department of Housing and Community Development, for funding to permit extensive work in this field in the Baltimore Metropolitan area.

In discussions with BNI, that corporation has proposed that the Commission enter into a contract with it for a fixed fee pursuant to which it would perform for the Commission certain functions and services in the housing field. Illustratively, BNI might agree to:

1. conduct original surveys and analyses concerning the problems relating to housing and race relations and their effect upon the social, economic and cultural life of the City;

2. conduct neighborhood educational programs on the issues of racial stabilization in areas affected by racial change when requested by the Commission;

3. conduct planned programs of public meetings with

local improvement associations, religious institutions and other civic groups in order to provide factual and statistical data on racial and housing issues when requested by Commission;

4. consult with representatives of various segments of the housing industry with regard to enlisting aid and support of such groups in obtaining and maintaining stabilized housing when requested by the Commission;

5. act, when called upon by the Commission, as a consultant and to provide consultative services and research to the Commission on housing problems as they are affected by racial considerations;

6. assist the Commission when so requested in the solution of specific racial disturbances emanating from neighborhood housing problems; and/or

7. provide Commission speakers and literature on the subject of stabilization of neighborhoods when required by the Commission in order to carry out its specific educational efforts in this field.

We believe that the functions and services described above are consistent with the general powers and duties of the Commission as set forth in Section 3(a) of Article 49B of the Annotated Code of Maryland which provides as follows:

> "3. Powers and duties.
>
> "(a) The said commission shall have authority and power to make such surveys and studies concerning interracial relations, conditions and problems as it may determine, and to promote in every way possible the betterment of interracial relations. In making such studies and surveys, it shall be authorized to expend any funds which may be provided for in the budget or otherwise made available.
>
> "On the basis of such studies or surveys, the Commission shall recommend to the Governor such

additional legislation or changes in existing legislation as may be deemed desirable."

While the provisions of Article 49B are silent with respect to specific power of the Commission to enter into contracts in furtherance of its statutory objectives and duties, we think that this power is necessarily implied. Moreover, the statutory mandate to "promote in every way possible the betterment of interracial relations" would seem logically to permit the Commission to attempt to achieve this objective in part by means of contracting with a third party to perform certain services which concededly would be entirely permissible if performed directly by the Commission. In short, "every way possible" should be construed to mean exactly that, by direct or indirect means.

We are cognizant of the fact that the open housing provisions of the Human Relations Law, enacted as Chapter 385 of the Acts of 1967, were rejected upon referendum in November of 1968. We do not believe that this would derogate in any way from what we have previously said in regard to your inquiry. As you have noted in your letter, housing problems are at the core of much racial tension and the Commission is desirous of working towards solutions of such problems whether or not it has specific enforcement powers in regard to a fair housing law.

We conclude, therefore, that the Commission may contract for services to be supplied by BNI so long as these services can be fairly said to advance the duties and objectives of the Commission as set forth in the Human Relations Law, as amended to date.

FRANCIS B. BURCH, *Attorney General.*

RICHARD G. MCCAULEY, *Asst. Attorney General.*

HUMAN RELATIONS COMMISSION — LEGISLATION WHICH WOULD ELIMINATE ANNUAL SALARY OF PRESENT CHAIRMAN WOULD CONTRAVENE ARTICLE III, SECTION 35 OF THE MARYLAND CONSTITUTION.

October 7, 1970.

Stephen D. Shawe, Esq.

You advise that the Human Relations Commission may be interested in sponsoring legislation which would eliminate the present salary of the chairman as now provided for in the budget and provide per diem payments and expenses for the members. You inquire whether this could be done consistent with Article III, Section 35, of the Maryland Constitution. It is our opinion that legislative action to change the salary of the chairman before the end of his present term or a vacancy in his office, whichever occurs first, is unauthorized.

The office of chairman of the Human Relations Commission was created by Chapter 548 of the Laws of 1951. As enacted and as in effect until 1969, the Human Relations Law contained no statutory authorization for payment of an annual salary to the chairman. The 1969 General Assembly changed this by enacting Chapter 153 of the Laws of 1969, codified as Section 2 of Article 49B of the Maryland Code, which provides, in relevant part, as follows:

> ". . . The chairman of the Commission shall be paid such compensation as shall be provided in the budget. . . ."

William H. Adkins, II, Esq., the present chairman of the Commission, was appointed by the Governor in July of 1969. Due to the fact that no salary was provided by statute for the chairman of the Commission until July 1, 1969, the effective date of Chapter 153 of the Laws of that year, and that the salary of the present chairman was not set forth as a separate item in the 1970 Budget Bill or the Personnel Detail, an annual salary of $15,000 was allocated to the

chairman from the general funds of the Commission for the fiscal year ending June 30, 1970. The same salary, $15,000, was included in the 1970 Budget Bill and Personnel Detail for such budget for the fiscal year ending June 30, 1971.

The relevant portion of Article III, Section 35, of the Maryland Constitution provides:

> ". . . ; nor shall the salary or compensation of any public officer be increased or diminished during his term of office. . . ."

As announced by the Court of Appeals in *Comptroller v. Klein,* 215 Md. 427 (1958) at 434, the purpose of this provision was twofold, namely:

> ". . . to prevent a public officer from using his office for the purpose of putting pressure upon the General Assembly or other authorized agency to award him additional compensation and, on the other hand, to prevent the General Assembly or other agency from putting pressure on a public officer by offering him increased compensation or threatening a decrease thereof."

We have no difficulty divining that the proposed legislation would have the effect of diminishing or increasing the salary of the present chairman in contravention of Article III, Section 35, of the Maryland Constitution. The present chairman's "constitutional" salary was fixed by the 1970 budget and this amount may not either be increased or decreased during his present term of office. *Comptroller v. Klein, supra; cf., Pressman v. D'Alesandro,* 211 Md. 50 (1955); *Calvert County Comm'rs v. Monnett,* 164 Md. 101 (1933); see, 50 Opinions of the Attorney General 221 (1965).

While your proposal may not be presently permissible, we note in passing that the constitutional salary freeze applies only to the salary of the incumbent office holder for the term for which he was elected or appointed, and that the constitutional prohibition would not be applicable to a succeeding term, even though the incumbent was the

same individual who held office during the prior term when the change in compensation was effected, *Comptroller v. Klein, supra.* Accordingly, the suggested legislation would be on sound constitutional grounds if it took effect at the expiration or sooner termination of the term of the present chairman, whether or not the chairman succeeded himself by reappointment to a new term.

Except as limited in its applicability as set forth above, we do not believe that there is otherwise any legal impediment to an amendment of existing law to provide for per diem payment and reimbursement of expenses to the members. If prior to the future effectiveness of any such legislation, however, the chairman should desire to effect a voluntary reduction of his salary, he could of course remit such portion of his salary to the Treasury of the State as he might deem appropriate.

FRANCIS B. BURCH, *Attorney General.*

RICHARD G. MCCAULEY, *Asst. Attorney General.*

HUMAN RELATIONS COMMISSION—CONSTITUTIONAL LAW—COMMISSION ON NEGRO HISTORY AND CULTURE—COMMISSION'S STATED OBJECTS AND PURPOSES ARE CONSTITUTIONALLY VALID.

October 7, 1970.

Mr. Franklin C. Showell.

Your recent letter directs our attention to the Act of Assembly (Article 41, Section 409(d) as amended by Chapter 129 of the Acts of 1970) which creates the Maryland Commission on Negro History and Culture to study ways to advance the understanding of Negro history and culture and make recommendations to the Governor and the legislature for appropriate legislation to implement the Commission's findings. Your letter advises that the Commission expects to make recommendations in three specific areas: (1) the establishment of a museum or center on black history and culture, (2) the creation of a permanent commission on black history and culture, and (3) State funding of these projects. We are asked to pass upon the constitutionality of the Commission's proposed recommendations.

The test of constitutionality of legislative action and the expenditure of public funds therefor is whether a public purpose is thereby served. A public purpose is not susceptible of exact definition but may be said to be that which is generally accepted as such; *Johnson v. Baltimore,* 158 Md. 93, 104. An example which offers a parallel to the facts we are here asked to consider is the holding of the Court of Appeals of Maryland that the establishment and maintenance of a free public library in Baltimore City was for a public purpose; *Johnson v. Baltimore, supra.* For other examples of purposes held to be public *cf. Marchant v. Mayor and City Council of Baltimore,* 146 Md. 513; *Lerch v. Maryland Port Authority,* 240 Md. 438, involving legislation to improve port facilities; and *Frostburg v. Jenkins,* 215 Md. 9, upholding the constitutionality of an act author-

izing a municipality to render financial assistance to the construction of a building to be used for a private industry.

The project described in the act creating the Maryland Commission on Negro History and Culture has pronounced social and educational merit in all of its aspects. Any special interest that it may hold for a segment of the population does not diminish its importance or value to all of the inhabitants of the State. Its availability to all citizens should make a significant contribution to better understanding and better relations within the total community. As such, it profoundly touches the general welfare. Accordingly, we believe to be constitutionally valid the stated objects and purposes of the Commission and its recommendations relating thereto.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Asst. Attorney General.*

INDUSTRIAL DEVELOPMENT FINANCING AUTHORITY, MARYLAND

RECORDATION TAX AND TRANSFER TAX LIABILITY IN TRANSACTION INVOLVING MORTGAGE INSURANCE BY MARYLAND INDUSTRIAL DEVELOPMENT FINANCING AUTHORITY.

August 7, 1970.

Mr. Charles V. Phelps.

We are in receipt of your recent letter, in which you inquire as to the recordation tax and transfer tax liability involved in a transaction with the Maryland Industrial Development Financing Authority (MIDFA).

The recordation tax is codified in Section 277 of Article 81 of the Annotated Code of Maryland. Subsection (a) of Section 277 imposes a recordation tax upon written instruments, as follows:

> "A tax is hereby imposed upon every instrument of writing conveying title to real or personal property, or creating liens or encumbrances upon real or personal property, offered for record and recorded in this State with the clerks of the circuit courts of the respective counties, or the clerk of the Superior Court of Baltimore City, provided that conveyances *to* the State or any agency thereof or any political subdivision of the State shall not be subject to the tax or charge imposed by this section. The term 'instruments of writing' shall include deeds, mortgages, chattel mortgages, bills of sale, leases, deeds of trust, contracts and agreements . . . but shall not include . . . purchase-money mortgages . . .". (Emphasis supplied.)

The State transfer tax is imposed by Section 278A of Article 81. Subsection (a) of Section 278A, as amended by Chapter 605 of the Laws of Maryland of 1970, effective June 1, 1970, imposes a transfer tax upon written instruments conveying title to real property, as follows:

"A tax is hereby imposed upon every written instrument conveying title to real property, or a leasehold interest therein, offered for record and recorded among the land records in the State, but conveyances *by or to* the United States, the State, or any political subdivision of the State, or any agency or instrumentality thereof, shall not be subject to the tax imposed by this section. The term 'written instrument' includes leases for a term of years above seven years, not perpetually renewable but does not include any mortgage, deed of trust, conditional sales contract, or any other device the purpose of which is to afford a security in real property rather than convey title thereto." (Emphasis supplied.)

For ease of reference, we will consider, in outline fashion, each instrument involved in a typical transaction involving mortgage insurance by MIDFA.

1. *Deed to City by Present Owner of Project.*

   (a) *Recordation Tax.* No recordation tax will be due. Under Article 81, Section 277, no tax is payable on a conveyance *to* a political subdivision.

   (b) *Transfer Tax.* No transfer tax will be due. Under Article 81, Section 278A, no tax is payable on a conveyance *to* a political subdivision.

2. *Mortgage (Deed of Trust) on Land and Equipment from City to Bank.*

   (a) *Recordation Tax.* In the present case the mortgage (actually a deed of trust) is a mixed real and chattel mortgage, since it covers land, buildings and equipment. To the extent that the mortgage relates to realty, no recordation tax will be due as the mortgage will be a "purchase-money mortgage" on realty, which is not an "instrument of writing" subject to the recordation tax. See Article 81, Section 277 (a), *supra.* As stated in 25 Opinions of the Attorney General 643, 644:

> ". . . section 4 of Article 66 [purchase-money mortgage or deed of trust preferred to previous judgment or decree] presents a fair standard in determining what is a purchase-money mortgage [for purposes of recordation tax exemption]. By reference to this section it is apparent that the following conditions must be met: (1) The deed to the land and the mortgage must be given at the same time and as part of the same transaction; (2) the mortgage must 'recite that the sum so secured is in whole or in part the purchase money of the property purchased'. Under such circumstances it is immaterial 'whether the mortgage is given to the vendor of the property so purchased or to a third party who advances the purchase money in whole or in part'."

See also, 22 Opinions of the Attorney General 741; 50 Opinions of the Attorney General 428, ". . . viewed through the rationale of the mortgage exemption, a purchase-money deed of trust on realty is indistinguishable from a purchase-money mortgage on realty". *Cf., Gay Inv. Co. v. Comi,* 230 Md. 433, modifying rule of *Heuisler v. Nickum,* 38 Md. 270, as to what constitutes a purchase-money mortgage, on the basis of Article 66, Section 4.

To the extent that the mortgage relates to equipment, a more difficult question will be presented. This office has continually taken the position that a purchase-money *chattel* mortgage, with certain limited exceptions, is not exempt from the recordation tax. As stated in 40 Opinions of the Attorney General 603, 604:

> "You also inquire whether purchase-money chattel mortgages are exempt from the recordation tax. Section 273 of Article 81, *supra,*

specifies that the tax shall apply to 'deeds, mortgages, chattel mortgages, bills of sale sale * * *', etc. and exempts, among others 'purchase-money mortgages'. We have consistently ruled that purchase-money chattel mortgages were not intended to come within the exemption and that the tax applies to them. 24 Opinions of the Attorney General 981; 26 Opinions of the Attorney General 476; 27 Opinions of the Attorney General 431. * * *"

We are of the opinion that the mortgage in question will be subject to a recordation tax to the extent that it relates to chattels. Thus, it will be necessary, for tax purposes, to break the mortgage down into its taxable (*i.e.*, chattel) and nontaxable (*i.e.*, realty) components by determining what portion of the proceeds will be used for the purchase of chattels.

(b) *Transfer Tax.* No transfer tax will be due. Article 81, Section 278A, does not impose a transfer tax on a mortgage or deed of trust.

3. *Mortgage Insurance Agreement (Guaranty) Between MIDFA, Bank and City.*

(a) *Recordation Tax.* We do not believe that a recordation tax will be payable on this instrument. The agreement is, in essence, a guaranty. Under the terms of the agreement, the Bank agrees not to foreclose the mortgage in the event of a default in payment by the City (which would actually represent a default by the Tenant under the lease with the City). Instead, MIDFA will step in and make mortgage payments to the Bank as such payments become due, succeeding to the Bank's interest under the mortgage as well as the City's interest under the lease with the Tenant. Under these circumstances we are of the

opinion that the agreement is not taxable, since it does not convey title to property nor "create" a lien or encumbrance on the property.

(b) *Transfer Tax.* No transfer tax will be due. The agreement does not "convey title to real property".

4. *Lease from City to Tenant.*

(a) *Recordation Tax.* Looking to the terms of Article 81, Section 277, it should be noted that there is an exemption for conveyances *to* a political subdivision, but not for conveyances *by* a political subdivision. This should be contrasted with the transfer tax, Article 81, Section 278A, which expressly exempts conveyances "by or to" a political subdivision. The failure to include conveyances by a political subdivision in the recordation tax exemption, while doing so in the case of the transfer tax, is an obvious indication that the General Assembly did not intend to exempt conveyances by a political subdivision from the recordation tax.

The Court of Appeals of Maryland has consistently taken the position that exemptions from the recordation tax are to be strictly construed in favor of the State. The mere existence of doubt has been said to be sufficient to deny the exemption. As stated in *Hammond v. Phila. Elec. Pwr. Co.*, 192 Md. 179, 185-187:

> "The recordation tax statute has been before this court several times, ... In the case of *Pittman v. Housing Authority*, 180 Md. 457, 25 A. 2d 466, the question was whether the Housing Authority of Baltimore City was exempt from the tax because of a general exemption in the Maryland Housing Authority's law from all taxation and special assessments of the city, the State, or any

> political subdivision thereof. We held to the firmly established principle that exemptions from taxation are strictly construed in favor of the State and that the exemption in the Housing Authority's law did not apply to taxes imposed upon the enjoyment of a privilege. Our conclusion was that the Housing Authority was not exempt from the recordation tax.
>
> * * *
>
> "The question is the construction of the act itself, and whether the appellees are exempt under its terms. In the consideration of this question, there must be borne in mind the principle already referred to, that every exemption must be strictly construed. As Chief Judge McSherry said in the case of *Sindall v. Baltimore City,* 93, Md. 526, at page 530, 49 A. 645, 646: 'The taxing power is never presumed to be surrendered, and therefore every assertion that it has been relinquished must, to be efficacious, be distinctly supported by clear and unambiguous legislative enactment. To doubt is to deny an exemption.' "

See also, *Clarke v. Union Trust Co. of D.C.,* 192 Md. 127, and 40 Opinions of the Attorney General 509.

No constitutional provision has been brought to our attention which would prohibit the State from "imposing" a recordation tax on the privilege of recording instruments to which a political subdivision is a party. On the contrary, such taxation would seem to be constitutionally permissible. In *Pittman v. Housing Authority,* 180 Md. 457, the Court held that the recordation tax was payable on a deed to the Housing Authority of Baltimore City, although it was a "public

agency". For further reference, see 25 Opinions of the Attorney General 607 (deed of trust from local housing authority subject to recordation tax); 22 Opinions of the Attorney General 600 (deed to State Roads Commission subject to recordation tax, reversed by Ch. 253 of the laws of 1945); 16, McQuillin, *Municipal Corporations*, Sec. 44.57; *City of Abilene v. Fryar*, 143 S.W. 2d 654.

Our review of the above considerations leads us to the conclusion that the lease from the City to the Tenant will be subject to the recordation tax at the usual rate.

(b) *Transfer Tax.* No transfer tax will be due. Under the 1970 amendment to Article 81, Section 278A, conveyances *by* a political subdivision are not subject to the transfer tax.

5. *Assignment of Lease from City to Bank as Additional Security.*

(a) *Recordation Tax.* In the present case the assignment of the lease is merely given as additional security to protect the Bank, as mortgagee. The assignment, which is not operative until a default under the terms of the mortgage, is without "independent" consideration, as it is part of the mortgage transaction and the consideration for the assignment will be the mortgage loan from the Bank. Thus, the assignment will be made as an integral part of the mortgage transaction, rather than as a separate transaction. In 43 Opinions of the Attorney General 120, it was stated that an assignment of a lease would be subject to the recordation tax when made as "an entirely separate and distinct business transaction" apart from the "original lease agreement" for "an entirely new consideration". Since in the present case the assignment is an integral part

of the original transaction, without new or "independent" consideration, we are of the opinion that no recordation tax will be due.

(b) *Transfer Tax.* No transfer tax will be due on the assignment of the lease, as Section 278A of Article 81 exempts conveyances *by* a political subdivision.

6. *Financing Statement between City and Bank for Equipment to be Purchased with Proceeds of Mortgage Loan.*

(a) *Recordation Tax.* No recordation tax will be due, since the chattel portion of the mortgage will have already been subjected to the recordation. tax. See discussion in Section 2(a) hereof. As stated in 43 Opinions of the Attorney General 320, 321, in referring to the recordation tax, "it was never intended by the law to impose a double tax on the same consideration."

(b) *Transfer Tax.* No transfer tax will be payable. Article 81, Section 278A, only applies to instruments conveying title to real property.

7. *Deed from City to Tenant Pursuant to Tenant's Option to Purchase.*

(a) *Recordation Tax.* This instrument will be subject to a recordation tax, since Article 81, Section 277, does not except conveyances *by* a political subdivision. *Cf.*, 43 Opinions of the Attorney General 320, which discusses the computation of the recordation tax on a deed of conveyance upon the exercise of an option to purchase contained in a lease upon which the recordation tax was previously paid. Of course, if the option is exercised by the tenant at the end of a lease, as is contemplated, and the option price is only a nominal sum, as is also contemplated, then the recordation tax will be insignificant.

(b) *Transfer Tax.* Under Article 81, Section 278A, as amended, no transfer tax will be due, since the conveyance will be made *by* a political subdivision.

It has been suggested that in most, if not all, of the above instruments the City is merely acting as a straw party and that therefore no recordation tax should be imposed. We do not believe, however, that the position of the City may be taken so lightly. In 42 Opinions of the Attorney General 126, we recognized that a deed from a straw party was not subject to the recordation tax in the absence of consideration and defined a straw party as follows:

> "A straw party is a mere conduit for convenience in holding and passing title, and acts in the capacity of a trustee for the real purchaser. A 'straw man' is one who holds naked legal title to property for benefit of another." (Citations omitted.)

It would seem to us that the City holds more than "naked legal title to property for the benefit of another". The City will acquire the property in fee simple, mortgage it, and lease it to the tenant. While this may all be done originally as an accommodation for the Tenant, the City may well end up with unencumbered title to the property at the end of the term of the mortgage and lease. The Tenant "may" be given an option to purchase as part of the lease agreement, pursuant to Article 41, Section 266W(c), but the Tenant may elect not to proceed under the option. Even if the City were to provide a mechanism whereby it reserved the right to compel the Tenant to "pick up" its option to purchase, the City may decide that it would not be in its interest to exercise this right. If the Tenant does exercise its option to purchase, such will not occur, in the ordinary course of events, until the expiration of the lease, which is usually for a term of between fifteen and twenty-five years. *Cf.*, 43 Opinions of the Attorney General 116, where a straw party transaction was found to exist when a reconveyance was required "within ten days". Under all of these

circumstances, we do not believe that the City will be acting merely as a "straw party" as that term has been used to find an exemption from recordation taxes.

No opinion is expressed herein on the applicability of a *local* transfer tax, such as that imposed by Baltimore City. An opinion as to whether any of the instruments outlined above would be subject to a local transfer tax should be obtained from the attorney for the political subdivision which imposes the tax.

FRANCIS B. BURCH, *Attorney General.*

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

INDUSTRIAL DEVELOPMENT FINANCING AUTHORITY, MARYLAND—M.I.D.F.A.—VALIDITY OF GUARANTEE EXECUTED PRIOR TO 1969 AMENDMENTS TO MARYLAND INDUSTRIAL DEVELOPMENT FINANCING AUTHORITY ACT.

October 30, 1970.

Mr. Charles V. Phelps.

In 1965, the Maryland Industrial Development Financing Authority ("MIDFA") executed a guarantee agreement pursuant to the Maryland Industrial Development Financing Authority Act ("Act"), as contained in Article 41, Sections 266J to 266CC of the Annotated Code of Maryland, insuring the payment of a mortgage on an industrial project. On page one of the guarantee agreement, in an introductory clause, it was stated that MIDFA had "authorized the pledging of the full faith and credit of the State of Maryland to insure payment of the principal and interest . . . [of the mortgage] consistent with the terms and limitations" contained in the Act. Section one of the agreement provided as follows:

> "Development Authority [MIDFA] agrees to insure the payment to the bank of all mortgage installments accruing on and after any default in the payment by the County . . . , in accordance with the provisions of the Maryland Industrial Development Financing Authority Act and the terms of the mortgage obligation."

At the time when the guarantee agreement was executed, Section 266L of Article 41 of the Annotated Code of Maryland read as follows:

> "The Maryland Industrial Development Financing Authority is authorized to insure the payment of mortgage loans secured by industrial projects, and to this end the faith and credit of the State are hereby pledged, consistent with the terms and limitations of the terms of this subtitle."

In *Md. Indus. Devel. v. Meadow-Croft*, 243 Md. 515, the constitutionality of Section 266L was attacked on the basis that it unconstitutionally pledged the full faith and credit of the State in contravention of Section 34 of Article III of the Maryland Constitution. The lower court held that Section 266L was void in its entirety. The Court of Appeals, however, limited this holding and ruled that Section 266L was unconstitutional only insofar as it purported to pledge the faith and credit of the State. Thus, the Court of Appeals modified the decree of the lower court to read as follows:

> "1. That Section 266L of Article 41 of the Annotated Code of Maryland (1965 Replacement Volume) as enacted by Chapter 714 of the Laws of Maryland of 1965 be and it is hereby construed to mean that the purported pledge of the faith and credit of the State thereunder is of no legal force or effect.
>
> "2. That Sections 266J and 266CC, inclusive, of Article 41 of the Annotated Code of Maryland (1965 Replacement Volume), *including Section 266L* as hereinabove construed, are hereby declared constitutional, valid and in force and effect." (Emphasis added.)

In 1967, the General Assembly, in response to the *Meadow-Croft* case, amended Section 266L to read as follows:

> "The Maryland Industrial Development Financing Authority is authorized to insure the payment of mortgage loans secured by industrial projects, and to this end the faith and credit of the State are hereby pledged to the extent of thirty million dollars ($30,000,000)."

The constitutionality of Section 266L as amended in 1967 came before the Court of Appeals in the case of *Md. Indus. Devel. v. Helfrich*, 250 Md. 602. The complainant in this case had sought declaratory and injunctive relief as follows:

> ". . . a declaration:
>
> "(1) holding the Act and the transactions pro-

posed by the Authority to be unconstitutional and void;

"(2) holding Section 266L of the Act to be unconstitutional and void;

"(3) holding Section 266L of the Act to be invalid, void and of no effect because it erroneously declares that the faith and credit of the State would be pledged by the Act to the payment of the principal of and interest on mortgages insured under the Act;

* * * *

". . . and an injunction:

"(1) forbidding appellants to represent in any way that the faith and credit of the State are pledged to the payment of the principal of and interest on mortgages insured under the Act;

"(2) forbidding appellants to take any action pursuant to the purported authority of the Act;

"(3) forbidding any payment from the State's Emergency Fund or the issuance of State bonds by the Board of Public Works, pursuant to the purported authority of the Act; and

"(4) directing the Board of Public Works to order the Comptroller and the Treasurer to withdraw all moneys committed to the mortgage insurance fund under the purported authority of the Act."

The Court stated that in its view "Section 266L's attempt to pledge the State's faith and credit to the guarantee of mortgages to a maximum amount of $30,000,000 is unconstitutional and void". The Court refused to rule on the other issues raised, on the basis that the *Meadow-Croft* case was determinative of these issues.

In 1969, Section 266L was again amended and now reads as follows:

> "The Maryland Industrial Development Financing Authority is authorized to insure the payment of mortgage loans secured by industrial projects to the extent of thirty million dollars ($30,000,000)."

The 1969 amendment to Section 266L has not been subjected to any court test, since all reference to a pledge of the full faith and credit of the State of Maryland has now been deleted.

In view of the Court's decisions in the *Meadow-Croft* and *Helfrich* cases, you have asked for our opinion as to whether the guarantee executed by MIDFA in 1965 is still legally binding upon MIDFA. It is our view that the guarantee is still in full force and effect and should be honored by MIDFA. In the *Meadow-Croft* case the Court of Appeals noted, at page 519, that "[i]f the purported pledge of the State's credit in Section 266L is of no legal effect, the Act can be administered to insure mortgages without reliance on the State's faith and credit". The Court further noted, on page 526, that "Section 266L, therefore, must remain in the Act, but subject to the construction which we have placed upon it". In the *Helfrich* case, the Court was of the view that Section 266L, as amended in 1967, was unconstitutional only in its attempt to pledge the State's faith and credit.

It would therefore appear that Section 266L has never been held to be unconstitutional insofar as it authorized the insuring of mortgages by MIDFA. While it has been determined that MIDFA may not pledge the full faith and credit of the State to support its guarantee, the Court of Appeals has expressly rejected the notion that MIDFA was powerless to make a guarantee as such. The only effect of the *Meadow-Croft* and *Helfrich* decisions is that the guarantee of MIDFA is supported solely by the mortgage insurance fund created by Section 266S, which reads, in part, as follows:

> "There is hereby created an industrial project mortgage insurance fund, hereinafter in this subtitle referred to as the 'fund' which shall be used

> by the Authority as a non-lapsing, revolving fund for carrying out the provisions of this subtitle. To this fund shall be charged any and all expenses of the Authority, *including mortgage insurance payments required by loan defaults* and to the fund shall be credited all receipts of the Authority, including mortgage insurance premiums and proceeds from the sale, disposal, lease, or rental of real or personal property which the Authority may receive under the provisions of this subtitle." (Emphasis added.)

Even if Section 266L had been declared unconstitutional in its entirety, other sections of the Act, such as Section 266P(8), (9) and (12), would seem to empower MIDFA to execute guarantee agreements, which would be supported by the mortgage insurance fund.

The mortgage insurance fund was originally established by direct appropriation pursuant to Section 266BB of Article 41, which has never been amended and provides:

> "For the purpose of establishing the mortgage insurance fund and for the initial expenses in establishing the Authority as herein provided, the Governor shall place in the budget bill an item of one hundred thousand dollars ($100,000) for the fiscal year ending June 30, 1966; one hundred thousand dollars ($100,000) for the fiscal year ending June 30, 1967; one hundred thousand dollars ($100,000) for the fiscal year ending June 30, 1968; one hundred thousand dollars ($100,000) for the fiscal year ending June 30, 1969; and one hundred thousand dollars ($100,000) for the fiscal year ending June 30, 1970. Any unexpended balance of any or all such appropriations shall be carried forward to succeeding fiscal years for the purposes aforesaid."

Additions to the mortgage insurance fund have proven more difficult. When the Act was originally passed, Section

266Z provided for additions to the mortgage insurance fund as follows:

> "If from time to time in the opinion of the Authority the addition of moneys to the mortgage insurance fund is required to meet obligations, the Authority in writing shall request the Governor to provide sufficient moneys for this purpose. The Governor may submit this request to the next regular session of the General Assembly, as an item of appropriation in the budget bill."

After the decision in the *Meadow-Croft* case, Section 266Z was amended (although it had not been held unconstitutional) so as to provide for additions to the mortgage insurance fund, first, through the Board of Public Works from its emergency fund, and, second, by a State loan to be known as the "State Industrial Development Loan Fund". A decree holding that certain portions of Section 266Z relating to the State loan were unconstitutional was affirmed in the *Helfrich* case. Consequently, Section 266Z was amended to delete the references to the State loan and as now written Section 266Z provides as follows:

> "(a) Request to Board of Public Works.—If from time to time in the opinion of the Authority the addition of moneys to the mortgage insurance fund shall be required, the Authority in writing shall request the Board of Public Works to provide sufficient moneys to maintain its reserve at a level deemed adequate by the Authority, and upon receipt of such request, said Board may pay over the amount so requested from its emergency fund.
>
> "(b) Disposition of funds in excess of those adequate to meet Authority's obligations.—If at any time the amount of funds credited to the mortgage insurance fund exceeds an amount deemed adequate by the Authority to meet its obligations, the excess shall, upon resolution duly adopted by the members of the Authority, be paid to the Treasurer of the State of Maryland."

However, while the legislation authorizing additions to the mortgage insurance fund may have encountered difficulty, such problems have not affected the ability of MIDFA to guarantee mortgages which are supported by direct appropriation to the mortgage insurance fund pursuant to Section 266BB.

We further note that MIDFA has always collected a mortgage insurance premium in connection with the project now under discussion, as authorized by Section 266U. It would therefore appear that an argument could be made that MIDFA is now estopped to deny the validity of the 1965 guarantee agreement.

In view of all of the above, it is our opinion that the 1965 guarantee agreement is still binding upon MIDFA and should be honored accordingly. The guarantee, however, is supported only by the mortgage insurance fund and not by a pledge of the full faith and credit of the State of Maryland. Thus, all payments by MIDFA under the guarantee must be taken exclusively from the mortgage insurance fund, as created by direct appropriation pursuant to Section 266BB and Section 266S and as added to pursuant to Section 266Z (as amended in 1969).

We feel that we should further point out that the difficulty which has arisen in the instant inquiry will not be present in any guarantee agreement issued by MIDFA after the 1969 amendments to Section 266L and Section 266Z of Article 41.

FRANCIS B. BURCH, *Attorney General.*

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

INSURANCE

INSURANCE COMMISSIONER—CONTRACTS OF INSURANCE—MOTOR CLUBS UNDERTAKING TO PAY FOR LEGAL SERVICES RENDERED TO MEMBER AND TO PROVIDE OR PAY FOR TOWING AND EMERGENCY ROAD SERVICE ARE CONTRACTS OF INSURANCE.

June 9, 1970.

Mr. Newton I. Steers, Jr.

Your recent letter advises that in connection with your current review of the activities of automobile clubs doing business in this State, you desire our opinion regarding the applicability of the Insurance Code to membership agreements of automobile clubs that offer payment for legal services incurred by members and payment for towing and emergency road service.

With respect to legal service benefits, we have advised you, that an undertaking by an automobile club to reimburse its members for the expense of retaining counsel to represent them constitutes insurance within the meaning of the Insurance Code. You now inquire whether or not the same result would obtain if the motor club were to pay legal counsel drectly for services rendered to members. In our opinion, this also would constitute "insurance" within the meaning of Section 2 of the Insurance Code.

We have previously ruled that contracts containing combined legal service provisions and other benefits are contracts of insurance. 16 Opinions of the Attorney General 178 (1931); Opinion of the Attorney General, December 9, 1958 (unpublished).* It is implicit in these opinions that, alone or in conjunction with other benefits, an undertaking by an automobile club to pay an attorney directly or indirectly any legal fees charged or chargeable to a member under a membership agreement constitutes an insurance contract. Our view is supported by a large majority of courts which have considered this matter. *Continental Auto*

Club, Inc. v. Navarre, 337 Mich. 434, 60 N.W. 2d 180 (1953); *Arkansas Motor Club, Inc. v. Arkansas Employment Security Division,* 237 Ark. 419, 373 S.W. 2d 404 (1963); *Allin v. Motorist's Alliance of America,* 234 Ky. 714, 29 S.W. 2d 19 (1930); *Physicians' Defense Co. v. O'Brien,* 100 Minn. 490, 111 N.W. 396 (1907); *Physicians' Defense Co. v. Cooper,* 188 F. 832 (D.N.D. Cal. 1911), aff'd 199 F. 576 (CA-9, 1912).

As with undertakings to provide legal service benefits to motor club members, we have also advised you that an undertaking to reimburse the member directly for towing expenses constitutes insurance within the meaning of Section 2 of the Insurance Code. See also 5 Opinions of the Attorney General 267 (1920). Your particular inquiry is with respect to towing and emergency road service provided by the automobile club's own personnel and equipment or by a third party under a contract with the club. Emergency road service typically includes towing or providing limited labor and repairs (including the installation of parts or materials) to move the car from the scene of the breakdown or accident. In our opinion, an undertaking by an automobile club to provide or procure the above services for its members contemplates a contract of insurance. It does not differ in principle from direct reimbursement of the member for the described expenses. See Opinion of the Attorney General, December 9, 1958 (unpublished)*; *Arkansas Motor Club, Inc. v. Arkansas Employment Security Division supra,* at 407, fn. 5; *cf. National Auto Service Corporation v. State,* 55 S.W. 2d 209 (Tex. Civ. App., 1932).

We do not think that any meaningful distinction can be made under the Insurance Code between the case of reimbursement and providing the member with a benefit either directly or through a contracting third party. Section 2 of Article 48A defines insurance very broadly as follows:

> " 'Insurance' is a contract whereby one undertakes to indemnify another or pay or provide a specified or determinable amount or benefit upon determinable contingencies."

As so defined, insurance is not limited to undertakings to pay money to an insured by way of reimbursement. Clearly, the insurer's obligation need not be one for the payment of money alone, but rather it may be for providing its equivalent or some act of value, some benefit, to the insured on the occurrence of the insured event, for which a premium is paid. 12 Appleman, *Insurance Law and Practice,* Section 7001 (1946 Ed., 1969 Supp.). This has been recognized in our previous opinions dealing with insurance benefits the same as, or analogous to, those here under consideration. Compare 15 Opinions of the Attorney General 195 (1930) (repairs performed directly by corporation) with Opinion of the Attorney General, December 9, 1958 (unpublished) (charge for towing and road service paid to third party for services rendered); 18 Opinions of the Attorney General 311 (1933) (cost of medical services paid to doctors for services rendered); 16 Opinions of the Attorney General 178 (1931) (cost of legal and medical services paid to attorneys and doctors for services rendered); 12 Opinions of the Attorney General 142 (1927) (cost of repairs paid to repair shop for services rendered); see also *Continental Auto Club, Inc. v. Navarre, supra; Allin v. Motorist's Alliance of America, supra; National Auto Service Corporation v. State, supra;* 63 A.L.R. 711; 100 A.L.R. 1442; 119 A.L.R. 1241; 167 A.L.R. 306 and cases cited therein.

We believe that an undertaking to provide emergency road service and towing under the circumstances here presented is a contract of insurance and not a so-called "service contract". We have previously pointed out in our opinion of December 3, 1957, 42 Opinions of the Attorney General 254 (1957), at 256-257, that:

> "A contract of insurance may be distinguished by the presence of five elements:
>
> '(a) The insured possesses an interest of some kind susceptible of pecuniary estimation, known as an insurable interest.
>
> (b) The insured is subject to a risk of loss through the destruction or impairment of

that interest by the happening of designated perils.

(c) The insurer assumes that risk of loss.

(d) Such assumption is part of a general scheme to distribute actual losses among a large group of persons bearing somewhat similar risks.

(e) As consideration for the insurer's promise, the insured makes a ratable contribution, called a premium, to a general insurance fund.' Vance, *Law of Insurance*, (3rd Ed., 1951), Sec. 1."

In addition to the presence of all five of the above elements, hazard is an important ingredient of the towing benefit (as with other property and casualty insurance undertakings), the occurrence of which is not to be anticipated in the ordinary course. This is to be distinguished from a typical service contract which derives its basic character and thrust from the expectation that the services in fact will be performed, in return for which an agreed consideration will be paid. While we recognize that a service contract may be contingent and that the sole test cannot be the assumption of risk, still these basic differences aid in resolving the ultimate determination of whether, looking at the undertaking and its operation as a whole, service rather than indemnity or risk distribution is the principal object and purpose of the arrangement.

We note in passing that typically motor clubs provide a number of benefits, some of which, such as providing maps and touring instructions at the request of the member, certainly cannot be taken to be insurance benefits. There are other benefits which many auto clubs provide, however, such as health and accident insurance and bail bond protection, which are insurance benefits and which typically are insured under group policies written by licensed insurers. Their character as insurance benefits is not altered by the fact that the automobile club, as a group policy-

holder, may be permitted to enroll its members in the group by reason of an exception in the statutory definition of insurance agent, Section 166(a)(3). Similarly, benefits such as providing payment for legal service or towing and emergency road service do not lose their character as undertakings of insurance simply because other noninsurance benefits are combined in the same benefit package.

In conclusion, therefore, we are of the opinion that an undertaking by a motor club or other such entity to pay all or part of the cost of legal services rendered to a member, whether paid directly to the member by way of reimbursement or to the attorney who renders services to the member, and an undertaking to provide towing and emergency road service, either directly by the motor club or other entity or by payment to contracting third parties, constitute insurance contracts under the circumstances presented.

In rendering this opinion, we do not pass upon whether the undertaking in respect of legal services, or the solicitation thereof, would violate any provision of law or canon of legal ethics relating to the practice of law in this State under the circumstances here reviewed.

FRANCIS B. BURCH, *Attorney General.*

RICHARD G. MCCAULEY, *Asst. Attorney General.*

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* (Insurance Commissioner has Copy).

INSURANCE—INSURANCE CODE—APPROVAL OF UNAUTHORIZED REINSURERS FOR PURPOSES OF PROVIDING CREDIT FOR BUSINESS CEDED BY AUTHORIZED INSURERS—FEE FOR REVIEW OF DOCUMENTS—NO SUCH FEE IS AUTHORIZED UNDER INSURANCE CODE AS AMENDED TO DATE.

August 11, 1970.

The Honorable Thomas J. Hatem.

We have your Division's recent letter in which inquiry is made whether the Insurance Division may impose a monetary charge for its review of certain documents pertaining to the status of foreign unauthorized reinsurers to whom insurance written by authorized insurers has been ceded. The question posed arises in connection with your review of annual statements submitted by authorized insurers to your Division where such statements indicate that insurance business has been ceded to such unauthorized insurers and the filing insurer seeks your approval by way of due recognition of the ceded business. We are of the opinion that you are not authorized to impose the fee in question.

By Section 58 of Article 48A of the Annotated Code of Maryland as amended to date (the Insurance Code), authorized insurers are required to file annual statements ". . . in such form and content as is approved or adopted for current use by the National Association of Insurance Commissioners . . . and as supplemented for additional information required by the Commissioner". By Section 74(a) of the Insurance Code, no credit for reinsurance of a particular risk is permitted unless the assuming insurer is an authorized insurer or is a solvent insurer accepted by the Commissioner for purposes of such reinsurance. We are advised that in granting such approvals, your Division will give due recognition to insurance business ceded to unauthorized reinsurers provided that (i) the reinsurer's annual statement for the previous year shows that such company meets the minimum capital, surplus and investment require-

ments imposed upon authorized insurers writing insurance on a direct basis in this State, (ii) a certificate of compliance is filed indicating that the unauthorized reinsurer is in good standing with the Insurance Department (or similar supervisory entity) of the state of incorporation, and (iii) a proper certificate of deposit is filed indicating that sufficient collateral has been deposited with an appropriate custodian in the incorporating jurisdiction. The specific question raised by your Division relates to imposing a charge for reviewing these qualifying documents.

We should observe in the first instance that by reason of specific exemption contained in Section 43(4) of the Insurance Code, no certificate of authority is required in connection with transactions of reinsurance consummated by foreign reinsurers, and only authorized insurers are required by Section 58 to file an annual statement. Therefore, it is clear that your Division has no power to require the foreign unauthorized reinsurer to file these documents or to impose a charge therefor.

We turn then to the question of whether such a fee may be imposed upon the authorized insurer desiring due recognition in its annual statement for such ceded business. The specific authority of the Insurance Division to charge fees for processing of officially filed documents is set forth in Section 41. Review of this Section indicates that there is no provision for such a charge as is here under consideration. Finding no other statutory authorization elsewhere in the Insurance Code, we conclude that a special charge for reviewing the reinsurers' qualifying documents as enumerated above would not be proper. We would therefore suggest that consideration be given to seeking appropriate legislation to permit the imposition of such a charge should you find the same desirable.

FRANCIS B. BURCH, *Attorney General.*

RICHARD G. MCCAULEY, *Asst. Attorney General.*

INSURANCE — INSURANCE CODE — VIOLATIONS SUBJECT TO CRIMINAL PROSECUTION — PROCEDURE TO BE FOLLOWED BY INSURANCE DIVISION.

September 17, 1970.

The Honorable Thomas J. Hatem.

We have your recent letter in which you request us to advise you with regard to a procedure for the Insurance Division with respect to handling matters which may involve criminal violations of the law as well as violations of Article 48A of the Maryland Code (the Insurance Code). Before addressing ourselves to the particulars of such a procedure, we believe that it is appropriate to review the general statutory framework involved, and the general rules of law which flesh out this framework.

The Insurance Commissioner is charged with the general duty to enforce the provisions of the Insurance Code, Section 24(1). In carrying out this broad mandate, he may, *inter alia,* grant, refuse, suspend or revoke certificates of authority of insurers, Sections 53 and 55; he may impose a monetary penalty upon an insurer in lieu of revocation or suspension, Section 55A; he may grant, refuse, suspend or revoke licenses for insurance agents and brokers, Section 175; he may impose a monetary penalty in lieu of revocation or suspension of an agent's or broker's license, Section 175A; he may, in lieu of or in addition to revocation or suspension of an agent's or broker's license, require restitution, Section 175B; and, in addition to all other administrative remedies and powers heretofore mentioned or otherwise contained in the Insurance Code, he may institute such suits or other legal proceedings as may be required for the enforcement of the provisions, whether by way of original suit or by way of enforcement of his own order, Section 25.

In executing the powers and discharging the duties of his office to make administrative determinations, whether quasi-

judicial or legislative in nature, the Insurance Commissioner may, and in many instances is required by the Insurance Code, to hold hearings. See, Section 35(1) (general permissive power); Section 35(2) (general mandatory duty); *cf.* Section 245 (rate hearings). At such hearings, formal rules of pleading or evidence need not be strictly observed, Section 38(4); and the standard of proof required to support the decisions on such hearing must be supported by the "preponderance" of the evidence in the case of rate hearings, *N.B.C.U. v. Insurance Commissioner*, 248 Md. 292 (1967), and "competent, material and substantial evidence" in the case of all other hearings, Section 40(5).

The responsibility of the Insurance Division with respect to conduct which violates the Insurance Code but which is also criminal in nature, is set forth in Section 25(1), which provides in relevant part as follows:

> ". . . If the Commissioner has reason to believe that any person has violated any provision of this article for which criminal prosecution is provided, he shall so inform the State's attorney of the county or of Baltimore City either where the person resides or the violation occurred. If there is a violation of any provision of this article which is State-wide in nature and which has no local situs within the State the violation shall be referred to the Attorney General for prosecution."

It can be seen from the language of the above provision that the duty to refer evidence of criminal violations to the State's Attorney is mandatory.

In addition to the civil sanctions imposed for conduct in violation of the Insurance Code, there are several specifically designated acts which, by the terms of certain provisions themselves, are also made expressly criminal. See, Sections 233, 345(d), 361, 486G and 500. There is also a general provision, Section 12 of the Insurance Code, which provides that every willful violation of any provision of the Insurance Code, with respect to which violation a greater

penalty is not provided by other applicable laws of the State, is made punishable criminally by a fine of not more than $1,000; and Section 12 further provides that this criminal penalty shall be "in addition to any administrative penalty otherwise applicable thereto . . .".

It can thus be seen that as a general principle, and by the express provisions of Section 12, it is entirely proper for the Insurance Division to proceed against any person who may violate the Insurance Code even though the conduct in question may also constitute a criminal violation. Moreover, it is clear that the determination of guilt or innocence in a criminal prosecution brought as a result of such conduct will not act as a bar to the imposition by an administrative agency of a civil sanction. *Helvering v. Marshall,* 303 U.S. 297 (1938); 1 *Davis Administrative Law Treatise,* Section 2.13 (1958, as supplemented). Nor will an administrative decision operate as *res adjudicata* in a subsequent civil or criminal proceeding. 2 Cooper, *State Administrative Law,* 527 (1965, as supplemented).

With this background, we have reviewed the procedural steps which you now employ in connection with the disposition of conduct which may be criminal. We think that in general they are proper, but we feel that they should be supplemented and restated as follows:

1. Every violation of the Insurance Code which is believed by your Division to be willful and which otherwise falls under Section 12 of the Insurance Code, and every other specific violation designated as criminal, should be immediately referred to the appropriate State's Attorney; violations of a State-wide nature should be referred to the Attorney General's Office.

2. The Insurance Division should inform the State's Attorney that it intends to proceed against the alleged violator by administrative proceeding concurrently with any criminal proceeding. Any deferral of administrative action should be at the express request of the State's Attorney and with the concurrence of the Insurance Division. Representatives of the Insurance Division should meet with

representatives of the State's Attorney's Office to formulate a plan of investigation and enforcement so that neither arm of government will unwittingly prejudice the other's case.

3. The Insurance Department should not delay moving against a violator where immediate action is desirable in the best interests of the people of the State.

4. The Insurance Division need not, and generally ought not, await the outcome of criminal proceedings before appropriate disciplinary or other administrative action is taken.

5. In connection with investigations or hearings conducted administratively, the Insurance Division may examine under oath a suspected violator or other person, and if the answers to the questions propounded tend to incriminate him it is incumbent upon the witness, if he does not answer, to invoke the Fifth Amendment privilege against self-incrimination. If he invokes the privilege, the question of compulsion or immunity may be settled at this point. In this regard Section 28 of the Insurance Code provides as follows:

> "No person shall be excused from attending and testifying or producing any evidence upon any examination, investigation, or hearing conducted by or under authority of the Commissioner, on the ground that his testimony or the evidence required of him may tend to incriminate him or subject him to a penalty of forfeiture. Before any such person is required or permitted to testify or produce evidence, the Commissioner shall consult with the Attorney General and with his consent no person shall be prosecuted or punished in any criminal action or proceeding for or on account of any act, transaction, matter or thing concerning which he is so compelled to produce evidence or to testify under oath, except for perjury committed in such testimony."

As can be seen from the above quoted section, only the Attorney General can confer immunity, and no offer of the same by any other person will be in any way effective. Thus, any discussion of immunity with witnesses ought to be avoided by the Insurance Division.

6. Request should be made of the respective State's Attorneys to advise the Division of any convictions of licensed persons since a conviction of crime may provide independent grounds for suspension or revocation proceedings.

FRANCIS B. BURCH, *Attorney General.*

RICHARD G. MCCAULEY, *Asst. Attorney General.*

JUDGES

JUDGES' PENSION PLAN—JUDGES IN OFFICE PRIOR TO JULY 1, 1969, NOT REQUIRED TO PARTICIPATE IN CONTRIBUTORY PENSION PLAN.

January 6, 1970.

Mr. Frederick W. Invernizzi.

You have asked our advice as to whether a judge who has been serving as a circuit court judge as of June 30, 1969, and who has become a judge of the Court of Appeals of Maryland subsequent to June 30, 1969, is required to become a member of the new pension plan promulgated by Chapter 612, Acts of 1969. You further ask whether circuit court judges who are reappointed to additional terms as circuit court judges subsequent to June 30, 1969, are required to become members of the new pension plan.

Prior to July 1, 1969, Article 26, Section 49(a)-(h) established a noncontributory pension plan for "[e]very judge of the circuit court for any of the counties, of the Supreme Bench of Baltimore City, of the Court of Appeals of Maryland and of the Court of Special Appeals". Chapter 612, which became effective July 1, 1969, added a new subsection (i) to Section 49 and created thereby an alternate pension plan with a contributory feature and greater retirement benefits. Subsection (i) (2) provides as follows:

> "All judges *subject to the provisions of this subtitle who are in office as of June 30, 1969,* may elect to remain under the present pension plan or to be under the pension plan provided for in this subsection; and those *taking office after June 30, 1969,* shall be under the pension plan provided for in this subsection." (Emphasis supplied.)

As can be seen, participation in the new pension plan is not mandatory as to those "judges subject to the provisions of this subtitle who are in office as of June 30, 1969", but only "those taking office after June 30, 1969" must partici-

pate in the new pension plan. Regarding the circuit court judge who was appointed to the Court of Appeals of Maryland after June 30, 1969, the crucial issue to be decided is whether he was one "taking office after June 30, 1969" within the meaning of the statute. While it is true that the circuit court judge took office as a judge of the Court of Appeals of Maryland after June 30, 1969, it is also true that he was one of those "judges subject to the provisions of this subtitle who are in office as of June 30, 1969".

We think it apparent that the thrust of this subtitle is to create a pension plan for all judges at the circuit and appellate levels and that, as far as eligibility is concerned, the particular court that the judge is a member of is secondary. Viewing Section 49 in its entirety, we are therefore of the opinion that the legislature intended to make the new pension plan mandatory only for those judges who had not been covered by the noncontributory pension as of June 30, 1969. The court level a judge ascended to after June 30, 1969, is immaterial. What is determinative is whether the judge in question was subject to the noncontributory pension plan and in office as of June 30, 1969.

Since the judge who is now a member of the Court of Appeals of Maryland was subject to the provisions of Section 49(a)-(h) and in office as of June 30, 1969, we conclude that he is not required to participate in the new pension plan. The same conclusion necessarily follows as to those who were circuit court judges as of June 30, 1969, and were subsequently reappointed.

FRANCIS B. BURCH, *Attorney General.*

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

JUDGES — WITNESSES — SUMMONS UNDER COMMISSION OF FOREIGN COURT.

October 5, 1970.

Honorable Dulany Foster.

In your letter of September 10, 1970, you advised that a commission had been issued to George J. Helinski, Esquire, 1601 Court Square Building, Baltimore, by the Provincial Court of the Province of British Columbia, for the deposing of two witnesses. You asked whether a summons for the witnesses might properly be issued by your court.

Article 35, Section 32 of the Maryland Code provides as follows:

> "Whenever any mandate, writ or commission is issued out of any court of record in any other state, territory, district or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this State, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this State."

"Foreign jurisdiction" here means a foreign "country", not just another state. *Mercantile Safe Deposit and Trust Co. v. Slater,* 227 Md. 459. See also Rule 403 c of the Maryland Rules of Procedure.

We have not seen the commission but we assume it was validly issued by a court of record. Based on that assumption and the above referred to statute, we are of the opinion that the summons can be issued through your court.

FRANCIS B. BURCH, *Attorney General.*

FRANCIS X. PUGH, *Asst. Attorney General.*

JUDGES—PEOPLE'S COURT—COURTS OF LIMITED JURISDICTION HAVE AUTHORITY TO HOLD HEARINGS TO DETERMINE COMPETENCY TO STAND TRIAL AND TO ORDER AN EXAMINATION OF A DEFENDANT BY DEPARTMENT OF MENTAL HYGIENE.

October 8, 1970.

Honorable J. Hodge Smith.

We are pleased to respond to your recent inquiry as to whether courts of limited jurisdiction have the authority to hold hearings to determine competency to stand trial and to order an examination of a defendant by the Department of Mental Hygiene under newly re-enacted Article 59. Article 59 was repealed and a new Article 59 was enacted in lieu thereof by Chapter 407 of the Laws of 1970.

Under old Section 15A of Article 59 of the Annotated Code of Maryland, jurisdiction was specifically conferred upon all courts of limited jurisdiction, including the Municipal Court of Baltimore City. The question as to whether courts of limited jurisdiction now have the same authority arises under Section 23 of the new Article. Section 23 provides in pertinent part the following:

> "Whenever prior to or during the trial, any person charged with the commission of any crime shall appear to the court, or be alleged to be incompetent to stand trial, by the defendant himself, the court shall determine upon testimony and evidence presented *on the record* whether such person is unable to understand the nature of the object of the proceeding against him or to assist in his defense. As used in this subtitle, 'court' means any court having any criminal jurisdiction." (Emphasis supplied.)

Since all courts of limited jurisdiction have some criminal jurisdiction (Article 52, Sections 13, 25-25H; Article 26, Section 109), it seems that courts of limited jurisdiction

would be included within the above definition of "court". The problem arises in the italicized phrase *on the record* since courts of limited jurisdiction are not courts of record in the sense that they do not enroll on parchment (or paper) their proceedings and they do not proceed according to the course of the common law, and are confined strictly to the authority given them by statute; but they are courts of record in the sense that they are bound to keep a record of their proceedings and may fine or imprison. See *Planters' and Mechanics' Bank of Columbus v. Chipley,* Ga. Dec. 50, 51, pt. 1 and *Thomas v. Robinson,* N.Y., 3 Wend. 267, 268; *contra, Heininger v. Davis,* 117 N.E. 229, 231, 96 Ohio St. 205.

Notwithstanding the possible inconsistency, it is our opinion that courts of limited jurisdiction are to be included within the definition of "court" for this subtitle. The definition of "court" as "any court having any criminal jurisdiction" is extremely broad. As a general rule, although two parts of a statute are apparently conflicting, effort must be made to reconcile them, so as to give effect to both, when possible. See *McConihe v. Comptroller,* 246 Md. 271, 228 A. 2d 432 (1967). Where one part of a statute is susceptible of two constructions, and the language of another is clear and definite, and consistent with one of such constructions, and opposed to the other, that construction must be adopted which will render all parts harmonious. See *Smith v. Higinbothom,* 187 Md. 115, 48 A. 2d 754 (1946). Applying these principles of law to the question presented, it is obvious that the definition of court is clear and definite and that the most harmonious construction would be that courts of limited jurisdiction are to come within the dictates of this Section and new Article.

In addition, where a statute is uncertain and susceptible of more than one construction, one may look to prior and contemporaneous statutes to determine its meaning. See *Baltimore Transit Emp. Credit Union v. Thorne,* 214 Md. 200, 134 A. 2d 84 (1957). Since courts of limited jurisdiction were given this authority under the past law, this further reinforces our conclusion that courts of limited

jurisdiction have the authority to hold hearings to determine competency to stand trial and to order an examination of a defendant by the Department of Mental Hygiene.

As to your other question as to what type of record would be required, it is our opinion that the court would still make its determination "upon testimony in evidence" and that no transcribed testimony would be required in courts of limited jurisdiction.

FRANCIS B. BURCH, *Attorney General.*

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

LABOR AND INDUSTRY, DIVISION OF

MINIMUM WAGE AND HOUR LAW—ARTICLE 100, SECTION 83(3) — COMPUTATION OF OVERTIME COMPENSATION PURSUANT THERETO.

July 21, 1970.

Mr. Kenneth Goldberg.

Your recent letter requests that we review an administrative rule proposed to be issued by your office pursuant to Article 100, Section 83(3), which provides:

> "All employees as may be subject to the provisions of this subtitle shall receive a wage of one and one-half (1½) times their usual hourly wage rate for any hours worked in excess of forty (40) hours during any work week."

Specifically, you ask our opinion as to whether the following formula would be a correct method for determining a salaried employee's "usual hourly rate" for calculating overtime compensation.

You relate the following example. A clerk in a retail auto parts store is paid $150.00 per week for a 50-hour week. His employment history reflects that he has always worked a 50-hour week. Under the provisions of Article 100, Section 83(3), in order to determine his "usual hourly rate", you propose "dividing his salary by 40 plus the number of hours customarily worked over 40 plus ½ of the latter figure", or

$$\frac{150.00}{40+10+5}=2.73 \text{ per hour.}$$

Therefore, under the formula you propose, if the subject employee worked 52 hours in one week, he would be paid $150.00 + 3 hours × $2.73 per hour, or $158.19.

Our review of Article 100, Section 83(3) and the formula you propose to use to determine if employees subject thereto are in compliance with the terms of that section

leads us to the conclusion that said formula is incorrect and cannot be used to compute overtime compensation under the aforesaid provisions of the Code. The terms of Section 83(3) are *in pari materia* to Title 29, Section 207 of the United States Code Annotated, known as the Fair Labor Standards Act, and the "regular hourly rate" described therein may be equated to the "usual hourly rate" on the basis of which overtime compensation is to be computed under the Maryland statute.

The case of *Nowicki v. Forward Ass'n,* 116 N.Y.S. 2d 766, 281 App. Div. 5 (N.Y., 1952), concerned an employee who worked a 48-hour week and who was compensated at the rate of $50.00 per week. The Court, for the purpose of determining overtime due under the FLSA, which requires time and one-half for each hour over 40 per week, held that the employee's hourly rate would equal 1/48th of $50.00, or $1.04 per hour, and the employee would be entitled to 52 cents for each hour of overtime. The Court stated:

> "When a salary is paid for a specified number of hours in a work week, the regular rate must be computed by dividing the weekly salary by the specified number of hours for the week. As plaintiff's weekly salary was $50, his regular hourly rate concededly was one forty-eighth, not one fortieth of that sum. This amounts to $1.04. Under the Fair Labor Standards Act, overtime pay must be allowed at the rate of not less than one and a half times the regular rate at which the employee is actually employed. Thus for each hour of overtime plaintiff was entitled to receive not $1.04 plus $.52 but only $.52. The weekly salary of $50 received by plaintiff compensated him for 48 hours' work. Having been paid the regular hourly rate for forty-eight hours, plaintiff may not recover again the regular hourly rate for the eight hours worked weekly in excess of forty hours. The overtime premium of $.52 per hour is what was still due and unpaid. That the method thus outlined is the correct method of computation was concisely set forth

> by this court in a lucid opinion by Mr. Justice Van Voorhis in Schlein v. Metzger, 275 App. Div. 340, 343, 344, 89 N.Y.S. 2d 1, 4. See, also, Interpretative Bulletin on Overtime Compensation, United States Department of Labor, January, 1950, part 778; Code of Fed. Reg., Cum. Supp., tit. 29, ch. V, part 778, and Overnight Motor Co. v. Missel, 316 U.S. 572, 589, 62 S. Ct. 1216, 86 L. Ed. 1682."

As to computing overtime compensation for an employee who is paid on a monthly basis, the Court in *Triple "AAA" Company v. Wirtz,* 378 F. 2d 884, 887 (10th Cir., 1967), stated:

> "For purposes of computing overtime compensation to be recovered by the four employees, and to compute the statutory 'regular rate' of compensation, the trial court found, and the employer agreed, that each employee had worked at least an average of forty-four hours per week. The trial court computed the overtime compensation by taking the monthly salary times twelve months and then dividing by fifty-two weeks. This figure represents the weekly compensation. The weekly compensation was then divided by forty-four hours, the number of hours the weekly salary was meant to compensate. The resulting figure is the hourly 'regular rate' for forty-four hours. Because the employees had already received the 'regular rate' for the four overtime hours, as computed above, the trial court added one-half the regular rate to the four overtime hours for each week. We find no error in the trial court's method of computing overtime compensation to be recovered from the employer. See the Overnight Motor, Crawford Production, Seneca Coal, and Patsy Oil & Gas cases, supra."

This question was also considered in Section 778.113 of Interpretative Bulletin No. 1262 of the United States Department of Labor, where it was stated:

"(a) *Weekly salary.* If the employee is employed solely on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If an employee is hired at a salary of $70 and if it is understood that this salary is compensation for a regular workweek of 35 hours, the employee's regular rate of pay is $70 divided by 35 hours, or $2 an hour, and when he works overtime he is entitled to receive $2 for each of the first 40 hours and $3 (one and one-half times $2) for each hour thereafter. If an employee is hired at a salary of $70 for a 40-hour week, his regular rate is $1.75 an hour.

"(b) *Salary for periods other than workweek.* Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. A monthly salary is subject to translation to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semimonthly salary is translated into its equivalent weekly wage by multiplying by 24 and dividing by 52. Once the weekly wage is arrived at, the regular hourly rate of pay will be calculated as indicated above. The regular rate of an employee who is paid a regular monthly salary of $277.33, or a regular semimonthly salary of $138.67 for 40 hours a week, is thus found to be $1.60 per hour. The Administrator has announced that, as an enforcement policy, he will consider that payment of such regular monthly or semimonthly salary is in accordance with the minimum wage requirements of the Act for employment to which the $1.60 minimum rate is applicable. Under regulations of the Administrator, pursuant to the authority given to him in Section 7(g)(3) of the Act, the parties may provide that the regular rates shall be deter-

mined by dividing the monthly salary by the number of working days in the month and then by the number of hours of the normal or regular workday. Of course, the resultant rate in such a case must not be less than the statutory minimum wage."

Therefore, we advise that the correct method for computing overtime compensation in accordance with Article 100, Section 83(3) for weekly salaried employees is to determine the usual hourly wage by dividing the number of hours worked into the salary and pay the employee the sum of 40 hours at the usual hourly rate plus one and one-half times said rate for all hours over 40. In your example of a retail auto parts clerk who works 50 hours for a weekly salary of $150.00, the employee's usual hourly wage is $3.00 and his overtime compensation is $4.50 per hour. He should be paid $120.00 for 40 hours and $45.00 for 10 hours, or $165.00 for the 50-hour workweek.

The hourly rate for monthly salaried employees should be computed as follows:

$$\text{Monthly sal.} \times 12 = \frac{\text{yearly sal.}}{52} = \frac{\text{weekly sal.}}{\text{usual number of hours worked per week}} = \text{usual hourly rate.}$$

Upon determination of the usual hourly rate, overtime compensation may be computed for hours in excess of 40 hours in any workweek as in the above example for weekly salaried employees.

FRANCIS B. BURCH, *Attorney General.*

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

LABOR AND INDUSTRY, DIVISION OF—ARTICLE 100, SECTION 83 (3)-MD. WAGE AND HOUR LAW AND FEDERAL FAIR LABOR STANDARDS ACT—OVERTIME PROVISIONS THEREOF CONSTRUED IN RELATION TO ONE ANOTHER; EMPLOYMENTS COVERED BY MD. WAGE AND HOUR LAW OVERTIME PROVISIONS.

August 7, 1970.

Mr. Henry Miller, Commissioner.

Recently you wrote our office inquiring as to the application of the provisions of House Bill 692, which amends Section 83 of Article 100 of the Annotated Code of Maryland (1964 Replacement Volume) to certain employments which are presently exempted under the provisions of the Federal Fair Labor Standards Act.

Article 100, Section 83, was amended by House Bill 692, adding new subsection (3) thereto, providing:

> "All employees as may be subject to the provisions of this subtitle shall receive a wage of one and one-half (1½) times their usual hourly wage rate for any hours worked in excess of forty (40) hours during any work week."

Title 29, Section 207 (a) (1) of the United States Code Annotated, known as the Federal Fair Labor Standards Act (FLSA), provides:

> "(a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 213 of Title 29 of the U.S.C.A. enumerates cer-

tain employments which are either partially or wholly exempt from the overtime provisions of Section 207 of the Act.

In some instances the exemptions contained in the Federal Act are in conformity with those employments exempted by the Maryland Wage and Hour Law, under the provisions of Article 100, Section 82 (e) of the Code. In other instances the Federal Act exempts or partially exempts certain employments from its provisions which are not exempt under the provisions of the state law.

Title 29, Section 218 of the U.S.C.A. provides:

> "No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter."

You now ask our opinion whether, pursuant to Section 218 of Title 29 of the U.S.C.A., the overtime provisions of Article 100, Section 83 (3) are applicable to those employments which are either partially or wholly excluded from the overtime provisions of the Federal Act, but which are not excluded by the state law.

A review of the exemptions provided for under Section 213 of the Federal Act resulted, for the purposes of a determination of this matter, in the establishment of three types of exemptions under said act. The first type is one which

exempts specific employments from the forty hour provision of Section 207 of the Act, but establishes some other maximum hour provision. An example of this type employment is found in Section 213 (b) (8) which sets a work week of 48 hours for employees of an institution, other than a hospital, primarily engaged in the care of sick, aged or mentally ill or defective persons who reside on the premises. The second type of exemption is one which concerns employments which are subject to other federal agencies which have power to establish qualifications and maximum hours of service for employees in the area of their jurisdiction, such as the Interstate Commerce Commission (Section 213 (b) (1)). The third type of exemption is one which completely exempts an employment from the overtime provisions of Section 207 of the Act, and which does not place the employment under another federal agency, or contain another maximum hour provision, such as those employments contained in Section 213 (b) (17) of the federal act, covering individuals employed by an employer engaged in the business of operating taxicabs.

Both the federal and Maryland statutes appear to reflect a legislative intent that these wage and hour laws shall co-exist in harmony insofar as possible, and that, in the case of any employee covered by both the federal and State law, that statute shall be applicable which operates most favorably to the employee. Any federal or State law or municipal ordinance which establishes a higher minimum wage or a lower maximum work week than the Fair Labor Standards Act is declared by that statute to take precedence; U.S.C.A., Title 29, Section 218. On the other hand, the Maryland Wage and Hour Law provides that nothing contained therein "shall be deemed in any way to diminish the right of any employee as may be granted pursuant to the federal Fair Labor Standards Act"; Article 100, Section 91A. Accordingly, the respective federal and Maryland wage and hour laws, whether considered separately or in connection with each other, evidence an intent to give effect to the highest minimum wage and the lowest maximum work week to the broadest spectrum of employees.

We believe that a reasonable and proper construction of both the FLSA and the Maryland Wage and Hour Law includes the following:

1. Where the employment is within any of the 12 categories of exceptions described in Article 100, Section 82 (e) of the Maryland Code, the Maryland Wage and Hour Law does not apply. Possible FLSA coverage is a matter for federal determination.

2. Where the employment is covered under both federal and State law, that law should be applied which has higher standards and provides superior benefits.

3. Where the employment is FLSA-exempt, but is not exempted by the provisions of the Maryland Wage and Hour Law, the employee is covered by the Maryland law.

4. Where the employment is exempted from the provisions of the FLSA, but is subject to the jurisdiction of one or more other federal agencies, if the Maryland law has higher standards or provides additional or superior benefits, then the employment would be subject to the provisions of the Maryland Wage and Hour Law.

We also note that the above enumerated conclusions have been concurred in by the General Council's Office of the United States Department of Labor, through oral communication with our office.

FRANCIS B. BURCH, *Attorney General.*

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

LEGISLATIVE COUNCIL

CONSTITUTIONALITY OF LEGISLATION CONFERRING ADVISORY OPINION POWERS ON COURT OF APPEALS.

February 11, 1970.

Dr. Carl N. Everstine.

We are in receipt of a letter from your office concerning legislation to authorize the General Assembly and the Governor to obtain advisory opinions from the Court of Appeals. The language which has been suggested is as follows:

> "The General Assembly, acting by Joint Resolution of two-thirds majority of each of its bodies, and the Governor [shall] have the authority to require the Court of Appeals to render advisory opinions upon questions of law necessary to be determined to exercise legislative or executive power."

You have requested our opinion as to whether the above legislation would be constitutional. Thus the question presented for our consideration is whether the General Assembly may by legislation, absent enabling provisions in the Constitution of Maryland, authorize or require the Court of Appeals to render advisory opinions.

The problem of whether a state legislature may statutorily endow the state judiciary with advisory opinion powers, when the state constitution is silent on the subject, has arisen in various cases and the results have differed. Some courts have taken the view that, absent constitutional authorization, the legislature of a state may not require the judiciary to render advisory opinions upon request by the legislature or by the executive. See, for example, *In Re Senate*, 10 Minn. 78 (1865); *In Re Constitutionality of House Bill 222*, 90 S.W. 2d 692 (Ky., 1936); *In Re Opinion of the Justices*, 64 A. 2d 169 (Vt., 1949). Generally speaking, the cases which have held that a state legislature does not have the power to impose advisory opinion functions upon the state judiciary by legislation, are based upon the

doctrine of separation of powers. As stated by the Supreme Court of Vermont in *In Re Opinion of the Justices,* at p. 171:

> "But in the absence of a specific constitutional authorization and where the fundamental law distinguishes between the functions of the executive, legislative and judiciary departments, providing that neither shall exercise the powers and duties of the others, the courts of this country, whether Federal or State, have almost unanimously, when the question has been considered by them, declined to accede to an executive or legislative request for an opinion which cannot be considered otherwise than as extra-judicial."

On the other hand there are at least two cases which have held that statutes imposing advisory opinion functions upon the judiciary are constitutional. These cases are *In Re Opinion of the Justices,* 96 So. 487 (Ala., 1923), and *In Re Opinion of the Justices,* 88 A. 2d 128 (Del., 1952). Broadly speaking, the Alabama and Delaware cases, which represent the minority viewpoint, are based on the proposition that the doctrine of separation of powers should not be rigidly applied. "[F]rom the earliest times in this country, the functions of the three departments of state government have been to some extent intermingled, and the theoretical distinction between them has never been observed in practice with literal vigor", *In Re Opinion of the Justices* (Del.), at p. 139. For further reference, see 103 A.L.R. 1087, *Annotation*: "Power of Legislature, Absent Constitutional Provisions in That Regard, to Authorize or Require Courts or Justices Thereof to Render Advisory Opinion upon Request of Governor or of Either House of Legislature"; 37 Harv. Law Rev. 970, "Advisory Opinions of National and International Courts"; 20 Am. Jur. 2d, *Courts,* Sec. 275; and 21 C.J.S. *Courts,* Sec. 36. See also *In Re Matter of Ore. Laws 1967, Chap. 364, Sec. 4, Ballot Title,* 431 Pac. 2d 1, (Ore., 1967); and *Reply of Judges,* 33 Conn. 586 (1867).

While the Court of Appeals of Maryland has never had occasion to decide the precise question now under discussion, we do not deem it necessary at this time to review in detail the authorities cited above, since on two recent occasions the Court of Appeals, in varying contexts, has stated that it will not render advisory opinions in the absence of a *constitutional* mandate. In *Hammond v. Lancaster,* 194 Md. 462 (1950), which involved the constitutionality of the Subversive Activities Act, Chapter 86 of the Laws of Maryland of 1949, and the Emergency Act, Chapter 310 of the Laws of Maryland of 1949 (the purpose of which was to declare the Subversive Activities Act to be an emergency measure), the Court stated as one "of the fundamental concepts of our constitutional law" that:

> "The American doctrine of judicial review may be considered as a correlative to the doctrine of the separation of powers, and must always be exercised with due regard to the legislative prerogative. There are a number of subordinate rules that tend to limit the scope of review, among the most important of which are the presumption of constitutionality and the rule that courts will not decide moot or abstract questions, *or, in the absence of constitutional mandate, render advisory opinions.*" (194 Md. at pp. 471-472, emphasis added.)

The later case of *Planning Commission v. Randall,* 209 Md. 18 (1956), involved a bill which had been vetoed by the Governor, but not returned to the General Assembly for reconsideration at its next regular or special session, as required by Article II, Sec. 17, of the Constitution of Maryland. It was the expectation of the petitioner that the Legislature would override the Governor's veto at its next session. The Court refused to enjoin the Secretary of State from transmitting the bill to the General Assembly when it next convened and also declined to declare the bill to be void in whole or in part, on the basis that to grant the relief prayed would be an interference with legislative action which had not been completed. The petition which

had been filed also asked the Court to decide nine questions of law arising from the passage of the bill by the General Assembly. The Court summarily refused to answer these questions, stating on page 27:

> "The appellant here is also asking that an advisory opinion be rendered on pending legislation. It has been held specifically by this court that it will not render advisory opinions to the Legislature or to anyone else. It was held in *Hammond v. Lancaster,* 194 Md. 462, 71 Atlantic 2d 474, that *the courts will not, in the absence of constitutional mandate, render advisory opinions* nor will the courts render advisory opinions unless there is an actual justiciable controversy between the parties." (Emphasis added.)

Since the Court of Appeals has said on two occasions that it will not render advisory opinions "in the absence of constitutional mandate", and as a majority of the courts to consider the question have held statutes such as that under discussion to be invalid, we are of the opinion that the proposed legislation would be declared unconstitutional by the Maryland Courts. In our opinion the result which the legislation seeks may only be accomplished through an amendment to the Constitution of Maryland.

While the above discussion answers the question which you have posed to us, we believe that we should call to your attention one additional factor. The proposed wording of the statute does not make it clear whether the General Assembly and the Governor must jointly request an advisory opinion or whether one branch may request an advisory opinion without the concurrence of the other. We would suggest that this be clarified before any further action is taken on the proposal to confer advisory opinion powers on the Court of Appeals.

FRANCIS B. BURCH, *Attorney General.*

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

LICENSING AND REGULATION, DEPARTMENT OF SMALL LOANS

SALES FINANCE COMPANIES, LICENSING OF SUBSIDIARIES AND AFFILIATES, SUBSIDIARY AND AFFILIATE WITHIN ARTICLE 83, SECTIONS 154-165 OF THE CODE.

December 21, 1970.

Mr. Allan T. Fell.

Your letter of November 29, 1970, requests our opinion as to whether a "subsidiary or affiliate of a sales finance licensee need a sales finance license if they only collect and service retail sales contracts." Your letter does not further explain the nature of the functions encompassed by the term "collect and service retail sales contracts". For the purpose of this opinion, we shall assume that the subsidiary collects the payments due under existing sales contracts and performs unspecified "service" in connection with such contracts.

The answer requires a determination whether such subsidiary or affiliate is a "place of business" within the meaning of Article 83, Section 155, Annotated Code of Maryland (1969 Replacement Volume) which requires that where an applicant operates more than one place of business, a separate application shall be filed for each business location, and Section 157 (d) which provides that only one place of business may be maintained under a license, but that more than one license may be issued to the same applicant.

Article 83, Section 154 states:

> "No person, except a banking institution shall engage in the business of a sales finance company in this State without a license therefor obtained from the Commissioner, as provided in this subtitle."

It would appear from a reading of the definition of sales

finance company (Article 83, Section 164 (b)) that only a person who acquires, invests in or lends money or credit on the security of an installment sale agreement must be licensed. However, this section must be interpreted in conjunction with Sections 155 and 159 of Article 83 which state:

Section 155.

> "Where an applicant operates several places of business, separate applications for license shall be made for each such place of business."

Section 159.

> "(c) Places of business to which applicable—The Commissioner in his discretion may revoke or suspend only the particular license with respect to which grounds for revocation or suspension may occur or exist; but if he finds that grounds for revocation or suspension are of general application to all places of business, or to more than one place of business, operated by such licensee, he shall revoke or suspend all of the licenses issued to said licensee or those licenses to which the grounds for revocation or suspension apply, as the case may be."

A similar question was before the court in *Goldstein v. State Revenue Commission,* 178 S.E. 164, 50 Ga. App. 317 (1934) in which a dry cleaning operator who maintained one plant where the actual cleaning was done, and several establishments where customers left their clothes, picked them up and paid for the service, was held to be subject to a licensing tax for each establishment used as part of his business operation, within the meaning of the term "place of business" as used in the Georgia statute. The Court stated, at 166:

> "The trial court correctly ruled that the plain meaning of the occupation tax statute in question, as to those engaged in the dry cleaning business in the city of Atlanta, was to impose upon all persons,

> firms, or corporations engaging therein a tax of $25 for each place of business maintained; and that the stores, depots, or places where the plaintiff in error received clothes to be cleaned, and, after cleaning the same at his dry cleaning plant, delivered them at the store or place where received to be delivered to his customer upon payment of the charges therefor, each constituted a 'place of business' within the meaning of the Tax Act. Had the Legislature intended to impose the tax only upon such places of a person, firm, or corporation, engaged in the dry cleaning business, where the actual dry cleaning was done, they could have easily so provided."

Since the collection of payments due under a retail sales agreement is an essential function of the operation of the business of a sales finance company, we believe that the premises where such collections are made, as well as the performance of "service" of sales contracts, is a place of business of the sales finance company within the meaning of Article 83, Section 155 and as such subject to the licensing provisions of the statute. We advise that each separate establishment used to carry on any of the essential functions of a sales finance company is to be considered a separate place of business within the meaning of that term as used in the Finance Company Act, to which the licensing provisions of the Act apply. Any other construction would operate to divest your office of regulatory authority over integral parts of the sales finance business and create a licensing void, a result both unnatural and unwarranted by the mandate of the statute.

FRANCIS B. BURCH, *Attorney General.*

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

LOAN LAWS, ADMINISTRATOR OF

ARTICLE 83, SECTION 153E—INTERPRETATION THEREOF—MARYLAND RETAIL CREDIT ACCOUNTS LAW AS APPLICABLE TO TRANSACTIONS BY FOREIGN CORPORATIONS DOING INTERSTATE AND INTRASTATE BUSINESS WITH MARYLAND RESIDENTS.

February 17, 1970.

Mr. F. Vernon Boozer.

Your recent letter informs us that certain out-of-state mail order houses have established retail credit accounts with Maryland residents, whereby said residents make purchases directly from out-of-state outlets, and pay for such purchases over a period of time. You further advise us that the agreement governing these transactions provides that Illinois law shall apply to said contract, and pursuant thereto, the seller has assessed a service charge against the Maryland residents, which is in excess of that permitted by the Maryland Retail Credit Accounts Law, but is in conformity with the rate of service charge allowed by Illinois law.

You further inform that the seller, in this instance, is registered to do business in Maryland and maintains numerous retail outlets within this State, and that on various occasions buyers are instructed to obtain their mail order purchases at these locations. You now inquire whether Article 83, Section 153E of the Annotated Code of Maryland (1969 Replacement Volume) affords Maryland residents the protection of the Maryland law in this situation.

Article 83, Section 153E provides:

> "No act, agreement or statement of any buyer shall constitute a valid waiver of any benefit or protection under the provisions of this subtitle."

In 23 Opinions of the Attorney General 173, the factual situation involved a foreign corporation which was solicit-

ing business in Maryland by direct mail advertising, with all such orders being subject to acceptance by the corporation's home office, and with all billing and collecting being done from there. When orders were accepted the materials involved were prepared at the home factory and shipped to Maryland. The work of installation was done by local carpenters, but if installation was not properly done, the foreign corporation would send a mechanic from its home office to correct any defects. We stated at this time, in reviewing whether the foreign corporation was involved in intrastate business, that "[t]he distinction between the doing of intrastate, as distinguished from interstate, business, is a difficult one to apply."

In ruling that the corporation was doing intrastate business, we noted the distinction between the doing of a local act after interstate commerce had been completed, and the doing of an act necessarily incidental to and inseparable from an interstate sale within the protection of the commerce clause.

In 42 Opinions of the Attorney General 141 (1957) we ruled that a Pennsylvania corporation, with principal offices outside of the State of Maryland, was doing intrastate business, and thus subject to the laws of Maryland, even though the corporation in question had no office or other place of business in Maryland, and sales to Maryland residents were made pursuant to contracts which were wholly negotiated and effected outside of Maryland. Again we noted the distinction between the doing of intrastate business as distinguished from acts inseparable from an interstate sale.

In 36 Opinions of the Attorney General 252 (1951) we discussed the applicability of the Maryland sales tax to a transaction similar to the situation you present. The facts therein involved a Pennsylvania corporation, which was organized into three separate divisions, one of which was engaged in general contracting, one in manufacturing and selling heavy equipment, and a third division which manufactured and sold small equipment. The corporation was

qualified to do business in Maryland, and had a Baltimore agent whose only authority was to solicit and sell for the small machinery division of the corporation.

A contract between a Maryland buyer and said corporation for the manufacture and purchase of an ore unloader was negotiated and executed in Pennsylvania. The heavy machinery division was the only one connected with the transaction. In ruling that the Maryland sales tax did not apply to this transaction we noted that "[t]he fact of the single corporate identity is, we think, under the facts here involved not significant." This conclusion was based upon the fact that the seller's representative in Maryland was not authorized to contract for or solicit this type of business in Maryland and was as isolated from this transaction as if he had been the representative of some other manufacturer.

At this time, we noted with approval the case of *Norton Company v. Department of Revenue of the State of Illinois*, 340 U.S. 534, 95 L. Ed. 517, 71 S. Ct. 377 (1951), which concerned the Illinois retailer's occupation tax as applied to a Massachusetts corporation, with an office and warehouse in Illinois from which its products were customarily sold, and which also shipped goods from Massachusetts direct to Illinois purchasers on the purchaser's order direct to the Massachusetts home office.

The Illinois Supreme Court held that the presence of the seller's local retail outlet was sufficient to attribute all income derived from Illinois sales, including direct mail order sales, to the seller's retail outlet in Illinois, and render it all taxable.

The Supreme Court of the United States held, in reviewing the Illinois Supreme Court's decision in *Norton*, that a vendor does not, by engaging in business within a State, lose its right to do interstate business. *Cooney v. Mountain States Tel. & Tel. Co.*, 294 U.S. 384, 79 L. Ed. 934, 55 S. Ct. 477 (1935). However, the Court went on to hold that a seller ". . . cannot channel business through a local outlet

to gain the advantage of a local business and also hold the immunities of an interstate business."

> "The only items that are so clearly interstate in character that the State could not reasonably attribute its proceeds to the local business are orders sent directly to Worcester by the customer and shipped directly to the customer from Worcester. Income from these we think was not subject to this tax."

In the recent case of *Lilly & Co. v. Sav.-On-Drugs,* 366 U.S. 276, 6 L. Ed. 2d 288, 81 S. Ct. 1316 (1961), it was stated in a concurring opinion that a foreign corporation which uses its retail outlets in a State to "promote or solicit business within the State for their account, . . . would constitute a local incident subject to the State's licensing power, even though the ultimate purpose and effect of the arrangement itself were also to enhance . . . interstate business."

The factual situation you present is identical to that presented in *Norton, supra,* which we cited in 36 Opinions of the Attorney General 252, in that in both *Norton* and the factual situation you present, a foreign corporation was engaged in two distinct types of transactions within a state. One solely concerning the interstate sale of goods involving no local acts which were not incidental to the carrying out of such a sale, and the other involving sales which depended upon local acts which were not necessary to the carrying out of strictly interstate sales.

As we pointed out in 23 Opinions of the Attorney General 173, discussed herein, the distinction between the doing of intrastate, as distinguished from interstate, business, is a difficult one to apply, and thus we advise you that a vendor who solicits its mail order sales through retail outlets in this State, or allows for any connection between its mail order sales and its local retail outlets should be deemed to have committed an act which would change the nature of the mail order transaction from a strictly interstate one

to one with significant enough intrastate contacts to make the transaction subject to the Maryland Retail Credit Accounts Law.

However, if the foreign corporation's mail order sales are not in any way connected with its retail operations within this State, it is our opinion that the sales would not be subject to the provisions of the Maryland Retail Credit Accounts Law, which we believe was intended to apply to local transactions.

FRANCIS B. BURCH, *Attorney General.*

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

LOAN LAWS, ADMINISTRATOR OF—INSTALLMENT SALES CONTRACTS, DISPOSITION OF REFUNDS—RIGHT OF FINANCE COMPANY TO CHARGE INSURANCE COSTS TO BUYER—INTERPRETATION OF ARTICLE 83, SECTIONS 129(A)(6), 131 (A), (B) AND (C) AND 133 (C).

February 20, 1970.

Mr. F. Vernon Boozer.

Your recent letter requests our opinion as to the proper disposition of premium refunds due by virtue of the cancellation of an insurance policy in conjunction with a retail installment sales contract. You have also asked whether a sales finance company, if the installment sales contract between it and the buyer so allows, may purchase single interest insurance on the goods which are the subject of the contract, and may charge the cost of such insurance to the buyer.

Turning first to your inquiry concerning the proper disposition of premium refunds due because of the cancellation of an insurance policy on goods which are the subject of an installment sales contract, you inform that it is the practice of many lenders to finance the amount of money necessary to insure the goods sold for the contract period, and that if the insurance company cancels the policy, subsequent to the sale of the goods, some lenders credit the amount due by virtue of such cancellation to the final payments due under the installment agreement. You further inform that other lenders *pro rate* these refunds over the remaining payments due under the contract, while still others apply the proceeds only to installments which have fallen due at the time of the refund, returning the balance of the refund, if any, to the borrower. You now ask which of these methods of handling insurance premium refunds is authorized under the provisions of Article 83, Section 131 (c), of the Annotated Code of Maryland (1969 Replacement Volume).

Article 83, Section 131(c) provides:

> "(c) Cancellation, refunds and dividends.—Any cancellation, surrender, or other refunds, and all dividends, received under such policies by the seller or any holder of the agreement shall forthwith be remitted to the buyer, or credited against any amounts then due under the agreement by the buyer to the seller or holder."

The answer to your question depends upon the meaning of the term "then due" as used in Section 131(c). Although we find no cases in Maryland which have defined the phrase "then due," the case of *Winand v. Cane,* 154 F. Supp. 529, 536 (D.C., Md., 1957), defined the word "then" as meaning "at that time," "soon afterwards," or "immediately."

In the case of *Edelen v. First National Bank of Hagerstown,* 139 Md. 422, 425 (1921), the Court stated:

> "The meaning of the word 'due' depends, of course, upon the connection in which it is used. *Feeser v. Feeser,* 93 Md. 725. Various instances of its use, illustrating its different significations, are cited in 3 Words and Phrases, 2216, and 19 C.J. 818. It is here employed to express one of the terms of a promissory note, and with respect to such a subject and purpose there can be no serious doubt as to its meaning. A negotiable instrument is not 'due' until it matures or becomes payable according to its terms. It is not until the time fixed in the note for its payment has arrived that any part of the sum it specifies is 'due', in the sense in which that word is customarily used in such a connection. *As thus employed it has regard to the maturity, and not merely to the existence, of the indebtedness. Adams v. Clarke,* 14 Vt. 9; *Swanson v. Spencer,* 177 Mo. App. 124. When, therefore, the note in this case provides that judgment may be entered 'at any time' 'for such sum as may be due thereon,' it means that the entry of the judg-

ment can only occur after the note has matured." (Emphasis added.)

By letter of April 5, 1960, to the then Deputy Administrator of Loan Laws, in answer to an inquiry as to whom, under Article 83, Section 131(c) of the Code the return premium should be paid if the insurance company cancels the insurance policy it was stated:

> "It is therefore our opinion that when the insurance is cancelled and the premium returned to the finance company, it should refund it to the buyer or credit him with that amount on his account."

If this opinion were intended to require the finance company to apply the insurance refund to the amount of those installments which had already matured, and to refund the balance to the buyer, then we are in agreement with that conclusion. However, if it were intended to allow a finance company to apply the refunded insurance premium to any amount which was either due or would become due under the installment sales agreement, then we disagree, and herewith reverse, such an interpretation of Section 131(c).

It is our opinion that the use of the phrase "then due" in Section 131(c) relates not to the entire amount of the indebtedness under the installment contract, but only to those installment payments which have become due and payable and have not been paid at the time of the insurance premium refund. The balance of this refund, if any, would then be payable to the buyer.

You have also asked our opinion as to whether a seller, if the agreement so provides, may charge the buyer with the cost of furnishing single interest insurance to cover the goods which are the subject of the sale, in the event the initial insurance coverage on the goods is cancelled.

Article 83, Section 131, provides, in part:

> "(a) Premium.—Where a seller or sales finance company undertakes to sell, purchase, or supply insurance on the goods at the buyer's expense, the

amount charged any buyer for such insurance shall not exceed the premium actually payable by the seller or sales finance company and in no event more than the rate charged for similar insurance coverage by those companies whose rates are promulgated by any nationally recognized organization of underwriters.

"(b) Copy of charges to be mailed buyer; description of coverage.—Within 25 days after the delivery of the goods under any installment agreement, if any charge was thereby made to the buyer for insurance, the seller or sales finance company which was party to such instrument shall mail or cause to be mailed to the buyer at his address as shown on such instrument either a copy of each insurance policy, or an owner's certificate representing such policy clearly setting forth the amount of the premium, the kind or kinds of insurance and the scope of the coverage and all of the terms, exceptions, limitations, restrictions and conditions of the contract or contracts of insurance. If the goods sold consist of a motor vehicle or vehicles, the description of the insurance coverage, if any, shall include in 12-point bold type or larger a definite statement that the insurance includes or does not include coverage for personal liability and property damage caused to others, as the case may be. If the seller or sales finance company which was a party to such instrument assigns it without having complied with the requirements of this subsection, the assignee shall in like manner mail such copy or certificate to the buyer within the same period or within 5 days after such assignment, whichever is later."

It is our opinion that Section 131(a) specifically allows a ". . . sales finance company . . . to sell, purchase, or supply insurance on the goods at the buyer's expense . . ." However, if the buyer is charged with the cost of any

insurance under the initial terms of the agreement, a copy of the policy, or owner's certificate, containing the information required by subsection (b) must be mailed to the buyer within 25 days of delivery of the goods.

Concerning your inquiry as to whether the sales finance company may be the party to whom the insurance is payable, should the goods covered be damaged or destroyed, we refer you to Article 83, Section 129(a)(6), which provides:

> "(a) Names and addresses of parties and description of goods.—Every installment sale agreement shall state the full names, the place of residence and post office addresses of all the parties thereto and the date when signed by the buyer. It shall contain a clear description of the goods subject to the installment sale agreement, which shall be sufficient to identify them readily, and shall recite in simple tabular form the following separate items as such and in the following order:
>
> "(6) The cost to the buyer of any insurance for the payment of which credit is to be extended to the buyer, the amount or extent and expiration date thereof, a concise description of the coverage, and *the party or parties to whom such insurance is payable.* If the goods sold consist of a motor vehicle or vehicles, the description of the insurance coverage, if any, shall include in 12-point bold type or larger a definite statement that the insurance includes or does not include coverage for personal liability and property damage caused to others, as the case may be." (Emphasis added.)

We are of the opinion that the use of the phrase "party or parties to whom such insurance is payable" is sufficiently broad to include the sales finance company whose goods are in the possession of the buyer, but who still has a substantial interest in said goods. See our letter to the Deputy Administrator of Loan Laws, dated April 5, 1960.

You have also asked our opinion as to whether, upon

cancellation of the insurance coverage on the goods which are the subject of an installment sales contract, during the life of the contract, a sales finance company may secure single interest insurance on said goods and charge the cost of said insurance to the buyer, if the sales agreement so provides.

Article 83, Section 133, provides:

> "No seller, sales finance company or holder shall directly or indirectly charge, contract for, or receive from the buyer or any surety or guarantor for him any charge or amount whatsoever on account of, or in connection with, an installment agreement, for the extension of credit, interest, fees, commissions, delinquency, collection, repossession, and foreclosure, or otherwise, excepting only:
>
> "(c) Premiums for insurance authorized by Section 131, if no charge was made in the agreement on account of such insurance for the period covered;".

It is our opinion that Section 133(c) contemplated the factual situation you present and allows for the placing of single interest insurance on the goods which are the subject of the retail installment sales agreement, and the charging of the actual cost of the premiums for such insurance to the buyer, during the contract period, if the sales agreement so provides.

FRANCIS B. BURCH, *Attorney General.*

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

MOTOR VEHICLES

EXCISE TAX—LIABILITY FOR PAYMENT OF EXCISE TAX IN THE SALE OF NEW MOTOR VEHICLES BETWEEN NEW CAR DEALERS AND USED CAR DEALERS.

January 20, 1970.

Mr. Gordon N. Wilcox.

You have directed to our attention certain transactions whereby a franchised automobile dealer sold new cars to a used car dealer who then sold them to members of the general public. The used car dealer did not have a franchise to sell new automobiles. In each sale the used car dealer provided temporary registration and tags to his customer who was furnished an original certificate of title applied for by the new car dealer. The titling tax payable upon the issuance of the certificate of title was paid by the new car dealer when he made application for the certificate, the amount of the tax having been obtained from the purchaser. Your principal inquiries are: (1) does the used car dealer owe any excise tax to the State and (2) does the new car dealer owe the State any excise tax?

Upon the stated facts, we have no difficulty in finding that two separate sales were made of each motor vehicle, the first sale being from the new car dealer to the used car dealer and the second from the latter to the ultimate purchaser. In addition to independent evidence of the fact that two separate sales of each motor vehicle occurred, you have advised us of the pendency of an action at law between the new car dealer as plaintiff and the used car dealer as defendant in which it is alleged in the Declaration that "from time to time the Plaintiff sold motor vehicles to the Defendant which were purchased by the Defendant and which the Defendant then sold to purchasers". *Luby Chevrolet Company, Inc. v. John Henry Wilbanks, t/a Johnny's Used Cars,* Superior Court of Baltimore City, Docket 1969, Folio 1120, filed June 26, 1969. Obviously, the entry upon

the manufacturer's certificate of origin that the vehicle was sold by the new car dealer to the ultimate purchaser was untrue. The certificate was a subterfuge and an evasion which deliberately omitted any reflection of the sale to the used car dealer. To the same effect, the new car dealer's application for a certificate of title in connection with a sale from the used car dealer to the ultimate purchaser was simply a device which cloaked the identity of the actual seller.

Article 66½, Section 24 requires every owner of a motor vehicle (except those exempted by Section 23) to apply for registration and the issuance of a certificate of title and pay a stipulated excise tax. The ultimate purchaser, a member of the public in each transaction to which you have referred us, paid the excise tax and received his certificate of title. As to these sales, no excise tax is due. On the other hand, the used car dealer was also an owner by purchase from the new car dealer and, unless exempt under Section 23, was subject to the requirement of application for registration and certificate of title and payment of excise tax.

Section 23(1) describes exemptions in favor of manufacturers, transporters, *dealers,* lien holders and some nonresidents holding a temporary registration issued by the Department of Motor Vehicles. As to the "dealer" exemption (clearly none of the other exemptions is applicable to a used car dealer), for every purpose under the Motor Vehicle Code the term "dealer", unless used in conjunction with "used car", "used vehicle" or "trailer", means (1) a sales branch or agency of a manufacturer of motor vehicles, (2) a new car distributor who holds an unexpired written appointment as such from the manufacturer, or (3) a new car dealer who holds an unexpired written appointment as such from the manufacturer or authorized distributor. A used car dealer plainly does not qualify under any of the three categories. Therefore, as to each new car purchased by the subject used car dealer, registration and a certificate of title should have been applied for and excise tax

paid. It goes without saying that for every such car purchased for which an excise tax was not paid there is due the State of Maryland the amount of excise tax that should have been paid.

Turning to the question of who owes the tax, we note the following pertinent provisions of Article 66½, Section 47(b):

> ". . . When a registered dealer transfers his title or interest to another party, other than a registered dealer, he shall execute and acknowledge an assignment and warranty of title upon the certificate of title and, if a Class A motor vehicle, shall obtain from the transferee the written application for certificate of title of said motor vehicle and the prescribed fees therefor, and shall forward the same . . . to the Department . . .".

Upon the transfer of his interest in each car to the used car dealer, the new car dealer had a duty to comply with this section. The "prescribed fees" which should have been collected and forwarded include the excise tax since such tax is payable at the time of application for a certificate of title. The failure to do so constituted a violation of the statute for which the new car dealer is also liable, the primary liability being that of the used car dealer-owner. Although only one tax is collectible for each sale from the new car dealer to the used car dealer, we believe that the State may collect any unpaid tax from either dealer. Our conclusion in this regard is reinforced by the provisions of Section 47(c), which requires the keeping of proper records of tax and fees collected by "dealers who collect any tax or the prescribed fees" and the preservation of such records for a period of three years.

You have asked certain subsidiary questions, including whether the used car dealer in this case was selling new vehicles without a salesman's license. This question is moot in view of our finding that the used car dealer was the owner of the vehicles sold by him, having been purchased

from the new car dealer and sold to the ultimate purchasers for his own account.

You have also made an inquiry with regard to the application of Article 66½, Section 47, subtitle "Transfers to and from dealers". We advise that a new car dealer may be a transferee without payment of excise tax only as to motor vehicles for which he holds a valid dealer franchise, and none other. Upon the transfer of any other make of car an excise tax is payable.

Answering your final question, in no case is a used car dealer who is the transferee of a new motor vehicle entitled to exemption from the requirements of registration, titling and payment of excise tax upon the issuance of a certificate of title, whether the transfer is from the manufacturer, distributor or a franchised new car dealer. Article 66½, Section 23(1).

FRANCIS B. BURCH, *Attorney General.*

N. BARTON BENSON, JR., *Spec. Asst. Attorney General.*

MOTOR VEHICLES—CHARGES UNDER ARTICLE 66½, SECTION 206 OF DRIVING WHILE IN AN INTOXICATED CONDITION, AND DRIVING WHILE DRIVING ABILITY IMPAIRED BY ALCOHOL, MAY BE BROUGHT EITHER CONJUNCTIVELY (NOT DISJUNCTIVELY) OR SEPARATELY—WHERE MORE THAN ONE OFFENSE IS CHARGED UNDER THE STATUTE, THE PROSECUTION SHOULD NOT BE FORCED TO ELECT PRIOR TO TRIAL TO PROCEED ON ONLY ONE OR THE OTHER OF THE CHARGES.

July 9, 1970.

Honorable T. Bryan McIntire.

Your recent letter raises questions concerning Article 66½, Section 206 of the Annotated Code of Maryland (1969 Supplement), which statute provides in part:

> "(a) *Driving while intoxicated or under influence of narcotic drugs.*—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) *Driving while ability is impaired by consumption of alcohol.*—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."

Your inquiry initially concerns the proper method of stating charges for violations of the above statute. Specifically, you ask whether it is necessary that separate charges be brought for alleged violations of the statute.

The formulation of an appropriate charge or charges for violation of Section 206, *supra,* is to be governed by the general rule, well established in this State, that every charge or accusation must be framed in language which

clearly informs the accused of his alleged violations 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 or offenses. *Presley v. State,* 6 Md. App. 419; *Butina v. State,* 4 Md. App. 312; *Dize v. State,* 212 Md. 1. See also *Smith v. Warden, Maryland House of Correction,* 208 Md. 672; and Maryland Rule 702 a. Ordinarily, a charge couched in the language of the statute will be legally sufficient. *State v. Petrushansky,* 183 Md. 67; *Dize v. State,* supra. Careful attention must, however, also be given to the rule, equally well established in this State, that where a statute prohibits the doing of two or more acts disjunctively, it is improper to charge the performance of one or the other of the prohibited acts in the same count. See *Bonneville v. State,* 206 Md. 302.

This office, in an opinion to the Police Commissioner of Baltimore City dated November 18, 1969, discussed the general principles above outlined, and noted their particular application to Article 66½, Section 206. It was there stated:

> ". . . 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. We believe, therefore, that a suspected offender may be charged separately with the acts described in Section 206 (a) and (b)."

You are, therefore, advised, in accordance with the above, that in our opinion either a conjunctive charge or separate charges may be brought for alleged violations of the statute.

You also inquire as to whether the prosecution may be forced prior to trial (in a situation where more than one offense under the statute is charged) to elect to proceed on only one of the allegations.

We observe that the precedents and long usage in this State strongly support the joinder for trial of related offenses growing out of the same occurrence. See *Wanzer v. State,* 202 Md. 607; *Simmons v. State,* 165 Md. 155; *Wheeler v. State,* 42 Md. 563; *State v. Burk,* 2 H. & J. 426. See also *Williams v. State,* 214 Md. 143. The only relevant limitation seemingly engrafted upon this type of procedure is that the courts may, in their discretion, guard against injustice to the accused when, upon a preliminary showing, it is

determined by the court that the accused will be confounded or embarrassed in his defense, (or that, in the case of a jury trial, the jury will be distracted by trial of several charged together). In such circumstances the court may order the State's Attorney to elect the allegation upon which he will stand. But it is clear that the accused cannot demand such action of the court as of right. He must first establish his entitlement to such a protective ruling by the court. See in this regard *Wanzer v. State,* 202 Md. 601, 607-608, where it was said:

> "Frequently indictments contain several counts alleging the same offense in different ways to meet the evidence, the details of which the prosecutor may not be able accurately to foresee before the trial. The use of multiple counts is not restricted to this situation, for it is well recognized that counts for distinct crimes may be combined, especially if they are of the same grade or if they are otherwise connected. *People v. Gates,* 13 Wend. (N.Y.) 311; *Pointer v. U.S.* 151 U.S. 396, 14 S. Ct. 410, 38 L. Ed. 208; *Simmons v. State,* 165 Md. 155, 167 A. 60; *Wheeler v. State,* 42 Md. 563, *State v. Burk,* 2 H. & J. 426.
>
> "There is no rigid rule, and the only limitation is that courts will guard against injustice. Where the court, in its discretion, determines that there is reason to apprehend that the accused will be confounded, or the jury distracted by trial of the several counts together, he may order the State's Attorney to elect upon which counts he will stand, or in a clear case he may quash the indictment. *Simmons v. State, supra; State v. Bell,* 27 Md. 675; *State v. McNally,* 55 Md. 559. *The defendant can not demand such action as of right where there is no basis for thinking that the joinder of the counts will embarrass him in the trial.* Such was the rule at common law and it has been consistently followed in this State. *Simmons v. State, supra; Toomer*

v. State, 112 Md. 285, 76 A. 118." (Emphasis added).

We perceive no valid reasons why the above salutary principles should not apply to prosecutions under Article 66½, Section 206. Therefore, it is our opinion that, in cases where more than one offense under the statute is charged, *only* upon the showing by an accused of his entitlement to a protective ruling of the court, and not otherwise, should the prosecution be forced to preliminarily elect upon which particular offense to proceed.

FRANCIS B. BURCH, *Attorney General.*

DONALD NEEDLE, *Asst. Attorney General.*

MOTOR VEHICLES—A MOTORIST WHO IS ENTITLED TO SUMMONS MUST ENDORSE THE NOTIFICATION OF HIS COURT APPEARANCE ON THE SUMMONS OR BE TAKEN INTO CUSTODY AND NOT RELEASED UNTIL BOND IS POSTED—ARTICLE 66½, SECTIONS 30, 320, 321, 335, 338.

July 10, 1970.

Mr. Raymond P. Woodward.

We have been asked to respond to your request as to the procedure to follow when a motorist refuses to sign a traffic summons and when a defendant fails to appear for trial.

As provided in the Annotated Code of Maryland (1967 Repl. Vol.), Article 66½, Section 321, residents of Maryland or of a sister state which honors reciprocity in accordance with Article 66½, Section 58, are entitled to receive a summons and personal recognizance for a court appearance in connection with a traffic violation. As you perhaps know, no person has the right to demand and receive a summons, pursuant to Article 66½, Section 324 in cases involving certain offenses, such as driving while under the influence of intoxicating liquor, where there has been an accident resulting in personal injury which in the judgment of the officer making the arrest requires immediate detention of the operator, and in cases where the operator cannot satisfactorily identify himself as the owner of the vehicle to the arresting officer.

Your question was directly answered by the Court of Appeals in *Hendershott v. Young*, 209 Md. 257 (1955). The Court therein was concerned with a motorist who had parked her automobile in a street intersection in Montgomery County. A police officer witnessed the violation, and as the lady was a resident of Maryland, the officer, as required, asked her to sign a summons agreeing to appear in the People's Court on the day named. The motorist refused to sign the summons and was taken by the officer before a Justice of the Peace who acted regularly as the

Committing Magistrate. The motorist also refused to post collateral of $6.45 and was thereupon committed to the custody of the Sheriff of Montgomery County, bail being set in the commitment at $50.00. The Court, *in dictum*, upheld the procedure utilized by the police officer and Justice of the Peace, while also pointing out that if she had posted collateral of $6.45, which sum did not exceed the maximum amount prescribed as the fine for such offense, she could have been released from custody while awaiting trial.

Therefore, in answer to your first question, if a motorist, who is entitled to receive a summons, refuses to endorse the notification of his court appearance on the summons, such a motorist should be taken into custody and presented forthwith to the nearest available Justice of the Peace or Trial Magistrate. In accordance with Article 66½, Section 30, if an immediate hearing cannot be conducted, and the motorist refuses to post collateral, the motorist would then not be entitled to be released from custody until posting bond. It might be noted in this regard that Article 66½, Section 320 specifies that, "such bond or cash money or undertaking to be in amount determined by the magistrate or clerk to the magistrate not to exceed the maximum amount prescribed as the fine for such offense."

In relation to the procedure to be followed when a defendant fails to appear for trial if mere collateral will not be accepted by the court, Article 66½, Section 321, provides that upon such failure to appear, "the said justice of the peace, trial magistrate, police justice, or justice of the peace of the traffic court, as the case may be, before whom said summons is made returnable shall issue a warrant for the arrest of said person or in lieu of said warrant shall send by registered mail with return receipt requested a second summons to the violator at his last known address setting the case for trial on a date at least two weeks subsequent to the original date of trial."

Article 66½, Section 335, then provides that, "Any person wilfully violating his written promise to appear in court, given as provided in this article, is guilty of a mis-

demeanor regardless of the disposition of the charge upon which he was originally arrested."

Article 66½, Section 338—the general penalty section for misdemeanors not otherwise specified—provides a first conviction penalty of either a fine of not more than One Hundred Dollars ($100) or imprisonment for not more than ten (10) days.

Finally, it is important to point out for your general information that Maryland Code (1969 Cum. Supp.), Article 66½, Section 86C provides as follows:

> "Notwithstanding any other sections of this article, if any person has been charged with a violation, other than parking, under this article after July 1, 1968, has been properly summoned for trial, and has failed to appear for trial and the enforcement agency is unable to apprehend him by warrant, the Department shall attach a notation of such failure to appear to his driving record and to his application for renewal or reinstatement, and he shall not be entitled to a renewal or reinstatement of his operator's or chauffeur's license until he shall have answered said warrant and appeared for trial."

FRANCIS B. BURCH, *Attorney General.*

JOHN J. GARRITY, *Asst. Attorney General.*

MOTOR VEHICLES—CONSTITUTIONALITY OF CHAPTER 158 OF THE LAWS OF MARYLAND OF 1969 (DRIVING MOTOR VEHICLE WHILE DRIVING ABILITY IS IMPAIRED BY THE CONSUMPTION OF ALCOHOL).

August 13, 1970.

Mr. John C. Eldridge.

We are in receipt of your recent letter in which you raise the question of whether the titles of Chapters 157 and 158 of the Laws of Maryland of 1969 are unconstitutional under the provisions of Article III, Section 29, of the Constitution of Maryland. As stated by you, "it has been suggested that the titles may be defective on the grounds that the creation of the offense of driving while driving ability is impaired by the consumption of alcohol is not sufficiently referred to or described in the titles". Actually, your inquiry may be limited to Chapter 158, since Chapter 157, a companion measure, relates to chemical tests for the purpose of determining alcoholic content of blood in a criminal prosecution and does not create the offense of driving a motor vehicle while driving ability is impaired by the consumption of alcohol.

Article III, Section 29, of the Constitution of Maryland requires that ". . . every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title . . .". The title of Chapter 158 of the Laws of Maryland of 1969 provides as follows:

> "An Act to add new Section 92A to Article 66½ of the Annotated Code of Maryland (1967 Replacement Volume, 1968 Cumulative Supplement), title 'Motor Vehicles,' subtitle 'Administration—Registration—Titling,' to follow immediately after Section 92 thereof; and to add new Section 104A to the same Article to follow immediately after Section 104 thereof; and *to repeal Section 206 of the same Article, subtitle 'Operating Vehicles Upon*

Highways,' and to enact new Section 206 to stand in the place and stead of the Section so repealed; to provide as a condition to obtaining or renewing a motor vehicle driver's license, the applicant shall expressly consent to the taking of a chemical test of his blood, breath, or urine, and to provide that the operation or attempted operation of a motor vehicle on the public highways of this State by a validly licensed non-resident motor vehicle operator implies the consent of the operator to the taking of a chemical test of his blood, breath, or urine, if either the resident or non-resident motor vehicle operator is detained by the Maryland State Police or by certain qualified members of local police agencies, and the test is to be given by persons certified and qualified for any offense alleged to have been committed while operating a motor vehicle in an intoxicated condition or operating while his driving ability is impaired by the consumption of alcohol, relating to the presumption arising from a refusal to take a chemical test, and to the revocation, suspension or refusal of licensing, providing for hearing and appeal from suspension or refusal of licensing, and to notify other states in such cases, *and relating generally to* the licensing of motor vehicle operators and *the operation of motor vehicles in this State.*" (Emphasis added.)

Prior to amendment by Chapter 158 of the Laws of Maryland of 1969, Section 206 of Article 66½ provided:

"Section 206. Persons under the influence of intoxicating liquor or narcotic drugs.

"It shall be unlawful for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive or attempt to drive any vehicle, streetcar or trackless trolley within this State.

"Every person who is convicted of a violation of this section shall be punished by imprisonment for not more than one (1) year, or by fine of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00), or both fine and imprisonment. On a second or subsequent conviction he shall be punished by imprisonment for not less than six months nor more than two (2) years and in the discretion of the court, a fine of not more than one thousand dollars ($1,000.00)."

As amended by Chapter 158, Section 206 of Article 66½ provides:

"Section 206. Driving while intoxicated, under influence of drugs or while driving ability is impaired by consumption of alcohol.

"(a) Driving while intoxicated or under influence of narcotic drugs.—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) Driving while ability is impaired by consumption of alcohol.—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.

"(c) Penalty for violation of subsection (a).—Every person who is convicted of violation of subsection (a) of this section shall be punished by imprisonment for not more than one (1) year or by fine of not more than one thousand dollars ($1,000.00), or by both fine and imprisonment.

"On a second or subsequent conviction, he may be punished by imprisonment for not more than two (2) years, and in the discretion of the court,

a fine of not more than one thousand dollars ($1,000.00).

"(d) Penalty for violation of subsection (b).— Every person who is convicted of a violation of subsection (b) of this section shall be punished by fine of not more than five hundred dollars ($500.00).

"On a second or subsequent conviction, he may be punished by imprisonment for not more than one (1) year, and in the discretion of the court, a fine of not more than five hundred dollars ($500.00)."

The offense of driving while driving ability is impaired by the consumption of alcohol is not expressly referred to in the title of Chapter 158. The same is true of the offense of driving while intoxicated. Instead, the title of Chapter 158 simply refers to a Code reference by providing "to repeal Section 206 of the same Article [Art. 66½], subtitle 'Operating Vehicles Upon Highways,' and to enact new Section 206 to stand in the place and stead of the Section so repealed; . . .". Thus, the question under consideration is reduced to the problem of whether a mere Code reference in the title of an act is sufficient compliance with the requirements of Article III, Section 29, of the Constitution of Maryland.

In his leading article entitled "Titles of Legislative Acts", 9 Maryland Law Review 197, Dr. Carl N. Everstine, now Director of the Department of Legislative Reference, concluded that "there are three generally used styles for drafting titles; and so far as form is concerned, any one of the three is valid". Dr. Everstine refers to titles giving a Code reference and states "[a] second style of titles shows how the bill is to fit into the Code, such as by naming the article and subtitle, by referring to a prior act of the Legislature, but except in this indirect fashion gives no clue to its subject." It is then concluded that "the use of this form of title is perhaps the most definite way of all to avoid ques-

tion as to its validity, for if its numbers and Code references are correct, it cannot be misleading." As examples of this form of title, Dr. Everstine cites the following examples:

(1) Ch. 358 of the Acts of 1876, entitled "An Act to amend Art. 95, of the Code of Public General Laws by adding an additional section thereto", upheld in *Second German American Building Asso. v. Newman,* 50 Md. 62, 67 (1878).

(2) Ch. 108 of the Acts of 1878, entitled "An Act to add an additional Article to the Code of Public Local Laws, to be entitled Garrett County", upheld in *State v. Fox,* 51 Md. 412, 415 (1879).

(3) Ch. 362 of the Acts of 1888, entitled "An Act to add a new section to Article 30 of the Code of Public General Laws, title 'Crimes and Punishments,' subtitle 'Rivers,' to come in after section one hundred and seventy-one", upheld in *State v. Norris,* 70 Md. 91, 95 (1889).

(4) Ch. 380 of the Acts of 1894, entitled "An Act to repeal Art. 72 of the Code, title 'Oysters,' and to reenact the same with amendments", upheld in *State v. Applegarth,* 81 Md. 293, 303 (1895).

(5) Ch. 794 of the Acts of 1906, entitled "An Act to repeal Sec. 183, Article 81, Code of Public General Laws of Maryland, title 'Revenue and Taxes,' subtitle 'Tax on Mortgages,' and to reenact the same with amendments", upheld in *Miller v. Wicomico County,* 107 Md. 438, 444 (1908).

(6) Ch. 118 of the Acts of 1908, entitled "An Act to repeal Section 205 of Article 93 of the Code of Public General Laws (as said section stands in the Code of 1904), title 'Testamentary Law,' subtitle 'Inventory and List of Debts,' so far as said section applies to the City of Baltimore; and a new section to Article 4 of the Code of Public Local

> Laws, title 'City of Baltimore,' subtitle 'Register of Wills,' to follow Section 354 and to be designated as Section 354A", upheld in *Barron v. Smith*, 108 Md. 317, 327 (1908).

We are of the opinion that Dr. Everstine's analysis is entirely correct. As stated by the Court of Appeals in *Allied American Co. v. Comm'r*, 219 Md. 607, 614, "[i]t has been held that titles need do no more than indicate the precise article and section of the Code in which the new legislation appears". See also *Dean v. Slacum*, 149 Md. 578, 580, "[i]t has been repeatedly decided that a correct title description of an act by Code article and section designations is a compliance with the constitutional requirement". For further reference, see *Pressman v. Tax Comm'n*, 204 Md. 78; *Shipley v. State*, 201 Md. 96, 104; *Jacobs v. Klawans*, 225 Md. 147, 155; *County Comm'rs. v. Meekins*, 50 Md. 28.

In considering the sufficiency of a title, it must be kept in mind that ". . . Section 29, of Article III, does not require the title of an act to contain an abstract of the body of the statute, *nor to mention or indicate each provision in it*", *Jacobs v. Klawans, supra,* (emphasis added). As stated by the Court of Appeals in *Allied American Co. v. Comm'r*, 219 Md. 607, 615, quoting from the Supreme Court of New Jersey:

> "A title to an act need not be an index to all that it contains and need not set forth all of its exclusions or conditions. It is a label and need only set forth its object, not its product."

In this connection, it should also be noted that the title of Chapter 158 does contain broad language to the effect that the act relates generally to "the operation of motor vehicles in this State".

Recently, this office had occasion to consider the question of whether a bill complied with Article III, Section 29, of the Constitution of Maryland when the bill "created" several crimes without making express reference thereto in the title, (Opinion Letter dated May 13, 1970, addressed to

the Honorable Marvin Mandel, (55 Opinions of the Attorney General 122)). After reviewing many cases, including some of those discussed herein, this office concluded:

> "We have found no authority which would suggest that an act containing criminal provisions, whether the crime be 'new' or a recodification of a preexisting crime, must make express reference thereto in its title in order to be constitutional. Instead, whether a statute which contains criminal penalties is sufficiently titled under Article III, Section 29, of the Constitution of Maryland, turns upon the general principles applicable to the titling of all legislative acts, although obviously special care should be taken if the act contains criminal prosecutions."

Applying the principles previously discussed, it is our opinion that the title of Chapter 158 of the Laws of Maryland of 1969 is not unconstitutional under the provisions of Article III, Section 29, of the Constitution of Maryland. As stated in the Opinion Letter dated May 13, 1970, previously referred to, "while we would have preferred that the title be more descriptive so as to give real notice of the contents of the bill, we find no constitutional defect".

FRANCIS B. BURCH, *Attorney General.*

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

MOTOR VEHICLES—UNEXPENDED FUNDS FROM FEES COLLECTED BY DEPARTMENT OF MOTOR VEHICLES, WHICH LEGISLATURE PROVIDED COULD BE USED FOR BOUNTY FEES FOR JUNK AUTOMOBILES, REVERT TO GENERAL TREASURY AT THE END OF THE FISCAL YEAR AND CANNOT BE USED BY DEPARTMENT TO ESTABLISH A RESERVE FUND.

October 20, 1970.

Mr. Michael J. Potthast.

We have your recent letter inquiring whether the fees collected under Section 28(e) of Article 66½ of the Annotated Code of Maryland should be held in a reserve account for the payment by the Department of Motor Vehicles of bounty fees for the destruction of junk automobiles, as provided by Section 71(k)(6) of Article 66½, or whether the excess of such funds remaining after the payment of the bounty fees payable in any fiscal year should revert to the State Treasury and be distributed as motor vehicle revenue. Section 28(e) of Article 66½ requires the Department of Motor Vehicles to collect $2.00 for each certificate of title for new vehicles and $4.00 for each certificate of title for vehicles requiring inspection. The statute then provides that $1.00 of the amount collected "may be used for the purpose of administering the provisions of Section 71". Subsection (k)(6) of Section 71 provides that the Department of Motor Vehicles shall pay a fee of $10.00 to scrap processors for each vehicle completely destroyed. The statutory provision permitting the use of funds collected under Section 28(e) for administering the provisions of Section 71 has been in effect since July 1, 1969; however, the statutory provision that authorized the payment of bounty fees under Section 71 did not become effective until July 1, 1970. You advise that no allocation of fees was made to support any budgetary administrative costs for the payment of bounty fees during the 1969-70 fiscal year and the total amount of funds collected under Section 28(e) during the 1969-70 fiscal year which would have been avail-

able for the payment of bounty fees was $629,926.00. This sum was subsequently distributed as motor vehicle revenue to the State Roads Commission and Baltimore City pursuant to the provisions of Section 38 of Article 89B. The Commissioner of Motor Vehicles has now requested that the amount of $629,926.00 be recovered from the State Roads Commission and Baltimore City and placed in a reserve fund.

It is our opinion that the disposition of the funds in question is covered by Section 2 of Article 15A which provides as follows:

> "Every department, board, commission, officer and institution receiving an appropriation for operating expenses, and every State agency whose expenses are paid out of fees collected, shall notify the Comptroller, at the end of the fiscal year for which such appropriation is made, whether and to what the unexpended balance of such appropriation, if any there will be at the end of the said fiscal year, is needed to meet obligations incurred during that year and which will be unpaid at the end thereof. Any unexpended balance of such appropriation, against which there will be no outstanding obligation at the end of the fiscal year, except balances from sources dedicated by any act of Congress or by the laws of the State to some specific purpose or purposes, shall revert to the general treasury of the State at the end of the fiscal year."

This section establishes a budgetary rule requiring departments to revert to the general treasury at the end of the fiscal year unexpended balances of appropriations for operating expenses. While the section does not explicitly require the reversion of the unexpended fees collected, we believe that the inclusion in the mandate of the statute of State agencies "whose expenses are paid out of fees collected" requires the construction that excess fees collected also revert to the general treasury at the end of the fiscal year.

An exception to the rule requiring reversion to the general treasury is provided where the balance is from a source dedicated by the laws of the State to some specific purpose or purposes. The question then arises whether the provision in Section 28(e) that $1.00 of each fee collected for a certificate of title "may be used for the purpose of administering the provisions of Section 71" constitutes an exclusive dedication to a specific purpose or purposes. A negative answer is indicated.

We believe that the words "may be used for administering the provisions of Section 71" clearly permits the use of fees collected in accordance with Section 28(e) to be expended in administering Section 71, but in our opinion the statutory provision does not extend to permitting the department to retain excess or unexpended fees in a reserve fund because such an interpretation would run counter to the uniform budgetary rule set forth in Section 2 of Article 15A.

We also direct your attention to Section 198 of Article 41, which requires excess collections of a department to revert to the general treasury and which provides in pertinent part as follows:

> "Every department, institution or other governmental agency shall monthly account for to the Comptroller and pay to the Treasurer all fees, revenues, collections and income of every kind received by it, and the same shall be credited by the Comptroller, in a special account, to such department, institution or governmental agency, unless a special account is already by law prescribed for such receipts; and such receipts shall become available to and be used by such department, institution or governmental agency, only upon warrant of the Comptroller, in accordance with law, and if not so used, or if not otherwise dedicated by law, the same shall revert in due course to the general treasury. . . ."

Section 198 serves to delineate by statute a uniform budgetary rule requiring that funds not expended by a department revert to the general treasury. If it had been the intent of the Legislature to depart from this uniform budgetary rule in the instant situation, we believe that it would have provided in clear and unequivocal terms for the establishment of a reserve fund. Since it has not done so, we must conclude that there is an absence of statutory authority for the establishment of the proposed reserve fund by using unexpended funds collected in a prior fiscal year. Cf. 45 Opinions of the Attorney General 27. Accordingly, we advise you that the amount of $629,926.00, stated to have been collected pursuant to Section 28(e), cannot be recovered from the State Roads Commission and Baltimore City and placed in a reserve fund. Our conclusion in no way prevents the use of fees which are currently collected under Section 28(e) from being used for the current expenses incurred in administering Section 71, including the payment of bounty fees.

FRANCIS B. BURCH, *Attorney General.*

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

MOTOR VEHICLES — TRIAL MAGISTRATES — MOTOR VEHICLE CODE OFFENSES PUNISHABLE AS FELONIES—TRIAL MAGISTRATES DO NOT HAVE JURISDICTION TO HEAR, TRY AND DETERMINE OFFENSES DESCRIBED AS FELONIES UNDER THE MOTOR VEHICLE CODE (ARTICLE 66½, ANNOTATED CODE OF MARYLAND).

October 26, 1970.

Honorable D. James Villa.

You have asked our opinion as to whether or not the Trial Magistrates of Maryland have jurisdiction to try crimes referred to as felonies in the Motor Vehicle Law in view of the restriction on the jurisdiction of the Trial Magistrates under Article 52, Section 13, Annotated Code of Maryland. Article 52, Section 13 (a), Annotated Code of Maryland, grants power to the Trial Magistrates of the State to try all offenses which are not made punishable by the statute defining the offense by confinement in the penitentiary, or which do not involve a felonious intent. *Yantz v. Warden*, 210 Md. 343; 34 Opinions of the Attorney General 283.

You make particular inquiry as to the power of the Trial Magistrates to try cases under Article 66½, Section 77(a), which designates as a felony certain acts involving the alteration or forgery of motor vehicle registration documents and plates with fraudulent intent and provides that the punishment upon conviction shall be a fine of $100.00 to $1,000.00 or imprisonment for not more than five (5) years, or both. The new motor vehicle law, Chapter 534, Laws of 1970, effective July 1, 1970, carries this offense over unchanged as Section 4-110 (a). The new code provides in Section 17-102 that the penalty for conviction of any violation declared to constitute a felony shall be punishment by imprisonment for not more than five (5) years or by a fine of not less than $500.00 nor more than $5,000.00, or by both such fine and imprisonment.

Article 66½, Section 325, Annotated Code of Maryland, provided that the Trial Magistrates of Maryland had juris-

diction to hear and determine complaints involving the violation of any of the provisions of Article 66½. This provision has also been carried over into the new motor vehicle law as Section 16-301 (a).

However, both the old and the new motor vehicle codes provide that in the event of any conflict between the provisions of Article 52 and Article 66½ regarding jurisdiction and procedures before trial magistrates, the provisions of Article 52 shall prevail (Article 66½, Section 336 of the old code, Article 66½, Section 16-209 of the new code). There is a clear conflict between the provision of Article 52 which denies to trial magistrates jurisdiction to try those offenses which involve a felonious intent, and the provision of Article 66½ which would appear to grant jurisdiction to trial magistrates to try cases involving offenses declared therein to constitute a felony.

Section 1 of the old code made Article 66½ the exclusive and controlling state-wide law as to those matters covered by it unless the Legislature specifically provided otherwise. The new code does not include any similar provision. The Legislature has, however, specifically granted power to the Municipal Court of Baltimore City to try all cases involving violations of the motor vehicle laws of the State (Article 26, Section 109 (Section 40-47)), but no other local court created by the Legislature has been given this specific authority. The creation of the various People's Courts in the Counties has been accompanied by a legislative grant of criminal jurisdiction similar to that previously conferred upon the Trial Magistrates of that County. Article 52, Sections 25, 25A, 25B, 25C, 25D, 25F, 25G, 25H, Annotated Code of Maryland.

While a general reading of the new motor vehicle code would make it appear that the Legislature intended the trial magistrates to have power to hear and determine, in general, all cases arising under the motor vehicle laws, we believe that strict statutory construction denies them the power to hear and determine those violations designated as felonies in the motor vehicle code. This most recent legis-

lation again stated that conflicts between the jurisdiction granted in Article 66½ and that restricted by Article 52 must be interpreted to allow the provisions of Article 52 to prevail. No other legislation has given specific jurisdiction over offenses defined as felonies in Article 66½ to trial magistrates throughout the State in general. Therefore, it must be concluded that trial magistrates do not have the power to hear, try and determine the felony defined in Article 66½, Section 4-110 (a) or any other violation classified as a felony in Article 66½.

FRANCIS B. BURCH, *Attorney General.*

CLARENCE W. SHARP, *Asst. Attorney General.*

NATURAL RESOURCES

BOARD OF REVIEW—POLICY AND PROGRAM DECISIONS NOT ITS JURISDICTION—HAS NO REVISIORY POWER OVER RULES AND REGULATIONS.

SECRETARY OF NATURAL RESOURCES—POLICY AND PROGRAM DECISIONS HIS RESPONSIBILITY; ALSO HAS REVISORY POWER OVER RULES AND REGULATIONS.

January 14, 1970.

Mr. John W. Neumann.

This is in response to your inquiry regarding the duties and responsibilities of the Board of Review of the Department of Natural Resources. Your inquiry is twofold:

1. Should the Board of Review hear protests against policy or program decisions within the Department of Natural Resources, and after hearing such protests, does the Board have the authority to change such policy or program?

2. What is the extent of the power of the Board of Review to revoke or amend rules or regulations promulgated by the agencies within the Department of Natural Resources?

The Department of Natural Resources (hereinafter called "Department") was created by Chapter 154 of the Laws of 1969, codified as Sections 232 et al., of Article 41 of the Maryland Code, (1969 Cum. Supp.). The duties and responsibilities of the Board of Review (hereinafter called "Board") are set forth in Section 236(b) of Article 41, as follows:

> "The board may make recommendations to the Secretary regarding the operation and administration of the Department of Natural Resources as it shall from time to time deem necessary or desirable. If no advisory board is created for the Department as provided for in Section 238 of this article, the board of review shall advise the Secre-

> tary as to all matters affecting the Department submitted by him for its consideration.";

in Section 236(c), as follows:

> "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. The board shall report at least annually to the Secretary and its report shall incorporate a summary of appeals heard and the determinations thereof by categories. No member of the board shall participate in any determination nor vote in any proceeding as to which he has, directly or indirectly, a private interest.";

and in Section 237, in pertinent part, as follows:

> "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 within such period as established by regulation of the board of review and in the manner hereinafter set forth . . .".

The Statute also created the position of Secretary of Natural Resources, some of whose duties and responsibilities are set out in Article 41 of the Code, and others in Article 66C of the Code (1969 Cum. Supps.). Section 234(a) of Article 41 provides that:

> "The Secretary shall be responsible for the coordination and direction of comprehensive planning in the area of natural resources. In addition, he shall keep himself fully apprised of plans, proposals, projects, and programs of the departments and other agencies or units within the jurisdiction of the Department of Natural Resources, and shall have power to approve, disapprove, or modify any plan, proposal, project, or program, provided that any action approving, disapproving, or modifying plans, proposals, projects or programs not be inconsistent with law."

Section 5 (a) of Article 66C provides, in pertinent part, that:

> "The Secretary of Natural Resources, in addition to his other powers, duties and functions as provided by law, shall be responsible for the development of coordinated policies for the conservation, enhancement, wise use, perpetuation of the natural resources of the State . . .".

From an examination of the foregoing, it is clear that policy or program decisions within the Department are the responsibility of the Secretary and though the Board shall advise the Secretary until such time as the Advisory Board may be created, there is no provision in the law for the Board to hear or decide protests against such decisions. The Secretary might, by regulation (Article 41, Section 236 (c)), make some of such decisions reviewable by the Board, but we know of no such existing regulations.

In your inquiry, you have called to our attention Section 54 of Article 96A, asking if that statute gives your Board authority to revoke or amend rules or regulations of the Department. This statute provides as follows:

> "Any person or party aggrieved by a final decision of the Department, whether such decision is affirmative or negative in form, or by any rule or regulation of the Department, may appeal to the Board of Review of the Department of Natural

> Resources as provided for in Article 41 of the Code."

A careful reading of this statute reveals that by its terms it is limited to a "person or party aggrieved". We feel that the Board, which might be considered a primarily judicial or quasi-judicial body, does not qualify as such. It is our opinion that this statute was intended to provide for an appeal to your Board by someone aggrieved by a final departmental decision, such as a denial of a license or permit, or by someone aggrieved by a departmental rule or regulation, such as a claim that a water quality regulation is improper.

We also call your attention to Section 235(b) of Article 41, which provides as follows:

> "The *Secretary of Natural Resources shall* be responsible for promulgating rules and regulations for his office and shall review and *have revisory power over the rules and regulations of all of the departments and other agencies within the Department of Natural Resources*, provided that no rule or regulation promulgated by the Secretary or by other departments or agencies within the Department of Natural Resources shall be inconsistent with law." (Emphasis Supplied).

We do not think that the Legislature, in enacting Chapter 154, intended that the Secretary and the Board should have revisory powers over member agency rules or regulations, since the possibility of an indeterminable conflict is obvious.

We also refer you to Sections 3A and 3B of Article 41 of the Code (1969 Cum. Supp.) These sections deal with the authority of the secretaries of the principal departments of State government. The broad delegation of authority contained therein sustains our views on the questions we have answered above.

FRANCIS B. BURCH, *Attorney General.*

RICHARD C. RICE, *Spec. Asst. Attorney General.*

NATURAL RESOURCES—NATURAL RESOURCES DEPARTMENT—FISH AND WILDLIFE ADMINISTRATION CONFLICT BETWEEN FEDERAL AND STATE LAW RELATING TO "FEEDING AND BAITING" OF WILD WATERFOWL AND MIGRATORY GAME BIRDS—EFFECT OF CHAPTER 535 OF THE ACTS OF 1970.

September 18, 1970.

Mr. Joseph H. Manning.

By letter dated June 9, 1970, Charles M. Milton, Jr., Chief Wildlife Officer of your Department, has requested an opinion as to the effectiveness of Chapter 535, of the Acts of 1970, which is codified as Article 66C, Section 150, et seq., of the Annotated Code of Maryland, which became effective July 1, 1970. It appears to Chief Milton that the aforesaid Act conflicts with Federal Acts and Regulations pertaining to the taking of wild waterfowl and migratory game birds. He has set forth the State law with particular reference to Section 155, titled "Feeding and Bait," and the Federal Regulations, Section 10. 3 b (9). One of his basic concerns is the difference between the terms in the Federal Regulation "Normal Agricultural Planting and Harvesting," and the term in the State Regulation "Normal Agricultural Operation or other Natural Causes."

Chief Milton further makes an inquiry as to the provision under the Federal Regulations that knowledge and intent are not prerequisites to prosecution, while under Section 155 (b) of the new State Act some proof of knowledge is required. A third point raised by the letter is that the wording "so as to lure migratory game birds," as used in Section 155 (a) of the State law, is less stringent than the Federal Regulation which reads "so as to constitute for such birds a lure, attraction or enticement."

The Federal Government obtained its control over migratory birds under a Treaty between the United States and Great Britain entered into August 16, 1916, and an Act of

Congress known as the Migratory Bird Treaty Act passed to give effect to the Treaty. Subsequently Congress, under the authority of Article I of the United States Constitution, enacted the provisions of Title 16 U.S.C.A., Sections 703 through 711, to carry out the provisions of the Treaty with Great Britain and a subsequent Treaty entered into with Mexico. The terms of the Treaties and the laws and regulations passed to carry them into effect became the supreme law of the land under the provisions of Article VI, Clause 2, of the United States Constitution. Title 16 U.S.C.A. Sections 703 through 711, has been held to be constitutional in the case of *Sickman v. U. S.*; C.A. Ill. 184 F. 2d 616, Cert. Den. 341 U.S. 939

Section 708, of said Title 16, permits the several states and territories to make or enforce laws and regulations not inconsistent with Federal law provided such laws and regulations give further protection to migratory birds.

From a careful reading of the State Law and the Federal Acts and Regulations relating to migratory birds, it appears that Section 155, of Article 66C, is inconsistent with Federal Acts and Regulations and is less protective of migratory birds. Since the Treaties and the Federal Acts and Regulations are the supreme law of the land, it is our opinion that any laws and regulations of the State of Maryland regarding baiting of migratory birds and waterfowl which conflict with the Federal Laws, and are less stringent than the Federal Laws, are invalid and of no effect whatsoever to the extent of such conflict. This conclusion is also consistent with the prior ruling of the Maryland Attorney General's Office by the then Deputy Attorney General Stedman Prescott, Jr., as reported in Volume 43, page 182, dated September 23, 1958.

FRANCIS B. BURCH, *Attorney General.*

EDWARD S. DIGGES, *Spec. Asst. Attorney General.*

NURSING HOMES

SEPARATE CATEGORIES OF ADMINISTRATION AND REIMBURSEMENT RATES.

February 5, 1970.

The Honorable Melvin A. Steinberg.

Your letter of January 21, 1970 questions the legality, in relation to the Budget Bill of 1969, of two per-patient reimbursement rates based on two different categories of nursing homes, *viz.*, skilled nursing homes and intermediate care homes. You mention that the State is presently paying a rate of $13.50 for patients in skilled nursing homes and $12.50 for patients in intermediate care facilities and that this may be contrary to the intention of the Legislature to pay $13.50 for patients in both such categories.

The Budget Bill of 1969 as originally proposed provided for "a skilled nursing home per diem rate of cost or to a maximum of $13.50", however, language was added to the bill providing that such payments be made only to "those homes [which] qualify as skilled nursing homes under the regulations promulgated by the U. S. Department of Health, Education and Welfare under Title XIX of Public Law, 89-97 * * *", Section 5, Chapter 162, Acts 1969, Supplemental Budget—Fiscal Year 1970, Item 27.

Title XIX of Public Law 89-97 was affected by the Social Security Amendments of 1967, in particular, Section 1902 (a) of the Act was amended to upgrade the standards which must be met by nursing homes in order to be denominated "skilled nursing homes". These standards became effective January 1, 1969. Consequently, those institutions in the State of Maryland which did not meet such standards on January 1, 1969, not only were ineligible to receive reimbursement in which the federal government would participate, but also could not receive any amount from the State Department of Health by virtue of the proviso contained in the Budget Bill of 1969 mentioned above.

However, the 1967 amendments to the Social Security Act also added Section 1121 which allows, under Title XI, assistance payments by the State Department of Social Services to facilities which provide care for patients who require less than "skilled nursing home care".

The legislative history of the Social Security Amendments of 1967 reveals that the Congress was concerned with skilled nursing home care being used for patients whose condition was such that they needed nursing care but not to the extent that the skilled nursing homes could provide. Congress felt that the states were classifying patients such as elderly persons, who need little more than supervision and assistance in daily life, as persons needing more extensive and expensive skilled nursing care. Therefore, through the amendments referred to above, two facility classifications were created under the Social Security Act; (1) the skilled nursing care home providing the more expensive "medical" type of care for which reimbursement is given under the medical assistance title of the Social Security Act through State Departments of Health, and (2) the intermediate care facility which provides nursing care short of "skilled care" and for which reimbursement is provided under the general provisions title of the Social Security Act through State Departments of Social Services (see 1967 U. S. Code Cong. & Ad. News, pgs. 5348-5351).

We hope this makes clear the reasons why the existence of the two described categories of nursing care and their different rates is fully consistent with both federal and state law.

FRANCIS B. BURCH, *Attorney General.*

J. MICHAEL MCWILLIAMS, *Spec. Asst. Attorney General.*

NURSING HOMES—OUTBREAKS OF INFECTIOUS OR CONTAGIOUS DISEASES—RESPONSIBILITIES OF STATE AND CITY.

September 17, 1970.

Dr. Neil Solomon.

Recently there occurred an outbreak of Salmonella at a nursing home located in the City of Baltimore. Both the Baltimore City Health Department and the State Department of Health and Mental Hygiene became involved in subsequent investigations. As a result you have posed the following question to us. Upon such occurrences, as above, or upon the outbreak of other infectious or contagious diseases or conditions symptomatic thereof, what are the respective responsibilities of the local Health Department and the State Department of Health and Mental Hygiene?

For purposes of our reply, we shall limit our discussion to such outbreaks as they may occur at a nursing home or other related institution licensed, in the first instance, by the State pursuant to Article 43, Section 556 *et seq.*, Annotated Code of Maryland, 1965 Replacement Volume, subtitle "Hospitals and Related Institutions". That a nursing home falls within the category of a "related institution", and, therefore, is to be licensed by the State, is set forth in Section 556 (d) and (e) (1) *supra,* and the definition and classification therein set forth.

As enacted in 1965, this subtitle gave licensing authority and jurisdiction to the then State Board of Health and Mental Hygiene. Chapter 77, Laws of Maryland, 1969, abolished the Board and created, in lieu thereof, a principal department of State Government, the Department of Health and Mental Hygiene of Maryland, and as the head of such Department, a Secretary of Health and Mental Hygiene. As codified in Article 43, Section 1H, all the rights, powers, duties, obligations and functions formerly exercised by and conferred upon the aforesaid Board were transferred to and were to be exercised and performed by the Secretary of Health and Mental Hygiene. Therefore, the licensing author-

ity and jurisdiction conferred in Article 43, Section 556 *et seq., supra,* were, as of July 1, 1969, vested in the Secretary of Health and Mental Hygiene.

Consequently, your office has the duty and responsibility to receive and review applications from those who desire to open a nursing home or to continue the operation of an existing nursing home. You are authorized to issue licenses to open, maintain, and operate such facilities when, after inspection, such facilities are found to comply with the provisions of the aforesaid subtitle and rules and regulations adopted thereunder.

Section 561 (a), *supra,* requires that you cause each such institution to be periodically inspected for compliance with rules and regulations.

Section 562 vests in you full power and authority to promulgate reasonable regulations prescribing minimum standards of safety and sanitation of the physical plant and in the diagnostic, therapeutic and laboratory facilities of such institutions and, in addition, you shall prescribe minimum standards of services for the care of patients and their medical supervision.

Moreover, we understand that a policy directive of the State Department of Health (now a subordinate agency of the principal department of which you are the head, as aforementioned) of long standing duration is still in force and effect today. That directive, as enunciated by Dr. Robert Riley, then Director of the State Department of Health, required that local health departments make sanitary inspections covering rodent and vermin control, dishwashing, garbage disposal, food handling and storage, and general sanitation. Continuously through the intervening years, and in practice today, is a procedure under which the State, as the licensing authority, requests sanitary inspections by local authorities as prerequisites to annual renewal of licenses.

This, of course, is consistent with Section 561 (a), *supra,* which requires that you shall *cause* inspections to be made,

although the State would not be precluded from conducting its own inspections should it determine to do so.

In addition to the aforegoing enumeration of specialized responsibilities relative to the licensure and inspection of nursing homes, the Secretary of Health and Mental Hygiene has the following general jurisdiction, duties and powers. Article 43, Section 1F, supra, provides, *inter alia,* that you:

a. establish general policy for the environmental, physical and mental health services of the State and *its subdivisions* (emphasis supplied).

b. give general supervision to the administration of the health laws of Maryland *and each county and city thereof* (emphasis supplied).

Article 43, Section 9, *supra,* further provides that whenever your office assumes jurisdiction over any health condition in this State, the local health authorities shall assist you. This section does not exclude the City of Baltimore therefrom, and, by inference, appears to hold that you may assume jurisdiction under such conditions as, in the conduct of your office, you deem necessary and appropriate to protect the health interests of the people of this State. Furthermore, this statutory provision is interwoven with Section 1F, *supra,* which, as we have pointed out, gives you general supervision over the administration of all health laws in Maryland.

Thus, even where the city, or other local health department, may have local laws or ordinances requiring nursing homes to meet certain local standards, the Secretary of Health and Mental Hygiene does not—indeed, he cannot—abdicate his statutory mandate, as above set forth. In such instances the nursing home is required to submit proof to the State that it meets those local standards at the time the application for license is submitted. See Maryland State Department of Health *"Regulations Governing Nursing Homes"* 43G02—Section 030203. In such instances, we understand that the usual practice is for the local depart-

ment of health to confirm such proof, in writing, to the State.

Whether or not the City has a local law or ordinance applicable to the same subject matter is not material to our discussion. Section 3 of Article XIA of the Maryland Constitution provides in part that from and after the adoption of a charter by the City of Baltimore, the Mayor and City Council of Baltimore, "*subject to the Constitution and Public General Laws of this State*" (emphasis supplied) shall have full power to enact local laws of the City, but "in case of any conflict between said local law and any Public General Law now or hereafter enacted the Public General Law shall control."

For a discussion of such a conflict, see *Rossberg v. State,* 111 Md. 394, 74A, 581, 582; *Heubeck v. City of Baltimore,* 104 A. 2d 99.

We have found no local ordinance in the City of Baltimore which is in conflict with the Public General Law, as hereinabove enumerated and discussed. However, even where there is a positive grant of police powers to a municipality to conserve the health or safety in a particular field, the State will be held to have retained its original jurisdiction over the same subject and to possess the authority to exercise it concurrently with the municipality. See McQuillin, *Municipal Corporations,* Volume 6, Sections 24, 54.

Such tandem responsibility is apt to occur in the following illustrative example. State Regulations Governing Nursing Homes, supra, require, at Section 2402 thereof, that the occurrence of an infectious disease, food poisoning or dysentery, shall be reported immediately by the examining physician to the local health department *and* to the State Department of Health (emphasis supplied). Assuming such notice, both the local and State health departments would be obligated to launch an investigation of the matter either jointly or separately and take all proper steps for the restriction or suppression of such disease, or condition.

If the local health authority is the first to be notified, it shall promptly notify the State of such epidemic or unusual sickness within such local jurisdiction, and when thus informed, it is the duty of the State, cooperating with and aiding the local health department, to make scientific and practical investigation and inquiries into the cause or causes of such disease and to devise the most efficient means for its restriction or suppression or for the exclusion of any threatened disease and to take steps to prevent the spread and recurrence of such disease.

Pursuant to State Department of Health *Regulations Relating to Communicable Disease*—43B01—Sections 0301 and 030203 it is the duty of every physician on a case of reportable disease or condition, of known or unknown etiology, to report same to the local health officer who shall in turn notify the Commissioner of the Maryland State Department of Health. Here, as above, the duty of the local health authority is clearly defined provided there is notice in the first instance.

It is the opinion, therefore, that except when the Secretary of Health and Mental Hygiene assumes sole jurisdiction over situations as described in your query, the responsibilities of the local Health Department and the Department of Health and Mental Hygiene for Maryland are (1) to investigate and inquire into the cause or causes, (2) devise efficient means for its restriction or suppression or for the exclusion of any threatened disease, (3) to take steps to prevent the spread and recurrence of such disease and that such responsibilities are to be exercised concurrently.

FRANCIS B. BURCH, *Attorney General.*

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

PERSONNEL, SECRETARY OF

CHAPTER 98, LAWS OF 1970; CHAPTER 156, LAWS OF 1969—SECRETARY HAS POWER TO TRANSFER, REASSIGN AND/OR MERGE EMPLOYEES AND APPROPRIATED FUNDS AMONG AND WITHIN CONSTITUENT AGENCIES, AND FROM CONSTITUENT AGENCIES TO THE OFFICE OF THE SECRETARY, SUBJECT TO COMPLIANCE WITH APPROPRIATE BUDGETARY AND MERIT SYSTEM LAWS, AND SUBJECT FURTHER TO PRIOR CONSENT OF THE GOVERNOR IN CASE OF REORGANIZATIONS.

August 11, 1970.

Mr. Henry G. Bosz.

By your recent letter, you have requested our opinion with respect to the power of the Secretary of Personnel to transfer, merge and/or reassign services, positions and/or appropriated funds within the Department. Your inquiry requires an examination of the general reorganization act for State government enacted in 1969 as Chapter 156 of the laws of that year, codified in Article 41, Sections 1 through 15C ("the 1969 Act"), and the legislation creating the Department of Personnel, Chapter 98 of the Laws of 1970 ("the 1970 Act"), which took effect as of June 1, 1970.

The 1969 Act is an enabling act and provides the superstructure of reorganization for the executive and administrative departments of State government. This Act provides generally for the consolidation of the various executive and administrative departments, boards, commissions and other units of the executive branch of State government into not more than twenty principal departments, as may be prescribed by law. Article 41, Section 2.

The 1970 Act created the Department of Personnel as a principal department of State government under the direction of the Secretary of Personnel, who is appointed by the Governor with the advice and consent of the Senate. By the terms of the 1970 Act, the Office of the Commissioner of

Personnel, the State Employees' Standard Salary Board, and the State Incentive Awards Board were abolished and their functions transferred directly to the Office of the Secretary of Personnel. Article 41, Section 218(a). Concurrently, the Board of Ethics, the Board of Trustees of the Employees' Retirement System of the State of Maryland, the Board of Trustees of the Teachers' Retirement System, the Board of Trustees of the State Police Retirement System, and the State Accident Fund (hereinafter collectively referred to as "Constituent Agencies") were placed under the direction of the Secretary of Personnel.

With this background, we turn now to your inquiry. As we view it, the general question posed by you necessarily includes several more specific questions, including (i) whether the Secretary of Personnel has power to transfer, merge or reassign positions or employees within a Constituent Agency, among Constituent Agencies, and/or between one or more Constituent Agencies and the Office of the Secretary; and (ii) whether the Secretary of Personnel has power to transfer appropriated funds within a Constituent Agency, among Constituent Agencies, and/or between one or more Constituent Agencies and the Office of the Secretary.

In responding to these specific questions, we turn first to the provisions of the 1969 Act. This Act provides the Secretary of Personnel with certain broad general powers which are to be read in *pari materia* with the provisions of the 1970 Act. Pursuant to Section 3A of Article 41, it is provided that the Secretary:

(i) shall be responsible for the efficient and orderly administration of the Department;

(ii) shall be responsible for the comprehensive planning of programs and services within his jurisdiction;

(iii) shall be responsible for reviewing and approving the plans of all Constituent Agencies within his jurisdiction;

(iv) shall be responsible for the budget of his office;

(v) shall be responsible for the budgets of all Constituent Agencies within his jurisdiction;

(vi) shall be responsible for the organization of his office;

(vii) shall be responsible for recommending to the Governor changes in the organization and placement of units of the State Government within his jurisdiction;

(viii) shall have authority to appoint officers and employees in his office as provided in the budget;

(ix) may review any personnel action taken by any Constituent Agency; and

(x) shall have such assistants, employees and professional consultants as may be provided in the budget within his assigned jurisdiction.

In addition to the above broad powers and duties, the Secretary, by Section 12 of Article 41, was made responsible, under the direction of the Governor,

> ". . . for the coordination of programs and activities within and between principal departments for the elimination and prevention of duplication and overlapping of programs, activities and services within and among their respective departments. They shall be responsible for proposing, for the Governor's approval, plans for centralizing and coordinating administrative staff and clerical services within and among the divisions and departments within their jurisdiction, to the end that such services can be more efficiently and effectively conducted."

The 1970 Act creating the Department of Personnel did not by its terms constrict or otherwise limit the general powers granted to the Secretary in the 1969 Act except in particulars not relevant to the issues here involved. Specifically, the 1970 Act provided that the Secretary should be responsible for the operation of the Department and should establish guidelines and procedures to promote the orderly and efficient administration thereof. Article 41, Section 213 (c). The Secretary also was charged with responsibility for the budget of his Office and for those of the Constituent Agencies within his jurisdiction. Article 41, Section 217 (a). By Section 15B added to Article 64A (the Merit System

Law) in the 1970 Act, the Secretary was directed ". . . for purposes of efficiency and economy in State government, to review any positions in any classes of employment in the State government, and to recommend to the appointing authority a plan of reorganization, reassignment or elimination of the positions reviewed".

We think that the obvious intent of the General Assembly in enacting the 1969 Act was to eliminate the process of proliferation of agencies, the fragmentation of functions, and the diffusion of responsibility existing in State government. In our opinion, this intent was made fully operative in the express provisions of that Act. We are also of the opinion that, except to the extent that it may have specifically narrowed the powers granted to the Secretary under the 1969 Act (see, *e.g.*, Article 41, Section 217 (b)), the General Assembly otherwise manifested no intent in the 1970 Act to preclude the Secretary of Personnel from appropriately transferring, merging or reassigning positions, employees or funds so as to more efficiently carry out the functions of his office and those of the Constituent Agencies within his jurisdiction. To the extent that the specific power to so transfer, merge or reassign may not have been expressly conferred in each of the specific situations concerning which you inquire, we think that such power necessarily must be implied as essential to the full and adequate exercise of the powers and duties expressly provided therein. See, *Huffman v. State Roads Commission*, 152 Md. 566 (1927).

In construing the powers of the Secretary of Personnel, we think that it is necessary to distinguish between transfers, mergers or reassignments of positions or employees which are in the nature of reorganizations and those which are not. With regard to plans of reorganization, we think that it is clear that, while the Secretary need not receive the approval of any of the Constituent Agencies, the express provisions of Section 3A of Article 41 enacted in the 1969 Act would require the Secretary to recommend to, and receive the approval of, the Governor before such reorganization could be effected. On the other hand, where

such changes are not in the nature of a reorganization, the Secretary has the power to initiate the same without leave of the Constituent Agencies and without the requirement that he submit the same to and receive the approval of the Governor. In both instances, however, the provisions of Article 64A (the Merit System Law) and the rules and regulations promulgated thereunder must be adhered to in carrying out such administrative changes.

With regard to the transfer of appropriated funds incident to a plan of reorganization, or for any reason other than in connection with such a reorganization, we think that the Secretary of Personnel does have the power to initiate such transfers. But this power is not without limitation, however, since we are of the opinion that in order to effect such transfers, the Secretary must comply with the appropriate budgetary procedures as outlined in Article 15A of the Maryland Code.

Section 8(a) of Article 15A provides that the items and amounts making up the appropriation in any budget bill shall represent the initial plan of disbursement and apportionment of the appropriations of which they are part; and that each appropriation shall be paid out only in accordance with the schedule therefor, unless such schedule be amended, within the limits of such appropriation, by appropriate amendment of the budget. Such an amendment may be accomplished by Senate or House resolution (Article 15A, Section 8(b), (c)), or by amendment of the schedule by the Governor (Article 15A, Section 8(d)). Recommendations for amendment of the budget must first be submitted by the Secretary of Personnel to the Director of Budget and Procurement, who shall endorse his recommendation to the Governor thereon. Article 15A, Section 27.

It can thus be seen that transfers, mergers or reassignments in the nature of reorganizations and all reallocation of funds within the Department of Personnel must receive the approval of the Governor. This is consistent with Section 15C of Article 41, which places ultimate responsibility in the Governor for the reorganization of State government.

In summary, then, we are of the opinion that, subject to compliance with Article 64A (the Merit System Law) and the appropriate budgetary procedures set forth in Article 15A of the Maryland Code, and except as otherwise expressly provided in the 1970 Act, the Secretary of Personnel, without the approval of any Constituent Agency, may (i) transfer, merge or reassign positions or employees within a Constituent Agency, among Constituent Agencies, and/or between one or more Constituent Agencies and the Office of the Secretary, but only with the approval of the Governor of the State of Maryland in the case of a reorganization, and (ii) transfer appropriated funds within a Constituent Agency, among Constituent Agencies, and/or between one or more Constituent Agencies and the Office of the Secretary.

FRANCIS B. BURCH, *Attorney General.*

RICHARD G. MCCAULEY, *Asst. Attorney General.*

MODIFICATION OF LAND USE AND CONTROL UNDER REDEVELOPMENT AGREEMENTS—STATE PROPERTY NOT SUBJECT TO MUNICIPAL ZONING REGULATIONS.

May 26, 1970.

Mr. Vladimir A. Wahbe.

By an agreement dated July 28, 1954 between the State of Maryland ("State") and the Mayor and City Council of Baltimore ("City"), it was agreed that the City would acquire and convey to the State certain property in the Mount Royal Plaza area of Baltimore City. Under the provisions of Article 1, Section 8, of the Agreement, the City was to prepare a "Redevelopment Plan" for the area containing various standards and controls for land use. The State agreed to devote the property which it was purchasing to the uses specified in the Redevelopment Plan. The restrictions on the use of the property were to run with the land and be binding until January 1, 2004. Pursuant to this Agreement, the City subsequently approved a Redevelopment Plan for the property in question (Renewal Area #12; U.R. Md. 1-3) and conveyed the property enumerated in the Agreement to the State. The property is now used for a State office building complex.

The Redevelopment Plan, which is now known as the Urban Renewal Plan for Mount Royal Plaza, recites, in Section G(1), that the plan may be modified at any time by ordinance of the City, "provided that if modified after sale or lease of any land in the project area, the modification or variance must be consented to in writing by the purchaser or lessee of the property directly or immediately affected by the changes". The original Redevelopment Plan has been amended seven times. The latest amendment, by Ordinance No. 392, approved March 24, 1969, provides that the lots in the renewal area owned by the State "shall be used for structures containing offices for the State of Maryland, not

to exceed three million square feet gross area, provided, however, if a rapid rail transit system is built that serves these lots, the allowable square foot gross area for offices can be increased to five million".

A proposed ordinance, No. 621, is now pending before the City Council of Baltimore City. Generally speaking, the proposed ordinance would completely revise the zoning laws of Baltimore City. Insofar as the property now in question is concerned, the proposed ordinance is more restrictive than the Redevelopment Plan. The proposed zoning ordinance, if applicable, would not permit the State to achieve the space goals now permitted by the Redevelopment Plan, as amended.

With this background in mind, you have asked for our opinion as to the following. First, would the proposed zoning ordinance, if enacted, "repeal or supersede" Ordinance No. 392, approved March 24, 1969, which permits the State to use the property in question for office structures not exceeding three million square feet, without a rapid rail transit system, or not exceeding five million square feet in the event a rapid rail transit system is built? Second, at the expiration of the effective period of the Redevelopment Plan, will the State hold the property in question subject to City zoning restrictions?

We are of the opinion that the proposed City zoning ordinance will not repeal or supersede any provisions of the Redevelopment Plan, as amended. As noted above, since the property in question has been sold to the State, any modification or variance in the Redevelopment Plan must be consented to in writing by the State. The City cannot, by unilateral action, amend the uses which are permitted by the Redevelopment Plan.

In addition, it is clear that property owned by the State is not subject to municipal zoning regulation. For many years it has been the position of this office that State owned property is not subject to local zoning regulations. In 35 Opinions of the Attorney General 273 Attorney General

Hall Hammond, now Chief Judge of the Court of Appeals of Maryland, stated "it is accordingly our opinion that Baltimore City zoning regulations do not apply to State construction, in the absence of a contrary intent expressed in legislation dealing with the particular State agency involved". This position has been repeated in several opinions recently issued by this office, which have not yet been published. Numerous opinions of this office have taken a similar approach with regard to related questions. See, for example, 51 Opinions of the Attorney General 86 (county laws relating to licensing of electricians not applicable to State employees); 46 Opinions of the Attorney General 156 (contractor on State building not required to obtain plumbing permit); 36 Opinions of the Attorney General 221 (State not required to have electrical wiring in public buildings inspected by local authorities); 23 Opinions of the Attorney General 400 (plumbing contractors not required to obtain work permits for work upon State institutions). The only opinion which has ever taken a contrary approach (23 Opinions of the Attorney General 399) was expressly overruled by Attorney General Thomas Finan in 46 Opinions of the Attorney General 156. All of these opinions are based upon the "sovereign right of the State to regulate its property without interference from subordinate State entities", 51 Opinions of the Attorney General 86.

Article 66B of the Annotated Code of Maryland, which authorizes the City to promulgate zoning regulations, does not indicate whether the State is to be subject to City zoning. Senate Bill No. 356 of the 1970 Regular Session of the General Assembly, which repealed and reenacted Article 66B with amendments, is also silent on this subject. In such a situation the State will not be presumed to have restricted its sovereignty or to have waived its right to regulate its own property. As stated by Attorney General Hall Hammond in 35 Opinions of the Attorney General 273, 274-275:

> "There is no expression in these Sections [Art. 66B, Secs. 1-3], or in any other part of the enabling Act, which indicates that the State is, or is

not, to be subject to City zoning. On this, the language itself is neutral.

"We have found no controlling Maryland decisions. In *Kentucky Institution v. Louisville,* 123 Ky. 767, 97 S.W. 402, a valid local ordinance requiring fire escapes was held inapplicable to a State institution for the blind.

" 'The State', said the Court, 'will not be presumed to have waived its right to regulate its own property by ceding to the City the right generally to pass ordinances of a police nature regulating property within its bounds.' Similarly *Milwaukee v. McGregor,* 140 Wis. 35, 121 N.W. 642, held a municipal building code inapplicable to the construction of public school buildings by the school board, a State agency. The Court there held that general legislation will not be deemed to restrict the sovereignty of the State, in the absence of express language to the contrary, and likened this rule to the immunity of the State from suit without its consent (*State v. B. & O. R.R. Co.,* 34 Md. 344, 374) and to the State's exemption from the statute of limitations (*Booth v. United States,* 11 G. & J. 373).

"Similar results have been reached in the attempted application of municipal zoning to state agencies invested with the power of eminent domain. *State v. County Commissioners of Cuyahoga County,* 79 N.E. (2) 698, aff'd 78 N.E. (2) 694 (Ohio); *Decatur Park District v. Becker,* 368 Ill. 442, 14 N.E. (2) 490.

"It has been held on similar principles that agencies of the Federal Government are not subject to local zoning and building regulations in the absence of statutory language indicating the opposite Congressional intent. *U. S. v. City of Chester,* 144 F. (2) 415; (C.C.A. 3d); *Curtis v. Toledo Housing Authority,* 78 N.E. (2) 676 (Ohio); 171

A.L.R. 325 and cases there cited. (In *Baltimore v. Linthicum*, 170 Md. 245, this question was argued, but the Court found it unnecessary to decide it.)"

We believe that the above quotation continues to accurately summarize the existing state of the law.

We are therefore of the opinion that both questions asked by you must be answered in the negative. The proposed zoning ordinance of the City will not "repeal or supersede" the Redevelopment Plan, as amended. Nor will the State hold the property in question subject to City zoning restrictions at the expiration of the effective period of the Redevelopment Plan. The same would be true, of course, during the effective period of the Redevelopment Plan. In reaching this conclusion we have considered Section 2.0-1b of the proposed zoning ordinance and Article III, Section 6, of the Agreement between the City and the State, but we do not find these provisions to be applicable or controlling.

We would agree, however, with your suggestion that in the interest of inter-governmental cooperation your office should bring this matter to the attention of the appropriate City officials so that the proposed zoning ordinance and accompanying plans may be amended so as to correspond to the uses permitted on the subject property under the provisions of the Redevelopment Plan, as amended.

FRANCIS B. BURCH, *Attorney General.*

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

PLANNING AND ZONING—STATE PLANNING DEPARTMENT—ARTICLE 62C (FRIENDSHIP INTERNATIONAL AIRPORT AUTHORITY BILL), AS AMENDED, REPEALS BY IMPLICATION ARTICLE 1A, SECTION 38 (STATE FUNDS TO AIRPORT UNDER GUIDANCE OF DEPARTMENT OF STATE PLANNING).

July 2, 1970.

Mr. Vladimir A. Wahbe.

In 1966 the General Assembly enacted legislation providing State aid for financing capital improvements to Friendship International Airport. The statutory provisions are now found in Article 1A, Section 38, of the Annotated Code of Maryland, and provide as follows:

"Section 38. Capital improvements.

"(a) Policy of State.—Because of the role of Friendship International Airport as the airport for the entire State of Maryland and the high desirability of making constant improvements and refinements in the service and facilities of Friendship International Airport, it is the policy of the State of Maryland to make grants of funds to and for the use of the mayor and city council of Baltimore on behalf of Friendship Airport for the capital improvements program of the airport.

"(b) Director of State Planning to attend airport board meetings.—The Director of State Planning, or his designee, shall be invited to attend all official meetings of the airport board of the mayor and city council of Baltimore in order to become familiar with the operational background of Friendship International Airport affecting its proposed capital improvements program.

"(c) Submission of proposed capital improvements program to State Planning Department.—The airport board of Baltimore shall submit any

proposed capital improvements program for Friendship International Airport on which State financial participation is sought, as hereinafter detailed, to the State Planning Department not later than July 1st of each year in which such capital improvements project is proposed.

"(d) Reports by Director of State Planning to Governor and General Assembly.—Sixty days prior to every regular session of the General Assembly of Maryland, the Director of State Planning shall report to the Governor and to the General Assembly concerning proposals by the airport board of the mayor and city council of Baltimore for the capital improvement program for Friendship International Airport. In this report the Director of State Planning shall list the several proposals for capital improvements together with an estimate of cost therefor, any contributions or payments therefor by the federal government or from any other source, and the remaining portion of the cost to the mayor and city council of Baltimore. In the report also the Director of State Planning shall include his recommendation as to each item in the proposed capital improvement program for Friendship International Airport and as to whether or not the State of Maryland, as in this section provided, should defray a portion of the cost of any, or all, of the proposed capital improvement projects for the coming year.

"In this report also the Director of State Planning shall determine the amount of money necessary for the payment of the State of Maryland of one-half of the cost of these capital improvement projects to the mayor and city council of Baltimore, after first deducting any contributions or payments made therefor by the federal government or from any other source.

"(e) Authority of Governor to provide State

funds.—For those capital improvement projects at Friendship International Airport which are approved by the Director of State Planning, the Governor may provide State funds sufficient to pay to the mayor and city council of Baltimore on behalf of Friendship Airport one-half of the estimated costs of the projects to the mayor and city council of Baltimore, computed as in this section provided.

"(f) Termination of capital improvements financing by State.—If the Director of State Planing and the Governor of Maryland determine in their judgment that Friendship International Airport needs no further capital improvements or that it has become sufficiently self-supporting to pay not only its operating costs but also to finance its capital improvements programs out of its revenues, further capital improvements financing by the State shall be terminated and the Governor shall recommend to the General Assembly the repeal or modification of this section. (1966, ch. 317.)".

In 1969 the General Assembly enacted a statute creating the Maryland Airport Authority (Article 62C, Sections 1-25). It was originally contemplated that the Maryland Airport Authority would buy Friendship International Airport from the Mayor and City Council of Baltimore (Article 62C, Section 7). However, difficulties with the purchase arose when the Court of Appeals ruled in *Balenson v. Maryland Airport Authority*, 253 Md. 490, that Section 7 of Article 62C was "invalid because it failed to observe the mandate of Maryland Constitution, Article III, Section 34".

At its 1970 Regular Session, the General Assembly amended Article 62C so as to create the Friendship International Airport Authority to act in the stead of the Maryland Airport Authority. Section 7 of Article 62C was amended to provide for a lease of Friendship International Airport from the Mayor and City Council of Baltimore to the Friendship International Airport Authority, for a term of

not less than forty years, commencing on September 1, 1970. Sections 5(j) and 10 of Article 62C, as amended, authorize the Friendship International Airport Authority to issue revenue bonds for the purpose of providing funds to pay the cost of any extensions, enlargements or improvements to "airport facilities". Section 7(b) of Article 62C, as amended, provides as follows with regard to outstanding grants of state and federal funds to the City of Baltimore for the operation of Friendship International Airport:

> "Until the execution of the lease between the Authority and the City and until such time as the Authority expresses to the City its ability to assume active responsibility for the operation of the Airport, the City shall continue its current capital improvement programs in progress by utilizing *authorized unexpended* state and federal grants together with funds of the City of Baltimore." (Emphasis added.)

With the above background in mind, you have asked for our opinion as to the effect of Article 62C, as amended, upon Article 1A, Section 38. It is our opinion that Article 62C, as amended, completely repeals by implication Article 1A, Section 38. Article 62C clearly belongs in that class of legislation which embraces a complete scheme for a given subject. As stated by the Court of Appeals in *Hitchcock v. State,* 213 Md. 273, 279:

> "In such case [*i.e.* an act which belongs "to the class of legislation that embraces a complete scheme of regulation for a given subject"], the courts have taken the view that the new law is a substitute for existing laws on the subject, and repeals those earlier laws. Where the Legislature undertakes to deal with the whole subject matter, there is an exception to the general rule that repeal by implication is not favored, although it has been said in such cases the repeal is not really by implication, but is actual, although not expressed."

See also *LaFontaine v. Wilson*, 185 Md. 673, 681; *State v. Coblentz*, 167 Md. 523, 527; *Ferry Corp. v. Queen Anne's Co.*, 160 Md. 398, 405; *State v. Amer. Bond. Co. of Balto.*, 128 Md. 268, 272; and *State v. Gambrill*, 115 Md. 506, 512.

Considering the contents of both statutes, and particularly in view of Section 7(b) of Article 62C, as amended, which provides for a continuation only of "authorized unexpended" state grants, we are of the opinion that Article 62C, as amended, repeals by implication the provisions of Article 1A, Section 38.

The repeal by implication of Article 1A, Section 38, takes effect as of July 1, 1970, the effective date of the 1970 amendments to Article 62C. We do not believe it is necessary to consider the question of whether, in view of the *Balenson* case, *supra*, the original provisions of Article 62C, as enacted in 1969, would repeal by implication Article 1A, Section 38, as such a repeal is clearly the result of the 1970 legislation creating the Friendship International Airport Authority.

We further believe, to answer the additional questions raised by you, that the Friendship International Airport Authority will come into being on July 1, 1970, even if the Chairman and members of the Authority have not been appointed on that date and even though the term of the lease from the City of Baltimore will not become effective until at least September 1, 1970.

In conclusion, as of July 1, 1970 the responsibilities of the Department of State Planning under Article 1A, Section 38, will cease. We call your attention, however, to Section 22 of Article 62C, which provides that the Director of the State Planning Department (now the Department of State Planning) shall call and chair joint sessions between the Friendship International Airport Authority and the Maryland Port Authority to institute joint studies and activities.

FRANCIS B. BURCH, *Attorney General.*

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

PLANNING AND ZONING—INTERPRETATION OF SEDIMENT CONTROL PROVISIONS OF CHAPTER 245 OF THE LAWS OF MARYLAND 1970.

October 20, 1970.

The Honorable Thomas Hunter Lowe.

In your recent letter you raised numerous questions with regard to the "Sediment Control" provisions of Chapter 245 of the Laws of Maryland of 1970. The pertinent sections of this Act, which adds new Sections 105 through 110 to Article 96A of the Annotated Code of Maryland, are as follows:

"105.

"The General Assembly of the State of Maryland hereby determines and finds that the lands and waters comprising the watersheds of the State are great natural assets and resources; that as a result of erosion and sediment deposition on lands and in waters within the watersheds of the State, said waters are being polluted and despoiled to such a degree that fish, marine life, and recreational use of the waters are being adversely affected. In order to protect the natural resources of the State, the Secretary of Natural Resources is directed to adopt criteria and procedures to be used by the counties and the local soil conservation districts to implement soil and shore erosion control programs. Such procedures may provide for the review and approval of major grading, sediment and erosion control plans by the Department of Natural Resources.

"106.

"(A) Before land is cleared, graded, transported, or otherwise disturbed for purposes including, but not limited to the construction of buildings, the mining of minerals, the development

of golf courses, and the construction of roads and streets by any private person, partnership, corporation, municipal corporation, county or State agency within the State of Maryland, the proposed earth change shall first be submitted to and approved by the appropriate soil conservation district. Land clearing, soil movement and construction shall be carried out in accordance with the written recommendations of the said soil conservation districts regarding the control of erosion and siltation and the elimination of pollution.

"(D) Notwithstanding the provisions of this section, the Department of Natural Resources shall review and approve all land clearing, soil-movement and construction activity undertaken by any agency of the State government.

"107.

"The provisions of this subtitle shall not apply to agricultural land management practices, the construction of agricultural structures or to the construction of single-family residences and/or their accessory buildings on lots of two acres or more. Regardless of planning, zoning or subdivision controls, no permits shall be issued by any county or municipality for grading or for the construction of any building, other than those matters exempted above, unless such grading or construction is in accordance with plans approved as provided in this subtitle.

"108.

"(A) The counties and municipalities shall have the power and authority to issue grading and building permits as otherwise provided by law. No grading or building permit shall be issued until the developer submits a grading and sediment control plan designed by a professional engineer registered in the State of Maryland, approved by the

> appropriate soil conservation district, and the developer certifies that all land clearing, construction and development will be done pursuant to the said plan. Criteria for sediment control and for referral of an applicant to the appropriate soil conservation district shall be acceptable to the soil conservation district and the Department of Natural Resources. The county agency responsible for on-site inspection and enforcement of the provisions of this subheading shall make a final inspection and forward its report to the appropriate soil conservation district. Notice of violation of the provisions of this subtitle shall be filed with the Department of Natural Resources, as well as with the appropriate county agency."

Your initial series of questions relates to the applicability of Section 106(A). First, you have inquired as to whether land may be cleared or graded only pursuant to written recommendations of the controlling soil conservation district. We are of the opinion that under the terms of the statute this question should be answered in the affirmative, subject to the provision of Section 110 authorizing action by the Bureau of Public Works or similar agency in municipalities not within a soil conservation district. Second, you have asked whether the State Roads Commission must have the written approval and recommendations of the applicable soil conservation district before "building or scraping" a road. The answer to this question depends upon what you mean by the expression "scraping". We do not believe, for example, that the scraping of a dirt road during the course of routine maintenance, such as to remove potholes, would require the approval of the applicable soil conservation district. On the other hand, if the scraping goes beyond routine maintenance and involves a change in the character of the road or the building of a new road, then we believe prior approval would be required. Third, you have asked whether Section 106 (A) applies "in the event land is being cleared for the erection of an improvement by private person and/or town, county or state agen-

cies". Since the statute expressly states that it is applicable to the construction of buildings by private persons, as well as municipal corporations and State and county agencies, this question must also be answered in the affirmative. Finally, you ask "how detailed would the application of this Law be". We do not believe that the statute gives a clear answer to this question. On the one hand, the language of Section 106(A) is extremely broad, as it simply states that "[b]efore land is cleared, graded, transported, or otherwise disturbed . . . the proposed earth change shall first be submitted to and approved by the appropriate soil conservation district". On the other hand, the illustrations given relate only to major clearing and grading. In addition, the statute is intended to regulate clearing and grading which would result in erosion and sediment deposition in the waters of the State. Since the provisions of the statute are ambiguous in this respect and the legislative intention is not altogether clear, we are of the opinion that the statute should be construed to apply only to such clearing or grading as would have a reasonable likelihood of causing erosion or sediment deposition in the waters of the State if not properly conducted. Any other construction would lead to absurd results, since a child digging with a spoon in the backyard of his home technically transports or otherwise disturbs land. It has often been recognized that when the application of a statute is ambiguous, a construction which would be in accord with the fair and reasonable intention of the Legislature should be adopted, and oppressive or absurd consequences should be avoided. *Read Drug & Chemical Co. v. Claypoole,* 165 Md. 250; *Kolb v. Burkhardt,* 148 Md. 539; *Height v. State,* 225 Md. 251. The determination of whether the prior approval of the appropriate soil conservation district would be required would therefore have to be determined on a case by case basis after a consideration of all the relevant factors. As this determination may prove to be difficult, we would recommend the passage of clarifying legislation.

Next, you have raised several questions concerning Section 106(D). First, you have asked whether this section,

properly interpreted, means that before land is cleared by an agency of State government the Department of Natural Resources, as well as the appropriate soil conservation district, must give its approval. We believe that under Section 106(D) only the Department of Natural Resources would be required to give approval when land is being cleared by a State agency. Second, you have asked the extent to which this section would be applicable to agencies of State government. Particularly, you inquire as to whether it would apply to the scraping of dirt roads by the State Roads Commission. We believe that the scope of applicability of Section 106(D) should be determined on the same basis as set forth in the above answer to your fourth question concerning Section 106(A). Again, clarifying legislation would seem to be appropriate.

You have then asked whether under Section 107 "any structure save agricultural buildings erected on land less than two acres must receive the approvals set forth in Section 106(A) before the county or municipality is permitted to grant a permit to begin construction". This question must be answered in the negative. Under Section 107 there are three exceptions: first, for agricultural land management practices; second, for agricultural structures; and third, for single-family residences on two acres or more.

Turning to Section 108(A), you have asked whether it is proper to interpret this section to mean that "any person" erecting a home on less than two acres must first submit a grading and sediment control plan designed by a professional engineer. We do not believe that this is a proper interpretation of Section 108(A), since the required submission of a grading and sediment control plan designed by a professional engineer applies only to a "developer". Therefore, only a "developer" would be required to submit the grading and sediment control plan.

Lastly, you have asked whether Section 110 substitutes the Bureau of Public Works or some other municipal agency to act in the place of a soil conservation district in those municipalities not within such a district. We believe that

this is a proper interpretation of the requirements of Section 110. The statute clearly provides that in municipalities which are not within a soil conservation district the Bureau of Public Works or a similar municipal agency is empowered and directed to enforce and carry out the provisions of the subheading in lieu of a soil conservation district.

We further believe that you are correct in your assumption that the effective date of any amendments to Chapter 245 could be prior to July 1, 1971, so long as there is compliance with the applicable provisions of the Constitution of Maryland.

FRANCIS B. BURCH, *Attorney General.*

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

POLICE

POLICE COMMISSIONER—PARKING VIOLATIONS—PETTY OFFENSES—WAIVER OF RIGHT TO CONFRONTATION AND PRIVILEGE AGAINST SELF-INCRIMINATION—POLICE OFFICER'S OATH.

January 26, 1970.

Commissioner Donald D. Pomerleau.

In your letter you ask us to pass on the legality of the certification procedures now being used by the Baltimore City Police Department when issuing parking summonses. The present summons contains the following certification:

> "POLICE OFFICER'S OATH: I, THE UNDERSIGNED POLICE OFFICER, ATTEST AND CERTIFY, UNDER PENALTY OF PERJURY, THAT THE MATTERS HEREIN SET FORTH, ARE TO THE BEST OF MY KNOWLEDGE, TRUE."

The reverse side of the summons states:

> "IT SHALL NOT BE NECESSARY THAT THE OFFICER WHO ISSUED THE SUMMONS APPEAR, AND THE COPY OF THE SUMMONS BEARING THE CERTIFICATION BY THE OFFICER SHALL BE PRIMA FACIE EVIDENCE OF THE MATTERS HEREIN SET FORTH."

See Article 66½, Section 322, Annotated Code of Maryland (1967 Repl. Vol.).

The problem presented is the outgrowth of a ruling by a Judge of the Municipal Court of Baltimore City who questions the constitutionality of Article 66½, Section 322, supra, on the theory that the non-appearance provision of that section of the law deprives the alleged violator of his/her right to confrontation, which, in turn, amounts to "self-incrimination by the defendant" and that the certifi-

cation affixed to the parking summons is deficient because: "it doesn't follow the 'truth, whole truth, and nothing but the truth formula' required by the Court."

It is a well settled principle that every presumption favors the constitutionality of a statute and that a statute should only be voided on constitutional grounds where a defect is clearly proven. Where any doubt exists, the legislation should be sustained. See *Sutherland Statutory Construction,* 3rd Ed., Section 1706; *Woodell v. State,* 2 Md. App. 433, 437; and *Bacheller v. State,* 3 Md. App. 626, 631-636.

Article 66½, Section 322, supra, relates to a distinct class of offenses known as "parking violations". As applied to Baltimore City, these offenses are enumerated in Article 31, Baltimore City Code (1966 Ed.), which includes a schedule of local traffic ordinances and regulations of the Baltimore City Department of Transit and Traffic. Pursuant to this ordinance, the Commissioner of Transit and Traffic is authorized to prohibit vehicles from stopping and/or parking on sections of roads, streets, lanes, or alleys, etc., and to adopt and promulgate rules, regulations, orders, and directives relating to, or in conjunction with the movement of vehicular and pedestrian traffic in the City of Baltimore. See Article 31, Section 2, supra, at pp. 23 and 24. A closer examination of Article 31, Section 94, "General Fines"; Section 102, "Snow Emergency Routes"; and Sections 127-128, "Clear Streets" sets forth the various penalty provisions for parking violations in Baltimore City and reflects fines ranging from $10.00 to $25.00 and costs.

"Generally speaking, the rules applied to the prosecution of crimes are applicable to the prosecution of traffic infractions." *People v. Bliss,* 278 N.Y.S. 2d 732. However, there is a body of case law which holds that violations of traffic laws, ordinances, and regulations do not constitute "crimes". See *Hobart v. First Criminal Judicial District Court of Bergen County,* 160 A. 674; *Breland v. Gray,* 37 N.Y.S. 2d 291; *People v. Letterio,* 213 N.E. 2d 670; and more recently *People v. Bliss, supra.* These cases all involve specific stat-

utes declaring such traffic offenses as parking violations not to be a "crime". See *Breland v. Gray, supra.* The Maryland Motor Vehicle Law does not contain such a specific statement nor is there any decision of the Court of Appeals of Maryland on this point. It, therefore, becomes necessary to examine case law outside the State of Maryland to determine the basic nature of parking violations.

In *People v. Letterio, supra,* the highest Appellate Court of the State of New York ruled that the right to counsel as guaranteed by the Sixth Amendment of the United States Constitution did not apply to traffic offenses because neither the State law nor the Federal law requires the Court, having jurisdiction of petty offenses such as traffic offenses, to advise the defendant of his right to counsel. The Court said, "there are, historically, certain minor transgressions which admit of summary disposition." (Emphasis added.) On the other hand, the Supreme Court of the United States held that the offense of "reckless driving", although subject to a maximum punishment of thirty (30) days imprisonment and a $100.00 fine could not be classified as a "petty offense" in respect of which Congress may dispense with a jury trial because it is "an act of * * * obvious depravity". *District of Columbia v. Colts,* 282 U.S. 63, 75 L. Ed. 177, 51 S. Ct. 52.

The pertinent question before us is whether the possible consequences to the defendant from a conviction of a petty offense are sufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of a speedy and non-jury adjudication? We think not. Petty offenses are not matters of recent origin. The Federal Government has classified a "petty offense" as one punishable by no more than six (6) months imprisonment and a fine of $100.00. See Title 18, U.S.C.A., Section 1. Similarly, Rule 719 (2) (a), Maryland Rules of Procedure, requires that counsel need only be assigned to an accused "if the offense charged is one for which the maximum penalty is death or imprisonment for a period of six (6) months or more, or a fine of $500.00,

or both." In *Duncan v. Louisiana*, 88 S. Ct. 1444, the Supreme Court took the position that jury trials, which are secured by the Sixth Amendment of the Constitution of the United States, are not required for petty offenses, while the Maryland Rules of Procedure do not require the appointment of counsel as heretofore stated. It would then follow and be within the realm of legal logic that the constitutional right to confrontation and the privilege against self-incrimination may be waived in less explicit terms than those required by the Supreme Court in *Miranda v. U. S.*, 384 U.S. 436; *Johnson v. Zerbst*, 304 U.S. 458, 464; and more recently enunciated by the Court of Special Appeals of Maryland in *Wayne v. State*, 4 Md. App. 424. The aforementioned cases involve criminal prosecutions of a felony as distinguished from petty offenses. The substantive crimes charged in each of these three cases were *malum in se*, therefore, the Court held that any waiver of a constitutional right would have to be of a voluntary, knowing, and intelligent nature. On the other hand, the language of Article 66½, Section 322, supra, imposes an implied waiver to a "parking violation" which is *malum in prohibitum*. In the case of parking violations, a waiver may result from the failure of an alleged parking violator to notify the Deputy Clerk of the Traffic Division of the Municipal Court of Baltimore City that he desires a full hearing, including a confrontation by the officer who issued the summons, at least five (5) days prior to the date of his hearing as set forth in the summons.

Based on the authorities cited herein, we conclude that parking violations are "petty offenses" and that the failure of a person summoned for a parking violation to notify the Deputy Clerk of the Traffic Division of the Municipal Court, under the conditions set forth above, acts as a waiver of the inherent right to confrontation as guaranteed by the Sixth Amendment of the Constitution of the United States and, at the same time, dispenses with the privilege against self-incrimination as guaranteed by the Fifth Amendment of the Constitution of the United States.

Next we turn to the question of the Police Officer's Oath

as set forth on page one (1) of this opinion and find that the certification connotes under "penalty of perjury" the truth of the matters set forth in the summons. There is no fixed formula for an oath; all that is required of a witness is to swear or affirm according to such form as they declare to be binding to tell the truth. See *C.J.S. Witnesses,* 320; see also *Poe Pleading and Practice,* Tiffany's Edition, Vol. II at p. 256.

We are cognizant of the essential function of the Traffic Courts in the day to day administration of justice and we share in their concern for the rights of an accused. We do not believe, however, that the provisions of our law in the instant case amount to a denial of those rights.

FRANCIS B. BURCH, *Attorney General.*

BERNARD L. SILBERT, *Asst. Attorney General.*

POLICE—POLICE COMMISSIONER—LINE OF DUTY INJURIES —SPECIAL DISABILITY BENEFITS—SPECIAL DEATH BENEFITS—QUALIFICATIONS.

March 16, 1970.

Commissioner Donald D. Pomerleau.

In your letter you state that your agency has a daily need to determine whether injuries sustained and reported by its employees are incurred "in the line of duty". Accordingly, you indicate that your Medical Section follows the general guidlines of an unreported opinion by this office issued on March 29, 1967. Because that opinion did not cover all possible contingencies, but answered only the factual issues presented, you ask us to express our opinion on the following hypothetical cases relating to "line of duty" injuries.

Question 1: An employee is ordered to report to duty on an emergency basis. He leaves home in his personally-owned car or public conveyance en route to his assignment and is involved in an accident from which he sustains injuries. In this case, the employee is not reporting on a regularly scheduled shift, but has been notified to report to his unit immediately because of a police emergency. Would this be considered line of duty?

Answer: Yes—As stated in our previous opinion—"A requirement of eligibility for the special disability benefit of the Retirement System is a showing that disability arose 'out of and in the course of the actual performance of duty'." See Opinion of Attorney General, 3/29/67, supra, cf. *Police Commissioner v. King*, 219 Md. 127. The illustration in the first hypothetical case indicates that the employee was not merely "on call" or merely en route to work, but under a direct order to report because of a police emergency. A failure to do so on his part without justifiable excuse could be interpreted as dereliction of duty.

Question 2: A police officer is assigned an official vehicle as part of his regular police duties. The nature of such duties require that his car be immediately available, and

as a consequence, the officer used the car as transportation between his home and his place of duty:

(a) If this officer, using the assigned vehicle between home and work while working on a regular shift is injured in an automobile accident en route, are his injuries considered to be line of duty?

(b) If this officer is carrying another member of the Department as a passenger while en route between his home and work in his assigned vehicle to report on his regularly-assigned shift and is involved in an accident, is the employee passenger who might be injured considered to be injured in line of duty?

(c) If the officer to whom the car is assigned is en route between his home and work in his assigned vehicle to report to his regularly-assigned shift, but is riding as a passenger with another member of the Department who is the operator of the vehicle, are any injuries sustained by the employee passenger and/or the employee operator in an accident to be considered line of duty? Would injuries sustained by additional employee passengers be considered line of duty?

Answer: (a) Yes—Though an injury to an employee while on his way to work is not considered to be received in the course of his employment, if he is employed to work at a certain place and as a part of his employment duties his employer provides him with free transportation to or from work, his period of service continues during the time of transportation. Therefore, an injury which occurs during the course of transportation would be regarded as arising within the "line of duty". See *Heaps v. Cobb*, 185 Md. 372 and *Harrison v. Central Construction Co.*, 135 Md. 170.

(b) No—In this instant the guest passenger is not "on duty" nor could he be considered within that class of employees who is normally supplied with free transportation by his employer. Such an employee who might be injured would not be considered to have sustained his injury within the "line of duty". See *Police Commissioner v.*

King, supra, and *Harrison v. Central Construction Co., supra.*

(c) Yes—In this case the passenger employee to whom the vehicle was assigned would have to be considered—on duty. All that is required is that the injured party sustained his injury during the interim of transportation.

No—In the latter case the employee operator would not be entitled to benefits under the principles of law as heretofore enunciated in answer (b). Neither the passenger-operator nor additional passengers would be considered to have been injured in the "line of duty".

Question 3: If the cases in questions 1 and 2(a) are both to be considered not line of duty in your opinion, then a third eventuality should be explored. A police officer using an assigned vehicle between home and work, when called to report on non-scheduled emergency basis, is injured in an automobile accident en route. Are his injuries sustained in line of duty?

Answer: Though the question as framed renders itself moot because of our affirmative conclusions in answers 1 and 2(a), we will clarify the matter by repeating the test to be applied. That test is set down in the *Harrison* case at P. 177—"When an injury occurs before the beginning or after the termination of work there are two general rules applicable to the question as to whether it arose out of and in the course of employment. The first is that an employee, while on his way to work, is not in the course of his employment. The second is that where the workman is employed to work at a certain place, and as part of his contract of employment there is an agreement that his employer shall furnish him free transportation to or from his work, the period of service continues during the time of transportation, and if an injury occurs during the course of transportation it is held to have arisen out of and in the course of employment."

Because that employer, in an hypothetical sense, has provided the employee with transportation, the employee's

service is logically extended and would continue through the transportation. Any injury sustained thereunder would, under the *Harrison* case, be considered to have occurred in the "line of duty".

Question 4: Under questions 1 through 3, should a finding of negligence on the part of the employee have any bearing on the line of duty determination?

Answer: No—A finding of negligence will preclude an applicant from benefits under the Retirement System as provided in Article 22, Section 32(e)(i), Baltimore City Code, "Special Disability Benefits" and "Special Death Benefits" respectively. However, those persons making application for ordinary disability retirement benefits, see Section (c) or ordinary death benefits as set forth in Section (h) would not be required to negate the element of willful negligence in perfecting their claims before the Retirement Board.

It is obvious that this opinion is not binding on the Board of Trustees who are charged with the responsibility of managing the employee's Retirement System. That function is the statutory duty of the City Solicitor of the City of Baltimore. See Article 33, Section (k), Baltimore City Code. As a member ex officio of that Board, your attention is called to the heretofore stated guidelines which we have prepared in answer to the hypothetical questions presented by the Deputy Commissioner of the Administrative Bureau. Subsequent claims for special disability or death benefits should be decided solely on the basis of a factual investigation and the medical determination of the departmental medical officer.

FRANCIS B. BURCH, *Attorney General.*

BERNARD L. SILBERT, *Asst. Attorney General.*

POLICE — POLICE COMMISSIONER — JUVENILES — OFFENSES EXEMPT FROM THE DIVISION OF JUVENILE CAUSES OF THE SUPREME BENCH OF BALTIMORE CITY—JURISDICTION OF MUNICIPAL COURT TO TRY MANSLAUGHTER BY AN AUTOMOBILE; UNAUTHORIZED USE OR OCCUPANCY OF A MOTOR VEHICLE; TAMPERING WITH A MOTOR VEHICLE; OPERATING A VEHICLE UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUGS, WHEN COMMITTED BY PERSONS WHO HAVE REACHED THEIR 16TH BIRTHDAY.

March 17, 1970.

Commissioner Donald D. Pomerleau.

You request that we express our opinion concerning certain provisions of Article 26, Section 70-2(d)(2), Annotated Code of Maryland (1966 Repl. Vol.) as it relates to the jurisdiction of the Division of Juvenile Causes of the Supreme Bench of Baltimore City. Subsection (d) sets forth certain "exemptions" from specific proceedings of which the Court lacks jurisdiction. Specifically, subparagraph (2) states:

> "A proceeding involving a child who has reached his 16th birthday, alleged to have done an act in violation of any provision of Article 66½, or any other traffic law or ordinance (other than manslaughter by automobile, unauthorized use or occupancy of a motor vehicle, tampering with a motor vehicle, or operating a vehicle under the influence of intoxicating liquor or drugs)."

In your letter you state that the Division of Juvenile Causes of the Supreme Bench of Baltimore City has indicated that it will not accept petitions for proceedings involving persons who have reached their 16th birthday, but have not reached their 18th birthday, when the charges to be placed are one or more of the following:

1. Manslaughter by an automobile.
2. Unauthorized use or occupancy of a motor vehicle.

3. Tampering with a motor vehicle.
4. Operating a vehicle under the influence of intoxicating liquor or drugs.

As defined in Article 26, Section 70-1 (c), supra, "child" means a person who has not reached his 18th birthday except in Baltimore City where, until July 1, 1970, "child" means a person who has not reached his 16th birthday.

The 1969 Legislature imposed an effective date of July 1, 1970, to confer on the Division of Juvenile Causes of the Supreme Bench of Baltimore City the exclusive jurisdiction to try as a "child" those persons who have not reached their 18th birthday. We, therefore, conclude that those offenses, as heretofore enumerated in paragraph 2 above and set forth as exclusions from a class of exempt motor vehicle offenses, should be brought before the Municipal Court of Baltimore City pursuant to their jurisdiction under Article 26, Sections 109 and 115, supra, (Municipal Court Act) until July 1, 1970, unless said date is extended by House Bill number 940 which is currently pending before the General Assembly.

FRANCIS B. BURCH, *Attorney General.*

BERNARD L. SILBERT, *Asst. Attorney General.*

POLICE—POLICE COMMISSIONER, BALTIMORE CITY—PISTOL LAW—FALSE APPLICATION—CONFISCATION AND DISPOSAL OF FIREARMS IN VIOLATION THEREOF—SEARCH AND SEIZURE GUIDELINES SET BY CHIMEL V. CALIFORNIA, 89 S. CT. 2034.

June 1, 1970.

Commissioner Donald D. Pomerleau.

We have been asked by your Operations Bureau to pass upon procedures for the disposition of weapons which are obtained by purchasers who have made false application in violation of Article 27, Section 442(e) and (k), Annotated Code of Maryland (1967 Repl. Vol.)—"Maryland Pistol Law". You state that the "Maryland Pistol Law" fails to make a provision for seizure, confiscation, or disposal when the weapon is not seized incidental to a crime and the defendant has falsified his application. In turn, you ask that we answer the following questions:

1. Can we (the Baltimore City Police Department) seize the weapon at the time a person is arrested for falsifying his application?

Answer—Yes. Code Article 27, Section 442, et seq., makes it a statutory crime for an applicant to supply any false information or make a material misstatement in his application to purchase or transfer a pistol or revolver. Assuming that an arresting officer has probable cause to believe that an individual has violated that section of the law as provided herein, such a person could be properly arrested; his person and his immediate surroundings could be legitimately searched. In the event that such a search produced the firearm purchased by false application or any other weapon, such a weapon could properly be seized contemporaneous to the lawful arrest. The guidelines for such arrest and search procedures was the subject matter of a memorandum distributed by the Attorney General to all law enforcement agencies on August 27, 1969. In that memo-

randum, we directed your attention to the following arrest guidelines as set forth in the case of *Chimel v. California,* 89 S. Ct. 2034:

(1) A police officer has the right to search the person of an arrestee for weapons that he might use to resist arrest or effect his escape.

(2) A police officer has the right to seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

(3) The permissible search area includes the immediate vicinity into which an arrestee might reach in order to grab a weapon or other evidentiary items.

(4) In the event that law enforcement officers feel that it is advisable to extend the search beyond the area delineated in *Chimel,* a search warrant should be obtained.

Our own Court of Appeals in *Scott v. State,* 7 Md. App. 505, decided August 12, 1969, has held that they cannot construe *Chimel* to mean that the search area is confined to that precise spot which is an arm's length from the arrestee at the moment of his arrest. He may well lunge forward or move backward or to the side and thus into an area in which he might grab a weapon or evidentiary item within his reach before the officer could, by the exercise of reasonable diligence, restrain him.

Within the guidelines set forth above, we deem appropriate the arrest and seizure of a weapon obtained in violation of Article 27, Section 442, supra.

2. Can the Municipal Court Judge confiscate the weapon upon conviction of the defendant for the charge of falsification?

Answer—Yes. Article 19, Section 15, Baltimore City Code (1966 Edition), title "Dangerous Weapons", subtitle "Forfeiture", provides as follows:

> "The Court or Police Magistrate who convicts any person of any criminal offense shall declare as

> forfeited and confiscated any gun, pistol, firearm, switch-blade knife, or other dangerous weapon which was in the possession of the person at the time of committing the offense in which either was used or held for possible use in connection with the offense. The said weapon shall be turned over to the Police Department of Baltimore City for disposal and shall not be treated or considered as the property of the person so convicted."

This Section declares any dangerous weapon subject to forfeiture if the possessor (1) was convicted for the commission of a criminal offense; (2) the weapon was in his possession when he was arrested; and (3) the weapon was connected with the commission of the offense or held for possible use for that purpose. Assuming its constitutional validity, and without passing any opinion thereon, the short answer to whether the police may confiscate weapons under this ordinance is that the authority to declare a forfeiture of a weapon is conferred in terms not upon the police, but upon the convicting Judge of the Municipal Court or Criminal Court of Baltimore City, as the case may be.

3. Can the Judge turn over a weapon to the Baltimore City Police Department for disposal and the weapon not be treated or considered as the property of the person so convicted?

Answer—Yes. Article 19, Section 15, supra, divests the original owner of any right, title, or interest in a weapon ordered by the Court to be forfeited and confers a broad discretion upon the Police Department to deal with a weapon so forfeited or confiscated. The statute by its terms is complied with by any procedure that affectuates the "disposal" of the weapons. "Disposal" is defined as sale, pledge, giving away, using, consumption, or any other disposition of a thing. See *Black's Law Dictionary*. The same source defines the term "dispose of" as "to exercise finally, in any manner, one's power of control over; to pass into the control of someone else; to alienate, relinquish, part with, or get rid of; to put out of the way; to finish with; to bargain

away". See also 12(A), *Words and Phrases,* 492, which clearly acquaints disposal with action to get rid of property in some manner. The statute does not require the destruction of confiscated or forfeited firearms. Its mandate includes destruction, but also permits other disposition. We conclude that disposition by transfer, sale destruction, or otherwise, that embodies adequate safeguards against the danger of contraband or forfeited weapons returning to criminal channels, is consistent with the broad discretion conferred upon the Police Department by the statute.

4. If the Judge does not have the prerogative to seize the weapon for disposal, what are the procedures?

Answer—This question is rendered moot by our previous answer to question #2.

CONCLUSION

We find that any violation of the "Maryland Pistol Law" is a crime proscribed by Article 27, Sections 442 and 448, supra, and that an arrest for a violation of these Sections of the law subjects the arrestee to the applicable laws of arrest, search and seizure, and forfeiture now enforceable in this State and the City of Baltimore.

FRANCIS B. BURCH, *Attorney General.*

BERNARD L. SILBERT, *Asst. Attorney General.*

POLICE—POLICE COMMISSIONER—POLICE OFFICERS—SIXTH AMENDMENT RIGHT TO COUNSEL DURING INVESTIGATORY PHASE OF AN ADMINISTRATIVE INQUEST.

September 17, 1970.

Commissioner Donald D. Pomerleau.

You have asked us to advise you regarding the right of members of the Baltimore City Police Department to have counsel present during interviews and interrogations conducted by the Internal Investigation Division of your Department.

Our opinion of March 31, 1967, stated our conclusion that the privilege against self-incrimination could not be invoked by police officers who are asked questions specifically directed and narrowly related to the performance of their official duties. The question now posed is whether or not the right to counsel as afforded under the Sixth Amendment of the United States Constitution applies to officers who are questioned for purposes of possible departmental disciplinary action.

The Sixth Amendment right to counsel as enunciated in *Miranda v. Arizona,* 86 S. Ct. 1772, and numerous other cases, applies to custodial interrogations in contemplation of criminal charges. A police department disciplinary investigation is in the nature of an administrative inquest. In *Garrity v. New Jersey,* 87 S. Ct. 616, the Supreme Court ruled that giving a policeman who was summoned before the Grand Jury a choice between self-incrimination or job forfeiture is a violation of his constitutional rights. A case in which the Defendant's statements are adduced before the Grand Jury and later used as evidence in a criminal proceeding, and condemned by the Supreme Court as placing the Defendant between the "rock and whirpool", is distinguishable from a police internal investigation intended to inquire into the official acts and duties of members of the Baltimore City Police Department.

The responsibility for departmental discipline is an administrative matter vested in the Police Commissioner pursuant to the Laws of Maryland (1966), Chapter 203, Section 536 ["Omnibus Act"]. The provisions of the "Maryland Administrative Procedures Act", Article 41, Section 244-256, Annotated Code of Maryland (1965 Repl. Vol.) apply to disciplinary matters brought before the Police Commissioner or the Disciplinary Board. Because the Police Commissioner is only empowered to impose that punishment which is set forth in Section 536, Paragraph C of the "Omnibus Act", supra, the entire disciplinary proceeding is administrative rather than criminal in nature; and the issue is not whether a policeman has a right to exercise a constitutional privilege, but whether his willingness to cooperate in an intradepartmental investigation concerning his official conduct may be tantamount to a breach of public trust. See *Appeal of Emmons,* 164 A. 2d 184.

According to departmental General Order 70-4 (4/12/70), the Internal Investigation Division of your Department is authorized to make an independent investigation of a complaint in preparation for a possible disciplinary hearing. In the course of such preparation, it is incumbent upon the Internal Investigation Division to obtain statements from members of your Department against whom complaints have been filed. The best interests of the public and the Police Department require a thorough, fair, and unfettered investigation. Neither the "Omnibus Act" nor the "Maryland Administrative Procedures Act" provides for counsel as a matter of right during the investigatory stage of any proceeding against a departmental employee.

We advise that in an investigation of a purely administrative nature the purpose of which is to determine the fitness of a police officer to be a member of the Police Department of Baltimore City, or which is preliminary to the institution of possible disciplinary proceedings; the subject is not entitled to be represented by counsel during interrogation by the agency charged with the conduct of the investigation. As a cautionary note, we emphasize that when

possible criminal action may result from an internal investigation, the right to the presence of counsel requires special consideration which depends upon the facts in each case.

FRANCIS B. BURCH, *Attorney General.*

BERNARD L. SILBERT, *Asst. Attorney General.*

POLICE—ANNAPOLIS POLICE DEPARTMENT—MAINTENANCE AND INSPECTION OF JUVENILE OFFENSE POLICE RECORDS —ARTICLE 26, SECTION 70-23.

July 2, 1970.

Honorable Julian B. Stevens, Jr.

We have been asked to respond to your inquiry on behalf of the Annapolis Police Department concerning this office's interpretation of Maryland Code (1969 Cumulative Supplement) Article 26, Section 70-23, which deals with the maintenance and inspection of juvenile offense police records. You have asked our opinion as to whether or not the commingling maintenance procedure presently used by the Annapolis Police Department in relation to juvenile and adult police records is proper. You have also requested guidance as to whom a juvenile's arrest record could be divulged.

Maintenance of Juvenile Records

Maryland Code (1969 Cumulative Supplement) Article 26, Section 70-23, provides as follows:

> "(a) Police records concerning a child shall be maintained separate from records of arrests of adults and shall not be open to public inspection or court subpoena or their contents divulged to the public, unless a charge of delinquency is transferred for criminal prosecution under Section 70-16 of this subtitle.
>
> "(b) Inspection of the records shall not be permitted without an order of a judge exercising general jurisdiction in the county in which the records are maintained."

In construing the above sub-section, it is imperative that such analysis be made in conjunction with the legislative purpose and rationale of the entire Act dealing with juvenile causes, as set out in Maryland Code (1969 Cumulative

Supplement), Article 26, Section 70. The pertinent purposes of the Act are described as being:

> "(1) To provide for the care, protection and wholesome mental and physical development of children coming within the provisions of this subtitle;
>
> "(2) To remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior, and to substitute therefor a program of treatment, training, and rehabilitation consistent with the protection of the public interest; . . ."

In directly focusing upon the area of "privacy and confidentiality", and its underlying rationale, The President's Task Force on Juvenile Delinquency (of which the learned Judge J. Dudley Digges, now a member of the Maryland Court of Appeals, was an advisor) reported in its work *Juvenile Delinquency and Youth Crime*, pages 38-40, that the case for "confidentiality" of juvenile petitions, probation officer reports, social or clinical studies and related documents, rested upon the following two premises:

> "First, it is generally believed that public disclosure of this material would interfere with the effectiveness of the Court's rehabilitation program.
>
> The purpose of confidentiality is:
>
> > to prevent the humiliation and demoralizing effect of publicity or unnecessary disclosure of private affairs heavily charged with feelings of anxiety, guilt and recrimination. Disclosure would make it more difficult for the court to utilize a child's feeling of self respect in effecting rehabilitation.
>
> Second, the persistence of the stigma of delinquency, with its attendant adverse consequences upon the youth's ability to become reintegrated into the community—obtaining private and public em-

> ployment, qualifying for bonds, being eligible for military service, obtaining licenses—stands as a self-defeating obstacle to effective rehabilitation and one that persists throughout his life. A basic flaw in our penal system is that 'it fails to provide accessible or effective means of fully restoring the social status of the reformed offender' ".

When Sections 70 and 70-23 are considered together, and in light of the general rationale as articulated by the President's Task Force, it is clear that the Maryland Legislature intended not only to provide the most ideal rehabilitative environment possible for a child by making his acts of delinquency inviolate insofar as public disclosure is concerned, but also intended to protect an adult's reputation from being damaged from transgressions which amounted to acts of delinquency during his youth.

To fortify these protective concepts, the Legislature also provided, in Maryland Code (1969 Cumulative Supplement) Article 26, Section 70-21 that, ". . . no disposition of any proceedings under this subtitle shall be deemed a conviction of crime or impose any civil disabilities ordinarily resulting from such a conviction . . . ." The Legislature also provided in this section that:

> "The court, on its own motion or for good cause shown, may order that juvenile court records be sealed.
>
> "The proceedings with reference to a child in the juvenile court shall not be admissible as evidence against him in any criminal proceeding, other than a charge of perjury, except after conviction of a crime in proceedings to determine his sentence."[1]

Therefore, in direct answer to your question in relation to the maintenance of juvenile records, the present practice of the Annapolis Police Department of commingling juvenile delinquency records with that of adults who have committed criminal violations, other than mere traffic offenses over which the Juvenile Court does not have jurisdiction, is

in direct violation of the legislative mandate as spelled out in Section 70-23, which provides that, "Police records concerning a child shall be maintained separate from records of arrests of adults and shall not be open to public inspection or court subpoena or their contents divulged to the public . . ." .

Fingerprint and Photograph Files

Just as imperative as is the protection of a juvenile's offense record from public disclosure is the maintenance of effective law enforcement through various investigative tools utilized in crime detection, such as fingerprint and photograph files.[2] As such objective items of police intelligence do not in themselves comprise a "police record" nor divulge the nature of a juvenile offense "to the public", such law enforcement detection devices do not fall within the purview of Maryland Code (1969 Cumulative Supplement) Article 26, Section 70-23.

Because of possible stigmatization and its resultant demoralizing effect upon children when fingerprinted and photographed, it is recommended that great discretion be exercised by police officials when authorizing process through the evidence section. As a guideline, the procedure adopted by the Prince George's County Juvenile Squad (General Order 70-4) is to only process, as a general rule, juveniles over fourteen years of age who have been charged with a felony or certain misdemeanors such as breaking and entering, unauthorized use of a motor vehicle, sex offenses, and narcotic offenses. Authorization to process juveniles under fourteen or juveniles over fourteen who have committed other offenses than those enumerated, must be gained from either the highest ranking member of the Juvenile Squad on duty at the time, or the Watch Commander if a Juvenile Detective is not available. Juveniles are then only processed on State and F.B.I. cards when jurisdiction has been waived by Juvenile Court.

Inspection of Juvenile Records

As previously stated, you have also asked our advice as to whom a juvenile's arrest record could be divulged. You

have specifically asked whether they may be shown to insurance company representatives, bonding company investigators upon waiver by the juvenile, the victim of the particular offense, police officers, state's attorneys, agents of the State Department of Juvenile Services, and other like agencies.

As the recommendations of the President's Task Force on Juvenile Delinquency seem to have formed the basis for many of the recently revised Maryland laws relating to juveniles, it is appropriate to examine their findings in this area.

The Task Force found that whenever juvenile court records are retained, a dilemma arises as to who should have access to them and under what circumstances. The Task Force pointed out, "Employers, schools, and social agencies have an understandable interest in knowing about the record of a juvenile with whom they have contact. On the other hand, experience has shown that in too many instances such knowledge results in rejection or other damaging treatment of the juvenile, increasing the chances of future delinquent acts."

In addressing itself to a solution of this problem in order to minimize the inherent difficulties, the Task Force suggested the following:

> ". . . legal reports should be available only to official agencies of criminal justice except when the juvenile court judge is satisfied that the information will not be used against the juvenile's interest. Social reports—which often contain the most personal of information and may incorporate the investigator's subjective interpretations—should be available only on a strictly limited basis to those agencies that need and will use the information for the same purpose for which it was originally gathered. Thus, social reports would be available only to agencies such as criminal court probation departments, mental health clinics, social agencies dealing with the delinquent."

When examining the language of Article 26, Section 70-23, *supra,* it is clearly evident that the Maryland Legislature adopted the overall philosophy of the Task Force of allowing only official agencies of criminal justice to inspect a juvenile's police record, by virtue of expressly providing that such records "shall not be open to public inspection unless by court order." Furthermore, in keeping with the protective policy as expressed in Article 26, Section 70, it would appear that diagnostic, clinical, and social reports would not be included as part of a "police record", and therefore remain inviolate to general law enforcement personnel, but available as privileged material only to specific support agencies of the Juvenile Court which are directly concerned with juvenile delinquency.

Based upon the explicit language of Maryland Code (1969 Cumulative Supplement) Article 26, Section 70-23, and the clear protective intent which cloaks the entire Juvenile Act, it is our opinion that inspection of a juvenile's "police record" is categorically denied to bonding company investigators, insurance company representatives, victims of delinquency acts, employers, and like individuals constituting the general public, unless allowed by court order pursuant to subsection (b) of Article 26, Section 70-23.

FRANCIS B. BURCH, *Attorney General.*

JOHN J. GARRITY, *Asst. Attorney General.*

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[1] See *Westfall v. State,* 243 Md. 413; *Johnson v. State,* 3 Md. App. 105, and *Gray v. Director,* 245 Md. 80, which held, in essence, that although it is impermissible to attack the credibility of a witness by asking him about his past juvenile record, the court may consider one's juvenile record in evaluating the individual's antisocial tendencies and status as a defective delinquent. Article 26, Section 70-21 seems to extend these holdings to include the consideration of a juvenile's record in perjury trials and sentencing proceedings.

[2] For scope of investigatory problems, see report submitted by The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in A Free Society,* pages 97, 266.

POLICE—MARYLAND STATE POLICE—ADMISSIBILITY IN EVIDENCE OF A CERTIFIED RECORD OF A DEPARTMENT OF MOTOR VEHICLES LOCATED IN ANOTHER STATE.

July 7, 1970.

Col. T. S. Smith.

By recent letter you request the opinion of this office as to whether a certified record of a department of motor vehicles located in another state is admissible in evidence in a Maryland court.

The basis for this request was the case involving a citizen who was charged by a Maryland State Trooper with a violation of Article 66½, Section 111 of the Maryland Code, with furnishing a false affidavit on July 8, 1969 when he applied for a Maryland Operator's License. The false information allegedly furnished was a negative answer to the question on the application: "Has your privilege to operate a motor vehicle ever been revoked, suspended, cancelled or refused in this or any other state or D.C.?" Investigation by Maryland State Police determined that the citizen had his driving privileges revoked by the State of Missouri May 14, 1969.

At the time of trial, June 3, 1970, in the People's Court of Harford County, a Maryland State Police Officer produced the following documents:

> 1. A certification by James E. Schaffner, Acting Director, Department of Revenue, State of Missouri, dated December 2, 1969, which stated:
>
> "THE UNDERSIGNED, AFTER BEING SWORN STATES, that he is the duly appointed Acting Director of the Department of Revenue, State of Missouri, and as such has access to the records of said Department; that the hereunto attached are true and correct copies of said records, and that the following statements are true and correct: Under case FP 101414,.....,

driving and registration privileges were revoked May 14, 1969, for a period of 365 days, because of twelve points assessed against his driving record. As of this date this subject's revocation remains in full force and effect in the State of Missouri." The above quoted statement, under oath, then bore the signature James E. Schaffner, Acting Director, and was notarized December 3, 1969 before Peggy L. Bryson, Notary Public.

2. Attached to the December 2, 1969 certification was a "Revocation Notice" dated May 23, 1969 bearing the letterhead and seal of the State of Missouri, Department of Revenue. This "Revocation Notice" was addressed to ....., 4556 Karole Manor, St. Louis, Missouri 63134, and superseded a revocation which began January 22, 1969. This document stated:

"In accordance with Section 302, 304 RSMO., your driving privilege is hereby revoked effective 05/14/69 for 365 days and thereafter until the financial responsibility requirements of Chapter 303, RSMO., have been met. This revocation is the result of your convictions of traffic laws and/or ordinances as shown below:"

Following this statement appeared an itemization of seven convictions for which a total of 15 points were assessed. These convictions included speeding (4 convictions), no operator's license (1 conviction), C & I (2 convictions). This "Revocation Notice" was signed Peter W. Scott, Drivers License Registration, and instructed the citizen to surrender his Operator's License to the Department of Revenue.

3. A form letter dated December 5, 1969 to the Maryland State Highway Patrol re this citizen bearing the seal and letterhead of the Department of Revenue, State of Missouri, James E. Schaffner, Acting Director. This letter listed the seven convic-

tions referred to on the "Revocation Notice" (#2, *supra*), one warning, a suspension of the citizen's Operator's License October 24, 1968, a revocation January 22, 1969 for one year and another revocation for one year dated May 14, 1969. Then the following was set forth:

"I, the undersigned, hereby certify that the above attached is a true photostatic copy of the driver's license ledger card of files in the name of....., 4556 Karole Manor, St. Louis, Missouri as same appears in our files this 5th day of December, nineteen hundred and sixty-nine, which said records are in my charge and custody:"
This certification was signed H. J. Turnbull, Supervisor, and appropriately notarized.

The June 9, 1970 memo of Trooper First Class W. L. Willis attached to your letter to this office indicated that efforts by the Maryland State Police to introduce the certified records from the State of Missouri at the trial on June 3, 1970 were unsuccessful as the presiding judge ruled that this material was hearsay. It was as a result of this ruling that the opinion of this office was sought.

The Maryland Legislature by statutory enactment, Article 35, Section 59, has provided a modern practical exception to the hearsay rule to permit business records of every kind to be admissible in evidence and this statute does not limit or restrict the manner in which these records may be admissible. The statute reads:

"Any writing or record, or a photostatic or photographic reproduction thereof, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record, or photostatic or photographic reproduction thereof

> at the time of such act, transaction, occurrence or event or within a reasonable time thereafter, and photostatic or photographic reproductions of such admissible documents, photostated or photographed at a later time, shall likewise be admissible for such purpose if photostated or photographed in the regular course of business in good faith and without intent to defraud. All other circumstances of the making of such writing or record, or photostatic or photographic reproduction thereof, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight, but not the admissibility thereof. The term 'business' shall include business, profession, occupation and calling of every kind."

This section is applicable in criminal as well as civil cases, *Dunn v. State*, 226 Md. 463; it is a broad exception to the hearsay rule, *Frush v. Brooks*, 204 Md. 315; hospital records are included within the purview of this statute, *Dubs v. State*, 2 Md. App. 524, as are bank records, *Hyman v. State*, 4 Md. App. 636, and the statute applies to every business, profession, occupation and calling of every kind, *Bethlehem-Sparrows Point Shipyard v. Scherpenisse*, 187 Md. 375.

The laws of the State of Missouri require courts to report motor vehicle convictions to the Director of Revenue within ten days after the conviction, and the latter is required to record the conviction and date of the offense. (See Vernon's Annotated Missouri Statutes, Section 301.430.) These records thus clearly constitute entries made in the regular course of business as specified in the quoted Maryland statute. The certification under oath by the Acting Director of the Department of Revenue of the State of Missouri as to the correctness of the records would appear to be sufficiently authenticated to meet the test of "necessity and circumstantial guarantee of trustworthiness". *Morrow v. State*, 190 Md. 559 at 562, Wigmore, *Evidence* (3rd Ed.) 1522, 1530. It is, of course, necessary that testimony be

offered to show the source and origin of the authenticated documents and the rules of evidence adhered to. The admission into evidence of these records will serve "to put an end to narrowness in the use of the familiar rule of evidence that the person whose statement is received as testimony should speak from personal observation or knowledge, and to bring the rule of evidence nearer to the standards in responsible action outside of the courts." *Bethlehem-Sparrows Point Shipyard v. Scherpenisse*, 187 Md. 375 at 381.

In reaching the conclusion that certified records of the Department of Motor Vehicles of another state are admissible in evidence in Maryland courts a marked similarity was noted in Article 66½, Section 205A of the Annotated Code of Maryland (1967 Replacement Volume). This statute provides that certified records of the Maryland Department of Motor Vehicles shall have the same effect as original records and shall be received as evidence in any tribunal in this State.

FRANCIS B. BURCH, *Attorney General.*

H. EDGAR LENTZ, *Asst. Attorney General.*

PORT AUTHORITY, MARYLAND

VARIOUS AND SUNDRY PROBLEMS RELATING TO POLICE OPERATIONS BY SPECIAL POLICEMEN COMMISSIONED ON BEHALF OF MARYLAND PORT AUTHORITY.

February 19, 1970.

Lieutenant Francis C. Lilley.

We are in receipt of your recent letter raising various questions with regard to police operations by the Security Force of the Maryland Port Authority. This force is composed of approximately fifty men, each of whom are, or are in the process of being, commissioned as "Special Policemen" pursuant to the provisions of Chapter 581 of the Laws of Maryland of 1969, codified as Article 41, Sections 60-70, of the Annotated Code of Maryland (1965 Replacement Volume and 1969 Cumulative Supplement). We shall consider your questions in the order in which they were presented in your letter to us.

1. You have inquired as to whether the Dundalk Marine Terminal, the Locust Point Marine Terminal, and the Clinton Street Marine Terminal, are to be considered as private or public property. It is our opinion that in general each of these terminals should be considered to be private property for purposes of police operations by the Security Force of the Maryland Port Authority.

2. You have asked whether the roads within the Dundalk Marine Terminal and the Locust Point Marine Terminal are public or private roads. Since we find no evidence of any dedication to the public, as the roads were built by and are maintained by the Authority, and since both terminals may be entered only through a gate or gates where a Security Officer of the Authority is stationed, we are of the opinion that the roads within the named terminals should be considered private roads for purposes of police operations by the Security Force of the Authority. Of

course, as you know, Clinton Street, which runs through the Clinton Street Marine Terminal, is a public street.

3. You have raised the question of whether the Authority may adopt traffic regulations, to control the use of vehicles on the previously mentioned terminals, which could be enforced within the State and City courts. It is our opinion that while the Authority may adopt "rules of the road" for vehicles on the terminals, such regulations could only be enforced by private measures, such as by denying access to the terminals to any persons who violate the regulations or by towing away (if adequate notice is given) vehicles parked in designated "No Parking" areas. Under existing law the Authority does not have the power to adopt traffic regulations, the violation of which could be heard and tried as criminal charges in the State and City courts. If the Authority desires to have the power to adopt traffic regulations for its terminals which could be enforced in the State and City courts, then it should seek passage of legislation similar to Article 89B, Section 120B, which gives the State Roads Commission the power to adopt rules and regulations to control traffic on certain facilities (*e.g.*, Baltimore Harbor Tunnel) and Article 26, Section 109 (37), which confers jurisdiction on the Municipal Court of Baltimore City to hear, try and determine the cases of persons charged with violation of rules and regulations adopted by the Commission. Copies of Article 89B, Section 120B, and Article 26, Section 109 (37), are enclosed for your reference.

4. You have asked for a definition of trespassing to guide you in determining whether or not a person has committed a criminal trespass upon any of the several terminals operated by the Authority. Since it is our opinion that the terminals are private property, trespassing can best be defined, at least for your purposes, as a violation of Article 27, Section 576, (trespass on posted property), or a violation of Article 27, Section 577, (wanton trespass). Copies of Article 27, Sections 576 and 577, are enclosed for your reference and study. Generally speaking,

if property is posted against trespassers in a conspicuous manner then any charge should be made under Section 576. On the other hand, if the premises are not posted, then any charge should be made under Section 577, but only after the "trespasser" has been requested to leave.

5. You have asked us to define the arrest powers of Security Force members under Article 41, Sections 60 through 70. The subject is too diversified and involved for a comprehensive answer here. The following are some of the salient points of the law. Under Article 41, Section 64, Special Policemen, when duly commissioned by the Governor, have "the powers of a police officer upon the property described in the application for the commission". This means that on the property of the Maryland Port Authority, Security Officers have the arrest powers of an ordinary police officer. Thus, generally speaking, a Security Officer may make an arrest on the property of the Authority in the following circumstances: (1) under a duly issued arrest warrant; (2) without a warrant if the arrestee has committed a felony in the presence of or view of the Security Officer; (3) without a warrant where the Security Officer has probable cause to believe that a felony has been committed and that the arrestee is the person who committed the felony; and (4) without a warrant for the commission of a misdemeanor in the presence or view of the Security Officer. Extreme prudence is essential in exercising the power of arrest. Security personnel should have approved training. They should know the difference between felonies and misdemeanors in Maryland and also understand the meaning of probable cause to make an arrest. In the absence of adequate training and instruction it is recommended that arrests be made by members of the Security Force only upon warrants of arrest and for crimes committed in their presence or view.

6. You have asked whether members of the Security Force may carry weapons to protect the property of the Authority before they have been issued a commission under Article 41, Sections 60 through 70. As long as the weapon

is carried in plain sight and not concealed upon or about the person of the Security Officer, nor carried openly "with the intent or purpose of injuring any person in any unlawful manner", we are of the opinion that the Security Officer may carry a weapon as a "reasonable precaution against apprehended danger" and to protect the property of the Authority, even though the Officer has not yet received a commission, provided that such action is not in violation of rules and regulations governing the conduct of special police promulgated by the Superintendent of State Police pursuant to Article 41, Section 62 (b).

7. You have asked if it is proper for the Security Officer to search cars leaving the terminal if there is "no probable cause" or if no arrest has been made. Unless the operator or owner of the car voluntarily and knowingly consents to the search, it would be improper to search cars leaving the terminals, except as an incident to a valid arrest. Even if the search was conducted as an incident to a valid arrest, if there was no search warrant, the search could not lawfully extend beyond the area of the arrestee's immediate control, (*i.e.*, the area in which the arrestee might gain possession of a weapon or destructible evidence). Thus, for example, it would be doubtful whether a Security Officer could make a valid search of the trunk of an automobile as an incident to a valid arrest of an operator or a passenger, at least in the absence of a search warrant.

8. You have asked "if a 'decal' identification system is initiated at the terminals, could a 'waiver of search' be one of the conditions to obtain a 'decal' ". We are of the opinion that this could be done, but that the "waiver of search" would be of doubtful validity if relied upon to justify a search which would otherwise be illegal. Thus while there is no legal reason why a "waiver of search" could not be one of the conditions for obtaining a decal, such a waiver should not be relied upon by members of the Security Force to justify a search under conditions which would not otherwise authorize a search.

9. You have inquired as to who has custodial rights of

cargo on "leased" property and on "public" property in the terminals. This would depend upon the terms of the various agreements under which cargo is stored on the terminals. We are informed by W. Gregory Halpin, Deputy Director of the Maryland Port Authority, that under existing agreements the Authority does not have any "custodial rights" over any of the cargo stored either in public areas or in leased areas.

10. You have asked whether the Security Force has the right to make arrests on ships docked at the various terminals owned by the Authority. This question must be answered in the negative, since under Article 71, Section 64, the powers of Special Policemen may only be exercised "upon the property described in the application for the commission" and "in connection with the care, custody, and protection of the other property of the requesting authority or other property, real or personal, for which it has assumed an obligation to maintain or protect". Since ships docked at the terminals are not the property of the Maryland Port Authority, as such ships are not in the "care, custody, and protection" of the Authority, and since the Authority has not assumed "an obligation to maintain or protect" the ships, members of the Security Force do not have the right to go aboard ships in order to make arrests.

11. You have asked several questions with regard to picket lines. First, you have inquired as to the proper location for the lines. If the responsible officials of the Authority determine that they will not allow picketing on the property of the Authority, then the proper location for the lines would be on public streets outside of property belonging to the Authority. Of course, if the Authority decides to allow picketing on the terminals, then it would be up to appropriate officials of the Authority to decide where they would permit the picketing. Second, you have asked what is the proper charge to place if pickets enter a terminal, in the event that the proper officials of the Authority determine not to allow picketing on Authority property. The proper charge to place would be one of trespassing, in the manner set forth in the answer herein

to your fourth question. Third, you have asked whether free access to terminals must be maintained by the pickets. This question must be answered in the affirmative. In this connection, we call your attention to the provision of Article 41, Section 64, which provides as follows:

> "In order to facilitate the orderly ingress and egress of traffic to and from the property described in the application, he [a Special Policeman] shall have authority to direct and control traffic on public highways and roads adjacent to and in the immediate vicinity of the property described in the application when this activity is approved in advance by the Superintendent of the Maryland State Police."

Fourth, you have asked what is the proper charge to be placed if free access to the terminal is not maintained. If the pickets are on property of the Authority, then the proper charge would be trespassing, as set forth in the answer herein to your fourth question. If the obstruction is on the public road adjacent to the terminal, and the Security Force has received the prior approval of the Superintendent of the Maryland State Police to direct and control traffic on such streets, as above provided, then the proper charge would be based on Article 27, Section 121, of the Annotated Code of Maryland, which makes it "unlawful for any person to willfully obstruct the free passage of persons passing along or by any public street or highway". A copy of this statute is enclosed for your study and reference.

12. You ask whether the Authority has the power to impound vehicles parked in restricted areas or otherwise hindering movement within the terminals. We are of the opinion that the Authority does have this power and may impound the vehicles, if adequate and sufficient notice is given to persons bringing cars onto the terminal and restricted areas are conspicuously posted with signs stating that vehicles parked in the area will be impounded or towed away. As a subsidiary to this question, you ask who

would be responsible for any damage to the impounded vehicle. If the party towing away the vehicle negligently damaged the vehicle, then such party would ultimately be responsible, although it is possible, under certain circumstances, that the Authority would also be held liable to the person whose car was impounded, if it can be shown that the car was improperly impounded and/or that the party doing the towing was the agent of the Authority. This particular question depends upon the facts in each case and cannot be adequately answered in the abstract. Also, you have asked for our opinion "as to the manner of removal of vehicles to be impounded". This is more of a policy question than a legal question. Vehicles parked on Authority property contrary to posted notices which also contain towage warnings to violators may be removed by arrangement with a licensed towing company. Abandoned vehicles as defined by law (Article 66½, Section 71), which we have discussed in a previous communication, may be removed by the police and liaison should be established with local police for appropriate procedure. Lastly, you inquire as to whether the Maryland Port Authority has the authority to incorporate parking restrictions in formal rules and regulations. The Authority has this power, since under Article 62B, Section 5 (f), the Authority is authorized "to establish reasonable rules and regulations for the use of any project which are not inconsistent with the provisions of this article [Article 62B] or any other applicable law of the State of Maryland".

13. You inquire as to whether rules and regulations adopted by the Maryland Port Authority can be enforced on property which is leased by the Authority to private persons. Unless a reservation was made in the lease permitting the Authority to enforce its rules and regulations on the leased premises, such premises would not be subject to the rules and regulations of the Authority.

In considering the answers which we have given in this letter to the questions posed by you, we feel that it is our duty to add a *strong caution*. The questions which you

have presented and our answers thereto have been in the abstract. In a particular case, facts or considerations which we cannot anticipate at this time might alter the result. Therefore, in any particular situation, if you have any doubt as to the applicability of our comments in this letter, you should contact this office before acting.

FRANCIS B. BURCH, *Attorney General.*

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

PORT AUTHORITY, MARYLAND—STATE AND LOCAL PROPERTY TAXATION OF PROPERTY OWNED OR LEASED BY MARYLAND PORT AUTHORITY.

August 12, 1970.

Mr. Joseph L. Stanton.

In your recent letter you have asked us to advise you with regard to whether property of the Maryland Port Authority is exempt from State and local "property taxes" under various situations.

Before undertaking your specific questions, reference should be made to the applicable statutes, which are Article 62B, Section 18(b), and Article 81, Section 8 (6) (e), of the Annotated Code of Maryland. Section 18 (b) of Article 62B sets forth the following exemption from *local* property taxes for property of the Authority:

> "The right and power of any county and the mayor and city council of Baltimore to impose annually taxes on land and improvements thereon, present and future, acquired and developed by the Authority, within their respective limits, shall be retained by such political subdivisions; but this right to impose taxes shall not apply to land and improvements thereon acquired from the political subdivision, *nor shall such right to impose taxes apply to any cargo-handling facilities owned or leased, as lessor or lessee, by the Port Authority, and the land used solely in conjunction therewith,* whether purchased, erected, constructed or leased prior to or subsequent to June 1, 1966, said cargo-handling facilities and land to be exempt from all ordinary taxes and benefit assessments *to the owner of such facilities, to the Authority, and to the lessees of the Authority* from the date when such property was or may hereafter be purchased, erected, constructed or leased.
>
> * * *

"As used herein, the term 'cargo-handling facilities' shall mean and include, without intending thereby to limit the generality of such term, any one or more of the following or any combination thereof: lands, piers, docks, wharves, warehouses, sheds, transit sheds, elevators, compressors, refrigeration storage plants, *buildings, structures* and other facilities, appurtenances and equipment *necessary or useful in connection with the handling, storage, loading or unloading of goods, wares, merchandise, freight and any type or kind of personal property at steamship terminals.*" (Emphasis added.)

A similar exemption is found in Section 8 of Article 81, which relates to *State and local* property taxes:

"No leasehold or other limited interest in real or tangible personal property shall be subject to taxation except the following which shall be subject to taxation in the same amount and the same extent as though the person in possession or the user thereof were the owner of such property.

* * *

"(e) The interest or privilege of any lessee, bailee, pledgee, agent, or other person in possession of or using any real or personal property which is owned by the federal or State governments, and which is leased, loaned, or otherwise made available to any person, firm, corporation, association, or other legal entity, with the privilege to use or possess such property in connection with a business conducted for profit, . . . shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property, provided that the foregoing shall not apply to federal or State property for which negotiated payments are made in lieu of taxes by any of the aforesaid owners, . . . *nor shall it apply to port facilities owned by the federal or*

> *State governments (or any agencies or instrumentality thereof)* or by any political subdivision of the State of Maryland. * * * As used herein, the term 'port facilities' shall mean and shall include, without intending thereby to limit the generality of such term, any one or more of the following or any combination thereof: Lands, piers, docks, wharves, warehouses, sheds, transit sheds, elevators, compressors, refrigeration storage plants, *buildings, structures,* and other facilities, appurtenances and equipment *necessary or useful in connection with the operation of a modern port or in connection with shipbuilding and ship repair* and *every kind of terminal or storage structure or facility now in use or hereafter designed for use in the handling, storage, loading or unloading of freight or passengers at steamship terminals, and every kind of transportation facility now in use or hereafter designed for use in connection therewith.*" (Emphasis added.)

See also Article 81, Section 9(1), which exempts "property, real and personal, tangible and intangible, belonging to this State or to any county or city of this State" from "assessment and from State, county and city taxation".

You have first inquired as to whether real property and improvements thereon which are owned and operated by the Authority, are exempt from State and local property taxes. Under the provisions of Article 62B, Section 18(b), real property and improvements owned by the Authority are exempt from *local* taxation only in the following circumstances: (1) if the land and improvements thereon are acquired from the political subdivision, or (2) if the land and improvements encompass "cargo-handling facilities" as defined in the statute. In other cases, property owned by the Authority is subject to local property taxes, since the right and power of any county and the City of Baltimore to impose such taxes has been expressly retained. We do not believe, however, that land and improvements

thereon owned and operated by the Authority would be subject to *State* taxation. The reservation in Article 62B, Section 18(b), relates solely to taxation by political subdivisions. In addition, of course, if State taxation were imposed, then the State would be taxing itself, since the Authority is a body politic and corporate and an instrumentality of the State of Maryland performing essential governmental functions of the State (Article 62B, Section 3 (a)). *Cf.*, Article 81, Section 9(1), *supra.*

Your second inquiry deals with the question of whether real property and improvements thereon which are leased by the Authority, as lessee, are subject to State and local property taxes. Unless subject to an independent exemption, property leased by the Authority from another party is subject to *local* property taxation, except in those instances when the property constitutes a "cargo-handling facility", as defined in Article 62B, Section 18(b). However, even when property leased by the Authority would be exempt from local property taxes as a "cargo-handling facility", the *State* property tax would still apply, at least in the absence of an independent exemption. As previously noted, Section 18(b) of Article 62B, in exempting, *inter alia*, "cargo-handling facilities" leased to the Authority, only relates to taxation by local government. The exemption from State taxation for "port facilities" found in Article 81, Section 8, only applies to property *owned* by the Authority and leased to another party; there is no exemption for property *leased* by the Authority but owned by another party. Of course, the State property tax would be paid by the party from whom the Authority was leasing the property, absent an agreement to the contrary. *Cf.*, Article 81, Section 8(6), which, with certain exceptions, provides that a leasehold interest in real property shall not be subject to taxation.

In those instances where the Authority leased property from the owner thereof and then, in turn, subleased the property to another party, the tax situation would be the same as described in the previous paragraph, *i.e.* exempt from local taxation if a "cargo-handling facility", but subject to State taxation.

Your next question deals with the situation where property owned by the Authority is leased by the Authority to other parties. In this case, a *State* property tax would be due and payable by the lessee of the Authority under the provisions of Article 81, Section 8(6), if the property was used "in connection with a business conducted for profit", unless the property constituted a "port facility" as defined therein. Similarly, the *local* property tax would be due and payable, unless the property in question constituted a "cargo-handling facility" as defined in Article 62B, Section 18(b), in which case no tax would be payable.

Your last question relates to the taxable status of improvements constructed by lessees of the Authority on property which is owned by the Authority. In determining whether the exemption from *local* taxation contained in Article 62B, Section 18(b), would apply, it would be necessary to determine whether the improvement constructed by the lessee on the property of the Authority was "owned" by the Authority. The question of ownership would largely depend upon the terms and conditions of the lease between the Authority and the party constructing the improvements and the circumstances surrounding the lease. As stated in 51 C.J.S., *Landlord & Tenant*, Section 394(1), ". . . the ownership and right to remove improvements placed on the leased premises by a tenant are determined by the intention of the parties as evidenced by the terms of the lease and the circumstances of the case". If the improvement constituted a "cargo-handling facility" as defined in Article 62B, Section 18(b), and under the terms of the applicable lease became the property of the Authority upon construction, *i.e.*, was "owned" by the Authority, then the improvement would be exempt from local real estate taxation. On the other hand, if the improvement did not constitute a "cargo-handling facility" or if the improvement remained the property of the party leasing from the Authority, then local real estate taxes would be due and payable on the improvement. This may result in a situation where land would be exempt, but certain improvements thereon would not be. While curious, this result is entirely workable, since

land and improvements are separately assessed for purposes of property taxes. The determination of the applicability of the *State* property tax would also turn on the question of ownership of the improvement constructed by the lessee, as the exemption in Article 81, Section 8(6), only applies to "port facilities" which are "owned" by the Authority. Thus, the improvement would be exempt from State property taxation only if it was a "port facility" which was "owned" by the Authority. Naturally, the question of ownership of an improvement, for purposes of exemption from State and local property taxes, would have to be determined on a case-by-case basis.

In considering all of the questions which you have raised, it should be noted that the definition of "cargo-handling facilities" in Article 62B, Section 18(b), and the definition of "port facilities" in Article 81, Section 8, are both written in very general terms, *e.g.*, "buildings, structures, and other facilities, appurtenances and equipment *necessary or useful* in connection with the operation of a modern port" (emphasis added). It would seem to us that only in extraordinary cases would property, leased or owned by the Authority, fall without the definition of "cargo-handling facilities" or "port facilities".

FRANCIS B. BURCH, *Attorney General.*

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

PORT AUTHORITY, MARYLAND—EFFECT OF CREATION OF DEPARTMENT OF TRANSPORTATION (CHAPTER 526 OF THE LAWS OF MARYLAND OF 1970) UPON MARYLAND PORT AUTHORITY LOAN OF 1967—OUTSTANDING CONTRACTS OF MARYLAND PORT AUTHORITY TO BE ASSUMED BY MARYLAND PORT ADMINISTRATION.

October 14, 1970.

Mr. Robert R. Green.

We are in receipt of your recent letter in which you raise several questions with regard to the absorption of the Maryland Port Authority into the Department of Transportation under Chapter 526 of the Laws of Maryland of 1970. This Act will become effective, insofar as concerns the questions raised by you, on July 1, 1971.

Your first question, as stated by you, is "[o]n July 1, 1971, what happens to the unissued portion of the 1967 Maryland Port Authority Loan?" Under Section 8B of Article 62B of the Annotated Code of Maryland, the Board of Public Works was authorized, upon recommendation of the Maryland Port Authority, to issue a State loan, known as the "Maryland Port Authority Loan of 1967", to be evidenced by bonds in an aggregate principal amount not exceeding $50,000,000. You have informed us that "[a]t the present time there remains $38,000,000 of unused bonds from this loan". The answer to your inquiry is controlled by new Article 94A, Sections 3 and 10, of the Annotated Code of Maryland (Section 2 of Chapter 526). These statutory sections provide as follows:

> "3. Transfer of authority from other agencies.
>
> "The power, authority, obligations, duties and discretion heretofore granted under any act of the General Assembly of Maryland to the Maryland Port Authority, Metropolitan Transit Authority or the State Roads Commission of Maryland relating to the borrowing of money, the incurring of

indebtedness or the issuance, sale, delivery or repayment of any bonds, notes or other evidences of indebtedness, including bonds of prior issues and revenue bonds of prior issues and including the unexercised borrowing power contained in any such act, are hereby transferred, granted to and vested exclusively in the Department of Transportation and, with respect to such revenue bonds only, in the Maryland Transportation Authority."

* * * *

"10. Termination of authority to issue bonds under certain other laws.

"Except with respect to the continuing authority of the Department to issue and sell its 'County Highway Construction Bonds—Second Issue' under the provisions of Section 211G-1 of Article 89B of the Code, the authority to issue and sell general or special obligation bonds, notes or other evidences of indebtedness other than revenue bonds, contained in Code Articles 62B (title 'Maryland Port Authority'), 64B (title 'Metropolitan Transit District') and Article 89B (title 'State Roads'), shall continue after July 1, 1971, but shall be terminated upon completion of delivery of the first issue and sale of Consolidated Transportation Bonds authorized under this subheading, and this section shall constitute a covenant to that effect between the State of Maryland and the holders of any Consolidated Transportation Bonds issued under this subheading."

Under Section 1(c) of Article 94A, as added to the Code by Chapter 526, "bonds of prior issues" includes bonds under the Maryland Port Authority Loan of 1967.

It is therefore our opinion that the authority to issue bonds as part of the Maryland Port Authority Loan of 1967 will continue after July 1, 1971, but the power to recommend the issuance of bonds will be vested in the Department of Transportation, rather than the Maryland

Port Authority. The power to issue bonds under the Maryland Port Authority Loan of 1967 will not cease until completion of delivery of the first issue and sale of Consolidated Transportation Bonds as authorized by Chapter 526.

Second, you have inquired as to the disposition of monies remaining from the previous sale of bonds under the Maryland Port Authority Loan of 1967, which have not been expended by the Authority as of July 1, 1971. In answering this question, it is first necessary to consider Section 11 of Article 94A, which provides as follows:

> "11. Transportation Trust Fund.
>
> "(a) The Transportation Trust Fund is hereby created. On July 1, 1971, except for rentals, rates, fees, tolls or any other charges or revenues pledged to secure revenue bonds of prior issues, except for funds established pursuant to and provided for in Sections 150 through 179 of Article 66½ of this Code, and *except for other funds by law expressly applied to some other purpose* or declared exempt from the provisions of this section, there shall be transferred to the credit of such Fund for the account of the Department all funds theretofore held for the account of any of the agencies, administrations, authorities, commissions, boards, instrumentalities and offices of the State government either included within the Department of Transportation or abolished under Article 41 of the Code. Thereafter, *except* with respect to rentals, rates, fees, tolls or any other charges or revenues pledged to secure revenue bonds or revenue bonds of prior issues, funds established pursuant to and provided for in Sections 150 through 179 of Article 66½ of this Code, and *other funds by law expressly applied to some other purpose* or declared exempt from this section, there shall be credited to such Fund for the account of the Department any and all taxes, fees, charges and revenues of whatever kind collected or received by, paid or

> appropriated to, or to be credited to the account of, the Department or any of its constituent agencies or administrations, in the exercise of their rights, powers, duties, obligations or functions, including, but not by way of limitation, any general fund appropriations, the proceeds of any State loan made for transportation purposes and any federal grants for such purposes. * * *" (Emphasis supplied.)

Section 8B(e) of Article 62B, in providing for the disposition of proceeds of sale of bonds issued under the Maryland Port Authority Loan of 1967, provides, in part, as follows:

> "The balance of the proceeds of bonds issued under the provisions of this section [after payment of costs incurred in the issuance of the bonds] shall be paid to the State Treasurer and shall be paid out by the State Treasurer upon the order of the Authority, and upon warrants of the State Comptroller, solely for the purposes set forth in subsection (a) of this section."

In subsection (a) of Section 8B of Article 62B, it is provided that the funds received from the sale of bonds shall be used "for the purpose of providing funds (i) for paying the cost of any extensions, enlargements or improvements of the existing port facilities, and (ii) for paying the cost of any additional port facilities". The terms "existing port facilities" and "port facility" are defined in Section 4(e) and (g) of Article 62B.

Considering the above statutory provisions, we are of the opinion that monies held by the Treasurer of the State as of July 1, 1971 from the prior sale of bonds under the Maryland Port Authority Loan of 1967, will not become a part of the Transportation Trust Fund, since "by law [such funds are] expressly applied to some other purpose", *i.e.* for paying the cost of extensions to existing port facilities and any additional port facilities. The only change

after July 1, 1971, will be that the proceeds of prior bond sales will be paid out by the State Treasurer upon the order of the Maryland Port Administration, rather than the Maryland Port Authority. Article 41, Section 207C (d), (Section 1 of Chapter 526), *infra.*

Third, you have noted that the Authority is entering into commitments which will require the Authority to expend monies after July 1, 1971. You have inquired as to whether these commitments will "automatically be picked up by the new Department of Transportation". We are of the opinion that this question must be answered in the affirmative. Article 41, Section 207C (d), provides as follows:

> "(d) All references in this Code, other laws, ordinances, resolutions, rules, regulations, directives, legal actions, *contracts* or other documents to the Maryland Port Authority shall be deemed to mean the Maryland Port Administration or, if such references relate to matters within the jurisdiction of the Maryland Transportation Authority and such construction be more reasonable, then such references shall be deemed to mean the Maryland Transportation Authority." (Emphasis supplied.)

FRANCIS B. BURCH, *Attorney General.*

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

PUBLIC WORKS, BOARD OF

LICENSES TO DREDGE OR FILL WETLANDS—BOARD SECRETARY MAY SIGN AND ISSUE LICENSE WHEN DULY APPROVED BY BOARD IN ACCORDANCE WITH PROCEDURE PRESCRIBED BY ARTICLE 66C, SECTION 721.

August 26, 1970.

Mr. Andrew Heubeck, Jr.

You have directed to our attention new Section 721 of Article 66C of the Annotated Code of Maryland providing for the issuance by the Board of Public Works of licenses to dredge and fill State wetlands under stated conditions provided in the statute. You have asked (1) whether the described licenses may be signed by the Secretary of the Board of Public Works instead of bearing the signatures of the three members of the Board and (2) whether the Board of Public Works itself is required to hold hearings on the issuance of a license or if it may designate an officer or employee of the Department of Natural Resources or its own Secretary for such purpose.

Answering your first question, the signing and issuance of a license which has been duly approved by the Board of Public Works is a ministerial act. The definition of a ministerial act is one performed in a manner prescribed by higher authority and without the exercise of judgment or discretion. See *Words and Phrases*, Volume 27. When the Board has considered and approved an application for a license, the required judgment and discretion have been exercised. The signing and issuance of the license is a mechanical function and we see no reason why it may not be performed by the Board Secretary. His signature may be affixed "By Order of the Board of Public Works".

Answering your second question, we advise that Article 66C, Section 721 provides that the application for a license to dredge or fill shall be considered by the Board of Public

Works upon the report and recommendations of the Secretary of Natural Resources, after an appropriate investigation by the Secretary, including the taking of evidence and the holding of hearings. The statutory provision that "The Board of Public Works after a hearing in the local subdivision affected shall decide if issuance is in the best interest of the State" in our opinion is equally susceptible of being interpreted to mean that such hearings may be conducted by the Board of Public Works or the Secretary of Natural Resources. We believe the better view to be that the provision for a hearing in the local subdivision refers back to the earlier stated requirement of appropriate hearings by the Secretary of Natural Resources. It is illogical and inconsistent for the Board of Public Works to be required to hold a hearing after the Secretary of Natural Resources has already done so for the same purpose. Such duplication of effort would serve no useful purpose, and we have found no evidence of legislative intent requiring that it be done.

Finally, it is our opinion that the Board of Public Works is authorized to designate its Secretary to join with the Secretary of Natural Resources or his representative(s) to hold hearings for the purpose of fact-finding and to make recommendations with respect to applications for licenses to dredge or fill. It must be noted, however, that the mandate of the statute vests the ultimate responsibility for approval or disapproval of such applications upon the Board of Public Works whose duty in this respect may not be delegated.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Asst. Attorney General.*

REGISTERS OF WILLS

TESTAMENTARY LAW — VARIOUS SUBSTANTIVE QUESTIONS CONCERNING NEW ARTICLE 93, ADDED BY CHAPTER 3 OF THE LAWS OF MARYLAND OF 1969.

April 24, 1970.

Mr. Thomas M. Eichelberger.

In your recent letter you raise a number of questions concerning new Article 93 of the Annotated Code of Maryland (1969 Replacement Volume), enacted as Chapter 3 of the Laws of 1969, the bulk of the provisions of which apply "to the estates of decedents dying on or after [January 1, 1970]". See Article 93, Section 12-102(a). In responding to your inquiry we have attempted to combine questions which seem to be related:

> 1. *Must the first published newspaper notice in administrative probate, the appropriate number of which is to be delivered to the register of wills pursuant to Section 2-209, be forwarded to the heirs and legatees by the register of wills by certified mail, postage prepaid, return receipt requested, addressed to addressee at the address last known, with delivery restricted to the addressee?*

This question brings out the interrelation between Sections 2-209 and 7-103. Section 2-209 refers to the duties which must be carried out by the register of wills within five days after he receives from the personal representative the text of the first published newspaper notice (see Section 7-103) and the names and addresses of the heirs and legatees (see Section 7-104). It requires the register to forward a copy of the notice to each heir and legatee "by delivery or by certified mail."

You ask whether "certified mail" must be of the restrictive type outlined in Section 1-103. That section states that notice shall be sufficient if deposited as registered or "cer-

tified mail, postage prepaid, return receipt requested, addressed to the addressee at the address last known to the sender, with delivery restricted to the addressee." It is interesting to note that the above quoted requirement applies only to the "first notice . . . to be given to any person" under the new statute while "any subsequent notice" shall be sufficient if deposited as ordinary mail, postage prepaid.

It is clear from an examination of the statute that the notice required to be given by Section 2-209 is "the first notice . . . to be given to any person" under new Article 93 in the event of administrative probate (see Section 5-301 etc.). This is true because when the register acts on the petition for probate in administrative probate, the appointment of the personal representative is made by the register himself. Not more than fifteen days after the appointment has taken place, every personal representative must then deliver to the register the text of the first published newspaper notice of his appointment and must advise the register of the names and addresses of the heirs and legatees under Section 7-104. That section activates Section 2-209 already discussed.

The net result of this is that, in administrative probate, within twenty days after the appointment of the personal representative, the notice required by Section 2-209 must go out from the register of wills. Because this notice is "the first notice" in administrative probate, it must be in strict compliance with the additional requirements of Section 1-103. Once the return receipts, signed by the addressees, have been received they should be retained by the register in the estate file. See House Bill 547, passed by the General Assembly at its 1970 session, Section 1 of which treats this same subject.

2. *Must the notice to all interested persons that judicial probate has been requested, which the register of wills is required to mail by Section 5-403(a), also be in compliance with the requirements of Section 1-103?*

The answer to this question (as did the answer to Ques-

tion 1) turns upon whether the notice in question is the "first notice" required to be given and, hence, falls within the requirements of Section 1-103. Examination of the statute indicates that if judicial probate is requested on the original petition for probate, the orphans' court must conduct a hearing and all interested persons are entitled to reasonable notice of it (see Section 5-403). In that event, the notice of the hearing (rather than the notice of appointment of the personal representative) becomes the first notice to be mailed to interested persons and, hence, must be sent in compliance with Section 1-103.

It is important to note, however, that there is a provision in the statute for a proceeding in administrative probate to be transferred to judicial probate. This may occur under certain circumstances within eighteen months of the decedent's death at the request of an interested person in accordance with Section 5-304(b) or if a petition to caveat is filed after administrative probate in accordance with Section 5-207(b). Judicial probate is mandatory at any time in certain instances stated in Section 5-402.

Once the machinery for judicial probate has been set into motion, Section 5-403, relating to notice, must be complied with, but in these latter instances that notice would not be the "first notice" to interested persons because the notice required by Sections 2-209 and 7-104, in all likelihood, would have already been sent by the register after the appointment of the personal representative in the administrative probate proceeding. Notice of the hearing would then become "subsequent notice" under Section 1-103 and is required to be sent only by ordinary mail, postage prepaid by the register of wills.

The answer to this question is that registered or certified mail in compliance with Section 1-103 is required if judicial probate was requested in the first instance and that notice by ordinary mail is legally sufficient if the proceeding became converted at a later date from administrative probate to judicial probate.

3. *In the event that administrative probate has been granted but subsequently a petition for judicial probate has been filed, is a second notice to creditors, under Section 7-103, required?*

We have already discussed the manner in which an administrative probate proceeding may be subsequently converted into a judicial probate proceeding under Sections 5-304(b), 5-207(b) and 5-402. In the answer to Question 1, discussed above, we also pointed out that in administrative probate a personal representative is required to publish a notice to creditors in a timely manner after his appointment by Section 7-103. You now ask whether, in the event of a subsequent judicial probate and appointment of a personal representative pursuant to Section 5-404 by the orphans' court, a second notice to creditors must be published under Section 7-103.

We find no requirement in the statute of a subsequent publication. Creditors are protected by the six-month period provided in Section 7-103. Furthermore, it is clear from Section 5-405 that the appointment of the original personal representative, in the administrative probate proceeding, remains unaffected by the filing of a request for judicial probate unless his powers have been suspended by the orphans' court after an allegation of unfitness and of danger to interested persons and creditors. This latter provision should fully protect a creditor because, even if no such allegations are made, a petition for judicial probate has the effect of preventing any distribution by the personal representative without court order.

It is interesting to note that there is a possibility of further subsequent proceedings under Section 5-407 even after the judicial probate has been completed. If our answer to this question were otherwise, the estate could be put to the expense of publishing innumerable notices to creditors, each of which would have the effect of reopening and extending the original six-month period established by Section 7-103. We do not believe that this was the result intended by the General Assembly.

4. *Must a petitioner elect judicial probate if he wishes to have the witnesses to the will appear in person or may this be done in administrative probate also?*

Section 5-301 describes the nature of the proceeding for administrative probate before a register of wills and Section 5-303 states that in such event it is not necessary for the witnesses either to appear or make a verified statement, if the will appears to the register to have been duly executed and contains a proper attestation clause. There is nothing in this language which would prevent the petitioner from bringing the witnesses before a register if he should so choose, and the mere fact that a petitioner wishes to have the witnesses to the will appear in person does not automatically require him to utilize the judicial probate procedure.

5. *Must a petitioner filing a petition for probate appear in person before the register of wills in an administrative probate proceeding?*

Once again, the procedures for administrative probate are found in Sections 5-301 *et seq.* of the statute. There is no requirement in either of these sections or in the sections relating to petitions for probate (5-201 *et seq.*) which would require a petitioner to appear in person before the register of wills. Section 5-302 provides that a register, upon receipt of a petition, "shall appoint one or more personal representatives on the basis of the allegations contained" in it. No personal appearance is required by either that section or Section 5-205(a) if the petition for probate is filed by the person entitled to administer the estate. See also Section 6-101.

6. *What technique should the register of wills use to determine the value of an estate in the first instance so that a proper bond may be posted?*

Unless excused from giving bond, under Sections 6-101 and 6-102 every personal representative must file a surety bond as a condition of his appointment in a penal sum the amount of which may not exceed the "probable maximum

value" of the personal property in the estate, less the market value of any posted collateral and the amount of properly deposited cash. The exception to this requirement prevails in the event that a personal representative "is expressly excused by the decedent's will or by the written waiver of all interested persons" from filing such a bond, but even in that event the bond described in Section 6-102(a), further described in Section 6-102(f) as "nominal bond", must be filed.

The statutory form for the petition for probate, found in Section 5-206, contains no requirement of the disclosure of the estimated assets of the estate, nor do the sections relating to the contents of letters of administration (Sections 6-103 and 6-104). The register must issue the letters if he finds that the will is properly executed and that the data contained in the petition for probate is accurate (see Sections 5-302 and 5-304).

As the procedure for setting bond is not statutorily delineated, the register should utilize reasonable means in order to arrive at the proper figure. This may be accomplished by asking the personal representative to declare the value of the estate in accordance with Section 6-102(c), the last sentence of which reads as follows:

> "The penalty sum may be increased or decreased by the Court at its discretion for good cause at any time during administration."

This means that if the inventories filed pursuant to Sections 7-201 and 7-203 indicate a higher or lower valuation than that originally declared by the personal representative, the amount of the bond may be adjusted accordingly. See generally, Stiller and Redden, "Statutory Reform in the Administration of Estates of Maryland Decedents, Minors and Incompetents", 29 *U.Md.L.Rev.* 85, 102-03 (1969).

7. May the notice requirement of the statute be waived?

A variety of notices are required under certain circumstances by new Article 93. Examples of these are the notice

of appointment to interested persons required by Sections 2-209 and 7-104, the notice of hearing upon judicial probate required by Section 5-403, and the notice to creditors required by Section 7-103. The purpose of the statutory provisions for notice is to insure that the appropriate persons are given notice of certain anticipated actions required of the personal representatives and it is, therefore, for the protection of these persons. Nothing in the statute, as it appears from any of these sections, would prevent a person from waiving his right to receive these notices if such waiver is in writing, is duly executed in proper form and is filed with the register of wills. See House Bill 547, 1970 General Assembly. (Chapter 600, Laws of 1970).

8. *May individual items of inventory be simultaneously subjected to revision upon petition by interested persons, the State of Maryland and/or by the orphans' court itself?*

Section 7-204 reads as follows:

"The State of Maryland or any interested person may at any time before the estate is closed, petition the Court for revision of any value assigned to any item of inventory and the Court may, after hearing, require such revision as it may deem appropriate."

By virtue of this section the State, the orphans' court acting on its own initiative or through its clerk, the register of wills, or any interested persons may petition to revise the value assigned to *any item* of inventory. This would mean that the personal representative may seek to have certain items revised while the taxing authorities may seek to have other items revised. The statute is broad in its scope and would seem to permit this to be done simultaneously or in separate proceedings.

9. *May real estate be included in the assessable base for the tax on commissions of personal representatives?*

Real estate is made a part of the probate estate by Section 1-301. Section 7-601 (b) relates to the schedule of maximum commissions and contains the following language:

> "For the purposes of this subsection (b) of Section 7-601 only, the phrase 'property subject to administration' shall not include real property or income therefrom, and shall not be affected by expenses or charges attributable thereto."

The tax on commissions of personal representatives is found in Article 81, Section 144, which now reads as follows:

> "All commissions allowed to personal representatives and special administrators by the orphans' courts of this State shall, except as provided in Section 174 of this article, be subject to a tax, for the benefit of the State of an amount equal to (1) one percent of the first twenty thousand ($20,000) dollars of the estate plus one fifth of one percent on the balance of the estate, or (2) ten percent of the total commissions allowed, whichever is greater, the said tax shall be due and payable whether the personal representative or special administrator waives his commissions or not, it being hereby intended that no commissions less than this tax shall be allowed by the orphans' courts of this State, and that no waiver of commissions or legacy as compensation or in lieu of commissions shall defeat the payment of this tax. This tax shall be payable only once on the same property, and a subsequent executor or special administrator shall be allowed a credit for any tax on commissions actually theretofore paid by any previous personal representative or special administrator."

This section was slightly amended from a technical standpoint only in 1969.

Because a personal representative is specifically prevented from receiving any commissions whatsoever on real prop-

erty, we conclude that the value of real property may not be considered in computing the tax on commissions prescribed in Article 81, Section 144. See comment to Article 93, Section 7-601.

FRANCIS B. BURCH, *Attorney General.*

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

REGISTERS OF WILLS — INHERITANCE TAX — INTEREST OF NON-RESIDENT DECEDENT IN MARYLAND REAL ESTATE HELD IN TRUST—NO EQUITABLE CONVERSION—REAL ESTATE HELD IN TRUST REMAINS AN INTEREST IN REAL PROPERTY AND SUBJECT TO TAX.

June 24, 1970.

Mr. Joseph H. Welch.

You have asked us to advise you regarding the estate of a decedent who died on June 21, 1969, a domiciliary of Sarasota County, Florida. An attorney in your county has qualified as ancillary administrator of the estate in order to administer the assets situated there. One of these assets is an undivided one-half interest in lands which presently comprise 1,848.04 acres on Deep Creek Lake in your county, as well as certain smaller parcels of land in the aggregate total of 511 acres. This real estate was conveyed on January 4, 1957, by the decedent and her husband (who predeceased the decedent) and 27 other grantors (all related by either blood or marriage) to 6 of their number as grantees in order "to facilitate the sale of said lands and interest, in whole or in part, and the distribution of the net proceeds thereof among the respective owners". The 6 grantees were characterized in the instrument as "trustees" and were empowered "to hold said lands and interest for the benefit of the said parties of the first part" with "full power to option, sell or lease any and all of said lands and interests" and to "distribute the net proceeds . . . to the parties of the first part". Although the trustees were given said power of sale, there is no direction in the instrument, either express or implied, that all of the acreage in question must be liquidated through sale. In fact, in the more than 12 years that elapsed between the execution of the instrument and the death of the decedent the lands in trust have only been partly subdivided and only certain lake-front lots have, in fact, been sold by the trustees. The remainder of the tract, which is the great bulk of it, has never been converted by the trustees. Furthermore, while the trustees

were given, by the instrument, the power to form a corporation "to hold title to said real estate and interests, and to convey any and all of said lands or interests to said corporation in exchange for [its] common stock", no such corporation was ever formed. Under these circumstances you ask whether these assets may be taxed in Maryland.

The general rule is that the tangible personal property and interests in real property, either legal or equitable, of a nonresident decedent situated in Maryland may be made subject to Maryland inheritance tax but that intangible assets of such a decedent, even though situated in Maryland, may not be so taxed. See letter to Leroy C. Shaughnessy dated November 29, 1968, which appeared in The Daily Record on December 5, 1968, and will be published in 53 Opinions of the Attorney General 516 (1968). See also Article 81, Section 149 of the Maryland Code, which restricts the taxing power to property "having a taxable situs in this State", and Article 81, Section 174, relating to reciprocal exemptions between states with respect to inheritance taxation of intangible assets of nonresident decedents. The question then becomes whether the 1957 instrument had the effect of converting the decedent's interest as a tenant-in-common in real property into a beneficial trust interest which by its nature represents an interest in personalty.

A closely analogous fact situation was treated by the Court of Appeals of Maryland in *Lynn v. Gephart*, 27 Md. 547 (1867). A number of the children and descendants of one David Lynn, including the deceased grantor, George Lynn, held a joint interest in two tracts of land, namely, "The Rose Hill Estate" and the "Wharf Property".

> ". . . The devisees, therefore, with their husbands and wives, thinking to make their common property more productive by having it divided into lots and parcels best adapted for sale, and ready to meet the demands of purchasers, and at the same time to provide for a transfer of titles with the least inconvenience to themselves, united in

> choosing Erastus Edgerton as their common agent and *trustee,* to whom they conveyed said property, a part being excepted, by their deed [of trust dated October 3, 1849] . . ." (at 548) (Emphasis supplied.)

The Court found that it was the intent of the grantors that the tracts of real estate in question should be sold and converted into cash but recognized (at 563) that the real question was "whether there was any change in the character of the property described in the deed of trust, by virtue of its mere execution". The Court went on to state that "unless there is some clear intention . . . by which a definite character either as money or as land, has been unequivocally fixed upon it [by the instrument] . . . the property retains its original character" (at 563). After examining the terms of the trust agreement, strikingly similar to those of the trust instrument under discussion here, the Court reached the following conclusion at 564-565:

> "There being no conversion of the real estate conveyed by the deed of trust to [the successor trustee], the grantors in said deed retained an equitable interest in the same until sold, and in its proceeds after sale, to the extent of their respective shares, which are to be treated as real estate. . . ."

Cf. cases where a clear and unequivocal direction is given the trustee by the settlor to convert the real estate into cash, namely, *Talbott v. Compher,* 136 Md. 95 (1920); *Paisley v. Holzshu,* 83 Md. 325 (1896); *Tait v. Dante,* 78 F. 2d 303 (4th Cir., 1935); *Restatement (Second) of Trusts,* Section 131(1).

The rule enunciated in *Lynn* remains in effect in the Maryland case law today and is entirely consistent with the point of view taken in *Restatement of Trusts,* in both its original and second versions. See *Restatement (Second) of Trusts,* Section 130(b) (1956) and *Restatement of Trusts,* Section 130(b) (1935), which read as follows:

> "Except as stated in Section 131,
>
> * * *
>
> "(b) if the trust property is real property, the interest of the beneficiary is real property unless the interest of the beneficiary is so limited in duration that if it were a legal interest it would be personal property."

See also *Senior v. Braden,* 295 U.S. 422 (1935), which reached a similar conclusion with respect to the status of trust certificates in real estate.

It is apparent from an analysis of the 1957 deed of trust and from the information received from the ancillary administrator that the 29 grantors were seeking to simplify the state of the title to the tracts of land in question so that sales, when terms became favorable, could be made in an expeditious manner. The fact that there was no express direction to the trustees to liquidate the real estate is best demonstrated by the fact that only a small percentage of the tracts in question have been sold by the trustees (only the lake-shore lots). Under these circumstances we are of the view that the *Lynn* case is controlling and that the interest of the decedent in the subject tracts was an equitable one in real estate. As such, these interests are subject to the Maryland inheritance tax even though the decedent was a nonresident of the State of Maryland, this taxing power being based rather upon the fact that the real estate in question is situated in Maryland. For discussion of a closely related inheritance tax question, see 42 Opinions of the Attorney General 395 (1957).

Because the interest of the decedent in the tracts has been inventoried at $93,611, the only remaining question is the rate at which the inheritance tax should be applied. The trust instrument made no provision for disposition of the corpus in the event of the death of any of the grantors. The decedent's will provides that these interests pass to

her three sons, and the tax should therefore be applied at the lineal rate. See Article 81, Section 149 of the Maryland Code.

FRANCIS B. BURCH, *Attorney General.*

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

REGISTERS OF WILLS — TESTAMENTARY LAW — INTESTATE DISTRIBUTION — DESCENDANT FAILING TO SURVIVE A DECEDENT BY 30 DAYS IS DEEMED TO HAVE PREDECEASED SAID DECEDENT—INTEREST OF SAID DESCENDANT PASSES PER STIRPES TO HIS ISSUE BY REPRESENTATION.

June 24, 1970.

Mr. Thomas M. Eichelberger.

In your letter of June 5, 1970, you advised that A died intestate on January 7, 1970, survived by two sons, B and C. B died intestate on January 21, leaving five children. C has been named personal representative and you now ask how the estate should be distributed.

Contrary to your suggestion, the provisions of Article 93, Section 4-401 do not apply in this instance because Sections 4-401 through 4-413 relate to testate situations. The applicable provision is Section 3-110, which states:

> "In the event a descendant . . . fails to survive the decedent by thirty (30) full days, he shall be deemed to have predeceased the decedent for purposes of intestate succession, and shall not be entitled to the rights of an heir. . . ."

Applying this section to the facts at hand, along with Sections 1-210 (a) and 3-103, it is seen that distribution should be made one-half to C and one-half to the five children of B *per stirpes*. The particularly relevant language is the following from Section 1-210 (a):

> ". . . A child . . . who did survive the decedent shall receive one share, and the share of each deceased child . . . (leaving issue who did survive the decedent), . . . shall be divided among his issue in the same manner."

FRANCIS B. BURCH, *Attorney General.*

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

REGISTERS OF WILLS—TESTAMENTARY LAW—TESTATE DISTRIBUTION—LEGATEE FAILING TO SURVIVE A DECEDENT BY 30 DAYS IS DEEMED TO HAVE PREDECEASED THE DECEDENT — INTEREST OF SAID DECEASED LEGATEE PASSES TO THOSE PERSONS ENTITLED TO TAKE FROM HIM PURSUANT TO THE "ANTI-LAPSE" STATUTE—EFFECTIVE DATE OF THESE PROVISIONS.

June 26, 1970.

Mr. Thomas M. Eichelberger.

In your letter of June 16, 1970, you advised me that A died testate on May 22, 1970, and that B, the sole beneficiary under the will, died 20 days later, on June 10, 1970. The will in question was executed by the decedent on October 7, 1960. You inquire as to the status of the interest of the deceased beneficiary.

Article 93, Section 4-401 of the Annotated Code of Maryland (1969 Replacement Volume) makes it clear that in such an instance (when a legatee who is not the spouse dies within 30 days after the decedent) the deceased legatee is deemed to have predeceased the testator and his interest would then pass without administration directly to the persons entitled to take from said deceased legatee under the "anti-lapse" statute (Section 4-403). These sections do not apply, however, to the situation under discussion because Section 12-102(c) of the same Article establishes that the sections discussed above apply only to "wills executed on or after" January 1, 1970. Because in the prior law there was no equivalent to new Section 4-401, the interest of B in the estate of A would pass to her personal representative and would be reported as an asset of her estate just as if she had survived the decedent by more than 30 days.

FRANCIS B. BURCH, *Attorney General.*

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

REGISTERS OF WILLS—TESTAMENTARY LAW—EMPLOYMENT OF SPECIAL APPRAISERS BY PERSONAL REPRESENTATIVE —STANDING APPRAISERS ARE NOT ENTITLED TO REAPPRAISE ASSETS ALREADY APPRAISED BY SPECIAL APPRAISERS—PROCEDURE FOR SEEKING REAPPRAISAL OF CERTAIN ASSETS, THE VALUE OF WHICH IS QUESTIONED BY THE REGISTER OF WILLS.

June 26, 1970.

Mr. J. Louis Davis.

At your request we are writing to explain the interrelationship of several sections of new Article 93 of the Maryland Code (1969 Replacement Volume) relating to appraisals.

A personal representative may, pursuant to Section 7-202 (b), employ special appraisers of his own selection to ascertain the fair market value of different types of assets of an estate the value of which may be fairly debatable. If the personal representative complies with the requirements of that subsection, it is not necessary for him to utilize the standing appraisers voluntarily employed by you in your office, pursuant to Section 2-301(a). See the following Comment to Section 7-204:

> ". . . The changes give the personal representative the power himself to appraise those items the value of which are not likely to cause dispute—listed securities, debts, money and money accounts —and gives him the additional power to determine whether to use either special appraisers of his own selection or general appraisers to value the items which ought properly to be given independent treatment.
>
> "The appraisal methods formerly used in different subdivisions of the State have been subjects of considerable criticism. *The Commission believed that the personal representative should have*

the opportunity to seek, as he often has done, genuinely professional assistance without having thereafter to present the professional's appraisal to an official appointee who may perhaps be less qualified, but who will still charge an additional fee for his official activity." (Emphasis supplied.)

More particularly, subsection (b) of Section 2-301 makes it clear that you are not entitled to have your standing appraisers reappraise assets which have already been appraised by the special appraisers employed by the personal representative. The only exception to this rule would be if you are of the opinion that the value arrived at by the special appraisers is erroneous. In that event you may utilize the reappraisal provisions of Section 7-204 by petitioning the Orphans' Court for a revision of the value assigned to the item whose value you question. The Court may, after hearing, require an appropriate revision. Even in the event of such action, the standing appraisers would not be entitled to an additional appraisal fee unless an actual independent appraisal were made by them.

FRANCIS B. BURCH, *Attorney General.*

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

REGISTERS OF WILLS—INHERITANCE TAX—DETERMINED BY TAX RATES IN EFFECT AT DEATH OF SETTLOR ALTHOUGH NOT VESTED IN POSSESSION AT THAT TIME—DISTRIBUTION TO ESTATE OF LINEAL PURSUANT TO A SETTLEMENT AGREEMENT IS TAXED AT LINEAL RATHER THAN COLLATERAL RATE DESPITE THE FACT THAT ACTUAL TAKERS MAY BE COLLATERALS—DISTRIBUTION TO ILLEGITIMATE DAUGHTER OF MOTHER PURSUANT TO A SETTLEMENT AGREEMENT IS TAXED AT THE LINEAL RATHER THAN COLLATERAL RATE.

November 2, 1970.

Mr. Leroy C. Shaughnessy.

In your recent letter you raise certain questions about the inheritance taxes to be assessed by you upon the distribution of this trust. The settlor created the trust in question by will and died on October 24, 1918. By the terms of the trust, income was to be distributed to her son, A, during his lifetime, then to her granddaughter, B, during her lifetime, and upon the death of B the trustee was to distribute the corpus "to the then living issue or descendants" of said granddaughter, but in the event that she left "no issue or descendants surviving her" then distribution was to be made to her son, C. A died on April 15, 1946; B died on May 9, 1968 survived by a daughter, D, for whom "no record has been found to establish that [her mother] was at any time married to [her] father"; and C died on January 6, 1969.

The trustee had reservations about its authority to make distribution under these circumstances and on November 14, 1968 filed a petition for instructions in the Circuit Court for Baltimore City. Agreement was reached by the parties to the litigation on May 28, 1970 by the terms of which ⅓ of the corpus and the accrued income was to be paid by the trustees to D and ⅔ was to be paid to Y, the executor of the estate of C. The terms of the agreement do not indicate whether the actual recipients of the share passing through the estate of C stand in a collateral or lineal relationship

to the settlor. This agreement was ratified by an Order of the Circuit Court of Baltimore City on June 4, 1970.

The question now arises as to whether an inheritance tax is presently due upon the shares passing from the trustee to the estate of C and to D, directly. At the time of the settlor's death (October 24, 1918), there was no lineal inheritance tax in Maryland and the collateral rate of tax was 5%. This remained the case until the amendments to the law which were added in 1935, adopting the present 1% lineal and 7½% collateral rates. See Chapter 695 of the Laws of Maryland of 1908; Maryland Code (1912), Art. 81, Sec. 120; Chapter 90 of the Laws of Maryland of 1935; see also Eney, "Death and Taxes—Maryland Style," 17 *U. Md. L. Rev.* 101, 107 (1957). The remainder interest of the living issue or descendants of granddaughter B being vested as of the date of the creation of the trust, it is clear under Maryland law that the 1918 inheritance tax rates must be applied. In *Safe Deposit and Trust Company v. Bouse*, 181 Md. 351, 356 (1943) the following statement appears:

> "Accordingly the rate of inheritance tax is to be determined according to the law in effect at the time when remainders vest in interest, when the rights of the parties become fixed and certain, and not when the remainders pass in possession upon the death of the life tenant."

See also *Mercantile-Safe Deposit and Trust Company v. Register of Wills*, 252 Md. 311, 318 (1969); 46 Opinions of the Attorney General 189 (1961); 42 Opinions of the Attorney General 384 (1957); *cf.* Page, "Maryland Death Taxes", 25 *U.Md.L.Rev.* 89, 91-92 (1965); *cf.* Article 81, Section 161(c) of the Maryland Code. Our first conclusion, therefore, is that in determining whether taxes are presently due you must bear in mind that no lineal tax may be applied and that the collateral tax rate is 5%.

Turning first to the ⅔ share passing to the estate of C, we are of the opinion that there is no inheritance tax presently due. C was the son of the settlor and, hence, stood

in a lineal relationship to her; the fact that the actual recipients of the funds may be collaterals is of no importance with respect to this distribution from the trustee to the executor. See *Mercantile-Safe Deposit and Trust Company v. Register of Wills, supra* at page 318, where this subject is discussed. Nothing herein contained, however, would prevent inheritance taxes from being assessed upon the ultimate distribution from the executor to the actual takers.

Another question is presented by the ⅓ share to be distributed to D. Opinions of this office make it clear that property passing from a *father* to his illegitimate child is subject to a collateral rather than a lineal tax rate. See 42 Opinions of the Attorney General 418 (1957) and 37 Opinions of the Attorney General 388 (1952). The relevant statute requires an opposite conclusion, however, with respect to property passing from a *mother* to her illegitimate child.*

Article 46, Section 7 of the Maryland Code states that "[t]he illegitimate child . . . of any female . . . shall be capable in law to take and inherit both real and personal estate from [her] mother . . . ." Because an illegitimate child may inherit from her mother just as a natural child could, it is apparent that the lineal rather than the collateral tax rate should be assessed. See generally Note, "Inheritance By And From Illegitimates Under Maryland Intestacy Law", 20 *U. Md. L. Rev.* 276, 282 (1960). Article 46, Section 7 was repealed by Chapter 3 of the Laws of Maryland of 1969, effective January 1, 1970. It was replaced in the law by new Article 93, Section 1-208 in which it is stated that "[a] person born to parents who have not participated in a marriage ceremony with each other shall be deemed to be the child of his mother". The Comment to this section makes it clear that this merely "incorporates the provisions of former" Section 7 of Article 46. Because of the identity between the old and the new statute, it is not necessary to decide whether the distribution in question is brought about by the death of the life tenant on May 9, 1968 or by the settlement agreement dated May 28, 1970 and ratified by

court order on June 4, 1970. In either event, D is deemed to be a lineal taker from her mother. As such, no inheritance tax is presently due because under the tax law as it stood in 1918 property passed to lineals free of inheritance tax.

FRANCIS B. BURCH, *Attorney General.*

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

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* An interesting question not raised by this fact situation relates to the constitutionality (under the equal protection clause) of assessing inheritance tax at the collateral rate against property passing from a father to his illegitimate children. See *In Re Estate of Pakarinen,* 178 N.W. 2d 714 (Minn., 1970); see generally Krause, "Legitimate and Illegitimate Offspring Of *Levy v. Louisiana*—First Decisions On Equal Protection And Paternity," 36 *U. Chi. L. Rev.* 338 (1968).

SOCIAL SERVICES, DEPARTMENT OF

SECRETARY OF EMPLOYMENT AND SOCIAL SERVICES—CHAPTER 96, LAWS OF 1970—SECRETARY HAS POWER TO TRANSFER EMPLOYEES AND APPROPRIATED FUNDS FROM CONSTITUENT AGENCIES TO OFFICE OF THE SECRETARY, SUBJECT TO COMPLIANCE WITH BUDGET AND MERIT SYSTEM LAWS.

August 11, 1970.

Mrs. Rita Davidson.

In your letter of July 30, 1970, you ask whether the Secretary of Employment and Social Services has the authority to transfer positions and funds from the various Boards, Commissions, Committees, Councils, Departments, Divisions and Offices of the State Government which are included within the Department of Employment and Social Services, to the Office of the Secretary of that Department.

The Department of Employment and Social Services was created (effective September 1, 1970) by Chapter 96, Laws of Maryland 1970. The powers of the Secretary are to be found in said Chapter 96 and in the pertinent sections of Chapter 156, Laws of Maryland 1969. The latter enactment was the initial and enabling legislation for the general reorganization of the Executive and Administrative Departments of State Government. The reorganization was undertaken in order to eliminate the process of proliferation of agencies, the fragmentation of functions and the diffusion of responsibilities present in the former organizational structure of the State Government. See "Executive Reorganization: A Comprehensive Plan for Maryland", Report of the Governor's Executive Reorganization Committee, January 1969.

The Secretary of Employment and Social Services bears responsibility for the budget of his office and the constituent units within his jurisdiction, Article 41, Section 205C (a). He has the final authority for rules and regulations for

his Department, Article 41, Section 205C (b). The Secretary has the power "to perform any power, duty, responsibility or function" that can be performed by any constituent of the Department of Employment and Social Services, Article 41, Section 205C (c). The Secretary is responsible for the overall planning of activities of his entire Department, Article 41, Section 205C (e).

The appointment and removal of personnel within the jurisdiction of the Department of Employment and Social Services is subject to the Secretary's approval, Article 41, Section 205B (c).

Article 41, Section 205B (b) provides in pertinent part that the Secretary "shall also have attached to his office such * * * employees as are provided for in the State budget. * * *" Article 41, Section 3A provides in pertinent part that the Secretary "shall have such * * * employees * * * as may be provided in the budget, unless otherwise provided by law, within his assigned jurisdiction. * * * He shall have the authority to appoint officers and employees in his office as provided in the budget and may review any personnel action taken by any units of the State of Maryland within his jurisdiction. * * *"

It is inconceivable that the Legislature would create the Department of Employment and Social Services and clothe its Secretary with the authority outlined above without intending that the Secretary have the power to transfer to his office the personnel and funds necessary to effectuate the purposes for which the Department was created. Governmental agencies have those powers which "are expressly delegated to them by the organic or statutory law of the Government of which they are a part," and such powers "as are by implication essential to the full and adequate exercise of such express power." *Huffman v. State Roads Commission*, 152 Md. 566 (1927).

Considering the language of the statute and the purposes for which it was enacted, it is our opinion that the Secretary does have the power to transfer positions and funds

from constituent parts of the Department to his Office, subject, of course, to the appropriate budget and personnel regulations established to effectuate such transfers.

Additionally, it is to be noted that when the transfer of positions and funds reaches such proportion as to be considered reorganization within and between principal departments (such as "centralizing and coordinating administrative staff, and clerical services within and among the divisions and departments within their jurisdiction,") the approval of the Governor, as Chief Executive Officer of the State Government, is required. Article 41, Sections 12 and 15C.

FRANCIS B. BURCH, *Attorney General.*

J. MICHAEL MCWILLIAMS, *Asst. Attorney General.*

STATE'S ATTORNEYS

CRIMINAL LAW—CRIME OF COMMON LAW EXTORTION EXISTS IN MARYLAND — STATUTE OF LIMITATIONS ON PROSECUTION OF MISDEMEANORS NOT EXTENDED BY FRAUD.

August 28, 1970.

Honorable Howard L. Cardin.

In your letter of August 17, 1970, you requested our opinion whether common law extortion exists as a crime in Maryland today or whether the crime is confined to violations of Sections 562 and 563 of Article 27 of the Maryland Code. The Code restrictions cover the more modern forms of extortion commonly referred to as blackmail.

Common law extortion has been defined as the oppressive use of power by a public official, acting under color of his office, to collect an unlawful fee or thing of value. *Iozzi v. State,* 5 Md. App. 415, 418; Perkins *Criminal Law* (1957), Chapter 4, Section 10; Wharton's *Criminal Law,* Section 1392, et seq.; *State v. Weleck,* 91 A. 2d 751 (N.J. 1952). The crime had its statutory origin in the statute of 3 Edw. I c 15, dealing with the release of certain prisoners on bail, which provided that if a sheriff took "[a]ny reward for the deliveries of such, he shall pay double to the prisoner, and also shall be in the great Mercy of the King". While the act named particularly the sheriff, it extended to every ministerial officer concerned in the administration or execution of justice, the common good of the subject, or the service of the King. IV Blackstone's Commentaries, page 141 (Lewis' Edition) (referring to the statute as 3 Edw. I c *16*). The "official" by whom the crime could be committed eventually included every person holding an official or quasi-official position. *Kitby v. State,* 31 A. 213 (N.J. 1894); *Commonwealth v. Saulsbury,* 25 A. 610 (Pa. 1893).

We have examined Sections 562 and 563, above referred to, and conclude that their sole purpose is to proscribe

extortion by private citizens and not to limit in any way the continuing existence, as a crime, of common law extortion by public officials. It is, therefore, our opinion that the common law crime of extortion exists in Maryland today by virtue of Article 5 of the Declaration of Rights.

You also inquired whether the one year limitation on prosecutions of misdemeanors under Article 57, Section 11, could be extended by the provisions of Section 14. This latter section provides that the "[r]ight to bring suit" shall not be barred by limitations where knowledge of the existence of a cause of action has been concealed by fraud. We do not believe this section is applicable since it appears to apply, from its language, only to civil cases. *Piper v. Jenkins*, 207 Md. 308, 317. In addition, were the statute to apply to criminal prosecutions, the effect would be virtually to emasculate the provisions of Section 11 since few perpetrators of crime do not seek to conceal their criminal agency.

We share your concern over this obstacle to prosecutions of common law extortions committed more than a year prior to discovery which exists since they are classified as misdemeanors. *Perkins, supra.* However, we must add that the exception in Section 11 for crimes punished by confinement in the penitentiary also does not remove the statute of limitations on prosecution even though the only restriction on punishment for violation of a common law offense is that it not be cruel and unusual. *Kirkorian v. State,* 233 Md. 324. A defendant could be sentenced to the penitentiary for commission of the crime, Article 27, Section 690 (a). See *Duvall v. State,* 5 Md. App. 484, 488. However, the intent of Article 57, Section 11, was only to remove the statute of limitations from prosecution of misdemeanors "classified" as felonies. *Archer v. State,* 145 Md. 128, 137; Article 27, Section 690(b).

As a final comment, in the event that the extortion victims were placed in fear of personal injury, it might be

possible to prosecute the crime as robbery, *Santoni v. State*, 5 Md. App. 609, 622, and avoid the limitations problem in that manner.

FRANCIS B. BURCH, *Attorney General.*

FRANCIS X. PUGH, *Asst. Attorney General.*

TAXATION

SALE OF TAX MAPS BY STATE DEPARTMENT OF ASSESSMENTS AND TAXATION IS SUBJECT TO THE RETAIL SALES TAX ACT—THE DEPARTMENT OF ASSESSMENTS AND TAXATION IS A "PERSON" WITHIN THE DEFINITION OF THE RETAIL SALES TAX ACT.

April 24, 1970.

Mr. Albert W. Ward.

You have requested the opinion of this office as to whether the sale of copies of tax maps by the State Department of Assessments and Taxation to members of the public is a transaction subject to taxation under the provisions of the Retail Sales Tax Act as set forth in Article 81, Sections 324-371, of the Annotated Code of Maryland (1969 Replacement Volume).

As you state in your letter, your Department is required to prepare and maintain tax maps pursuant to the provisions of Article 81, Section 45(c) of the Maryland Code. That section states:

> "The supervisors of assessments in the counties shall maintain, for public inspection, a complete set of tax maps for each county, together with parcel reference lists, which any person may inspect without fee or reward. In addition, sales records or transfer voucher forms relating to sales of real property shall be subject to inspection, without charge, by interested parties upon request."

The above statute sets forth the requirement that these tax maps be maintained "for public inspection . . . which any person may inspect without fee or reward". Although there is no statutory requirement that your department *sell* copies or facsimiles of these tax maps, your letter indicates that your department has, since 1956, provided copies of said tax maps to members of the public upon

request. The fee currently charged is $4.00 per map, or in the case of printed copies of a complete set of maps for an entire county, the charge is based upon the number of maps for the county.

The Maryland Retail Sales Tax Act is a true sales tax and imposes the tax upon the purchaser. *Frank J. Klein v. Comptroller,* 233 Md. 490. The tax is imposed not on property but on the occurrence of an event, a purchase. *Central Credit v. Comptroller,* 243 Md. 175. The vendor in such a transaction is responsible for the collection of the tax. *Rockower Bros. v. Comptroller,* 240 Md. 379.

The words "sale" and "selling" are defined in Section 324(d) of Article 81. That section states, in pertinent part:

> " 'Sale' and 'selling' mean any transaction whereby title or possession, or both, of tangible personal property is or is to be transferred by any means whatsoever for a consideration including rental, lease or license to use, or royalty, by a vendor to a purchaser, or any transaction whereby services subject to tax under Section 325 of this subtitle are rendered for consideration to any purchaser by any vendor. Such consideration may be either in the form of a price in money, rights or property or by exchange or barter, and may be payable immediately, in the future, or by installments. Nothing in this subsection shall apply to the renting of machines and equipment used exclusively for agricultural purposes."

It is clear from the facts that both title and possession of copies of the tax maps are transferred from the State to individuals by purchase.

We pass to a consideration of whether the department, in this instance, is a "vendor" within the meaning of the Retail Sales Tax Act. Vendor is defined in Section 324(b) of Article 81, *supra,* as a "person selling property or rendering services upon the sale of which a tax is imposed . . .".

> "'*Person*' means an individual, partnership, society, club, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee or any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any other group or combination of individuals acting as a unit." Section 324(a)

It has been determined that the United States is a "person" within the definition of "vendor" contained in the Retail Sales Tax Act statute, *supra. Comptroller v. Kaiser Corp.*, 223 Md. 384. In *Kaiser*, a corporation, purchaser of an aluminum extrusion plant from the General Services Administration, an agency of the Federal Government, claimed a refund of the sales and use tax paid on the machinery and equipment included in the transaction. The claim for refund was denied by the Maryland Court of Appeals, the opinion stating in pertinent part:

> ". . . But the statute, as we read it, does not predicate the tax upon engaging in the business of selling, but rather upon the *act of selling itself*. Even in the case of sales outside the regular course of business, we think it is clear that the tax is collectible, unless it be shown that the particular transaction is casual and isolated." (p. 389, emphasis supplied)

The court then concluded that the United States was a "person" within the definition of vendor contained in the statute and that the sale in question fell within the taxing power of the State.

An earlier indication of the Maryland Court of Appeals interpretation of the word "person" as used in the Retail Sales Tax Act, *supra,* is found in *John McShain, Inc. v. Comptroller,* 202 Md. 68. The court said at p. 72:

> ". . . It is true that the word 'person' is not ordinarily construed to include a sovereign state or the federal government, but the statute here contains a very broad definition of 'person' in Section

> 320(a) and Section 368(a) to include anyone acting in a 'fiduciary or representative capacity', and the stress is on the use or purpose, not upon the status of the operating means."

The definition of "person" set forth in Section 324(a) of Article 81 is identical to that definition interpreted by the Court of Appeals in *McShain, supra,* and *Kaiser, supra.* In light of the above judicial precedents, we are of the opinion that the State Department of Assessments and Taxation is a "person" within the definition of the Retail Sales Tax Act. As you have indicated that copies of the tax maps are regularly sold by the department to members of the public for a monetary consideration, we conclude that such transactions are subject to taxation under the Retail Sales Tax Act.

FRANCIS B. BURCH, *Attorney General.*

JOSEPH R. RAYMOND, *Asst. Attorney General.*

TAXATION — SALES AND USE TAXES — AMENDMENT TO CASUAL SALE EXEMPTION REQUIRES TRUSTEE IN BANKRUPTCY TO COLLECT TAX ON LIQUIDATION SALES FOR $1000 OR MORE AND ALL SALES MADE THROUGH AN AUCTIONEER.

August 29, 1970.

Mr. Henry A. Heinmuller, Jr.

You have requested our opinion as to the effect of the amendment made by Chapter 424 of the Acts of 1969 of the General Assembly to Section 326(e) of Article 81 of the Annotated Code of Maryland, concerning the exemption from the Retail Sales Tax for casual and isolated sales. Specifically, you raise four questions, as follows:

1. Does the Maryland law require the imposition of the sales tax on sales made by a trustee in bankruptcy in conjunction with a liquidation when the sale is for $1,000 or more, or is made by an auctioneer?
2. Is there any federal prohibition against the imposition or collection of this tax?
3. May the sales tax, if not susceptible to collection from the vendor, be collected from the purchaser?
4. May the use tax be imposed and collected from a purchaser in the above situation?

I.

As to the first question, it is our opinion that the 1969 amendment removes any exemption which Section 326 previously provided for sales made by a trustee in bankruptcy in conjunction with the liquidation of a bankrupt's estate where the sale is for an amount of $1,000 or more, or is made through an auctioneer.

Section 326(e), from the initial enactment of the retail sales tax in 1947 until June 1, 1958, provided an exemption for "casual and isolated sales by a vendor who is not regu-

larly engaged in the business of selling tangible personal property". The Acts of 1958, Chapter 55, added the phrase "and the use of an auctioneer shall not make a sale taxable which otherwise is not taxable under this subsection". This section remained unchanged until the amendment made in Chapter 424 of the Acts of 1969 removed the phrase added by the 1958 amendment and substituted the language "provided, however, that this exemption shall not apply to casual sales for amounts of $1,000 or more, and/or which are made through an auctioneer or other regular dealer".

Under this provision as it existed before the 1969 amendment sales made by a trustee in bankruptcy in conjunction with a liquidation would have been considered exempt if they fell within the doctrine first enunciated in *Comptroller v. Thompson Trailer Corp.*, 209 Md. 490, 121 A. 2d 850 (1956), and further developed in *Comptroller v. Kaiser Corp.*, 223 Md. 384, 164 A. 2d 886 (1966), and *ACF Industries v. Comptroller*, 257 Md. 513, 263 A. 2d 574 (1970), that:

> ". . . [A] sale . . . by one not regularly engaged in business . . . was a casual and isolated sale, since *the seller* was in liquidation and the sale was in conjunction with a complete liquidation of the only business of the vendor at the time of the sale. . . ." (223 Md. at 388, 164 A. 2d at 888) (Emphasis supplied.)

In addition, by an administrative rule promulgated contemporaneously with the original enactment of the Retail Sales Tax Act in 1947 it was provided that:

> "All sales made by officers of a court pursuant to court orders are casual and isolated sales with the exception of sales made in connection with or in the conduct of a regular established place of business. Examples of such casual sales are those made by sheriffs in foreclosure proceedings and sales of confiscated property."

The 1969 amendment substantially changes the preexisting law relating to casual and isolated sales. We have no difficulty in determining the clear mandate of the amendment to mean that any sale which is for an amount of $1,000 or more, and a sale *in any amount* made through an auctioneer, cannot be considered exempt as casual and isolated.

II.

Secondly, you ask whether there is anything in the United States Constitution or federal law which would prohibit the imposition or collection of this tax, as required by Maryland Law.[1]

We believe that the applicable doctrine has been summarized by H. Wurzel in "Taxation during Bankruptcy Liquidation", 55 Harv. L. Rev. 1141, 1166-67 (1942), as follows:

> ". . . But there is no implied immunity of a federal instrumentality from a state tax that is general and nondiscriminatory if its effects upon the Federal Government are merely 'incidental'. A general and nondiscriminatory tax on a trustee fulfills this requirement.
>
> ". . . As a liquidator the United States has no beneficial interest of its own in the property the legal title to which is held by its instrumentality, the trustee. The tax does not place a financial burden upon the United States; nor will it—unless it is discriminatory and therefore unconstitutional —render the trustee's task more difficult or cumbersome. . . ."

It has been long settled that personal property in the custody of a trustee in bankruptcy is subject to state property taxes. In *Swarts v. Hammer,* 194 U.S. 441, 24 S. Ct. 695, 48 L. Ed. 1060 (1904), the Supreme Court, in so holding, stated:

> ". . . By Section 7 . . . [of the Bankruptcy Act] the title to all of the property of the bankrupt not declared to be exempt is vested in the trustee. By

> the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessity of protection by the state and municipality or which should exempt it from its obligations to either. If Congress has the power to declare otherwise, and wished to do so, the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt. . . ."

As to a retail sales tax such as Maryland's, we believe the case of *In re Leavy*, 85 F. 2d 25 (2d Cir., 1936), to be directly on point. Judge Augustus Hand, for the Court, held that a trustee in bankruptcy was required to collect the New York City sales tax on sales made in liquidation of an estate. Relying on the facts that the New York law defined the term "person" to include "an executor, administrator, receiver, trustee or other fiduciary" and that the tax was imposed on the purchaser and not the trustee who was merely required to collect the tax "for and on account of the city of New York", it was held that the tax was applicable and constitutional. The Court stated:

> ". . . We cannot see that the collection would have required steps on his part that would in any fair sense have interfered with the discharge of his functions. . . ." (85 F. 2d at 26)

It is our opinion that the principles enunciated in the *Swarts* case, as well as the holding of the *Leavy* case, clearly establish that there is no constitutional objection, *per se*, to the imposition of a state tax to a trustee in bankruptcy and that, in the absence of specific exemption by Congress, the question of taxability is primarily one of state law.

We believe that this result is in no way altered by the Congressional enactment contained in 28 U.S.C., Section 960, that:

> "Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

This statute, which explicitly authorizes the collection of state taxes from a trustee in bankruptcy who conducts the bankrupt's business, has no application when the trustee is liquidating rather than conducting the business and cannot be deemed to imply an exemption in light of the Supreme Court's strong caveat in the *Swarts* case against inferring an exemption from taxation where none is clearly expressed in the bankruptcy law. Thus, it has been held that this section does not exempt a trustee in bankruptcy from taxes validly imposed under state law.[2] See *Brown v. Collector of Taxes for Dist. of Col.*, 247 F. 2d 786 (D.C. Cir., 1957). See also *United States v. Sampsell*, 266 F. 2d 631, 635 (9th Cir., 1959).

Nor do we believe that the Ninth Circuit Court of Appeals decision in *California State Board of Equalization v. Goggin*, 245 F. 2d 44 (1957), *cert. den.* 353 U.S. 961, 77 S. Ct. 863, 16 L. Ed. 2d 910, is apposite. While that decision held that the California sales tax could not be imposed upon the liquidation sales of a trustee in bankruptcy and relied, in part, upon 28 U.S.C., Section 960, we must consider the rationale of that decision to be that California sales tax law imposes the tax (technically, a gross receipts tax) not on the purchaser but on the vendor (the trustee) and, consequently, directly burdens the governmental function of liquidating the estate.[3]

We find nothing in the Maryland Retail Sales Tax Act which could be considered discriminatory or imposing an undue burden on governmental functions of a trustee in bankruptcy. In light of the almost identical provisions in Maryland law to those relied on by the Second Circuit in *Leavy, supra*, we feel constrained to reach the same conclusion, that the sales tax may lawfully be imposed on the

purchaser from a liquidating trustee in bankruptcy who is required to collect and remit the tax.

III.

As we have concluded that the Maryland sales tax may be lawfully imposed on the purchaser from a vendor who is a trustee in bankruptcy, it follows that there is no prohibition against the direct collection of the tax from the purchaser pursuant to Section 331 of Article 81 in lieu of the normal procedure whereby the trustee would collect and remit the tax.[4]

IV.

Similarly, it is our opinion that the use tax may be lawfully imposed and collected in the situation described by you. The use tax which is imposed "on the use, storage, or consumption in this State of tangible personal property and certain services purchased within or without this State" by Section 373 of Article 81 has been held to be a complement to the sales tax. See, e.g., *Comptroller v. Thompson Trailer Corp., supra.* Thus, Section 375(a) and (b) of Article 81 exempt from this tax the use, storage or consumption of all property on which a sales tax has been paid or which is specifically exempted from the sales tax. Accordingly, where the sales tax has not been paid on the purchase of property which is lawfully subject to such tax, the use tax is due and is either to be collected by the vendor or remitted directly by the purchaser. Article 81, Sections 376 and 387. As there is no prohibition against the imposition of the sales tax under the same circumstances as the use tax is imposed, we likewise believe that the imposition of the Maryland use tax would not offend any constitutional or federal standard and may be collected from either the vendor or the purchaser.

FRANCIS B. BURCH, *Attorney General.*

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

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[4] Section 326(f) of Article 81 contains an additional exemption from the retail sales tax for "[s]ales which are not within the taxing

power of this State under the Constitution of the United States". This section merely accords to the Federal Constitution and Acts of Congress the priority which they would in any event be entitled to under the Supremacy Clause of the Constitution. United States Constitution, Article VI, Clause 2. *M'Culloch v. Maryland,* 4 Wheat. 316, 17 U.S. 316, 4 L. Ed. 379 (1819). See also *Comptroller v. Pittsburgh-Des Moines Steel Co.,* 231 Md. 132, 144, 189 A. 2d 107, 113 (1963).

[2] Both *Collier on Bankruptcy* and Wurzel conclude that Section 960 is silent as to trustees who liquidate without carrying on the business of the bankrupt and that the question of taxability is primarily one of state law. See 3A *Collier on Bankruptcy,* Section 62.14[3] at 1520, 1526 (1969); H. Wurzel, "Taxation during Bankruptcy Liquidation", 55 Harv. L. Rev. 1141, 1168 (1942).

[3] See also *State Board of Equalization v. Boteler,* 131 F. 2d 386 (9th Cir., 1942); *California State Board of Equalization v. Goggin,* 191 F. 2d 726 (9th Cir., 1951).

[4] Section 331 (a) provides that where a purchaser has failed to pay or a vendor failed to collect the sales tax, such tax shall be payable by the purchaser directly to the Comptroller, and the purchaser is required to file a return and pay the tax in accordance with the applicable provisions. Section 331 (b) authorizes the Comptroller to require by regulation direct payment of the tax by a purchaser when it is deemed necessary for proper enforcement.

TAXATION—RECORDATION TAX—HOUSING AUTHORITY EXEMPT FROM STATE RECORDATION TAX—HOUSING AUTHORITY IS A POLITICAL SUBDIVISION WITHIN THE MEANING OF THAT TERM AS DEFINED BY ARTICLE 81, SECTION 277, AND, AS SUCH, IS ENTITLED TO EXEMPTION FROM THE RECORDATION TAX.

November 4, 1970.

George N. Manis, Esquire.

You have asked whether instruments of writing conveying title to the Housing Authority of the City of Annapolis within the meaning of Article 81, Section 277 of the Annotated Code of Maryland (1969 Replacement Volume) are exempt from the State recordation tax imposed by that section.

The rate of tax is fixed by action of the Anne Arundel County Council (see Subsection (q)), but the relevant language with respect to exemptions is contained in subsection (a), which reads as follows:

> ". . . provided that conveyances to the *State or any agency thereof or any political subdivision of the State* shall not be subject to the tax or charge imposed by this Section." (Emphasis supplied.)

The current exempting language quoted above was added by Chapter 253 of the Laws of Maryland of 1945 to then Article 81, Section 220 of the 1939 Code.

Prior to that enactment the Court of Appeals of Maryland specifically decided in *Pittman v. Housing Authority,* 180 Md. 457 (1942), that the Housing Authority of Baltimore City was subject to the State recordation tax about which you now inquire. The opinion analyzed the legal status of housing authorities under the statute enabling their creation (Chapter 517 of the Laws of Maryland of 1937) and found (at p. 461) that "undeniably" they were "public agencies", that their property was "public prop-

erty" and that "the Legislature [had] the unquestioned power to exempt them from taxation." To the same effect see *Matthaei v. Housing Authority*, 177 Md. 506, 515 (1940). The Court in *Pittman* went on to point out that housing authorities were exempt from taxation under the following language (now slightly amended as Article 44A, Section 22 of the present Maryland Code):

> "The property of an authority is declared to be public property used for essential public and governmental purposes and such property and an authority shall be exempt from all taxes and special assessments of the city, the State or any political subdivision thereof."

In consideration of this exemption, housing authorities are required to pay to the appropriate political subdivision an annual amount mutually agreed upon ". . . in lieu of such taxes and special assessments". Article 44A, Section 22.

The Court recognized, however, a difference between annual property taxes classified as *ad valorem* taxes and excises or taxes which are imposed not in lieu of property taxes, but upon the enjoyment of a privilege. It noted that:

> "A tax imposed upon the recording of a deed, even though computable on the amount of consideration, is not a tax on property, but a privilege tax imposed upon the privilege of recording the deed".

This led to the conclusion that:

> ". . . an exemption from all State and local taxes (as in Article 44A, Section 22) would not relieve from some taxes (privilege taxes) where the intention of the Legislature to restrict the scope of the exemption can reasonably be inferred."

The Court said that the general rule requiring strict construction of the tax exemptions must be followed in determining the legislative intention. The Court also noted that in determining whether a particular tax bill is within the terms of a tax exemption statute, great weight should be

given to the "policy of the law" in making the exemption. In this respect the Court made the important point that the Article 44A, Section 22 exemption from taxes was enacted into law at the regular session of the Legislature in 1937 at a time when there were no recording taxes in existence which could have been encompassed by the exemption. It was not until the special session of 1937 that the Legislature voted to impose a recordation tax, and the Court found to be important the fact that "it was imposed upon the recordation of all deeds and certain other instruments, without any exception in favor of State, county or municipal agencies."

The clear implication from this language is that the Court found that the legislative policy in enacting the Section 22 exemption was not to include taxes then not in existence, this finding being supported by the fact that the recordation tax as originally enacted had no provision for any exemptions. For these reasons the Court concluded that it was not the intention of the General Assembly to include the State recordation tax within the Section 22 exemption.

The question now becomes whether Chapter 253 of the Laws of Maryland of 1945 legislatively overruled the holding of the *Pittman* case. Chapter 253 was enacted subsequent to the establishment of the recordation tax and subsequent to the decision in the *Pittman* case. Recordation taxes were already in existence when the exemption was created so that the point raised in *Pittman* of prospective application of an exemption is not apposite. The only question now is whether the exemption encompasses recordation taxes theretofore and thereafter imposed on housing authorities.

In order for the exemption claim to be sustained, it must be shown to be within the *spirit* as well as the *letter* of the exemption. *Pittman v. Housing Authority, supra*; *Broadbent Mantel Co. v. M. & C. C. of Baltimore*, 134 Md. 90; *Grand Lodge of Maryland, Knights of Pythias v. M. & C. C. of Baltimore*, 157 Md. 542. We will inquire first into whether the exemption at issue is within the letter of the

law. An affirmative answer requires a finding that the Housing Authority of the City of Annapolis is either an "agency" or a "political subdivision" of the State of Maryland within the language of present Article 81, Section 277 (a).

Preliminarily, it should be noted that three years elapsed between the *Pittman* decision and the enactment of said Chapter 253. There is no recorded legislative history to indicate that it was the intention of the General Assembly to alter the holding in the *Pittman* case. The most effective manner in which this could have been carried out would have been either a concurrent amendment to Article 44A, making it clear that the General Assembly considered housing authorities to be either agencies or political subdivisions of the State or by specific amendment to present Article 44A, Section 22, quoted above, broadening the real property tax exemption of housing authorities to include privilege taxes such as the State recordation tax. The fact that the Legislature did not specifically exempt housing authorities from the burden of the recordation tax, however, is not persuasive in and of itself. The *Pittman* case makes it clear that a general tax exemption may encompass specific taxes which have not been expressly delineated if such exemption is apparent under a strict construction of the statute.

The determinative question is whether a housing authority is a State "agency" or a "political subdivision". It is clearly not a State "agency" inasmuch as housing authorities, under Article 44A, are contemplated to be municipal agencies created by the governing body of incorporated cities or towns of this State. The question of exemption, then, resolves itself to the one issue—is a housing authority a *political subdivision* of the State?

A housing authority is a creature of a municipality which has elected to establish it under the provisions of Article 44A. It is a municipal agency which exercises police power to clear slums and to perform other activities directly related to the health and welfare of the community. A hous-

ing authority exercises governmental functions (Article 44A, Section 8 specifically says so) which the municipality could or would perform except that it has conferred its sovereign powers in that area upon the housing authority.

In 47 Opinions of the Attorney General 201 and 35 Opinions of the Attorney General 298, we held that a county board of education and the Lexington Market Authority, respectively, are exempt from the recordation tax because they are "agencies of a political subdivision of the State set up expressly to perform a governmental function of that subdivision". We said that the above two agencies should be considered the equivalent of the political subdivisions themselves for the purposes of the recordation tax and, as political subdivisions, exempt from that tax. In our opinion a housing authority is in precisely the same situation, and we see no reason to make any distinction between them for purposes of the recordation tax.

Our conclusion that the exemption is provided for by the letter of the law is supported by cases in other jurisdictions, specifically relating to housing authorities. In *Housing Authority v. Dockweiler,* 94 P. 2d 794 (1939) the California statute at issue contained identical language to that of Article 44A, Section 8, defining an authority as a "public body, corporate and politic". The Court in that case held that such an authority fit within the definition of a "municipal corporation" so as to be exempt from taxation. Under the rationale of this case a housing authority in Maryland would be tantamount to a municipal corporation and as such would surely be a political subdivision of the State. For other out-of-State cases reaching similar results see *Knoxville Housing Authority v. Knoxville,* 123 S.W. 2d 1085 (Tenn. 1939); *Wells v. Housing Authority,* 197 S.E. 693 (N. C. 1938); *Lennox v. Housing Authority,* 290 N.W. 451 (Neb. 1940) (opinion supplemented in 291 N.W. 100); *Laret Investment Co. v. Dickman,* 134 S.W. 2d 65 (Mo. 1939).

We are confident that the exemption of housing authorities is within the spirit of the general exemptions set forth

in Article 81, Section 277. The exemption of state "agencies" and "political subdivisions" indicates a legislative intention not to tax governmental units serving the public. A housing authority as a "public body corporate and politic exercising public and essential governmental functions" fits within this general category and the same reasons which would suggest exemptions for other governmental units apply.

In summary then, it is our opinion that the Housing Authority of the City of Annapolis fits within the letter and the spirit of the exemption accorded to *political subdivisions* of the State in Article 81, Section 277 and is not subject to the payment of the recordation tax imposed by that section.

FRANCIS B. BURCH, *Attorney General.*

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

TREASURER

TREASURER, STATE—DISBURSEMENTS—PROCEDURE FOR DISBURSEMENT OF STATE FUNDS TO POLITICAL SUBDIVISIONS APPROVED FOR LEGALITY.

December 10, 1970.

Mr. E. J. Schamel.

Your recent letter asks us to pass upon the legality of a contemplated change in the State Treasurer's procedure for the disbursement of funds to political subdivisions.

We understand that the present procedure is for the Treasurer, upon receipt of a warrant from the Comptroller directing the payment of a stated sum, to draw and transmit by mail a check payable to the subdivision, which check is thereafter cleared through the drawee bank. Your proposed procedural change would involve the presentation to the drawee bank of a "transmittal list submitted by the Comptroller" and a check payable to the drawee bank, duly signed by the Treasurer and countersigned by the Comptroller, in the total amount due the political subdivision according to the tenor of the warrant. The drawee bank would transmit funds equal to the amount of the Treasurer's check, presumably to a bank or depository designated in advance by the political subdivision, and would certify the transfer to the Treasurer. A bank receiving funds for the account of a local subdivision would issue a memorandum to the local fiscal officer indicating that funds have been deposited to the credit of the political subdivision. A copy of such credit memorandum would be sent to the State Treasurer.

The validity of any procedure for the disbursement of State funds by the Treasurer requires compliance with the provisions of Article VI, Section 3 of the Maryland Constitution, which provides in pertinent part that

"The Treasurer shall receive the moneys of

> the State . . . and he or such of his deputies as may be authorized to do so by the Legislature shall disburse the same for the purposes of the State according to law, upon warrants drawn by the Comptroller, or his duly authorized deputy, and on checks countersigned by the Comptroller, or his duly authorized deputy, and not otherwise. The Treasurer or such of his deputies as may be authorized to do so by the Legislature shall take receipts for all moneys paid from the Treasury Department; . . .".

The General Assembly has not fully implemented the constitutional mandate, the only legislative action in that regard having been to endow the Chief Deputy Treasurer and the Deputy Treasurers with the Treasurer's power to make disbursements and take receipts; Article 95, Section 7 of the Annotated Code of Maryland (1969 Replacement Volume). In the cited section, however, the reference to disbursements is stated in terms identical to the constitutional provision. It prescribes no approved procedure and sheds no light upon the legality of any particular method of disbursement. Accordingly, the legality of any disbursement procedure must be measured against the constitutional requirements, which appear to be three in number: (1) that any disbursement of State funds shall be for the purposes of the State according to law; (2) that disbursement shall be made upon warrants duly drawn and checks duly countersigned; and (3) that proper receipts shall be taken for all moneys paid from the State Treasury.

Aside from the strict requirement that disbursement is authorized only upon the authority of a warrant in due form and by check drawn as stipulated, the constitutional provision would seem to entertain a degree of flexibility in the disbursement procedure that may be considered lawful. Disbursement "for the purposes of the State in accordance with law" appears to be satisfied by a procedure which accomplishes the delivery of State funds by deposit in the bank and bank account of the political subdivision

entitled to them. When State funds are so paid by agreement of and instruction from the political subdivision, we believe such disbursement to be tantamount to disbursement directly to the payee.

The procedure proposed in your letter does not in any way alter or circumvent the requirement of disbursement only upon warrants drawn and checks countersigned by the Comptroller or his authorized deputy and, therefore, in our opinion, is compatible with the second constitutional requirement.

As to the requirement that the Treasurer or his authorized deputy shall take receipts for any moneys paid out of the Treasury, we are not prepared to say that certification to the Treasurer by the receiving bank that the transfer of funds has taken place, which your letter indicates to be the contemplated form of acknowledgement, is an adequate discharge of the Treasurer's duty to take proper receipts for disbursed funds. We would be able more confidently to endorse this element of your proposed disbursement procedure if it were to include a provision for the Treasurer to obtain a receipt signed by an authorized official of the political subdivision receiving the money.

Mindful that the present method of disbursement is said to be slow and cumbersome and that it works a hardship in one way or another on the receiving political subdivision and also upon those charged with the duty of disbursement, and in the light of a constitutional mandate of a rather general nature which has not been implemented by the legislature in specific terms, and subject to provision for adequate receipts as previously noted, we believe that the proposed disbursement procedure meets the test of legality.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Asst. Attorney General.*

TRIAL MAGISTRATES

ALLEGANY COUNTY—REDUCING SENTENCE WITHIN 90 DAYS.

January 27, 1970.

Edward J. Ryan, Esquire.

This letter is in reply to your recent inquiry as to whether a trial magistrate of Allegany County has the power to reduce a sentence within ninety days after imposition. We find no provision in the Trial Magistrates System subtitle of Article 52 of the Annotated Code of Maryland (1968 Replacement Volume) or in any amendment thereof, which confers power upon trial magistrates to reduce sentences after conviction. Generally, except as modified by this subtitle, their "authority, powers and civil and criminal jurisdiction" are the same as those "vested in any justice of the peace by law applicable to the counties for which they are respectively appointed", or "such as may hereafter be prescribed by law." See Article 52, Section 100. Section 100 of Article 52, however, does confer power upon trial magistrates to suspend sentence or costs, or both. The question then becomes whether the "reduction" of a sentence could be construed as a "suspension" of a sentence. The District Court for the Southern District of New York had almost this precise question before it in *United States v. Felder*, 13 F. 2d 527 (1926), in which it held that the Probation Act of 1925, empowering the court to suspend sentence and place defendants on probation, did not authorize the lower court to eliminate or modify the sentence after the expiration of the term. The Court went on to state the following at page 528:

> "The act expressly grants power 'to suspend the imposition or execution of sentence.' It does not grant any further or greater power than that which is included within the words quoted. Lexicographers define the word 'suspend' to mean 'to cause to cease *for a time;* to interrupt; to delay; to

> withhold *for a time* on certain conditions; to cause to cease for a time from operation or effect; to cease temporarily from operation or activity.' The word 'modify' is similarly defined as follows: 'To limit or reduce in extent or degree; to change the form or qualities of.' "

See also *Snodgrass v. State,* 150 S.W. 162, 67 Tex. Cr. R. 615 (1912).

It should be pointed out that language in Article 52, Section 13(a) which grants to trial magistrates the power ". . . to do all acts which may be necessary for the exercise of their said jurisdiction, and may pronounce judgments 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. . . ." could be argued to convey to trial magistrates the power to reduce sentences since circuit court judges are so empowered under Rule 764(b) (1). It is clear, however, from a close reading of the *Good* case, 240 Md. 1, that this argument would fail. In *Good,* the Court of Appeals held that in the absence of a 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 judgment subsequent to the statutory ten day period. See also 39 Opinions of the Attorney General 206, 40 Opinions of the Attorney General 635, and the opinions of the Attorney General dated December 8, 1969 to Governor Marvin Mandel and January 26, 1970 to State's Attorney Charles E. Moylan, Jr. concerning the authority of judges of the Municipal Court of Baltimore City to change judgments.

In the *Good* case, *supra,* the Court of Appeals relied heavily upon the rationale of *State v. Jacob,* 234 Md. 452, in which the court stated at pages 456-457 that:

> ". . . [W]hen 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."

Clearly, the same rationale applies here; for when the Legislature has wished to grant to trial magistrates, judges of People's Courts, or Municipal Court judges the power to reduce sentences, it has done so specifically. See Article 52, Sections 98B, 99, and Article 26, Section 113.

It is, therefore, our opinion, upon the basis of the reasoning and authorities cited, and particularly upon the rationale of *Good v. State,* and *State v. Jacob, supra,* that Trial Magistrates of Allegany County have no lawful authority to reduce a sentence within ninety days after imposition.

FRANCIS B. BURCH, *Attorney General.*

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

OPINIONS
OF THE
ATTORNEY GENERAL
CITED

OPINIONS OF THE ATTORNEY GENERAL OF MARYLAND

INDEX
TO
OPINIONS

INDEX TO OPINIONS

A

Page

Acts—

Acts—Construed or Referred to—

A—(Continued)

A—(Continued)

B

B—(Continued)

Baltimore City—(Continued)

Baltimore Neighborhoods, Inc.—

Banks and Banking—

B—(Continued)

Banks and Banking—(Continued)

Bankruptcy, Trustee In—

Bond Bills—

C

Capital Improvements—

Clerks of Court—

C—(Continued)

C—(Continued)

Constitutional Law—(Continued)

C—(Continued)

Constitution of Maryland—

Constitution of the United States—

C—(Continued)

Correctional Services—

Court of Appeals—

Courts—

C—(Continued)

Criminal Law—

D

Diseases, Infectious or Contagious—

Dockets—

E

Education—

Elections—

E—(Continued)

Elections—(Continued)

Employees, State—

E—(Continued)

F

F—(Continued)

G

General Assembly—

General Services, Department of—

Governor—

H

Hall of Records—

H—(Continued)

I

Injuries—

Industrial Development Financing Authority—

Insurance—

I—(Continued)

J

L

L—(Continued)

M

M—(Continued)

Merit System—(Continued)

Minors—

Misdemeanor—

Mortgages—

Motor Vehicle Code Offenses—

M—(Continued)

Motor Vehicles—

Motor Vehicles, Department of—

Mount Royal Plaza—Urban Renewal Plan—

N

Natural Resources, Department of—

Natural Resources—Planning—

Negro History and Culture, Commission on—

Nursing Homes—

O

Oath—

P

P—(Continued)

P—(Continued)

Political Subdivisions—

Port Authority, Maryland—

Public General Laws—

P—(Continued)

Public General Laws—(Continued)

P—(Continued)

Public General Laws—(Continued)

P—(Continued)

Public General Laws—(Continued)

P—(Continued)

Public General Laws—(Continued)

P—(Continued)

Public General Laws—(Continued)

P—(Continued)

Public General Laws—(Continued)

P—(Continued)

Public General Laws—(Continued)

P—(Continued)

Public General Laws—(Continued)

P—(Continued)

Public General Laws—(Continued)

P—(Continued)

Public General Laws—(Continued)

P—(Continued)

Public General Laws—(Continued)

P—(Continued)

Public General Laws—(Continued)

Public Works, Board of—

R

Records, Court—

Registers of Wills—

R—(Continued)

Registers of Wills—(Continued)

Reorganization Acts—

Residence—

Retail Credit Accounts Law—

Retirement Systems—

S

S—(Continued)

T

T—(Continued)

Taxation—(Continued)

Testamentary Law—

T—(Continued)

Testamentary Law—(Continued)

Towson State College—

Transportation, Department of—

Treasurer, State—

Trial Magistrates—

U

V

W