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## Summary of Attorney General's Opinions

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# SUMMARY OF ATTORNEY GENERAL'S OPINIONS\*

*ADMINISTRATIVE LAW. Anatomical Board: Right to pauper's bodies.* Florida law<sup>1</sup> does not require that dead bodies be turned over to the State Anatomical Board when relatives are known but are financially unable to pay for burial.<sup>2</sup>

*Appointments by Governor: Inadvertent error in selection.* Where the governor through inadvertent error appoints an individual who is geographically<sup>3</sup> unqualified to fill a county board position, the individual is a de facto officer whose acts are valid as to the public,<sup>4</sup> but the appointment is a nullity and a new appointment must be made.<sup>5</sup>

*Board of Massage: Examinations.* The Florida Board of Massage has no authority to conduct examinations and charge fees for teachers and instructors of massage.<sup>6</sup> It may conduct an inspection and examination of all schools of massage.<sup>7</sup>

*Indians: Interest in reservation income.* The general power of expenditure of income from Florida Indian reservations is granted to the tribal authorities subject to the Board of Commissioners of State Institutions.<sup>8</sup> The tribes' interest in this income is that of a cestui que trust and may be used by the state only to the extent of administering such income.<sup>9</sup>

*LEGISLATIVE COMMITTEE: Civil liability.* Legislators serving on interim committees are immune from civil liability while the committees function. The Attorney General may represent the members of such a committee in any suit arising from the committee's pursuit of its business.<sup>10</sup>

*State Board of Health: Disposition of property.* The State Board of Health may sell or lease property which is no longer needed.<sup>11</sup> Such a sale

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\* This issue of the Summary contains those opinions of general or public interest from Op. Att'y Gen. 056-295, October 1, 1956, through 056-356, December 28, 1956. The Summary of Opinions was prepared for publication by Harvey I. Reiseman, and was edited by Harold P. Barkas. We are grateful to Hon. Richard W. Ervin, Attorney General of the State of Florida, for supplying copies of these opinions.

1. FLA. STAT. § 240.06 (1955).
2. OP. ATT'Y GEN. 056-303 (Oct. 12, 1956).
3. LAWS OF FLA. c. 25807 (1949).
4. *Sawyer v. State*, 94 Fla. 60, 113 So. 736 (1927).
5. OP. ATT'Y GEN. 056-326 (Nov. 20, 1956).
6. OP. ATT'Y GEN. 056-355 (Dec. 21, 1956).
7. FLA. STAT. § 480.05(2)(3).
8. FLA. STAT. § 285.12 (1955).
9. OP. ATT'Y GEN. 056-336 (Dec. 3, 1956).
10. OP. ATT'Y GEN. 056-299 (Oct. 4, 1956).
11. FLA. STAT. § 381.171(2) (1955).

need not be for cash, but can be made in consideration of an agreement to provide the Board with office or other space which the Board might require.<sup>12</sup>

*Use of State Funds: Newspaper subscriptions.* State funds may be used for subscription to newspapers and news letters only if the receipt of such literature can be found to serve some direct public interest.<sup>13</sup>

**BANKS AND LOANS.** *Advance interest: Possibility of usury.* A loan for a fixed period of time is usurious<sup>14</sup> if advance interest plus a bank discount on the loan total more than 10% per annum of the amount actually received.<sup>15</sup>

*Foreign banks: Notes secured by mortgages.* A foreign banking association, having trust powers and using trust funds, may make loans in this state and take notes secured by mortgages on real property in return.<sup>16</sup> Such conduct would not be in violation of provisions of the state banking code which prohibit foreign banks from acting "as trustee of any real estate in this state or any interest therein under any agreement whereby the beneficial interest in such property is vested in others."<sup>17</sup> The reason is that a mortgage does not have an estate or interest in mortgaged lands.<sup>18</sup>

**COURTS.** *Breach of peace in unincorporated area: Power of Justice of Peace.* A justice of the peace may issue a warrant for breach of the peace in accordance with the common law if the offense is committed outside an incorporated area. State law does not define breach of the peace and no ordinance could apply.<sup>19</sup>

*Court reporters: Preservation of notes.* There is no law which requires that a court reporter's notes of a criminal trial be preserved beyond the time in which an appeal may be taken; but once an appeal has been taken and such stenographic notes are filed with the clerk of the court,<sup>20</sup> they become a part of the clerk's records and should be preserved permanently.<sup>21</sup>

*Disqualification of judge: Authority of governor.* Until a circuit judge sends a copy of an order of his disqualification on the hearing of a particular cause to the governor, as directed by statute,<sup>22</sup> the governor has no authority to appoint another judge to the hearing.<sup>23</sup>

12. OP. ATT'Y GEN. 056-301 (Oct. 10, 1956).

13. OP. ATT'Y GEN. 056-347 (Dec. 11, 1956).

14. FLA. STAT. § 687.02 (1955).

15. OP. ATT'Y GEN. 056-309 (Oct. 23, 1956).

16. OP. ATT'Y GEN. 056-329 (Nov. 21, 1956).

17. FLA. STAT. § 660.10(4) (1955).

18. FLA. STAT. §§ 697.01, 697.02 (1955); *Shavers v. Duval County*, 73 So.2d 684 (Fla. 1954).

19. OP. ATT'Y GEN. 056-296 (Oct. 2, 1956).

20. FLA. STAT. § 924.23 (1955).

21. OP. ATT'Y GEN. 056-344 (Dec. 11, 1956).

22. FLA. STAT. § 38.009 (1955).

23. OP. ATT'Y GEN. 056-328 (Nov. 21, 1956).

*Extra compensation to witnesses: Power to grant.* A circuit court order awarding grand jury witnesses compensation for food and lodging in addition to per diem and mileage is voidable, not void.<sup>24</sup> Hence, the state is bound by the order until it is set aside.<sup>25</sup>

*Justice of peace: Alteration of decision after remanding.* A justice of the peace may not recall his decision and alter a charge after the defendant has been remanded to a higher court, since no statute vests such power in a justice of the peace.<sup>26</sup> A defendant has a remedy when he feels he has been wrongfully detained.<sup>27</sup>

*Juvenile court judges: Right to issue search warrants.* Juvenile court judges are committing magistrates,<sup>28</sup> and such magistrates have the right to issue search warrants.<sup>29</sup>

**CRIMINAL LAW.** *Culpable negligence causing bodily injury: Degree.* Any negligence which would be sufficient for conviction of manslaughter<sup>30</sup> is sufficient to sustain a conviction of culpable negligence<sup>31</sup> causing bodily injury.<sup>32</sup>

*Magazine contest: Gambling and lottery laws.* Where a corporation advertises a contest in a national magazine sold in Florida and the prize to be awarded is on the basis of skill rather than chance, there is no violation of the Florida gambling or lottery laws<sup>33</sup> even though all other elements of a lottery are present.<sup>34</sup>

*Municipal conviction: Second offense within state felony statute.* A conviction in a municipal court is not for violation of a state statute although the ordinance may contain the same provisions as the statute. A municipal conviction and a subsequent state conviction are insufficient to charge a defendant with a felony<sup>35</sup> as provided by a second offender statute.<sup>36</sup>

*Non-support: Extradition.* A Florida resident<sup>37</sup> can be extradited for non-support if a proper and timely criminal complaint is made under the laws of the demanding state.<sup>38</sup>

24. State v. Lewis, 72 So.2d 823 (Fla. 1954).

25. OP. ATT'Y GEN. 056-313 (Oct. 30, 1956).

26. OP. ATT'Y GEN. 056-310 (Oct. 25, 1956).

27. FLA. STAT. § 79.01 (1955); Fla. Stat. § 909.04 (1955).

28. FLA. STAT. § 901.01 (1939).

29. FLA. STAT. § 933.01; OP. ATT'Y GEN. 056-356 (Dec. 28, 1956).

30. FLA. STAT. § 782.07 (1955).

31. FLA. STAT. § 784.05 (1955).

32. OP. ATT'Y GEN. 056-334 (Nov. 30, 1956).

33. FLA. STAT. §§ 849.08, 849.09, 849.11 (1955).

34. OP. ATT'Y GEN. 056-315 (Nov. 1, 1956).

35. OP. ATT'Y GEN. 056-343 (Dec. 11, 1956).

36. FLA. STAT. § 849.09 (1955).

37. FLA. STAT. § 88.061 (1956).

38. OP. ATT'Y GEN. 056-308 (Oct. 23, 1956).

*Runaway delinquent: Extradition.* A child who runs away from a state boarding home after being adjudged a delinquent has not committed an act which is defined as criminal and cannot be subjected to extradition.<sup>39</sup>

*Worthless out of state checks: Florida jurisdiction.* Where an out-of-state check is delivered in a Florida county, the county has jurisdiction<sup>40</sup> to issue a criminal warrant against the maker.<sup>41</sup>

*ELECTIONS. Freeholder re-registration: Eligibility in general elections.* When a county calls for a re-registration of freeholders, all those who register or reregister are eligible to vote in both general or freeholder elections, while those who do not re-register are not eligible in freeholder elections although they remain eligible for general elections.<sup>42</sup>

*Petitions. Signatures and sufficient number of signatures.* The general election laws of Florida<sup>43</sup> do not require that names be signed to petitions in exactly the same manner as the names appear in county registration books and affidavits of parties or witnesses may be accepted for a determination of a signature's validity. A determination as to whether a petition<sup>44</sup> has been signed by a requisite number of voters must be made on the basis of the number of voters registered in a county on the day when the petition is presented.<sup>45</sup>

*FLORIDA. County Attorneys' Convention: Expenses.* Expenses incurred by county attorneys in attending a national convention of their group may be reimbursed out of county funds if there is a benefit to the county as the result of such attendance.<sup>46</sup>

*County fee officers: Charging convention costs to office.* A county fee officer, such as a tax assessor or clerk of circuit court, may not charge to the operation of his office expenses incurred by reason of entertaining the national convention of his association.<sup>47</sup>

*County hospitals: Splitting fees.* The practice of county hospitals collecting and splitting fees for out-patient treatments with hospital radiologists is not <sup>48</sup> an unlawful practice of medicine.<sup>49</sup>

*Funeral homes: Right to refuse release of body for autopsy.* A funeral home has no authority to refuse the release of a body to a county medical examiner when an autopsy is ordered,<sup>50</sup> and a funeral director may be com-

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39. OP. ATT'Y GEN. 056-338 (Dec. 7, 1956).

40. FLA. STAT. §835.05(2) (1955).

41. OP. ATT'Y GEN. 056-316 (Nov. 1, 1956).

42. OP. ATT'Y GEN. 056-331 (Nov. 28, 1956).

43. FLA. STAT. c. 567 (1955).

44. FLA. STAT. §567.01 (1955).

45. OP. ATT'Y GEN. 056-307 (Oct. 17, 1956).

46. OP. ATT'Y GEN. 056-323 (Nov. 15, 1956).

47. OP. ATT'Y GEN. 056-305 (Oct. 16, 1956).

48. OP. ATT'Y GEN. 056-322 (Nov. 15, 1956).

49. FLA. STAT. § 458.13(1) (1955).

50. LAWS OF FLA. c. 31063 (1955).

pelled to release a body by an order of inquest or by a mandatory injunction by a court of record.<sup>51</sup>

*Sale of intoxicants: Municipal power to deny right.* The State Beverage Act supersedes all municipal powers over sale of intoxicating beverages except those with regard to hours, sale zones and sanitary conditions.<sup>52</sup> A municipal ordinance which denies a liquor license to a motel is invalid since motels as well as hotels are exceptions to the general restrictions on licensing.<sup>53</sup>

*Sale of intoxicants: Municipal and county power.* Municipalities and counties have the power to regulate hours for the sale of intoxicants.<sup>54</sup> Where the municipality and county do not express this power, the state laws apply.<sup>55</sup>

*Sheriff's departments: Arrests by non-uniformed officers in unmarked cars.* Officers of a county sheriff's department are not required to wear uniforms or drive marked autos when making arrests for violations of Florida laws committed in their presence.<sup>56</sup>

*INSURANCE: Financing of premiums: Legality.* A plan by an insurance company which would finance premiums due under issued contracts is lawful in this state <sup>57</sup> provided: the company has the power under its charter to offer such a plan; no discrimination results regarding those policy holders who have paid cash; and sufficient interest is charged on the credit given so as to remove the possibility of prohibited rebates.<sup>58</sup>

*LICENSES. Occupational: Application requirements.* Each successive time a person applies for an occupational license<sup>59</sup> he must establish<sup>60</sup> that he has been a resident of Florida for two years and is a registered voter of the county wherein he resides.<sup>61</sup>

*Specialty occupations: Part of general occupation.* Although minor plumbing maintenance may be performed on one's own property without an occupational license,<sup>62</sup> the performance of minor maintenance on the property of another requires compliance with the law.<sup>63</sup> The specialty busi-

51. OP. ATT'Y GEN. 056-297 (Oct. 2, 1956).

52. *Miami v. Kichinko*, 156 Fla. 87, 22 So.2d 627(1945).

53. OP. ATT'Y GEN. 056-318 (Nov. 2, 1956).

54. FLA. STAT. § 562.14 (1955).

55. OP. ATT'Y GEN. 056-325 (Nov. 19, 1956).

56. OP. ATT'Y GEN. 056-312 (Oct. 26, 1956).

57. OP. ATT'Y GEN. 056-342 (Dec. 10, 1956).

58. FLA. STAT. § 625.19 (1955).

59. FLA. STAT. § 205.41 (1955).

60. OP. ATT'Y GEN. 056-332 (Nov. 29, 1956).

61. FLA. STAT. § 205.411 (1955).

62. FLA. STAT. § 553.03(4) (1955).

63. FLA. STAT. § 555.11(2) (1955).

ness of cleaning septic tanks is a part of the business of plumbing; therefore, one engaged in this business would be required to meet the requirements for receiving an occupational license.<sup>64</sup>

**MUNICIPAL CORPORATIONS.** *Water sheds: Prohibition of water sports.* Municipal corporations do not have the power to prohibit fishing,<sup>65</sup> bathing and other water sports in or on waters within the water sheds from which they draw their municipal water supply unless delegated the express power by the state for purposes of exercising the police power regarding health or safety.<sup>66</sup>

**PUBLIC ASSISTANCE.** *Withholding information: Liability.* Withholding information on an application for public assistance is a representation,<sup>67</sup> and puts the applicant in a position of liability for a statutory breach.<sup>68</sup>

**STATUTORY LAW.** *Arrest warrants: Sunday service.* The Florida statute prohibiting the service of an arrest warrant on Sunday<sup>69</sup> has been superseded by a later statute<sup>70</sup> permitting Sunday service.<sup>71</sup>

*Bank filing taxes. Conflicting statutes.* Since there is an irreconcilable conflict between statutes regarding the filing of taxes to be paid by banking corporations,<sup>72</sup> the latest expression of the legislature,<sup>73</sup> must control.<sup>74</sup>

*Filing fees: Controlling statute.* A statute covering clerk's fees upon the filing of any civil action in a circuit court,<sup>75</sup> being the last expression of the legislature on the subject, takes precedence over an earlier statute which provides for a different fee.<sup>76</sup>

*Interstate Probation agreements: Meaning of "State".* The legislature has passed statutes in which it is expressly provided that the word "state" shall be applicable to the territories as well as the several states of the United States.<sup>77</sup> The absence of such provision in the authorization of the governor to enter into a compact with any state of the United States concerning persons released on parole or probation<sup>78</sup> indicates that in this regard "state" does not apply to territories and the District of Columbia.<sup>79</sup>

64. OP. ATT'Y GEN. 056-345 (Dec. 11, 1956).

65. *Bell v. Vaughn*, 155 Fla. 551, 21 So.2d 31 (1945).

66. OP. ATT'Y GEN. 056-354 (Dec. 21, 1956).

67. FLA. STAT. § 409.36 (1955).

68. OP. ATT'Y GEN. 056-300 (Oct. 10, 1956).

69. FLA. STAT. § 47.46 (1955).

70. FLA. STAT. § 901.04 (1955).

71. OP. ATT'Y GEN. 056-327 (Nov. 21, 1956).

72. FLA. STAT. §§ 608.05(3), 659.15 (1955).

73. FLA. STAT. § 608.05(3) (1955).

74. *Tamiami Trails Tours v. Lee*, 142 Fla. 68, 194 So. 305 (1940); OP. ATT'Y GEN. 056-335 (Dec. 1, 1956).

75. FLA. STAT. § 28.241(1) (1955).

76. OP. ATT'Y GEN. 056-340 (Dec. 10, 1956).

77. FLA. STAT. §§ 88.031, 941.39 (1955).

78. FLA. STAT. § 949.07 (1955).

79. OP. ATT'Y GEN. 056-350 (Dec. 17, 1956).

**TAXATION. Ad valorem tax: Eleemosynary trust benefits as a life estate to relatives.** Generally, property used for eleemosynary purposes is exempt from Florida ad valorem taxation,<sup>80</sup> and the use made of the property is the main test of the exemption.<sup>81</sup> Where the settlor establishes a trust for an eleemosynary corporation with the income to go to his relatives for life and then to be used for charitable purposes after their death, the trust is not exempt from taxation until actually used for purposes of a charitable character.<sup>82</sup>

**Foreign promissory notes: Florida acceptance.** Promissory notes signed in other states but accepted in Florida are subject to state taxation,<sup>83</sup> since acceptance is considered a part of delivery.<sup>84</sup>

**Intangible property tax: Personal property.** An intangible property tax is constitutionally authorized upon the recording of an obligation secured by mortgage, deed of trust or other lien.<sup>85</sup> However, the legislature has provided for the tax upon only instruments which encumber real property<sup>86</sup> and not for those which encumber personal property such as a lease for a term of years.<sup>87</sup>

**Motor vehicles with mounted equipment: Ad valorem.** A motor vehicle is subject to ad valorem taxes if the use of the equipment thereon rather than transportation is its primary purpose. Whether ad valorem taxes may be levied on cranes, cement mixers and other equipment mounted on a motor vehicle chassis is dependent upon the primary use of the vehicle.<sup>88</sup>

**Municipal occupational licenses: Insurance companies.** A municipality may impose an occupational license tax upon an insurance company operating within its limits to the extent of fifty per cent of the state license tax imposed, or to a greater extent if reasonable and just, if its municipal charter gives it such power.<sup>89</sup> No excise tax may be levied by the municipality, since the administration of insurance laws is vested in the Commissioner of Insurance.<sup>91</sup>

**State University publication.** The publication department of a state university is a tax exempt government agency.<sup>92</sup>

80. FLA. STAT. §199.02(5) (1955).

81. Hay Foundation v. Wilcox, 156 Fla. 704, 24 So.2d 237 (1945).

82. OP. ATT'Y GEN. 056-321 (Nov. 14, 1956).

83. FLA. STAT. § 201.08 (1955).

84. OP. ATT'Y GEN. 056-339 (Dec. 7, 1956).

85. FLA. CONST. art. IX, §1.

86. FLA. STAT. § 199 (1955).

87. OP. ATT'Y GEN. 056-353 (Dec. 21, 1956).

88. FLA. STAT. § 320.08 (1955).

89. OP. ATT'Y GEN. 056-314 (Oct. 31, 1956).

90. FLA. STAT. § 205.02 (1955).

91. OP. ATT'Y GEN. 056-341 (Dec. 10, 1956).

92. OP. ATT'Y GEN. 056-348 (Dec. 12, 1956).