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SUMMARY OF ATTORNEY GENERAL'S OPINIONS*

This issue of the Summary contains those opinions of general or public interest from OP. ATT'Y GEN. 054-258 December 5, 1954, through 055-35 February 18, 1955.

ADMINISTRATIVE LAW. *Florida Board of Forestry: Leases.* The Florida Board of Forestry has the authority and power to negotiate and enter into gas and oil leases.¹ However, the board must first determine that such leases are consistent with the interests of the public in the management of the state forest or reforestation projects. The leases then should be concurred in by the trustees of the Internal Improvement Fund, and actually executed by them.²

Florida Citrus Commission: Utilization of funds. The Florida Citrus Commission has discretionary authority in determining the procedure to be followed in utilizing funds obtained from a tax on different types of citrus fruits.³

It is unnecessary to maintain separate funds for each variety of citrus fruit in view of the present procedure of allocating advertising benefits according to the revenue received from each particular type of citrus fruit.⁴

Florida Game and Fresh Water Fish Commission: Necessity of licenses. A person who is employed on a year round basis to train dogs is not required to purchase a guide license if he renders a guide service to his employer as part of his year round employment, since this service is merely incidental to the main function of his employment.⁵

Nor is a person who is employed by a professional hunter's guide to drive the guide and hunting party in the guide's vehicle required to purchase a guide's license since he is not *engaged in the business of guiding hunters*.⁶

Florida State Road Department: Non-emergency projects. The State Road Department may not undertake construction of a non-emergency

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1. FLA. STAT. §§ 253.51-253.61 (1945).
2. OP. ATT'Y GEN. 1054-270 (Dec. 21, 1954).
3. FLA. STAT. § 601.15 (1953).
4. OP. ATT'Y GEN. 054-269 (Dec. 21, 1954).
5. FLA. STAT. § 372.62 (1929).
6. FLA. STAT. § 372.63 (1945); OP. ATT'Y GEN. 055-10 (Jan. 21, 1955).

project which is not set forth in its annual budget until all the projects included in the budget are completed.⁷

Nor is the department obligated to pay contractor's estimates for non-emergency projects not included in the budget.⁸

State Advertising Commission: Governor's baseball dinner. Funds of the State Advertising Commission may not be used to defray an appropriate part of the cost of the Governor's baseball dinner, since this is not a mode of advertising as defined by the statute.⁹

State Advisory Council on Education: Membership eligibility. A professor or a dean at one of the colleges at a state institution of higher learning is ineligible for membership on the State Advisory Council on Education, because the Council is a "lay" advisory body.¹⁰

State Fire Marshal: Common carriers. The words "common carriers operating within the State of Florida", as used in the statute,¹¹ include common carriers by water moving from ports of other states or foreign countries into Florida ports.¹²

ATTORNEYS. *Defense attorneys: Right to interview witness.* A defense attorney does not have the absolute right, on behalf of his client, to hold a private interview in a public building with a witness. Such an interview may be subject to such terms and conditions deemed necessary in the discretion of the court.¹³

CONSTITUTIONAL LAW. *Gasoline Tax: Use for roads in another county.* A county may not allocate a portion of its constitutional "second gas tax",¹⁴ nor a portion of its statutory¹⁵ "additional gas tax" for highway expenditure in another county.¹⁶

CORPORATIONS. *Transfer of corporate stock by reason of incorporation in another state.* When a foreign corporation, owning stock in a domestic corporation, incorporates in a third state, there is no transfer of the Florida corporate stock as to require the payment of a stock transfer tax unless the corporate entity has substantially changed.¹⁷

COURTS. *Clerks, Requirement to provide documents.* The clerk of a circuit court is not required to provide more than one free copy of a recorded document to a veteran who needs the copies to secure a particular benefit available to him through the Veterans' Administration.¹⁸

7. FLA. STAT. § 208.44 (1953).

8. OP. ATT'Y GEN. 055-5 (Jan. 7, 1955).

9. FLA. STAT. § 286.19 (1945); OP. ATT'Y GEN. 055-34 (Feb. 18, 1955).

10. FLA. STAT. § 228.15 (1947); OP. ATT'Y GEN. 055-26 (Feb. 10, 1955).

11. FLA. STAT. § 552.031 (1953).

12. OP. ATT'Y GEN. 055-29 (Feb. 14, 1955).

13. OP. ATT'Y GEN. 054-259 (Dec. 16, 1954).

14. FLA. CONST. ART. IX, § 16 (1885).

15. FLA. STAT. § 208.44 (1941).

16. OP. ATT'Y GEN. 055-36 (Feb. 18, 1955).

17. FLA. STAT. § 201.04 (1941); OP. ATT'Y GEN. 055-30 (Feb. 15, 1955).

18. FLA. STAT. § 293.15 (1953); OP. ATT'Y GEN. 054-266 (Dec. 16, 1954).

Municipal judge: Surrender of driver's license. A municipal judge should require the surrender of a driver's license in situations involving mandatory revocation, if bail or collateral is forfeited by the defendant.¹⁹

The license together with the record of conviction should then be forwarded to the Department of Public Safety.²⁰

Powers: Suspension of the execution of a sentence. A court is without power to suspend the execution of a sentence lawfully imposed except for the purpose of giving effect to an appeal, or where cumulative sentences are imposed, or in some cases of necessity or emergency.²¹

A person given a suspended sentence for reasons not within the purview of the above exceptions is subject to immediate imprisonment.²²

CRIMINAL LAW. *Bail bond: Constable's approval.* Normally, a constable does not have the power to approve or disapprove a bail bond of a person arrested by him. However, where a criminal warrant is delivered to the constable for execution, with the amount of the bail to be required endorsed on it as required by statute, the constable may take and approve a bail bond in said amount.²³

Habitual Criminal Statutes: Mandatory duty of prosecuting attorney. Where the facts justify the filing of a habitual criminal information, it is the mandatory duty of the prosecuting attorney to allege such previous convictions either in the indictment or information for the current felony, or to allege them in an information filed subsequent to the conviction for the current felony.²⁴

Indecent language: Telephone conversations. A statute²⁵ condemning the use of indecent language "upon the private premises of another, or so near thereto as to be heard by another" can be violated by the use of vulgar language in a telephone conversation.²⁶

Lotteries: Advance sale of tickets. Prizes awarded as a result of drawings from tickets purchased at an advance sale, admitting patrons to an industrial exhibition, constitutes an illegal lottery.²⁷

Lotteries: Punchboards. Prizes awarded as a result of obtaining a pre-determined lottery number by puncturing a hole in a punch board constitutes an illegal lottery since the three elements of a lottery are present: (1) consideration, (2) a prize (3) an award by chance.²⁸

19. OP. ATT'Y GEN. 054-267 (Dec. 16, 1954).

20. FLA. STAT. § 322.25 (1953).

21. Pensacola Lodge No. 497, BPOE v. State, 74 Fla. 498, 77 So. 613 (1918).

22. OP. ATT'Y GEN. 055-13 (Dec. 30, 1954).

23. OP. ATT'Y GEN. 055-19 (Jan. 28, 1955).

24. FLA. STAT. §§ 775.09-775.11 (1927); OP. ATT'Y GEN. 055-28 (Feb. 14, 1955).

25. FLA. STAT. § 847.04 (1953).

26. OP. ATT'Y GEN. 054-262 (Dec. 16, 1954).

27. OP. ATT'Y GEN. 054-268 (Dec. 21, 1954).

28. OP. ATT'Y GEN. 054-258 (Dec. 6, 1954).

Lotteries: Shuffleboard. Prizes awarded as a result of points determined by winning games at shuffleboard do not constitute a lottery, since the game of shuffleboard is primarily a game of skill, and not one of chance.²⁹

Motion to suppress evidence: Re-introduction of testimony at the trial. Where a motion to suppress evidence is heard and testimony is taken at a hearing before the trial of a criminal case, it is necessary to re-introduce this testimony at the trial in order to introduce seized contraband, since it is within the province of the trial court to determine all questions of fact, and pass upon the admissibility of the evidence.³⁰

Municipal officers: Extra-territorial powers of arrest. A municipal police officer has no power to arrest beyond the corporate limits of a municipality, even though the violation occurred within the corporate limits and the violator is immediately pursued to a point outside of the municipality, unless special power was granted to the officer by an applicable special act.³¹

Municipal officers: Immunity from arrest. A municipal police officer does not enjoy immunity from arrest for speeding outside of the corporate limits even though the officer was pursuing a violator of a municipal ordinance.³²

Narcotics: Forfeiture. If a man is discovered in an automobile with unlawful narcotics on his person, a forfeiture of the vehicle would be authorized, even though no narcotics were found in the automobile.³³ Pertaining to this point, the Florida Statute is somewhat broader than the federal law.³⁴

Resisting arrest: Wildlife officers. A charge of "resisting arrest" may be made against a person resisting arrest by a wildlife officer engaged in his lawful duty of enforcing game and fresh water fish laws and regulations.³⁵

FELONIES. Convictions: Masseurs. A person who has been convicted and sentenced to a three and one-half year term in the federal penitentiary is not entitled to be registered and issued a certificate of registration as a masseur, masseuse or for a massage school,³⁶ under the statute³⁷ which requires such an applicant to take an oath that he has not been convicted of a felony.

GAMING. Cock fighting. Cock fighting is not prohibited when there

29. OP. ATT'Y GEN. 055-1 (Jan. 3, 1955).

30. OP. ATT'Y GEN. 055-23 (Feb. 9, 1955).

31. OP. ATT'Y GEN. 055-24 (Feb. 9, 1955).

32. *Ibid.*

33. OP. ATT'Y GEN. 055-9 (Jan. 21, 1955).

34. FLA. STAT. § 398.24 (1953).

35. OP. ATT'Y GEN. 055-19 (Jan. 28, 1955).

36. OP. ATT'Y GEN. 054-275 (Dec. 29, 1954).

37. FLA. STAT. § 480.06 (1953).

is no gambling upon the outcome of the fight and where neither of the cocks is equipped with sharpened or artificial spurs.³⁸

However, the fighting of cocks provided with artificial or sharpened spurs possibly constitutes cruelty to animals.³⁹

INSURANCE. Budget plan agreement. The validity of budget plan agreements lies within the judgment and discretion of the Insurance Commissioner, even though such agreements are not repugnant to the statute.⁴⁰

Burglary insurance: Purchases of safes. Where a foreign corporation sells portable safes in Florida, and with each purchase there is furnished burglary insurance, this does not constitute the negotiation of insurance contracts subject to regulatory insurance laws of this state. The reasons being: (1) the insurance is merely incidental to the purchase of the safe; (2) a master policy has been negotiated out-of-state; (3) the purchaser transmits no premium to the insurer; and (4) the insured makes no application for the insurance.⁴¹

Group life: Eligibility. A group life insurance policy insuring "all grower members" of the Florida Citrus Mutual is invalid, since it does not appear that the members of this organization are eligible for such group insurance coverage.⁴²

Reinsurance and retrocession agreements: Insurance Commissioner's approval. Any agreement effecting reinsurance of any risk or risks of a domestic insurer by an insurance company "not authorized to do business in this state" must be approved by the Insurance Commissioner. However, if the domestic company reinsures its risks with an insurance company authorized to engage in business in this state, the Commissioner's approval is not necessary, unless *substantially all* of its risks are the subject of the reinsurance.

Agreements accomplishing retrocession of business are not required to be approved by the Insurance Commissioner.⁴³

PUBLIC OFFICERS. Appointees Commissions: Governor's appointees. The Secretary of State is required to prepare the commissions of appointees of the Governor. When the qualifying papers have been filed, the Secretary of State is then required to attest and to affix the seal to such commissions. The duty of the Secretary of State in this regard is strictly ministerial, and he cannot question the appointments made by the Governor in

38. Mikell v. Henderson, 63 So.2d 508 (Fla. 1953); OP. ATT'Y GEN. 055-2 (Jan. 6, 1955).

39. FLA. STAT. § 828.12 (1953).

40. FLA. STAT. § 643.09 (1947); OP. ATT'Y GEN. (Jan. 28, 1955).

41. OP. ATT'Y GEN. 055-27 (Feb. 11, 1955).

42. FLA. STAT. § 635.24 (1953); OP. ATT'Y GEN. 055-3 (Feb. 1, 1955).

43. FLA. STAT. § 626.10 (1927); OP. ATT'Y GEN. (Jan. 26, 1955).

situations involving subsequent appointments made to posts occupied by the appointees of the outgoing Governor.⁴⁴

Florida State Turnpike Authority: Sale of material by public officers to state agencies. A company, one of whose officers is a member of the Florida Turnpike Authority, although prohibited from selling products to the Turnpike Authority, would be allowed to sell to any other state agency.⁴⁵

Legislature: Sergeant at Arms. Sergeants at Arms of the Senate and House of Representatives of the State Legislature may employ personnel within 15 days of the convening and adjournment of the legislature in order to prepare for the meeting of the legislature, to wind up its affairs, and to protect its property after each session. This time period may be extended with the approval of the President of the Senate and Speaker of the House of Representatives.

The expenses of the Sergeants at Arms must be approved by the proper committee on legislative expense.⁴⁶

Retirement systems: County health officers. County health officers, and employers of county health units, paid with state warrant, should be members of the state officers and employees retirement system, not the county retirement system.⁴⁷

PUBLIC PRINTING. *Diplomas.* Engraved diplomas of a state university are included within the meaning of the statute⁴⁸ requiring all public printing to be done in the state.⁴⁹

REAL PROPERTY. *Homestead exemption: Trust agreements.* Owners residing upon land which is held for them in trust by a bank are entitled to homestead tax exemption, if they otherwise qualify for the exemption.⁵⁰

TAXATION. *Documentary Stamp Tax: Collateral pledge to secure advances.* A written agreement between a bank and a borrower, whereby the borrower deposits with the bank collateral to secure payment of an advance or loan, and which agreement contains provisions allowing the bank to sell the collateral if necessary, is not "a written obligation to pay money" under the statute⁵¹ which imposes a documentary excise tax upon such instruments.

Whether an instrument is susceptible of a documentary stamp tax is determined by the *form* and *face* of the instrument. Since the collateral

44. State ex rel Fleming, Governor v. Crawford, Secretary of State, 28 Fla. 441, 10 So. 118 (1891); OP. ATT'Y GEN. 055-6 (Jan. 12, 1955).

45. OP. ATT'Y GEN. 055-15 (Jan. 28, 1955).

46. OP. ATT'Y GEN. 055-4 (Jan. 7, 1955).

47. OP. ATT'Y GEN. 055-3 (Jan. 7, 1955).

48. FLA. STAT. § 283.03 (1953).

49. OP. ATT'Y GEN. 054-260 (Dec. 16, 1954).

50. FLA. CONST. ART. X, § 7 (1885); OP. ATT'Y GEN. 055-18 (Jan. 18, 1955).

51. FLA. STAT. § 201.08 (1953).

pledge to secure advances does not contain a promissory note or written terms of payment, none may be inferred.⁵²

Federal Savings and Loan Associations: Assessment of deposits. Funds placed with a Federal Savings and Loan Association may not be assessed in the name of the association under the authority of the Florida Statute,⁵³ because the federal act⁵⁴ embraces the entire field, and leaves no room for state legislation.⁵⁵

Issuance of tax deeds: Surplus funds. A clerk of a circuit court who issues a tax deed on March 1st of a given year for delinquent taxes for prior years may not redeem tax sale certificates issued for non-payment of taxes for the same year in which the tax deed was issued from surplus funds received by him when the tax deed was sold.⁵⁶

Mileage taxes. Mileage taxes⁵⁷ imposed upon vehicles of auto transportation companies and other similar vehicles are applicable to mileage traveled by such vehicles over public toll roads and bridges where public funds have been invested in such roads or where the highway will become a part of the public free highway system after it has been paid for through the toll charges.⁵⁸

52. OP. ATT'Y GEN. 054-265 (Dec. 16, 1954).

53. FLA. STAT. § 193.09 (1927).

54. 12 U.S.C. § 1464 (1947).

55. OP. ATT'Y GEN. 055-31 (Feb. 14, 1955).

56. OP. ATT'Y GEN. 055-35 (Feb. 18, 1955).

57. FLA. STAT. § 323.15 (1953).

58. OP. ATT'Y GEN. 054-264 (Dec. 16, 1954).