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Summary of Opinions of the Attorney General

SUMMARY OF OPINIONS OF THE ATTORNEY GENERAL*

This issue reports several opinions believed to be of more than usual interest, and begins the analysis of tendencies which should eventually be of lasting value to the practitioner. Generally, the policy of the attorney general's office is strict interpretation of the statutes, leaving law-making to the courts as well as to the legislature. Especially is that true in dealing with protection of the public treasury by competitive bidding on contracts, the avoidance of favoritism in awarding contracts to an employee of a state agency, and the wise limitation on the practice of nepotism.[1] Similarly, the preservation of the public morals is not influenced by general tolerance of a form of gambling which has been banned by the legislators: a one-turkey shooting match is unlawful, while the giving of door prizes is not.[2] Some consistency in the ethical viewpoint may be discerned, perhaps with less effort than rationalizing the different approaches to tax exemption for an old but struggling college and for a new osteopathic general hospital.[3] Also carrying out the fundamental policy are four opinions which indicate that the office is not seriously afflicted by the judicial neurosis of stare decisis, although the attorney general feels bound to follow, through confusion even unto error, a legal theory adopted by the Florida Supreme Court.[4]

However, the weakness of any narrow policy is demonstrated in the reluctant failing to take advantage of opportunities to avoid injustice to servicemen's widows, and to better achieve a sound pension system.[5] Instead, the problems are left for equally problematical solution by the next legislature. At the same time, the validity of the policy is shown by the refusals to decide questions of constitutionality, and to do more than state the applicable rules for the guidance of tax assessors in adding to the public funds.[6]

AUTOMOBILES. *Vehicle licenses.* While motorists ponder the burdens of ownership, the sale of automobile license plates constitutes a worrisome

*This issue covers selected opinions offered from Oct. 18 through Nov. 21, 1950. OPS. ATT'Y GEN. 050-493 through 050-533, omitting OPS. 050-495, 050-503, 050-509, 050-516, 050-518, 050-529, 050-532. The *Summary of Opinions* was written by Richard W. Rodgers.

1. See CONTRACTS, *Competitive bidding;* HIGHWAYS, *State contracts with employees;* COUNTIES, *Employees.*

2. See GAMING, *Prize or reward, Wagering.*

3. See TAXATION, *Exemptions, non-profit institutions.*

4. See PENSIONS, *Disqualification for misconduct;* TAXATION, *Documentary stamp tax;* STATUTES, *Repeal of tax.*

5. See TAXATION, *Exemptions, veterans;* PENSIONS, *Disqualification for misconduct.*

6. See CONSTITUTIONAL LAW, *Delegation of authority;* TAXATION, *Exemptions, non-profit institutions; Summary of Opinions,* MUNICIPAL CORPORATIONS, *Police power,* 5 MIAMI L.Q. 124 (1950).

duty, albeit a rather lucrative one, of the county tax collector. The service charge collected from each purchaser is retained as part of the income of the office; yet the tax collector, in this function, acts as an agent of the state and not of the county.[7]

CLERKS OF COURTS. *Retirement.* A former clerk of a circuit court may retire upon satisfying the express requisites of the statutory plan, even though the last official audit of the records of his office has disclosed that money is owed to the county.[8]

COLLEGES AND UNIVERSITIES. *Professors' income taxes.* While the federal income tax regulations have long regarded as a non-deductible personal expense the cost of advance studies by a school or college teacher, a recent federal court decision affords a slim chance for deducting the expenditure as a business or a necessary non-business expense. This opinion by the state attorney general, interpreting the case, does not offer the scholar much solid ground between the quicksand of non-deductibility and the morass of work undertaken as a condition of continued employment.[9]

Radio stations. A college-operated radio station, although not entirely a part of the institution and competing with commercial stations, is exempt from ad valorem taxation if in fact it is an educational facility of which the income is used for educational purposes.[10]

CONSTITUTIONAL LAW. *Delegation of authority.* There may be a good argument for finding an unconstitutional delegation of legislative authority in the statutory direction that the federal statutes or regulations governing the safe operation of aircraft *shall* be considered in determining whether the operator was careless or reckless under state law.[11]

Search and seizure. Since the prohibition of an unreasonable search and seizure does not forbid a reasonable search without a warrant as an incident to a legal arrest,[12] a warrant is not necessary to search an automobile in which there is a person who an officer has probable cause to believe is committing the felony of possessing bolita tickets.[13]

CONTRACTS. *Competitive bidding.* Several opinions since late summer display a consistently strict application of statutes which direct advertising for and receipt of competitive bids on certain state or county contracts exceeding a specified sum.[14] In order to protect the public from collusion,

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7. OP. ATT'Y GEN. 050-512 (Nov. 1, 1950); FLA. STAT. §§ 320.03, 320.04 (1949). See COUNTIES, *Tax Collector, infra.*

8. OP. ATT'Y GEN. 050-515 (Nov. 1, 1950); FLA. STAT. §§ 134.05–134.07 (1949). See PENSIONS, *Disqualification for misconduct, infra.*

9. Hill v. Comm'r of Int. Rev., 181 F.2d 906 (4th Cir. 1950); OP. ATT'Y GEN. 050-530 (Nov. 21, 1950). See INTERNAL REVENUE, *Income tax, infra.*

10. OP. ATT'Y GEN. 050-531 (Nov. 21, 1950); FLA. CONST. Art. IX, § 1, Art. XVI, § 16; FLA. STAT. § 192.06 (1949); Fla. Laws 1887, c. 3808, § 14 (John B. Stetson Univ.). See TAXATION, *Exemptions, non-profit institutions, infra.*

11. OP. ATT'Y GEN. 050-517 (Nov. 3, 1950); FLA. STAT. § 860.13(2) (1949).

12. FLA. CONST., Declaration of Rights, § 22; Longo v. State, 157 Fla. 668, 26 So.2d 818 (1946); Italiano v. State, 141 Fla. 249, 193 So. 48 (1940).

13. OP. ATT'Y GEN. 050-520 (Nov. 8, 1950); FLA. STAT. § 849.09 (1949).

14. FLA. STAT. §§ 341.14–341.15, 125.08 (1949).

fraud, favoritism or extravagance, the statutes are mandatory and are narrowly construed[15] against evasion or circumvention even in good faith or for well meant expediency.[16] The proper procedure should be followed unless the factual situation clearly falls within one of the two exceptions,[17] either to avoid delay which would seriously injure the public interest in an emergency, or to make unnecessary the gesture of advertising despite positive knowledge that competitive bidding will not ensue.[18] The minimum value or amount is determined by the actual purchase cost, not by the cash payment calculated as the selling price minus a trade-in allowance,[19] nor by the deliberate splitting of invoices totaling more than the minimum on what would logically be a single transaction for one type of article with one seller.[20] Advertising for bids must be general, not merely invitations to bid issued to a few chosen dealers,[21] yet may not be required at all if only one firm is capable of performing the work.[22] A rental agreement for road construction, under which the lessor operates the equipment on terms like those of the usual bid contract, either is an attempted evasion of the statute or itself is a contract subject to the statutory provision.[23] Two of these rulings appear to stop long-standing practices, of the State Road Department, which may have originated with erroneous earlier administrative interpretations of the law.[24] The same strict policy was applied in the matter of favoritism in letting contracts with an employee of the state agency, although a distinction was drawn in that some personal services of which the value is based on intangibles are not within the competitive bidding statutes.[25]

Installment purchase. A similarly strict attitude is revealed in the interpretation of the rule that a governmental contract is void which involves the expenditure of funds in excess of the amount appropriated. Lacking available money to pay the entire purchase price on the current budget, a state agency cannot make the purchase on an installment plan which would

15. Daytona Beach v. News Journal Corp., 116 Fla. 706, 156 So. 887 (1934); Finley Method Co. v. Standard Asphalt Co., 104 Fla. 126, 139 So. 795 (1932); Webster v. Belote, 103 Fla. 976, 138 So. 721 (1931) (leading case); Willis v. Hathaway, 95 Fla. 608, 117 So. 89 (1928) (FLA. STAT. §§ 341.14–341.15). OPS. ATT'Y GEN. 050-388 (Aug. 9, 1950), 050-394 (Aug. 11, 1950), 050-437 (Sept. 8, 1950), 050-508 (Oct. 30, 1950).

16. OP. ATT'Y GEN. 050-508 (Oct. 30, 1950).

17. OP. ATT'Y GEN. 050-388 (Aug. 9, 1950).

18. OPS. ATT'Y GEN. 050-388 (Aug. 9, 1950), 050-437 (Sept. 8, 1950).

19. OP. ATT'Y GEN. 050-437 (Sept. 8, 1950); FLA. STAT. § 341.15 (1949).

20. OP. ATT'Y GEN. 050-508 (Oct. 30, 1950); FLA. STAT. § 125.08 (1949). See COUNTIES, *Contracts, infra.*

21. See note 16 *supra.*

22. See note 14 *supra.*

23. OP. ATT'Y GEN. 050-394 (Aug. 11, 1950); FLA. STAT. §§ 341.14–341.15 (1949). The argument of the attorney general was sustained by the Circuit Court of Leon County in a decision invalidating a rental agreement made without competitive bidding. OPS. ATT'Y GEN. 050-437 (Sept. 8, 1950), 050-394 (Aug. 11, 1950).

24. See note 16 *supra.*

25. OP. ATT'Y GEN. 050-505 (Oct. 30, 1950). See HIGHWAYS, *State contracts with employees, infra.*

obligate future payments totaling more than the available current appropriation.[26]

CORONERS. *Jury call and selection.* The duty and function of summoning a coroner's jury for a criminal inquest is implicitly assigned to the constable of the district or county or the sheriff, not to the coroner or a justice of the peace in the capacity of coroner who issues the warrant. The jurors need not be selected from the jury lists of the county jury commission, and that would seem to be impracticable since those lists are county-wide and a coroner's jury is only district-wide. Thus, while the question was not directly answered, it appears that a coroner cannot select the jury from the county jury list, instead of issuing the warrant for the proper official to summons a jury.[27]

CORPORATIONS. *Cooperatives.* A cooperative association organized under § 619 is 'non-profit' in the sense that the purpose, while not eleemosynary, is not for the entrepreneurial profit of the association itself or of the members as such, but is for the gain of the members as producers. A citrus-growers cooperative plan of operation is to charge each member more than the actual cost, and, regarding that sum as a deposit, to issue a certificate for payment in the future. The legal relationship between the association and the member is that of trustee and beneficiary, or of agent and principal; so that the cooperative has only a bare legal title to the reserves and retained funds held as the property of the members.[28]

Governmental agencies. The provision that an agency of the state or county units of government "shall have all the powers of a body corporate, including the power to sue and be sued as a corporation," does not waive the common law immunity of the sovereign from liability in tort, but only enables suit to be brought on a contractual obligation.[29]

COUNTIES. *Budget Commission.* A county budget commission has the authority to strike from the budget, submitted by the county commission, an item for secretarial help for the county attorneys which is not fixed by statute and so is within the control of the local officials.[30]

Contracts. A recent opinion follows the policy of strict construction of the requirement of competitive bidding for certain purchases in excess of

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26. OP. ATT'Y GEN. 050-533 (Nov. 21, 1950); FLA. STAT. § 282.05 (1949). Still, a rental contract with an option to purchase at a later date might be permissible under certain circumstances. See OP. ATT'Y GEN. 049-204 (May 11, 1949).

27. OP. ATT'Y GEN. 050-522 (Nov. 14, 1950); FLA. STAT. § 936.03 (1949); FLA. STAT. §§ 40.10, 936.04 (1949), OP. ATT'Y GEN. 050-39 (Jan. 25, 1950).

28. OP. ATT'Y GEN. 050-521 (Nov. 14, 1950); FLA. STAT. § 619 (1949). See TAXATION, *Documentary stamp tax, infra*; San Joaquin Valley Poultry Protective Ass'n v. Comm'r of Int. Rev., 136 F.2d 382 (9th Cir. 1943); *In re* Wisconsin Cooperative Milk Pool, 119 F.2d 999 (7th Cir. 1941); Green County Rural Elec. Cooperative v. Nelson, 234 Iowa 362, 12 N.W.2d 886 (1944); Mooney v. Farmers' Mercantile & Elevator Co., 138 Minn. 199, 164 N.W. 804 (1917).

29. OP. ATT'Y GEN. 050-523 (Nov. 14, 1950); FLA. STAT. § 388.15 (1949); Arundel Corp. v. Griffin, 89 Fla. 128, 103 So. 422 (1925). See COUNTIES, *Mosquito Control District, infra.*

30. OP. ATT'Y GEN. 050-514 (Nov. 1, 1950); see Sparkman v. County Budget Comm'n, 103 Fla. 242, 137 So. 809 (1931).

a specified amount. Looking to the actual purchase of what would logically be a single transaction for one type of article with one firm, rather than to the form adopted of intentionally splitting the invoices so that each would be less than the minimum, the transaction was not made in accordance with the law.[31]

Employees. Nepotism has been recognized by statute as one of the lesser privileges of office, to be practiced, if at all, only within the limitations laid down by the wisdom of the legislators, most of whom have relatives. Each official is allowed to employ one relative, and while it is immaterial that a person is hired by an entire board rather than solely by the member whose kin he is, the employment of one person will exhaust the ration of each of two officials on the same board to whom he is related.[32] Odd as it may be that kinship to more than one board member might be more of a handicap than an advantage, at least to the officials, the ruling is in line with the attitude against favoritism towards a business owned by an employee of a state agency, and is distinguishable from the interpretation of a competitive bidding statute as not including contracts for personal service.[33]

Highways. Instead of levying the special road and bridge tax, of which one-half was to be paid over to municipalities in the county, the county commissioners obtained the needed funds from race track tax and gas tax moneys, and thus the county is not liable to the municipalities for the share of highway taxes.[34] This would appear to frustrate the intent of the statute providing for the special levy, as the county may derive a large amount of highway funds from the municipal areas, yet not pay a proportionate share to maintain roads within the incorporated sections.

Mosquito Control District. The grant of all the powers of a corporate body to a county anti-mosquito district does not render it liable in tort; hence the district need not carry liability insurance on motor vehicles, although to do so would be advisable.[35]

Tax Collector. The county tax collector acts as the agent of the state, and the county commission is neither directed nor expressly authorized to furnish office supplies for his use, in selling motor vehicle license plates. While the commissioners might elect to provide the supplies from the

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31. OP. ATT'Y GEN. 050-508 (Oct. 30, 1950); FLA. STAT. § 125.08 (1949). See *Contracts, Competitive bidding, supra.*

32. OP. ATT'Y GEN. 050-501 (Oct. 24, 1950); FLA. STAT. § 116.10 (1949); see OP. ATT'Y GEN. 050-80 (Feb. 14, 1950).

33. OP. ATT'Y GEN. 050-505 (Oct. 30, 1950); see HIGHWAYS, *State contracts with employees, infra.*

34. OP. ATT'Y GEN. 050-519 (Nov. 7, 1950); FLA. STAT. § 343.17 (1949). See HIGHWAYS, *Counties, infra.*

35. OP. ATT'Y GEN. 050-523 (Nov. 14, 1950); FLA. STAT. § 388.15 (1949). See CORPORATIONS, *Governmental agencies, supra.*

special fund of excess fees,[36] the opinion did not consider whether an excess collected in the capacity for the county would be properly devoted towards fulfilling a function for the state.

ELECTIONS. *Write-in ballots.* A valid write-in vote for a person not named on the printed ballot may now be cast simply by writing the candidate's name in the blank space provided, a recent amendment having eliminated the requirement that a cross-mark also be placed before the name.[37] Although the change makes less difficult a write-in vote on either voting machines or paper ballots,[38] it cannot eliminate the trouble which sometimes is encountered in ascertaining for whom the vote was cast. The intention of the voter shown on the face of the ballot should not be defeated because of incorrect spelling or use of an initial instead of the full name, but an erroneously written name which is the correct name of another person should be counted as a vote for the latter.[39] As the county canvassing board cannot go behind the returns from the election districts,[40] the precinct officials should either sub-total each irregular form of a name and give the total for the candidate clearly intended, or give a separate tally for each name which does not clearly show the intent of the voter.[41]

GAMING. *Prize or reward.* Earlier an opinion stated that a coin-operated amusement device which does not give any prize or reward can be legally possessed, and accordingly this one indicates that the machine is not a gambling device unless it is used for gambling purposes.[42] The same conclusion, on converse facts, was reached as to the legality of giving a door prize for which no charge is made either for the lottery slip or for admission, and as to the drawing of the name of a charity to receive a free will offering taken up during the show.[43]

Wagering. On the other hand, the fundamental policy was again laid down, that neither public tolerance nor lack of adverse effect on public morals should influence the attorney general to declare legal a contest which violates the statute. A turkey-shoot in which only one person wins the prize constitutes wagering on a game of skill, since in effect each contestant is betting his entrance fee against the fees of the others.[44] More obviously gambling is the sale of sealed tickets naming two baseball teams which

36. OP. ATT'Y GEN. 050-512 (Nov. 1, 1950); FLA. STAT. § 145.05 (1949). See AUTOMOBILES, *Vehicle licenses, supra.*

37. FLA. STAT. § 99.19 (1941), as amended Fla. Laws 1949, c. 25187, FLA. STAT. § 99.19 (1949), State *ex rel.* Nuccio v. Williams, 97 Fla. 159, 120 So. 310 (1929).

38. See FLA. STAT. § 100.29 (1949).

39. State *ex rel.* Nuccio v. Williams, note 37 *supra*; State *ex rel.* Carpenter v. Barber, 144 Fla. 159, 198 So. 49 (1940); Sievers v. Hannah, 296 Ill. 593, 130 N.E. 361 (1921); McCreary v. Bursmier, 293 Ill. 43, 127 N.E. 171 (1920).

40. FLA. STAT. § 99.44 (1949); State v. Alachua County Canvassers, 17 Fla. 9 (1878); State *ex rel.* Attorney General v. Johnson, 35 Fla. 2, 16 So. 786 (1895).

41. OP. ATT'Y GEN. 050-513 (Nov. 1, 1950).

42. OP. ATT'Y GEN. 050-496 (Oct. 19, 1950); FLA. STAT. § 849.16 (1949); see OP. ATT'Y GEN. 050-484 (Oct. 11, 1950), *Summary of Opinions*, 5 MIAMI L.Q. 122-123 (1950).

43. OP. ATT'Y GEN. 050-498 (Oct. 20, 1950).

44. OP. ATT'Y GEN. 050-528 (Nov. 15, 1950); FLA. STAT. § 849.14 (1949).

must score more runs than any other team in order for the purchaser to win the cash prize,[45] as actually it is a wager that those two teams will make higher scores than any others. Still, the ethic revealed by these results seems to be that it is lawful, and moral, to receive without paying or to pay without receiving, but immoral, and unlawful, to pay and be rewarded disproportionately.

Wire information. Further, the Bookie Wire Bill is violated by the operator of the gambling room who, in order to sell the baseball score tickets, obtains his information over a private telegraph wire.[46]

HEALTH. *Tubercular patient: escape and return.* A tubercular person who has been involuntarily committed to the state sanatorium, and escapes to return to the county from which he was sent, is still the responsibility of the officials of the sanatorium. To accomplish his return, they may appoint agents, who may include any sheriff in the state, and pay the custody fees from funds appropriated for that purpose.[47]

HIGHWAYS. *Counties.* The county is not liable to the municipalities for one-half of the special road and bridge tax which has not been levied, the necessary funds having been obtained from race track and gas tax moneys.[48]

Municipalities: traffic control. Florida, in accepting the benefits of the Federal Aid Highway Act of 1944, enacted the provision giving power to the State Road Department to control the placing of traffic signals on roads constructed at state expense with federal contributions. The authority extends to placement by "any public authority or other agency," and as all highways are subject to the state legislature, a municipality must first obtain the approval of the state highway authorities and the United States highway commissioner before installing traffic signals on a federal aid highway within its boundaries.[49]

State contracts with employees. Like the requirement of competitive bidding and, to some extent, the limitation on nepotism, the prohibition of a state agency contracting with a firm in which an employee is interested has been enacted for the purpose of preventing favoritism, fraud and collusion in spending public money. However, the legislators and the public tolerate some hiring of relatives, and the competitive bidding statutes are often construed not to govern contracts for personal services of which the true value depends on intangibles of education and skill and discretion. In pursuance of the strict policy of the attorney general, though, the personal

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45. OP. ATT'Y GEN. 050-493 (Oct. 18, 1950); FLA. STAT. §§ 849.01, 849.11, 849.14 (1949).

46. OP. ATT'Y GEN. 050-493 (Oct. 18, 1950); FLA. STAT. §§ 365.01(4), 365.02 (1949). See TELEPHONE, TELEGRAPH AND RADIO, *Private wire, infra.*

47. OP. ATT'Y GEN. 050-494 (Oct. 18, 1950); FLA. STAT. §§ 392.17–392.18 (1949).

48. OP. ATT'Y GEN. 050-519 (Nov. 7, 1950). See COUNTIES, *Highways, supra.*

49. OP. ATT'Y GEN. 050-502 (Oct. 25, 1950); FLA. STAT. §§ 341.621(1), (4)(c) (1949); Duval County v. Jacksonville, 36 Fla. 196, 18 So. 339 (1895).

service of preparation of abstracts of title was declared to be not greatly different from road construction, and should not be done by a firm owned by an employee of the State Road Department. Recognizing that a criminal statute is narrowly construed, the opinion expressed doubt whether the employee would be guilty of an illegal act; but in accordance with the general doctrine, even in the absence of statute, against public officers having a private interest in the contracts of their governmental agency, the contract would be void as aganist public policy.[50]

INSURANCE. *Counter-signature.* A policy or indemnity contract must be counter-signed by a commissioned and licensed resident local agent of the insurer. Though the nature of an indemnity "bond" issued directly to the person indemnified was not described by the request for an opinion, probtract would be void as against public policy.[50]

INTERNAL REVENUE. *Income tax.* A recent federal decision allows a teacher to deduct the cost of advanced studies which were necessary for renewal of the professional certificate in order to perform a contract to teach during the next school year. Interpreting the possible scope of that case, an opinion offers some possibility that a college professor might also take a deduction for advanced studies required to retain his position, although generally the expense of preparation to become qualified for professional employment is not a deductible business or necessary non-business expense.[52]

JUDGES. *County Judge: fees.* Fees which are legally collectable by a county judge, although not charged, are included in determining whether he must account for excess fees, and if he must, in calculating the amount. Thus, a judge who elects not to collect a fee might be required to pay from his own pocket the amount of it; so that, while the opinion did not expressly give this conclusion, in practice a county judge may be obliged to collect the fee for services in an incompetency proceeding.[53] The opinion did not answer the query whether the bill is submitted to the county commission.

PENSIONS. *Disqualification for misconduct.* The authorities are said to be divided on whether misconduct, in the absence of a statutory provision, is ground for denying payment of a pension or retirement pay to one who has satisfied the conditions of the plan. A previous opinion by the attorney general may take the affirmative,[54] but two in the past year have adopted what appears to be the majority view, ruling that a teacher convicted of a

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50. OP. ATT'Y GEN. 050-505 (Oct. 30, 1950); FLA. STAT. § 341.15 (1949); Leesburg v. Ware, 113 Fla. 760, 153 So. 87 (1934); Fla. Stat. § 839.09 (1949). See CONTRACTS, *Competitive bidding, supra;* COUNTIES, *Employees, supra.*

51. OP. ATT'Y GEN. 050-527 (Nov. 15, 1950); FLA. STAT. § 631.15 (1949).

52. Hill v. Comm'r of Int. Rev., 181 F.2d 906 (4th Cir. 1950); OP. ATT'Y GEN. 050-530 (Nov. 21, 1950). See COLLEGES AND UNIVERSITIES, *Professors' income tax, supra.*

53. OP. ATT'Y GEN. 050-497 (Oct. 19, 1950); FLA. STAT. § 145.05 (1949); Fla. Laws 1949, c. 25241, FLA. STAT. § 392.17 (1949).

54. OP. ATT'Y GEN. 047-337 (Oct. 14, 1947); *see* OP. ATT'Y GEN. 050-16 (Jan. 3, 1950).

felony and released on parole from the penitentiary,[55] and an official who owes money from his office to the governmental unit,[56] are entitled to receive the retirement pay or pension. While there was not a discussion of the principles involved, it is submitted that the conflict in the authorities arises from the confusion in regarding a pension as a vested or somewhat vested right or as not a vested right. The present position of the attorney general seems to be founded on some form of a vested right theory, and if so would be in accord with the latest vague expression of the thought of the Florida court.[57] However, it would not be unreasonable to state that an official who owes money to the government from his office has not so completely wound up his active affairs as to be receiving retirement pay, even though he may have ceased performance of his duties.

RECORDS. *Certified copies for veterans.* Free certified copies of any public record required by the Veterans' Bureau, to determine the eligibility of an applicant for benefits, shall be provided by the custodian of the record. This aid is not limited to guardianship cases; and there is no provision for a fee to be paid by the county commission to the clerk of the circuit court for making the certified copy.[58]

Public inspection. A citizen of this state has the privilege, which shall not be denied, of personally inspecting all state, county, and municipal records,[59] except those which public policy demands be kept secret. Not every paper is a 'public record', which is a document either required by law, or necessary in performing a duty imposed by law, or directed by law to serve as a memorial and evidence of an event, made by the authorized official. Various records of the Florida Merit System are accordingly open to the public, except for some memoranda by officials for personal use, and confidential investigative reports and character references and other information obtained in trust, bearing upon the character of an individual rather than upon his qualifications. Examination papers, apart from the questions, should be open for inspection by those who can show reasonable ground for seeking assurance that there was no unfairness, favoritism, or irregularity.[60]

SCHOOLS. *County Board: member's residence.* A county school board member vacates his office by moving his "residence" from the election district in which he was chosen. Usually 'residence' is interpreted to mean domicile, and the intention probably was that a member maintain his permanent abode in the district he represents, so that temporary habitation else-

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55. OP. ATT'Y GEN. 050-16 (Jan. 3, 1950); FLA. STAT. §§ 238.02, 238.05, 238.07, 238.07(2)(b) (1949).

56. OP. ATT'Y GEN. 050-515 (Nov. 1, 1950); FLA. STAT. §§ 134.05–134.07 (1949). See CLERKS OF COURTS, *Retirement, supra.*

57. Cay v. Whitehurst, 44 So.2d 430 (Fla. 1950), 5 MIAMI L.Q. 166 (1950).

58. OP. ATT'Y GEN. 050-525 (Nov. 14, 1950); FLA. STAT. § 293.15 (1949).

59. FLA. STAT. § 119.01 (1949).

60. OP. ATT'Y GEN. 050-510 (Oct. 31, 1950); see Amos v. Gunn, 84 Fla. 285, 94 So. 615 (1922); State *ex rel.* Cummer v. Pace, 121 Fla. 871, 164 So. 723 (1935).

where would not amount to a change of residence. That a member who has moved retains his registration in the original voting precinct could indicate only a temporary change, but is not sufficient to decide the question.[61]

SHERIFFS AND CONSTABLES. *Constables: search without warrant.* Liquor licensees agree, by force of statute, that the place of business may be searched without a warrant by officers of the Beverage Department and by sheriffs and policemen. Also, a general law gives authority to beverage officers and sheriffs to search any person, place or conveyance to investigate whether the beverage law is being violated. Neither provision grants authority for a constable to search without a warrant.[62]

STATES. *Florida boundary: Dry Tortugas.* The state constitution describes the boundary as running along the Gulf Stream and the Florida Reefs, to and including the Tortugas Islands, one of which is the Dry Tortugas. Shrimp grounds between the Tortugas and the Florida keys are under the jurisdiction of the state, within the three mile limit, which is the same measure from the island boundary as from the mainland.[63]

STATUTES. *Repeal: unpaid taxes.* The effect upon due but unpaid taxes of repealing a tax statute is surrounded by the confusion which seems, for some reason, inherent in problems of legislation. The Florida Supreme Court has said that the general rule is to continue the force of the statute, while the attorney general states that the rule in most states is to abrogate all rights, for the collection of taxes levied but not collected. Still, the attorney general follows the Florida court in adopting the theory laid down in one case.[64]

TAXATION. *Documentary stamp tax.* Two opinions reverse earlier conclusions on the applicability of the documentary stamp tax, indicating perhaps that the office is only slightly afflicted with the contagious disease of stare decisis. One points out that the previous opinion was justified in view of an incomplete statement of the mode of operation of a cooperative, while the other shows a more thorough consideration of the governing statutes and interpretations by other states concerning the federal exemption.

Certificate of interest. The certificate issued by a cooperative association, evidencing the interest of a member in reserves and retained funds, is a declaration that the property is held in a trust (or an agency) relationship. The association has only a bare legal title to use the property for the benefit of the members; and, construing the statute in favor of the taxpayer, the certificate of equity in a cooperative is not a certificate of interest in property held by the association for itself and is not subject to this excise tax.

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61. OP. ATT'Y GEN. 050-506 (Oct. 30, 1950); FLA. STAT. § 230.19 (1949).

62. OP. ATT'Y GEN. 050-526 (Nov. 14, 1950); FLA. STAT. §§ 210.15(6), 562.41(1) (1949).

63. FLA. CONST. Art. I; OP. ATT'Y GEN. 050-500 (Oct. 24, 1950).

64. OP. ATT'Y GEN. 050-507 (Oct. 30, 1950); see Lee v. Walgreen Drug Stores Co., 151 Fla. 648, 10 So.2d 314 (1942); California Employment Comm'n v. Arrow Mill Co., 45 Cal. App.2d 668, 114 P.2d 727 (1941). See TAXATION, *Unemployment compensation, infra.*

The result should be compared with a ruling, reported in the previous issue, that a certificate of membership in a country club, lacking actual monetary value, is not a certificate of interest on which the tax is levied.[65]

Promissory note. In the same general field of horticulture and agriculture are several federal agencies which may also be affected by this excise tax on promissory notes. As the documentary stamp tax is levied on the process of creating or executing the instrument, and the superior federal statutes call for an exemption only while the property is held by the federal agencies, the tax is applicable to the issuance of a promissory note which is not part of the mortgage transaction with the agency. However, the federal law may exempt the credit instrument secured by the mortgage, making execution of the note a part of the transaction so that the state tax is superseded. Accordingly, a mortgage-secured note given to the Farmers' Home Corporation or to a Federal Production Credit Association is not exempt, while one to a Federal Land Bank is exempt, from the documentary stamp tax.[66] In either case, only the maker of the note and mortgage would be liable, not the federal agency; and the documents should be recorded for the agency even though the maker has not paid the tax.[67]

Exemptions. Federal. In addition to the exemption from the documentary stamp tax, discussed above, an agency of the Federal Government is exempt from state taxation of intangible personal property assessed against the holder rather than on the property itself. A promissory note, secured by a mortgage on realty in this state, held by a Federal Land Bank, the Farmers' Home Corporation, or a Federal Production Credit Association, is not taxable as intangible property except when the United States does not own stock in a Credit Association.[68] Therefore, the agencies considered in this opinion apparently are entirely free of state taxation on the notes taken with mortgages, and the exemption of a Federal Land Bank seems to have been extended to the maker of the promissory note.

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65. OP. ATT'Y GEN. 050-521 (Nov. 15, 1950), modifying OP. ATT'Y GEN. 050-238 (May 11, 1950); FLA. STAT. § 201.05 (1949). See State v. Sweat, 113 Fla. 797, 152 So. 432 (1934) (favorable construction); State v. Cook, 108 Fla. 157, 146 So. 223 (1933) (state tax statute copies federal statutes); Kansas Wheat Growers' Ass'n v. Motter 14 F.2d 242 (D. Kan. 1929) (federal statute); *Summary of Opinions*, 5 MIAMI L.Q. 126 (1950). See CORPORATIONS, *Cooperatives, supra.*

66. Farmers' Home Corp., 7 U.S.C. §§ 1014, 1024 (1946). Federal Production Credit Ass'n, 12 U.S.C. §§ 1131, 1138(c) (1946); OP. ATT'Y GEN., 1935-1936 BIENNIAL REP. (Sept. 1, 1936); Plymouth Citrus Growers' Ass'n v. Lee, 157 Fla. 893, 27 So.2d 415 (1946). Federal Land Banks, 12 U.S.C. § 642, as extended into 12 U.S.C. §§ 1021–1129 (1946); see 42 U.S. ATT'Y GEN. 54 (1919); FLA. OP. ATT'Y GEN., 1931–1932 BIENNIAL REP. (Nov. 9, 1931); Federal Land Bank v. Crosland, 261 U.S. 374 (1922); McGovern v. Federal Land Bank, 209 Minn. 403, 296 N.W. 473 (1941); Federal Land Bank v. Hubard, 163 Va. 860, 178 S.E. 16 (1935).

67. OP. ATT'Y GEN. 050-504 (Oct. 30, 1950), withdrawing and replacing OP. ATT'Y GEN. 049-14 (Jan. 18, 1949).

68. OP. ATT'Y GEN. 050-504 (Oct. 30, 1950); FLA. STAT., c. 199 (1949); State v. Gay, 160 Fla. 445, 35 So.2d 403 (Fla. 1948); State v. Gay, 46 So.2d 165 (Fla. 1949), 4 MIAMI L.Q. 404 (1950); see note 66 *supra*. See TAXATION, *Documentary stamp tax, promissory note, supra.*

Non-profit institutions. Educational or charitable institutions may be exempt from ad valorem taxation; but the criterion is neither the statute by which it is organized nor the terms of the charter. Instead, the test is the actual utilization of the property, including funds and income, by the organization.[69] Thus, construing an exemption against the taxpayer, the property of a hospital must be used exclusively for the purposes for which it was formed and which are within the exempt classes;[70] while in the absence of a clear showing that a college-operated radio station is not used for educational purposes, although not entirely a part of the institution and in competition with commercial stations, the exemption should be granted.[71] In each case the final decision must be made on the facts, by the tax assessor. The variance in approach of these two opinions is not wholly due to differing statutory provisions, for the latter one substitutes a more liberal application of "educational" and of the nature of the use rather than the narrow requirement of exclusive use laid down in the former.

Veterans. An exemption from license taxes which was given to honorably discharged disabled veterans was also allowed to the unremarried widow of the deceased disabled veteran. The opinion is that the widow of a serviceman who was killed before receiving an honorable discharge cannot claim the benefit of the provision, as the express terms apply only to those who were honorably discharged.[72] It is submitted that a more liberal reading need not have construed the condition of honorable discharge into a clause from which it is omitted as an express term, and might have recognized the legislative intent to be generous enough to include the current connotation of a "veteran's widow" as applying to the wife of a man killed in service.

Unemployment Compensation. Three years after the repeal of a section in the unemployment compensation law defining an employer, the Industrial Commission seeks to collect the contributory tax for wages paid prior to the change in the law. Conforming to the view of the Florida Supreme Court on which is the general rule, the opinion applies the doctrine that a repealed taxing statute continues in force for the collection of due but unpaid taxes; with the conclusion that not only should the contributions be collected, but also that the Commission lacks the authority to

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69. FLA. CONST. Art. IX, § 1, Art. XVI, § 16; FLA. STAT. § 192.06 (1949); Dr. William Howard Hay Foundation v. Wilcox, 156 Fla. 704, 24 So.2d 237 (1946); Riverside Military Academy, Inc. v. Watkins, 155 Fla. 283, 19 So.2d 870 (1944); Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211 (1939); Lummus v. Florida Adirondack School, 123 Fla. 832, 168 So. 232 (1936); University Club v. Lanier, 119 Fla. 146, 161 So. 78 (1935).

70. OP. ATT'Y GEN. 050-524 (Nov. 14, 1950); State v. Doss, 146 Fla. 752, 2 So.2d 303 (1941); Lummus v. Florida Adirondack School, *supra* note 69; Steuart v. State, 119 Fla. 117, 161 So. 378 (1935).

71. OP. ATT'Y GEN. 050-531 (Nov. 21, 1950); Fla. Laws 1887, c. 3808, § 14 (John B. Stetson Univ.); *see* Federal Radio Comm'n v. Nelson Bros. Bond & Mtg. Co., 289 U.S. 266, 271 (1933)(educational nature of broadcasts). See COLLEGES AND UNIVERSITIES, *Radio stations, supra.*

72. OP. ATT'Y GEN. 050-499 (Oct. 20, 1950); FLA. STAT. §§ 205.16, 205.161, 205.161(2) (1949).

compromise and settle a claim even though there would be nothing due at this time under the present law.[73]

TELEPHONE, TELEGRAPH AND RADIO. *Private wire.* Telegraphic service over a wire not connected to or available for general exchange or toll service, contracted for use between the two designatd points of the local telegraph company office and the customer, is a 'private wire' within the definition of the Bookie Wire Bill.[74]

WORKMEN'S COMPENSATION. *Self-insurer: government.* The State of Florida and its administrative units, and all the political subdivisions, are self-insurers unless the particular one in question has exercised the election to procure insurance in order to have the benefits of the compensation law. Still, the provision for an election not to accept the Workmen's Compensation Act is only for private employers, not for the governmental bodies.[75]

73. OP. ATT'Y GEN. 050-507 (Oct. 30, 1950); FLA. STAT. § 443.03(7)(d) (1941), repealed Fla. Laws 1947, c. 24085; OP. ATT'Y GEN. 047-321 (Oct. 3, 1947)(Commission lacks specific authority to compromise delinquencies). See STATUTES, *Repeal: unpaid taxes, supra.*

74. OP. ATT'Y GEN. 050-493 (Oct. 18, 1950); FLA. STAT. § 365.01(4) (1949). See GAMING, *Wire information, supra.*

75. OP. ATT'Y GEN. 050-511 (Nov. 1, 1950); FLA. STAT. § 440.05(1) (1949) (election not to accept Act); FLA. STAT. § 440.38 (b)(5)(election to obtain insurance).