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# Our Legal Chameleon, The Florida Homestead Exemption Part V

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# OUR LEGAL CHAMELEON, THE FLORIDA HOMESTEAD EXEMPTION: V

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## PART V — THE TWO TAX EXCLUSIONS*

### *1. Basic Preliminary Considerations*

The exemptions of homestead realty and personalty from forced sale, and the exclusions of portions of each from taxation, are fundamentally different concepts.[463] There are four distinct species of our chameleon, re-enumerated in this footnote;[464] and, while an individual may at times find all four on his property, he may also discover, at a crucial moment, that he has only one. They all have certain similarities, and a still greater number of differences. In the interest of clarity the basic distinctions between the two forced sale chameleons and the two tax chameleons are summarized.

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*This concludes the discussion of the law of Florida homestead exemptions. Parts I-III, appearing in 2 U. OF FLA. L. REV. 12-83 (1949), deal with the realty and personalty exemptions from forced sale and the effect of inurement of the former upon transfer; Part IV, in 2 U. OF FLA. L. REV. 219-242 (1949), analyzes the procedural aspects of homestead exemptions; Part V is a study of the tax exclusions. Footnotes are numbered consecutively throughout. The full text of Article X of the Florida Constitution is reproduced in 2 U. OF FLA. L. REV. 83-84; Section 7 thereof governs the residence exclusion. The homestead personalty tax exclusion, found in FLA. CONST. Art. IX, §11 reads:

". . . there shall be exempt from taxation to the head of the family residing in this State, household goods and personal effect [*sic*] to the value of Five Hundred ($500.00) Dollars . . . ."

[463]Shambow v. Shambow, 153 Fla. 760, 15 So.2d 836 (1943); *compare* Nelson v. Franklin, 152 Fla. 694, 12 So.2d 771 (1943), and Miller v. West Palm Beach Atl. Nat. Bank, 142 Fla. 22, 23, 194 So. 230 (1940) (homestead for descent purposes found not to exist, though residence exclusion allowed), *with* Collins v. Collins, 150 Fla. 374, 7 So.2d 443 (1942) (allowance of residence exclusion accorded some evidentiary value in establishing domicile). *Cf.* 2 U. OF FLA. L. REV. 232 (1949).

[464]These are: exemption of all homestead realty from forced sale; exemption of $1,000 of homestead personalty from forced sale; exclusion for tax purposes of $5,000 from the assessed valuation of Florida realty resided upon by a legal or equitable owner or by his dependents; and exclusion from taxation of $500 of the assessed valuation of household goods and personal effects of the head of the family residing in Florida. Admittedly the personalty forced sale exemption is in reality a $1,000 exclusion from

It is well to emphasize first, however, that the so-called "homestead tax exemption" itself embraces two species, one relating to realty and the other to personalty. Both are partial only; they reduce the taxable base, reckoned in assessed valuation, by a certain dollar amount, which is $5,000 in the case of realty and $500 in the case of personalty. Furthermore, any relation that the realty exemption may bear to the family is purely coincidental; for this reason it is here described by a term that suits it, namely, the "residence exclusion." Family headship is not required. The personalty exclusion, on the other hand, is truly homestead as this concept has traditionally been understood in Florida law; family headship is required.

Reported cases dealing with the residence and personalty exclusions are few, but fortunately the Attorney General of the State of Florida has been consulted frequently with regard to most of the problems involved. His opinions form a clear, concise, logical, and — so the authors of this article believe — practical body of interpretive material. Admittedly an occasional conclusion of doubtful validity can be found,[465] but on the whole these expositions constitute a valuable segment of our jurisprudence. Though not binding on the courts, they do represent the considered judgment of the senior legal officer of the State of Florida, aided by an able staff, and are accordingly entitled to considerable weight; heavy reliance is placed on them here. The manner of citation is detailed below.[466]

levy on all personal property of the family head; and the word "homestead" can at times signify the home of a single person. But the phrase "homestead personalty exemption" has always been associated with forced sale, and protection of the family has been the mainspring of homestead law in Florida since 1868, *cf.* 2 U. OF FLA. L. REV. 13-17 (1949); accordingly four different terms are employed herein to emphasize the distinct natures of our four species.

[465]REP. ATT'Y GEN. 158 (1941) constitutes an example of this. The problem raised as to family headship is irrelevant, while the highly significant factor of rural or urban location is overlooked; but errors in these opinions in the homestead field are as rare as those in judicial opinions or law review articles.

[466]Individual opinions, upon release, bear a date and, more recently, a serial number. After each even-numbered year they are classified by subject-matter and published in an unnumbered bound volume known as the BIENNIAL REPORT OF THE ATTORNEY GENERAL. Although otherwise well indexed, the volume does not tabulate the opinions by either serial number or date; consequently citations herein to opinions through 1948 specify the page in the bound volume, which in turn is readily identified by the year in which the opinion was rendered, even though each volume bears on its bound edge a two-year date. Month and day are not given unless two relevant opinions begin on the same page. Opinions released in 1949 are cited by serial number, month, day and year.

For the sake of brevity, conclusions are stated rather dogmatically; the reader can readily ascertain by glancing at the footnotes whether the authority for the statement is a decision of the Supreme Court of Florida or, in the absence of reported cases, an opinion of the Attorney General.

*Similarities.* First, the tax exclusions and the forced sale exemptions are called by the same name; indeed, they are all lumped together on occasion, as in the title of this article, under the term "the homestead exemption." In popular parlance this misnomer can be justified; but from the standpoint of legal analysis a steer and a carrot could with equal logic be termed identical because both are used in a beef-stew. One must constantly remind himself that the homestead exemption is a chameleon, or rather several species of this genus, each of which changes color to accord with the background against which he is viewed. In the field of taxation he takes on still another hue, which is usually red when he comes in contact with county and municipal finances. His perch, technically speaking, is the assessed valuation of a residence, or of household goods and personal effects; he is often large enough to cover this valuation entirely;[467] and he has become today one of the most prolific and jealously guarded little reptiles in the entire State of Florida.

Second, the tax exclusions and the forced sale exemptions are both cumulative; in other words, exemption or exclusion on a homestead or residence basis does not eliminate or limit any other exemption or exclusion.[468]

Third, as regards both the two forced sale exemptions and the two tax exclusions, realty and personalty are governed by strikingly different principles.[469]

Fourth, citizenship is not a requisite for any of these exemptions or exclusions today.

Fifth, the problems arising in connection with the meaning of "residence," and the related concept of physical abandonment, are remarkably similar in both forced sale and tax law.

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[467]This assessed valuation, as we shall see, rarely equals the actual value of the property as reckoned by realtors and other business men; *cf.* Part V, 8 *infra.*

[468]REP. ATT'Y GEN. 776 (1946); 71 (Jan. 22, 1935); 71, 83 (Jan. 10, 1935). For an example of additional exclusions see FLA. CONST. Art. IX, §9. *Cf.* 2 U. OF FLA. L. REV. 78 (1949) as regards forced sale.

[469]These similarities and differences, stated now in summary form, are later discussed in detail. Footnote citations are largely postponed at this point, in order to avoid unnecessary duplication.

Sixth, the physical extent of the realty is expressly made the same, with the sharp distinction between rural and urban; furthermore, contiguity is normally essential.

Seventh, assessments for special benefits to realty are excepted from both the forced sale exemption and the residence exclusion.

Eighth, the prohibition of reduction of the size of exempt realty by involuntary inclusion within city limits applies in the forced sale and tax fields.

Ninth, the personalty tax exclusion, like its forced sale counterpart, does not depend on ownership of any realty or estate therein.

Finally, although our chameleon always perches either on property or on its assessed valuation, he must be born somehow. The parents of the forced sale chameleon are a homesteader and a debt,[470] while the tax chameleon is the offspring of a tax and a residence in the case of realty, or of a tax and household goods and personal effects owned by the head of a family in the case of personalty. Without a tax, if one could imagine such a delightful condition, there would be no need for any exclusion; and of course it cannot be used to reduce taxes of a different nature. The exclusion is confined to the specific types of property designated, and furnishes no protection against taxes based on a different incidence or object-matter.

*Differences.* The differences between the forced sale exemptions on the one hand, and the tax exclusions on the other, are of even greater importance than are the similarities.

First, although the claimant of the personalty tax exclusion must be the head of the family, the applicant for the residence exclusion need not be.

Second, this residence exclusion applies to some, but not to all, of those lesser estates or interests in realty that serve as a perch for the forced sale chameleon.

Third, the personalty tax exclusion, unlike the personalty forced sale exemption, does not embrace all types of personal property.

Fourth, the exclusion from the taxable base does not inure to the widow and heirs; they must establish each year exclusions of their own after the death of the owner.

Fifth, only one residence exclusion is allowed per dwelling house; the taxgatherer, although he does not shut his eyes entirely to the claimant

[470] *Cf.* 2 U. OF FLA. L. REV. 23 (1949).

for exclusion purposes, fixes his gaze on the realty itself when collection is involved.

Sixth, the tax chameleons can never grow to be iguanas. The realty species is limited to $5,000 of the assessed valuation, while the personalty species is fully grown at $500, when only half the size of his $1,000 brother, the personalty forced sale chameleon.

Seventh, the perch of both tax chameleons is fixed once a year, on New Year's Day, and remains unchanged throughout the year.

Eighth, the tax chameleons must be caught annually on or before April 1; the right to either exclusion is lost if not positively asserted by this date each year.

Ninth, the judge, who beams fondly upon our merry forced sale chameleons as they scamper about, looks with a cold and fishy eye on the younger brothers; claimants of the tax exclusions are not in theory favored with that "liberal construction" accorded the exemptions from forced sale,[471] although it must be conceded that the bench has not been overly stern.

Tenth, procedural morasses are more easily detected; at least they lie where one usually expects to stumble into them in tax-law territory. Only a few of the adjective provisions are peculiar to homestead law.

Eleventh, the residence exclusion, unlike the exemptions from forced sale, is most unusual in the United States; for better or for worse, Florida has deliberately cut off from the impoverished treasuries of her counties and cities a source of revenue considered normal and equitable by most Americans.

Finally, the residence and the personalty exclusions are in no wise a shield against forced sale. Taxes levied against the property to the extent of the excess of its assessed valuation over and above the respective $5,000 and $500 deductions must be paid, or forced sale for delinquency follows. The related question as to whether liability for taxes not levied against such property can nevertheless be enforced against it depends entirely on Section 1 rather than Section 7 of Article X.[472]

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[471] *Cf.* 2 U. OF FLA. L. REV. 14-16 (1949).

[472] *Cf.* Florida Industrial Comm'n v. Coleman, 154 Fla. 744, 18 So.2d 905 (1944), and the discussion in 2 U. OF FLA. L. REV. 18 (1949). The constitutional issue is still debatable. Attorney General Gibbs expressed the opinion that the homestead personalty exemption from forced sale did not bar levy on the automobile of a taxpayer delinquent in meeting taxes on whisky found in his still, REP. ATT'Y GEN. 521 (1940); Attorney General Watson saw no constitutional objection to extending this doctrine to the collection of workmen's compensation by selling the home of the employer, REP.

*History.* The older of the two so-called homestead tax exclusions, which truly deserves the appellation "homestead," is the one applicable to personalty. As might be expected in any constitution that has grown by political spurts rather than systematically,[473] the personalty exclusion and the residence exclusion appear in separate articles, and the one that bears no logical relation to the family is in Article X.

The personalty exclusion was adopted in 1924, along with the prohibition of state income tax and inheritance and estate taxes, and today lies buried between this prohibition and the 1930 proviso authorizing estate and inheritance taxes in limited form.[474]

The adoption of the forerunner of the residence exclusion was completed by sundown of November 6, 1934, and was effective immediately.[475] It required that the claimant be not only a resident but also a citizen of Florida, as well as the head of a family. It further provided that "title to said homestead may be vested in such head of a family or in his lawful wife residing upon such homestead or in both." Assessments were insulated from exemption by the phrase "special assessments for benefits."

After first securing adoption of the amendment by the citizens of Florida as an exemption to the head of the family, however, the Legislature promptly disregarded the basic reason employed in obtaining their

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ATT'Y GEN. 585 (1942), even though payment of other legally recognized business debts, having equally as much relation to the home, cannot be compelled in this manner. Both opinions rest on the monarchial premise that the sovereign must be allowed to use virtually any sort of pressure to gather the revenues it wishes. However sound this notion may have been in the United States when government was limited to true community functions, it merits re-examination today. *Cf.* the prophetic insight exhibited by Brown, C. J., over twenty years ago, in Earle v. Dade County, 92 Fla. 432, 437-438, 109 So. 331, 333 (1926). The doctrine expressed by Sebring, J., in St. Petersburg v. Fiore, 33 So.2d 852 (Fla. 1948), though not in point on the constitutional question, exhibits a wholesome trend.

[473]This is not to say that the Florida Constitution does not function fairly well in practice, thanks largely to an industrious Supreme Court and an active Florida State Bar Association. Whatever view one may entertain as to its substance, however, the need for at least formal revision is obvious to any logical mind. *Cf.* David, *The Case for Constitutional Revision in Florida,* 3 MIAMI L. Q. 225 (1949); Redfearn, *A New Constitution for Florida,* 21 FLA. L. J. 2 (1947).

[474]FLA. CONST. Art. IX, §11.

[475]FLA. CONST. Art. X, §7, as then adopted. *Cf.* Dame, *The Homestead Exemption Amendment,* 9 FLA. L. J. 399, 400, 403 (1935). This date is important even today in identifying those bond issues for which homesteads are liable taxwise; see Impairment of Obligation of Contract, Part V, 2 *infra.*

approval by passing Section 2 of Chapter 17060 of Florida Laws 1935, removing this requirement of family headship. This statute is the true father of the present Section 7, adopted November 8, 1938, and effective January 1, 1939.[476] The resolutions leading to the 1938 proposal went through several drafts in the Legislature in the process of formulation, without much improvement over the 1935 statute;[477] and the braintwister that we now struggle with was the result.

The requirement of citizenship was eliminated, and perhaps even the necessity of Florida residence by the claimant.[478] Family headship was scuttled. Contiguity was specifically made a requisite. The provisions as to title were broadened; assessments were this time referred to as "assessments for special benefits"; and limitations, or expansions as the case may be,[479] were added as regards the amounts that could be claimed by each of several owners. The Legislature, though already directed by Section 6 of this same article to enact enforcement laws, was this time additionally authorized, though not directed, to "prescribe appropriate and reasonable laws regulating the manner of establishing the right to said exemption."

Chapters 192 and 200 of the current Florida Statutes, as well as 193 to some extent, contain the supplementary legislative provisions of today.

*Construction.* That each of the various participants in the framing of Section 7 as it now stands had a definite idea should be assumed; but that in concert they succeeded admirably in concealing their thoughts is beyond question. It is of course widely recognized that proponents of varying principles not infrequently experience difficulty in reaching a common denominator, with the result that the final product is satisfactory to all because clear to none. Such is Section 7. It has turned our chameleon into a veritable kaleidoscope. Ultimately the correct color-patterns will be selected by the judiciary; but in the meantime we can at least examine the possible combinations, and can perhaps remove some of the mirrors.

A parenthetical word is pertinent at this point. The members of our Legislature are in the main practical men with valuable ideas; but a mastery of the precise phraseology essential to administration of their

[476]FLA. CONST. Art. X, §7. The gist of the 1935 statute now appears, in modified form, as FLA. STAT. §§192.12, 192.13 (1941).

[477]REP. ATT'Y GEN. 438 (1939) presents a scholarly analysis of the legislative history of the 1938 amendment.

[478]The word "perhaps" is used advisedly; see Residence in Part V, 3 *infra*.

[479]This vexing problem is analyzed in detail in Part V, 7 *infra*.

concepts in individual cases cannot, in fairness, be always expected. This is not to say that their ideas are muddled; compromise terminology is notoriously vague, and even clear general rules do not always cut cleanly among borderline instances in application. It is confidently expected that the excellent start made by Statutory Revisor Henderson and Director Weiss of the Legislative Reference Bureau will in time result in a close approximation of the legislative intent and the formulation thereof that a judge or administrative official is bound to follow.

Whenever ambiguity appears on the horizon, the bench opens fire with its battery of canons of construction.[480] If the vessel in which ambiguity rides be a statute imposing liability, one canon spouts a strict construction in favor of the taxpayer.[481] If, on the other hand, the ship happens to be a statute exempting taxpayers assumed to be already liable, another canon belches forth a strict construction against the taxpayer.[482] The use of canon, and the validity of the distinction between the two heavy rifles just described, are subjects beyond the scope of this discussion. The important point is that each canon is firmly mounted, and that both, taken together, produce those shifting tactical maneuvers that are the pride of the judiciary, the marvel of laymen, the life-blood of practitioners, and the despair of law students. The second canon, namely, strict construction against the taxpayer, is the one employed to blast claimants of homestead tax exclusions, precisely because Section 7 of Article X and Section 11 of Article IX are formally so phrased as to create exemptions rather than to impose liability.

### 2. *The Underlying Obligation*

*Impairment of Obligation of Contract.* The supreme law of the land is the Constitution of the United States; whenever a federal question is

[480]The uses of these in the law were sharply analyzed and firmly established by Cicero, particularly in his discussion *de inventione.* A masterful summary, embracing the influence of Plato and Aristotle, is presented by Huntington Cairns in his LEGAL PHILOSOPHY FROM PLATO TO HEGEL 151-160 (1949), reviewed in 2 U. OF FLA. L. REV. 308 (1949). Their semblance of certainty is highly deceptive; they are so mounted that there is at least one pointing in any desired direction.

[481]*E.g.,* State *ex rel.* Tampa Electric Co. v. Gay, 40 So.2d 225, 229 (Fla. 1949); De Vore v. Gay, 39 So.2d 796 (Fla. 1949); Peninsular Tel. Co. v. Clearwater, 39 So.2d 473, 475 (Fla. 1949); Cunningham v. Stefanidi, 144 Fla. 214, 197 So. 722 (1940); State *ex rel.* Rogers v. Sweat, 113 Fla. 797, 152 So. 432 (1934).

[482]*E.g.,* Steuart v. State *ex rel.* Dolcimascolo, 119 Fla. 117, 161 So. 378 (1935); Rast v. Hulvey, 77 Fla. 74, 85, 80 So. 750, 753 (1919); *see* Lummus v. Florida-Adirondack

involved this atomic bomb is dropped. Section 10 of Article I prohibits the states from passing any "Law impairing the Obligation of Contracts . . . ." Against this the Florida Constitution cannot prevail;[483] and accordingly homestead realty once contractually obligated as a source of tax revenue to meet liabilities incurred by some governmental unit remains chargeable, so long at least as it remains legally within the unit, despite any subsequent relief attempted by Florida law.

For this reason the date of adoption of the original homestead tax amendment is still of practical import; after such date anyone furnishing credit against "security," in the form of tax revenues from all property subject to taxation, has had constructive notice that this security cannot include taxes on the first $5,000 of the assessed valuation of residences qualifying under Section 7. Property owned by those meeting the requirements of Florida citizenship and residence, as well as of family headship and title held in a certain manner,[484] cannot be taxed, to the extent of the exclusion limit, for debts incurred after November 6, 1934. For aliens and for all persons not heads of families, as well as for those holding title in the more liberal ways permitted today, the material date is November 8, 1938.[485]

Not all governmental debts are protected by the impairment principle. The prolixity of litigation involving this factor connotes serious conceptual difficulty, but the line of demarcation has been drawn clearly and consistently. The basic issue, well posed by Mr. Justice Buford in *State v. West Palm Beach,*[486] involves two questions only: (1) the existence of

School, Inc., 123 Fla. 811, 821, 168 So. 232, 237 (1936).

[483]It is, of course, essential that one alleging impairment must prove it, American Can Co. v. Tampa, 152 Fla. 798, 811, 14 So.2d 203, 211 (1943); the canon of strict construction against the claimant of exemption does not apply at this stage.

[484]From 1934 through 1938 the holder of title was necessarily either the family head, his lawful wife residing on the property, or both.

[485]It is apparent that some resident owners entitled to the $5,000 exclusion under the 1938 amendment could not qualify under Section 7 as adopted for true homesteaders in 1934, and are accordingly liable on all secured obligations of their governmental entities issued on or before November 8, 1938.

[486]127 Fla. 849, 174 So. 334 (1937); *cf.* Groves v. Board of Public Instruction, 109 F.2d 522 (C. C. A. 5th 1940);Long v. St. John, 126 Fla. 1, 170 So. 317 (1936); *contrast* Board of Public Instruction v. State *ex rel.* Barefoot, 145 Fla. 482, 199 So. 760 (1941) (promissory notes), *with* Coral Gables v. State, 128 Fla. 874, 176 So. 40 1937) (mere tort judgments and stated account). In this connection note carefully the technical pitfall dug by the Supreme Court in Fleming v. Turner, 122 Fla. 200, 211-212, 215, 165 So. 353, 358, 359 (1935). The surprising factor is the willingness of the

the debt on November 6, 1934, or on November 8, 1938 in the other instances just mentioned; and (2) the inclusion of the otherwise exempt property among the lands that lay within the jurisdiction of the governmental debtor upon creation of the obligation, and that were then liable, by virtue of the pledge of tax revenues derived or to be derived therefrom, as underlying security for the debt. If the property was then taxable, no residence exclusion is permitted, provided, of course, that there was at the time a specific contract obligating the tax revenues of the governmental unit as distinct from a mere unsecured obligation. Debts of a general nature, no matter when incurred, cannot be met by taxing excluded property. Stated somewhat differently, the line is sharply drawn between funded debt and floating debt, between refunding bonds and funding bonds.

Furthermore, the original bonds must have been issued, that is, negotiated by the issuer, on or before November 6, 1934, or November 8, 1938, as the case may be. Mere authorization of the issue does not of itself confer any rights on a future bondholder. He is not prejudiced by any provisions of Section 7 enacted before actual issuance of the bonds he holds; no law already in existence at that time can possibly impair the obligation of his subsequent contract, since all such law forms a part thereof.[487]

Alteration of the law must not, of course, be confused with changes in factual conditions under existing law. If an owner of vacant land

Court, on the mere ground of judicial convenience, to approve a dangerous trap for honest laymen in order to relieve a taxpayer admittedly obligated, the sole loophole for his escape being lack of abstruse legal knowledge on the part of certain county commissioners.

[487]REP. ATT'Y GEN. 458 (1939). The sharp distinction between impairment of the obligation of a contract and impairment of the right to make a contract, both of which are sometimes confused in the loose phrase "impairment of contract," should be clearly visualized. A contract must exist before any obligation thereof can arise to be impaired, whereas the constitutionality of laws restricting freedom to enter into contracts of a given type previously unobjectionable is a problem of substantive due process, and has no bearing here. This latter type of unconstitutionality is well illustrated in Liquor Store, Inc. v. Continental Distilling Corp., 40 So.2d 371 (Fla. 1949), discussed *infra* in Legis., 2 U. OF FLA. L. REV. 408 (1949).

From a somewhat different angle, no bondholder can look to property outside the jurisdiction of the debtor at the time his bonds were originally issued; therefore residences incorporated into a municipality after the adoption of Section 7 are not taxable, to the extent of any residence exclusion they may have, even for the purpose of meeting its secured obligations existing prior to such adoption, REP. ATT'Y GEN. 777 (1946).

later makes it his residence or that of his dependents on or before January 1 of any year, he can claim the residence exclusion for such year even as against bonds already outstanding at the time, provided they were issued after enactment of the 1934 or the 1938 amendment, whichever happens to be pertinent; the holder of such bonds has constructive notice, upon his acquisition thereof, that the character of property for exclusion purposes is required by law to be determined afresh on the first day of each year, and that this may well vary from year to year.

*Assessments.* Detailed treatment and delimitation of the various kinds of taxes, as well as any intensive analysis of the features that distinguish taxes as a whole from assessments, would require a separate and lengthy discussion. Accordingly, the most that can be attempted here is to sketch broadly the line drawn by our Supreme Court, and to state the primary basis of distinction. This has seldom, if ever, been more clearly summarized than by Mr. Chief Justice Terrell in *Klemm v. Davenport.*[488] The difference, as might be expected, is one of degree, and rests upon special enhancement of the value of the specific property lying within the designated area.

By way of illustration, the category of assessments includes not only such unquestioned expenses as paving[489] but also those incurred by drain-

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[488]100 Fla. 627, 631, 129 So. 904, 907 (1930):

"A tax is an enforced burden of contribution imposed by sovereign right for the support of the government, the administration of the law, and to execute the various functions the sovereign is called on to perform. A special assessment is like a tax in that it is an enforced contribution from the property owner, it may possess other points of similarity to a tax but it is inherently different and governed by entirely different principles. It is imposed upon the theory that that portion of the community which is required to bear it receives some special or peculiar benefit in the enhancement of value of the property against which it is imposed as a result of the improvement made with the proceeds of the special assessment. It is limited to the property benefited, is not governed by uniformity and may be determined legislatively or judicially."

*Cf.* Martin v. Dade Muck Land Co., 95 Fla. 530, 574-578, 116 So. 449, 464-465 (1928).

[489]Special benefit to abutting property is required even as to paving, Rafkin v. Miami Beach, 38 So.2d 836 (Fla. 1949), in which the city seriously impaired the value of residential property by widening an adequate street and diverting heavy traffic into this area for the convenience of motorists generally, and then actually sought to make the unfortunate owners pay for the paving as a "special benefit." A majority of four refused to permit this sly maneuver.

age districts[490] and special inland navigation districts,[491] as well as by special road and bridge districts whenever a special benefit peculiar to district property can be shown.[492] Conversely, it does not embrace a school,[493] or a county hospital abortively set up as the instrumentality of a special district.[494]

The tax exclusions are specifically adapted to realty, ownership in the broad sense, and residence, or alternatively to household goods and personal effects, ownership, and family headship. Therefore our tax chameleons are always found on the ad valorem tax, which, as its name indicates, is reckoned on valuation and is based on the taxable incidence of ownership. Excise, license and privilege taxes, while their object-matter may happen to be real or personal property, rest on different taxable incidences; accordingly our chameleons cannot find a footing on them, even though the right to acquire, use, transfer or consume various material things, or to engage in a profession or vocation, is regarded from some viewpoints as a property right. Utility taxes, collected by the company from the consumer and transmitted to the governmental entity imposing the tax, have been classified as excise or license taxes.[495]

Whether the conversion of the 1934 phrase "special assessments for benefits" into the 1938 "assessments for special benefits" signifies any

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[490]Martin v. Dade Muck Land Co., 95 Fla. 530, 116 So. 449 (1928). See note 499 *infra*, however.

[491]State *ex rel.* Board of Comm'rs of Florida Inland Nav. Dist. v. Latham, 121 Fla. 486, 493, 163 So. 890, 893 (1935).

[492]State *ex rel.* Ginsberg v. Dreka, 135 Fla. 463, 185 So. 616 (1938); note, however, the strong implication that not every road district would confer special benefits upon district property.

[493]State *ex rel.* Clark v. Henderson, 137 Fla. 666, 188 So. 351 (1939). And yet, while refusing to pay any of their share of expenses for free schools for their children, citizens of this ilk have nevertheless managed to filch the right to vote to create bonded debt that they themselves have no intention whatever of paying, Lersch v. Board of Public Instruction, 121 Fla. 621, 164 So. 281 (1935).

[494]*Compare* Crowder v. Philips, 146 Fla. 428, 442, 1 So.2d 629, 631 (1941), *with, e.g.*, State v. Walton County, 97 Fla. 59, 119 So. 865 (1929). For a general picture, see the thorough analyses by Davis, J., in Jinkins v. Entzminger, 102 Fla. 167, 135 So. 785 (1931) (special and general benefits within taxing entity), and by Brown, C. J., in Lewis v. Leon County, 91 Fla. 118, 107 So. 146 (1926) (nature of county purpose, constituting general benefit).

[495]*Cf., e.g.*, Peninsular Tel. Co. v. Clearwater, 39 So.2d 473 (Fla. 1949); Heriot v. Pensacola, 108 Fla. 480, 146 So. 654 (1933), a scholarly summarization of the law by Bird, Circ. J., sitting as associate justice. The distinction between excise and license taxes roams beyond our discussion here.

change in meaning has been a subject of debate. Attorney General Gibbs thought that no difference resulted.[496] Mr. Justice Buford argued the contrary view in his dissent in *State* ex rel. *Clark v. Henderson.*[497] Mr. Justice Whitfield, writing for the majority in the same case, preferred to leave the issue undecided.[498] It is not likely that the judiciary will base any major shift in the law upon this variance in terminology. Rather, one can predict with considerable confidence that judicial classification of any given levy as either a tax or an assessment, at least in so far as our Legislature remains silent on the matter,[499] will swing on the primary distinction first mentioned in this abbreviated discussion of assessments.

### *3. Who*

A sharp divergence appears at this point between personalty and realty. The claimant of the personalty tax exclusion must be "the head of the family residing in this State . . . ."[500] Accordingly the analysis in Part I *supra*[501] applies here also. Technically, the owner of the realty should file for the residence exclusion, while the family head should claim the personalty exclusion.

In practice, however, some assessors prefer filing by the family head as regards both exclusions, regardless of ownership by the other spouse. Since the two normally live together, and only one residence exclusion is allowed per dwelling house, the practical result is the same as far as the residence is concerned. The necessity for careful differentiation is further lessened by the statutory direction that tangible personalty be assessed in the name of the husband as between man and wife, or of the

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[496]REP. ATT'Y GEN. 438, 447 (1939).

[497]137 Fla. 666, 674, 188 So. 351, 355 (1939).

[498]*Id.* at 670, 188 So. at 353.

[499]A recent example of legislative conversion of an assessment into a tax is Fla. Laws 1949, c. 25214, §3, which imposes the Central and Southern Florida Flood Control District special tax on "all property subject to county taxes in said district . . . ." OP. ATT'Y GEN. 049-310 (July 8, 1949) accordingly rules that the residence exclusion applies. Inasmuch as floods have rarely, if ever, been known to bypass land merely because there was a house on it, a clearer instance of special enhancement of the value of realty within a given area would be difficult to discover; yet residences are accorded favoritism even under these extreme conditions.

[500]FLA. CONST. Art. IX, §11.

[501]2 U. OF FLA. L. REV. 24-31 (1949). In particular, the inept draftsmanship that produced the phrase "head of the family residing in this State" is subject to the analysis at pp. 30-31, as far as the personalty tax exclusion is concerned.

family head whenever a family relation exists; but even so, a special return showing separate ownership can be filed, and the assessor is empowered to split assessments in his discretion in any event.[502] Careful attention to returns and the exclusions claimed is therefore indicated. In instances of doubt, the local assessor should be consulted as to his practice.

*Title.* Section 7 begins with the words "Every person who has the legal title or beneficial title in equity to real property in this State . . . ." The property, then, must be located in Florida, and the claimant must have legal or equitable title. Furthermore, by way of liberalization under the 1938 amendment, "Said title may be held by the entireties, jointly, or in common with others . . . ."[503]

Legal title of course includes fee simple title; and by statute it has been extended so as to embrace, among holders of title, vendees in possession under purchase contracts appropriately recorded, and widows holding by virtue of dower or of estates limited in time, provided the claimant resides on the realty.[504]

A life tenant in residence can claim the exclusion.[505] Whether a tenant for years under a will may do so is debatable. Unlike a life tenant, he is not seised. But feudal distinctions in property law do not necessarily govern taxation today. Logically, whenever taxes are collected from a resident in possession, he should be able to claim the exclusion; this is undoubtedly the policy of Section 7. That the Supreme Court

[502]FLA. STAT. §200.07 (1941). The family head is not necessarily a husband; *cf.* 2 U. OF FLA. L. REV. 24-29 (1949).

[503]Even under the strict 1934 wording of Section 7 Attorney General Landis, in REP. ATT'Y GEN. 71, 76 (1935), took the position that "title" embraces "an undivided interest in the land such as a tenancy in common . . . ." Indeed, he went so far as to construe this word "to include any beneficial interest in land which may be the homestead." The influence of the earlier sections of Article X is apparent in this latter statement, although they significantly do not contain the word "title." In any event, the proposition is too broad today; *cf.* note 506 *infra.*

[504]FLA. STAT. §192.13 (1941). Note, however, that today the widow receives either absolute title or a life estate: dower and lesser estates do not apply to homestead realty, FLA. STAT. §§731.23, 731.27, 731.34 (Cum. Supp. 1947); nor can it be devised when the owner is survived by a widow or lineal descendants, FLA. STAT. §731.05 (Cum. Supp, 1947); *cf.* 2 U. OF FLA. L. REV. 58-59, 222-223 (1949). *Cf.* REP. ATT'Y GEN. 62 (1936). This opinion takes the view that as regards a widow, as well as a conditional vendee, recordation of the deed or other instrument is required, although §192.13 does not specifically prescribe this in the case of the widow.

[505]REP. ATT'Y GEN. 62 (1936); the will or other instrument must be duly probated or admitted to record in the county where the realty is located, however.

will so rule when the issue arises, however, cannot be predicted with certainty.

At this point, expansion of the word "title" stops. It does not extend to the interest of a lessee,[506] even assuming that an ad valorem tax on realty could be levied thereagainst; and it is apparent that a fortiori the residence exclusion, unlike the forced sale exemption,[507] cannot be stretched to cover interests of even lesser stature.

Equitable title differs from legal title principally in the respect that it is not perfected at law, and accordingly may require the intervention of a court of equity in order to become fully effective.[508]

*Single Persons.* Any connection that the residence exclusion may on occasion have with the family is today purely fortuitous. A single person living alone can claim it; and this applies to a married woman if she has legally established a domicile separate from that of her husband and owns the property in question.[509] Mere living apart is not, of course, conclusive; the old common-law ghost of the identity of husband and wife still stalks the corridors of our legal edifice, and vanishes only when confronted with proof of intent on the part of the wife to live permanently and for justifiable cause in a residence other than that of her husband.[510] In this event each, if otherwise qualified, can claim the full residence exclusion.[511]

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[506]A leasehold interest is not equitable ownership, REP. ATT'Y GEN. 163 (1941); 447 (1939); the lessor still holds title to the property.

[507]*Cf.* 2 U. OF FLA. L. REV. 32 (1949).

[508]REP. ATT'Y GEN. 438, 447 (1939); TIFFANY, OUTLINES OF REAL PROPERTY, c. 5 (1929); WALSH, A TREATISE ON EQUITY §86 (1930).

[509]REP. ATT'Y GEN. 193 (1947); 449 (1940); *cf.* 285 (1946); *contrast* 279 (1948).

[510]The assessor is faced with the practical difficulty of determining in each instance whether a married female claimant has established a separate domicile in Florida, and whether both spouses are claiming exclusions when entitled to only one.

[511]REP. ATT'Y GEN. 449 (1940); *contrast* Barlow v. Barlow, 156 Fla. 458, 23 So.2d 723 (1945), *and* Tigertail Quarries, Inc. v. Ward, 154 Fla. 122, 16 So.2d 812 (1944), *with* Herron v. Passailaigue, 92 Fla. 818, 110 So. 539 (1926), *and* Hunt v. Hunt, 61 Fla. 630, 54 So. 390 (1911). *Cf.* 2 U. OF FLA. L. REV. 30 (domicile), 24 (mere physical separation), 28 (legal separation, divorce, and desertion) (1949); Olsen v. Simpson, 39 So.2d 801 (Fla. 1949) (divorced husband held family head because of obligation to support children); but note that, although there can be only one head per family in establishing the exemption from forced sale, there can be as many residence exclusions as there are individuals, including members of one family, with separate domiciles. Family headship is not requisite to the residence exclusion.

*Successors in Interest.* An heir otherwise entitled to the residence exclusion can claim it as the equitable owner of realty in an undivided estate.[512] Executors of one dying in the first quarter of any given year may claim the exclusion on or before April 1, provided the deceased could have obtained it, and provided further that the deceased was not at the time of his or her death a homesteader under Section 1 of Article X.[513] If he was, the homestead realty is not a part of the estate, and the personal representative has no jurisdiction over it;[514] the widow or the heir should file the claim, not because of her or his residence on the property, but rather by virtue of the fact that the deceased was entitled to the residence exclusion for such year.

By parity of reasoning, inasmuch as there are no homestead restrictions on the right to bequeath personalty,[515] the personal representatives of a deceased family head should through April 1 be able to claim the $500 tax exclusion on household goods and personal effects to which he was entitled on the first of the preceding January.

*Entrymen.* Although the residence exclusion is governed by Florida law, and the owner of federal patent lands "homesteaded" is not necessarily entitled to it,[516] an entryman under the Florida Statutes may claim it.[517] The material date is that on which he completes the statutory requirements for obtaining a conveyance, regardless of whether he obtains it in fact. On such date he becomes the equitable owner of the property; and on the first of the following January he becomes liable to taxation thereon, in all probability. In any event, his right to the residence exclusion arises simultaneously with such liability.[518] He can, of course, lose this right later by failing to meet the residence requirements of Section 7, even though he may remain the owner of the property and liable as such for taxes. But to acquire the right to conveyance in the first place he must, by statute, have made the property his place of abode for three years.

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[512]REP. ATT'Y GEN. 198 (1943).

[513]REP. ATT'Y GEN. 282 (1946); *cf.* FLA. STAT. §733.01 (Cum. Supp. 1947). As to filing returns see notes 542, 545 *infra.*

[514]REP. ATT'Y GEN. 283 (1946); *cf.* 2 U. OF FLA. L. REV. 54-62, 222, 227-231 (1949).

[515]*Cf.* 2 U. OF FLA. L. REV. 82-83 (1949).

[516]REP. ATT'Y GEN. 167 (1941).

[517]REP. ATT'Y GEN. 365 (1948); *cf.* FLA. STAT. §253.35 (Cum. Supp. 1947).

[518]*Ibid. Cf.* also Part V, 4 *infra.*

*Partners and Shareholders of Corporations.* Neither a partnership nor a corporation can be the head of a family.[519] Therefore, until the 1938 amendment became effective, neither could claim any residence exclusion.[520] Nor can either obtain the personalty tax exclusion even today. As of January 1, 1939, however, the law was changed as to realty; today a partner, it is submitted, can claim the residence exclusion as the equitable owner of his share of partnership realty, provided he meets the other requisites.[521] Attorney General Watson so advised in his well-reasoned opinion of February 14, 1947,[522] citing extensively pertinent authorities from other jurisdictions. Furthermore, although in phrasing Section 7 it would have been a relatively simple matter to use legal terminology and say "held by the entireties, by joint tenancy, or by tenancy in common," the draftsmen chose instead to use the broader lay language embracing any kind of co-holding.

From an economic standpoint there is no reason whatever for refusing to extend this right of tax exclusion to shareholders of a non-profit, mutual-ownership corporation, in which the shares of each represent his ownership of his residence. Attorney General Landis was of this view, even under Section 7 as originally adopted.[523] The contrary position was taken more recently by Attorney General Watson.[524] The difficulty with allowing the exemption lies in the fact that at law the very purpose of a corporation is to insulate the shareholders as individuals; and equity is loath to intrude so far as to disregard the corporate entity in favor of one who deliberately adopts the corporate device.[525] When he chooses this glamorous creature of the law, he takes her with her vices as well as her virtues. He owns a share of her — but she still owns the apartment.

That the earlier opinion accords economically with the spirit of Section 7 is recognized; the residence of an individual becomes none the less

[519] *Cf.* 2 U. OF FLA. L. REV. 21 (1949). From the forced sale standpoint, individual exemptions cannot be advanced to evade payment of partnership debts prior to bona fide dissolution. The term "beneficial title in equity" does not appear in Section 1, however.

[520] REP. ATT'Y GEN. 71, 76 (1935).

[521] FLA. CONST. Art. IX, §11 does not mention title at all. The test, it is suggested, is a simple one: if the household goods and personal effects are taxable to a family head as "his," then they are "his" for tax exclusion purposes.

[522] REP. ATT'Y GEN. 617 (1947).

[523] REP. ATT'Y GEN. 61 (1936).

[524] REP. ATT'Y GEN. 196 (1947).

[525] *Cf.* WORMSER, DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS 29 (1929), the outstanding treatise in this particular field.

so merely because he cannot afford a plot of ground to go with it. Any dogmatic prediction as to the outcome of this issue would be rash at present, but the authors of this article incline toward the view that shareholders, even of the type here considered, unfortunately do not come within the purview of Section 7, even as broadened in 1938. By the same token, amendment of Section 7 to include them is strongly indicated.

*Citizenship.* An alien is today on an equal footing with others in applying for the exclusions. Citizenship is not required for either the residence[526] or the personalty exclusion.[527] The earlier decision in *Steuart v. State* ex rel. *Dolcimascolo*,[528] and indeed all opinions touching on the residence exclusion prior to the 1938 amendment, are accordingly matters of legal history from the citizenship aspect.

*Residence.* The problem of residence is a knotty one. Nowhere does Section 7 as amended require the claimant to be a Florida resident, unless a substantial clause be eliminated as meaningless. To be sure, the property must be located in Florida. But the words defining the claimant as an owner "who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person . . ." is an excellent illustration of the familiar debating maxim that too much is seldom enough. If he must reside thereon in any event, the reference to "permanent home of another or others" means precisely nothing; and courts are reluctant to make this assumption if it can possibly be avoided.[529]

On the other hand, if these words are to be accorded significance, the terminology "resides thereon and in good faith" becomes superfluous: he cannot possibly make the property his permanent home without residing

[526]FLA. CONST. Art. X, §7, as amended in 1938, Smith v. Voight, 158 Fla. 366, 28 So.2d 426 (1946). Nor need the claimant be a registered voter, OP. ATT'Y GEN. 049-192 (May 4, 1949), although in practice registration is highly desirable both as an aid to the assessor and as a strong evidentiary fact for the resident. So also is the sworn statement of domicile provided for in FLA. STAT. §222.17 (1941).

[527]OP. ATT'Y GEN. 049-356 (Aug. 1, 1949). FLA. CONST. Art. IX, §11, never has prescribed citizenship.

[528]119 Fla. 117, 161 So. 378 (1935). Needless to say, the decision was correct when rendered.

[529]*See, e.g.*, Crawford v. Gilchrist, 64 Fla. 41, 54, 59 So. 963, 968 (1912); State v. Bryan, 50 Fla. 293, 385, 39 So. 929, 958 (1905). Admittedly, the draftsmanship is on occasion so faulty that the words convey no thought at all; *cf., e.g.*, Miller v. Phillips, 157 Fla. 175, 25 So.2d 194 (1946).

thereon; and if he physically occupies the premises in bad faith his presence is nugatory and deceives no one but himself. It is submitted that this language was intended to mean "who makes it his or her domicile or that of a legal or natural dependent. . . ." Attorney General Gibbs has ruled that the owner of a residence in one county, if he maintains dependents of his therein on a permanent basis, can obtain the residence exclusion thereon even though he votes as a resident of another Florida county, provided he limits himself to the one claim.[530]

This same opinion avoids meeting squarely a query propounded as to whether the claimant can under some circumstances be a citizen and therefore a resident of another state.[531] Section 7 unequivocally permits this, albeit perhaps unwittingly, unless the claimant must himself reside on the property. This latter construction, however, has already been shown to render "permanent home of another" meaningless. The only logical conclusion is, therefore, that he can reside outside Florida provided he holds legal or equitable title to realty in Florida and makes it the permanent home of one or more of his dependents.

The words "legally or naturally dependent" are but a synonym for members of a family at law or a family in fact. This concept has been analyzed in Part I, 2 *supra*;[532] and that discussion is applicable here, though with less emphasis on communal living in instances of those "morally dependent." There must of course be necessity for support and some basis for a claim thereto or expectancy thereof.[533] Since, however, family headship is not required by Section 7, its existence is merely strong evidence of dependency rather than a necessary factor.

There is, or was, still another ambiguity: Were the words "resides thereon" inserted, in addition to the term "permanent home," with the thought of compelling continuous physical presence of the claimant on the property? The Supreme Court recently answered this question in the negative.[534]

Residence is first established by physical presence on the property,

[530]REP. ATT'Y GEN. 438, 445-446 (1939).

[531]*Id.* at 443. "Resident" is defined in FLA. STAT. §192.14 (1941).

[532]2 U. OF FLA. L. REV. 24 (1949).

[533]*Cf.* REP. ATT'Y GEN. 438, 446 (1939), aptly quoting the definition of a dependent given in Duval v. Hunt, 34 Fla. 85, 100-101, 15 So. 876, 881 (1894). A conclusion of fact, such as this always is, is notoriously difficult to formulate with exactitude until the basic evidentiary facts are presented.

[534]Jacksonville v. Bailey, 159 Fla. 11, 30 So.2d 529 (1947). This matter is discussed under Abandonment in Part V, 4 *infra*.

coupled with the intent at the time not to reside permanently or indefinitely elsewhere.[535] The Attorney General was recently asked to give his opinion on the legal result when such intent is manifest but the law relating to rent control prevents the purchaser from entering by January 1.[536] He advised, quite logically, that inability to take possession, when thus occasioned by "the sovereign aided by the act of the public enemy,"[537] is immaterial; in other words, factual absence compelled by law is nevertheless legal presence.

### *4. When*

It is not the purpose of this article even to raise, much less to analyze, the various general problems in the broad field of liability to and exemption from taxation by Florida of real or personal property at state, county and municipal levels. Only to the extent that the residence and personalty tax exclusions overlap them will they be considered. In dealing with the time element, however, it is helpful to bear in mind a few general rules that can be concisely formulated.

The State of Florida, after the calendar year 1940, has been expressly forbidden to levy any ad valorem tax either upon realty or upon personalty other than intangibles.[538] Ad valorem taxation of realty and tangible personalty is thus reserved to the counties and municipalities.[539]

All property is taxable on January 1, and the tax is a lien thereon.[540] Realty is separately assessed as of this date.[541] Returns must be filed by every owner or person in control of the property on or before April 1; and, if these are not filed by then, the assessor thereafter determines the valuation.[542] Taxes are due on November 1, or as soon thereafter as

[535] *Cf.* 2 U. OF FLA. L. REV. 30 (1949); OP. ATT'Y GEN. 049-432 (Sept. 12, 1949).

[536] REP. ATT'Y GEN. 195 (1947).

[537] *Id.* at 196.

[538] FLA. CONST. Art. IX, §2. For a thorough exposition of our intangible tax see Legis., 2 U. OF FLA. L. REV. 262 (1949).

[539] *Cf.* FLA. CONST. Art. IX, §5, and the authorization by the Legislature therein directed.

[540] FLA. STAT. §§192.04 (1941), 200.02 (Cum. Supp. 1947).

[541] FLA. STAT. §193.11 (Cum. Supp. 1947); *cf.* §192.04 (1941); Simpson v. Hirshberg, 159 Fla. 25, 30 So.2d 912 (1947); REP. ATT'Y GEN. 284 (1946).

[542] FLA. STAT. §193.12 (1941). Although annual filing of a return as to realty may not be customary among homeowners, there are legal dangers involved; *cf.* Adams v. Fielding, 148 Fla. 552, 4 So.2d 678 (1941) (alternative holding). Most resident owners can in practice, however, and do trust their local assessor to set the valuations of their residences. See also note 545 *infra*.

the assessment roll comes into the hands of the tax collector, and may be paid at any subsequent time through March 31 of the following year at progressively decreasing discounts starting at four percent in November and reaching zero in March.[543] If not paid they become delinquent on April 1.[544]

The same dates and requirements apply to taxes on tangible personalty,[545] with the exception, to some extent, of the time controlling the assessment. All property, both real and personal, is specifically made subject to taxation on January 1.[546] But whereas Florida realty is always here then, regardless of its owner, personalty may well be elsewhere and yet arrive in Florida within the year. The material time for liability to taxation of tangible personal property in each county extends between January 1 and March 1;[547] therefore it seems logical that personalty already in a given county on January 1 should be assessed as of that date, while personalty entering between January 1 and March 1, inclusive, should be assessed, as a practical matter, on an "average" basis.[548]

The tax chameleons are born each year, if at all. The old refrain "once a homestead, always a homestead," which is misleading even as to forced sale,[549] is the exact opposite of the truth from the standpoint of the tax exclusion. Each year requires a separate and distinct determination, on the basis of the facts as they then exist.

*Filing date.* Applications for either exclusion must be made by the

[543]FLA. STAT. §193.41 (Cum. Supp. 1947).

[544]*Ibid.* The law governing current tax sales for delinquency is summarized in Legis., 2 U. OF FLA. L. REV. 273 (1949).

[545]*Cf.* FLA. STAT. §§193.12 (1941), 192.57, 200.08 (Cum. Supp. 1947) (returns generally); 193.41 (Cum. Supp. 1947), 200.25, 200.26 (1941) (date due and discounts); 193.41 (Cum. Supp. 1947), 200.27 (1941) (delinquency); 200.18 (1941) (list by judge of county judge's court); 200.17 (1941) (return by court clerk, receiver or custodian).

[546]FLA. STAT. §193.04 (1947).

[547]FLA. STAT. §§200.13 (1941), 193.11 (Cum. Supp. 1947). The words "between January first and March first" apparently are meant to include both these dates in §200.13. Both statutes were approved by the Governor on June 7, 1941, and both were filed with the Secretary of State on June 9. The latter was amended in 1943 without clearing up the ambiguity produced by the two when read together. *Cf.* Lee Cypress Co. v. Hendry, 155 Fla. 757, 21 So.2d 351 (1945); REP. ATT'Y GEN. 232 (1947).

[548]Administratively, it is practically impossible to inventory and assess the personalty of a new resident on the very day he arrives.

[549]*Cf.* 2 U. OF FLA. L. REV. 35 (1949).

taxpayer on or before April 1.[550] Furthermore, they must be filed each year; failure to do so constitutes automatic waiver of all rights for the year in question.[551] Doubt as to the power of the Legislature to set the time and manner of filing, and to deny the residence exclusion upon failure to comply with these requirements, was expressed recently in *Jacksonville v. Bailey;*[552] but the statement is mere dictum, and fails to take account either of the practical necessity for determining with finality the total amount of assessed valuation to be excluded before fixing the annual millage rates on the remainder, or of the language in Section 7 specifically authorizing the Legislature to "prescribe appropriate and reasonable laws regulating the manner of establishing the right to said exemption."

The residence exclusion requires a separate application, while the personalty exclusion must be claimed by the family head on his personal property return.[553] This April 1 deadline cannot be extended, even by the county commissioners, except in those rare instances in which waiver by the party entitled to exemption is impossible.[554]

A claim for residence exclusion, when properly filed with the county tax assessor, covers municipal as well as county taxes without further action.[555] It is submitted that the results of application need not be the same, however; the municipality is not bound by county determination

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[550]REP. ATT'Y GEN. 448 (1939); 522 (1937); 71, 81 (1935). Part V, 5 *infra* explains where claims should be filed. The form to be used is detailed in FLA. STAT. §192.15 (1941).

[551]FLA. STAT. §§192.16 (Cum. Supp. 1947) (realty), 200.15 (1941) (personalty).

[552]159 Fla. 11, 13, 30 So.2d 529, 530 (1947).

[553]FLA. STAT. §§192.16 (realty), 200.15 (personalty) (1941).

[554]REP. ATT'Y GEN. 287 (1946); *cf.* 197 (1944) (pointing out that the filing provisions of the statute do not excuse widows, war veterans, cripples or the blind); 448 (1939). The 1946 opinion takes the position that an insane person is incapable of waiver; the view seems sound unless a guardian has been appointed. *Cf. also* REP. ATT'Y GEN. 194 (1948). Both the 1946 and 1939 opinions recognize that late filing may possibly be justified under exceptional circumstances, which, however, must arise before they can be specifically considered. The wisdom of this caveat was demonstrated during World War II. J. N. Lummus, Jr., tax assessor of Dade County and former president of the National Association of Assessing Officers, proposed to go to the extensive extra labor of rechecking residences of servicemen with a view to forestalling automatic waiver of tax exclusion by the absent owners. The American Legion was equally active. These efforts met with the approval and commendation of Attorney General Watson, REP. ATT'Y GEN. 199 (1943); 166 (1942). *Cf.* Fla. Laws 1943, c. 21880, FLA. STAT. §192.55 (Cum. Supp. 1947), now expired.

[555]FLA. STAT. §§167.72 (Cum. Supp. 1947), 192.18 (1941).

as regards its own assessments, even though it may choose to adopt the county figures.[556]

*Governing Date.* Unlike the forced sale exemptions, the right to either exclusion is set on a specific date each year. In general, the same reasoning applies to both tax exclusions.

Subjection to taxation and assessment of the residence are fixed as of January 1 in each year; and the logical implications of the mandate have been consistently followed by the Attorney General in ruling on the right to the residence exclusion.[557] The owner of realty on January 1 is entitled to the exclusion if otherwise qualified, even though he moved to Florida late in the preceding fall.[558] If he sells or abandons the property after the first of the year, his basis of claim still exists;[559] and, as has already been noted, his widow, heir, executor or administrator, as the case may be, is allowed to file the claim on or before April 1 if he dies on or after January 1 and prior to the deadline for submitting the application.[560] By the same token, one who meets the ownership and residence requirements throughout most of the year, yet not on January 1, is not entitled to the exclusion.[561] The reason underlying this is readily apparent: the

[556]REP. ATT'Y GEN. 199 (1943); *cf.* FLA. CONST. Art. IX, §5, directing municipalities to "make their own assessments"; FLA. STAT. §167.44 (1941); Vassar v. Arnold, 154 Fla. 757, 18 So.2d 906 (1944) (special law forcing adoption by city of county tax roll held unconstitutional); Holman v. Fort Pierce, 154 Fla. 743, 19 So.2d 58 (1944) (assessment of same lot by county at $500 and by city at $905 approved); Bradenton v. Seaboard A. L. Ry., 100 Fla. 606, 130 So. 21 (1930).

[557]REP. ATT'Y GEN. 284 (1946); 288 (1945); 162 (1941); 71, 79 (1935); *cf.* the ruling that lands conveyed after January 1 by Murphy Act deed from the state are not taxable in that year, REP. ATT'Y GEN. 276 (1946). Since Simpson v. Hirshberg, 159 Fla. 25, 30 So.2d 912 (1947), there should be no further doubts.

[558]REP. ATT'Y GEN. 162 (1941).

[559]REP. ATT'Y GEN. 288 (1945). Of course, only one residence can be claimed; and the mere fact that an individual is physically in a given building on January 1 does not necessarily make it his residence. A subterfuge will not suffice.

[560]See Successors in Interest, Part V, 3 *supra.*

[561]REP. ATT'Y GEN. 284 (1946). Let us assume that *A*, who resides on his property on January 1, sells it to *B* on March 15, and establishes another domicile elsewhere in Florida. *B* immediately makes this property his home, and claims the residence exclusion thereon. Two matters are beyond doubt: (1) *A* can claim the exclusion up to the time of sale, since he can file at any time on or before April 1; and (2) neither *A* nor *B* is entitled to the exclusion on his new residence, because neither resided there on January 1. But can *A* file claim for exclusion on his January 1 residence on, say, March 20? He no longer owns the property. Yet these taxes are a lien on the property as of January 1, according to FLA. STAT. §192.04 (1941). At-

taxes are assessed as of January 1; and, regardless of arrangements between the parties involved as to who is to pay them in fact for any given year, the residence or non-residence character of the property, its valuation, and the right to the exclusion all relate to the first day of the year.[562]

Turning to personalty, the date on which it should be assessed for tax purposes may perhaps be debatable in theory;[563] but one thing is certain, namely, that the right to the exclusion, in those instances in which it can be advanced at all, arises simultaneously with liability to taxation. As to this, the mandate of our Constitution is unequivocal: "there shall be exempt from taxation to the head of the family residing in this State, household goods and personal effect [*sic*] . . ." to the value of $500.[564]

*Abandonment.* It is now settled that continuous physical presence on the property is not a prerequisite to securing the residence exclusion. In *Jacksonville v. Bailey*[565] the owner was successful in his claim, even though he and his family had moved out of their home and had rented it for approximately three months, including the first of January, during the so-called winter season. He had been residing on the property for several years; did not claim any other home; removed from the premises his necessary personal belongings only; and moved back as soon as his tenants had departed. In other words, Bailey never abandoned his residence.

Of the various indicia of permanent residence or domicile previously

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torney General Watson has ruled that *A* can file under these circumstances, REP. ATT'Y GEN. 288 (1945), even though *A* does not hold the legal or equitable title specified in Art. X, §7. But on what does *A* on March 20 base his authority to enter a claim, as distinct from the conditions requisite to its creation? What connection does he then have with the title? The answer is not free from doubt; accordingly *A* should as a practical matter file his claim prior to the sale, even though it be consummated on the first business day of the year. *B* should insist upon this at the time; and the saving in taxes can be apportioned between *A* and *B* on the basis of whatever bargain they choose to make.

[562]*Ibid.*

[563]See notes 547, 548 *supra.*

[564]FLA. CONST. Art. IX, §11.

[565]159 Fla. 11, 30 So.2d 529 (1947). For many years the Attorney General accurately anticipated this very decision; *e.g.*, REP. ATT'Y GEN. 286 (1946); 438, 446-447 (1939); 71, 78 (1935). Note the sharp analysis of the converse situation in REP. ATT'Y GEN. 164 (1941). *Cf.* the middle position in REP. ATT'Y GEN. 279 (1948) (absence without rental regarded as not conclusive of abandonment); 194 (1948) (insane person in institution held incapable of abandoning his homestead property).

discussed,[566] presence is but one, the relative force of which varies with the nature and length of any absence. The determination of residence is a conclusion of fact, reached in each instance by weighing the relevant evidentiary facts of record in the light of the principle that under the law of any given jurisdiction, including Florida, an individual must have one, but only one, permanent residence. Both abandonment of the homestead, resulting in loss of the forced sale exemption, and abandonment of the residence, so as to destroy the right to the tax exclusion, rest on the same basis.[567]

It follows as a corollary that the conclusion of fact to be drawn from absence as an evidentiary fact varies directly with another evidentiary fact, namely, the calling of the claimant. This is especially true when such calling is military service. Never does the law operate more drastically than when it requires an individual, more recently even in time of peace, to leave his home and sacrifice for the communal benefit several valuable years of his life, or perhaps life itself, at a wage-ceiling not tolerated in other employment. Yet the smuggest of civilians concede that even a man in the armed forces is entitled to a permanent residence somewhere, and that it does not shift from ship to ship or from beachhead to beachhead. The community that sends him out, and that refuses to allow his family even the minimum of subsistence in an invariably rising market while he is away, can hardly complain taxwise when as a direct result he has to rent his home in order to keep his family alive. This has been recognized, in the main, in several opinions: the distinction is in full accord with the law of domicile when one becomes familiar with it, and no special category is created; absences "on business" are merely longer when one is on military duty, and do not per se constitute abandonment of the one domicile he must have.[568] He may, however, establish a new domicile at his station, thereby abandoning his former one.

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[566]2 U. OF FLA. L. REV. 29-31, 37-40 (1949); *cf.* FLA. STAT. §192.14 (1941). Functional abandonment as related to the residence exclusion, that is, the use of a portion of the residence, without departing therefrom, for purposes of rental income, is treated in Urban Realty, Part V, 6 *infra.*

[567]See notes 565, 566 *supra; compare* Jacksonville v. Bailey, 159 Fla. 11, 30 So.2d 529 (1947), *with* Collins v. Collins, 150 Fla. 374, 7 So.2d 443 (1942).

[568]Attorney General Ervin's opinion 049-188 (April 29, 1949) covers the law admirably; *cf.* REP. ATT'Y GEN. 620 (1947). The dangers of a casual approach to domicile are strikingly illustrated in REP. ATT'Y GEN. 524 (1940). Correction was soon made in a thorough analysis by Attorney General Watson, REP. ATT'Y GEN. 165 (1941); see also note 554 *supra.* Re-enlistment is dealt with in REP. ATT'Y GEN. 284

### *5. Where*

Claim for the residence exclusion must be filed with the county tax assessor in a form substantially as set forth in the statute.[569] Oath is not required; but making or subscribing an application that one knows or has reason to know is false as to any material matter constitutes a misdemeanor.[570]

Realty is separately assessed by both the county and city where situated;[571] consequently the application for exclusion should be filed with the assessor of the county in which the property is located. The personalty tax exclusion should be similarly claimed, since it must be listed on the tangible personalty return.[572] As a practical matter, of course, most household goods and personal effects are kept in the residence; accordingly no problem will normally arise in choosing the proper county to the extent of the $500 exclusion.

All claims for residence exclusion duly filed with the county tax assessor are deemed to have been filed for municipal tax purposes also;[573] in other words, only one filing is now necessary, but by the same token failure to file properly costs the claimant his exclusion as regards both county and municipal realty taxes. City assessors are governed by the provisions of the laws relating to the residence exclusion.[574] It follows logically, although the matter may perhaps be debatable, that the city assessor is not bound by the action of the county assessor in granting or denying a claim duly presented, and should make his own decision, even though in practice it may well accord with that of the county assessor.[575]

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(1946), but the facts here resulted in a treatment too cursory to be of much general value. As for absence on business, see 2 U. OF FLA. L. REV. 37-40 (1949).

[569]FLA. STAT. §192.15 (1941). The use of the present tense in the form does not, however, shift the date as of which the right to exclusion is fixed from January 1 to any date on or before April 1 that the claimant happens to select for filing, REP. ATT'Y GEN. 288 (1945); see Governing Date, Part V, 4 *supra.*

[570]FLA. STAT. §192.57 (Cum. Supp. 1947).

[571]FLA. STAT. §193.06 (1941); see note 573 *infra.*

[572]FLA. STAT. §§209.09, 200.15 (1941); *cf.* 193.12 (1941) as regards returns. As to oath, contrast the contradictory §§192.57(1) and 200.08(1) (Cum. Supp. 1947).

[573]FLA. STAT. §167.72 (Cum. Supp. 1947).

[574]FLA. STAT. §192.18 (1941).

[575]This reasoning is predicated on FLA. STAT. §192.18 (1941) and the analogous authorities cited in note 556 *supra.* An adverse ruling by the city assessor can apparently be tested before the county commissioners in accordance with FLA. STAT. §192.19 (1941), and in any event in the circuit court.

### 6. On What

The taxable base, from the assessed valuation of which the residence exclusion of Section 7 is deducted, is described as "the said home and contiguous real property, as defined in Article 10 [*sic*], Section 1 . . . ." For this reason the discussion in Part I, 5 *supra*[576] is in the main applicable here, except that for tax exclusion purposes the realty unquestionably must be contiguous to the residence. The physical limits set forth in Section 1 are applied in Section 7 by specific reference thereto.

The realty includes new buildings constructed by each January 1; the *cum onere* doctrine applies equally to taxation and exclusion.[577] It should be noted in passing that a houseboat is personalty, unless so attached to the land as to become a house rather than a boat.[578]

*Rural Realty.* The residence to be valued and assessed, when outside the limits of an incorporated city or town, extends to a maximum of 160 acres, "together with . . . the improvements on the real estate . . . ."[579] This means all improvements, of whatever nature.[580] For example, a fishing camp, including cottages rented out, is part of the taxable base from which the exclusion is deducted, if on the rural property on which the residence of the owner is located.[581]

It should also be noted at this point that Section 5 of Article X applies, as one would normally suppose, to the entire article, including Section 7;[582] no rural "homestead provided for in section one shall be reduced in area on account of its being subsequently included within the limits of an incorporated city or town, without the consent of the owner." The only question of importance that arises here is this: Can a mere residence, the owner of which is entitled to the exclusion under Section 7, be reduced in area upon inclusion within a municipality, when its owner is not the head of a family residing in Florida and when, therefore, it is not a "homestead provided for in section one"? The answer, it is suggested,

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[576]2 U. OF FLA. L. REV. 40-52 (1949).

[577]REP. ATT'Y GEN. 71, 82 (1935); *cf.* Yowell v. Rogers, 128 Fla. 881, 175 So. 772 (1937).

[578]FLA. STAT. §200.01 (1941), REP. ATT'Y GEN. 195 (1948); *cf.* FLA. STAT. §200.44 (Cum. Supp. 1947).

[579]From FLA. CONST. Art. X, §1, incorporated by reference in §7.

[580]REP. ATT'Y GEN. 619 (1947); 71, 75 (1935).

[581]REP. ATT'Y GEN. 777 (1946).

[582]REP. ATT'Y GEN. 264 (1946); 240 (1944); 164 (1942); 787 (1935).

is yes; if the property does not qualify as homestead under Section 1, then Section 5 cannot come into play at all, by its very terms. Any change in Section 5, if desired, could readily have been effected along with the amendment adding Section 7.

*Urban Realty.* A residence inside a municipality not only embraces no more than a half-acre, but it is also limited, by the definition incorporated from Section 1, to "the residence and business house of the owner"; accordingly our realty tax chameleon finds himself in the same varicolored labyrinth in which his bewildered brother, the forced sale chameleon, has so often run for the laboratory technicians of the law.

Speaking very generally, however, he has discovered somewhat different paths, with the result that his color-transmutations have not been so marked. The swift-footed shade of Achilles Mabry, dissenting in *Smith v. Guckenheimer & Sons,*[583] which in *McEwen v. Larson*[584] caught the hapless Hector of *Cowdery v. Herring,*[585] has to date failed to overtake the brother.[586] Young *Anolis carolinensis* Fiscus is still moving well. Perhaps, indeed, this is because he has merely been playing about in the office of the Attorney General rather than running three — or more — times 'round the walls of the Supreme Court Building; but his more advantageous route was not open to his brother. The natural reluctance to render judgment-proof the owner of a large hotel or apartment house[587] is virtually eliminated in our tax law by the $5,000 limit; and, probably

[583]42 Fla. 1, 42, 27 So. 900, 902 (1900).

[584]136 Fla. 1, 185 So. 866 (1939).

[585]106 Fla. 567, 143 So. 433 (1932), *aff'd on rehearing,* 106 Fla. 574, 144 So. 348 (1932), though on rather confused reasoning. The chase is described in 2 U. OF FLA. L. REV. 40-47 (1949).

[586]REP. ATT'Y GEN. 286 (1946) (large dwelling, presumably urban, rented in part as apartments and rooms by resident owner, held exempt); 281 (1945) (urban hotel, operated by resident owner, held exempt); 163 (1941) (tourist camp, houses rented out, and apartment house all held exempt if on urban half-acre resided on, even though claimant occupies another house); 438, 445 (1939) (any rental properties on half-acre held exempt if rents furnish livelihood); 71, 73-74 (1935) (urban hotel, even if not operated by resident owner, apartment house, separate dwelling houses, as well as portions of business building rented out, held exempt, provided these and residence of owner are all on the half-acre and the rents are used for livelihood).

[587]Florida is in the minority, even as regards the nationally widespread exemption of realty from forced sale, in providing no valuation limit on the property; over half the states set this at $2,500 or less. *Cf.* 2 U. OF FLA. L. REV. 13-14 (1949). A brief but forceful criticism appears in Pollitt, *The Defeat of Justice,* 23 FLA. L. J. 118, 129 (1949).

more for this reason than any other, the Attorney General has consistently recognized what is common knowledge to all lay Floridians and to most lawyers, namely, that renting to tourists is very definitely a business in Florida, and that it requires a "business house" in the form of apartments, cabins, or some other type of lodging.

The earlier opinions probably went too far in extending the exclusion to embrace rental properties that are a mere sideline rather than the principal business of the owner;[588] but the later view[589] has the decided merit of recognizing that renting, when it is one's business in fact, should constitute one's business at law. The paths of our forced sale and residence exclusion chameleons diverge sharply at this point; but the misstep, it is submitted, lies not in the tax opinions of the Attorney General, but rather in the still unexplained overruling of the realistic doctrine of *Cowdery v. Herring*[590] propounded by Mr. Justice Davis in connection with forced sale.

*Contiguity.* Section 7 specifically says "the said home and contiguous real property . . . ." Contiguity is therefore a prerequisite. But the matter is not so easily dismissed. If contiguity is destroyed by operation of law, what then? An early opinion[591] transferred the ratio decidendi of *Clark v. Cox*[592] into tax exclusion law by eliminating contiguity as a requisite in instances of transection of a rural tract by roads. Two years later, however, the owner of three urban lots, separated by a public street in existence at the time he purchased them, applied for a tax exclusion embracing all three. The Attorney General advised that the exclusion base was confined to the residence and could not stretch across the street.[593]

Both opinions can be reconciled by careful analysis of *Clark v. Cox.* The same principle that prevents abandonment by an insane owner placed in an asylum, or by a military man forced to leave his home "on business,"

[588] *E.g.*, REP. ATT'Y GEN. 163 (1941).

[589] Notably REP. ATT'Y GEN. 281 (1945).

[590] See note 585 *supra.* The Supreme Court might declare any rented property subject to tax; *see* Yowell v. Rogers, 128 Fla. 881, 883, 175 So. 772, 773 (1937). *But cf.* Jacksonville v. Bailey, 159 Fla. 11, 30 So.2d 529 (1947).

[591] REP. ATT'Y GEN. 71, 75 (1935). This interpretation of *Clark v. Cox* extends the principle beyond the facts giving birth to it; in any event, contiguity was not specifically required until the subsequent amendment of 1938.

[592] 80 Fla. 63, 85 So. 173 (1920), analyzed *supra,* 2 U. OF FLA. L. REV. 50 (1949).

[593] REP. ATT'Y GEN. 523 (1937). This view gains support from the requirement of contiguity in State *ex rel.* Dunscombe v. Courson, 144 Fla. 439, 198 So. 108 (1940).

should produce a similar result when the community splits the property by eminent domain. But when the separation is caused by the owner himself or already exists upon his acquisition of the parcels, the contiguity specified in Section 7 should be strictly observed.[594] Today the law governing both the forced sale exemption of homestead realty and the residence exclusion from taxation is the same in respect of contiguity.

*Homestead Personalty.* The $500 tax exclusion is confined to the household goods and personal effects of the family head. It has no application to intangibles, nor does it cover all tangibles; the broad scope accorded the exemption of $1,000 of personalty from forced sale is considerably limited in the tax field.[595] The household goods and personal effects must first be assessed; thereafter the $500 is deducted from their assessed valuation.[596]

### *7. How Much*

Section 7 flatly prescribes a maximum residence exclusion of $5,000 per person. This provision is clear, and needs no discussion. But unfortunately the other limits are not well delineated. The chief difficulty springs from the conglomeration of terms used: "real property" owned by one "who resides thereon"; "permanent home"; "the said home and contiguous real property, as defined in Article 10, Section 1"; and ultimately, "dwelling house." Why were all these varying designations used if they all mean the same thing; and if they do not, what distinctions were intended?

Just to liven matters up a bit, the ancestor of the present limiting provision[597] employed the term "any single parcel of real property" where the words "any one dwelling house" now stand, while the original Section 7 used the single phrase "homestead as defined in Article X" in lieu of the luxuriant verbiage listed above. Again, Section 7 now permits co-holding of the title, with the proviso that:

". . . no such exemption of more than Five Thousand Dollars shall

[594] *Cf.* 2 U. OF FLA. L. REV. 47-52 (1949).

[595] Hackney v. McKenny, 113 Fla. 176, 151 So. 524 (1933); Tarpon Springs v. Chrysostomides, 108 Fla. 500, 146 So. 845 (1933); *cf.* 2 U. OF FLA. L. REV. 77-78 (1949) as regards personalty exempt from forced sale. See also note 501 *supra*.

[596] Hackney v. McKenny, *supra* note 595.

[597] Fla. Laws 1935, c. 17060, §2, now, as modified, FLA. STAT. §192.12 (1941).

> be allowed to any one person or any one dwelling house, nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person."

Assessed valuation of what? Of the dwelling house? Of the home and contiguous real property? Or of the entire parcel?

Assume a rural tract of 160 acres, owned in equal, undivided shares by four tenants in common, and assessed at $40,000. On the property are four dwelling houses: two of the co-owners reside there, each in a separate house; the third, who lives in a hotel, supports his aged parents in the third house, and claims a residence exclusion thereon; while the fourth resides in a nearby town and rents the remaining dwelling house to tenants. The interest of each co-owner being one-fourth, his proportionate share of the assessed valuation is $10,000. The fourth co-owner cannot claim any residence exclusion; but this fact has no influence whatever on the proportionate shares of the other three. None of them is entitled to an exclusion of more than $5,000, of course; nor can any of the four dwelling houses be allocated an exclusion of more than $5,000.

The problem then is: Can each of the two resident co-owners, as well as the co-owner supporting his dependent parents in the third house, obtain an exclusion of $5,000, which of course does not exceed his $10,000 share of the assessed valuation; or does the $5,000 maximum relate to the entire tract, in which event each co-owner is limited to one-fourth of such amount, or $1,250? Viewed from another angle, does "the said home and contiguous real property" signify each "home" or "dwelling house," or does it mean the entire "single parcel of real property" as statutorily prescribed in 1935 but now altered to read "any one dwelling house" in accordance with the current Section 7?

The phrase "single parcel of real property" was quite properly relied upon in an early 1936 opinion[598] relating to a co-operative apartment governed by the original Section 7 and supplementary statutes. In a general survey opinion following the 1938 amendment the same answer was given,[599] although the significance of the change from "single parcel of real property" and "homestead as defined in Article X" to "any one dwelling house" was completely overlooked. Several years later, the Attorney General was specifically asked how much could be claimed by each

[598] REP. ATT'Y GEN. 61 (1936).

[599] REP. ATT'Y GEN. 438, 444 (1939).

of several partners, living in separate dwellings on a tract of land owned by them. His reply advised that:[600]

> "... each partner may claim ... a value up to five thousand dollars but not in excess of the value of the interest of the owner."

Applying this answer to our hypothetical case, each of the three co-owners residing on the property, since the value of his interest is $10,000, is entitled to the full $5,000 residence exclusion. By the same reasoning, if the value of the tract were $16,000, each of the three would have an interest of $4,000, and consequently could not obtain a $5,000 exclusion; but he could get one of $4,000 as contrasted with a mere $1,250.

The distinct concepts of amount to be allowed, as against the right to any exclusion at all, must be viewed separately. Unless the property be the residence either of the owner or of his moral or legal dependents, no exclusion may be claimed, as pointed out in Part V, 3 *supra*. This applies to co-owners as well as to a sole owner. The first question to ask, of course, is: What is the share of each co-owner in the ownership? The second question then is: Does any co-owner fail to make the property his residence or that of his dependents? If he does not qualify, his share is completely eliminated as a basis for any exclusion. He cannot claim one himself; neither can he pass along his share of the ownership to another co-owner as a ground for exclusion. If none of the co-owners qualifies, no residence exclusion is available at all. Each must comply with one of the two residence requirements as a separate individual; and each is confined to an exclusion computed on the basis of his share only. The third question then arises: How much can be claimed by each of those co-owners meeting either or both of the residence tests?

Returning to this problem and our hypothetical case, not every Florida assessor would grant an exclusion in excess of $1,250 to the three co-owners fulfilling one of the residence requirements. To be sure, our analysis thus far accords with the phraseology of Section 7; and in particular the argument can soundly be advanced that, had the framers intended to limit to $5,000 the total of the exclusions to be allowed partial owners of any realty jointly owned, or to restrict the percentage of the $5,000 "exemption" allowed each partial owner to his share of the ownership, they could easily have said so. The fact is that they did not. Instead, the limit was specifically set at his share of the assessed valuation — not of the exclusion.

[600] REP. ATT'Y GEN. 617, 619 (1947). This opinion presents a very able analysis.

Furthermore, since the total of the exclusions as regards any tract obviously can never exceed the taxable base from which they are deducted,[601] and since this base is always the assessed valuation, therefore, if confinement to a share of one overall exclusion was intended, there was no point whatever in imposing the superfluous limitation to a proportionate share of the assessed valuation. The limit would have been automatic at $5,000 or any lesser valuation anyhow. At the same time, it is fundamental that clauses deliberately inserted in a constitution, especially by way of amendment, are not to be tossed aside as meaningless.[602]

So far, so good. But other language in Section 7 is also directly in point:

> "Every person who has the . . . title . . . shall be entitled to an exemption . . . up to the assessed valuation of Five Thousand Dollars on the said home and contiguous real property . . . . Said title may be held by the entireties, jointly, or in common with others, and said exemption may be apportioned among such of the owners as shall reside thereon, as their respective interests shall appear . . . ."

These last words, taken alone, may be read as indicating a limit of one exclusion per home and contiguous realty embraced in any title. Yet every person who has the title is expressly granted an exclusion; and this exclusion, which is limited to not over $5,000 of the assessed valuation, runs to each person rather than to each title. The language first discussed, which follows immediately after the above passage, also evidences a distinction betwen the exclusion itself and the $5,000 ceiling, in that it speaks of "no such exemption of more than Five Thousand Dollars . . . ."

It is to be hoped that the Gordian knot will eventually be cut by reference to the manifest purpose of the amendment, namely, to accord each owner of a residence, whether of himself or of his dependents, one exclusion of not over $5,000 from his taxable base computed thereon, regardless of how title is held from a formal legal angle. Economically, no valid reason can be advanced for refusing the full $5,000 exclusion to each of several co-owners when each lives in an individual "dwelling house," including in this term an apartment legally or equitably owned.[603] There

[601]This base, for many residences, is frequently less than $5,000, of course.

[602]See note 529 *supra*.

[603]The term "dwelling house," it is submitted, should be construed in a functional sense rather than in that used by a building contractor. Whenever distinct homes

is no doubt that, merely by partitioning the property, each can validly claim up to this amount; and Section 7 specifically authorizes co-holding of title to any "real property in this State," with an exclusion to each qualified person. Furthermore, the 1938 change, effected by amendment of our Constitution, from the former statutory "single parcel of real property" to the present "any one dwelling house" is presumably more than a mere touch of style. Opposed to this is the canon, for what little it may be worth in this situation, that exemption provisions when ambiguous are construed strictly against the unlucky citizen, even though the weird draftsmanship is not his fault.

As the foregoing analysis shows, no room is left for anything but doubt. The only definite statements that can be made at present are that the taxing authorities, until our Supreme Court is properly called upon to speak, are justified in allowing each partial owner his full exemption not exceeding $5,000 per claimant; and that no one envies the Court its task of having to rule one day on this jargon that is Section 7. The decision, when rendered, could go either way. Meanwhile the authors of this article incline, albeit not dogmatically, to the view that each co-owner should be accorded either the full $5,000 exclusion or a percentage of the assessed valuation corresponding to his share of the ownership, whichever is the lesser.

### *8. What Procedure*

In the main, the procedure in the homestead tax field is like any other tax procedure in Florida. From the standpoint of the taxpayer it is largely administrative rather than judicial; only in rare instances does he go to the circuit court, which has "exclusive original jurisdiction . . . in all cases involving the legality of any tax, assessment, or toll . . . ."[604]

Returns, assessments, and the filing of claims for exclusions have already been discussed from the standpoint of both the residence and the personalty exclusions.[605] It should be noted that the tax officials can

exist in fact, even in one overall structure, the use of common walls, corridors or main entrance should make no difference; the underlying policy of Section 7 is met.

[604]FLA. CONST. Art. V, §11; *cf.* FLA. STAT., c. 196 (1941), as amended (Cum. Supp. 1947). The county assessor may also contest in the circuit court an alteration of his assessment by the county commissioners that he deems incorrect, REP. ATT'Y GEN. 198 (1943). If sued, he is represented by the county attorney, OP. ATT'Y GEN. 049-290 (July 1, 1949).

[605]Part V, 4, 5 *supra.*

correct their own errors in many instances.[606]

The mechanics of appeal as regards the residence exclusions are succinctly detailed in Section 192.19 of Florida Statutes 1941. Briefly, the assessor must approve or disapprove the application prior to the first Monday in May; should he disapprove, it is his duty to notify the claimant, giving his reasons, and to file a copy with the clerk of the board of county commissioners. This constitutes an appeal automatically; and the commissioners, sitting as a board of equalization, may affirm or reverse upon review. The applicant may appear before the board in person or by agent, but the board must review the disapproval by the assessor in any event.[607] Whether the claimant appears or not, he may, within fifteen days of affirmance by the board of the denial by the assessor, "file in the circuit court of the county in which the residence is situated a proceeding against the assessor for a declaratory decree . . ."[608] or he may initiate "other appropriate proceedings . . . ."[609]

The judiciary has been reluctant to interfere with the discretion reposed in the tax assessor and the board.[610] Any worthwhile analysis of judicial control in this field would require a lengthy article, but the influence of Section 7 on this subject may be briefly sketched. It was early settled that, although under Article IX, Section 1, a "uniform and equal rate of taxation" must be provided, and although assessment at less than 100 per cent of "full cash value" fails to comply with the statute,[611] neverthless a lower assessment is permissible if made uniformly throughout the jurisdiction involved, because no harm to anyone results.[612]

The residence exclusion amendment destroyed the premise for this originally sound view. To be sure, tax equals rate times base; and, when all are taxed, any alteration of the one factor is the same as alteration of

[606]OP. ATT'Y GEN. 049-313 (July 8, 1949). *Cf.* REP. ATT'Y GEN. 524 (1938) (assessor can correct clerical error of extension on tax roll after allowing exclusion, and can grant exclusion after first denying it and failing to notify the claimant; but notice of denial constitutes automatic appeal and prevents further changes by him).

[607]REP. ATT'Y GEN. 194 (1948); *cf.* OP. ATT'Y GEN. 049-380 (Aug. 12, 1949).

[608]Declaratory decrees are governed by FLA. STAT., c. 87 (Cum. Supp. 1947); *cf.* Smith v. Voight, 158 Fla. 366, 28 So.2d 426 (1946); see the excellent discussion by McCarthy, *Declaratory Judgments,* 3 MIAMI L. Q. 365 (1949).

[609]*E.g.,* bill in equity to enjoin; *cf.* Schleman v. Connecticut Gen. Life Ins. Co., 151 Fla. 96, 9 So.2d 197 (1942).

[610]*E.g.,* State *ex rel.* Kent Corp. v. Board of County Comm'rs, 37 So.2d 252 (Fla. 1948); Poland v. Pahokee, 157 Fla. 179, 25 So.2d 271 (1946) (realty); Hackney v. McKenny, 113 Fla. 176, 151 So. 524 (1933) (personalty).

[611]FLA. STAT. §193.11 (Cum. Supp. 1947).

[612]Camp Phosphate Co. v. Allen, 77 Fla. 341, 349, 81 So. 503, 506 (1919).

the other. But when those in a certain valuation bracket are not taxed at all, the principle does not apply. For example, if a residence is worth $10,000 and is accurately assessed, a reduction of 50 per cent in the rate still leaves a tax at this new rate on the non-exempt $5,000 of the base. When, however, the $10,000 base is reduced by 50 per cent, the $5,000 exclusion renders the entire property tax-free. Stated in another manner, it is not enough today that assessments be equal relatively, that is, as compared with assessments of similar property within the jurisdiction. They must be accurate abstractly; they must equal 100 per cent of full cash value. Since 1934, abstract inequality has constituted a form of relative inequality. This subject is clearly and thoroughly analyzed by Mr. Justice Thomas in *Schleman v. Connecticut General Life Ins. Co.*[613]

When, a bit later, in *Cosen Investment Co. v. Overstreet*[614], a taxpayer sought a reduction of his assessment on the ground that his property was valued at 100 per cent while neighboring land was valued at only 75, he was denied relief in spite of the manifest inequality forbidden by the Constitution, the reasoning being that although this other land was assessed at too low a figure, nevertheless the property of the complainant had been properly valued.

Taking his cue from these decisions, another taxpayer, in *State* ex rel. *Kent Corp. v. Board of County Commissioners,*[615] recently attempted to obtain a proper assessment of all the property in his area. He too was unsuccessful, although the Supreme Court had already admitted quite frankly, as "a matter of common knowledge," that "the several assessors of this State have never assessed the property in their counties at its full cash value . . . ."[616] The statutory mandate to the contrary[617] has

[613]151 Fla. 96, 9 So.2d 197 (1942). See also the able treatment of assessments generally by Brown, J., in West Va. Hotel Corp. v. W. C. Foster Co., 101 Fla. 1147, 132 So. 842 (1931).

[614]154 Fla. 416, 17 So.2d 788 (1944). Oddly enough, this argument, although equally applicable to the personalty in Hackney v. McKenny, 113 Fla. 176, 151 So. 524 (1933), was completely overlooked then.

[615]37 So.2d 252 (Fla. 1948). Relator sought mandamus, alleging assessments at only 25 percent of actual cash value. The assessor admitted "that properties have sold for much more than their assessed value." *Id.* at 253. The companion proceeding against the city, State *ex rel.* Kent Corp. v. Fort Lauderdale, 37 So.2d 253 (Fla. 1948), was equally futile.

[616]Camp Phosphate Co. v. Allen, 77 Fla. 341, 351, 81 So. 503, 507 (1919). The assessor in this case was so naive as to admit on the record that he had used a 50% basis of valuation. This was approved, even so, at that time; his downfall was due to relative discrimination among similar lands.

[617]FLA. STAT. §§193.11 (Cum. Supp. 1947), 200.06 (1941).

proved to be a waste of words in practice. The individual assessors, who are locally elected officers, cannot fairly be saddled with the blame; the root of the evil lies in the lack of moral fibre patent in a large segment of our communities today.

It might appear at a hasty glance that a taxpayer can no longer place any reliance on the courts in correcting improper assessments. This observation is not a fair one, however. Fraud,[618] lack of jurisdiction, or illegal procedure[619] will be corrected; and patent inequalities in assessments, all ranging below 100 per cent, will still be given consideration,[620] provided the relief sought is relative equalization at the higher rather than the lower of the divergent percentages used. This much was indicated in the *Cosen*[621] case.

But what of the abstract inequality condemned in the *Schleman*[622] decision? Has this been reduced to mere words by the recent *Kent*[623] case?

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[618]Fraud can be either actual, that is, predicated on intentional favoritism, *e.g.*, Cooey v. Johnson, 95 Fla. 946, 117 So. 111 (1928) (omission from rolls of similar property owned by friends of the assessor), or constructive, that is, inescapably demonstrated by extreme abstract overvaluation, *e.g.*, Schleman v. Connecticut Gen. Life Ins. Co., 151 Fla. 96, 9 So.2d 197 (1942) (assessment at 300% of actual value in a business sense); Bradenton v. Seaboard A. L. Ry., 100 Fla. 606, 130 So. 21 (1930).

[619]*E.g.*, Seaboard A. L. Ry. v. Allen, 82 Fla. 191, 89 So. 555 (1921) (enforcement of tax levy on property not even owned by complainant); Arundel Corp. v. Sproul, 136 Fla. 167, 177, 186 So. 679, 683 (1939) (complainant not given hearing by board of equalization); Camp Phosphate Co. v Allen, 77 Fla. 341, 361-362, 81 So. 503, 510 (1919) (refusal of board to consider evidence submitted by complainant at hearing).

[620]*E.g.*, Louisville and N. R. R. v. Amos, 98 Fla. 350, 357, 123 So. 745, 747 (1929) (unequalized undervaluations); Walter C. Hardesty, Inc. v. Holly Hill, 100 Fla. 1130, 131 So. 134 (1930) (assessment based on flat front-footage, regardless of improvements); Camp Phosphate Co. v. Allen, *supra* note 619 ($3.00 per acre for resident farmer; $15.00 per acre for corporations on land of same type). The difficulty is that Cosen Inv. Co. v. Overstreet, 154 Fla. 416, 17 So.2d 788 (1944), has since rendered this doctrine virtually useless; today the taxpayer is helpless when his assessment does not exceed 100%, unless raises in other valuations can be compelled. Furthermore, Attorney General Ervin has recently ruled that inequalities in percentages of full cash value employed by the assessor do not invalidate the tax roll; "proper proceedings" to compel "proper assessments" should be brought, OP. ATT'Y GEN. 049-303 (June 30, 1949). In view of the *Cosen* decision, *supra*, the only "proper" proceeding available is a suit to force higher assessments of those properties valued at the lesser percentage.

[621]*Supra* note 620.

[622]Schleman v. Connecticut Gen. Life Ins. Co., 151 Fla. 96, 9 So.2d 197 (1942).

[623]State *ex rel.* Kent Corp. v. Board of County Comm'rs, 37 So.2d 252 (Fla. 1948). This still fails to comply with FLA. STAT. §193.11 (Cum. Supp. 1947), of course; a

Of course, this latter differs from *Schleman* in that the assessments were allegedly below rather than above 100 per cent; and it varies from *Cosen* in that the inequality complained of was, on the surface, abstract rather than relative.[624] Our Supreme Court quite naturally hesitated to disturb valuations honestly reached by the assessor, especially after refusal of the circuit judge to find any abuse of discretion; the Court is simply not equipped functionally to become a tax equalization commission on a full-scale basis, however much one may be needed.[625]

At the same time, the *Kent* decision comes painfully close to an admission that the Court is either powerless or unwilling to enforce the statutory mandate of assessment at "full cash value." To the business man this term means the full amount of cash that can be obtained for the property in question at any given time — and the time for reckoning assessments of realty is the first of each and every year. The Court, however, refused to construe it as the equivalent of "current market value"; instead escape was effected by means of the finding that in the past, presumably around 1930, the market value of the property was below the present assessed valuation. The test accordingly becomes a matter of whim. What period is to be used: five years, ten years, or fifty years? Should the lowest value within the period be taken, or the highest value, or the mean? Does a falling or rising realty market have any influence? Why bother to assess each year if valuation is to be frozen on a long-range basis?

Viewed from another angle, how many owners of residences would willingly accept in eminent domain proceedings an amount as compensation equal to the "full cash value" at which their property is actually assessed? Again, where in Florida can one purchase today an urban house and lot, or a rural farm with the usual buildings, for $5,000? Yet, according to our assessment rolls, such property does exist — at a total of hundreds of millions of dollars.

The *Kent* decision, one naturally assumes, is sound in the light of the record, particularly in view of the emphasis in the opinion on failure of

fraction of "market value" may perhaps be taken as "actual value" or "real value," but it is definitely not "full cash value."

[624]In actuality, of course, abstract inequality today constitutes relative inequality, in that property assessed at $5,000 or less, when worth more, escapes taxation entirely, contrary to the law.

[625]*Cf.* the observations of Whitfield, J., in Roberts v. American Nat. Bank of Pensacola, 97 Fla. 411, 421, 121 So. 554, 558 (1929). Recommendations for a state tax commission by those informed in fiscal matters have consistently been rejected; *cf., e.g.,* The Florida Taxpayer, Dec. 1948, p. 4, col. 2; Gainesville Daily Sun, April 15, 1949, p. 1, col. 4.

the relator to demonstrate clearly the alleged abuse of discretion in the form of wholesale underassessments; but the Court should be on the alert, whenever a convincing record of underassessment is presented, not to reduce the *Schleman* opinion to a futile display of rhetoric, thus leaving helpless those few residents that actually finance our counties and cities. Furthermore, statutory amendment of Sections 193.11 and 200.06 from "full cash value" to "current market value" would constitute a step forward by eliminating the basis for an indicated judicial disinclination to act in this field.[626]

### *9. Why*

It is common knowledge today that the residence exclusion, in view of the notoriously low assessments in many counties, often exceeds $15,000. By reduction of the taxable base to less than one-third of what the property is selling for, its owner is enabled to evade his proper taxes as effectively as he could avoid them by an amendment tripling the exclusion. High millage rates on other property, and general curtailment of county and municipal budgets, have inevitably followed.[627] In recent years exempt realty in Florida has reached a value of well over half that of taxpaying realty; and the residence exclusion accounts for three-fourths of this tax-free property.[628] Special charges for those desiring services have been necessary, such as the now widespread municipal assessment for garbage collection.[629]

[626]The reluctance of the Supreme Court to release a further flood of litigation is natural under the present conditions; see the concise explanation of the difficulties by Thomas, C. J., at the completion of his term as administrative head of the Court, in *Justice Without Delay*, 2 U. OF FLA. L. REV. 1 (1949).

[627]The dire effects of our residence exclusion and traditional under-assessment, especially in combination, have not passed unnoticed; *cf, e.g.*, an excellent editorial in St. Petersburg Times, March 30, 1949, p. 6., col. 1. The financial plight of cities, and the apathy of the states toward them, were stressed in the national annual conference of mayors this year. More federal aid and the downfall of state government were forecast; *cf.* The Florida Times-Union, March 21, 1949, p. 1, col. 4. The important point is that this criticism, whether justifiable or not, is growing; yet further federal usurpation of state government is hardly a pleasant outlook for Floridians.

[628]The computation is based on the analyses of the Florida tax assessment rolls by counties for 1946, 1947 and 1948, tabulated each year in the annual REPORT OF THE COMPTROLLER OF THE STATE OF FLORIDA OF COUNTY FINANCES. In rough figures, property assessed at two billion dollars is taxed, while realty assessed at one billion, chiefly residences, escapes.

[629]Provided by general law in 1943, FLA. STAT. §167.73 (Cum. Supp. 1947). Use

Aside from the valuation problem, our residence exclusion is itself a fiscal freak.[630] While three states provide preferences giving some advantage to homesteaders,[631] over three-fourths of them and the District of Columbia do not allow a true homestead exclusion.[632] Of those granting one, more than a third apply it against state taxes only;[633] and a majority of the others set the value ceiling at less than half that of Florida.[634] Indeed, Florida is the only state offering the $5,000 bonanza against all state and local taxes.[635]

Ethically, the exclusion is a Florida counterpart of the free-ride propaganda developed by the Federal Government in order to enlist support for its spending orgy begun in the early thirties. The basis locally is the notion that an individual who professes to regard his public schools and his other county and municipal services as worthless, and who is unwilling to contribute to their maintenance, is nevertheless entitled to have his fellow-citizens buy them for him as a charity case. The odd thing is that when such a person has later been confronted with the choice of removing his own garbage, for example, he has almost always changed his mind, and has decided that this benefit is so desirable that he can well afford to purchase it after all. Whether he will later be offered the same choice as regards education, police and fire protection, and various other services, cannot be predicted with accuracy. But at all events there is no doubt that a realistic appraisal of this confusion of inability to pay with a desire to sponge on one's neighbors is called for in the light of local public finances, and that the time is ripe for at least a semblance of moral integrity

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of disposal services by the residents is optional, of course. This "dodging" of responsibilities by community drones received caustic comment, thoroughly deserved, from Terrell, J., in Klemm v. Davenport, 100 Fla. 627, 638, 129 So. 904, 910 (1930).

[630]The survey of the provisions in other states was made by Mandell Glicksberg, Case Editor, and Irvin P. Golden and Mallory E. Horne, formerly of the research staff, of U. OF FLA. L. REV. *Cf.* 15 ASSESSORS' NEWS-LETTER 33 (Nat. Ass'n of Assessing Officers, April 1949).

[631]Iowa, Minnesota (which permits an exclusion also), West Virginia. A few states grant tax reductions of a homestead or residence nature to veterans, but these are too limited in scope to be classified as general exclusions.

[632]Exclusions are allowed as follows: Alabama, $2,000; Arkansas, $2,000; Florida, $5,000; Georgia, $2,000; Louisiana, $2,000; Minnesota, $4,000; Mississippi, $5,000; Oklahoma, $1,000; South Dakota, $5,000; Texas, $3,000; Wyoming, $500.

[633]Alabama, Arkansas, Minnesota, South Dakota, Texas.

[634]See note 632 *supra*.

[635]Mississippi runs a close second by applying a $5,000 exclusion against state and some local taxes. As regards Florida ad valorem taxes, see p. 365 *supra*.

and honest thinking in dealing both with tax exclusions of this type and with our present policy of drastic underassessment.[636]

*10. Influence on Federal Taxation*

This topic logically belongs in Part II; but because most general practitioners visualize all tax problems under a tax heading, the matter was footnoted during the preparation of Part I[637] and assigned to discussion here. The choice proved fortunate indeed for the authors. The problem involved was noted with characteristic speed by one of the deans of the American tax bar;[638] and sound solutions were suggested thereafter by another able tax attorney.[639] Accordingly, the matter is merely touched upon here.

Basically, the difficulty is that our Constitution, amplified by the statutes governing descent of homestead realty when the deceased is survived by a widow and lineal descendants, compel a life estate to her and vested remainders per stirpes to the latter.[640] As a consequence unintended by Florida, the marital deduction provided in the Revenue Act of 1948,[641] which is of vital importance to those sharing estates valued at $60,000 or more, is in all probability unavailable to Floridians.

As Norman suggests, a ready remedy could be administered by provid-

[636]This is not to say that property owners should carry the tax load by themselves. Major tax revisions, having at least some relation to benefits demanded and received, are long overdue. But a fortiori the burden should not, and indeed cannot, be borne by a mere fraction of the property owners.

[637]2 U. OF FLA. L. REV. 12 (1949); *cf.* note 4.

[638]Morehead, *New Estate and Gift Taxes — How They Affect Property Ownership in Florida,* 26 TAXES 491 (1948).

[639]Norman, *State Sponsored Tax Avoidance Possibilities in Florida,* 23 FLA. L. J. 3 (1949). See generally Surrey, *Federal Taxation of the Family — The Revenue Act of 1948,* 61 HARV. L. REV. 1097, 1128-1130, 1149, 1153 (1949); Rosenberg, *Estate Taxes and Homestead Property,* 21 FLA. L. J. 148 (1947). The Tax Court has carried our Supreme Court Rules of Descent, Part II, 3 *supra,* 2 U. OF FLA. L. REV. 67 (1949), to their devastating conclusion in Estate of Charles E. Bedford, 5 T. C. 726 (1945); when any children exist, the mere possibility of another heir makes it impossible to convey homestead realty from husband and wife to the wife as a gift, even with the consent of all living lineal descendants, with the result that the full federal estate tax, without diminution of homestead realty by gifts, is compelled. Nor is the marital deduction available, since the interest of the widow is a life estate.

[640]FLA. CONST. Art. X, §§2, 4; FLA. STAT. §§731.27, 731.25 (Cum. Supp. 1947); *cf.* Part II, 1 *supra,* 2 U. OF FLA. L. REV. 53, 60 (1949).

[641]INT. REV. CODE §812(e)(1)(B) (1948).

ing that the widow of a deceased leaving an estate of this size, and survived by lineal descendants also, shall take a fixed, absolute, undivided interest in the homestead realty rather than a life estate. This interest might be a child's part, for example, or preferably a flat one-half. The result could be attained by statute; the former descent provisions applicable to homestead realty were unquestionably constitutional,[642] and they prescribed descent of precisely this type.

It is hoped that the Florida Legislature will be sufficiently alert in 1951 to avoid driving needlessly the citizens it represents into the never-filled federal tax net, and will prevent this waste of money that could provide far greater benefits if spent at home.[643]

### *11. Interplay with Murphy Act*

Murphy,[644] born June 9, 1937, died by his own hand on June 9, 1939 — or at least so it seemed. But death came slowly. Since that date he has remained in a coma yet alive still, and has kept the bar in a turmoil, thanks to his strain of strong homestead blood. The many problems that have arisen, and that may yet confront the practitioner by reason of this seeming corpse, are not within the purview of this discussion.

From the homestead standpoint, however, the redemption period of ten years, reckoned from the date of sale, to any person other than the owner of the property, of any tax certificate that was more than two years old on June 9, 1937, is of direct significance; the redemption period for non-homestead realty was only two years.[645] It is probable that the ten-year redemption period does not apply to tax deeds to homestead realty obtained from the Trustees of the Internal Improvement Fund, following automatic vesting in the State of Florida on June 9, 1939, of fee simple

[642]*Cf.* Nesmith v. Nesmith, 155 Fla. 823, 21 So.2d 789 (1945). The superseded provisions are FLA. COMP. GEN. LAWS §§5484, 5493 (1927); *cf.* 2 U. OF FLA. L. REV. 58-59 (1949).

[643]According to Wahl, *The Assessment and Collection of Federal Income Taxes*, 3 MIAMI L. Q. 200 n.1 (1949), the federal taxgatherers, for the fiscal year ended June 30, 1948, extracted $392,217,125.55 from Floridians. This is sufficient to meet our state budget at peak figures for over three years; what Floridians get in return, aside from defense, would hardly characterize this as a sound investment.

[644]Fla. Laws 1937, c. 18296. Portions carried forward as still effective are found in FLA. STAT. §§192.35-192.37 (1941), 192.38 (Cum. Supp. 1947). *Cf.* also FLA. STAT. §§192.39, 192.45, 192.46 (1941), 192.47-192.50 (Cum. Supp. 1947).

[645]FLA. STAT. §§192.35 (non-homestead), 192.36 (homestead) (1941). This means "homestead" in the true sense; family headship is required.

title to all lands against which there remained outstanding certificates already more than two years old on June 9, 1937;[646] but the issue is not free from doubt.[647]

## CONCLUSION

As stated at the outset, this article does not purport to view our homestead chameleon from every conceivable angle, but rather to sketch his outline and the colorings by which he can be recognized in his Florida habitat.

His puffy red throat is largely bluff; he depends, for his well-known protection against predatory jurists, upon camouflage while perched, and speed over short distances when discovered. The judiciary occasionally pulls off his tail; but he merely grows a new one.

Four leading species are readily distinguishable: homestead realty forced sale, homestead personalty forced sale, residence tax exclusion, and homestead personalty tax exclusion. Sports do exist; but their practical import is slight, and their relationship to the genus is for the most part one of name only.[648] The two forced sale species are hardier, and are found throughout the United States; the tax varieties prefer the milder climate and rural background of the South and Middle West, although one pygmy offshoot has been noted as far north as Wyoming.[649]

The realty forced sale chameleon feeds chiefly on creditors and second wives, although the most pernicious pest of all, the insatiable federal tax-

[646] FLA. STAT. §192.38 (Cum. Supp. 1947); *cf.* State *ex rel.* Parks v. Sloan, 131 Fla. 232, 179 So. 402 (1938) (certificates not at least two years old on effective date of Murphy Act held not embraced within it).

[647] *Contrast* Young v. Ewing, 151 Fla. 353, 9 So.2d 716 (1942), *with* Golden v. Grady, 34 So.2d 877 (Fla. 1948) (alternative holding); *cf.* Stewart v. Powell, 158 Fla. 420, 28 So.2d 879 (1947). The *Young* and *Golden* cases are somewhat in conflict, although Chapman, J., wrote the opinion in the former and concurred in the latter, while Terrell, J., wrote the opinion in the latter after concurring in the former. Thomas, J., concurred in both. The *Young* case was not cited in the *Golden* opinion. The latter decision can well rest on the first ground set forth in the opinion; and the *Young* case more nearly accords with the provisions of the Murphy Act. Furthermore, it recognizes the practical necessity of setting some reasonable limitation on presentation of old claims; *cf.* 2 U. OF FLA. L. REV. 237 (1949).

[648] *E.g.*, take the following quaint passage — whatever it means — in FLA. STAT. §372.57(10) (Cum. Supp. 1947):

> "No license shall be required for a resident to take game in the county of his residence, on his homestead or the homestead of his spouse or minor child, or minor children, to take game on the homestead of their parents."

[649] Size: $500, WYO. COMP. STAT. §32-105 (1945).

gatherer-spender, is unfortunately too large for him to swallow. His residence exclusion brother thrives on the productive members of the community. The former is the sole species that has ventured into the field of descent; and, as has been noted, his camouflage has proved so effective to the judicial eye that he has managed to roam at will even into the neighboring tract of transfers inter vivos.[650]

The entire genus is indeed prolific in Florida; our chameleon may be seen on the office walls of every attorney at frequent intervals, and is not averse to the more austere precincts of tax assessors, county commissioners and judges. He is prized by both chancellors and probate judges; in fact, there are recorded instances of their fighting over him. He is a friendly little chap, often accompanying practitioners home at night after playing about their offices all day; and he bobs up at the most unexpected times in the oddest places. Students and professors, with whom he is not at all popular, are pestered with him each year during certain seasons.

The bench has played the major role in his development in Florida — and played it well. The amazing thing is not that our justices have largely restrained him from growing into a dragon, but rather that they have prevented his taking on the amorphous characteristics of the amoeba. The unhappy judge, unlike his comrades in government, must admit any creature brought to the courthouse doorstep, including a chameleon, and turn it back to society as a respectable member of the community. This task is not for apprentices; but the manner in which it can be skillfully performed, even when the foundling is sadly misshapen, is well illustrated in the opinions of both our Supreme Court and our Attorney General. On the whole, like much Florida law, the law of homesteads is there, if one will but search for it sincerely and diligently — and its interpretations through the years have built an integrated body of legal principles.

Its current flaws are the result of its constitutional incapacity to grow along with those to whom it applies. The impoverished agricultural com-

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[650]Part II, 3 *supra*, 2 U. OF FLA. L. REV. 67 (1949). The recent opinion in Scoville v. Scoville, 40 So.2d 840, 842 (Fla. 1949), contains a significant dictum:

> "Aside from these limitations, a deed which has as its object the conveyance of homestead property to a grantee other than the living spouse should be treated as any other inter vivos transfer of real property . . . ."

The phrase "other than the living spouse" indicates that, perhaps quite wisely at this late stage, the extensive overruling referred to in 2 U. OF FLA. L. REV. 77 (1949) will not be attempted, and that the Supreme Court Rules of Descent are by now too firmly established to be abandoned without amendment of the Constitution.

munity of 1868, crushed in all but spirit, and leaning heavily on the two homestead exemptions from forced sale as it faced the future with grim determination, is not the Florida of today. Nor can this Florida achieve her full stature while, taxwise, a large number of her citizens deem it clever to demand more from their government each year while contributing little or nothing toward its maintenance. The realty forced sale exemption requires a value limit. The residence exclusion, if retained at all, should be reduced from $5,000 to a figure that accords at least some weight to the benefits demanded by the many present tax-free recipients of county and municipal benefits. The advisability of repealing the engrafted Supreme Court Rules of Descent merits consideration. The phraseology of the entire Article X should be revised so as to express definite concepts; and Section 7 should, if retained, be redrafted and placed where it belongs, namely, with the taxation provisions. Supplementary statutes should be reworded so as to present correctly the meaning given to Article X by the Supreme Court. Enactment of provisions requiring the filing of claims of homestead for forced sale exemption purposes would materially improve this branch of our law. Assessments for taxation should be accurately and uniformly made at 100 per cent of current market value.

And yet, despite the obvious need for trimming the two realty species down to their proper size, this elusive little creature as a genus still deserves a perch amidst the life and law of Floridians. In words that Webster might well have used had he observed our chameleon in action: "He is a homely little beggar, Your Honors, but there are those who love him."

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