

that the statute permitted a municipal tax on specified utility purchases only on condition that competitive services were also taxed. The latter conclusion, however, has now been altered by the decision in *Belcher Oil Co. v. Dade County*, 271 So.2d 118 (Fla. 1972), holding that the statute *permits but does not require* a tax on competitive services when specified utility purchases are taxed:

[W]e cannot agree that Dade County was compelled or mandated by the statute to tax competitive services, but, in our opinion, municipalities *are merely authorized or empowered* by Fla. Stat. §167.431, F.S.A., to levy taxes on public utilities. Whether they choose to enact an ordinance imposing such a tax is within the legislative discretion of the municipality. . . . (Emphasis supplied.)

In *Belcher*, the normally mandatory terminology used in §167.431, F. S. 1971, was construed as permissive in view of the constitutional language in Art. VII, §§1 and 9, and Art. VIII, §2, State Const. 1968. When a municipality has exercised its legislative discretion to impose such a tax, it must then still make a critical factual determination, *vel non*, as to whether fuel oil service is "a competitive utility service," subject to appropriate judicial review. *Owen v. Cheney*, *supra*, as modified by *Belcher Oil Company v. Dade County*, *supra*. *Belcher* further considered the taxation of a competitive utility service to be discretionary. It is assumed, as indicated in the dissent to *Belcher*, that such discretion is ultimately controlled by constitutional equal protection principles. In any event, the attorney general cannot resolve factual questions, nor legally make any legislative or judicial findings of fact. *Cf.* AGO 072-6.

073-66—March 21, 1973

#### PROBATE

#### WITH WHOM CLAIMS OF CREDITORS TO BE FILED

To: Robert M. Johnson, Representative, 74th District, Sarasota

Prepared by: Rebecca Bowles Hawkins, Assistant Attorney General

#### QUESTION:

Should claims of creditors against the estate of a decedent be filed in the office of the circuit court clerk inasmuch as the circuit courts now exercise jurisdiction over decedents' estates under revised Art. V?

#### SUMMARY:

Claims of creditors against a decedent's estate should be filed in the office of the clerk of the circuit court in which the administration of the estate is pending.

Your question is answered in the affirmative.

Section 733.16, F. S. 1971, presently requires creditors' claims to be filed "in the office of the county judge granting letters." Now that the circuit court has jurisdiction of the administration of decedents' estates under revised Art. V, this requirement can no longer be given effect, as written. It goes without saying that creditors' claims must be filed in the estate proceedings pending in the circuit court; and in view of the fact that the records of the circuit court and the progress dockets of pending cases, including estates of decedents, are required by law to be kept by the clerk of the circuit court (*see* §28.211, F. S.), it is reasonable to construe §733.16 as now requiring creditors' claims to be filed with the clerk of the circuit court rather than with the circuit judge himself. This

conclusion is in accord with the provisions of §28.2401, F. S., providing a uniform filing fee for estates of decedents and requiring the circuit court clerk to collect a fee of sixty dollars for "filing of *all documents* in any estate having an inventory value not exceeding \$60,000." (Emphasis supplied.) As noted in AGO 072-327, this filing fee covers the clerk's services in filing the claims of creditors.

I understand that a reviser's bill to be introduced in the 1973 Session of the Legislature will amend §733.16, *supra*, to clarify this matter in accordance with the foregoing conclusion. In the meantime, it is suggested that the claims of creditors be filed with the circuit court clerk rather than with the circuit judge himself.

073-67—March 21, 1973

### TAXATION

#### AMOUNT OF SURTAX LIABILITY ON CERTAIN CONVEYANCES

To: J. Ed Straughn, Executive Director, Department of Revenue, Tallahassee  
Prepared by: William R. Cave, Assistant Attorney General and James D. Whisenand, Legal Intern

#### QUESTION:

When computing the surtax due under §201.021(1), F. S., on a deed of conveyance, does the total consideration on which such tax is based include a mortgage which the grantee assumes and agrees to pay when the original mortgagor (grantor) is released from the obligation by the mortgagee?

#### SUMMARY:

The total consideration for the measure of the surtax imposed by §201.02(1), F. S., includes the amount of a mortgage which the grantee assumes, agrees to pay, and from which the mortgagee releases the grantor (as mortgagor).

This question should in my opinion be answered in the affirmative. Section 201.021(1), F. S., levies a surtax on certain documents:

A documentary surtax, in addition to the tax levied in §201.02, is levied on those documents taxed by §201.02, at the rate of fifty-five cents per five hundred dollars of the consideration paid; provided, that when real estate is sold, the *consideration*, for purposes of this tax, *shall not include amounts of existing mortgages* on the real estate sold. If the full amount of the consideration is not shown on the face of the document, then the tax shall be at the rate of fifty-five cents on each five hundred dollars or fractional part thereof of the consideration. (Emphasis supplied.)

Existing mortgages, such as a mortgage assumed by grantee without release of the grantor by the mortgagee, on real estate conveyed, are exempt from the surtax imposed by §201.021(1), F. S. *Hubbard v. Highland Realty & Investment Co.*, 156 So. 322 (Fla. 1934). The grantee assumes primary liability and the grantor-mortgagor remains secondarily liable, permitting the initial mortgage to remain binding. *Kendall House Apartments, Inc. v. Department of Revenue*, 245 So.2d 221 (Fla. 1971).

A novation occurs when the contracting parties mutually agree to discharge a valid existing obligation (the original mortgage) and replace it with a new obligation. [See] 23 Fla. Jur. *Novation* §2; *United Bonding Insurance Co. v.*