

4793.

REAL PROPERTY—TRANSFER OF REAL PROPERTY UNDER SECTION 2768, G. C. WHEN.

SYLLABUS:

1. *Section 10509-102, General Code, as amended by the 91st General Assembly at its regular session (116 O. L. 397, 398) does not repeal by implication the provisions of section 2768, General Code.*

2. *Where real property of a deceased person passes by the laws of descent and no administration of the estate is had in the Probate Court, the title to real property may still be transferred under the provisions of section 2768, General Code.*

3. *Where the real property of a deceased person passes by the laws of descent and there is no administration of the estate, the title to real property may be transferred through the Probate Court under sections 10509-5 and 10509-102, General Code, as amended by the 91st General Assembly, regular session (116 O. L. 393, 394, 397, 398).*

COLUMBUS, OHIO, October 14, 1935.

HON. FLOYD A. COLLER, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads:

“The Probate Judge and Auditor of this county have asked me to obtain your opinion as to the effect of the enactment of section 10509-102, General Code, which takes effect September 2nd, 1935, upon the provisions as to the affidavits to be filed before the Auditor under section 2768.

The Honorable Gilbert Bettman rendered an opinion in 1931, being opinion No. 3842, at page 1490, in which he stated that the enactment of section 10509-102, at that time only rendered inoperative that part of section 2768 which was inconsistent with the latter section.

I believe that the present Legislature re-enacted section 10509-102 to overcome the effect of that decision, and that by means of the first paragraph of said section and the latter paragraph of said section, now section 2768, in so far as it pertains to the transfer of property by affidavit filed in the Auditor's office, becomes inoperative and is repealed by implication. You will note that the latter part of Section 10509-102, effective September 2nd, provides for the filing of affidavits in the Probate Court in cases of

intestacy where no administration of the estate was had. That being the case, it seems to me there is no way to transfer property in case of death, excepting through the Probate Court, and that the provisions of section 2768, as to transfer by affidavit in the Auditor's office, are now meaningless.

Will you please give me your opinion as to whether such is true or not?

If, in your opinion, property may be transferred by affidavit under section 2768, in case of death by intestacy and no administration, then can it be done either way? Wither through the Probate Court or through the Auditor's office?"

Section 10509-102, General Code, as amended by the 91st General Assembly, at its regular session (116 O. L. 397, 398), effective September 2, 1935, reads as follows:

"Excepting as to real estate sold to pay debts or as to lands registered under section 8572-1 et seq. of the General Code and cases in which an order has been made relieving an estate from administration, wherein the order directing transfer of real estate to the persons entitled thereto may be substituted for the certificate of transfer; whenever real estate passes by the laws of intestate succession or under a will, the administrator or executor, if any, shall, prior to the filing of his final account, file in the probate court an application requesting of the court a certificate of transfer as to such real estate.

Such application shall be verified on oath by the person filing it, or by some person who knows the facts therein stated, and shall contain: the name, place of residence at death and date of death of the decedent; whether he died testate or intestate; the fact and date of the filing and probate of the will, if any, and of the appointment of an administrator or executor; a description of each parcel of real estate situated in Ohio owned by the decedent at the time of his death; in so far as they can be ascertained, the names, ages, places of residence and relationship to the decedent of the persons to whom each such parcel of real estate passed by descent or devise; a statement that all the known debts of decedent's estate have been paid or secured to be paid, or that sufficient other assets are in hand to complete the payment thereof; and such other pertinent information as the court may require.

The court shall thereupon transmit to the recorder of each county in Ohio where real estate so passing is situated, a certificate of transfer which shall recite: the name and date of death of the

decendent; whether he died testate or intestate and, if testate, the volume and page of the record of the will; the volume and page of the probate court record of the administration of the estate, if any; the names of the devisees, if any, and the interests to them passing, and the names of the persons inheriting, if any, and the interest by each inherited, in each such parcel of real estate; a description of each such parcel of real estate; and such other information as in the opinion of the court should be included.

If no administration has been had on an estate and if no administration is contemplated, or if the executor or administrator has failed to file such application before being discharged, such application for a certificate to transfer real estate, including real estate devised or inherited before the effective date of this act, may be filed by any heir or devisee, or a successor in interest, in the probate court where the testator's will is probated or, in the case of intestate estates, in the probate court where administration was had, if any, and if no administration was had, in the probate court in the county in which such decendent was resident at the time of his death."

Prior to admendment, such section read as enacted in 1931, (114 O. L. 424) effective January 1, 1932, as follows:

"Whenever real estate passes by the laws of intestate succession or under a will, the administrator or executor shall, immediately upon the determination of heirship as to such decendent according to law, or in the event the estate is one in which determination of heirship is not required by law, within three months after the date of the appointment of such executor or administrator, file in the probate court an application describing each parcel of real estate so passing, and requesting of the probate court a certificate of transfer as to such real estate. The court shall thereupon transmit to the recorder of each county in Ohio where real estate so passing is situated, a certificate of transfer which shall recite the name of the decendent, whether he died testate or intestate, the fact and date of the filing and probate of the will, if any, or in case of intestacy, of the appointment of the administrator, the place of residence at death and date of death of the decendent, a description of each parcel of real estate owned by the decendent at the time of his death, the names, and so far as they can be ascertained, the ages, addresses and relationship to the decendent of each person to whom each parcel of such real estate passed upon the death of the decendent, the volume and page of the probate court record of the estate, and such other information as in the court's opinion should be included.

Where ancillary administration proceedings are had as to a person residing outside Ohio who died leaving real estate in Ohio, the ancillary administrator shall apply for such certificate of transfer when heirship has been determined according to law, and the probate court shall thereupon transmit such certificate to the recorder of each county in Ohio in which real estate belonging to the decedent is situated."

Section 2768, General Code, in effect at the time of the enactment of section 10509-102, General Code, in 1931, and not disturbed by the legislature since enactment and amendment of the last mentioned section, reads as follows:

"The county recorder shall not record any deed of absolute conveyance of land or any conveyance, absolute or otherwise, of minerals or mineral rights until it has been presented to the county auditor, and by him endorsed 'transferred', or 'transfer not necessary.' Before any real estate the title to which shall have passed under the laws of descent shall be transferred, as above provided, from the name of the ancestor to the heir at law or next of kin of such ancestor, or to any grantee of such heir at law or next of kin; and before any deed or conveyance of real estate made by any such heir at law or next of kin shall be presented to or filed for record by the recorder of any county, such heir at law or next of kin, or his or their grantee, his agent or attorney, shall present to such auditor the affidavit of such heir or heirs at law or next of kin, or of two persons resident of the state of Ohio, each of whom has personal knowledge of the facts, which affidavit shall set forth the date of such ancestor's death, and the place of residence at the time of his or her death; the fact that he or she died intestate; the names, ages, and addresses, so far as the ages and addresses are known and can be ascertained of each of such ancestor's heirs at law and next of kin, who by his death inherited such real estate and the relationship of each to such ancestor and the part or portion of such real estate inherited by each, which such transfers shall be made by the auditor in accordance with the statement contained in such affidavit, and such auditor shall indorse upon such deed or conveyance the fact that such transfer was made by affidavit. Such affidavit shall be filed with the recorder of the county in which such real estate is situated at or before the time when such deed or conveyance shall be filed with such recorder for record and shall be by him recorded in the record of deeds, and such affidavit of descent shall be by him indexed in the general index of deeds, in his office, in the name of

such ancestor as grantor and in the name of each of such heirs at law or next of kin as grantees in the same manner as if such names occurred in a deed of conveyance from such ancestor to said heirs at law and for such indexing and recording the recorder shall receive the same fees as are provided by law for the indexing and recording of deeds.

The said record of the affidavit above mentioned, shall in the trial of any cause, so far as competent, be *prima facie* evidence with (within) foregoing provision of this act, but the truth of such statements may be rebutted or overcome by any competent evidence.

Any person or persons who shall, willfully and fraudulently make affidavit to any statement above mentioned, which shall be false, knowing the same to be false or who shall, for the purpose above mentioned, deliver to any county auditor for the purpose of obtaining any such transfer, or deliver to the county recorder, for the purpose of having the same recorded, any such affidavit containing any such false statements, knowing the same to be a false statement, shall be guilty of a misdemeanor and on conviction thereof, be fined in any sum not exceeding five hundred dollars and be imprisoned in the county jail not to exceed six months, or both, and in addition, be liable in damages to any person who may be injured by the making, filing, recording or use as aforesaid of such affidavit."

As you state in your communication, the question was presented to my immediate predecessor late in 1931, after the enactment of section 10509-102, General Code, as to whether or not the last mentioned section repealed section 2768, General Code, by implication, and whether or not real estate could still be transferred by affidavit under said section 2768, General Code. He held as disclosed by the syllabus, as follows:

"1. Section 2768 of the General Code is not repealed by implication through the enactment of Section 10509-102 of the General Code.

2. The enactment of Section 10509-102 renders inoperative that part of Section 2768 which is inconsistent with the latter section.

3. The county recorder should accept for record affidavits for the transfer of real property prepared in conformity with the requirements of Section 2768."

Some time after the rendition of this opinion, I was called upon to rule on the question of whether or not it was necessary in all cases where real

estate is to be transferred to have administration of the estate in order that the administrator or executor might file the application under section 10509-102, General Code. Replying to this question, it was held in *Opinions of the Attorney General for 1933*, Vol. II, Page 846, as disclosed by the syllabus :

“A probate court may relieve an estate of less than five hundred dollars from administration as provided in Section 10509-5, General Code. The necessary affidavit provided for in Section 2768 of the General Code may be made by one or more of the next of kin and the county auditor and county recorder should accept such affidavit in transferring the title to the real estate from the deceased to the next of kin or heirs entitled to the real estate, in estates in which administration has been dispensed with.”

In the opinion, at page 847, it was stated :

“Section 2768, General Code, in so far as it is not inconsistent with Section 10509-102, General Code, enables one or more of the heirs of the deceased or two or more persons who know the facts, to make the necessary affidavit to enable the county auditor and county recorder to transfer the real estate from the deceased to the next of kin or heirs of the deceased. *Section 10509-102, General Code, does not require an application in all instances to be made by an administrator or executor in order to transfer title of real estate belonging to the deceased person, but is only required in such instances as there are administrators or executors already appointed.* The question as to whether Section 2768 of the General Code was repealed by implication by the enactment of Section 10509-102 was fully discussed in Opinion No. 3842 of my predecessor, found in *Opinions of the Attorney General for 1931*, Vol. III, p. 1490. Such opinion held that Section 2768 of the General Code was not repealed by implication by the enactment of Section 10509-102 of the General Code, and renders inoperative only that part of Section 2768 which is inconsistent with Section 10509-102, General Code.” (Italics mine).

It will be seen that before amendment of section 10509-102, General Code, it was held by this office that section 10509-102 only required an application to be made for transfer of title to real estate in instances where administrators or executors were already appointed. In other cases, the affidavit provided for by section 2768, General Code, was permissible.

Now, an examination of the amendment of section 10509-102, General Code, does not indicate that the legislature intended that the right to transfer

property by affidavit of inheritance under section 2768 ,General Code, should no longer be permitted.

The first paragraph of section 10509-102, General Code, must be considered with the provisions of section 10509-5, General Code, as amended in the same act (116 O. L. 393, 394). Before amendment of section 10509-5, General Code, such section, as passed in 1931 and enacted in the same act as section 10509-102, General Code, read:

“When satisfied that an estate is of less value than five hundred dollars, the court may in its discretion upon application and proper showing make an order relieving such estate from administration, and directing payment to the proper persons. Such order shall have the same effect as administration proceedings in freeing land in the hands of an innocent purchaser for value from possible claims of creditors.”

As amended in Amended Senate Bill No. 116 of the 91st General Assembly (the same bill in which 10509-102 was amended), section 10509-5 reads:

“Upon the application of any interested party, after notice of the filing thereof has been given to the surviving spouse and heirs at law in such manner and for such length of time as the court may direct, and after three weeks’ notice to all interested parties by publication thereof once each week in a newspaper of general circulation in the county, unless such notices are waived or found unnecessary, the court, when satisfied that the assets of an estate are of less value than five hundred dollars and that creditors will not be prejudiced thereby, may make an order relieving such estate from administration and directing delivery of personal property and transfer of real estate to the persons entitled thereto.

For such purpose the court shall fix the amount of property to be delivered or transferred to the surviving spouse or minor child or children of the deceased, in lieu of the claim of such spouse or minor child or children to property not deemed assets and to an allowance for a year’s support.

When a delivery or transfer of property has been ordered without administration, the court shall appoint a commissioner to execute instruments of conveyance when necessary.

The application provided for herein shall be in writing and shall contain the name, date and place of death of the decedent; the names, ages and addresses of the persons entitled to the next estate of inheritance and their respective degrees of relationship to

the decedent; a summary statement of the character and value of the property comprising the estate; and a list of all known creditors of the decedent with the amount of their claims.

An order of the court relieving an estate from administration hereunder shall have the same effect as administration proceedings in freeing land in the hands of an innocent purchaser for value from possible claims of unsecured creditors."

Considering the amended language of section 10509-5 with 10509-102, it would appear that the new amended law does not make it mandatory that in cases where there is no administration of an estate and all realty of the estate passes as intestate property, an application for transfer of real estate must be made through the Probate Court, and title may not be transferred by affidavit filed with the County Auditor. It will be noted that the first paragraph of section 10509-5, General Code, states that upon filing of the application for relieving an estate from administration, the court "may make an order relieving such estate from administration and directing delivery of personal property and transfer of real estate to the persons entitled thereto."

Also, the fourth paragraph of section 10509-102, as amended, employs the word "may" instead of "shall" in laying down the right for an heir to file the certificate of transfer with the Probate Court where there is no administration of the estate. The language in these sections clearly is permissive, purporting to give the Probate Court jurisdiction only to make an order of transfer, and does not make this procedure an exclusive method for transfer of title to the realty where there is no administration of an estate and the realty of the estate descends wholly by the laws of descent.

While it may not probably be legally arguable that the comment of the Probate Code Committee of the Ohio State Bar Association, which suggested the amendment of section 10509-102, General Code, in the manner in which it was amended by the General Assembly, is controlling as to the intent of the legislature, yet such comment is helpful in showing the purposes to be accomplished by the amendment of the section.

After examination of the *Supplemental Report* of the Special Committee on Revision of Ohio Probate Laws of the Ohio State Bar Association, made at the annual meeting at Cedar Point, Ohio, on July 12 to 15, inclusive, 1934, reported in the June 25, 1934, issue of the Ohio State Bar Association Report, it may be noted that the committee's recommendation for the amendment of section 10509-102, General Code, as set forth therein, was adopted by the legislature, with the single exception that the words "or as to lands registered under section 8572-1 et seq. of the General Code" in the first paragraph of section 10509-102, as amended, were added by the legislature. The committee's comment appears under said section as follows:

“The time for filing the application has been changed owing to the fact that, in actual practice, it is often impossible to determine whether real estate will have been sold to pay debts until the estate is otherwise fully liquidated.

The information from which the court is to determine the interests to be transferred, especially in cases where complete and regular administration is not had, should all be contained in a verified application. Title does not originate in the certificate, to be sure, but the lay public will depend on it to an extent that its accuracy should be reasonably safeguarded.

Under the present section it was never thought advisable by the majority of the committee to repeal the existing provision of the ‘time honored’ affidavit of inheritance. That course would be more feasible under the present revision and is greatly desired by probate courts and taxing authorities in the interest of preventing estates from slipping by without application for determination of inheritance tax being made.

The last paragraph of the present section can well be omitted altogether since it is covered specifically in 10511-21 (*infra*).”

It may be noted from this comment that the committee did not request the absolute elimination of the provision for the time honored affidavit of inheritance set out in section 2768, General Code.

It should be noted that the legislature also adopted the recommended draft of amendment of section 10509-5, as set forth in the same report of the Bar Committee as was section 10509-102, with the single exception that the committee’s suggestion to raise the amount from \$500 to \$1,000 was not followed.

If the legislature had intended that the subject matter of section 2768, General Code, be repealed, it certainly would have expressly repealed the said section or amended it in such a way as to definitely take away the right to file the affidavit of inheritance with the auditor, in cases where real estate was inherited by the laws of descent and no administrator was appointed for the estate. The “comment” of the committee was undoubtedly before the legislature when the sections in the amended form suggested by said committee were passed.

I am consequently of the view, in specific answer to your question, that real property may still be transferred by affidavit under section 2768, General Code, in case the estate consists solely of real estate passing by the laws of descent, and the estate is not being administered in the Probate Court. If the estate consists solely of real estate passing by the laws of descent, and the estate is not being administered, I see no reason why, instead of an affidavit being filed under section 2768, an application for transfer may not be filed in the

Probate Court in accordance with the fourth paragraph of section 10509-102, General Code, as amended, or the first paragraph of section 10509-5, General Code.

It is believed that the foregoing will dispose of your questions.

Respectfully,

JOHN W. BRICKER,

Attorney General.

4794.

APPROVAL, PAPERS IN CONNECTION WITH THE CONVERSION OF THE HOME BUILDING AND LOAN COMPANY OF WOOSTER, OHIO, INTO FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WOOSTER.

COLUMBUS, OHIO, October 15, 1935.

HON. WILLIAM H. KROEGER, *Superintendent of Building and Loan Associations of Ohio, Columbus, Ohio.*

DEAR SIR:—I have examined the various papers submitted by you in connection with the conversion of The Home Building and Loan Company of Wooster, Ohio, into First Federal Savings and Loan Association of Wooster, and find the papers submitted and the proceedings of said The Home Building and Loan Company, as disclosed thereby, to be regular and in conformity with the provisions of section 9660-2 of the General Code of Ohio.

All papers, including two copies of the charter issued to the said First Federal Savings and Loan Association, are returned herewith to be filed by you as a part of the permanent records of your department, except one copy of the charter which the law provides shall be filed by you with the Secretary of State. The law further provides that such filing with the Secretary of State shall be within ten days after the requirements of said section 9660-2 have been complied with by The Home Building and Loan Company, and that your approval shall be endorsed on the copy so filed. You will find on the copies of the charter, form of approval for your signature.

Respectfully,

JOHN W. BRICKER,

Attorney General.