

5191.

APPROVAL—BONDS OF MONTGOMERY COUNTY, OHIO,  
\$12,000.00.

COLUMBUS, OHIO, February 27, 1936.

*State Employes Retirement Board, Columbus, Ohio.*

5192.

APPROVAL—BONDS OF BEECHWOOD VILLAGE SCHOOL  
DISTRICT, CUYAHOGA COUNTY, OHIO, \$15,000.00.

COLUMBUS, OHIO, February 27, 1936.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

5193.

PROBATE COURT—JUDGE THEREOF MAY GRANT APPLI-  
CATION FOR CERTIFICATE TO TRANSFER REAL  
ESTATE WHEN.

*SYLLABUS:*

*A probate judge has permissive power to grant an application for the certificate to transfer real estate in an estate consisting of real estate only, exceeding \$500.00 in value, and where no administration of the estate is had or intended, providing the application is made by an heir or devisee or a successor in interest, in accordance with the provisions of Section 10509-102, General Code (116 O. L. 398).*

COLUMBUS, OHIO, February 27, 1936.

HON. HOWARD S. LUTZ, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR: This acknowledges receipt of your recent communication, which reads as follows:

“The Probate Judge desires to have your opinion as to whether under the last paragraph in Section 10509-102, 116 Ohio Laws, Senate Bill 116, he is entitled to grant an application

for the certificate to transfer real estate where no administration is had or intended where the property involved is of a value greater than \$500.00.

I will appreciate receiving your opinion on this question."

When the probate laws of Ohio were generally revised by the passage of Amended Senate Bill No. 10, at the regular session of the 89th General Assembly (114 O. L., 320-481), effective January 1, 1932, Sections 10509-5 and 10509-102, General Code, read as follows:

"Sec. 10509-5. 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."

"Sec. 10509-102. 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 decedent 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 decedent, 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 decedent, a description of each parcel of real estate owned by the decedent at the time of his death, the names, and so far as they can be ascertained, the ages, addresses and relationship to the decedent of each person to whom each parcel of such real estate passed upon the death of the decedent, 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 of 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.”

In Opinions of the Attorney General for 1931, Vol. III, page 1490; Opinions of the Attorney General for 1933, Vol. II, page 846, and Opinion No. 4793, rendered October 14, 1935, it was stated, after a consideration of these sections, as well as Section 2768, General Code, that in estates under \$500.00, transfer of real property could be made by an affidavit of inheritance as provided in the last named section, and could not be made by the Probate Court because Section 10509-102 required the application for transfer to be filed by an administrator or executor to give the Probate Court jurisdiction under Section 10509-102, General Code.

Under the language of the said Sections 10509-5 and 10509-102, it would appear that the Probate Court did not have jurisdiction to grant an application for the certificate to transfer real estate unless there was administration of an estate, as such Section 10509-102 clearly gave the administrator or executor, only, authority to file the application.

In Vol. 18, Ohio Jurisprudence, 52, 53, under Section 12 of the topic “Executors and Administrators,” sub-topic “Circumstances Avoiding Necessity of Administration,” it is stated, after quoting Section 10509-5, General Code, as enacted in 1931:

“Whether this statute will be held to be exclusive of the cases in which administration will be dispensed with, under the rule that the expression of one thing is the exclusion of another, is a question that must be settled by the courts.

Prior to its enactment the courts of Ohio recognized circumstances dispensing with the necessity of administration. Where there is no personal property of any kind, no debts to be met, nor anything for him to act upon, appointment of an administrator would be a vain and useless ceremony. Likewise, where it appears that ‘substantially’ all outstanding debts of the deceased have been paid by the parties entitled to funds under a will, there is no necessity for the appointment of an administrator or executor to close up the estate, and courts will not tolerate or encourage administration proceedings when it appears that they would merely fulfill the forms of administrations of estates. And there is no necessity for administering an estate in a case where a will left the property to a widow, who, though made executrix, never qualified, but paid all debts and legacies. The supreme court refused to pass upon the right to dispense with administration where there are no debts of the estate, and only distribution to be made to those entitled, when there was no proof that there were no debts, saying that it was unnecessary to consider whether

the general rule as to dispensing with administration applied in such a case. In a previous case the supreme court held that a proper showing of existing indebtedness of decedent seems necessary for the appointment of an administrator, and without such showing it is doubtful whether the court has authority to appoint an administrator de bonis non, where, in his application, he stated that there were no assets, and did not aver that there were debts to be paid."

Thus, prior to amendment of Sections 10509-5 and 10509-102, General Code, in 1935, it is arguable that the Probate Court might have had no jurisdiction to grant a certificate of transfer of real estate in an estate consisting of real estate only, over \$500.00 in value, and where there was no administration had of such estate, in view of there being no debts of such estate.

With this status of the law in mind, the provisions of Sections 10509-5 and 10509-102, General Code, as amended in 1935, in Amended Senate Bill No. 116 (116 O. L., 385-405), should be considered. Such sections as amended in such act (116 O. L., 393, 394, and 397 and 398), read:

"Sec. 10509-5. 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."

"Sec. 10509-102. 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 decedent; 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 decedent was resident at the time of his death."

From the status of the law before amendment, as already shown, and the wording of the amended sections quoted above, it would seem that the legislature meant to confer on the Probate Court jurisdiction to provide for transfer of real estate in instances where the estate was under \$500.00 and no administration was had, as well as in estates over \$500.00 even though there was no administration.

It is to be noted that the words "if any" appear after the words "administrator or executor" in the first paragraph of Section 10509-102, General Code, as amended. Such paragraph appears to make it the duty of the administrator or executor of an estate in which real estate passes by the laws of intestate succession or under a will, to file in the Probate Court an application requesting a certificate of transfer before discharge, with certain exceptions, if there is an administrator or executor administering the estate.

The fourth paragraph of the same section must be read with the first section, as all parts of a statute are to be construed together to establish the intent of the legislature in enacting such statute. The language of such fourth paragraph recognizes that the first paragraph does not require an administrator or executor to file the application in all instances to give the Probate Court jurisdiction, and is in harmony therewith. The language of the fourth paragraph "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", is very broad and takes into account that instances might arise, as indicated by the language "if any" in paragraph one, where there would be no administrator or executor to file such certificate, and thereby seeks to give the Probate Court permissive power to allow any heir or devisee, or a successor in interest, to file the certificate.

The third paragraph of the section, also, is in line with this construction, as it directs the court to transmit to the county recorder the certificate of transfer, which certificate shall recite, among other things, the Probate Court record of the administration of the estate, *if any*.

The comment of the Ohio State Bar Association Probate Code Committee which prepared the new amended language of these sections prior to passage by the General Assembly, seems to indicate that the said committee intended a Probate Court to have jurisdiction to grant an application for transfer in instances where the estate (composed of real estate only) exceeded \$500.00, and no administration of the estate was had or intended.

Such comment of the said committee appears in the June 25, 1934, issue of the Ohio State Bar Association Report, beneath Section 10509-102, General Code, set forth therein in its amended form, and reads:

“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 for 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*).” (Italics mine.)

Furthermore, the foregoing comment suggests an additional reason why the legislature might have meant to give power to a Probate Court to grant a certificate of transfer in estates over \$500.00, where there was no administration. It might have been felt that if Probate Courts had jurisdiction in such instances, such power would aid in preventing estates from escaping the application for determination of inheritance tax.

In the opinion reported in Opinions of the Attorney General for 1931, Vol. III, page 1490, heretofore referred to, is to be found an additional possible reason for the legislature making provision for permissive power for the Probate Court to grant a certificate of transfer in estates composed of real estate, only, over \$500.00, as well as estates under \$500.00, where there was no administration.

At pages 1493 and 1494 of Vol. III, Opinions of the Attorney General for 1931, it is stated :

“It is not presumptuous to assume that cases may arise wherein persons owning land in Ohio, may die residents of other states and their estates be there administered. The parties having the next estate of inheritance may deem it unnecessary to procure ancillary administration in Ohio either by reason of the fact that there are no creditors in Ohio or because such creditors will be fully paid by the persons holding such next estate of inheritance or for some other reason deemed sufficient by the persons interested in the estate.

It is further common knowledge among conveyancers, abstractors, and others having to do with real estate transfers, that at the present time, in Ohio, there are innumerable real estate titles which now stand, and for a period of years, have stood, as a matter of record, in the name of the decedent, all of whose estates have either been wholly administered through the Probate Court under the former law, and the administrator discharged; or, in other cases where the legal title to a parcel of real estate stood in the name of a married woman who is deceased, all of the expenses of her last illness, and funeral expenses were paid by the husband, and no administration was had of her estate. There are also numerous instances where the title to the real estate has passed to the heirs by reason of intestacy in which, either there has been an administrator who has been discharged without having caused an affidavit of transfer of real estate to be transferred with the recorder or where, for other reasons, no affidavit for transfer has been made of record.”

The legislature could very well have intended to give permissive power to the Probate Court to grant a certificate of transfer, where there was no administration had or intended so as to, among other things, take care of situations involving facts along the line suggested in the foregoing opinion.

The conclusion reached herein is in line with the conclusion reached in my opinion No. 4793, rendered October 14, 1935, a copy of which is enclosed herewith. While the question asked and discussed therein was not precisely the same as involved in your communication, such opinion is pertinent to your matter.

In view of the foregoing, and in specific answer to your question, I am of the opinion that a probate judge has permissive power to grant an application for the certificate to transfer real estate in an estate consisting of real estate, only, exceeding \$500.00 in value, and where no administra-



tion of such estate is had or intended, providing the application is made by an heir or devisee or a successor in interest, in accordance with Section 10509-102, General Code (116 O. L. 398).

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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5194.

APPROVAL—PROPOSED AGREEMENT WITH PENNSYLVANIA RAILROAD COMPANY, COVERING ELIMINATION OF GRADE CROSSING IN BEDFORD, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, February 27, 1936.

HON. JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR: You have submitted for my consideration a proposed agreement by and between the Director of Highways and the Pennsylvania Railroad Company, covering the elimination of the grade crossing over the tracks of said company on State Highway No. 16 located south of the village of Bedford in Cuyahoga County, Ohio.

After examination, it is my opinion that said proposed agreement is in proper legal form and when the same is properly executed it will constitute a valid and binding contract.

Said proposed contract is being returned herewith.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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5195.

APPROVAL—PROPOSED AGREEMENT WITH THE WABASH RAILROAD COMPANY, COVERING ELIMINATION OF GRADE CROSSING IN TOLEDO, LUCAS COUNTY, OHIO.

COLUMBUS, OHIO, February 27, 1936.

HON. JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR: You have submitted for my consideration a proposed agreement by and between the Director of Highways, the City of Toledo