

OPINION NO. 68-068**Syllabus:**

A certificate of transfer issued by the Probate Court is not subject to the newly enacted real property transfer fee imposed by Section 319.54, Revised Code.

To: Harry Friberg, Lucas County Pros. Atty., Toledo, Ohio
By: William B. Saxbe, Attorney General, April 16, 1968

I have before me your request for my opinion involving an interpretation of Section 319.54, Revised Code, recently amended by Amended Substitute House Bill No. 919, effective December 12, 1967, which enactment imposes a county real property transfer fee on conveyances. The provision provides that the charge and collection of the transfer fee is the duty of the county auditor. Your specific question is as follows:

Are certificates of transfer issued by the Probate Court subject to the imposition of this real property transfer fee?

It is a matter of prime importance, I believe, to observe that the statutory language of this, as well as the related sections of the Revised Code, limit the application of the transfer fee processing to "conveyances." Section 319.54, supra, provides that the county auditor shall charge and receive one dollar, or ten cents per hundred dollars, or fraction thereof of the value of real estate conveyed. Thereafter, it is provided that the county auditor shall deposit receipts of the fees on conveyances in the county treasury.

Section 319.202, Revised Code, provides that before the county auditor indorses any real property conveyance, he shall make sure the transfer fee is paid or exempted. Section 317.22, Revised Code, dealing with the duties of the county recorder in this connection, provides that no deed of absolute conveyance of land or conveyance of minerals shall be recorded until the conveyance bears the stamp of the county auditor. We must, therefore, turn our attention to the nature of the certificate of transfer issued by the Probate Court. If it is a conveyance, it is subject to the transfer fee. However, if it is found not to be a conveyance, it is not subject to the fee.

I feel it is fundamental to the law of real property that the legal term "conveyance" is restricted to cases where the instrument itself serves to move title from one person to another, usually from the grantor to the grantee. Black's Law Dictionary, Fourth Edition, page 402, defines conveyance as:

"* * * An instrument in writing under seal
* * * by which some estate or interest in lands
is transferred from one person to another * * *"

The definitive implications of Section 5302.03, Revised Code, appear to me to be of the same effect. When we examine Section 2113.61, Revised Code, describing the circumstances of the issuance of a certificate of transfer by the Probate Court, we see that a certificate of transfer is, in fact, an instrument reflecting the passage of title at an earlier time, to wit: the death of the decedent and previous owner. In the one instance, this is by operation of the laws of descent and distribution, and in the other, by virtue of the will of the testator. The certificate of transfer thus does not of its own vitality serve to transfer title. It must consequently fail to qualify as a conveyance.

It may be also observed, that the legislature has recognized this distinction in its enactments. For example, Section 319.20, Revised Code, provides that the county auditor shall, under the circumstances prescribed:

"* * * transfer any land or town lot or part thereof, minerals therein, or mineral rights thereto, charged with taxes on the tax list, from the name in which it stands into the name of the owner, when rendered necessary by a conveyance, partition, devise, descent, or otherwise. * * *"

(Emphasis added.)

Section 319.54, supra, does enumerate a series of conveyances which are exempted from the transfer fee. But if a certificate of transfer fails to qualify as a conveyance, as I am so holding, it would not appear fitting that it be mentioned as an exempted conveyance.

In the interim since your request was received, Substitute Senate Bill No. 511, further amending Section 319.54, Revised Code, has been enacted as an emergency measure, effective March 10, 1968. Under this most recent amendment, certificates of transfer still are not subject to the transfer fee, but exemption is now for different reasons. As the statutory provision now reads, all transfers are included within the term "conveyance" but

certificates of transfer are specifically exempted by the newly amended Section 319.54 (F) (3) (n), Revised Code.

It is therefore my opinion and you are accordingly advised that a certificate of transfer issued by the Probate Court is not subject to the newly enacted real property transfer fee imposed by Section 319.54, Revised Code.