

**OPINION NO. 68-069****Syllabus:**

In any transfer presented prior to March 10, 1968, where it is indicated that the essential elements of execution and delivery have occurred in their entirety prior to January 1, 1968, said transfer was not made subject to the real property transfer fee imposed by Section 319.54, Revised Code. But transfers presented after March 10, 1968, are subject to the transfer fee, regardless of the time of execution and delivery of the instrument.

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**To: Elmer Spencer, Adams County Pros. Atty., West Union, Ohio**  
**By: William B. Saxbe, Attorney General, April 16, 1968**

I have your request for my opinion concerning the applicability of Section 319.54, Revised Code, which imposes a real property transfer fee, to certain deeds which may or may not antedate the law.

You cite a particular deed in question before you and advise it was made, delivered, transferred and recorded in November, 1967, in a county other than Adams with adequate federal documentary stamp affixed, but which deed also covered real property in Adams County and was presented there January 10, 1968, for transfer by the county auditor.

The specific question is whether the county real property transfer fee is applicable to this deed.

The final paragraph of Section 319.54, Revised Code, as amended by Amended Substitute House Bill No. 919, effective December 12, 1967, provides:

"No real property transfer fee provided for in division (F) (3) of section 319.54 of the Revised Code shall be applicable with respect to the conveyance of real property unless such conveyance takes place on or after January 1, 1968."

(Emphasis added.)

I think at the outset it may be accepted that a conveyance takes place on the date on which the deed becomes effective. Perhaps another way of expressing this would be to say that the conveyance takes place on the date title moves from the grantor to the grantee.

The requirements of a deed causing title to move from grantor to grantee are not in a general way controversial. I think a summary quotation from 17 O. Jur. (2nd), Deeds, Section 53, may suffice. I quote, beginning at page 152:

"It is well settled that in order to convey title by deed there must not only be a proper execution and acknowledgment of the deed, but also a delivery for the purpose of passing title. It is an elementary principle that a deed to be operative as a transfer of the ownership of real estate, must be delivered with intention by the grantor to sever his right to control the instrument further and an intention by the grantee to assume control over it. Delivery gives the instrument force and effect."

As counterpart of the foregoing, it may be observed that when execution, acknowledgment, and delivery of the deed has been made with the purpose of passing title, the deed has then become effective and the conveyance has "taken place" to use the specific words of Section 319.54, supra.

In the interim since your request, Section 319.54, Revised Code, has again been amended by the enactment of Substitute Senate Bill No. 511, which was signed by the Governor as an emergency measure and became effective March 10, 1968. The last paragraph of said Section 319.54 now reads:

"The real property transfer fee provided for in division (F) (3) of this section shall be applicable to any conveyance of real property presented to the county auditor on or after January 1, 1968, regardless of its time of execution or delivery."

This amendment makes it quite clear that any instrument of transfer presented to the auditor after March 10, 1968, shall be subject to the transfer fee regardless of the time of execution or delivery. The only question which remains then relates to those instruments presented between January 1, 1968 and March 10, 1968.

Construing all of the provisions of the most recent enactment together with the related sections of the Revised Code in pari materia, the above quoted last paragraph of Section 319.54, supra, is at best ambiguous. But to construe the new law as applying to instruments otherwise exempt, presented prior to its effective date, would make this statutory language apparently unconstitutional. The transfer fee is in effect an excise tax upon the transaction of transferring real property of record. It is in this respect like a sales tax, the latter being an excise tax on the transaction of making a sale. The Supreme Court of Ohio has held that Section 28, Article II, Ohio Constitution provides that the General Assembly shall have no power to pass retroactive laws, and that a sales tax can operate prospectively only. See State ex rel. v. Ferguson, 133 Ohio St. 325. An attempt to tax transactions antedating the law is unconstitutional. See Safford v. Metropolitan Life Insurance Company, 31 Ohio App., aff'd, 119 Ohio St. 332.

It is an universally applied principle that an act will be

construed in such a way as to sustain its constitutionality if that is possible. Our Supreme Court in Co-op, Leg. Committee, et al. v. Public Utilities Commission, et al., 177 Ohio St. 101, held as follows in the second branch of the syllabus:

"2. Where reasonably possible a statute should be given a construction which will avoid rather than a construction which will raise serious questions as to its constitutionality."

It is my opinion that it is not only reasonably possible, but is the more persuasive construction when considering these related provisions in pari materia, to find here the legislative intent to apply the provisions of the new act only to transfers presented after the effective date of the act, March 10, 1968.

I am, therefore, of the opinion that in any transfer presented prior to March 10, 1968, where it is indicated that the essential elements of execution and delivery have occurred in their entirety prior to January 1, 1968, said transfer was not made subject to the real property transfer fee imposed by Section 319.54, Revised Code. But transfers presented after March 10, 1968, are subject to the transfer fee, regardless of the time of execution and delivery of the instrument.