

these funds are all withdrawn from the present account and no more funds are deposited in that account, the bond in question automatically ceases to be of any force.

Respectfully,  
 GILBERT BETTMAN,  
*Attorney General.*

3842.

TRANSFER OF REAL PROPERTY—MAY BE TRANSFERRED BY  
 AFFIDAVIT—SECTION 2768, GENERAL CODE, NOT REPEALED  
 BY ENACTMENT OF SECTION 10509-102.

*SYLLABUS:*

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 *Section 2768 of the General Code is not repealed by implication through the enactment of Section 10509-102 of the General Code.*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

COLUMBUS, OHIO, December 11, 1931.

HON. J. S. HARE, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—Your recent request for an opinion reads as follows:

“For the guidance of the auditor, recorder and probate judge of this county, I desire your opinion on the following:

Under the provisions of the new Probate Code, which becomes effective January 1, 1932, it is provided in Section 10509-102 that real estate shall be transferred on the order of the probate judge after an application has been filed by the Administrator or Executor for such transfer. The Legislature in enacting this section overlooked Section 2768 of the General Code, which provides for transfer of real estate by affidavit.

Does Section 10509-102 repeal Section 2768 by implication, or can real estate still be transferred by affidavit under Section 2768 of the General Code?

It is my request that you give this immediate attention for the reason that preparations are being made in this county to put the new code into effect, and it is necessary that this matter be cleared up.” Section 10509-102, of the General Code, reads 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 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 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 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, of the General Code, 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 provisions of this act, but the truth of such statements may be rebutted or overcome by any competent evidence.

Any person or persons who shall, wilfully 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."

Upon examination of these statutes, it is to be noted that Section 10509-102 provides for the recordation of a certificate of transfer of decedent's property with the county recorder, which certificate is to be prepared by the administrator or executor. Section 2768, General Code, provides for the filing of an affidavit with the county recorder for the transfer of property, upon the filing of an affidavit executed by the heir at law or next of kin of the decedent. You will note that Section 2768 provides that "before any real estate, title to which shall have passed under the laws of descent, shall be transferred," the affidavit provided in such section shall be filed with the county recorder. There is therefore a provision in this section which is inconsistent with Section 10509-102, General Code. However, repeals by implication are not favored by the laws of Ohio, and, as stated by Judge Newman, in the case of *In re Hesse*, 93 O. S., 230, at page 234:

"It is settled that where there are contradictory provisions in statutes and both are susceptible of a reasonable construction which will not nullify either, it is the duty of the court to give such construction, and further, that where two affirmative statutes exist one is not to be construed to repeal the other by implication unless they can be reconciled by no mode of interpretation."

The first paragraph of the syllabus in the case of *Goff v. Gates*, 87 O. S., 142, reads:

"An act of the legislature that fails to repeal in terms an existing statute on the same subject-matter must be held to repeal the former statute by implication if the later act is in direct conflict with the former, or if the subsequent act revises the whole subject-matter of the former act and is evidently intended as a substitute for it."

Judge Donahue, in deciding said case, at page 149, says:

"Repeals by implication are never favored. On the contrary, a court will endeavor to make such reasonable constructions of the new legislation so that effect may be given to both."

Section 10509-102, supra, evidently supersedes present Section 10526, General Code, which section provides for the recordation of a certificate of devise prepared by the Probate Court. However, in the new Probate Code Act there are many new features concerning the administration of estates. The new Code provides for the determination of an heirship by judicial proceedings.

Upon examination of Sections 10509-95 et seq., it is apparent that these sections are directory, and that there is nothing contained therein which would require the determination of heirs pursuant to their provisions. The language "or in the event the estate is one in which determination of heirship is not required by law," is therefore surplusage and should be disregarded in construing the sections.

We would further call your attention to Section 10509-5, General Code, which reads as follows:

"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 affect as administration proceedings in freeing land in the hands of an innocent purchaser for value from possible claims of creditors."

This section, it will be noted, makes no provision for the appointment of an administrator or giving any other person the capacity to execute the affidavit required by Section 10509-102, which latter section gives the court no discretion to issue the certificate until the affidavit therein provided for shall have been filed with the Probate Court. There would therefore be no provision for the transfer of the title to real estate on the records of the county recorder if Section 2768 had been repealed.

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 other 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.

Upon an examination of the language used in the act, it is apparent that the Legislature could not have intended to repeal Section 2768, General Code, for the reason that the language used throughout the act is permissive, rather than mandatory, and further since the new Section 10509-102, General Code, provides only for the transfer of title to property by an executor after the will shall have been probated, or by an administrator, after his appointment.

While Sections 2768 and 10509-102, General Code, are inconsistent in many respects, it can hardly be said that the latter section can repeal by implication that part of Section 2768, with which it is consistent, and therefore Section 2768 would remain effective for the transfer of title to real property belonging to decedents' estates in all cases where Section 10509-102 is not applicable by its terms.

It is therefore my opinion that Section 10509-102 is not so inconsistent with Section 2768 that it would repeal such section by implication; accordingly the county recorder should accept for record affidavits for transfer prepared in conformity with Section 2768 of the General Code.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

3843.

PETITION—TOWNSHIP ROAD IMPROVEMENT—SIGNATURES OF  
51% OF LAND OWNERS NECESSARY FOR TRUSTEES TO PRO-  
CEED BY MAJORITY VOTE—ADDITIONAL SIGNATURES RE-  
OPEN ENTIRE PROCEDURE.

*SYLLABUS:*

1. *Where only a majority of a board of township trustees acts upon a petition to improve a road if said petition does not contain at least fifty-one percent of the land or lot owners who are to be especially taxed or assessed for said improvement the action of said trustees is void.*
2. *Under such circumstances, if the board of trustees has acted by a unanimous vote, the lack of sufficient signatures on the petition would have no effect.*
3. *Under such circumstances, additional names might be added to the petition, but if action is to be taken by only a majority of the members of the board of trustees, in order to make the action valid, it will be necessary for them to re-enact all of the procedure the same as if an original petition had been filed.*