1529.

AFFIDAVIT—FILED WITH COUNTY AUDITOR FOR TRANSFER OF INHERITED REALTY—MAY BE MADE BY SURVIVING SPOUSE.

SYLLABUS:

Under the provisions of Section 2768, General Code, a surviving spouse may execute the affidavit therein provided for, irrespective of whether the decedent left children or otherwise.

COLUMBUS, OHIO, February 17, 1930.

HON. L. M. SOLIDAY, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—In your recent communication you request my opinion as follows:

> "Under our statute as to the filing of affidavits for transfer and record of real estate inherited it is provided that the affidavit should be signed by an heir or next of kin of the deceased or by two persons who know the facts.
>
> Is the surviving spouse of the intestate included within the term 'heir or next of kin,' so as to be able legally to sign and swear to such affidavit?"

Section 2768 of the General Code provides in part:

> "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."

Your question, of course, is whether the surviving widow or widower of one who has died intestate owning real estate, is an "heir at law" or "next of kin" of decedent.

The term "heirs at law" means those who by law might be entitled to succeed to the property as an estate of inheritance.

In the case of *Smith et al.* vs. *Hunter,* 86 O. S. 106, the court in construing this term, used the following language.

> "The meaning of the phrase 'her heirs at law' which the testator used to indicate his intention has not been changed since he used it for that purpose. It then meant, and it now means, those who by law might be entitled to suc-

ceed to the property of which she should die seized as of an estate of inheritance."

Of course, where a husband or wife died seized of real estate which came by purchase, the surviving husband or wife would inherit all of said property in fee simple, if said decedent left no issue. Under such circumstances it is believed that said survivor should be regarded as an heir at law. You do not state in your communication whether or not the surviving spouse had children. The general rule is that the term "next of kin" does not include a widow or widower. It has been stated that "a wife cannot in general claim as next of kin of her husband nor a husband as next of kin of his wife." See Bouvier's Law Dictionary. However, in the case of *Steele, Admr.*, vs. *Kurtz*, 28 O. S. 191, it was held that the surviving husband was the next of kin when he has no children, under statutes providing for suits for damages by reason of death as a result of wrongful acts. The statute under consideration provided that the action should be brought "for the exclusive benefit of the widow and next of kin of such deceased person."

The case above mentioned was approved and followed by the Supreme Court, in a per curiam opinion, in the case of *Weisflock, et al.* vs. *Sigling*, 116 O. S. 435, in construing Section 8574, General Code, which refers to persons who take intestate property under the statutes of descent and distribution. There are of course many cases to the effect that both the terms "heirs at law" and "next of kin" will be given a liberal interpretation in connection with the construction of a will in order to carry out the intent of the testator as disclosed by the context.

While there are many decisions to the effect that "next of kin" only includes blood relations and does not include a surviving husband or wife, it must be stated that the term must be construed with reference to the particular statute in which it is used. It will be observed that the surviving spouse in most instances would have more information with reference to the facts to be set forth in such an affidavit than any other person. While much confusion has arisen as to exactly what is required, in view of the language of said section, I am inclined to the view that if the surviving spouse, whether the decedent left children, or otherwise, makes the affidavit setting forth the things required therein, the same is a sufficient compliance with the terms of the section. It is not believed that the affidavit is necessarily controlling as to the actual vesting of the property. In other words, if the affidavit should be false and not mention one of the heirs at law, it could not, by any process of reasoning, be said to bar said omitted heir from taking possession of his rightful estate. The requirement is simply to set forth the information for the benefit of those who are attempting to trace the chain of title, and I see no reason to require a technical construction of the section and am inclined to the view that any court would declare the signing of such an affidavit by the surviving spouse to be a sufficient compliance with the section.

In specific answer to your inquiry, it is my opinion that under the provisions of Section 2768, General Code, a surviving spouse may execute the affidavit therein provided for, irrespective of whether the decedent left children or otherwise.

Respectfully,
GILBERT BETTMAN,
Attorney General.