

ADMINISTRATION: Mortgaged land is an estate on which letters of administration should be granted. The Probate Court has no right to require security for costs except in the circumstances stated in Sec. 1238 R. S. Mo., 1929, Mo. Stat. Ann. page 1466.

February 21, 1940

Hon. C. S. Saltsman
Judge of Probate Court
Crawford County
Steelville, Missouri



Dear Sir:

This will acknowledge receipt of your letter dated February 7th, 1940, requesting our opinion in the following terms:

"There has been filed with the Probate Court a motion by certain creditors of a man recently deceased in Crawford County. At the time of this man's death he left a great number of debts and some real estate, which real estate is heavily encumbered for much more than its actual worth. This creditor filing the motion has asked for administration upon the estate stating that she is the holder of a note secured by second mortgage on the real estate, and that the note itself will be outlawed before the lapse of nine months, at which time she could foreclose and the object of the administration would be so that she might have someone against whom she could file suit on this note before it is outlawed by the Statute of Limitations.

"My contention is that there is no estate because the encumbrances against the real estate are greatly in excess of its value and consequently there is no equity which would constitute an estate or any other property on which to administer. My contention has also been that Letters of Administration be refused and the motion denied on account of no estate existing.

"Will you kindly give me your opinion at the earliest possible date whether or not I am right, under these conditions? Also in the event that administration was granted can the Probate Court require bond for costs? I have been unable to find any law on this point, but am satisfied in the event of administration upon this estate that there would not be sufficient property to pay the costs."

The question whether letters of administration should be granted is answered by the following words of the Supreme Court in St. Louis National Bank, et al v. Field, et al, 156 Mo. 306, l.c. 310,311, 56 SW 1095:

"Under our law, upon the death of an intestate his whole estate, real as well as personal, is liable to come into the hands of his administrator for the payment of his debts. The administrator is not authorized to take possession of the real estate until ordered to do so by the probate court, but when so ordered, and when he takes possession under such order,

the land is in custodia legis, and the administrator is liable on his bond for the lawful application of the rents arising out of it. It is his duty to collect the rents, and if so ordered by the probate court pay off the mortgage, if any, on the land, or if the court so order, sell it subject to the mortgage. (Eoff v. Thompkins, 66 Mo. 225; State to use v. Purdy, 67 Mo. 89; Lewis v. Carson, 93 Mo. 587.) The fact that the estate is insolvent and unable to redeem the mortgage, or that the mortgaged property is insufficient for that purpose, is a subject to influence the probate court in determining what orders it will make in reference to the mortgaged property, but it does not affect the jurisdiction of that court over the subject. * * * * *

"The statute forbids a sale of land under a mortgage or deed of trust within nine months after the death of the mortgagor. (Sec. 144, R. S., 1889.) That provision is in line with other requirements of our statutes regarding the administration of estates indicating the control and care that the administrator should take of the real estate even when it is mortgaged. * * * "

R. S. Mo., 1889, sec. 144, cited above is to the same effect as R. S. Mo., 1929, sec. 141, Mo. Stat. Ann. page 88.

Regarding the value of the estate, as stated by the Supreme Court in Turner v. Campbell:

"There is no positive rule of law that

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an estate must be of a given value,
as a condition precedent to the
granting of letters testamentary
(11 Am. & Eng. Enc. of Law, 2 Ed.
744; 18 Cyc. 71; Phinney v. McGregory
102 Mass. 186)."

The Probate Court has no right to require security for costs, except in the circumstances stated in Sec. 1238 R. S. 1929, Mo. Stat. Ann. page 1466, quoted and discussed in the attached copy of an opinion of the Attorney General, dated December 17th, 1937.

CONCLUSION

Mortgaged land is an estate on which letters of administration should be granted. The Probate Court has no right to require security for costs, except in the circumstances stated in section 1238 R. S. Missouri, 1929, Mo. Stat. Ann., page 1466.

Respectfully submitted,

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APPROVED:

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