

ADMINISTRATION: Public Administrator is agent of the Probate Judge. Personal property must be sold before real estate to pay debts and legacies. An estate escheating to the state is subject to inheritance tax return.

March 1, 1940

Mr. Clark H. Gore
Public Administrator
Atchison County
Rock Port, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated February 20th, 1940, which reads as follows:

"As Public Administrator of Atchison county, I have a problem in which I would like your counsel.

"I am in charge of the estate of George Potschke, a German who died here in January, 1939 at the age of eighty. I am not sure he was ever naturalized. He left no known heirs though he probably had distant relatives in Germany where he was born.

"The time for probating claims against his estate has expired and all claims are paid except the one in question now pending in the circuit court here. There is \$2100.00 in cash, about \$2000.00 in real estate contracts not yet due, and about \$2000.00 worth of real estate left in the estate the remainder of which will escheat to the state, after the statutory period has elapsed.

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"One, Herman Voltmer, a German with whom Potschke made his home a great deal of the time from 1919 to 1935, brought a suit for specific performance, claiming that the deceased promised to leave all of his property to him at his death. We contested this suit and the court found for us in a decree in which he held that the evidence clearly showed a cause of action for services rendered but not for specific performance.

"Voltmer has now filed an action for services rendered for about \$8100.00. The costs in the first case taxed against plaintiff was nearly \$200.00 and the costs in the present case will be more than that especially if plaintiff takes a change of venue as he threatens he will if the case is not disposed of without a jury trial.

"The case would undoubtedly go before Judge Bridgeman where my attorney and I believe plaintiff would recover at least half of what he is asking, and possibly more. Plaintiff has suggested that we waive a jury and let the court pass upon the evidence produced at the former trial to determine the amount due plaintiff. The court has indicated to me that if this is done he would find about \$4000.00 due plaintiff. I know I could compromise it for that sum.

"I have sued the plaintiff for rents and money paid as surety, and will recover about \$1100.00 which will be deducted from any amount he recovers from the estate.

"Because of the interest the state has in the outcome of this matter I would

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like your advice on which course to take. If we stand trial by jury in a foreign county we will have to pay a great amount of costs and gamble on whether or not the judgment will be for more or less than it will be if we let the court here decide the amount due from the evidence of the former trial.

"Am I, as public administrator, incurring any personal liabilities by stipulating that the evidence of the former trial may be used in the present case to determine the outcome of the latter suit?

"Another question in my mind is: From what property would I pay a judgment of \$4000.00? It would take all the cash, and the real estate contracts are payable monthly and will not be due for several years. If these contracts were put up for sale it might be difficult to find a buyer and the estate would undoubtedly take a loss on them. It would be best to sell the real estate, as it is in great demand and would bring the appraised value; but would I be permitted to sell it when I have other personal property (the real estate contracts) in the estate?

"As the remainder of this estate will escheat to the state, is it necessary to make an inheritance tax return? I would like to have your opinion on these matters within the next few days as this case is coming up in circuit court here next week.

Section 300 R. S. Missouri, 1929, referring to Section 299, in reference to the duty of public administrators taking charge of estates, reads as follows:

"In addition to the provisions of this article, he and his securities shall have the same powers as are conferred upon, and be subject to the same duties, penalties, provisions and proceedings as are enjoined upon or authorized against executors and administrators, guardians and curators by articles 1 to 13, inclusive, of this chapter, so far as the same may be applicable. He shall have power to administer oaths and affirmations in all matters relating or belonging to the exercise of his office.

Section 97 R. S. Missouri, 1929, reads as follows:

"Executors and administrators shall prosecute and defend all actions commenced by or against the deceased, at the time of his death, and which might have been prosecuted or maintained by or against such executor or administrator."

An administrator or a public administrator is the agent of the probate court and not the agent of the parties interested in the probate proceedings. It was so held in the case of Rollins v. Shaner, 292 S. W. 419, par. 7, where the court said:

"It is true, in a certain sense, that an administrator is the agent of the heirs and the legatees, but his agency

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is representative rather than personal. The appointment obtains, in some instances, irrespective of the wishes of the heirs. He is responsible to them for any act without his authority. But, acting within his authority and in accordance with law, he may legally perform acts against the express wishes of the heirs. His rights as administrator cannot be revoked without the consent of the courts. He holds in custodia legis the estate coming into his hands as administrator. Therefore, in the strict sense of the word, he is not the agent of the heirs, but is rather the agent of the probate court, whose order, generally speaking, he must obey."

In view of the fact that the public administrator is the agent of the probate court, it is suggested that the administrator under the above facts set out should use his discretion as to which he considers the best proposition for the settlement of the claim, and have the matter approved by the Probate Judge. In that way, he would relieve himself of any liability upon his bond. We would also suggest that the public administrator ask the approval of the Probate Judge for the use of the evidence of the former trial, and in that way the public administrator would release himself of any liability on his bond. All that the public administrator is bound by, is the rule to use due care in the settlement of the estate. It was so held in the case of Harms v. Pohlmann, et al, 297 S. W. 138, par. 5, where the court said:

"As to executors and administrators, it has been held they stand in the situation of trustees for those interested in the estates they administer, and, in the management thereof, they are generally liable only for want of due care. Lewis v. Carson, 16 Mo. App. 342; Hill v. Evans, 114 Mo. App. 715,

722, 91 S. W. 1022; State ex rel. v. Dickson, 213 Mo. 66, 99, 111 S. W. 817. The case last named is directly in point and determines this issue against plaintiff's contention. The court held the sale of personal property by the administrator, upon the direction and request of adult distributees, or one who had authority to represent them, without an order of the probate court, bars them from recovery on the administrator's bond for any mismanagement of the estate. The administrator had the right to rely upon their approval of the sale, and to them it makes no difference whether he got an order of the probate court to sell or not."

The above authorities answer your first question which reads as follows:

"Am I, as public administrator, incurring any personal liabilities by stipulating that the evidence of the former trial may be used in the present case to determine the outcome of the latter suit?"

Your second question requires an opinion from this department as to whether or not you can sell real estate to pay debts when there is personal property still in the estate.

Section 113 R. S. Missouri, 1929, reads as follows:

"If the perishable goods be not sufficient to pay the debts, the executor or administrator shall, in the

same manner, sell other personal estate until the debts and legacies be all paid; but specific legacies shall not be sold in any case, unless it become necessary for the payment of debts."

Under the above section perishable and personal property shall be sold for the payment of debts and legacies.

Section 142, Laws of 1939, page 176, reads as follows:

"If any person die and his personal estate shall be insufficient to pay his debts and legacies, his executor or administrator shall present a petition to the proper court, stating the facts and praying for the sale of the real estate, or so much thereof as will pay the debts and legacies of such deceased person: Provided, that where real estate is sold to pay debts or legacies, the proceeds from the sale thereof may be used when necessary to pay expenses of administration before being applied to the payment of debts and legacies."

Under the above section real estate cannot be sold where there is sufficient personal property to pay the debts and legacies. In selling real estate for the payment of debts, Sections 143, 144 and 145 should be strictly followed in the sale of real estate.

In view of the above sections, it is the opinion of this department that the real estate cannot be sold if there is sufficient personal property to pay the debts and legacies, and the personal property should be first sold before there can be a sale of real estate for

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the payment of debts and legacies.

Your third question reads as follows:

"As the remainder of this estate will escheat to the state, is it necessary to make an inheritance tax return? I would like to have your opinion on these matters within the next few days as this case is coming up in circuit court here next week."

In answer to the above, will say that in 1936 this office rendered an opinion that even where the estate will escheat to the state, it is necessary that it be assessed for inheritance tax return.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB:RW