

Opinion No. 33-609

June 16, 1933

BY: E. K. NEUMANN, Attorney General

TO: Excise Tax Department, State Tax Commission, Santa Fe, New Mexico.

{*58} Your letter of June 15th, relative to duties of Probate Courts in matters concerning succession tax matters, has been received and you desire information as follows:

1. "What must be the procedure this office should follow in order to obtain a report of the administration of an estate in a county where the Probate Judge and County Clerk and Ex-Officio Clerk of the Probate Court have refused or neglected to comply with the provisions of Chapter 141, Article 11 of the 1929 Codification,"

(a) "What, if any, penalty is imposed by the statutes upon such Probate Judge or County Clerk for their failure to comply with the law."

We will answer first your question in paragraph (a), and can do this no better than referring you to Section 141-1120 of the 1929 Compilation, which makes failures or refusals of the Probate Judge or Clerk or other public officer to comply with the Act a misdemeanor punishable by a fine of not more than \$ 100.00 or by imprisonment not to exceed ninety days, or both.

In answer to the first part of your question, it is our belief that upon any failure or refusal of any of the public officers, executors or administrators, to comply with Section 141-1110 of the 1929 Compilation, a mandamus proceeding would lie against such official to compel the things mentioned therein to be done and performed.

Your second question is as follows:

2. "A resident of New Mexico dies leaving considerable property consisting of cash, stocks, bonds and other intangible property, the administration of the estate is completed in the Probate Court, no report is made of the same to this office, the Probate Judge allows the estate to be closed and the property distributed to heirs and beneficiaries and the administrators or executors discharged; through investigation it is found that the estate was subject to tax, but no property is found in the State of New Mexico which can be identified as belonging to the deceased before his death;

(a) What, if anything can be done to collect this tax?"

(b) "Is the Probate Court or {*59} Probate Clerk subject to a penalty for allowing this estate to be closed without duly reporting the same to this office, as provided by law?"

(c) "Are they liable for the tax or any part of it?"

Unless the property is in this state, it would be difficult to enforce collection. No final settlement of the estate is permitted, under Section 141-1116, until the tax has been paid. If settled before payment, the Probate Judge is, no doubt, liable under 141-1120. He is not liable for the tax.

The tax is a lien upon the property until paid, but, if not within the state, as said above, collection would be difficult (141-1104).

Executors and administrators are liable for the tax (141-1102).

The above answers all questions under (a), (b) and (c).

In answer to your questions (a), (b) and (c) of your third question, wish to advise that we believe a lien for the taxes may be foreclosed regardless of ownership of the property, and also that the executor or administrator is also liable even after he has been discharged. The Probate Judge or Clerk is not liable for the taxes.

By: FRANK H. PATTON,

Asst. Attorney General