

Opinion No. 17-1943

February 28, 1917

BY: HARRY L. PATTON, Attorney General

TO: Hon. J. D. Mell, Probate Judge, Roswell, New Mexico.

Bond Required of Foreign Executors

OPINION

Upon giving attention to your letter of the 17th inst. I notice the dilemma in which you are placed in matters of procedure in cases of non-resident administration.

By the provisions of section 2223 of Code 1915 a non-resident is not qualified to act as executor or administrator.

Section 2238 authorizes a foreign executor or administrator to file "An authenticated copy of his appointment in the Probate Court of any County in which there may be any real estate of the deceased, after which he may be authorized under an order of the Court to sell real estate and other property of the deceased in the same manner and upon the same conditions and terms as are prescribed in the case of an executor or administrator appointed in this State."

Under the provisions of section 5886 et seq, before a foreign executor can proceed in this State, except in cases in which he is relieved from giving bond under the terms of the will, he is required to enter into good and sufficient bond to be fixed and approved by the Probate Court.

I do not think that by giving authority to foreign executors and administrators to act in certain instances in this State that you are violating the provisions of section 2223, but I do agree with you that rights of interested parties should be safe-guarded in cases of proceeding by foreign executors and administrators as if they were appointed within the jurisdiction. Section 2215 says that, "Whenever in this chapter the word 'Executor' occurs, it may be taken to mean administrator, when the sense will admit it, unless otherwise specified." Section 2238 is in the same chapter. Were section 5886 in this same chapter, when the word 'Executor' occurs it could be construed to mean administrator. In such case a bond would be required. Such, however, is not the case. I do think, however, were I in your place, I would strain the construction in this instance and require the filing of a bond in cases of a foreign administrator, "in the same manner and upon the same conditions and terms as are prescribed in the case of an executor or administrator appointed in this State."

I am herewith returning the files in the case, which you enclosed in your letter.