

**Kaikainahaole v. Allen**

Supreme Court of Hawaii

November 25, 1902, Submitted ; December 16, 1902, Decided

No Number in Original

**Reporter**

14 Haw. 527 \*; 1902 Haw. LEXIS 38 \*\*

KOOLAU KAIKAINAHAOLE,  
Administratrix of the Estate of John W.  
Kaikainahaole, deceased, v. SAMUEL  
C. ALLEN

**Prior History:** [**\*\*1**] Appeal from  
Circuit Judge, First Circuit.

**Core Terms**

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mortgage, mortgagee, foreclosure,  
temporary injunction, promissory note,  
dissolution, injunction, damages, further  
proceedings, secured by mortgage,  
mortgaged premises, attorney's fees,  
court of equity, decree appealed,  
instructions, conditioned, dissolved,  
foreclose, contends, deceased,  
securing, services, anywise, advice,  
decree, refers

**Headnotes/Syllabus**

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**Headnotes**

A mortgagee has his remedy against  
the land by foreclosure, even though he  
has failed to present his claim to the  
administrator of the deceased  
mortgagor within the time prescribed by  
Section 1525 of the Civil Laws.

A court of equity will not advise an  
administrator upon simple questions of  
law about which he should have  
consulted an attorney.

**Counsel:** C. W. Ashford for  
complainant.

Kinney, Ballou & McClanahan for  
respondent.

**Judges:** Frear, C.J., Galbraith and  
Perry, JJ. Opinion of the Court by Perry,  
J.

**Opinion by:** PERRY

**Opinion**

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[\*528] OPINION OF THE COURT BY  
PERRY, J.

The complainant, administratrix of the  
estate of John W. Kaikainahaole,  
deceased intestate, by bill in which the  
facts are averred in detail, asks a court  
of equity to restrain the respondent, who  
is the mortgagee in a certain mortgage  
executed by the decedent in his lifetime  
to secure the payment of a promissory  
note for \$ 2,500, from foreclosing the  
mortgage and from selling the

mortgaged premises on the ground that the claim of the mortgagee was not presented to the administratrix within six months from the day of the first publication of the statutory notice published by her **[\*\*2]** to creditors or within six months from the day when the note and mortgage became due and that therefore such claim is barred by the statute (Section 1525, Civil Laws) and the mortgagee is powerless to foreclose his mortgage. The administratrix also prays that she "may be fully advised and instructed by this Honorable Court, whether, in law, or in equity, she, as such Administratrix as aforesaid, should be held or permitted to pay such promissory note, or to in any manner satisfy or discharge the said mortgage? Whether the said Estate of John W. Kaikainahaole is in anywise, and, if at all, in what manner, and to what extent, liable to said defendant in the premises? Whether said mortgaged premises are in anywise, and if at all, in what manner, and to what extent, and upon what conditions, liable to sale under or by virtue of a foreclosure of said mortgage, either as a means of paying the principal, or the interest, or both the principal and the interest represented by said promissory note, or otherwise, or at all?"

Upon the filing of the bill and an approved bond in the sum of \$ 250 conditioned for the payment by the complainant, in case the injunction should be thereafter dissolved, **[\*\*3]** of all costs, charges and damages

suffered by respondent by reason of its issuance, a temporary injunction was issued enjoining the respondent from selling the mortgaged property at foreclosure sale, but this injunction was dissolved and the bill dismissed by final decree.

The complainant's bill was framed upon the theory that a **[\*529]** mortgagee who has failed to present his claim to the administrator of a deceased mortgagor within the time prescribed by the statute, has thereby lost his remedy by foreclosure. The law has, however, been decided to the contrary in this jurisdiction. In the case of *James Campbell et al. v. Kamaiopili et al.*, (1872) in which the same question arose, the Supreme Court said: "We do not think the act was intended to divest mortgagees of their titles or of their remedies against the land by foreclosure. The counsel for the respondents contends for a different construction of the statute. It is true that it refers to all claims, even if they are secured by mortgage, but as the mortgage and note are two distinct securities, and nothing but payment of the debt will discharge the mortgage, it follows that the mortgage is not barred, as the statute only **[\*\*4]** refers to claims secured by mortgage, and not to the mortgage itself." See, 3 Haw. 477, 478.

Counsel for the complainant recognizes the applicability of that decision, but contends that it is erroneous and asks that it be overruled. The law as laid down in that case has been a rule of

property here for thirty years and is in accordance with the preponderance of authority elsewhere. It is unnecessary to set forth the various reasons which have been stated in support of the rule. No sufficient ground has been shown for overruling the decision.

Regarding merely as a bill for instructions, the bill cannot be sustained. While it is true that trustees may, under certain circumstances, come into a court of equity to seek advice and instructions, concerning their duty in the administration of the trust, we think that this is not such a case. The questions of law asked by the administratrix are such as can be readily answered by counsel. She is entitled to obtain from an attorney the desired advice at the expense of the trust estate. See 27 Am. & Eng. Encycl. Law 153 and Greene v. Mumford, 4 R.I. 313, 321-323.

The decree appealed from requires the complainant to pay the respondent the **[\*\*5]** sum of fifty dollars as an attorney's fee necessarily incurred by the respondent in securing the dissolution of the temporary injunction. On this point the decree was made **[\*530]** without any evidence having been adduced to support it. Apparently the court merely allowed the amount which it thought would be reasonable compensation for the services rendered by respondent's counsel in procuring the dissolution of the injunction. It does not necessarily follow that that was the extent of the damages suffered by the

respondent, for it may be that the respondent had paid or agreed to pay to his attorney in full for such services a sum less than that fixed by the Circuit Judge. Evidence was necessary in order to establish the amount of the damage, if any.

The decree appealed from, in so far as it orders the dissolution of the temporary injunction and the dismissal of the bill, is affirmed, and in so far as it relates to the attorney's fee, is reversed, without prejudice to the respondent's right to take such further proceedings as he may be advised are proper to recover such damages, secured by the bond, as he may be entitled to, and the cause is remanded to the Circuit Judge for such **[\*\*6]** further proceedings as may be proper in conformity with this opinion.

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