Michigan Law Review

Volume 46 | Issue 5

1948

EXECUTORS AND ADMINISTRATORS-PERSONAL TORT LIABILITY-EFFECT OF STATUTES AUTHORIZING CONTINUANCE OF DECEDENT'S BUSINESS

LeRoy H. Redfern S.Ed.
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Common Law Commons, and the Torts Commons

Recommended Citation

LeRoy H. Redfern S.Ed., *EXECUTORS AND ADMINISTRATORS-PERSONAL TORT LIABILITY-EFFECT OF STATUTES AUTHORIZING CONTINUANCE OF DECEDENT'S BUSINESS*, 46 MICH. L. REV. 645 (1948).
Available at: https://repository.law.umich.edu/mlr/vol46/iss5/5

This Response or Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

EXECUTORS AND ADMINISTRATORS—PERSONAL TORT LIABILITY—EFFECT OF STATUTES AUTHORIZING CONTINUANCE OF DECEDENT'S BUSINESS—It is an accepted doctrine wherever the question has arisen that executors and administrators are liable for their torts individually rather than in a representative capacity, and that judgments against them, recovered in tort actions, are collectible out of the private property of the representative and not out of estate assets.[1] The same rules are applied in cases involving trustees.[2] Conceding the correctness of this general doctrine, the question may be raised whether statutes which permit the court to authorize a personal representative to continue the operation of a decedent's business should be construed so as to change the common law rule and relieve executors and administrators of personal liability for torts. This question was considered in the recent California case of *Johnston v. Long*.[3] Plaintiff sustained personal in-

[38] See BLOSE and CAILVER, STATISTICS OF THE EDUCATION OF NEGROES 6, Table 8 (1944). For further material, see 56 YALE L. J. 1059 at 1062 (1947), and 14 J. OF NEGRO EDUCATION 509 et seq. (1945); 15 id. 263 et seq. (1946); 16 id.

[1] Fredenburg v. Horn, 108 Ore. 672, 218 P. 939 (1923) (conversion); Digby v. Cook, 200 Ark. 1004, 142 S.W. (2d) 228 (1940) (defective condition of premises); Christensen v. Frankland, 324 Ill. App. 391, 58 N.E. (2d) 289 (1944) (trespass and assault); Boyle v. Nolan, 123 N.J.L. 365, 8 A. (2d) 358 (1939) (negligence in making repairs); Bannigan v. Woodbury, 158 Mich. 206, 122 N.W. 531 (1909) (servant of executrix negligent in operating logging road); McCue v. Finck, 20 Misc. 506, 46 N.Y.S. 242 (1897) (executrix's employee negligent); Kalua v. Camarinos, 11 Hawaii 557 (1898) (administrator's servant negligent); ATKINSON, WILLS, § 223 (1937); 21 AM. JUR. 553; 24 C.J. 128; 51 L.R.A. 261 (1901); 44 A.L.R. 637 (1926); 127 A.L.R. 687 (1940).

[2] 2 TRUST RESTATEMENT, § 264 (1935); 3 BOGERT, TRUSTS, part 2, § 731 (1946); 2 SCOTT, TRUSTS, §§ 264 and 267 (1939); 127 A.L.R. 687 (1940). Professor Bogert takes the position that a personal representative who carries on the business of a decedent is a trustee, and that this is true whether or not he be given this designation. 3 BOGERT, TRUSTS, part 1, § 572 (1946).

[3] (Cal. 1947) 180 P. (2d) (Adv. Sheet) 21, (opinion withdrawn by order of Court), as modified on denial of rehearing 181 P. (2d) 645. Two justices dissented to both opinions on the ground that the jury was confused; one justice dissented, taking the position that authorization to an executor to conduct a business in his official capacity carries with it authorization to be sued in the same capacity, and that the judgment in this case runs against the defendant solely as executor of the estate.

juries when an overhead door fell on him as he was entering a garage. The garage was operated by defendant executor according to the terms of the testator's will and pursuant to the California Probate Code. The injury was caused by the negligence of an employee. Plaintiff instituted a suit for damages against defendant in his individual capacity. The district court of appeals found for defendant on the ground that section 572 of the Probate Code,[4] which permits the court to authorize a personal representative to carry on the business of a decedent, makes an executor, who is not personally at fault, liable exclusively in his representative capacity.[5] The Supreme Court of California reversed, taking the position that an executor has always been personally liable for any torts committed by him in administration of the estate, and that there is nothing in section 572 of the Probate Code to indicate that a change in the rule was intended.

This appears to be the first instance in which a personal representative has sought to invoke a statute authorizing him to continue decedent's business as a defense to a tort action. The conflict between the majority on the one hand, and one dissenting justice and the District Court of Appeals, on the other, suggests that the executor's arguments have some merit and that the principal case should not be regarded as foreclosing the issue in other jurisdictions having similar statutes.

It is the purpose here to consider the effect of statutes which provide authority for personal representatives to operate a business on the representatives' tort liability. An important factor in deciding whether the statutes change the common law rules relating to tort liability of executors and administrators is the manner in which the courts regard those rules—are they fair and do they make for good law, or are they harsh and arbitrary? For this reason attention is first directed to the practical operation of and reasons behind the common law doctrine.

A. *The Common Law*

1. *Direct suit against the estate*

In line with the basic proposition that executors, administrators and trustees are liable for their torts individually,[6] there is general agreement that the victim of the representative's tort cannot obtain

[4] "After notice to all persons interested in an estate, given in such manner as may be directed by the court or a judge thereof, the court may authorize the executor or administrator to continue the operation of the decedent's business to such an extent and subject to such restrictions as may seem to the court to be for the best interest of the estate and those interested therein." Cal. Prob. Code Ann. (Deering, 1944) § 572.

[5] Johnston v. Long, (D.C. App. Cal. 1946) 171 P. (2d) 538.

[6] ATKINSON, WILLS, § 223; 21 AM. JUR. 553; 24 C.J. 128; 51 L.R.A. 261 (1901); 127 A.L.R. 687 (1940); and cases cited supra, note 1.

recovery from the decedent's or trust estate.[7] The reasons usually assigned for the latter holding are that in so far as the representative commits a wrong he does not represent the estate and that the law will not allow property of the estate to be impaired or dissipated through the negligence or improvidence of the representative.[8] In recent years, however, there has been some agitation for making the estate primarily liable for all of the economic burdens arising out of a business from which it derives a profit. In conformity with this idea it has been suggested that an individual who is injured by the tort of the representative of the estate should have a direct action against the estate.[9] The Commissioners on Uniform State Laws proposed a statutory solution in the trust cases,[10] but the suggested change has not been widely accepted. The Model Probate Code does not make such a change and later cases indicate that many jurisdictions are satisfied with the common law rule which limits the injured party to his action against the personal representative.[11]

2. *Reaching the personal representative's right to exoneration*

Even though the injured party must resort to a suit against the personal representative and does not usually have an action against the estate, the representative does not have to stand the loss in every case. It is well settled that when the personal representative who is free from blame is held individually liable for the tortious act of an agent, he is entitled to indemnity out of the estate assets.[12] This prin-

[7] Ibid.

[8] Clauson v. Stull, 331 Pa. 101, 200 A. 593 (1938); Hundley v. Pendleton, 9 Ga. App. 268, 70 S.E. 1115 (1911); Plimpton v. Richards, 59 Me. 115 (1871); Louisville v. O'Donaghue, 57 Ky. 243, 162 S.W. 1110 (1914); Parmenter v. Barstow, 22 R.I. 245, 47 A. 365 (1900); Brown v. Mack, 185 Misc. 368, 56 N.Y.S. (2d) 910 (1945).

[9] 2 SCOTT, TRUSTS, § 271A2 (1939); Fulda and Pond, "Tort Liability of Trust Estates," 41 COL. L. REV. 1332 at 1353 et seq. (1941).

[10] Uniform Trusts Act, §§ 13 and 14, 9 U.L.A. 719 (1942); Vanneman and Rowley, "The Uniform Trusts Act," 13 UNIV. CIN. L. REV. 157, 171-175 (1939).

[11] SIMES, MODEL PROBATE CODE 138 (1946) (§ 131 on continuation of decedent's business); Skinner v. Redding, (Del. Sup. Ct. 1945) 45 A. (2d) 507; Ostheimer v. McNutt, (Ind. App. 1946) 66 N.E. (2d) 142; Brown v. Mack, 185 Misc. 368, 56 N.Y.S. (2d) 910 (1945); Christensen v. Frankland, 324 Ill. App. 391, 58 N.E. (2d) 289 (1944); Digby v. Cook, 200 Ark. 1004, 142 S.W. (2d) 228 (1940); Boyle v. Nolan, 123 N.J.L. 365, 8 A. (2d) 358 (1939); Kirchner v. Muller, 280 N.Y. 23, 19 N.E. (2d) 665 (1939). *Contra*, Ernest G. Beaudry, Inc. v. Freeman, 73 Ga. App. 736, 38 S.E. (2d) 40 (1946).

[12] Havill v. Newton, 202 Ill. App. 15 (1916); McCue v. Finck, 20 Misc. 506, 46 N.Y.S. 242 (1897); Benett v. Wyndham, 4 DeG. F. and J. 259, 45 Eng. Rep. 1183 (1862); Matter of Lathers' Estate, 137 Misc. 226, 243 N.Y.S. 366 (1930), annotated in 29 MICH. L. REV. 469 (1931) and 79 UNIV. PA. L. REV. 623 (1931); 1 TRUSTS RESTATEMENT, § 247 (1935); 21 AM. JUR., Executors and Administrators, § 307; 44 A.L.R. 637 at 676 (1926).

ciple is sound. The representative is not an insurer of the estate and if his acts in the administration of the estate are proper, and he is not individually at fault, there is no reason for not allowing him to seek reimbursement from the estate for losses sustained. Such a holding has led to argument that when the personal representative is not at fault the tort creditor should be allowed to bring a direct suit against the estate in order to avoid circuity of action.[13] This argument is usually rejected. The explanation given in many of the trust cases is that courts of law do not recognize the trustee in any other capacity than as owner of the estate, and that the trust estate is not regarded as a separate entity.[14] But such reasoning carries no weight in cases involving executors and administrators. It is everywhere recognized that executors and administrators can be sued in a representative capacity in a law court. Moreover, non-existence of the trust as a legal entity is no longer a controlling consideration.[15] The chief reason for not allowing a tort creditor a derivative suit against the estate, without a showing of special facts, is that such a procedure would necessitate a trial in the same action both of the tort liability and of the question whether the nature of the tort was such that the representative should be entitled to reimbursement out of the assets of the estate. It is further argued that the element of representative's fault would not be a fighting issue if he were sued in his official capacity. The plaintiff would be attempting to prove that the representative was not personally at fault, and it could hardly be expected that the representative would argue strenuously that he was not liable in his representative capacity but was personally at fault and should pay for the injury out of his private assets.[16]

There has been some dissatisfaction with the reasoning employed to deny tort creditors the right to reach the personal representative's right to exoneration. A few writers have asserted that the current trend is toward allowing the injured party to be subrogated to whatever right the representative may have.[17] The more recent cases indicate, however, that a substantial majority of the courts still adhere to the general rule that the tort creditor may not sue the personal representative in his representative capacity.[18]

[13] Ewing v. Foley, 115 Tex. 222, 280 S.W. 499 (1926); 25 VA. L. REV. 235 (1938); 51 HARV. L. REV. 1455 (1938).

[14] Wahl v. Schmidt, 307 Ill. 331, 138 N.E. 604 (1923); 2 SCOTT, TRUSTS 1485 (1939).

[15] 2 SCOTT, TRUSTS 1528 (1939); Fulda and Pond, "Tort Liability of Trust Estates, 41 COL. L. REV. 1332 at 1334 (1941).

[16] Kirchner v. Muller, 280 N.Y. 23, 19 N.E. (2d) 665 (1939).

[17] 3 BOGERT, TRUSTS, part 2, § 732 (1946); 25 VA. L. REV. 235 (1938); 51 HARV. L. REV. 1455 (1938); 44 A.L.R. 637 (1926).

[18] Note 11, supra.

Although the party suffering from a tort of the personal representative's agent may not have a direct suit against the estate, without a showing of special facts, there is good authority for such a suit when the will provides that the estate should be liable,[19] when the representative is insolvent or out of the jurisdiction,[20] and when the tort of the representative or his agent is committed while the representative is acting under the control or supervision of the beneficiaries of the business.[21] If the estate is unjustly enriched by a tort of the representative the tort creditor may be able to reach estate assets even though the representatives would not have a right to reimbursement if he satisfied the claim.[22]

3. *Suit against the personal representative*

With the possible exception of Georgia and Oregon, courts agree that a personal representative is individually liable for the torts of employees engaged in the business of the estate, and the fact that the assets of the estate are insufficient to reimburse the representative is no defense.[23] The most difficult case, and the one in which a personal

[19] Prinz v. Lucas, 210 Pa. 620, 60 A. 309 (1905) (deed of trust); Birdsong v. Jones, 222 Mo. App. 768, 8 S.W. (2d) 98 (1928) (trust instrument); 3 BOGERT, TRUSTS, part 1, § 572 (1935); 2 TRUSTS RESTATEMENT, § 270 (1935). Cf. Ireland v. Bowman & Cockrell, 130 Ky. 153, 113 S.W. 56 (1908).

[20] Matter of Damsky, 175 Misc. 460, 23 N.Y.S. (2d) 897 (1940); Johnson v. Leman, 131 Ill. 609, 23 N.E. 435 (1890); Dantzler v. McInnis, 151 Ala. 293, 44 S. 193 (1907); Gates v. McClenahan, 124 Iowa 593, 100 N.W. 479 (1904) (trustee residing outside the state).

[21] Wright v. Caney River R. R., 151 N.C. 529, 66 S.E. 588 (1909); Ross v. Moses, 175 S.C. 355, 179 S.E. 757 (1935).

[22] This principle is no broader than the restitutionary doctrine of unjust enrichment. The estate may be held even though tort was intentional. In re Hunter, (D.C. Pa. 1907) 151 F. 904, 44 A.L.R. 637 at 664 (1926). If the representative acted in good faith some courts hold that he is only liable in his official capacity. Grimes v. Barndollar, 58 Colo. 421, 148 P. 256 (1914); White v. McFarland, 148 Mo. App. 338, 128 S.W. 23 (1910); Mulford's Admr. v. Mulford's Executor, 40 N.J. Eq. 163 (1885). Other courts hold the representative is not exonerated of personal liability even though he acted in good faith. Von Schmidt v. Bourn, 50 Cal. 616 (1875); Herd v. Herd, 71 Iowa 497, 32 N.W. 469 (1887).

[23] Kalua v. Camarinos, 11 Hawaii 557 (1898); McCue v. Finck, 20 Misc. 506, 46 N.Y.S. 242 (1897); Campus v. McElligott, 122 Conn. 14, 187 A. 29 (1936); Fisher v. McNeely, 110 Wash. 283, 188 P. 478 (1920); Baker v. Tibbetts, 162 Mass. 468, 39 N.E. 350 (1895). But see Fetting v. Winch, 54 Ore. 600, 104 P. 722 (1909), for dictum that an executor without personal fault is not liable in his individual capacity if he has no interest as a distributee. Dobbs v. Noble, 55 Ga. App. 201, 189 S.E. 694 (1937); Ernest G. Beaudry, Inc. v. Freeman, 73 Ga. App. 736, 38 S.E. (2d) 40 at 47 (1946), " . . . under the testamentary scheme [authority in the will to continue a garage business] the First National Bank as executor and trustee of Ernest G. Beaudry was liable to the plaintiff for the injuries inflicted by its tortious act in its representative and not individual capacity. . . . "

representative would have the best chance of getting a court to stray from the beaten path, is that in which the estate is insufficient to provide reimbursement. When faced with such a dilemma the representative might argue that his liability to the plaintiff is limited by the amount by which the estate can reimburse him. Such a solution is suggested in the comparatively recent Nebraska case of *Smith v. Rizzuto*.[24] A trustee was sued for injuries sustained from a fall caused by ice accumulation upon the porch of an apartment house to which the trustee held title. The trustee was not in a managerial position at the time the accident occurred. In a suit against the trustee in his individual capacity the court limited recovery to the value of the trust estate. It has been suggested by some authorities that the solution reached in *Smith v. Rizzuto* might be applied in cases where a trustee or executor is operating a business,[25] but clearly the case is not authority for such application. The Nebraska court limited its decision to a situation in which a trustee is held liable as title holder, and even on that point it is of questionable soundness.[26]

In a case in which the estate is insufficient to reimburse the representative, the real problem would appear to be whether the hardship that would be placed on the trustee or executor by holding him liable to the full extent of the loss outweighs the hardship that would be imposed on the person seeking to enforce liability if he were allowed to recover only to the extent of the estate assets. It is submitted that requiring the executor to pay to the full extent of the loss is not only a harmonious application of legal doctrine but also sound from a policy standpoint. The injured party has no warning and can do little to protect himself from loss, whereas the personal representatives may secure liability insurance, paying premiums out of the assets of the estate as a proper expense of the business.[27]

[24] 133 Neb. 655, 276 N.W. 406 (1937), noted in 18 NEB. L. BUL. 98 (1937); 51 HARV. L. REV. 1455 (1938); 23 IOWA L. REV. 669 (1938); and 22 MINN. L. REV. 907 (1938).

[25] 2 SCOTT, TRUSTS 1488 (1939); Fulda and Pond, "Tort Liability of Trust Estates," 41 COL. L. REV. 1332 at 1356 (1941).

[26] The defendant, though named in the will as trustee, renounced. Ordinarily when a trustee disclaims, not having previously accepted the trust, his disclaimer has a retroactive effect and relieves him of any liability to the beneficiaries or to third parties. 1 SCOTT, TRUSTS, § 102.3 (1939). Furthermore, even though it be assumed that a trustee named in the will could not renounce and thereby avoid liability, the section in the TRUSTS RESTATEMENT cited by the Nebraska Court as authority for its holding does not in fact support it. 2 TRUSTS RESTATEMENT, § 265 (1935). A caveat following this section states that "it is not intended to express any opinion on the question" of whether a trustee is personally liable as a title holder beyond the value of estate assets.

[27] In re Stewart's Will, 169 Misc. 917, 9 N.Y.S. (2d) 315 (1938), holding executor is entitled to credit for premiums paid on insurance against public liability.

B. Statutes

It is well established that an executor or administrator has no authority to carry on the business of decedent solely by virtue of his position. The inherent power of a court to authorize the personal representative to continue decedent's business is so uncertain that at least twenty states have deemed it necessary to provide such authority by statutory enactment.[28] The question is raised as to whether these statutes have any effect upon the personal representative's liability for torts of his agents.

In *Johnson v. Long*[29] the California Supreme Court took the position that the California statute granting power to the court to authorize a personal representative to carry on the business of decedent does not change the common law tort liabilities of executors and administrators. Although the language of the California statute differs from the language of comparable statutes in other states, their basic features are the same and a similar construction might well be expected.

The pertinent part of the California statute reads as follows:

> ". . . The court may authorize the executor or administrator to continue the operation of the decedent's business to such an extent and subject to such restrictions as may seem to the court best for the interest of the estate and those interested therein."[30]

The absence of express language referring to the responsibilities and liabilities of the executor or administrator who operates the business is typical of this kind of statute. Another common feature of the continuation of business statutes is that no mention is made of the liability of decedent's estate to business creditors or tort creditors. Thus, a contention that these statutes relieve the personal representative of

Holland v. Doke, 135 Ark. 372, 205 S.W. 648 (1918); Richardson v. McCloskey, (Tex. Comm. App. 1925) 276 S.W. 680; 33 C.J.S., Executors and Administrators, § 238 (b).

[28] Ala. Code (1940) tit. 61, § 198; Conn. Gen. Stat. (1930) § 4960; 21 Fla. Stat. Ann. (1944) § 733.08; 31 Ga. Code (1937), tit. 113, § 1523; 3 Ill. Ann. Stat. (Smith-Hurd, Supp. 1946) § 366 (a); 2 Iowa Code (1946) § 635.52; Kan. Gen. Stat. (Supp. 1943) § 59-1402; 2 Me. Rev. Stat. (1944) c. 141, §§ 50, 66; 6 Mass. Ann. Laws (Supp. 1946) c. 195, § 7; 23 Mich. Ann. Stat. (Moore, 1943) §§ 27.3178 (287), (641) to (654); 1 Miss. Ann. Code (1942) § 579; 3 N.D. Rev. Code (1943) c. 30-18, § 1816, subdiv. 5; 7 Ohio Gen. Code Ann. (Page, 1938) § 10509-9; Ore. Laws (1943) c. 376; 20 Pa. Ann. Stat. (Purdon, 1930) § 807; R.I. Laws (1938) c. 575, § 33; 9 Tex. Civ. Stat. (Vernon, 1939) art. 3427; 5 Utah Code Ann. (1943) § 102-11-8; 3 Wash. Rev. Stat. Ann. (Remington, 1932) § 1460; Cal. Prob. Code Ann. (Deering, 1944) § 572. For a discussion of a number of these statutes see Adelman, "The Power to Carry on the Business of a Decedent," 36 Mich. L. Rev. 185 (1937).

[29] Note 3, supra.

[30] Cal. Code Ann. (Deering, 1944) § 572.

individual tort liability must be based on something other than express statutory language.

The executor in *Johnson v. Long* argued that the California statute placed him in a position similar to that of a receiver in bankruptcy and, therefore, should be construed as relieving him of his common law liability for the torts of his agents.[31] He further argued that since the statute had been interpreted so as to shift contract liabilities from the executor to the estate it should also be regarded as placing tort liabilities on the estate rather than the personal representative in situations in which the representative is free from fault.[32] These arguments were made possible by earlier opinions interpreting the statute. Prior to *Johnson v. Long* the California District Court of Appeals had suggested that the statute made the estate the operator of the decedent's business and the executor an agent of the estate.[33] That court held that contractual obligations entered into by an executor or administrator properly operating a business, which under the common law rule were chargeable to the executor or administrator, were chargeable directly to the estate.[34]

The California District Court of Appeals cited its earlier opinions as authority for interpreting the statutes so as to discharge an executor from tort liabilities in situations in which he was not at fault.[35] The court reasoned that there is no substantial difference in theory between a representative's personal liability for contracts executed in conducting the business of a decedent and his personal liability for torts of business employees. The California Supreme Court summarily dismissed this line of reasoning by stating:

> " . . . There is no doubt that contractual obligations properly incurred are chargeable against the estate and that tort liability,

[31] Ordinarily receivers who are themselves free from fault are not personally liable for injuries caused by their servants. 63 L.R.A. 227 (1904); 10 A.L.R. 1055 (1921); Underhay, "Tort Claims in Receiverships and Reorganizations," 22 IOWA L. REV. 60 (1936). "Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences and liabilities are official and not personal. . . ." McNulta v. Lochridge, 141 U.S. 327 at 332, 12 S.Ct. 11 (1891).

[32] Where the personal representative, operating the business of decedent, makes a contract with a third person the personal representative is personally liable on the contract in the absence of a valid stipulation in the contract limiting his personal liability. In re Thurber's Estate, 311 Ill. 211, 142 N.E. 493 (1924); Anglo-American Direct Tea Trading Co. v. Seward, 294 Mass. 349, 2 N.E. (2d) 448 (1936); ATKINSON, WILLS 612 (1937).

[33] California Employment Stabilization Commission v. Hansen, 69 Cal. App. (2d) 767, 160 P. (2d) 173 at 175 (1945); In re Estate of Allen, 42 Cal. App. (2d) 346, 108 P. (2d) 973 (1941); see 2 Ops. Cal. Atty. Gen. 132 (1943).

[34] Ibid.

[35] Johnston v. Long, (D.C. App. Cal. 1946) 171 P. (2d) 538.

where the executor is not personally at fault, should ultimately be borne by the estate."[36]

The court took the position that if the statute had any effect on the question of tort liability it could be carried out by applying the rule of the *Restatement of Trusts*. This was merely another way of saying that the statute left unchanged the common law doctrine of executors' and administrators' tort liability.[37]

It is submitted that the logic employed by the California District Court of Appeals is sound. There is no basis for construing such a statute so as to change the common law as to the contract liabilities of the personal representative and the decedent's estate while leaving unaltered their liabilities for the torts of agents and employees. The difficulty with this analysis, so far as other jurisdictions are concerned, is that outside of California this type of statute has not been regarded as materially altering the common law contract liabilities of the executor or administrator. Although there are some indications that the statutes may furnish authority for allowing a contract creditor to bring a direct suit against the estate to obtain the representative's right to reimbursement, most courts have not construed the statutes so as to relieve the executor or administrator of his personal liability for contracts executed in the conduct of the business.[38]

It is unlikely that other courts which have construed these statutes as leaving unchanged the positions of the executor and of the estate in regard to contractual liability would interpret them as shifting tort liabilities from the executor to the estate. But if the court has used the statute as a basis for permitting a contract creditor to bring a direct action against the estate to reach the executor's right to exoneration, it might allow a tort creditor a similar right. On this latter point, however, *Johnson v. Long* cannot be ignored. Dictum in that case suggests that, even though the statute may be held to place contract liability directly upon the estate, still, it provides no authority for a tort creditor to obtain the representative's right to reimbursement by a direct suit against the estate.[39]

LeRoy H. Redfern, S.Ed.

[36] (Cal. 1947) 180 P. (2d) (Adv. Sheet) 21 at 25, (opinion withdrawn by order of court), as modified on denial of rehearing, 181 P. (2d) 645 at 650.

[37] 2 TRUSTS RESTATEMENT, § 264 (1935).

[38] State Bank of Orlando & Trust Co. v. Cummer Lumber Co., 105 Fla. 522, 141 S. 602 (1932); Street & Co. v. Downs, 43 Ga. App. 688, 160 S.E. 97 (1931); Anglo-American Direct Tea Trading Co. v. Seward, 294 Mass. 349, 2 N.E. (2d) 448 (1936). Contra, McMillan v. Hendricks' Estate, 17 Tex. Civ. App. 153, 46 S.W. 859 (1898).

[39] The only statute found that expressly relieves executors and administrators of personal liability for torts of their agents and employees is a 1941 Act of the Michigan