

1948

## EXECUTORS AND ADMINISTRATORS-TORT ACTION AGAINST PERSONAL REPRESENTATIVE AFTER ESTATE IS CLOSED

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### Recommended Citation

LeRoy H. Redfern S.Ed., *EXECUTORS AND ADMINISTRATORS-TORT ACTION AGAINST PERSONAL REPRESENTATIVE AFTER ESTATE IS CLOSED*, 46 MICH. L. REV. 687 (1948).

Available at: <https://repository.law.umich.edu/mlr/vol46/iss5/16>

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EXECUTORS AND ADMINISTRATORS—TORT ACTION AGAINST PERSONAL REPRESENTATIVE AFTER ESTATE IS CLOSED—Plaintiff sustained personal injuries due to the negligent act of an employee in a business operated by defendant executor with court authorization. Eight months after the accident occurred the assets of the estate were distributed and the executor discharged.

Four months later the plaintiff instituted a suit for damages against defendant in his individual capacity. *Held*, discharge of the executor did not relieve him of personal liability for the tortious acts of his agent. *Johnston v. Long*, (Cal. 1947) 180 P. (2d) 21, as modified on denial of rehearing 181 P. (2d) 645.

It is well established that an executor is personally liable for the torts of agents and servants engaged in a business operated on behalf of the estate.<sup>1</sup> When the probate court has jurisdiction over the decedent's estate and the jurisdiction is properly invoked, a final decree of distribution or the discharge of the personal representative usually serves to protect the representative who acts in good faith under it against all claims connected with the estate.<sup>2</sup> In the principal case the California Supreme Court declared that the closing of the decedent's estate did not operate to cut off the personal liability of an executor for the torts of his agent. In support of such a view it may be argued that since a personal representative operating the business of decedent is individually responsible for torts committed by his agents, in the same manner as if he owned the business, the decree of distribution or representative's discharge does not put an end to his tort liability.<sup>3</sup> It is believed that most courts would agree with such an argument, taking the position that a tort claim against the personal representative is not in issue in the decree of distribution and that the legislature did not intend the statutes providing for discharge of the executor or administrator to operate as a bar to liability of the representative for torts.<sup>4</sup>

<sup>1</sup> See comment, *supra* p. 645.

<sup>2</sup> *Cleaveland v. Draper*, 194 Mass. 118, 80 N.E. 227 (1907); *In re Coyne's Estate*, 103 Okla. 279, 229 P. 630 (1924); *Togneri's Estate*, 296 Ill. App. 33, 15 N.E. (2d) 908 (1938); 3 WOERNER, *AMERICAN LAW OF ADMINISTRATION*, 3d ed., §§ 561 and 562 (1923); ATKINSON, *WILLS*, 745-748 (1937); 21 AM. JUR. 644.

<sup>3</sup> Professor Bogert takes the position that a personal representative who carries on the business of a decedent is a trustee. 3 BOGERT, *TRUSTS*, part 1, § 572 (1946). To the effect that the personal representative is liable as if he owned the business: 2 SCOTT, *TRUSTS*, § 264 (1939); note 1, *supra*. The Missouri and Utah statutes on the conclusiveness of decrees of distribution go about as far as any of the statutes in making the decree final. But even these statutes speak of the decree as conclusive only as to parties interested in the estate. Mo. Rev. Stat. Ann. (1942) § 230; Utah Code (1943) § 102-12-9. For a compilation and analysis of statutes on conclusiveness of decrees of distribution see SIMES, *MODEL PROBATE CODE* 348-349 (1946). With the exception of two statutes referred to in note 5, *infra*, none of the statutes on discharge of a personal representative appear to release him from personal liability for acts committed while operating the decedent's business. Statutes relating to discharge of the personal representative are considered in SIMES, *MODEL PROBATE CODE* 365-366 (1946).

<sup>4</sup> ROLLISON, *WILLS* 645 (1939). The principal case furnishes an example of how a court may summarily dismiss a contention that discharge of the personal representative relieves him from liability for torts, when there is ground for argument. The California Probate Code provides, "Decree of discharge: When the estate has been fully administered . . . the court must make a decree discharging him [the personal representative] from all liability to be incurred thereafter." Cal. Prob. Code Ann. (Deering, 1944) § 1066. In *Racouillat v. Requena*, 36 Cal. 651 at 654-655 (1869), the California Supreme Court stated that the statutory language "all liability to be incurred thereafter" is superfluous and meaningless and the discharge of the personal representative is unconditional. This decision was not cited in the principal case.

There are statutes, however, which purport to make the discharge of the executor or administrator absolutely final in every respect.<sup>5</sup> It is conceivable that these statutes would be construed so as to bar even tort claims against the personal representative in his individual capacity. Failure on the part of the injured party to present his claim or to institute suit within the nonclaim period would probably not result in the action being defeated by the nonclaim statute. The usual nonclaim statute contemplates the presentment of claims or demands existing at the time of the debtor's death, or arising out of obligations incurred by him while alive, and unless the statute provides otherwise, claims resulting from the continuation of decedent's business are not barred.<sup>6</sup> The plaintiff must, however, commence his action within the period of the general statute of limitations.<sup>7</sup> The personal representative is individually liable for the torts of his agents even though the estate is insufficient to indemnify him.<sup>8</sup> Thus the fact that there is no estate in existence would not of itself defeat a suit by a party suffering from the tort of the representative's agent. But to interpret the nonclaim statutes, statutes providing for discharge of executors and administrators, and decrees of distribution in such a manner that no notice of a tort claim is required and that a representative is not released from personal liability for torts of his agents when the estate has been distributed and the representative discharged would place the executor or administrator in an insecure position. By unnecessarily delaying his suit until after distribution of the estate a tort creditor could foreclose the chances of the personal representative's obtaining reimbursement from the decedent's estate, and leave him with no more than a precarious claim against the distributees.<sup>9</sup> On the other hand, an accident

<sup>5</sup> The Alabama statute states that following a showing by the executor or administrator that all duties have been properly performed "the court must make a judgment or decree discharging him from all liability as such executor or administrator." Ala. Code (1941) tit. 61, § 362. The Georgia Code provides that on hearing of petition for discharge of administrator, if the ordinary is satisfied the administrator has discharged his duties "the prayer of the petition shall be granted, and the administrator released from all liability as such. . . ." Ga. Code Ann. (1937) § 113-2302. See *Clair v. Burke*, 62 Ga. App. 607, 9 S.E. (2d) 119 (1940), to the effect that the discharge of administrator relieves him of "all liability on account of his administration."

<sup>6</sup> *Nealley's Appeal*, 110 Me. 552, 88 A. 480 (1913); *In re Kelly's Estate*, 183 Wis. 485, 198 N.W. 280 (1924); *ATKINSON, WILLS* 654-655 (1937); 34 C.J.S. 742; 21 AM. JUR. 587.

<sup>7</sup> *Hewitt v. Beattie*, 106 Conn. 602 at 617, 138 A. 795 (1927).

<sup>8</sup> 2 SCOTT, TRUSTS, § 265.4 (1939); 127 A.L.R. 687 (1940).

<sup>9</sup> ". . . when he is the real party in interest the representative should secure a refund, unless, indeed, he has paid [distributees] with conscious disregard of a claim due and payable or reasonably sure to become payable." Warren, "Problems in Probate and Administration," 32 HARV. L. REV. 315 at 335 (1937). The RESTATEMENT provides that a trustee is entitled to indemnity from the beneficiary to the extent of property so conveyed "unless the beneficiary has so changed his position that it is inequitable to compel him to indemnify the trustee." 1 TRUSTS RESTATEMENT, § 249(2) (1935). As to problems involved in obtaining recovery from distributees after the estate is closed see: *In re Strassenburgh's Estate*, 148 Misc. 595, 266 N.Y.S. 634 (1933); *Hewitt v. Beattie*, 106 Conn. 602, 138 A. 795 (1927); 3 WOERNER,

might occur shortly before the estate is distributed, and it would be unfair to the tort creditor if his claim were barred by distribution of the estate and discharge of the personal representative. It is submitted that the fairest way to handle this type of suit is to use a doctrine of laches—making delay on the part of the plaintiff in instituting his suit without valid cause and to the prejudice of the personal representative a good defense.

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AMERICAN LAW OF ADMINISTRATION, 3d ed., 1902, 1970 (1923); Simes, "Rights of Creditors of a Decedent to Recover from Distributees after the Estate is Closed," 41 MICH. L. REV. 920 (1943); L.R.A. 1916A 1185.