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The Feasibility of Requiring Presentation of Purely Contingent Claims in Probate

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The convention closed with a banquet and dance at the Finlen Hotel, Saturday night.

THE FEASIBILITY OF REQUIRING PRESENTATION OF PURELY CONTINGENT CLAIMS IN PROBATE

Practitioners in the field of probate administration often encounter a problem of considerable difficulty in the matter of presentation of contingent claims. Claims which are fixed, whether matured, unmatured, liquidated or unliquidated give little or no trouble. They must be presented within the non-claim period or they are barred. Difficulty arises, however, when the court is called upon to determine the applicability of non-claim statutes to a contingent claim. Such statutes are of substantially two types: those generally requiring creditors to present "all claims" and those requiring presentment of "all claims whether due, not due, or contingent." Legislation which merely provides that "all claims" shall be presented may be interpreted by the court as not requiring the presentation of contingent claims. Atkinson indicates that this is the usual interpretation of such statutes.[1] At common law, a contingent interest was so nebulous as to be lacking in many of the incidents of property. However, states having the latter type of statute have much more trouble construing their statute so as not to include contingent claims. These non-claim statutes have the effect of a special statute of limitations and if the claims are not presented within the time allowed,[2] they are barred forever.

> The Montana statute reads that all claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever.[3] In connection with this statute, attention should be called to another which states that no holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator.[4]

In *Nathan* v. *Freeman* the Montana Supreme Court held that a contingent claim on the executory contract in suit need not be presented before action is brought thereon against the estate. In that case, a lessee took a lease of real property to be used as a motion picture theater. It was agreed that after the

[1] 1 ATKINSON, WILLS (1st ed. 1937) §237, p. 656.
[2] The time expressed in the notice must be ten months after its first publication when the estate exceeds in value the sum of ten thousand dollars, and four months when it does not. R.C.M. 1935, §10171.
[3] R.C.M. 1935, §10173. (Same as Cal. Prob. Code 1937, §707; and Cal. C. Civ. Proc. 1923, §1493).
[4] R.C.M. 1935, §10180. (Same as Cal. C. Civ. Proc. 1923, §1500).

termination of the lease, the lessee would restore the property to its original condition as it was before the alteration. The lessee died before such termination and the lessor brought action for breach of contract without presenting his claim in probate. The Court held that such a claim was not required to be presented saying that R.C.M. 10173 refers only to indebtedness of a deceased person, contracted by him during his lifetime, and then existing.[5]

However, California Courts on similar facts have held that such claims must be presented within the time allowed under penalty of being forever barred. In *Verdier* v. *Roach* the lessor covenanted to indemnify the lessee from damage by water during the lease term. The lessor died and a claim for damages accrued thereafter and after the time to present claims had expired. The Court held this to be a contingent claim which must be presented and was therefore barred.[6] In another California case a contractor agreed to indemnify and save the plaintiff harmless against claims arising out of the work performed. The plaintiff presented a claim against the contractor's estate within the time allowed although a claim on the contract had not yet arisen. The Court held that such presentation was proper.[7]

Utah follows the California decisions saying that such contingent claims must be presented or they are barred. This was the language used where an agent was to manage a building and collect rents for a ten year period at an agreed compensation and after four years, the principal died. After the period for filing claims had expired, the executor breached the contract by discharging the agent. It was held that the agent's action on such breach was barred although, during the running of the non-claim period, he had no reason to believe that the executor would breach the contract.[8]

North Dakota[9] and most of the states having statutes like Montana's agree that contingent claims must be presented although they have not become absolute and are not liquidated in amount.[10]

[5](1924) 70 Mont. 259, 225 P. 1015.
[6](1892) 96 Cal. 467, 31 P. 554.
[7]Southern Pac. Co. v. Catucci (1941) 47 Cal. App. (2d) 596, 118 P. (2d) 494.
[8]Halloran-Judge Trust Co. v. Heath (1927) 70 Utah 124, 258 P. 342.
[9]Johnson v. Larson (1927) 56 N.D. 207, 216 N.W. 895; Graber v. Bontrager (1939) 69 N.D. 300, 285 N.W. 865.
[10]1 ATKINSON, WILLS (1st ed. 1937) §237, p. 656.

Minnesota[11] and Oklahoma,[12] in accord with Montana, have held that some contingent claims need not be presented.

All these states have statutes substantially the same as Montana's[13] and thus the difference in decisions turns in some little measure on statutory construction.

Montana interprets section 10173 as meaning that claims existing before death must be presented and those arising after death need not be. "Claim" has reference only to those which existed against the decedent lessee at the time of his death, not to those subsequently arising during the administration of his estate.[14] Claims under the non-claim statutes are such as exist "at the time of the death of the deceased" or grow out of a contract, act, or omission of a decedent during his lifetime.[15] The statute is treated as referring to a contingency based on the act of the deceased. The word "arising" seems to be treated as requiring the claim to be in existence at death. The distinction is pointed out in the principal case, the Montana Court illustrating by saying that the statute would be applicable to rentals to become due under a lease after the death of the lessee being "a claim arising upon a contract . . . not due."[16] Minnesota and Oklahoma follow this interpretation.

California, however, makes no such distinction. It takes the very literal interpretation as do the states concurring with its decisions. They do not consider the words "claims" and "arising" as determinative as Montana does but, instead, all the weight of the statute seems to be placed on the word "contingent." Webster defines contingent as depending on something that may or may not occur. Nebraska says that a contingent claim against an estate is one where liability depends on a future contingent event rendering it wholly uncertain whether there ever will be a liability.[17] Woerner states that a "contingent claim is where the liability depends upon some future event, which may, or may not, happen, and therefore makes it wholly uncertain whether liability will ever arise."[18]

[11]Hantzch v. Massolt (1895) 61 Minn. 361, 63 N.W. 1069; McKeen v. Waldron (1879) 25 Minn. 466.
[12]O'Neill et al. v. Lauderdale (1921) 80 Okl. 170, 195 P. 121.
[13]Minn. C. Civ. Proc. 1921, §8812; N.D. C. Civ. Proc. 1913, §8736; Okl. C. Civ. Proc. 1921, §1234; Utah C. Civ. Proc. 1933, §102-9-4.
[14]Nathan v. Freeman, *supra*, note 5.
[15]Dodson v. Nevitt (1885) 5 Mont. 518, 6 P. 358.
[16]Nathan v. Freeman, *supra*, note 5.
[17]Parker v. Luehrmann (1934) 126 Neb. 1, 252 N.W. 402.
[18]2 WOERNER, AMER. LAW OF ADMINISTRATION (3rd ed. 1923) §394, p. 1276.

In the light of these definitions and the wording of the statutes, it is not at all difficult to follow the California Court's reasoning.

The rule that the construction placed on a statute by the highest Court of another state from which it was borrowed, before it was adopted in Montana, is controlling here, will not be followed if the decision construing it be not founded upon correct reasoning.[19] The reasoning of the California Court is treated as incorrect for Montana's purposes, sense of justice and logic. It is true that Montana probably felt constrained to administer, as the Utah Court put it,[20] "abstract justice in the case notwithstanding the plain, unambiguous words of the statute," but justice it certainly is. The plaintiff has a lawful claim which should be satisfied.

Some Courts draw an analogy between bankruptcy and probate proceedings as to presenting contingent claims of this nature and reason somewhat on the order that where a claim must be presented in bankruptcy, so should a like claim be presented under the non-claim statute. But upon a close study of the two proceedings, it will be seen that they are different in this respect. A determination in bankruptcy on this point should not rule in probate. The purposes of the two proceedings and the reasons for requiring presentment are quite different. Bankruptcy is primarily for the purpose of discharging an honest debtor and at the same time paying all creditors, whose claims would be discharged, at least their pro rata share. In order to effect a discharge and thus give the debtor a new start, it is necessary that most claims be treated as provable since those not so treated are not discharged. There is more reason too from the creditor's standpoint for letting one with a contingent claim come in since there might never be any other assets and he should get his share. The bankrupt is discharged from all provable debts and since this includes contingent liabilities, they are discharged in bankruptcy.[21] Although these aims prevail, still the bankruptcy Court won't allow such a claim if it is not capable of liquidation or of reasonable estimation or if such liquidation or estimation would unduly delay the administration of the estate or any proceeding under the act.[22]

[19]Leffek v. Leudeman (1933) 95 Mont. 457, 27 P. (2d) 511.
[20]See Halloran-Judge Trust Co. v. Heath, *supra*, note 8, 349.
[21]In re Tastyeast Inc. (C.C.A. 3rd, 1942) 126 Fed. (2d) 879.
[22]*Bankrupt Act of* 1898 *as Amended by Chandler Act*, (1938) §57 (d), p. 51.

The purpose of administration of a decedent's property is to collect the assets, pay deceased's creditors from the amount so realized, and distribute the balance to persons entitled thereto under the will or intestate laws.[23] Presentation of claims is intended to bring about the expeditious and efficient settlement of estates.[24] It is designed for the protection of the estate and all interested therein and to compel those having claims against the estate to present them within a limited time in order that the estate may be closed up speedily. The purpose is that the administrator may be apprised of the facts so that he may act advisedly in passing upon the merits of the claim presented.[25] The Idaho Supreme Court states that the purpose of requiring the presentation of claims against estates is, first, to furnish the administrator with pertinent evidence touching the validity and justice of such claims, by which means he may determine whether they ought to be paid out of the funds of the estate, and second, to enable him to justify his acts, in some measure at least, in accounting with the probate Court.[26] Requiring such purely contingent claims to be presented seems to run counter to the aim of a speedy and efficient administration. Time would be lost in attempting to determine the worth of such a claim and the administrator would certainly be more troubled in administration if all contingent claims had to be contended with. The ones discussed in this treatise might well be incapable of satisfactory liquidation, and money or property would possibly be lying idle in Court awaiting the maturing of a contingency. Even in a bankruptcy Court a contingent claim will not be allowed when it will unduly delay the administration of the estate and in that proceeding, contrary to probate, the creditor may never have another chance to get satisfaction. There is no guarantee that the bankrupt will ever again get assets which one with a non-discharged claim will be entitled to apply to his claim.

After an estate is administered through probate proceedings, that is not the end to the property since it is still in existence so that the creditor can get at it when his claim matures. Under some circumstances, the holder may maintain an action against the legatees, devisees, next of kin, or heirs, to the ex-

[23]Jones v. Peabody (1935) 182 Wash. 148, 45 P. (2d) 915, 100 A.L.R. 64.
[24]State ex rel. Steinfort v. District Court (1940) 111 Mont. 216, 107 P. (2d) 890.
[25]Nevin-Frank Co. v. Hubert (1923) 67 Mont. 50, 214 P. 957.
[26]Flynn v. Driscoll (1924) 38 Idaho 545, 223 P. 524; See also 41 A.L.R. 145.

tent that they have shared in the estate.[27] An eminent authority has said that the remedy of a creditor whose right of action accrued after the time in which claims may be presented against the estate while under administration is generally in equity or in some states at law, and may be enforced against distributees to the extent of the property received by them.[28] Given some development of this device, it is believed that it would admirably take care of the problem of contingent claims. Thus there would be no danger that the creditor would not be reimbursed. The contingent creditor would also be more certain of recovering the full amount of his claim since it is quite possible and very probable that the court might underestimate the worth of the contingent claim in setting aside the amount in court to cover it when it becomes absolute. Where the statutory remedy doesn't adequately cover the situation, a Court of equity has undoubted jurisdiction to adjudicate the future claim and order sufficient assets retained by the representative on distribution of the estate to discharge it when due.[29] By this it appears that the creditor could choose between this equitable remedy before the administration of the estate is completed and a legal remedy thereafter against the heirs, devisees, and legatees when the claim becomes due.[30] The Oklahoma Supreme Court suggests a remedy along this line saying that the weight of authority is to the effect that where a claim against the estate does not accrue or become enforceable until after the administration of the estate which has been distributed and passed into the hands of the heirs, its collection may be enforced by a direct action in the District Court, against the heirs of the deceased, and they may be held

[27]McKeen v. Waldron, *supra*, note 11. Under some statutes it must be presented to the probate court if the holder wants to look directly to the assets of the estate for payment instead of pursuing the personal representative. Gross v. Thornson's Estate (1918) 286 Ill. 185, 121 N.E. 600.

[28]3 WOERNER, AMER. LAW OF ADMINISTRATION (3rd ed. 1923) §579, p. 1982.

[29]Petrie v. Voorhees (1867) 18 N.J. Eq. 285; Banker's Surety Co. v. Meyer (1912) 205 N.Y. 219, 98 N.E. 399, Ann Cas. 1913D 1218.

[30]If the creditor would choose the equitable remedy, it would probably be because the value of the claim is easily estimated otherwise he would wait until it matures. Having this choice, he would be assured of a recourse. As to the adequacy of the legal remedy being a bar to equitable action, the creditor should be able to show, when necessary, that the legal remedy as to him is inadequate because of waiting too long, probability of not getting anything, or the like and thus get the estimated amount into Court awaiting maturity of his claim. To make it more certain, such choice and election could be incorporated into the statutes.

liable to the extent of the assets received by them from the estate.[51]

Is this not then the better procedure? Atkinson believes that there is every reason why a Court should construe its statutes if possible so as not to require the presentment of purely contingent claims. The devices to secure the payment of unmatured claims are scarcely applicable. It would be burdensome and might be impossible to require the legatees to give bond for the satisfaction of such claims as is done to satisfy unmatured claims which are fixed. It would be unreasonable to postpone the final settlement of the estate until the contingency has occurred for this may not happen until many years after decedent's death, or indeed may never take place. Moreover even a careful holder of a contingent claim would scarcely present or file it where, as in the Utah case, he had no means of knowing that the executor would discharge him on his ten year contract after the non-claim period had run. And so also it could be reasoned as to the holder of a warranty deed, a guaranty or a bond the breach of which has not yet occurred during the non-claim period. Finally if such claims are filed, their number and tentative nature might cause perplexities in the administration to no practical advantage.[52] The Montana Court, in speaking of the California decision of *Verdier* v. *Roach*, gave some more reasons: There is no way on earth by which the happening of the event could have been anticipated, nor by which the possibility of its occurrence could have been foreseen, nor was it possible in advance to determine the nature, character or extent of the resulting damage. We cannot and will not give indorsement to such a construction of the statute.[53] California[54] has said that it is quite as important that contingent claims should be presented for allowance as that absolute claims should be presented; otherwise provision cannot be made for them before the estate is settled;[55] timely notice of all claims which may prejudicially affect the estate should be given, so that the administrator may have an opportunity to investigate their merits and contest

[51]O'Neill v. Lauderdale, *supra*, note 12.
[52]1 ATKINSON, WILLS (1st ed. 1937) §237, p. 657.
[53]See Nathan v. Freeman, *supra*, note 5, 270.
[54]See Verdier v. Roach, *supra*, note 6, 558.
[55]By not requiring purely contingent claims to be presented and by giving the creditor the election between an equitable remedy before administration is completed, to estimate the amount of his claim and impound such amount in Court, and the legal remedy against the heirs after administration of the estate, there is no need that provision be made for them before the estate is settled.

them, if advisable, before evidence of their invalidity shall be lost; no greater hardship results from barring contingent claims if not presented within the time prescribed by law, than results from barring absolute claims. But with due respect to the California Court and granting the hardship in both instances, one is normally less likely to present a purely contingent claim than an absolute one whether for lack of knowledge of the law or a feeling that one has no claim until breach and the claim becomes fixed.

The Montana reasoning seems more just in view of the fact that the amount cannot be definitely determined and thus it is necessary for the creditor to rely on the estimate given by the Court. This might very easily and often does result in his getting a proportionally slight amount in probate administration. An example of this is in a bankruptcy case where the bankrupt's contingent interest in a trust estate was sought to be sold under execution to satisfy his debts. Under the law of Maryland, this could not be done and the court commented on the wisdom of this rule saying his interest was entirely speculative depending on his surviving his mother and no one is willing to pay any considerable amount. The trust property had a value of many thousand dollars and under a sale, invalid by Maryland law, the bankrupt's contingent interest was sold for the paltry sum of $325. The Court further said that it is unjust to seize and destroy an interest which is so uncertain and contingent that it cannot be fairly sold or appraised.[36] The same applies in probate proceedings when it is necessary for the Court to determine the value of a highly speculative contingent claim. Waiting until the contingency occurs and then bringing suit for that definite amount would be to the best interest of the creditor and since the heir shouldn't get clear title to the decedent's property until all claims are paid out of it, such heir would not be out anything.

The statutes have hit upon a middle ground between Civil[37] and Common Law[38] liability of the heirs and devisees now allowing recovery only to the amount of property received

[36]See Suskin & Berry Inc. v. Rumley (C.C.A. 8th, 1930) 37 F. (2d) 304.
[37]1 ATKINSON, WILLS (1st ed. 1937) §198, p. 528. At Civil Law the heir steps in place of the ancestor at once with the latter's full rights and burdens and the additional obligation of paying legatees according to the latter's will. If the heir takes as universal successor, he must pay all debts although they may exceed the value of the estate.
[38]1 GARDNER, WILLS (2nd ed. 1916) §162, p. 529. At the Common Law the debts of the testator was payable only from his personal property unless, by the will, the realty was charged therewith.

by them[39] so there is no hardship on them in allowing the holder of a purely contingent claim to bring suit against them when it becomes due.

Utah recognizes the need for a change in their decisions but states that it is a matter of a change in legislation.[40] The Montana decision that the non-claim statute has no application to claims arising out of contracts executory at the time of death finds support as regards contingent claims dependent on the happening of some event in the future in the Minnesota cases. But for the broad proposition in the main opinion that the statute has no application to claims arising subsequent to the death of the contracting party because of existing executory contracts, there seems to be no other authority.[41] Montana apparently stands alone on this broad proposition as to claims arising under executory contracts, finding partial support in the Minnesota and Oklahoma cases previously cited. Perhaps the Court in the principal case did not intend that its language should be taken so broadly as is indicated. Since an executory contract by operation of law becomes the obligation of the personal representative and he may be made to pay damages for breach thereof out of the estate,[42] this seems to lend support to the position taken in Montana. In addition, this should be more reason for not requiring presentment of purely contingent claims since one could easily rely on this operation of the law and thus wait for a breach and consequent suit for damages.

A much better practice would be to omit the requirement that such purely contingent claims, like those discussed in this comment, be presented and to permit suit against the devisees, legatees, and such others as receive the decedent's property, after the contingency has occurred if such happens after the administration is completed. This remedy is often allowed either by statute or upon equitable principals.[43] Montana also

[39]Under statutes, all the property passes subject to the debts of the ancestor, excepting so far as personal exemptions are made e.g. homestead. O'Neill v. Lauderdale, *supra*, note 12.

[40]Halloran-Judge Trust Co. v. Heath, *supra*, note 8.

[41]144 A.L.R. 149.

[42]Nathan v. Freeman, *supra*, note 5; Janin v. Browne (1881) 59 Cal. 37; McCann v. Pennie (1893) 100 Cal. 547, 35 P. 158; 1 ATKINSON, WILLS (1st ed. 1937), §226, p. 618; 11 Cal. Jur. 970; 24 C.J. 53.

[43]Parks v. Murphy (1924) 166 Ark. 564, 266 S.W. 673; Zollickoffer v. Seth (1876) 44 Md. 359; Forbes v. Harrington (1898) 171 Mass. 386, 50 N.E. 641; O'Neill v. Lauderdale, *supra*, note 12; State v. Burnes (1908) 129 Mo. App. 474, 107 S.W. 1094; Chitty v. Gillett (1915) 46 Okl. 724, 148 P. 1048, L.R.A. 1916A 1181; Logan v. Dixon (1889) 73 Wisc. 533, 41 N.W. 713.

seems to contemplate such in its statute providing that no suit shall be brought against devisees and legatees to contribute to payment of a claim by excepting from the operation thereof, creditors whose claims were not due ten months before the day of settlement or whose claims were contingent and did not become absolute ten months before such day."

It is believed that good legislation on this point should provide that: All absolute claims whether matured or unmatured, liquidated or unliquidated, shall be presented within ten months or be forever barred. Claims which are contingent as of the date of death of the deceased and which become absolute within the ten month's period shall be presented as fixed claims or be forever barred. If such contingent claims become absolute after the ten month period but before the estate is settled, they may be presented as a claim against the estate subject to the right of the personal representative to reject the claim on the ground of undue delay and embarrassment to him in the final administration of the estate. If such contingent claims becoming absolute after the ten month period are presented and rejected or if not presented to the administrator, suit may be brought against the heirs, devisees and legatees, each being held according to the proportion of the decedent's property each received.

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"R.C.M. 1935, 10314. When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor, whose claim was not included in the order for payment, has any right to call upon the creditors who have been paid, or upon the heirs, devisees, or legatees, to contribute to the payment of his claim; but if the executor or administrator has failed to give the notice to the creditors, as prescribed in section 10171, such creditor may recover on the bond of the executor or administrator the amount of his claim or such part thereof as he would have been entitled to, had it been allowed. This section shall not apply to any creditor whose claim was not due ten months before the day of settlement, or whose claim was contingent, and did not become absolute ten months before such day

EFFECT OF PRIOR CONTRADITORY STATEMENTS IN IMPEACHMENT

The unorthodox view,[1] that prior self-contradictory statements are not only admissable for impeachment purposes but also as evidence of the fact contained in the prior statement, was adopted by the Montana Supreme Court in *State* v. *Jolly*.[2]

The defendant was being prosecuted for receiving stolen

[1]3 WIGMORE, EVIDENCE (3d ed. 1940) §1018, p. 687.
[2](1941) 112 Mont. 352, 116 P(2d) 686.