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Creditors' Claims in Probate; What Claims Must Be Filed within the Period of the Non-Claims Statute

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cases as moves in the right direction, then it is suggested that the contract clause, as amended, of the corresponding Texas venue statute be looked to.[63] Since that amendment, the Texas law on the point seems to have become fairly well established.[64]

Should the Legislature wish to adopt something similar to what has been called, *supra,* the compromise solution, it would seem in order to word the two sentences of Section 93-2904 in the alternative; to specifically include all contracts, whether express or implied; to provide that it is the defendant's performance, or part of that performance, to which reference is made; and to provide for either the application of ordinary rules of contract interpretation, or for a special rule of legal implication. The contract clause of the justices' courts venue statute could serve as a model.[65]

But should the Legislature, in the interests of procedural stability, consider a return to the rule of the *Interstate* line of cases desirable, then it is suggested that the contract-tort clause be placed ahead of the general venue section with the other exceptions; that the clause specifically include all contracts, express or implied; that it provide that it is the defendant's performance, or part of that performance, to which reference is made; and that it provide for either the application of the ordinary rules of contract interpretation, or for a special rule of legal implication, as in the venue statute for justices' courts.

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[63] *Supra,* note 48.
[64] See, e.g., Port Iron & Supply Co. v. Casualty Underwriters (1938) 118 S.W. (2d) 627; Rowan Drilling Co. v. Le Bus et al. (1938) 119 S.W. (2) 97; Johnston et al. v. Personius (1951) 242 S.W. (2d) 471.
[65] R.C.M. 1947, § 93-6601.

CREDITORS' CLAIMS IN PROBATE; WHAT CLAIMS MUST BE FILED WITHIN THE PERIOD OF THE NON-CLAIMS STATUTE

The Montana non-claim statute applying to the filing of creditors' claims in probate reads as follows:[1]

> 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; provided, however, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or judge, that the claimant had

[1] R.C.M. 1947 §91-2704.

> no notice as provided in this chapter, by reason of being out of the state, it may be presented at any time before an order of distribution is entered; and, provided, further, that nothing in this chapter contained shall be so construed as to prohibit the right, or limit the time, of foreclosure of mortgages upon real property of decedents, whether heretofore or hereafter executed, but every such mortgage may be foreclosed within the time and in the manner prescribed by the provisions of this code, other than those of this chapter, except that no balance of the debt secured by such mortgage remaining unpaid after foreclosure shall be a claim against the estate unless such debt was presented as required by the provisions of this chapter.

Our statute refers only to contract claims and necessarily excludes tort claims arising during the decendent's life from the condition precedent of filing a claim before bringing an action against the estate for damages. In allowing the bringing of such a claim after the expiration of the statutory period, one case[2] held such a claim must be reduced to judgment before the amount owed the claimant can be determined. The court also said that "the character of claims (necessarily presented) . . . are such as have come into existence by contract, express or implied." Outside Montana, the decisions are conflicting on the necessity of presenting tort claims. In any event, action must be brought and the claim liquidated by a judgment in the plaintiff's favor prior to the expiration of the non-claim period or, at any rate, final settlement and discharge of the personal representative. Since the period for the presentation of claims has been shortened by recent Montana legislation[3] with consequent earlier final settlement in the offing, tort claimants would be well advised to promptly adjudicate their tort claims in the appropriate tribunals.

Our statute commences to run from the time of the first publication of notice to creditors by the personal representative of the deceased.[4] Claims must be presented within four months of such date, else they are forever barred.[5] And such claims must be presented to the personal representative[6] as distinguished from

[2]Hornbeck v. Richards, 80 Mont. 27, 257 P. 1025 (1927).
[3]R.C.M. 1947 §91-2702.
[4]*Supra*, note 3.
[5]*Supra*, note 3. This section was amended in 1953 to make the period four months for all claims regardless of the size of the estate. Prior to this time, the period was 10 months for estates of $10,000 or over, 4 months for those estates under that amount.
[6]R.C.M. 1947 §91-2705.

those states requiring presentment to the court. Should the personal representative also be a creditor of the estate, he must file a claim against the estate.[7] No suit may be brought until such claim is filed with the personal representative,[8] therefore the suit papers would not be a notice of the creditor's claim as intended by the statute. It is undecided in Montana as to whether a personal representative may waive the statutory period, but our courts would undoubtedly follow the majority rule and not allow it.

Montana follows the majority rule in holding that no claim need be presented in actions of ejectment,[9] and specific performance,[10] and it can be safely assumed our court would follow the majority in ruling the same in actions for replevin,[11] suit to quiet title,[12] or a suit to impress a trust on specific property.[13] Such claims are not claims of creditors as contemplated by the legislation, but rather are for possession of property by virtue of the claimant's ownership, rather than a claim against the estate.

Presentation of claims upon a mortgage on a specific piece of property is specifically excluded by the statute. But should the property be insufficient to meet the debt, and a deficiency exists, it must be presented as a claim within the statutory period.[14] A mortgagee would be well advised to present his claim even though the debt is represented by a mortgage, regardless of how sufficient the value of the property may seem to him.

Atkinson[15] suggests breaking the claims of creditors into three classes; matured, unmatured and contingent. Such a classification can very aptly be applied to our statute, which specifically refers to ". . . contract claims due, not due, or contingent." For the sake of clarification, the status of Montana cases will be discussed under these headings.

(1) *Matured claims*: This division can further be divided into two classes; (a) those maturing before death and (b) those maturing after death. No difficulty should be reached in this category as indisputably, both must be presented within the statutory period. But those *maturing* after death must be distinguished from those *arising* after death, such as those for funeral

[7]R.C.M. 1947 §91-2722. See In re Rodger's Estate, 68 Mont. 46, 217 P. 678 (1923).
[8]R.C.M. 1947 §91-2711.
[9]Lamme v. Dodson, 4 Mont. 560, 2 P. 298, (1883).
[10]In re Estate of Banks, 80 Mont. 159, 260 P. 128 (1927).
[11]Moore v. Moore, 141 Miss. 795, 105 So. 850 (1925).
[12]McGuire v. Cunningham, 64 Cal. App. 536, 222 P. 838 (1923).
[13]Elizade v. Elizade, 137 Cal. 634, 70 P. 861 (1902).
[14]Mathey v. Mathey, 109 Mont. 467, 98 P.2d. 373 (1939).
[15]ATKINSON ON WILLS, Page 654.

expenses, administration expenses *etc.*, as these become by operation of law the obligation of the decedent's personal representative.[16]

(2) *Unmatured claims*: Claims which will become due after the non-claim statute has run must be presented within the non-claim period. If the unmatured claim is liquidated no difficulty should arise as it differs from a matured claim only in that it is not yet due. Our statutes do not provide for the proper manner in which to deal with such claims by the personal representative, but once again we may refer to Atkinson[17] wherein he suggests three plausible methods; (a) The amount to be due in the future can be discounted to its present value and that sum paid at once to the creditor; (b) the representative may retain a sum sufficient to pay the obligation at maturity; or (c) distribution can be made to the heirs who will be required to give a bond for payment of their respective shares of the claim when it becomes due. In the absence of authority to the contrary, it would seem that the court could apply the most appropriate method for payment of the unmatured claims, depending on the facts. But by requiring the presentation of unmatured claims, such creditors are placed in the same position as matured creditors, in that they too are under a duty to seek payment before distribution to the heirs. It would seem that unliquidated, unmatured claims should be presented during the period as though liquidated, even though our courts have distinguished unliquidated, contingent claims from liquidated, contingent claims.[18]

(3) *Contingent claims*—defined by Webster as being "an event which may occur; a possibility; a casualty." In determining what is required to be presented under our codes, our courts have placed Montana in a definite minority of states in not requiring the presentment of such claims. The contingent claim cannot be treated in the same manner suggested for a matured claim as the contingency may never occur. The final distribution of the estate cannot be delayed as it may be years before the happening of the event contemplated, or it may never occur. The same argument is suggested against the requirement of bond by the heirs. Presentation of contingent claims could involve the estate in administrative difficulties that could not be satisfactorily determined. On the other hand, there are several valid reasons why contingent claims should be presented; namely, so provision may be made for them, or so that any claim prejudicial

[16] *Infra* note 20.
[17] ATKINSON ON WILLS, Page 655.
[18] *Infra*, note 20.

to the estate may be investigated and contested if advisable before evidence of the invalidity of the claim is lost.[19] The overwhelming majority of the states are persuaded by the latter reasoning as outweighing the difficulties such claims present, in requiring that they be filed with the personal representatives.

Nathan v. Freeman,[20] decided in 1924 but still prevailing in our state, placed Montana in a decided minority, by holding the statute does not apply to obligations arising after the death of the decedent out of an executory contract entered into before death. In this case, the decedent was a lessee of a building owned by the plaintiff. The lease required the lessee to stand all expenses required to place the building in the condition it was in when the agreement was entered into, and to pay for any additional assessment that might be made against the lessor for any addition the lessee might add to the building. After the lessee's death, his administrator carried on the business for a time, but on failure to pay the rent, the lessor terminated the lease. No claims were filed within the period required. The court refused to allow the rentals that were to become due on the ground that they were not presented within the statutory time, since they were within the classification of claims "not due." But as to the claims for damages for failure to restore the building to its original condition, and for the money plaintiff had to expend for assessments after the death of the lessee, it was held that no claim need be presented under the statute. It was at this point that the court varied from the majority view. The theory relied upon by the court was based on the fact that this was an obligation arising subsequent to the death of the promisee on an executory contract. Quoting from the decision, the court said;

> ". . . these statutes of nonclaim have reference to an indebtedness existing at the time of the decedent's death, not to such as arise subsequently by reason of a breach of the executory contracts of the deceased. Such claims are incident to the administration of the estate . . . the executor alone is liable either personally or in his representative capacity, dependant on the facts."

But was not the court erroneous in the decision in the face of our code which expressly provides for presentment of contingent claims? It seems to their writer that the court attempted to place the claim in a category reserved for claims *arising after* the death of the decedent as to which the non-claim period would

[19]41 ALR 146.
[20]70 Mont. 259, 225 P. 1015 (1924).

not apply. It is unfortunate that the court did not discuss what claims would then fall under the classification of "contingent" should these be excluded. The decision is contrary to our code as it abolishes the possibility of presentment of any claim contingently existing at death but becoming fixed and absolute after the death of the decedent and is this not what is meant when the statutes refers to a "contingent" claim? Is not an inchoate claim in existence before death, even though the contingency occurs after death, upon which liability depends?

The court recognized the majority view as expressed in *Verdier v. Roach*[21] but expressly refused to follow it. The facts of the *Verdier* case are similar to the *Nathan* case in that an agreement was entered into by the deceased lessor with the plaintiff lessee to keep the lessee harmless for any water damage occurring to the plaintiff's property due to water. Plaintiff remained in possession after the lessor's death and presented no claim during the statutory period. Two years after death, plaintiff's property was damaged as anticipated by the lease, but the claim was denied as it was an existing, valuable claim against the estate during the statutory period and if it had been presented, the administrator could have made due allowance for the happening of the contingency. If still contingent on settlement of accounts, the amount the claimant would be entitled to could be paid into court. The court recognized that difficulties very probably would arise in providing for payment of a liability that is unliquidated and may never occur, but concluded that the difficulties could have been overcome due to general jurisdiction of the probate court. This case seems to be the better reasoning based upon a statute reading as does ours, and the legislative purpose for a quick and satisfactory conclusion of probate and disbursement to the heirs of property free from any claim. It is submitted the *Nathan* case is contra to our statute.

However, there are practical difficulties under a statute requiring the presentation of contingent claims, viz;

(1) The ordinary man would hardly think of presenting a claim regarding something he could often not anticipate as occurring, and,

(2) The court would have difficulty in estimating the present worth of a possible future claim which might never arise.

It, therefore, is believed that non-claim statutes might well be framed so as not to require the presentation of purely contingent claims, allowing distribution to the heirs, and provide

[21]96 Cal. 467, 31 P. 554 (1892).

that, if in the future, the contingent claim ripens into a fixed claim, the creditor then have a right against the heirs to the extent they received valuable property from the deceased.

Thus, such a statute might provide that: All absolute claims, whether matured or unmatured, liquidated or unliquidated, shall be presented within four months of the first publication of notice or be forever barred. Claims which are contingent as of the death of the deceased and which become absolute within the four months period shall be presented as fixed claims or be forever barred; those becoming fixed thereafter, and before final distribution, *may* be presented subject to the right of the personal representative to reject the claim on the grounds of delay and inconvenience in getting his accounts ready for final distribution, and, if the claim should be rejected under this latter category or should become fixed even later, the creditor should have a right against the heirs, devisees and legatees to the extent they participated in the bounty of the deceased.

A somewhat similar problem is presented in bankruptcy. Section 63(a)8 of the Federal bankruptcy statute makes contingent claims provable, but section 57(d) provides that the claim shall not be allowed unless the amount thereof is estimated in the manner and within the time directed by the court, or if it is determined that it is not capable of estimation, or estimation would unduly delay the administration of the estate. The bankruptcy court is, however, concerned with making claims provable where possible, since if not provable, the debtor is not discharged therefrom; also, the limited assets being distributed in bankruptcy are probably all that will ever be available to the creditors. In decedent's estates, the question of a discharge is not involved. Moreover, the majority of decedent's estates are not insolvent, and no great injury is, therefore, apparent to contingent creditors in requiring that they proceed against the heirs.

II.

SPECIFIC PERFORMANCE OF AN AGREEMENT TO DEVISE

Remarkably enough, contracts to devise for consideration rendered during the life of the promisor are not uncommon. Accordingly, a study of the remedy of specific performance under our non-claim statutes is appropriate at this point. The term "specific performance" cannot be employed in its strict sense in this situation, as the court cannot make a will to comply with the promise after the death of the testator. It is rather a remedy that would regard the personal representatives or the heirs, de-

visees or legatees as holding the property in question in trust for the benefit of the promisee. The quetion then presented, after determination of the right to the remedy of specific peformance, is whther the promisee is a *creditor* as contemplated in our statutes, or if he is rather a person who need not present a claim within the statutory period.

Erwin v. Mark[22] is the authoritative case in Montana. In that case the promisee managed the personal affairs of the testator during her life in consideration of a promise to leave the promisee a legacy in the amount of $4,000. The testator left a will with the agreed clause contained therein, but when the will was admitted to probate, a petition was presented to revoke the probate of the will. The plaintiff herein made no claim as a creditor during the statutory period, and nine months after the period for presentment of claims had expired, the will was revoked. Plaintiff then brought this action for specific performance of the contract, and asked that the defendants, the heirs of the promissor, be declared to be trustees for the plaintiff to the extent of $4,000. The defendants contended plaintiff's remedy at law was adequate as he could have presented his claim according to the statute, and brought suit thereon if it had been rejected. The court found the services rendered by the plaintiff were of such nature as would not permit the court to determine the money value of the services.[23] Specific performance was granted, the court holding the claim was not required to be presented during the period reserved for claims of creditors on the theory as represented in the following quotation from the decision:

> "The statute of nonclaim does not refer to claims of title, or for the recovery of property, for the reason that claims of such a character cannot in any just sense be said to be claims against the estate of the deceased. On the contrary, the right of recovery is based upon the fact

[22]105 Mont. 361, 73 P.2d. 537, 113 ALR 1064 (1937).

[23]The services rendered were determined to be of confidential and personal offices as could only be performed by a close relative or friend and could not be purchased on an employment basis, and thus could not be determination on quantum meruit.
A study of cases would allow the following to be important considerations to determine if specific performance would lie for a promise to bequeath in return for consideration for services rendered:

(1) The relationship of the promisor and promisee.
(2) The type of service rendered: ie, was the element of love or devotion necessary to render the service.
(3) The reasons for the desire of the promisor such services be rendered.
(4) Was it in the contemplation of parties involved that such services be compensated in money?

> that the property claimed does not belong to the estate, but belongs to the party asserting title to it.'"[24]

That a valid contract may be entered into to dispose of property by will[25] is a rule recognized in all the states. And it is equally well recognized that such a contract is subject to specific performance in that a trust will be declared in favor of the promisee against the person or persons who presently have the property in question in their hands.[26] But the question of which contracts are entitled to specific performance must then be determined.

The defendants in the Erwin case contended therein that an exception existed to the general doctrine, namely that when the agreement specifies a sum certain in money there is an adequate remedy at law for breach of contract. There seems to be serious conflict at this point, but the Montana court held such an exception does not exist. Once again the court reasoned on the basis of the type of claim contemplated in the statute. Recognizing the difference between a claim against an estate and a claim based on a right of ownership, they refused to rule an agreement for a sum certain in money would allow an adequate remedy at law in the latter instance. Such a claim, they reasoned, could not be satisfied until after the debts contemplated by the statute had been allowd and paid. The plaintiff could not determine the amount of the claim until after the claims had been satisfied, which would of necessity not be until after the statutory period had run. Plaintiff was claiming as a distributee, and if the estate had been insufficient to satisfy these debts, the plaintiff would receive nothing. But to require him to file a claim would but make him a preferred distributee who would take pro-rata with the creditors and before the other distributees under the will. Thus the court reasoned:

> "According to the allegations of the complaint, plaintiff is not a creditor of the estate, in the sense that her claim would have to be paid ahead of the bequests in case a will were left by the deceased. By the very terms of the contract she was to become the beneficiary of a bequest in the sum of $4,000. Whether she would actually get that amount would depend upon, first, the amount of debts owing by deceased, and second, whether after the debts

[24]The court is quoting from Fred v. Asbury, 105 Ark. 494, 152 S.W. 155 (1912). It should be noted though, this case deals with a promise to leave "all my estate" rather than a specific sum.

[25]Burns v. Smith, 21 Mont. 251, 53 P. 742 (1898).

[26]PAGE ON WILLS (2nd. Edition) Vol. 1, §107. The subject matter is annotated in 113 ALR 1070, wherein it is recognized certain statutes may expressly require the presentation of such a claim. This is not the case in Montana.

> were paid, there was sufficient property in the estate to pay all legacies in full. These issues could not be settled in an action at law for damages."

This was held to be sufficient to require specific performance regardless of the type of services rendered, as the plaintiff could not determine the exact amount of money to which he was entitled and so an action at law would not give adequate compensation, as damages could not be determined.

Although the latter, in regard to the type of services being immaterial, is merely dictim of the court, it is felt that such is not the law. Should the services be of an ordinary nature, damages can be determined on a quantum meruit basis[27] in a court of law. This, of course, is true only when the property is still in the hands of the personal representative as a court of law cannot declare a trust in favor of the promisee. So such a claim, for services not of extraordinary value, must then be presented during the statutory period.

The conflict that exists is then grounded upon the question of whether "an agreement for a sum certain in money" is of such a nature as to allow determination of the value of the claim in a court of law, rather than in a proceeding in equity. The view of the Montana court in the *Erwin* case is upheld in the case of *Ashbauth v. Davis*,[28] an Idaho decision, which relied upon the *Erwin* case in deciding that specific performance would be granted regardless of the fact that the promise to be enforced was for a sum certain in money. Therein, the Idaho court said:

> "The fact that the promised bequest is a sum certain, or ascertainable, in money does not appear to be a controlling factor."

The court felt that the real question involved was whether a resort to equity powers was necessary to give complete relief. It was found to be the appropriate relief after determining the necessity of imposing a trust on the distributees. The Idaho court distinguished a case involving the management of ranch property in return for a promise to will a certain tract of land to the

[27] BLACKS LAW DICTIONARY defines "Quantum Meruit" as; as much as he deserved; the common count in the action of assumpsit, for work and labor founded on implied assumpsit. . . .

[28] 71 Ida. 150, 227 P.2d. 954 (1951). This was not a personal service contract but rather an agreement between a husband and wife wherein mutual contracts were entered into, each agreeing to will the title to all community property owned by reason of the death of the other to the heirs of the first decedent by a prior marriage.

promisee.[29] Specific performance was denied in that instance because services of an intimate personal nature were not required and the value of such services could easily be determined at law. Therefore, Idaho would not follow the dictum of the *Erwin* case that the type of service rendered is immaterial as to the propriety of awarding specific performance. Both cases refer to a Colorado case[30] which granted specific performance of a contract to bequeath on the ground that it would be impossible to determine the value of services rendered by any money standard. Again, the court distinguished the type of claim contemplated by a statute similar to Montana's and the type presented by one claiming a right in the property.

The conflicting view is represented by the case of *Morrison v. Land*,[31] a California case involving a promise to pay a specific sum in money for the promise of the plaintiff to remain in the promisor's employment until the latter's death. The employment involved the management of a hotel. California recognized the doctrine of specific performance of an agreement to devise when the remedy at law is inadequate,[32] such as where an element of peculiar personal services is present that would be incapable of compensation in money. But the court denied specific performance because the service rendered was not of the requisite nature, and also, because the amount was specific. Therein, the court said:

> "In such an action (for breach of contract at law) the measure of damages would have been the value of property agreed to be bequeathed, for that was the amount in which he was damaged by the breach."

The California decision seems to be based on the theory that a promise of a sum certain would allow the court to assume the parties contemplated the services were intended to be com-

[29]Andrews v. Aikens, 44 Ida. 797, 260 P. 423, 69 ALR 8 (1927). This case might have been in error in denying specific performance as it involved a promise to convey land. The court said the services required could be compensated for in money damages as they were not of such personal nature as to require otherwise. But the court overlooked the general rule that a court of Equity will not look to the adequacy of the legal remedy in a contract to convey land, to grant specific performance, but based their decision on the fact the land involved had no peculiar or special value, such as ancestral or sentimental, and the plaintiff had made no improvements, nor had lived thereon. It was an oral contract, but the fact the plaintiff had completely performed could remove it from the Statute of Frauds.

[30]Oles v. Wilson, 57 Colo. 246, 141 P. 489 (1914). The promise was made to plaintiff's father, that if plaintiff, then a minor, would reside with the promisor he would bequeath to her, on his death, one-third of his estate.

[31]169 Cal. 580, 147 P. 259 (1915).

[32]McCabe v. Healy, 138 Cal. 81, 70 P. 1008 (1902).

pensated for in money.[33] The *Erwin* case recognized the conflicting view as represented in the *Morrison* case, but expressly chose not to follow it.

A distinction must be kept in mind between the situation presented in the case under discussion, where the will actually contained the bequest, and the situation where no will is made at all, or if it is made, the promised bequest is omitted. In the *Erwin* case it is entirely possible that the court was influenced by the fact that the plaintiff bona fide believed the will was sufficient to provide for him, and failed to file a claim as creditor within apt time accordingly. The doctrine of equitable estoppel has been applied in a workmen's compensation case[34] in Montana to allow recovery by a claimant after the statutory period had run. But also, it must be kept in mind that in that case, the reliance was on an affirmative act committed by the agent of the defendant, while in the principal case, the reliance was upon the validity of the will and not upon an act done by the heirs.

It would seem that Montana has adopted the view more consistent with the theory behind the remedy. If the courts agree: (1) That the claimant under the agreement should take only after the other creditors have been satisfied, (2) that the purpose of the statute is to allow the personal representative to make a speedy and satisfactory distribution to the distributees, of which the plaintiff is one, and (3) that a trust cannot be declared in an action at law, then it is difficult to see how the court can reason that a promise to leave a specific sum would require the claimant to sue on breach of contract and to forsake his remedy in equity. If the services were of such a nature, requiring attentions that could not be purchased from anyone other than a person in a certain relationship to the promisor, can a court of law determine the value of such services to allow recovery for damages for breach of contract?

It is difficult to determine the weight of authority on this question since the statutes adopted in various states vary considerably. But in the states which have statutes similar to ours,

[33]This theory of "intent of the parties" is further exemplified in Walder v. Calloway, 99 Cal. App. (2d) 675, 222 P.2d. 455 (1950). In that case, plaintiff, divorced wife of the promisor, left her home in the east to care for the promisor during his last days, in return for his promise to leave his entire estate to her. After finding the services rendered were of extraordinary nature, the court allowed specific performance on the theory that such services, as in the contemplation of parties, were not to be compensated in money, and, as in contemplation of law, could not be compensated for in money.

[34]Lindbloom v. Employers' Liability Assurance Corp., 88 Mont. 488, 295 P. 1007 (1930).

it would seem that the Montana view has considerable support and is better reasoning. It is doubted that any state would follow the dictum of the Montana court in holding that the mere fact that the promisee could not take until the creditors had been satisfied would be a sufficient reason to grant specific performance. Of course, it is apparent that if there was an actual intent that the claimant would be compensated for the "reasonable value" of the services, a different problem would be presented.

There is a danger present in filing a claim as a creditor as it may have the effect of precluding an action for specific performance as an election of remedy. It is generally held, in the absence of extenuating circumstances that such presentment of a claim as a creditor is a bar to an action of specific performance.[35] Montana would no doubt follow the general rule, but certain facts can be presented whereby the filing does not constitute a final election.[36]

It must be kept in mind, however, in determining what procedure will best benefit your client, that an election to bring suit for specific performance may place the claimant in a worse position than if a claim is filed against the estate for breach of contract. Should the estate be insolvent, the creditors will be satisfied first and the claimant will share with the distributees on a pro-rata basis from the remainder; thus the situation may arise whereby he will receive nothing at all, or possibly only a reduced amount.

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[35]Laird v. Laird, 115 Mich. 352, 73 N.W. 382 (1897); Reich v. Misch, 316 Mich. 264, 25 N.W. 2d. 57 (1946); Ballou v. First National Bank, 98 Colo. 101, 53 P.2d. 592 (1935).

[36]Rowe v. Eggum, 107 Mont. 378, 87 P.2d. 189 (1938). It is not an election of remedies so as to bar an action for specific performance when made under a mistake of rights.

SUBROGATION CLAIMS IN INSURANCE AND THE REAL PARTY IN INTEREST STATUTE

The purpose of this article is to discuss the Real Party in Interest Statue, and its particular application to Insurance Law. Almost every state in the union now has a statute, which in effect is a real party in interest statute. Section 93-2801, *Revised Codes of Montana,* 1947 provides:

> "Every action must be prosecuted in the name of the real party in interest, except . . ." (Exceptions not applicable).

This statute had as its origin the New York Code, where this pro-