

Winter 1969

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CLAIMS LAW IN PROBATE

In August of 1969, the House of Delegates of the American Bar Association approved the Uniform Probate Act. A few of the more significant provisions of the new act are the following:

1. The adoption of a four month claim period for filing claims by creditors after publication of the first notice.¹
2. Presentation of the claim notice to either the court or the decedent's personal representative.²
3. An overall three year limitation for the commencement of action against a decedent's estate in cases where the estate has not been formally probated.³
4. The removal of lien secured and insured claims from the operation of the "claim bar."⁴
5. The provision for the filing of "any type of claim" within the structure of the probate procedure.⁵

¹ All claims against a decedent's estate . . . are barred against the estate . . . unless presented as follows:

(1) within four months after the date of the first publication of notice to creditors if notice is given in compliance with Section 3-801; provided, claims barred by the non-claim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state.

UNIFORM PROBATE ACT §3-803(a).

² Claims against a decedent's estate may be presented as follows:

(a) *Receipt by personal representative; Court filing.* The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant and the amount claimed or may file a written statement of the claim, in the form prescribed by rule, with the clerk of the Court (emphasis added).

Id. §3-804.

³ No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced after the third anniversary of the decedent's death

Id. §3-108.

The section concludes with specific exceptions to the three-year rule, but its normal application will be that of making the presumption of intestacy final after the three-year period.

All claims against a decedent's estate which arose before the death of the decedent . . . are barred against the estate . . . unless presented as follows:

(2) if notice to creditors has not been published, within [3] years after the decedent's death.

Id. §3-803.

⁴ (c) *Liens and Liability insurance not affected.* Nothing in this section affects or prevents: (1) any proceeding to enforce any mortgage, pledge or other lien upon property of the estate; or (2) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance.

Id.

⁵ All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof,

These provisions of the Act would have a significant impact upon current Illinois law in the area of probate claims. The effect of these sections can best be illustrated by an intensive examination of a relatively recent case involving Illinois claim law in probate.

The Illinois Appellate Court, in the case of *Schloegl v. Nardi*,⁶ clarified Illinois' position regarding the effect a late tort claim filing would have when the claim is covered by decedent's liability insurance policy. In *Schloegl*, the court determined that the plaintiff, in a personal injury action, should be allowed to pursue his action in spite of the fact that it was not commenced within the time period provided in the Probate Act.⁷

The decedent, Albert Perrine, was involved in an automobile accident on July 13, 1963 in which plaintiffs, Herman Schloegl, his wife, and daughter were injured. Perrine died on January 31, 1964 of causes unrelated to the accident. An estate was opened⁸ and defendants, Gertrude Nardi and Besse Estrop, named executors in Perrine's will, were issued letters testamentary⁹ on February 5, 1964. The claim notice was properly pub-

whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate

Id.

The statute of limitations, however, will not fall during the four-month period of administration.

The running of any statute of limitations measured from some other event than death and advertisement for claims against a decedent is suspended during the four months following the decedent's death but resumes thereafter as to claims not barred pursuant to the sections which follow.

UNIFORM PROBATE ACT §3-802.

⁶ *Schloegl v. Nardi*, 92 Ill. App. 2d 302, 234 N.E.2d. 558 (1968), [hereinafter cited as *Schloegl*].

⁷ ILL. REV. STAT. ch. 3, §204 (1967).

All claims against the estate of a decedent, except expenses of administration and surviving spouse's or child's award, not filed within 7 months from the issuance of letters testamentary or of administration, are barred as to the estate which has been inventoried within 7 months from the issuance of letters.

The time limit in the above section was revised downward from nine months to seven months by a 1967 amendment to the PROBATE ACT. Law of July 26, 1967, ch. 3, §204, [1967], Ill. Laws 2023.

⁸ The principle provisions of the PROBATE ACT relating to the opening of the estate are as follows:

Within 30 days after a person acquires knowledge that he is named as executor of the will of a deceased person, he shall either declare his refusal to act as executor or institute a proceeding to have the will admitted to probate in the court of the proper county.

ILL. REV. STAT. ch. 3, §62 (1967).

"Any person desiring to have a will admitted to probate shall file a verified petition therefor in the court of the proper county." ILL. REV. STAT. ch. 3, §63 (1967).

⁹ Letters testamentary represent the letters of office of the executor issued by the court.

When a will is admitted to probate, the court shall issue letters testamentary to the executor named therein if he qualifies and accepts the office, unless the court is satisfied that no tax will be due . . . by reason of the death . . . and unless the court finds that (1) all claims are paid

lished.¹⁰ On June 19, 1964 a supplemental inventory¹¹ was filed which listed decedent's liability insurance policy. The description of the policy disclosed that coverage under the policy extended to any liability in connection with the accident of July 13, 1963. The estate was duly administered, closed, and the final report filed on November 13, 1964.¹²

On July 9, 1965, plaintiff filed his suit,¹³ against decedent's estate for the injuries suffered as a result of the accident. Service was made on July 15, 1965. He also filed a petition in the probate division¹⁴ stating the nature of his claim. The petition

(2) all heirs, legatees and devisees . . . are residents of this State and are all of legal age and (3) the persons in interest desire to settle the estate without administration.

ILL. REV. STAT. ch. 3, §75 (1967).

¹⁰ In *Schloegl*, the notice was published on Feb. 13, 20 & 27, 1964. The text of the notice provision of the PROBATE ACT is as follows:

In the administration of every decedent's estate the first Monday in the second month following the month in which letters testamentary or of administration are issued shall be called "the claim date". Promptly after the issuance of letters testamentary or of administration it is the duty of the clerk of the court to publish once each week for 3 successive weeks a notice informing all persons of the death of the decedent, the date of issuance of letters of office, the name and address of the executor or administrator and of his attorney and the claim date as fixed by this Section. The notice shall be published in a newspaper published in the county where the estate is being administered, the first publication to be not less than 21 days prior to the claim date.

ILL. REV. STAT. ch. 3, §194 (1967).

¹¹ The PROBATE ACT specifies the requirements for filing both an original and a supplemental inventory.

Within 60 days after the issuance of letters to an executor . . . he shall file with the clerk of the court a verified inventory of the real and personal estate which has come to his knowledge and of any cause of action on which he has a right to sue. If any real or personal estate comes to the knowledge of an executor . . . after he has filed an inventory he shall file a supplemental inventory thereof within 60 days after it comes to his knowledge.

ILL. REV. STAT. ch. 3, §171 (1967).

As indicated in section 204 of the PROBATE ACT (see note 2 *supra*) the fact that an asset is recorded in the original or in a supplemental inventory has no bearing on its availability to satisfy late claims, unless it is uncovered subsequent to the seven month period provided by section 204.

As for the contents of the inventory, the Act calls for the following:

The inventory shall describe the real estate. . . shall list all personal estate, designating each item of personal estate other than cash and goods and chattels as "good", "doubtful", or "desperate", and shall be signed and verified by the person making the inventory.

ILL. REV. STAT. ch. 3, §172 (1967).

¹² The mode of reporting and approval of the final report are also provided for in the PROBATE ACT:

Within 60 days after the expiration of 7 months after the issuance of letters or within such further time as the court allows and thereafter whenever required by the court . . . every executor . . . shall present a verified account of his administration to the court . . .

ILL. REV. STAT. ch. 3, §289 (1967).

¹³ "Every action, unless otherwise expressly provided by statute, shall be commenced by the filing of a complaint." ILL. REV. STAT. ch. 110, §13 (1967).

As to the insufficiency of the mere filing of an action in reference to probate proceedings, see note 29 *infra*.

¹⁴ The petition referred to in the text would involve an application to reopen the estate as provided for in section 308a of the PROBATE ACT and a

was allowed without notice¹⁵ to defendants, the estate reopened, and the executors reinstated. Upon motion by the executors, the court quashed service both in the negligence action and in the probate suit. Plaintiff's appeal resulted from a denial of a rehearing on their petition.

In arriving at its decision, the court analyzed much of the area of claims procedure in probate.

GENERAL STATUTE OF LIMITATIONS V. PROBATE FILING PERIOD

The *Schloegl* court initially considered the question of whether the two year general statute of limitations¹⁶ or the probate filing period¹⁷ should be determinative of plaintiff's right to have the estate reopened. The court stated rather steadfastly that: "The general statute of limitation is the *sole governing statute* which operates as an absolute bar to the filing of the action for the personal injuries."¹⁸ In arriving at this conclusion, however, the court framed two questions¹⁹ which implied that the filing provision of the Probate Act would never serve to increase the time allowed by the general statute of limitations. This was certainly not reflective of Illinois law.²⁰ The Limita-

notice of claim as provided for by section 192.

The applicable text of those sections would read as follows:

If an estate has been administered and the executor . . . discharged, it may be reopened to permit the administration of a newly discovered asset or of an unsettled portion of the estate on the verified petition of any interested person.

ILL. REV. STAT. ch. 3, §308a (1967).

A claim against the estate of a decedent, a minor, or an incompetent, whether based on contract, tort or otherwise may be filed in the proceeding for the administration of the estate. Every claim filed shall state the nature of the claim and when based on contract shall be accompanied by an affidavit of the claimant or any person having knowledge of the facts that the claim is just and unpaid after allowing all just credits, deductions and set-offs.

ILL. REV. STAT. ch. 3, §192 (1967).

¹⁵ If the petition asks the appointment of the former executor . . . designated by the will, the court may order such notice of the hearing on the petition . . . as it directs or the court may hear the petition without notice.

ILL. REV. STAT. ch. 3, §308a (1967).

¹⁶ ILL. REV. STAT. ch. 83, §15 (1967).

¹⁷ ILL. REV. STAT. ch. 3, §204 (1967). For text of section, see note 7 *supra*.

¹⁸ *Schloegl* at 306, 234 N.E.2d at 561 (emphasis added).

¹⁹ The questions raised by the court were:

What if Ferrine had died 23 months after the accident in question — would the statute of limitations have been extended until nine months after letters of administration had issued in that case? What if letters did not issue for years?

Id. at 305, 234 N.E.2d at 558.

²⁰ It would seem apparent that the legislature intended that the PROBATE ACT and the LIMITATIONS ACT would be in harmony as evidenced by the following:

If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives . . . an action may be commenced against his executors or administrators after the expiration of the time limited for

tions Act²¹ provides that if a potential defendant dies prior to the expiration of the time limited for commencement of an action against him, the action may be commenced against his personal representative *after* the expiration of the general statute of limitations as long as it is initiated within nine months of the issuance of letters testamentary. It would appear that this time period could be extended to as much as seven additional years beyond the general statute if letters testamentary were not issued.²²

The answer to any question concerning the apparent conflict between these two provisions is better found by examining the function of the rules rather than by assuming that some absolute priority exists. The function of the two year statute of limitations is to prevent actions on stale claims or where plaintiff has been guilty of laches.²³ It provides a sanctuary for those subject to suit and eliminates the necessity of perpetually saving evidence. Another theory advanced has been that:

Statutes of this character have sometimes been said to be founded in part at least on the general experience of mankind that claims which are valid are not usually allowed to remain neglected, and that the lapse of years without any attempt to enforce a demand creates a presumption against its original validity.²⁴

The filing limitation, on the other hand, has no such function to serve. It is provided to facilitate the quick settlement of estates and an early distribution of inventoried assets to creditors and heirs.²⁵ Although the bar of the filing period is limited to

the commencement of the action, and within 9 months after the issuing of letters testamentary or of administration.

ILL. REV. STAT. ch. 83, §20 (1967) (emphasis added).

The apparent discrepancy between the above section and section 204 of the PROBATE ACT (see note 7 *supra*) is most likely a result of poor house-keeping by the legislature. It is likely that it will be revised downward to seven months to agree with the probate provision.

²¹ *Id.*

²² The maximum limitation for the barring of claims is also provided for by section 204 of the PROBATE ACT.

All claims barrable under the provisions of the preceding paragraph shall in any event be barred unless letters testamentary or of administration are issued upon the estate of a decedent within 7 years after his death.

ILL. REV. STAT. ch. 3, §204 (1967).

Under Illinois common law, it would appear that absent issuance of letters, a claim would never be barred. See *Roberts v. Tunnell*, 165 Ill. 631, 46 N.E. 713 (1897), involving the presentment of a note for payment. The note was due in 1880 and therefore the limitations statute would have run in 1890. However, the maker died in 1887 and his personal representative was not appointed until 1894. Plaintiff initiated his action within a year of the appointment of decedent's personal representative. The court held that the LIMITATIONS ACT did not bar the action and that it could be initiated against the administrator whenever he should be appointed.

²³ See *Cross v. Janes*, 327 Ill. 538, 158 N.E. 694 (1927); *Mosby v. Michael Reese Hosp.*, 49 Ill. App. 2d 336, 199 N.E.2d 633 (1964).

²⁴ 53 C.J.S. *Limitations of Actions* §1b(1) (1948).

²⁵ *Sanders v. Merchants State Bank*, 349 Ill. 547, 182 N.E. 897 (1932) involved an action on a contingent liability resulting from the purchase of bank stock by decedent (among others). In finding against the widow the

"inventoried assets;"²⁶ in some respects it is more absolute than the general statute. Whereas some disagreement existed at the outset, it is now uniformly held that the limiting provisions of section 204 of the Probate Act will be strictly enforced without exception for minors or any other persons operating under a legal disability.²⁷

An examination of the legislative history of the probate filing provision is also indicative of an intent to facilitate the rapid settlement of estates. Each successive amendment to the section has resulted in a reduced filing period.²⁸

court ruled that since contingent claims could not be heard in probate, the filing limitation was not effective to bar the action of the creditors:

This provision creating a limitation upon the time for filing claims against an estate is not a general statute of limitations. The purpose of the act in regard to the administration of estates was to facilitate their early settlement, and the limitation for the exhibition of claims to two years . . . had that particular purpose in view.
Id. at 566, 182 N.E. at 904. *Accord*, *Pratt v. Baker*, 48 Ill. App. 2d 442, 199 N.E.2d 307 (1964), *cert. denied*, 389 U.S. 874 (1967).

In *Bosnak v. Murphy*, 28 Ill. App. 2d 110, 170 N.E.2d 640 (1960) the court denied a claim based upon a negligence action for a falling tree. The action was instituted within nine months but summons was not served until after the expiration of the nine month filing period. The court stated that:

If there were no such requirement as to claims . . . the executor could . . . [never] promptly close an estate with safety, and the purpose of the limitation period, "of facilitating the early settlement of estates," would be frustrated.

Id. at 115, 170 N.E.2d at 643.

²⁶ *Hood v. Commonwealth Trust & Sav. Bank*, 376 Ill. 413, 34 N.E.2d 414 (1941) involved a contingent liability on bank stock purchased at less than par value where the liability had matured and was payable *prior* to decedent's death.

[I]f a claim is not exhibited to the county or probate court, or if suit is not commenced thereon within the time fixed by statute for filing claims, *the claim is barred as to all property inventoried or accounted for during the period.*

Id. at 427, 34 N.E.2d at 422 (emphasis added). *See Austin v. City Bank* 288 Ill. App. 36, 5 N.E.2d 585 (1937).

²⁷ *Pratt v. Baker*, 48 Ill. App. 2d 442, 199 N.E.2d 307 (1964), *cert. denied*, 389 U.S. 874 (1967) involved a claim for services rendered by an incompetent. The claim was submitted by the conservator thirty months after issuance of letters testamentary. The court stated:

It is true that, prior to 1940, sec 71 of ch 3, Ill Rev Stats, 1937 . . . contained a specific exception in favor of persons of unsound mind, as to the time limit. The revised Probate Act adopted in 1939, effective January 1, 1940, omitted this and other exceptions so that the law now in force reads: "All claims not filed within 9 months from the issuance of Letters Testamentary or of Administration are barred as to the estate which has been inventoried within 9 months from the issuance of letters."

Id. at 444, 199 N.E.2d at 308.

It follows that whether or not Gilbert Baker was incompetent or insane within the meaning of the general statute of limitations, his claims are barred under the nonclaim statute, sec 204 of the Probate Act as to inventoried assets of the estate.

Id. at 446, 199 N.E.2d at 309.

²⁸ The various amendments to the filing period limitation are as follows: *Seventh* — All other debts and demands of whatsoever kind, without regard to quality or dignity, which shall be exhibited to the court within two years from the granting of letters as aforesaid, and all demands not exhibited within *two years* as aforesaid, shall be forever barred, unless the creditors shall find other estate of the deceased, not inven-

FILING PROBATE CLAIMS

Methods Available for Filing Claims

Basically, a claimant has two choices when proceeding against decedent's estate on a tort claim within the seven month claim period. He may institute action in a court other than the probate division,²⁹ or he may file a claim as provided by the Probate Act.³⁰ If he initiates action in other than the probate division, mere filing of the action is insufficient to toll the running of the filing period.³¹ For probate purposes, summons must be served upon the executor in order to constitute sufficient notice for enforcement of the claim out of the inventoried assets.³² Actual knowledge of an unfiled claim on the part of the executor or administrator is also ineffective to waive the statutory requirement as stated in *In re Grant*.³³

[T]he knowledge of the personal representative that there was a claim made by creditors, does not take the case out of the statute, which requires a claim to be exhibited in court.³⁴

Assets Excluded from Satisfaction of Late Claims

Illinois' statute prescribes,³⁵ and the courts have uniformly held,³⁶ that assets inventoried by the executor are not subject to satisfaction of claims not filed within the prescribed filing

toried or accounted for by the executor
Law of April 1, 1872, ch. 109, §70, [1871-72], Ill. Laws 95 (repealed 1903) (emphasis added).

"Seventh — All other debts . . . shall be exhibited to the court within one year from granting of letters" Law of May 15, 1903, ch. 109, §70, [1903], Ill. Laws 3 (repealed 1939) (emphasis added).

All claims against the estate of a decedent, except expenses of administration and widow's or child's award, not filed within *nine months* from the issuance of letters testamentary . . . are barred as to the estate which has been inventoried
Law of July 24, 1939, ch. 3, §204, [1939], Ill. Laws 52 (repealed 1967) (emphasis added).

"All claims against the estate of a decedent . . . not filed within 7 months from the issuance of letters testamentary . . . are barred as to the estate which has been inventoried" Law of July 26, 1967, ch. 3, §204, [1967], Ill. Laws 2023 (emphasis added).

²⁹ We believe that these cases have determined that the statutory filing of claims must be made in the Probate Court during the limitation period in order to participate in inventoried assets, but that as to claims over which the Probate Court has no jurisdiction because of nature and content, the filing of the action in a court of competent jurisdiction will be sufficient for participation in the inventoried assets, if, during the limitation period, either service of summons be made on the executor or a filing of the claim be made in the Probate Court.
Bosnak v. Murphy, 28 Ill. App. 2d 110, 115, 170 N.E.2d 640, 643 (1960).

³⁰ ILL. REV. STAT. ch. 3, §192 (1967). See text of statute at note 14 *supra*.

³¹ *Shopen, Changes in Probate Procedure*, 52 ILL. B.J. 772, 776 (1964).

³² See note 29 *supra*.

³³ 300 Ill. App. 179, 20 N.E.2d 817 (1939).

³⁴ *Id.* at 185, 20 N.E.2d at 820.

³⁵ ILL. REV. STAT. ch. 3, §204 (1967). See text of statute at note 2 *supra*.

³⁶ See, e.g., *Hood v. Commonwealth Trust & Sav. Bank*, 376 Ill. 413, 34 N.E.2d 414 (1941); *Darling v. McDonald*, 101 Ill. 370 (1882).

period. The court in the case of *In re Duffield*³⁷ stated that:

This statute has been uniformly held to require that claimants must, in order to participate in the distribution of the assets of an estate, present their claims, for the purpose of having them allowed. Failing to do so, they can only have their claims satisfied out of property not inventoried.³⁸

It is well settled, therefore, that an inventoried asset will not be a source for payment of a delinquently filed claim.³⁹ This is true even in situations where undistributed assets, sufficient to pay the claim, remain in the estate.⁴⁰

Assets Available for Satisfaction of a Late Claim

What then is available to the holder of an unfiled claim? The courts have indicated that such an individual can secure satisfaction after the expiration of the filing period in two situations: first, in the case of newly discovered assets;⁴¹ and secondly, in the case of an unsettled portion of the estate.⁴² Although these exceptions originated in the Illinois common law,⁴³ they have subsequently been codified within the Probate Act.⁴⁴

If decedent's personal representative has inventoried "newly discovered" assets subsequent to the expiration of the seven month claim period, a new claim day is published and creditors may file against the new assets on or before the new claim day.⁴⁵

³⁷ 258 Ill. App. 78 (1930).

³⁸ *Id.* at 85.

³⁹ *Hood v. Commonwealth Trust & Sav. Bank*, 376 Ill. 413, 34 N.E.2d 414 (1941). *Accord*, *Darling v. McDonald*, 101 Ill. 370 (1882).

⁴⁰ *Pearson v. McBean*, 133 Ill. App. 585 (1907), *aff'd*, 231 Ill. 536, 83 N.E. 173 (1907).

⁴¹ Assets discovered subsequent to the filing of the inventory and the expiration of the filing period. *See* ILL. REV. STAT. ch. 3, §§171 & 204 (1967).

⁴² In *Eskildsen v. Chicago Macaroni Co.*, 310 Ill. App. 515, 34 N.E.2d 723 (1941) decedent was a plaintiff and defendant attempted to have judgment vacated because plaintiff had died during the pendency of the action. The administratrix had been discharged. The court ruled that discharge did not include unsettled portions of the estate. In *Starr v. Willoughby*, 218 Ill. 485, 75 N.E. 1029 (1905) the court held that an executor's power of sale did not terminate with the closing of the estate. *See also* *People v. Rardin*, 171 Ill. App. 226 (1912).

Aside from these cases, the term "unsettled portion of an estate" has been used interchangeably with the concept of newly discovered assets.

⁴³ One of the last cases to mention the concept of unsettled estate and newly discovered assets was *In re Estate of Palmer*, 41 Ill. App. 2d 234, 190 N.E.2d 500 (1963). In that case the court stated:

Whether it should have been inventoried as a newly discovered asset or as an unsettled portion of the estate became a matter to be determined on the merits. . . . If the insurance policy was "newly discovered assets," Section 95, Chap 3, Ill Rev Statutes, provides a remedy. If . . . an unsettled portion of the estate, notice giving reasonable time would be sufficient.

Id. at 237-38, 190 N.E.2d at 501-02.

⁴⁴ ILL. REV. STAT. ch. 3, §308a (1967). *See* text of statute at note 14 *supra*.

⁴⁵ If after 7 months from the issuance of letters testamentary or of administration, the executor or administrator files an inventory listing estate not previously inventoried and thereafter the clerk of the court publishes once each week for 3 successive weeks a notice informing

It is the knowledge of the court that determines whether or not an asset is "newly discovered."⁴⁶ If the estate is unsettled as to a portion of the assets at the termination of the filing period, the estate is required to give notice and allow an additional reasonable time for filing.⁴⁷

If no notice is given as to such portions of the estate as are unsettled or as to assets not inventoried, the only bar to action on the claim would be the lesser of the seven year limitation in the Probate Act⁴⁸ or the operative general statute of limitations. In cases where notice is lacking, there would be no opportunity for an extension of the general statute of limitations as previously discussed.⁴⁹ The provision for extension of the general statute of limitations beyond the normal filing period applies only in cases where letters testamentary have not issued at all.⁵⁰

EFFECT OF CLOSING THE ESTATE

As a general rule, the closing of an estate acts as a discharge of the executor. The case of *In re Estate of Palmer*⁵¹ stated it in these words:

As to all matters before the court, the order approving the report and closing the estate became final after 30 days. . . . As to all matters before the court it is binding, and where proper notice has been given to the heirs, devisees and creditors and the executor is discharged, the executor is functus officio and can no longer be sued in the absence of fraud, accident or mistake.⁵²

This general rule was qualified, however, in the same case by the further statement that, "the order of discharge is only effective as to matters which have been adjudicated and does not extend to unsettled portions of the estate."⁵³ The qualifying words in the first quote would appear to be "[a]s to all matters before the court." A notice of discharge is only proper, therefore, when

all persons that claims may be filed against the estate of the decedent on or before a date as designated in the publication . . . all claims not filed on or before the designated date are forever barred as to the estate listed in such inventory.

ILL. REV. STAT. ch. 3, §204 (1967).

⁴⁶ In the case of *In re Estate of Nitti*, 22 Ill. App. 2d 300, 160 N.E.2d 706 (1959), the original inventory indicated cash received from indebtedness of \$64,500 in 1943. In 1957, the administratrix, alleging a claim against Greenberg, was allowed to reopen the estate. Greenberg's executors claimed that the estate could not be reopened since they had a receipt from Nitti's administratrix for the \$64,500 dated in 1944 and therefore she had knowledge of the claim. In spite of this, the court held that since "they" had no record of a claim against Greenberg until 1957, the order reopening the estate was valid.

⁴⁷ See note 43 *supra*.

⁴⁸ ILL. REV. STAT. ch. 3, §204 (1967). See text at statute at note 22 *supra*.

⁴⁹ See text at note 21 *supra*.

⁵⁰ See note 21 *supra*.

⁵¹ 41 Ill. App. 2d 234, 190 N.E.2d 500 (1963).

⁵² *Id.* at 237, 190 N.E.2d at 501.

⁵³ *Id.*

the entire estate has been administered or "brought before the court." The court in *People v. Rardin*⁵⁴ stated that:

An order of . . . court approving an executor's report, declaring estate settled, and discharging executor, has the effect only of closing the account up to the time the report is approved and is void as to unsettled matters of the estate.⁵⁵

It would seem apparent, therefore, that prior administration of the estate and formal discharge of the decedent's representative⁵⁶ would impose no significant burden upon a creditor's attempt to recover on a delinquent filed claim, if he can discover some asset that has not been subject to administration.⁵⁷ In such situations, the Probate Act now provides a procedure for reopening the estate.⁵⁸ The provisions call for the filing of a verified petition alleging the existence of a previously unfiled claim and the existence of either newly discovered assets or an unsettled portion of the estate.

LIABILITY INSURANCE AS AN ASSET

The court in *Schloegl* encountered its principal difficulty in relation to the inventoried liability insurance policy. In the case of *In re Mahan*⁵⁹ the court was faced with the question of whether an uninventoried insurance policy was an asset sufficient to open an estate *after* a tort claimant had filed his claim. The court stated that:

A careful reading of this opinion reveals that our Supreme Court squarely held that the automobile casualty insurance policy was an asset of the estate. . . . We perceive no reason to qualify this doctrine merely because said insurance policy was not inventoried within nine months.⁶⁰

This determination that the insurance policy *was* an asset, coupled with the fact that in *Schloegl*, the policy had been inventoried seemed to preclude the allowance of a claim subsequent to the expiration of the filing period. This did not stop the *Schloegl* court from stating the following:

Was the insurance policy an asset of the estate which had been administered and consequently is now no longer available to satisfy

⁵⁴ 171 Ill. App. 226 (1921).

⁵⁵ *Id.* at 230.

⁵⁶ Court affirmed the executor's power of sale as to real estate after estate had been closed and executor had been discharged. *Starr v. Willoughby*, 218 Ill. 485, 75 N.E. 1029 (1905). The court stated:

[I]t has been repeatedly held by this court that an order . . . discharging an . . . executor on a final accounting when the estate is not fully settled, as to the unsettled portion of the estate is void.

Id. at 493, 75 N.E. at 1032.

⁵⁷ The court does not appear concerned with whether there are sufficient assets for the creditor; merely if *any* assets exist which will aid in satisfaction of a claim. See *In re Nave*, 344 Ill. App. 89, 100 N.E.2d 328 (1951).

⁵⁸ ILL. REV. STAT. ch. 3, §308a (1967).

⁵⁹ 341 Ill. App. 472, 94 N.E.2d 523 (1950).

⁶⁰ *Id.* at 475, 94 N.E.2d at 524.

any judgment these plaintiffs might obtain? No. . . . [T]he Probate Act requires the administrator or executor to inventory the real or personal estate of the decedent. This policy was neither. . . . It was . . . a "unique asset." . . . [I]t provided a potential fund for satisfaction of any judgment obtained by a claimant asserting a timely claim under the general statutes of limitations.⁶¹

It would appear that the *Schloegl* court would view the liability policy as an asset only after a claim had been filed. This certainly would be a logical approach to the problem. It is important to view the inventoried policy in reference to the reason behind the limitation on filing claims. The filing period was established to accelerate the distribution of assets to decedent's legatees, devisees, and creditors.⁶² According a liability insurance policy the same immunities available to other assets in decedent's estate is not within the "reason for the rule." Allowing outstanding claims to be enforceable against an insurance company does not prevent the executor from distributing the tangible assets of the estate. Further, since the policy itself has no realizable or tangible value to the estate, its availability to claimants does not subject the executor to any significant disability.⁶³ A liability policy is an asset, therefore, only to the extent that claims have been entered against the estate which are subject to satisfaction from that policy. It is an asset only when a filed claim forecasts an actual realization on the policy.

From the prior discussion, it should be apparent that the act of inventorying the policy or failing to do so has no juridic effect. If the policy is inventoried and claims covered by such policy are filed against the estate, the policy is properly classified as an asset; but only to the extent of the claims filed. If no claim is filed, the policy is not properly inventoried as an asset, since it has no "net" realizable value.⁶⁴

CONCLUSION

The *Schloegl* court, while arriving at a correct conclusion, by-passed an opportunity to reconcile its decision in reference to claims against a decedent's liability insurance policy with prior Illinois case law.⁶⁵ In the future, it would seem incumbent upon

⁶¹ 92 Ill. App. 2d 302, 306-07, 234 N.E.2d 558, 561 (1968).

⁶² See text at note 25 *supra*.

⁶³ Assuming a \$20,000 estate with no claims, but a \$10,000 liability insurance policy. Heirs would distribute \$20,000 and the policy would have no asset value. If a tort claim of \$8,000 were entered against the estate, the policy would have a potential value of \$8,000 since, to that extent, it protects the other assets of the estate. The estate would still be able to distribute \$20,000 and pay the tort claim of \$8,000. Therefore, in such a case, the insurance policy must be considered to be an asset, but only to the extent of the protection it affords the other assets.

⁶⁴ With the exception of its short rate cancellation value.

⁶⁵ See text at note 59 *supra*.

the court to resolve the apparent inconsistencies between those cases which hold such policies to be assets and those holding contra, rather than simply ignoring such questions. In doing so, it would have to consider the underlying policies supporting a filing period limitation,⁶⁶ rather than attempt to arbitrarily classify what constitutes an asset and what does not. The court would be well advised to adopt the provisions of the Uniform Probate Act⁶⁷ and simply exclude insured claims from the protection of the claims bar rather than attempting to redefine the term asset when it appears convenient to do so.

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⁶⁶ See text at note 25 *supra*.

⁶⁷ See note 4 *supra*.