therefore, be allowed. Although matters of proof will never be simple, a clear understanding of what must be proven will resolve the present ambiguity so that both the courts and counselors will have a clear concept of the taxpayer's rights under the medical deduction.

PROTECTION AGAINST DOUBTFUL CLAIMS DURING PROBATE

During the probate of an estate, claims based on lost notes amounting to $29,000 were filed against the estate after their legal existence could have been destroyed by the non-claim statute[1] had the administrator acted promptly. The administrator disallowed the claims, however, and defended the estate in actions brought by the claimants. The heirs were allowed to participate in the trial, but " . . . were not parties to said actions and had no control over them. . . ."[2] After a verdict for the claimants, the administrator did not file a motion for a new trial although the heirs attempted to induce him to do so. Thereupon, the heirs themselves petitioned for a new trial, and upon its denial, they sued the administrator and recovered damages based on his inadequate protection of the estate. Victory, however, was short-lived, or at least postponed, when the appellate court reversed. The Court held that the administrator's failure to utilize the statute of non-claim did not constitute an actionable wrong, and that if the suits had been improperly defended, the heirs' remedy was to appeal rather than to collaterally attack the judgment by suing the administrator.[3]

The *Riddell* decision does more than arouse sympathy for a few possibly injured heirs. It raises the general problem of how parties interested in an estate, such as heirs or creditors,[4] can protect their interests and control the functioning of the administrator when doubtful claims are filed against the estate. This problem may arise at various

1. The statute of non-claim is a special statute of limitation in probate proceedings which requires that claims be filed within a certain period in order to be recoverable against the estate. State *ex rel.* Buder v. Brand, 305 Mo. 321, 327, 265 S.W. 989, 991 (1824). See notes 19 and 21 *infra*. For a discussion of claims which are not barred by the statute of non-claim, see Comment, 41 MICH. L. REV. 920 (1943).

2. Riddell National Bank v. Englehart, 105 N.E.2d 357, 360 (Ind. App. 1952).

3. *Id.* at 361.

4. Any person who has a claim on the estate, whether heir or creditor, is possibly endangered by the recovery of a doubtful claim by a creditor and therefore may be an interested party within the meaning of this note. Consequently, references throughout the note to "heirs" will generally be applicable to "creditors" also.

stages of the processing of a claim, and if it is not answered correctly the interested parties may suffer irreparable damage. Several slight alterations in the present procedure for handling claims could eliminate some of the controversial obstacles which confront heirs attempting to preserve their interests in an estate against doubtful claims of creditors.

Probate is usually begun by grant of letters of administration,[5] after which notice is given to the creditors to present their claims. When a claim is duly presented, the administrator must either allow or refuse it. Whether allowed or refused the claim must then be presented to the court and placed on a schedule in order to give all interested parties notice of the action which has been taken. A desirable variation of the procedure provides a mandatory hearing on all claims, thus insuring the interested parties, not only notice, but an opportunity to ascertain the facts surrounding a claim.[6]

If sufficient notice is provided, the interested parties are adequately protected by their right to object to any claim allowed by the administrator.[7] An objection forces a suit on the claim in which the interested

5. For the purpose of this note, the administrator, whose appointment is made by letters of administration, and the executor, whose appointment is made by letters testamentary, may be used synonymously. Griffin v. Irwin, 246 Ala. 631, 633, 21 So.2d 668, 669 (1945); Baker v. Forsythe, 178 Md. 682, 16 A.2d 921 (1940).

6. "The primary purpose of the schedule of debts is to give information to the interested parties. Under the proposed [now adopted] revision, notice is simplified and costs reduced to a minimum; the court is given jurisdiction to modify or reverse the action of an executor or administrator in allowing and rejecting a claim upon hearing and exceptions." Comment to OHIO GEN. CODE ANN. § 10509-119 (1938).

At common law the administrator could pay claims immediately and would be allowed credit on his final accounting. Shepard v. Young, 74 Mass. 152 (1857). Today, statutes generally require that claims first be approved by the court, TEX. STAT., REV. CIV. art. 3534 (1948), or payment be ordered by the court, VT. REV. STAT. § 2997 (1947). Although most states will allow the administrator credit for just claims paid without authorization, *In re* Machado's Estate, 186 Cal. 246, 248, 199 Pac. 505, 506 (1921); *In re* McKinnon's Estate, 118 Mont. 217, 218, 164 P.2d 726, 727 (1945), others require strict compliance with the statute and will not allow credit for claims improperly paid. Acker v. Watkins, 193 Ark. 192, 194, 100 S.W.2d 78, 79 (1936); Boyd's Estate v. Thomas, 162 Minn. 63, 66, 202 N.W. 60, 63 (1925). Such strict compliance is made mandatory in at least one state by statutory amendment. Thompson v. Thompson, 217 S.W. 863, 864 (Mo. App. 1920).

The model code would evidently leave the question to the determination of the courts, MODEL PROBATE CODE § 148 (1946), but the PROPOSED INDIANA PROBATE CODE § 1419(b) (Sept. 1952) states ". . . the personal representative, if the estate is solvent, may pay any claims he believes just and correct, whether or not such claims have been filed. . ." thus giving him express power to pay without court authorization. Section 1607 then provides such payment may be objected to by the heirs on final accounting. Whether this policy, attaching primary importance to winding up the claims, should predominate over that which prefers the preservation of the estate seems questionable.

7. This objection may be made at any time prior to the final accounting, or within a specified time thereafter. Beach v. Norris, 127 Kan. 619, 621, 274 Pac. 256, 257 (1929);

party either defends himself[8] or is joined as a party defendant with the administrator.[9] This ability to actually control the defense of the claim is extremely important, but unfortunately does not always exist for when the administrator objects to a claim, he assumes the burden of defending the suit.

An important obstacle which faces the interested parties who force a suit on an allowed claim is that they, rather than the estate, must bear the expenses of litigation. While this is obviously somewhat of a deterrent, it is based on the sound reason that to subject the estate to these expenses would encourage frivolous and unreasonable objections to valid claims on the bare chance that they might fail. A few states have solved this problem by allowing the expense of the defense to be charged to the estate when a claim is defeated or decreased by a certain percentage.[10]

However well protected the interested parties may be against improper allowances by the administrator, they are not completely out of danger. Their real difficulties may arise when least expected—on the trial of a questionable or excessive claim which it is the duty of the administrator to disallow.[11] If a suit is then instituted against the estate, it is the administrator's, not the heirs', duty to defend.[12] In this defense he theoretically represents all interested parties and is " . . . bound to the exercise of care and diligence, such as prudent and judicious men ordinarily bestow on their own affairs. . . ."[13]

When the heirs, who will actually suffer loss by the recovery of the claim, do not defend themselves, their concern is with enforcement of the administrator's duty, *i.e.,* to direct the trial in the best interest of the estate. One means of control is by exercise of the right to par-

Commerce Union Bank v. Gillespie, 178 Tenn. 179, 187, 156 S.W.2d 425, 428 (1940). In Ohio, objection is raised at the hearing, *In re* Estate of Blue, 67 Ohio App. 37, 46, 32 N.E.2d 499, 505 (1939); in Indiana, objection is made by formal pleadings which stand in opposition to the allowance. Decker v. Decker, 102 N.E.2d 920, 921 (Ind. App. 1952).

8. IND. ANN. STAT. § 6-1017 (Burns 1933).

9. OHIO GEN. CODE ANN. § 10509-136 (Supp. 1952).

10. IND. ANN. STAT. § 6-1017 (Burns 1933) (when a claim is decreased by ten per cent). However, this provision is not included in the Indiana proposed code. INDIANA PROPOSED PROBATE CODE § 1414(b). OHIO GEN. CODE ANN. § 10509-135 (Supp. 1952) (if the claim is decreased, the court may allow what in its discretion is just).

11. Custer v. Beyer, 76 Ind. App. 303, 306, 130 N.E. 834, 835 (1921); *In re* Mead's Estate, 145 Ore. 150, 161, 26 P.2d 1103, 1106 (1933).

12. McNair v. Howle, 123 S.C. 252, 260, 116 S.E. 279, 283 (1922); Thompson v. Weimer, 1 Wash.2d 145, 150, 95 P.2d 772, 775 (1939).

13. McNabb v. Wixom, 7 Nev. 163, 171 (1872). He must therefore ". . . interpose every legal defense. . . ." Estate of Kniffen, 231 Wis. 589, 592, 286 N.W. 8, 9 (1939); McGowen v. Miles, 167 Tenn. 554, 557, 72 S.W.2d 553, 554 (1934).

ticipate in the trial, to which interested parties are entitled if they can show that they will sustain financial grievance or pecuniary loss by an adverse decree.[14] But, even upon establishment of this right, the heirs can neither completely control the conduct of the defense, nor can they compel the administrator to comply with what would apparently be his duty. Several examples bear this out.

The predominant issue has been whether the persons ultimately aggrieved can force the administrator to plead the statute of limitations against the claim of the creditor. One can well understand the amazement of an interested party who discovers that part of the estate is going to claimants whose rights could have been barred by the statute. Yet this frequently happens in states where pleading the statute is discretionary with the administrator.[15] This result is sometimes rationalized on the theory that heirs should not be allowed to make the deceased lay in his grave a moral debtor.[16] This extreme position has been mitigated by increasing acceptance of the view that the administrator must plead the statute if it ran in the deceased's lifetime, but if it ran after his death it is completely superseded by the statute of non-claim.[17] In the latter situation, depending on the length of the period for filing claims, the claimant who would otherwise be barred by the statute of limitations benefits to that extent to the detriment of the heirs.[18]

The statute of non-claim is concededly different from the statute of limitations and must be pleaded by the administrator; its effect is

14. *In re* Estate of Smith, 240 Iowa 499, 513, 528, 36 N.W.2d 815, 823, 830 (1949); Anderson v. Houpt, 43 Ohio App. 538, 543, 184 N.E. 29, 31 (1932).

15. McDonald v. Carnes, 90 Ala. 147, 148, 7 So. 919, 920 (1890); McNair v. Cooper, 174 N.C. 566, 567, 94 S.E. 98, 99 (1917). See ROLLISON, THE LAW OF WILLS § 260 (1939), which points out that the rule is concededly anomalous with the unanimous view which requires the statute of frauds to be pleaded. For a general discussion of the trend among the states, see *In re* Estate of Smith, 240 Iowa 499, 515, 36 N.W.2d 815, 825 (1949) in which the court overruled prior decisions and joined what it termed the majority by forcing the pleading of the statute. *Accord,* Allen v. Turner, 152 Kan. 590, 594, 106 P.2d 715, 718 (1940); *In re* May's Estate, 255 App. Div. 311, 5 N.Y.S.2d 681, 687 (1938). For a collection of recent cases, see Note, 8 A.L.R.2d 660 (1949).

16. Hallyburton v. Carson, 5 N.E. 912, 915 (N.C. 1887). Another reason advanced is that since the deceased was under no obligation to plead it, the administrator who stands in his shoes would likewise be under no obligation to do so. Baker v. Bush, 25 Ga. 594, 193 (1858); Woods v. Irwin, 141 Pa. 178, 179, 21 Atl. 603, 604 (1891).

17. *I.e.,* after the period of non-claim begins to run, the statute of limitations has no application. Mueller v. Light, 92 Ark. 522, 528, 123 S.W. 646, 648 (1909); Vanderpool v. Vanderpool, 48 Mont. 448, 454, 138 Pac. 772, 774 (1930); Johnson v. Larson, 56 N.D. 207, 214, 216 N.W. 895, 897 (1927); MODEL PROBATE CODE § 135 (1946); INDIANA PROPOSED PROBATE CODE § 1401 (Sept. 1952).

18. This result is defended in Comment, 36 MICH. L. REV. 973, 979 (1938).

said to be to "erase" the debt itself, rather than to bar the remedy.[19] However, even the statute of non-claim may not completely protect the heirs, as shown by the *Riddell* case which in effect makes the operation of the statute optional with the administrator.[20] Although the case is perhaps singular in its effect,[21] it does typify the reluctance of courts to hold the administrator liable simply because he has shown a preference to the creditors.[22] This policy may stem from the fiduciary duty which the administrator originally owes to the creditors as well as to the heirs.[23] It seems illogical, however, to extend this fiduciary relationship to a claimant in a suit at law adverse to the estate, since the claimant is actually opposing his original fiduciary.

In addition to the apparent problems which heirs may face in attempting to safeguard their interests in the estate,[24] a more subtle

19. Latham v. McClenney, 36 Ariz. 337, 339, 285 Pac. 684, 685 (1930); Vanderpool v. Vanderpool, 48 Mont. 448, 453, 138 Pac. 772, 774 (1930). Although the Tennessee courts hold it a mere bar to the remedy, the same result is reached by forcing its use. Woods v. Woods, 99 Tenn. 50, 58, 41 S.W. 345, 347 (1879). The effect of the statute is surprisingly different in several states: Some merely postpone the payment of those claims not filed within the period, GA. CODE ANN. § 113-1505 (1936); TEX STAT., REV. CIV. art. 3509 (1948); others protect the administrator when he has paid a claim of a lower grade as a result of the failure to file the preferred claim, DEL. REV. CODE c. 98, § 41 (1935); MASS. ANN. LAWS c. 197, § 2 (Supp. 1944). But the purpose of the statute is always to protect the estate and to wind it up speedily; for this reason it cannot be ignored by the administrator. State *ex rel.* Buder v. Brand, 305, Mo. 321, 327, 265, S.W. 989, 991 (1924); Woods v. Woods, *supra.*

20. Riddell National Bank v. Englehart, 105 N.E.2d 357, 361 (Ind. App. 1952).

21. IND. ANN. STAT. § 6-1001 (Burns 1933), states that claims, ". . . if not filed in at least thirty (30) days before the final settlement of the estate shall be barred. . . ." However, by allowing an optional date for the final report, as the *Riddell* case does, the operation of the statute becomes optional. The ultimate result is certainly contrary to the great majority of states which hold the administrator liable for failure to bar claims by utilization of the statute of non-claim. See note 19 *supra.*

In other states where the statute runs from a definite time, *e.g.,* from the letters of administration, ALA. CODE tit. 61, § 211 (1940), or from the notice to the creditors, S.D. CODE § 35.1404 (1939), this unwarranted complication could not arise. Such a statute is adopted in the INDIANA PROPOSED PROBATE CODE § 1401 (Sept. 1952), from the MODEL PROBATE CODE § 135 (1946). For a collection and analysis of these statutes see SIMES, PROBLEMS IN PROBATE PRACTISE 325 (Michigan Legal Studies (1946).

22. See note 15 *supra.* Faulkner v. Fay, 23 Ariz. 313, 315, 203 Pac. 560, 561 (1922) (the administrator ". . . primarily represents the creditors. . . ."); Rollins v. Shaner, 316 Mo. 953, 959, 292 S.W. 419, 421 (1921) (". . . he may legally perform acts against the express wishes of the heirs. . . ."); Kilborne v. Fay, 29 Ohio St. 264, 280 (1876) (the duties of the administrator are analogous to the duties of an assignee for the creditors). These cases lend credence to this view.

23. Supposedly this fiduciary relationship with the creditor would apply to other duties of the administrator; *e.g.,* collecting all the estate's assets and speedily winding up the affairs of the estate. See *In re* Estate of Smith, 240 Iowa 499, 518, 36 N.W.2d 815, 826 (1949).

24. Gold v. Bailey, 44 Ill. 491, 493 (1867), presents another problem. There the administrator did not put a written release into evidence and the heirs objected after the trial. It was held that the heirs were then without remedy as they could have informed themselves of it at the trial and pleaded it there. See also McGuire v. Rogers,

difficulty may arise—that of controlling the overall defense against the contested claim.[25] Although heirs may even be permitted to introduce evidence and to examine witnesses, most, if not all, of the defense is usually carried on by the administrator, who, in the majority of cases has absolutely no personal financial interest in the adjudication. In fact he is really a representative of both the heirs and the creditors and yet he defends actions which are brought by creditors. Several states have recognized this relationship, to the extent that, for the purposes of appeal, the administrator is considered to be a "disinterested stakeholder" and is therefore denied the right to appeal.[26]

This lack of a truly adversary proceeding is often extremely detrimental to the heirs' interests. Favorable evidence, if submitted to the court at all, may not be submitted in its most favorable light. This would seem to be a logical consequence of its being propounded by a person not usually affected by the decision; meanwhile, opposing evidence is urged upon the court by the person with an actual financial grievance at stake, and therefore it is presented in its most favorable light.

Thus, if the heirs feel that the trial has been unfairly or poorly defended by the administrator, their difficulties begin. An interested party is bound by the decree of the court, as it is the prudent policy of the law not to require creditors to litigate first against the administrator and then against the heirs.[27] For this reason the heirs are limited in their attempts to obtain a new trial. For instance, a showing that certain facts did not exist or were not known to the administrator at the time of the trial will give basis for granting a new trial, but simply showing that the facts were not pleaded at the trial or were not known by the heirs at that time will provide no such basis.[28] If, then, the heirs

74 Md. 194, 18 Atl. 888 (1891); Sherman v. Whiteside, 93 Ill. App. 572, 575, *aff'd*, 190 Ill. 576, 60 N.E. 838 (1901), holding in effect that the neglect of the administrator is no basis for setting aside an allowance. In Riddell National Bank v. Englehart, 105 N.E.2d 357 (Ind. App. 1952) at page 359, the court intimated that since they were not "parties to the litigation" the heirs could not obtain a change of venue which might also be of considerable disadvantage.

25. The interested party attempts to exercise this control by his right to participate in the trial. See note 14 *supra*. But, the dissent in the *Riddell* case points out that for the purposes of that case ". . . such participation was unavailing because of their lack of control, and the fact that they were not parties, and that the appellant refused their proper demands to insure an adequate defense and refused to file a motion for a new trial." Riddell National Bank v. Englehart, 105 N.E.2d 357, 362 (Ind. App. 1952).

26. Linton v. Walker, 32 Cal.2d 367, 369, 196 P.2d 559, 560, (1948); Ekdahl v. Wessman, 127 Conn. 141, 14 A.2d 757 (1940).

27. Since the heirs have the right to participate, they could do so if they have an objection to interpose; they will not later be able to complain if they have not exercised this privilege. Townsend v. Bevers, 185 Miss. 312, 327, 188 So. 1, 6 (1939); *In re* Estate of Blue, 67 Ohio App. 37, 57, 32 N.E.2d 499, 507 (1939).

are unable to obtain a new trial, two other remedial avenues are available—appeal, or suit against the administrator directly for his conduct with regard to the claims. Which remedy could be pursued more successfully is a perplexing problem, and the election of one may well destroy any opportunity which the heirs might have had to correct a wrong by pursuit of the other. Should they first proceed against the administrator and fail, the time for appeal will undoubtedly have lapsed, thus foreclosing appeal as a possible remedy.

The right to appeal varies of course;[29] several states even restrict it to those heirs who participated in the trial, apparently with greater concern for convenience of the courts than for the sake of logic and justice.[30] As a protection to interested parties, appeal may be deceiving, for although apparent errors and flagrant breaches of trust are correctable, a simply haphazard or lackadaisical defense on the trial level is almost irreparable on appeal. This is the obvious consequence of the general rules that appeal is limited to the record,[31] evidence is considered in the light most favorable to the appellee, and a verdict will not be reversed on ground of insufficient evidence unless it is apparent that reasonable men could not have so decided. Another disadvantage exists in the reluctance of the courts to find a breach of trust on the part of the administrator.[32]

Illustrative of this is the case of *Lane v. Bowes*.[33] It was shown on appeal that the administrator had sat at the creditor's table, counseled the creditor's witnesses and allegedly had not revealed the evidence in the light most favorable to the estate. When the heir appealed from

28. Andrews v. Osborne, 195 Mich. 77, 81, 123 N.W. 599, 601 (1909); *In re* Barker's Estate, 249 App. Div. 336, 293 N.Y.Supp. 199, 204 (3rd Dep't 1937), *rev'd on other grounds*, 279 N.Y. 499, 18 N.E.2d 656 (1930). See also 1 HENRY, PROBATE LAW AND PRACTICE § 324 (4th ed. 1931). The difficulties of this particular problem are to some extent obviated in states in which a trial de novo is allowed on appeal. About one half of the states have reasonably refused to allow this because it increases costs, impedes prompt administration and relegates the lower court to the position of an inferior tribunal. See Simes and Basye, *The Organization of the Probate Court in America*, 42 MICH. L. REV. 965, 43 MICH. L. REV. 113 (1944).

29. This right is generally established by showing a pecuniary loss as a result of the decree. People v. Harrigan, 294 Ill. 171, 173, 128 N.E. 334, 335 (1920); *In re* Estate of Burton, 203 Minn. 275, 278, 281 N.W. 1, 2 (1938).

30. Hall v. Rutherford, 89 Ark. 553, 555, 117 S.W. 548, 549 (1909); *In re* Kennedy, 328 Pa. 193, 194, 194 Atl. 901, 902 (1937).

31. Parties who are to be effected by the decree are not bound by it unless there is adequate notice to establish it as a proceeding in rem. Where such adequate notice is not provided, there are other procedural safeguards provided, such as a trial de novo on appeal in which the question of being bound by the record does not arise. See Simes, *The Administration of a Decedent's Estate as a Proceeding In Rem*, 43 MICH. L. REV. 675 (1945).

32. See *In re* McKinnon, 218 Kan. 527, 577, 255 N.W. 632, 635 (1934); Peeters v. Schultz, 300 Mo. 324, 337, 254 S.W. 182, 188 (1923); see note 21 *supra*.

the denial of his motion for a new trial, the appellate court held that all the presumptions of the validity of the claim persisted, and in the absence of proof of actual fraud the heir was without remedy.[34] To establish this type of fraud is a herculean task and of questionable merit even when accomplished. For example, though collusion is a sufficient basis for setting aside an unjust allowance by the administrator, it is not a basis for invalidating the recovery of a claim at the trial unless it is made out to be actual fraud.[35]

Thus heirs who choose to appeal face a formidable undertaking. Because of these difficulties it may well be that a claim would be affirmed on appeal; recovery of the claim is then to some extent justified, and consequently the heirs' case against the administrator is weakened. Hence, the heirs may choose to proceed directly against the administrator for breach of duty for failure to properly protect the estate.[36]

However, even this avenue of approach is not easy. The real damage to the heirs' interest is often not caused by actual fraud, but rather by the administrator's failure to use such care as the heirs would have used in defense of the estate's assets. Although this standard is often stated as the administrator's duty,[37] adequate enforcement of it is almost impossible. The action which enforced the duty at common law was called devastavit and was established by showing that the administrator wrongfully permitted a loss to accrue to the estate.[38] Statutes

33. 32 Ind. App. 330, 67 N.E. 1002 (1937).

34. *Id.* at 337, 67 N.E. at 1005.

35. "The fraud, collusion or mistake which will authorize the setting aside of a judgment, or an adjudication of this kind must be such as prevented a proper trial. It must be extrinsic or collateral to the matter directly involved in the adjudication and not intrinsic in character such as inheres in the adjudication rendered." *In re* Nicholson's Estate, 230 Iowa 1191, 1209, 300 N.W. 332, 342 (1941). If extrinsic fraud is shown, such as failure to give notice, the decree can be set aside. Purington v. Dyson, 8 Cal.2d 322, 325, 65 P.2d 777, 779 (1937); Francon v. Cox, 38 Wash.2d 530, 536, 231 P.2d 265, 270 (1951).

36. It may be, however, that in Indiana he is not permitted to proceed directly against the administrator. As pointed out in the dissenting opinion in Riddell National Bank v. Englehart, 105 N.E.2d 357, 362 (Ind. App. 1952), ". . . the effect of the majority holding requires that heirs of an estate must prosecute an appeal in probate matters, although not parties thereto, to preserve their cause of action against an administrator. . . ." That he must first appeal from wrongfully established claims in order to proceed against an administrator appears to be a novel requirement. See Davis v. Smith, 5 Ga. 274, 290 (1848); *In re* Devereux, 164 Misc. 295, 298 N.Y.Supp. 819, 824 (Surr. Ct. 1937). At page 362 of the *Riddell* case, the dissenting judge goes on to say that ". . . to all intents and purposes . . ." the decision destroys ". . . any separate cause of action which might exist by virtue of § 6-2101 BURNS STAT. . ." which statute apparently sets out the grounds for a cause of action against the administrator for failure to adequately defend the estate against claims.

37. See note 13 *supra*.

38. Beardsley v. Martsteller, 120 Ind. 319, 320, 22 N.E. 315, 316 (1889). See also 1 HENRY, PROBATE LAW AND PRACTICE § 137 (4th ed. 1931).

replace this action today and attempt to specifically describe breaches of trust which will give rise to a right of action against the administrator. None are definite enough, however, to enable heirs to successfully predict when they may proceed against the administrator, because doubtful claims of creditors have been unjustly satisfied in court.[39]

The Indiana statute takes a step in the proper direction by enunciating the general duty of care, including the duty to litigate all available defenses to the claim.[40] But the unfortunate effect of the only cases decided under the statute has been to discourage any idea that recovery could be obtained on the basis of the statute.[41] The act has been treated with the same attitude by the courts as have most of the statutes requiring court authorization of a claim before payment, *i.e.*, that they do not exist for the benefit of the heirs.[42] Because an increasing number of estates are administered today by disinterested trust companies, rather than by interested heirs or creditors, the attitude of the courts should be to construe these statutes in accord with the probable legislative intention, to protect the rightful claimants to the estate.

In lieu of more strict construction of the administrator's duties by the courts, adequate protection of the estate must apparently come from statutory innovation. The legislature should set out more definitely what actions by the administrator will be considered actionable breaches of trust.

To strike at the core of the problem, it would seem feasible to grant the real party in interest—the one whose share in the estate would be decreased—power to replace the administrator for the purpose of litigating the suit. He would then have the option of defending the action himself, or of permitting the administrator to defend, subject to the prescribed statutory duties. Although this exact procedure may not exist in any state, analogies can be found.[43] Such procedure has

39. D.C. CODE ANN. § 20-117 (1951) (". . . for all loss and damage to the estate resulting from his breach of duty. . . ."); IOWA CODE ANN. c. 32, § 635.57 (1950) (". . . special defenses must be pleaded . . ."); VA. CODE § 64-154 (1950) (". . . any waste [that] may have been committed. . . ."); MODEL PROBATE CODE § 172(c) (1946) (". . . and for any other negligent or willful act or non-feasance by which loss to the estate arises. . . .").

40. IND. ANN. STAT. § 6-1013 (Burns 1933), also adopted in § 1411 of the PROPOSED INDIANA PROBATE CODE (Sept. 1952). Although this is generally the duty of the administrator in the absence of statute, McNabb v. Wixom, 7 Nev. 163, 171 (1872), had the rule been enunciated in statute the heir might have found a remedy where specific defenses were not pleaded, as in Gold v. Bailey, 44 Ill. 491 (1867).

41. Riddell National Bank v. Englehart, 105 N.E.2d 357, 361 (Ind. App. 1952); Lane v. Bowes, 32 Ind. App. 330, 332, 67 N.E. 1002, 1005 (1937).

42. See note 6 *supra*.

43. In Texas any interested party may, upon the execution of a bond, have the

been employed in several cases where the contest was between two adverse claimants to determine their rights to the entire corpus of the estate.[44] The result of this procedure is to some extent also reached where administration is dispensed with in small estates, thus placing the real parties in interest at odds. It would seem equally sensible to dispense with the administrator, at least for the purposes of litigation, where there are only several claimants. Although it would be unusual to find only several claimants at the beginning of administration, such a situation often develops after partial administration. If the heirs could replace the administrator in these situations the result would be to dispense with the administrator when he has exhausted his usefulness to them and to the estate.

This is, in effect, only an extension of the general policy which recognizes the administrator as a fiduciary for the estate, and therefore allows an interested party to petition the court for his removal when his interest is prejudicial to the estate.[45] By using this replacement procedure the heir could control the entire suit and adequately protect his interest. Coupled with more definite declaration of the administrator's duties when he defends the suit himself, this remedy appears to guarantee satisfaction of the deceased's assumed intent—that the largest amount possible, after payment of just debts, should go to the natural objects of his bounty.

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estate withdrawn from administration, TEX. STAT., REV. CIV. art. 3458, and then the heir is open to a suit on his bond on a claim against the estate. TEX. STAT., REV. CIV. art. 3462 and 3463.

44. Estate of Jessup, 80 Cal. 625, 22 Pac. 260 (1889); *In re* Thompson's Estate, 156 Wash. 286, 287 Pac. 21 (1930).

45. *In re* Elders Estate, 160 Ore. 111, 116, 83 P.2d 477, 478 (1938).