Circuit Court in St. Louis. The course is designed to instruct lawyers, particularly younger lawyers, in the technique of preparing and trying civil and criminal cases. The size of the class has been limited so that each student may have an opportunity to participate in the laboratory work planned.

NOTES

BURDEN OF PROOF IN FEDERAL CONFLICT OF LAWS SITUATIONS—SAMPSON v. CHANNELL

The case of *Swift v. Tyson*,[1] as interpreted by the Supreme Court of the United States in subsequent decisions, construed the Federal Judiciary Act of 1789[2] as requiring that federal courts apply the decisions of state tribunals only in local actions. Thus was originated the doctrine that, in general, federal courts would declare and apply federal common law. When the facts of the case arose entirely within one state, the federal court applied state common law rules in local actions and in other cases applied its own federal common law. In a two-state transaction the same procedure was followed, with the federal court extending its general federal rule to a conflict of laws situation. Recently the decision in *Erie R. R. v. Tompkins*[3] overturned the doctrine of the *Swift* case and held that in diversity of citizenship cases federal courts are to follow the decisions of state courts. When the facts arise wholly within the state in which the federal court is sitting, the common and statutory substantive law of that state is to be applied. In a two-state transaction the case has been interpreted as meaning that the federal court shall follow the conflict of laws rule of the state in which it is sitting to determine the appropriate substantive rule to be applied.[4] It is the purpose of this note to examine the problems incident to determining the proper rules as to burden of proof.

The rule of law which is applied by a forum to facts arising wholly within its state is called its internal law rule; that applied when important facts have a connection with other states is called the conflict of laws rule of the forum. In a conflict of

1. (U. S. 1842) 16 Pet. 1.
2. (1789) 1 Stat. 92, c. 20, 28 U. S. C. A. (1928) sec. 725.
3. (1938) 304 U. S. 64.
4. Schram v. Smith (C. C. A. 9, 1938) 97 F. (2d) 662, 664; New England Mut. Life Ins. Co. v. Spence (C. C. A. 2, 1939) 104 F. (2d) 665. See also McCormick and Hewins, The Collapse of "General" Law in the Federal Courts (1938) 33 Ill. L. Rev. 126, 139.

laws case it is frequently necessary to determine whether a particular point of law is "substance" or "procedure"; the process by which this determination is made is called qualification.[5]

In applying the rule of *Erie v. Tompkins,* on several occasions the federal courts have qualified burden of proof as a matter of substance and have applied the law of the state in which the court was sitting.[6] In all these cases the operative facts took place in the state in which the federal court was sitting, and thus no conflict of laws problem was presented.

The recent case of *Sampson v. Channell*[7] for the first time presented facts necessitating qualification of burden of proof by a federal court in a conflict of laws situation. In that case an action was brought in the federal court in Massachusetts, seeking damages for personal injuries sustained in the state of Maine. If the suit had been brought in Maine, the plaintiff would there have had the burden of proving freedom from fault. Massachusetts, as a matter of internal law, places the burden of proving contributory negligence on the defendant; in conflict of laws situations Massachusetts has declared that contributory negligence is a procedural matter to be controlled by its local rule. In reversing the decision by the district court the federal circuit court of appeals stated that the *Erie* case was based upon the policy that a litigant should not be able to affect a decision by his choice of state or federal courts. When a case is equally balanced, so that a party may win if a new advantage is discovered in his favor, burden of proof will determine the outcome of the case. Thus by choosing between state or federal courts, a plaintiff might be able to tip the scales in his favor. This un-

5. The terms "characterization," "classification," and "categorization" are synonymous with "qualification." A recent, and the most complete treatment of the problem is made by Robertson, *Characterization in the Conflict of Laws* (1940). See also Lorenzen, The Theory of Qualification and the Conflict of Laws (1920) 20 Col. L. Rev. 247; Beckett, The Question of Classification ("Qualification") in Private International Law (1934) 15 Brit. Y. B. of Internat'l Law 46; Cheatham, Internal Law Distinctions in the Conflict of Laws (1936) 21 Cornell L. Q. 570; Falconbridge, Characterization in the Conflict of Laws (1937) 53 Law Q. Rev. 537; Falconbridge, Renvoi, Characterization and Acquired Rights (1939) 17 Can. Bar Rev. 369; Robertson, A Survey of the Characterization Problem in the Conflict of Laws (1939) 52 Harv. L. Rev. 747; Robertson, The 'Preliminary Question' in the Conflict of Laws (1939) 55 Law Q. Rev. 565; Note (1940) 2 La. Law Rev. 715.

6. Cities Service Co. v. Dunlap (1939) 308 U. S. 208; Equitable Life Assur. Soc. v. MacDonald (C. C. A. 9, 1938) 96 F. (2d) 437; Francis v. Humphrey (D. C. E. D. Ill. 1938) 25 F. Supp. 1; Schoop v. Muller Dairies, Inc. (D. C. E. D. N. Y. 1938) 25 F. Supp. 50; Coca-Cola Bottling Co. v. Munn (C. C. A. 4, 1938) 99 F. (2d) 190.

7. (C. C. A. 1, 1940) 110 F. (2d) 754; 128 A. L. R. 394.

fortunate possibility can be prevented in part if the federal courts apply the state rule as to burden of proof. Although the desired result was clear to the circuit court of appeals, its achievement required an unusual application of the qualification process. First, under the rule of the *Erie* case, the court qualified burden of proof as substantive in order that it might treat the point in the same way as the Massachusetts court would. Then the court qualified burden of proof a second time and held that it was procedural, to be governed by the Massachusetts internal rule.

> If the federal court in Massachusetts on points of conflict of laws may disregard the law of Massachusetts as formulated by the Supreme Judicial Court and take its own view as a matter of "general" law, then the ghost of *Swift v. Tyson*, * * * still walks abroad, somewhat shrunken in size, yet capable of much mischief.[8]

The decision is novel since where, as in the instant case, the state classes burden of proof as procedural, the federal court in reaching its decision will be giving the same matter two different qualifications for different purposes. This surface incongruity is thus explained in the *Sampson* case:

> The explanation is that reasons of policy, set forth in the *Tompkins* case, make it desirable for the federal court in diversity of citizenship cases to apply the state rule, because the incident of burden of proof is likely to have a decisive influence on the outcome of litigation; and this is true regardless of whether the state court characterizes the rule as one of procedure or substantive law.[9]

It is difficult to determine what is substantive and what is procedural.[10] A matter may be declared substantive for one purpose and procedural for a different purpose. The line is not fixed but must be drawn according to the purposes of the qualification.[11] This paper deals with the purposes for which burden of proof has been qualified as substance or as procedure. Several

8. Sampson v. Channell (C. C. A. 1, 1940) 110 F. (2d) 754, 761. The court stated that Rule 8(c) of the new federal rules applies only to burden of pleading and not to the determination of burden of proof as a matter of substance or procedure within the rule of Erie R. R. v. Tompkins.

9. Sampson v. Channell (C. C. A. 1, 1940) 110 F. (2d) 754, 762.

10. See McClintock, Distinguishing Substance and Procedure in the Conflict of Laws (1930) 78 U. of Pa. L. Rev. 933; Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 Yale L. J. 333; Arnold, The Role of Substantive Law and Procedure in the Legal Process (1932) 45 Harv. L. Rev. 617; Note (1926) 11 Minn. L. Rev. 44.

11. Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 Yale L. J. 333, 335.

fact situations are involved, the chief of which also involves the possibility of *renvoi*. To facilitate treatment, *renvoi* will be considered in a separate section of this note. It is to be remembered, however, that the problem throughout is one of qualification.

I. QUALIFICATION

Qualification is the process of determining to what legal concept a particular issue—as burden of proof—belongs, and then applying the conflict of laws rule indicated by the determination.[12] A court must first determine whether the issue in the case is one of procedure, tort, contract, or some other legal classification and then must apply the appropriate conflict of laws rule which deals with procedure, with tort, with contract, or whatever other legal concept is involved. The problem of qualification of burden of proof, suggested by the principal case, may arise in several situations: In a state court applying the substantive law of another state; in a state court applying federal substantive law; and in a federal court applying the rule in *Erie R. R. v. Tompkins*.

In the ordinary conflict of laws situation, when the facts occur in one state and suit is brought in another state, burden of proof has almost uniformly been held to be procedural and the local law applied.[13] Only one court has held otherwise.[14] This treatment obtains when contributory negligence is regarded as a complete defense. But when the *lex loci* makes contributory negligence only a partial defense, to be pleaded in mitigation of damages, burden of proof has been held by several courts to be substantive so that the *lex loci* applies.[15] The reasoning of these courts is that the rule of mitigation of damages gives the plaintiff a new right, which did not exist at common law, to recover although guilty of contributory negligence. This right existing at the *lex loci*, being something new and distinct from the common law, is considered a matter of substance which is not to be nullified by procedural rules of the forum. For this purpose the *lex loci* is applied to all the elements of the transaction, including burden of proof.

12. See note 5, supra.

13. Levy v. Steiger (1919) 233 Mass. 600, 124 N. E. 477; Menard v. Goltia (Mo. 1931) 40 S. W. (2d) 1053; Sapone v. New York C. & H. R. R. (S. Ct. 1927) 130 Misc. 755, 225 N. Y. S. 211. See Connole v. East St. Louis & S. Ry. (Mo. 1937) 102 S. W. (2d) 581.

14. Precourt v. Driscoll (1931) 85 N. H. 280, 157 Atl. 525, 78 A. L. R. 874.

15. Caine v. St. Louis & S. F. Ry. (1923) 209 Ala. 181, 95 So. 876, 32 A. L. R. 793; Fitzpatrick v. International Ry. (1929) 252 N. Y. 127, 169 N. E. 112, 68 A. L. R. 801.

The cases involving application of federal substantive law by state courts have arisen under the Federal Employers' Liability Act[16] and the Interstate Commerce Act[17] as amended. Here burden of proof has been called substantive in order that the federal rule as to burden of proof would apply and not that of the state.[18]

What is the purpose of qualifying burden of proof as substantive under such circumstances? It is clear that in passing each of these Acts Congress intended to establish a policy which would be enforced uniformly throughout the country. When a case is otherwise equally balanced, burden of proof will determine the outcome. To assure uniformity of result, therefore, it is necessary that the court ignore the state rule as to burden of proof if it is in conflict with the rule indicated in the federal statute.[19] In relation to the Federal Employers' Liability Act there may be a further basis for calling burden of proof substantive. Under this statute[20] contributory negligence is not an absolute defense but is available only in mitigation of damages. An analogy may be drawn between this situation and those cases arising under similar state statutes in which the courts speak of preserving the "new right" created by the legislature against nullification by the procedural law of the forum. When a state statute makes contributory negligence a matter of mitigation of damages only, as has been pointed out, such statute creates a substantive right which will be enforced in the forum despite the existence of any contrary procedural rule as to burden of proof at the forum.[21] The only difference between that situation and the one existing under the Federal Employers' Liability Act is that one involves a state statute while the other involves a federal statute. The similarity of the problem makes it possible to say that if burden of proof is qualified as substantive under state statutes treating contributory negligence as mitigating damages, with these statutes being considered as creating "new rights," then burden of proof might well be qualified the same way under the federal statute and for the same reason, but as yet this approach has not been adopted by the state courts.

16. (1908) 35 Stat. 65, c. 149, 45 U. S. C. A. (1928) secs. 51-59.
17. (1887) 24 Stat. 384, c. 104, 49 U. S. C. A. (1929) sec. 16.
18. Louisville v. N. R. R. (1931) 223 Ala. 338, 135 So. 466, cert. denied (1931) 284 U. S. 661; A. Polk & Son v. New Orleans & N. E. Ry. (Miss. 1939) 185 So. 554; Barnet v. N. Y. Cent. & H. R. R. (1918) 222 N. Y. 195, 118 N. E. 625.
19. Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 Yale L. J. 333, 345.
20. (1908) 35 Stat. 66, c. 149, 45 U. S. C. A. (1928) sec. 53.
21. See cases cited supra note 15.

Under *Erie R. R. v. Tompkins*,[22] two situations must be considered in applying the rule that federal courts in diversity of citizenship cases are bound by state decisions on matters of substance. First, if the facts before the federal court arose in the state of the forum, only the general rule of the state will be applied; this is an internal rule situation. Second, if all or part of the facts of the case before the federal court arose in a state other than the one in which the court is sitting, a conflict of laws situation is presented. These situations must be investigated separately as different considerations are involved.

The Internal Rule Situation. This situation is entirely within the doctrine of *Erie R. R. v. Tompkins*. The test of a matter as substance or procedure within the doctrine of the *Erie* case is whether it may determine the outcome of the case.[23] If the federal court held burden of proof to be procedural and applied its own rule, its rule might be different from that of the state and so give an advantage to one of the parties litigant. In this situation burden of proof may easily determine the outcome of the case,[24] and should be qualified as substantive.[25] This has been the usual holding of cases raising the problem in an internal law situation and the federal cases have applied the local state rule as to burden of proof.[26]

The Conflict of Laws Situation. Reasoning from the *Erie* case, this situation presents a double problem. First, is burden of proof substance or procedure for the purpose of reference to the law of the state? Second, assuming it to be substance, so that "the law of the state" is to be applied, to *what* law of *what* state does this refer? In practice, the second question has been answered by the application of the conflict of laws rule of the state in which the federal court is sitting.[27] This left the first question of substance *versus* procedure to be answered by the principal case of *Sampson v. Channell*. The *Sampson* case held

22. (1938) 304 U. S. 64.

23. Erie R. R. v. Tompkins (1938) 304 U. S. 64; Sampson v. Channell (C. C. A. 1, 1940) 110 F. (2d) 754, 128 A. L. R. 394.

24. First Nat'l Bank v. Liewer (C. C. A. 8, 1911) 187 Fed. 16.

25. Cities Service Co. v. Dunlap (1939) 308 U. S. 208; Equitable Life Assur. Soc. v. MacDonald (C. C. A. 9, 1938) 96 F. (2d) 437; Francis v. Humphrey (D. C. E. D. Ill. 1938) 25 F. Supp. 1; Schoop v. Muller Dairies, Inc. (D. C. E. D. N. Y. 1938) 25 F. Supp. 50; Coca-Cola Bottling Co. v. Munn (C. C. A. 4, 1938) 90 F. (2d) 190.

26. But see McDonald v. Central Vt. Ry. (D. C. D. Conn. 1940) 31 F. Supp. 298.

27. Schram v. Smith (C. C. A. 9, 1938) 97 F. (2d) 662, 664; New England Mut. Life Ins. Co. v. Spence (C. C. A. 2, 1939) 104 F. (2d) 665. See McCormick and Hewins, The Collapse of "General" Law in the Federal Courts (1938) 33 Ill. L. Rev. 126, 139.

that, for the purpose of the *Erie* case, burden of proof is substantive and the court therefore looked to the conflict of laws rule of the state. It has been noted that the Massachusetts court qualifies burden of proof as procedural and for conflict of laws purposes applies its own internal law rule.

Should burden of proof be qualified as substantive under *Erie R. R. v. Tompkins* in a conflict of laws situation? The nature of this problem can best be illustrated by a hypothetical case. Suppose that a cause of action for tort arises in state *A*, whose rule regarding proof places an onerous burden on the plaintiff. But if he can secure service on the defendant in state *B*, the plaintiff will win because the conflict of laws rule of that state places the burden on the defendant. Here the plaintiff can control the outcome of the case by a selection of state courts. The decisions after the *Erie* case and before the principal case had shown that, if the plaintiff sued in the federal court of state *A*, the result would be the same as if he had sued in the courts of state *A*.[28] The *Sampson* case now shows that if the plaintiff sues in the federal court of state *B*, the result will be the same as if he sued in the courts of state *B*.

Thus in a conflict case which turns solely upon the issue of burden of proof, the plaintiff still may be able to determine the outcome of litigation by a selection of federal courts, but any possible choice in the selection of federal courts is no greater than the available choice in the selection of state courts. In general the possibility of choice was condemned by the *Erie* case; it was eliminated, as between state and federal courts, in cases arising in the state where the federal court is held, by denying the existence of a general federal common law. One method of eliminating any remaining choice between two federal courts would be to hold that the new Federal Rule 8 (c) makes burden of proof of contributory negligence procedural, thus establishing a uniform rule for all federal courts; before the *Erie* case many cases held that burden of proof was governed by the federal practice.[29] But this would restore to the plaintiff the possibility of choice between federal and state courts, contrary to the doctrine of the *Erie* case. Another solution, as one writer argues, would be to hold that the *Erie* case requires a federal court to follow the internal law rules of its state but leaves it free to act as arbiter over divergent conflict of laws rules.[30] As applied

28. See cases cited supra note 25.
29. Texas & Pac. Ry. v. Volk (1894) 151 U. S. 73; Miller v. Union Pac. R. R. (1933) 290 U. S. 227; Pokora v. Wabash Ry. (1934) 292 U. S. 98.
30. Note (1939) 52 Harv. L. Rev. 1002.

to burden of proof, this position has been flatly rejected by the principal case.

It is submitted that the *Sampson* case offers the most practicable solution. The plaintiff still has a choice between two state courts or between two federal courts in different states. Admitting that this is an evil, it is not caused by a difference between the rules applied by the state and federal courts of the same state. It results necessarily from our federal system and will continue until the state courts adopt a uniform rule on burden of proof.

It then appears that burden of proof, even in a choice of laws situation, should be qualified as substantive under the doctrine of the *Erie* case, and the rule of the state in which the federal court is sitting should be applied. Any apparent anomaly produced by the juggling of the words "procedure" and "substance" in reaching the result will be resolved if it is recognized that these words are at best mere labels which, prior to *Sampson v. Channell,* have been applied by courts to justify results reached on grounds of policy not made explicit. That they appear strained in covering the various subtleties of meaning expressed by the court in achieving substantial justice is a criticism not of the policy of the *Erie* case but, rather, of the inexpressiveness of language.

II. Renvoi

If the case before the federal court involves a conflict of laws situation, the first qualification of burden of proof as substantive will result in a reference to the state conflict of laws rule; but in the state rule there is inherent a second qualification. Out of this second qualification may arise the problem of *renvoi.* In *Sampson v. Channell* it was found that for conflict of laws purposes Massachusetts had characterized burden of proof as procedural. But what would happen if the Massachusetts courts had qualified the matter as substantive? In the conflict of laws substantive propositions relating to torts are almost universally referred to the law of the place where the tort occurred—in this case, Maine. In that situation the possibilities of *renvoi* are opened to the federal court.

Before going into its various ramifications, a brief statement of the doctrine of *renvoi* is appropriate. When one speaks of the "law" of a particular state which is the forum for trial of a case he may mean one of three things. First, he may mean those rules which determine the rights of the litigants arising out of facts which have taken place, or are treated as if they

had taken place, wholly within that state. These rules are designated as the "internal law" of the state. Second, he may mean those rules which determine the rights of litigants arising out of facts which have wholly or partially occurred outside the state. These principles constitute the "conflict of laws" of the state. Third, he may employ the word very broadly as designating the whole "law" of the state and thus include its "internal law" plus its "conflict of laws" rules.

It is a characteristic of conflict of laws principles to look to the "law" of some other state with which the facts of a case have important connection. In a particular case the conflict of laws rules of the forum may refer the court to the law of a foreign state; if the court then makes the reference to the whole body of law of the foreign state, including the foreign internal law and conflict of laws rules, then the forum is said to be adopting the doctrine of *renvoi*.[31] The conflict of laws rules of the foreign state may, in turn, refer the matter back to the forum, and the forum may again refer it back to the foreign conflict of laws rule and thus there will be an "international game of lawn tennis,"[32] with the reference bouncing figuratively between the forum and the foreign state. As this process is occasioned by the reference in the conflict of laws portion of the state's "law," it can be broken only by a reference at some stage to the "internal law" of one of the states. Those who advocate employment of the doctrine of *renvoi* say that when the conflict of laws rule of the forum has referred to the conflict of laws rule of a foreign state, and the latter rule has, in turn, referred to the "law" of the forum, the last reference back to the forum is to its "internal law." This type of *renvoi* is called "remission."[33] It may be, however, that the conflict of laws rule of the foreign state will refer the matter to the "law" of still another state; as to the new state, the word "law" is usually taken as meaning its "internal law" and this type of *renvoi* is called "transmission."[34]

31. See Lorenzen, The Renvoi Theory and the Application of Foreign Law (1910) 10 Col. L. Rev. 190; Lorenzen, The Renvoi Doctrine in the Conflict of Laws—Meaning of the "Law of a Country" (1918) 27 Yale L. J. 509; Schreiber, The Doctrine of the Renvoi in Anglo-American Law (1918) 31 Harv. L. Rev. 523; Griswold, Renvoi Revisited (1938) 51 Harv. L. Rev. 1165; Falconbridge, Renvoi, Characterization and Acquired Rights (1939) 17 Can. Bar Rev. 369.

32. In re Tallmadge (Surr. Ct. 1919) 109 Misc. 696, 709, 181 N. Y. S. 336, 344.

33. Lorenzen, The Renvoi Doctrine in the Conflict of Laws—Meaning of the "Law of a Country" (1918) 27 Yale L. J. 509; Schreiber, The Doctrine of the Renvoi in Anglo-American Law (1918) 31 Harv. L. Rev. 523.

34. Lorenzen, supra note 33; Schreiber, supra note 33.

Many authorities have rejected the doctrine of *renvoi*, in either form, by stating that in any conflict of laws case the reference by a forum to the law of a foreign state is to only the internal law of the state.[35] The Restatement of Conflict of Laws, however, adopts the doctrine of *renvoi* in two situations relating to land located in another state and to divorce.[36]

The possible application of *renvoi* in the general situation suggested by the *Sampson* case must be considered in relation to three separate sets of facts. In the first, the federal court (hereafter referred to as F_1) qualifies burden of proof as substance but the state courts in that district (referred to as F_2) qualify it as procedure. Here, as will be shown, for the purposes of *renvoi* it makes no difference how the matter is treated by courts of the state where the cause of action arose (that state being designated as F_3). In the second, the three courts, F_1, F_2, and F_3, each qualifies burden of proof as substance. And in the third, the courts F_1 and F_2 consider burden of proof as substance but those of F_3 qualify it as procedure.

First. Where the courts of F_1 qualify burden of proof as substance and the courts of F_2 view it as procedure, it is immaterial how the point is regarded by the courts in F_3 where the cause of action arose. This is because of the fact that, for administrative convenience in applying its usual rule to a conflict of laws point, F_2 has declared that burden of proof is a procedural matter; thus there will here be no further reference to any legal rule of F_3. This was the fact situation actually presented in the *Sampson* case.

Under its interpretation of the *Erie* case, F_1 must apply the law of F_2 and, to do so, the federal court must qualify burden of proof as substance. For both internal and conflict of laws purposes F_2 regards burden of proof as procedure, and it is an elementary principle of conflict of laws that the internal rule of the forum is to be applied to a matter of procedure.[37] But which court is the forum? It is not F_2 since, by hypothesis, the action is brought in the federal court, F_1. Therefore the matter might well be referred, by that type of *renvoi* called "remission," from the law of F_2 back to the law of F_1.[38] If so, unless for some rea-

35. See Griswold, Renvoi Revisited (1938) 51 Harv. L. Rev. 1165.

36. Restatement, *Conflict of Laws* (1940) secs. 8(1) and 8(2).

37. Beale, *Conflict of Laws* (1935) 1599, sec. 584.1; Goodrich, *Conflict of Laws* (2d ed. 1938) 187, sec. 77; Stumberg, *Principles of Conflict of Laws* (1937) 128.

38. MacDonald v. Central Vt. Ry. (D. C. D. Conn. 1940) 31 F. Supp. 298, has actually held this, saying that the federal court must follow the classification made by the state, and therefore apply the federal procedural

son the process stops with F_1, there may be an endless cross-reference between the courts of F_1 and F_2.

The application of this *renvoi* can be prevented by a statement of the purposes for which the matter is respectively qualified as substance and procedure by the courts of F_1 and F_2. F_1 has treated burden of proof as substance to effectuate the purpose of *Erie R. R. v. Tompkins*. F_2 has qualified it as procedure for the administrative convenience of trying the case under its own usual rule. If F_1 were to accept the matter as referred back to it, it would be ignoring the reason for which F_2 had classified it as procedure and would be defeating the purpose expressed in the *Erie* case. The court in *Sampson v. Channell* recognized that there were different purposes behind the qualifications and prevented *renvoi* by stating that the matter came to rest in F_2. In this the decision is sound since a matter may properly be qualified as substance for one purpose and as procedure for another.

Second. Where the courts of F_1, F_2, and F_3 each qualifies burden of proof as substance, the issue will first be referred by F_1 to F_2 under the doctrine of *Erie R. R. v. Tompkins*. The conflict of laws rule of F_2 will then refer the matter to the "law" of F_3, since a matter classified as substantive in a tort action is considered in relation to the *lex loci delicti*.[39] If the courts of F_2 reject the doctrine of *renvoi*, they will look to the "internal law" of F_3.[40] And if the courts of F_2 adopt the doctrine they will look to the entire law of F_3 including its conflict of laws; but, by hypothesis, the conflict of laws rule of F_3 classifies the issue as one of substance to be governed by the same rule as in its own internal law. That is, by its conflict of laws rule, F_3 refers to its own internal law rule. Thus in this situation it is immaterial whether F_2 adopts or rejects the doctrine of *renvoi* as both that court and the court of F_1 will apply the internal law of F_3. But by looking to F_2's conflict of laws rule the court of F_1 was referred to the law of F_3, a third legal system. As to F_1 there was therefore involved the type of *renvoi* called "transmission." This will occur under the rule of the *Sampson* case whenever F_2 classifies an issue as one of substance. But, practically, the situation will seldom arise. As yet only one state has qualified burden of proof as substance in a choice of laws situation[41] and it is

rule 8(c). It is submitted that the fact that the federal court must follow the state classification does not require the application of the federal procedural rule.

39. See note 37, supra.

40. See Schreiber, supra note 33.

41. Precourt v. Driscoll (1931) 85 N. H. 280, 157 Atl. 525, 78 A. L. R. 874.

very unlikely that two states so holding will be involved in a single case.

Third. Where the courts of F_1 and F_2 each qualifies burden of proof as substance, but the court of F_3 regards it as procedure, the court of F_1 will first look to the conflict of laws rule of F_2 and will then be referred by it to the "law" of F_3. In this situation there are two possibilities of *renvoi.* If the courts of F_2 do not adopt the doctrine of *renvoi,* as many courts and authorities do not,[42] the matter will come to rest with the internal law of F_3; there will thus be operative, as to F_1, the transmission type of *renvoi* considered under the second factual situation above. But if F_2 adopts the doctrine of *renvoi* there is, at the outset, the same difficulty which existed in the first possibility of *renvoi* considered above. Since F_3 qualifies burden of proof as procedural, the law of the forum is to be applied.[43] But what is the law of the forum? For general purposes the term "law of the forum" refers to the legal system of the jurisdiction in which the action is brought. Used in this very loose sense, F_1, the federal court, will be the forum. Thus the matter may revert back to F_1 and unless it comes to rest there, the reference will again proceed through all three courts. There is involved that type of *renvoi* called "remission" because the reference is being "remitted" to the forum. This is probably the only possibility of a "remission" involving three separate legal units. But this *renvoi* also may be prevented by noting the difference in purposes for which the courts of F_1 and F_3 qualify burden of proof.[44] The courts of F_1 treat burden of proof as substance in order to effectuate the policy of the *Erie* case, while the courts of F_3 may qualify it as procedure in order that they may apply their own rule as to burden of proof. Recognition of the purposes of qualification at least will eliminate F_1 from the possible remission by preventing the reference from jumping from F_3 back to F_1.

But this does not solve the problem of choice by F_1 between the rules of F_2 and F_3. If the courts of F_2 look to the conflict of laws rule of F_3, the procedural qualification by the latter will occasion a reference back to F_2 since the federal court is practically sitting as a state court. According to some authorities advocating the doctrine of *renvoi,* the reference from the con-

42. See Griswold, Renvoi Revisited (1938) 51 Harv. L. Rev. 1165.

43. See Beale, *Conflict of Laws* (1935) 1599, sec. 584; Goodrich, *Conflict of Laws* (2d ed. 1938) 187, sec. 77; Stumberg, *Principles of Conflict of Laws* (1937) 128.

44. See Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 Yale L. J. 333.

flict of laws rule of F_3 is to be accepted as a reference to the "internal law" of F_2, where the matter comes to rest.[45] In this event there is a "transmission" coupled with a "remission," the route being from F_1, to F_2, to F_3, to F_2. It is repeated that if F_2 rejects the doctrine of *renvoi,* the court will apply a rule which is the same as the internal law of F_3.

Thus of three situations possibly giving rise to *renvoi,* it is eliminated in the first by a recognition of the differences in purpose for which qualification is made of burden of proof; this is illustrated by the *Sampson* case. In the second situation there is the transmission type of *renvoi* with the federal court applying the internal law of F_3. In the third set of possible facts *renvoi* may be presented in either of two forms; in one form it can be eliminated by a recognition of the purposes for which qualification is made. In the other form the *renvoi* may involve either a transmission coupled with a remission, or a simple transmission, depending on whether the courts of F_2 adopt or reject the *renvoi* doctrine. The possibilities of *renvoi* raised by these sets of fact situations presented above were not considered by the court in *Sampson v. Channell* and until these questions have been litigated many points relating to *renvoi* in conflict of laws cases in federal courts will be left in doubt.

CONCLUSION

The *Sampson* case presented for the first time the problem of qualification by a federal court in a conflict of laws situation. The problem is difficult under any circumstances because the conclusion may rest less upon logic than upon matters of policy which may not be made explicit in the opinion. In decisions by state courts it has been the almost universal rule that in conflict of laws cases, for reasons of administrative convenience, burden of proof will be qualified as procedure. In cases involving a federal statute, however, state courts have qualified it as substance in order that the legislative policy expressed by Congress could be uniformly applied throughout the country free from local rules as to burden of proof. Subsequent to *Erie R. R. v. Tompkins,* the federal courts have qualified burden of proof as substantive in diversity of citizenship cases which presented no conflict of laws problem; this qualification was made in order to insure uniformity of result between the federal court and the court of the state in which it was held. The *Sampson* case presented the same problem in a conflict of laws situation. The court

45. See Griswold, Renvoi Revisited (1938) 51 Harv. L. Rev. 1165.

there held, to accomplish the policy of uniformity required by the *Erie* case, that in a conflict of laws situation, also, burden of proof would be treated as a substantive issue. Thereupon a second qualification was involved; because the conflict of laws rules of the state court qualified the matter as procedural, the federal court then adopted that qualification and applied the internal rule of that state. Apart from its significance for the points it left undecided, the *Sampson* case is important in that the court, despite the apparent confusion resulting from undescriptive labels, adopted two different qualifications of the same point of law in order to reach a desirable result. The realistic approach to the problem of burden of proof in a conflict of laws case furthers the policy expressed in the *Erie* case of preventing choice of result through a selection of courts.

The *Sampson* case left undecided problems which will arise if the conflict of laws rules of the state should qualify the matter as substantive. In that event the court will be faced with the various possibilities of *renvoi* presented above. Until such time as there is further litigation, these problems will remain as matters of conjecture.

MELVIN COHEN.

PERSONAL DISQUALIFICATIONS OF ADMINISTRATORS*

II. JUDICIAL DISQUALIFICATIONS

Adverse Interest

The contention is often made that an applicant for letters of administration is disqualified if he has an interest adverse to the estate[108] which he wishes to administer. Thus the applicant may be claiming property which is also claimed by the estate,[109] or he may be a debtor of the estate,[110] or he may be an adverse party in a suit brought by the estate on a cause of action other than debt.[111] Is the applicant disqualified by reason of these factors?

* Part I of this note, dealing with statutory disqualifications of administrators, appears at page 106, supra.

108. Adverse interest towards the other heirs of the intestate should not disqualify since it is present in every case where there are two or more heirs. Each heir is interested in seeing that the others get less in order that his own share may be greater. The very fact that this interest exists in almost every case demonstrates that it should not be a disqualification. But see State ex rel. Wilson v. Martin (1930) 223 Mo. App. 1176, 26 S. W. (2d) 834, where this interest was considered by the trial court. The appellate court did not, however, discuss this issue.

109. See In re Brundage's Estate (1904) 141 Cal. 538, 75 Pac. 175.

110. See In re Graham's Estate (1925) 27 Ariz. 167, 231 Pac. 918.

111. See Ellmaker's Estate (Pa. 1835) 4 Watts 34.