

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 estate¹⁰⁸ 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.

Adverse interest arising from a claim to the property of the estate does not come within the statutory disqualification for want of integrity.¹¹² The same is true of other kinds of adverse interest.¹¹³ As a result, in the nineteen states¹¹⁴ which hold the statutory disqualifications exclusive and mandatory, adverse interest is not a disqualification and the preferred applicant must be appointed.¹¹⁵ Only in those states in which the statutory disqualifications are not exclusive and in which the court has discretion to add other disqualifications,¹¹⁶ is there any question of an adverse claimant's eligibility.

It seems clear that an adverse claimant should not be appointed. He, as representative, will be too willing to admit that he, as individual, has a just claim to the property, or that his debt to the estate has been satisfied or is not recoverable. Of course this danger is slightly lessened by the fact that the court supervises the activities of the administrator. But before a court can act it must be given facts, and obviously the adverse administrator will not be over-zealous to disclose personally detrimental facts. The disclosure might be compelled before his appointment in the hearing on his qualifications; but this would not insure future candor, investigation, and prompt action. Creditors and other distributees might be injured by this failure. In addition, where litigation is pending between the estate and the applicant, it is inappropriate to have the same party acting as both plaintiff and defendant.¹¹⁷

The majority of the courts recognize the validity of these arguments and hold that the adverse claimant should not be ap-

112. *Estate of Carmody* (1891) 88 Cal. 616, 26 Pac. 373.

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

114. See notes 92 to 97, *supra*.

115. *Marcus v. McKee* (1934) 227 Ala. 577, 151 So. 456 (claimed property); *McFrey v. Casey* (1924) 211 Ala. 649, 101 So. 449 (debtor); *In re Graham's Estate* (1925) 27 Ariz. 167, 231 Pac. 918 (debtor); *In re Brundage's Estate* (1904) 141 Cal. 538, 75 Pac. 175 (claimed property); *Estate of Carmody* (1891) 88 Cal. 616, 26 Pac. 373 (claimed property); *In re McLure's Estate* (1922) 63 Mont. 536, 208 Pac. 900; *In re Blackburn* (1913) 48 Mont. 179, 137 Pac. 381 (claimed property); *In re McOwens Estate* (Surr. Ct. 1921) 114 Misc. 151, 185 N. Y. S. 907; *Copperfield v. Shedd* (1932) 158 Okla. 40, 10 P. (2d) 490 (party litigant). The rule of the above California cases was changed by statute which expressly gave the court the right to disqualify "for other cause" than those enumerated in the statute. After this amendment, adverse interest was held to disqualify the applicant. *In re St. John's Estate* (1937) 8 Cal. (2d) 175, 64 P. (2d) 725 (claimed property).

116. See notes 95 to 107, *supra*.

117. See *Spencer's Estate* (1897) 7 Pa. Dist. Rep. 216.

pointed.¹¹⁸ The very existence of a minority¹¹⁹ is somewhat surprising. It is interesting to note that the courts of Washington, which hold its statute to be non-mandatory in spite of its express mandatory provisions,¹²⁰ are among this minority. If the court's desire for discretion was so great that it would ignore the statutory mandate, it is remarkable that it has not exercised its discretion in this situation.

Massachusetts courts are among those holding that adverse interest disqualifies. However, the adverse interest must be held in a personal rather than representative capacity.¹²¹ Since the bias of an individual is not apt to be greatly lessened by the fact that he is acting in a representative rather than in an individual capacity, it is submitted that this qualification is unsound.¹²²

In all states, including those in which adverse interest does not constitute an absolute disqualification, the existence of this interest will be considered by the court in choosing between two otherwise equally qualified applicants, and the applicant free of adverse interest will be appointed administrator.¹²³ It should be noted, incidentally, that adverse interest is a more important consideration than non-residence in those states where non-resi-

118. *In re St. John's Estate* (1937) 8 Cal. (2d) 175, 64 P. (2d) 725 (claimed property); *Davis v. Davis* (1925) 33 Ga. App. 628, 127 S. E. 779 (debtor); *Moody v. Moody* (1859) 29 Ga. 519 (claimed property), with which compare *Sampson v. Sampson* (1932) 44 Ga. App. 803, 163 S. E. 326 (claimed property); *Hunt v. Crocker* (1932) 246 Ky. 338, 55 S. W. (2d) 20 (claimed property); *Stearns v. Fiske* (Mass. 1836) 18 Pick. 24 (debtor); *State to use of Miller's Adm'r v. Bidlingmaier* (1853) 26 Mo. 483 (adm'r of adverse estate); *Territory v. Valdez* (1872) 1 N. M. 533 (debtor); *Failor's Estate* (1899) 10 Pa. Super. 253 (claimed property); *In re Bieber's Appeal* (1849) 11 Pa. St. 157 (debtor); *Ellmaker's Estate* (Pa. 1835) 4 Watts 34 (party litigant).

119. *Ford v. Peck* (1924) 116 Kan. 481, 227 Pac. 527 (debtor); *Kearney v. Turney* (1867) 28 Md. 408 (debtor); *Pendleton v. Pendleton* (1846) 14 Miss. 448 (claimed cause of action); *Buscher v. Buscher* (1913) 72 Wash. 675, 131 Pac. 193 (claimed property).

120. See *supra*, note 97.

121. *Morgan v. Morgan* (1929) 267 Mass. 388, 166 N. E. 747. A receiver of a bankrupt's estate was appointed administrator of the bankrupt's estate when the bankrupt died. The functions would obviously conflict.

122. See *In re Clark's Estate* (Surr. Ct. 1934) 152 Misc. 723, 274 N. Y. S. 282, in which it was held that the applicant was disqualified by reason of adverse interest existing between the guardian-applicant and the estate of the deceased. Adverse interest was not present between the ward of the guardian-applicant and the intestate estate. See *State to use of Miller's Adm'r v. Bidlingmaier* (1853) 26 Mo. 483, in which the administrator of one estate applied for letters of administration on the estate of the first intestate's husband. The application was denied.

123. *Succession of Virgets* (1935) 182 La. 491, 162 So. 53, with which compare *Succession of Weis* (1891) 43 La. Ann. 475, 9 So. 712; *In re Rouse's Estate* (1918) 71 Okla. 296, 176 Pac. 954.

dence does not constitute an absolute disqualification. Thus, other things being equal, a non-resident is preferred to a resident applicant who has an interest adverse to the estate.¹²⁴

Marital Misconduct

Desertion. It is well settled that voluntary separation does not deprive either spouse of the right to administer the other's estate.¹²⁵ There is, however, a conflict of authority where the applicant has, without cause, deserted his or her spouse. Alabama, in *Brown v. Brown*,¹²⁶ held that abandonment is not a disqualification, while New York has held that it is.¹²⁷ In a Kentucky case¹²⁸ an abandoning spouse was denied the right to administer on the ground that she was a non-resident; in a West Virginia case¹²⁹ the abandoning spouse was appointed, on the ground that she was the natural guardian of the infant children whom she had taken when deserting. The court intimated that because of the abandonment she had no personal right to the letters of administration.¹³⁰

How can this seeming conflict of authority be resolved? Should a deserting husband or wife be entitled to administer the estate of the abandoned spouse? Inasmuch as an administrator must have an interest in the estate, the answer to this question turns upon whether the deserter loses his right to the property of his spouse by reason of the abandonment. If the right to the property is lost, the right to administer is also lost. Statutes in some states prohibit a spouse from sharing in the deceased spouse's estate if he has without cause abandoned the decedent during the latter's lifetime.¹³¹ Since the abandoning spouse, in such states, no longer has an interest in the intestate's property, the right to administer given by the statute is lost. A forfeiture statute of

124. *Pickering v. Pendexter* (1865) 46 N. H. 69.

125. *Williams v. McConico* (1855) 27 Ala. 572; *In re Brueneman's Estate* (1939) 32 Cal. App. (2d) 606, 90 P. (2d) 323; *Keadman v. Rose* (1879) 63 Ga. 458; *In re Merrill's Estate* (1935) 245 App. Div. 323, 281 N. Y. S. 424.

126. (1920) 204 Ala. 157, 85 So. 439. See *Nichols v. Smith* (1914) 186 Ala. 587, 65 So. 30.

127. *In re Rechtschaffen's Estate* (1938) 278 N. Y. 336, 16 N. E. (2d) 357. But cf. *In re Schwartz's Estate* (Surr. Ct. 1930) 138 Misc. 537, 246 N. Y. S. 478.

128. *Radford v. Radford* (Ky. 1837) 5 Dana 151.

129. *In re Estate of Stolling* (1918) 82 W. Va. 18, 95 S. E. 446.

130. A North Carolina statute provides that abandonment of the wife deprives the husband of the right to administer the wife's estate. But this is the only state having an express statutory disqualification on this ground.

131. *Atkinson, Wills* (1937) 116, sec. 54. See *In re Rechtschaffen's Estate* (1938) 278 N. Y. 336, 16 N. E. (2d) 357.

this type exists in New York,¹³² and its decision that abandonment disqualifies can be thus explained. The Alabama case, *Brown v. Brown*,¹³³ is not inconsistent with this analysis, since a forfeiture statute does not exist in that state.¹³⁴ These decisions show that abandonment is not a common law disqualification.

It has been held that abandonment by a husband does not come within the disqualification for improvidence or want of understanding.¹³⁵ It would seem, however, that the abandoning spouse should be found wanting in integrity.¹³⁶ This result is doubtful, however, in view of the result obtained in cases involving other misconduct, such as adultery and bigamy on the part of the wife, which will be next considered.

Adultery. Adultery and bigamy do not disqualify the surviving spouse.¹³⁷ They do not show lack of integrity within the meaning of that statutory disqualification,¹³⁸ and apparently they are not common law disqualifications which exist independently of statute.¹³⁹

Adultery should be sufficient to disqualify the surviving spouse. Does it not show deficiencies in character which should disqualify an aspirant to a fiduciary position? By statute in North Carolina it is provided that an adulterous spouse living apart from the other may not be appointed administrator of the latter's estate. Finally, where a statute takes away an adulterous spouse's interest in the estate of the other spouse,¹⁴⁰ disqualification might be based on the theory that the applicant has lost his or her pecuniary interest in the estate.¹⁴¹

132. 1 N. Y. Thompson's Laws (1939) Decedent Estate Law, sec. 87.

133. (1920) 204 Ala. 157, 85 So. 439.

134. *Nolen v. Doss* (1901) 133 Ala. 259, 31 So. 969.

135. *In re Schwartz's Estate* (Surr. Ct. 1930) 138 Misc. 537, 246 N. Y. S. 478. At the time of this decision, want of integrity was not a statutory disqualification. The rule of this case has been changed by *In re Rechtschaffen's Estate* (1938) 278 N. Y. 336, 16 N. E. (2d) 357. The decision in the latter case was based, however, on lack of financial interest in the estate and not on a statutory disqualification.

136. But integrity is considered solely in reference to business relations. See *supra*, page 115.

137. *Estate of Newman* (1899) 124 Cal. 688, 57 Pac. 686; *In re Dettman's Estate* (1917) 195 Mich. 231, 161 N. W. 836; *Coover's Appeal* (1886) 52 Pa. St. 427; *Bennett v. Howard* (1893) 18 R. I. 384, 28 Atl. 333.

138. (1899) 124 Cal. 388, 57 Pac. 686.

139. *In re Dettman's Estate* (1917) 195 Mich. 231, 161 N. W. 836; *Coover's Appeal* (1886) 52 Pa. St. 427; *Bennett v. Howard* (1893) 18 R. I. 384, 28 Atl. 333.

140. *Atkinson, Wills* (1937) 112-115, sec. 54.

141. See *supra*, page 116.

Miscellaneous

Business Experience. In those states in which the statutory grounds of disqualification are exclusive, it is settled that an applicant is not barred by lack of business experience.¹⁴² But business experience ending in misfortune may be a disqualification. Thus, prior bankruptcy of an applicant is evidence of improvidence.¹⁴³

Even in those states in which the statutory grounds of disqualification are not exclusive, lack of business experience does not usually amount to a disqualification,¹⁴⁴ while business failure does.¹⁴⁵ Of course, unusual circumstances may alter this result. Thus, where control of a large insurance company is involved, it is essential that the applicant have some business experience.¹⁴⁶ Where the court is choosing between two applicants who are otherwise equally qualified, the scales will be inclined in favor of the applicant with a good business record,¹⁴⁷ while a business failure will incline the scale in favor of the other applicant.¹⁴⁸

142. *Stouffer v. Stouffer* (1909) 110 Md. 368, 72 Atl. 843. The Maryland courts might now reach a contrary result since the statute today is not mandatory. Accord: *In re Carney's Estate* (1914) 83 N. J. Eq. 615, 91 Atl. 598; *In re Stege's Estate* (Surr. Ct. 1937) 164 Misc. 95, 299 N. Y. S. 115.

143. *Willis v. Jones* (1875) 42 Md. 422; *Coope v. Lowerre* (N. Y. 1845) 1 Barb. Ch. 45; *In re Ferguson* (Surr. Ct. 1903) 41 Misc. 465, 84 N. Y. S. 1102. Cf. *In re Brinckmann's Estate* (Surr. Ct. 1915) 89 Misc. 41, 152 N. Y. S. 542, which held that loss of property did not show improvidence so long as the loss could be ascribed to misfortune.

144. *Maddox v. Maddox* (1921) 27 Ga. App. 369, 108 S. E. 304; *Wilkey's Appeal* (1885) 108 Pa. 567. *In State ex rel. Wilson v. Martin* (1930) 223 Mo. App. 1176, 26 S. W. (2d) 834, an applicant without business experience was disqualified by the court. It was stated that the applicant also had an adverse interest towards the other heirs of the intestate. But this is generally true. See note 108, *supra*. Adverse interest should only be a disqualification when it is directed against the intestate's *estate*. *In Stephenson v. Stephenson* (1857) 49 N. C. 472, it was held that an illiterate person without business experience was "incompetent" within the meaning of the statute. *In In re Pollard's Estate* (1920) 105 Neb. 432, 181 N. W. 133, a creditor without business experience was disqualified when the other, and unpreferred, applicant showed that he had a favorable business experience.

145. *Cornprobst's Appeal* (1859) 33 Pa. 537, held that an insolvent applicant was disqualified. *Levan's Appeal* (1886) 112 Pa. 294, 3 Atl. 804, repeated this rule by way of dictum. But mere poverty of the applicant does not disqualify. *Bowersox's Appeal* (1862) 100 Pa. 434, 45 Am. Rep. 387.

146. *State ex rel. Gregory v. Henderson* (1935) 230 Mo. App. 1, 88 S. W. (2d) 893.

147. *Succession of Virgets* (1935) 182 La. 491, 162 So. 53; *Cramer v. Sharp* (1892) 49 N. J. Eq. 558, 24 Atl. 962.

148. *Bell v. Mimiswood* (1812) 2 Phillim. 22, 161 Eng. Rep. 1066. *In Iredale v. Ford and Bramworth* (1859) 1 Sw. & Tr. 305, 164 Eng. Rep. 740, there were two applicants, each of whom was favored by one rule of preference. The court held that the fact that the one applicant had been

Senility. The fact that the applicant is aged¹⁴⁹ or infirm¹⁵⁰ is not a common law disqualification in any state if it appears that he has sufficient understanding and capacity to execute the duties of the trust. Of course, if the applicant does not have the "understanding"¹⁵¹ required by some statutes, he cannot be appointed; but old age alone does not constitute such a want of understanding.¹⁵²

Hostility toward heirs. Where the statutes are mandatory, a person entitled to letters of administration cannot be rejected because of a hostile feeling toward the heirs.¹⁵³ However, in those states in which the statutory disqualifications are not exclusive, a surviving spouse should not be appointed if he or she is hostile toward the other distributees.¹⁵⁴ Where there is hos-

previously adjudged a bankrupt was sufficient reason to favor the other applicant.

149. *Halley v. Haney and Thompson* (1826) 19 Ky. 141; *Wilkey's Appeal* (1885) 108 Pa. 567. And see cases cited *infra*, note 153.

150. *Mobley v. Mobley* (1926) 149 Md. 401, 131 Atl. 770; *Matter of Berrien* (1885) 3 Dem. Surr. (N. Y.) 263; *In re Stege's Estate* (Surr. Ct. 1937) 164 Misc. 95, 299 N. Y. S. 115. But see *Slay v. Davidson* (Tex. Civ. App. 1935) 88 S. W. (2d) 650, in which the trial court held that an aged and infirm person was disqualified. The disqualified person then attempted to nominate a person to act in his stead. The appellate court held that he could not nominate, since the trial court had held that he could not act as administrator. Evidently there was no appeal on the question whether an infirm aged person was disqualified. And see *State ex rel. Wilson v. Martin* (1930) 223 Mo. App. 1176, 26 S. W. (2d) 834, in which an aged infirm applicant who was hostile towards the majority of the heirs of the intestate was denied appointment. Which was the crucial factor was not indicated.

151. See *supra*, page 114.

152. *Estate of Wright* (1918) 177 Cal. 274, 170 Pac. 610; *Estate of Berrien* (N. Y. 1885) 3 Dem. Surr. 263; *In re Stege's Estate* (Surr. 263. In *Johnson's Estate* (1920) 182 Cal. 642, 189 Pac. 280, the applicant was 83 years of age, suffered from hallucinations, and was forgetful. The combination of these factors was held to show a want of understanding within the statute. See *Haughey v. Haughey* (1920) 73 Ind. App. 318, 127 N. E. 454, in which the widow was passed by for several reasons, two of which were old age and poor health.

153. *Estate of Wright* (1918) 177 Cal. 274, 170 Pac. 610; *Dooley v. Dooley* (Tex. Civ. App. 1922) 240 S. W. 1112. See *Smith v. Lurty* (1907) 107 Va. 548, 59 S. E. 403, in which hostility towards heirs was held to be a disqualification although not made so by the statute involved. The court did not recognize or deny that the statute was mandatory. But the effect of the added disqualification was to make the statute discretionary only.

154. *Martin v. Otis* (1919) 233 Mass. 491, 124 N. E. 294, 6 A. L. R. 1340; *In re Abramovitz's Estate* (1936) 278 Mich. 271, 270 N. W. 294; *In re Messler's Estate* (1938) 16 N. J. Misc. 434, 1 A. (2d) 322; *In re Friese's Estate* (1935) 317 Pa. 86, 176 Atl. 225; *Warner's Estate* (1904) 207 Pa. 580, 57 Atl. 35, 99 Am. St. Rep. 804; *Smith v. Lurty* (1907) 107 Va. 548, 59 S. E. 403. *Contra*: *Pingree's Estate* (1929) 74 Utah 384, 279 Pac. 901. See *Carpenter v. Wood* (1902) 131 Mich. 314, 91 N. W. 162 (creditor denied appointment on the ground of hostility); *State ex rel.*

tility throughout a class, as among children of the deceased, that class will be disqualified and a disinterested third person appointed, even though he does not have an interest in the estate.¹⁵⁵

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Wilson v. Martin (1930) 223 Mo. App. 1176, 26 S. W. (2d) 834 (brother of intestate denied appointment because of old age, infirmity, and hostility toward heirs); *In re Stott's Estate* (1925) 133 Wash. 100, 233 Pac. 280 (distributees denied appointment on the ground that they had a feeling of hostility towards the creditors of the deceased).

155. *In re Eva's Estate* (1918) 93 Conn. 38, 104 Atl. 238 (applicant was also a nonresident); *In re Appointment of Administratrix* (1893) 10 Ohio Dec. 731; *Drew's Appeal* (1878) 58 N. H. 319; *Ellis v. Ellis* (1919) 42 N. D. 535, 174 N. W. 76; *In re Schmidt* (1897) 183 Pa. 129, 38 Atl. 464; *In re St. Martin's Estate* (1934) 175 Wash. 285, 27 P. (2d) 326; *Bridgman v. Bridgman* (1887) 30 W. Va. 212, 3 S. E. 580. Where the class is disqualified, the nominees of the groups within the class will also be denied appointment. *In re Tracy's Estate* (1932) 214 Iowa 881, 24 N. W. 309; *McWilliams v. Anderson* (1918) 102 Neb. 170, 166 N. W. 261.