

4. Thereafter the Missouri cases have consistently classified the garnishment of intangible debts as a proceeding *in personam* in relation to the garnishee, and as a proceeding *in rem* in relation to the principal debtor.

5. A rule of garnishment, such as that laid down in *Harris v. Balk* must reasonably meet the needs of the forum with respect to commercial control, without undue interference with legitimate interests of other states. But it must go further. Some means must be found to protect the interests of the principal debtor, and to guard against the possibility of double liability of the garnishee, which is inherent in the *dictum* in *Harris v. Balk*. On this phase of the problem there are no Missouri cases. Of the suggested solutions, it is submitted that a statute requiring the plaintiff to post a bond indemnifying the garnishee and the principal debtor against possible loss has the greatest merit.

RALPH T. SMITH.

### PERSONAL DISQUALIFICATIONS OF ADMINISTRATORS\*

At early common law there were no statutes governing the selection of the administrator of a decedent's estate.<sup>1</sup> Today in all American states,<sup>2</sup> as well as in England,<sup>3</sup> there are statutes

\* Part II of this note, dealing with judicial disqualifications of administrators, will appear in the next issue of the Quarterly.

1. 3 Schouler, *Wills, Executors and Administrators* (6th ed. 1923) 1671, sec. 1389.

2. Ala. Code (1928) secs. 5730, 5742-5745; Ariz. Rev. Code (1928) secs. 3922-3925, 3992; Ark. Digest of Statutes (Pope's 1937) c. 1, secs. 7-9, 15; Cal. Probate Code (1937) c. 4, art. 1, secs. 420-426, art. 2, sec. 442; Colo. Comp. Laws (1921) secs. 5222, 5228; Conn. Gen. Stats. (1930) sec. 4904; Del. Rev. Code (1935) secs. 3808-3810; Fla. Comp. Laws (1927) secs. 5521-5526; Ga. Code (1933) c. 113, secs. 1202-1204; Idaho Code (1932) tit. 15, secs. 312-328; Ill. Smith-Hurd Ann. Stats. (1934) c. 3, sec. 18; Ind. Burns Stats. (1933) tit. 6, secs. 301-304; Iowa Code (1935) secs. 11883, 11884, 12066; Kan. Gen. Stats. (1935) c. 22, secs. 312, 328; Ky. Carroll's Stats. Ann. (1936) secs. 3845, 3896; La. Civil Code (1932) secs. 1042-1046; Me. Rev. Stats. (1930) c. 76, secs. 18, 25, 27; Md. Ann. Code (1924) art. 93, secs. 15-29, 53; Mass. Gen. Laws (1932) c. 193, secs. 1, 2; Mich. Comp. Laws (1929) secs. 15586, 15595; Minn. Mason's Stats. (Supp. 1936) secs. 8992-68; Miss. Code (1930) secs. 1629, 1630, 1642; R. S. Mo. (1929) secs. 6-10, 43, 47; Mont. Rev. Code (1935) secs. 10068-10073; Neb. Comp. Stats. (1929) c. 30, secs. 314, 323; Nev. Comp. Laws (1929) secs. 9637-9641; N. H. Pub. Laws (1926) c. 299, secs. 2-10; N. J. Rev. Stats. (1937) tit. 3, c. 7, sec. 6; N. M. Stats. Ann. (1929) c. 47, art. 1, secs. 109-111; N. Y. Thompson's Laws (1939) Surrogate's Court Act, secs. 94, 118; N. C. Code (1935) secs. 6-15; N. D. Comp. Laws (1913) secs. 1657, 8663; Okla. Stats. (1931) secs. 1135-1149; Ore. Code Ann. (1930) tit. 11, secs. 208-210, 231; Ohio Gen. Code Ann. (Page's 1926) tit. 3, c. 3, secs. 10629, 10636, 10617, (Supp. 1926-1935) secs. 10509-3; Pa. Purdon's Stats. (1936) tit. 20, secs.

prescribing the order in which applicants for letters of administration should be appointed. Thus, the Missouri statute provides that

Letters of administration shall be granted: First, to the husband or wife; secondly, to those who are entitled to distribution of the estate, or one or more of them, as the court or judge or clerk in vacation shall believe will best manage and preserve the estate: *Provided, however*, if the court, or judge in vacation, should believe no one of such persons entitled to administer is a competent and suitable person, some other person than those above mentioned may be appointed.<sup>4</sup>

This section designates those who are theoretically<sup>5</sup> entitled to be appointed administrator of a decedent's estate. Other sections provide that certain persons may not be appointed administrator. Thus, Section 10<sup>6</sup> provides that letters of administration shall in no case be granted to a non-resident of the state, and Section 6<sup>7</sup> provides that

No judge or clerk of any probate court, in his own county, or a deputy, and no male or female person under 21 years of age, or of unsound mind, shall be executor or administrator.

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343, 344; R. I. Gen. Laws (1923) secs. 5428, 5429; S. C. Code of Laws (1932) sec. 8968; S. D. Comp. Laws (1929) secs. 3249-3254; Tenn. Code (1932) secs. 8148, 8151; Tex. Vernon's Stats. Ann. (1936) arts. 3353-3359; Utah Rev. Stats. (1933) tit. 102, c. 4, secs. 1-5; Va. Code (1936) secs. 5360, 5373; Vt. Pub. Laws (1933) secs. 2775, 2776, 2789; Wash. Remington's Comp. Stats. (1922) secs. 1431, 1457; W. Va. Code (1932) secs. 4123, 4129; Wis. Stats. (1937) sec. 311.02; Wyo. Rev. Stats. (1931) secs. 18-1701—18-1704. Citations to particular statutes will not be given hereafter. Reference will be to the name of the state.

3. The first English statute was passed in 1357. 31 Edw. III, c. 11.

4. R. S. Mo. (1929) sec. 7.

5. This right is often more theoretical than real. Thus, in Missouri, if a preferred person is disregarded for any cause, he is without remedy. An appeal will not lie, since an order refusing to appoint an applicant administrator is not within R. S. Mo. (1929) sec. 284 (15), providing for appeal from the probate court to the circuit court. *State ex rel. Grover v. Fowler* (1891) 108 Mo. 465, 18 S. W. 960. *Mandamus* will not lie since the statute providing for appointment of administrators gives the court discretion. *State ex rel. Thompson v. Nortoni* (1917) 269 Mo. 562, 191 S. W. 429; *State ex rel. Wilson v. Martin* (1930) 223 Mo. App. 1176, 26 S. W. (2d) 834. Of course, if there is an actual or inferential finding that the preferred applicant is qualified, he must be appointed. For instance, if a preferred applicant is appointed co-administrator with another person this is a finding that he is competent and qualified and therefore is entitled to have sole administration. *State ex rel. Gregory v. Henderson* (1935) 230 Mo. App. 1, 88 S. W. (2d) 893. And if he is not given the sole appointment, he may compel it by *mandamus*. *State ex rel. Fansher v. Guinotte* (1933) 227 Mo. App. 902, 58 S. W. (2d) 1005.

6. R. S. Mo. (1929).

7. *Ibid.*

Statutory disqualifications of administrators have thus far escaped comment in legal periodical literature. They will be the basis of the discussion in the first portion of this paper. After them the disqualifications which exist independently of statute in some states, will be considered.

## I. STATUTORY DISQUALIFICATIONS

### *Minors*

Twenty-eight states, including Missouri, provide that a minor is incompetent to serve as administrator.<sup>8</sup> Although this disqualification has not caused any reported litigation, it is probable that an applicant's status as minor would be determined by his age at the time of the granting of letters rather than his age at the time of the intestate's death.<sup>9</sup>

### *Conviction of Crime*

Statutes in four states provide that a person who has been convicted of a felony is incompetent to serve as administrator,<sup>10</sup> and three other states disqualify persons who have been convicted of a felony or misdemeanor involving moral turpitude.<sup>11</sup> These statutes have caused comparatively little trouble; but those statutes which in fourteen states<sup>12</sup> disqualify for conviction<sup>13</sup> of an infamous crime have caused a great deal of trouble, since the courts are unable to agree on the meaning of "infamous". *Garitee v. Bond*<sup>14</sup> held that the infamous nature of a crime is determined by the character of the crime itself and not by the penalty inflicted for its commission. By this test a conviction for a misdemeanor can be a conviction for an infamous crime if the misdemeanor involves moral turpitude.<sup>15</sup> Some courts are

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8. Ala., Ariz., Ark., Cal., Colo., Del., Fla., Idaho, Ind., La., Me., Md., Miss., Mo., Mont., Nev., N. H., N. M., N. Y., N. C., N. D., Okla., Ore., S. D., Tex. (except as to the surviving spouse, who is entitled to administer even though she is not of age), Utah, Wash., and Wyo. In Georgia there is an express provision that the surviving spouse should be appointed regardless of age.

9. See *In re Herriot's Estate* (1933) 219 Cal. 529, 28 P. (2d) 356, and *In re Halstead's Estate* (1937) 282 Mich. 253, 276 N. W. 438, 114 A. L. R. 272.

10. Ind., Miss., N. Y., N. C.

11. N. M., Ore., Wash.

12. Ala., Ariz., Cal., Colo., Fla., Idaho, Md., Mont., Nev., N. D., Okla., S. D., Utah, Wyo. See also the Delaware statute, which disqualifies for conviction of a crime disqualifying the applicant from taking an oath.

13. No degree of legal or moral guilt is sufficient without a conviction. *Coope v. Lowerre* (N. Y. 1845) 1 Barb. Ch. 45.

14. (1905) 102 Md. 379, 62 Atl. 631.

15. *Garitee v. Bond* (1905) 102 Md. 379, 62 Atl. 631; *In re Greene's Estate* (Surr. Ct. 1905) 48 Misc. 31, 96 N. Y. S. 98; *In re Dunham's Estate* (1937) 181 Okla. 407, 74 P. (2d) 117.

aided by constitutional provisions that no person shall be held to answer for an infamous crime unless on presentment or indictment by a grand jury. If the applicant was not indicted by a grand jury, he could not have been convicted for an infamous crime and therefore does not fall within the statutory prohibition.<sup>16</sup> While none of the cases arising under the disqualifying statutes have so indicated, it is possible that some state courts will adopt the definition of the United States Supreme Court in *Ex parte Wilson*,<sup>17</sup> and hold that the true test of infamy is not the nature of the crime but the nature of the punishment.<sup>18</sup> Under this rule it would not be material whether the conviction was for a felony or for a misdemeanor; if the court had authority to inflict an infamous punishment on the applicant, he would be disqualified even though the punishment actually awarded was not infamous.<sup>19</sup> An infamous punishment has been defined as imprisonment at hard labor in a state prison or penitentiary.<sup>20</sup>

There is a division of authority on the question whether conviction for a crime committed in another state can be considered a disqualification. Thus, *Estate of O'Brien*<sup>21</sup> held that conviction of a felony in a sister state could not be considered, while *In re Dunham's Estate*<sup>22</sup> held that conviction in a sister state of an infamous crime came within the statutory prohibition. But in the latter case it was further held that if the crime was not infamous by the law of the forum, the applicant would not be disqualified. The question may be asked: Would this latter court disqualify for conviction in a sister state for a non-infamous crime if the crime was infamous in the forum? The above holding would logically compel a disqualification. Would that be the correct result?

The test of conviction for an infamous crime is undoubtedly intended as a test of the applicant's character. If he commits an infamous crime his character is such that he should not be appointed to a position of trust. But it would seem that this test is a yardstick of an individual's character only if it be used in connection with the law of the place where the crime was committed. The laws of the state where the act was committed

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16. *Matter of O'Hare* (Surr. Ct. 1908) 6 Mills 511, 60 Misc. 269, 113 N. Y. S. 281.

17. (1884) 114 U. S. 417.

18. See *In re Dunham's Estate* (1937) 181 Okla. 407, 74 P. (2d) 117.

19. *Ex parte Wilson* (1884) 114 U. S. 417.

20. *Ibid.*

21. (N. Y. 1884) 3 Dem. Surr. 156. See *Garitee v. Bond* (1905) 102 Md. 379, 62 Atl. 631.

22. (1937) 181 Okla. 407, 74 P. (2d) 117.

are conditions bearing on the character of the act, whereas the laws of the future forum are not. If this analysis is correct, the nature of the crime in the state where it was committed is the important consideration. It also follows that conviction for an infamous crime in a sister state should be a disqualification. While this result is partially supported by the *Dunham* case it is opposed by the *O'Brien* case, and is inconsistent with the rule of evidence that conviction of crime in a sister state does not disqualify a witness from testifying in the forum.<sup>23</sup>

#### *Unsound Mind*

Persons of "unsound mind"<sup>24</sup> or persons who have been "adjudged incompetent"<sup>25</sup> are disqualified in twelve states. In Indiana a person who is incapable of making a contract may not be appointed.

#### *Non-residence*

At common law a non-resident was eligible for appointment as administrator.<sup>26</sup> If he was before the court in order to obtain the appointment, it was thought reasonably certain that he would stay within the jurisdiction of the court until the administration of the estate had been completed. But the increasing mobility of the individual in recent years has caused difficulties where a non-resident is appointed administrator. A state can no longer be sure that the non-resident will remain in the state and continue to be subject to suit by resident creditors and distributees. A few states have attempted to solve this problem by providing that a non-resident shall not be appointed unless he first designates a resident agent upon whom service of process can be had,<sup>27</sup> or unless he posts a bond.<sup>28</sup> Either of these provisions solves the problem of the disappearing non-resident adminis-

23. 1 Wigmore, *Evidence* (2d ed. 1923) 939, sec. 522.

24. Ark., Colo., Del., Ga., Md., Miss., Mo., N. M., Ore., Tex.

25. N. Y., Utah.

26. *Fulgham v. Fulgham* (1898) 119 Ala. 403, 24 So. 851 (changed by statute); *Foley v. Cudahy Packing Co.* (1903) 119 Iowa 246, 93 N. W. 284 (but non-residence is a factor to be considered in exercising discretion); *Succession of Penney* (1855) 10 La. Ann. 290 (but presence within the state is required by statute); *Ehlen v. Ehlen* (1885) 64 Md. 360, 1 Atl. 880 (but the applicant must be a citizen of the United States); *In re McGill* (1929) 52 Nev. 35, 280 Pac. 321, 65 A. L. R. 1232; *Pickering v. Pendexter* (1865) 46 N. H. 69 (but non-residence is a factor to be considered); *Grogan v. O'Neill* (1927) 48 R. I. 187, 136 Atl. 842 (changed by statute); *Ex parte Barker* (Va. 1830) 2 Leigh 719; 1 Williams, *Executors* (5th ed. 1859) 537. Maine has an express statutory provision adopting the common law rule and allowing a non-resident to act as administrator.

27. Del., Fla., Pa., Tenn., Vt.

28. Georgia.

trator; but the majority of states, including Missouri, have not accepted this solution. Instead, they have passed statutes which provide that a non-resident may never be appointed administrator.<sup>29</sup> The courts, however, have been reluctant to disqualify non-residents in the absence of clear statutory disqualification. Thus, under statutes which provide that an administrator may be relieved of office if he "removes" from the state, the majority of courts have refused to make residence a requirement for appointment<sup>30</sup> on the theory that statutes in derogation of common law rules should be construed strictly.<sup>31</sup> It is, moreover, perfectly possible that a non-resident will come into a state and perform all of his duties without "removing" from the state after his appointment.<sup>32</sup> While this argument is sound theoretically, the danger that the non-resident will leave the state before the estate is administered remains very real. This danger can be avoided only by refusing to appoint a non-resident or by requiring that he appoint a resident agent. Since there are no agency provisions in the statutes of this type, the only alternative available to the courts is to declare that the statutory direction to relieve the administrator of his office if he "removes" from the state means that a non-resident should not be appointed in the first instance.<sup>33</sup> This rule, advanced by a minority of the courts, is rationalized on the ground that the court should not perform a vain act—the court should not appoint a non-resident when it knows that it will have to remove him immediately.<sup>34</sup> There is, however, nothing to support the basic supposition of these courts

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29 Ala., Ariz., Ark., Cal., Kan., Idaho, Ill., Mo., Mont., Neb., N. M., N. C., Ohio, R. I., Utah, Wash., Wyo. New Hampshire provides that a non-resident may be appointed in proper circumstances, and New York disqualifies only non-resident aliens.

30. *Brown v. Brown* (1920) 204 Ala. 157, 85 So. 439; *Chicago, B. & Q. Ry. v. Gould* (1884) 64 Iowa 343, 20 N. W. 464; *In re Bailey's Estate* (1909) 31 Nev. 377, 103 Pac. 232; *Stevens v. Cameron* (1907) 100 Tex. 515, 101 S. W. 791; *Bridgman v. Bridgman* (1887) 30 W. Va. 212, 3 S. E. 580; *In re Peele's Estate* (1910) 85 S. C. 140, 67 S. E. 135; cf. *Burkheim v. Pinkhussohn* (1900) 58 S. C. 469, 36 S. E. 908. *Contra: Fishel v. Dixon* (1926) 212 Ky. 2, 278 S. W. 545; *In re Estate of Ulhorn* (1894) 12 Ohio Cir. Ct. 765, 4 Ohio Cir. Dec. 526. Cf.: *In re Brennan* (1898) 5 Ohio Nisi Prius 490, 5 Ohio Dec. 499, holding that the statutory grounds for removing are not to be considered in determining qualifications for appointment; *Sarkie's Appeal* (1845) 2 Pa. 157.

31. *In re Peele's Estate* (1910) 85 S. C. 140, 67 S. E. 135.

32. *Stevens v. Cameron* (1907) 100 Tex. 515, 101 S. W. 791.

33. *Fishel v. Dixon* (1926) 212 Ky. 2, 278 S. W. 545; *In re Estate of Ulhorn* (1894) 12 Ohio Cir. Ct. 765, 4 Ohio Cir. Dec. 526; *Sarkie's Appeal* (1845) 2 Pa. 157.

34. *In re Estate of Ulhorn* (1894) 12 Ohio Cir. Ct. 765, 4 Ohio Cir. Dec. 526.

that the non-resident will actually remove from the state after he is appointed and before the administration is completed.

Even in those states which do not absolutely disqualify a non-resident, non-residence is usually considered an "unfavorable circumstance."<sup>35</sup> This is especially true where there are resident distributees or resident creditors,<sup>36</sup> or where the estate is very large and requires a great deal of attention.<sup>37</sup> In such cases the court may, in its discretion, refuse to appoint a non-resident applicant.

The rules for determining residence in conflict of laws problems generally, apply to cases under the statutes here involved. But there has been a sufficient number of cases in this branch of the law to make possible the statement of several specific propositions. The courts usually require the residence to be *bona fide*,<sup>38</sup> even where the statutes do not so provide.<sup>39</sup> To establish a *bona fide* residence there must be a union of act and intent.<sup>40</sup> Since the applicant will always be physically present, the only question is that of the applicant's intent. This intent can be shown by acts as well as by statements.<sup>41</sup> Expressed intent to stay within the state only so long as will be required for the administration of the estate is insufficient, since intent to reside *permanently* in the state is not shown.<sup>42</sup> Conversely, an expressed intent to reside permanently within the state is sufficient alone to justify a finding that the applicant is a *bona fide* resident of the state.<sup>43</sup> This intent, plus the fact that the applicant does not have a home elsewhere, is even more clearly sufficient.<sup>44</sup>

35. *In re Estate of Rugh* (1931) 211 Iowa 722, 234 N. W. 278. See also *Foley v. Cudahy Packing Co.* (1903) 119 Iowa 246, 93 N. W. 284.

36. *Ex parte Barker* (Va. 1830) 2 Leigh 719.

37. *Chicago, B. & Q. Ry. v. Gould* (1884) 64 Iowa 343, 20 N. W. 464.

38. *Estate of Newman* (1899) 124 Cal. 688, 57 Pac. 686; *Stevens v. Larwill* (1904) 110 Mo. App. 140, 84 S. W. 113. See *In re Cardoner's Estate* (1921) 27 N. M. 337, 201 Pac. 1051, 18 A. L. R. 575, which construed a statute disqualifying non-residents as not requiring a *bona fide* residence within the state.

39. E. g., Ga., Neb., and R. I.

40. *In re Estate of Nix* (1923) 66 Mont. 559, 564, 213 Pac. 1089. Cf.: *Becker v. Orr* (1909) 243 Ill. 77, 90 N. E. 181, holding that residence was lost as soon as intent to leave was formed, although the applicant had never left the state; Goodrich, *Conflict of Laws* (2d ed. 1938) 38, sec. 23.

41. *In re Gordon's Estate* (1904) 142 Cal. 125, 75 Pac. 672.

42. *In re Mulford* (1905) 217 Ill. 242, 75 N. E. 345, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986.

43. *Estate of Newman* (1899) 124 Cal. 688, 57 Pac. 686; *Headman v. Rose* (1879) 63 Ga. 458; *In re Myer's Estate* (1932) 92 Mont. 474, 17 P. (2d) 846.

44. *In re Gordon's Estate* (1904) 142 Cal. 125, 75 Pac. 672; *In re Estate of Nix* (1923) 66 Mont. 559, 213 Pac. 1089.

However, an expression of intent to reside permanently within the state can be overcome by showing that the applicant has a home and family in another state.<sup>45</sup> Entering the state before the intestate's death tends to show a *bona fide* intent;<sup>46</sup> on the other hand, entering the state only after death and for the purpose of administering the estate may be evidence of a lack of it.<sup>47</sup> Of course, if there is actually a *bona fide* residence within the state, the fact that the residence was established for the sole purpose of obtaining letters of administration is immaterial.<sup>48</sup> In all cases there is a distinct tendency on the part of the appellate courts to accept conclusively the trial court's determination of residence.<sup>49</sup>

### *Character Qualifications*

Statutes in thirteen states provide that no person is competent to serve as administrator who is "adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity."<sup>50</sup> Each of these statutory disqualifications will be considered in turn.

*Drunkenness.* The drunkenness<sup>51</sup> which disqualifies is not occasional<sup>52</sup> or even frequent<sup>53</sup> use of intoxicating liquors. The vital question is whether the applicant is by reason of habitual and excessive use of intoxicants so *incompetent* as to render him an unsafe guardian of property.<sup>54</sup> It is only when habits of drink are carried so far as to cloud the brain and weaken respect for honesty and integrity that the courts will disqualify for drunkenness.<sup>55</sup>

45. *In re Donovan's Estate* (1894) 104 Cal. 623, 38 Pac. 456; *In re Barnes' Estate* (1921) 187 Cal. 566, 203 Pac. 100; *In re Gordon's Estate* (1904) 142 Cal. 125, 75 Pac. 672.

46. *In re Gordon's Estate* (1904) 142 Cal. 125, 75 Pac. 672.

47. *In re Mulford* (1904) 217 Ill. 242, 75 N. E. 345, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986; *In re Fellin's Estate* (1919) 108 Wash. 626, 185 Pac. 604.

48. *Stevens v. Larwill* (1904) 110 Mo. App. 140, 84 S. W. 113; *In re Estate of Nix* (1923) 66 Mont. 559, 213 Pac. 1089.

49. See cases cited *supra*, notes 41 to 48.

50. Ala., Ariz., Cal., Idaho, Mont., Nev., N. Y., N. C., N. D., Okla., S. D., Utah, Wyo.

51. Colorado and Indiana also disqualify for "drunkenness," while Florida disqualifies for "intemperance." *In Martin v. Otis* (1919) 233 Mass. 491, 124 N. E. 294, 6 A. L. R. 1340, the court considered the use of intoxicants although it was not made a disqualification by statute.

52. *Root v. Davis* (1890) 10 Mont. 228, 25 Pac. 105; *In re Manley's Estate* (Surr. Ct. 1895) 12 Misc. 472, 34 N. Y. S. 258.

53. *In re Reichert's Estate* (Surr. Ct. 1901) 34 Misc. 288, 69 N. Y. S. 644.

54. *Root v. Davis* (1890) 10 Mont. 228, 25 Pac. 105.

55. *In re Reichert's Estate* (Surr. Ct. 1901) 34 Misc. 288, 69 N. Y. S. 644.



*Improvidence.* In the leading case of *Coope v. Lowerre*,<sup>56</sup> improvidence is defined as "that want of care or foresight, in the management of property, which would be likely to render the estate and effects of the intestate unsafe, and liable to be lost, or diminished in value."<sup>57</sup> By this test, the only material consideration is whether the applicant will be able properly to manage and preserve the estate. Thus it has been held that insolvency of the applicant is some evidence of improvidence, although not alone sufficient.<sup>58</sup> Similarly, a professional gambler is improvident since in the exigencies of games of chance he may possibly lose the estate's property as well as his own.<sup>59</sup> Neither abandonment of family,<sup>60</sup> nor dishonesty, nor thievery<sup>61</sup> shows improvidence since none of these qualities, it is said, indicates inability to manage and preserve an estate. It has been stated that the improvidence which disqualifies must amount to a lack of intelligence,<sup>62</sup> but this does not seem to be a sound interpretation of the statutes. An "intelligent" person might well be wasteful or negligent in reference to the care, management, and preservation of property.<sup>63</sup>

*Want of Understanding.* The want of understanding<sup>64</sup> which disqualifies an applicant must amount to a lack of intelligence.<sup>65</sup> Thus neither old age<sup>66</sup> nor illiteracy<sup>67</sup> is sufficient to disqualify, even though either may render it difficult for the applicant properly to perform the duties of an administrator. But want of understanding is established when it is shown that the appli-

56. (N. Y. 1845) 1 Barb. Ch. 45.

57. In addition to the thirteen states enumerated supra, note 50, Indiana provides that an improvident applicant is disqualified.

58. *Coope v. Lowerre* (N. Y. 1845) 1 Barb. Ch. 45. Cf.: In re Ferguson (Surr. Ct. 1903) 41 Misc. 465, 84 N. Y. S. 1102, which held that the fact that the applicant was unable to accumulate any property was sufficient evidence of improvidence; In re Brinckmann's Estate (Surr. Ct. 1915) 89 Misc. 41, 152 N. Y. S. 542, holding that improvidence was not shown, under the facts of the case, by proof that the applicant had lost his real estate.

59. *McMahon v. Harrison* (N. Y. 1851) 10 Barb. 659, aff'd (1852) 6 N. Y. 443.

60. *Nichols v. Smith* (1914) 186 Ala. 587, 65 So. 30.

61. *Estate of O'Brien* (N. Y. 1884) 3 Dem. Surr. 156. See In re Connor's Estate (1895) 110 Cal. 408, 42 Pac. 906, and *Root v. Davis* (1890) 10 Mont. 228, 25 Pac. 105, for a discussion of the relationship of drunkenness to improvidence.

62. In re Schwartz's Estate (Surr. Ct. 1930) 138 Misc. 537, 246 N. Y. S. 478. See *Matter of Flood* (1923) 236 N. Y. 408, 140 N. E. 936.

63. *Root v. Davis* (1890) 10 Mont. 228, 25 Pac. 105.

64. In addition to the thirteen states enumerated in note 50, supra, Florida disqualifies for want of understanding.

65. In re Greene's Estate (Surr. Ct. 1905) 48 Misc. 31, 96 N. Y. S. 98; *Matter of Berrien* (N. Y. 1885) 3 Dem. Surr. 263.

66. *Estate of Pacheco* (1863) 23 Cal. 466.

67. *Ibid.*

cant suffers from hallucinations, that he is forgetful, that his mind wanders, and that he is apt to be imposed upon.<sup>68</sup> It has been held that an applicant lacks understanding when he has not the requisite "understanding" of the duties and responsibilities accompanying the position of administrator.<sup>69</sup> But this rule, which is stricter than the lack of intelligence test, would probably disqualify most, if not all, widows even though they are expressly preferred by all the statutes. It would be something of an anomaly to give the widow a statutory preference only to refuse it judicially because she did not thoroughly understand the law and business connected with the administration of an estate.

*Want of Integrity.* Integrity, in the phrase "want of integrity,"<sup>70</sup> has been defined as follows:

" \* \* \* soundness of moral principles and public character, as shown by a person's dealings with others, in the making and performance of contracts, in fidelity and honesty in the discharge of trusts. In short, it is used as a synonym for probity, honesty, and uprightness in business relations with others."<sup>71</sup>

By this definition, integrity in business relations is the sole test; an applicant's private life cannot be scrutinized. The courts have consistently followed this narrow definition. Lack of integrity is not shown by adultery or bigamy,<sup>72</sup> by the fact that the applicant contends that the entire estate of the intestate was a gift to him,<sup>73</sup> or by the bad faith intrinsic in applying for the sole purpose of depriving another person of his statutory rights.<sup>74</sup> Strangely enough, no case has been found in which the applicant was found wanting in integrity.

#### *Coverture*

The majority of states have by statute<sup>75</sup> or decision,<sup>76</sup> established the rule that a married woman may be appointed admin-

68. In re Johnsen's Estate (1920) 182 Cal. 642, 189 Pac. 280.

69. In re Phyfe's Estate (Surr. Ct. 1920) 115 Misc. 699, 182 N. Y. S. 729.

70. Of the thirteen states mentioned in note 50, supra, Alabama, New York, and North Carolina omit the disqualification for want of integrity.

71. In re Bauquier's Estate (1891) 88 Cal. 302, 307, 26 Pac. 178. In re Dunham's Estate (1937) 181 Okla. 407, 74 P. (2d) 117, the court said by way of dictum that violation of a statute of a sister state might be sufficient evidence of lack of integrity.

72. Estate of Newman (1899) 124 Cal. 688, 50 Pac. 686.

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

74. In re McCausland's Estate (1915) 170 Cal. 134, 148 Pac. 924.

75. Ala., Cal., Del., Fla., Ga., Idaho, Iowa, Ky., Me., Md., Mont., N. H., Ohio, S. D., Vt., W. Va., Wyo.

76. Richard v. Mills (1856) 31 Miss. 450; Matter of Curser (1882) 89 N. Y. 401 (decision based on Married Woman's Act); In re Nurnberger

istratrix. The contrary rule has been adopted by statute in North Dakota and Utah. In Virginia it is provided that upon marriage a woman may be removed on motion of an interested party; in Nevada, removal is permitted on this ground on motion of the party next entitled to administer.

### *Interest in Distribution*

Statutes in seventeen states, including Missouri, provide that the applicant must be a person entitled to share in the distribution of the intestate's property.<sup>77</sup> Statutes in twenty-one other states provide that the next of kin of the intestate should be appointed.<sup>78</sup> Under the second type of statute it is settled that the term "next of kin" means those persons who take the personal estate of the deceased under the statutes of distribution.<sup>79</sup> Under both types of statutes, therefore, the applicant must be a distributee of the intestate's property.<sup>80</sup> In nine of the remaining ten states it is provided that letters of administration should be given to certain enumerated persons, such as the surviving spouse, the children, the father or mother, the brothers, *et cetera*.<sup>81</sup> A final catch-all phrase is then included—"the next of kin entitled to distribution."<sup>82</sup> It is clear that if none of the enumerated persons are before the court the same result will be reached as in the two types of cases previously mentioned, since the right to administer is given only to the next of kin entitled to share in the estate. But what is the result where one of the named persons applies for letters of administration, when he is

(1894) 40 S. C. 334, 18 S. E. 935 (decision based on Married Woman's Act); *Webb v. Deedham* (1823) 1 Add. 494, 164 Eng. Rep. 175. *Contra*, *Watkins v. Watkin's Adm'r* (1910) 136 Ky. 266, 124 S. W. 301.

77. Ala., Ark., Cal., Del., Fla., Ky., La., Miss., Mo., Mont., N. M., N. Y., Pa., Utah, Va., W. Va., Wyo. The Missouri statute does not expressly require that the surviving spouse have an interest in the estate.

78. Colo., Conn., Ga., Ind., Iowa, Kan., Me., Mass., Mich., Minn., Neb., N. H., N. J., N. C., Ore., Ohio, R. I., Tenn., Tex., Vt., Wis.

79. *In re Weaver's Estate* (1909) 140 Iowa 615, 119 N. W. 69, 22 L. R. A. (N. S.) 1161, 17 Ann. Cas. 947; *State ex rel. Cowley v. Superior Court* (1930) 158 Wash. 546, 291 Pac. 481, 70 A. L. R. 1460.

80. *In re Eggers* (1896) 114 Cal. 464, 46 Pac. 380; *In re Weaver's Estate* (1909) 140 Iowa 615, 119 N. W. 69, 22 L. R. A. (N. S.) 1161, 17 Ann. Cas. 947; *Hilton v. Hilton* (1908) 33 Ky. Law 276, 109 S. W. 905; *In re Rechtschaffen's Estate* (1938) 278 N. Y. 336, 16 N. E. (2d) 357; *cf. In re Estate of D'Admomo* (1914) 212 N. Y. 214, 106 N. E. 81, which arose under an old statute and which held that an interest in the estate was unnecessary. *Accord: Colbert v. Thornley* (R. I. 1908) 71 Atl. 65; *In re Bartz's Estate* (1932) 207 Wis. 639, 242 N. W. 171.

81. Ariz., Idaho, Ill., Md., Nev., N. D., Okla., S. C., S. D.

82. The express requirement that the next of kin be entitled to share in the distribution is omitted in the Illinois and Maryland statutes. But this omission does not cause a change in result. See cases cited *supra*, note 79.

not entitled to share in the intestate's estate? It has been held that the named person must be appointed even though this interest is lacking.<sup>83</sup> This is contrary to the cardinal maxim that the person with the greatest interest in the estate should be appointed administrator, since he will presumably exercise the greatest care in administering the estate for the benefit of all the creditors and distributees. Washington has avoided this unfortunate result by providing in its statute that the next of kin should be appointed, with named persons being entitled to preference. This statute has some of the characteristics of the second type mentioned above. If the named person is the next of kin, that is, entitled to a distributive share, he is entitled to administer; otherwise he is not.

In almost all circumstances, therefore, the applicant must be entitled to a portion of the intestate's property. Thus, if the distributee has already received his share of the property,<sup>84</sup> or has pledged his share,<sup>85</sup> he is not entitled to the letters of administration. Thus, too, if a widow has surrendered her right to the property of the deceased spouse by a valid ante-<sup>86</sup> or post-nuptial<sup>87</sup> contract, she is not entitled to administer his estate.<sup>88</sup>

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83. *Orear v. Crum* (1890) 135 Ill. 294, 25 N. E. 1097; *McColgan v. Kenny* (1888) 68 Md. 258, 11 Atl. 819. See *State ex rel. Scanland v. Thompson* (1916) 196 Mo. App. 12, 187 S. W. 804. But where the surviving spouse has agreed in the ante-nuptial contract not to "control" the property of the intestate either before or after his death, the right of administration is lost. *In re Evan's Estate* (1906) 117 Mo. App. 629, 93 S. W. 922.

84. *Moody v. Moody* (1859) 29 Ga. 519.

85. *Sarkie's Appeal* (1845) 2 Pa. 157.

86. *Maurer v. Nail* (1854) 5 Md. 324; *In re Bunimoivitz's Estate* (Surr. Ct. 1927) 128 Misc. 518, 219 N. Y. S. 763; *In re Friese's Estate* (1935) 317 Pa. 86, 176 Atl. 225; *Gooch v. Suhor* (1917) 121 Va. 35, 92 S. E. 843; *Charles v. Charles* (1852) 49 Va. 486. The ante-nuptial contract must be valid. Thus, it cannot be obtained by fraud or concealment of the assets of the prospective spouse. *Warner's Estate* (1904) 207 Pa. 580, 57 Atl. 35, 99 Am. St. Rep. 804.

87. *In re Davis* (1895) 106 Cal. 453, 39 Pac. 756; *In re Berner* (1922) 217 Mich. 612, 187 N. W. 377. Contra: *Garretson v. Garretson* (1890) 2 Ohio Cir. Dec. 581, in which the right to administer was granted on the ground that the widow was still entitled to her statutory one year's allowance. Where the parties do not obtain a divorce, it is essential that the right to future property acquired by the husband also be given up in order to deprive the widow of the right to administer. *Willis v. Jones* (1875) 42 Md. 422. The contract must be valid. Thus, in *Nusz v. Grove* (1867) 27 Md. 391, the widow was allowed to administer on the ground that the post-nuptial contract was invalid since a married woman did not have capacity to contract.

88. The courts apparently ignore the fact that the statutes designate that the surviving spouse should be appointed, and that the next of kin should next be preferred. Interest would only be necessary in determining who is the next of kin; it would not be necessary in determining who is

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In nine states statutes provide that the surviving business partner of the deceased shall not be appointed administrator.<sup>89</sup> In North Carolina, a surviving spouse who lived apart in adultery is not entitled to administer, nor is a husband who abandoned his wife.

It is the weight of authority that the statutory grounds for removing administrators must be considered statutory disqualifications for appointment.<sup>90</sup> Conversely, it will be found that most of the statutory and common law disqualifications herein discussed are also grounds for removal in many states.<sup>91</sup>

*Exclusiveness of Statutory Disqualifications*

Are the statutory disqualifications exclusive, or can the courts engraft upon the statutes other disqualifications? Must the applicant be appointed if he does not fall within one of the statutory disqualifications? The answer to these questions depends to a large extent on the wording of the particular statute.

the surviving spouse. But it might be said that the statute shows an "interest" that the surviving spouse have an interest, because of provisions requiring that members of subsequent classes have an interest.

89. *Ariz., Cal., Idaho, Mont., N. D., Okla., S. D., Utah, Wyo.* *Heward v. Slagle* (1869) 52 Ill. 336, held that the surviving partner was disqualified at common law.

90. *Schwarze v. Logan* (1939) 60 Idaho 251, 90 P. (2d) 692; *In re Daggett* (1908) 15 Idaho 504, 98 Pac. 849; *Hunt v. Crocker* (1932) 246 Ky. 338, 55 S. W. (2d) 20; *Fishel v. Dixon* (1926) 212 Ky. 2, 278 S. W. 545; *Stearns v. Fiske* (1836) 35 Mass. 24; *In re Diller's Application* (1896) 6 Ohio Dec. 182; *In re Estate of Ulhorn* (1894) 4 Ohio Cir. Dec. 526, with which compare *In re Brennan* (1898) 5 Ohio Dec. 499; *Ex parte Small* (1903) 69 S. C. 43, 48 S. E. 40; *Burkheim v. Pinkhussohn* (1900) 58 S. C. 469, 36 S. E. 908; *In re Sargent* (1885) 62 Wis. 130, 22 N. W. 131. *Contra: Sampson v. Sampson* (1932) 44 Ga. App. 803, 163 S. E. 326; *Chicago, B. & Q. Ry. v. Gould* (1884) 64 Iowa 343, 20 N. W. 464; *In re Brennan* (1898) 5 Ohio Dec. 499; *Stevens v. Cameron* (1907) 100 Tex. 515, 101 S. W. 791. See *State ex rel. Abercrombie v. Holtcamp* (1916) 267 Mo. 412, 185 S. W. 201, Ann. Cas. 1918D 454. But see cases cited supra note 30, holding that statutes requiring removal of administrators who become non-residents do not prevent the appointment of non-residents in the first instance.

91. Thus, R. S. Mo. (1929) sec. 43 provides that "If an executor or administrator becomes of unsound mind, or be convicted of any felony or other infamous crime, or has absented himself from the state for the space of four months, or become an habitual drunkard, or in anywise incapable or unsuitable to execute the trust reposed in him, or fail to discharge his official duties, or waste or mismanage the estate, or act so as to endanger any co-executor or co-administrator or fails to answer any citation and attachment to make a settlement, the court upon complaint in writing made by any person interested, supported by affidavit and ten days notice given to such executor or administrator, as prescribed in section 275 of this chapter, shall hear the complaint, and, if it finds it just, shall revoke the letters granted."

Statutes in seven states provide that the designated person "must" be appointed,<sup>92</sup> while statutes in fifteen other states provide that the designated person "shall" be appointed.<sup>93</sup> Since there are no discretionary provisions in either of these types of statutes, it would seem that the statutes are mandatory. This is the weight of authority.<sup>94</sup> Nevertheless, under the second type of statute the courts of South Carolina,<sup>95</sup> Tennessee,<sup>96</sup> and Washington<sup>97</sup> have held that the preferred person need not be appointed if unsuitable or unqualified for reasons other than those set out in the statute.<sup>98</sup> These courts disregard the plain terms of the statutes on the theory that the protection of the estate is the primary duty of the courts, and that the statutory preferences may be disregarded if the estate would be jeopardized by the appointment of the preferred person.<sup>99</sup>

All the statutes except the two types mentioned above give some discretion to the courts in the selection of an administrator.

92. Ala., Idaho, Mont., N. Y., Okla., S. D., Wyo.

93. Ariz., Fla., Ill., Ind., Ky., La., Nev., N. J., N. M., N. C., S. C., Tenn., Va., Wash., Wis.

94. *Johnston v. Pierson* (1934) 229 Ala. 85, 155 So. 695; *Bell v. Fulgham* (1918) 202 Ala. 217, 80 So. 39; *In re Brundage's Estate* (1904) 141 Cal. 538, 75 Pac. 175, the rule of which was changed by subsequent statute which is interpreted in *In re St. John's Estate* (1937) 8 Cal. (2d) 175, 64 P. (2d) 725; *Hayes v. Hayes* (1881) 75 Ind. 395; *State v. Jeffries* (1925) 83 Ind. App. 524, 149 N. E. 373; *Hood v. Higgins Curator* (1928) 225 Ky. 718, 9 S. W. (2d) 1078, with which compare *Hunt v. Crocker* (1932) 246 Ky. 338, 55 S. W. (2d) 20, which held that the statutory grounds for removal could be considered as statutory disqualifications; *Stouffer v. Stouffer* (1909) 110 Md. 368, 72 Atl. 843, with which compare the present Maryland statute, *supra* note 2, amended after this decision to give discretion to the court; *In re Carney's Estate* (1914) 83 N. J. Eq. 615, 91 Atl. 598, with which compare *In re Messler's Estate* (1938) 16 N. J. Misc. 434, 1 A. (2d) 322; *In re McLure's Estate* (1922) 63 Mont. 536, 208 Pac. 900; *In re Campbell* (1908) 192 N. Y. 312, 85 N. E. 392, 18 L. R. A. (N. S.) 606; *In re Rouse's Estate* (1918) 71 Okla. 296, 176 Pac. 954; *Dooley v. Dooley* (Tex. Civ. App. 1922) 240 S. W. 1112; *Murphy v. Karnes* (1921) 88 W. Va. 242, 106 S. E. 655, 70 A. L. R. 1471; *Welsh v. Manwaring* (1904) 120 Wis. 377, 98 N. W. 214. See: *Estate of Webb* (1932) 90 Colo. 470, 10 P. (2d) 947; *In re Owen's Estate* (1906) 30 Utah 351, 85 Pac. 277.

95. *Ex parte Small* (1903) 69 S. C. 43, 48 S. E. 40.

96. *Fitzgerald v. Smith* (1904) 112 Tenn. 176, 78 S. W. 1050.

97. *In re Estate of Thomas* (1932) 167 Wash. 127, 8 P. (2d) 963; *In re Langill's Estate* (1921) 117 Wash. 268, 201 Pac. 28. See *In re Stott's Estate* (1925) 133 Wash. 100, 233 Pac. 280 (criticism of the Langill case); *In re Messler's Estate* (1938) 16 N. J. Misc. 434, 1 A. (2d) 322; *Dooley v. Dooley* (Tex. Civ. App. 1922) 240 S. W. 1112. *In Smith v. Lurty* (1907) 107 Va. 548, 59 S. E. 403, the court disqualified for a cause not prescribed in the statute. In effect, therefore, the statute was not construed as mandatory.

98. *Ex parte Small* (1903) 69 S. C. 43, 48 S. E. 40.

99. *In re Langill's Estate* (1921) 117 Wash. 268, 201 Pac. 28.

Thus, statutes in eleven states prescribe that certain persons "shall" be appointed if "suitable,"<sup>100</sup> while statutes in six other states provide that the preferred person need not be appointed if he is "unqualified,"<sup>101</sup> "incapable,"<sup>102</sup> "incompetent,"<sup>103</sup> or "laboring under a disability."<sup>104</sup> Other statutes more plainly grant the courts discretion.<sup>105</sup> For example the Maryland and Oregon statutes state that the named person "shall" be appointed in the court's discretion, while the Connecticut and Utah<sup>106</sup> statutes provide that the preferred person may be rejected for good and sufficient reason. Where the statutes can be reasonably interpreted as allowing discretion, the courts are not hesitant to exercise it.<sup>107</sup>

In states in which the statutes are construed to be mandatory and the statutory disqualifications exclusive, nothing but the statutory disqualifications need be considered. In the remaining states, however, the statutory grounds of disqualification are not exclusive and an applicant may be disqualified for other reasons. The causes for refusing to appoint an applicant who is otherwise preferred, in states where the courts have discretion, will next be considered.

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*(To be continued)*

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100. Iowa, Kan., Me., Minn., Mo., Mich., Neb., N. H., Ohio, R. I., Vt.

101. Ark., Miss., Tex.

102. Delaware.

103. Pa. See also the North Carolina statute.

104. Georgia.

105. Cal., Colo., Conn., Md., Mass., N. D., Ore., Utah, W. Va.

106. See *In re Owen's Estate* (1906) 30 Utah 351, 85 Pac. 277, which held the statute mandatory although it expressly allowed discretion by the use of the term "may."

107. *In re St. John's Estate* (1937) 8 Cal. (2d) 175, 64 P. (2d) 725; *Eva v. Gough* (1918) 93 Conn. 38, 104 Atl. 238; *Moody v. Moody* (1859) 29 Ga. 519; *In re Tracy's Estate* (1932) 214 Iowa 881, 243 N. W. 309; *O'Neill v. Read* (1917) 179 Iowa 1208, 162 N. W. 775; *Morgan v. Morgan* (1929) 267 Mass. 388, 166 N. E. 747; *In re Abramovitz's Estate* (1936) 278 Mich. 271, 270 N. W. 294; *Pickering v. Pendexter* (1865) 46 N. H. 69; *In re Messler's Estate* (1938) 16 N. J. Misc. 434, 1 A. (2d) 322; *Territory v. Valdez* (1872) 1 N. M. 533 (but see the present statute, supra note 2); *Ellis v. Ellis* (1919) 42 N. D. 535, 174 N. W. 76; *Warner's Estate* (1904) 207 Pa. 580, 57 Atl. 35, 99 Am. St. Rep. 804; *In re Schmidt* (1897) 183 Pa. 129, 38 Atl. 464; *Ex parte Small* (1904) 69 S. C. 43, 45, 48 S. E. 40.