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CONFLICT OF LAWS

by

A. J. Thomas, Jr.*

I. CHOICE OF LAW—WRONGFUL DEATH

*McEntire v. Forte*¹ and *Click v. Thuron Industries*² were wrongful death actions arising out of airplane crashes occurring in states other than the forum, Texas. The *McEntire* crash occurred in New Mexico, and the widow of a Texas passenger brought suit for herself and her children against the estate of the pilot, who was also a Texan. The conflict of laws issue was the applicability of the New Mexico guest statute³ which prohibits recovery by a guest from the operator of an aircraft for injuries to the guest unless the injuries resulted from an intentional act of the operator or from his heedless or reckless disregard of the rights of others.

In *Marmon v. Mustang Aviation, Inc.*⁴ the Supreme Court of Texas declared emphatically that claims for wrongful death in another state are to be governed by the laws of that state, and that the Texas wrongful death statute has no extraterritorial effect so as to control results of injury or death in another state. In *Marmon* the crash and death of Texas citizens had occurred in Colorado. In order to avoid the application of the Colorado wrongful death statute, which limited recovery to \$25,000, the plaintiffs claimed application of Texas law under the most significant contacts or relationship doctrine. The plaintiffs contended that the cause of action was essentially a Texas cause of action between parties who were domiciliaries of Texas and that, therefore, Texas law should govern. The supreme court rejected this contention and, following the words of the Texas statute, applied the law of Colorado as the situs of "the wrongful act, neglect or default."⁵

The plaintiffs in *McEntire* attempted to distinguish *Marmon*. It was urged that the application of Texas law was not sought to avoid a limitation of damages provision contained in a wrongful death statute at the place of the wrong. The plaintiffs conceded that the New Mexico death statute, which has no such limitation, should apply. But the plaintiffs argued that the aviation guest statute should not control because the guest statute was a separate enactment not built into the death statute. On this point, it was alleged, the most significant contacts rule should be adopted so that Texas law rather than New Mexico law would determine the rights of the parties.

The Texas court rejected this distinction, finding that the guest statute applies to wrongful death cases by barring a guest's cause of action against a pilot unless the cause of action arises from an intentional, heedless, or reckless act. This provision was said to control in an aviation guest case to the same extent as if it had been written into the death statute itself. Since the Texas statute required

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¹ 463 S.W.2d 491 (Tex. Civ. App.—Dallas 1971), *error ref. n.r.e.*

² 460 S.W.2d 506 (Tex. Civ. App.—Tyler 1970), *error granted.*

³ N.M. STAT. ANN. § 44-1-16 (1953).

⁴ 430 S.W.2d 182 (Tex. 1968).

⁵ TEX. REV. CIV. STAT. ANN. art. 4678 (1952).

a right to maintain an action according to the law of the foreign state, and since no right existed by the law of New Mexico, the plaintiffs cause of action was barred. The Court declared that in such a case a Texas court was "not at liberty to accept one New Mexico statute and discard another in favor of a different rule of Texas law."⁶ Thus, because court interpretation of article 4678⁷ commands application of the law of the place of the wrong, Texas courts in wrongful death cases refuse to consider adoption of the most significant contacts rule.

Under the relatively new significant relationship theory wrongful death actions are to be governed by the laws of the place of injury unless some other state with respect to the specific issue has a more significant relationship to the transaction and the parties. The state of domicile of the parties as well as the place in which the relationship is centered are states that, depending upon their interests and the purpose of policy behind their applicable laws, might well have a more significant relationship than the state in which the injury occurred.⁸ In *McEntire* the parties were domiciled in Texas and their relationship was centered in Texas since the travel relationship began in Texas and would have ended in Texas but for the fortuitous crash in New Mexico. Under the new theory this relationship to Texas probably overbalances the contact with New Mexico. A New York case⁹ has held on facts similar to those of *McEntire* that when domiciliaries begin a trip in the state of domicile which is to end in the state of domicile, the place of injury is merely fortuitous and such state has no interest in the application of its guest statute. The purpose of such a limiting rule was to protect insurance companies against collusion between host and guest, and thus the place of injury could have no reason to extend its rule to protect out-of-state insurance companies which had insured persons domiciled in another state.

Nevertheless, the place of injury may have some interest to protect or may have some specific purpose behind its guest statute. For example, in the case at hand the place of injury, New Mexico, would further its interests by applying its guest statute if the purpose of its guest rule was to protect hosts while in the state from the ingratitude of their guests. In such an instance the court must look at the contacts, the interests of both states and the policy behind the laws, weigh the interests, and apply the law of the state which has the most significant contacts or relationship. Wide latitude rests in courts making such a determination. Perhaps Texas has been wise in rejecting, at least for the present, the new theory. As was pointed out by one court after discussion of the conflicting viewpoints in certain cases adhering to the new theory: "[C]ertainty in the law is not so common that where it exists, it is to be lightly discarded. We recognize

⁶ *McEntire v. Forte*, 463 S.W.2d 491, 493 (Tex. Civ. App.—Dallas 1971), *error ref. n.r.e.*

⁷ TEX. REV. CIV. STAT. ANN. art. 4678 (1952).

⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 175 (1971) [hereinafter cited as RESTATEMENT (SECOND)]; *see id.* § 6, comments *a-k*, § 145, comments *a-i*, for discussion of the significant relationship theory. For an excellent short discussion of the policy values and the conflict of laws, *see* R. LEFLAR, AMERICAN CONFLICT OF LAWS §§ 9-16 (2d ed. 1968).

⁹ *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). *But see Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965), where the court reached a different conclusion because the New Yorkers' journey during which injury occurred began and ended in another state.

the force of the countervailing arguments, but in the present state of law, we leave any change in established doctrine to the legislature."¹⁰

Click was a wrongful death action growing out of an airplane crash in Missouri. Here the specific point at issue was the applicability of the Missouri limitation period which, if followed, would preclude suit. It was alleged, among other things, that the law of Texas (which would permit the cause of action) should control.¹¹ It was further alleged that Texas law should govern because Texas had the most significant relationship with the parties and the occurrence; Missouri, other than being the place of the crash, had no contacts. Moreover, the plaintiffs contended that Texas should discard the *lex loci delicti* doctrine in favor of the most significant relationship doctrine. The court rejected these contentions and followed *Marmon* by applying the law of the place of injury.

Further argument was made that even under traditional doctrine the Texas limitation provision should govern since limitation statutes are procedural and, hence, to be governed by the law of the forum. The court admitted that normally the law of the forum applied to procedural matters, but that a well-known exception had developed. When a statute creates the right and in the same enactment the time limitation for the bringing of the action is set forth, the limitation bars the right itself and becomes substantive, not procedural. The Texas court found that the Missouri wrongful death statute¹² was one that possessed this "built-in" limitation period and that Missouri courts had construed it as substantive, an inherent part of the cause of action itself. Thus, the Missouri time limitation was applied by the Texas court to bar the cause of action.

II. JURISDICTION AND JUDGMENTS

Divorce Judgments. Webb v. Webb,¹³ *Moody v. Moody*,¹⁴ and *Diehl v. United States*¹⁵ all contained the common issue of the effect to be given to a divorce judgment when in fact no jurisdiction, in the conflict of laws sense, existed in the state or nation granting the divorce. Jurisdiction to grant a divorce usually exists when one of the parties is domiciled in the divorce-granting state.¹⁶ In both *Moody* and *Diehl* the parties attacking the validity of the divorce were the parties who had sought and obtained the divorces in Nevada and in Mexico respectively. In both cases the courts applied the doctrine of estoppel, holding

¹⁰ *White v. King*, 244 Md. 348, 355, 223 A.2d 763, 767 (1966). Counter argument however exists, for it is pointed out that under the old vested rights doctrine there is little certainty to be found. In applying the theory the courts have resorted to an assortment of escape devices to avoid application of what would have seemed to be the proper law because escape therefrom seemed desirable.

¹¹ The limitation period as prescribed by Texas law was two years in contrast to the one-year period prevailing under Missouri law.

¹² MO. REV. STAT. § 537.100 (1953).

¹³ 461 S.W.2d 204 (Tex. Civ. App.—San Antonio 1970).

¹⁴ 465 S.W.2d 836 (Tex. Civ. App.—Corpus Christi 1971), *error ref. n.r.e.*

¹⁵ 438 F.2d 705 (5th Cir. 1971).

¹⁶ In *Williams v. North Carolina*, 325 U.S. 226, 229 (1945), Justice Frankfurter stated that "judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile." See also *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953). *But see* RESTATEMENT (SECOND) § 72 which would permit a state other than the domicile of either party to exercise jurisdiction to grant a divorce if it has some relationship with the marital status to make it reasonable to dissolve the marriage, e.g., residence for some substantial period.

that the party who procures an invalid divorce is estopped from later asserting rights as a spouse. This is not to say that the divorce is a valid one based upon valid jurisdiction. The estoppel doctrine simply prohibits the person obtaining the divorce from denying the results of his own action.¹⁷ In *Webb* the trial court had held that a Mexican divorce was void and that a later marriage of the husband to another woman was consequently invalid. The wife denied that she had participated in any way or consented to the Mexican divorce. If this were true, and in the absence of proper jurisdictional facts in Mexico, the validity of the divorce could have been attacked by the wife.¹⁸ The court of civil appeals found, however, that there was sufficient evidence to raise a fact issue for the jury, since there was evidence indicating that the wife consented to and participated in the Mexican divorce. Such participation would make her one of the parties invoking jurisdiction, and she would be estopped to deny the validity of the divorce. Thus, it became necessary to reverse and remand for a new trial. These cases might have also been decided upon the bootstraps doctrine. If both spouses appear in divorce proceedings in a state in which there is no jurisdiction and the jurisdictional fact of domicile is litigated in that court and found to exist, or if there is fair opportunity to litigate the jurisdictional fact and it is not litigated, the jurisdictional fact is *res judicata*. The divorce decree cannot be made the subject of collateral attack unless the state granting the divorce would permit such collateral attack.¹⁹

Other conflict of laws issues were presented in these cases. In *Moody* the husband, after his unsuccessful attempt to question the validity of the Nevada divorce, argued that since alimony is not permitted under Texas law after a divorce, the Nevada judgment granting alimony was not entitled to full faith and credit in Texas. Suits for alimony are in personam; therefore, the person who is ordered to pay alimony must be personally subject to the jurisdiction of the court.²⁰ If personal jurisdiction exists, a decree is entitled to full faith and credit if it is final and unmodifiable as to amounts due and unpaid.²¹ The court held that the Nevada decree was valid and, as to accrued payments, that full faith and credit must be given.

Diehl involved the enforceability of a Mexican divorce in Texas, but it also involved certain other jurisdictional problems. In 1962 Diehl had filed suit in a federal district court in Texas for a refund of federal income taxes. A criminal prosecution had been brought against him earlier by the Government for tax evasion. The suit for refund was stayed pending the disposition of the criminal case. As a result of several delays secured by Diehl because of his ill health, the criminal prosecution remained undecided at the time of his death in 1966

¹⁷ The estoppel principle is discussed in Clark, *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, 70 YALE L.J. 45 (1960); Weiss, *A Flight on the Fantasy of Estoppel in Foreign Divorce*, 50 COLUM. L. REV. 409 (1950).

¹⁸ See, e.g., *Esenwein v. Commonwealth ex rel. Esenwein*, 325 U.S. 279 (1945); *Williams v. North Carolina*, 325 U.S. 226 (1945); *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953).

¹⁹ *Coe v. Coe*, 334 U.S. 378 (1948); *Sherrer v. Sherrer*, 334 U.S. 343 (1948). On the bootstraps doctrine, see R. LEFLAR, *supra* note 8, at § 224.

²⁰ This is the general rule. See RESTATEMENT (SECOND) § 77. H. GOODRICH & E. SCOLES, *CONFLICT OF LAWS* 277-78 (4th ed. 1964), discuss the enforcement of alimony decrees rendered in another state.

²¹ RESTATEMENT (SECOND) § 109.

and, therefore, was dismissed. Mrs. Diehl then moved to be substituted as plaintiff in the refund suit since she had been appointed independent executrix of her husband's estate. The motion was granted, but the Government then sought a motion to vacate the order substituting Mrs. Diehl as independent executrix on the ground that her application for letters testamentary in the probate court of Harris County, Texas, was false and fraudulent. It was claimed that she had deliberately misrepresented that Diehl was a domiciliary of Harris County at the time of his death, and that she was his widow at the time of the filing of proceedings in the county court. In reality Diehl was not a domiciliary of Harris County, and a divorce had previously been obtained in Mexico. Texas law requires the petition for probate to state whether the decedent had ever been divorced and further declares null and void all provisions of a will affecting the former spouse if the testator is divorced after making the will.²² Texas courts are also without jurisdiction to probate a will if the decedent is found to have been domiciled in another state or dies outside of the state leaving no relatives or property in Texas.²³

The motion to vacate the substitution order was granted by the district court. The court of appeals affirmed on the ground that the misrepresentations to the county court amounted to fraud so as to invalidate the judgment, since a judgment procured by fraud is void and not entitled to full faith and credit. This accords with the well-known rule that a judgment procured by fraud is entitled to no greater faith and credit than would be granted to it in the state of its rendition.²⁴ Apparently the federal court was of the opinion that such misrepresentation in securing letters testamentary would have voided the judgment of the Texas court under Texas law.

The court of appeals added that the jurisdictional fact for probate was domicile and that such a jurisdictional question was open to re-examination and attack. Since the deceased had not been domiciled in Texas at his death and since there had been a fraudulent allegation of domicile, this fraud and lack of domicile voided the Texas court's judgment.

A final jurisdictional issue in the case is of interest. After Mrs. Diehl had been dismissed from the case, one Ritter, who had been appointed temporary administrator of Diehl's estate in the Harris County court, sought to be substituted for the deceased in the federal refund case. Initially the district court granted this motion to substitute, but later reconsidered and vacated. The court of appeals affirmed on the ground of lack of jurisdiction in the Harris County court to appoint a legal representative. Administration is appropriate at a decedent's domicile or at a place where assets of the decedent's estate are located. Diehl was not domiciled in Texas, and the court found that there were no assets in Texas at the time of the death. Ritter claimed that the suit instituted for refund of income taxes from the federal government was an asset. The court declared the general rule that ordinarily a debt may be considered as an

²² TEX. PROB. CODE ANN. §§ 69, 81 (1956).

²³ Probate, it is generally said, may be had at the domicile of the testator and at the situs of any of his property, real or personal. See R. LEBLAR, *supra* note 8, § 201.

²⁴ Fraud is a defense to the enforcement of a judgment of another jurisdiction. For discussion, see H. GOODRICH & E. SCOLLES, *supra* note 20, at 397-98. See also Pyles, *The Impeachment of Sister State Judgments for Fraud*, 25 SW. L.J. 697 (1970).

asset at the domicile of the debtor,²⁵ but went on to say that a different rule prevailed with respect to debts of the Government. The Supreme Court of the United States had held that as to debts of the United States Government, the domicile of the creditor was the proper place for the purpose of founding administration.²⁶ Since Diehl (the creditor) was not domiciled in Texas at his death, Texas had no jurisdiction.

Adoption. The problem of jurisdiction in an adoption proceeding confronted a Texas court in *In re Benfield*.²⁷ The natural mother of a child attacked the validity of an adoption decree, alleging that it violated her constitutional right of due process, and because of such invalidity was not to be accorded full faith and credit. The grandfather had adopted the child in Arkansas and introduced into evidence an interlocutory decree of adoption reciting proper adoption notice and proof of publication in accordance with statutes of Arkansas. He also presented the final adoption decree which recited absence of objection to the adoption, coupled with a statement that the adoption was in the best interest of the child. The mother claimed that she had not consented to the adoption, that she had not received personal notice of the adoption proceedings, and that she was a nonresident of Arkansas at the time of the proceedings.

The court did not discuss the question of jurisdiction for adoption in the conflict of laws sense, which may be based on domicile of either the adopted child or the adoptive parent. However, if the adoption is sought at the domicile of either the adopted child or the adoptive parent, the adoption should be granted only when the court has personal jurisdiction over both. If jurisdiction over the child is lacking and there is personal jurisdiction over the person having legal custody of the child, the adoption can still take place.²⁸ Perhaps there is no conflicts problem in this case if the grandfather was a domiciliary of Arkansas and the child was also a domiciliary or personally subject to the jurisdiction of Arkansas at the time. The facts are not clear on this point. The Texas court, however, was concerned with the lack of jurisdiction over the nonresident, nonconsenting natural mother. The court cited *Armstrong v. Manzo*,²⁹ in which the United States Supreme Court held that failure to give notice to a nonconsenting parent in the adoption proceeding denied due process of law. The court distinguished *Benfield* on the ground that no notice of any kind was provided in *Armstrong*, while here constructive notice had been given via citation by publication in accord with the statutes of Arkansas. But is the court correct? Cases have held that adoption proceedings can validly take place with mere notice by publication to an absent natural parent.³⁰ It is doubtful, however, that such a viewpoint can stand under more recent cases. The Supreme

²⁵ *Maxwell v. Bugbee*, 250 U.S. 525 (1919).

²⁶ *United States v. Borchering*, 185 U.S. 223 (1902); *Wyman v. Halstead*, 109 U.S. 654 (1884).

²⁷ 468 S.W.2d 156 (Tex. Civ. App.—Amarillo 1971).

²⁸ On the problem of jurisdiction and adoption, see Baade, *Interstate and Foreign Adoption in North Carolina*, 40 N.C.L. REV. 691 (1962); Taintor, *Adoption in the Conflict of Laws*, 15 U. PITT. L. REV. 222 (1954). See RESTATEMENT (SECOND) § 78.

²⁹ 380 U.S. 545 (1965), noted in 19 SW. L.J. 417 (1965).

³⁰ See cases cited in 2 AM. JUR. 2D *Adoption* § 70 n.5 (1962).

Court of the United States in *May v. Anderson*³¹ held that the personal rights of a parent could not be extinguished in a custody proceeding unless the parent was personally subject to the jurisdiction of the court. This means that the requirement of personal jurisdiction must comport with the notice requirements of procedural due process, and apparently notice by publication would hardly ever satisfy those requirements.³² *Mullane v. Central Hanover Bank & Trust Co.*³³ held that a method must be employed to give a defendant notice of the action such that he has a reasonable opportunity to be heard. What is sufficient, of course, depends upon the circumstances, and generally, notice other than by publication can be effectuated. In a rare case in which no better method of service is possible (as where a defendant is in hiding) publication might be sufficient.³⁴

*Long-Arm Statutes. Woodcock, Cummings, Taylor & French, Inc. v. Crosswell*³⁵ concerned a petition for writ of error by a defendant foreign corporation against whom a default judgment was rendered by the district court. Service of process on the defendant had been accomplished under the provisions of the Texas long-arm statute.³⁶ The judgment of the trial court was reversed and remanded because proper affirmative pleadings by the plaintiff setting forth certain conditions precedent to jurisdiction under the Texas long-arm statute had not been made. Texas courts require that two conditions be met before process through the secretary of state may be resorted to under the statute.³⁷ An affirmative pleading must be made that the nonresident defendant does not maintain a regular place of business in Texas or have a designated agent in the state upon whom service may be made. Here the plaintiff's complaint failed to set forth either condition. Citing *McKanna v. Edgar*,³⁸ the present court held that substituted service on the secretary of state could not confer jurisdiction in the absence of an allegation that the defendant had no designated agent or regular place of business in Texas.³⁹

The problem of granting full faith and credit to a Kentucky default judgment against a Texas corporation under the Kentucky long-arm statute⁴⁰ was presented in *Country Clubs, Inc. v. Ward*.⁴¹ The Texas company challenged the enforcement of the Kentucky judgment on two grounds: (1) lack of proper service of process in accord with the Kentucky statute, and (2) lack of minimal contacts in Kentucky sufficient to confer jurisdiction. The Texas court agreed that jurisdiction over the defendant Texas company in Kentucky was

³¹ 345 U.S. 528 (1953).

³² *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

³³ *Id.*

³⁴ RESTATEMENT (SECOND) § 25, comment *d.*

³⁵ 468 S.W.2d 864 (Tex. Civ. App.—Houston [1st Dist.] 1971).

³⁶ TEX. REV. CIV. STAT. ANN. art. 2031b (1964).

³⁷ *Id.* art. 2031b, §§ 2, 3.

³⁸ 388 S.W.2d 927 (Tex. 1965).

³⁹ Note might be made of a recent decision of a United States Court of Appeals which described the Texas rules of pleading which so strictly required allegation of the conditions precedent, at least in an instance where the information appeared in other parts of the record, as archaic. *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (5th Cir. 1969).

⁴⁰ KY. REV. STAT. § 271.610 (1969).

⁴¹ 461 S.W.2d 651 (Tex. Civ. App.—Dallas 1970), *error ref. n.r.e.*

wanting and that, therefore, full faith and credit need not be accorded to the judgment.

As to the first ground, the court pointed out the general rule that for an in personam judgment against a nonresident corporation to be valid the method of service must strictly comply with the long-arm statute. Here there were no allegations that the Texas corporation was doing business as a foreign corporation in Kentucky without having complied with the Kentucky statute so as to permit designation of the secretary of state of Kentucky as its agent for service of process in Kentucky courts for causes of action arising out of the business done therein. Moreover, the only summons served upon the Texas corporation was a copy of an amended supplemental complaint which did not set forth the necessary jurisdictional allegations. Since there had not been strict compliance with the Kentucky statute, no jurisdiction over the defendant existed.

As to the contacts of the Texas company with Kentucky, it was shown that the company had been invited to come to Kentucky and to participate in an apartment project. The senior vice president of the Texas company made several trips to Kentucky and created and became president of a new corporation, Urban Properties, incorporated under the laws of Kentucky. Seventy percent of Urban's stock was owned by the Texas corporation. After the formation of Urban Properties the Texas company had no further contacts with Kentucky or with the project. Plaintiff's claim for services upon which the Kentucky judgment was based arose after the cessation of the Texas company's activities in Kentucky upon a contract for work and service between the Kentucky plaintiffs and Urban Properties. The court concluded that the Texas company did not have contacts with Kentucky prior to the consummation of the contract sufficient to give rise to the cause of action upon the contract. Thus, no minimal contacts existed upon which jurisdiction could be based. A foreign corporation remains subject to the jurisdiction of a state in which it has done business after its withdrawal from the state, but only as to causes of action arising from the business which it had been engaged in within the state prior to withdrawal.⁴³

The fact that seventy percent of Urban's stock was owned by the Texas company was not thought sufficient to confer jurisdiction in Kentucky over the Texas company. The court cited *Cannon Manufacturing Co. v. Cudaby Packing Co.*,⁴³ which held that jurisdiction over a subsidiary corporation does not confer jurisdiction upon the parent. Thus, the corporate fiction was maintained. The modern rule, however, has to some extent broken away from this concept so that in instances in which a foreign company through its subsidiary carries on activities in a state which give rise to a cause of action in that state, jurisdiction over the foreign corporation may be exercised by that state under its long-arm statute. The *Restatement (Second) of Conflict of Laws* states that jurisdiction can be exercised by a state over a foreign corporation in situations in which the corporation has a relationship to the state which makes it reasonable to exercise jurisdiction.⁴⁴ As to jurisdiction over the foreign parent corporation, it is stated that if the subsidiary does an act in the state at the direction of the parent, the

⁴³ RESTATEMENT (SECOND) § 48.

⁴³ 267 U.S. 333 (1925).

⁴⁴ RESTATEMENT (SECOND) § 52.

state has jurisdiction over the foreign parent corporation.⁴⁵ Moreover, jurisdiction over the subsidiary will give jurisdiction over the foreign parent if the foreign parent controls and dominates the subsidiary so as to disregard the subsidiary's independent status.⁴⁶ In *Country Club* the Texas court refused to follow the more modern view. In any event, the facts as presented do not indicate whether the subsidiary acted at the direction of the parent in making the contract for services or the extent of domination and control exercised by the parent over the subsidiary.

⁴⁵ *Id.* § 52, comment *b.*

⁴⁶ *Id.*