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CONFLICT OF LAWS

by

A. J. Thomas, Jr.*

I. CHOICE OF LAW

*Contracts—Usury. Securities Investment Co. v. Finance Acceptance Corp.*¹ involved suit on a contract by a Missouri lender against a Texas borrower. The borrower claimed that the interest under the contract was usurious. The trial court entered judgment for the borrower against the lender for the usurious interest. This judgment was based on the Texas law relating to usurious interest.² The court of civil appeals reversed and remanded, indicating among other things that Missouri law governed the issue of usury. The applicable Missouri statute denied corporations the protection of statutes limiting interest rates.³ Missouri law was said to control in the case because the parties had explicitly chosen Missouri law in the agreement.⁴ Thus, the court, citing *Teas v. Kimball*,⁵ relied on the Texas conflict of laws rule that “[w]here the parties to a contract specify in the instrument that it is to be governed by the law of a particular state that law will apply if it has a reasonable relationship to the contract.”⁶

Permitting the parties to choose the law which is to govern their rights and duties under the contract is a party autonomy rule and has been criticized for allowing bootstrapping. In the words of Judge Learned Hand: “Some law must impose the obligation, and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes.”⁷

The *Restatement (Second) of Conflict of Laws*, however, does include a limited party autonomy rule. The parties are given free choice of law when matters which they could have resolved by an express provision in their contract are involved. Even with matters which the parties could not have resolved in the contract, such as the validity of the contract or the creation of obligation thereunder, the parties are allowed to choose, unless the law of the state which is chosen “has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice.”⁸

The rule of *Teas* relied on in the principal case seems to set forth a similar rule in stating that the parties can choose the applicable law of a particular state providing that state has a reasonable relationship to the contract. Can it be said then that a partial party autonomy rule applies in Texas to the

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¹ 474 S.W.2d 261 (Tex. Civ. App.—Houston [1st Dist.] 1971), *error ref. n.r.e.*

² TEX. REV. CIV. STAT. ANN. art. 5069 (1971).

³ MO. REV. STAT. § 408.060 (1952).

⁴ The agreement stated: “All rights and liabilities of the parties shall be governed as to validity, interpretation, enforcement and effect by the laws of the state of Missouri.” 474 S.W.2d at 271.

⁵ 257 F.2d 817 (5th Cir. 1958).

⁶ 474 S.W.2d at 271.

⁷ *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115, 117 (2d Cir. 1931). *See also* J. BEALE, *THE CONFLICT OF LAWS* 1079-86 (1935).

⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) [hereinafter cited as RESTATEMENT (SECOND)].

creation of obligation or validity of a contract? Such a conclusion would be doubtful, at least as a general rule applying to all types of contracts.

The intention rule set forth in *Teas* seems to be dictum, since the parties in that case did not express their intention that the law of a particular state should govern. Instead, the place of making of the contract and the place of performance were different, and the court was attempting to determine which law should control in the absence of an expression of intention. The court determined that the law of the place of performance should govern, not because it was the law intended by the parties, but because "the focus of the contract was so centered in Texas that its validity should be determined by the laws of contract of that state."⁹ This sounds like the most significant contacts theory of conflict of laws, a theory which has not yet been adopted by the Texas courts despite the wording of the Fifth Circuit in *Teas*.¹⁰ In instances where the intention is not expressed, the Texas courts seem to follow Justice Story's old rule that when place of making and place of performance are different, the law of the place of performance controls because the parties presumably so intended.¹¹ This rule would seem to have no application to the question of whether an expressed intention will be given effect in a case in which the validity of the contract is in issue.

In usury cases, however, the rules of conflict of laws have been modified so that the intention of the parties is effectuated. It has been held that usurious contracts are governed by the law of either the place of making or the place of performance, or even more broadly, by the law of any state having a substantial bona fide relationship to the contract.¹² In an old Texas case involving a usurious contract, the court held that a citizen of one state who contracts with a citizen of another may establish the interest rate according to either state's law.¹³ Such a rule would, of course, allow the parties to choose the law of a state having a reasonable relationship to the parties and the transaction, and avoid the charge of usury. Moreover, in the absence of an expression of intention, the law of any place having a substantial bona fide relationship would apply. The court relied on this special usury conflict of laws rule in *Securities Investment*.

Torts. In *Click v. Thuron Industries*¹⁴ the Supreme Court of Texas affirmed

⁹ 257 F.2d at 824.

¹⁰ The Supreme Court of Texas refused to adopt the significant contacts theory in the case of *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182 (Tex. 1968). This was not a contracts case but a wrongful death case. For discussion of the case, see Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 23 Sw. L.J. 159, 159-62 (1969).

¹¹ J. STORY, *CONFLICT OF LAWS* § 280 (2d ed. 1841). This really seems to be merely a place of performance rule. A recent Texas Supreme Court case has held that the law of the place of performance is the proper law to govern the validity of the contract. *Castilleja v. Camero*, 414 S.W.2d 424 (Tex. 1967).

¹² The leading case is *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927). See also Stumberg, *Conflict of Laws—Validity of Contracts—Texas Cases*, 10 TEXAS L. REV. 163, 167, 168, 184 (1931-1932).

¹³ *Dugan v. Lewis*, 79 Tex. 246, 14 S.W. 1024 (1891). For a recent decision, see *Apodaca v. Banco Longoria, S.A.*, 451 S.W.2d 945 (Tex. Civ. App.—El Paso 1970), error ref. *n.r.e.*

¹⁴ 475 S.W.2d 715 (Tex. 1972).

a decision of the Tyler court of civil appeals,¹⁵ and refused once again to adopt the most significant contacts theory. Instead, the court relied on the *lex loci delictus* doctrine, and thus refused to overrule *Marmon v. Mustang Aviation, Inc.*¹⁶ The court was of the opinion that the Texas wrongful death statute could not be given extraterritorial effect because the Texas Legislature had not intended that it should be given effect outside of the state. Using the language of *Marmon*, the court concluded: "[H]ence we do not have and will not have a 'choice of laws' situation unless and until the Legislature gives extraterritorial force to the statute."¹⁷

II. UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT

*Westphal v. Palmer*¹⁸ removes a barrier which has existed in Texas to the enforcement of interstate support under the Uniform Reciprocal Enforcement of Support Act (URESA).¹⁹ The case of *Freeland v. Freeland*,²⁰ which arose in 1958 under the 1951 statute, had created an obstruction to the functioning of the Support Act and the obtaining of support by the out-of-state obligee under the Act. In that case a divorce, with custody of children to the mother and support by the father, was awarded by a court in Tarrant County, Texas. Thereafter, the mother and children established their residence in Indiana, where she subsequently secured a judgment for child support which was forwarded from Indiana to a court in Dallas County, Texas, for enforcement under the URESA. The father had changed his residence to Dallas County. It was held in *Freeland* that the court originally granting the support decree retained exclusive jurisdiction over the support order. Therefore, another Texas court could not modify, amend, or change the earlier orders. The court in *Westphal* recognized that "[t]he *Freeland* case stands for the proposition that, under the old act, the only proper Texas court to enforce a support order issued ancillary to a Texas divorce was the court entering it originally."²¹

The decision in *Freeland* has been criticized as inhibiting the full application of URESA and as being violative of its purpose.²² Thus, it is good to see the court in *Westphal* interpreting the new 1965 Texas Support Act²³ in such a way as to nullify the *Freeland* doctrine. In *Westphal* the facts were similar to those of *Freeland*, but the court held that the *Freeland* proposition did not apply because of certain new provisions of the 1965 Act.

First, section 28 provides that support actions may be brought under the

¹⁵ 460 S.W.2d 506 (Tex. Civ. App.—Tyler 1970), *error granted*. For discussion, see Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 26 SW. L.J. 191-93 (1972).

¹⁶ 430 S.W.2d 182 (Tex. 1968). For discussion, see Thomas, *supra* note 10, at 159-62.

¹⁷ 475 S.W.2d at 716.

¹⁸ 480 S.W.2d 277 (Tex. Civ. App.—Houston [14th Dist.] 1972).

¹⁹ URESA was originally adopted in Texas in 1951 (ch. 377, [1951] Tex. Laws 643) and provided a procedure whereby a person who is owed support may commence a proceeding in an initiating state against the person who owes the duty of support and who is located in another state. Copies of the petition and record are sent to the latter responding state where personal service may be had upon the obligor and a valid personal judgment can result. See TEX. REV. CIV. STAT. ANN. arts. 2328b-1 to -4 (1971).

²⁰ 313 S.W.2d 943 (Tex. Civ. App.—Dallas 1958).

²¹ 480 S.W.2d at 278.

²² Note, *Conflict of Laws*, 44 TEXAS L. REV. 814, 816 (1966).

²³ In 1965 the Texas Legislature repealed the earlier act and enacted TEX. REV. CIV. STAT. ANN. art. 2328b-4 (1971). Ch. 679, § 39, [1965] Tex. Laws 1561, 1579.

URESAs even though there is already pending in another court a divorce proceeding which may involve the issue of support. Although the situation covered by section 28 differs somewhat from that of *Freeland* and *Westphal*, both situations involve the possibility of future action by another court in the state. Second, section 29 states that no support order supersedes any other order, and provides that amounts for a particular period paid pursuant to either order are to be credited to amounts accruing or accrued for the same period under both. This section pertains to parties located in different judicial districts of the state and alleviates the dilemma of a defendant attempting to comply with the orders of different Texas courts ordering him to make support payments. Finally, section 31 was noted, which provides for intrastate application of the Support Act. Thus, the Act is now applicable not only to situations in which the plaintiff and defendant are in different states, but also when they are both in Texas but in different judicial districts. Since section 31 would permit Texas plaintiffs to obtain relief in a judicial district different from that wherein the first support order was awarded, the court reasoned that the legislature did not intend a different result for an out-of-state plaintiff in the same situation. Such a state of affairs would result if the *Freeland* holding were to be applied. This would defeat the legislative intent "to give the act the widest and most universal application possible."²⁴

III. JURISDICTION AND JUDGMENTS

Jurisdiction in Personam. In the case of *Chapman v. Schefsky*²⁵ a California resident had previously sued Texas defendants in a California court to rescind written contracts for sales of securities because of fraud and to obtain return of the purchase price. Jurisdiction in California over the nonresident defendants was obtained under a section of the California Corporation Code which requires those seeking to obtain a permit for the sale of securities in California to make an irrevocable appointment of the California corporations commissioner and his successor in office as the process agent.²⁶ The Texas defendants had complied with this statute to the extent that they had irrevocably designated the commissioner as their process agent. Proper citation was served on the commissioner and a copy of this, as well as of plaintiff's petition, was sent and received by the Texas defendants. The defendants, however, failed to appear and answer. Default judgment was then rendered against them by the California court. The plaintiff sought to enforce this judgment in Texas based on full faith and credit. Defendants resisted by attacking the validity of the judgment on the ground of lack of jurisdiction because of improper service of process.²⁷

Defendants' first contention was weak indeed. It was alleged that the indi-

²⁴ 480 S.W.2d at 280.

²⁵ 470 S.W.2d 786 (Tex. Civ. App.—Waco 1971), *error ref. n.r.e.*

²⁶ CAL. CORP. CODE § 25240 (West 1955).

²⁷ Jurisdiction over the person in the conflict of laws sense certainly existed in this case, either by consent through compliance with the California statute or through the doing of certain acts within the state. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Doherty & Co. v. Goodman*, 294 U.S. 623 (1935); *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917).

vidual who occupied the office of commissioner at the time the defendants designated the commissioner as agent no longer occupied that office at the time of suit in California, and that, although the California statute spoke of the commissioner "and his successor in office," in making the designation the defendants designated the commissioner of corporations only, with no mention of his successor. Therefore, service on the individual holding office at the time of suit was ineffective and not in keeping with the actual designation. The court made short shrift of this argument by finding that as intended by the laws of California, of which the court took judicial notice as requested by the parties, the designation appointed the office of commissioner, not the individual, as agent and that sufficient service had therefore been made.

Allegation was also made that the default judgment should be refused enforcement because of fraud which consisted of the failure of the plaintiff in the California case to disclose the correct amounts of certain set-offs. The Texas court did not agree, but found in accordance with the well-known rule that only extrinsic fraud, *i.e.*, fraud in the procurement of the judgment, may be used to attack a sister state judgment.²⁸ Since the giving of false testimony constituted intrinsic fraud, the judgment of the sister state could not be challenged.

Confession of Judgment. According to the facts of *Shaps v. Union Commerce Bank*²⁹ the defendant, while residing in Ohio, executed a note payable to the plaintiff which authorized any attorney at law to appear in any Ohio court of record and confess judgment. Such a provision is valid in Ohio. The defendant subsequently moved to Texas and, upon his failure and refusal to pay the note, a default judgment was obtained by confession in Ohio. Defendant had no actual notice of the suit nor was he served in Ohio. The trial court and the appellate court held that this judgment was entitled to full faith and credit in Texas despite the fact that a Texas statute prohibits a contractual authorization for confessions of judgment.³⁰ The appellate court concluded that a judgment obtained in a foreign state, where confessions of judgment are recognized as valid, will be given full faith and credit in Texas.

This decision would seem to imply that in all cases where the confession of judgment procedure is recognized in the foreign state Texas will accord full faith and credit. It is submitted that such an implication is too broad. In this case, where the contract was made and performable in Ohio, where the most significant contacts also seem to be in Ohio, it can be said without much trepidation that it is an Ohio contract to be governed by Ohio law. Since confession of judgment had been authorized by the contract and the authorization was valid according to the law governing the contract, jurisdiction in personam existed in Ohio based on consent.³¹ A valid judgment based upon

²⁸ R. LEFLAR, AMERICAN CONFLICT OF LAWS § 82 (1968); Stumberg, *supra* note 12, at 114-15. Extrinsic fraud is that fraud which goes to the opportunity to appear and to defend. See RESTATEMENT OF JUDGMENTS § 118b (1942).

²⁹ 476 S.W.2d 466 (Tex. Civ. App.—Beaumont 1972), *error ref. n.r.e.*

³⁰ TEX. REV. CIV. STAT. ANN. art. 2224 (1971).

³¹ See G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 78-79 (3d ed. 1963) (consent as a basis of jurisdiction in personam).

valid jurisdiction had been rendered and was entitled to full faith and credit.

But, assume that this had been a Texas contract and that judgment was confessed on this Texas contract in Ohio. Do we have a valid judgment which is required to be enforced in Texas? *Bernard Gloeckler Co. v. Baker Co.*³² would say not. In that case, notes which authorized confession of judgment were executed and made performable in Texas. Judgment was confessed in Pennsylvania, where such procedure was valid. Nevertheless, the Texas court refused full faith and credit on the ground that since the agreement was governed by Texas law (the court said validity, interpretation, and obligation of contracts depend on the law of the state where the contract originates) which made the confession of judgment void, the sister state did not have jurisdiction over the defendant and, thus, had no power to give a valid judgment. Jurisdiction, if present, would have been based on consent of the parties to an exercise of jurisdiction under the confession of judgment agreement. The confession of judgment agreement, however, was void under the law governing the contract. This lack of validity vitiated the consent and the lack of consent vitiated the jurisdiction.

The court in *Gloeckler* did say that a different question would have been presented had the note been made in Texas but performable in Pennsylvania, and cited *Hastings v. Bushong*.³³ The court did not elaborate on the point, but it would seem that it must have had in mind the rule of at least some Texas courts that if an agreement is made in one place, to be performed in another, the law of place of performance governs validity.³⁴ In such a case, if the place of performance recognizes confession of judgment notes, the consent and hence the jurisdiction to render a valid judgment both exist.

In *Shaps* the defendant also claimed fraud as a defense to the enforcement of the judgment. The alleged fraud was said to exist in a scheme whereby the Charles Corporation, which was defendant's employer at the time of the loan which occasioned the note, was seeking to induce its employees to buy its stock. The proceeds from the sales of Charles Corporation stock were to be used to adjust its debt structure with the plaintiff. As in *Chapman*,³⁵ the court held that only extrinsic fraud constituted a defense to the judgment, and the fraud, if any, was intrinsic.

Adoption. Traditionally, jurisdiction for adoption is based on the domicile of either the adopted child or the adoptive parent.³⁶ However, it seems clear that the personal rights of a natural parent cannot be extinguished in an adoption proceeding unless the parent was personally subject to the jurisdiction of the state of adoption.³⁷

³² 52 S.W.2d 912 (Tex. Civ. App.—El Paso 1932).

³³ 252 S.W. 246 (Tex. Civ. App.—San Antonio 1923), *error dismissed*.

³⁴ *Castilleja v. Camero*, 414 S.W.2d 424 (Tex. 1967); *see note 11 supra*, and accompanying text.

³⁵ *See notes 25-28 supra*, and accompanying text.

³⁶ 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.*

³⁷ In *Armstrong v. Manzo*, 380 U.S. 545 (1965), the United States Supreme Court held that failure to give notice to a nonconsenting parent in the adoption proceeding denied

In *Rodgers v. Williamson*³⁸ the adoptive parents, one of whom was the natural mother, were domiciled in Illinois where the adoption was granted. The father, a domiciliary of Texas, had received due notice of the petition of adoption, gone to Illinois, and employed an attorney to represent him in the case. He then consented to the adoption. Under these facts, the adoption proceeding would normally be entitled to full faith and credit in a sister state.³⁹ Nevertheless, the natural father attacked the decree collaterally in a Texas court, claiming fraud in the procurement on the ground that his consent to the adoption was obtained through representations that he would retain visiting rights with his child. Moreover, he sought to alter certain visitation rights which had been previously agreed upon and incorporated into the Illinois decree. The trial court, noting that no extrinsic fraud was shown, held that the adoption decree was subject to full faith and credit. The judgment was affirmed by the court of civil appeals.

Further, it was held that the visitation rights were created by an agreement which was purely personal between the parties and were not imposed by requirements of Illinois or Texas law. In an adoption the rights and duties of the natural parents in relation to the child are extinguished, for they are relieved of all parental responsibility.

It was also alleged by the natural father that the Texas court, which had rendered the divorce to the natural parents and awarded custody to the natural mother, had a continuing jurisdiction to modify the custody decree and thus the jurisdiction to alter the visitation rights agreed upon and incorporated into the Illinois adoption decree. The court responded that after an adoption decree the jurisdiction of a divorce court granting custody and visitation rights was terminated; and furthermore, according to Texas law, adoptive parents could only be deprived of custody of the child by proof of their bad moral character or by proof of abuse, neglect, or ill-treatment of the child. No such proof had been submitted to the court.

Custody Decrees. Disputes over the extraterritorial effect of sister state custody decrees seem to arise with some frequency. No doubt these disputes are caused in part by the state of confusion concerning the proper jurisdictional basis for the grant of a custody award and the recognition which is to be given to such an award in another state. The Supreme Court of the United States has not laid down definite standards for the recognition of these decrees. It is usually accepted, however, that they are subject to full faith and credit to some extent,⁴⁰ at least as to the facts existing at the time the decree is granted, but not as to changed conditions occurring after the grant of the decree.⁴¹ Even with respect to all matters up to the time of the rendition of the decree, the court issuing the decree must have some jurisdictional basis.

due process of law. In *May v. Anderson*, 345 U.S. 528 (1953), the Supreme Court held that 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.

³⁸ 482 S.W.2d 665 (Tex. Civ. App.—Dallas 1972).

³⁹ RESTATEMENT (SECOND) § 78; R. LEFLAR, *supra* note 28, § 242; G. STUMBERG, *supra* note 31, at 338-40.

⁴⁰ R. LEFLAR, *supra* note 28, at 348; G. STUMBERG, *supra* note 31, at 322.

⁴¹ *Kovacs v. Brewer*, 356 U.S. 604 (1958); *Halvey v. Halvey*, 330 U.S. 610 (1947).

Three places are generally recognized as having jurisdiction for purposes of awards of custody: the state of domicile of the child, the state where the child is present, or the state where the parents are personally present.⁴² When these bases of domicile or presence are found in one state, that state may exercise jurisdiction. Difficulties arise, however, where there is division. This is especially true when the award is granted in a place where the parents, or one of them, is not personally subject to the jurisdiction of the courts which are awarding custody, because the Supreme Court of the United States has held that a parent cannot be deprived of his or her right to custody of a child by a court not having jurisdiction over that parent.⁴³

These principles were involved in the Texas cases of *Franklin v. Wolfe*⁴⁴ and *Gunther v. Gunther*.⁴⁵ In *Franklin* a divorce decree had been granted in Texas and custody of the child had been awarded to the mother with provisions for visitation by the father. No problem of jurisdiction was present since the parties not only appeared to be domiciled in Texas but were personally present in the state. The mother married again and moved to California, taking the child. Later, the father appeared before a California court seeking a modification of his visitation rights. The California court confirmed the Texas judgment but did modify the visitation rights. Thereafter, the father took the child to Texas, refused to return the child to the mother at the end of the visitation period, and filed suit in a Harris County, Texas, court seeking the child's custody on the ground of changed conditions. Before the judgment in this case, the mother filed a petition for habeas corpus in a Harris County domestic relations court seeking discharge of the child from illegal confinement and return of custody to her. Judgment was rendered in her favor. Thereupon, the trial court dismissed the father's custody case for lack of jurisdiction, which was said to result because a valid California decree was res judicata of the issue. The father appealed from both decisions. The court of civil appeals, treating both in one opinion, affirmed the judgment giving custody to the mother on the ground that the California court's judgment as to visitation was res judicata of the parent's rights as of the date of the judgment. It was noted that changed conditions affecting the child's welfare might call for a change of custody, but here there was no relevant change of conditions.

Two side issues in this case are of some interest in the area of conflict of laws. The court presumed that the California law of res judicata in relation to a custody decree was the same as that of Texas. Such a presumption arises in Texas, *i.e.*, the presumption that applicable sister state law is the same as that of Texas, in the absence of a request that the court take judicial notice of the law of a sister state.⁴⁶

⁴² See, e.g., Justice Traynor's opinion in *Sampsell v. Superior Court*, 32 Cal. 2d 763, 197 P.2d 739, 741-51 (1948). See also RESTATEMENT (SECOND) § 79.

⁴³ *May v. Anderson*, 345 U.S. 528 (1953). The court held that full faith and credit was not required where the mother was "neither domiciled, resident nor present" within the state. *Id.* at 533.

⁴⁴ 483 S.W.2d 17 (Tex. Civ. App.—Houston [14th Dist.] 1972).

⁴⁵ 478 S.W.2d 821 (Tex. Civ. App.—Houston [14th Dist.] 1972), *error ref. n.r.e.*

⁴⁶ For discussion of this Texas rule, see Thomas, *Proof of Foreign Law in Texas*, 25 SW. L.J. 554 (1971).

The second issue concerned the father's custody suit that was filed in Texas prior to the habeas corpus proceeding of the mother. When the mother came to court to prosecute the habeas corpus proceeding, she was served with citation in the father's suit. The mother sought to invoke rule 120a,⁴⁷ which permits a special appearance to challenge jurisdiction. The court was of the opinion, following an earlier Texas case,⁴⁸ that this rule only permitted a challenge on the ground that the person or property was not subject to the jurisdiction. Therefore, since the mother was present in the state, although admittedly to participate in other litigation, rule 120a was not applicable. Thus, Texas does not appear to be in accord with the accepted rule which confers immunity from service of process upon nonresident parties who are attending trial.⁴⁹

In *Guntber* the domestic relations court of Harris County also had before it a habeas corpus action filed by a California mother seeking custody of her children. In a previous divorce proceeding in California, the California court, with jurisdiction over all parties, had granted custody to the father. Thereafter, the mother became dissatisfied with the decree and sought and obtained a change of custody before a California court. In this proceeding no service of process was made and the father received no notice. Indeed, he had left California with the children for Texas. The mother sought enforcement of this decree in Texas. The trial court held that she was entitled to custody by virtue of the California decree. The court of civil appeals found that the trial court had erred. There was no evidence that the father had received citation or notice, and actual or constructive jurisdiction over the father had not been obtained. Holding in accord with the Supreme Court doctrine that parents' rights to custody of children are personal, requiring personal service and jurisdiction,⁵⁰ the court of civil appeals found the custody judgment against the nonresident parent to be void. Moreover, the mother's suit for custody in California on grounds of changed conditions was held to be a new and independent act, not a necessary concomitant of the original custody award.⁵¹

The court then noted that the California decree granting custody to the father, which was based on jurisdiction over all parties, was entitled to full faith and credit as a valid sister state judgment unless changed conditions warranted change. The Texas court had jurisdiction to change custody upon proof of a material change of conditions since the parents were before the court and since jurisdiction to determine custody is not necessarily dependent upon the domicile of the children in Texas, but upon their presence in the state. Because of the father's deliberate secreting of the child from the mother for a period of several months, changing of custody from father to mother was

⁴⁷ TEX. R. CIV. P. 120a.

⁴⁸ *Oates v. Blackburn*, 430 S.W.2d 400 (Tex. Civ. App.—Houston [14th Dist.] 1968), error ref. n.r.e.

⁴⁹ See H. GOODRICH & E. SCOLES, *CONFLICT OF LAWS* 116 (1964); G. STUMBERG, *supra* note 31, at 71.

⁵⁰ *May v. Anderson*, 345 U.S. 528 (1953).

⁵¹ In general, jurisdiction once obtained over a defendant continues as to all subsequent matters in the same litigation, but not as to a different action not an essential concomitant of the original suit. See *Michigan Trust Co. v. Ferry*, 228 U.S. 346 (1913).

warranted on the ground that he had demonstrated himself to be an unfit and improper person to be awarded custody.

Probate. The 1934 *Restatement of the Conflict of Laws* provides that "[a] judgment in administration proceedings by a competent court in the state of domicile will be followed by the courts in other states insofar as the judgment relates to movables."⁵² Since the validity of a testator's disposition of movables is determined by the law of his domicile at death, it would follow that a will admitted to probate there should be conclusively recognized as valid in all other states because the domiciliary state had jurisdiction.⁵³ Nevertheless, the full faith and credit clause does not seem to have been construed to demand such recognition,⁵⁴ although a probate at the domicile must be accorded full faith and credit as to assets in that state.⁵⁵

It should be stressed that the domiciliary rule normally applies only to probate of movables. The weight of authority does not render a probate decree conclusive as to the validity of a will disposing of real property located in a state other than where the decree is granted.⁵⁶ The Texas rule, however, does not seem to be in accord with the weight of authority. *Bourland v. Hanes*⁵⁷ involved the enforcement of an Alabama probate decree in Texas. The will in question disposed of real property in Texas and personal property in Alabama. Making no distinction between real or personal property, the Texas court, following and citing earlier Texas cases,⁵⁸ concluded that jurisdiction to probate a will is possessed exclusively by the courts of the state of the decedent's domicile at death, and further, that full faith and credit must be accorded to the probate at the domicile when questions of the instrument's authenticity are involved.

This holding might be correct with respect to movables and certainly would be correct with respect to movables located in Alabama. But, as noted previously, the weight of authority would not require full faith and credit for a probate of a will disposing of land in another jurisdiction. In any event, the Alabama probate decree was refused enforcement in *Bourland* because the jury had found that the decedent was not domiciled in Alabama at her death.⁵⁹ The court of civil appeals refused to disturb this jury finding inasmuch as it was based on ample evidence.

⁵² RESTATEMENT OF THE CONFLICT OF LAWS § 470(1) (1934).

⁵³ *Id.* § 470(1), comment; see *Evansville Ice & Cold Storage Co. v. Winsor*, 148 Ind. 682, 48 N.E. 592 (1897); *Martin v. Stovall*, 103 Tenn. 1, 52 S.W. 296 (1899); *Jones v. Jones*, 301 S.W.2d 310 (Tex. Civ. App.—Texarkana 1957), *error ref. n.r.e.*

⁵⁴ H. GOODRICH & E. SCOLES, *supra* note 49, at 341.

⁵⁵ *Tilt v. Kelsey*, 207 U.S. 43 (1907).

⁵⁶ Annot., 131 A.L.R. 1023, 1026, 1033 (1941). See also *Hopkins, The Extraterritorial Effect of Probate Decrees*, 53 YALE L.J. 221, 229-36, 249-54 (1944). Such a decree is not recognized because the courts of one state have no jurisdiction to pass upon the title to real property having a situs in another state.

⁵⁷ 474 S.W.2d 592 (Tex. Civ. App.—Corpus Christi 1971).

⁵⁸ See *Holland v. Jackson*, 121 Tex. 1, 37 S.W.2d 726 (1931); *DeTray v. Hardgrove*, 52 S.W.2d 239 (Tex. Comm'n App. 1932), *judgment adopted*, and others cited in 474 S.W.2d at 598.

⁵⁹ A finding that decedent was domiciled in one state does not preclude subsequent litigation on this jurisdictional fact by persons who were not parties to the earlier proceeding. *Baker v. Baker, Eccles & Co.*, 242 U.S. 394 (1917).

IV. LONG-ARM JURISDICTION

Jurisdiction over Foreign Executrix. At common law the rule emerged that an administrator or executor could neither sue nor be sued in his official capacity outside the state of his appointment.⁶⁰ This traditional rule has in general been the rule in Texas, where it has been recognized that a foreign representative is an officer of the court appointing him, derives his authority from that court, and is, therefore, empowered to administer the assets only within the jurisdiction of the appointing court. A representative of an estate thus has no extraterritorial jurisdiction.⁶¹

The modern trend in many jurisdictions has been away from this narrow viewpoint; this has been especially true with respect to suits brought under non-resident motorist statutes. The validity of such statutes, which permit an action to be brought in the state where the automobile accident occurred against the foreign representative of a deceased nonresident motorist, has been upheld by the courts of many states.⁶² An exercise of jurisdiction over the foreign representatives in cases in which his decedent could have been sued can be justified since it permits litigation at a forum convenient to the witnesses and the plaintiff without placing an unreasonable burden on the defendant representative or on the decedent's estate. Thus, it is good to find the Texas rule so extended in the case of *Cox v. Crow*.⁶³

In this case suit was brought in a federal district court in Texas by a widow for the wrongful death of her husband in a collision which occurred in Texas. The defendant was the widow and executrix of the estate of the driver of the other car involved. Both the defendant executrix and her late husband were residents of Nebraska. She was appointed executrix by a Nebraska court and claimed that the court in Texas had no jurisdiction over her because she possessed no authority to sue or be sued in Texas. The court, applying Texas law, concluded otherwise. It cited several Texas statutes to uphold the result.⁶⁴ The court primarily relied, however, upon the non-resident motorist long-arm statute, article 2039a,⁶⁵ which designates the chairman of the state highway commission as agent for a nonresident driver for service of process in any suit against the driver growing out of an accident or collision on a Texas highway. The statute also provides that the chairman is agent for the legal representative of the driver's estate.

Looking to precedents in other states upholding an exercise of jurisdiction over the foreign representative, the court stated that "[m]any of the Circuit

⁶⁰ See H. GOODRICH & E. SCOLES, *supra* note 49, at 366; Cheatham, *The Statutory Successor, the Receiver and the Executor in Conflict of Laws*, 44 COLUM. L. REV. 549 (1944).

⁶¹ *Faulkner v. Reed*, 241 S.W. 1002 (Tex. Comm'n App. 1922), *holding approved*; *Lindahl v. Thacker*, 26 S.W.2d 283 (Tex. Civ. App.—San Antonio 1930); *Clark v. Webster*, 94 S.W. 1088 (Tex. Civ. App. 1906).

⁶² See, e.g., *Parrott v. Whisler*, 313 F.2d 245 (6th Cir. 1963); *Brooks v. National Bank*, 251 F.2d 37 (8th Cir. 1958). For a collection of other cases upholding the validity, see H. GOODRICH & E. SCOLES, *supra* note 49, at 127 n.186.

⁶³ 336 F. Supp. 761 (N.D. Tex. 1972).

⁶⁴ TEX. REV. CIV. STAT. ANN. art. 4671 (1952), which provides for wrongful death actions; *id.* art. 4676, which permits suit against the executor if the defendant dies before institution of suit; *id.* art. 5525 (1958), which permits the cause of action to survive after the death of the person against whom it should have accrued.

⁶⁵ *Id.* art. 2039a (1964).

Courts in this country have held specifically . . . that a non-resident administrator or executor may be sued as a defendant in the courts of the state where the accident occurred and in which the decedent would have been a defendant had he survived the accident."⁶⁶ The court went on to say that it believed the Texas rule to be the same, particularly in view of article 2039a which demonstrated a legislative intention that Texas courts have jurisdiction over cases involving torts committed on the state's highways.

The case was distinguished from the traditional rule which would not allow suit against a foreign representative in another jurisdiction, because cases in which that rule had been applied were concerned for the most part with the protection and administration of assets having a Texas situs. Moreover, it was asserted that such a rule, which was announced before the enactment of article 2039a, could not be controlling authority in a case involving a tort arising from the use of highways by a nonresident motorist.

Procedures Under the Long-Arm Statute. The Texas long-arm statute was involved in *Parnass v. L & L Realty Corp.*⁶⁷ The following three questions were before the court: "Whether the petition alleges the jurisdictional facts necessary for substituted service under this statute, whether such jurisdictional allegations must be supported by proof, and whether the record must show that the Secretary of State mailed the process to defendant."⁶⁸

At the time of the filing of the action the defendant was a Colorado resident, but at the time the cause of action arose the defendant was a Texas resident. Moreover, the cause of action arose out of business in which the defendant had been engaged in Texas. These facts were alleged in the plaintiff's petition. It was further alleged that defendant had not appointed an agent in Texas for service of process and that there was no person in Texas in charge of any business of the defendant upon whom service of process could have been made. Thus, service of process was made upon the secretary of state of Texas in accordance with section 6 of article 2031b.⁶⁹ Default judgment was rendered against the defendant, who sought reversal on writ of error, claiming that the plaintiff's petition was insufficient to authorize service on the secretary of state. Insufficiency resulted because the petition failed to allege that defendant did not maintain a place of regular business in Texas. Looking to the language of section 6, the court held that there was no requirement of an allegation that the party did not maintain a place of regular business in the state. To the contrary, section 6 provides for service on the secretary of state only when one becomes a nonresident after the cause of action arises and when one is not required to appoint a service of process agent in Texas. The court then stated that the plaintiff's petition need not allege that defendant was not required to appoint an agent in the state if it alleges as it did "that defendant

⁶⁶ 336 F. Supp. at 763.

⁶⁷ 482 S.W.2d 944 (Tex. Civ. App.—Dallas 1972).

⁶⁸ *Id.* at 945.

⁶⁹ TEX. REV. CIV. STAT. ANN. art. 2031b, § 6 (1964), provides that when a person becomes a non-resident after a cause of action arises in Texas but before suit has been brought upon it in a Texas court and when such defendant is not required to appoint a service agent in Texas, service of process may be had upon the secretary of state.

'has not appointed an agent in this state upon whom service may be made.'⁷⁰

Relying on section 1 of article 2031b, which creates a conclusive presumption that the person has designated the secretary of state as service agent in those instances where the person is required to appoint an agent and does not, the court reasoned: "If such a defendant [as here] is not required to appoint an agent, section 6 applies, and if he is required to appoint an agent but has not done so, process may be served on the Secretary of State under Section 1, which expressly so provides, so that in either event service on the Secretary of State is authorized."⁷¹

The contention was also made by the defendant that the plaintiff could not resort to section 6 if section 2 were available. Section 2 permits suit against a nonresident through service upon a person who at the time of suit is in charge of any business of the defendant's in the state. This argument was not heeded. First, the court asserted that the petition showed the non-availability of section 2 by stating that there was no person in the state charged with any business in which the defendant was engaged and upon whom service might have been had. Second, the court pointed out that section 2 was not applicable in any event, for it applies to suits against nonresidents arising out of business done in Texas, while section 6 applies to a cause of action arising while the defendant is still a resident of Texas but who later becomes a nonresident.

The court also rejected the defendant's argument that the judgment must be reversed because the plaintiff's jurisdictional allegations were not supported by proof. The court found that proof of jurisdictional prerequisites was not required when such prerequisites were set forth in the petition. In effect, the plaintiff's allegation of jurisdiction was considered to be admitted and established when the defendant failed to appear to contest the jurisdiction.

The defendant's concluding argument that the default judgment should be reversed because the record did not show that the secretary of state forwarded a copy of the citation to the nonresident defendant was also rejected. The court noted that strict compliance with the statutory method of service of process was required, but that this was satisfied by the allegation in the petition which set forth the statutory requirements for substituted service and the return reciting service on the secretary of state. Service was considered complete when it was made on the state official, and violation of the statutory duty by the official to mail the citation to the defendant would not oust the court from jurisdiction.⁷²

Minimum Contacts. As usual, the Texas courts were faced with several cases involving the vague minimum contacts jurisdictional rule which was promulgated by the Supreme Court of the United States in *International Shoe Co. v. Washington*.⁷³ In that case the Court considered the constitutionality of an exercise of judicial jurisdiction over a nonresident corporation and held that

⁷⁰ 482 S.W.2d at 946.

⁷¹ *Id.*

⁷² For a discussion of when service is complete under a statute which provides for constructive service on a nonresident motorist, see Annot., 82 A.L.R. 768, 773 (1933).

⁷³ 326 U.S. 310 (1945).

"due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁷⁴

The Texas long-arm statute, article 2031b, is based on this decision. Article 2031b permits suit against out-of-staters upon causes of action arising out of the doing of business within the state through service of process upon the secretary of state, who is directed to send a copy of the process to the non-resident defendant by registered mail. Doing of business for the purpose of the act includes "entering into a contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State."⁷⁵

In interpreting the constitutional requirements for exercise of jurisdiction over a nonresident under a long-arm statute, the Supreme Court of Texas stated in *O'Brien v. Lanpar Co.*:

- (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice⁷⁶

National Truckers Service, Inc. v. Aero Systems, Inc.,⁷⁷ *Clark Advertising Agency, Inc. v. Tice*,⁷⁸ and *Customs Textiles, Inc. v. Crown Sample Book*⁷⁹ each involved the doing of business in Texas by out-of-state defendants which consisted of contracts with Texas residents to be performed wholly or in part within the state.

In *National Truckers* the contract was accepted by the Texas resident in Texas; it was made performable in Texas by its own terms; and the cause of action arose out of defendant's default on the contract. It was then reasoned that since the first two factors required by *O'Brien* were fulfilled, the third would automatically be met because traditional notions of fair play would be satisfied. Thus, the three basic constitutional requirements for an exercise of jurisdiction over the nonresident were present.

A final point of interest in this case concerns the plaintiff, National Truckers Service (NTS). Was NTS, a Maryland corporation which had its corporate office and principal place of business in Texas, a resident of Texas for purposes of article 2031b, which defines doing of business in Texas as the making of a contract with a Texas *resident* to be performed in whole or in part in the state? The general rule, of course, is that a corporation is considered a citizen of the state in which it is incorporated, such place also being considered its domicile.⁸⁰

⁷⁴ *Id.* at 316.

⁷⁵ TEX. REV. CIV. STAT. ANN. art. 2031b (1964).

⁷⁶ 399 S.W.2d 340, 342 (Tex. 1966). This statement was quoted from *Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wash. 2d 106, 381 P. 245, 251 (1963).

⁷⁷ 480 S.W.2d 455 (Tex. Civ. App.—Fort Worth 1972).

⁷⁸ 331 F. Supp. 1058 (N.D. Tex. 1971).

⁷⁹ 472 S.W.2d 848 (Tex. Civ. App.—Waco 1971).

⁸⁰ RESTATEMENT OF THE CONFLICT OF LAWS § 87 (1934); RESTATEMENT (SECOND) § 41.

This was the first case to require the construction of the term "resident" for purposes of article 2031b. The court relied on the general rule that a foreign corporation is not only a resident of the state of incorporation but also of the place where it conducts business, particularly the place of its principal business. The court concluded that such a decision was necessary in order to comply with the constitutional requirements of equal protection, since it would deny equal protection of the laws to permit suit against a corporation doing business in Texas and at the same time deny such a corporation the right to bring suit in Texas.

In both *Clark Advertising* and *Custom Textiles* the courts found that there were sufficient contacts to meet the minimum contacts rule and that the requirements of article 2031b were met. In *Clark Advertising* the defendant had entered into a contract with the Texas plaintiff to furnish advertising and promotional services to the defendant for automobile races in Arizona. Although the defendant claimed that no part of the contract was to be performed in Texas, the court thought otherwise and stated that since the contract was made with a Texas resident having offices in Texas, the defendant could reasonably infer that part of the contract would be performed in Texas. On the question of traditional notions of fair play and substantial justice, it was pointed out that the defendants had conducted and supervised auto races in Texas on many occasions and that they had had the benefit and protection of Texas laws. Under these circumstances, to subject a defendant to suit in Texas in an instance where the defendant had made a contract with a Texas resident to be performed in part in Texas, would not offend notions of fairness.

Although the out-of-state defendant claimed that the suit in *Custom Textiles* was the result of a single isolated transaction in Texas and thus outside the pale of minimum contacts and article 2031b, the court disagreed. The facts demonstrated that the defendant had come to Texas to discuss the manufacturing of certain sample books for the Texas plaintiff. A contract was finally negotiated by telephone conversation authorizing the manufacture. Sample books were sent to Texas and monies were paid to defendant from Texas. These contacts were held to be sufficient.

The United States District Court for the Southern District of Texas, in *Bland v. Kentucky Fried Chicken Corp.*,⁸¹ considered the interesting problem of whether jurisdiction over a subsidiary corporation is sufficient to confer jurisdiction over the parent. The 1925 Supreme Court case, *Cannon Manufacturing Co. v. Cudaby Packing Co.*,⁸² fully maintained the corporate fiction and held that jurisdiction over the subsidiary did not confer jurisdiction over the parent. The modern rule, however, has to some extent broken away from this concept. 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 parent may be exercised by that state under a long-arm statute.⁸³

⁸¹ 338 F. Supp. 871 (S.D. Tex. 1971).

⁸² 267 U.S. 333 (1925).

⁸³ The RESTATEMENT (SECOND) § 52 permits an exercise of jurisdiction by a state over a foreign corporation in situations where the corporation has a relationship to the state which makes an exercise of jurisdiction reasonable. As to jurisdiction over a foreign

The district court in *Bland* followed the more modern view and held the foreign parent subject to the jurisdiction of Texas. Bland, a Texas seller of a motel, brought an action in Texas against Colonel Sanders Inn, Inc. (CSI) and Kentucky Fried Chicken Corporation (KFC), which owned ninety-five percent of the stock of CSI. Bland made a contract with the subsidiary CSI for the sale of the motel in exchange for shares of common stock in KFC which CSI would cause to be issued. This contract was made and to be performed in Texas. No question of judicial jurisdiction in Texas over CSI, the subsidiary, existed. The question before the court was whether jurisdiction existed over KFC under article 2031b and the minimum contacts rule. KFC did a great amount of business in Texas in the form of the granting of its franchise to Texas outlets. However, the cause of action did not arise out of the franchises, but out of a completely unrelated matter, *i.e.*, the sale and purchase of the motel. The franchising contacts would have been sufficient to meet the constitutional requirement of minimum contacts and fair play established in *International Shoe*, the court stated, even where the cause of action in the state did not arise out of those contacts. But since the Texas courts had limited the Texas long-arm statute to suits arising out of business done in Texas, the federal court declined to stretch the Texas statute to the limits of the minimum contacts rule.

Thus, jurisdiction, if it were to attach against KFC, would have to attach because KFC was, through its subsidiary CSI, a party to the contract. The court declared that through ownership of ninety-five percent of CSI stock, KFC controlled CSI's business decisions. Moreover, it was pointed out that the contract with the subsidiary was permeated with references to the parent's financial condition; that the contract's consideration was in the form of the parent's stock; and that KFC was to undertake the registration statement which would cover at least fifty percent of the stock issued to the plaintiff. These facts, the court believed, indicated that KFC through its subsidiary had entered into a contract in Texas which was by its own terms to be performed in Texas, and thus there was a doing of business in Texas sufficient under article 2031b for an exercise of jurisdiction. The provisions of the *Restatement (Second)* seem to be adopted, since the facts indicate that the subsidiary acted at the direction of the parent in making the contract and, furthermore, that the subsidiary was under the domination and control of the parent.⁸⁴

The final long-arm statute case for review here is that of *Hayes v. Caltex Petroleum Corp.*,⁸⁵ in which a federal district court failed to find sufficient minimum contacts for an exercise of jurisdiction in Texas. The plaintiff, an Oklahoma resident, sued defendant in Texas for unpaid salary, damages for breach of an employment contract, and exemplary damages. The defendant was a Delaware corporation which maintained no office in Texas. Its sole contacts

parent corporation, it is stated that if the subsidiary does an act in the state at the direction of the parent the state has jurisdiction over the foreign parent corporation. Moreover, jurisdiction over the subsidiary will establish jurisdiction over the foreign parent if the foreign parent controls and dominates the subsidiary such that it disregards the subsidiary's independent status.

⁸⁴ See note 83 *supra*.

⁸⁵ 332 F. Supp. 1205 (1971).

with Texas consisted of the maintenance of an employee in Houston to interpret certain physical data and the purchase of lubes from Texas suppliers for shipment abroad F.O.B. Texas ports. Shipment of these lubes was arranged by an independent freight forwarder.

The court, quoting the three basic elements for an exercise of judicial jurisdiction under the Texas long-arm statutes set forth in *O'Brien*, found that the second element was missing in this case, *i.e.*, the plaintiff's cause of action did not arise in Texas, for it was not connected with any of the defendant's activities in Texas.

In *National Truckers* it was said that the Texas long-arm statute permits an exercise of jurisdiction to the fullest permissible reach under the federal constitutional minimum contacts rule. *Eyerly Aircraft Co. v. Killian* was cited for the proposition that "the Texas purpose . . . was to exploit to the maximum the fullest permissible reach under federal constitutional restraints."⁸⁶ The Texas rule of *O'Brien*, however, seems to accept article 2031b and does not reach to the fullest possible limits of *International Shoe*. Thus, the court in *Bland* was of the opinion that article 2031b had not been interpreted to make a nonresident subject to the jurisdiction in an instance where the cause of action did not arise within the state.⁸⁷ The *O'Brien* rule requires that the cause of action arise or be connected with an act or transaction in Texas. Cases in other jurisdictions have held that the minimum contacts rule is satisfied and jurisdiction in a state can be exercised over causes of action which do not arise out of business done in that state, if the business that is done is of such a continuous and substantial nature as to make an exercise of jurisdiction reasonable.⁸⁸

An exercise of jurisdiction has been held to be reasonable when the defendant's principal place of business happened to be within the state. In *Hayes* the defendant's principal place of business was not Texas, the plaintiff was not a resident of Texas, and the cause of action was completely unrelated to defendant's activities in Texas. Moreover, the defendant's activities were perhaps too slight to make the defendant subject to suit even under the constitutional rule. The slighter the plaintiff's connection with the state, the greater must be the defendant's connection when the cause of action does not arise out of business done within the state.⁸⁹ The contacts of the plaintiff, the defendant, and the cause of action with Texas were too tenuous to justify jurisdiction in Texas in *Hayes*.

⁸⁶ 414 F.2d 591, 599 (5th Cir. 1969); see Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 25 Sw. L.J. 146 (1971).

⁸⁷ See notes 81-85 *supra*, and accompanying text.

⁸⁸ See, *e.g.*, *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Bryant v. Finnish Nat'l Airline*, 15 N.Y.2d 426, 260 N.Y.S.2d 625, 208 N.E.2d 439 (1965).

⁸⁹ See *Seymour v. Parke, Davis & Co.*, 423 F.2d 584 (1st Cir. 1970). See generally RESTATEMENT (SECOND) §§ 42, 47.