Buffalo Law Review

Volume 16 | Number 2 Article 18

1-1-1967

International Law—Treaty Stating That Jurisdiction Over the Disposition of Movables Is to Be Determined by Their Situs Considered to Mean That Movables Must Be Disposed of by the Law of Decedent's Domicile

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from the statute.[54] Until the MVAIC Law is relieved of this formalistic evidentiary safeguard, "physical contact" as defined in *Eisenberg* must remain operative as a condition precedent to the presentation of hit and run claims.

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INTERNATIONAL LAW—TREATY STATING THAT JURISDICTION OVER THE DISPOSITION OF MOVABLES IS TO BE DETERMINED BY THEIR SITUS CONSTRED TO MEAN THAT MOVABLES MUST BE DISPOSED OF BY THE LAW OF DECEDENT'S DOMICILE

An American citizen residing in Switzerland died testate in 1954, leaving his entire estate, which included personal property in both Switzerland and New York, to his widow. Also surviving the decedent was his acknowledged illegitimate son who would be entitled, under a Swiss statute, to a nine-sixteenths share of the estate, notwithstanding the will. Two weeks after the decedent's death, as a result of an ex parte proceeding before a Swiss Justice of the Peace, the widow obtained the Swiss equivalent of a simple probate, declaring her the sole heir under the will unless and until a formal contest was initiated. The widow then brought the Swiss personalty to New York. In 1957, the son took part in a New York probate proceeding which found the decedent to be a New York domiciliary and, in effect, barred the son from a 1958 accounting proceeding. In 1958 the son secured a decree from a Swiss appellate court declaring the decedent to have been a Swiss domiciliary, and granting him the statutory share of the estate. In 1961, he brought an action in the New York County Surrogate's Court to vacate or reopen that court's 1957 and 1958 decrees. The son contended that according to article VI of the Swiss-United States Treaty of 1850,[1] succession to the personalty was to be decided by Swiss courts according to Swiss law and, thus, the New York Surrogate's Court had no subject matter jurisdiction beyond directing the widow to return the property to the jurisdiction of the Swiss courts. The Surrogate denied his application and the Appellate Division affirmed the denial without a written opinion.[2] The Court of Appeals affirmed in a four-three decision. *Held*, despite the wording of the treaty, its interpretation should be that jurisdiction over movables is in the courts of and governed by the laws of the decedent's domicile. Therefore, petitioner is estopped from challenging

54. Four months before the *Eisenberg* decision a bill was introduced in the New York Legislature which would have deleted the physical contact requirement from section 617. It passed in the Assembly but was defeated in the Insurance Committee of the Senate. S.2040, A.4202, 189th N.Y. Legis. (1966).

1. Treaty of Friendship, Commerce, Reciprocal Establishment, and Extradition of Criminals With Switzerland, Nov. 25, 1850, 11 Stat. 587 (1850), 16 Martens N.R.G. (1e sér.) 25, T.S. No. 353 [hereinafter cited treaty].

2. 24 A.D.2d 705, 261 N.Y.S.2d 602 (1st. Dep't 1965).

the unappealed Surrogate's Court decree since the decedent had been found a New York domiciliary. *Matter of Rougeron*, 17 N.Y.2d 264, 217 N.E.2d 639, 270 N.Y.S.2d 578, *cert. denied*, 385 U.S. 899 (1966).

The traditional Anglo-American view is that the disposition of movables by will or by succession in case of intestacy, is governed by the law of a decedent's domicile,[3] while the law of the situs governs the disposition of immovables.[4] Several Continental nations do not follow the Anglo-American concepts of succession, but rather adhere to the Roman law doctrine of unitary succession, applying the law of the domicile or the law of the nationality to the succession of the *entire* estate.[5] Among these nations is Switzerland, which applies the law of the domicile.[6] Thus, in both the United States and Switzerland, domicile is the connecting factor where there is a conflict of laws pertaining to the disposition of movables.[7] It is apparently settled law that conceptually a person cannot have two simultaneous domiciles[8] and, also, that domicile is determined according to the *lex fori*.[9] When a decedent leaves any part of his estate in New York, there is a sufficient basis to give the surrogate jurisdiction to admit his will to probate.[10] Upon probate, New York law is applied to determine the domicile of a decedent. If he is found to have been a New York domiciliary, New York law will govern the succession to his property. If he is found a domiciliary of another jurisdiction, his personal property will either be transferred to that jurisdiction or distributed in New York according to the laws of the other jurisdiction.

In the instant case, the son asserted that article VI of the treaty is to be literally applied so that movables must be disposed of according to the law and by the judges of their situs at the time of death, rather than by the law of the decedent's domicile. If the son's interpretation is correct, the treaty, being the supreme law of the land, will supersede the Anglo-American rule of

3. *E.g.*, Cross v. United States Trust Co., 131 N.Y. 330, 30 N.E. 125 (1892); Chamberlain v. Chamberlain, 43 N.Y. 424 (1871). However, in certain related areas of personal property law some cases have applied the law of the situs to determine rights to and validity of the inter vivos transfer of personal property. See Wyatt v. Fulrath, 16 N.Y.2d 169, 211 N.E.2d 637, 264 N.Y.S.2d 233 (1965), 15 Buffalo L. Rev. 702 (1966); Hutchison v. Ross, 262 N.Y. 381, 187 N.E. 65 (1933).

4. *E.g.*, Knox v. Jones, 47 N.Y. 389 (1872); Matter of Osborn, 151 Misc. 52, 270 N.Y. Supp. 616 (Surr. Ct. 1934).

5. See Wolff, Private International Law 567-76 (2d ed. 1950), where the author evaluates the scission and unitary systems and lists the system followed by each European country.

6. Matter of Schneider, 198 Misc. 1017, 1025, 96 N.Y.S.2d 652, 660, *aff'd on rehearing*, 198 Misc. 1017, 100 N.Y.S.2d 371 (Surr. Ct. 1950); Nussbaum, *American-Swiss Private International Law*, 47 Colum. L. Rev. 186, 195 (1947); Wolff, *op. cit. supra* note 5, at 568.

7. Chesire, Private International Law 44-45 (6th ed. 1961) describes the connecting factor as the selection of "the legal system that governs the matter . . . *i.e.*, some outstanding fact which establishes a natural connexion between the factual situation before the court and a particular system of law."; see also Graveson, The Conflict of Laws 54, 59 (5th ed. 1965); Falconbridge, Essays on the Conflict of Laws 130 (2d ed. 1954).

8. Graveson, *op. cit. supra* note 7, at 151; Chesire, *op. cit. supra* note 7, at 172.

9. See, *e.g.*, cases cited 25 Am. Jur. 2d, *Domicil* § 3 n.19 (1966), and 15 C.J.S. *Conflict of Laws* § 9 n.94 (1939); Falconbridge, *op. cit. supra* note 7, at 130.

10. Matter of Barandon, 41 Misc. 380, 381, 84 N.Y. Supp. 937, 938 (Surr. Ct. 1903).

domicile as applied to personal property.[11] Article VI of the Swiss-United States Treaty of 1850 states:

> Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the judges of the country in which the property is situated.[12]

By a literal application of the treaty, movables, which are generally widely scattered and characteristically transient, would be distributed according to a wide variety of local laws.[13] It is because of this characteristic of movables that the law of the decedent's domicile is applied to achieve "unitary administration and distribution."[14] Two New York cases have dealt with the disposition of a decedent's estate where a conflict between New York-Swiss law existed.[15] The courts in both cases unequivocally employed the conventional Anglo-American domicile rule rather than applying article VI of the treaty which was clearly applicable.[16]

In light of the absurd result which would be reached by a literal construction of the treaty,[17] it is proper to look beyond its literal meaning and to its history to gain an insight into its construction.[18] Article VI of the 1850 treaty is derived from the Swiss-American Treaty of 1847.[19] In the Message of the Swiss Federal Council of December 3, 1850, to the Swiss National Assembly,[20] it was recognized that article VI could refer to either the last domicile of a decedent or to the situs of the property. The Message states that the former was the intended meaning. This conclusion has been adopted by the two American writers who have commented on the treaty.[21] The Message further states that in order to clear up this ambiguity, the Federal Council in 1850 proposed,

11. Bacardi Corp. of America v. Domenech, 311 U.S. 150 (1940); United States v. Belmont, 301 U.S. 324 (1937); Wyman v. Pan American Airways, Inc., 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. 1943).

12. 11 Stat. 587, 591 (1850).

13. See Nussbaum, *supra* note 6, at 195.

14. Falconbridge, *Renvoi in New York and Elsewhere*, 6 Vand. L. Rev. 708, 730 (1953). Compare statement that the law of the situs is applied to immovables in Anglo-American Courts because "the law-making and law-enforcing agencies of the country in which the land is situated have exclusive control over such land." Matter of Schneider, 198 Misc. at 1020, 96 N.Y.S.2d at 656 (Surr. Ct. 1950).

15. Matter of Batsholts, 188 Misc. 867, 66 N.Y.S.2d 358 (Surr. Ct. 1946); Matter of Barandon, 41 Misc. 380, 84 N.Y. Supp. 937 (Surr. Ct. 1903).

16. Nussbaum, *supra* note 6, at 197.

17. See *id.* at 195.

18. Kolovrat v. Oregon, 366 U.S. 187 (1961) (notes exchanged in negotiating 1881 treaty between the United States and Yugoslavia considered relevant).

19. 9 Stat. 902 (1847). The last part of article 1 states: "in case any dispute should arise between claimants to the same succession, as to the property thereof, the question shall be decided according to the laws and by the judges, of the country in which the property is situated." *Id.* at 903.

20. See 5 Miller, Treaties and Other International Acts of the United States of America 869 (1937) (translation from the French and German original) (The work is an official publication of the Dep't of State, edited by Miller). The Message is paraphrased in Nussbaum, *supra* note 6, at 195-96.

21. Nussbaum, *id.* at 195-96; Falconbridge, *supra* note 14, at 730; *accord*, Matter of Schneider, 198 Misc. at 1025, 96 N.Y.S.2d at 660 (Surr. Ct. 1950).

inter alia, that the treaty be changed so that the law and the judges of the last domicile of a decedent would govern the disposition of the estate. However, according to the Message, the American negotiators turned down the proposal fearing that a change in the language of the 1847 treaty "might bring about some unforeseen obstacle in the United States Senate, where it is greatly desired to preserve in judicial matters the expressions consecrated in other treaties. . . ."[22] The negotiators were certain that the meaning given to article VI would be that the law of domicile would govern the disposition of the entire estate.[23] The Swiss National Assembly apparently adopted the treaty with this understanding in mind,[24] but there is no clear indication that the same is true of the United States Senate.[25] A dispatch of the American negotiator to Washington on December 26, 1850, reads in part:

> I had the honor to transmit to you two copies [not now found in the archives of the Department of State]—one in French, the other in German—of the message, written by the President, with which the Federal Council accompanied the Treaty to the National Assembly.[26]

Preceding the printed translation of the Message, the editor states that "the lengthy message seems not to have been heretofore printed in the United States."[27] Nevertheless the contents of the Message are consistent with the prevailing view in the United States and Europe at the time; namely, the disposition of movables is governed by the law of the last domicile of the decedent.[28] In litigation over movables involving a conflict of Swiss and United States law, the Swiss courts have been consistent in interpreting the treaty—on the basis of the Message—to mean that the courts of the domicile of a decedent have jurisdiction over the disposition of his movables.[29]

After a lengthy discussion, the Court of Appeals indicated that if the treaty were literally interpreted, the jurisdiction of the New York Surrogate's Court would not extend beyond ordering the widow to return the contested personal property to the Swiss courts. The Court did not have to decide whether the petitioner had waived this jurisdictional objection by participating in the 1957 probate proceeding, since it ruled against his requested interpretation. Relying primarily on English translation of the Message of the Swiss Federal Council, the Court concluded that the diplomatic representatives of the United States and Switzerland apparently recognized "that the only proper interpretation [of article VI] was that jurisdiction would be in the courts and place

22. 5 Miller, *op. cit. supra* note 20, at 869.
23. *Ibid.*; Nussbaum, *supra* note 6, at 195.
24. 5 Miller, *op. cit. supra* note 20, at 845-906 where the various documents regarding the negotiation of the treaty are fully published.
25. *Ibid.*
26. *Id.* at 864.
27. *Id.* at 865.
28. Story, Conflict of Laws 633 (4th ed. 1852).
29. Nussbaum, *supra* note 6, at 196. See Matter of Schneider, 198 Misc. at 1026-28, 96 N.Y.S.2d 661-62, where two of the Swiss cases are quoted.

of the decedent's legal domicile. . . ."[30] Hence, once the Surrogate's Court found the decedent to be a New York domiciliary, it had the requisite jurisdiction to dispose of his movables according to the terms of his will. The majority further supported their decision by finding that contrary to the assertion of the petitioner, he did in fact know that his father had left personal property in Switzerland at the time of his death and that the widow had removed the property to New York. Thus, by participating in the original probate proceeding in New York, he recognized that the traditional domicile rule as to personal property was incorporated in the treaty. The three dissenting judges, while not contesting the majority's interpretation of the treaty, argued the equities of the entire case. If the widow had left the property in Switzerland, the son would have obtained his statutory share. Thus, they argue that the effect of the majority decision is to allow the widow to take the law into her own hands and unilaterally decide the choice of law by removing the property to New York.

This is the first reported case in the United States directly construing article VI of the treaty as it applies to movables. The Court of Appeals' decision can be considered a reaffirmation of the conventional domicile rule in spite of the treaty language to the contrary. The policy considerations underlying this rule must have been in the thoughts of the majority when they considered the case. Also, the finding that the petitioner knew of the personalty in Switzerland and, hence, could have litigated the treaty issue in 1957 could not have been viewed favorably in light of the reluctance of courts to open probate proceedings except under exceptional circumstances.[31] However, the equitable contentions of the minority are of considerable merit. If the Swiss Justice of the Peace had issued or denied a probate decree which had been upheld under Swiss law, the New York litigation would never have taken place. The petitioner would have received a statutory share of the personalty in Switzerland. It seems unjust that the petitioner's right—or lack of right depending on one's point of view—to share in the property should depend on such fortuitous circumstances. Nevertheless, from a policy standpoint, the Court was justified in not giving the treaty a literal interpretation. The majority was able to escape from a literal application by relying on the diplomatic understanding described in the Message of 1850. However, as construed by the majority, the treaty does nothing more than incorporate the existing conflict of laws doctrine. Thus, the treaty itself does not resolve the problem of the instant case; namely, what course of action the courts should follow when a decedent is declared by two different courts to have been domiciled within their respective jurisdictions and the decedent's personal property has been removed from one jurisdiction to the other after his death. It is questionable whether the Court should have felt compelled to interpret

30. Instant case at 272, 217 N.E.2d at 644, 270 N.Y.S.2d at 585.

31. Matter of Volkenberg, 160 Misc. 257, 289 N.Y. Supp. 1058 (Surr. Ct. 1936), *aff'd mem.*, 251 App. Div. 800, 298 N.Y. Supp. 176 (1st Dep't 1937).

the treaty as it did. First, there is some doubt as to the existence of the understanding.[32] Second, it appears that the United States Senate was not aware of the Message and, in any case, the Senate ratified a treaty and not a message written in a foreign language. Also, in light of the clear language of article VI, it cannot be said that its purpose was merely to crystallize for posterity the existing domicile rules. The treaty, though, must have some meaning. The most reasonable conclusion then is that the treaty was designed to assure that the law of the situs of personal property at the time of death would govern its disposition in cases of conflict of domicile (*i.e.*, concurrent domicile) where the personal property has been removed after the decedent's death. Thus, the disposition of movables would be accomplished in an orderly and equitable manner rather than have the dispositional rights to the movables depend, as in the instant case, on who got to the property first. This would also result in the giving "of a suitable respect for the decrees of other civilized countries. . . ."[33] In addition, if article VI is viewed in relation to article V,[34] order and equity in the disposition of an estate[35] would appear to be the object[36] of this section of the Treaty.

BRUCE D. DRUCKER

TORTS—ATTRACTIVE NUISANCE—PROPERTY OWNER NOT LIABLE FOR INJURIES SUFFERED BY A CHILD PLAYING WITH A METAL GRATING IMBEDDED IN A PUBLIC SIDEWALK

Five year-old George Cuevas, plaintiff in this negligence action, was injured while playing with several other children on a public sidewalk next door to his home. Imbedded in the sidewalk was a set of hinged metal gratings covering the entrance to an unused door leading into the defendant's cellar. The mechanism by which the gratings could be locked had been broken for about a year prior to the accident, and the gratings had not been secured in any manner during that time. Plaintiffs' evidence indicated that neighborhood children played with the gratings frequently, opening the metal doors and letting them slam shut, and that the defendants, who were aware of the children's activities, nonetheless did nothing to correct the situation. Plaintiff was injured while watching a playmate

32. Nussbaum, *supra* note 6, at 196.

33. Instant case at 274, 217 N.E.2d at 645, 270 N.Y.S.2d at 586 (dissenting opinion).

34. See Matter of Schneider, 198 Misc., at 1025, 96 N.Y.S.2d at 660 (Surr. Ct. 1950), where the court stated that article V defines ". . . the *capacity* and the *power* of citizens of each nation to deal with property located within the borders of the other country."

35. See Hauenstein v. Lynham, 100 U.S. 483 (1879) (In a state where aliens were not permitted to either sell or hold real property, article V was applied so as to give the Swiss successors the lesser right of selling the real property.).

36. See generally Santovincenzo v. Egan, 284 U.S. 30 (1931) (In construing treaty its purpose and the context of the provision in question control.). See also B. Altman & Co. v. United States, 224 U.S. 583, 600 (1912) where the court adopted the definition of a treaty as "a compact made between two or more independent nations, with a view to the public welfare."