

Characterisation

Re Maldonado's Estate [1953] 2 All ER 300 provides an outstanding example of a foreign rule being construed in its context, with a view to deciding whether it fell within the sphere of control of the foreign governing law.

A person died intestate in Spain leaving assets to the extent of some £ 26,000 in England. By Spanish law those assets passed to the Spanish State, since the deceased left no relatives entitled to take them by way of succession. The English choice of law rule applicable to this factual situation was that the intestate succession to movables must be determined according to Spanish law. Therefore, the sphere of control of Spanish law in the case was confined to matters of succession, and the problem was whether the Spanish rule ("The State shall inherit") under which the assets passed to the State was to be classified as a rule of succession.⁴

Thus, the rule under which movables, failing relatives, pass to the State is classified as a **rule of succession** in Spain but as a **confiscatory rule** in England, and the short question was whether in an English action this foreign conception of the relationship between and the deceased was to prevail with regards to movables found in England. Could the law of the domicile dictate to the English court what meaning should be attributed to heirship? It was argued before the court that the English rules of private international law are dominant so far as property in England is concerned, and that no one could be described as a successor in the eyes of English law unless he has a personal nexus with the deceased, a connection which certainly cannot be claimed by a sovereign state to which the property passes. This argument, however, did not prevail. It was held, that the Spanish law of domicile must be allowed to determine the sense and scope of the term "succession".

The *lex causae* theory

Re Maldonado is an example for the characterisation according to the *lex causae*, i.e. classification should be effected by adopting the categories of the governing law. Although this theory would lead to great coherence with the law eventually applied, there are two serious objections to this theory: First the whole purpose of characterisation is to discover what law governs the issue. **To say that the governing law dictates the**

⁴ It is pertinent to notice that, though movables of a deceased owner who dies intestate without leaving recognised successors pass to the state in the great majorities of countries, yet the capacity in which the States inherit is not uniform. In some Countries such as Germany and Italy, it has been regarded as an heir taking by way of succession; in other, such as Austria and Turkey, the State has been held to act in its capacity as the paramount sovereign authority and confiscates the movables as being *bona vacantia*, ownerless goods.

process of characterisation is to argue in circle, for how can we know what the governing law is until the process of characterisation is completed? Secondly, if there are two possible foreign laws to govern the matter, and they characterise the issue differently, which is to be adopted by local Court?

The adoption of this theory could compel the adoption to idiosyncratic foreign characterisation, such as the a rule that an e.g. Maltese person can only validly married, wherever the ceremony takes place, if he or she goes through the ceremony before a Roman Catholic priest.

The *lex fori* theory

The *lex fori* theory was proposed by the German and French writers, Kahn (1891) and Bartin (1897). It has been the prevailing theory on the Continent, and by and large has been adopted in practice also by English courts. According to this theory the court should characterise the issue in accordance with the categories of its **own domestic law**, and, hence, foreign rules of law in a accordance with their nearest analogy in the same law. Objections raised to the *lex fori* theory are that its application may result in a distortion of the foreign rule and render it inapplicable in cases in which the foreign law would apply it, and vice versa. Moreover, if there is no close analogy in domestic law⁵, the theory does not work.

Analytical jurisprudence and comparative law

This theory was espoused by the *Ernst Rabel*. Accordingly, conflict rules should use ‘conceptions of an absolutely general character’, and that these conceptions are borrowed from analytical jurisprudence, that general science of law, based on the results of the study of comparative law, which extracts from this study essential general principles of professedly universal application – and not principles based on, or applicable to, the legal system of one country only. The ECJ decided to characterise somewhat accordingly to *Rabels’s* theories; it held in e.g. *Handte v TMCS* that the Regulations are to be interpreted independently, having regard primarily to the objectives and general scheme of the Regulation itself, in order to ensure that it is applied uniformly in all the Contracting States. Any characterisation should not be taken as referring to how the legal relationship in question before the national court is classified by the relevant national law.

⁵ As there is, e.g. no analogy in English law to matrimonial property regime known to most continental laws.