Re PRINCESS AGA KHAN

AN APPRAISAL

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The recent decision of *Re Princess Nina Aga Khan*[1] has raised some very interesting points in both Conflicts of Laws and Family Law. The question to be decided by the Supreme Court of Jamaica was the legitimacy of the deceased Nina Dyer (or "Nina") who left a considerable amount of movables and immovables, her legitimacy being *sine qua non* for the success of the claimant who was her "father".

The facts are as follows: Mr. William Stanley Aldrich, an Englishman, claimed that Nina Dyer was his daughter lawfully begotten with his wife, Elsie Edith née Rogers, then deceased, with whom he went through a ceremony of marriage on June 8th, 1923. Mrs. Aldrich was said to have been a woman without any independent means. Mrs. Aldrich eloped with a wealthy Englishman, Stanley Dyer, in or about June 1929. Mr. Dyer was the owner of a tea plantation in Ceylon, and at the time was 36 years Mrs. Aldrich's senior. Mrs. Aldrich was described as "very attractive".

Mr. Aldrich (the claimant) discovered where Mrs. Aldrich was living with Mr. Dyer and used to see her. Sexual intercourse took place between Mr. Aldrich and Mrs. Aldrich on many occasions after Mrs. Aldrich had eloped (in one case they arranged to meet at the house of two friends, a Mr. and Mrs. Thomas Blyth) and Mrs. Aldrich became pregnant. Nina was born in a nursing home while Mrs. Aldrich was still living with Mr. Dyer.

Her birth was registered on March 5th, 1930 (she being born on February 15th, 1930) and her father was stated in the birth certificate to be "Stanley Hartop *Dyer, Ceylon Tea Planter of 136, Chatsworth Road*, N.W. 6." The informant was the said Stanley Hartop Dyer and the name of the mother was stated as "Elsie Dyer formerly Rogers". Nina Dyer was twice married and on both occasions married men of considerable means. She thus acquired a fortune through her marriages. Her first marriage was to Baron Heinrich von Thyssen. By this marriage she acquired Swiss citizen-

ship. A decree of divorce was pronounced in 1956 and in 1957 she married Sadruddin, son of Aga Khan. This marriage also ended in divorce but she retained her Swiss citizenship. Nina died in France on July 3rd, 1965 intestate, domiciled in Switzerland and leaving property in Jamaica. A Swiss court declared Mr. Aldrich to be the legitimate father of Nina.

The reason for the present action was that Mr. Aldrich on November 3rd, 1969, appointed, by power of attorney, the Royal Bank Trust Company (Jam.) Ltd. to be his attorney in Jamaica in respect of Nina Dyer's property. But on application for letters of administration on the instructions of Mr. Aldrich, it was observed that there was evidence in the relevant documents suggesting that Nina Dyer was not "lawfully begotten". If this were so, Mr. Aldrich would not be competent to instruct the Trust Company to act on his behalf; he could not share in the estate which the deceased left in Jamaica and the Attorney-General could claim such property on the authority of the Intestates' Estates and Property Charges Law, Cap. 166 J.

The issues raised by this decision will be examined under two headings and in two parts (part (b) to be published in later issue):

(a) Conflict of Laws

(b) Family Law

(a) Conflict of Laws

In this area, there was interesting discussion on two well-known topics; recognition of foreign judgements and renvoi.

It was contended by counsel, the Administrator General, that the competent court to decide on the status of a person was the court of the person's domicil of origin, the reason being that a judgement touching the status of a person was a judgement in rem. Counsel relied on the language of James and Cotton LJJ in *Re Goodman's Trust*:[2]

> If, as in my opinion is the case, the question whether a person is legitimate depends on the law of the place where his parents were domiciled at his birth, that is by his domicil of origin, I cannot understand on what principle, if he is by the law legitimate, he is not legitimate everywhere, and I am of the opinion that if a child is legitimate by the law of the country where at the time of his birth its parents were domiciled, the law of England, except in the case of succession to real estate in England recognises and acts on the status thus declared by the law of the domicil.[3]

James LJ said:

> According to the law as recognised, and that equity as practised in all other civilised communities, the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin–the law under which he was born.[4]

It is not surprising that the learned judge easily refuted the argument since the argument failed to take account of the following points:

(1) The Swiss court, in declaring Mr. Aldrich to be the legitimate father of Nina, had used "the legislation and jurisdiction of the place of origin," i.e., English law.

(2) The "father" had brought an action for declaration in England that he was Nina's legitimate father but was denied such relief on a technical jurisdictional point–the person seeking the declaration of legitimacy must be the petitioner himself and the appropriate petitioner was already dead (see *Aldrich* v. *Att. Gen.*)[5]

(3) There were two completely unrelated questions involved, which were being confused with each other:

(a) the legitimacy of a person at the date of his birth;
(b) the legitimacy of a person at the date of his death;

and these points can be further elucidated by the following example:

A's father F died leaving all property to his only son A. A married Miss Q and went to live in Utopia where in 1974 he died intestate. At his death he was domiciled in Utopia. In an action in 1975, A's two children claimed (1) that A was the legitimate son of F although A's mother committed adultery on two occasions ten months before his birth; (2) that they were entitled to a *legitima portio* of their father's property by Utopian law. The answer to this problem must surely be (assuming that no question of renvoi arises and the children are not faced with the decision in *Aldrich* v. *Att. Gen.*)[6]

(a) that A's legitimacy at his birth would be decided by the law of his domicil of origin at the date of his birth (see the apparently irreconcilable decisions of *Shaw* v. *Gould*, and *Re Bischoffsheim*);[8]
(b) that the question of succession to A's property must be decided by the law of his domicil at the date of his death and this law will decide his legitimacy AT THAT DATE (which as far as that law is

concerned might be something completely different unless it refers to the country of his origin). The question of whether A is legitimate at the date of his death will have nothing to do with the question of whether A is legitimate at the date of his birth if A died domiciled in Utopia and Utopia had different views on legitimacy and illegitimacy. Surely it cannot be argued that if A is declared illegitimate in England but dies domiciled in a country which does not differentiate between the two concepts, then his property descends according to English law for no other reason but that it was the law of his domicil of origin.

Such an argument would be contrary to common sense. In fact the learned judge repelled such an argument in no uncertain terms. He said:

> Is there a difference between a declaration as to legitimacy obtained in a competent English court by applying English law and a declaration obtained in a competent court in a foreign country by applying the same English law? Even if I were not to use the strong language of James LJ—and use an epithet much more mild —I would say that a strange situation would arise if Mr. Aldrich were to be told, and this court should hold that on the facts it is possible for Nina to be regarded as legitimate for all purposes in Switzerland where she was domiciled at the *date of death*[9] and of which she was a citizen but on the same facts and on the same principle, namely birth during lawful wedlock, in a christian and civilised country . . . she is to be regarded as a bastard here, where she left some of her property. And a more strange result is yet to come. The universal rule recognised in private international law is that in the case of intestacy, movable property of the deceased is to be distributed according to the law of the domicil of the intestate at the time of his death. And the law of the domicil at the time of death determines the class of persons to take and the right of representation. See *Lynch* v. *Paraguay Provisional Govt.*[10] According to the Swiss law, Mr. Aldrich is to take the property of Nina, he being considered as the legitimate father of the deceased.[11]

A short criticism must be made in this area however. The learned judge embarked on an examination of the law relating to legitimacy and illegitimacy on his own. It is submitted that this must by implication mean that the judge did not totally accept the foreign court's judgement on the matter. But it seems as if the judge did accept the Swiss court's decision since he noted that

> In so far as the movable property of the deceased in Jamaica is concerned, therefore, that is $1,000, Mr. Aldrich must be admitted to claim his interest, he being the legitimate father of Nina and the judgement of the Swiss court may be recognised to that extent.[12]

It is therefore submitted that with regard to the succession to the movable property, this examination was totally unnecessary and the learned judge nowhere makes it clear or even says that his only reason for this examination was to decide the question of succession to the immovable property, in which case it would have been necessary since succession to immovable property is governed by the *lex situs*, i.e., Jamaica.

The learned judge also made a valiant albeit futile attempt to grapple with the bewildering intricacies of that "famous but regrettable doctrine"[13] –Renvoi. He said:

> When the main arguments were put forward . . . I was regarded as an English judge sitting in the Strand to determine the question whether, on the facts, Nina was a legitimate or illegitimate child. Alternatively, I was required to remit the facts to England, place them before an English judge and await his decision on them. This was and is necessary, whatever course is adopted, since, as I have already pointed out, the "love affair" between Mrs. Aldrich and Mr. Dyer, the pregnancy of Mrs. Aldrich and the birth of Nina all took place in England between 1929 and 1930. None of these facts has any connection with Jamaica. No Jamaican is involved in the eternal triangle. I believe that to arrive at a satisfactory conclusion on the facts with the help of the law will require a feat of mental gymnastics.[14]

The short question is, "Why?" From the above quotation of the learned judge's decision it would appear that the learned judge was the victim of a ghastly misconception as to the *raison d'être* of the application of renvoi. The reason for the application of renvoi is one of law and not one of fact, i.e., a question of choice of law and not one of jurisdiction. The question of where the facts took place is irrelevant.

Renvoi arises in the following manner. Mr. O dies intestate and domiciled in France, being the owner of $10,000 worth of shares in a French company. He was born in England. His wife claims the shares in an English court. By English law, succession to movables is governed by the law of the

deceased's domicil at death, i.e., French law. But by French law, succession to the movables may be governed by the law of the nationality, apparently a reference to English law. Renvoi now steps in.

(1) Should the English judge apply French domestic law (internal law) to decide the question? Or does "law" mean French law in toto including its conflict of laws rule that the law of the nationality governs?

(2) Should the English judge "accept the renvoi" and apply English internal law to the question? This is known as "partial renvoi".

(3) Should the English judge decide as a French judge would, applying French law in toto as a French judge would? This is known as "total renvoi".

Renvoi arises because it is not clear whether "law" in the term "law of the nationality" means internal law or law in toto, including the conflict of laws rules and it is a confusing doctrine at the very least, the unruly brainchild of continental jurists.

It is submitted that the facts of the case evince a renvoi situation but only for an English court, not a Jamaican one. There was no question requiring an answer as to what English law was on the matter since English law and Jamaican law only differ as far as the standard of proof of evidence tending to rebut the presumption of legitimacy is concerned (see section 26 of the Family Law Reform Act 1969 U.K.). Further, there was no question of English law to be decided on since English law was only relevant in so far as a Swiss judge used it to come to his conclusion and as has been shown *supra,* this conclusion was accepted by the learned judge. The attempt by the Jamaican court to utilise the doctrine of total renvoi was unwarranted. It can hardly be accepted that the learned judge was applying renvoi without considering at least one or all of the important cases on that area, e.g., *Re Askew,*[15] *Re Ross,*[16] *Re Annesley,*[17] *Re Duke of Wellington,*[18] and *Collier* v. *Rivaz,*[19] the *fons et origo* in England of this hideous doctrine. It is respectfully submitted that the learned judge demonstrated the abysmal futility of the application of renvoi when he said:

> Some judges are not very sure about this doctrine of 'remission and transmission' of certain facts to a foreign court when a case comes up before them with a touch of private international law. I may be one of them. To ask a judge to worship at the shrine of renvoi may be as tricky an invitation as when Socrates was asked by a friend to worship at the temple of the sea-god.[20]

In any case, the reason given by the learned judge for applying renvoi (that "none of these facts has any connection with Jamaica") can hardly be taken seriously and the most that can be said of it is that it appears to be misconceived and if not so (as the writer contends it is), it is spurious and fallacious. In any case the learned judge would have had to examine English law in toto, including its conflict of laws rules and this he does not do.

Conclusion

For the sake of brevity, the conclusions may be enumerated as follows:

(1) Since intestate succession to movables is governed by the law of the deceased's domicil at death,[21] the Swiss court's judgement, being a judgement of the court of competent jurisdiction in the deceased's last domicil should have been accepted without question, an excursion into English or Jamaican law being totally unnecessary for this purpose.

(2) Succession to the immovable property of an intestate is governed by the *lex situs*, i.e., Jamaican law and any other law would have been unnecessary for this purpose.

(3) The application of the renvoi doctrine should be limited to cases "where the situation is an exceptional one and the advantages . . . clearly outweigh the disadvantages".[22] Therefore its application was unwarranted as the facts did not evince any necessity for its presence.

NOTES

1. (1972) 19 W.I.R. 102
2. [1881-1885] All E.R. Rep. 1138
3. *Supra*, at p. 1152 *per* Cotton L.J.
4. [1881-1885] All E.R. Rep. 1138 at p. 1154
5. [1965] p. 281; [1968] 2 W.L.R. 413
6. [1968] p. 281; [1968] 2 W.L.R. 413
7. (1868) L.R. 3 H.L. 55
8. [1948] Ch. 79
9. Italics added.
10. [1861-1873] All E.R. Rep. 934
11. *Ibid.*, 113
12. *Ibid.*, 114
13. Cheshire, *Private International Law* (9th ed., North), p. 60.
14. *Ibid.*, 110

15. [1930] 2 Ch. 259
16. [1930] 1 Ch. 377
17. [1926] Ch. 692
18. [1947] Ch. 506 aff'd 1948 Ch. 118
19. (1841) 2 Curt. 855. *See also Kotia* v. *Nahas* [1941] A.C. 403 P.C.
20. *Ibid.*, 110
21. *Pipon* v. *Pipon* (1744) Anb. 799, *Somerville* v. *Somerville* (1801) 5 Ves. 750
22. J. H. C. Morris, *Conflict of Laws*, p. 481