

ANNIE BELLA GRAHAM KIDD (GREAT BRITAIN)

v. UNITED MEXICAN STATES

(Decision No. 3, undated, dissenting opinion by Mexican Commissioner, undated. Pages 50-54.)

1. In this case the Mexican Agent has filed a demurrer on the ground that the British nationality of the late William Alfred Kidd (and therefore of his widow and children) has not been established. The claimant relies on an affidavit sworn by the late Mr. Kidd's father (annex 8) to the effect that his son was born and baptized at Arundel in Canada in 1877.

In addition to the general objections to affidavits which were pleaded in the case of Mrs. Cameron, the Mexican Agent pointed out that compulsory registration of births was in operation in England a few years before the late Mr. Kidd was born, and that in all probability it was also in operation in Canada. In these circumstances, he contended that a birth certificate could have been procured or a baptismal certificate, and that in any event evidence of a better quality was required than the affidavit of a near relation to the claimant's husband.

It appears, according to the information given by the British Agent, that the birth register had been lost, and he contended that secondary evidence of the birth by means of an affidavit was the best available evidence. The British Agent also put in evidence the birth certificates relating to the claimant's children, together with the declaration of the British Consul-General in Mexico City, dated the 27th December, 1916, to the effect that the claimant had been duly registered as a British subject.

2. It is not necessary, in the opinion of the Commissioners, to repeat their views on the question of the admissibility or the value of affidavit evidence generally; those views are fully set out in the judgment in the Cameron case. From one point of view, an affidavit sworn by a father concerning the birth of his child has more value than the statement he may make to the Registrar of Births, since the latter statements are not made upon oath. In this instance the affidavit is corroborated by other documents.

There is first of all the consular certificate, which was delivered a few months after the murder of the late Mr. Kidd and at a moment when the Consul-

General must have realized that he was imposing on his Government the serious obligation of protecting the interests of the widow and children. Furthermore, the day after Mr. Kidd's murder, there were proceedings before the Constitutionalist Court of First Instance, and in the course of the interrogatories all the witnesses described Mr. Kidd as a native of Canada. Two weeks after the murder of Mr. Kidd, the British Chargé d'Affaires at Mexico City reported to the Governor-General of Canada that "a Canadian, Mr. W. A. Kidd," had been killed. Moreover, there is the further fact that Mrs. Kidd returned to Canada after she lost her husband and that she was at once appointed as tutor of her minor children with the approval of the relatives on both sides.

On the one hand, there are all these facts corroborating the statements of the affidavit and helping to establish Mr. Kidd's British nationality. No evidence of any kind has been adduced by the respondent Government in rebuttal.

3. On these grounds the Commission is of opinion that the British nationality of the late W. A. Kidd (and, therefore, of his widow and children) has been duly established. The demurrer is overruled.

The Mexican Commissioner does not agree with this judgment and expresses a dissenting view.

Dissenting opinion of Dr. Benito Flores, Mexican Commissioner

The Mexican Commissioner regrets to have to dissent from the opinion of his distinguished colleagues, as regards the legal considerations taken into account by them for overruling the Demurrer entered by the Mexican Agent, in the matter of claim No. 29, presented by His Britannic Majesty's Government on behalf of Mrs. Annie Bella Graham Kidd; and bases his own opinion upon the following considerations in fact and in law.

The Facts

I. The British Government claims compensation amounting to \$75,000.00, Canadian currency, for the murder of William Kidd at El Carrizal, near Zitácuaro, and for the theft of all his personal property, committed by a band of men on the 8th October, 1916.

II. The British nationality of the claimant is proved by an affidavit made under date of the 11th August, 1927, by William Kidd, the father of the decedent, before G. Valois, a Notary Public in and for the Province of Quebec, Canada, and by means of the certificate of the marriage of William Alfred Kidd and Annie Graham. The claim is preferred on her behalf and on that of her five minor children at the rate of \$25,000.00 for the claimant and \$ 10,000.00 for each one of her said children.

III. William Kidd, the father of the decedent, asserts in his deposition that his son, William Alfred Kidd, was born at Arundel, Argenteuil County, Province of Quebec, Dominion of Canada, on the 3rd April, 1877.

The said William Kidd declares that the birth of his son was entered in the register, but that the original register was lost many years ago; and that his son was baptized about the 10th September, 1877, by the Rev. Arthur Whiteside, the Pastor of the Methodist Church at Mille-Isles Township.

IV. The Mexican Agent forthwith interposed a Demurrer, alleging that the British nationality of William Kidd had not been established by the affidavit made by the father of the decedent himself; that as the nationality of the said William Kidd had not been established, that of the claimant, the fact of whose marriage has been proved, had not been established either. He alleged that the

nationality of the minor children had not been properly proved, because no birth certificates were attached to the Memorial, and consequently prayed that the Commission should, as a British subject was not involved, abstain from taking jurisdiction over the claim.

V. The British Agent replied by asserting that the entry of Kidd's birth had been lost; but that the affidavit made by his father in order to prove his British nationality was sufficient and therefore for that of his wife; that in connexion with the nationality of the minors he subjoined with his Reply five certificates issued by the Supreme Court of St. Jerome, Province of Quebec, District of Terrebonne, for each one of the five children; but said certificates refer not to the Civil Register, but to the baptism of the said minors. When the case had already come up for hearing, the said British Agent also produced a Certificate of Consular Registry of Mrs. Annie Bella Graham Kidd as a British subject, dated the 26th December, 1916.

Legal Considerations

I. The Mexican Commissioner does not accept the affidavit of the father of William Kidd, as to the British nationality of his son, as sufficient to establish that fact, because it is an *ex parte* deposition, submitted by the father of the victim, a deposition which was challenged by the Mexican Agent, by reason of the very close relationship existing between the interested parties, as although the Commission has decided by a majority that affidavits constitute *prima facie* evidence, susceptible of conversion into full proof, by means of corroboration by other elements, the Mexican Commissioner holds that the affidavit of William Kidd's father finds no direct corroboration to demonstrate its sufficiency.

II. The consular certificate in which the British nationality of Mrs. Kidd is recorded is positively of no value as proof concurrent with the affidavit of her father, for two reasons:

(a) Because such registration was effected subsequently to the death of her husband and cannot have any retrospective effect; and

(b) Because, even on the assumption that proper proof had been shown of the nationality of Mrs. Kidd, it would not, either logically or in law, follow therefrom that the nationality of her husband had been established. The true principle is the contrary one, i.e., that if the nationality of the husband had been proved, that of his wife would also have been proved; but what happens is that the only element of evidence to show the nationality of William Kidd is the affidavit of his father, which is null and of no value, according to article 283 of the French Code of Civil Procedure; 283 of the Belgian Code; articles 1942, 1945 and 1946, subdivisions 1 and 2, of the Civil Code of the Netherlands; article 660, sections 1, 2 and 3, of the Spanish Code of Civil Procedure; article 327, second part, of the Italian Civil Code, and articles 302 and 356 of our Federal Code of Civil Procedure, all of which provisions unanimously reject the depositions of persons in any way interested in a controversy, on the understanding that the said laws assume a witness to have testified under oath and before the Court which is to weigh such evidence. In the present case, not even that circumstance is present; it is a case of the testimony of William Kidd's father, by way of *ex parte* evidence.

III. The fact that the witnesses who deposed before the Court of First Instance as to the details of the murder of William Kidd, reputed him to be a British subject, and the circumstance that the British Legation at Mexico, when reporting the murder of William Kidd to their Government, described him as a Canadian, do not mean anything but that the decedent, William Kidd, was at the outside considered by reputation as a British subject; but

seeing that the birth of William Kidd had, by the admission of his own father, been registered; that such registration was effected in April 1877, when compulsory registration was already in force in Great Britain; that he was baptized in September 1877, and that the certificate of baptism was duly issued by the Rev. Arthur Whiteside, the British nationality of William Kidd should have been established: (1) by means of a certified copy of the entry in the Civil Register; (2) by means of the certificate of baptism; and (3) by the evidence of witnesses, and in any event proof should have been shown of the impossibility of producing the best of said evidence, in the order given, according to the universally accepted principle in England, which says: "None but the best evidence may be adduced, that which is of a secondary kind not being admissible for that which is of a primary kind, where the primary evidence is accessible." (*Stephen's Commentaries on the Laws of England*, Vol. II, p. 603.)

The British Statute of 1874, which declared civil registry compulsory, and the authority of Lehr (*Eléments de droit civil anglais*, Paris, 1885, p. 17) assist in demonstrating the insufficiency of the evidence produced by the claimant for the purpose of establishing the British nationality of William Kidd.

In view of the whole of the foregoing, the Mexican Commissioner holds that the Demurrer entered by the Mexican Agent should be sustained, and that the Commission should therefore abstain from taking cognizance of this claim.