

RIO GRANDE IRRIGATION AND LAND COMPANY, LIMITED
(GREAT BRITAIN) *v.* UNITED STATES

(November 28, 1923. Pages 336-346.)

This is a claim preferred by His Britannic Majesty's Government on behalf of the Rio Grande Irrigation and Land Company, Limited, and founded upon an alleged denial of real property rights.

As will presently appear, this opinion is not concerned with the merits of the claim itself inasmuch as, in the view of the Tribunal, the Government of the United States of America is entitled to succeed on the preliminary point, relating to the jurisdiction of the Tribunal to entertain the claim at all.

It is necessary, however, to state in some detail the facts out of which the claim arises.

In the year 1893, a corporation entitled the Rio Grande Dam and Irrigation Company (hereinafter called the "American company") was formed under the laws of the territory of New Mexico with a capital stock of \$5 million in shares of \$100 each, for the purpose, *inter alia*, of constructing a dam across the Rio Grande River and impounding its waters for irrigation purposes. The dam was to be constructed at Elephant Butte, a point in Sierra County, New Mexico, about 120 miles above the city of El Paso, and all the concessions, rights and privileges necessary to the effective equipment of the undertaking as an irrigation enterprise were legally acquired by the company aforesaid. The term of the company's existence was forty-seven years. By virtue of a Federal Act of March 3, 1891, in case of an undertaking of this character, an approval and confirmation by the Secretary of the Department of the Interior was necessary. That approval and confirmation was given on February 1, 1895 (memorial, p. 51). By section 20 of that Act it is provided as follows:

"Provided, that if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture" (U.S. answer, app., p. 129).

In October, 1895, the Rio Grande Irrigation and Land Company, Limited (hereinafter called the "English company"), on whose behalf this claim is preferred, was incorporated in England, for the purpose of financing the American company in consideration of the transfer of the whole undertaking of the American company. Its capital was £ 500,000, consisting of £ 100,000 8 % cumulative preference shares of £ 1 each, and £ 400,000 ordinary shares of £ 1 each. There was also an authorized issue of 2,000 first mortgage debentures of £ 50 each bearing interest at 5 %. These debentures were secured on the undertaking and property of the company under a trust deed which was executed on August 28, 1896, and which conferred upon the National Safe Deposit Company, Limited, as trustee for the debenture-holders, a power of sale in the event, *inter alia*, of the company's going into liquidation, and empowered the trustee in such an event on request made, to appoint a receiver (section 10). Debentures were issued to the value of over £ 40,000, though the precise figure is uncertain. There was also an issue of preference shares to the value of £ 30,500.

The following were the arrangements made between the American and the English companies:

By an agreement dated March 27, 1896 (reply, p. 17), the American company agreed to lease to the English company:

"All the said concession of the American company and all the rights and privileges held or enjoyed by the American company therewith or thereunder as from the date hereof . . ." (reply, p. 17).

for the aforesaid term of 47 years, less three days. The American company covenanted to transfer to and vest in the English company: (a) "All the undertaking of the American company, now capable of being validly transferred to the English company; (b) "The benefit and obligation of certain contracts relating to the acquisition of land, water rights, water rents and water

supply which the American company had made with local landowners and municipalities.”

The price to be paid, on completion, by the English company was 300,000 fully paid ordinary shares in the English company and £ 26,500 in cash.

By an agreement dated May 30, 1896, between the two companies, Nathan E. Boyd, an American citizen and the promoter of the whole enterprise, and R. Chetham Strode were appointed the American company's nominees to receive the 300,000 ordinary shares on its behalf (reply, p. 23); while the payment of £ 25,600 in cash was subsequently altered by an agreement of May 31, 1896, between the two companies, to £ 19,450 in debentures and £ 7,050 in cash (U.S. additional evidence, p. 1).

To revert to the agreement of March 27, 1896, in execution of a power created by paragraph 7 thereof, Dr. Nathan E. Boyd was nominated by the American company a director of the English company; and by paragraph 11 it was provided:

“11. The American company shall continue its existence and shall act as the agent of the English company and shall comply with all instructions of the English company or its directors from time to time and shall if requested so to do by the English company hold all or any of the premises hereby agreed to be sold in trust for the English company or as it may from time to time direct” (reply, p. 22).

The arrangements between the companies were completed by an indenture dated May 30, 1896, which witnesses that the American company, in consideration of a yearly rent of \$1 and certain covenants to be performed by the English company, “has leased, demised, and to farm, let, and full liberty given to enjoy and exercise” (U.S. answer, app., p. 655), to the English company the whole of its irrigation undertaking, as therein particularly described:

“To have and hold . . . from the first day of June, one thousand, eight hundred and ninety-six, for and during and until the full end and term of forty-seven years thence next ensuing and fully to be completed and ended” (U.S. answer, app., p. 657).

The English company also acquired the control of the whole of the capital stock of the American company.

There is ample evidence in the minute book of the directors of the English company that, from an early moment in the existence of that company, its directors had felt anxiety as to the validity of the lease from the American company, in view of the alien laws of the United States. In January, 1896, Mr. Newton Crane, a distinguished American counsel, practising at the English bar, was consulted on the point; and expressed the opinion that the English company:

... “may hold canals by leasehold within the territory of New Mexico and State of Texas, and take over absolutely the franchises and powers granted by the United States and the Territory of New Mexico and the State of Texas”.

Mr. Hawkins, however, a local attorney in New Mexico, differed; and, this fact being brought to his notice Mr. Newton Crane, in an opinion dated November 18, 1896, while asserting the view that a lease was, both by American and English law, personal property and not an interest in real property, advised that it might be wise, in view of possible local hostility, to form another company in West Virginia, to which the stock of the American company should be transferred, the English company becoming the holder of all the stock in the West Virginia company; but that, in other respects, all arrangements should remain as they were. This advice was followed; and in April, 1897, a company entitled the Rio Grande Investment Company was incorporated

in West Virginia, to which the American company's stock was transferred as consideration for \$1 million worth of stock fully paid of the Rio Grande Investment Company, of which stock the English company became the holder (reply, p. 13; reply, p. 50; English company's minute book, meeting of Friday, April 30, 1897).

It has been discussed before us whether the undertaking as well as the stock of the American company was transferred to the Rio Grande Investment Company. There is evidence both ways, but in our view, the point is, for our present purpose, immaterial.

For some time, going back to a date anterior to the formation of the American company, there had been complaints made by the Mexican to the United States Government in respect of the depletion of the flow in the lower portion of the Rio Grande, owing, as it was alleged, to the interception of its waters for irrigation purposes in Colorado and New Mexico. Commissions of inquiry had been held, and as early as 1890, a suggestion was put forward by Colonel Anson Mills and other engineers that the United States should construct a dam near El Paso. The Elephant Butte enterprise brought this question to a point; it being alleged that the construction of the Elephant Butte dam would make a supply of water adequate for the needs of Mexico impossible.

The jurisdiction over navigable rivers in the United States is vested in the Secretary of War; and proceedings by the Attorney-General may be taken, if so advised, to prevent the diminution of the navigability of such rivers (see Act, September 19, 1890, c. 907; and Act, July 13, 1892, c. 158, printed at pages 125 and 129 of the U.S. answer, appendix).

The federal authorities, having satisfied themselves that the Rio Grande below El Paso was, for some considerable distance, navigable, in May, 1897, brought a suit in the District Court of New Mexico to obtain an injunction against the Rio Grande Dam and Irrigation Company with a view to preventing the construction of the dam at Elephant Butte, on the ground that it would obstruct and diminish the navigability of the Rio Grande. The record was amended by the addition of the English company as co-defendants. The suit was dismissed by the District Court; the dismissal was affirmed by the Supreme Court of New Mexico; but the Supreme Court of the United States, on appeal, reversed that judgment, and remitted the matter to the Court of New Mexico for inquiry as to whether the defendants' dam would diminish the navigability of the Rio Grande within the limits of present navigability. The inquiry was made, and the suit was again dismissed by both the courts of New Mexico; but, on appeal, was again remitted by the Supreme Court of the United States, for the purpose of the same inquiry. At this juncture, in April, 1903, leave was given by the District Court of New Mexico to the United States to file a supplemental complaint, praying that the rights of the American company relating to the Elephant Butte undertaking might be forfeited, on the ground that the work had not been completed within five years after the location of the section as required by section 20 of the Act of March 3, 1891, c. 561 (U.S. answer, app., pp. 74, 93, and 129). The supplemental complaint was served on the attorney of the American company but no appearance within the appointed time was entered thereto. A decree of forfeiture was granted by the District Court, and was affirmed both by the Supreme Court of New Mexico, and, in December, 1909, by the Supreme Court of the United States (U.S. answer, app., pp. 74-92).

The complaint of His Britannic Majesty's Government, as put forward in the reply, is that these proceedings were oppressively and indirectly launched and prosecuted with other than their avowed object; and that:

"The real purpose of the litigation appears to have been to defeat the Com-

pany's scheme and it is the initiation and relentless prosecution of the suit of which His Majesty's Government complain" (reply, p. 4).

More than nine years before the conclusion of this litigation namely, in April, 1900, the English company had gone into liquidation (reply, p. 26).

On May 3, 1900, Dr. Nathan E. Boyd was appointed receiver for the debenture holders (reply, p. 43); and on May 4, 1900, the liquidator of the company sold the equity of redemption in all the company's undertaking, assets and rights to the receiver (reply, p. 49), the debenture holders, thereupon, becoming the owners of everything belonging to the company.

The only remaining facts, relevant to the point of jurisdiction which we have now to decide are connected with the presentation of this case during this session before the Tribunal.

On Friday, November 9, 1923, the British Agent applied for leave to file a reply. This application was opposed by the United States Agent, broadly, on the ground, that, having regard to the history of the case, the rules of procedure, and the defective character of the memorial, so voluminous a document should not be admitted at so late a moment. After some discussion, having regard to the desire of both governments to have the case disposed of, it was agreed that the case should proceed, the reply being admitted, and both sides being at liberty to file additional evidence. Later, on the same day, the following conversation took place between the Tribunal and the Agents on both sides (transcript of record, 17th sitting, p. 23):

"The UMPIRE: . . . Mr. Nielsen, you want to present some observations about a preliminary motion, is not that so?"

"Mr. NIELSEN: I want to present a motion that this claim should be dismissed because of the manner in which it is presented, and because there is no showing of any British interest in it, I mentioned one individual whom we have always regarded as the real claimant.

"The UMPIRE: In the circumstances Mr. Nielsen will explain or deliver up that motion, and then Sir Cecil Hurst will answer.

"Mr. NIELSEN: I shall ask Mr. Dennis to argue that motion, if it pleases.

"The UMPIRE: Mr. Dennis will deliver that motion and then you will give your answer on the motion, Sir Cecil Hurst.

"Sir Cecil HURST: A reply will certainly be made on behalf of His Britannic Majesty's Government."

The motion to dismiss the claim was filed on that day by the United States Agent. Broadly, it raised two points: (1) the absence of British interest in the claim; (2) the breach of the Rules of Procedure in the presentation of the case.

On Monday, November 12, 1923, the British Agent wrote a letter to the United States Agent giving notice that he intended to argue that a preliminary motion of this character was not contemplated or provided by the rules or any of the instruments controlling the Tribunal. This point was in fact taken by the British Agent at the end of his argument made in reply to the motion, when, he further argued that, if such a motion was provided for anywhere, on the proper construction of rules 31, 37, and 38, application for leave to make it must be in writing, and that there had been no such application in writing; and further, that, while under the rules and the exchange of notes read together, an agreement in writing between the Agents, in such case, was necessary, here there was no such agreement, nor, indeed, any agreement at all.

To these arguments there is, in the opinion of the Tribunal, one conclusive answer. Whatever be the proper construction of the instruments controlling the Tribunal or of the rules of procedure, there is inherent in this and every legal

Tribunal a power, and indeed a duty, to entertain, and, in proper cases, to raise for themselves, preliminary points going to their jurisdiction to entertain the claim. Such a power is inseparable from and indispensable to the proper conduct of business. This principle has been laid down and approved as applicable to international arbitral tribunals (see Ralston's International Arbitral Law and Procedure, pp. 21 *et seq*). In our opinion, this power can only be taken away by a provision framed for that express purpose. There is no such provision here. On the contrary, by article 73 of chapter III of The Hague Convention, 1907, which, by virtue of article 4 of the treaty creating this commission, is applicable to the proceedings of this commission, it is declared:

"The tribunal is authorized to declare its competence in interpreting the *compromis* as well as the other acts and documents which may be invoked, and in applying the principles of law."

The question, therefore, which we have to decide is this: whatever our opinion may be as to the forfeiture of the American company's rights by the courts of the United States, does the English company possess the interest necessary to support this claim?

Clearly, the debenture holders, in this respect, are in no better position than their debtors, the English company, through whom they claim.

To answer this question, it is necessary to consider carefully the provisions of the United States Alien Law, Act of March 3, 1887, c. 340 (U.S. answer, app., p. 122); it being United States law which is decisive of the validity of this leave. This point, it may be observed, is raised on the face of the record.

The following are the material sections of the Act aforesaid:

"1. That it shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States, or of some State or Territory of the United States, to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts heretofore created:

"

"4. That all property acquired, held, or owned in violation of the provisions of this Act shall be forfeited to the United States, and it shall be the duty of the Attorney-General to enforce every such forfeiture by bill in equity or other proper process" (U.S. answer, app. pp. 122-123).

Two questions arise on these sections. The first is this: were the American company's rights, concessions, and privileges, real estate rights? This question is best answered by the description of them contained in : (1) The Agreement of March 27, 1896 (reply, p. 17); (2) The Indenture of May 30, 1896 (U.S. answer, app. p. 655); (3) The Trust Deed of August 28, 1896 (British additional evidence).

In our opinion, the answer to this question is in the affirmative. The description of these rights given in the documents referred to leaves no room for doubt on this point.

The second question is this: did the lease of these rights, concessions, and privileges, granting as it did to the English company, the entire undertaking for the whole life of the American company, constitute "an interest in real estate"? In the opinion of the Tribunal, the answer to this question also is in the affirmative. No decision to the contrary has been brought to our notice. Looking at the wording of the Act itself, the term "interest" is very wide, certainly wide enough to include a lease. It is no doubt true that a lease is personal

estate and goes to the executor; but that fact does not, in our opinion, prevent its being an interest in real estate—a view which seems to be supported by the description of a lease as a “chattel *real*”. Further, the words in section I, “hold or own”, appear to point in the same direction; as, had freeholds only been contemplated, the word “own” would have been sufficient; while the word “hold” is aptly referable to a lease. It should also be remembered that this claim is expressly put forward as “based on an alleged denial in whole or in part of real property rights” (reply, p. 3).

In an opinion, dated May 20, 1887, immediately after the passage of the Act under consideration, the Attorney-General of the United States expressed the view that “bona fide leases are not intended to come within the inhibition of the Act”, but the recent decision on November 19, 1923, of the Supreme Court of the United States in *Frick v. Webb* (281 Federal Reporter 407), seems to support a contrary view. This was a suit brought in the United States District Court by one Frick, who wished to sell some stock in a California land corporation to his co-plaintiff, Satow, a Japanese subject, to prohibit the Attorney-General of California from taking steps to prevent the sale being carried out, as being in contravention of section 2 of the Californian Alien Land Law of 1920 (Statutes of California, 1921, p. lxxxiii).

The material sections of that law are:

“*Section 1.* All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit, and inherit, real property, or any interest therein, in this State, in the same manner and to the same extent as citizens of the United States except as otherwise provided by the laws of this State.

“*Section 2.* All aliens other than those mentioned in section one of this act may acquire, possess, enjoy, and transfer real property, or any interest therein, in this State, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise” (279 Federal Reporter, p. 115).

The material portion of the headnote is as follows:

“Ownership by a Japanese subject, who is ineligible to citizenship, of stock in a farm corporation, which owned agricultural land, *held* ‘ownership of an interest in the land,’ within Alien Land Law, Cal. 1920, Sec. 2”.

In the course of the judgment these words occur:

“We think the ownership of stock in such a corporation would be an interest in real property”.

The plaintiff appealed to the Supreme Court of the United States which upheld the decision.

Without pushing this decision too far, it would seem, at least, to indicate that the Supreme Court of the United States is inclined to give a broad interpretation to the words “interest in real property” or “interest in real estate” where they occur in alien laws.

It was urged by the British Agent that, as the Alien Law of 1887 had never been invoked by the United States in the long litigation against the American and English companies, this point should not be taken by the Tribunal now. This, as has been said, is not the view we take of our power or duty in relation to a clear point of jurisdiction raised, as this is, on the face of the record. Further, the course followed in this respect by the United States may well be explained by the fact that the main object of that litigation was not to crush the English company, but to get rid of the Elephant Butte concession which had been granted to the American company.

It is possible, perhaps, to argue that the meaning of section 4 of the Alien Law of 1887 is that the title to such property is good until forfeited by proper process. It appears to the Tribunal that, if that meaning was intended, the words would have been "shall be subject to forfeiture", and not "shall be forfeited". However that may be, by section 1 the acquisition of real estate or any interest therein by the persons mentioned is made "unlawful". Such acquisition, therefore, cannot found any claim for compensation.

The result, therefore, is that the English company took no valid rights whatever under the lease from the American company, and possesses no interest on which a claim such as this can be founded.

A very large part of the arguments addressed to the Tribunal on both sides was directed to the transactions relating to the debentures issued by the English company and the nationality of the debenture holders. Having regard to the view which the Tribunal takes of the position of the English company under the alien law, discussion of these points is unnecessary.

Another ground urged before us by the Government of the United States was the breach of the rules of procedure which, it was alleged, His Britannic Majesty's Government had committed in the presentation of the claim. On this point, it is sufficient to say that, while recognizing that there were defects in the memorial in this case, the Tribunal does not think, in all the circumstances, that those defects were such as to furnish, in themselves, adequate ground for allowing a preliminary motion of this character.

In conclusion, we desire to say that, in our opinion, even had the lease from the American company been valid, a formidable point, arising out of the English company's relations with the Rio Grande Investment Company, might still have lain in the way of His Britannic Majesty's Government.

Now, therefore :

The award of the Tribunal is that the claim of His Britannic Majesty's Government be disallowed.