

Special Agreement.

[*See text of Award below.*]

ARBITRAL AWARD¹

Submitted to the Department of State by letter dated May 2, 1929.

The attempted expropriation of the claimant's property was not in compliance with the Constitution nor with the laws of the Republic. The expropriation proceedings were not, in good faith, for the purpose of public utility. While the proceedings were municipal in form, the properties seized were turned over immediately to the defendant company, ostensibly for public purposes, but, in fact, to be used by the defendant for purposes of amusement and private profit, without any reference to public utility.

The destruction of the claimant's property was wanton, riotous, oppressive. The defendant company appears to have been seeking from the municipal and judicial tribunals the form of justice rather than its substance.

An award of \$190,000 made to the claimant in complete settlement for the value of the land, the buildings and personal effects therein, for the deprivation of the use of the property and the expense of defending his rights.

The claimant, Captain Walter Fletcher Smith, is an American citizen. In the Spanish American War he served as captain of a company in one of the regiments of the United States Army. He has lived in Habana, Cuba, for about twenty-eight years. The leading facts of his claim are briefly stated substantially as follows:

In 1916, Captain Walter Fletcher Smith, an American citizen, a resident of Habana, Cuba, owned all of the stock of the Marianao Beach Company which in turn owned certain properties at Marianao Beach near Habana comprising approximately one million square meters of land which had been acquired in 1912. Prior to 1919, Captain Smith sold to the Compañía Urbanizadora del Parque y Playa de Marianao, commonly called the Playa Company, all the stock of the Marianao Beach Company for the sum of \$240,000. The contract of sale undertook to pass title to all real estate owned by the company as well as Captain Smith's rights and choses in action with respect to the Marianao Beach Company, except that two parcels of land containing approximately four thousand square meters were excluded from the transfer of title because they stood in the name of Captain Smith personally, and not in that of the company. The contract of sale specifically excluded these parcels which constitute the land now in controversy. The parcels had erected on them two dwelling houses, in one of which Captain Smith made his home; and it was provided in the contract of sale that the view to the water-front should not be obstructed.

In May, 1919, or about that time, the municipality of Marianao by resolution granted to the Playa Company a concession for the purpose of

¹ State Dept. press release, May 16, 1929.

urbanizing the district at and around Marianao Beach, which district included the lands bought by the company from Smith, as well as the four thousand meters of land which had been reserved by Smith. Thereafter certain overtures were made to Smith looking to the purchase of these two parcels, but the parties were unable to agree upon a price. It is claimed that persons interested, upon being unable to purchase the property from Smith, threatened to destroy it. Smith then applied by letter to the Secretary of the Government of Cuba, advising him of the threatened action and requesting protection against it.

On or about April 15, 1919, the Mayor of Marianao, in the name of the municipality and for the benefit of the Playa Company, instituted proceedings in the Court of First Instance of Marianao for the condemnation of the land and houses in question, basing the action upon certain orders and decrees.

The court gave "preliminary" possession of Captain Smith's land and houses and it is claimed that, within eight hours from the hour the court order was entered, the buildings had been completely razed by a force of approximately one hundred and fifty men, said to have been acting under the supervision of Congressman Carlos Manuel de la Cruz, attorney for the Playa Company. It is claimed that Captain Smith did not know of the petition until after the houses had been partially demolished, whereupon he ineffectively applied to the court to prevent further destruction.

Smith contested the expropriation proceedings in the Cuban courts, and later procured a judgment by the Audiencia holding that the proceedings in the lower court were illegal. He thereupon obtained a copy of the judgment of the Audiencia and applied to the lower court for restoration of possession which is said to have been the proper procedure to obtain execution of the judgment. Meanwhile new expropriation proceedings were instituted. Smith's petition was denied. He appealed from this second decision of the lower court.

The matter was taken up by this Government with the Government of Cuba, through diplomatic channels, in an endeavor to effect a settlement; and, while such efforts were unsuccessful, an agreement to arbitrate the question before a sole arbitrator has been reached.

At the time of entering into the agreement of arbitration, in a letter to the President of the Cuban Republic, the Ambassador of the United States set forth the substance of the agreement of arbitration:

My Government directs me to set out in this note the several points on which it is understood agreement has already been reached:

I. The questions to be decided by the Arbitrator are:

- (a) According to law shall the land be restored to Smith?
- (b) If it be restored what amount of damages shall he receive in addition to the restoration of the land?
- (c) If the land is not to be restored what amount is Smith entitled to receive in complete settlement?

II. The form of the questions described above is agreed upon without prejudice to the rights of the parties to present for such consideration as the arbitrator may desire to give it evidence on the five assertions advanced by the Cuban Government as follows:

"(1) The expropriation of the properties of Captain Smith has been effected by strictly applying the law of expropriation in force in

Cuba, promulgated by the American Government during the intervention.

(2) Captain Smith has never been prevented or unlawfully prevented from defending his rights before the Cuban courts.

(3) Captain Smith, and not we ourselves, is the party who has always delayed or unnecessarily extended the proceedings.

(4) Captain Smith has always attempted intimidation by alleging his status as an American citizen and has defamed many honorable persons, including the representatives of the United States in Cuba.

(5) Captain Smith has never been denied the payment of what his properties are lawfully worth, but we do not believe that we are obliged to pay for an unlawful speculation which he intends to make out of his status of being an American citizen."

In agreeing to the presentation of evidence on the five assertions just stated, the Government of the United States does not, of course, acquiesce in the statements or acknowledge their accuracy.

The learned counsel for the defendant contend that the expropriation proceedings were conducted in strict compliance with the constitution and laws of the Republic of Cuba; that it was the clear duty of the claimant, residing in Cuba, to live in good faith, subject to its laws, like any other resident of the Island; that these proceedings were for the "urbanization of the property" and "solely for purposes of public utility"; that the defendant corporation was under the protection of the Cuban courts; that those courts have acted in strict compliance with the laws of the land, and have passed upon the matter in an orderly and competent manner.

It is the clear intention of the Agreement of Arbitration to give the Arbitrator wide scope in passing upon the matters in question. The Arbitrator has proceeded to Cuba, examined the property, taken the testimony of all witnesses produced before him, and has made as careful an examination as possible of the records of all the tribunals acting upon the case.

Article 32 of the Constitution of Cuba requires:

No one shall be deprived of his property except by competent authority upon the justified proof that the condemnation is required by public utility and previous indemnification. If the indemnification is not previously paid, the judges and the courts shall protect the owners and, if needed, restore to them the property.

From a careful examination of the testimony and of the records, the Arbitrator is impressed that the attempted expropriation of the claimant's property was not in compliance with the constitution, nor with the laws of the Republic; that the expropriation proceedings were not, in good faith, for the purpose of public utility. They do not present the features of an orderly attempt by officers of the law to carry out a formal order of condemnation. The destruction of the claimant's property was wanton, riotous, oppressive. It was effected by about one hundred and fifty men whose action appears to have been of a most violent character. There is some evidence tending to show that, before the expropriation proceedings, certain persons, being unable to purchase the property from the claimant, threatened to destroy it.

While the proceedings were municipal in form, the properties seized were turned over immediately to the defendant company, ostensibly for public purposes, but, in fact, to be used by the defendant for purposes of amusement

and private profit, without any reference to public utility. The Arbitrator is of the opinion, then, that all the acts of expropriation shown in testimony, and the proceedings based upon them, were not of such a character as to give an indefeasible title to the defendant company.

Therefore the Arbitrator believes that it would be not inappropriate to find that, according to law, the property should be restored to the claimant.

The defendant company appears to have been seeking from municipal and judicial tribunals the form of justice rather than its substance. No reflection is to be made upon the character of the courts of Cuba. The Arbitrator was favorably impressed with the ability and competency of the lawyers of the Republic. It is not necessary, however, to discuss in detail the proofs relating to the action of the Cuban tribunals. Under all the circumstances of the case it seems clear that the action of those tribunals should not be held to render valid the proceedings of attempted expropriation.

While believing, as hereinbefore indicated, that the defendant company has acquired no clear title to the premises in question, the Arbitrator is of the opinion that it is for the best interests of the parties, and of the public, that the award be made under item "c" of the Agreement of Arbitration: "That, if the land is not to be restored, the Arbitrator should consider what Smith is entitled to receive in complete settlement", and the Arbitrator decides accordingly.

The evidence as to the value of the property taken is greatly conflicting and almost wholly irreconcilable. The claimant contends that his land was worth much more than \$200,000. The defendant contends that it was worth less than \$35,000. Much evidence on the question of value has been received in support of both contentions. The Arbitrator had also the benefit of viewing the property and taking into account the advantages of its location and possibilities, among others being the fact that it is adjoining a fine yacht club; and that the claimant had, by reservation, the right to an unobstructed view of the water-front. The evidence is likewise conflicting as to the value of the two buildings which were on the land. However, after taking into account all the testimony and documentary evidence, also the period of time during which the claimant has been deprived of the use of his property, approximately ten years, and the expense to which he has been put in defending his rights, the Arbitrator finds that, as compensation for the value of the land, of the buildings and personal effects contained therein, also the deprivation of the use of the property and in consideration of his expense in defending his rights, he should receive in complete settlement \$190,000. And the Arbitrator therefore awards the claimant the sum of One Hundred and Ninety Thousand Dollars, in complete settlement of all matters involved in these proceedings.

CLARENCE HALE,
Arbitrator.
