

PANAMA AND ABUNDIO CASELLI (PANAMA) *v.* UNITED STATES

*(June 29, 1933, dissenting opinion of Panamanian Commissioner, undated.
Pages 625-629.)*

This is a claim for 14,969 balboas, with interest, on behalf of Abundio Caselli, or the Government of Panama, as their respective interests may appear. Caselli is a Swiss citizen, but jurisdiction to decide the claim is expressly conferred on the Commission by art. I of the convention under which it acts.

In 1903 the United States entered into a treaty with the Republic of Panama. This treaty transferred the Panama Canal Zone to the United States. The treaty did not transfer title to the Zone; it transferred the use, occupation and control of the Zone in perpetuity, together with such rights as the United States would possess if it were the sovereign thereof. In 1904 the specific boundaries of the Zone were delimited by executive agreement.

Caselli and one Pellas were the owners, *pro indiviso*, of a portion of a tract of land known as El Tivoli, in the city of Panama. For the sake of brevity this portion of the larger tract is hereinafter called simply El Tivoli. In 1909 Caselli sold to the Government of Panama his half-interest in the property, less a small part thereof which he had previously sold to one Abad.

On October 17, 1913, Caselli brought suit against the Government to set aside the sale for *lesión enorme*, the ground for the action being that the price paid by the Government was less than half the true value of the property. The suit was decided in Caselli's favor by the Supreme Court of Panama which, on October 16, 1914, entered a decree giving the Government the option of rescinding the sale and returning the property or paying the balance of the price declared by the Court to be just.

The Government has never rescinded nor returned the property. On February 11, 1915, the Government owned Caselli's former share of El Tivoli subject to no lien or encumbrance in favor of Caselli. On that date, Panama and the United States exchanged ratifications of a boundary convention.

This convention contained no express conveyance of any property by either party to the other; it simply fixed boundaries for the Canal Zone somewhat different from the boundaries fixed in the original Canal Zone treaty of 1903 and delimited in 1904. The result of the Boundary Convention of 1914 was, however, to place in the Canal Zone some lands which had previously been a part of the Republic of Panama, and to place in the Republic of Panama some lands which had been previously in the Canal Zone. Among the lands which passed to the Canal Zone was El Tivoli.

The Boundary Convention of 1914 says nothing about payment by either party for the land transferred by the change in boundaries. When the parties to a document intend to create an obligation to make substantial money payments, they usually say so. We cannot infer an obligation to make payments from mere silence. The obvious and natural interpretation of the convention of 1914 is that it effected an exchange of properties and that each party was compensated by the properties received from the other. This conclusion is reinforced by the fact that the United States has not claimed compensation for the land which the convention of 1914 excluded from the Canal Zone and

returned to Panama, although part of this land had been purchased by the United States from the old French Canal Company, a private person, just as El Tivoli was purchased from Caselli.

But the Boundary Convention of 1914 refers back to the original Canal treaty of 1903, and provides that the rights acquired under the Canal treaty shall not be impaired. Article VI of the Canal treaty contains a provision safeguarding the rights of the owners of private property. This article provides:

“The grants herein contained shall in no manner invalidate the titles or rights of private land holders or owners of private property in the said Zone or in any of the lands or waters granted to the United States by the provisions of any article in this treaty . . .”

The article then goes on to provide for compensation in case private property is taken or damaged. Panama argues that El Tivoli, because it had been purchased from private persons and had not become property of public use, was “private property” when the Boundary Convention of 1914 took effect; that the convention of 1914 transferred to the United States not title but the use, occupation and control of the property in perpetuity; that in spite of the passage of the use, occupation and control, El Tivoli continued to be private property entitled to the protection of article VI of the 1903 treaty; and that when the United States entered upon and used the property it became obligated to make payment to Panama. The Commission does not agree with this reasoning. In the first place, the treaty of 1903 was drafted and executed in English only. Its words must be interpreted according to ordinary English usage. By that usage, private property is property belonging to private persons as contra-distinguished from property belonging to the state. The private nature of property by that usage does not depend upon the nature of the property but upon the nature of the owner. By that usage El Tivoli was public and not private property. It did not fall under article VI. In the second place, there is no evidence in the record that the United States ever entered upon El Tivoli or made any use of it, and, in the third place, had there been evidence of such an entry by the United States, it would not have indicated an assertion of any right in excess of the right of use, occupation and control transferred by the operation of the Boundary Convention of 1914.

At the hearing, reference was made to the terms of the paragraph in article I of the Claims Convention which submits this claim to the Commission. That paragraph reads as follows:

“As a specific exception to the limitation of the claims to be submitted to the Commission against the United States of America it is agreed that there shall be submitted to the Commission the claims of Abbondio [*Abundio*] Caselli, a Swiss citizen, or the Government of Panama and José C. Monteverde, an Italian subject, or the Government of Panama, as their respective interests in such claims may appear, these claims having arisen from land purchased by the Government of Panama from the said Caselli and Monteverde and afterwards expropriated by the Government of the United States, and having formed in each case the subject matter of a decision by the Supreme Court of Panama.”

It was suggested that the use of the word “expropriated” in this paragraph amounts to an admission by the United States that there was some sort of a taking by the United States of the property of El Tivoli other than the transfer under the convention of 1914, and that the use of the word “expropriated” also amounts to an admission by the United States that there was an obligation to make compensation in money. It is conceded that the convention of 1914

passed to the United States the use, occupation and control of El Tivoli in perpetuity. That in itself may be described as an expropriation. Nothing further need be inferred in order to make the word "expropriated" appropriate. Nor does the use of the word "expropriated" imply an obligation to make money compensation. There is no reason why compensation for an expropriation should not be made, as apparently it was made under the 1914 convention, by the reciprocal transfer of other property.

The obvious and reasonable explanation of the use of the word "expropriated" in the paragraph from the Claims Convention, quoted above, is that it was used by way of identification and description of the claim and that it was not intended as an admission in regard to the merits of the claim or in regard to any of the facts upon which the claim is based. If an admission of liability had been intended, it is to be assumed that the parties would have stated simply and expressly that they intended to admit liability and submit only the question of compensation.

This conclusion is further strengthened by the consideration that if the use of the word "expropriated" in the Claims Convention had been meant to have the effect of conceding the liability of the United States to make compensation for El Tivoli, there would have been nothing for this Commission to do except to fix the amount of the compensation. In other words, a special submission would have been made to this Commission for the sole purpose of having the Commission do something which normally and appropriately would be done by the Joint Land Commission. Such an assumption does not seem reasonable.

The Commission decides that the claim must be disallowed.

Dissenting opinion of Panamanian Commissioner

This is a case which, in normal circumstances, would have had to be decided by the Mixed Commission to which article VI of the Canal treaty of November 18, 1903, refers. Pursuant to this provision the United States of America was bound to pay the owners of land or private properties for the damage caused to the properties or land which it might be necessary to use in the Canal work. It devolves on said Mixed Commission only to evaluate and adjust the damage referred to. The liability of the American Government in this regard was admitted beforehand by the treaty itself. The authority of the Commission was limited in each case to passing upon the validity of the titles of the claimant and upon the amount of indemnity.

In the General Claims Convention of July 28, 1926, which created this Commission, the high contracting parties incorporated the paragraph of article I which is quoted in the majority opinion.

It is evident that the object of this provision was to give the Commission jurisdiction in two cases in which the claimants were foreigners or could be subrogated by the Government of Panama, and also to extend to this Commission the handling of claims originally under the jurisdiction of the Mixed Commission. It is obvious that in these cases it devolved upon this Commission to proceed conformably with the terms of the treaty which created the Mixed Commission, in the manner set forth.

Notwithstanding the lucid provision quoted, the majority of the Commission has departed from the perfectly clear tenor thereof and, on grounds inapplicable to the question, has decided to disallow the claim, with the result that the stipulation cited has become of no effect whatsoever.

For the reasons set forth, I regret to have to record my inability to agree with the decision of the majority.