MARGUERITE DE JOLY DE SABLA (UNITED STATES) *v.* PANAMA

(June 29, 1933, dissenting opinion of Panamanian Commissioner, undated. Pages 432-450.)

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

This claim is presented on behalf of Mrs. T. J. de Sabla, the owner of a tract of land known as "Bernardino" in the Province of Panama. The claimant contends that, during the period from 1910 down to the present, officials of the Government of Panama, though having notice that Bernardino was the private property of the De Sablas, have treated the tract as though it were *baldío* land, and have adjudicated over half of its area to private individuals, and granted numerous temporary cultivator's licenses on Bernardino to others, with the result of rendering the entire tract worthless to its owners.

Bernardino has belonged to the De Sabla family since 1843. It was the property of Teodoro Joly de Sabla, the claimant's husband, from 1897 until his death on October 22, 1914. The claimant succeeded to all his property at his death, and has since been the owner of Bernardino. Panama contends that the claimant is not entitled to present any claim for damages arising out of acts occurring during the lifetime of her husband and prior to her own ownership of the property.

The Commission finds that, as to acts committed during the life of Mr. de Sabla, a claim arose on his behalf. This claim belonged to the United States. It did not lapse on the death of Mr. de Sabla. It was competent for the United States to provide that it should be presented on behalf of Mr. de Sabla's executrix. This has been done. The rules of this Commission are clear on this point. article 13 *(f)* provides that "A claim arising from loss or damage alleged to have been suffered by a national who is dead may be filed on behalf of an heir, executor or administrator". The claimant is both the heiress and executrix of her husband, so recognized both by Panama and by the law of her husband's domicile. The rules require no more. Nothing in the rules suggests that an heir must show that a dead claimant's claim, as such, was bequeathed to her, or that such a claim would have survived under the municipal law of Panama.

The ownership of Bernardino by the De Sablas is not contested. Its total area was 3,180 hectares. From 1910 to 1928, the land authorities adjudicated to private individuals 40 separate tracts totaling 1,718 hectares, all of which the claimant contends were on Bernardino (most but not all of this adjudicated area was within the boundaries of Bernardino; see the discussion of damages below); these adjudications conveyed to the grantees full title to the land adjudicated. From 1917 to 1930, the land authorities granted to private individuals a total of 123 temporary licenses to cultivate land on Bernardino, covering 309 hectares in all. These adjudications and grants of temporary licenses purported to be made pursuant to successive public land laws enacted in Panama in the years 1907, 1913, 1917 and 1925. These laws, though they varied in their details, all gave power to the authorities to make such grants only on government land *(baldíos)* and, in defining such lands, uniformly excepted land which had been legitimately acquired under private titles.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Panama asserts that, under the laws, the authorities were required to grant all applications filed unless opposition was made and that consequently the granting of applications on Bernardino was entirely legal on the part of the authorities, and that this system was not confiscatory by international standards because the land laws in question gave the claimant an adequate means of defending herself against these incursions on her property, by permitting her to file an opposition to any application for an adjudication or a license, and thus to prevent the granting of such applications with respect to her property, so that the claimant's loss is attributable entirely to her own fault in failing to file oppositions and thus arrest the process in each individual case.

The United States contends that, on the contrary, the law required the authorities to reject of their own accord applications for land known to be private. The United States further asserts that if Panama were right in the contention that, under the land laws, applications on known private land had to be granted by the authorities unless opposed, then those laws as applied imposed so unreasonable a burden on private landowners as to fall below international standards.

The Commission cannot agree with Panama that the law required the Public Administrator to grant all unopposed applications for adjudications. It seems clear, on the contrary, that the Administrator, if he had notice that Bernardino was private property, should have refused all applications for adjudications thereon, even if unopposed. Since the land laws by their terms contemplated the adjudication only of public lands, and since the result of granting adjudications on private property was to deprive the owner of his property without compensation, the burden of persuasion on this issue is clearly on Panama. She has failed to sustain it. The Commission finds that the legislative intent to have applications for known private lands refused by the authorities of their own accord, is established by the following facts:

(a) All the land laws, beginning in 1907, contemplated the making of a national land map, to demarcate public from private lands. The clear inference from this requirement is that, once such maps were made, adjudications of lands shown thereon to be private, were to be denied. Otherwise, if private owners had to oppose each application even after the map were made, the making of the map, an expensive task, would have been useless and superfluous. The legislative intent clearly was, not that private owners should have to protect their rights by constant oppositions, but that adjudications should be made only on lands shown to be public on the map, and that the Administrators should reject of their own accord applications for lands appearing as private property on the map. That the failure to make the map prevented this protection from being effective can certainly not be adduced by Panama in support of its contention that the *law* intended to put the entire burden on the private owner.

(b) Pursuant to the plan for a general land map, the laws beginning in 1913 directed the Land Commissions to conduct proceedings to demarcate public from private lands. The initiative in these proceedings was to be taken by the Commission under the 1913 law and all subsequent laws. As to the 1913 law, this is established by decree No. 23 of 1913, which determined the demarcation procedure thereunder. The purpose of such demarcation proceedings clearly was to inform the commission as to what land was public and adjudicable. It follows from this, as from the map project, that the intent of the legislature was that, when the commissions thus got the information as to what was public land, no private land should thereafter be adjudicated, without the necessity of oppositions by private owners. Again as in the case of the land map,

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

the failure of the commissions to take the steps toward demarcation required by the laws, and to summon owners to present their titles for demarcation, cannot be used to support Panama's contention that Administrators were intended by the law to have no power to deny unopposed applications.

(c) Article 6 of decree No. 23 of 1913 admonished the Administrators of Lands that law 20 of 1913 could not destroy vested rights. If the intent of this law had been to put the onus of defending private titles on the owners, through opposition proceedings, as asserted by Panama, this admonition would be pointless.

(d) Resolution No. 59 of December 4, 1916, specifically stated that "the owner of a property is not liable to find himself at any moment in the position of having to oppose petitions which persons may make for part of the land which belongs to him; that it is just and fair . . . that those same owners should be prevented from having to incur the expense and trouble arising from such oppositions". It was therefore ordered that when the Administrator knows that land applied for is the property of another, either because it is so recorded in his office or because the owner has convincingly exhibited his recorded titles, the Administrator shall file away the petition.

(e) Article 51 of law 63 of 1917 continued the provision that the laws on *baldío* lands cannot destroy rights acquired conformably with pre-existing laws.

(f) Article 185 of the Fiscal Code of 1917 specifically empowered the General Administrator of Lands to disapprove any ruling of the Provincial Administrator affecting preferential or vested rights.

The Commission holds, on the basis of the above-recited considerations, that unopposed applications did not have to be granted, and that Administrators were to refuse adjudications of known private lands, even though no oppositions were filed. The Commission holds as a fact that the Administrator through the entire period in question did have notice that Bernardino was private property, and notice of its extent (see *infra*). Thus the most important protection held out to private owners by the law was denied to claimant, and was denied through the fault of government officials, the Provincial Administrators.

Panama also contends, however, that the remedy of opposition did exist, that it was adequate, and that the claimant's losses are her own fault for not availing herself of that remedy. The Commission holds that this contention is not sustained.

In the case of adjudications, opposition procedure was approximately the same under all of the successive land laws. An individual filed an application, giving the boundaries of the land applied for and its area, asserting that it was *baldío*, and supporting his allegations with the declarations of witnesses. This application was filed with the Provincial Administrator of Public Lands, who was during most of the period in question the Governor of the Province. The Administrator then drew up an *edicto* stating the substance of the application, including the boundaries and area of the tract applied for. This *edicto* was posted in his office for 30 days, and published in a newspaper three times during that period. At the end of the 30 days, any interested person was given 15 days in which to oppose the granting of the application. It is this procedure which Panama contends that the claimant should have followed in every case.

It is by no means clear that, under a fair construction of the land laws prior to 1917, the opposition procedure was open to the claimant at all. The structure of the 1907 and 1913 acts seems to indicate that the legislative intent was that a land map of the entire Republic was to be made, and that Land Commissions were to fix the boundaries between public and private lands. Once this obvious-

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

ly sound procedure was followed, so that the Government knew what lands it could adjudicate and what lands it could not, applications were to be entertained for adjudications of public lands. The opposition procedure was designed, not to accomplish the primary step of preventing private lands from being adjudicated, but to settle disputes where two individuals claimed the right to be adjudicated the same piece of public land.

This inference as to the original purpose of opposition procedure, made from the general structure of the laws, finds specific confirmation in the case of law 20 of 1913. Articles 65 and 66 thereof indicate that oppositions can only be filed by persons claiming to have a preferred right to the adjudication. This is stated to be the case in the Report of the General Administrator of Lands, June 28, 1922, Memoria of Secretary of Hacienda and Treasury, 1922, p. 313. It is further confirmed by the issuance of resolution No. 59 of December 4, 1916, which found it necessary to state that Administrators should not adjudicate lands belonging to private persons, and required an ocular inspection in case of dispute, a special proceeding not granted in case of oppositions.

From 1917 on, however, claimant clearly could have opposed, and she was once permitted to do so under the 1907 law. Indeed the principal strength of the contention of Panama lies in the fact that, on the four occasions when she did oppose, in 1910, in 1920, and twice in 1923, her oppositions were successful, either because the Administrator pigeonholed the petition, or because the petitioner, on examination of the De Sabla titles, voluntarily withdrew.

The United States contends that the opposition procedure was no real protection. This contention is based on three grounds: first, that the notice provided by the law was in fact inadequate; second, that the period allowed for opposition was unreasonably short when the protection of private property was in question; and third, that to be required to oppose every petition is an unreasonable hardship, particularly in a case where applications were as multifarious as in this one.

The assertion of inadequacy of notice is that, although the *edictos* were both posted and published, the boundaries of the land applied for, as described in the applications and consequently in the *edictos*, were customarily so vague that a landowner could not tell whether the land applied for was on his property or not. Indeed the Executive, in resolution No. 59 of December 4, 1916, recognized this to be the case. And even the recorded adjudications are extremely vague as to boundaries and difficult to plot. They commonly refer to the names of adjacent owners, or to being bounded by *baldios*, rather than giving recognizable landmarks.

Panama meets this argument by saying that, if the boundaries of the registered adjudications are sufficiently clear to enable the claimant at the present time to know that they are located on Bernardino, then the boundaries given in the applications, and posted in the *edictos*, must likewise have been clear enough to constitute due notice to the claimant that it was her land that was being applied for. But the boundaries which are now registered did not appear in the applications and *edictos*. The registered boundaries are the result of a survey by the land authorities, made subsequent to the publication of the *edicto*, and the fact that the tracts can be approximately located from their registered boundaries in no way bears on the adequacy of the notice to the claimant contained in the *edictos*. Moreover, it is clearly possible for a stated boundary to be so vague that it does not constitute notice to an owner, upon a bare reading thereof, that the tract applied for is on her land, and yet to be explicit enough so that a licensed surveyor, going over the whole property carefully with that purpose, can testify that the tract is located within the owner's land. This argument of Panama would, if anything, throw doubt on the testimony of the surveyor that the tracts are on Bernardino, rather than on the assertion that the

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

boundaries in the *edictos* were vague. An examination of the recorded boundaries of the adjudicated tracts sustains the claimant's contention in this regard.

In view of the fact that the result of an adjudication on private land might be the uncompensated loss of private property, the period allowed for opposition by the laws, 15 days after a 30-day posting of the *edicto*, also seems unreasonably brief.

There is great force in the contention of the claimant as to the hardship imposed on her by forcing her to resort to opposition on each application. The facts of the case show that one opposition, even when successful, accomplished no more than to kill the particular application opposed, and did not even prevent subsequent grants to the identical persons who had previously been successfully opposed. Beside the many adjudications actually made, a number of other applications were filed which never went to completion. To protect herself by oppositions the claimant would have had to keep a constant watch over the publication of *edictos* and file an opposition to every application which might, by its terms, possibly envisage the adjudication of part of her lands.

The Commission therefore finds that the machinery of opposition, as actually administered, did not constitute an adequate remedy to the claimant for the protection of her property. The contrary contention of Panama is weakened by the fact that, throughout the period in question, high officials of the Government in charge of administering the land laws repeatedly commented publicly on the deficiencies in those laws as administered, with specific reference to the frequency with which private lands were treated as public, in the manner here complained of.

The analogous issues as to temporary licenses may be briefly disposed of. As to the availability of other remedies than opposition, and the legal compulsion on the Alcaldes to grant unopposed applications, the considerations discussed with reference to adjudications are applicable. The laws all contemplated the grant of such licenses only on national property, and there is nothing in them to show that the Alcaldes did not have discretion to deny applications for licenses to cultivate lands known to be private. That the Alcalde of Arraijan did have such knowledge as to Bernardino is established by the evidence (see *infra*).

As to the adequacy of the remedy of opposition to the licenses, the claimant's case is even stronger than with respect to adjudications. No publication of applications for licenses was required by law. As a result, the first knowledge that licenses had been granted came from actual discovery of the licensees on the land. The fact that oppositions were allowed until the land was sown does not relieve the hardship which this system imposed on private owners having large estates. Small tracts can be sown in a very short time. The cumbersomeness of a system which required the claimant to oppose 123 applications for cultivator's licenses, after discovering the licensees on her land prior to planting, and gave her no general remedy, is obvious.

The Commission therefore finds that the authorities should have afforded the owners of Bernardino protection, by denying applications for grants and licenses thereon, and that Panama cannot avoid liability because of the claimant's failure to oppose each application.

We have stated above that the authorities had notice of the location of Bernardino and of the fact that it was the private property of the De Sablas. Let us consider the evidence on which this conclusion rests. In 1910, before the granting of any of the adjudications complained of, title papers and a map were filed with the Provincial Administrator in connection with a successful opposition to an application for an adjudication of Bernardino lands. In 1912, before the issuance of any of the licenses complained of, similar papers were filed,

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

together with a memorial, with the Alcalde of Arraijan. Further notices were given over a period of years both to the Administrator and the Alcalde, and similar notice was forcibly given to higher authorities as well. From 1916 on, there was added the constructive notice arising from the inscription of the property in the public registry. Coupled with these facts, the size of Bernardino, located within the respective jurisdictions of the Administrator and of the Alcalde of Arraijan, and the length of time during which it had been owned by the De Sablas, render it most probable that those officials had actual personal knowledge of the facts relating to the property. Indeed the claimant's son states that the status and extent of Bernardino were generally known to the officials whom he consulted.

Without denying these facts, and without denying the claimant's title, Panama does, however, contend, as a matter of law, that the boundaries and area were never brought to the attention of the authorities in the proper manner. This raises an important subsidiary issue, which rests on three arguments—first, that in the course of the chain of title from its earliest known beginning in 1822, successive owners, while only purporting to pass on the estate they had received, in fact altered the boundaries so as to increase the estate, and that such an alteration was of no legal effect unless accomplished by means of statutory delimitation proceedings to which the state was a party; second, that the land law of 1913 specified a means whereby private owners could give the authorities notice of their boundaries, by presenting their titles and having their land demarcated from the public domain, that this law required the owners to take the initiative in these proceedings, and that the claimant never did so; third, that the claimant herself misled the authorities by a registration of the area of her property as 300 hectares in 1916. These contentions will be discussed *seriatim.*

1. *Alteration of boundaries.* This contention is based on a detailed comparison of the boundaries of Bernardino as stated in the successive deeds and registrations from 1822 to date. The first thing to be noted is that the only possible variation in the boundaries of Bernardino, since the earliest deed, is on the north. The tract is bounded on the west by the Bernardino River, and on the east by the Polonia until it flows into the Aguacate and then by the Aguacate until it flows into the Bernardino on the south. The tract is thus bounded on three sides by well-defined landmarks, and has been so bounded from the start. Panama contends, however, as to the northern boundary, that it was first unjustifiably extended to include the headwaters of the rivers, and then further unjustifiably extended so as to give the *cordillera* as the northern boundary.

But the first deed merely says that the lands extend from the Bernardino to the Polonia, and gives no northern boundary. Taken by itself, this description seems logically to include all the land between the two rivers taken in their entirety, and thus the later mention of the headwaters of these rivers was a clearer specification of the old boundaries, and not an extension.

This description, still without specified northern boundary, was substantially repeated in deeds in 1843, 1853, and 1863. In 1869 for the first time a northern boundary is mentioned, as follows:

". . . and on the North, the *cordillera* from the headwaters of the Bernardino and Cope Rivers to the headwaters of Polonia Brook, with all waters flowing South".

In the absence of any evidence that this statement of boundary was erroneous, and in fact extended Bernardino beyond its previous location, the Commission cannot find that such a description of the property, made and regis-

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

tered in 1869, and standing on the registry for the full prescriptive period prior to 1882, constituted a usurpation of public domain which, after over 40 years, required delimitation proceedings in order to validate the stated boundaries.

Such being the case, the Commission attaches no importance to the slight variations in the successive statements of the boundaries of Bernardino in the public registry established by law 13 of 1913. The first registration, in 1916, though mentioning the 1869 deed, gave as the northern boundary simply *baldíos*. But on February 9, 1920, the Registrar, having examined a copy of the 1869 deed, put on the record a notation that the northern boundary was that quoted above from the 1869 deed. This was confirmed by the record of a formal ocular inspection and judicial decree in 1920 referred to at length below.

Thus Panama's allegation that the boundaries were altered is not sustained by the facts, and the Commission holds that the registration of the boundaries expressed in the 1869 deed was proper.

2. *Demarcation under law 20 of 1913.* This contention has been previously discussed. The 1913 public land law contemplated that the Land Commissions should make a land map, and conduct proceedings to demarcate private property from the public domain. The language of art. 6, which says that owners shall present to the commission their primitive titles "within a reasonable period which it (the Commission) may fix" is ambiguous, taken by itself, as to whether the initiative was to be taken by the commission or the owners. But decree No. 23 of 1913, establishing the procedure to be followed by the Commissions, makes it clear that the plan was for the owners to appear only when summoned by the Commission—a procedure perpetuated in law 63 of 1917.

It cannot therefore be said that the law required the claimant to present her titles to the Land Commissions, and that her failure to do so excuses the adjudications of her property. The law imposed a duty on the Commission, which it never fulfilled, both to make a land map, and to demarcate private from public lands, and it is the failure to perform this duty, over a long period, to which the claimant's troubles are principally attributable.

3. *Alteration in registered area.* When Bernardino was registered in T. J. de Sabla's name in the public registry on September 21, 1916, the boundaries were given, but the area was not. Two days later it was registered in the claimant's name. This inscription largely referred back to that in T. J. de Sabla's name, but gave the area as 300 hectares. There is nothing in the inscription to indicate the source of this figure, though Panama asserts that it must have come from the claimant's own statement in the succession proceedings to her husband's estate. The claimant's son asserts that the figure was a typographical error, and that he first discovered it when he procured a certificate of ownership in 1920, to be attached to a memorial addressed to the Governor. In 1920, after the discovery of the error, ocular inspection proceedings were conducted before the Third Circuit Court, the area was determined to be 3,180 hectares, and the decree of the Court to that effect was recorded in the public registry.

Panama contends first, that during the period of registration at 300 hectares, the authorities are to be excused for making adjudications and grants on Bernardino, because the registry only showed an area of 300 hectares, and the authorities could not know where these 300 were located. The Commission considers this position untenable. The registry stated the boundaries of Bernardino, the property within those boundaries was duly registered in the claimant's name, and no reason is perceived why the number of hectares registered as its area should in any way have induced the authorities to grant petitions for lands falling within the registered boundaries. If we assume that the authori-

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

ties were guided by the registry, then they should not have made grants within the registered boundaries. If they paid no attention to the registry, as seems more likely, then they were not deceived by the error in area.

Panama's next contention is that the ocular inspection, while stated to be a proceeding merely to rectify an erroneous area, actually was for the purpose of altering the boundaries of the tract. This argument has already been discussed in substance. The Commission finds that the ocular inspection was for the purpose stated, and did not involve an alteration of the true boundaries of Bernardino, as registered.

Such being the case, no defect in substance is perceived in the proceedings. A petition was presented to the judge, stating that the purpose of the proceedings was to establish the area of Bernardino, and notice thereof was, as required by law, served on the Fiscal, representing the Government, and on the adjoining landowners, Arias and Icaza. Experts were appointed, one by the claimant and one by the court. They traveled over all the boundaries of the property, and then declared the area to be 3,180 hectares on the basis of their inspection and of the maps before them.

Panama asserts that it was an error for the experts not to use an official map of Panama, instead of the "maps of the Canal engineers" which they stated they used. But the law does not state what maps shall be used, and the fact that the judge approved the survey containing this statement by the experts, and declared the area accordingly, seems conclusive as to its regularity, in the absence of any evidence to the contrary. There is no evidence to show either the impropriety of the proceedings, or that the area thus determined was erroneous.

Panama has failed to establish that the claimant omitted any steps required of her by law in order to establish the boundaries of Bernardino and bring them to the attention of the authorities. The record shows that the authorities had full and legally proper notice of the claimant's rights.

The Commission concludes that the adjudications and licenses granted by the authorities on Bernardino constituted wrongful acts for which the Government of Panama is responsible internationally. It is axiomatic that acts of a government in depriving an alien of his property without compensation impose international responsibility. Panama has attempted to justify the result reached by asserting that the claimant failed to comply with the duties and take advantage of the remedies created by Panaman law. This justification the Commission, for the reasons stated, finds to be unsustained. In so finding, no imputation of bad faith or discrimination is made against the Government of Panama or its land authorities. As the public statements of its high officials show, it was endeavoring throughout this period to bring order out of a chaotic system of public land administration. In such a period of development and readjustment, it is perhaps inevitable that unfortunate situations like the present one should arise. It is no extreme measure to hold, as this Commission does, that if the process of working out the system results in the loss of the private property of aliens, such loss should be compensated.

By reason of art. V of the convention, it is unnecessary to consider the question of what legal remedies were open to the claimant under the laws of Panama, after the wrongful grants had been made by the Government, to obtain redress for the past wrongs, either against the Government or against the grantees.

It remains only to determine the question of the damages caused to the claimant by the adjudications and licenses.

The question of damages is complicated by the fact that the claimant still retains a registered title to the whole of Bernardino, so far as the record of that property gives any indication. In spite of this fact, since conflicting registered

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

titles to the adjudicated portions of the property exist in the names of the grantees of these portions, or, in many cases, in the names of their transferees, the Commission must consider that the Bernardino land which has been adjudicated is permanently lost to the claimant. As to this portion, the Commission holds that the proper measure of damages arising from adjudications is to determine the total number of hectares on Bernardino which have been adjudicated, and the value of Bernardino lands per hectare, from the evidence before the Commission, and to award to the claimant the full value of the number of hectares of her property which have been adjudicated.

Accurate determination of the number of hectares on Bernardino which have been adjudicated is difficult. The United States has presented evidence of 40 adjudications totaling 1,718 hectares, all of which it alleges to be on Bernardino. This allegation is supported by a statement by Francisco Moreira, a licensed surveyor of Panama, and by an affidavit by Orlando del Vasto. Both of these witnesses were familiar with the property and both assert actual knowledge of the locations of the adjudicated tracts. Neither one alleges, however, that *all* the adjudications in question are in their entirety on Bernardino. Panama in her pleadings entered a general denial of the United States allegations, but made no specific contentions as to which tracts it claimed to be off Bernardino.

On this state of the record, the Commission, having examined the recorded boundaries of the adjudicated tracts, and entertaining doubts as to whether all of them were on Bernardino, called upon counsel for further explanation. On the basis of that explanation, and giving due weight to the statements of Moreira and del Vasto above mentioned, the Commission finds that 36 of the 40 adjudications in question were on Bernardino, in whole or in part, and that the total area on Bernardino which has been adjudicated is 1,362 hectares.

We turn now from the adjudications to the matter of cultivator's licenses. The evidence indicates that the bulk of the licenses were on the central and southern part of the property, while most of the adjudications were in the northern part. Presumably, the transitory licenses were granted on unadjudicated land. There were granted in all 123 licenses which were certified to be on Bernardino. The aggregate area of these was 309 hectares. The licenses were all temporary, usually for two years, but there is evidence that the licensees often did not leave at the end of the term and did not observe the proper limitations as to area. There is also evidence that these numerous licenses encouraged trespassers to come on the property. There is evidence also that the licensees destroyed the timber and denuded the soil by improper cultivation.

The claimant asserts a constructive total loss of the property because the breaking up of the continuity of the estate by adjudications, coupled with the damage done to forests and soil by the licensees, have rendered impracticable any development of the land.

Much of the evidence as to the value of the land is unsatisfactory. Most of it relates to the value of the timber which was originally on Bernardino. One witness for the claimant valued the land at $250 per hectare, assuming Bernardino to be in its original condition. Another valued it, apparently as of 1922, at $100 per hectare for agricultural purposes. In 1912, Mr. de Sabla refused successive cash offers of $75,000 and $135,000 for the entire tract. It should be noted, however, that the offerer overestimated the area of Bernardino, giving it as 10,000 acres whereas the correct area appears to have been 7,950 acres or 3,180 hectares. The offerer's agent, William McCoy, who subsequently became comptroller of the American Brakeshoe and Foundry Company, states that he examined and re-examined the property, assisted by expert timber cruisers, and that he considered the property to be worth $100 per

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

hectare. Some light is thrown on value by the fact that the Canal Zone authorities made a practice of leasing land in the Canal Zone at the rate of $5.00 per hectare per year. Carlos Icaza Arosemena, a witness in behalf of Panama and a neighbor of Bernardino, placed the value of 40,000 balboas on Bernardino, apparently in the condition in which it was in 1933. He did not know the extent of the property and disclaimed any knowledge of the value of the forests and even ability to distinguish between different kinds of trees. Ramón Arias F., another witness in behalf of Panama and a neighbor of Bernardino, testified that the lands in Bernardino "may be worth 15 balboas per hectare". He was not acquainted with the lands in their entirety but with that portion of them which adjoined the national highway. He did not know the area.

The higher of the two actual offers made for Bernardino in 1912 was at the rate of $13.50 an acre for the acreage assumed in that offer, and although the would-be purchaser estimated the acreage at too high a figure, this should not affect the value which he ascribed to the property per acre. Taking everything into consideration, the Commission is of the opinion that this offer gives as close an approximation to the true value per acre of Bernardino in its original state as can be reached. On this assumption, converting acres into hectares, we would get a value of $33.75 per hectare.

The Commission concludes that the claimant is entitled to receive $33.75 for each of the 1,362 hectares within Bernardino which have been adjudicated to others and that the balance of Bernardino, amounting to 1,818 hectares, has been deprived of half its value by cultivators licenses and the resulting deforestation and denudation of soil and also by the destruction of continuity resulting from both the adjudications and the cultivators licenses. The result of the computation based on these assumptions fixes the loss of the claimant due to illegal adjudications and licenses at $76,646.25.

The Commission decides that the Republic of Panama is obligated to pay to the United States of America on behalf of Marguerite de Joly de Sabla the sum of $76,646.25 without interest.

Dissenting opinion of Panamanian Commissioner

It is with profound regret I find it impossible to accept the foregoing decision, as I am not in accord with either the grounds upon which it is based nor with the estimate of damages which the Commission considers the claimant has sustained. Lack of time does not permit me to make a detailed analysis of all the arguments given for showing that Panama has incurred international liability for the acts or omissions of Panaman authorities in connection with Mrs. Joly de Sabla's land.

The land laws of Panama, in their aggregate, afford all the guaranties and protection required by landowners; and as recognized by the majority of the Commission the Government of Panama has put forth a continued effort to correct such defects as are inevitable in all legislation, especially in a new country like Panama and one with very limited wealth.

The majority of the Commission places great stress upon the lack of a general map of the real estate of the Republic, the preparation of which was ordered by a number of the National Assembly's enactments. It is to be observed that while such acts of the Assembly had an evidently praiseworthy object, the Assembly itself, doubtless taking into account the scarcity of funds, omitted to include the necessary appropriation in the budget of expenditures for preparing the map, which involves much work and which could not be done in a short time. It is not bold to make the assertion that few countries of the world have such a map and those which they do have in one form or another

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

are the outgrowth of work covering many years. This being the case, it is not conceived how, under international law, the lack of such a map can be the basis of liability.

The majority of the Commission accepts as valid the allegation of the claimant that because on some occasion or other she furnished the Administrator of Land of the Province of Panama and the Alcalde of Arraijan maps and titles to her property, those officials were obligated to refuse flatly any petitions which they might receive for adjudications or permits which might embrace the claimant's land. In connection therewith, several times citation is made of resolution No. 59 issued by the Secretariat of Hacienda and the Treasury on December 4, 1916. It is proper to observe that this resolution was drawn to cover a special case in which the petitioner gave definite evidence of his right of domain and of the bounds of his property. So that in all events the principle established by that resolution would be applicable only in cases of proprietors in a like situation.

The claimant has not accompanied her claim with any definite evidence of the northern boundary of her property and she attempts with a military map inadequate for determining this point to have this Tribunal decide so momentous a question. So it is inevitable to conclude that the claimant presented also to the authorities of Panama equally deficient records or evidence, and the conclusion is not overdrawn that her not filing with this claim the maps she says she furnished to the authorities aforesaid was because those maps would not have served to support her statements.

It is evident, therefore, that the authorities of Panama did not have proper grounds upon which to proceed as desired by the claimant.

In view of the foregoing the logical assumption is that the authorities of Panama did not overlook any legitimate right to which Mrs. de Sabla was entitled and hence that their acts have not been violatory of international law.

The contention advanced by the claimant that it was a heavy burden upon her to be continually watching the publication of edicts and opposing any petition which might involve an encroachment upon her land is wholly ungrounded and can be held only as a more or less able recourse taken by the claimant's attorney to impress the Commission. Unfortunately it seems that the attorney accomplished his purpose as regards my honorable colleagues who, in this case, make up the majority of the Tribunal, probably because they are unfamiliar with both the formalities surrounding such adjudications and with the terrain to which they refer. To show the palpable lack of any ground for this argument, the undersigned will enumerate the adjudications shown in the record and the dates thereof. During the years 1909, 1910 and 1911, there were only five adjudications. There were none in 1912, 1913 and 1914, and one each year in 1915 and 1916. In 1917 there were twelve, three or four adjudications from 1918 to 1922 inclusive, one a year, and one each year in 1923 and 1924. This enumeration shows that the burden of bringing opposition was not so grievous as the claimant would attempt to make [it] appear and that if during the years prior to 1917 the claimant had exercised reasonable vigilance over her property, certainly the petitions during the years following would not have amounted to the number they did and that the adjudications giving rise to this claim would not have been made.

Regarding permits for transitory cultivation, the same observation may be made. The 123 permits to which the claimant refers did not all cover the same period or occur during the same year. With a little effort and reasonable vigilance, Mrs. Joly de Sabla would have been able to prevent those permits becoming effective, if they had been for the cultivation of crops on her property. It is proper to observe here that in the certificate of the Alcalde de Arraijan

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

referring to these permits, they are mentioned as being at Bernardino, without signifying that this means that the permits referred to the property of that name, as there is an adjacent *corregimiento* of the same name. There is nothing in the record to clear up this point.

The evidence submitted to establish the area of the adjudications and the amount of the damage is, as the majority of the Commission recognizes, very deficient. The undersigned considers that with this evidence it is not possible to sentence Panama to pay an indemnity and that hence the claim should be disallowed.

The majority of the Commission considers that the absence of certain evidence of Panama is unfavorable to it, that some value should be accorded the evidence of the claimant, and a decision given in the form rendered. The undersigned is not in agreement with this reasoning, as he considers any award in such circumstances as very hazardous.

Such argument runs counter to the general principle of law that the burden of proof lies on the plaintiff and that the defendant is not under obligation to prove negative facts. With such a finding, in the instant case a claim is held to be established, not because the claimant has presented proof of the assertions made, but because the respondent Government has presented no evidence. The *ex-parte* testimony of Orlando del Vasto and the certificate of Moreira on which the Commission had relied to hold that certain adjudications lay within the property of the claimant and to fix the number of hectares they embrace has a very relative probatory value. There is no other evidence in the record and on the contrary there is grave doubt as to its accuracy, inasmuch as it has not been corroborated by the map produced by the claimant.

After this case was closed, the Commission entertained serious doubts in this regard and decided to ask the Agents for such explanations as they could give relative thereto. These explanations were not, in my opinion, productive of any practical results. The outside attorney of the claimant after continued effort for an entire day ended by relying on the testimony of Del Vasto and Moreira.

For these reasons I am of the opinion that this claim should be disallowed.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm