

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Lettie Charlotte Denham and Frank Parlin Denham (United States) v. Panama

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The Government of Panama in 1929 purchased a right of way through a coffee *finca* belonging to John W. Browne and George A. Browne and improved a road already existing along this right of way. In October, 1930, part of the road was washed out by heavy rains and thereafter there was a general repair reconstruction of the road.

Claim is made for \$500. The first ground on which the claim is based is that the washout above referred to was caused by a negligent construction of the road and resulted in damage to claimants' property. The Commission finds no adequate evidence that the washout was the result of negligent construction. The terrain was of that rough and broken type where washouts are difficult to guard against except by a kind of construction which cannot be expected in connection with small country roads.

The second ground on which the claim is based is that in making the general reconstruction of the road after the washout, the workmen rolled rocks onto the property of the claimants. There is no satisfactory evidence as to the damage caused by this action as distinguished from the damage caused by the washout.

The third ground for the claim is that the right of way purchased by the Government was a strip 8 feet in width along its entire length and that in the reconstruction of the road in some places the final road exceeded 8 feet. The contract under which the alleged 8-foot strip was purchased by the Government has not been put in evidence. The Commission is left in doubt whether the right acquired by the Government was to build a road the usable portion of which was to be 8 feet wide or whether the Government's right was to build a road no portion of which, including cuts and fills, should ever exceed 8 feet. The latter arrangement would have been so unreasonable that it is difficult to believe that it occurred, without clear evidence. If the Government was entitled, under its contract, to a usable road 8 feet wide plus necessary cuts and fills, then there is no evidence in the record that the lawful width was exceeded. Moreover, the lands on which the claimants' *finca* was situated were originally *indultado* lands, the grant whereof by the Government to the claimants' predecessor in title reserved the Government's rights for the construction of roads as set forth in art. 102 of law 20 of 1913. Among the rights reserved in this article was that of taking without compensation the right of way necessary for the construction of *caminos de herradura*. There is some question as to whether this phrase includes ordinary country wagon roads or only trails for horses. At any rate, it is clear that the right of the Government under this article extends to whatever property is required for cuts, fills and drains, and it is not shown that the actual road in question after reconstruction exceeded in width a reasonable allowance for a *camino de herradura* under art. 102, with reasonable extensions for cuts and fills.

The Commission decides that the claim must be disallowed.

LETTIE CHARLOTTE DENHAM AND FRANK PARLIN DENHAM
(UNITED STATES) *v.* PANAMA

(*June 27, 1933. Pages 516-521.*)

PROCEDURE: COUNTERACTION.—DENIAL OF JUSTICE: VIOLATION OF LAW, GOOD FAITH.—INTERPRETATION OF MUNICIPAL LAW. Dissolution of conjugal partnership between first claimant and James Fleming Denham by agreement set forth in public instrument executed before Panamanian notary on Novem-

ber 17, 1917, first claimant declaring to be satisfied with half of ganancial property, and waiving all subsequent participation therein. Will made by J. F. Denham before Panamanian notary on March 4, 1918, designating *inter alia* first claimant, her son (second claimant), and five illegitimate children as heirs. Death of J. F. Denham on March 5, 1918. Petition by wife, claiming right to half of estate, to have settlement of ganancial agreement handled in probate proceedings disallowed by Second Circuit Judge of Chiriquí. Recognition by concubine, mother of illegitimate children, on April 11, 1918, in public instrument executed before Panamanian notary, of, *inter alia*, first claimant's half share in ganancial property, first claimant waiving participation made in husband's will. Approval of this agreement on August 13, 1918, by judge who ordered that proper entries be made in public registry. Action brought by concubine before First Circuit Judge of Chiriquí to annul agreement of April 11, 1918, and cancel entries. Judgment of June 27, 1921: agreement declared null, but entries left to stand. Judgment confirmed by Supreme Court. New action brought by concubine to annul order of August 13, 1918, and cancel entries. Counteraction by first claimant to annul agreement of November 17, 1917, and husband's will of March 4, 1918. Judgment of September 12, 1921: counteraction dismissed, order of August 13, 1918, declared null, entries cancelled, new entries ordered in the name of claimants and illegitimate children in equal shares. Judgment confirmed by Supreme Court. *Held* that no denial of justice committed: no manifest violation of law, no manifest bad faith in application of law or weighing evidence.

Cross-reference: Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de los Norteamericanos Lettie Charlotte Denham y Frank Parlin Denham, Registro No. 13. (Publicación Oficial, Panamá, 1934.)

Bibliography: Hunt, Report, p. 521, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), p. 65; Friede, "*Die Entscheidungen . . .*", Z.a.o.R.u.V., Band V (1935), p. 466.

The United States has presented this claim on behalf of Lettie Charlotte Denham and Frank Parlin Denham for the sum of \$34,104.10 and interest, for loss and damage which it is alleged the claimants sustained as a result of acts of the authorities of Panama in connection with the estate of James Fleming Denham, the deceased husband and father, respectively, of the claimants.

The citizenship of the claimants is duly established.

In the year 1898 James Fleming Denham left his wife and son in the United States of America and took up his residence in El Boquete, Province of Chiriquí, Republic of Panama. The following year, 1899, his family joined him.

Some time later the child fell seriously ill, wherefore Mrs. Denham decided to return with him to the United States. She subsequently resided alternately with her son in California and with her husband in El Boquete. Along about that time Denham entered into illicit relationship with a native woman named Andrea González, by whom he had five children.

This brought about an estrangement between the husband and wife and for some time their relationship was interrupted. In November, 1917, they decided, by mutual consent and according to the laws in force in Panama, to dissolve the conjugal partnership existing as a result of their marriage. The terms and conditions of the agreement are set forth in public instrument no. 1435 executed before notary no. 1 of the Circuit of Panama. The parties thereto declared their conjugal partnership dissolved and Mrs. Denham declared that she had received to her entire satisfaction the sum of B/11,000.00 in payment of half of her

ganancial interest, as follows: B/5,000.00 which she had already received; B/1,000.00 at the time of signing the instrument; and a promissory note payable in San Francisco, California, on November 15, 1919.

The husband, Denham, took over all the assets and liabilities of the partnership to the exclusion of Mrs. Denham, who waived all subsequent participation in the ganancial interests.

The arrangements accessory to this agreement, such as a proposed divorce, were of a private character and are shown in the correspondence exchanged between the spouses on November 20, 1917. In the letters to which reference is made Mrs. Denham expressly ratified the pact made by the public instrument of November 17 of that year and set forth, in part, the following:

"I also promise and agree that, in no case nor under any circumstances will I ask you to contribute to my support, either through legal channels or privately, and I accept the sum stipulated here, \$11,000.00 as my full and complete share of my ganancial property."

Not long afterward Denham returned to El Boquete and his wife proceeded to the United States. On March 3, 1918, at 8 o'clock in the evening Denham was fatally wounded by one Segundo González in the town of Bajo Boquete, Province of Chiriquí. That same night Denham made an open will which it would not have been possible to enforce because it lacked legal requisites.

On the following day, March 4, the wounded man was taken to David for the purpose of sending him, if possible, to the city of Panama.

In the afternoon of the same day Denham made a new will before the notary of the Circuit of Chiriquí and witnesses, as required by law. This will is of record in instrument no. 198 and therein the wife and legitimate child and the five illegitimate children were designated heirs in equal shares, and Andrea González and Manuel Guerra legatees.

Denham died on the morning of March 5 aboard the steamship *David* while *en route* to the city of Panama.

The Second Circuit Judge of Chiriquí, by order of April 6, 1918, opened the testament of James Denham to probate and declared as heirs with equal participation Lettie Charlotte Denham, Frank Parlin Denham, Ana, Virgilia, Roberto, Jaime, and Ricardo González, the last five being children of Andrea González.

Considering that this distribution prejudiced her interests, and believing she had a right to half of the estate, Mrs. Denham made an effort to have the settlement of the ganancial agreement growing out of the conjugal partnership handled in the probate proceedings. The petition to do so was disallowed by the judge, as such a division could only be made separately by way of an ordinary action.

To avoid litigation, Mrs. Denham, in her own right and on behalf of her son, Frank Parlin Denham, as party of one part, and Andrea González, as mother and on behalf of her five minor children, party of the other part, on April 11, 1918, signed instrument no. 335 before the notary of the Circuit of Chiriquí, recognizing Mrs. Denham's half share in the property left by her deceased husband, the other half to be distributed equally among Frank Parlin Denham and the five children of Andrea González. Mrs. Denham waived the participation made in her husband's will; and from the date of the instrument of contract, assumed the administration of the estate until an opportunity should present itself to sell the properties *en masse* or separately. This agreement was, on August 13, 1918, approved by the judge who ordered that the proper entries be made in the public registry.

Believing the rights of her children to be prejudiced by the aforesaid settlement, Andrea González, through her attorney, filed an ordinary civil suit to

annul the contract contained in instrument no. 335 and cancel the entries made in the public registry as a result of the agreement.

The First Circuit Judge of Chiriquí rendered a judgment on June 27, 1921, declaring the agreement of 1918 null, but leaving the entries in the public registry to stand, holding that those entries had been made, not as a result of the agreement, but in obedience to the order of the Second Circuit Judge of August 13, 1918. The Supreme Court of Justice confirmed *in toto* the judgment of the judge of Chiriquí.

The action had as its legal basis the fact that Andrea González had concluded the contract on behalf of her minor children without having obtained the necessary judicial authorization. The claimant has alleged that this omission was remedied by the subsequent approval given by the judge handling the probate proceedings, but the Commission finds such an argument to be unfounded.

On November 7, 1921, Andrea González filed a new action to annul the order of August 13, 1918, rendered in the probate proceedings of the deceased James Fleming Denham's estate, and to cancel the entries made in the property registry as a result of those orders.

The suit was corrected by the plaintiff and when notice was served upon the defendant she answered it and at the same time filed a counteraction to have instrument 1435, and the dissolution of the conjugal partnership incorporated therein, declared null and void; and likewise to have the will, which James Fleming Denham executed before the notary of Chiriquí, instrument no. 198, declared null and void.

To support her action, she alleged, in short, that in the case of the so-called matrimonial capitulations, the inventory of the property belonging to the conjugal partnership as well as other requisites exacted by the Civil Code, had been omitted.

As concerns the will, it was equally alleged that certain essential requisites were omitted and also that the testator could not have possessed the necessary mental capacity for expressing his last will, in view of his serious condition. This litigation gave rise to extended judicial debate, to support which the parties adduced all the evidence they believed pertinent and advanced their respective legal viewpoints. The Circuit Judge of Chiriquí terminated those suits by his judgment of September 12, 1921, in which he declared that the counteraction had not been sustained; that the court order of August 13, 1918, issued in the probate proceedings of the estate of James Fleming Denham, were [*was*] null; that all entries made in the public registry as a result of those orders were cancelled; and, lastly, that the real property registered therein in the name of James Fleming Denham be entered in the name of the heirs, Lettie Charlotte Denham, Frank Parlin Denham, Ana, Virgilia, Roberto, Jaime, and Ricardo González, natural children of Andrea González, to whom the property mentioned belongs in equal shares. This judgment was approved by the Supreme Court of Justice.

The claimants consider that these judgments constitute a denial of justice, as a result of which Panama has incurred international liability.

The Commission has studied carefully all the judicial records of which copies have been presented and does not find evidence of any manifest violation of law or of manifest bad faith in the application of law or in weighing the evidence filed by the parties.

Decision

The Commission decides that this claim should be disallowed.
