

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

**Caroline Fitzgerald Shearer, Administratrix of the Estate of George Fitz-gerald
(United States) v. Panama**

29 June 1933

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The Republic of Panama files this claim in the sum of \$125.00 without interest on behalf of José Azael Ruiz versus the United States of America, for loss and damage which the claimant alleges he suffered at the hands of sailors of the American Navy, on a plantation belonging to him, located on Saboga Island, Archipelago of Las Perlas, Republic of Panama.

The Panaman nationality of the claimant is established.

The facts on which this claim is based happened between the signing and the exchange of ratifications of the convention of July 28, 1926. On the grounds stated in the case of Walter A. Noyes (Registry No. 5) the Commission holds that it has jurisdiction to decide the claim.

In the month of March, 1931, several units of the American Navy held maneuvers in the Archipelago of Las Perlas. Some of the sailors of that fleet landed on Saboga Island and trespassed upon the claimant's property and ate ripe fruit which he had intended to harvest and market. The resultant loss and damage are established by the testimony of witnesses and by a certificate issued by the municipal authority of the island.

This is a case analogous to that of José María Vásquez Díaz (Registry No. 19) in which the Commission has decided that the United States is liable.

Decision

The United States of America is obligated to pay to the Republic of Panama, on behalf of José Azael Ruiz, the sum of fifty dollars (\$50.00) without interest.

CAROLINE FITZGERALD SHEARER, ADMINISTRATRIX OF THE ESTATE OF GEORGE FITZGERALD (UNITED STATES) *v.* PANAMA

(*June 29, 1933. Pages 111-114.*)

PRESCRIPTION UNDER MUNICIPAL LAW.—INTERPRETATION, PROOF OF MUNICIPAL LAW.—EVIDENCE: BURDEN OF PROOF. Acquisition of six-tenths of an acre of *baldío* land on beach, in about 1850, by United States citizen. Enactment in 1882 of Panamanian law converting *baldío* lands into *bienes de uso público* not subject to prescription. Acquisition of land above, in 1886 or 1887, by Mr. George Fitzgerald. Enactment in 1904 of Panamanian law regulating adjudication of "tidal lots". Assertion by Governor of Province that Mr. Fitzgerald had no right but to be adjudicated part of tract on conditions defined by this law. *Held* that claimant failed to prove acquisition of ownership by predecessor, prior to coming into force of law of 1882, by alleged ordinary prescription requiring just title: at material time no public instrument of transfer was registered, and claimant did not show that Panamanian law did not require registration of such instrument as condition for beginning of running of period of possession for ordinary prescription.

Cross-reference: Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de la Norteamericana Carolina Fitzgerald Shearer, Registro No. 3. (Publicación Oficial, Panamá, 1934.)

Bibliography: Hunt, Report, p. 115; Friede, "*Die Entscheidungen . . .*", Z.a.o.R. u.V., Band V (1935), p. 466.

Claim for \$30,000, with interest, is made on behalf of the heirs of George Fitzgerald, deceased. The claimants are American citizens. The claim is based

on the alleged expropriation, without compensation, by the Panaman Government, in 1905, of a property of an area of sixtenths of an acre, occupied by the deceased on the beach of the Island of Carenero, Province of Bocas del Toro. On the property were a wharf and some buildings.

The record of the proceedings before the Commission mentions the chain of persons who had occupied the land since the middle of the nineteenth century until it was acquired in 1886 or 1887 by George Fitzgerald, who on January 12, 1893, sold the property to his brother Charles Fitzgerald, but repurchased it from the latter on November 2, 1894.

When the first holder occupied the plot, it was *baldio* land. According to the Panaman Government it never ceased to be. Consequently, after the National Assembly of Panama in 1904 had enacted a law (no. 62) regulating the adjudication of "tidal lots" in the Province of Bocas del Toro, the Governor of the Province took the view that the only right that Fitzgerald had, was to be adjudicated part of the property, on the conditions defined by that law.

It has been contended on behalf of the claimant that the land subject matter of this claim had become privately owned land by the effect of legislation which conferred ownership of *baldio* lands on persons who cultivated them. The Commission cannot sustain this contention as there is no evidence of cultivation within the meaning of that legislation. The main contention advanced by the Agent of the United States in support of the claim is, however, that ownership had been acquired by prescription, prior to the coming into force of law 48 of 1882 which converted all *baldio* lands into *bienes de uso público* which are not subject to prescription.

In an affidavit of January 5, 1907, George Fitzgerald stated:

"Approximately sixty (60) years ago this property was squatted on by an American named Tinsley who planted thereon coconut trees and built his residence on the said property.

"Tinsley sold during his life to a native of that locality named Taylor. The date of this transaction is not known to me.

"Taylor died approximately forty (40) years ago, and his daughter, Sarah Humphreys, now living in Bocas del Toro, succeeded to the property.

"After succeeding to the property, Sarah Humphreys sold the same to W. C. Downs, who purported to represent the Connecticut Rubber Company. William C. Downs was an American citizen and the conveyance from Sarah Humphreys to him has been recorded in the United States Consular Office of Bocas del Toro, and also recorded in the courts of Bocas del Toro.

"William C. Downs, after his acquisition of the property, invested thereon large sums of money amounting, I am credibly informed, to from \$20,000 to \$25,000 in the construction of two warehouses on the said property built of timber, one of which is seventy-five feet in length by twenty-five feet in breadth, and the other forty-five feet in length by twenty-four feet in breadth—these warehouses are now standing on the said property—and in the construction of a marine railway for the purpose of hauling ships from the water in order to repair the same, and he carried on at this point a general ship building and repairing business.

"William C. Downs subsequently sold the property to an American named Augustus O. Bourne, and Bourne then sold the property to William Brown, the Deed for the said property having been made before the 'Juez Político Caspar Cervera and L. A. Carnica, Secretary'.

"William Brown died in or about the year 1885, and his widow, who is now living in San José, Costa Rica, succeeded to the property, and sold the same to me for cash about the year 1886. The deed from the Estate of William Brown

was not made out and delivered to me, however, until 1891, and bears the date of March 5th of that year, and this deed has been recorded in the Colombian Consular Office in San José, Costa Rica.

"After purchasing this property, I continued the old business of a ship yard and lumber yard, and have continued the same until I was put out in the manner hereafter to be explained."

and also:

"Approximately ten years ago, the Colombian Government having passed a law requiring those owning lots in the Town of Bocas del Toro to make application for their paper title to the said lots, I applied to the Colombian Government in Bogotá for the papers for certain lots owned by me in Bocas del Toro, and at the same time for the papers for this property on the Island of Carenero. This application was made through my attorney. Dr. Franco, and while the title to the lots within the City of Bocas del Toro was granted me. I was refused papers for the property mentioned herein for the reason that 'the Government would not give papers for any land outside of the Town'. I subsequently again applied through Simon López, but the revolution in Panama having started my papers were never returned."

There is no further evidence of the existence of the deed mentioned in Fitzgerald's affidavit except a statement of the acting American consular agent at Bocas del Toro of December 24, 1904, which enumerates the documents presented to him on that day by Fitzgerald, adding that the latter declared his intention to deliver them to the Governor of the Province, for the purpose of proving and perfecting his titles to the properties to which the documents referred.

The date of the conveyance from Sarah Humphreys to William Downs is unknown. The affidavit says that Sarah Humphreys succeeded to her father, Thomas Taylor, the year of whose death Fitzgerald puts at about 1867, but there is evidence in the record that Taylor's wife lived on the property after her husband's death and that it was to her that Sarah Humphreys succeeded.

The prescription alleged by the American Agent is the ordinary prescription, which requires a just title. The Panaman Agent has argued that such title has not been shown, that the deed by which Sarah Humphreys is alleged to have conveyed the property to Downs was not a public instrument as required for the transfer of real property and that the 10-year period of possession, necessary to acquire real property by ordinary prescription, could not begin to run as from that deed, because only the registration of a public instrument could give possession.

This contention has led to lengthy arguments by both Agents.

The Commission, having given due consideration to all that has been advanced by both sides on the subject, is of opinion that the American Agent has not shown that Panaman law did not at the material time require as a condition for the beginning of the running of the period of possession for ordinary prescription, tradition of the possession through registration of a public instrument.

This claim must, therefore, be disallowed.
