

**REPORTS OF INTERNATIONAL  
ARBITRAL AWARDS**

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**RECUEIL DES SENTENCES  
ARBITRALES**

**Claim of the Salvador Commercial Company ("El Triunfo Company")**

8 May 1902

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AWARD OF ARBITRATORS, GIVEN ON 8 MAY 1902<sup>1</sup>—THE CLAIM OF THE SALVADOR COMMERCIAL COMPANY AND OTHER CITIZENS OF THE UNITED STATES, STOCKHOLDERS IN THE CORPORATION STYLED “EL TRIUNFO COMPANY, LIMITED,” WHO HAVE NOT ACQUIRED THEIR STOCK FROM CITIZENS OF SALVADOR OR OTHERS NOT CITIZENS OF THE UNITED STATES SINCE THE DATE OF THE FILING OF THE MEMORIAL OF THE SALVADOR COMMERCIAL COMPANY IN THE DEPARTMENT OF STATE OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Concession—State responsibility—Breach of concessionary contract—Estoppel—By tacit consent—Denial of justice—Definition and scope of—Measure of damages—Exclusion of probable future profits.

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Concession — Responsabilité de l'Etat — Violation d'un contrat de concession — Estoppel — Consentement tacite — Déni de justice — Définition et portée — Evaluation des dommages — Exclusion des profits futurs probables.

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Certain differences having arisen between the United States of America and the Republic of Salvador as to the liability of the last-mentioned Republic to pay an indemnity for the loss sustained by certain citizens of the United States, namely, the Salvador Commercial Company, H. H. Burrell, Luis Maslin, J. H. Ellis, J. B. Hays, and G. F. Thompson, by reason of the action of the Government of the Republic of Salvador in respect of the practical destruction or cancellation of a franchise or concession granted by the Republic of Salvador to certain persons, subsequently duly acquired under the laws of Salvador by a body corporate named and styled “El Triunfo Company, Limited,” of which corporation the said Salvador Commercial Company, a corporation created under the laws of the United States, and whose corporators are citizens of the United States, and other American citizens were the principal shareholders; which said franchise or concession granted for the period of twenty-five years the exclusive privilege to establish in the port of El Triunfo steam navigation, and to carry on coasting trade with adjacent ports, to establish a line of steamers to connect said port of El Triunfo with certain other

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<sup>1</sup> *Papers relating to the Foreign Relations of the United States*, 1900, p. 859.

ports on the Pacific coast of Central America, Colombia, Mexico, and California; with other valuable privileges and powers, and exemptions from governmental liabilities, all as more fully and at large appear in the said franchise or concession, duly executed as a bilateral contract by the grantees thereof, as well as by the executive officers of the Republic of Salvador, on the sixth day of October, in the year of our Lord one thousand eight hundred and ninety-four, and duly ratified in accordance with the constitution of the said Republic by the supreme legislature thereof on the nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-five, to which reference is hereby had and made; as well as to the construction of the said franchise or concession given by the formal act of the executive of the said Republic on the seventh day of November, in the year of our Lord one thousand eight hundred and ninety-four, wherein and whereby the said franchise or concession was declared to embrace and cover the entire Bay of Jiquilisco.

And it having been found impossible to adjust the said differences by diplomatic negotiation, it was agreed by the said United States of America and the Republic of Salvador to refer the said disputes to the arbitrament and award of the Right Hon. Sir Henry Strong, chief justice of Canada; the Hon. Don M. Dickinson, of the United States, and the Hon. Señor José Rosa Pacas, LL. D., of the city of Santa Anna, in Salvador, who, having taken upon themselves the duty of hearing and determining the said differences, do now, in accordance with and by the powers and under the terms of the protocol of the agreement between the said Governments in respect of the said claims, signed at Washington on the nineteenth day of December, in the year of our Lord one thousand nine hundred and one, and after having read and considered the evidence and documents produced by the parties, respectively, and after having heard the parties by their counsel, and after due consideration, proceed to make their award as follows:

That is to say, the said Señor Don José Rosa Pacas, differing from the other arbitrators aforesaid, doth adjudge, award, and determine that the Republic of Salvador is not liable in any way to the said United States in respect of the said claims or to the said claimants; but the said Sir Henry Strong and Don M. Dickinson, being a majority of the said arbitrators, do award, adjudge, and determine that the said Republic of Salvador is liable to the United States for the benefit and behoof of the said Salvador Commercial Company and the other American citizens named in the second schedule to this award annexed in respect of the said claims in the amount of five hundred twenty-three thousand one hundred seventy-eight and  $\frac{64}{100}$  dollars in gold coin of the United States, to be paid with interest at the rate of six per centum per annum from the date of this award until the said amount is paid at the time and in the manner specified in the protocol of submission; and the said two last-named arbitrators do award and declare that the sum of five hundred twenty-three thousand one hundred seventy-eight and  $\frac{64}{100}$  dollars so awarded to be paid to the United States is made up and composed of the several sums or items set forth in the first schedule to this award; and the said two last-named arbitrators do further declare that the said sum so awarded is in respect of the claims of the said claimants, being American citizens, as set forth in the second schedule to this award; and the said two arbitrators who make and sign this award do, in conformity with the requirements of the protocol or agreement of submission, state the grounds of their decision to be that the concession of franchise granted by the Republic of Salvador,

and which became vested in the El Triunfo Company (limited), was arbitrarily and unjustly revoked, destroyed, and cancelled by the Republic of Salvador, as they have more fully explained in a joint opinion signed by them.

In witness whereof, the said Sir Henry Strong and the Hon. Don M. Dickinson, being a majority of the said arbitrators, have signed declared, and published this their award at the city of Washington this eighth day of May, in the year of our Lord one thousand nine hundred and two, the said Señor José Rosa Pacas declining to sign the same.

Henry STRONG  
Don M. DICKINSON

This is the first schedule referred to in the within award:

536/1000th parts of \$750,000, value of the concession and franchise destroyed and annulled by the Government of Salvador . . . . .	\$402,000.00
536/1000th parts of \$28,956.87, the value of the steamer <i>Celia</i> , lost through the action of Salvador . . . . .	15,522.56
536/1000th parts of \$45,000, the value of the property of El Triunfo, taken by the Government of Salvador. . . . .	24,120.00
The expenses of the Salvador Company in endeavoring to secure restoration before intervention by the United States . . . . .	2,671.31
Expenses of prosecuting the claims, exclusive of attorney and counsel fees . . . . .	18,864.77
Attorney and counsel fees . . . . .	60,000.00
	523,178.64
Total amount of award. . . . .	523,178.64

The above schedule contains a statement of the several sums or items of claim of which the sum of five hundred and twenty-three thousand one hundred and seventy-eight and  $\frac{64}{100}$  dollars by the award directed to be paid by the Republic of Salvador to the United States is composed, made up, and allowed.

In witness whereof the two arbitrators concurring in the award have hereto set their hands this eighth day of May, A. D. 1902.

Henry STRONG  
Don M. DICKINSON

This is the second schedule referred to in the within award showing the American corporation and American citizens in respect of whose claims the indemnity mentioned in the said award is awarded and the amount awarded and attributed to each of the said claims, respectively, that is to say:

(501 shares) The Salvador Commercial Company and expenses as shown in Schedule 1 . . . . .	\$494,339.53
(5 shares) H. H. Burrell . . . . .	4,119.98
(10 shares) Luis Maslin. . . . .	8,239.66
(3 shares) J. H. Ellis . . . . .	2,471.97
(2 shares) J. B. Hays . . . . .	1,647.96
(15 shares) G. F. Thompson. . . . .	12,359.54

In witness whereof Sir Henry Strong and the Hon. Don M. Dickinson, two of the arbitrators, have set their hands this eighth day of May, A. D. 1902.

Henry STRONG  
Don M. DICKINSON

*OPINION OF HENRY STRONG AND M. DICKINSON*

This controversy has its origin in schemes to establish and develop a new port on the Pacific coast of Central America, in the Republic of Salvador, on the Bay of Jiquilisco.

For years, as the greatness of the natural resources of Salvador had been discovered and understood, the attention of capital, both foreign and domestic, had been directed to the subject of founding another, and, as was hoped, a better port for the purposes of commerce, and one to which the larger and richer resources of the Republic, both in agriculture, including cotton and tobacco, its rich woods, and its mineral wealth, might most economically be made tributary, and which should also be a port of distribution for imports.

As early as 1850 the Bay of Jiquilisco, in connection with this subject, had been brought to the attention of the investing world by well-known writers, whose positions and residence in Central America made their statements impressive. In these statements the Rio Lempa, as "the most important natural feature of Salvador," in connection with its proximity to estuaries of the Bay of Jiquilisco and the great advantages of a port which might be established on that bay, were pointed out.

Prior to the exploitation and development of the concession involved in this case, substantially the only ports of the Republic for commercial purposes had been those of La Libertad Acajutla and La Union, neither of which had certain commercial advantages that would appertain to a new port if established in Jiquilisco Bay, and all of which were subject to objections as seaports which at the new port would be obviated.

As time went on and knowledge of the conditions and of the possibilities of the development of the country became more widespread interest in the subject increased. The Government of Salvador, however, had never undertaken the improvement of the harbor within or the ship entrances to Jiquilisco Bay.

In the late summer or fall of 1894 contesting petitions were presented to the Government of Salvador for a concession of the right, for a period of years, to establish steam navigation in the port of El Triunfo, setting forth the details of the proposed enterprise. One application was presented by Simon Sol, Luis Lopez, and Lorenzo Campos, and the other by Henry H. Burrell and George F. Thompson, citizens of the United States, and Gustavo Lozano and Emeterio S. Ruano, citizens of the Republic of Salvador. The proposals were published in the official journal of the Republic by the proper executive department of the Government, and bids were invited for the franchise so sought.

These proceedings resulted in the awarding of the franchise or concession to the Burrell party, and on October 6, 1894, the Republic of Salvador granted them, for the period of twenty-five years, the exclusive right of steam navigation of the port, together with certain valuable privileges and as valuable exemptions. The grant was in the form of a bilateral contract, signed by the executive officers on behalf of the Government of Salvador as party of the one part and by the grantees as party of the other part.

On November 7, 1894, to forestall any possible misunderstanding or narrower construction in future as to the extent of the concession the President of the Republic officially construed the contract as covering the entire Bay of Jiquilisco.

The constitution of Salvador requiring that such a concession must be submitted to the supreme legislature for ratification, it was so submitted and ratified by that body on April 15, 1895.

There can be no doubt that the privileges conferred were of very great value, but in turn there were most onerous reciprocal obligations.

The grantees' privileges were exclusive as to steam navigation of the port to connect with any line of steamers then in existence or which might thereafter be es-

tablished, and to transship passengers, products, and merchandise which should be exported through the port, to carry on the coasting trade with adjacent ports, to establish a line of steamers to connect with other ports of Central America, Colombia, Mexico, and California.

And not only did the exclusive privileges apply to the port of El Triunfo but they were attached to such other places on Jiquilisco Bay and its estuaries as the company might establish for embarkation and debarkation and for the export of the natural products of the country.

The grantees were given the right to import, free of duties and taxes, all materials necessary for founding, constructing, and maintaining all works pertaining to the enterprise; exemption from taxes on all their property, franchises, and operations; exemption of their employees from military service; exemption from the use of stamped paper and revenue stamps in making contracts within the scope of the business, and the free use of the telegraph and telephone lines operated by the nation. The Government further agreed to do its utmost to keep the roads open between the port of El Triunfo and the coffee centers of the department of Usulután—the department or municipal subdivision in which Jiquilisco Bay was situated.

But the grantees of the concession or contract executed, as we have seen, on October 6, 1894, were required by its terms to have in readiness by March 1, 1895, such facilities at the port of El Triunfo as would enable them to handle and ship through the port the coffee crop of the year 1895, and furthermore, that during that year, unless prevented by unforeseen emergency or superior force, they must have the traffic definitely established, together with the construction and furnishing of a building for a Government custom-house not less than 60 varas (165 feet) long, with offices for the customs collector and his employees, and for the telegraph and telephone line, to be constructed wholly by the grantees at their own expense, and that such building and its furniture were to belong to the Government as of its own property; together, also, during that year, with the construction of such other buildings and other works the company might consider necessary for its own use, and the construction of a pier of iron and steel having the necessary conditions of strength and convenience for embarkation and disembarkation of freight and passengers, the construction of which was to be under the inspection of the Government, in order to assure compliance with the conditions of strength and convenience.

The pier also was to be the property of the Government, and the grantees were to provide steamers, steam tugs, launches, and such other boats as the traffic should require. The concession also required the procuring and placing at the expense of the grantees of such buoys as should be necessary to mark the entrance to the port, together with the erection of a light-house to indicate the entrance *if the Government should deem it necessary*.

It was provided, too, that the company should carry without charge the high officials of the Government, and all its employees when traveling by order of the Government; all materials of war and merchandise which the Government might embark by means of the company, if the property of the Government. The grantees were to carry correspondence by mail between the port and wherever they might have steamers plying, and were to give free pilotage to Government ships when entering or departing from El Triunfo, and were to pay \$1,200 per year, silver of the country, in monthly payments, during the entire twenty-five years. The tariffs to be imposed by the grantees, both for passengers and freight, for embarking and disembarking, were also to be approved by the Government.

The concession also required that the grantees should form a corporation to take and operate the concession.

Thereupon, on October 25, 1894, that corporation was formed, and is called throughout the case El Triunfo Company, Limited. The capital stock of the corporation was divided into 1,000 shares.

This capital stock was acquired and distributed as follows: the Salvador Commercial Company, a corporation created and existing under the laws of the State of California, which, as clearly appears by the record, was the moving projector and spirit in the enterprise of developing the port of El Triunfo and in acquiring the concession, took a majority of the stock, that is to say, 501 shares. Henry H. Burrell, who was made the president of El Triunfo Company, and who was an American citizen, acquired and held 5 shares. Julius H. Ellis, who became the secretary of El Triunfo Company, and who was an American citizen, acquired and held 3 shares; J. B. Hays, an American citizen, 2 shares; Luis Maslin, an American citizen, 2 shares, and George F. Thompson, an American citizen, 15 shares, so that the total shares held by citizens of the United States in El Triunfo Company were 536 in number.

It is apparent that upon the execution of its contract with the Salvador Government, through which the concession was acquired, and upon the formation of the corporation required by the concession, El Triunfo Company entered upon the preparation and development of the port, and the performance of the requirements imposed upon it, with exceptional enterprise and vigor.

The concession having been granted on October 6, 1894, and the corporation having been formed with its American representation within nineteen days thereafter, there being no nucleus at the port or even the beginning for a dock, or a known ship harbor within Jiquilisco Bay, it did, nevertheless, within four months and four days from the date of its incorporation—that is to say, on March 1, 1895—through many difficulties and embarrassments naturally incident to the initiation of such an enterprise, have that port ready, with sufficient equipment of every description to move and ship the coffee crop of 1895, and did ship that crop.

It is worthy of comment and deserving of consideration, in view of subsequent events, that this work was done under such circumstances, when in addition to the difficulties attendant upon every entirely new enterprise, requiring conception and creation from the beginning, it was also done in the face of the fact that the supreme legislature of the Republic of Salvador, from the date of the concession until the port was equipped and ready for business on March 1, 1895, had not ratified the concession or contract under which the work was done, and did not ratify it until April 19, 1895, so that the money was raised and the port practically created with no certainty that the grantees of the concession would ever receive the right to hold it or the value created by them by their work and expenditure in the port of El Triunfo.

There can be no doubt on this record that the company pushed forward the work of permanent equipment from March 1, 1895, with the same vigor and enterprise as had been displayed in the preparation for the shipment of the crop of the year 1895; for within one year and twenty-seven days from March 1, 1895, we find the president of the company reporting to the Government the entire completion of the permanent work and a full compliance with the contract on the part of those to whom the concession had been given.

This report was true, and this statement does not rest in any degree upon the testimony of the president or that given by or on behalf of the claimants, but upon the reports of the proper officials of the Government of Salvador, viz, its inspector-general, its secretary of the treasury, and its secretary of public works, who all report the completion of the enterprise in accordance with the contract, and a full compliance with their obligations in that regard by the grantees of the concession.

The grantees of the concession did much more.

Beginning at once upon the grant of the concession, and even before its ratification by the supreme legislature of Salvador, they brought about, by persistent efforts and powerful influence upon the Government of the United States, a hydrographic survey of the entrance and harbor at this port by the authorities and

instrumentalities of that Government. The ships of the United States began to arrive at the port in the month of December, 1896, for this purpose, and their survey, prosecuted continuously thereafter at a cost, as claimed by the record, of \$100,000 in gold, established the fact that the port of El Triunfo was one of the best and safest on the Pacific.

The official chart of the entrance and of the whole bay was issued by the Hydrographic Office of the United States, the depth of water on the bar was shown at high and low tide, the ample width and the straightness of the channel were demonstrated, as well as the fact that the distance across the bar was but a few hundred feet, and that the water in the channel inside the bar and throughout the entire bay was of entirely sufficient depth for the largest vessels.

As to establish the port it was essential that the safety of vessels entering and departing should be assured, there was probably nothing which could add so much to the advantage of the Government of Salvador, a maritime country, in respect of its commerce tributary to the interior, as this survey by the United States. Clearly it was a permanent addition and increment to the resources and wealth of the nation, and this was brought about almost wholly by the enterprise and energy of the American citizens who entered upon the enterprise of developing the port of El Triunfo, and was so added without any legal obligation to do so resting upon them by the contract or concession of October 6, 1894, or otherwise.

A very large amount of testimony has been presented to the arbitrators by the opposing sides in this controversy bearing upon the history of El Triunfo Company and its affairs and management from the beginning of its operations to the closing of the port of El Triunfo by the executive authority of Salvador in February, 1899. It has been the effort of counsel for Salvador to show at this hearing that the company did not comply with the terms of the concession either before or after the reports of the executive officers of the Government showing the completion of the preparation and equipment of the port for carrying on the business, as required by the concession.

It is of course obvious that the Salvador Government should be estopped from going behind those reports of its own officers on the subject and from attacking their correctness without supplementary evidence tending to show that such reports were induced by mistake or were procured by fraud or undue influence. No evidence of this kind is introduced. But were it otherwise, after the most careful and painstaking consideration of the evidence we are unable to discover anything in the record having any proper tendency to show any substantial or material failure of the company in this regard.

Having expended the necessary capital, and having received the official approval of the Government of compliance with the concession, it is still contended by Salvador that in the details of the management of its affairs and of the port, and in carrying on the business committed to it with the means it had provided, the company did not fully and in good faith perform its duty in its administration of the affairs of the port under the powers and privileges granted and in accordance with its liabilities under the concession.

From the beginning of 1896 to the autumn of 1898 it is evident to us, from the entire record, that the volume of business which came to this port after it was equipped and opened by El Triunfo Company was even larger than anyone, the most sanguine of the investors and believers in the profitable future of the enterprise, had anticipated. They had expected success. This induced the investment, encouraged and spurred on the spirit of enterprise which accomplished so much under the circumstances as hereinbefore detailed within the short period from October, 1894, to March 1, 1895, and in the year following, by the completion of the permanent improvements.

But it is not to be wondered at that the rapid increase of business, necessarily unanticipated to a degree, should have strained to some extent the capacity of the



first equipment and facilities provided to handle the business. As in all new ventures, the means and methods at first adopted were necessarily to a degree experimental. The distances from other and settled points of supply necessarily had to be met, and difficulties arose in getting skilled labor for the handling of the various kinds of products and merchandise, for additions and repairs to buildings, for the manning of ships, as well as in getting common laborers promptly, as the work increased beyond expectation.

The correspondence in evidence shows many such embarrassments which were surmounted. Promptness and evenness in the transaction of the business of the port could hardly be expected under the circumstances. But with all this it can not be said, as now here claimed by the Government of Salvador, that there was any such failure in the performance of its obligations in the circumstances of the case as would have justified or sustained a complaint for a breach of contract in a court of justice if this franchise had been a contract between private parties. Much less was there any such breach of contract on the part of El Triunfo Company at any time as would have justified a forfeiture of a dollar in damages against the company, or of a right granted it under the concession.

The complaints, when examined and analyzed, were few and insignificant. That the company met and overcame such emergencies as necessarily arose is shown by the fact that although the business from the fall of 1895 to the middle of 1898, a period of less than three years, increased in the matter of shipments alone to the extraordinary amount of between four and five hundred per cent, yet the facilities and equipment, as supplemented, improved, and provided, were not overwhelmed by this increase and on the whole were substantial and well kept up.

Naturally no profit was shown in the years 1895, 1896, and 1897, but the tendency to the meeting of both ends was certain from the beginning and increased with added momentum, demonstrating the future greatness of the enterprise, until, from the beginning of the year 1898, a steady balance of net profits was shown as long as the company operated, which was half the year, aggregating at the end of that time, according to the testimony introduced on behalf of Salvador by that Government's official accountant, the sum of \$17,000 over and above all losses and expenses of every kind, and according to the testimony introduced on behalf of the Salvador Commercial Company a much larger amount.

There can be no doubt that the record proves to a demonstration that the enterprise, which may properly have been considered an experiment up to the beginning of 1898, although it had shown an improving financial condition from the beginning of its business, was an assured financial success, equaling if not exceeding the most sanguine expectations of its promoters by this showing of profits on the steadily increasing business at the close of the first half of that year. A careful examination of the voluminous evidence in the case shows that from March 1, 1895, to the close of the first half of 1898 the percentage of gains on expenses and losses regularly increased at the rate of about  $33\frac{1}{3}$  per cent per annum.

It is clear to our minds that as soon as the success of the enterprise was so demonstrated, and its future as an exceptionally paying enterprise was assured, an intrigue commenced within the company, whose object was to oust the management and control the American interests and to wrest the concession from their hands and to appropriate it and the entire investment of the American shareholders for the benefit of the conspirators. There can be no other reasonable explanation of the events that now rapidly followed the stage of its affairs where the showing of profits and the percentage of increase promised such large returns for the future.

At the annual meeting of the shareholders, held on June 10, 1898, a full board of directors was elected, including Burrell and Ellis and Simon Sol, who had been one of the competitors for the concession as against the Burrell interests when it was granted in 1894. On the same day the board of directors met and organized, reelecting

Burrell president, Sol as vice-president, and Ellis as treasurer. At the next general meeting of the shareholders, held on July 31, 1898, one of the Salvadorean directors resigned his office as director and secretary, and Luis Lopez was elected to fill the vacancy.

It may be of significance in passing that this is the same Luis Lopez who, joining with Sol, was a competitor for the franchise as aforesaid as against the American or Burrell party in 1894. At the meeting of directors held on this same day this same Luis Lopez was appointed secretary of the company.

In September, 1898, while the president of the company was at the city of San Salvador on its business, Sol assumed the office of president by clear usurpation and without any authority whatever, and without notice to Burrell or Ellis assumed to hold a meeting of directors at his own house in Santiago de Maria, at which the only attendants besides himself were the said Lopez and one Cochella, and then and there passed a resolution removing Burrell from the position of president and putting himself in his place, and removing J. H. Ellis from the position of treasurer and putting Cochella in his place; so that the three, Sol, Lopez, and Cochella, the only attendants of the said alleged meeting, became by their own act the president, secretary, and treasurer of the company. Burrell received no notice of this meeting within time to reach it, and Ellis received no notice at all. These proceedings were clearly fraudulent and void, as shown by the record.

On October 14, 1898, another so-called meeting of the board of directors was held, which was assumed to be an extraordinary or special meeting, according to the minutes. This meeting was attended by Burrell and Ellis, although they received no notice of it; but having casually heard of it, in an endeavor to protect the interests of the American investors whom they represented, presented themselves.

Motions were offered by them in proper form at this meeting, and Sol, acting as president, refused to put the motions. Without detailing further the wholly illegal character of the meeting and of its proceedings, and the falsity of its minutes, the fact may be stated that under its proceedings a petition for adjudication of the bankruptcy of the company was authorized, and almost immediately filed in the court of first instance at Santiago de Maria, under the authority of the said alleged directors. Promptly following, on October 19, five days after the so-called meeting was held, a form of adjudication of bankruptcy was made by the court, and one Meardi was appointed receiver and custodian of the property and effects of the company.

This receiver at once possessed himself of all the books, papers, vouchers, and correspondence of the company and its officers, and these were withheld from the American investors and from their representatives. From that time free access to these papers was wholly denied them until after these proceedings were pending in Washington, and even then large quantities of such papers were never produced for their inspection. Immediately following this proceeding Ellis and Burrell, the sole representatives of the American capital invested in the company, were driven from Salvador in fear of their lives.

The Salvador Commercial Company and the other American investors in this enterprise, who had pushed it to success, were far away in California, unaware of these proceedings or any of them, but at the earliest time after they received advice of them they took measures to undo the transactions of the conspirators. In the meantime a civil war broke out in Salvador, throwing everything into confusion. A successful revolution was inaugurated and by it the existing administration was overturned. But as soon as it was possible under the circumstances representatives of the Salvador Commercial Company came to the Republic and undertook to have the acts of the conspirators vacated, the company rehabilitated by the action of its stockholders, all to the end that the proceedings in bankruptcy might be set aside and the directorate chosen by them reinstated in the management.

The bankruptcy proceedings were, in our opinion, the result of a fraudulent conspiracy, which successfully imposed upon the court in which the proceedings were taken. On February 12, 1899, in order to move in the only proper legal manner for the restoration of the company's rights and its rehabilitation by turning out the conspirators and installing a representative directorate to move in the matter, a meeting of the shareholders was called, to be held on February 28, to concert measures for these purposes. The call for the meeting was published in the official journal of the Republic on February 13, 1899.

On the day following the president of the Republic issued an edict closing the port of El Triunfo against all importations. Thus was the first step for relief met, thus was the concession stricken down and practically canceled and destroyed, and thus every effort of its owners and the American shareholders to extricate it from the results of the fraudulent manipulation of the conspiracy was paralyzed.

The Salvador Commercial Company presented to the Government its solemn protest against this decree. Every effort was made by the representatives of the American shareholders to obtain its revocation. All were in vain, and on May 13 the executive granted a concession to others, citizens of Salvador, of everything that had been covered by the franchise and concession of October 6, 1894. The owners of the American interests presented their solemn protest to the executive against this grant, but no attention was paid to it or to them.

Then followed the appeal of the American citizens interested to their Government for its intervention for their protection and for reclamation.

In view of this history it need hardly be said that the evidence discloses that at the time the proceedings in bankruptcy were taken by the false and fraudulent representatives of this company no creditor had complained and no creditor had a just cause of complaint against it for nonpayment of its debts. On the contrary, its complete financial success and the certainty of its prosperous future had been but then completely assured.

It is claimed that the United States can not in this case make reclamation for its nationals, the shareholders in El Triunfo Company who had thus been despoiled, for the reason that such citizens as so invested their money in the Republic of Salvador must abide by the laws of that country, and seek their remedy, if any they have, in the courts of Salvador; and, moreover, that before reclamation can be successfully urged against Salvador on their behalf it must be shown that such citizens of the United States, having appealed to the courts of the Republic, have been denied justice by those courts.

The general proposition of international law as thus stated is not denied.

If the Government of Salvador had not intervened to destroy the franchise and concession of El Triunfo Company, and thus despoiled the American shareholders of their interests in that enterprise, an appeal might have been, as it was evidently intended to be, made to the courts of Salvador for relief from the bankruptcy proceedings. The first step to that end would be the turning out of the conspiring directors and the installment of a proper directory by the supreme authority of the corporation, the shareholders' meeting.

But by the executive decrees, rather than by the bankruptcy proceedings, the property rights of the American citizens involved were irrevocably destroyed.

Seeking redress through a called meeting of the shareholders of the company, the moment the call was issued, and it appeared that the proper remedy was to be sought by the corporation itself, showing that the proceedings by its alleged representative directors for bankruptcy were fraudulent, and that the bankruptcy court had been imposed upon by their conspiracy, in fraud of the incorporators, whom they falsely pretended to represent, that moment the Government of Salvador came to the aid of the conspirators and by executive act destroyed the only thing of value worth retrieving through the courts.

It is not the denial of justice by the courts alone which may form the basis for reclamation against a nation, according to the rules of international law.

There can be no doubt—

Says Halleck—

that a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.

The law enacted by the Congress of Salvador in relation to foreigners provides (art. 39):

Only in case of the denial of justice, or of a voluntary delay of its administration, can foreigners appeal to the diplomatic forum, but only after having exhausted in vain the ordinary remedies provided by the laws of the Republic.

It is apparent in this case that an appeal to the courts for relief from the bankruptcy would have been in vain after the acts of the executive had destroyed the franchise, and that such a proceeding would have been a vain thing is the sufficient answer to the argument based upon this law of Salvador.

What would have profited these despoiled American citizens if they had successfully appealed to the courts for the setting aside of the bankruptcy proceedings, after the concession was destroyed by the closing of the port of El Triunfo and the grant of the franchise to strangers?

Said Mr. Fish to minister Foster:

Justice may as much be denied when it would be absurd to seek it by judicial process as if denied after being so sought.

Again, this is not a case of the despoliation of an American citizen by a private citizen of Salvador, on which, on appeal to the courts of Salvador, justice has been denied the American national, nor is it a case where the rules applying to that class of reclamations, so numerous in international controversies, have to do. This is a case where the parties are the American nationals and the Government of Salvador itself as a party to the contract; and in this case, in dealing with the other party to the contract, the Government of Salvador is charged with having violated its promises and agreements by destroying what it agreed to give, what it did give, and what it was solemnly bound to protect.

Some one of the most respected authorities in international law, Lewis Cass, has laid down the undoubted rule and its exception, as broad as the rule, when he says that—

When citizens of the United States go to a foreign country, they go with an implied understanding that they are to obey its laws and submit themselves in good faith to its established tribunals. When they do business with its citizens, or make private contracts there, it is not to be expected that either their own or the foreign government is to be made a party to this business or these contracts, or will undertake to determine any dispute to which they give rise. \* \* \*

The case is widely different when the foreign government becomes itself a party to important contracts, and then not only fails to fulfill them, but capriciously annuls them, to the great loss of those who have invested their time, labor, and capital in their reliance upon its good faith and justice. <sup>1</sup>

In any case, by the rule of natural justice obtaining universally throughout the world wherever a legal system exists, the obligation of parties to a contract to appeal

<sup>1</sup> Wharton's *Digest*, section 230.

for judicial relief is reciprocal. If the Republic of Salvador, a party to the contract which involved the franchise to El Triunfo Company, had just grounds for complaint that under its organic law the grantees had, by misuser or nonuser of the franchise granted, brought upon themselves the penalty of forfeiture of their rights under it, then the course of that Government should have been to have itself appealed to the courts against the company and there, by the due process of judicial proceedings, involving notice, full opportunity to be heard, consideration, and solemn judgment, have invoked and secured the remedy sought.

It is abhorrent to the sense of justice to say that one party to a contract, whether such party be a private individual, a monarch, or a government of any kind, may arbitrarily, without hearing and without impartial procedure of any sort, arrogate the right to condemn the other party to the contract, to pass judgment upon him and his acts, and to impose upon him the extreme penalty of forfeiture of all his rights under it, including his property and his investment of capital made on the faith of that contract.

Before the arbitrament of natural justice all parties to a contract, as to their reciprocal rights and their reciprocal remedies, are of equal dignity and are equally entitled to invoke for their redress and for their defense the hearing and the judgment of an impartial and disinterested tribunal.

It follows that the Salvador Commercial Company and the other nationals of the United States who were shareholders in El Triunfo Company, as hereinbefore named, are entitled to compensation for the result of the destruction of the concession and for the appropriation of such property as belonged to that company, excepting such property as was accumulated and constructed under the terms of the concession, to be vested in and owned by the Republic, to the extent of the interests of such American citizens in said concession and such property.

Under the terms of the protocol and by the accepted rules of international courts in such cases, nothing can be allowed as damages which has for its basis the probable future profits of the undertaking thus summarily brought to an end. Notwithstanding the evidence of the computable rate of increase of earnings and profits from the beginning until the end of the first half of 1898, and although the concession by its terms still had twenty-one years to run, yet we are precluded by the rule mentioned from assuming that the rate of profits would increase during the remainder of the term in the same ratio, or at all, or even that it would continue to earn at the rate actually shown by the evidence of Salvador itself, heretofore cited.

If on the tangible evidence for the assessment of the valuation of the franchise we give its value, in our view we can give nothing even for the cost of the buildings and structures erected by the capital of the company which, by the terms of the franchise, were to become the property of the Republic. Neither can we give any award for the expenditure made through the procurement of the company by the United States in the survey and charting of Jiquilisco Bay and its entrance, however much such structures and such survey may add to the permanent wealth of the Republic of Salvador.

On the clear and certain evidence before us, without involving ourselves in speculation, but computable on the uncontradicted and direct evidence presented, we find the value of the franchise, computed without reference to future or speculative profits or any speculative or imaginary basis whatever, to be \$750,000. We think also that damages should be awarded for the value of the steamer *Celia*, less the balance of her purchase price, which remained unpaid at the closing of the business of the company. We find also that the value of the property of the company taken and left in Salvador, which was not the property of the Government, as before stated, but which was exclusively the property of the company, to be \$45,000.

We are of opinion that the claimants before this tribunal are entitled to recover costs and reasonable attorneys' fees. Attorneys and counsel have been employed to

obtain relief from the Government of Salvador before the intervention of the Government of the United States was invoked. Since intervention eminent counsel have been employed whose residence and places of business are in California, and these, since the latter part of 1899, have been almost constantly employed in this matter both at Salvador and at Washington, at distances far remote from their places of residence and business.

These expenses have been exclusively borne by the Salvador Commercial Company. Before intervention by the United States they disbursed in that behalf, according to the evidence, irrespective of attorneys' fees, \$2,671.31 in an effort to secure rehabilitation of El Triunfo Company. After intervention by the United States the expenses of prosecuting this reclamation, borne by the Salvador Commercial Company, exclusive of all attorney and counsel fees, have been, according to the evidence, \$18,864.77.

We are of opinion that fair compensation for such attorneys and counsel employed after intervention, including their services rendered at the capital of Salvador and at Washington, is \$60,000. Of the valuation of the franchise, of the damages for the *Celia* and the property taken as above stated, we think the Government of the United States is entitled to recover, for the behoof of its nationals involved in this matter, each its or his proportion in accordance with the number of shares held in Triunfo Company. Limited; and as those shares were divided into 1,000 of \$100 each, each of the American citizens, including the Salvador Commercial Company, will be entitled, through the Government of the United States, to receive of this award for such property such proportion of the amounts as the number of shares held by each bears to the total number of shares of the company.

Aside from its share in the damages last mentioned, which would be represented by its 501 shares in El Triunfo Company, the Salvador Commercial Company is entitled to receive as a part of its damages all of the said expenses paid out and the attorney and counsel fees, in which the other stockholders, having contributed nothing, have no share.

We have not discussed the question of the right of the United States under international law to make reclamation for these shareholders in El Triunfo Company, a domestic corporation of Salvador, for the reason that the question of such right is fully settled by the conclusions reached in the frequently cited and well-understood Delagoa Bay Railway Arbitration.

The particulars and items of the damages found are definitely stated in the formal award and its schedule this day signed.

Henry STRONG  
Don M. DICKINSON