AWARD OF ARBITRATORS, GIVEN ON 2 MAY 1902[1]— THE CLAIM OF ROSA GELBTRUNK

Certain differences having arisen between the United States 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, Maurice Gelbtrunk and Isidore Gelbtrunk, members of the firm of Maurice Gelbtrunk & Co., by reason of the loss and destruction of merchandise belonging to the said firm during the occupation of the town of Sensuntepeque, in the month of November, 1898, by a revolutionary force, the said merchandise having been carried off, stolen, or destroyed by the soldiers of the said revolutionary army, which claim was afterwards assigned by the firm of Maurice Gelbtrunk & Co. to Rosa Gelbtrunk, the present claimant; and it having been found impossible to adjust the said differences by diplomatic negotiation, it was agreed by the said Republics to refer the said disputes to the arbitrament and award of the undersigned, Sir Henry Strong, chief justice of Canada; the Hon. Don. M. Dickinson, of Michigan, and the Hon. Señor Don 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, after having read and considered the evidence and documents produced by the parties, respectively, and having heard the parties by their counsel, proceed to make their award, as follows:

The said arbitrators do award, declare, and adjudge that the said United States is not entitled to any payment or indemnity in respect to the claim made by the said Rosa Gelbtrunk.

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[1] *Papers relating to the Foreign Relations of the United States,* 1900, p. 876.

In witness whereof, the arbitrators above named have signed and published this, their award, at the city of Washington, this 2nd day of May, in the year of our Lord 1902. Done in quadruplicate and in the English and Spanish languages.

Henry STRONG
Don M. DICKINSON
José ROSA PACAS

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OPINION OF HENRY STRONG

In 1898 Maurice Gelbtrunk & Co., a partnership firm composed of Maurice Gelbtrunk and Isidore Gelbtrunk, both of whom were American citizens, were engaged in carrying on a mercantile business in the Central American Republic of Salvador.

In November, 1898, there was a revolution in Salvador and a revolutionary force occupied the city of Sensuntepeque, where a quantity of merchandise of the value (in silver) of $22,000 and upward, belonging to the firm of Gelbtrunk & Co., was stored. There is no dispute as to the value of these goods or as to the fact of their being the property of Gelbtrunk & Co. The soldiers of the revolutionary army possessed themselves of the goods—"looted" them, in short—and sold, appropriated, or destroyed them. It does not appear that this was done in carrying out the orders of any officer in authority or as an act of military necessity, but, so far as it appears, it was an act of lawless violence on the part of the soldiery. The firm of Maurice Gelbtrunk & Co. having assigned their claim against the Republic of Salvador to the present claimant, Rosa Gelbtrunk, the wife of Isidore Gelbtrunk, Mrs. Gelbtrunk (who, following the status as regards nationality of her husband, was also an American citizen) appealed to the Government of the United States to intervene on her behalf in claiming indemnity for the property lost. The Government did so intervene, and having failed to bring about a satisfactory settlement by diplomatic negotiation, it was agreed by the United States and Salvador to refer this claim to the arbitrators to whom another claim by the United States against Salvador had already been referred. The arbitrators in question were the Hon. Don M. Dickinson, Don José Rosa Pacas, a citizen of Salvador, and myself. After having read the evidence and documents produced by the parties and heard the learned and able arguments of counsel, we came unanimously to the conclusion that the United States had failed to establish a right to indemnity on behalf of the claimant.

I now write this opinion not on behalf of my brother arbitrators, but as stating exclusively my own personal reasons for the conclusion arrived at.

There is no dispute as to facts. It is admitted, or cannot be denied, that the members of the firm of Gelbtrunk & Co. were American citizens; that the merchandise looted or destroyed in respect of which the claim is made was of the actual value stated; and, further, that it was stolen or destroyed by the soldiers as alleged. The only point for decision is that principally argued, namely, the right, upon established principles of international law, of the United States to reclaim indemnity for a loss accruing to its citizens upon the facts stated.

The principle which I hold to be applicable to the present case may be thus stated: A citizen or subject of one nation who, in the pursuit of commercial enterprise, carries on trade within the territory and under the protection of the sovereignty of a nation other than his own is to be considered as having cast in his lot with the

subjects or citizens of the State in which he resides and carries on business. Whilst on the one hand he enjoys the protection of that State, so far as the police regulations and other advantages are concerned, on the other hand he becomes liable to the political vicissitudes of the country in which he thus has a commercial domicile in the same manner as the subjects or citizens of that State are liable to the same. The State to which he owes national allegiance has no right to claim for him as against the nation in which he is resident any other or different treatment in case of loss by war—either foreign or civil—revolution, insurrection, or other internal disturbance caused by organized military force or by soldiers, than that which the latter country metes out to its own subjects or citizens.

This I conceive to be now the well-established doctrine of international law. The authorities on which it has been so established consist of the writings of publicists and diplomats, the decisions of arbitrators—especially those of mixed commissions—and the text of writers on international law. Without proposing to present an exhaustive array of authorities, I may refer to some of these.

In the case of Anthony Barclay, a British subject, having a commercial domicile in Georgia at the time of the march of General Sherman's army through that country, the mixed commission appointed under the treaty of Washington of May, 1871, disallowed a claim made for wanton destruction of valuable property—books, china, furniture, and works of art—it having been proved that this spoliation was committed by the soldiers of the army not only without authority, but in direct disobedience of the orders of the general commanding. (Papers relating to Arbitration of Washington, vol. 19, p. 50.)

In 1849 there were rebellions and political insurrections in Naples and Tuscany in the course of which British subjects suffered losses for which they claimed indemnity from the governments mentioned, and the British cabinet intervened diplomatically on their behalf to obtain it. It having been insisted by the British agents that Austria, which had furnished succor to the Italian governments, was liable, reclamations were made at Vienna, which were promptly refused. In his note in reply to the British Government, Prince Schwartsenberg insisted on the principle which seems to apply to the present case. That diplomat expressed his opinion as follows:

Lorsqu'un étranger se fixe dans une contrée autre que la sienne et qui vient à être en proie aux horreurs de la guerre civile, cet étranger est tenu d'en subir les conséquences. Le Prince ajoutait que, quelque disposées que pussent être les nations civilisées d'Europe à étendre les limites du droit de protection, jamais cependant elles ne la seraient au point d'accorder aux étrangers des privilèges que les lois territoriales ne garantissent pas aux nationaux.

The question did not, however, rest here. The Government of Great Britain applied to Russia to act as arbitrator of the claim, but that power refused to accept the office of arbitrator, inasmuch as to do so would be to cast doubt upon what it considered to be a plain and well-established principle of international law generally accepted by civilized nations; and the Russian chancellor, Count Nesselrode, expressed himself in the same terms as the Austrian minister. (Calvo, ed. 5, vol. 3, p. 144.)

The expression of this rule of law by the Austrian and Russian Governments in the Tuscany case was approved by Mr. Seward, Secretary of State, in a dispatch to the Austrian minister to the United States of the 16th of November, 1865, from which the following passage is extracted:

> It is believed to be a received principle of public law that the subjects of foreign powers domiciled in a country in a state of war are not entitled to greater privileges or immunities than the other inhabitants of the insurrectionary district. If for a supposed purpose of the war one of the belligerents thinks proper to destroy neutral property, the other can not legally be regarded as accountable therefor.

> By voluntarily remaining in a country in a state of civil war they must be held to have been willing to accept the risks as well as the advantages of that domicile. The same rule seems to be applicable to the property of neutrals, whether that of individuals or of governments, in a belligerent country. It must be held to be liable to the fortunes of war. In this conclusion the undersigned is happy in being able to refer the Austrian Government to many precedents of recent date, one of which is a note of Prince Schwartsenberg of the 14th of April, 1850, in answer to claims put forward on behalf of British subjects who were represented to have suffered in their persons and property in the course of an insurrection in Naples and Tuscany. (Wharton, vol. 2, p. 577.)

The same doctrine is laid down by another distinguished Secretary of State, Mr. Bayard, in a letter to Mr. O'Connor of the 29th of October 1885, wherein he says:

> However severe may have been the claimant's injuries, it must be recollected that like injuries are committed in most cases where towns are sacked, and that aliens resident in such towns are subject to the same losses as are citizens. It has never been held, however, that aliens have for such injuries a claim on the belligerents by whom they are inflicted. On the contrary, the authorities lay down the general principle that neutral property in belligerent territory shares the liability of property belonging to the subjects of the state. (Wharton, vol. 2, p. 581.)

Again, we find Mr. Marcy, Secretary of State, in 1854 using similar language, as follows:

> The undersigned is not aware that the principle that foreigners domiciled in a belligerent country must share with the citizens of the country in the fortunes of war has ever been seriously controverted or departed from in practice.

And this passage is quoted with approval in a letter from the Attorney-General of the United States to the Secretary of State. (Wharton, vol. 2, p. 586.)

These citations might be largely added to, but those already made are sufficient to show that the rule that aliens share the fortunes of citizens in case of loss by military force or by the irregular acts of soldiers in a civil war is firmly established.

It is, however, not to be assumed that this rule would apply in a case of mob violence which might, if due diligence had been used, have been prevented by civil authorities alone or by such authorities aided by an available military force. In such a case of spoliation by a mob, especially where the disorder has arisen in hostility to foreigners, a different rule may prevail. It would, however, be irrelevant to the present case now to discuss such a question. It therefore appears that all we have to do now is to inquire whether citizens of the United States, in the matter of losses incurred by military force or by the irregular acts of the soldiery in the revolution of November, 1898, in Salvador, were treated less favorably or otherwise than the citizens of Salvador.

To this inquiry there can be but one answer: They were not in any way discriminated against, for the legislature of the Republic in providing indemnity for such losses applied the same as well to foreigners as to the citizens of Salvador.

For these reasons I am of opinion that we have no alternative but to reject this claim.

Henry STRONG,
President

I concur.

Don M. DICKINSON

APRIL 26, 1902.

I concur in your respect-worthy opinion.

JOSÉ ROSA PACAS

APRIL 26, 1902.