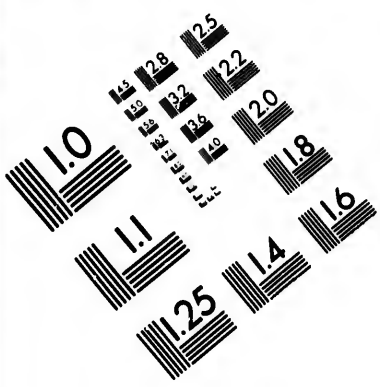

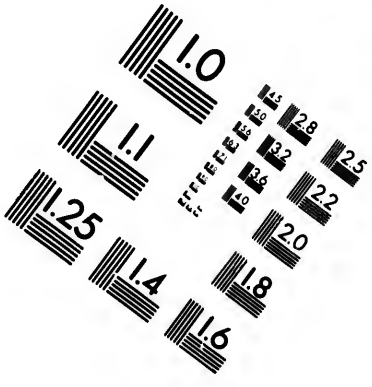

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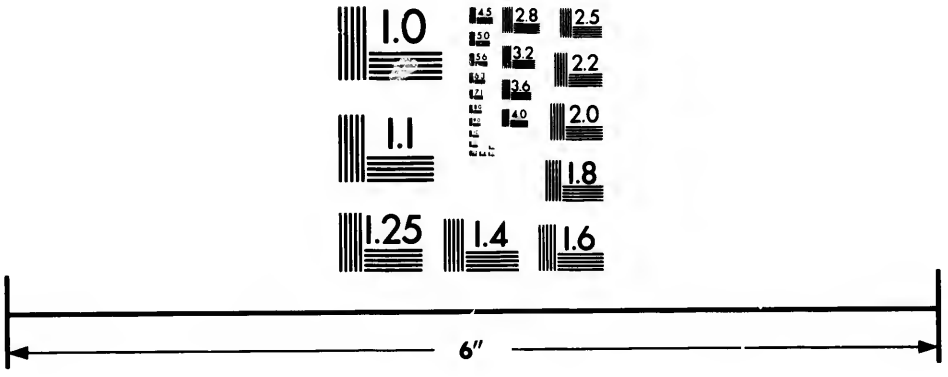

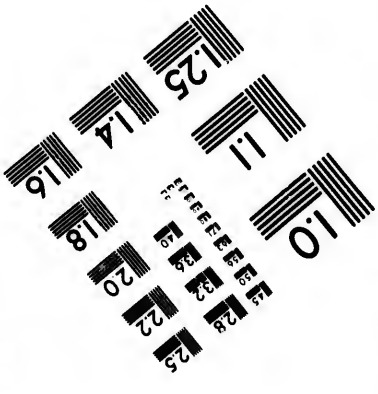

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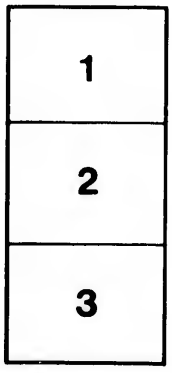

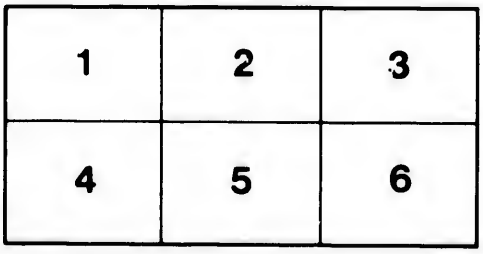

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A.

From the Author

THE

OREGON QUESTION

DETERMINED BY THE

Rules of International Law.

BY

EDWARD J. WALLACE, M.A.,

BARRISTER-AT-LAW, BOMBAY.

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THE

OREGON QUESTION.

THE public discussion to which the Oregon Question has been recently subjected in England and in America has already produced one portion, at least, of its usual effects: misapprehensions of mere matters of fact have been cleared away; apocryphal accounts of the geography of the country, and of the history of its discovery, which were current in earlier periods of the dispute, have been rejected, while the data on which the definitive settlement of the controversy must, in any event, be founded, are assuming at length a tolerably fixed and authentic form. It is now no longer disputed that the continuation of the great continent in a north-westerly direction from the Mexican provinces on the Pacific, and the general outline of the coast, were first ascertained by the Spaniards; the more exact configuration of several portions of it, or their isolation from the mainland, being subsequently determined by British or American traders, in their transient visits for purposes of commerce. One succeeded in sailing round Queen Charlotte's Island, another penetrated several leagues into the Straits of Fuca, a third was fortunate enough to succeed in running his ship over the bar at the embouchure of the principal river, until at

last Vancouver laid down a complete and accurate chart of the whole coast; and overland expeditions from the United States and from Canada threw a light upon the physical geography of the interior. But if we turn from these, the mere facts of the case, to the legal conclusions which are sought to be drawn from them,—if we take a single step towards the inquiry, how far these data are decisive of the rights of the two contending governments,—we find ourselves at once engaged in a conflict of the most irreconcilable dogmas; every one of which is nevertheless propounded by its author, as "an undisputed principle of International Law."

Thus, the British government insists upon the principle, that "the earth is the common inheritance of mankind, of which each individual, and each nation, is entitled to appropriate a share by *Occupancy and Cultivation**." On the other hand, the government of the United States, (regardless of the inconsistency), besides claiming whatever it may appear to be entitled to on the footing of *Occupation*, sets up one claim to the territory on the ground of *Discovery*, and another on the ground of *Contiguity* to Louisiana. If we turn to the writers on the question at home, we find almost every one bringing forward some theorem or verbal formula of his own, which, however incon-

* These are the terms in which Dr. Wheaton, in his "Elements of International Law," enunciates the claims made by the British government in the Nootka negotiations with Spain. They were the same in the time of Queen Elizabeth, and remain the same now.

sistent it may be with those of all his predecessors, or with the position taken by the diplomatists of his own country, he seems to suppose will be sufficiently accredited as "an undisputed principle of International Law," upon the mere guarantee of his private assertion.

Accordingly, we read of titles by *Discovery*, which are either (1) *perfect* or (2) *imperfect*, (3) in favour of the individual discoverer or (4) in favour of the discoverer's sovereign: the two latter being made moreover dependent on other additional circumstances, such as, whether the discoverer held a commission from his sovereign, or whether his sovereign thinks proper to accept the territory discovered. There is also the title by *Contiguity;* but what contiguity means, or what are the limitations to be annexed to it, no two persons are agreed: this title moreover, it appears, may also be either *perfect* or *imperfect*, though what the value of an imperfect title is, needs more explanation than has been given. Lastly, there is the title by *Prescription*, which, as applied to a territory where, by the hypothesis, no sort of right has ever yet been exercised, is not a little unsatisfactory. And the result of the whole is, that the claim of Great Britain is pronounced by the "Foreign Quarterly Review" to be perfect on all of these grounds, and by the "Edinburgh" to be imperfect upon each of them.

In this state of the controversy, it is obvious that the bare assertion of this or that proposition, as a rule of International Law, is no longer of any avail;

for there is no conceivable dogma, bearing upon the question at issue, of which both the affirmative and the negative have not been asserted once and again. If, therefore, we would help the dispute to a peaceable conclusion, it will be necessary to pass from assertion to proof, establishing the truth from the concurrent testimony of the recognised writers on International Law. By these means, and by these alone, the public in either country can be enabled to form for themselves an opinion entitled to the character of a rational conviction. For the people of Great Britain, on the one hand, have to justify to their consciences the extreme measures that may become necessary for the vindication of their rights. The people of the United States, on the other hand, have to satisfy themselves, that, in yielding in the present instance to the claims of Great Britain, they are making no concession to an arbitrary demand, but to the principles of that system to which all civilised nations have given their assent, bearing in mind the eloquent injunction of their own Chancellor, contained in his celebrated "Commentaries on American Law," viz. that "*no civilised nation, that does not arrogantly set all ordinary law and justice at defiance, will ever venture to disregard the uniform sense of the established writers on International Law.*"

To collect, and state in their own words, the general sense of all the established writers on the particular questions in dispute in the Oregon Controversy, is the object of the following pages. But we shall proceed, in the first place, to point out what those questions are.

It is asserted, then, by England, to be a general principle of the Law of Nations, that "the earth is the common inheritance of mankind, of which each individual and each nation is entitled to appropriate a share by *Occupancy and Cultivation*." It is further asserted, as a matter of fact, that her subjects have been proceeding peaceably from time to time, since the commencement of the present century, with her sanction, and without dispossessing any former settler, to *Occupy* a considerable portion of the Oregon Territory, thereby acquiring valuable territorial rights; and, that, such being the case, it is the solemn and inalienable duty of the British government, to protect and assist its subjects in the maintenance of those rights against the aggression of any foreign power; and to reserve the power of adding those settlements to its own domains at any period it may think proper; conceding, of course, a similar power to the government of the United States, in regard to any portion of the territory that may be found to be in the occupation of their citizens under similar circumstances.

In opposition to this claim, the government of the United States, passing over the undoubted fact of British occupation, asserts itself to have been previously entitled to the *Eminent Domain* of the country, to a greater or less extent, (for to *what* extent has never yet been very exactly defined), but, at all events, to a considerable portion of the territory now in the possession of the British.

To lay a foundation for this claim, the Government of the United States falls back upon the voyages of discovery made by the old Spanish navigators, to the benefit of which it alleges itself to have become entitled by treaty; or, if that should be considered too infirm a basis for such a pretension, then it insists on the discoveries made by its own citizens, and particularly on the fact of Gray, in 1792, having been the first to cross the bar of the principal river; and also upon the over-land expedition of Lewis and Clarke, in 1805, from the Rocky Mountains to the sea. Or, if the dogma of *Discovery* should fail, then it is contended that Oregon ought to be considered as having been French territory by virtue of its *Contiguity* to Louisiana, and as having consequently passed to the United States by the treaty of 1803. Or, if both *Discovery* and *Contiguity* should fail, then, once more changing the line of argument, it takes up the principle of *Occupation;* but, not content with the application to its own case of this principle as enunciated by Great Britain, (which, as we have seen, would entitle it to take its stand on so much of the territory as American citizens may be found to be now actually in possession of), it asserts a title to the Eminent Domain of every district in which any of its citizens may at any time heretofore have been temporarily settled, notwithstanding that such settlements may have been made without knowledge or authority of the Government, and have passed by regular transfer into the hands of foreigners.

From this statement of the claims of the two

countries, it will be apparent that there is a conflict between them upon no less than *three* Questions of International Law:—

1*st* The question, whether the mere *Discovery* of a vacant country, unaccompanied by settlement, gives the discoverer (or the discoverer's sovereign) a right to exclude other persons subsequently coming to occupy.

2*ndly*. The question of the limitation, in a wider or a narrower sense, of the phrase "*Contiguity*;" or, in other words, of the extent of *Environ* to be attached to a territorial acquisition in the midst of an otherwise unoccupied region.

3*rdly*. The question of the conditions under which the right of *Eminent Domain* of the Mother Country attaches to the settlements of her subjects in unoccupied territory, so as to render her acquiescence in a transfer of their territorial acquisitions to foreigners essential to the validity of the title of the latter or of their sovereign.

We propose to discuss these three questions in their order; but the affirmative of the proposition involved in the first question, maintained by the United States, and which puts forward the right of the first mere *Discoverer* in opposition to the right of the first industrious *Occupier*, is so important in its consequences, and proceeds upon so serious a perversion of several elementary principles of Law, that we shall feel ourselves justified in entering into it at greater

length than the others, introducing likewise the judgments passed upon it by the established authorities, with a short review of the fundamental considerations upon which publicists have agreed to erect this portion of the structure of International Law.

The origin of the right of Territorial Property, whether as regards states or individuals, is usually explained and illustrated in a general way, as follows:—The Earth and all that it contains are naturally and necessarily presumed to have been destined by the Creator for the use of Man: and this use, or the right to it, was originally common to all; but, as the members of the human family multiplied, it was found to be for the benefit of all that such land as was required to be occupied should be occupied in severalty, rather than in common. This was the origin and justification of separate and exclusive property throughout the world; and, in order to avoid the disputes which would be likely to arise between several persons who might be desirous of appropriating the same tract, this rule (also of universal prevalence) was adopted; *viz.* that he who was the first to make *a beneficial use* of the land should be allowed to continue it, to the exclusion of those that came after. If any man, therefore, entertained the wish, or intention, not to make a beneficial use of a particular district himself, but merely to exclude others, his case obviously did not come within the policy of the rule, which was to encourage the most beneficial possible use of the land. Again, if one man entertained the

wish, or intention, to make a beneficial use of a particular district, and even promulgated his intention to every one so to do; but another, entertaining the same wish and intention, should proceed before the first had put his intention into practice, actually to make a beneficial use of that district, it is equally clear that the rule would favour the latter rather than the former; for the object of the rule was actual *use* of the land, and there being obviously no certainty that the *intention*, however loudly expressed, would ever issue in the *fact*, the fact accomplished was allowed to deserve the better title. This rule has been acknowledged in all systems of *Municipal* Law* to have been the true and only basis of proprietorial rights between individual men as they existed upon the face of the earth anterior to the introduction of municipal legislation. Now the condition of individual men in that phase of their existence is for the present purpose precisely analogous to the actual condition of independent sovereign powers. It would therefore be a natural conclusion, that the right to territory, as regards sovereign states also, should remain a right in common, and not in severalty, until an actual *beneficial occupation* was established by some one state; and that of those that might actually proceed to establish that beneficial occupation, the one that was first in order of time would have the better right. And, accordingly, we shall find that *Occupation*, as

* Digest, 41. 1. 3.: Quod nullius est, id ratione naturali *occupanti* conceditur. And see *Ib.* 41. 2. 1.; Black. Comm., book ii, chap. 16, and notes.

distinguished from mere wish or intention, or the barren exercise of some bodily faculty, as of mere sight or original *Discovery*, is the sine quâ non of all the established writers on the acquisition of *International* rights of property in vacant countries.

And the reader shall now be put into a position to judge for himself of the truth of this assertion.

Grotius, de Jure Belli et Pacis.—" Thus we may see what was the original of the Right of Property: for it was derived, not from any mere volition or act of the mind [non animi actu solo], since in that case one man could not possibly know what others had designed to appropriate to themselves, that he might abstain from it, and, besides, several might have had a mind to the same thing at the same time; but it resulted (in virtue of a certain compact among mankind) either from actual division or from *occupation* [occupatio] . . . . For the community of goods being in progress of time found to be inconvenient, and no actual division of all things being yet made, it must be taken to have been universally agreed, that whatsoever any man should have first proceeded to *occupy*, that should be allowed to remain exclusively his own [ut quod quisque *occupâsset*, id proprium haberet] *."

And, again: " In order to acquire the domain, it is necessary there should be a *corporeal possession* [corporalis † quædam possessio] ‡."

* Lib. ii, cap. 2, s. 5. See also lib. ii, cap. 3, ss. 1, 4.

† *Corporalis;* id est, ipsum ut corpus in nostrâ potestate sit. (Note by Gronovius, ad loc.)

‡ Lib. ii, cap. 8, s. 3.

Puffendorf, de Jure Naturæ et Gentium.—"This rule, therefore, for settling the disputes between two claimants, has been agreed upon; *viz.* that the title to the territory shall vest in him who is *the first to occupy it* [primo occupatori], *not in him who happens first to come in sight of it* [non ei, qui primùm in conspectum venit] *."

Again: "We are *then* properly said to have *occupied*, when we have *taken actual possession* [quando possessionem adprehendimus]; but the mere seeing a thing, or the knowing where it is to be found, will confer no title at all [vidisse autem tantùm, aut scire ubi quid sit, nondum ad possessionem sufficere judicatur] †."

Bynkershoek, de Dominio Maris.—"A state cannot stretch the limits of its domain beyond the reach of its actual power of bodily detention and restraint [ultra detentionem *corporalem*] ‡."

And, again: "Besides the mere will to exercise control, there must be actual control physically exercised §."

Burlamaqui, Principes.—"The dominion over vacant countries is to be acquired by *taking possession* of them ‖."

Vattel, Droit des Gens.—"All mankind have an equal right to things that have not yet fallen into

* Lib. iv, cap. 4, s. 5. See also *Ib.*, s. 9.

† Lib. iv, cap. 6, s. 8. See also *Ib.*, ss. 2, 3.

‡ *Ib.*, cap. 1.

§ Opera omnia, fol. edit., vol. ii, p. 136: Præter animum, possessionem desidero.

‖ Part iv, chap. 9, s. 6. See also chap. 8, s. 4.

the separate possession of any one: such things belong to the first *occupant* [*premier occupant*]. When, therefore, a nation finds a country uninhabited and without an owner, it may lawfully appropriate it; and, after it has sufficiently made known its will in this respect, it cannot be lawfully deprived of it by any other nation. Thus navigators, going on voyages of discovery, furnished with a commission from their sovereign, and meeting with islands or other lands in a desert state, have taken possession of them in the name of their nation; and the title thus acquired is generally respected, *provided that a real possession has presently followed* [pourvu qu'une possession réelle l'ait suivi de près] *."

And, again: " Nature, having intended the whole earth to supply the wants of the general family of mankind, gives a nation the right of appropriating particular districts to itself, *only for the purpose of its making some real use of them*, and not for the purpose of hindering other nations from deriving advantage from them. The law of nations, therefore, will not acknowledge the proprietorial or sovereign right of a nation over any uninhabited countries, except those which it has *really and in point of fact occupied* [occupés réellement et de fait], in which it has formed some *settlement*, or of which it makes *some actual use*. In fact, when navigators have met with desert countries, in which those of other nations had, in their transient visits, erected some monument to shew their having

* Livre i, chap. 18, s. 207.

ta.. n possession of them, they have paid as little regard to *that empty ceremony* [vaine cérémonie], as to the regulation of the Popes, who divided a great portion of the world between the crowns of Spain and Portugal*."

Von Martens, Précis du Droit des Gens Moderne de l'Europe.—"Assuming occupation, therefore, to be physically possible, it is further necessary that it should take place *in point of fact* [qu'elle ait lieu effectivement], and that the act of taking possession should accompany the manifestation of a design of appropriating the object. The simple declaration of the will of a nation is no more sufficient to impose upon others the duty of abstaining from the use or occupation of the object in question, than a papal grant, or than a private agreement between two (other) particular claimants. The bare fact of having been the first to discover or visit an island, &c., which is then forthwith abandoned again, and whereon no permanent indications remain of the possession and of the declaration of the discoverer's claim, is admitted by all nations, without opposition or dissent, to be insufficient to found any right: and the erection of such things as crosses, landmarks, inscriptions, &c., has been often denied, and with good reason, both by sovereigns and theoretical writers, to be effectual for acquiring or maintaining an exclusive title to a country of which no real use is made†."

Pinheiro Ferreira, note ad loc., (in his edition of

* Liv. i, s. 208.

† Liv. ii, chap. i, s. 37.

Martens: Paris, 1831).—"The right of property among nations is derived from the same principle as the right of property among individuals anterior to all social compact; . . . and certain acts there are, which, independent of all social compact or express stipulation, confer a right of territorial property; namely, *possession* and user [possession et l'usage]. Thus it is, that a nation, upon discovering a country previously unoccupied, *if it proceeds to make settlements or establishments there*, either for the purpose of agriculture or of any other branch of industry, acquires, by that bare act the property therein*."

Again, the same author, in his note on Vattel, liv. i, c. 18:—"When the question is raised, whether such and such a territory belongs or not to such and such a nation, the point to decide is, not whether that particular nation has the wantonness or caprice to forbid the approach of other nations to it, (having itself all the while no intention of turning it to its own advantage); but the point to decide is this: Has the nation put the territory *to any profitable use?* Is it *in possession*, or does it exercise the ordinary powers of possession? Is it engaged in any measures for the development of its natural resources? If nothing of this sort has been done, the question is at end. It would be as weak to respect such a pretension, as it is preposterous to put it forward †."

* Martens, Précis, edit. Paris, 1831, avec des Notes par Pinkeiro Ferreira, ancien ministre des affaires étrangères en Portugal, tome i, p. 379, note.

† Vattel, edit. Paris, tome iii, p. 200.

Klüber, Droit des Gens Moderne de l'Europe, 1831: —"A state may acquire property in things which belong to nobody [res nullius] by *occupation;* in things which belong to another, by contract. . . . . In order, however, that the occupation should be valid and effectual, the object itself ought, 1, to be such as is naturally susceptible of an exclusive proprietorial right; 2. It ought to belong to nobody; 3. The state ought to have the deliberate intention of acquiring property in it; and, 4, ought, moreover, to *take actual possession* of it, that is to say, ought to have it entirely at its own disposal and *within its own physical control* [entièrement à sa disposition, et dans son pouvoir physique]*." And, again: "By lawful *occupation* the right is first acquired; by continuous possession it is maintained." And, again: "In order to acquire property in a thing by the means of *occupation*, it is not enough merely to entertain the design of acquiring it, or to give ourselves the credit of possession by a mere process of the mind. Even a public announcement of our design to occupy, made before occupation actually effected by another, will not suffice to exclude the latter †. It is necessary that we should, moreover, have been in point of fact *the first to occupy* [il faut qu'on ait réellement occupé le premier]; and it is by this means alone, by the acquisition thus made of an exclusive right over the particular object,

* Tome i, s. 125.

† For instance, the bare discovery of an island will not suffice. (Klüber).

that we can impose upon the rest of the world an obligation to abstain from it *."

Heffter, International Law of modern Europe †." —" The acquisition by a state of new territory can only be effected, according to the rule of International Law, by one of the following means:—1. By treaty; 2. By natural accretion; 3. By *occupation*. . . . .

"3. The acquisition of territory by the means of *occupation* is subject to these restrictions:—

1. It obtains only in the case of things which are by their natural condition susceptible of exclusive possession.
2. It requires a deliberate intention on the part of the occupying state to hold the territory in permanent subjection to its own authority.
3. *It must be accompanied by an actual taking of possession*, whereby the design of a continuing appropriation is demonstrated, and wherewith the arrangements or institutions requisite for the exercise of the functions of exclusive sovereignty are to be connected. On the other hand, *mere verbal declarations or manifestoes, and transient inanimate tokens of an intended appropriation*, are altogether insufficient for any legal purpose ‡.

Oppenheim, System of International Law§.—" The

* Klüber, tom. i, s. 126.

† Das Europäische Völkerrecht der Gegenwart, by A. W. Heffter, Professor of Law at the University of Berlin, &c.: 1844.

‡ Sect. 70. See also s. 69, n. (1), on the necessity of physical possession.

§ System des Völkerrechts: Frankfort, 1845.

acquisition of new territory may be effected either by *occupation* or by treaty; but originally, and in the first instance, by that which is the only duly recognised and effectual method, conformable alike to the law of nature and of nations, by *occupation, not by mere discovery, but by actual taking of possession*, or by conquest [nicht durch die blosse Entdeckung, sondern durch Einnahme, Eroberung]*."

These quotations, it is presumed, are sufficient to warrant the enunciation of the two following propositions, as expressing "the general sense of the established writers on International Law":—

1*st.* That the *Discovery* of territory, whether made by a private individual or an officer in the service of an independent state, if unaccompanied by actual occupation or user, gives no right to exclude subsequent settlers.

2*ndly.* That actual Occupation confers an exclusive title upon the first actual occupant.

The first proposition destroys at once the pretensions of the United States, founded on the proceedings of the Spanish navigators, and of their own citizens, Grey, Lewis, and Clarke; and the country must, therefore, be treated as having been, at the conclusion of the expedition of the latter, as perfectly free and open to settlement as if it had still remained a terra incognita.

And the question comes to this, who were the first actual occupants of Oregon, and have they maintained

* Oppenheim, chap. vii, s. 8. See also s. 4.

their occupation? Now, in the year 1806, the British fur traders made their appearance in the northern portion of the territory; and this is the era of the commencement of the first fixed, methodical, and continuous occupation of the country,—the first actual use made of it,—the first regularly conducted attempt to develope its natural resources. The English, indeed, as well as the Spaniards, Russians, and Americans, had, we know, visited the coasts long before, for trading purposes; but there is no evidence that any *settlement*, even of the most trifling kind, was ever made in Oregon, till Mears, the Englishman, built his huts, in 1788, on a small spot of land in Nootka Sound. But this was a settlement of too trifling and temporary a character to form the foundation of any claim of proprietorial right at the present day. Mears was forcibly dispossessed by the Spaniards, who built a fort, and held military occupation for some months. But their settlement was wrongful in the first instance, and was on that ground abandoned; and they have never subsequently occupied any place on the coast north of San Francisco.

In the year 1811 some trading posts were established on the lower portion of the river Oregon (to which the British fur traders of the North-west Company had not yet extended their operations) by the partners and servants (British subjects and United States citizens combined) of the Pacific Fur Company. The posts thus occupied were sold in 1813 to the British North-west Company, who thus acquired an

occupatory footing in the southern portion of the territory, down to the mouth of the river Oregon.

Of the present state of British occupation some idea may be gained from the following details:—

Fort Citrille, the principal establishment of the Hudson's Bay Company in the basin of the north branch of the Oregon River, is thus described by Mr. Spaulding, an American missionary: — "It stands on a small plain, of 2000 or 3000 acres, said to be the only arable land on the Columbia, above Vancouver. There are one or two barns, a blacksmith's shop, a good flour-mill, several houses for labourers, and good buildings for the gentlemen in charge. Mr. M'Donald raises this year (1837) about 3500 bushels of different grains, such as wheat, peas, barley, oats, corn, buckwheat, &c., and as many potatoes; has eight head of cattle and one hundred hogs. This post furnishes supplies of provisions for a great many forts, north, south, and west*".

Other posts of the company in the upper basin of the Oregon River, are Fort Wallawalla, or Nezperçés, at the confluence of the northern and southern branches; Fort Okinagan, at the entrance of the Okinagan River into the north branch; and two others, on the Flatbow and Flathead rivers.

On the southern shore of Admiralty Inlet, which is one of the few districts in the territory adapted for agriculture, there is a large agricultural and pastoral settlement of British subjects.

* Quoted in Farnham's "Rocky Mountains," vol. ii, p. 233.

In the coast district, farther to the north, the principal settlements of the Hudson's Bay Company are the following:—*Fort Langley*, at the entrance of Frazer's River into the eastern extremity of the Strait of Fuca, in latitude 49° 25′; *Fort M'Loughlin*, on Milbank Sound, in latitude 52°; and *Fort Simpson*, on Dundas island, in latitude 54° 30′; Commodore Wilkes, of the United States navy, in his official report on the country made in 1843, expresses his opinion, that there is "no place north of Frazer's River where a new settlement could be formed that should pay its own expenses*;" a tolerably clear admission, that this portion of the country, at all events, is fully occupied by the Hudson's Bay Company. And, taking these several posts in connexion† with the large settlement at Nasqually, the command of the whole Strait of Fuca becomes obviously essential to maintaining the independence of the Company; and, indeed, the strait itself answers to the narrowest possible definition of a close sea.

In the upper basin of the Frazer River are *Fort Frazer*, founded in 1806, and several others,—*Fort Alexandria*, *Fort Chilcotia*, *Fort George*, *Fort St. James*, *Fort Thompson*, &c.

In the district drained by the southern branch of the Oregon River are Forts Boisé and Hall, the head-

* Farnham, vol. ii, Appendix.

† The traffic between the different coast stations of the company, and with other places on the continent or the adjacent islands, where they have no fixed posts, is maintained by ships belonging to the company, of which there are several, as well steamers as sailing vessels, appropriated to this service.

quarters of the hunting parties in the service of the Hudson's Bay Company. At the mouth of the Oregon is Fort George, acquired in 1813. But *Fort Vancouver* is the "principal establishment of the Hudson's Bay Company west of the Rocky Mountains; situated near the north bank of the Oregon, at the distance of 82 miles in a direct line from its mouth, and about 120 miles following the course of the stream. The *fort* is simply a large square picketed inclosure, containing houses for the residence of the chief factor, traders, clerks, and upper servants of the company; magazines for the furs and goods, and workshops of various kinds*."

"Six hundred yards below the *fort*, and on the banks of the river, is a village of fifty-three houses, in which live the company's servants; and the Vancouver Farm, stretching up and down the river,—3000 acres, fenced into beautiful fields, and sprinkled with dairy-houses and herdsmen's and shepherds' cottages †."

The following, on the other hand, is the description of the fate of American occupation, given by an official writer of that government:—

"From 1813 to 1823," says Mr. Greenhow, "few, if any, American citizens were employed in the countries west of the Rocky Mountains; and *ten years more elapsed* before any *settlement* was formed or even attempted by them in that part of the world. . . . The Americans *had no settlements of any kind*, and their

* Greenhow. p. 34.

† Farnham, vol. ii.

government exercised no jurisdiction whatsoever west of the Rocky Mountains." In other words, so late as the year 1833, the Americans had no territorial rights in Oregon. But, in the meantime, so assiduously had the proceedings of the British been conducted, that in the year 1818, according to the same author, "*the North-west Company held the whole trade of the Columbia country;*" and from that time to this their occupation has been becoming more prevalent and pervading.

It will be proper, however, to enter a little more at length into the question of the character and legal sufficiency of the occupation of these regions on the part of the British.

As respects the character and extent of the occupation required by the Law of Nations, we have already seen that the one thing necessary is, that a *beneficial use should be made of the country;* and there is, of course, no particular description of occupation (*ex. gr.* agricultural) required by the Law of Nations. "It is competent for any person to proceed to take possession of land for the purpose of exercising there *any such* branch of industry as may be calculated for his private interests. . . . . The establishment of the occupant may be 'soit d'agriculture, soit d'une autre branche d'industrie.' (P. Ferreira)." And similarly Vattel declares the pastoral occupation of the Arabs sufficient to entitle them to maintain exclusive possession of the regions in which they dwell. "Si les Arabes pasteurs voulaient cultiver soigneusement la terre, un moindre espace pourrait leur suffire.

Cependant aucune autre nation n'est en droit de les resserrer, à moins qu'elle ne manquât absolument de terre; car enfin ils possèdent leur pays; ils s'en servent à leur manière; ils en tirent un usage convenable à leur genre de vie; sur lequel ils ne reçoivent la loi de personne*." Agreeably to this rule, the North American Indians would have been entitled to have excluded the British fur-traders from their hunting-grounds; and not having done so, the latter must be considered as having been admitted to a joint occupation of the territory, and thus to have become invested with a similar right of excluding strangers from such portions of the country as their own industrial operations pervade.

Now it is well known, that, with the exception of a comparatively small district in the south-western corner of Oregon, the territory is of no value except for the furs to be obtained in hunting. The country, in a word, is in all its principal features analogous to the regions east of the Rocky Mountains, of which the British fur companies had long previously been in possession; and on their arrival in Oregon, in the year 1806, they proceeded at once to organise there a similar system of occupation. The fur-bearing animals vere the only valuable products of the country, and these they proceeded at once to monopolise; and, in the systematic and strictly enforced preservation and periodical hunting of these animals in one district after another, and in the con-

* Vattel, Droit des Gens, liv. ii, s. 97. And see Heffter, s. 70, n. (2).

trol required and exercised for these purposes over the native population throughout the territory, must be recognised a sufficient assertion and exercise of proprietorial right, in fact being the only one of which such regions are susceptible, the best, and indeed only method of developing and appropriating its natural resources. "The furs are obtained partly by hunters and trappers in the regular service of the company, but chiefly by trade with the Indians, who take the animals." "The company at the same time never allow their territory to be overtrapped. If the annual return from any well trapped district be less in any year than formerly, they order a less number still to be taken, until the beaver and other fur-bearing animals have time to increase*." "The furs thus obtained are sent at stated periods to one of the great depositories, either on the Atlantic or Pacific, whence they are carried to London in the vessels of the company. The goods required for trade and for the supply of the forts are received in the same manner; the interior transportation being performed almost entirely in boats on the rivers and lakes, between which the articles are borne on the backs of the *voyageurs*, or boatmen †." "In the treatment of the aborigines of the countries under its control, the Hudson Bay Company appears to have admirably combined and reconciled policy with humanity." . . . . . "Schools

* Farnham, vol. ii.

† "Goods are transported across the Continent from the mouth of the Columbia to Hudson Bay, or to Montreal, and vice versâ, almost entirely by water." (Greenhow, p. 37).

for the instruction of the native children are established at all the principal trading posts, each of which also contains an hospital for sick Indians, and offers employment for those who are disposed to work whilst hunting cannot be carried on. Missionaries are encouraged to endeavour to convert them to Christianity, and to induce them to adopt the usage of civilised life, so far as may be consistent with the nature of the labours required for their support; and attempts are made, at great expense, to collect the Indians in villages, on tracts where the climate and soil are most favourable for agriculture . . . . and the prohibition to supply these people with ardent spirits appears to be rigidly enforced. . . . . By the system above described, the natural shyness and distrust of the savages have been in a great measure removed. . . . . *The dependence of the Indians upon the company is, at the same time, rendered entire and absolute;* for, having abandoned the use of all their former arms, hunting and fishing implements, and clothes, they can no longer subsist without the guns, ammunition, fish-hooks, blankets, and other similar articles, which they receive only from the British traders."

It would be difficult to point out any European settlement on the face of the globe to which so perfect and so honourable a title has been acquired. Of its sufficiency, as respects the Law of Nations, an unexceptionable practical instance is afforded by the history of the Russian settlements on the same coast to the north of the 54th parallel, between the years 1794 and 1824. In the former year the most southerly of the Russian

settlements was ascertained by Vancouver to lie beyond the 59th parallel: in the latter year their occupation had extended down as far as the 54th. Thus we have an instance where a species of occupation precisely similar in its character to that of the British fur companies, in similar regions, for the space of thirty years, was admitted by the United States, as well as by Great Britain*, to be sufficient to confer a territorial right upon the occupiers. By the application of the same rule, we are entitled to claim, on the part of Great Britain, the whole coast of Oregon north of the mouth of the Oregon River, including the whole basin of the Frazer River, and the basin of the north or main branch of the Oregon River; *for within this portion of Oregon, the control and appropriation of the whole natural resources of the country* (such as they are) *have been maintained exclusively by the British companies for a still longer period.*

We therefore pass to the southern portion of Oregon. The examination of the respective pretensions of the two countries to territorial rights (in the basin of the Saptiu) introduces the second of the three great questions at issue in the present controversy, viz. the claim made to the whole of the portion† of Oregon on the part of the United States, as having

* By the United States, on the 20th of April, 1824; by Great Britain, on the 20th of February, 1825.

† The territory to the north would, if the dogma of contiguity were the true one, of course belong to Great Britain by reason of its geographical position.

formed part of Louisiana, or as having necessarily belonged to the owners of Louisiana, taking that word in its old signification as the basin of the Missouri and Mississippi. We have therefore to ascertain, whether, conformable to "the general sense of the established writers," a territory geographically situated as Oregon is, will, by mere force of its geographical situation, belong to the state which has acquired the proprietorial right to a country situated as is Louisiana.

Now the geographical facts involved in this question are shortly these: that the two countries are *united* (since that is the phrase) by a vast range of mountains, clothed with perpetual snow, and with barren wildernesses on either side, which form an interval of a thousand miles* between the eastern and western cultivation. The caravans of emigrants who undertake the passage take provisions for six months, and many of them die of starvation on the way. If, therefore, there really is any rule of International Law, which, under such circumstances as these, is decisive in favour of the United States, that rule must at all events be admitted to be, in a practical point of view, ridiculous and injurious.

Again, it has so happened that the government of the United States, in her diplomatic communications with Spain in 1819, laid down the following rule on this very subject of contiguity:—"That, when any European nation takes possession of any extent of

* This is the distance between the westernmost settlement in the United States and the easternmost in Oregon. (Greenhow).

sea-coast, that possession is understood as extending into the interior country, *to the sources of the rivers emptying within that coast*, to all their branches, and the countries they cover: and to give a right in exclusion of all other nations to the same." Now it is at once obvious that these limits, which no one will suspect the government of the United States of laying down with any undue strictness, and of which the latitude is indeed extravagant enough, will rigidly exclude Oregon from Louisiana, and make the Rocky Mountains the extreme western boundary of the latter. The diplomacy of the United States is therefore between the two horns of a dilemma, of which the one is the principle of law it maintained against Spain in 1819, and the other the totally inconsistent principle it is attempting to force upon Great Britain in 1845.

But, after all, it matters little whether the rule enunciated is ridiculous, or injurious in practice, or even inconsistent with the former professions of the government insisting upon it. The material and definitive question is, whether so wide a construction of the phrase "*contiguity*," as would allot unoccupied (and even undiscovered) Oregon to the owner of Louisiana, is, or is not, a recognised rule of International Law? Those who have paid attention to the principle which runs through all the citations from the European publicists quoted in these pages, will certainly have no hesitation in deciding this question in the negative, nor be in need of the express declaration on the point, which Burlamaqui

has appended to the quotation given above from his treatise. After observing that the dominion over vacant countries is to be acquired by taking possession of them, he proceeds—"and the dominion thus acquired will extend to *just so much of the country as one is in possession of**." The leading principle upon which the title derived from occupation is founded is, that the territory, and every part of it to which that title attaches, *is being made of some real use to the owner;* and this can only be predicated of territory which is either productive itself or necessary to the integrity or security of that which is so. In the case of adjacent seas the rule is well known, "Ibi finitur imperium, ubi finitur armorum vis;" and the principle is precisely the same in relation to a territorial environ, and will sanction the appropriation of nothing more than is actually and *bonâ fide* essential for the complete enjoyment of the productive portion of a settlement, for the maintenance of its necessary or habitual lines of communication, and for its military defence. The question of the extent of environ, in this or that particular case, is of course one that depends on topographical details. In the present case there is certainly no necessity for going into minutiæ; for, with a natural boundary such as that afforded by the Rocky Mountains, and the wildernesses that lie on their eastern declivities, no sensible or honest man can ever contend that Oregon

* And see Martens, liv. ii, s. 38.

is a necessary environ to Louisiana for any of the purposes above specified.

So much for the second question at issue between Great Britain and the United States. The third and last is raised by the following circumstances:—

Between the years 1811 and 1813, there were certain private individuals, citizens of the United States, in occupation of land in the southern part of the Oregon territory. They were members of a private association trading in furs; and the principal seat of the commercial part of their business, and the place where the principal partner resided, was New York. This trading partnership, through the agency of certain of the partners and clerks, occupied land in Oregon for about two years, and then sold it to a rival British Company. At subsequent periods, similar instances of temporary occupation of spots of land for similar purposes, though on a smaller scale, appear to have occurred in another part of Oregon, (the basin of the Saptiu). The first settlers were citizens of the United States; the purchasers and successors in the settlements were British subjects. The Americans retired voluntarily, with no intention of ever returning; the British hold the ground to this day. Both Americans and British acted throughout on their own private account; neither the one nor the other have received from their governments any commission, order, or authority to do what they did. Neither government ever made its appearance on the scene, or promulgated any expression of its will upon the

subject, or even gave any indication of its cognisance of what was going on, till the Americans had already been succeeded by the British. In this state of things the government of the United States takes up this position. It contends that, at the instant of the first occupation of land by its citizens, the Eminent Domain over the territory vested, *ipso facto*, in the United States; that the subsequent sale and relinquishment of the spots occupied by its citizens could not affect the right of the United States; and, consequently, that they remain invested with the Eminent Domain over them to this day. So that the British subjects who succeeded to these settlements are to be considered as intruders or trespassers on the territory of the States. Let us approach this position a little more nearly. In the first place, it clearly involves this proposition—that a state may acquire new territory, not merely without any formal declaration of its intention to that effect, but without even entertaining any such intention; and yet we have seen that Grotius declares that, even if the intention had been entertained, it would have availed nothing by itself; objecting very naturally, that, if that were so, "one State could not know what the other had designed to appropriate." And Vattel, too, declares it a necessary condition, that a state should "suffisamment marquer sa volonté à cet égard." And Klüber says that the state should have "the deliberate intention of acquiring the property." And Heffter lays down a rule to the same effect. Again, the position now under consideration implies that the individual occupants, if subjects of the

state, stand in need of no express commission from the state to acquire the sovereignty for it; and yet Vattel makes it a condition that they should be "furnished with a commission from their sovereign;" and Hefftter, upon a review of all the authorities, declares that there is no such thing as a general tacit authority vested in the individual subjects of a state, to be the means of acquiring new territory for it. [Eine stillschweigende Vollmacht für alle Unterthanen eines Staates *existirt nicht.*] Indeed, the right of deciding whether such and such a newly discovered or occupied country shall or shall not be added to the national domain, is notoriously one which is invariably reserved for the head of the state; the decision of such a question involving the most important questions both of domestic and of foreign policy. In the European monarchies it is one of the most important prerogatives of the crown; and in the United States it is expressly by the constitution vested in Congress. Now Congress has but one way of expressing its opinion or will on such a subject, namely, by an act passed with all the usual formalities. In the case, therefore, of the United States, no doubt can ever arise as to whether the state has "suffisamment marqué sa volonté à cet égard;" for the existence or non-existence of an act of Congress is a matter that can never be open to any difference of opinion. The notorious fact is, that no act for the annexation of Oregon has ever passed; and therefore, if the "sense of the established writers" is to be followed, the conclusion is inevitable, that the Eminent Domain over Oregon has never yet

vested in the United States. The transfer, therefore, of the local establishment of this or that individual settler was a proceeding which can in no way have affected the United States, or required their consent. The sovereignty of the United States had not attached to the settlement before their transfer. It is impossible, therefore, that it should subsist now.

But the legal and political condition of private persons, emigrants from their mother country, and settlers in a vacant territory, has been so often misrepresented, that it may be convenient to make one or two additional observations upon it in this place.

The constitution of most states allows the government to forbid the emigration of the subjects whenever it thinks proper; but, if no prohibition is laid upon the emigration of this or that person, his conduct in emigrating will of course be perfectly lawful. Again, it is another usual prerogative of the head of the state to prohibit its subjects from settling in this or that country; but if it lays no such prohibition on a particular emigrant, his conduct in settling there will be perfectly lawful, and will carry with it all the usual consequences of such a step. If he, therefore, occupies vacant ground, he acquires the entire property in it. But, it may be asked, is his position then one of entire independence? As against other settlers, and as against foreign governments, his position is one of absolute independence. (Vattel, ii, ss. 96, 7). The rule of Natural Law, which, as we have seen, is incorporated into the Law of Nations, gives him the entire proprietorial right, in virtue of his being the

first occupant. But his independence of the government of his mother country is another thing, and will depend entirely upon the Municipal Law of that country. If the Municipal Law of his mother country leaves him at liberty to denationalise himself, (as is sometimes the case), he will then be independent of all the world; and if any nation, even that to which he lately belonged, should attempt to control the freedom of his actions within his new domain, or to reduce him to a state of subjection, and possess itself of the local sovereignty, that nation would have no better title to the acquisition it had made than that which mere might supplies. But, according to the Municipal Law of some states, for instance of Great Britain, *nemo potest exuere patriam*, (no subject can shake off his allegiance); and hence some persons have too hastily inferred, that the settlement of a British subject forms *ipso facto* part of the domain of the British crown. The fallacy is obvious. The British crown can, no doubt, by force of that maxim of the Municipal Law, attach the settlement to its domain without consulting the will of the settler, for the latter cannot lawfully resist the assumption, at any time, of the Eminent Domain; he cannot decline to hold his land under the crown; to do so would be an act of rebellion; but, until the proper measures have been taken on the part of the crown to assume the Eminent Domain, (being a formal declaration of its sovereign pleasure made by some specially authorised person; a step, it is to be remembered, which every foreign state has a right to have duly performed), the crown can-

not by possibility have any right to the land, whatever right it may have to the personal obedience of the settler; and the inevitable conclusion is, that, so long as the original settler is not prohibited by the government to which he owes allegiance from parting with the possession to another, a transfer of his interest to any third person is a perfectly legal and valid transaction, and operates as a conveyance of the whole proprietorial right, without the reservation of any interest in favour of the first proprietor's sovereign.

The sum of the whole is, that, so long as the occupation by its subjects continues, the state is at liberty to assume the Eminent Domain; and if it does so, a right is then called into existence, which the subject is not competent to affect or transfer. But if the occupation of its own subjects is allowed to cease, without the necessary measures being taken for the acquisition of the Eminent Domain, and foreigners succeed to the possession, the opportunity is irrevocably gone, and the title to the land has become absolute in the new occupant, or, at least, is subject only to such conditions as allegiance to his own sovereign may impose upon him in his turn.

Bearing in mind these considerations, which are but the logical development of the elementary principles established above, and proceeding to apply them to the history of occupation in Oregon, it is impossible to arrive at any other conclusion, than that the purchase by the British fur companies of

the posts originally established by citizens of the United States, and over which, as we have already shewn, the United States had never acquired the Eminent Domain, was a transaction which effectually vested the entire property of those settlements, with all their rights and appurtenances, in British subjects, who still continue in possession of them, subject only to the acknowledged right of the British crown to assume the high domain over them at its pleasure.

We have now examined at length, and with constant reference to the established authorities, the exclusive pretensions of the United States government to the southern portion of the Oregon Territory, as well those which are based on the dogma of *Contiguity,* as those which depend upon the attempt to revive in favour of the government of the United States a claim of right, which has long ceased to exist, in favour of its original possessors; and the conclusion to which our examination of them has led us is, that the only rational termination of the controversy as regards this portion of the Territory is to be reached by following the same clue as in our previous inquiry relating to the country north of the Oregon River, *viz.* by a valuation and comparison of the extent of the districts now actually in the bonâ fide occupation of subjects and citizens of the two countries respectively. What remains is matter of mere topographical detail, which of necessity we leave to others; satisfied ourselves, if we shall be found to have furnished an intelligible clue to the settlement of a dan-

gerous controversy, and to have re-established, on a consistent and logical foundation, one important principle of International Law.

NOTE.

THE Oregon question, as it subsists at present between the United States and Great Britain, has been discussed above solely upon the footing of the general principles of the Law of Nations, and without allusion to the provisions of any express treaty on the subject. Great Britain, it is well known, has entered into three treaties respecting it; viz. the treaty of 1790 with Spain, and the two treaties of 1818 and 1827 with the United States. But neither of these introduced any modification of the actual rights of the two contracting parties as they might ultimately be agreed (and as we have, in the preceding pages, ascertained them) really to be. The rights of the two governments were to remain precisely as they were at Common Law, (if the phrase may be allowed); the only effect they had, or were intended to have, being, to waive or suspend for a time the assertion (on the part of Spain in the one case, and of the United States in the other) of certain *overriding pretensions* which Great Britain refused to admit, and of which we have been occupied in these pages in demonstrating the illegality: the arrangement for the meanwhile being by consent precisely that for which Great Britain had uniformly contended; viz. that the disputed territory should be open to the enterprise of both nations, and of course of all the rest of the world, consistently with the principle that res nullius cedit primo *occupanti*. Ever since the conclusion of the last of these treaties, this principle has been in active operation, and is now near the accomplishment of its work. Between British and American settlers the country is at last actually *Occupied;* and the last duty now to be performed is to trace the line of demarcation between what is occupied by subjects of Great Britain and what by citizens of the United States.

FINIS.