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The Doctrine of the Acquisition of Territory by Occupation in International Law

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Cornell University
School of Law.
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THE DOCTRINE OF THE ACQUISITION OF TERRITORY BY OCCUPATION IN INTERNATIONAL LAW.

The rules of International Law which are now regarded as practically settled, respecting the different modes by which a sovereign power is enabled to take possession of, and hold, any particular portion of territory, as against all other powers, are of comparatively recent origin. All the great nations of Europe have ever displayed a marked degree of covetousness when the control of different parts of the surface of the earth has been in question, and this inclination attained its widest scope at the time of the discovery and subsequent colonization of the western continent. The movements of the various powers, at that time, were in nowise fettered by rules of law, or of practice, as have been, to a considerable extent, like undertakings in Africa during recent years.

When Alexander VI put forth his famous Papal Bull in the year 1493, respecting this question, and sought thereby to satisfactorily settle the dispute between Spain and Portugal, relative to the rights of those countries in the newly discovered parts of the world; and when this Bull was soon after ratified by the Treaty of Tordesillas; only to serve as a source of further complication in the international
relations of the states concerned; the necessity for some more positive regulations, acceptable to all colonizing countries, was made most apparent.

By the edict in question, it was decreed that all lands west of a line drawn from pole to pole, one hundred leagues to the westward of the Azores, not already secured to some Christian state, should belong to Spain, and that all such lands east of the line should be possessed by Portugal; free from interference of any kind on the part of all other powers. The result was, however, that not only did the other nations of Europe refuse to accede to the Papal decision, but the parties immediately concerned in same,—Portugal and Spain,—never arrived at a conclusion between themselves, as to the precise boundaries laid down in this Bull. For centuries after its promulgation claims were made at various times, based upon this attempted arbitration, but were never suffered to prevail by Great Britain, Holland, or any of the other great colonizing nations of Europe.

According to the claims of Spain and Portugal, the mere discovery of lands previously unknown, gave to the discovering power a title to such lands which could not be wrested away by other nations through subsequent occupation and settlement. Discovery and conquest were the two principal methods then in vogue, of acquiring new territory. Title to lands was obtained and lost through the costly medium of force, and this system was only supplanted by the gradual growth of a few broad principles of International Law, recognized to a
greater or less extent by the European powers.

At the present day five modes of territorial acquisition by a sovereign power are recognized, namely: by occupation, by conquest, by prescription, by cession, and by accretion. Of these five, only the first will be here considered.

While it is undoubtedly true that at an early date mere discovery gave a good title, such is no longer the case. "The authorities on International Law now combine in laying it down with one consent, that discovery in itself gives no title, and even temporary occupation will suffice to create a title merely inchoate, that occupation to be valid must be effective." But it may also be said that notwithstanding the truth of such a statement, it is also correct to say that a nation claiming title to certain territory will greatly fortify such claim if it is possible to show discovery of such land by the nation making the claim. Discovery, therefore, serves to confirm subsequent occupation by the discovering power. However, discovery in order to be of any avail for this purpose must not be concealed from the knowledge of the world at large. Timely notice should be given of its pretensions, by the nation laying claim to the inchoate title by discovery, which claim is bound to be respected by all the world, and a reasonable time after discovery is then allowed a nation wherein to perfect its title by acts necessary to be

performed subsequently. Although it is true that there can never be a re-discovery of any territory, still should the original discovery be concealed by a nation, from its neighbors, any of the latter, upon making a discovery of the land for itself, previous to a notification of discovery on the part of the former nation, would take a title superior to that of its predecessor.

The two inseparable factors in the acquisition of territory by occupation are annexation and settlement. The formal act of the state, whereby it claims sovereignty over the territory in question, constitutes annexation of same; (a) and here, according to an American writer, a difference is to be noted between discovery and annexation,- in that discovery, such as necessary to give to a state a good right to perfect its claims, may be made by any subject of the state, whether officially connected with same, or as a private citizen; while annexation can never be brought about by a private individual, and any acts of his in that direction are incapable of ratification by the state. He holds that to constitute a valid annexation, the formal act whereby the territory is acquired must be performed by a state official especially authorized to do so, or by some state representative not having such special authority, but whose act is subsequently ratified by his home government. Regarding this contention, it has been suggested that on principle, an annexation capable

(a) The Principles of International Law, p 148; T. J. Lawrence - Boston - 1895.
of ratification might as readily be made by a private citizen
of the ratifying state, as by anyone else, thus applying to
this situation rules of law similar to those accepted in
municipal law, whereby the acts of a person in behalf of
another, wholly without authority, may by ratification be
made as effective as if done under an existing agency. In
the absence of any decisive holding on this point it may be
considered an open question. Whether the territory annexed
is inhabited or not, the procedure is the same, and rights of
the natives need not be taken into consideration, so far as
international rights and obligations are concerned. And it
follows, that where one nation has secured title to lands by
annexation and settlement, it cannot be disturbed in such
possession by any other nation in virtue of rights claimed to
have been acquired through direct negotiations with the nat-
ive inhabitants of the territory in question.

Within a reasonable time after discovery and annex-
ation the title to the territory must be perfected by settle-
ment, which must be a real and permanent occupation of the
territory. A mere formal attempt at settlement will not suf-
fice, but it must be actually carried into effect and main-
tained continuously. From this it does not follow that every
cessation of occupation will destroy the title held by a
nation. Just how long a break in the occupation is necessary
to constitute an abandonment is not settled definitely; but
where the intention exists to re-occupy territory temporarily
given up, and such intention is duly manifested, an abandon-
ment will not be presumed until a considerable length of time has elapsed. In the case of the Delago Bay dispute, England and Portugal both laid claim to certain territory at that point, the former basing its claim upon negotiations that had taken place between that country and the natives, while Portugal put her pretensions upon the grounds of original discovery and subsequent occupation. Great Britain contended, however, that Portugal had lost control of the territory about 1823, during a native insurrection, and that this temporary cessation of dominion constituted a break in the required continuous occupation, sufficient to establish an abandonment. The matter was finally submitted to the French government, for arbitration, and its decision was given in favor of the claims of Portugal, on the ground that the comparatively brief termination of Portuguese sovereignty was not of sufficient weight to cancel the several centuries of occupation preceded by discovery.

As already indicated, mere discovery gives no title. So, too, settlement alone, without previous discovery, may not give an indefeasible title, but when discovery and settlement are combined, within the proper period of time, a perfect title is the result; and in a case where title to territory is claimed by one power on the ground of settlement, while rights to same are sought to be enforced by another power by reason of discovery, the latter power may be estopped to assert its claims by reason of laches in failing to follow ________

(a) Snow's Cases on International Law, p 11.
up the discovery by the acts necessary to the acquirement of a good title.

Having considered briefly the formalities necessary to be observed in the procurement of a title to new territory, a title which will be recognized in International Law, the query arises as to the exact extent of the territory which may be thus claimed, and at this point have arisen, and are arising still, some of the most important questions ever solved through the rules of International Law, i.e. questions of boundaries between adjoining sovereign powers. An extract from a letter by John Quincy Adams, written in 1818, when, as Secretary of State, he conducted the negotiations between this country and Spain regarding the Louisana boundary question, is interesting as showing his view of the causes of these disputes on this continent. In part, he says, "The question of disputed boundaries between European settlements in America is not new. From the nature of these settlements, the imperfect geographical knowledge possessed by all the parties to them, of the countries where they formed their establishments, and the grasping spirit by which they were all more or less animated in forming them, it was inevitable that disputed boundaries should be an appendage to them all. Of this spirit of boundless ambition, Spain gave the most memorable example, by the original pretension of engrossing to herself the whole American hemisphere. The com-

(a) The Oregon Question, p 169; Travers Twiss - London - 1846.
mon sense and common feeling of mankind could not and did not long tolerate this assumption. With what lingering reluctance, and by what ungracious graduations Spain was compelled to recede from it, is notorious in the annals of the last three centuries."

The proposition has probably never been disputed that a colonizing power is not limited in its claims to the precise area of territory really occupied by its posts and settlements. The establishment of such a colony and the maintenance of same carries with it a right to assert dominion over an expanse of country stretching away, possibly, for hundreds of miles from the comparatively insignificant area in fact occupied. This question may arise under a variety of circumstances, but the usual conditions may be divided into four classes. First, where a part of an island is occupied; secondly, in the case of an occupation of a portion of seacoast; thirdly, where the banks of a river are occupied at its mouth, and finally, cases where settlements are made in the interior of a country.

And first, as to a post established on an island. Here there can be little doubt as to the right of a nation to claim sovereignty over the entire island, where it is of ordinary size. A question may arise, however, in the case of an unusually large island, e. g. Australia, where but one locality is occupied. If another power should plant a colony

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(a) Secretary of State to Don Luis de Onis; Washington, March 12, 1818; British State Papers, Vol. V.
on a distant part of the island, it is altogether probable that the first power would have no reason for objecting to a division of the territory, in case it had never proceeded to exercise positive acts of dominion over the entire extent of the island. In a case where two or more such settlements have been made by different powers, on an island, the same principles would probably be applicable to determine the true divisional line between them, as are applied in the case of a continent.

Greater difficulty is experienced when the question of boundaries arises between states planting settlements at different points along the coast line of a vast continent. In the occupation of North America by the several powers of Europe, pretensions of unprecedented dimensions were put forth. Thus it was long contended that a settlement and occupation of any portion of the Atlantic coast carried with it a right to hold as the domain of the colonizing power an extent of territory measured in width by the coast line occupied, and extending across the continent to the Pacific. This doctrine, however, could hardly survive the reducing to actual possession, of those tracts of country then altogether unknown, and at present no such ideas are put forth or entertained.

When a settlement has been made on a portion of the sea-coast it is now considered the right of the power making such settlement to claim jurisdiction over the coast so occupied, together with such an extent of the back country as is
drained by the rivers emptying into the sea within the occupied coast; in other words, the territory extending back from the coast as far as the water-shed. It has also been suggested that "the extent of coast must bear some reasonable proportion to the territory which is claimed in virtue of its possession." On this point a recent writer remarks, "We hear much of a certain 'Hinterland Doctrine'. The accepted rule as to the area of territory affected by an act of occupation in a land of large extent has been, that the crest of the water-shed is the presumptive interior limit, while the flank boundaries are the limits of the land watered by the rivers debouching at the point of coast occupied. The extent of territory claimed in respect of an occupation on the coast has hitherto borne some reasonable ratio to the character of the occupation. But where is the limit to the 'Hinterland Doctrine'?" As a probable explanation of the origin of this doctrine attention may be called to the circumstance,—that it is usually the case, when a new country is being settled, that the first settlements are along the coast. That being the case, and the only practicable way of reaching the interior country being by means of the navigable rivers, it is easy to see that the nation exercising sovereignty over the coast should hold the key to the interior parts of the country, through its control of the rivers emptying within its borders, and by its right to debar other powers entering such

(a) Hall's International Law, p 110 - London - 1895.

(b) Walker's Science of International Law, p 161.
rivers, be able to exercise exclusive dominion over the country penetrated by them. While this explanation might very well apply in the earlier days of colonization, the same reasons do not exist for the assertion of such a doctrine in the more modern progress of occupying Africa. Here there are great tracts of country that can be reached much more easily by railways than by the river courses, so that different principles must govern the final distribution of that continent among the powers, than were applied in other parts of the world at an earlier date.

The foregoing method of determining boundaries can be easily put into practice where one power alone forms settlements upon the coast in the vicinity of certain streams, but where two or more nations colonize stretches of sea-coast, at no great distance from one another, the doctrine that each may exercise dominion over the territory drained by rivers debouching within its line of coast, cannot be strictly applied, as the areas of country thus drained might often overlap. It has been the custom, where this condition of affairs existed, to establish a point upon the coast, midway between the most advanced posts of each power, and a line is then drawn straight toward the interior from this point, as the established boundary line. This plan is the one usually adopted in the absence of any so-called natural boundary, e.g. a river. However, if such a natural boundary exists at some point between the frontier posts of the different countries, even though it should not be situated exactly midway
between them, it is the usual practice that this natural boundary should be constituted the divisional line between them, each nation exercising dominion over the territory on its side of the river, and under the river to the middle point of its channel. An exception to both these methods of demarcation may arise, however, where two powers have occupied portions of sea-coast, and a dispute arises as to the control of certain territory left unoccupied between the different settlements, and where absolute dominion of this territory is necessary to the security of one of the powers, and not essential to the other. Here the doctrine of the right of self preservation would probably prevail and give to the former power possession of the intervening country.

These leading principles for the determination of boundary lines between neighboring colonies of different nations were early laid down as part of International Law by the United States, in the correspondence carried on by Messrs. Pinckney and Monroe, on the part of this country, with the Spanish government in 1805, when a settlement was being sought of the dispute between Spain and the United States, relative to the correct boundaries of the Louisiana territory, then recently purchased from France. Spain controlling the Floridas on the east and Mexico on the west, made certain claims in behalf of those boundaries, which were resisted by the States. In referring to the principles to be applied to the general subject of acquisition of territory, the American Commissioners (a) Twiss, The Oregon Question, p 174.
at Aranjuez used the following language, "The principles which are applicable to the case, are such as are dictated by reason, and have been adopted in practice by European powers in the discoveries and acquisitions which they have respectively made in the New World. They are few, simple, intelligible, and at the same time founded in strict justice. The first of these is, that when any European Nation takes possession of any extent of 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 country they cover, and to give it a right in exclusion of all other nations to the same. The second is, that whenever one European Nation makes a discovery and takes possession of any portion of that continent, and another afterwards does the same at some distance from it, where the boundary between them is not determined by the principle above mentioned, the middle distance becomes such of course. The justice and propriety of this rule is too obvious to require illustration. A third rule is, that whenever any European Nation has thus acquired a right to any portion of territory on that continent, that right can never be diminished or affected by any power, by virtue of purchases made, by grants or conquests of the natives within the limits thereof."

In this quotation we find the bulk of the International Law on this subject, put in this letter as the content-

(a) Pinckney and Monroe to Don Pedro Cevallos, Aranjuez, April 20, 1805; British State Papers, Vol. V.
tion of the United States in one of her boundary disputes, but since that time practically embodied into the Law of Nations as the guiding principles in the settlement of contentions between powers, formerly brought to a final solution by the means of might, and not of right.

A somewhat different query arises in a case where a colony is established only at the mouth of a great river, without any effort being made to subjugate a greater or less extent of the coast. If the river itself be navigated and explored, and dominion be exercised over the territory along its banks, back into the interior country, there would probably be little question as to the proper application of the principle giving to the settling power the territory drained by the river. The difficulty arises where no attempt is made to go beyond the mouth of the river, and a claim to the exercise of sovereignty over the country back to the watershed, merely on the ground of the occupation of the river-mouth, is probably ill founded. Quite a recent example of a dispute of this character was seen in the controversy between Great Britain and the United States, over the boundary line between this country and the British possessions bordering on our North West Territory. Here the United States claimed a right to all the territory drained by the River Columbia, by virtue of a post established at the mouth of that river. There were conflicting claims regarding the priority of discovery and exploration of the river, and among the questions raised was one as to the power of a private citizen of a coun-
try to secure for such country rights to territory explored
by him, without any attempt being made toward permanent col-
onization. Upon this phase of the dispute an extract from
the diplomatic correspondence of the United States, at that
time, is of interest, as showing the opinion held by our
statesmen, and also some of the reasons for certain rules
that may now be considered obsolete, but the effects of which
cannot be ignored.

"The ground taken by the British Government, that a
discovery made by a private individual, in the prosecution of
a private enterprise, gives no right, cannot be allowed.
There is nothing to support it, either in the reason of the
case or in the law and usage of nations. To say the least of
it, if a discovery so made confers no right, it prevents any
other nation from acquiring a right by subsequent discovery,
although made under the authority of Government, and with an
express view to that object. In no just acceptation of the
term can a country be said to be 'discovered', if its exist-
ence has been previously ascertained by actual sight. This
is a mere question of fact, which a private person can settle
as well as a public agent. How far the mere discovery of a
territory which is either unsettled, or settled only by sav-
ages, gives a right to it, is a question which neither the
law nor the usages of nations has yet definitely settled.
The opinions of mankind, upon this point, have undergone very
great changes with the progress of knowledge and civilization.
Yet it will scarcely be denied that rights acquired by the
general consent of civilized nations, even under the erroneous views of an unenlightened age, are protected against the changes of opinion resulting merely from the more liberal, or the more just, views of after times. The right of nations to countries discovered in the sixteenth century is to be determined by the law of nations as understood at that time, and not by the improved and more enlightened opinion of three centuries later."

From some of these views the United States was virtually compelled to recede by reason of the final determination of the controversy, for Great Britain retained control of the territory surrounding the upper waters of the Columbia River, thus indicating, at least, that the principle sought to be applied by this country, to the effect that control of the mouth of a river carried with it a right to exclusive dominion of the territory drained by such river, did not obtain as a part of the recognized International Law.

Still another phase of this territorial question comes to view where a power effects a settlement in the interior of a continent,—say on the head waters of a stream, and does not extend its explorations and occupation to the mouth of the stream. When, at a later date, another power establishes posts on the coast and at the mouth of said river, the inquiry as to the correct boundary line between the two powers calls for the invention and interpretation of some new principles. This question seldom, if ever, arose during

(a) Mr. Upshur, Secretary of State, to Mr. Everett, Oct. 9, 1843.
the earlier centuries, for the reason already referred to, i.e. that access to the interior portions of a country could practically only be had by means of the rivers having their sources within such country. At this age, however, and especially on the African Continent, the question is a very live one, and the principles to be applied in the eventual parceling out of that country are yet to be determined upon. Reference is made to this situation in a late work upon International Law, as follows:— "During the older days of colonial occupation, in countries where questions of boundary arose, waterways were not merely the most convenient, they were the necessary, means of penetrating into the interior. It was reasonable therefore that the power which could deny access to them should, as a general rule, have preferential rights over the lands which they traversed. But in Africa, which is the only portion of the earth's surface where this part of the law of occupation still finds room to assert itself, large tracts of country can be more easily reached over land, especially by means of railways, than along the river courses, and the great river basins are so arranged that a final division of the continent could hardly be made in accordance with their boundaries."

Notwithstanding the extensive disposition to yield assent to these comprehensive principles, on the part of the leading powers of the civilized world, and the apparent ease of applying them as cases arise; there still remains ample

(a) Hall's International Law, p 112.
opportunity for the framing of additional rules or laws.

Chief among these is the answer to the query, - What constitutes occupation? This investigation, in any particular case, involves, almost exclusively, historical research, and as a timely example, mention may be made of the present labors of the Venezuelan Boundary Commission. Months have been spent in an attempt to unravel and put into proper order the various accounts of the different explorations, establishing of military posts, attempts at settlement, attacks and counter-attacks, indulged in by the disputing nations and their grantors. After this shall have been satisfactorily completed, the solution proper of the dispute should be comparatively speedy; when, by the application of the accepted principles of International Law, to the facts as found, the Commission can report its finding as to the "true divisional line between the Republic of Venezuela and British Guiana."

This late situation of affairs, whereby two of the greatest of modern powers were placed in the most strained relations for a considerable length of time, only serves to re-emphasize the infinite importance of establishing certain fixed and universally accepted rules of international intercourse, which shall be employed as guides in the peaceful settlement of all international differences.