Venezuela-British Guiana Boundary Arbitration. THE PRINTED ARGUMENTS ON BEHALF OF THE UNITED STATES OF VENEZUELA BEFORE THE TRIBUNAL OF ARBITRATION.

J.M de Rojas, Agent of Venezuela; Benjamin Harrison, Benjamin F. Tracy, A. Mallet Prevost, James Russell Soley, Counsel for Venezuela, 1898 Vol 1 (of 2).

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VENEZUELA-BRITISH GUIANA BOUNDARY ARBITRATION

THE PRINTED ARGUMENT

ON BEHALF OF THE

UNITED STATES OF VENEZUELA

BEFORE THE

TRIBUNAL OF ARBITRATION

J. M. DE ROJAS,
Agent of Venezuela.

BENJAMIN HARRISON,
BENJAMIN F. TRACY,
S. MALLET-PREVOST,
JAMES RUSSELL SOLEY,
Counsel for Venezuela.

IN TWO VOLUMES.—VOLUME I.

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1898

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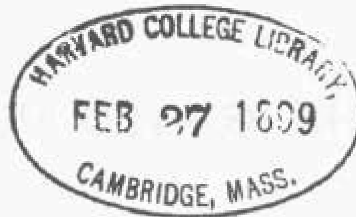

May 15, 1914
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JUN 18 1914

Pursuant to Article VIII of the Treaty of Arbitration signed at Washington on the 2nd day of February, 1897, between the United States of Venezuela and Her Majesty, the Queen of Great Britain and Ireland, the Agent of Venezuela before the Arbitration Tribunal has the honor to submit herewith the printed argument prepared by the counsel for Venezuela.

The Agent also has the honor to present a number of papers which have been prepared by His Excellency Señor Rafael Seijas, formerly Minister of Foreign Affairs of the Republic of Venezuela, as also two papers prepared by the undersigned Agent.

The papers by Señor Seijas and by the undersigned will be found at pages iii—lxxx of Volume II.

Respectfully submitted,

J. M. de Rojas,
Agent of Venezuela.

Washington, D. C., December 15, 1898.

NEW YORK, December 15, 1898.

Your Excellency:

We have the honor to hand you herewith the printed argument prepared by us, as counsel of the United States of Venezuela, in order that, in pursuance of Article VIII of the Treaty of Arbitration between Venezuela and Great Britain, signed at Washington, February 2, 1897, it may be delivered to the Arbitrators and to the Agent of the British Government.

Very respectfully,

BENJAMIN HARRISON,
BENJAMIN F. TRACY,
S. MALLET-PREVOST,
JAMES RUSSELL SOLEY,
Counsel for Venezuela.

To His Excellency, J. M. DE ROJAS,
Agent of Venezuela.

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CORRECTIONS.

	For	*Read*
Page 82, par. 2, line 1	That Sir Robert	Sir Robert.
" 156, " 4, " 3	had anywhere	had yet had anywhere.
" 168, " 3, " 3-4	of the river named	of that river, named.
" 173, 6th line from last	"as the.	as "the.
" 314, par. 4, line 1	explained (p.)	explained (p. 162).
" 316, " 1, " 2-3	Spaniard"—evidently	Spaniard" (B. C. I, 213), evidently.
" 316, " 3, last line	(B. C.,)	(Argument, pp. 531-551).
" 329, " 2, line 12	(p.)	(p. 155).
" 336, " 2, " 1	Storm claimed he transmitted	Storm transmitted.
" 337, " 2, " 7	(p.)	(p. 316).
" 337, " 2, " 8	1894	1694.
" 337, " 2, " 8	Spaniard, ... administration"	Spaniard," .... administration.
" 337, " 3, lines 1-2	boundaries. Put in limitation to	boundaries to.
" 339, " 3, line 6	(V. C. II, 99)	(V. C., II, 117).
" 340, " 5, last line	(p.)	(p. 329).
" 343, " 5, line 2	letter last quoted	letter of August 1761.
" 349, " 1, lines 5-6	which never went	which went.
" 370, " 5, line 1	adversary	adverse.
" 393, 4th line from last	(pp.)	(pp. 9-67).
" 394, par. 5, line 1	(1)	(3).
" 394, " 6, " 1	(2)	(4).
" 395, " 2, last line	(Ch. VII, pp.)	(Ch. V, pp. 153-177).
" 397, " 6, last line	(B. C. I, 167)	(B. C. I, 187).
" 399, " 4, " "	(B. C.)	(B. C., p. 35).
" 405, " 1, line 5½		*Add* The British Case (p. 28) states:
" 408, " 6, " 6.	(B. C.)	(V. C.-C., II, 102).
" 409, " 1, last line	(V. C. II, 318).	(V. C.-C., II, 107).
" 412, " 2, line 5	200.	300.
" 412, " 6, " 3	(V. C. II, 55).	(B. C. II, 55).
" 413, " last line	(B. C. II,)	(B. C. II, 68).
" 416, " 7, line 4	as	of.
" " " 7, " 5	of	as.
" 419, " 5, last line	(p.)	(pp. 487-492; also V. C.-C. I, 56-58).
" 422, " 1, last line	(B. C.)	(B. C., II, 130).
" 428, " 4, line 6.	past	post.

	For	Read
Page 432, last par., line 1	this statement	these statements.
" 433, par. 1, last line	occurred	according.
" " " 5, last line	1764	1754.
" 441, last par., line 4	Governor General, Don.	Governor General. Don.
" 466, par. 1, last line	(B. C. VII,)	(B. C. VII, 22, 25-27).
" 468, " 1, " "	kind, anybody	kind, by anybody.
" 479, " 8, " "	fort at Orinocque	fort here, to Orinocque.
" 487, " 2, line 4	rights of in	rights of Spain in.
" 488, " 1, " 6	Cuyuni, or exercised	Cuyuni ever exercised.
" 495, " 1, " 4	where	were.
" 495, last line	as to make	as to making.
" 496, par. 2, line 6	can	could.
" 500, " 3, " 5	meaning be conveyed	meaning conveyed.
" 507, " 2, " 8	two years before	that same year.
" 509, last line	page	pages.
" 517, par. 6, line 3	not yet ventured	not ventured.
" 518, " 2, " 4	(B. C. VI, 180)	(B. C. V, 180).
" 521, first line	(V. C. II, 30)	(V. C. II, 330).
" 524, par. 3, line 1	(B. C. II, 36)	(V. C. II, 36).
" 540, " 1, " 4	which	this.
" 545, " 9, " 2	168	186.
" 553, " 2, " 6-7	to that the Spanish	to that of the Spanish.
" 555, " 3, " 4	carry the	carry away the.
" 558, " 1, " 10-11	accompanied continuous	accompanied by continuous.
" 558, next to last line	them	there.
" 617, par. 3, line 5	waste to the Dutch	waste the Dutch.
" 620, " 6, last line	they successfully	they had successfully.
" 628, " 4, line 2	1785	1755.
" 633, " 4, " 2	Chiefs	Captains.
" 637, " 4, " 5	Post	Posts.
" 639, " 2, " 7	were	was.
" 668, " 4, " 2	that	but.
" 693, " 1, " 8	(B. C. VI, 94)	(B. C. VI, 96).
" 696, " 3, " 3	between *this* and *Government* insert..	country, and considering it unsafe to encourage this excessive influx of strangers into the.
" 696, " 5, " 2	would	could.
" 697, " 6, " 1	Barima], all	Barima] there are several Spanish Indians, all.
" 748, last par. lines 1-2	are *entirely uninhabited*	are *uninhabited.*
" 763, " " line 1	added, especially	added that, especially.

CHAPTER I.

GENERAL OUTLINE OF THE CONTROVERSY.

The purpose of the Treaty by which this high Tribunal has been constituted is to make "a speedy and final settlement" of a boundary dispute of long standing, which arose in Guiana between the Kingdom of Spain and the Netherlands, and which was left unsettled by them at the time of the acquisition of their territories by their successors in title, Venezuela and Great Britain. Neither the Netherlands nor Spain is a party to the present controversy.

The original title of Spain to Guiana, that is to say, the territory between the Orinoco and the Amazon, rested upon discovery and occupation.

The mainland of South America was discovered by Columbus in 1498 in this very region. In the following years his lieutenants explored the coast between the Amazon and the Orinoco. During the first quarter of the sixteenth century, charters were granted and settlements established by Spain in various parts of South America, the city of Cumaná, a short distance to the west of the Orinoco, being one of the most ancient.

In 1530, a grant of Guiana was made by the Spanish Crown to Diego de Ordaz. The charter defined the grant as including the coast from the Orinoco to the Amazon. In 1531, Ordaz, in command of an expedition, took possession under his charter, ascending the Orinoco for six hundred miles. In 1537, his lieutenant, Herrera, ascended the Orinoco still further.

Many other Spanish expeditions are recorded during the sixteenth century, the last and most important of them being that of Antonio de Berrio, which started in 1582 from Santa Fé, the capital of the New Kingdom of Granada, and proceeded down the Meta and the Orinoco, finally establishing settlements on the island of Trinidad and at Santo Thome, on the east or south bank of the Orinoco, and therefore in the territory of Guiana, in 1591. Berrio was appointed by the King of Spain, Governor and Captain-General of Guiana, and the boundaries of his province were defined as the Orinoco and the Amazon, and included also the island of Trinidad. In 1595, Vera, Berrio's principal lieutenant, brought out an expedition from Spain, numbering two thousand persons, as colonists, soldiers and missionaries.

During the ten years following the foundation of Santo Thome expeditions were made from time to time and at various points along the coast of Guiana and in the interior, of which formal possession was taken with solemn ceremonies by Berrio. The Essequibo is mentioned among the points frequented by Berrio's lieutenants. It was early settled by the Spaniards, and supplies of provisions for Santo Thome and Trinidad were obtained from there. Trade was carried on at that point and in the intervening territory of Barima and Moruca.

In 1581 the Netherlands formally renounced the sovereignty of Spain, of which they had until that time been the vassals, and the war then raging between the two countries continued until 1648, with an interval of truce from 1609 to 1621.

The first mention of a Dutch voyage to Guiana was in 1598, when a trading vessel of the Dutch ascended the Orinoco to Santo Thome. The Dutchman Cabeliau took part in the voyage and gave an account of it. It was purely a mercantile venture.

No Dutch settlement is mentioned on the coast of Guiana prior to 1613, in which year the Spaniards surprised and destroyed their settlement upon the river Corentin. No Dutch settlement is known at this period west of the Corentin; but in 1615

there was a settlement of Spaniards, who were engaged in tilling the soil in Essequibo.

In 1621, the truce having come to an end, the Dutch West India Company was chartered by the Netherlands for the purpose of concentrating Dutch trade and maritime enterprise in connection with both continents of America in the hands of a single company. About 1626 the company sent persons to "lie" in the river Essequibo, and at some time within the next eighteen years a fort was built upon the site of an earlier Spanish fort on the island of Kykoveral, situated in the Mazaruni River, close to the point at which it empties into the Essequibo.

By the Treaty of Munster (1648), at the end of the war, Spain acknowledged the independence of the Netherlands, and released and confirmed the possession to them of the places which they at that date "held and possessed." At that date the Dutch held and possessed several places in the territory of Guiana, such as Surinam, Berbice, and Essequibo. During the war they had also twice successfully attacked and sacked Santo Thome, the Spanish capital of Guiana. As far as the evidence shows, however, the westernmost of the places held or possessed by the Dutch at the date of the Treaty was the fort at Kykoveral.

Upon the facts, Venezuela contends that an original title was established and perfected by Spain to the whole of Guiana by discovery and occupation; that by the Treaty of Munster, at the close of the Thirty Years' War, Spain confirmed the Dutch title to the places they held and possessed at the date of the Treaty, which places they had acquired by conquest during the war, and that the westernmost of the places so held and possessed was the island of Kykoveral, to which access from the sea was only obtained by the river Essequibo; that therefore the river Essequibo, with the said island, forms the western boundary of Dutch acquisition in 1648, and determines the western limit of the Dutch territories at that period.

During the following period, lasting for one hundred and sixty-six years, the Dutch remained in possession of the Essequibo, and gradually developed a settlement and plantations on that river. At first the centre of settlement was the island of Kykoveral, the plantations being grouped around it on the neighboring banks of the Essequibo, the Cuyuni and the Massaruni.

All these rivers, at a distance of less than twenty miles from their point of union, are obstructed by falls or rapids, at which point navigation ends. The settlements never went beyond these falls. Their tendency during the whole period of Dutch rule was down the river, until finally the neighborhood of the original post was almost abandoned, the plantations growing in number and extent, however, towards the river mouth.

In 1658 a new colony was established on the Pomeroon, a river about thirty miles northwest of the Essequibo, emptying into the sea. This was destroyed by a hostile English attack in 1665, again founded in 1686, and finally destroyed by the French in 1689. From that time Dutch dominion on the Pomeroon was only asserted by a trading post. The territory west of Moruca, where the post was finally placed, the Dutch never settled, and hardly traversed, except in the early period for the purpose of trading with the Spaniards of Orinoco.

In 1674 the Dutch West India Company came to an end, and a charter was given to a new company, which took the place of the old one, but whose operations were restricted specifically to Essequibo and Pomeroon.

A great growth of Spanish settlement was witnessed in the territory on the upper Cuyuni and its tributaries, starting from the immediate neighborhood of Santo Thome, until at the end of the eighteenth century there were over thirty such settlements in this quarter, most of them conducted by Spanish missionaries. There were also important towns, such as Upata and Tupuquen. Great numbers of Indians established themselves with the

Spaniards at the mission settlements, and under their direction and supervision engaged in agriculture or other occupations. The produce of these towns and settlements, especially the tobacco of Upata and the cattle and hides from the missions, became the principal exports of the Spanish colony. A fort was placed on the south bank of the Cuyuni, opposite the Curumo.

The Spaniards also maintained an occupation of the lower Orinoco, which gradually developed until at the end of this period there were five posts at intervals on the banks of the river or its islands below the old site of Santo Thome. Above that point was the capital, Angostura, and the important settlements of Suay, Piacoa and others, all on the south of the Orinoco. The lowest of the five posts on the river was a pilot station on Papagos Island, a short distance above the river mouth.

The dispute between Spain and the Netherlands as to the posses-sion of territory west of the falls of the Cuyuni, in the interior, and of Essequibo, on the coast, first arose on the occasion of the sta-tioning of a trading agent by the Dutch in the Cuyuni at a point about fifty miles from its mouth, or from thirty-five to forty miles above the falls which marked the limit of Dutch settlement. The Spanish Commandant of Guayana, asserting that this was an intrusion upon Spanish territory, destroyed the post in 1758 and made prisoners of the occupants, upon which the Netherlands made a remonstrance. The Dutch remonstrance was not pressed, and no attention was ever paid to it by Spain, which thereafter maintained an active patrol of the interior and of the coast territory to the limits of Dutch settlement.

In 1810 Venezuela declared her independence of Spain, and after a protracted war obtained its recognition.

By the final Treaty of Peace and Recognition between Vene-zuela and Spain, dated March 30, 1845, Spain "renounces for her-self, her heirs and successors the sovereignty, rights and action which she has upon the American territory known under the

old name of Captaincy General of Venezuela, now Republic of Venezuela." (V. C., vol. iii, p. 48.)

Article II defines the territory thus renounced and ceded as follows:

"In consequence of this renunciation and cession H. M. recognizes the Republic of Venezuela as a free, sovereign and independent nation, composed of the provinces and territories mentioned in her Constitution and other posterior laws, to wit: Margarita, *Guayana*, Cumana, Barcelona, Caracas, Carabobo, Barquisimeto, Barinas, Apure, Merida, Trujillo, Coro and Maracaibo and any other territories or islands which may belong to her." (V. C., vol. iii, pp. 48–49).

The boundary of the province of Guayana is stated in the *Instruccion* of Don Jose Abalos, Intendant General of the Captaincy General of Venezuela, in February, 1779, "for the settlement of the Province of Guayana," as follows:

"The boundaries of the said Province of Guayana, which begins, on its eastern side, to windward of the outflow of the River Orinoco into the sea on the border of the Dutch Colony of Essequibo." (B. C., IV, pp. 194–195.)

During the war of 1803 the British took Essequibo and held it by military occupation until 1814. By the First Additional Article of the Treaty of London dated August 13, 1814, the Netherlands ceded to Great Britain the "establishments of Demerara, Essequibo and Berbice." (V. C., vol. iii, p. 47.) The territory ceded came subsequently to be known as British Guiana.

It has been the contention of Venezuela that at the time of the acquisition of British Guiana by Great Britain, in 1814, the western boundary of the Dutch territory was the boundary which had been established by the Treaty of Munster, and that the Spanish title to the territory west of that boundary had not been divested by any act of the Dutch in the intervening period; that in so far as the rule of adverse holding which has been agreed to

by Venezuela in the Treaty of Arbitration is concerned, no extension of Dutch settlement or control beyond the boundaries heretofore named has brought the Dutch occupation during this period within the terms of the rule, and that the boundaries existing in 1814 are, therefore, the same as those existing in 1648.

No question as to the boundary arose between Venezuela and Great Britain until 1841, when the British Surveyor Schomburgk set up boundary posts along a certain line, afterwards known as "the Schomburgk line," upon territory to which Venezuela claims title. Upon the protest of Venezuela, Great Britain disclaimed any intention of asserting dominion by the placing of the posts, and removed them. A negotiation between Lord Aberdeen and Señor Fortique thereupon took place in reference to the boundary, which, however, came to no result.

As to the period from 1814 to 1897, Venezuela contends that, under the terms of the Treaty by which the Arbitrators were directed to "investigate and ascertain the extent of the territories belonging to, or that might lawfully be claimed by, the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of British Guiana," the consideration of acts performed by Great Britain subsequent to this period is excluded, in so far as the question of establishing the title by adverse holding is concerned.

The apprehension of attempts to occupy the territory in dispute led, in 1850, to an exchange of notes between the two parties, embodying an agreement on the part of each not to occupy or encroach upon the territory in dispute. Charges have been made on one side or the other of violations of the agreement, and, in consequence of Great Britain's refusal to withdraw her stations and officials from the disputed territory, diplomatic relations were broken off by Venezuela in 1887. The agreement has never been abrogated, however, and was appealed to by Great Britain as late as the year last mentioned.

Negotiations have from time to time been attempted in reference to the boundary, in the latest of which, that in 1893, Great Britain laid claim not only to the territory bounded by the Schomburgk line, but to a vast region to the west of it, including territory which had been occupied by the Spanish settlements of the eighteenth century. These negotiations have proved fruitless.

During the last twelve years settlements have been made in the disputed territory under the authority of Great Britain, lands have been allotted, plantations established, numerous police stations and Government offices have been erected, and an enormous revenue has been derived by the Colonial authorities from the royalty on gold mining.

CHAPTER II.

THE TREATY OF ARBITRATION.

Before proceeding to the consideration of the facts which are made, by the Treaty, the subject of inquiry in the present controversy, it is necessary to examine the provisions of the Treaty itself.

I. THE PURPOSE OF THE TREATY.

The purpose of the Treaty of Arbitration entered into by and between the Governments of Great Britain and Venezuela is stated in the preamble as follows:

"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and the United States of Venezuela, being desirous to provide for an amicable settlement of the question which has arisen between their respective Governments concerning the boundary between the Colony of British Guiana and the United States of Venezuela, have resolved to submit to arbitration the question involved."

II. THE QUESTION IN CONTROVERSY.

The duty imposed upon the Tribunal is stated in Article I of the Treaty as follows:

"An Arbitral Tribunal shall be immediately appointed to determine the boundary-line between the Colony of British Guiana and the United States of Venezuela."

The first point to be noticed in the Treaty is that the question in controversy, as established both by the preamble and by Article I, is "to determine the boundary-line between the Colony of British Guiana and the United States of Venezuela." This fact is of prime importance. What is to be determined is the boundary line, and the boundary line between two States. It is a single line. The States are recognized as coterminous. The territory in question is territory that belongs either to one or to the other. There are not two boundary lines to be fixed. There is no inter-

mediate stretch of territory between the two States which belongs to neither. The boundary is a line which marks not only the frontier of one, but the frontier of the other.

This statement of the question in controversy is in accordance with the history of the dispute. From the time the question of frontiers first arose by the confirmation of the Dutch title to what they "held and possessed" in 1648, it has been a question of a boundary line between two coterminous States. It has never been regarded otherwise by either the present contestants or by their respective predecessors in the title, Spain and the Netherlands. There never has been a time when either party admitted or in any way implied the existence of an unappropriated belt of territory between them. Nor has any third party ever suggested the existence of such a belt.

The British Counter-Case, however, ignoring the fundamental article of the Treaty that the question to be decided is a single boundary line, and that the territories of the parties to the Treaty are thereby recognized as coterminous, advances an extraordinary proposition, of which no intimation is conveyed by the Case, as to the acts of Great Britain during the present century as a foundation for British territorial claims. It states (p. 108):

> "Moreover, there has been nothing to prevent the extension of British settlement and control if the regions into which such extension was made were at the time lying vacant. Territory added to the British Colony by such extension cannot be awarded to Venezuela, however recent the British possession may have been."

The meaning of the above passage depends entirely upon the significance of the word "vacant." If by that word is meant merely "unoccupied by settlements," no more extravagant pretension was ever made as to the right of territorial extension. It would amount to saying that any State may extend its settlement and control into adjoining regions which were unoccupied by actual settlement, irrespective of any question of title to those regions. It would mean, for example, that the United States

might, by means of settlement and control, extend the boundaries of Alaska, or even of the States lying on its northern frontier, by the mere encroachments of settlers under its political control into the neighboring territory of British Columbia, on the ground that "the regions into which such extension was made were at the time lying vacant." It is an attempt to make frontiers dependent not upon title, but upon settlement; and if such a theory were correct, no State would be safe from encroachment unless its frontier territory was populated throughout its whole extent. If, on the other hand, by the words "lying vacant," as used in the above passage, it is meant, "not under any claim of title by a civilized State," then the proposition has no application to the present controversy, unless, at the time of the encroachments, there was a region of territory, intermediate between Venezuela and British Guiana, which belonged to neither; which was under no claim of title by any civilized State; or, in fine, which was *terra nullius*.

The Counter-Case, however, leaves no doubt that of the two meanings above suggested the latter is the one intended to be conveyed. It makes the statement, on page 114:

"Great Britain denies that her present occupation (extending to the Schomburgk line) does in fact include any greater extent of territory than was occupied or politically controlled by the Dutch and by Great Britain since her succession to the Dutch title. The only change has been that in the last fifteen or twenty years her occupation of the outlying districts has been marked by more complete political administration. But even if that were not so Her Majesty's Government would be entitled to retain the whole territory up to the Schomburgk line, on the simple ground that at the date of the Treaty of Arbitration they were in possession, and that the territory in question cannot be shown to have ever belonged either to Spain or Venezuela." (B. C.-C., p. 114.)

The above passage makes it clear that in the previous citation the regions that are referred to as "lying vacant" were regions that belonged to nobody. The passage lays down three propositions:

(1) That the territory in dispute, up to the Schomburgk line, belonged neither to Spain nor to Venezuela.

(2) That at the date of the Treaty of Arbitration, Her Majesty's Government were in possession of it.

(3) That by reason of this fact alone, even without any earlier occupation or political control by the Netherlands or by Great Britain, they are entitled to retain the whole territory.

The propositions above cited amount to saying that if the territory in dispute was not Dutch, neither was it Spanish, and as certainly no third party had a claim to it, it was open to the occupation of the first comer; that no other State having taken possession, and that Great Britain at the time of the Treaty of Arbitration, namely, 1897, having acquired such possession, her title is thereby established.

The above claim is in substance a claim that the boundary line shall be determined not, as provided in Article III of the Treaty, by the conditions existing in 1814, but by those existing at the date of the Treaty of Arbitration in 1897. It ignores all reference to 1814; ignores the Spanish title originally established over the whole of this territory, and the indisputable fact that both parties to the controversy have from the beginning regarded the territory in controversy as belonging either to one or the other.

While the question whether any portions of Europe or America were a subject of colonization by the civilized world may have been open to discussion in the last century, it can hardly be said to be open to discussion now. The question whether territory in a given locality is open to colonization is a question of fact, depending upon whether that territory has been so occupied by any civilized State that a title has been acquired thereto. We shall have occasion repeatedly in the course of this argument to refer to the fact that a large part of the territory of many civilized States is more or less destitute of settlement. The fact is true even of some European countries. It is also true of large tracts of territory on the American conti-

nent. The title, however, of the States within which such territories are included is not thereby rendered inoperative, nor are such territories, by reason of their unsettled character, the subject of colonization by any and every civilized State that may undertake the planting of colonies. Certainly this is true of the entire continent of Europe, whether settled or unsettled. It is submitted that as to the continent of America, for very many years, it has been equally true. To claim that at any time, within the last half of the 19th Century, portions of America, by reason of their unsettled character, were like the unsettled and unoccupied parts of Africa, is to disregard the evidence both of history and political geography.

It is not alone, however, the history and political geography of the American continent in general which are appealed to in opposition to the doctrine of *terra nullius* thus advanced in the present controversy. The history and political geography of this particular region absolutely negative such an idea. Whatever may be said of the condition of this region during the one hundred and sixty-six years between the Treaty of Munster and the Treaty of London, it cannot be said that it was nobody's territory. The controversy as to the territory was a controversy between the Spanish and the Dutch alone. Not a shadow of claim was ever put forward to it during this period by any other State. The occupation of it was either Dutch or Spanish occupation. The control of it was either Dutch or Spanish control. The title to it was either Dutch or Spanish title. Any part of it that was not Spanish was Dutch. Any part of it that was not Dutch was Spanish. Wherever the true boundary line of the territory acquired by Great Britain may be found to have been at the date of the acquisition, that boundary line was a boundary between Spanish and Dutch possessions. It was not two boundary lines, separating the territory of the Netherlands, on the one hand, and of Spain on the other, from a neutral belt of unoccupied territory, of nobody's property, open to all the world, intermediate between the two.

Wherever it was, it was a single boundary between coterminous States, and it is so regarded by the Treaty.

Every fact advanced in behalf of the Venezuelan claim, on the one hand, and in behalf of the British claim, on the other, in the history of the century and a half intervening between the two Treaties goes to disprove the existence of such a neutral belt. The determination of the single boundary could have been made in 1814 as exactly and certainly as it is to be made now. Nobody but the two claimants was concerned in the dispute; no occupation was ever projected or attempted, much less carried out, by any other State upon this territory. Spain and the Netherlands were left to fight out the question between them, and upon every occasion upon which the question arose it will be found that it was treated on both sides, during this whole period, solely as a question where the line of demarcation between the territories of the two States should be run.

The extravagance of this extreme British doctrine of a *terra nullius* existing as late as "the last fifteen or twenty years" can best be shown by referring briefly to the historical facts, any one of which is sufficient to contradict it, and all of which in order to its acceptance must be totally ignored.

The first of these is the original Spanish title. The inchoate title by discovery is admitted by the British Case. A vast number of acts, performed by the Spanish in the century and a half following discovery and preceding the acknowledgment of Dutch title to Essequibo in the Treaty of Munster, many of them acts performed while the Dutch were still the subjects of Spain, and therefore incapable of acquiring an independent title, perfected the inchoate title by discovery, as will presently be more fully shown.

The essential fact, however, which destroys the theory here advanced in the British Case of a neutral belt between the two colonies, which was *terra nullius*, is that, during the history of Dutch and Spanish control to the very time of British acquisition,

neither party admitted the existence of such a belt, but both, on the contrary, repeatedly denied it either expressly or by implication.

No instance can be found where the territories of the two colonies are referred to otherwise than as being separated by a single boundary.

In 1712 the boundary was referred to in a session of the Society of Surinam, where it was spoken of as "the boundary in America between the subjects of the States-General and those of the King of Spain." (V. C.-C., vol. ii, p. 182.)

In 1746 the Commandeur at Essequibo called attention to the necessity of taking action in reference to the founding of a Spanish fort between the Orinoco and Essequibo, and said:

"I dare not take anything upon myself, especially as the proper frontier line there is unknown to me." (B. C., II, p. 45.)

Later in the year he again writes (*ib.*, pp. 46–47) of the peril to the colony "to have such neighbors so close by, who in time of war would be able to come and visit us overland, and especially to make fortifications in our own land is in breach of all custom. I say upon our own land—I cannot lay this down, however, with full certainty because the limits west of this river are unknown to me."

In 1750 he reported (*ib.*, p. 67):

"Because the limits are unknown, we dare not openly oppose them."

In 1754 the Director-General of the colony is awaiting "the so long sought definition of the frontier, so that I may go to work with certainty." (V. C., vol. ii, p. 113.)

In 1758, on the occasion of the capture of the Dutch post in the Cuyuni, the two parties to the dispute laid claim to the same point of territory, each contending that it appertained to its own colony—a conclusive proof that the territories were coterminous.

In the same year the Director-General at Essequibo referred (*ib.*, p. 126) to D'Anville's map, and said:

"Our boundaries are portrayed on it."

The map in question, which is shown in the British Atlas (map 16), shows a single boundary.

In 1759, the Director-General, discussing the boundary, referred to "the Wayne, which is pretended to be the boundary-line, (although I think the latter ought to be extended as far as Barima)." (B. C., II, p. 180.)

In the same letter, referring to the Cuyuni post, he sums up the situation by the statement that—

> "In the same way as they are masters upon their territory to do what pleases them, so your Lordships are also masters upon yours." (B. C., II, p. 180.)

Here is no suggestion of intermediate territory.

In his letter of May, 1760 (B. C., II, p. 184), the Director-General referred to the line as "the dividing boundary in South America."

In 1767 he said (*ib.*, III, p. 141):

> "That we, as well as the Spaniards, regard the River Barima as the boundary division of the two jurisdictions, the east bank being the Company's territory, and the west bank Spanish."

In 1794 Sirtema van Grovestins, the first Governor-General of Essequibo after the final termination of the West India Company's charter, refers (V. C., vol. ii, p. 248), in a letter to the Council of the Colonies, to "the creek of Moruca, which up to now has been maintained to be the boundary of our territory with that of Spain."

In the *Instrucción* of Don José Abalos, Intendant-General of Venezuela in February, 1779 (B. C., IV, p. 194), "for the Settlement of the Province of Guayana," he refers to "the boundaries of the said Province of Guayana, which begins, on its eastern side, to windward of the outflow of the River Orinoco into the sea on the border of the Dutch Colony of Essequibo."

Guayana is specifically named as among the provinces of the Captaincy General of Venezuela, renounced and ceded by the

Spanish Crown by the Treaty of Peace and Recognition between Venezuela and Spain in 1845 (V. C., vol. iii, pp. 48-49).

In 1801 the Dutch Council of the American Colonies, with the approval of the Government, secretly sent an envoy to the Congress of Amiens with confidential instructions to "try to have the limits between the Batavian [Dutch] and Spanish possessions in South America irrevocably defined." (V. C.-C., vol. ii, p. 189.)

In 1808, during the British occupation, the Secretary of Demerara, writing an official letter to Gerrit Timmerman, appointing him Protector of the Indians, names the district which is placed under his supervision as "the west coast of the aforesaid Colony from the Creek Supename right up to the Spanish boundary, the River Pomeroon being included therein." (B. C., V., p. 191.)

Finally, the proposition of Lord Salisbury with which the negotiations resulting in the present Treaty of Arbitration was begun is conclusive as to the position of the British Government that the territories of Spain and the Netherlands were coterminous in 1814, and that there was only a single boundary line between them. Lord Salisbury's proposition, made May 22, 1896, was that a mixed commission be appointed "to investigate and report upon the facts which affect the rights of the United Netherlands and of Spain, respectively, at the date of the acquisition of British Guiana by Great Britain. . . .

"Upon the report of the above Commission being issued, the two Governments of Great Britain and Venezuela, respectively, shall endeavor to agree to a boundary line *upon the basis of such report.*" (V. C., vol. iii, p. 305.)

Lord Salisbury then proposes that "failing agreement, the report, and every other matter concerning this controversy on which either Government desire to insist, shall be submitted to a tribunal . . . which tribunal shall fix the boundary line *upon the basis of such report*, and the line so fixed shall be binding upon Great Britain and Venezuela."

Whatever inferences may be drawn from this proposition of Lord Salisbury in reference to other questions, one thing is certain: that it necessarily implied the existence of a single boundary line in 1814, and as necessarily excluded any possibility at that date of a "vacant" territory between the two countries.

The principle advocated by Lord Salisbury was embodied in the Treaty, which, by providing for the ascertainment of the territorial limits in 1814 and by calling for the determination of "a boundary line" between the two countries, negatives the idea that either in 1814 or at the date of the Treaty of Arbitration any such intermediate belt could have been in existence.

From the earliest consideration of this question by Venezuela and Great Britain, no suggestion has ever been made of an intermediate territory between the two countries. Beginning with the earliest negotiations, in 1844, between Lord Aberdeen and Señor Fortique, every discussion has been on the basis of a single boundary line between the two countries. These negotiations negative the theory that any intermediate territory existed in the view of either of the parties to the dispute.

III. THE DATE AS OF WHICH THE BOUNDARY IS TO BE ASCERTAINED.

The Treaty next fixes the date as of which the boundary is to be determined. It says (Article III):

"The Tribunal shall investigate and ascertain the extent of the territories belonging to, or that might lawfully be claimed by the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of British Guiana, and shall determine the boundary line between the Colony of British Guiana and the United States of Venezuela."

The first point necessarily to be defined by the Treaty was the scope of the inquiry to be made by the Tribunal in determining the question of boundary. The question here was upon what state of facts the Tribunal was to reach its decision. The history

of this territory from its first discovery to the Treaty of Arbitration covered a period of four hundred years. For two centuries and a half the Dutch or their grantees had been at Essequibo. During all this time a boundary line had existed, although it had never been laid down. The line was necessarily to be ascertained as of some specific date, and it was necessary that the date should be named in the Treaty.

It was contended by Venezuela that the question of title was finally settled in 1648; that the extent of the territories of both parties, and therefore the question of title had been finally ascertained at that date, and that the boundary should be ascertained as of that date.

It was contended by Great Britain, on the other hand, that as the question of territorial limits had been seriously affected by acts occurring subsequently to the Treaty of Munster, the boundary should be determined as of a later date, to wit, the date of the British acquisition of British Guiana, in 1814.

The British contention prevailed, and the date was so fixed by the Treaty. Clearly the rights of Great Britain, while extending, under this provision of the Treaty, to the territory belonging to or that might lawfully be claimed by the Netherlands at the later date, were limited to such territory, and could not be extended by subsequent British encroachments. Such is the plain and obvious reading of the Treaty.

Nothing could be clearer from a mere inspection of the Treaty than the fact that the Arbitral Tribunal is to determine the true boundary line by ascertaining the extent of the Spanish and Dutch territories at the time of the acquisition by Great Britain of the colony of British Guiana; that the facts which it is to consider are facts bearing upon the conditions existing in 1814; and that, in considering the territorial rights and claims of the respective parties, either as arising under law in general or under the specific rules subsequently prescribed in the Treaty, no question can arise in reference to encroachments since 1814 upon Spanish or Venez-

uelan territory of which the Dutch were not in possession at that date.

The Treaty recognizes the fact that a line existed as of right in 1814, which determined the possessions of the two contending parties at that date, and it is the extent of the territories at that date which the Tribunal is instructed to investigate and ascertain.

Although this proposition is so plain that an extended argument of it could hardly be required, it would appear to be disputed in the British Case.

It has, therefore, been deemed best at the outset to point out that the proposition here contended for is established not only by the language of the Treaty, but also by the equities of the case and the history of the controversy; that this treaty provision was adopted at the instance and upon the proposal of Great Britain herself and against the contention of Venezuela, as shown not only by the negotiations which led up to the Treaty, but, finally, by the position taken in the British Counter-Case itself.

1. The Language of the Treaty.

The Treaty in express terms fixes the date as of which the extent of the territories of the two contending parties shall be ascertained. That date is the time of the acquisition by Great Britain of the colony of British Guiana, namely, the date of the signing of the Treaty of London, in 1814. This date is actually prescribed as the date as of which the territorial limits on each side are to be ascertained and determined, and the fixing of the limits as of this date is the duty imposed upon the Arbitrators by the Treaty. Such being the case, no acts of Great Britain either in the nature of settlement or of control over territory of which the Dutch had no possession in 1814 can affect the question before the Tribunal.

This is the plain reading of the Treaty. If it is not, for what purpose and to what end was the Tribunal expressly directed to ascertain the extent of the territories of Spain and the Nether.

lands respectively at the date in question? The Tribunal is not here to engage in an academic discussion; it is constituted to determine the boundary between Venezuela and British Guiana. By the agreement of the contending parties, its inquiry is to be directed to investigating and ascertaining the extent of the territories of each as they existed at the date when Great Britain acquired British Guiana. It surely could not be the intention of the Treaty that the Arbitrators, having solemnly reached a true line upon the basis laid down by the Treaty for the determination of a boundary, namely, the extent of the respective territories in 1814, were thereupon to cast aside the result of their deliberations, to reject the true line so ascertained, and to make a fresh start on the basis of some other date which is nowhere suggested by the Treaty. To hold otherwise would be to contend that this august Tribunal was directed in terms by the Treaty constituting it to reach an express conclusion which was not to be a conclusion; to determine a true boundary line which was not to be a boundary line; to consider, by "investigating and ascertaining," a state of facts expressly defined, which had been no sooner considered than it was to be thrown aside as unworthy of consideration.

Notwithstanding this provision, formulated in language as plain as could be devised, the British Counter-Case takes the position (pp. 107-8) that, under Rule (*a*) of the Treaty, which provides that adverse holding for fifty years may make a good title,

> "Great Britain is entitled to retain whatever territory has been held by her, or has been subject to her exclusive political control, for a period of fifty years, although the result might be to give to Great Britain territory which had never been Dutch, and might even conceivably have at one time been Spanish."

In support of this claim the British Case has offered an immense mass of evidence, comprising an entire volume of its Appendix, covering the history of the British colony since 1814, and has devoted Part II of the chapter on political control to "British Administration." (B. C., pp. 99-112.)

If Rule (*a*) had been intended to apply to the period of British occupation or of British rule since 1814, why was the Tribunal of Arbitration expressly required "to investigate and ascertain the extent of the territories belonging to, or that might lawfully be claimed, by the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of British Guiana?"

If no distinction is to be made in their effect upon the boundary question between acts belonging to the Dutch period and acts belonging to the British period, why was the Tribunal expressly instructed to direct its attention to the conditions existing at the time of the British acquisition, and not to the conditions existing at any other time? Under the theory of the British Counter-Case, the Tribunal is to give precisely the same consideration to what happened after this date as to what happened before, and the insertion of the fundamental instruction in the Treaty for the guidance of the Arbitrators is a meaningless string of words, to be rejected by the the Tribunal as utterly vain and purposeless.

It is not believed that the Tribunal will find itself able to adopt any such interpretation of the Treaty. That concise instrument was not drawn with the intention that its clauses and paragraphs should be regarded as mere verbiage, destitute of meaning and purpose. When it laid down in so many words that the extent of the territories was to be investigated and ascertained as it existed at a certain date, it meant that it should be investigated and ascertained as of that date. When it prescribed that date in its rule of investigation and ascertainment, it did not intend to prescribe as the rule of investigation and ascertainment some other date, namely, the date of the Treaty, the only date to which the investigation and ascertainment, under the contention of the British Counter-Case, can be referred.

2. The Equities of the Case.

The controversy between the Netherlands and Spain had been from the beginning, and is stated in the Treaty as being, a controversy as to what should be the boundary between the two countries in South America; in the language of the preamble, "the question which has arisen between their respective Governments concerning the boundary between the Colony of British Guiana and the United States of Venezuela." The question was, and had always been, where a certain line should be fixed. Each side admitted, and each side claimed, that at any time during the history of the controversy a line could be drawn which should as of right form the true boundary. The dispute was as to where that line lay. The territories of the two States were contiguous. It was understood that everything which was not Dutch was Spanish; that everything which was not Spanish was Dutch; and no one disputed the fact that the title was in one or the other of these two, or set up any third claim to any part of the territory. The only question was as to the respective territories of each State, or, in other words, as to what was the exact geographical location of the line which marked the limitation of their coterminous frontier.

At the time of the British acquisition of the colony of Guiana the controversy had been agitated for more than half a century. During this entire period acts of territorial control had been repeatedly performed in the territory in question. The Dutch had attempted to establish a post in the territory for the purposes of trade and the recapture of runaway slaves, and the post had been destroyed by the Spanish authorities and the occupants arrested and imprisoned. The conflicting claims had been the subject of diplomatic correspondence and of active controversy, and all this had taken place a long time previous to the acquisition of the "Establishment of Essequibo" by Great Britain.

It was a standing international controversy; the facts bearing upon it were matters of history; its notoriety and publicity were unquestioned, and it was a controversy to which Great Britain succeeded, upon the acquisition of the territory whose boundary was the matter at issue. Whatever the territory was that passed to Great Britain by the Treaty of London under the name of the "Establishments of Demerara, Essequibo, and Berbice," it was taken subject to the Spanish claim as to the disputed boundary.

At the time of Great Britain's acquisition of the "Establishment of Essequibo," a line existed as of right which formed the boundary between it and the adjoining territory of Spain, although the line had never been traced, and was the subject of controversy. It was plainly the intention of the Treaty that the determination of this line should settle the boundary dispute. It was not, and could not have been, its intention to allow one of the parties to it to set up a title founded upon its own encroachments upon the territory whose boundary at the outset of its acquisition might thus be fixed as of right, and so to take advantage of its own wrong committed while the controversy was pending. It was not, and could not have been, the intention of the Treaty to fix such a date for the ascertainment of the true line, as to include in its consideration every act of trespass which one party had been enabled by the simple operation of *vis major* to commit, and to make these very trespasses the foundation of title. Especially was this true when the parties had made a solemn agreement in 1850, which both repeatedly recognized and appealed to,—Her Majesty's Government, in one case at least as late as 1887,—and which never has been abrogated, that neither should extend its occupation on the territory in dispute—an agreement which by its very date precluded any fifty years' adverse holding subsequent to the date of the British acquisition.

In the nineteenth century the period was long since past when any territory could be acquired in South America by mere encroachment. Modification of frontiers might still be accom-

plished by means of conquest and cession, but the advancement of a boundary line by simple appropriation of the territory of a neighbor was no more possible at that date in South America than it would be possible to-day in Europe or in North America. It was doubtless for this reason that the Treaty fixed the date of the acquisition by Great Britain of its Colony of British Guiana as the date to which the boundary question should be referred and which should mark the epoch whose conditions should determine its ascertainment. The reason for the provision, however, is purely a philosophical discussion. Directions to the Arbitrators are stated plainly in the Treaty, and whatever may have been the reason for the Treaty, the fact that the date was fixed by the Treaty is sufficient to dispose of the question.

3. The History of the Controversy.

A reference to the history of the controversy between Venezuela and Great Britain will abundantly disclose that Venezuela has always contended that British Guiana did not extend beyond the actual possessions of the Dutch at the date of the Treaty of Munster (1648). Her contention has been that by the Treaty of Munster the Dutch were limited to the settlements as they actually existed at that date; that they had no right to extend their territory beyond such limits; that any such attempted extensions were met by protests or resistance on the part of Spain, and were of no validity; that the limits of the territory which the Netherlands ceded to Great Britain in 1814 were no greater than the territory ceded by Spain to the Netherlands in 1648. Upon this reasoning Venezuela had sought to fix the date as of which the line should be ascertained at 1648.

If the Dutch actually possessed in 1648 any part of the disputed territory (which is denied), it was but an insignificant part of the territory which Great Britain now claims. Great Britain accordingly rested her case upon the proposition that, even though the title of the Dutch under the Treaty of Munster was limited to the

territory which at that time they actually possessed in fact, she can now claim additional territory by virtue of a later occupation made by the Dutch between 1648 and 1814, and continued long enough to ripen into a title by prescription.

Such was the British claim, and it was admitted in the Treaty by fixing the date of determining the boundary of the territories at 1814, as against the Venezuelan contention of 1648, and such is undoubtedly the law of this case, made so by the express provision of the Treaty.

That this has been the history of the controversy between Great Britain and Venezuela from its commencement in 1841 down to the signing of the present Treaty in 1897, is clearly shown by the correspondence—Venezuela seeking to fix the line of 1648, and claiming that British territory could not go beyond this line; and Great Britain seeking to fix the line of 1814, and claiming thereby the benefit of all alleged extensions of the line of 1648 caused by the Dutch occupation.

The establishment in the Treaty of the date of 1814 as the date at which the Arbitrators should find the line was a diplomatic victory for Great Britain, and the recognition of the principle for which she had always contended. Nowhere, and at no time, has Great Britain ever asserted that the territory to which she now lays claim was other than that to which the Netherlands were entitled at the time of the acquisition by Great Britain of the "Establishments of Demerara, Essequibo, and Berbice."

4. THE CORRESPONDENCE LEADING UP TO THE PRESENT TREATY.

If the language of the Treaty in reference to this point admitted of any doubt as to the intention of the parties, the correspondence between the United States and Great Britain which immediately preceded and led up to the negotiation of the Treaty would remove it.

On May 22, 1896, Lord Salisbury, in a letter to Sir Julian Pauncefote, proposed a form of arbitration of the boundary dis-

pute. His proposition was that, by agreement between Great Britain and the United States, a commission be created, consisting of four members, namely, two British subjects and two citizens of the United States, "to investigate and report upon the facts which affect the rights of the United Netherlands and of Spain, respectively, at the *date of the acquisition of British Guiana by Great Britain*. (V. C. vol. iii, p. 304.)

"This commission," Lord Salisbury proposed, "will only examine into questions of fact, without reference to the inferences that may be founded on them; but the finding of a majority of the commission upon those questions shall be binding upon both Governments.

"Upon the report of the above commission being issued, the two Governments of Great Britain and Venezuela, respectively, shall endeavor to agree to *a boundary line upon the basis of such report*. Failing agreement, the report, and every other matter concerning this controversy on which either Government desire to insist, shall be submitted to a tribunal of three—one nominated by Great Britain, the other by Venezuela, and the third by the two so nominated; which tribunal shall fix the boundary line *upon the basis of such report*, and the line so fixed shall be binding upon Great Britain and Venezuela. Provided, always, that in fixing such line, the tribunal shall not have power to include as the territory of Venezuela any territory which was *bona fide* occupied by subjects of Great Britain on the 1st of January, 1887, or as the territory of Great Britain any territory *bona fide* occupied by Venezuelans at the same date." (V. C., vol. iii, p. 305).

"In respect to any territory with which, by this provision, the tribunal is precluded from dealing, the tribunal may submit to the two powers any recommendations which seem to it calculated to satisfy the equitable rights of the parties, and the two powers will take such recommendations into their consideration."

"It will," continues Lord Salisbury, "be evident from this proposal that we are prepared to accept the finding of a commis-

sion voting as three to one upon all the facts which are involved in the question of Dutch and Spanish rights *at the time of the cession of Guiana to Great Britain.* We are also prepared to accept the decision of an arbitral tribunal in regard to ownership of all portions of the disputed territory, *which are not under settlement by British subjects or Venezuelan citizens.*"

In reply to this communication, Mr. Olney (after pointing out the defects of the two commissions proposed by Lord Salisbury, and their inability to reach an effective conclusion, and to dispose finally of the question in controversy between the two governments), speaking of the commission of four which was to investigate and report the facts, said: "It is to report the facts affecting the rights of the United Netherlands and of Spain, respectively, *at the date of the acquisition of British Guiana by Great Britain.* Upon the basis of such report, a boundary line is to be drawn, which, however, is in no case to encroach upon the *bona fide* settlements of either party." (V. C., vol. iii, p. 306.)

Further pointing out the defects of the two commissions proposed, and suggesting that it was not apparent why the same commission should not be charged with determining all the facts which the controversy involved, Mr. Olney declared that Lord Salisbury's proposals, "looked at as embodying a practical scheme for a speedy and final settlement of the boundary dispute," could not be regarded as satisfactory. Further commenting upon Lord Salisbury's proposals, Mr. Olney (*ib.*, p. 308) says: "In the opinion of this Government, however, such *bona fides* on the part of the British settler is quite immaterial. So far as *bona fides* is put in issue, it is the *bona fides* of either Government that is important, and not that of private individuals. Suppose it to be true that there are British subjects who—to quote the dispatch—'have settled in territory which they had every ground for believing to be British,' the grounds for such belief were not derived from Venezuela. They emanated solely from the British Government; and if British subjects have been deceived by the assurances of their

Government, it is a matter wholly between them and their own Government, and in no way concerns Venezuela. Venezuela is not to be stripped of her rightful possessions because the British Government has erroneously encouraged its subjects to believe that such possessions were British. * * * Venezuela's claims and her protests against alleged British usurpation have been constant and emphatic, and have been enforced by all the means practicable for a weak power to employ in its dealings with a strong one, even to the rupture of diplomatic relations. It would seem to be quite impossible, therefore, that Great Britain should justify her asserted jurisdiction over Venezuelan territory upon which British subjects have settled in reliance upon such assertion by pleading that the assertion was *bona fide* without full notice of whatever rights Venezuela may prove to have." (*ib.*, p. 308.)

"In the opinion of this government," continued Mr. Olney, "the proposals of Lord Salisbury's despatch can be made to meet the requirements and the justice of the case only if amended in various particulars.

"The commission upon facts should be so constituted, by adding one or more members, that it must reach a result, and cannot become abortive and possibly mischievous.

"That commission should have power to report upon all the facts necessary to the decision of the boundary controversy, including the facts pertaining to the occupation of the disputed territory by British subjects.

"The proviso by which the boundary line as drawn by the arbitral tribunal of three is not to include territory *bona fide* occupied by British subjects or Venezuelan citizens on the 1st of January, 1887, should be stricken out altogether, or there might be substituted for it the following:

"Provided, however, that, in fixing such line, if territory of one party be found in the occupation of the subjects or citizens of the other party, such weight and effect shall be given to such occupation as reason, justice, the rules of international law, and the equi-

ties of the particular case may appear to require." (V. C., vol. iii, p. 309.

The suggestions made by Mr. Olney were substantially adopted. The proposal of Lord Salisbury, providing that the tribunal should not have power to include as territory of Venezuela any territory which was *bona fide* occupied by subjects of Great Britain, was stricken out. The commission of four was dropped, and the arbitral tribunal was changed from three to five. No change was made in the date as of which the territorial rights of the contending parties were to be ascertained.

The date as of which the true boundary line should be drawn was a vital fact, and its importance could not have been overlooked by either Lord Salisbury or Mr. Olney. It must be ascertained as of some particular date. All the facts bearing upon the rights of the parties as to that date must be investigated and the facts found in order that the true line may be ascertained. This date might have been: *first*, that of the acquisition by Great Britain of British Guiana, namely, 1814. The investigation would then involve the claims and the acts of two Governments not parties to this Treaty, namely, the Netherlands and Spain. Under such an inquiry, no act or fact arising subsequently to 1814 would be of the slightest materiality or relevancy. All the investigation would be directed to the history of the settlements made by the Netherlands of the territory in question, the character of the government which they had established, the extent of the territory over which they exercised jurisdiction, the nature, character and extent of their settlements; in short, every act or fact tending to prove the title of the Dutch to the territory in question would have been pertinent and essential to the ascertainment of the true boundary line, as showing the character and extent of the Dutch possession, which it asserted adversely to the prior title of Spain.

Or, *second*, the date of the inquiry might have been fixed as the date of the Treaty. Had the commission been required "to investigate and ascertain the extent of the territories belonging to

or that might lawfully be claimed by British Guiana or by the United States of Venezuela respectively, at the date of this Treaty," a different and much wider field of investigation would have been opened, and other and different facts would require to be investigated, ascertained and determined. The whole history of this territory for nearly a century subsequent to 1814, all the acts and controversies, the correspondence, claims, assertions, denials, and acts of jurisdiction of the two countries respectively, would have been the subject of investigation, and would largely have constituted the basis of determination.

In this correspondence Lord Salisbury nowhere suggests that the boundary line should be ascertained as of the date of the Treaty of Arbitration. The only circumstances arising subsequent to 1814 which are referred to as having a bearing upon the question are stated in the proviso originally suggested, as follows:

"Provided, always, that in fixing such line, the tribunal shall not have power to include as the territory of Venezuela any territory which was *bona fide* occupied by subjects of Great Britain on the first of January, 1887."

This proposition was rejected, and at Mr. Olney's suggestion a rule was inserted in its place, which became Rule (*c*) of the Treaty, as follows:

"In determining the boundary-line, if territory of one Party be found by the Tribunal to have been at the date of this Treaty in the occupation of the subjects or citizens of the other Party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the Tribunal, require."

Thus, every question, both of fact and of law, involved in the question of Dutch and Spanish rights in regard to the ownership of all portions of the disputed territory at the time of the cession of Guiana to Great Britain, was submitted to the ascertainment and determination of a single tribunal, with the express provision that the rights of ownership thus established in one of the parties over any territory should not be affected by the fact that such ter-

ritory had subsequently been occupied by the subjects or citizens of the other.

5. The Position adopted by Great Britain in the Counter-case.

Finally, the foregoing contention is expressly admitted in the British Counter-Case. At page 114 her position is stated as follows:

"Great Britain denies that her present occupation (extending to the Schomburgk line) does in fact include any greater extent of territory than was occupied or politically controlled by the Dutch and by Great Britain since her succession to the Dutch title."

This important admission of the British Case shows the reason why Great Britain was willing to take the line of 1814 as the boundary to be fixed and to eliminate any acts subsequent to that date from the controversy, except as provided in Rule (*c*) That Great Britain should have agreed to the establishment of the line of 1814 was quite reasonable, in view of the fact that she does not *now* put forward any prescription based upon the extension by her of that line. It was not claimed in the diplomatic correspondence that led up to the Treaty, nor is it claimed in the British Case that Great Britain extended the line of Dutch occupation to any territory that she might now prescribe for under Rule (*a*) of the Treaty. It was also well known to Great Britain that the Agreement of 1850 cut off any possible claim by her to such a prescription. The British settlers, in whose behalf Lord Salisbury's solicitude was excited, had not entered the disputed territory before 1880, and, so far as their case might be regarded as matter of international consideration, it was provided for in Rule (*c*). It was because, as Great Britain herself states, her present occupation, meaning thereby her occupation not only up to the date of the Treaty, but up to the very filing of the Case, does not include any greater extent of territory than the Dutch occupied at the time of the cession. This is the fundamental fact in the interpretation of this clause of the Treaty—that British occupation of the present

day extends no farther than the Dutch occupation which preceded it. Upon that statement, made solemnly in her own Case, Great Britain stands or falls. The fact once admitted that the present occupation is not in excess of the occupation of 1814, no reason can be shown for admitting evidence as to occupation since that date.

IV. THE THREE RULES OF THE TREATY.

The Treaty, having stated the general subject-matter of the arbitration as being the determination of the boundary line in accordance with the extent of the territories of Spain and the Netherlands respectively in 1814, proceeds to lay down three Rules, which, as well as the appropriate principles of international law not inconsistent with such Rules, are to govern the decision of the Arbitrators. Article IV is as follows:—

"In deciding the matters submitted, the Arbitrators shall ascertain all facts which they deem necessary to a decision of the controversy, and shall be governed by the following Rules, which are agreed upon by the High Contracting Parties as Rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the Arbitrators shall determine to be applicable to the case :

RULES.

"(*a*) Adverse holding or prescription during a period of fifty years shall make a good title. The Arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.

"(*b*) The Arbitrators may recognize and give effect to rights and claims resting on any other ground whatever valid according to international law, and on any principles of international law which the Arbitrators may deem to be applicable to the case, and which are not in contravention of the foregoing rule.

"(*c*) In determining the boundary-line, if territory of one party be found by the Tribunal to have been at the date of this Treaty in the occupation of the subjects or citizens of the other Party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the Tribunal, require."

RULE (a)

1. Adverse Holding—Duration and Character.

Rule (*a*), in reference to adverse holding, is as follows:

"Adverse holding or prescription during a period of fifty years shall make a good title. The Arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription."

The subject of inquiry having been broadly laid down in Article III of the Treaty, namely, that the Arbitrators are to "investigate and ascertain the extent of the territories belonging to, or that might lawfully be claimed by, the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of British Guiana," certain rules are added, which are to be followed by the Arbitrators in conducting this investigation and ascertainment. The rules do not change the subject of inquiry as thus broadly laid down, but serve as a guide to the Arbitrators in conducting the inquiry. That inquiry is as to the extent of the territories of the two parties in 1814. Manifestly, the subordinate rule cannot, by specifying certain applications of the principle of adverse holding, reverse the fundamental definition of the subject-matter of the arbitration, and be construed as enlarging the field of inquiry thus defined, because the date named in the primary definition is not repeated in the rule itself. Such an interpretation would nullify the fundamental basis of the Treaty.

Inquiry as to the facts constituting, or claimed as constituting, an adverse holding, within the meaning of the Treaty, must therefore be limited to matters occurring prior to 1814.

The term "adverse holding" means a naked holding or possession, by which title may be acquired, adversely or in opposition to the holder of the prior title. Of course a claim of adverse holding presupposes a prior title, as is admitted by the British Counter-Case, where the principle is thus stated at page 114:

"But no question of adverse holding or prescription can arise except where one Power has occupied territory by right belonging to the other."

A plea of adverse holding is, therefore, an admission of the existence of a superior title, and the burden rests upon the claimant to show an adverse holding sufficient to establish a title.

The adverse holder must show actual settlement or exclusive political control for fifty years, but no specific requirement is prescribed in proving the anterior title. This is left to be determined by general principles of law.

"Adverse holding" is in general used of individuals and as bearing on the ownership of land under the municipal law of the State of whose territory it forms a part. In the Treaty, however, it is used of States and as bearing upon the title or right of sovereignty of a State in and to its territory. One relates to private title, or ownership of the fee; the other to public title, or dominion over the territory.

The foundation of title by adverse holding is the actual possession of land. The fact of possession is the determining fact in the creation of title. In the case of individuals, the fact of possession is one readily comprehended and recognized. In the case of States, it is a much more complex and difficult question. States do not act through individuals, but through governments. The acts of individual subjects of a State are not the acts of the State. The declarations of individuals are not the declarations of the State. The evidence of possession as to adverse holding is, therefore, not the same in the case of States as in the case of individuals. So also with the effect of adverse holding. The condition of private ownership, which expresses the relation of an individual to his land as the effect of adverse holding, is replaced by the condition of dominion or sovereignty, which expresses the relation of the State to its territory. In the case of States, the fact of possession must, therefore, be determined with reference to this effect of creating public title, that is to say, sovereignty or dominion; while, in the case of individuals, it is

determined only with reference to the effect of creating private title or ownership.

In view of the fact that the question presented in this arbitration is a question not as to individuals, but as to States, with all that the distinction implies, the first point to be determined is: In seeking to establish the public title of a State by adverse holding what acts are to be deemed the equivalent of possession in the case of individuals?

The first requisite, which lies at the foundation of the whole subject, is that the act, whatever it is, must be a national act. The party here seeking to acquire title is the State. The possession must, therefore, be the possession of the State.

When the subjects or citizens of one State enter the territory of another and make settlements there, their acts are those of mere private individuals. Unless expressly authorized, or adopted by the State itself, to which they belong, they remain nothing more than private and individual acts. No claim of adverse holding can be made on behalf of the State, for the State itself has not entered. The act of entry must be a national act, in order to be the foundation of public title.

The settlement of persons associated together upon unoccupied territory of a foreign State is a matter of frequent occurrence; yet no claim could be made that such settlement operated, no matter how long it might last, to transfer the dominion of the land upon which they settled to the State of which they had been and might continue to be the subjects. A claim of adverse holding, to be made by a State, must be based on public acts of possession and control. It must in some way have the stamp of authority from the sovereign, either by holding under grants from him or by declarations made by him. Unless it is so defined as an act of sovereignty, it cannot become the basis of adverse holding to establish a sovereign's title.

The act must also be done under a claim of right, and a claim not only on the part of the individuals, but on the part of the sov-

ereign who seeks to take advantage of their acts. This principle lies at the bottom of all adverse holding. Unless the adverse holder enters under a claim of ownership he does not oust the prior holder. He is understood to hold under the prior owner. The claim must, therefore, be a claim of territorial sovereignty, for nothing less would lay the foundation of public title, and it must be a claim made by the sovereign himself, because no one but the sovereign can assert such a claim. The claim, as a claim of the sovereign, must be open and notorious. No State can be permitted to send its subjects into the unoccupied territory of another State, to establish themselves there, and then, after a long time has elapsed, to assert that their entry was made by its direction and under a claim of right on its part which no one ever heard of before. The holding can only be computed from the time when the State makes the open claim. What may have been done before that time goes for naught.

Nor is it enough that the act shall be in its inception an act of the intruding sovereign and made under a claim of right on his part. It must continue to be the act of the sovereign. The community so formed in the territory of another by which public title is attempted to be created must be controlled and governed by the State which claims the benefit of the intrusion. It must be not only a public act of the intruding State in the beginning, but it must continue to be such a public act. It can only keep this character as long as the intruding sovereign maintains political control over the territory thus occupied. Political control, therefore, is an indispensable accompaniment of all adverse holding by which public title is to be created.

The political control, moreover, must be a political control over the territory to which the claim extends. It is not sufficient that it should be merely the control of subjects as subjects who happen to be in the territory. It must be a territorial control; or, in other words, a control of all persons within the territory. A control of, or jurisdiction over, the persons merely

of subjects, as subjects, even within the territory, is a personal control or jurisdiction. It is not a territorial control. Nothing less than a territorial control is sufficient to establish this form of title.

The term "adverse holding" is a term familiar to English jurisprudence, and its application is subject to well-defined principles. As used in Rule (*a*), it has, in addition, certain express qualifications, to be found in the text of the Rule itself. These qualifications do not affect the general principles above referred to, which are inherent in the meaning of the term. They operate as specific restrictions or definitions in the application, in the present proceeding, of the term as generally understood.

In this proceeding, as already stated, the question involved is not one of private title, or ownership of the fee, but of public title, or dominion over the territory. It is chiefly on account of this distinction that the necessity arises for the express qualifications of the term "adverse holding" in the Treaty.

These express qualifications relate to two facts; FIRST, *The Period of Duration of the holding or possession;* SECOND, *Its Character.*

First; In the case where individual title to land is created by adverse holding, the period of duration of the holding necessary to make title is prescribed by the municipal law of the State within whose territory the land lies, either by statute or otherwise. There being no fixed rule prescribing such a period in international law, which regulates international controversies, it became necessary to assume a period which should have the effect of creating title, and this period was fixed by agreement in the Treaty, for the purposes of this arbitration, at fifty years.

Second; The possession of an adverse holder, where the question involved is one of public title, must be evidenced by actual settlement.

In the case of an individual claiming under an adverse possession, possession must be evidenced by actual occupation. As the

claim of the adverse holder is a claim to disseize him who has the possession, the burden is upon him to establish an occupation which amounts to an actual ouster. The mere performance of acts which are no indication of ownership and which are done on sufferance is not an ouster and does not constitute adverse possession.

With stronger reason does the same principle hold in the case of States. The burden here is upon the intruding State to show possession by positive and actual occupation of the soil itself. This can only be accomplished by settlement.

This principle is recognized in terms by Rule (*a*) of the Treaty, which says that "the Arbitrators *may* deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding." The meaning of this paragraph is clear. It is that actual settlement of a district is a necessary condition to constitute adverse holding; but it states that, apart from the rule of law and for the purposes of this investigation, the Tribunal may, in its discretion, take into consideration another condition as well as the legal one of actual settlement.

In so far as actual settlement is concerned, therefore, the Treaty is affirmative of the general rule of law. It is to be noted, however, that in defining what shall constitute the test of adverse holding by States—what, in other words, shall correspond to possession in the case of adverse holding by individuals—the Treaty has employed not loose and general phrases, but phrases that are emphatic, well defined and specific. It is not mere possession that will be sufficient, it is not even mere use and enjoyment, but settlement, a thing very different from possession or from use and enjoyment. Nor is it mere settlement that is required; it must be actual settlement, and actual settlement of a district. It would be difficult to find language more precise and exact. Each and all of these terms is to be given full force and effect in determining the merits of any claim of adverse holding.

Even in the case of individual proprietors, acts are often allowed upon the land which the proprietor does not choose to consider a trespass. Much more is this the case with reference to individual strangers in the territory of a State. In most countries, even those which are most completely settled and organized, foreigners are allowed to go and come at will. So long as they keep the peace and do not violate the law, they are not molested in any way; they travel, they hunt, they fish, they pursue their runaway cattle over the border, they trade, in many States they even buy land and build houses, till the soil, and use its natural products, or they may settle as mere squatters, without being disturbed or proceeded against by the State. If this is true of countries that are settled, much more is it true of countries where, although held under a perfect and undisputed title, no settlements have yet been made. The fact that individuals are suffered to do these acts, that they are tacitly allowed this use and enjoyment of the territory, indicates no such territorial possession as to make them adverse holders, as the subjects of a foreign State. Not only this, but a foreign State may itself, through its agents, do many of these acts within the territory of another State, as the acts themselves involve no claim of sovereignty, as well as private individuals, and no significance can be attached to the fact that they perform such acts. A Government may engage in trade, in which case its property so engaged in trade in a foreign country comes under the same rules as that of private individuals (The *Charkieh*, L. R. IV, Adm. & Ecc. 59, 1873). Or it may delegate a certain portion of governmental authority to a private trading corporation which may engage in trade in a foreign country. The acts of such a trading corporation which it performs on sufferance in the territory of another do not constitute possession in any sense, nor can it claim an adverse holding by reason of such acts.

2. Settlement, as Basis for Adverse Holding.

Such possession, under the general rules of law, can only be evidenced by settlement, accompanied by the exercise on the part of the sovereign claiming to hold adversely, of political control under a claim of right, and this principle is recognized by the Treaty.

The *first* question to be considered is what is meant by "settlement."

First; "Settlement" implies *fixity of abode.* It implies the creation of dwellings. Mere transit over a territory will not create it. Travelling, exploring, voyaging with whatever object, whether for hunting or for any other purpose, is not settlement. Trading in the heart of a country, however extensive or however regularly pursued, is not settlement. Still less is trading by water. The casual use and enjoyment of natural products is not settlement. The pursuit of runaway slaves or of cattle is not settlement. None of these acts, even though by their frequency they may develop into habitual practices, has any bearing upon the question of settlement. The only act that can constitute settlement is the establishment of fixed abodes.

Secondly; the idea of settlement involves the establishment of abodes by persons in more or less considerable numbers. It means at least *the nucleus of a permanent population;* persons whose homes and occupations are at that point, and who form what may have some claim at least to being called a community.

A whaling ship voyaging to the Pacific leaves one of its crew on the Galapagos Islands, where he remains for a year or two before another ship takes him off. The whaler does not constitute a settlement.

John Sutton goes to live for a few months on the shell-bank at Waini, where he trades with the Indians (B. C., VI, p. 128). Sutton does not constitute a settlement.

The boy William Kendal, a servant of Father Cullen, at the Santa Rosa Mission, runs away and lives for a dozen years with

the Indians on the Auka, and marries a daughter of one of the head men, and is discovered there, after this long absence, by some one who chances to pass that way (B. C., VII, p. 238). But Kendal does not constitute a settlement.

"A Dutchman had been eight years domiciled in the River Aguirre," and this fact is thought worthy of being stated in the British Case (p. 48), although the Aguirre is undisputed Venezuelan territory, which even the wildest claims either of Great Britain or the Netherlands have never called in question. But the fact of the Dutchman being so domiciled does not constitute the Aguirre a Dutch settlement.

Thirdly; settlement implies, necessarily, the *establishment of homes* by inhabitants—dwellers. The designation of a trading agent to remain at some point for purposes of traffic in an unsettled part of a neighbor's territory does not constitute settlement, though he builds a cabin and occupies it and derives his sustenance from the cultivation of the soil. The Dutch post in Cuyuni, the only post which they ever established in the disputed territory west of Moruca, had, therefore, no elements of a settlement.

Still less does the mere erection of a building for shelter, to be occupied from time to time by such an agent, or by traders or hunters generally, as occasion may arise, fulfil the requirements of this term. Thus, the shelter which Beekman erected in Barima, even if it had been used, which the evidence fails to show, would have had no claim to be called a settlement.

In support of this proposition we quote from the British Counter-Case (p. 44), the language of Queen Elizabeth, in reply to the complaint of the Spanish Ambassador respecting the expedition of Sir Francis Drake, in 1580:

"Besides Her Majesty does not understand why her subjects and those of other Princes are prohibited from the Indies, which she could not persuade herself are the rightful property of Spain by donation of the Pope of Rome, in whom she acknowledged no prerogative in matters of this

kind, much less authority to bind Princes who owe him no obedience, or to make that New World as it were a fief for the Spaniard and clothe him with possession: and that only on the ground that Spaniards have touched here and there, have erected shelters, have given names to a river or promontory; acts which cannot confer property."

A trading agent's cabin, whether temporary or permanent, may be dignified by the name of a "post," and its occupant may be called a "*Postholder*," although, as a matter of fact, the Dutch called him merely an "*Outlier*." But whatever else such post may be called, it cannot be called a settlement. A settlement may grow up in the neighborhood of such a post, by the building of dwellings and their occupation by those who till the soil, or gather its products, or conduct trading or other enterprises from that point. But the post by itself is not a settlement.

Fourthly; a settlement, as already stated, to be the basis of adverse holding, *must be subject to the political control of the sovereign who claims as an adverse holder.* If the settlement is detached from such control, if there is nothing to show that his laws and his government extend over it, and extend over it as a portion of his territory, so that they apply to all persons within the limits of the settlement, whether subjects or foreigners, it is not a settlement within the meaning of the law governing adverse holding.

Much more strongly does this restriction upon settlement as a foundation for adverse holding apply in a case where the State claiming as an adverse holder not only fails to assume the government of the settlement, but expressly disavows it. Thus, when the Colonial authorities of Essequibo, in 1766, on account of the disturbances which Dutchmen from Surinam had created in Barima, forbade colonists to settle there, it precluded itself from any advantage which it might otherwise have acquired. Under its own law, the act of its subjects was illegal, and while the law remained in force the Dutch sovereign could not derive any dominion from the act.

Similarly, in 1850, when Great Britain entered into an agreement with Venezuela not to occupy the territory in dispute, it became illegal for British subjects to settle in the territory. So long as that agreement remained in force, Great Britain could not take advantage of such a settlement as an adverse holder, because by her own treaty she had expressly prohibited and rendered illegal such an act.

Fifthly; The settlement must be actual. In the case of individuals, the phrase "actual possession" is used in opposition to "constructive possession." Thus, while one who holds adversely, under documentary title defining his holding by metes and bounds, is only in actual occupation of a part of the land covered by his deed, he is held to be constructively in occupation of the whole.

In the case of States, "actual settlement" is used in contradistinction to "constructive settlement," that is to say, the constructive extension of the settlement beyond the localities of actual settlement. The object of the Treaty in using the word "actual" is to exclude, once and for all, all loose and vague claims to extend the effect of such adverse holding beyond the localities actually settled. No constructive extension of the term, such as is recognized in the case of individual possession can be admitted. In order that a district may be claimed, the district must be actually settled. A settlement at the mouth or on the lower banks of a river cannot be extended constructively to include the headwaters of the river or its upper banks. It is not an actual settlement of that district. No claim of adverse holding can be allowed as to any locality unless it is shown, to the satisfaction of the Arbitrators, that actual settlement was made at that locality.

To sum up; in order to fulfil the effective conditions of adverse holding under the head of settlement, as to any particular locality, it is necessary that inhabitants in greater or less numbers should have adopted that locality as a fixed place of abode, and should have established there, their homes and occupations with a certain degree of permanence; that they should be under a recognized

and actual political control; and, finally, no such claim can be established beyond the area of actual settlement. To make a good title under the Treaty, adverse holding must be peaceable and not by force. No holding by force, against the protest of the State whose territory has been seized, will ever ripen into a title by prescription. As between individuals the bringing of an action arrests the running of the statute. There is no tribunal to which an injured State can appeal to recover the territory of which it has been deprived by force. Its maintained protest has the same effect to arrest the maturing of the title by prescription as the bringing of an action by an individual.

3. Exclusive Political Control.

We have seen that, both by the Treaty and by the general principles of law, the essential test of adverse holding, in the case of States, is actual settlement; that the settlement must be a national act, and that it must be under the national control. Without such control settlement cannot lay the foundation of adverse holding. It remains to consider how and how far, under the Treaty, political control of itself may operate to establish a claim of adverse holding without settlement.

Here a broad distinction is taken by the terms of the Treaty. While the reference to actual settlement is mandatory, the reference to political control apart from settlement is merely permissive. The language of the Rule is:

> "The Arbitrators *may* deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding."

The obvious force of this distinction between settlement and political control as tests of the effectiveness of an adverse holding to create a title is that, while the Arbitrators are to be concluded by the fact of actual settlement, they are not necessarily to be concluded by the fact of political control, unaccompanied by settlement. They are to examine the attendant circumstances and conditions surrounding such control, if they find it, and

are to accord to the claim such weight as they may deem just, having in consideration all these circumstances and conditions. Exclusive political control is by no means a final test. It may be found to exist, but it does not on that account necessarily lay the foundation of title. If, for example, such control rests on the exercise of force, in the face of the protest of a weaker Power holding the prior title, it could have, and should have, but little significance in determining the question of adverse holding. All the circumstances surrounding the claim are to be considered and weighed by the Arbitrators, and it is only to have the effect and significance to which it is entitled by a just and equitable consideration of all the facts of the case. To entitle it, however, to be considered at all by the Arbitrators, it must, in the terms of the Treaty, be "exclusive political control of a district."

The language referring to control is not loose and inexact any more than the language referring to settlement. It is not mere influence, or alliance, or superiority, or leadership, that is required, but control—a very different thing from all the others. Nor is it mere control. It must be political control; and more than that, it must be exclusive political control, and exclusive political control of a district. Only if it fulfils all these requirements can it be the subject of consideration by the Tribunal at all; and if it fulfils these requirements, it is then for the Arbitrators to determine how far they will consider it.

It is necessary to define at the outset the terms which constitute this remarkably precise and exact phrase of the Treaty.

"*Political control*" means the exercise of sovereignty over a territory, through political or governmental administration.

"*Political control of a district*" means the actual exercise of sovereignty over that district, through political or governmental administration.

"*Exclusive political control of a district*" means such an exercise of sovereignty over that district to the exclusion of all other sovereignty.

First; Political control must be in the exercise of sovereignty. The question which is being here considered is the question how far an adverse holding based upon political control may operate to the extinguishment of a prior title and the ousting of its holder. The title in question, as has been repeatedly suggested, is not the private title of an individual who owns the fee, but the public title of the State to the territory of which it is sovereign. The claim of adverse holding presupposes the existence of a prior title, and in the present case a prior public title of the sovereign existing in all its completeness. The question is what form of political control shall be sufficient to create a title adversely to this previously existing title of the sovereign.

Obviously, the first consideration is that the political control which is to constitute such an adverse holding must be a control that is maintained in the exercise of a like relation, namely, the relation of sovereignty. In this manner of creating a title adversely, nothing less than acts which are both in intention and in the nature of the acts themselves acts of sovereignty can displace a previously existing sovereignty. It is against the title of a sovereign, formally asserted and maintained, that the claim of adverse holding is now sought to be enforced. Clearly, no acts can lay the foundation of an effective holding unless made in pursuance of an equally definite assertion of sovereignty. A claim of sovereignty, therefore, made openly and notoriously, is the first requisite to fulfil the necessary conditions.

Secondly; the acts themselves *must be such as necessarily imply* sovereignty and, what is more, *territorial sovereignty.* As has been already pointed out, individual foreigners are allowed, according to the customs of most countries, a large latitude of action in the country in which they may for any purpose sojourn. The fact that such foreign individuals are also agents of a foreign government does not cut them off from the liberty of action which is allowed to foreigners generally. The doing of an act in another's territory by such an agent, even an act which may be in

the execution of some official function or duty, carries with it no necessary implication of sovereignty. The fact that in doing an act, which a private individual would equally be allowed to do, he is performing an official duty does not alter the character of the act as an act habitually permitted by the territorial sovereign to be done. The latter does not view the official person sojourning upon his domain in any other light than that in which he views all other sojourners. Such a sojourner may be acting officially with respect to his own Government, but he is not acting officially with respect to the Government of the territory. Consequently, no implication can be drawn from his acts.

The facts above stated are important, because it is precisely of acts of the character described that the British Case on political control is made up. As a matter of fact, there was no such thing as political control exercised by the Dutch in the territory in dispute. Individual Dutchmen were, however, allowed a considerable liberty of movement by the Spanish authorities, and whether these individual Dutchmen were merely private traders or were the officials or employees of the Dutch West India Company made no difference to the King of Spain.

These facts were all the more striking in this particular case by reason of the peculiar character of the Dutch West India Company as a company at the same time engaged in mercantile trading and in the government or management of a trading colony. A trading company clothed, as was this corporation, on the one hand, with certain delegated powers of government to run a colony and, on the other, occupied with the question of trade and trade profits as a private corporation, stands in a peculiar condition. It is in great danger of mixing up its two functions. It may, for instance, have a certain territorial scope for its trade, which of course does not imply sovereignty in any sense. It may thus extend its trade on its neighbor's territory. It also regulates the trade of its colonists, who are quasi-subjects; and it regulates their trade not only in the colony, but out of the colony,

and particularly it regulates their competition outside of the colony with its own trade outside. It uses its powers of government to back up its functions of trade. The consequence is that it exercises a personal jurisdiction over its subjects on foreign territory in connection with matters of trade more extensive than that which Governments ordinarily attempt to exercise. Having begun with matters of trade, it extends this regulation and jurisdiction to other matters, and it is all the more ready to do this in that the colonial character of its enterprise gives it large powers and supervision over the persons and occupations of its colonists.

Thus, the West India Company, through the Colonial authorities, was in the habit of sending its employees, who were chiefly old negro slaves, to trade in the neighboring wilderness with the Indians. It also had Dutch employees who did the same business. These employees were likewise sometimes used to pursue and capture runaway slaves, as they would cattle, upon foreign territory and to bring them back.

There was also a class of employees, a degree higher in the official scale than the roving traders or outrunners. These were called *Outliers*, a name which is generally translated in the evidence, *Postholders*. An *outlier* was sent to a certain point to look after the trade at that point, to give information of the movements of runaways and capture them if possible, and to keep the Colonial authorities informed generally of what was going on.

There is really only one case, that of the post in Cuyuni, which has any material bearing upon the boundary dispute, and nothing in the nature of sovereignty could be attributed to the Outlier who was stationed there.

The Colonial authorities also maintained close supervision over the colonists. Regulations and laws were made which the colonists were obliged to observe, not only in the colony itself, but when they went into the adjoining territory of Spain. This personal jurisdiction over the Dutch colonists was not an exercise of sovereignty over the territory in question, because it related

solely to Dutch subjects and followed them wherever they went. There is not an instance in this whole controversy of the exercise, or attempted exercise, west of Moruca, of any control over anybody but Dutchmen.

Thirdly; Political control requires that there should be *an* actual *exercise of sovereignty through the medium of government.*

While it may not be necessary that the government should be of an elaborate or highly organized type, sovereignty must actually be exercised through governmental agents. This does not mean that they must necessarily be the ordinary civil agents of government. Political control may be exercised by military as well as by civil agents, but sovereignty must be actually exercised by agents, and these agents must be governmental agents. Unless government officers are actually and effectively controlling a district there is no political control of that district within the meaning of this rule of the Treaty.

The definition given above requires that the control be exercised over the territory as territory, and upon all persons within it, whether subjects or foreigners. The control which is exercised only over subjects sojourning within a given territory is not political control over that territory. It is merely a personal control over subjects irrespective of territorial control. If it appears as to this territory in dispute, that one Power exercised control over all persons within the territory, and that the other did not, the first alone exercised political control over the territory. The performance of acts connected with trade in the territory has of itself no significance, because it is no indication of political control; but the exclusion of persons, and especially of persons other than subjects, from the performance of such acts of trade is an indication of political control. It is not necessary in order to political control that this right of exclusion shall be exercised at all times and in all places any more than it is necessary in order to assert political control over the territory of any civilized State that the Government should exclude foreigners or

refuse to allow them to trade there. But if it does exclude them, and they assent to the exclusion, it is an assertion on the one part and an admission on the other of territorial sovereignty and political control in the Government that exercises the right of exclusion.

Of course in an unsettled territory there will be far less to indicate political control than in a settled territory. But that cannot affect the question of title. If political control is to be proved in such a territory, the acts which indicate it will doubtless be less numerous and less extensive than in fully organized districts containing a settled population. The tests of political control in such a district are the actual exercise of a right to exclude foreigners therefrom, and to control the actions of foreigners as well as subjects therein. The apprehension of foreigners for violations of governmental regulations in such territory is an act of great significance. On the other hand, the fact that a sovereign issues regulations as to acts of his own subjects in a territory does not constitute an exercise of political control therein, especially when he has no governmental agencies to enforce such regulations, and when, as a matter of fact, such regulations are not enforced by him.

The enforcing of governmental regulations in an unsettled territory is not necessarily in the hands of civil officers. It is enough that it is in the hands of governmental officers. The distinction between the military police and civil police does not by any means universally exist even in civilized countries, and in wild and unsettled colonies it is almost wholly obliterated. The exercise of control may therefore be in the hands of military officers, coast guard officers and the like, as well as in the hands of civil police. They are agents of the government charged with the duty of enforcing the regulations of the government, and they have the ability to enforce them and do, in fact, enforce them.

The question further arises in a country in the unsettled parts of America as to whether control is exercised over the Indians, and in what such control consists.

The territory in question, during the greater part of its history, while Spain asserted over it the rights of a sovereign and while it was the resort of Spaniards in great numbers for the purpose of trading with the Indians, gold seeking, hunting and other purposes, was in large part unsettled. A considerable part of the forests which covered it was traversed at will by roving tribes of Indians, who, like many others of their race, had no regular abode. They were the natives of the soil, the aborigines who, under the principles which have universally governed the relations of the civilized settler and the native American, remained in the territory on sufferance without political rights and with only such liberty of action and movement as the dominant race saw fit to allow.

Whatever may be assumed to be the meaning of the Treaty as to exclusive political control over a district, certainly the relations of the Government setting up a claim of such control over these roving bands of Indians could have no bearing upon the question. The claim is made in the British Case and dwelt on at considerable length that, from time to time, the colonists of Essequibo entered into various agreements with some of these tribes and exercised some influence over their predatory occupations and over the choice of their chiefs; but such interference and influence, could not, from the nature of things, constitute a political control. In the first place, the tribes were wandering inhabitants of the forest, and could not be said to belong to any particular district. In the second place, the tribes of Indians had not, and could not have, any political status. Still less could they have any international status. International law deals only with civilized States and their relations, and a question of disputed sovereignty arising between two such States can be in nowise affected by the attitude which some particular band of Indians, from considerations of fear, convenience, or temporary interest, may assume towards some particular colonists. The natives certainly had no political control over a district them-

selves. Still less could the acquisition of influence over them be construed as transmitting through them a political control, which they did not, and could not, themselves possess. Influence over and alliance with the Indians does not amount to political control.

Fourthly; In order to create adverse holding of a district, the political control must be exercised over the district. As with the question of settlement, so with the question of political control; whatever may be its significance, it can only extend over the territory where it is actually exercised. No control exercised only within a part of a district can be extended constructively over the whole district. The establishment even of complete forms of government, fully equipped with all governmental machinery, at one point, although constituting the exercise of political control at that point, cannot be construed to extend any further than the limits of the control actually exercised. No claim of adverse holding at any locality, based on political control, can be allowed, unless the Arbitrators are satisfied that political control was exercised throughout the locality. It follows that, under the Treaty, no claims can be sustained on the ground of the exercise of political control to territories of vague and ill-defined boundaries, where there is no area that can be ascertained specifically over which the political control is exercised.

Fifthly; Political control must be exclusive. In order to have significance in this proceeding, as the equivalent of adverse holding, political control, or the exercise of sovereignty through political or governmental administration, must be to the exclusion, during the entire period, of all other sovereignty or control. No acts or classes of acts which are equally performed in the territory in question by both parties can have any bearing upon the claim of adverse holding. The exercise of control in the locality, during the period, by the party holding the anterior title puts an end to the claim as to that locality.

The above principles apply equally to prescription. Prescription is that operation of law by which title is established: (1) by lapse of time, where the title, although its origin is unknown, has been held so long that the memory of man runneth not to the contrary, or, in other words, where the foundation of the title is lost in the mists of antiquity; (2) where, by lapse of time, a wrongful possession comes to have the force of a rightful title.

The first meaning obviously has no application here. In the second meaning, "prescription" is synonymous with "adverse holding," and is governed by the same rules.

RULE (b)

The effect to be given to general principles of international law in the determination of the true boundary line is thus stated in Rule (*b*) of the Treaty:

"The Arbitrators may recognize and give effect to rights and claims resting on any other ground whatever valid according to international law, and on any principles of international law which the Arbitrators may deem to be applicable to the case, and which are not in contravention of the foregoing rule." [Rule *a*].

The only class of rights and claims referred to in the present controversy are the territorial rights and claims of the parties to this Treaty, in so far as they affect the primary question which the Arbitrators are directed by the Treaty to decide. The Arbitrators are to recognize and give effect to all such territorial rights and claims resting on:

(*a*); any ground whatever valid according to international law, and

(*b*); any principles of international law which the Arbitrators may deem to be applicable to the case, and which are not in contravention of Rule (*a*).

As the Treaty at the outset prescribes the date as of which the extent of the territories of the respective parties is to be determined, the clause now under consideration must be read in con-

nection with that statement. As in the case of Rule (*a*), it is only as determining the question of the boundary of 1814 that these territorial rights and claims are to be considered, for it is clearly not the intention of the Treaty that the three subsidiary Rules should extend the limits of the subject matter of the controversy beyond the date fixed by Article III, except in so far as said Rules direct the consideration of a different date.

Under Rule (*b*), the Tribunal is directed to recognize as valid any title which is valid under the rules of international law, except in so far as Rule (*a*) may establish a different principle.

The only claim of title which has so far been specifically referred to by the Treaty is title under an adverse holding, which can never be an original title. Rule (*b*) admits the proof of original titles, and directs the Tribunal to consider any claim of title, including, of course, such original titles as they may deem valid under international law and not in contravention of Rule (*a*). It also introduces such rules of international law as may be used to define the terms "adverse holding" or "prescription."

The original title under which the whole territory in dispute is claimed by Venezuela is the title by which the whole of Guiana from the Orinoco to the Amazon was originally held by Spain. Under the principles of international law, discovery accompanied by intention to acquire possession creates an inchoate title. Where this inchoate title is followed by occupation, consisting of acts of military or political control, explorations, surveys, establishment of trading posts, grants of land to subjects, charters and othet acts indicative of possession or control, the title by discovery becomes complete. The original title of Spain, which Venezuela as a party to this controversy now sets up, is a title by a perfected discovery, and the principles of law governing the establishment of such a title are to be applied in the present case.

The original title of the Dutch, on the other hand, to the "Establishment of Essequibo" is a title based upon conquest from Spain and the cession of the territory by Spain to the

Netherlands under the Treaty of Munster; and the validity of such titles and the extent to which they are to be established are matters to be determined by the Arbitrators who, in making their determination, are to be governed by the principles of international law that may be applicable to the case. The only express proviso which is attached to the application of these principles is that they shall not be in contravention of Rule (*a*). Where a title is sought to be established as against an original title, on the basis of adverse holding, no claim can be considered unless its duration is for the period of fifty years, and unless it fulfils in other respects the requirements of that Rule and of the general rules of international law.

RULE (c)

The adjustment of the relations between the territorial sovereign and subjects of the other party who may be found in occupation of the territory of such sovereign is covered by Rule (*c*) of the Treaty, which is as follows:

"In determining the boundary-line, if territory of one party be found by the Tribunal to have been at the date of this Treaty in the occupation of the subjects or citizens of the other party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the Tribunal, require."

This Rule recognizes the fact that when the territories of each party shall have been ascertained by the defining of the true boundary line, it might be found that the subjects or citizens of one party were at the date of the treaty actually settled upon territory thus ascertained to belong to the other. The question would then arise how, with the greatest fairness both to the State in whose territory such settlers were found and to the settlers themselves, an adjustment should be made of the relations between the two; and it was accordingly provided in the Treaty that the Tribunal should itself finally adjust these relations, upon considerations of reason, justice, the principles of international law and the equities of the particular case.

It is not stated by the Treaty what form of adjustment, if any, is to be adopted by the Arbitrators in carrying out the provisions of Rule (*c*). The whole matter is left to their judgment and discretion. It is clearly contemplated by the Rule that some provision shall be made to settle the relations of both parties, but that, as far as the status of the territory upon which such cases arise is concerned, the territory having once been fixed by the determination of the boundary line, the existence of such cases as are referred to in Rule (*c*) cannot cause any modification of the line. The case only arises, in fact, where the subjects or citizens of one State are found in the territory of the other, as determined by the fixing of the boundary line, and the language of the Rule in itself negatives the idea that the fact of their settlement there shall alter the political status of the territory.

That this is the correct interpretation of the Rule is confirmed by the provisions of Rule (*a*). Under Rule (*a*), it is provided that adverse holding shall only be established by settlement or exclusive political control for fifty years. If it were the intention of Rule (*c*) that the occupation therein referred to should have the effect of deflecting the boundary line, then Rule (*a*) would become meaningless, and the possession of fifty years would be no better than the possession of yesterday. Such a construction of the Treaty would virtually read the fifty-year provision entirely out of it. It would, in substance have the effect of saying that where the subjects or citizens of one party were found in the territory of the other party that fact of itself should put an end to its status as the territory of such other party—a conclusion which is obviously untenable.

That such is the meaning of the Rule is further confirmed by the negotiations which led up to it. The proposition was originally made by Lord Salisbury that while the line was to be determined by the Commission as of the date of 1814, no territory should be included as Venezuelan which was found in the occupa-

tion of British subjects on January 1, 1887. The exact language of his proviso is as follows:

"Provided, always, that in fixing such line the tribunal shall not have the power to include as the territory of Venezuela any territory which was *bona fide* occupied by subjects of Great Britain on the first of January, 1887." (V. C., vol. iii, p. 305.)

This proposition was rejected, Venezuela refusing to agree that the line of 1814, having once been ascertained, should be modified by the mere fact of occupation of what was shown thereby to be Venezuelan territory by British settlers in 1887.

The grounds of the objection to Lord Salisbury's proposition are thus stated by Mr. Olney, who was conducting the negotiation:

"The decisive objection to the proposals is that it appears to be a fundamental condition that the boundary line, decided to be the true one by the arbitrators, shall not operate upon territory bona fide occupied by a British subject January 1, 1887—shall be deflected in every such case so as to make such territory part of British Guiana. It is true that the same rule is to apply in the case of territory bona fide occupied by a Venezuelan January 1, 1887. But, as Great Britain asks for the rule and Venezuela opposes it, the inevitable deduction coincides with the undisputed fact—namely, that the former's interest is believed to be promoted by the rule, while the latter's will be prejudiced.

"The true question, therefore, is, is the rule just in itself—without reference to its actual working—so that Great Britain has a right to impose her will upon Venezuela in the matter? How this question can be answered in the affirmative it is most difficult to perceive, and is not even attempted to be shown by the despatch itself. It is a rule which is certainly without support in any principle of international law, or in any recognized international usage." (V. C., vol. iii, p. 307.)

* * * * * *

"Venezuela is not to be stripped of her rightful possessions because the British Government has erroneously encouraged its subjects to believe that such possessions were British." (*ib.*, p. 308.)

* * * * * *

"The proviso by which the boundary line as drawn by the arbitral tribunal of three is not to include territory bona fide occupied by British subjects or Venezuelan citizens on the 1st of January, 1887, should be stricken out altogether, or there might be substituted for it the following:

Provided, however, that, in fixing such line, if territory of one party be found in the occupation of the subjects or citizens of the other party, such weight and effect shall be given to such occupation as reason, justice, the rules of international law, and the equities of the particular case may appear to require." (*ib.*, p. 309.)

The contention of Mr. Olney that the proposal of Lord Salisbury was unjust to Venezuela, in that it provided that where territory was *bona fide* occupied by subjects of Great Britain, "the boundary line shall be deflected in every such case so as to make such territory part of British Guiana," prevailed, and the present rule was inserted, which provided for the claims not only of British occupants in 1887, but the claims of British occupants down to the date of the Treaty. Instead, however, of a provision that such occupancy should deprive Venezuela of territory which might be ascertained to be hers by the line of 1814, the provision in the Treaty laid down that the Tribunal should itself adjust the relations between these British occupants and the Venezuelan Government on considerations of reason, justice, the principles of international law, and the equities of the case.

Assuming that the facts will disclose cases in which British subjects have settled on what is found to be Venezuelan territory, the question arises as to what adjustment shall be made of their relations with the Venezuelan Government. If such settlers are mere squatters, holding under no grant, their cases require no consideration. They would not be entitled to recognition even by Great Britain, much less would there be any obligation upon Venezuela to recognize them. If, however, such occupants hold under grants from the British Crown, it would seem that such grants would become invalid as being void *ab initio*, unless confirmed by Venezuela. What is to be the validity of such grants, and whether they are void or voidable, or whether Venezuela shall be required to confirm them, or whether they shall be deemed to have been so confirmed by virtue of a provision in the arbitral decision itself, are questions for the Tribunal to determine.

The evidence annexed to the British Case and Counter-Case, covering the history of British administration, while it fails to state with particularity the number, location or character of temporary or other grants in the disputed territory at the date of the Treaty, gives certain general indications in reference to the history of settlement since the acquisition of the colony by Great Britain.

Down to 1850 there was no occupation of the disputed territory by British settlers, either with or without a grant, on the coast, west of the Moruca or in the interior above the first falls of the Cuyuni.

In 1850 an agreement was entered into by the two parties that neither should occupy or encroach upon the territory in dispute; and no territorial benefits can certainly be derived by Great Britain from any occupation which took place while that agreement was in force. Neither can reason, justice, the principles of international law, or the equities of the case, require that Venezuela should assume any obligations in reference to the compensation either of the British Government or of British subjects for the revocation or invalidation of grants made by the British Government during that period.

The construction correctly put upon this agreement by Great Britain is shown by the text of the proclamation issued January 30, 1867, by the Colonial authorities of British Guiana, as follows:

"Whereas in the year 1850 a mutual engagement was entered into by the Government of Great Britain and that of Venezuela, to the effect that neither Government would occupy or encroach upon certain tracts of country theretofore in dispute, lying between the boundary of British Guiana, as claimed by Great Britain, and the boundary of Venezuelan Guiana, as claimed by Venezuela;

"And whereas a company has been lately formed assuming the name of British Guiana Gold Company, for the purpose of seeking for gold and working any deposits thereof to be found within the tracts aforesaid, and it is understood that British subjects are employed by the said company within the said tracts: Now, this is to inform those British subjects and all

others concerned, and they are hereby required to take notice, that Her Majesty's Government can not undertake to afford protection to British subjects so employed in these tracts as aforesaid, and that all such British subjects can only be recognized as a community of British adventurers, acting on their own responsibility and at their own peril and cost." (V. C., vol. iii, pp. 148-149.)

The Agreement of 1850 has never been abrogated or repudiated and was appealed to by Great Britain as late as January, 1887, in the letter of the Earl of Iddesleigh of that date to Mr. St. John, the British Minister at Caracas. By this express admission it was in force at that date, and no action taken since that date has disturbed it.

Apart, however, from the question whether the Agreement of 1850 was in force subsequent to 1887, and even assuming that it was not, the British Government has, by its own action, put the holders of grants upon notice that such grants were taken under an uncertain tenure.

In June, 1887, the Governor of British Guiana, by express instruction from the Home Government, addressed the Court of Policy in the following terms:

"Before we proceed to the order of the day, I am anxious to make statement with reference to the question of the boundary between this colony and the Republic of Venezuela. Among the applications which have been received for mining licenses and concessions, under the mining regulations passed under ordinance 16 of 1880, 16 of 1886, and 4 of 1887, there are many which apply to lands which are within the territory in dispute between Her Majesty's Government and the Venezuelan Republic. I have received instructions of the secretary of state to caution expressly all persons interested in such licenses or concessions, or otherwise acquiring an interest in the disputed territory, that all licenses, concessions, or grants applying to any portion of such disputed territory will be issued and must be accepted subject to the possibility that, in the event of a settlement of the present disputed boundary line, the land to which such licenses, concessions, or grants apply may become a part of the Venezuelan territory; in which case no claim to compensation from the colony or from Her Majesty's Government can be recognized; but Her Majesty's Government

would, of course, do whatever may be right and practicable to secure from the Government of Venezuela a recognition and confirmation of licenses, etc., now issued." (V. C., vol. iii, pp. 307–308.).

This wise precaution was doubtless taken in view of the fact that the Agreement of 1850 was still in force; but whether it was so or not, the effect of the caution was to put all grantees upon notice that their grants might be defeated by the determination of the boundary question, and no person holding under such a grant can claim any indemnity if that which he was notified might happen did happen, namely, the determination of the territorial sovereignty of the territory where the grant lay against Great Britain. It will be noticed that there is here no suggestion that the boundary line was to be deflected to, or include, such settlements.

Even if such a reservation had not been made by Great Britain, however, the failure to make it, in view of the circumstances of the case, would not be a matter for which Venezuela was responsible. In fact, a short time later, that is to say, on September 5, 1887, the caution previously given was withdrawn by Great Britain, and on that date, the Secretary of State for the Colonies wrote to the Governor of British Guiana:

" Her Majesty's Government have decided that mining concessions and grants of land may be made by the Government of British Guiana within the line referred to in the *Gazette* notice of 21st October last as the boundary of the territory claimed by Great Britain " [the Schomburgk line], " without any reservation, and on the understanding that, should negociations with Venezuela be renewed, no territory within that line (subject to somepossible modification for the purpose of giving to Venezuela the command of the mouths of the Orinoco) will be conceded to that Republic." (B. C.-C., App., p. 312.)

It thus appears that Great Britain first put all her subjects upon notice and then distinctly withdrew and contradicted the notice, and gave them an affirmative assurance that their titles would be defended, even if it should be found that they were in territory that might be rightfully claimed by Venezuela. As to

the responsibilities towards its own grantees in which this extraordinary action of the Government involved it, we have nothing to say except to call attention to the fact that the responsibilities thus assumed were far more onerous and emphatic than would have been the case had the Governor of British Guiana not made his reservation of the previous June, only to be followed by a positive contradiction in September.

Wherein lies the responsibility of Venezuela with reference to these grantees, under the circumstances here related? As Secretary Olney says, in his letter to Sir Julian Pauncefote, of June 12, 1896:

"Suppose it to be true that there are British subjects who—to quote the despatch—'have settled in territory which they had every ground for believing to be British,' the grounds for such belief were not derived from Venezuela. They emanated solely from the British Government; and if British subjects have been deceived by the assurances of their Government, it is a matter wholly between them and their own Government and in no way concerns Venezuela. . . . In but one possible contingency could any claim of that sort by Great Britain have even a semblance of plausibility. If Great Britain's assertion of jurisdiction, on the faith of which her subjects made settlements in territory subsequently ascertained to be Venezuelan, could be shown to have been in any way assented to or acquiesced in by Venezuela, the latter Power might be held to be concluded and to be estopped from setting up any title to such settlements. But the notorious facts of the case are all the other way. Venezuela's claims and her protests against alleged British usurpation have been constant and emphatic, and have been enforced by all the means practicable for a weak power to employ in its dealings with a strong one, even to the rupture of diplomatic relations." (V. C., vol. iii, p. 308.)

Under these circumstances, it is asserted by Venezuela that the adjustment of the equities of such settlers, provided for by Rule (c), whatever it requires, does not require any compensation to British settlers in territory which proves in the arbitration to have been Venezuelan. The grants to these settlers are of the most recent origin. As there was no British settlement in the

disputed territory in 1850, west of the Moruca, neither was there any settlement in that territory until after 1880. All grants which have been issued have been issued subsequent to that date. As appears from the statement of Mr. im Thurn, grants were not made in the coast territory until 1890, and then they were given gratuitously to settlers who had up to that time been mere squatters, and many of whom had no connection with the British Government except the fact that they had settled upon land which that Government claimed. (B. C., VII, p. 273.)

Taking all these facts into consideration,—the recent character of the settlement, the Agreement of 1850 not to occupy this territory, still appealed to by Great Britain in 1887, the action of the British Governor in issuing conditional grants in June of that year, the action of the Colonial Secretary in removing the conditions annexed to those grants, in the following September,—can it be said that the adjustment of the equities of such settlers in territory which proves to be Venezuelan is a matter that devolves upon Venezuela? Is there any obligation upon Venezuela to respect such grants? Whatever may be the obligations of the British Government towards the grantees, is there any such obligation on the part of Venezuela? Will this Tribunal, in the face of the history of this dispute and of the action of Great Britain during the present century impose any liability upon the Venezuelan Government in behalf of these settlers? Will it not rather say that the grants were void *ab initio,* and that if the grantees are to remain in possession, they can only do so upon such terms as Venezuela may prescribe?

Only one more fact remains to be taken into consideration. A large part of the concessions given by the British Government since 1887 in the disputed territory relate to mining privileges. By reason of these privileges an immense quantity of gold, amounting in value to about twenty million dollars, has been taken from the territory. As far as placer mining is concerned, it has

been stripped of an enormous source of natural wealth. The revenue derived by the British Government from royalties on these concessions has amounted to over a million dollars, a revenue which has, if this territory is decreed to be Venezuelan, been abstracted from it by the British Government at substantially no cost to itself. In view of this fact, certainly Great Britain should take care of her own grantees. She had the use of the territory without right for ten years, and in the exercise of that use she stripped it of its resources, at enormous pecuniary advantage to herself. Can she now, by reason of the fact that she took the risk of giving to her subjects the privilege of operating this business, to strip this territory to her own great pecuniary advantage, and in utter disregard of the possible rights of Venezuela, claim that Venezuela is under any responsibility to make good to these grantees any damages which they may suffer by reason of the establishment of Venezuelan title to the territory? To give such effect to British occupation would outrage reason, justice, the principles of international law, and the equities of the case.

CHAPTER III.

DIPLOMATIC CORRESPONDENCE.

Having thus considered the meaning and scope of the treaty of arbitration, it is now proposed to take up the diplomatic correspondence between Spain and the Netherlands, and between Venezuela and Great Britain, with a view to ascertaining what territorial claims have been advanced, and upon what grounds those claims have been rested.

In a note addressed to Sir Julian Pauncefote November 26, 1895, Lord Salisbury stated that "the dispute on the subject of the frontier did not, in fact, commence till after the year 1840" (V. C.-C., vol. iii, p. 275.) This is true, so far as Great Britain and Venezuela are concerned; but to begin the study of the diplomatic correspondence at that point, ignoring what passed on the same subject between Spain and the Netherlands during the eighteenth century, would be to pass by a vital part of the controversy.

The significance of Great Britain's claims subsequent to 1840 can be appreciated only when it is considered that she succeeded to the rights of the Dutch. It is to the year 1747, therefore, that we first invite attention.

In the year 1747 there was a profound ignorance on the part of the Dutch as to the proper location of the boundary between the colony of Essequibo and tho Spanish dominions. In September of that year "the Ten" adopted a resolution instructing that "all the respective Chambers, each by itself, investigate and inquire whether it can be discovered how far the limits of this Company in Rio Essequibo do extend" (V. C., vol. ii, p. 99).

In December, 1748, the Governor wrote to the Company, and,

after referring to the talk of some old people and Indians, added: "but this talk gives not the slightest certainty" He also expressed a wish "that, if it were possible," he "might know the true boundary" (V. C., vol. ii, p. 101).

The visit of the Governor to Holland in 1750 led to many consultations on this point between himself, the Company and the Stadtholder—all without result—and he returned to Essequibo with the boundary still a matter of conjecture.

In 1754 he again appealed to the Company for "the so long sought definition of frontier" (V. C., vol. ii, p. 113), and asked: "Is not this regulated by the Treaty of Münster?" To this the Company answered: "We would we were able to give you an exact and precise definition of the proper limits of the river of Essequibo such as you have several times asked of us; but we greatly doubt whether any precise and accurate definition can anywhere be found, save and except the general limits of the Company's territories stated in the preambles of the respective charters granted to the West India Company at various times by the States General" (V. C., vol. ii, p. 117).

The Spanish attack on the Cuyuni post in 1758 brought matters to a crisis. It obliged Governor Storm van 's Gravesande to take a definite stand in the matter; and hence, by his orders, the Military Commandant in Essequibo wrote, on December 8, 1758, to the Spanish Commandant in Orinoco:

> "That in the name of the States General his Sovereigns he persists, and now for the second time demands the freeing of the prisoners and a suitable satisfaction for this violation and insult done to the territory of his Sovereigns, and that, since it seems to him, according to the letter in question, that you in Guayana and at Cumaná are ignorant of the boundaries of the territory of His Catholic Majesty and those of the States General according to the treaties at present subsisting, he has ordered me to send you the enclosed map on which you will be able to see them very distinctly. . . . ." (V. C., vol. ii, p. 128).

D'Anville's map, here referred to, is reproduced as No. 16 in the Atlas accompanying the British Case; and it is important to note that the line there shown gave Barima Point and both

the Barima and Amacura rivers, from their sources to their mouths, to Spain. The extreme claim of the Dutch in 1758, as regards the coast, is thus seen to have extended no further than just beyond the Waini River.

This statement of the Dutch claim in 1758 was communicated by the Dutch Governor to the Dutch West India Company; and the Company, so far from enlarging on it in the Remonstrance presented in 1759 to the Court of Spain, limited itself to affirming its immemorial possession, not of the Barima, nor of the Amacura, nor even of the Waini, but merely *of the Essequibo River and all its branches.* It asked "that reparation may be made for the said hostilities, and that the Remonstrants may be reinstated in the quiet possession of the said post on the river of Cuyuni, and also that through their High Mightinesses and the Court of Madrid a proper delimitation between the Colony of Essequibo and the river Orinoco may be laid down by authority, so as to prevent any future dispute" (V. C., vol. ii, p. 134).

Spain made no formal answer to this Remonstrance, and it is hardly necessary to add that the Dutch received no satisfaction. The practical result of the appeal was that Spain continued to occupy the Cuyuni and to exclude the Dutch from the post in the quiet possession of which these latter asked to be reinstated.

The Dutch Remonstrance of 1759 was followed by another in 1769. Between these dates the Dutch continued to exhibit vacillation and uncertainty regarding the location of their boundary, and to search for information as to where the line should run. The Spaniards, on the other hand, continued to exclude the Dutch from both the interior and the coast, and to assert sovereignty over the whole disputed region. A glance at some of the correspondence between the Dutch Governor and the Colony during this period cannot fail to be instructive. That correspondence shows, on the one hand, the ignorance of the Dutch authorities as to the extent of their territory, and their admission as to the extent of

Spanish territory, and, on the other hand, the trifling and insignificant grounds upon which they based their extreme pretensions.

First, as to the ignorance of the Dutch:

Referring to the destroyed Cuyuni post of 1758, the Company thus wrote to the Governor on May 31st, 1759:

"Meanwhile we should like on this occasion to be exactly informed where the aforesaid Post on the River of Cuyuni was situated; for in the latest map made by you of the Colony we have found indeed, that river, but have not yet succeeded in finding the Post itself. Furthermore, what grounds you might be able to give us to further support our right to the possession of the aforesaid Post—perhaps a declaration by the oldest inhabitants of the Colony could in this connection be handed in, which might be of service. We should also like to have a more specific description of the Map of America by M. D'Anville, to which you appeal; for that gentleman has issued many maps dealing with that continent, and in none of these which have come to our notice have we been able to discover any traces [of what you mention,"] (B. C., II, p. 174).

Again, on December 3rd, 1759, they wrote:

"Wherefore we still request you to lay before us everything which might in any way be of service in proof of our right of ownership to, or possession of, the aforesaid river, because after receiving it we might perhaps present to the States-General a fuller Remonstrance on this head, with a statement of facts joined thereto. For this purpose there might especially be of use to us a small map of the River of Cuyuni, with indication of the places where the Company's Post, and also the grounds of 'Oud Duinenburg' and of the Company's coffee and indigo plantations were situated, and, finally, of the so-called Blue Mountain in which the miners carried on their work for our account," (B. C., II, p. 181).

And in the same letter they add:

"We see from your letter that you extend the boundary of the Colony in the direction of the Orinoco not only as far as Waini, but even as far as Barima. We should like to be informed of the grounds upon which you base this contention, and especially your inference that, Cuyuni being situate on this side of Waini, it must therefore necessarily belong to the Colony; for, so far as we know, there exist no Conventions that the boundary lines in South America run in a straight line from the sea-coast inland, as do most of the frontier lines of the English Colonies in North America" (B. C. II, p. 182).

Seven years later the Company still continued in ignorance as to the proper boundary of their Colony. On September 25, 1766, they thus wrote to the Governor:

"In one of your preceding letters you told us that the place about the Barima, where some scum and offscourings of folk were staying together and leading a scandalous life, was Spanish territory, and that you intended to have Mr. Rousselet, who was going on a mission to Orinoco submit some propositions to the Spanish Governor for the extirpation of that gang. And now you inform us of your having sent thither the Postholder of Moruka with positive orders, probably *propria authoritate* without any concurrence of the aforesaid Governor, inasmuch as Mr. Rousselet had not yet departed thither on his mission, and we cannot quite make this tally with the other. If that place is really Spanish territory, then you have acted very imprudently and irregularly; and, on the contrary, if that place forms part of the Colony, and you had previously been in error as to the territory, then you have done very well, and we must fully approve of your course, as also of the Court's Resolution that henceforth no one shall be at liberty to stay on the Barima. But if the Court has no jurisdiction in that place, we see little result from that Resolution: *extra territorium suum jus dicenti enim impune non paretur*" (B. C., III, p. 137).

The above extracts are all taken from letters of the Company; and it will be observed that the ignorance which these exhibit is complete, so much so, indeed, that not even a suggestion came from the Company to enlighten the Governor or to help him to an understanding of what he should regard as being within his jurisdiction.

The letters of the Governor during this period prove the same ignorance on his part; they also serve to make clear the extreme Dutch claims of the eighteenth century; they disclose the origin of those claims, and they reveal the foundations upon which both those claims and the subsequent British pretensions have been built.

It will be remembered that in writing to the Spanish Commandant on the Orinoco complaining of the attacks upon the Cuyuni Post of 1758, Storm van 's Gravesande had transmitted a copy of D'Anville's map. That his own views were based

upon D'Anville's authority is shown by the following extract from his letter to the Company, dated September 9, 1758:

> "It is my opinion that this river is of the greatest importance to your Lordships, much more so than any one of the others, and also that it is perfectly certain and indisputable that they have not the slightest claim to it. If your Lordships will be pleased to look at the map of this country, drawn by Mr. D'Anville with the utmost care, your Lordships will clearly see that this is so" (B. C., II, p. 144).

It was during 1759 that van 's Gravesande seems to have first had any independent views of his own as to the boundary, for on September 1st, of that year, he thus wrote to the Company:

> "The time is too short to enable me to send what your Lordships require concerning Cuyuni, and in this despatch I shall have to content myself with informing your Lordships that Cuyuni being one of the three arms which constitute this river, and your Lordships having had for very many years the coffee and indigo plantation there, also that the mining master, with his men, having worked on the Blue Mountain in that river without the least opposition, the possession of that river, as far, too, as this side of the Wayne, which is pretended to be the boundary-line (although I think the latter ought to be extended as far as Barima), cannot be questioned in the least possible way, and your Lordships' right of ownership is indisputable, and beyond all doubt" (B. C., II, p. 180).

It is important to note with regard to this letter, first that van 's Gravesande gives the Waini as the "pretended boundary"—pretended, of course, by the Dutch, not by the Spanish; second, that his own views, which were at that time the extreme views, were, for reasons not stated, that the line should go *as far as* Barima—that is to say, *up to* the Barima; third, that whatever rights the Company then had to the River Cuyuni were based upon certain facts, or supposed facts, which van 's Gravesande enumerates, namely, that the Cuyuni was an affluent of the Essequibo, that the Company had had "the coffee and indigo plantation there," and that "the mining master" had at one time done some prospecting "on the Blue Mountain."

What weight ought to attach to the fact that the Cuyuni is an affluent of the Essequibo is a matter which will be considered in another part of this argument, and with regard to which the opinion of van 's Gravesande can hardly be controlling; the coffee and indigo plantation to which he refers was located below the lowest fall, and can hardly, therefore, be regarded as constituting an occupation of the river above those falls; similarly the work of the "mining master," by whom of course is meant Hildebrandt, was confined to the lowest reaches of the river, and even so was abandoned, as a failure, almost as soon as begun.

These were *all* the grounds adduced by van 's Gravesande in support of his claim, but that he rested little on them, and that what really influenced him was D'Anville's authority, is shown by the limit which he admits with regard to the Cuyuni, since his claim there was only to such part of it as lay "this side of the Wayne," that is to say, this side of that imaginary line appearing in D'Anville's map.

All this is confirmed by a later letter of van 's Gravesande, written on May 2nd, 1760, in which he says:

"I trust and doubt not that their High Mightinesses will obtain proper satisfaction for an act that is so entirely contrary to the law of nations, and I can very well understand that the death of the King of Spain must delay the settlement of the matter.

"I have very little to add to what I have already had the honour of submitting to your Lordships in several of my despatches, and although I am aware, as your Lordships are pleased to inform me, that no Treaties have been made which decided that the dividing boundary in South America should run inland in a direct line from the sea-coast, as is the case with the English in North America, it still appears to me (*salvo meliori*) to be an irrefutable fact that the rivers themselves, which have been in the possession of your Lordships for such a large number of years, and have been inhabited by subjects of the State without any or the least opposition on the part of the Spanish, are most certainly the property of your Lordships. I am strengthened in my view of this matter by the fact that Cuyuni is not a separate river like Weyne and Pomeroon (which *last* has been occupied by us, and still contains the foundations of your Lord-

ships' fortresses), but an actual part of the River Essequibo itself, which is divided into three arms about 8 to 10 miles above Fort Zeelandia, and about one long cannon shot below Fort Kijkoveral, and to each of which the Indians give a separate name—the first Cuyuni, the second Massaruni (in which is Kijkoveral), and the third Essequibo—the principal stream below this division being called not Essequibo, but Araunama by the Arawaks, the real aborigines of this country.

"Although I do not doubt that your Lordships will now have received the map compiled by Mr. D'Anville, I have, in order to make the matter clear to your Lordships, copied that part of the map which relates to our possessions, and filled in with as much precision as possible the sites of your Lordships' plantation of Duynenburg, situated partly in Massaruni and partly in Cuyuni. In Cuyuni I have marked your Lordships' coffee plantation, indigo plantation, the dwelling place of the half-free creoles (to which the Spaniards came very close), and Blauwenberg, and [the] Post which was sacked, together with the sites of your Lordships' three other Posts in Maroco, Maykouny, and Arinda, up in Essequibo" (B. C., II, pp. 184–185).

Here again van 's Gravesande bases his claims, first, upon D'Anville's authority; and second, upon a supposed *possession* of certain rivers by the Company. When detailed reference is made to this so-called *possession*, it is significant that the Barima is not mentioned; that, in speaking of the Waini and the Pomeroon, van 's Gravesande distinctly limits the Company's possession to the Pomeroon—"which *last*," he says, "has been occupied by us"—and that the *possession* of the Cuyuni and Mazaruni is made to rest, (*a*) upon the existence of the plantation Duynenburg, situated at the point of junction of the Mazaruni and Cuyuni, (*b*) upon the coffee and indigo plantation, (*c*) upon the dwelling-place of the half-free creoles, (*d*) upon the mining at Blauwenberg, and (*e*) upon the Post which had been sacked.

The location of all of these places, except Blauwenberg and the sacked Post was *below* the lowest fall; while these two were but a short distance above them. The prospecting operation of Hildebrandt in the Blauwenberg, or Blue Mountain, have just been referred to above. As for the Post which had been

sacked, it is clear that the establishment of a Post which was immediately destroyed by the Spaniards under a claim of right, can hardly prove either Dutch occupation or Dutch title.

Again, on August 12th, 1761, van 's Gravesande wrote:

"After taking everything out of the Company's canoe of Aechtekerke they let it go, and it came home, but they have kept the fine new canoe belonging to the plantation Duynenburg. The latter having been captured this side of Barima, I am of opinion that it was captured upon the Honourable Company's territory, for, *although there are no positive proofs to be found here*, so has always been so considered by the oldest settlers, as also by all the free Indians. Amongst the latter I have spoken with some very old Caribs, who told me that they remember the time when the Honourable Company had a Post in Barima, for the re-establishment of which they had often asked, in order that they might be relieved from the annoyance of the Surinam pirates; and then, lastly, *because the boundaries are always thus defined* by foreigners, as may be seen on the map prepared *by D'Anville*, the Frenchman, a small extract of which I have sent by the 'Demerary Welvaeren.'

"*These are the only reasons*, your Lordships, upon which I base my opinions, because *there are no old papers here out of which any information could be obtained*" (B. C., II, p. 201).

It is now known that the tradition about a former Dutch post in Barima, here referred to by van 's Gravesande, was without foundation; and in this connection attention is called to the fact that the Dutch Governor himself, the person most interested in proving the existence of such a post, and the one most likely to have had at hand the proofs, if any had existed, distinctly states that "*there are no positive proofs to be found here*," and that "*there are no old papers here out of which any information could be obtained.*" Even had such proofs been found, and the existence of the mythical post been established, van 's Gravesande distinctly limited his claim to "*this side* of Barima."

That the Barima was regarded by van 's Gravesande as Spanish appears even more clearly in the following extract from a letter, dated August 18, 1764, and in the British Case attributed to 's Gravesande. In this he says:

"Whilst on this subject I take the liberty to inform your Excellency that mentioning the River Barima in those passes causes complaints from the Spaniards, who, maintaining that the river belongs to them, *in which I believe they are right*, some of these passes have already been sent to the Court of Spain" (B. C., III, p. 114).

It should be stated in this connection that D'Anville, along with other geographers, placed the Barima west of the Amacura. A reference to the Barima River may, therefore, really be to the Amacura. It is not, however, likely that van 's Gravesande made any such distinction between the two in the passages above quoted. As has been seen, his notions of boundary were derived from D'Anville, and all his arguments regarding Dutch possession and Dutch territorial rights were arguments intended to support, not any theory of his own, but simply *D'Anville's* line. Now, that line gave both the Amacura *and* the Barima to Spain; and hence, such must have been van 's Gravesande's own views of the matter. In further explanation of van 's Gravesande language, it should also be remembered that the names *Barima* and *Barima River* were, in those days, as they have been since, often used to designate the entire region which constitutes the southeastern bank of the Main or Ships Mouth of the Orinoco; and that it consequently included both the Barima and Amacura Rivers. When van 's Gravesande speaks of D'Anville's line and of the Dutch boundary going "as far as Barima," he evidently means as far as this undefined Barima *region*. Indeed, he could hardly mean anything else, because the D'Anville line does not in fact go as far as the river which D'Anville called Barima, but only as far as the river which he called Amacura.

Of equal, if not of greater importance, with van 's Gravesande declarations was the following formal statement, made on July 28, 1767, by the Amsterdam Chamber of the Dutch West India Company to the States General, in reply to the Memorial of the shareholders of the Zeeland Chamber:

"The second reason why there is no foundation for the claim of the Zeeland Chief Participants, that the silence of the Representative and the Direct-

ors respecting the alleged addition of the oft-mentioned words 'and adjoined or subordinate rivers and places,' implies an acknowledgment that under this term Demerara must also be included, and that therefore from our side consent has been given to the surrender of that Colony, consists herein, that the natural meaning of the expression 'Essequibo and adjoined or subordinate rivers' is not that which the Zeeland Chief Participants attribute to it (namely, that all the places which are situate on the mainland of the so-called Wild Coast, between the boundaries which the Chief Participants themselves have arbitrarily and without giving any grounds therefor defined as extending *from Moruka* to Mahaicony, or from Rio Berbice as far as the Orinoco, are 'adjoined, subordinate to, and inseparable from,' the Colony Essequibo), but, on the contrary, only this, that under that description are comprehended the various mouths and rivers, originating from Rio Essequibo or emptying into it, which are marked on the map, such as, for instance, Cuyuni, Massaruni, Sepenouwy, and Magnouwe" (B. C., III, p. 147).

Certainly the Amsterdam Chamber in this statement regarded the *Moruca* as the *extreme* western boundary on the coast.

The final deliverance of the Dutch authorities on the boundary question is to be found in the Remonstrance of 1769. Ten years had passed since the Court of Spain had been appealed to for redress on account of the attack on the Dutch Cuyuni Post. No answer had been returned to that appeal, except that Spain continued to exclude the Dutch from both the interior and the coast. The Dutch attempt, in 1766, to establish another Post on the Cuyuni, below the Post of 1758, had resulted in the abandonment of that Post and in the removal of the postholder to a new location still further down among the lowest falls of the Cuyuni. This removal was due to fears of Spanish attack. Spain had maintained an undisputed control on the Cuyuni River; Dutch and Caribs had been driven out; the Spaniards had been coming with impunity down to the lowest falls. On the coast the Dutch had been effectively excluded from the entire Barima-Waini region; they had been prevented from fishing in the Orinoco mouth; their trade on the Orinoco and Barima had been interdicted; Dutch slave traders had been

cleared out of Barima; Dutch vessels in that region had been captured; the Spaniards had come even as far as the Moruka, and had attacked the Dutch post located there. It was because of all this that another and final Remonstance was addressed by the States General to Spain. The following are extracts from that Remonstrance:

"READ to the Assembly the Remonstrance of the Representative of his Serene Highness the Prince of Orange and Nassau, and Directors of the Chartered West India Company in the Presidial Chamber of Zealand, on behalf of the Company in general, as having the particular direction and care of the colony of Essequibo, and of the rivers which belong to it, declaring that they, the remonstrants, had in this capacity from time almost immemorial been in possession not only of the aforesaid River Essequibo and of several rivers and creeks which flow into the sea along the coast, but also of all branches and streams which fall into the same River Essequibo, and more particularly of the most northerly arm of the same river, called the Cuyuni; that from time immemorial also on the banks of the same River Cuyuni, which is considered as a domain of the State, there has been established a so-called Post, consisting of a wooden lodge, which, on behalf of the Company, like several others in this Colony, is occupied and guarded by a Postholder and outrunner or assistant, with some slaves and Indians.

"That, accordingly, the remonstrants, especially after what had happened in 1759, had been extremely surprised to learn by a letter from Laurens Storm van 's Gravesande, Director-General of the Colony of Essequibo, written the 9th February last, that a Spanish detachment coming from the Orinoco had come above that Post and had carried off several Indians, threatening to return at the first following dry season and visit Masseroeny, another arm of the Essequibo, lying between that and the Cuyuni River, and, therefore, also unquestionably forming part of the territory of the Republic, in order also to carry off from thence a body of Caribs (an Indian nation allies of the Dutch and under their jurisdiction), and then to descend the River Masseroeny, ascend the Cuyuni, and visit the Company's said Post in Cuyuni. (B. C., IV, p, 29.)

* * * * * *

"That they, the remonstrants, had taken all that as a mere threat, which, as on many other occasions, would have no effect, and this, although the Director-General aforesaid had also informed them, by a letter of the 21st February, 1769, of which they produced an extract (Addendum B),

of the establishment of two Spanish Missions, occupied by a strong force, one not far above the Company's said Post in Cuyuni (apparently, however, on Spanish territory), and the other a little higher up on a creek which flows into the aforesaid Cuyuni River.

"That if, indeed, they could have expected or have had to look forward to an attack from the Spaniards in time of peace, it must, therefore, certainly have been from that side, especially in view of all that the Director-General had further mentioned in his letter of the 3rd March last, and of which an extract was added as Addendum C; but that they, the remonstrants, had learned with the greatest astonishment from a letter written by the Director-General, dated the 10th March last, to his son-in-law, the Commandeur of Demerara, which the latter had sent them in the original, and of which a copy forms Addendum D, that the Spaniards had begun to carry off the Indians from Moruca, and had made themselves masters of the Company's Post there, being a small river or creek south of the Weyne River, situated between the latter and the Pomaroon River, where from time immemorial the Company had also a trading place and a Post, and which also incontestably belonged to the territory of the Dutch. (B. C., IV, p. 30.)

* * * * * *

"That they, the remonstrants, considered it their duty to further bring to the knowledge of their High Mightinesses on this occasion that the people of the Orinoco had some time ago not only begun to dispute with the people of the Essequibo about the fishing rights in the mouth of the Orinoco, and thereupon to prevent them by force from enjoying the same, notwithstanding that the people of Essequibo had been for many years in peaceful and quiet possession of that fishery, which was of great value to them on account of the abundance of fish in it; but that, further, the people of Orinoco were beginning to prevent, by force, their fishing upon the territory of the State itself, extending from the River Marowyne to beyond the River Wayne, not far from the mouth of the Orinoco, as could be seen by the maps extant of those regions, particularly that of M. d'Anville, which on account of its precision was regarded as one of the best * * *." (B. C., IV, p. 31.)

These extracts should be read in the light of the correspondence between the Company and van's Gravesande, to which reference has above been made, The correspondence explains what was meant by the States-General when they allege "an almost immemorial possession" of the Essequibo, "of the rivers and

creeks which flow into the sea along the coast," and of the Cuyuni. van 's Gravesande had distinctly limited that "possession" to the Pomeroon on the coast, and to the indigo and coffee plantations, the mining operations of Hildebrandt, and the destroyed or abandoned Posts in the interior. It was *that* possession which the States-General had in mind when they drew up their last Remonstrance. In this Remonstrance the States-General bear testimony to the effectiveness of Spanish control. They declare that Spanish forces had come down to the very junction of the Cuyuni and Mazaruni rivers, and had carried Indians away from there as captives.

In the next paragraph the States-General refer to the establishment of two Spanish missions, "one not far above the Company's said Post in Cuyuni," "and the other a little higher up on a creek which flows into the aforesaid Cuyuni River"; and the important admission is added, with reference to the nearer of these Spanish Posts, that it is "apparently, however, on Spanish territory." Thus did the Dutch recognize the fact that the Spaniards had rights upon the Cuyuni river, and that at least a part of that river was Spanish territory.

The next paragraph calls attention to the coast region. The Spaniards are declared to have made themselves masters of the Moruca Post; and, feeling that Dutch rights there were in question, the States-General sought to justify their title by alleging that the Moruca was south of the Waini, and near the Pomeroon, of which the Dutch had been long in possession.

The next quoted paragraph is all important, for it furnishes the final, authoritative, and official definition of the extreme pretensions of the Dutch on the coast. It begins by bearing testimony to the fact that the "people of the Orinoco" had by force prevented the Dutch from even fishing in the mouth of the Orinoco. As showing that territorial rights were not in the thought of the Dutch in connection with these Orinoco fisheries, the States-General add, that *further than that*, Spaniards were beginning to prevent

their fishing even "*upon the territory of the State itself.*" Then follows a most important clause—a definition in express terms of that territory as "*extending from the River Marowyne to beyond the River Wayne, not far from the mouth of the Orinico,* as could be seen by the maps extant of those regions, particularly that of M. d'Anville" (*see* British Atlas, maps 16 and 23).

Here, then, we have a statement of the Dutch *extreme* claim on the coast, formulated by the Dutch West India Company, approved by the States-General, and communicated by them in a formal diplomatic Remonstrance to the Court of Spain. That statement is a distinct recognition of Barima Point and of the Barima and Amacura Rivers as Spanish, and it effectually estops the Dutch, and their successors the British, from claiming any part of that Point or of either of those rivers.

This Remonstrance, as we have said, was the last official Dutch utterance on the subject. Spain never answered it, but continued to exclude the Dutch from the Barima-Waini region and from the Cuyuni. The Dutch acquiesced; further protests were useless; they had no power to expel the Spaniards; and so seventy-one years of diplomatic silence ensued. No wonder that Lord Salisbury was led to believe that "the dispute on the subject of the frontier did not, in fact, commence until after the year 1840." Had he, and his predecessors in the Foreign Office, been more fully informed as to the earlier diplomatic history of the question, it is inconceivable that they would ever have put forward, as a demand based on *Dutch* rights, a claim either to Barima Point or to the Barima or Amacura Rivers, which the Dutch never dreamed of as theirs, and which the States-General, in 1769, distinctly and formally recognized to be Spanish territory.

A single incident breaks the silence between 1769 and 1840.

On February 10, 1836, and again on April 27 of the same year, Mr. Hamilton, British Vice-Consul at Angostura, wrote to Sir Robert Ker Porter, British Minister at Caracas, calling at-

tention to the dangerous navigation of the Orinoco by the *Boca de Navios* or ships' mouth. A British brig had, in the month of January preceding, been lost there; and Mr. Hamilton, in reporting the circumstance, spoke of the advisability of having a beacon erected on the Point of Cape Barima, and urged the British Minister to bring the matter to the attention of the Venezuelan Government. He added the information that "there was a pilot-boat which was to have gone out every day from Point Barima and cruise about, but it was badly managed" (B. C., VII, p. 84). Of course he meant a Venezuelan pilot boat, and it is perfectly clear that in his mind Barima Point, from which the pilot boat had made or was to have made its daily start, and upon which he suggested the erection of a beacon, was Venezuelan territory. This is most important evidence as to the current local belief of the time regarding the ownership of Barima Point. Mr. Hamilton was a British official residing at Angostura, perfectly informed as to the navigation of the Orinoco, and naturally conversant with the views current there. Had there been a possibilty in his mind of Barima being English he would never have written as he did.

That Sir Robert Ker Porter made a request to the Venezuelan Government in conformity with Mr. Hamilton's suggestion, and if he did not at the time apprise his own Government of that request, his neglect simply shows that in his mind Barima was so indisputably Venezuelan that it never occurred to him that his action in making the request could ever come to have a political significance. Barima had never been held by the Dutch; had never been claimed by them or by Great Britain; had, on the contrary, been formally recognized by the highest Dutch authorities as Spanish. Spain had always held and claimed it, until succeeded in her rights by Venezuela; and thereafter Venezuela had continued to do the same. No thought had ever been entertained that it was other than Venezuelan territory. What more natural, therefore, than that a British Consul and a British Minister should act upon that belief. What better witnesses, what stronger evidence

can we have, that the position deliberately taken by the States-General in 1769 regarding Barima had undergone no change during the sixty-seven intervening years? It had been recognized as Spanish in 1769 by Dutch officials; it was recognized now as Venezuelan by British officials, without hesitation and without a thought that it could be regarded as debatable ground. No wonder, then, that when, in 1841, news reached Angostura that the British flag was flying at Barima, the intelligence should have created "the utmost surprise and alarm" there (B. C., VII, p. 72). It proves how unprepared the public mind was for such an announcement; and it was not strange that Mr. O'Leary, then British Minister, in communicating the report to the Governor of British Guiana, should have refrained from justifying such action (B. C., VII, p. 72).

This incident of flag flying was pregnant with trouble. It was the unauthorized act of a young German naturalist, who for some years had been at work in British Guiana under the auspices of the Royal Geographical Society, and who had offered to, and been authorized by, the British Government to locate the boundary which he alleged to have been claimed by the Dutch during their possession of the Colony. Schomburgk's work will be made the subject of a separate chapter. For the present it is enough to point out that prior to his time no Dutch or British official had claimed Barima, and that his action in that regard gave rise to a controversy which has lasted fifty-eight years, and which, but for him, would never have involved the Barima region.

Confirming Schomburgk's views that whatever right Great Britain had to the Barima, was a right derived from the Dutch, Governor Light, on October 20, 1841, in writing to Señor Aranda, spoke of the "occupation of the Barima by the Dutch," and added the phrase, "from whom Great Britain derives her claim" (V. C., vol. iii, p. 198).

So the Earl of Aberdeen, in his note of January 31st, 1842, to Sr. Fortique, declared that in removing the posts erected at Barima

and Amacura by Schomburgk, "Her Majesty's Government must not be understood to abandon any portion of the rights of Great Britain over the territory *which was formerly held by the Dutch in Guiana*" (B. C., VII, p. 80).

This view of the matter was later repeated in even stronger terms by Lord Aberdeen in his note of March 30th, 1844, to Sr. Fortique, where, reviewing the whole subject, he presented Great Britain's claim at length, basing it exclusively upon an alleged prior Dutch occupation.

These views, that British rights were founded exclusively on *Dutch* rights, that however the boundary might be run, it was a boundary separating former *Dutch* territory from former *Spanish* territory, and that there was no such thing as *terra nullius* between them, were in complete accord with historical facts and with the claims of all prior diplomatic correspondence.

The formal declaration of Lord Aberdeen on this subject committed Great Britain to the position thus taken. Unless Great Britain can show that she has, since 1844, acquired title to territory which, in 1844, belonged to Venezuela, her position must still be what her Prime Minister in that year declared it to be, and she should be held to it, taking the consequences, whatever they may be.

We have said that Schomburgk's survey was the immediate cause of the present boundary dispute. The origin of the Schomburgk line, its publication to the world, and its claims to consideration, will be discussed in another chapter. As a link in the diplomatic correspondence under examination, only that phase of it will now be considered which has direct reference to the extent and character of the claims put forth at various times by Great Britain.

The Schomburgk line was intended, both by Schomburgk and by the British Foreign Office, to be the definition of Great Britain's extreme claim founded upon Dutch occupation. The line involved no concession to Venezuelan rights. It meant

no surrender of British territory. It was an expression of Great Britain's Case at the time. Whatever question there might be as to territory lying to the east, there was and could be none as to that lying west. That territory, past all doubt, was Venezuelan.

Lord Aberdeen on October 21 1841, in writing to Señor Fortique, referred to Schomburgk as one appointed "to survey and mark out *the boundaries between British Guiana and Venezuela*" (V. C. III, p. 199). And in another note of March 30th, 1844, in speaking of the British claim to the Orinoco and of the Venezuelan claim to the Essequibo, he uses this language:

"If the undersigned were inclined to adopt the spirit of M. Fortique's note, it is obvious, from what has been stated, that he must claim for Great Britain, in her right of succession to Holland, the entire coast from the Orinoco to the Essequibo. . . .

"But the Undersigned is of opinion that negotiations are not facilitated by putting forward claims which it is not seriously intended to maintain, and, therefore, he will not follow M. Fortique's example, but will declare at once what concessions *from her extreme claim* Great Britain, out of friendly regard to Venezuela, and from a desire to prevent the occurrence of any serious differences, is willing to admit.

"Believing, then, that the undivided possession of the Orinoco is the object most important for the interests of Venezuela, Her Majesty's Government are prepared to cede to the Republic a portion of the coast amply sufficient to insure Venezuela against the mouth of this, her principal river, being at the command of any foreign Power. With this view, and regarding it as a most valuable concession to Venezuela, her Majesty's Government are willing to waive their claim to the Amacura as the western boundary of the British territory, and to consider the mouth of the Moroco River as the limit of her Majesty's possessions on the sea-coast.

"They will, moreover, consent that the inland boundary shall be marked by a line drawn directly from the mouth of the Moroco to the junction of the River Barama with the River Waini, thence up the River Barama to the Annama, and up the Annama to the point at which that stream approaches nearest to the Acarabisi, and thence down the Acarabisi to its confluence with the Cuyuni, from which point it will follow the bank of the Cuyuni upwards until it reaches the high lands in the neighbourhood of Mount Roraima which divide the waters flowing into the Essequibo from those which flow into the Rio Branco.

"*All the territory lying between a line such as is here described, on the one side, and the River Amacura and the chain of hills from which the Amacura rises, on the other,* Great Britain is willing to cede to Venezuela, upon the condition that the Venezuelan Government enter into an engagement that no portion of it shall be alienated at any time to a foreign Power, and that the Indian tribes now residing within it shall be protected against all injury and oppression" (B. C., VII, p. 90).

Now the line proposed above as the boundary to be agreed upon is what has come to be known as the Aberdeen Line; if to the territory lying east of that line there be added the territory described in the last paragraph above cited the result will be a territory bounded on the west by the present Schomburgk Line. Lord Aberdeen's proposition was that Great Britain should keep a part of this territory, and should cede the balance to Venezuela. Of course this was intended to be a complete and final settlement of the entire boundary question; Great Britain by the proposed cession forever extinguishing all claims which she might have to territory beyond the Aberdeen Line. This proposed cession, however, was of "all the territory lying between a line such as is here described (the Aberdeen Line) on the one side, and the River Amacura and the chain of hills from which the Amacura rises, on the other." If this meant anything it meant that that was the only territory west of the Aberdeen Line to which Great Britain could even pretend that she had a claim; or in other words that the Schomburgk Line constituted Great Britain's extreme claim. Even this extreme claim, Lord Aberdeen admits, it was "not seriously intended to maintain," and it was from this "extreme claim" that Great Britain, out of friendly regard to Venezuela, "was willing to make concessions."

Were it necessary more evidence might be referred to in support of the statement that the Schomburgk line in 1841 represented the extreme British claim. Certainly it cannot be necessary. Even the evidence already cited would seem to be in support of a fact too clear to need proof, were it not that Great Britain's extreme claim has constantly grown since, and that it

has subsequently been seriously argued in her behalf that the Schomburgk line represented great concessions to Venezuela; that immense tracts lying to the west, and which for centuries have been the principal site of Spanish missions and villages, belonged of right to Great Britain; that those tracts are within the so-called disputed territory; and that Venezuela's continued occupation of them constituted a violation of the agreement of 1850.

A further important fact to be noted regarding Schomburgk's survey is that it did not constitute even a pretended occupation of the disputed territory. The correctness of this statement might well be questioned were it not that we are bound to accept upon this point the word and assurances of no less a person than Lord Aberdeen. As Prime Minister of Great Britain he distinctly disclaimed at the time any intention to occupy, and he declared that Schomburgk's acts were not to be construed by Venezuela as implying an occupation. The following are Lord Aberdeen's words:

"The Undersigned begs leave to refer to his note of the 21st October last, in which he explained to M. Fortique that the proceeding of Mr. Schomburgk in planting boundary posts at certain points of the country which he has surveyed was *merely a preliminary measure* open to future discussion between the two Governments, and that it would be premature to make a Boundary Treaty before the survey shall be completed.

"The Undersigned has only further to state that much unnecessary inconvenience would result from the removal of the posts fixed by Mr. Schomburgk, as they will afford the only tangible means by which Her Majesty's Government can be prepared to discuss the question of the boundaries with the Government of Venezuela. Those posts were erected for that express purpose, and *not*, as the Venezuelan Government appear to apprehend, *as indications of dominion and empire on the part of Great Britain.*

"And the Undersigned is glad to learn from M. Fortique's note of the 8th instant that the two Venezuelan gentlemen who have been sent by their Government to British Guiana have had the means of ascertaining from the Governor of that Colony that the *British authorities have not occupied Point Barima*" (B. C., VII, p. 79).

That the Colonial authorities were of one mind with Lord Aberdeen on this subject is clear from the language of Governor

Light, as reported by Señor Fortique to the Earl of Aberdeen. Señor Fortique says:

> "The second is the conduct observed by the Governor of English Guiana in his conferences with the Commissioners whom the Government of Venezuela accredited to him with the view of asking for explanations of those demarcations, as he manifested to them 'that inasmuch as the real boundaries between the two Guianas are undefined and questionable, *the operation of Mr. Schomburgk neither has nor could have been undertaken for the purpose of taking possession,* but only in the way of simply laying down the boundary-line supposed or presumed on the part of British Guiana, and that, therefore, while the confines remain undetermined, *the Government of Venezuela ought to rest assured that no fort would be ordered to be built on the territory in question, nor that any soldiers or force whatever would be sent thither*'" (B. C., VII, p. 78).

It was in answer to this that Lord Aberdeen wrote the note before, in part quoted.

This, then, was the situation when, in 1841, Lord Aberdeen gave his consent to the removal of the Schomburgk posts. Great Britain had notified Venezuela of the commission issued to Schomburgk; had adopted Schomburgk's work as an expression of the extreme British claim; had rested that claim upon a supposed former Dutch title; had disclaimed any intention to occupy the Barima; had thereby admitted that such occupation did not in fact exist; and, yielding to the force of Sr. Fortique's arguments, had ordered the removal of every semblance of British dominion from the line run by Schomburgk.

The order for the removal of the Schomburgk posts was followed by an interchange of diplomatic notes, which resulted on March 30th, 1844, in Lord Aberdeen's proposal of the line which bears his name. This proposal was not accepted by Venezuela, and the negotiations were thereupon suspended.

Matters continued in this unsettled state during the years from 1844 to 1850. In the latter year rumors were circulated, on the one hand, that Great Britain intended to "lay claim to the Province of Venezuelan Guiana" (Blue Book, Venezuela

(1896) No. 1, p. 256); and, on the other hand, that Venezuela intended to erect a fort at Barima. These reports were communicated by the British Minister at Caracas to the Home Government, and, as a result, the former, acting under instructions from Viscount Palmerston, on November 18th, 1850, addressed a note to Sr. Lecuna, the Venezuelan Secretary of State for Foreign Affairs. In this note, after referring at some length to the rumors above mentioned, he said:

"The Venezuelan Government cannot, without injustice to Great Britain, distrust for a moment the sincerity of the formal declaration, now made in the name and by express order of Her Majesty's Government, that Great Britain has no intention of occupying or encroaching upon the disputed territory; hence, in a like spirit of good faith and friendliness, the Venezuelan Government cannot object to make a similar formal declaration to Her Majesty's Government, namely, that Venezuela herself has no intention of occupying or encroaching upon the disputed territory" (V. C. vol. iii, p. 212).

To this Sr. Lecuna replied, on December 20th, 1850, in part, as follows:

"By order of His Excellency, the President of the Republic, the Undersigned begs to state in reply that the Government never could have persuaded itself that, in despite of the negotiation open in this matter, and of the rights of Venezuela alleged in the question of boundaries pending between the two countries, Great Britain would desire to employ force in order to occupy the territory claimed by each country; much less could the Government think this possible after Mr. Wilson has so repeatedly assured it, and as the Executive Government believes with sincerity, that these imputations are destitute of any foundation whatever, and, on the contrary, are the very reverse of the truth.

"Reposing in this confidence, fortified by the protestations contained in the note under reply, the Government has no difficulty in replying that Venezuela has no intention to occupy or encroach upon ("usurpar") any part of the territory, the dominion of which is in dispute, and that it will not view with indifference that Great Britain shall act otherwise" (V. C., vol. iii, p. 213).

This interchange of formal declarations is what has come to be known as "The Agreement of 1850." In subsequent years each

party has charged the other with violating it. It will be well to pause for a moment and to consider certain points which will later be useful in determining the truth of these charges.

Whether or not the Agreement has been violated depends, in the first place, upon what territory was intended to be included within its provisions. In his note to Sr. Lecuna, Mr. Wilson had used the phrase "disputed territory," without defining it in any way, except that in another part of the same note he referred to Point Barima as a place "the right of possession to which is in dispute between Great Britain and Venezuela" (Blue Book, Venezuela (1896) No. 1, p. 263).

In his reply Sr. Lecuna was somewhat more explicit. He said that the Venezuelan Government could never have persuaded itself that "Great Britain would desire to employ force in order to occupy *the territory claimed by each country*," and then declares his own country's intention not to occupy "any part of the territory *the dominion of which is in dispute*" (V. C. vol. iii, p. 213).

This definition of the "disputed territory" was satisfactory to the British Government, and must therefore be taken as binding upon it. What was "the territory claimed by each country" in 1850? No diplomatic correspondence on the subject had passed since 1844. The claims made by each Government in that year still held good. What were those claims?

So far as Great Britain was concerned we have already shown that *her* extreme claim did not go beyond the Schomburgk line. Indeed, in referring to that boundary, Lord Aberdeen had distinctly said that it was "not seriously intended to maintain" it. It is clear therefore that the western boundary of the disputed territory could have gone no further than the Schomburgk Line, if indeed it went even as far as that.

The eastern boundary is equally free from doubt. Spain's claim to the Essequibo had been repeatedly presented to Great Britain. Referring to it, in his note of March 30, 1844, Lord Aberdeen says:

"Such a claim, independently of all question of right, would be practically far less injurious to Venezuela than that which M. Fortique has asserted is to Great Britain, inasmuch as, whilst Venezuela is without a settlement of any sort upon the territory in question, *the admission of the Essequibo as the boundary of Venezuela* would involve at once the surrender by Great Britain of about half the Colony of Demerara, including Cartabo Point and the Island of Kyk-over-al, where the Dutch had their earliest settlements upon the Mazaruni, the missionary establishment at Bartika Grove, and many actually existing settlements upon the Arabisi coast to within 50 miles of the capital" (B. C., VII, p. 90).

This may seem an extreme view, *from the British standpoint;* but, extreme or not, there was the claim; and in 1850 the British Government accepted Sr. Lecuna's description of the "disputed territory" as "*territory claimed by each country.*" Great Britain bound herself to respect that claim, and to neither "occupy or encroach" upon that territory. It is, indeed, reasonable to suppose that neither government expected, at the time, that any plantations or settlements actually located within the disputed territory were to be withdrawn. Indeed, the agreement did not contemplate evacuation. It provided that the territory in dispute should not be occupied or encroached upon; and such a stipulation, if interpreted as it might well be as having regard to the future, is quite consistent with the continuance of the plantations then existing along the Arabian coast. Its sole effect with regard to them would be to stop the running of any prescription which might otherwise be claimed in their favor.

But Lord Aberdeen is by no means the only witness to the fact that practically the entire territory between the Schomburgk line and the Essequibo was to be treated as disputed territory. On November 19, 1850, the very day following the British declaration that it would not encroach upon this territory, Mr. Wilson, the British Minister, in a despatch to Viscount Palmerston, said:

"Considering, however, the intrigues on foot to mislead and excite the public mind by the malicious assertion of the occupation of 'Fuerte Viejo' by British troops," etc. (V. C., vol. iii. p. 212).

Now, *Fuerte Viejo* appears under the name of *Viejo Fuerte* in Codazzi's map. So far as we are aware it occurs in no other map. In Codazzi's map it is identified with Kykoveral, long since abandoned by both Dutch and British. How long must it have been abandoned, and how far removed from actual British settlements must it have been for Mr. Wilson to have indignantly referred to the "malicious assertion" that the British had occupied it? His reference to it at this time and in this way is proof that he regarded it as located within the disputed territory.

So matters stood in 1850. Both Governments excluded themselves from this disputed territory; and so long as the agreement continued neither Government, by acts in violation of it, could acquire title to the territory in question.

In 1876 and 1877, an ineffectual effort was made by Venezuela to arrive at some settlement regarding the boundary. Notes were addressed by Sr. Calcaño and Sr. de Rojas to the Earl of Derby, but nothing came of them. In 1879, the question was once more brought to the attention of the British Government, and negotiations were begun with the Marquis of Salisbury.

In a note dated May 19, 1879, Señor de Rojas called attention to the fact that thirty-eight years had passed since Venezuela had first urged Her Majesty's Government to conclude a Boundary Treaty. He referred to the line of right which Venezuela claimed, and stated that his Government was prepared to arbitrate that right. At the same time he suggested that Great Britain might prefer to agree to a line of accomodation or "convenience," and that if so he was prepared to negotiate on that basis.

Lord Salisbury's reply, while it contained an important admission, showed how the British view had changed since Lord Aberdeen's day. It contained an important admission because it recognized the fact that this boundary question cannot be decided, *as a matter of right*, without taking into account the rights that, under the rules of international law, belong to *discovery, first settle-*

ment, conquest, cession and treaties. These are Lord Salisbury's words:

"With regard to the first of these questions, I have the honour to state that Her Majesty's Government are of opinion that to argue the matter on the ground of strict right would involve so many intricate *questions connected with the original discovery and settlement of the country*, and subsequent *conquests, cessions, and Treaties*, that it would be very inlikely to lead to a satisfactory solution of the question" (B. C., VII, p. 96).

In view of subsequent British statements, which seem to treat the question of discovery, first settlement, conquest, cession and treaties as something having nothing to do with this case, this statement of Lord Salisbury, which is in entire accord with the views of the most accredited writers on international law, and which has reference to this particular boundary dispute, is most important.

Having thus committed himself to the principles referred to, Lord Salisbury proceeded to define the extent and the basis of Great Britain's extreme claim. These are his words:

"The boundary which Her Majesty's Government claim, in virtue of ancient Treaties with the aboriginal tribes and of subsequent cessions from Holland, commences at a point at the mouth of the Orinoco, westward of Point Barima, proceeds thence in a southerly direction to the Imataca Mountains, the line of which it follows to the north-west, passing from them by the Highlands of Santa Maria just south of the town of Upata until it strikes a range of hills on the eastern bank of the Caroni River, following these southwards until it strikes the great backbone of the Guiana district, the Roraima Mountains of British Guiana, and thence, still southward, to the Pacaraima Mountains" (B. C., VII, p. 96).

It is hardly necessary to point out the enormous jump which the British "extreme claim" thus took. It was, indeed, a remarkable growth for thirty-six years, since the time when Lord Aberdeen had proposed to cede to Venezuela the Barima-Waini region; at that time Lord Aberdeen contenting himself with the mouth of the Moruca on the coast, had probably "compensated" himself in the interior by claiming west as far as the great bend of the Cuyuni. That claim may have done very well for 1844, but 1880 demanded greater things, and so about 15,000,000 acres were suddenly added to Great Britain's pretensions.

It will be noted, too, that the basis of the British title had been modified. Schomburgk, Lord Aberdeen, and all who went before, had been content to rest British rights upon the former Dutch occupancy. Whether or not doubts had in the meantime arisen at the Foreign Office in London regarding the sufficiency of such Dutch rights, the fact is that another source of Dutch title was now for the first time alleged, and "ancient Treaties with the aboriginal tribes" were now for the first time invoked.

These treaties must have antedated the Dutch cession, for that cession is referred to by Lord Salisbury as something subsequent. What these treaties may have been, we are at a loss to know. They are not given in either the British Case or Counter-Case, and no explanation of them has ever been vouchsafed. If, in fact, they were ever made, or if, as seems more likely, Lord Salisbury was misinformed regarding them, it is very certain—for reasons set forth in another Chapter of this Brief—that they could have conferred no rights of sovereignty upon Great Britain. The subsequent diplomatic correspondence, and the Case and Counter-Case submitted to the Arbitral Tribunal by Great Britain, would seem to indicate that this claim of title based on Indian treaties has been abandoned.

The Marquis of Salisbury was succeeded shortly by Earl Granville, and the negotiations begun with the former were continued with the latter. Propositions and counter-propositions were followed, on September 15th, 1881, by a proposal from Lord Granville for the adoption of the line since known as the Granville line. The memorandum submitted by Earl Granville with his note of that date contains two passages which demand attention. They are the following:

"As regards that portion of the territory which lies between the . . . . . and the mouth of the Orinoco, Her Majesty's Government believe that that no impartial person, after studying the records, can escape the conviction that the Barima was undoubtedly before, and at the time of the conclusion of the Treaty of Munster (1648), held by the Dutch, and that the right of Her Majesty's Government to the territory up to that point is in consequence unassailable (B. C., VII, p. 99).

* * * * * *

"This boundary [referring to his proposed line] will surrender to Venezuela what has been called the Dardanelles of the Orinoco. It will give to Venezuela the entire command of the mouth of that river, and it yields about one-half of the disputed territory, while it secures to British Guiana, a well-defined natural boundary along almost its whole course, except for about the first 50 miles inland from the sea, where it is necessary to lay down an arbitrary boundary in order to secure to Venezuela the undisturbed possession of the mouths of the Orinoco; but even here advantage has been taken of well defined natural land-marks. The Barima, connected as before mentioned by its tributaries with the centre of the country of Essequibo, is also connected with the Waini by a channel through which the tide flows and ebbs" (B. C., VII, p. 100).

Both of these paragraphs, taken in connection with Earl Granville's proposition to draw a line which should give Barima to Venezeula, show that Earl Granville was in accord with Lord Aberdeen, both as to the basis of Great Britain's claim to Barima, and as to the superior right of Venezuela to the same place upon the principle of security.

Lord Granville distinctly says that "the right of Her Majesty's Government to the territory up to" the mouth of the Orinoco was "in consequence" of a supposed former Dutch possession of Barima. Indeed, he goes even further, and by implication admits that such supposed Dutch possession, in order to have been effective, must have antedated the Treaty of Munster, and must have continued to the very date of that Treaty. This is certainly good law.

In the second paragraph above quoted (which is the ninth of the memorandum) Lord Granville recognizes the superior right of Venezuela to Barima on the principle of security. It would be difficult to improve on Earl Granville's language. His testimony to the fact that Barima and the region thereabout constituted the "Dardanelles of the Orinoco" is testimony to a fact—a fact which should be controlling in this controversy. On the other hand, his proposition to surrender the Barima to Venezuela "*in order to secure to Venezuela the undisputed possession of the mouths of the*

Orinoco" is a recognition of the principle of security and of the right of Venezuela to have awarded to her whatever might be necessary to insure that security to her Orinoco settlements.

Later correspondence of Lord Granville shows how fully he recognized this principle of security, and proves that while he was prepared to concede the application of the principle to Venezuela as her right, he was also influenced by it in considering what territory Great Britain must herself have.

It was on May 25th, 1883, that he thus wrote to Colonel Mansfield:

"It was considered that the proposals then made would yield to Venezuela every reasonable requirement, while securing the interests of British Guiana, and that any further Concession to Venezuela than is proposed in the Memorandum which was transmitted to you with my despatch of the 30th September, 1881, would have the effect of bringing the boundary-line into inconvenient proximity to the settled districts of the Colony of British Guiana, and would tend to deprive the Colonial Government of complete control over the water system of its territory" (B. C., VII, p. 103.)

Here we see clearly that, even as applied to Great Britain, who represented the title of a second comer, Lord Granville was of opinion that no line should be drawn which would bring Venezuela within "*inconvenient proximity*" to the settled districts of the Colony, or which should deprive Great Britain "of complete control over the water system of its territory." If Venezuela were to receive no more than that at the hands of this Tribunal, she would have awarded to her the whole of the Barima-Waini region as far as the mouth of the Moruca, for not otherwise can she enjoy that "complete control" of her water system, which Lord Granville invoked as a correct principle to apply to the case of even a second comer.

Earl Granville's propositions were not accepted by Venezuela. Negotiations continued, and had, in 1885, reached a point where an arbitration of the question had been agreed to. At this stage Lord Granville was succeeded by Lord Salisbury, who withdrew

the consent of the British Government previously given to arbitration, and the question of boundary was once more set afloat on the sea of diplomacy.

The next two years witnessed a series of unsuccessful efforts to settle the question—efforts which, unfortunately, in February, 1887, resulted in the suspension of diplomatic relations between the two countries. The immediate cause of this suspension was an invasion of the Barima-Waini region by Great Britain, an invasion which Venezuela resented as a violation of the Agreement of 1850. Great Britain alleged in justification of herself that Venezuela had herself first violated that Agreement. To determine the truth of the matter, we must go back a few years.

Up to 1863 there was, so far as appears, no infraction of the Agreement of 1850 by either Government—understanding, of course, that this Agreement referred to only that territory which was in dispute in 1850. In 1863 an English Mining Company was formed in Georgetown to work mines located on the Cuyuni, about two days' journey above its mouth, and from twenty to thirty days' journey below Tupuquen—that is to say, located close to the Essequibo River. In 1867 the British Government caused a notice to be given to the Company to the effect that if the Company continued its operations in the disputed territory, those going there would be regarded as adventurers not entitled to British protection (V. C., vol. i, p. 183). The Company came to an end, and the action of the British Government in giving the above notice proves that it looked upon the locality where the mines were as a part of the disputed territory, and that it still considered itself bound by the Agreement of 1850.

Between 1880 and 1882, British mining exploration of the interior was renewed; and during the latter year the Puruni River, a branch of the Mazaruni, became known as a rich gold field (V. C., vol. iii, p. 323). The Puruni was much further in the disputed territory than the mines which had been worked

in 1863 to 1867; and, of course, if the British Government had intended to observe the Agreement of 1850, it would have put a stop to these new mining operations just as it had done to the operations of the Georgetown Company in 1867. Instead of doing this, the British Government, in 1884, actually established regulations for the work; established offices for the collection of revenue from these mines; and imposed upon the gold produced a royalty which was thereafter regularly collected (V. C., vol. iii, p. 323). Here was clearly an infraction by Great Britain of the Agreement of 1850.

Prior to 1884, the Venezuelan Government had granted three different concessions for lands bordering on British Guiana. There is not, and never has been, any pretence that any actual entry was ever made under any of these grants into any part of the territory which was in dispute in 1850; but the granting of these concessions was, in 1884, used by the British Government as a pretext for taking formal possession of the Barima-Waini region as far west as the River Amacura.

The first of these concessions, dated May 12th, 1881, was granted to General Pulgar. It gave the right to work mines "in the State of Guayana," to construct railroads in that State, and to enjoy exclusive use of its water ways. It contained nothing derogatory to British rights in the disputed territory; and no one under its authority ever set foot in that territory. If, as the British Case alleges, General Pulgar ever published a map claiming any part of the disputed territory as included in his grant, that map was prepared and published without the sanction or knowledge of the Venezuelan Government.

The second concession was granted to C. C. Fitzgerald on September 22nd, 1883. It conferred upon the grantee certain rights in the Island of Pedernales, and also in the following described territory:

"The territory from the mouth of the Araguao, the shore of the Atlantic Ocean, the waters above the Greater Araguao, to where it is joined by

the Araguaito stream, from this point following the Araguaito to the Orinoco, and thence the waters of the Upper Orinoco surrounding the Island of Tortola, which will form part of the territories conceded, to the junction of the Jose stream with the Piacoa, from this point following the waters of the Jose stream to its source, thence in a straight line to the summit of the Imataca range, from this summit following the sinuosities and more elevated summits of the ridge of Imataca *to the limit of the British Guiana*, from this limit and along it toward the north to the shore of the Atlantic Ocean, and lastly from the point indicated, the shore of the Atlantic Ocean, to the mouth of the Araguao, including the island of this name, and the others intermediate or situated in the Delta of the Orinoco, and in contiguity with the shore of the said ocean." (B. C., VI, p. 219.)

Mr. Fitzgerald having obtained this concession, which it is needless to point out does not in any way encroach upon British territory since it is in terms limited "*to the limit of the British Guiana*," appears to have published a map and a prospectus, both of which are reproduced in the Appendix to the British Case. Neither the map nor the prospectus was issued with either the sanction or the knowledge of the Venezuelan Government, and no possession was, under the authority of that concession, ever taken of any land within the disputed territory.

The third concession was to Herbert Gordon, and was dated May 21st, 1884. The limits of this concession were as follows:

"On the north the highest points of the Imataca range, and the lands granted to C. C. Fitzgerald; on the south the chain of Pacaraima; on the west a straight line drawn from the peak of Barlina in the Imataca range, passing the torrent and hills of Tasconi, and ending in the Pacaraima chain; *and on the east British Guayana*." (B. C., VI, p. 221.)

Under this concession no possession of any part of the disputed territory was taken, and it will be observed that the concession itself was in terms bounded on the east by *British Guiana*.

None of these concessions were regarded seriously by the British Government. It was clearly understood by the British authorities that the maps and prospectuses published by the concessionees were not issued under Government authority. Colonel Mansfield, writing to Earl Granville on July 26th, 1884, said:

"I have the honour to report to your Lordship that the Venezuelan Government has constituted a new 'Federal Territory' under the name of the 'Federal Territory of the Delta of the Orinoco,' which, according to the Decree, is to be bounded on the east *by British Guiana*, actual frontier not specified.

"A Governor and staff of officials have been appointed, and the site of the capital, which is to be called Manoa, has been selected on the south-easternmost branch of the Orinoco, or perhaps more properly on the extreme right channel of the Delta.

"I beg to enclose a small map, more or less giving the limits of the new territory. *This map has been published by Mr. Fitzgerald*, of the Manoa Company, who has a concession for colonizing the district, *and not upon the authority of the Venezuelan Government, whose Decree, as I mentioned above, merely speaks of British Guiana as the limit.*

"The above is of interest in connection with the pending question of the limits of British Guiana." (B. C., VI, p. 223.)

When Colonel Mansfield thus wrote, all three of the concessions above mentioned had been granted; and it is clear from the way in which he refers to them that the thought of their constituting an infraction of the Agreement of 1850 never occurred to him. Lord Granville evidently took the same view of the matter, for, referring to the Gordon concession, he wrote to Colonel Mansfield on August 19th, 1884, as follows:

"I have communicated to Her Majesty's Principal Secretary of State for the Colonies your despatch of the 2nd ultimo relating to a contract signed on the 21st May, whereby a concession has been granted by the Venezuelan Government to Herbert Gordon, an inhabitant of the Federal territory of Yuruary, for the colonization of a large district, the sovereignty over which is claimed both by Her Majesty's Government and by that of Venezuela.

"With reference to this matter, I have to request that you will find means to caution Mr. Gordon that his concession would not be of any validity in respect of any territory, proving to be English, which it may purport to cover.

"You should also find an opportunity to convey an intimation to the same effect to the Government of Venezuela, in order to guard against the possibility hereafter of the tacit acquiescence of Her Majesty's Government in the concession being advanced in support of the claim of Venezuela to the district in dispute." (B. C., VI, p 223.)

On October 9, 1884, Colonel Mansfield wrote to Earl Granville as follows:

"I am informed that the Manoa Company is but a shadowy affair, not to call it, as my informant did, a mere bubble with a mendacious prospectus; while Mr. Gordon is living in a needy manner in Caracas and La Guayra, which does not look like colonizing a district half the size of Belgium." (B. C., VI, p. 224.)

Certainly Colonel Mansfield did not regard this "concession" as a very serious affair; and so little bearing did he consider that it had upon the Agreement of 1850 that when, on the same day, he wrote to the Venezuelan Minister, informing him of the notice which he had given Gordon and Fitzgerald that their concessions would not be regarded as valid in respect of territory claimed by Great Britain, instead of complaining of any infraction of the Agreement of 1850 by Venezuela, he limited himself to making the following representation:

"Lord Granville also wishes me to convey an intimation to the same effect to the Government of Venezuela, in order to guard against the possibility hereafter of the tacit acquiescence of Her Majesty's Government in the concessions being advanced in support of the claim of Venezuela to the districts in dispute.

"I have the honour to request your Excellency to explain to the President of the Republic that the above intimation is not inspired in the smallest degree by a spirit of hostility, but simply to guard against a misunderstanding in any future discussion of the boundary, a question which your Excellency is well aware is one of long standing, and which Her Majesty's Government would gladly see brought to a satisfactory solution." (B. C., VI, p. 224).

It was in the same month of October, 1884, that, according to the testimony of Sir Henry Irving, Governor of British Guiana, an agent of the Manoa Company posted up certain notices on the east side of the Amacura River. These notices were to the effect that all persons holding land on the Company's property should communicate with the Company. It will be noted that the posting of these notices was not an act of the Venezuelan Government; and even if it had been it would not have constituted any occupa-

tion of the disputed territory; but, whatever the character of the act itself, the letter in which the British Governor communicated the information to the Earl of Derby furnishes the best possible proof of the way in which, for years before that time, Great Britain had, in the disputed territory, been doing systematically things of a far more serious nature and about whose official character and meaning there could be no doubt. This is what Sir Henry Irving had to say:

"Information having lately reached me that notices, of which I enclose a specimen, were being served by the agent of a Company styling itself 'The Manoa Company, Limited,' on the inhabitants of the territory lying on this side of the Amacura River, I deemed it proper to dispatch an officer of this Government to the district to ascertain and report on the operations of the Company.

"2. I selected for this duty Mr. McTurk, the Acting Special Magistrate of the Pomeroon district; and I have the honour to transmit to your Lordship copies of the instructions with which I caused him to be furnished and of his report. I also inclose copies of letters which I have received from the President *pro tem.* of the Manoa Company, accompanied by a prospectus and map.

"3. The Company has, it will be seen, obtained a concession from the Venezuelan Government of the territory lying between the Orinoco and the boundary-line of British Guiana. *The line is not defined by the concession,* but the *Company* have defined it for themselves by exhibiting in their map and prospectus the Moruca River as the limit of their grant.

"4. This is a definition against which the Colonial Government is bound to protest. Its effect would be to sever from the Colony the whole of the territory lying between the Moruca and the Amacura Rivers, *within which the Colonial Government has exercised jurisdiction for a long series of years,* to hand over to the tender mercies of a Foreign Joint Stock Company a considerable population of aboriginal Indians, many of whom have taken refuge in this territory from Venezuelan ill-usage, and who have learnt to regard themselves as living under British rule and under the protection of British law; and to surrender to a foreign power a control over the inland water communication of the Colony which would now be a source of embarrassment to the Government, and which might in the future endanger the safety of the Colony.

"5. The boundary between Venezuela and British Guiana being unsettled, *the Colonial Government has had to determine for itself the limits of*

its jurisdiction. This it could only do by adopting some definite boundary line, and *it has taken for the purpose the line of compromise suggested by Sir R. Schomburgk*, which, as your Lordship is aware, is considerably within the territorial claim of Great Britain. Although that line has never been officially recognized by both Governments, *it has for a long series of years been taken for all practical purposes as the settled boundary of the Colony*. In illustration of this, I may state that *in criminal cases jurisdiction has been from time to time proved by showing that the crime occurred at a place on the British Guiana side of that boundary line*. The definite line thus adopted and recognized can only be given up if another definite line be adopted under proper sanction.

"6. The concession from the Venezuelan Government to the Manoa Company is to the boundary of British Guiana, without defining such boundary; and *it does not, therefore, in terms, appear to interfere with the rights of the Colony*. The Company, however, under color of the Venezuelan claims, are now seeking to exercise proprietary rights within the Colony, and are interfering with the inhabitants.

"7. In these circumstances, the Colonial Government has no alternative but to oppose the claims of the Company, and to take steps for the maintenance of order and for the protection of life and property.

"8. The means I shall propose to adopt for this purpose would be the employment of a revenue schooner carrying a small force of police, and the erection of one or more temporary buildings at the mouths of the Amacura, Barima, and Waini Rivers, or elsewhere, which could be occupied by the men as police stations, as occasion might require;" (B. C., VI., p. 225.)

Could any confession be more complete? In 1842, if the assurances of Lord Aberdeen and Governor Light are to be believed, Great Britain was not occupying the Barima. In 1850 the British Government entered into a solemn engagement with Venezuela not to occupy or encroach upon it. Venezuela had relied upon the good faith of Great Britain to keep that engagement; yet it appears that after a lapse of thirty-eight years, that engagement sat so light upon British officials that a British Governor could say, in the most matter of fact way in the world, that "*the Colonial Government has exercised jurisdiction for a long series of years*" between the Moruca and the Amacura; that it had, of its own motion adopted the Schomburgk line as the definite

boundary line of the Colony; that that line had "*for a long series of years been taken for all practical purposes as the settled boundary of the Colony;*" and that "in criminal cases jurisdiction" had "been from time to time proved by showing that the crime occured at a place on the British side of that boundary line."

Venezuela does not admit many of the statements made by Governor Irving—but they constitute a complete estoppel against Great Britain to allege that Venezuela had by the acts complained of violated the Agreement of 1850; and in view of his statements, it may well be asked, what had become of the Agreement of 1850? Had not Venezuela claimed the Barima-Waini region in 1850? Had not Great Britain solemnly bound herself to respect that claim, and not to "occupy or encroach upon" that region? Yet here is the British Governor reciting what he had been doing there for years past in violation of that Agreement; and then proposing to send an armed force and to erect posts and buildings there —and for what? To keep out a number of private individuals who, without any authority from Venezuela, he alleges threatened to go there, and who were acting under a concesssion which the British Governor himself declared "*does not . . . in terms, appear to interfere with the rights of the Colony.*"

In other words, the British Governor gives his testimony, on the one hand, to the fact that the Venezuelan Government had not passed the Schomburgk line; and, on the other hand, alleges the further fact that for years past his own Government had, in violation of that Agreement, been occupying the whole of the disputed territory up to the very line which, in 1850, had marked the limits of Great Britain's extreme claim. Having stated these facts, the British Governor then proposes to strengthen the British hold upon that territory by sending an armed force into it and erecting police stations at the mouths of the Amacura, Barima and Waini Rivers.

Had the threatened action of the Manoa Company, which the British Governor feared, been invested with an official charac-

ter; had it, in fact, constituted a violation by Venezuela of the Agreement of 1850; and had Great Britain, up to that time, faithfully observed that agreement herself, she would have been within her rights had she denounced that Agreement as no longer binding upon her. But the action of the Manoa Company was not the action of the Venezuelan Government; the posting up of the notices on the Amacura and the Barima was not an occupation of the disputed territory; Great Britain had herself been for years systematically violating the Agreement of 1850; and she not only failed now to denounce that Agreement, but continued for years thereafter to invoke it and to appeal to it as still in force.

While on the subject of this Agreement, it may be well to follow to the end the events which further determine its place in the present controversy.

What immediately followed was in line with Sir Henry Irving's recommendations. Mr. McTurk was sent to take forcible possession of the mouth of the Orinoco; and in 1885 the Barima-Waini region was organized into a separate British "district" under the jurisdiction of a special commissioner (V. C., vol. i, p. 186).

It might be inferred from this that Great Britain proposed to treat the Agreement of 1850 as no longer in force. Certainly, after Sir Henry Irving's confessions in 1884, after the formal and forcible occupation of the Barima by Mr. McTurk a few months later, and after the erection of the Barima-Waini region into a British "district" in 1885, Great Britain was hardly in a position to appeal to the Agreement of 1850 as against Venezuela; yet, strange to say, this is precisely what she did. It was in December of 1886 that the Venezuelan Government, having just learned of the British encroachments upon the Barima and upon the Amacura, determined to erect a lighthouse at Barima Point. Mr. St. John, the then British Minister at Caracas, gives a most instructive account of what took place; and the resulting correspondence between himself and the Earl of Iddesleigh throws much light upon the British attitude at that time.

According to his own account (B. C., VII., p. 117), Mr. St. John, pursuant to request, called upon President Guzman Blanco, on December 6th, 1886, and was informed by the President that the Venezuelan Government proposed to erect a lighthouse at Barima Point. While the President explained that such action would be but to comply with the "alleged desire of" Her Majesty's Government in 1836, yet it is clear that the real reason which moved him was the then recent action of the British at Barima. The President informed Mr. St. John of "news of the very gravest kind" which had reached him, namely, that "Her Majesty's Government" had "formally taken possession of the disputed Guiana territory by establishing British functionaries upon it in violation of all previous understanding and arrangement." The answer of Mr. St. John was most significant. Not for one moment did he deny the existence of the "previous understanding and arrangement," referred to by President Guzman Blanco; neither did he allege any violation of that Agreement by Venezuela; neither did he attempt the slightest justification of the acts attributed to the British authorities; his only answer was that the rumor "was probably untrue." Certainly this was an admission that, if true, Venezuela's complaint was well founded; and that, if true, Great Britain had violated her engagements.

Having attempted in this way to meet President Blanco's charge, the British Minister next proceeded to protest against the proposed erection of a Venezuelan lighthouse at Barima Point, on the ground that "the erection of a lighthouse would still constitute a violation of disputed ground" (B. C., VII, p. 117). Here, then, we find the British Government at the very moment when, in violation of the Agreement of 1850, it was itself in full possession of the Barima-Waini region, invoking that Agreement against Venezuela. Was not this an admission that Venezuela had kept the Agreement up to that time? Or, if not this, was it not at least an admission that if there had been a previous violation on the part of Venezuela,

Great Britain elected to stand by the Agreement and to hold it as still binding upon both Governments? Mr. St. John's action, which was reported to and approved by the Home Government, whatever other significance it may have had, certainly had this: It overlooked the acts of the Manoa Company, and all other previous acts which might be claimed to have been in violation of the Agreement of 1850; and it continued the life of that Agreement, notwithstanding such acts. If this be so, the British occupation of Barima at that time, an occupation of which Mr. St. John was evidently ignorant, forever barred Great Britain from justifying her own violations of the Agreement of 1850 by alleging previous violations by Venezuela.

That there may be no question as to the formal approval of Mr. St. John's action, and of the formal appeal made by Great Britain as late as 1887 to the Agreement of 1850 as an Agreement still in force, we quote Lord Iddesleigh's note in answer to Mr. St. John. That answer was dated January 12th, 1887, and contained the following words:

"You will inform President Blanco . . . that an attempt to erect such a lighthouse without the consent of Her Majesty's Government would be a departure from the reciprocal engagement taken by the Governments of Venezuela and England in 1850 not to occupy or encroach upon the territory in dispute between the two countries;" (B. C., VII, p. 118.)

In view of this appeal, in January, 1887, to the "reciprocal engagement" of 1850, and in view of the opposition made to the erection of a lighthouse by Venezuela as an act which would have been in violation of that Agreement, it is interesting to note, among others, the following passages:

From letter of Francis Stephen Neames, British Rural Constable, to Jesus Manuel Tebar and Santiago Rodil, dated December 24th, 1886:

"The Undersigned have received the official note, dated the 24th December, 1886, requesting to answer you about our appointments by the English Government of Georgetown, Demerara, and we have the honour to tell you

that, in reality, *we have been appointed by Mr. Michael McTurk*, one of her Majesty's Stipendiary Magistrates in and for the Colony of British Guiana, *to be a Rural Constable in British Guiana*, as you have seen it in the precept signed by said Michael McTurk which we have handed to you. We also inform you that the Undersigned Francis Stephen *Neames has been acting Rural Constable since the 1st March*, 1885, *and the Undersigned George Benjamin Jeffrey has been appointed and acting as Constable since the 6th Septembe*r, 1886, *both as Constables in Amacura River.*

"We have not received instructions to interfere with the Venezuelan authorities on the right bank of the Amacura River, but we have instructions to prevent any foreign vessel from selling rum and other spirituous liquors on the English territories, in which case any vessel selling rum without a proper licence given by our government may be seized at any time." (V. C., vol. iii, pp. 252–253.)

From letter of Senor Urbaneja to Mr. St. John, dated January 26, 1887:

"The Head of the Commission has just returned here, and has informed the Government of its result.

"Unfortunately, the grave reports which caused that step are confirmed.

"Firstly, the Commission found in the neighbourhood of the right bank of the River Amacura two Commissaries, Messrs. Francis Stephen Neame and J. B. Jeffry.

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"In the said village of Amacura the Commision took declarations on oath from the Venezuelan Commissary, Mr. Robert Wells, and Messrs. Aniceto Ramuñez and Alfonso Figueredo.

"Their depositions . . . established the fact of the existence of a wooden house with a tiled roof, which serves as a public office, flies the British flag, was built by order and at the expense of the Colonial Government, and was seen by the Commisioners. It was in the same manner also proved that an English revenue-cutter, named 'Transfer,' had on various occasions made voyages to the Amacura, conveying the British Magistrate and armed police functionaries, with the object of inquiring into, judging, and deciding criminal and police cases; and that vessels legally dispatched from Ciudad Bolivar are registered in Amacura as well as in Barima, and are prohibited from selling their goods and continuing their course on the Barima unless in ballast, requiring them, in order to trade, that they obtain permission in Georgetown." (V. C., vol. iii, pp. 255–256.)

Were these formal British acts—the exclusive jurisdiction established, the erection at Amacura of a "wooden house with a tiled roof which serves as a public office, flies the British flag, was built by order and at the expense of the Colonial Government," any less "a departure from the reciprocal engagement taken by the Governments of Venezuela and England in 1850, not to occupy or encroach upon the territory in dispute between the two countries," than would have been "the erection of a lighthouse without the consent of Her Majesty's Government" at Barima? If so that "engagement" could hardly have been "reciprocal."

We have said that Mr. St. John's action was reported to and approved by the Home Government. In this connection there is a circumstance which is not calculated to inspire confidence in the sincerity of the British authorities at that time. Mr. St. John had stated to President Blanco that "in order to prevent the disputed territory from becoming an asylum for criminals, these had often been pursued by British police, and could be similarly pursued by Venezuelan police when escaping from the other side" (B. C., VII., p. 118). This statement of Mr. St. John, so far as regards the pursuit of criminals by Venezuelan police, was distinctly disapproved by the Earl of Iddesleigh, who thus wrote on January 12th, 1887:

"In the first place I have to acquaint you that the language which you inform me you held at your interview with General Guzman Blanco has the approval of Her Majesty's Government; *they do not, however, wish you to say anything further concerning the pursuit of fugitives into the disputed territory by the Venezuelan police, as it is not desirable to encourage the Venezuelan Government to adopt such action.*" (B. C., VII., p. 118.)

Are we to understand from this that Great Britain, while claiming for herself, under the Agreement of 1850, the right to pursue fugitives from justice into the disputed territory, denied that right to Venezuela? If not, then only one of two interpretations can be placed upon the words of the noble Earl. Either both

nations had the right to make the pursuit, in which case it appears that Her Majesty's Government proposed to "discourage" Venezuela, that is, to *prevent* Venezuela from doing what she had a right to do; or else neither nation had the right, in which case, since Lord Iddesleigh approved of what Mr. St. John had said relating to *British* police, it appears that Her Majesty's Government proposed to do and continued to do things which were in violation of this treaty engagement. There seems to be little choice between the horns of this dilemma. Either one places the British Government of that time in a very unenviable light.

It will be remembered that up to this time no violation of the Agreement of 1850 by Venezuela had been even *alleged*. The sending of Mr. McTurk to the Barima, in 1884, and the erection of the Barima-Waini region, in 1885, into a separate "district," were in consequence of the acts of a private Company, acting under a charter which Sir Henry Irving himself declared at the time, "*does not, therefore, in terms, appear to interfere with the rights of the Colony*" (B. C., VI, p. 225). It was not until three years later, when diplomatic relations between the two countries had, in consequence of British encroachments upon the disputed territory, been suspended, that Great Britain's action in that regard was sought to be justified by alleged prior violations by Venezuela of the Agreement of 1850. It was then that the action of the Manoa Company was *for the first time* laid at the door of the Venezuelan Government, and that that Government was charged with other acts of alleged "occupation and encroachment."

It was on March 7th, 1887, that Lord Salisbury thus wrote to Mr. St. John:

"The Venezuelan Government, in their note, also charge Her Majesty's Government with a breach of the reciprocal engagement of 1850.

"You are already aware, from General Guzman Blanco's note to the Earl of Rosebery of the 28th July, 1886, a copy of which was forwarded to you in the Earl of Iddesleigh's despatch of the 25th August last, that,

although his Excellency complained of the action of the British Colonial authorities at the mouth of the Orinoco River in October 1884, and declared it to be a violation of the Agreement of 1850, no allusion whatever was made to the fact that on repeated occasions long prior to that date the Venezuelan Government had violated that engagement by granting concessions of land in the disputed territory for mining and other purposes.

"I refer especially to the concessions made on the 12th May, 1881, on the 22nd September, 1883, and on the 20th March, 1884, at the very time when proposals made by the British Government for the settlement of this long-disputed boundary question were said to be actually under consideration by the Venezuelan Government.

"Her Majesty's Government, therefore, consider that they were fully justified in issuing the Notice which appeared in the 'London Gazette' of the 22nd October, 1886, and in taking such other precautions as seemed to be necessary to safeguard the rights of Great Britain." (B. C., VII, p. 133.)

Six years later, when negotiations were proceeding in London with a view to re-establishing diplomatic relations, Lord Rosebery thus wrote to Senor Michelena:

"With regard to clause 4 of the *pro memoriâ*, in which it is proposed that both Her Majesty's Government and that of Venezuela shall acknowledge and declare that the *status quo* of the boundary question is that which existed in 1850, Her Majesty's Government consider that it is quite impossible that they should consent to revert to the *status quo* of 1850, and evacuate what has for some years constituted an integral portion of British Guiana. They regret, therefore, that they cannot entertain this proposition.

"The Declaration made to the Venezuelan Government in the year 1850 by Sir Belford Wilson, the British Chargé d'Affaires, was as follows: That 'whilst on the one hand Great Britain had no intention to occupy or encroach on the disputed territory, it would not on the other hand view with indifference aggressions in that territory by Venezuela.' The arrangement on this basis was disturbed by Venezuela on several successive occasions prior to any attempt on the part of Her Majesty's Government to exercise jurisdiction in the districts in question. In the same year (1850) in which the Declaration was made, the Venezuelan Government began to establish new positions to the east of Tumeremo, and in 1858 they founded the town of Nueva Providencia, on the south side of the River Yuruari. Again, in 1876, licences were granted by the Government of Venezuela to

trade and cut wood in the district of Barima, and to the eastward of that district. In 1881, the Venezuelan Government made a grant of a great part of the disputed territory to General Pulgal, and in 1884 it made concessions to the Manoa Company and others, which were followed by actual attempts to settle the territory.

"In contrast to this action, the attitude of the British Government was marked by great forbearance and a strong desire to execute the arrangement in good faith. In proof of this disposition, it may be instanced that when applied to in 1881 to grant a Concession in the disputed territory to certain applicants they distinctly declined to entertain the proposal, on the ground that negotiations were proceeding with Venezuela, and it was not until the encroachments of the Manoa Company began to interfere seriously with the peace and good order of the Colony that Her Majesty's Government decided that an effective occupation of the territory could no longer be deferred, and steps were taken for publicly asserting what they believe to be the incontestable rights of Great Britain.

"Those rights they are unable now to abandon, and they could not consent that any *status quo* except that now existing should remain in force during the progress of the negotiations." (B. C., VII, p. 143.)

Finally, in his note of November 26, 1895, to Sir Julian Pauncefote, Lord Salisbury, after referring to the Declarations exchanged in 1850 between Venezuela and Great Britain, thus continues:

"This constitutes what has been termed the 'Agreement of 1850,' to which the Government of Venezuela have frequently appealed, but which the Venezuelans have repeatedly violated in succeeding years.

"Their first acts of this nature consisted in the occupation of fresh positions to the east of their previous settlements, and the founding in 1858 of the town of Nueva Providencia on the right bank of the Yuruari, all previous settlements being on the left bank. The British Government, however, considering that these settlements were so near positions which they had not wished to claim, considering also the difficulty of controlling the movements of mining populations, overlooked this breach of the Agreement. (V. C.-C., vol. iii, p. 279.)

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"In 1876 it was reported that the Venezuelan Government had, for the second time, broken 'the Agreement of 1850' by granting licences to trade and cut wood in Barima and eastward. (*ib.*, pp. 279-280.)

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"This boundary was proposed to the Venezuelan Government by Lord Granville in September 1881, but no answer was ever returned by that Government to the proposal.

"While, however, the Venezuelan Minister constantly stated that the matter was under active consideration, it was found that in the same year a Concession had been given by his Government to General Pulgar, which included a large portion of the territory in dispute. This was the third breach by Venezuela of the Agreement of 1850.

"Early in 1884, news arrived of a fourth breach by Venezuela of the Agreement of 1850, through two different grants which covered the whole of the territory in dispute, and as this was followed by actual attempts to settle on the disputed territory, the British Government could no longer remain inactive." (*ib.*, p. 281.)

It will be noticed, in the first place, that these statements of Lord Salisbury and Lord Rosebery regarding alleged violations of the Agreement of 1850 by Venezuela referred to acts, or supposed acts, which took place prior to December, 1886, when, as we have seen, Mr. St. John, on behalf of Great Britain, and with a full knowledge of these facts, invoked that Agreement as still in force. Whether or not these allegations had any foundation in fact, Great Britain, by appealing to that Agreement, as it did in 1886, elected to disregard them, and to hold by the Agreement itself as still binding. That a failure to denounce the Agreement, after receiving information of its violation by the other party, constituted an election to regard the Agreement as still binding, is asserted by Lord Salisbury himself, who, in the passages above quoted, referring to what he calls the first case of violation by Venezuela in 1858, says: "The British Government, however, . . . overlooked this breach of the Agreement" (V. C.-C., vol. iii, p. 279). That is to say, a breach may be overlooked by the innocent party, if he so wishes, and, in case of such election, the original Agreement continues in force. It follows as a matter of course that if the breach be overlooked and if the Agreement be regarded thereafter as still in force, the *overlooking* constitutes a *waiver* of the breach, and that, consequently, the breach so waived cannot thereafter be alleged to justify another breach by

the party who elected to waive the first one. Such being the law, it follows that when, in December of 1886, Great Britain invoked the Agreement of 1850 as still binding, and when she based upon it her objection to the erection of a Venezuelan lighthouse at Barima Point, she thereby *overlooked* all those violations alleged by Lord Rosebery and Lord Salisbury, and having thus waived them could not thereafter, and cannot now, use them to justify violations of her own.

But, however sound this position may be in point of law, Venezuela has no need to rest upon it. As a matter of fact she has never—not even to this day—violated the Agreement of 1850.

Let it be remembered that that Agreement had reference to territory in dispute—not now—but in 1850. At that time the present Schomburgk line, according to Lord Aberdeen, marked the extreme British claim. About the territory to the west of it there was no dispute whatever. Tumeremo, to which Lord Rosebery referred, was, according to the British Atlas (map 4) eighty-five miles due west of that line, and had been founded as early as 1788. Nueva Providencia, to which Lord Rosebery and Lord Salisbury both referred, was, according to another British map (Blue-Book, V. p. 1, 1896) fifteen miles west of Tumeremo, that is to say, one hundred miles west of the territory which was in dispute in 1850. The grants to Pulgar, Fitzgerald and Gordon, as already explained, and as Sir Henry Irving at the time stated, did not interfere with the rights of the Colony; and the Venezuelan Government was certainly less responsible for the unauthorized acts of these concessionees than Great Britain herself had been for the acts of the British mining company which was organized in Georgetown in 1863, and which, from 1863 to 1867, continued to work mines in the disputed territory with the knowledge and without the interference of the British authorities. Even after four years' existence the British Government did nothing to *prevent* those mining operations; it merely refused to *sanction* them, or to extend its support to the Company. If that was a good rule

to apply in 1867 to Great Britain, who for four years had allowed a British company to mine in the disputed territory, why is it not a good rule to apply to Venezuela in 1884 with regard to an insignificant, unmeaning and unauthorized act of an agent of a Venezuelan company?

The only other Venezuelan "*encroachment*" referred to by Lord Rosebery and Lord Salisbury, is that of certain licenses alleged to have been issued in 1876 "to trade and cut wood in Barima and eastward." What these licences may have been nowhere appears, for there is no evidence regarding them; and, as the British Case makes no mention of them, it is to be presumed that later investigation has satisfied the compilers of the British Case that no such licenses were issued.

To sum up, then, the various alleged Venezuelan violations relied upon by Lord Rosebery and Lord Salisbury amount to this: that Venezuelan settlements were made in Venezuelan territory at a distance of eighty-five and one hundred miles, respectively, west of the disputed territory, one in the year 1788 and the other in the year 1858; and that in 1881, 1883 and 1884 three grants were made by Venezuela relating to lands west of the British boundary, which did not, according to the statement of the then British Governor "in terms appear to interfere with the rights of the Colony."

As against these, we have, on the British side, this: for years, prior to 1884, according to Sir Henry Irving, the British treated their extreme claim of 1850 as the actual boundary of the Colony; they exercised jurisdiction there; in 1884, they took forcible possession of the mouth of the Orinoco; in 1885, the Barima-Waini region was organized into a separate British district; buildings were erected there under the protection of the British flag; and to-day, against Venezuelan protests, Great Britain is holding by force the territory which she agreed in 1850 to neither occupy nor encroach upon.

It is a familiar rule of law that rights are not acquired by

repeating wrongs. British occupation, against Venezuelan protest and in violation of British Agreement, cannot be made the basis of British title.

The armed invasion of the disputed territory by Great Britain in violation of her Agreement of 1850, and her refusal to evacuate it, were the immediate cause of the suspension of diplomatic relations in February of 1887. Let us now take up the diplomatic correspondence which followed that suspension.

In January, 1890, some three years after the suspension of diplomatic relations, Venezuela attempted to reopen the discussion of the boundary question with Great Britain. She was induced to this action by certain representations made to her Minister in Paris by Sir Andrew Clarke and Captain Lowther, persons whom the Venezuelan Government then believed were acting with authority from the British Government. Clarke and Lowther represented to Venezuela that Great Britain was prepared "to evacuate the invaded territory, and to submit the case to the arbitration of a friendly Power, provided Venezuela would declare diplomatic relations to be re-established between the two countries" (V. C., vol. iii, p. 276).

The action of Sir Andrew Clarke and Captain Lowther was subsequently disavowed by the British Government, but it was due to the representations made by them that in January, 1890, Senor Urbaneja addressed himself to the Marquess of Salisbury. These advances by Venezuela were met by Great Britain with the following statement:

> "As regards the frontier between Venezuela and the Colony of British Guiana, Her Majesty's Government could not accept as satisfactory any arrangement which did not admit the British title to the territory comprised within the line laid down by Sir R. Schomburgk in 1841. They would be ready to refer to arbitration the claim of Great Britain to certain territories to the west of that line" (V. C., vol. iii, p. 274).

That a British Minister could, in 1890, make such a proposition shows the great expansion of the British claim since the days of

Lord Aberdeen, and proves the completeness with which Great Britain had made herself mistress of territory, which, in 1850, she had solemnly pledged herself neither to occupy nor encroach upon. In 1844 the British premier put forward the Schomburgk line as Great Britain's extreme claim, thereby admitting that the territory to the west belonged to Venezuela. Forty-six years later (1890) another British premier refused to discuss the title to that territory which, in 1844, his predecessor had admitted to be doubtful; but expressed his willingness to submit to arbitration the title to territory which had not been in dispute in 1844, and which Lord Aberdeen had, at that time, admitted to belong to Venezuela. Could such a proposition be other than offensive to any self-respecting power? Venezuela declined the offer and these preliminary negotiations came to an end.

While these negotiations were without results, some of the correspondence merits attention.

A *Memorandum* from the British Foreign Office, dated February 13, 1890, affirmed the position taken by the British *Promemoriá* of February 10, 1890, and contained, among other things, the following statements:

> "The claim of Great Britain, on the other hand, to the whole basin of the Cuyuni and Yuruari is shown to be solidly founded, *and the greater part of the district has been for three centuries under continuous settlement by the Dutch and by the British as their successors.*" (V. C., vol. iii, p. 277).

This statement is made with reference to the region in which most of the Spanish Capuchin missions had been established, and of which, therefore, Spain and its successor, Venezuela, had been in exclusive possession for at least one hundred and fifty-six years prior to 1880. It was the region from which the Dutch were expelled by the Spanish in 1758, when the former attempted to put up a trading post on the lower Cuyuni; it was the region which, as regards the part west of

the Cuyuni proper, Lord Aberdeen had, in 1844, admitted to be indisputably Venezuelan; and it was the region which, having been entered by British adventurers for the first time in 1863, was in 1867 declared by the British Government to be beyond the limits where British subjects could look to it for protection. Quite apart, however, from these facts, which alone suffice to disprove the above quoted declaration of the British Foreign Office, it is important to note that here again, as late as February, 1890, Great Britain still rested her title to the interior upon supposed Dutch settlements, and upon her succession to Dutch rights in that quarter.

This continued reliance by Great Britain upon former Dutch rights is even more clearly shown in the following passage, taken from a later British *Memorandum*, dated July 24th, 1890:

> "That territory, and by far the greater portion of the large tract of country which the Venezuelan Government seeks to put in question, accrued to the Netherlands under the Treaty of Munster of 1648 by right of previous occupation. It was constantly held and claimed by the States-General in succeeding years. It was publicly and effectively occupied by Great Britain during the wars at the close of the last century, and the formal transfer of the country so occupied was effected by the Treaty of Peace with the Netherlands of the 13th August, 1814, and was in no way questioned by Spain on the conclusion of peace with her in the same year." (V. C., vol. iii, p. 283).

The Memorandum from which this passage is taken contains another important statement. The Venezuelan Case regards the Barima as a part of the Orinoco system, and treats Point Barima as Orinoco territory (V. C., vol. i, p. 14). The British Case (p. 8), on the other hand and also the British Counter-Case (p. 6) attempt to deal with the Barima as though it were something separate from the Orinoco, and treat the Barima-Waini region, including Barima Point, as a basin by itself (British Atlas, map 3). The British Memorandum of July 24th, 1890, to which we have referred, was a reply to a propo-

sition submitted by Señor Pulido. Pulido's memorandum was in part as follows:

"The Government of the United States of Venezuela should formally declare that the River Essequibo, its banks, and the lands covering it belong exclusively to British Guiana, and Her Majesty's Government should formally declare that the Orinoco River, its banks, and the lands covering it belong exclusively to the United States of Venezuela." (V. C., vol. iii, p. 280.)

The British answer to this was as follows:

"The proposed Declaration, if it be correctly understood, would recognize the right of Great Britain to the main stream only of the Essequibo and the land immediately upon its banks, without including its tributaries, in exchange for a similar recognition of the right of Venezuela to the main stream of the Orinoco, and the land upon its banks and in the neighbourhood of its mouth, including Point Barima and the adjacent district, . . ." (V. C., vol. iii, p. 283.)

This definition by the British Foreign Office of what was included under the term "Orinoco River, its banks, and the lands covering it," formulated at a time when British interests were apparently not menaced by such definition, is obviously entitled to greater weight than the subsequent allegations of the British Case and Counter-Case contradicting it.

These preliminary negotiations of 1890, as already stated, ended without accomplishing anything. Another and final attempt was made by Venezuela three years later, through Señor Michelena. This attempt was likewise doomed to failure; but certain statements made in the course of the correspondence merit attention.

On May 26, 1893, Señor Michelena submitted to the Earl of Rosebery a *Pro-memoria* containing certain proposed bases for the settlement of the boundary question. The first of these bases began thus:

"The Government of Great Britain claims certain territory in Guiana, as successor in title of the Netherlands, and the Government of Venezuela claims the same territory as being the heir of Spain"; (V. C., vol. iii, pp. 286–287).

These had up to that time been the acknowledged bases upon which both titles rested: Great Britain had never claimed any other source of title. This formal statement presented by Venezuela, as a mere preamble to a proposition for the settlement of the boundary dispute, was returned by Lord Rosebery, amended as follows:

"[Whereas] The Government of Great Britain claims certain territory in Guayana as successor in title of the Netherlands and [by right of conquest as against Spain, and whereas] the Government of Venezuela claims the same territory as being the heir of Spain; . . . ." (V. C., vol. iii, p. 289).

The modifications thus introduced give to this preamble an importance which it would not otherwise have. As modified it must be taken to embody, in an authoritative manner, all that could, at the time, be claimed as sources of British title. If Great Britain had, in 1893, relied in any measure upon prescription, or upon the existence of a no-man's land between the original Dutch and Spanish possessions and a British occupation of that land, or upon Indian treaties or Indian relations of any kind, Lord Rosebery would certainly have so stated in this preamble. The fact that he made modifications in it, and that he added words which more clearly defined the origin of the British title, proves that he intended the preamble to be both accurate and exhaustive in this regard. Whatever other sources, therefore, the British title may in fact have, it is clear that no other was known to the British Government in 1893.

Having noted this fact, let us next inquire into the meaning of the words added by Lord Roseberry to this preamble. A title "by right of conquest as against Spain" can refer to nothing later than 1648. The Netherlands certainly acquired no title by conquest *after* that year. It has at times been contended, and is now maintained by the British Case that, after the Treaty of Munster, the Dutch enlarged their domains; though it is at the same time asserted that such enlargement was the result of *peaceful* occupation under the

terms of the treaty, not of conquest. So also with regard to Great Britain, since Lord Rosebery wrote in 1893, a number of new claims have been put forward, to prove British rights to the disputed territory; but there is no pretence, so far as we are aware, that Great Britain ever conquered any part of it from Spain—certainly there could be no foundation for such a claim were it made. Such being the case, it must be that when Lord Rosebery inserted the words "by right of conquest as against Spain," he referred to the title originally acquired by the Dutch, for that title was, in fact, "a title by conquest." If we are correct in the interpretation thus placed upon Lord Rosebery's words, the admission is a most important one, for it recognizes that the Dutch came to Guiana to war against Spain on Spanish soil, and that the rights which they thus acquired are to be measured by the strict rules applicable to such cases.

But this is not the only admission made by Lord Rosebery in the course of this correspondence of 1893.

One of the claims of the British Case is this:

"That prior to 1796 the Dutch, and, *since that date* the British, have been in possession of all the territory now in dispute" (B. C., pp. 18–19).

This claim is repeated later in the following language:

"After the acquisition of the Colony by the British, Great Britain exercised over the territory now in dispute all those rights by which nations usually indicate their claim to territorial possession." (B. C., p. 120.)

It goes without saying that if the British have been *in possession* of this territory during the entire century; if they have, in fact, *exercised over it all the sovereign rights of a nation* during that period; and if this *possession* and *exercise of sovereign territorial rights* are to serve as bases of British title—and such is evidently the intention of these allegations—then that *possession* or *occupation* must have been *effective*—nothing else can suffice; nothing else can sustain the allegations of the British Case. It is precisely here that Lord Rosebery upsets the British contention;

for, writing to Señor Michelena on July 3rd, 1893, he says, speaking of the Agreement of 1850:

"In contrast to this action, the attitude of the British Government was marked by great forbearance and a strong desire to execute the arrangement in good faith. In proof of this disposition, it may be instanced that when applied to in 1881 to grant a Concession in the disputed territory to certain applicants they distinctly declined to entertain the proposal, on the ground that negotiations were proceeding with Venezuela, and it was not until the encroachments of the Manoa Company began to interfere seriously with the peace and good order of the Colony that her Majesty's Government decided that *an effective occupation of the territory could no longer be deferred,* and steps were taken for publicly asserting what they believe to be the incontestable rights of Great Britain." (V. C., vol. iii, pp. 288–289).

If this mean anything, it means that prior to 1884, the now alleged British occupation of the Barima-Waini region and of the Cuyuni region had not been "*an effective occupation*"—an occupation, that is to say, which under the rules of international law could be made the basis of a title by occupation. Of course this admission by a British premier is conclusive, for it is an admission against interest.

With the failure of Señor Michelena's mission, the diplomatic correspondence between Great Britain and Venezuela came to an end.

Before closing this Chapter attention should be called to one or two passages in subsequent instructions, to Sir Julian Pauncefote, which show that, as late as the close of 1895, the British Government still continued to rely exclusively upon a *Dutch* title.

On February 23, 1895, the Earl of Kimberley thus wrote to the British Ambassador in Washington:

"On the other hand, Great Britain has throughout been prepared to make large abatements from her extreme claim, although Her Majesty's Government have been continually accumulating stronger documentary proofs of the correctness of that *extreme claim* as being their *inheritance from their Dutch predecessors.*" (V. C., vol. iii, p. 260.)

On November 26, 1895, Lord Salisbury thus stated the origin of the British claim:

"The title of Great Britain to the territory in question is derived, in the first place, from conquest and military *occupation of the Dutch settlements* in 1796. Both on this occasion, and at the time of a previons occupation *of those settlements* in 1781, the British authorities marked the western boundary of their possessions as beginning some distance up the Orinoco beyond Point Barima, *in accordance with the limits claimed and actually held by the Dutch, and this has always since remained the frontier claimed by Great Britain.*" (V. C.-C., vol. iii, p. 275.)

To the very last, therefore, the British rested even their *extreme* claim upon the "inheritance from their Dutch predecessors," and asserted a frontier "in accordance with limits claimed and *actually held* by the Dutch." These repeated statements by British authorities with regard to the exclusively *Dutch* origin of the British title have been dwelt upon at length because of the complete change of front, in this regard, presented by the British Counter-Case in the following passages:

"It is admitted that Great Britain acquired Guiana from the Dutch, but, for the reasons given in other parts of this Counter-Case, Her Majesty's Government protest against the attempt made in the Venezuelan Case to confine the extent of British dominion to the limits of territory actually settled by the Dutch." (B. C.-C., p. 33.)

"The history of the British occupation of Essequibo is entered upon in the Venezuelan Case with a reservation that the definition of the present boundary must depend upon the extent of Dutch and Spanish rights in 1803, and that the British claims cannot in law have anything in the history of the present century to support them (*ib.*, p. 107.)

* * * * * * * *

"The contention that the British claims cannot in law have anything in the history of the present century to support them, is not correct. In the first place it is clear that by virtue of Article IV, Rule (*a*) of the Treaty of Arbitration, Great Britain is entitled to retain whatever territory has been held by her, or has been subject to her exclusive political control for a period of fifty years, although the result might be to give to Great Britain territory which had never been Dutch, and might even conceivably have at one time been Spanish. Moreover, there has been nothing to prevent the extension of British settlement and control, if the regions into which

such extensions were made were at the time lying vacant. Territory added to the British Colony by such extension cannot be awarded to Venezuela, however recent the British possession may have been." (B. C.-C., pp. 107-108.)

If the earlier claim of the Earl of Kimberley and of Lord Salisbury, and of every other British premier and Foreign Secretary who has written on the subject during the past sixty years, are sound, then every inch of territory within Great Britain's *extreme* claim, is now British *because it was formerly Dutch.* In this last British utterance, however, new sources of title are, for the first time, alleged. Prescription is invoked under Article IV, Rule (*a*), of the Treaty of Arbitration; and that, too, with regard to territory, which, it is suggested, "*had never been Dutch, and might even conceivably have at one time been Spanish.*" So, too, contrary to every historical fact, and in conflict with every claim ever made by Dutch or British, it is suggested that there was a no-man's land between Dutch-British settlements, on the one hand, and Spanish-Venezuelan settlements, on the other, and that this "vacant" territory could lawfully be appropriated by Great Britain, and must now be awarded to her "however recent the British possession may have been."

What is the significance of a claim which prior British assertions render impossible and untenable? Has faith in "Dutch inheritance" begun to weaken? Is the fact at last realized by our adversaries that "British possession" is, in fact, a matter of very recent date?

CHAPTER IV.

THE SCHOMBURGK LINE.

Our study of the Diplomatic Correspondence would not be complete did we omit to consider more fully than we have yet done Schomburgk's work and the various lines which bear his name.

The Schomburgk Line has played an important part in this boundary controversy. Schomburgk's survey of the Barima and Amacura in 1841, the erection of boundary posts at the mouths of those rivers, and his formal assumption of possession of that region on behalf of Great Britain, revived a dispute which had lain dormant for seventy-two years. The claims to which that and subsequent Schomburgk surveys gave rise, the treatment of those claims and surveys in after years by the British Government, and the contradictory character of maps and lines which have at various times been attributed to him, or which have been alleged to be based on his authority, have given rise to a host of questions whose scope would seem to cover the whole boundary dispute, and whose seeming contradictions have at times seemed to baffle solution.

The investigations of the United States Commission, the contributions which have since been made to the subject, and the important maps and papers recently submitted with the Case of Great Britain, tend to simplify these questions, and for the first time render possible a satisfactory answer to them. It is the purpose of this Chapter to formulate and to consider some of these questions.

Before doing this, it may be well to state very briefly the facts which constitute the history of the Schomburgk lines; the proof of what we have to say will follow.

In 1839 Schomburgk proposed to the British Government to survey a line which, beginning at the mouth of the Amacura

River, runs substantially south, and cuts the Cuyuni some fifty or sixty miles west of the Essequibo; this is what has been called *Schomburgk's Original Line* That particular line was approved by the British Government in 1840, and Schomburgk was authorized to survey it. Between 1840 and 1842 Schomburgk surveyed parts of *another* line, and suggested that other line to the British Government as a *desirable* boundary; this new line is what has been called *Schomburgk's Expanded Line.* The British Government, having had that expanded line mapped by Mr. Hebert, filed it away in its secret archives, together with Schomburgk's maps and reports, and for the next forty-four years--that is to say, until 1886—continued to treat the Original Schomburgk Line of 1839 as the boundary line of the Colony, publishing it as such on several official maps. In 1886 the *Expanded Line*, which had been proposed by Schomburgk in 1842 and which had lain rejected by the British Government for forty-four years, was first published, and from that date to this, that once rejected line has been treated by Great Britain as the actual boundary of the Colony.

Let us now formulate and consider the various questions to which these facts give rise. And, *first*, what was the purpose of the Schomburgk survey?

In his Memoir of July 1, 1839, addressed to Governor Light, Schomburgk said:

" By an Additional Article to a Convention signed at London, the 13th August, 1814, Demerara, Essequibo, and Berbice were finally ceded to Great Britain. The British Empire acquired, therefore, Guiana, *with the same claims to the termini of its boundaries as held by the Dutch before it was ceded by Treaty to Great Britain.*" (B. C., VII, p. 3.)

" When the settlements were in the possession of the Netherlands the present countries of Demerara and Essequibo were divided into the Colonies of Pomeroon, Essequibo and Demerara. * * * As the first was the most western possession, and formed the boundary between Spanish Guiana, its limits were considered to extend from Punta Barima, at the mouth of the Orinoco, in latitude 8° 4′ north, longitude 60° 6′ west, south-west by west to the mouth of the River Amacura, following the Caño Cuyuni from its

confluence with the Amacura to its source, * * * These limits of our territory were contested by the Spaniards." (*ib.*, p. 4.)

Then follows a discussion of alleged historical and geographical facts, concluding with this statement:

"According to the foregoing remarks and propositions the boundaries of British Guiana would be: * * *

"3. The Western Boundary—From the source of the River Takatu, along its right bank to the junction of the River Xuruma of the Portuguese, to the source of the River Cristaes or Coting, in 5° 9′ 30″ north latitude along the northern slope of the Roriema Mountains, to the source of the Caco, pursuing from thence, in a northern direction, the line of separation between the rivers that flow into the Mazaruni, and the tributaries of the Cayuni, towards the Rinacotto, traversing the River Cayuni at the mouth of the streams Aruarua and Parawayauri, and extending in a northerly direction across the Sierra Imataca, to the source of the stream Cayuni, following that river to its junction with the River Amacuro to the embouchure of the latter river at the mouth of the Orinoco." (B. C., VII, p. 6).

After a further review of the question, he arrived at this conclusion:

"My deductions from the different circumstances to which I have attempted to draw the attention of your Excellency, are that it is practicable to run and mark the limits of British Guiana on the system of natural divisions, and that *the limits thus defined* are in perfect unison with the title of Her Britannic Majesty to the full extent of that territory." (B. C., VII, p. 7.)

This Memoir, with an accompanying map, reproduced as Number 43 in the British Atlas, was forwarded by Governor Light to the Marquess of Normandy, with a recommendation that Schomburgk be employed to survey the limits of British Guiana (B. C., VII, p. 1). The British Colonial Office referred Governor Light's recommendation to the British Foreign Office, with the following statement:

"I am directed by Lord John Russell to request that you will submit for the consideration of Viscount Palmerston the accompanying copy and extract of despatches which have been received from Mr. Light, Governor of British Guiana.

"I am to request that you will observe to Viscount Palmerston that Lord John Russell considers it to be important that the *boundaries between British Guiana and the conterminous territories* should be ascertained and agreed upon if possible, and that Mr. Schomburgk's researches in those parts, which were conducted under the direction of the Royal Geographical Society with the aid of Her Majesty's Government, have qualified him in a peculiar manner to be of use should the services of any person acquainted with the geography of British Guiana be required for the *delimitation of the British territory*" (V. C., vol. iii, p. 76).

The answer of the Foreign Office was, in part, as follows:

"With reference to that part of your letter in which you state that Lord J. Russell considers it to be important that the boundaries of British Guiana should be ascertained and agreed upon if possible, and that Mr. Schomburgk's researches in those parts have qualified him in a peculiar manner to be of use, should the services of any person acquainted with the geography of British Guiana be required for fixing *the boundaries of British territory*, I am to state to you that the course of proceeding which Lord Palmerston would suggest for the consideration of Lord J. Russell is *that a map of British Guiana should be made out according to the boundaries described by Mr. Schomburgk*, and that the said map should be accompanied by a Memoir describing in detail the natural features which define and constitute *the boundaries in question*, and that copies of that map and Memoir should be delivered to the Governments of Venezuela, of Brazil, and of the Netherlands *as a statement of the British claim*. That, in the meanwhile, British Commissioners should be sent to erect landmarks on the ground in order to mark out by permanent erections the line of *boundary so claimed by Great Britain*. It would then rest with each of the three Governments above mentioned to make any objection which they might have to bring forward against these boundaries, and to state the reasons upon which such objections might be founded, and Her Majesty's Government would then give such answers thereto as might appear proper and just" (V. C., vol. iii, pp. 76–77).

It will thus be seen that Mr. Schomburgk proposed to survey a line which he specifically described; which he declared to be the line formerly claimed by the Dutch as the limit of their Colony; that he proposed that line because, according to him, the British boundary and the former Dutch boundary were identical; and that finally it was proposed by Lord Palmerston to draw the line

so described as a *statement of the British claim*, and to present it as such to Holland, Brazil and Venezuela.

The propositions of Schomburgk were accepted by the British Government; and, with Schomburgk's map before it (British Atlas, map 43), showing a line which runs practically north and south from Barima Point to Mt. Roraima and which cuts the Cuyuni some sixty or seventy miles above its junction with the Essequibo, that Government authorized a survey of "*the boundaries described by Mr. Schomburgk*"—that is to say, of that north and south line—and directed that, upon the completion of that work, the new map to be prepared, with that line upon it, should be delivered to the Governments of Venezuela, of Brazil and of the Netherlands "*as a statement of the British claim.*"

This is certainly good evidence of Great Britain's *extreme claim* at that time. It is also evidence of the fact that British limits, were, in 1840, regarded by the British Government as identical with the Dutch limits of the preceding century, and that these limits had constituted a common boundary with Spain.

It is evident, from what has been said, that the *purpose of the Schomburgk survey* was to mark out the limits which had been *claimed* by the Dutch as the boundary of their Colony, so that the line so surveyed might be presented to the Governments of Venezuela, Brazil and the Netherlands "as a statement of the British claim."

Furthermore, it is evident that both Schomburgk and the British Government regarded the north and south line of Schomburgk's map of 1839 (British Atlas, map 43) as a correct statement of what the Dutch had claimed.

Whether or not they were right in this last assumption is a question of some importance, for if the north and south line proposed by Schomburgk in 1839 in fact exceeded the earlier Dutch claim, then Great Britain's express determination to accept the Dutch claim as a definition of British rights would necessarily operate to cut down still further the British *extreme* claim in 1839.

Second.—This leads us to inquire what *basis* there was *for Schomburgk's assertion that his line of* 1839 *did in fact express the Dutch claims of the Eighteenth Century.* In his Memoir of July 1 (16), 1839, he cites no authority for this assertion, but states it simply as a fact. Two years later apparently some doubt on this point had arisen in the minds of the British authorities, for on October 23, 1841, Schomburgk, at Governor Light's request, made a "special report" on the subject. The following statements are taken from that report:

"In compliance with your Excellency's desire to be informed upon what grounds I claimed, in Her Britannic Majesty's name, the right of possession of the River Barima, and the eastern bank of the River Amacura as the western boundary between Her Majesty's Colony of British Guiana and the Venezuelan territory:

"I beg leave to observe . . . that, according to Hartsinck, the Dutch West India Company considered the mouth of the Orinoco to be the limit of their possessions; . . .

"Modern English geographers assume the Amacura as boundary from whence the line of limit extends to the sources of the Canno Coyunni, and from thence to the River Cuyuni.

"I refer your Excellency to the maps published by Mr. Arrowsmith and others in the course of the last ten years." (B. C., VII, pp. 31–32.)

So, in a Memorandum on the same subject, dated November 30, 1841, he says:

"In 1621 the States-General granted to some Dutch merchants, who formed a corporation under the name of the West Indische Maasschappy, or West India Company, an exclusive right to all the African and American commerce, and the right of governing any new colonies which it might acquire, retaining to themselves the power of nominating the Company's Governor-General abroad.

"This grant comprised the coast from the Orinoco to the eastward and Hartsinck, the authentic historian of Guiana or 'the Wild Coast,' as it then was called, mentions in several places that the limits of the West India Company extended to the mouth of the Orinoco.

* * * * *

"It has been my aim, with the limited resources which I have at my command, to prove that the Orinoco was, at the 17th century, politically

recognised as the boundary of the Dutch West India Company." (B. C., VII, p. 35).

These various extracts give us Schomburgk's authorities on the subject of Dutch *claims*. In addition to these he cited historical facts, or alleged facts, to prove that the Dutch had a *right* to the mouth of the Orinoco; but we are not at this moment concerned with Dutch rights. What we are now considering is what the Dutch *claimed*, not what they had a *right* to claim; and upon this point we find that Schomburgk's authorities are: (*a*) The Charter of the Dutch West India Company of 1621, (*b*) Hartsinck, (*c*) Rolt, (*d*) W. Faden, (*e*) Thomas Jefferys, (*f*) Arrowsmith. We submit that these authorities are hardly sufficient to establish Schomburgk's contention respecting Dutch *claims*. As regards the effect of the Charter granted to the Dutch West India Company in 1621, the claim made above by Schomburgk was repeated in the British Case, and was thus answered in the Venezuelan Counter-Case:

"The States General of the Netherlands, by the charter which they granted to the Dutch West India Company in 1621, granted to that Company only such monopoly of trade as it was in their power to grant, to wit, a monopoly against other Dutchmen, not a monopoly against the world. The territorial limits of that monopoly were no less than the whole of North and South America and a good part of Africa. It will hardly be contended that the States-General claimed to control the trade of those continents; much less can it be maintained, as intimated by the British Case, that the Company was, by virtue of the charter, vested with a monopoly of trade as against other nations." (V. C.-C., vol. i, p. 74.)

This whole subject is fully discussed by Professor Burr in his Report to the United States Commission, and the fallacy of the position taken by Schomburgk is there fully demonstrated.

Schomburgk's other authorities are Hartsinck, who published in 1770, Rolt, who wrote in 1750, and three English geographers whose maps were published in 1773, 1798 and 1832, respectively. These authorities may have been sufficient for Schomburgk in 1839-1841, because at that time very little was known about the

subject. Governor Light himself, in writing to the Marquess of Normanby, on July 15, 1839, had said:

"There are no documents in the archives of the Colony respecting the western or southern limits of British Guiana. The memoir of Mr. Schomburgk is therefore valuable." (B. C., VII, p 1.)

This being the case, Schomburgk can hardly be blamed for having relied on the only authorities within his reach. Fortunately, however, we do not now have to depend upon the say-so of historians or map-makers, but can go direct to the archives of the Dutch West India Company. Those archives place the matter quite beyond dispute: they furnish us with the reports of the Dutch Governor to the Dutch West India Company, with the record of the Proceedings of that Company, and with the diplomatic correspondence on the subject between the Netherlands and Spain. That correspondence has been examined in the preceding Chapter, and need not be repeated here further than to quote the following passage from the so-called *Great Remonstrance* presented to the Court of Spain in 1769:

"That they, the remonstrants, considered it their duty to further bring to the knowledge of their High Mightinesses on this occasion that the people of the Orinoco had some time ago not only begun to dispute with the people of the Essequibo about the fishing rights in the mouth of the Orinoco, and thereupon to prevent them by force from enjoying the same, notwithstanding that the people of Essequibo had been for many years in peaceful and quiet possession of that fishery, which was of great value to them on account of the abundance of fish in it; but that, further, the people of Orinoco were beginning to prevent, by force, their fishing upon the territory of the State itself, *extending from the River Marowyne to beyond the River Wayne, not far from the mouth of the Orinoco, as could be seen by the maps extant of those regions, particularly that of M. d'Anville*, which on account of its precision, was regarded as one of the best" (B. C., IV, p. 31).

This was the last authoritative Dutch utterance on the subject, and must be deemed conclusive as against Great Britain. The d'Anville line, which is here presented as the extreme Dutch

claim, is thus described by Messrs. Coote and Bolton in the Appendix to the British Case:

> "It is drawn in a straight line from a point on the coast which almost coincides with that known as Mocomoco, nearly to the Amuku Lake, separating the waters of the Orinoco from those of the Amazon, leaving the Rivers Amakura, Barima, Carapana and Caroni to the west."
>
> (B. C., VII, p. 353.)

This entirely coincides with the definition of territorial rights given above by the States General, when they declared that the "territory of the State itself" extends "from the River Marowyne to beyond the River Wayne, not far from the mouth of the Orinoco."

Clearly, then, the Dutch had not claimed Barima Point nor the Barima River nor the Amacura, but only as far west on the coast as about Point Mocomoco; and Schomburgk was wrong when he asserted that the Dutch claim had included that point and those rivers.

The result of all this is important. Whether the line asserted by Schomburgk in 1839 to be the line which marked the limits of prior Dutch claims did or did not correctly mark those limits, Great Britain, by her action at the time, accepted without qualification the principle laid down by Schomburgk that British claims were to be measured by Dutch claims. Having committed herself to that principle, the British extreme claim must necessarily be limited by the Dutch extreme claim; and hence Schomburgk's error as to what that Dutch extreme claim had been places Great Britain in this dilemma: either she must surrender her claim to all territory west of Point Mocomoco, including Barima Point and the Barima and Amacura Rivers, because the Dutch claim did not include these; or else she must violate the principle which she laid down for her own guidance in 1840, and press a claim to territory which the Dutch did not claim, and which both the Dutch West India Company and the States General of the Netherlands admitted, in 1769, to be Spanish.

Having thus disposed of Schomburgk's assertion that his line of 1839 represented what the Dutch had *claimed*, and having shown the position in which the approval of Schomburgk's propositions and proposals by the British Government places that Government, let us next inquire

Third.—What was it that *Schomburgk actually did in the execution of the task entrusted to him.*

It is now claimed by Great Britain that as a result of his surveys Schomburgk finally proposed as the western boundary of British Guiana the line which appears on Hebert's map of 1842 (British Atlas, maps 38, 39). Let us, for the present, assume the correctness of that statement. Between this line and the line proposed in 1839 there is a difference of about 10,300 square miles. If the line of 1839 already exceeded the extreme claim of the Dutch, what shall be said of this new line of 1842? Clearly it cannot have been drawn with any regard to Dutch *claims*. The fact is that having once obtained his commission and started out on his work of survey, Schomburgk's enthusiasm seems to have quite run away with him; and, instead of adhering to his instructions to survey the line proposed by him in 1839, and to mark out what the Dutch had claimed, he seems to have almost forgotten that line, and to have regarded Dutch *claims* only when they happened to fall in with his own notions of British interests. In illustration of this we quote the following passages from his reports:

> "Taking namely the mouth of the River Barima as the place of departure; the line of demarcation ought to be directed to the mouth of the River Amacura, *in order to be able to insure the political importance which always would be attached to the mouth of the Orinoco*" (B. C., VII, p. 5).

Again, after having stated in his report of August, 1841, that during the period 1750-1760, "the Dutch possessions extended *to the foot* of that series of falls of which Kanaima is the most considerable" (B. C., VII, p. 28), and having also stated that the Island Tokoro-patti had been "towards the close of the last

century the *furthest outpost of the Dutch*" (B. C., VII, p. 28), he nevertheless makes the following claim in his report of January 23, 1842:

"I consider that Her Majesty has undoubted right to any territory through which flow rivers that fall directly, or through others, into the River Essequibo. Your Excellency is well aware that the Cuyuni falls a few miles above the penal settlement into the Mazaruni, and both rivers after their junction empty themselves at Bartika Point into the Essequibo. Upon this principle the boundary line would run from the sources of the Carimani towards the sources of the Cuyuni proper, and from thence towards its far more northern tributaries, the Rivers Iruari and Iruang, and thus approach the very heart of Venezuelan Guiana.

"These rivers are of less importance to Great Britain, but as a maritime power the possession of Point Barima is of great importance, and relinquishing the claim to the territory watered by the Upper Cuyuni and its northern tributaries, the Iruari or Iuruario, and Iruang, Hėr Majesty's Government acquires additional grounds to impress the claim of Point Barima the Dardanelles of the Orinoco, as it has been lately styled by the Venezuelans. *Upon these grounds* I considered it unnecessary to proceed further towards the sources of the Cuyuni" (B. C., VII, p. 50).

Whether Schomburgk was right or wrong in holding these views—and we are not now discussing that point—it must be clear that the line which he was surveying when he wrote the above was not a line based upon Dutch *claims*. Neither could it have been based upon Dutch *occupation*, for, according to his own statements, Tokoro-patti, which is about 220 miles east of the extreme line above suggested, was the farthest outpost of the Dutch.

Of course, Schomburgk never seriously proposed any such preposterous line as that suggested in the passage above quoted. The most that he proposed in the Cuyuni region was the line appearing in Hebert's map of 1842, but that he regarded even that line as extravagant, and as going beyond the limits of Dutch *rights* can be seen from the following passage taken from his final *Memorandum* to Lord Stanley, dated December 26, 1844:

"I expect likewise that the Venezuelan Government will oppose the right bank of the River Cuyuni being taken as a boundary line from where

that river receives the Acarabisi to its source, and from thence to Mount Roraima, *in consequence of the Spaniards having had a fortified post, called Cadiva, opposite the mouth of the River Curumu.* Her Majesty's Government may easily meet such an opposition by drawing their attention to the circumstance that the Dutch possessed a fortified post where the River Barima falls into the Orinoco; nevertheless, Her Majesty's Government has resolved to forego the claim to the possession of that territory, between the former Dutch post and the Maroco, in order to facilitate the negotiations for an adjustment of the limits. (B. C., VII, pp. 60–61.)

In order to grasp the full meaning of this passage, it should be remembered that it was written as a commentary on the line proposed a few months before by Lord Aberdeen. Lord Aberdeen had proposed to yield to Venezuela the entire Barima region, and had suggested the line on the Cuyuni River in the interior. Schomburgk at once recognized the fact that that interior Cuyuni line could not be upheld upon the basis of any Dutch claim or Dutch occupation, and that therefore the British had no *right* to it. He recognized, too, that Venezuela could allege a better title to that river by actual occupation, for he said the Spaniards "had a fortified post, called Cadiva, opposite the mouth of the River Curumu," but he suggested that this objection, which he fully expected would be raised by Venezuela, might be met by Great Britain by her saying: "True, Spain was in possession of the Cuyuni, but so were the Dutch in possession of Barima, and, as we have given you Barima on the coast, you should give us the Cuyuni *as compensation* in the interior."

We can hardly want better evidence to prove how completely Schomburgk had abandoned all thought of Dutch *claims* or even of Dutch *rights*, and how intent he had become upon securing for Great Britain everything that could by any possibility be obtained for her.

We do not mean by this that Schomburgk ever completely lost sight of the fact that he must allege some Dutch justification for his Line, or that he must advance arguments to prevent it from having the appearance of being wholly arbitrary. On

the contrary, he seized upon every possible circumstance to impress upon his line a Duch character, and to make it appear as though even his extreme pretensions had some sort of Dutch basis. What we mean is that he did not feel himself bound or limited by any such considerations. One cannot read his reports and letters, especially his "*confidential*" letter to Governor Light, without feeling that Schomburgk, ever zealous for British success and for the extension of British rule, had made up his mind to claim certain points because he regarded them as of political importance; and that his arguments, drawn from supposed historical or other considerations, were of the nature of afterthoughts, intended to support what he had already determined to claim. His "*confidential*" letter of October 23, 1841, is alone sufficient to prove this point; its importance warrants its quotation in full:

"In my letter of this day's date, I informed your Excellency upon what grounds I founded the right of possession of Her Majesty to the Barima, and I have now to point out the importance which is attached to this position, should the British Government establish the Amacura as the boundary between British Guiana and Venezuela.

"The River Orinoco may be termed the high-road to the interior of the territories of Venezuela and New Granada. It has at his mouth the appearance of an ocean, and articles of commerce may be transported on this stream for 400 or 500 leagues. Nearly 300 tributary streams, of more or less importance, flow into it, which may serve as additional canals and facilitate the commerce of the interior. Santa Fé de Bogota may be reached within a distance of 8 miles by one of its tributary streams, the Meta, and operations of commerce or war, combined with others from the Pacific, could be carried on by means of the vast plains or llanos. A small fleet may go up the Orinoco and the Meta within 15 or 20 leagues of Santa Fé, and the flour of New Granada may be conveyed down the same way.

"And the only access to this vast inland communication for sailing vessels of more than 10 feet draft of water is by means of the Boca de Navios, which is *commanded from Point Barima.*

"The River Barima falls into the south side of the Orinoco near the most eastern point of its mouth and in a direction almost parallel to the coast. Point Barima is, therefore, bounded to the west by the river of that

name, to the north by the Orinoco, to the east by the Atlantic, and to the south by impenetrable forests. Colonel Moody considers this position 'susceptable [*sic*] of being fortified so as to resist almost any attack on the sea-side—the small depth of water, the nature of the tides, and its muddy shores, defend it. The Barima, and the uncultivated forests on marshy ground, present an impenetrable barrier against the interior, and debarkation from the Orinoco might be put under the fire of any number of guns—and the land reproaches [*sic*] on that soil could be easily rendered inaccessible to an invading force.'

"This is the importance which Colonel Moody in a military respect has attached to this point, and which, so far as my knowledge goes in this matter, is fully born out by personal inspection during my late survey of the entrance to the Barima.

"The Venezuelan Government, as at present organised, tottering in their interior relations, and embarrassed by a number of slaves who would hail the opportunity to shake off their fetters, hated and despised by the aborigines, whom maltreatment and cruelties have alienated, would be an insignificant enemy—but in the hands of any of the maritime European powers, matters would assume another aspect.

"France has attempted to establish a fortified position at the mouth of the Amazon near Macapa, which she claims as the eastern boundary of Cayenne. A settlement at this spot commands the commerce of the Amazon, and this no doubt, is the reason why this Power puts such importance upon its possession. Supposing that unforeseen circumstances should put France in occupation of Point Barima at the Orinoco, and that Macapa at the Amazon is ceded to her, she will then command the commerce of the two first rivers of South America, and hold the military keys of the northern provinces of Brazil and of the former Spanish provinces of South America, north of the equator, which territories will be always at the mercy of that power which commands the channels to their commerce.

"Finally, trusting to the prospects of prosperity and a continued emigration to British Guiana, there could not be a more favourable position for a commercial settlement than Point Barima. The capital of Spanish Guayana is Angostura, situated a distance of 85 leagues from the mouth of the Orinoco, and the intricate navigation of that river presents numerous difficulties to foreign vessels going up the Orinoco as far as Angostura.

"A commercial settlement established at the extreme point of Barima, where one part of the town would front the River Barima, and the other the Orinoco, would soon induce foreign vessels to dispose of their cargoes at the new settlement, and leave the further transport to the interior to

smaller craft; naturally this premises the supposition that amicable relations and commercial treaties exist between Great Britain and Venezuela. The bar at the Barima admits vessels of 16 feet draft of water, which if once entered, may safely anchor in from 4 to 5 fathoms water. The peculiar formation of the fluvial system of the coastland between the Barima and the Essequibo admits an inland navigation, in punts and barges, to Richmond Estate, on the Arabisi Coast of the Essequibo, which with a few improvements might vie with any of the interior canals of England." (B. C., VII, pp. 33–34).

In line with the above are the following statements taken from three other of Schomburgk's letters:

"Taking namely the mouth of the River Barima as the place of departure; the line of demarcation ought to be directed to the mouth of the River Amacura, *in order to be able to insure the political importance which always would be attached to the mouth of the Orinoco,* and to prevent stragglers from escaping into the Republic of Venezuela." (B. C., VII, p. 5).

Again:

"A short distance above the mouth of the River Araturi is the Venezuelan Post Coriabo. The importance of this natural canal in a military or a commercial point of view is undeniable, but its importance to Venezuela (if a denser population should make it such) is rendered abortive in a military aspect if Great Britain possesses the right or eastern bank of the Amacura" (B. C., VII, p. 16).

Again:

"I have the honour to enclose herewith a memorial in which the grounds are recapitulated, chiefly with regard of Her Majesty's right of possession to the Barima—*a point of more importance to Great Britain than I have ventured to make it appear in my memorial.*" (B. C., VII, p. 34).

With such views regarding the mouth of the Orinoco, it is not surprising that Schomburgk should have gone beyond everything ever claimed by the Dutch, and that he should have dwelt at length upon and given importance to supposed historical facts, some of which were without foundation, and many of which were trivial in the extreme.

It is not the purpose of this Chapter to discuss those alleged facts. That will be done in other parts of this argument. For

the present it will suffice to say that Mr. Schomburgk had very limited means for ascertaining the truth of what he asserted, and that many points which were formerly in doubt are now too clear to admit of discussion.

It may be worth while to point out in connection with Schomburgk's allegations of historical facts that while he was able to find, either in historical works or in current Indian traditions, statements which seemingly supported a Dutch claim to the Barima, he failed to find anything whatever to support his claim to the line around the great bend of the Cuyuni in the interior. Indeed, he found evidence of the strongest kind to contradict that claim, for he himself testifies that the Spaniards had "had a fortified post, called Cadiva, opposite the mouth of the River Curumu" (B. C., VII, p. 60), and, commenting on Lord Aberdeen's proposed line of 1844, he frankly said that he expected Venezuela would, because of that Spanish fort, object to that part of the line. He was certainly right in thus appreciating the importance of the Curumu fort. If "a small shelter" at Barima in 1684, which had erected without the knowledge or sanction of the Dutch West been India Company, which as soon as its existence had been reported to that Company had been ordered to be abandoned, which after a temporary occupation of at most a few months had been deserted and forgotten, and which had remained abandoned for over a century and a half, could be invoked by Great Britain to prove a Dutch title; surely a Spanish fort, authorized by the Spanish Government, erected on the southern bank of the Cuyuni by Spanish authorities, manned by Spanish troops, and maintained by Spain for the very purpose of asserting her sovereignty over that region, might not unwarrantably be invoked to prove a Spanish title.

It was in the face of this recognized Venezuelan right that Schomburgk ran his line past the remains of the old Spanish fort and around the great bend of the Cuyuni, leaving the very site of the Spanish fort within British limits. This is the line which

until 1897, Great Britain refused to arbitrate, and with reference to which, in 1895, Lord Salisbury thus wrote:

"It is important to notice that Sir R. Schomburgk did not discover or invent any new boundaries. He took particular care to fortify himself with the history of the case. He had further from actual exploration and information obtained from the Indians, and *from the evidence of local remains*, as at Barima, and local traditions, as *on the Cuyuni*, fixed the *limits of the Dutch possessions*, and the zone from which *all trace of Spanish influence was absent. On such data he based his reports*" (V. C-C., vol. iii, p. 277).

Evidently the views entertained by Lord Salisbury in 1895 were not the views entertained by his predecessors in 1842, for upon no other theory can we explain the fact that this new line proposed by Schomburgk was not published to the world or communicated to Venezuela until 1886, that is to say, forty-four years after Hebert had completed the map now published on pages 38-39 of the British Atlas.

It will be remembered that when Lord Palmerston authorized the surveys proposed by Schomburgk, he had before him Schomburgk's map of 1839, with the line which, running apparently north and south, cuts the Cuyuni fifty or sixty miles west of the Essequibo. He also had before him the Memoir in which Schomburgk described *that* line. With that map and that Memoir before him, Lord Palmerston suggested to Lord John Russell "that a map of British Guiana should be made out *according to the boundaries described by Mr. Schomburgk*" (V. C., vol. iii, p. 77); and then added that the map thus to be prepared should, with an accompanying Memoir, be delivered to Venezuela, Brazil and the Netherlands, "*as a statement of the British claim*" (V. C., vol. iii, p. 77).

Schomburgk, having received his commission, made his surveys and prepared various maps, memoirs and reports. The line which he in part drew upon these maps, and in part suggested in his reports, was by Hebert transferred in full on to a map prepared by him for the British Government in 1842. This new line was not the line whose survey Viscount Palmerston had author-

ized in 1840; it was not the line which he had suggested should be presented to Venezuela, Brazil and the Netherlands *as a statement of the British claim;* and the British Government, in 1842, with Hebert's map, with Schomburgk's map and with a number of Schomburgk's reports before it, recognized these facts, and, instead of presenting this new map and these reports to Venezuela, Brazil and the Netherlands, *as a statement of the British claim*, filed them away in its secret archives and kept them there for forty-four years.

But this is not the only proof which we have that the British Government, in 1842, refused to accept *as a statement of the British claim* that new line suggested by Schomburgk; and that, instead, it adhered to the north and south line of 1839. Let us look a little further into this matter.

It was in 1867 that Great Britain was first called upon to utilize the Schomburgk maps. In that year, according to the statements of the British Case, a tracing of Schomburgk's large "physical map" (British Atlas, maps 47-48), upon which Schomburgk had drawn no boundary whatever, was "made by Mr. Stanford for the use of the Colonial Government" (B. C., p. 143). Now, although no boundary appears on Schomburgk's original "physical map," it is clear, from what follows, that the copy of that map, which was prepared by Mr. Stanford, and which was by the British Government furnished "to the Colony in February, 1867, for the use of the colonial surveys" (B. C., p. 143), did have a boundary upon it. The surveyors in question were Messrs. Brown and Sawkins, who were employed to make a geological survey of the British Colony. Of course, in order to do this, they had to know how far the Colony extended, and hence a map of the boundary was furnished them by the British Government. Referring to the map thus furnished, and which could have been no other than that sent out for their use from London, Messrs. Brown and Sawkins use such expressions as these: "The boundary of Venezuela, *according to the map furnished us*," "as far as

Ottomong River, which forms the boundary line between this Colony and Venezuela," "near the boundary line of the Colony, as drawn on Schomburgk's map." The report of Brown and Sawkins on the geology of British Guiana was published by order of the Lords Commissioners of the Treasury in 1875 (B. C., p. 143), and the map accompanying that report gives a boundary line corresponding substantially with the north and south line proposed by Schomburgk in 1839, and adopted in 1840 by the British Government "as a statement of the British claim." The geological features of this map, and its boundary line, were reproduced by one of the maps published by the United States Commission and reprinted in the Venezuelan Atlas as Map No. 2 (*see* also, same, map 90).

Where did the line which appeared on the map furnished to Messrs. Brown and Sawkins as a guide for their work come from? It was certainly placed there by authority. The map itself had been copied by Mr. Stanford in London from a Schomburgk map upon which no boundary appeared. The only conclusion to be drawn from these circumstances is that Mr. Stanford was directed by the British Government itself to place upon the map prepared for the use of the surveyors the line which Brown and Sawkins afterwards found on that map. By this action, and by its subsequent adoption of Brown and Sawkins' work, as evidenced by the publication of that work by order of the Lords Commissioners of the Treasury, the British Government for the second time since 1840 declared the north and south Schomburgk Line of 1839 to be the boundary of the Colony. That the British Government had in its possession at the time the Hebert map of 1842 and the various Schomburgk maps and reports which have since been published, merely proves that it had not yet given its assent to Schomburgk's proposals of 1842, and that it still regarded his *Expanded* Line of that date as too extravagant to adopt even as the British extreme claim.

Another British official map was published in 1876. The British Case gives the following account of it:

"The third of these maps was prepared by Mr. Stanford in 1875, and published in 1876. It was prepared at the instance of the Colonial authorities, and had upon it the following note—

"NOTE.—*The boundaries indicated on this map are those laid down by the late Sir Robert Schomburgk, who was engaged in exploring the Colony during the years 1835 to 1839 under the direction of the Royal Geographical Society. But the boundaries thus laid down between Brazil on the one side and Venezuela on the other and the Colony of British Guiana must not be taken as authoritative, as they have never been adjusted by the respective Governments: And an engagement subsists between the Governments of Great Britain and Venezuela by which neither is at liberty to encroach upon or occupy territory claimed by both.*" (B. C., p. 144.)

This is the map published on page 41 of the British Atlas and as No. 88 in the Venezuelan Atlas. It was prepared by Mr. Stanford, the same who, in 1867, had copied the map furnished to Brown and Sawkins; as might be expected, this new map gave the Schomburgk north and south line of 1839 as the boundary of the Colony. The British Case informs us that the map was prepared "at the instance of the Colonial authorities;" and this, of course, stamps it as an official publication.

The note appearing upon the face of the map is most significant, and should be read in connection with our discussion in the Chapter preceding, on the subject of the extent of the territory in dispute in 1850. In that Chapter we assumed, for the sake of argument, that the Schomburgk Line, which marked Great Britain's extreme claim in 1850, was the *Expanded Schomburgk Line* of 1842; here, however, we have the evidence to prove that Great Britain's extreme claim at that time, and for at least twenty-six years thereafter, went no further than the line proposed by Schomburgk in 1839. No other interpretation can be put upon this note; its purpose is clearly to warn British settlers from going into the disputed territory, and to let it be known that the line

claimed in the map was a *claim* only, and not a boundary which was accepted as settled.

This note has another significance. It states that "the boundaries indicated on this map are those laid down by the late Sir Robert Schomburgk." This is a distinct declaration by the Colonial authorities, at whose instance the map was prepared and published, that the line appearing on that map was a line which, at that time, the British Government regarded as *the Schomburgk Line*. That map, with that statement upon it, was in use for both official and private purposes for ten years before the British Government discovered that the *Schomburgk Line*, which had been proposed in 1839, which had been accepted by Lord Palmerston and Lord John Russell in 1840 as a statement of the British claim, and which the British Government had since that time treated as the extreme boundary of the Colony, was neither the *Schomburgk Line*, nor a statement of the British claim, nor the boundary of the Colony; it was at the same time discovered that another line, which had been proposed by Schomburgk in 1842, which Schomburgk himself in 1844 had regarded as extravagant, and which the British Government had, at that time, considered and refused to adopt, was after all the *only* Schomburgk Line, and the true boundary of the Colony. Can the British Government be permitted thus to contradict its previous statements, thus to brush aside the history of forty-four years, and by the stroke of a pen to thus add 10,000 square miles to her domain?

But we have not yet finished with this pregnant note. Why was it erased when, in 1886, the *original Schomburgk Line* was taken out and the *Expanded Schomburgk Line* substituted in its place? In 1886, and even as late as 1887, the British Government was still appealing to the Agreement of 1850 as yet in force; the note could not, therefore, have been erased because of any statement which it contained with reference to that Agreement, unless indeed Great Britain is ready to confess that it was no longer

her intention to observe that Agreement, and that therefore she erased the note. The only other statement contained in the note, apart from the purely formal one that Schomburgk had been engaged in exploring the Colony during the years 1835-1839, was the statement that the boundaries on the map published in 1876 were those laid down by Sir Robert Schomburgk. The boundary which for ten years that note had declared to be the *Schomburgk Line* was now to be erased and a new line substituted. With the old line, therefore, disappeared also the old statement—and yet Great Britain maintains to-day that there is only one *Schomburgk Line*, and that the line first published in 1886 is that line!

After these various official publications of the *original Schomburgk Line* of 1839 as the boundary claimed by Great Britain, reference to other maps, published by persons who were in a position to know what Schomburgk's views were, and what the British Government claimed as a result of his surveys, would seem to be unnecessary. There were many such publications; we shall briefly refer to only one or two of them, but before doing so we stop to correct an erroneous statement of the British Case to the effect that as early as the date of Schomburgk's surveys the Venezuelan Government was notified of the *Expanded Line* and made remonstrance upon the subject. The following is the language of the British Case in this connection:

"The Venezuelan Government were aware of the position of the boundary posts erected by Schomburgk, and made remonstrances to Her Majesty's Government upon the subject.

"The line proposed by Lord Aberdeen in 1844, from the source of the Acarabisi to its junction with the Cuyuni and then along the Cuyuni to its source, corresponded with the line proposed by Schomburgk for that part of the frontier.

"From that time up to 1877 no definite proposals were put forward, and there was consequently nothing to call for any reference to the Schomburgk line. But in the first proposal made by Her Majesty's Government after the resumption of negotiations in 1881 specific reference was made to 'Schomburgk's original Map' and to 'the boundary line proposed by

Schomburgk,' and the latter was described in terms which leave no doubt as to its direction. Moreover, the map illustrating the proposal, which was sent to the Government of Venezuela in Earl Granville's despatch of the 15th September, 1881, was a reduction of Hebert's Map, and gave the true Schomburgk line, with those variations only, in the vicinity of the coast, which were necessitated by the terms of Lord Granville's proposal." (B. C., pp. 144–145.)

In this passage the British Government alleges three sources whence Venezuela, prior to 1886, might have derived knowledge of Schomburgk's Expanded Line: the first was the erection of the Schomburgk boundary posts; the second Lord Aberdeen's proposal in 1844; and the third Lord Granville's proposal in 1881.

As regards the Schomburgk posts, we have to remark that the two great bends which characterize the *Expanded Schomburgk Line*, namely, the one around the head waters of the Barima, and the one around the Cuyuni to its source, were not marked by Schomburgk with any posts whatever, because he never visited either locality. A glance at Schomburgk's maps and at Hebert's map, British Atlas (maps 38, 39, 44, 46), shows that on the western boundary, after leaving the mouth of the Amacura River, the few boundary marks which Schomburgk fixed were all far in the interior where probably no one ever saw them. Such boundary marks, even if they had been known to the Venezuelan Government, would have been entirely inadequate to convey any notion of *Schomburgk's Expanded Line*, and therefore to cite these as a proof that Venezuela had knowledge of that line is hardly calculated to inspire confidence in the belief that any very conclusive evidence on that point can be adduced. The only posts to which Venezuela's attention appears to have been drawn were those at Barima Point, and at the mouth of the Amacura River; both of these points are on the *Schomburgk Line of 1839*, and hence these boundary posts could not have indicated that Great Britain claimed any other than that Line.

Lord Aberdeen's proposal of 1844 was for a line starting from the mouth of the Moruca, thence to the Cuyuni by the Waini, the Aunama and the Acarabisi, and thence up the Cuyuni to its source and to Mount Roraima. It was on its face a compromise proposal, and Lord Aberdeen nowhere referred to any part of it as the *Schomburgk Line*. Clearly, then, the present British contention that Lord Aberdeen's proposal of that line to Venezuela was a notification to that Government of the *Expanded Schomburgk Line* cannot be sound; with equal reason might Venezuela contend that she herself had the right to regard the *whole* of the Aberdeen Line as the line proposed by Schomburgk; for certainly Lord Aberdeen, in describing his line, made no distinction between what was and what was not Schomburgk's; and in the course of the whole dispatch concerning this proposal Schomburgk is mentioned only once, when reference is made to the fact that on his visit to the Barima he had there found "traces of the entrenchment and surrounding cultivation," attributed by him to the Dutch.

Coming now to the dispatch of Earl Granville of September 15, 1881, we confidently affirm that it proves the very reverse of what Great Britain contends. As stated in the British Case, that dispatch to the Government of Venezuela was accompanied by a map which showed the line proposed by Lord Granville, which in the interior followed the great bend of the Cuyuni to its source, and which in that respect coincided with *Schomburgk's Expanded Line* of 1842. But the significant point of the matter is that Earl Granville, in the dispatch in question, not only failed to identify his proposed line in the interior beyond the junction of the Acarabisi and Cuyuni with the *Schomburgk Line*, but on the contrary, *distinguished* it from that line, and showed conclusively by the language he used that what *he* regarded as the true *Schomburgk Line* was a line different from that around the Cuyuni bend. This is the language in which Earl Granville defined that part of his proposed line:

"Thence (that is to say, from the junction of the Cuyuni and the Acarabisi) along the left bank of the River Cuyuni to its source, and from thence in a south-easterly direction **TO** the line as proposed by Schomburgk." (B. C., VII, p. 100.)

No man could have used that language if he understood that the line he was describing was the *Schomburgk Line* from the junction of the Cuyuni and the Acarabisi to the end. Lord Granville wrote the above in 1881; for forty-one years his Government had been treating the *Schomburgk Line* of 1839 as the only *Schomburgk Line* and as the boundary of British Guiana; it had authorized the geological survey of the Colony upon the basis of that 1839 boundary; it had published the great Colonial map of 1876 with that boundary upon it, and no other line would so naturally have been in Earl Granville's mind when he penned the above words. It was from the Acarabisi that his own proposed line was to run, and, having traced the Cuyuni to its source, that proposed line was then to turn in a southeasterly direction and go back **TO** the Schomburgk Line. Can such language be held to be notice to Venezuela of the *Expanded Schomburgk Line* of 1842? And if it could, can the British Government explain why it waited from 1842 to 1881 to give that notice?

Having thus disposed of the claims now made by the British Case with regard to Venezuela's having had notice of the *Expanded Schomburgk Line*, let us once more return to the matter of publications, and see what light other maps throw on Great Britain's attitude from 1840 to 1886.

A full account of Sir Robert Schomburgk's boundary explorations was published at Leipzig, in 1847, in three volumes, prepared by his brother Richard, who accompanied him most of the way as botanist. The text of this work made no reference to boundary, but its map—stated in a note to have been prepared from Sir Robert's large map in the Colonial Office in London—gave the boundary line, declared by another note to be *the boundary claimed by Great Britain;* the line given is substantially the north and

south line of 1839 (British Atlas, map 40). The British Case informs us that Richard Schomburgk had access only "to the map of the Colony prepared by his brother, showing merely the physical features." This may be so, and yet Richard Schomburgk's relations to Sir Robert were such that it would require strong evidence to convince an impartial judge that the line appearing on the Leipzig map received no inspiration from either Robert Schomburgk or from the British officials who permitted Richard to copy his brother's map at the Colonial Office.

Another map, which may be termed semi-official, is that published in the *Colonial Office List*. This *List* is published in London in serial continuity, and states on its title page that it is compiled from official records by permission of the Secretary of State for the Colonies, by Mr. John Anderson, an official of the Colonial Office. The edition of this *List* published in *March*, 1886, as also the prior editions, give Schomburgk's north and south line of 1839 as the western boundary of British Guiana (Ven. Atlas, map 86). The edition published in *December*, 1886, and all subsequent editions, give instead the *Expanded Schomburgk Line* (Ven. Atlas, map 86). Taking this in connection with all that has gone before, is it too much to affirm that the maps of this *Colonial Office List* must have had if not the formal approval, at least the quiet sanction of the British Government; and that these maps are to-day evidence of what the British Government claimed in and prior to 1886?

In the Atlas accompanying the Venezuelan Case are reproduced still other maps giving the Schomburgk Line of 1839. They are all maps for which, either directly or indirectly, either Schomburgk or the British Government must be held to be ultimately responsible. These are: the map printed in *Parliamentary Papers*, 1840, Vol. 34 (Ven. Atlas, map 32); the map in Schomburgk's *Description of British Guiana;* London, 1840 (Ven. Atlas, map 83); *Schomburgk's map, Leipzig, 1841* (Ven. Atlas, map 84); the Schomburgk map, reproduced from original in *Exposition Universelle de Paris, 1867*, Catalogue des produits exposes par la Guyane

Anglaise, London, 1867 (Ven. Atlas, map 89); map by *C. Barrington Brown*, London, 1876 (Ven. Atlas, map 90), one of the surveyors employed by the British Government to make the geological survey of the Colony. In addition there are scores of others which it is not worth while to mention here.

To sum up: in 1839 Schomburgk proposed to the British Government to survey as a boundary of British Guiana the line appearing in his map of that date; the British Government approved that proposal, authorized that survey, and declared its intention of proposing that line *as a statement of the British claim;* Schomburgk, instead of surveying that line, surveyed another, or rather part of another, line which goes much further west, and suggested that new line to the Government as a *desirable* boundary; the British Government not only failed to approve Schomburgk's new proposals, but continued for forty-four years to adhere to the *original Schomburgk Line* of 1839. During that period Schomburgk's reports and his *Expanded Line* were kept secret, and every British publication, whether official, semi-official, or private, proclaimed as the western boundary of British Guiana the *original Schomburgk Line* of 1839. In 1886 the British Government published the *Expanded line* for the first time, declaring it to be the only *Schomburgk Line* and the boundary of the Colony. That Government thus reversed the action of all former British administrations for forty-six years, and comes into court to-day, asking this Tribunal to stamp its approval upon such a course of dealing.

CHAPTER V.

THE GEOGRAPHICAL FEATURES OF THE TERRITORY IN DISPUTE AS BEARING ON THE QUESTION OF TITLE.

The territory in dispute comprises a considerable portion of the land lying between the Essequibo, on the east, and the Caroni, a tributary of the Orinoco, on the west.

The course of both the Essequibo and the Caroni is nearly due north; that of the Orinoco is nearly east and west. The main tributaries of the Essequibo are the Cuyuni and the Massaruni. The course of these rivers, with their branches, is also approximately east and west. As a consequence, it happens that the Cuyuni River System practically traverses in the interior the entire territory between the Essequibo and the Caroni, including the whole width of the territory in dispute.

The territory between the Essequibo and the Caroni is bounded on the north by the Orinoco and by the sea. To the north of the Cuyuni valley, which, as already stated, has an easterly and westerly trend, lies a range of mountains, defined on the maps with considerable clearness, which is known as the Imataka Ridge or Imataka Mountains. This ridge runs in general parallel with the Cuyuni and its tributary the Curumo in a northwest and southeast direction, across the whole territory between the Caroni and the Essequibo. Near its eastern extremity is a small spur or group of hills, known as the Blauwenberg or Blue Mountains. The range is sufficiently defined to form a clear division between the basin of the interior and the territory watered by the rivers which run north into the Orinoco and the sea.

In the discussion of the various districts in controversy in this Argument the region south of this range of hills is designated the Interior Territory, the region north of them the Coast Territory.

The physical features of the Interior Territory had a marked influence upon its history. Its extreme eastern border extends

close up to the fringe of settlements on the Essequibo. This river runs in a line almost due north for a distance of over five hundred miles. Its mouth forms a large estuary, and in the lower part of its course it contains many islands. The rivers Cuyuni and Massaruni empty into it at a point about sixty miles from the sea. Just before reaching the Essequibo the two rivers unite.

The lower Essequibo is a large navigable river, though navigation ceases at no great distance above the mouth of the united Cuyuni and Massaruni. On the Cuyuni and Massaruni navigation is also brought to an end a short distance above the mouths of these rivers by falls or rapids. The Cuyuni is over 300 miles long. The lowest falls are about twelve miles from its mouth. In the Mazaruni the lowest falls are about ten miles from its mouth. The obstructions to navigation in the falls or rapids constituted a physical barrier, a natural boundary, beyond which settlement at no time passed, and it determined ultimately the development of the colony away from the upper waters and their tributaries.

The British Counter-Case dwells at great length (pp. 15–20) upon the character of the falls in these two rivers, with a view to show that they were not impassable. It objects to the name "falls," although that designation was invariably applied to them by the Dutch for more than a century, and although its own Atlas calls them "cataracts." It insists that they are not falls but rapids, and that they can be passed. The question is one of material importance, for the falls were one determining feature in the history of the Cuyuni. As to the character of the obstruction, no one denies that it was possible to pass it by taking the canoes overland, and sometimes by "shooting" the falls, though only at great risk. This, however, is not navigation, and a river which, is in the condition described is not a navigable river.

Whether the obstructions to navigation in the Cuyuni are known as "falls" or "rapids," and whether it was possible in some way and at some times to pass them, the fact remains as an incon-

trovertible fact, that their presence was effectual in determining the limits of colonial development. Had the rivers been navigable highways, which they were not in any sense, they would undoubtedly have led to the establishment of some settlements or plantations above the point where settlements and plantations absolutely stopped.

The early plantations of the Essequibo colony clustered about the point where the union of the Cuyuni and Mazaruni with the Essequibo forms a small inland basin. On the four radiating arms of this basin, from the point of union as a centre, the entire settlement was established within a distance of twelve miles from the central point. For a long time the colony was nearly stationary, and when about 1734 it began to develop, the movement was entirely towards the mouth of the Essequibo. In 1740 the fort was removed from Kykoveral to Flag Island, and from that time on the old plantations in the neighborhood of the union of the three rivers were almost wholly abandoned.

It was well known that the land beyond the falls was adapted for cultivation, but at no time was there any movement towards settlement in that direction. This was due entirely to the obstruction of the falls. Of this fact there is abundant evidence.

The engineer Saincterre reported to the Company, March 19, 1722 (B. C. I, 252): "The ground is even better above in the Rivers Essequibo, Mazaruni and Cuyuni, than below; but because they are full of rocks, falls, and islands, and much danger is to be feared for large sugar canoes, this is the reason why up to this time the Europeans have not been willing to establish sugar plantations there," showing that no such plantations had yet been established.

The Court of Policy, in a letter to the West India Company, July 14, 1731 (B. C. II, 14) states: "The great number of rocks which lie in these two rivers, and which occasion the falls by reason of the strong stream rushing over them, makes these rivers unnavigable for large vessels, wherefore it is impossible to estab-

lish any plantations there, although the soil is very well fitted for it."

In 1739 the Commandeur reported (B. C. II, 30), speaking of the prospecting for minerals in the Cuyuni above the falls:

"As the continuous rainy season . . . makes the road [*weg*] above the falls very dangerous, it has prevented the making of any further discovery—assuming that anything at all is to be found there."

Hildebrandt, the Mining Engineer, reported (V. C. II, 93) in 1741 that he "came to a great fall named Tokeyne, where we had great[er] trouble to get up than we had anywhere, the perpendicular height of the above named fall being 4½ fathoms [27 feet]. If I had not had the luck [to meet] six Indians who showed themselves helpful in dragging over my boat, I should have found it impossible to get up; and I kept these Indians by me still after they had helped me, in order to show the way further through the many islands and two other difficult falls."

And, again, in the following year (V. C. II, 94), he

"came to beneath the second great fall and saw almost no chance to get up, so was the water swollen, which in my former journey I could not get through; so that the additional Indians were very opportune for me, and it was dark by the time we had the two boats up above."

Even Schomburgk gives his testimony to the existence of these conditions and their effect upon the colony. He mentions one fall (B. C. VII, 28) as "called the *Canoe-wrecker*, in consequence of many fatal accidents which have occurred here." Speaking of the Camaria, one of the lowest group of falls in the Cuyuni, he said (B. C. VII, 29):

"As *it did not afford any portage*, we attempted to descend it in our craft. It nearly proved our destruction. As it was, the craft filled with water, and it was only the presence of mind of some of our crew to which, under the Almighty, we were indebted for our safety."

At the next fall, "Ematubba, generally called 'the Great Fall,'" he had to unload and haul his corials overland.

His general conclusion in reference to the Cuyuni is thus stated (B. C. VII, 30):

"But the difficulties which the Cuyuni presents to navigation, and those tremendous falls which impede the river *in the first day's ascent*, will, I fear, prove a great obstacle to making the fertility of its banks available to the Colony. The Amacura, Barima and Waini, are, for a great distance, free of such impediments."

Even the Indians were not exempt from these accidents. In 1778, Director-General Trotz recorded the fact (B. C. IV, 190) that an Indian Owl named Taumaii, in descending the river, "had the mischance to go down the first fall with his vessel, whereby all his goods were lost," and that a friend who accompanied him was drowned.

A word of comment must be given to the evidence upon which the British Counter-Case contends that the falls so described in other parts of its evidence are not obstructions to navigation. It relies upon an affidavit of Mr. McTurk, Stipendiary Magistrate of the colony of British Guiana, and of all its officials the most zealous promoter of extended frontiers. The examination will be valuable at this early stage of the Argument as showing the value of Mr. McTurk's depositions in general, a subject to which we shall have occasion to refer more than once at a later stage. Mr. McTurk's affidavit (B. C.-C. App., 403-5) was made June 14, 1898, for use in this arbitration. He undertakes to make two points: First, that the falls of the Cuyuni are not very difficult or dangerous; and, second, that the most difficult falls are not in the lower, but in the upper part of the river. Unfortunately for Mr. McTurk, the evidence annexed to the British Case contains several of his reports, made before it was supposed that the boundary question would be submitted to arbitration, and these reports contain evidence quite at variance with that of his later deposition. In order to show the difference between Mr. McTurk reporting the facts to his superior officer and Mr. McTurk

making a deposition to be used in this arbitration, they are printed in parallel columns.

(1.) *As to the Difficulties and Dangers of Navigation.*

Deposition 1898.

"The falls and rapids on the Cuyuni, Massaruni, and Essequibo, although difficult and tedious to pass, offer no insuperable difficulties to navigation, which is conclusively shown by the number of boats which annually pass up and down, and in those cases where accidents have occurred it has been on account of the carelessness or incompetency of those in command of the boat."

Report of Descent of Cuyuni 1891. (*B. C. VI*, 248–9).

"On the 14th the boat went twice on the rocks, the first time splitting the larboard streak, and the second time pitching me out, when I got a number of bruises. This was through no fault of the steersman, but because we came so suddenly on the rocks round points above them. We then had to clear a road across an island about 400 yards long, lay rollers, unload, and haul the boat over. This occupied nearly half a day. At 12.30 P. M. we started for the other side.

"The appearance of the river from the lower side of this portage was most appalling; as far as the view was clear the river was a seething mass of broken water, with numerous whirlpools and pointed rocks showing between the waves. We all viewed them with dread, knowing we had to pass over them somehow. Placing myself at the highest part of the lading with the glasses, I directed the steersman, and by alternately running and lowering, at 1 P. M. came out into clear water, finishing one of the most dangerous passages through falls it has been my lot to experience.

"On the 16th January we had to unload and haul over the boat twice owing to the size of the falls swollen

by the rains, and again once more on the 17th. On this morning the boat was flung bodily on to a rock by the bursting up of the water, the uprising of the accumulated water from below. One man, who was standing up at the time, was thrown several feet clear of the boat, and was driven down the fall, but clung to some bushes below. We jumped on the rock, and at the next uprising of the water the boat swung round and floated off; one man not jumping in in time was left on the rock. As soon as we acquired control over the boat, we picked up the men holding on to the bushes, and went as near as we could to the other on the rock, about 40 yards off, as we could get no nearer; he was motioned to swim, and I stood ready with a rope to throw to his assistance; he jumped in and reached the boat safely. We arrived, without further mishap, at the penal settlement at 10.30 A. M."

Report January 23, 1890.
(*B. C. VII*, 325.)

"9. There have been several accidents during the year, and in many cases attended with the loss of life."

Report February 17, 1891.
(*B. C. VII*, 327.)

"As in last year, there have been several accidents on the rivers, and a deplorable loss of life."

Report August 5, 1895.
(*B. C. VII*, 335.)

"The steersman ran the boat into a fall dangerous at all times, but especially so in the then state of the river; in each case the result was the same—a lamentable loss of life."

Report September 7, 1891.
(*B. C. VI*, 253)

"If it is decided that a station is to be put up at the mouth of the Uruan, the matter must be taken in hand while the dry weather lasts, as it is not only a very laborious but dangerous undertaking to ascend the Cuyuni at any other time."

(2.) *As to the comparative extent of obstructions in the upper and lower Cuyuni.*

The proposition here is thus stated by the British Counter-Case (p. 16), on the strength of Mr. McTurk's deposition:

"In other words, the obstacles to navigation on the Cuyuni below the Uruan are distributed along the whole course, and are not, as the Venezuelan Case suggests, confined to the lower part, *where indeed they are less formidable than further up.*"

The sole authority cited for this statement is Mr. McTurk's deposition. In the columns following this deposition is compared with his previous reports:

Deposition 1898.
(*B. C-C. App.*, 403.)

"The suggestion in the Venezuelan Case that the falls and rapids in the Cuyuni render it almost impossible to traverse from the Essequibo end, and that these rapids and falls constitute a natural barrier against any one ascending the river

Report February 16, 1889.
(*B. C. VII*, 322.)

"The lower part of the Cuyuni is very much obstructed by falls, which though not so numerous as those on the Mazaruni, are larger and tortuous in their course. The latter circumstance adds to the difficulty and danger of getting over them. Beyond

from its mouth while leaving the upper part of the river above these falls easy to traverse, is entirely erroneous. As a matter of fact, the falls and rapids occur throughout the whole distance between the mouth of the Cuyuni and the Uruan, and it is not correct to suppose that the most difficult falls are those nearest its mouth."

the falls at Womopoh the river is clearer, the falls being small and considerable distances apart."

Report January 20, 1891.
(*B. C. VI*, 247.)

"On the 1st January we came out from among the islands into the open river above Kanaima falls."

Kanaima is about half way between Uruan and the lowest fall in the Cuyúni. Womopoh is two days below Kanaima. In the report last cited Mr. McTurk mentions the passage on his way up of twenty-one falls before reaching "the open river above Kanaima falls." He does not mention one between there and Uruan, a distance of over one hundred miles. On his way down he does not mention a fall above Kanaima, and his experience below that point is quoted in the first series of parallel columns.

On Map 1 of the British Atlas sixteen cataracts, portages, rapids, and "great cataracts," are mentioned by name below Kanaima, while only two of this class of obstructions are mentioned above.

If McTurk's deposition is not sufficiently contradicted by McTurk's reports, the following statements of British officials are a conclusive answer.

Hilhouse, who had been for many years in the colony, and had held a high Colonial office in connection with the Indians, ascended the Cuyuni in 1837, and stated that he ascended fully 77 feet in the first day (V. C., p. 29, note). He added:

"It is evident that colonization can never be attempted on this river: the first day's journal determines that."

Mr. Perkins, the Government Surveyor of British Guiana, said in 1893 of the Cuyuni (V. C., p. 30):

"It has long been known as amongst the most dangerous, if not *the* most dangerous, of all the larger rivers of British Guiana, and there are

times when the height of its waters, either above or below a certain point, gives it every right to claim this unenviable notoriety. My first experience was a highly unpleasant one in 1877. . . . In coming down stream our boat capsized at the Accaio—the lowest fall in the river—where one man was drowned and everything was lost."

An important point in the phraseology of the Dutch records is here to be noted. It has been said that the plantations of the colony of Essequibo proper, during the first century of its existence, extended around the water basin formed by the junction of the three rivers, with their four arms, namely, those of the Essequibo, the Massaruni and the Cuyuni as far as the obstructions of the falls and on the lower Essequibo to an undefined distance in the direction of the sea. The general designation used by the Dutch authorities in referring to the plantations on the Cuyuni and Massaruni in this circle around the water basin and below the falls was "in Cuyuni," or "in Massaruni." A plantation "in Cuyuni" meant a plantation between the Cuyuni falls and the mouth of the river. A plantation "in Massaruni" meant a plantation between the Massaruni falls and the mouth of the river. Later, when the trend of the settlements in Essequibo was toward the river mouth, and all but a few of the upper plantations were abandoned, the fort being moved 30 miles lower down, it became customary to speak of these localities below the falls as "up in Cuyuni," or "up in Massaruni."

This phraseology is important, in view of the loose manner in which the phrases "in Cuyuni" and "in Massaruni" are used in the British Case. Their use there would seem to imply that they had reference in the Dutch documents to the upper waters of the two rivers. Such is not the fact. The expressions were used habitually in reference to the settlements about the river mouth, and those only.

Thus the British Case (p. 15) says:

"The timber in the forests of Massaruni, Cuyuni and Waini was granted out by the Government for felling."

No timber grant was ever made in Massaruni or Cuyuni beyond the falls.

Even in 1880, im Thurn says (V. C., vol. iii, p. 407):

"It is at present impossible to cut timber profitably beyond the cataracts [on the various rivers], owing to the difficulty of carrying it to market."

Again (p. 29) the Commandeur is reported as stating that "he has 'again begun to make here a new plantation, in the River Cuyuni above the fort.'"

Here the reference is to the same portion of the river below the falls.

The British Case states (p. 35) that a settlement of "a novel kind was established in an island in the Cuyuni," referring to the creole settlement. This, again, was below the falls.

It also speaks (p. 36) of several grants of land "in Massaruni" and "in Cuyuni," possibly half a dozen. There never was a grant of land by the Dutch above the falls of either the Cuyuni or the Massaruni.

The existence of the falls in the Cuyuni and Massaruni was the determining factor in the history of the river-valleys.

The Eastern border of the interior territory where it approaches the Essequibo, is rugged and at the period in question was covered with a dense forest. The rivers which would otherwise have constituted natural highways of travel were closed to navigation. The difficulties of access on this side were such as to determine the relations of the Dutch colony of Essequibo to this territory. No settlement ever penetrated beyond the natural boundary made by the falls. No body of soldiers from the garrison ever passed this boundary. Neither the Governor, the Secretary, the commandant of the garrison, or any other officer, except the postholder, ever set foot in it. The only other Dutchmen who ever passed the falls from Essequibo were isolated individuals, and these only on occasional visits. The only persons connected with the Dutch colony

that are ever mentioned as passing this barrier are the Company's old negro traders, the Outlier, who was for a short time in the Cuyuni, the two Byliers who were employed at the same post, the Outrunners, who went to trade with the Indians, and occasional individuals trading on their own account.

On the other hand, the western side of the interior district, which immediately adjoined the Orinoco, was open country, separated from the valley of that river only by low hills, which were freely passed and repassed by the Spaniards from the provinces of Cumaná and Barinas, across the river, and from the capital of Santo Thome, on the eastern side of the river itself. This open country consisted of plains, prairies or savannas, as they were called, admirably adapted for the pasturage of cattle. The existence of these immense savannas determined from the beginning the great product of Spanish Guiana, namely, cattle, horses and hides; and it was over these savannas that the Spaniards passed to the Cuyuni.

The Spaniards, descending the slopes of the low hills that bordered the Orinoco valley, established themselves and their herds in the immense district watered by the tributaries of the Cuyuni. Their missionary efforts among the Indians, which had begun in the seventeenth century under the royal direction, in the early part of the eighteenth resulted in the planting of settlements, of which the first, that of Suay, commonly known as Purisima Concepción, was in the immediate neighborhood of Santo Thome, and became the residence of the Prefect of the Missions. During the century a great number of these settlements were established, the earliest of them not far to the southward of Suay, until they filled a vast extent of territory. Some of these were towns with a mixed population of Indians and Spaniards, such as Upata and Guasipati; some of them were enormous cattle farms, such as Divina Pastora; some of them were settlements of Indians exclusively, in charge of missionaries, where the Indians

erected houses, dwelt and labored and, abandoning their wandering life, were taught the cultivation of the soil and the practice of useful arts. At these settlements were soldiers from the Spanish garrison of Guayana, and at one of them, that opposite the mouth of the Curumo, on the south bank of the Cuyuni, there was a fort with a garrison of its own.

That the accessibility of this territory from the west necessarily resulted from the character of the country is shown by the evidence.

The English engineer Barry, who visited the gold mines near Guacipati, by the usual route from the Orinoco, describes the character of this region (V. C., p. 32), where the traveler "emerges on open tracts of moderate extent not bare, but diversified by clumps of trees dotted about, while the rolling ground reminds him of the most beautiful parts of English country scenery. Park, as it were, succeeds park, till he is at last fairly puzzled where to select to encamp, among so much contented and rival loveliness, and here, at a nominal rent, the cattle breeder may come and establish himself, with the certainty of realizing thirty per cent. per annum on his outlay."

In another place, he describes the country as "vast undulating plains of waving grass, dotted at intervals with clumps of splendid trees. . . . Occasionally a thin belt of forest marked the course of a stream."

The British Counter-Case relies on Mr. McTurk's deposition (B. C.-C. App., 403) to dispute the facility of access to the Cuyuni valley from the Orinoco. As a matter of fact, its accessibility is proved, though unintentionally, by Mr. McTurk's statement.

While he says:

"These savannahs do not touch the Upper Cuyuni,"

he adds that it is only

"a day's journey on mules to the edge of the savannah, or about 30 miles."

One could desire no better evidence of facility of access than this. The distance from Santo Thome to the Cuyuni at Uruan is 150 miles, of which 120 is the "open park" described by Barry, and the remaining 30 is traversed on mules through the forest in one day.

For a hundred miles further below Uruan the Cuyuni is "the open river above Kanaima falls" described by McTurk.

It is this point to which particular attention is directed here, namely, the accessibility of the region from the west, not only to the Cuyuni, but along the Cuyuni valley, as contrasted with its inaccessibility from the east. The district was well watered by the tributaries of the Cuyuni. But such was the character of the land that it was unnecessary to use the streams for purposes of transit. In this whole territory transit was easily effected by land.

In view of these facts, which were part of the physical geography of the country, it is not surprising that, while the interior territory was the subject neither of settlement nor of control by the Dutch from its eastern side, it was subject throughout the whole period to very extensive settlement and control by the Spanish from its western side. As to the Spanish settlements themselves, it is enough to say that by the close of the century they numbered upwards of thirty; that their herds of cattle numbered two hundred thousand, and that the population of Indians living directly under the supervision of those in charge of the settlements numbered upwards of twenty thousand.

As to control, while no Dutch official, except possibly the Postholder, ever set foot in the territory, it was repeatedly visited and patrolled by Spanish officials in command of detachments of men from the Spanish garrison. These will be more fully spoken of when we come to discuss the subject of control.

Attention is here directed not only to the point that the falls of the Cuyuni and Massaruni make a natural boundary for the colony, but that the ridge through which they break in their

descent indicates a natural line of geographical demarcation for the district beyond. The fact of this "break" in the mountains is stated in the Venezuelan case (p. 29), and emphatically denied in the British Counter Case (p. 16). Yet it rests upon no less an authority than Schomburgk who, whatever may have been his ignorance of public law, must at least be admitted by Great Britain to have been a geographer. He refers to his "descent of the third series of falls, caused by a small range of mountains, through which the river has broken itself a passage." (B. C., VII, 29). The river falls 200 feet in thirty or forty miles, and it is this range through which it breaks that forms the eastern boundary of the Interior Territory.

This district has been spoken of in the Venezuelan Case as "the Cuyuni-Mazaruni Basin," a term to which the British Case takes exception. It cannot be denied, however, that its character as a basin is distinctly marked. Starting about twenty miles from the Orinoco, at the western end of the Imataka Ridge, which crosses the territory in dispute from northwest to southeast, the line of demarcation turns sharply to the southward, midway between the fifty-ninth meridian and the Essequibo, and follows the range of mountains through which the Cuyuni and Massaruni break at the falls; thence passing up the latter river it crosses over by the watershed separating the tributaries of the Amazon from the rivers of the north, and finds its way back to the point of departure by the mountains which border the Caroni on the east. That there are in the interior of this country small mountainous areas is undoubted; but these lie to the south of the Massaruni, where they form isolated points of elevation, and do not affect the general character of a single geographical district. That this district was penetrated by the Spaniards and possession taken of it at an early date, long in fact before the Dutch were ever heard of in the country, has been already shown; in fact, the Spaniards could not go twenty miles south of Guayana Vieja, the second site of Santo Thome, without

penetrating it. According to the Venezuelan Case (p. 32), the usual length of the journey from the mouth of the Caroni to Guacipati, more than half way to the Cuyuni, was but three days on horseback; and the country was as accessible in the time of Berrio and Vera as it was when Barry made the journey.

The British Uruan police station, according to the authorities cited (V. C., p. 31), can only be reached by a "very hazardous and long journey of forty or fifty days," and it costs the Government "an immense annual sum to maintain their small number of police at Yuruan on salt and tinned provisions (sent all the way from . . . the Essequibo, in paddled boats);" while, "within 200 yards on the other bank of Kuyuni is the Venezuelan outpost, supplied with all kinds of fresh food from their cattle farms and plantations," and "in direct communication with their capital by road and wire."

The claim made by the the Dutch to this region was a claim to "all the branches and tributaries which flow into it [the Essequibo], and especially of the northernmost arm of the river named Cuyuni" (V. C. II, 134). It was, therefore, a claim over the vast territory covered by the mission settlements up to within twenty miles of the Orinoco. It was based on the possession of settlements which were wholly below the falls. In other words, it was a claim to extend as against a prior holder, whose prior title was recognized, a posession of a dozen miles of the course of the river to the whole extent of the territory watered by that river, three hundred miles in length, to say nothing of its tributaries.

The principle upon which, apart from any question of prior titles and adverse holding, title to such a region as the Cuyuni basin depends is the principle of natural outlets. The only reason why the possession of those at the river mouth is held to carry with it a possession of the territory above is, as stated by Twiss (Oregon Question, p. 247), "because their settlements bar the approach to the interior country, and other nations can have

no right of way across the settlements of independent nations." So Phillimore (Int. Law, § 288): "The right of dominion would extend from the portion of the coast actually and duly occupied, inland so far as the country was uninhabited, and so far as it might be considered to have the occupied seaboard for its *natural outlet* to other nations." Where is the natural outlet of the Cuyuni valley? and where is its natural barrier? This question is one of geography, and its answer lies in the wall which nature has erected on the east and in the great stretch of gently sloping prairies and savannas on the west.

In view of the above facts, it is well that the British forbear to press their "extreme claim," which includes the whole valley of the mission settlements. As an alternative proposition, they fall back on the Schomburgk line, which makes the upper Cuyuni the boundary from the Acarabisi to its source. As far as natural frontiers are concerned, this line is no better than the other. It is not only the accessibility of the mission valley from the Orinoco upon which we have dwelt, but the accessibility of the Cuyuni district through the mission valley to the Orinoco. The theory that the Cuyuni here makes a natural boundary is untenable. As is well said by F. de Martens (Int. Law, pp. 456-7):

"Correctly speaking, rivers have never formed natural obstacles between nations. On the contrary, the masses of population in the basins of the principal streams show that they served rather to draw people together, even in former times. This is still more true of modern times. Streams that traverse many States are, in every sense of the word, arteries of international communication. It may be said, then, of water-courses that serve as frontiers: First, nature herself has predestined them to unite rather than separate States; second, the right to navigate them, guaranteed by treaties, results, moreover, very naturally, in some difficulty in determining the territorial jurisdiction over the water-course by the countries so bounded; third, to establish this line of demarcation, it is indispensable that the States having such boundaries should arrive at a complete understanding.

"The preceding fully demonstrates that, in reality, a water-course can only serve as an artificial and conventional boundary, but in no sense as a

natural one. As to the strategic importance of streams and rivers, that is incontestable."

The Coast Territory, between the Orinoco and the Moruca, while its physical features seem at the first glance to be in direct contrast with those of the interior, was similar in one essential particular, that the natural access to the territory was from the west and not from the east. The territory is separated from the district which has just been discussed by the ridge of hills known as the Imataka Ridge, running north-west and south-east from the Caroni to the Orinoco.

Of the rivers in this district four of the principal streams, the Imataka, the Aguirre, the Amakura, and the Barima, empty into the Orinoco, and one, the Waini, into the ocean.

The further fact to be noticed is that the rivers in this district all flowed to the west. In the Interior district the course of the rivers was to the east. In the interior, however, the rivers were not navigable from their mouths, being virtually closed a few miles above the mouth by impassable rocks and rapids. In the coast territory no such obstructions to navigation existed.

Another difference between these rivers and the rivers of the interior lay in this, that the rivers of the interior, running east, took their rise in the extreme western part of the territory in the neighborhood of the Orinoco; while the rivers of the coast, running west, did not, on account of the curvature of their course, take their rise in the eastern part of the territory near the Essequibo. Hence, although the interior rivers were accessible through their headwaters to the Spaniards, the coast rivers were not in the same way accessible to the Dutch. The source of most of the coast rivers, in fact, was much nearer the Orinoco than the Essequibo, while that of the others was close to the district in which lay the outermost mission settlements of Spain. The principal rivers of the interior, the Curumo and Yuruari, with their continuation in the Cuyuni, extended through the whole territory, beginning at a point less than forty miles from the Orinoco and three hundred

miles from the Essequibo. The rivers of the coast territory, running first north-east and then north-west, never approached the Essequibo at all. So that in both regions the rivers were alike inaccessible from the east and accessible from the west.

The merest inspection of the map shows that all the rivers of the coast district are a part of the same river system. They rise in the same range of hills, they follow the same line of curvature in their course, and they empty into the stream of the Orinoco. They thus form four concentric water courses, the line of curvature merely expanding from the innermost arc of the Imataka to the outermost of the Barima. The Waini belongs to the same system, but the sweep of its curve reaches the coast east of the Orinoco, and at this point it has found its way to the sea.

Singularly enough, however, the Waini, a short distance before it reaches the sea, is connected with the Barima by a deep navigable channel only a few miles in length, a channel through which the tide ebbs and flows and which at all times affords a passage for large ships. This is the celebrated Mora Channel or Mora Passage, and its existence, by rendering the Waini as accessible from the Orinoco as the Barima itself, and by subjecting it to the same influences of tides and currents, brings the Waini directly into the Orinoco system.

It is also to be noticed, with regard to these tributaries of the Orinoco, that none of them are obstructed to the slightest degree by falls or rapids except in their upper reaches. Schomburgk (B. C. VII, 12) describes the Barima as 700 feet wide, with a depth of 18 to 24 feet, and he says (*Id.*, 13): "A finer river for steamers could not be desired." All of them are distinctly navigable rivers. In fact, their navigability is the one physical fact that is of cruical importance in the history of this region, just as the impassable character of the Cuyuni and Massaruni, due to the obstruction of the falls, is the crucial physical fact in the history of the interior district. So far as physical conditions were con-

cerned, the navigability of these tributaries of the Orinoco determined the history of the coast district for two centuries. In the same way, with reference to physical conditions, the non-navigability of the Cuyuni and Massaruni determined during the same period the history of the interior district. The two facts, taken together, afford a perfect explanation of the fact that, apart from political considerations, the river system in the Interior Territory was destined to be controlled from its headwaters, and the river system in the Coast Territory from its point of discharge.

The natural gateway to the Interior Territory was from the headwaters of the river, while the natural gateway to the Coast Territory was from the lower waters of the river; but in both cases it was from the west.

Another noticeable fact in connection with the coast territory is to be found in the "*itabos.*" These are shallow passages or ditches through the savanna, and connect at different points the tributary creeks of the large rivers. They are only useful for navigation by canoes and other small boats. They are kept open more or less by artificial means, and during a considerable part of the year cannot be used at all. Most of these, such as the itabo called Morebo, which connects the tributary creeks of the Barima with those of the Waini in the interior, and a similar chain of passages between the Aruka and Amakuru, have no special significance. By means of these creeks and bayous, it was often, though not always, possible to make a short cut between the upper waters of the rivers of the coast territory, only, however, in boats of the lightest draught.

There was one itabo, however, which crossed the savanna between the Moruka and a system of creeks called the Biara and Assacatta, which emptied into the Baramani, which in turn emptied into the Waini. This itabo formed the only natural connection between the Moruka and the west. Great reliance is, therefore, placed upon it by the British Case as showing a natural means of access to the territory commonly known as Barima from

the Essequibo. It was, however, a very uncertain reliance. The savanna was about six miles in width, and this was the only passage through it. Moreover, it did not connect with the Essequibo. From that river it was necessary first to go by sea to the mouth of the Moruka, thence proceeding up that stream, and finally to pass through the itabo, when the itabo was passable. Even from Pomeroon, it was usual to go to the mouth of the river and pass by sea to the mouth of the Moruka in order to get through; and from Essequibo in the Dutch period it was customary to go round Cape Nassau for the purpose. The passage through the itabo seems to have been peculiarly liable to interruption. It necessitated, when coming from Essequibo, a voyage partly by sea, and it was the only means of access into the district. On the other side, however, any one could start from the Orinoco in a vessel of almost any size and range freely through the whole district as far as the Moruka itabo without going outside at all.

There is abundant evidence, both Dutch and British, as to the accessibility of the Coast Territory on the west from the Orinoco, and its inaccessibility on the east from the Essequibo. Thus, in 1839, Crichton, the British Superintendent of Rivers and Creeks, making his first journey to this territory from Pomeroon, "learned also that I could not proceed through the savannah, as it was almost dry and totally impassable except for very small corials" (B. C., VI, p. 68). He therefore returned down the creek, proceeded by the sea coast, and entered the coast territory from the sea. On his return, notwithstanding the heavy weather and that he was "in repeated danger of being swamped," he again took the sea route (B. C., VI, p. 72), "as the inland communications were all nearly dry."

Still more emphatic is the testimony of Superintendent McClintock in 1848 (B. C., VI, p. 171), who said:

"The want of a canal through this part of Upper Morocco forms a complete barrier for several months of the year to all communication with the

Rivers Winey, Barima and Oronoco, thereby cutting off, although for a time only, that intercourse so essential to the general welfare of the Pomeroon District."

Mr. im Thurn, the able and efficient British Government Agent in charge of the existing Northwestern District, who has had twenty years' experience in the colony, says (V. C., p. 27) of what he calls "a narrow itabbo or artificial water-path, which connects the Moruka with the Waini River":

"This connecting passage is in all about 30 miles in length; but only about the first 10 miles of this is actually semi-artificial itabbo, made by the constant passage of the canoes of the Redman through the swampy savannah. . . .

"We found the itabbo section of this passage very difficult to get through. Generally, it was hardly wider than the boat, and its many abrupt windings added to our difficulties. . . . We had either to force the boat under the low-lying branches or make a passage by cutting them away. On either side of the channel the ground is so swampy as hardly anywhere to allow foothold of even a few inches in extent. . . .

"This itabbo is quite dry in the longer dry seasons, and is then, of course, impassable; for walking along its banks is out of question—a circumstance which has a good deal to do with the fact that the parts beyond had up till then been almost completely shut off from the rest of the colony."

The principles which have been already stated in discussing the legal effect of geographical features in the interior district apply with equal force to the coast. As has been already stated, the question is a question of natural outlets. Is the natural outlet of the Amakura and the Barima, and even of the Waini, which is to connect those rivers with the nearest trade centres and with the rest of the world, through the broad and deep channels at their mouths, into the Orinoco, or is it through an artificial water-path thirty miles long, "hardly wider than the boat," which during a great part of the time is wholly impassable? These last are the features of the only outlet from the coast territory to the Essequibo, according to the highest British authority, the Government Agent

for the district. To which river system are these great water courses and the territory through which they flow naturally appurtenant? This admits of but one answer.

Close the itabo permanently and it will have no appreciable effect upon this district. Is it to be supposed that anybody goes now by that route in preference to going outside by steamer? This immense territory is in no way dependent upon the passage through the savanna.

We cannot close this discussion without calling attention to the grossly misleading character of Map 3 of the British Atlas, which purports to show the water-basins. The author of the British Case has chosen to unite the basin of the Cuyuni and Massaruni with that of the Essequibo. Of this we do not complain, because it is, perhaps, well to show in this graphic way how the application of the watershed theory makes in the British view of this case the possession of the island of Kykoveral extend constructively to the banks of the Orinoco. It also shows to what impossible results the watershed theory would lead if it were applied, as the law forbids it to be applied, to lateral frontiers. The point with which we are particularly concerned, however, especially in view of the definition given to the so-called "Essequibo basin," is that given to the Orinoco basin. While every tributary of a tributary of the Essequibo is carefully included in the "basin" of that river, one of the most important tributaries of the Orinoco is excluded from the Orinoco basin, and the Barima is joined with the Waini as if it were a tributary of the latter. The Barima certainly is a tributary of the Orinoco. If the Waini is a tributary of the Barima, it is also a tributary of the Orinoco. If they can be united by a common outlet, they form an integral part of the basin of the Orinoco.

A discussion of the principles of law bearing upon natural features is unnecessary in this case, because they have no application where the question, as here, is of establishing title by adverse

holding. They have only been mentioned in order to emphasize the fact that the physical features of the territory in dispute make it a natural appurtenance of the Orinoco rather than of the Essequibo, and because at various times in the history of the controversy, chiefly through the West India Company's ignorance of this fact, some claim inconsistent with it has been made. In the case of an adverse holder, however, all these grounds of constructive possession are denied. He takes only that which he actually holds; and whether the natural outlet is through him or through the holder of the prior title, it can avail him naught.

CHAPTER VI.

SPANISH TITLE—DISCOVERY.

We now address ourselves to a discussion of the territorial titles of Spain and Venezuela, on the one side, and of the Netherlands and of Great Britain, on the other, in Guiana.

Venezuela asserts a title to the territory in dispute, based upon the discovery of Guiana by Spain. Guiana had become a known and defined geographical district, by the name of the "Province of Guiana," before the earliest Dutch voyager touched its shores.

Antonio de Berrio, writing in 1593, speaks repeatedly of "Guiana," and gives its bounds thus:

"These great provinces lie between two very great rivers, namely, the Amazon and the Orinoco"* (B. C., I., p. 5).

In the anonymous petition to the States General, assigned by the British Case to the year 1603, we have this description of the "Province of Guiana":

"The Province of Guiana, situated in America, lies upon 4, 6, and more degrees north of the equator, extending from the great River Amazon to Punt della Rae or Trinidad" (B. C., I., p. 24).

From this we learn that, before the Dutch had entertained a thought of going there for settlement, the bounds of Guiana were well known to them, and that it had come to be called a "Province," a name that does not appropriately describe an unappropriated country.

But we do not need to follow the evidence found in the cases of the respective governments, in order to establish our point that Guiana, at the time of its discovery and settlement by Spain, was a distinct geographical unit, having natural boundaries as

* The region was described by Domingo de Vera as "the noble prouinces of Guiana and Dorado" (V. C., vol. i., p. 39).

distinct as those of an island—for all this is most forcibly stated to be true in the British Case. It is there said:

"Guiana, as understood by historians and geographers, comprises the territory bounded by the Orinoco, the Cassiquiare, the Rio Negro, the Amazon, and the Atlantic Ocean, whence it was often spoken of as the Island of Guiana" (B. C., p. 6).

Major John Scott, who is given credit by the presentation in the British Case (I., p. 167) of a report ascribed to him, upon Guiana, and attributed to the year 1669, speaks of Guiana as a "province" bounded on the southeast by the Amazon and on the northwest by the Orinoco, fronting 230 leagues on the Atlantic Ocean, and says these rivers meet in the interior. He therefore calls it an "island." The area embraced within these bounds is about 690,000 square miles.

And yet in the British Counter-Case (p. 137, par. 2) we have this remarkable statement:

"There was no province of Guiana, and no defined tract of territory to which Spain became entitled by virtue of her settlement on the Orinoco."

It is admitted by Great Britain that this distinct, well defined geographical unit, called Guiana, was discovered by Spain. We quote:

"It is admitted that Spain was the first nation to discover Guiana" (B. C.-C., p. 130).

These admissions might be fairly taken to relieve the counsel of Venezuela from the duty of referring to any of the evidence bearing upon the subject of the discovery of Guiana by Spain. But we prefer to call attention briefly to a few of the Spanish voyages to the coasts and rivers of Guiana, and of Spanish expeditions into the interior, especially as it is claimed by Great Britain that Spain's explorations were very limited.

As early as 1502 Alonso de Ojeda, sailing from Cadiz, in command of an expedition, visited the Gulf of Paria, at the mouth of the Orinoco (Winsor. Narrative and Critical History, vol. ii, p 189).

In 1530 Pedro de Acosta, with 300 men, settled "in Parema, southward of Oranoque." (B. C. I, p. 169). In 1531 Diego de Ordaz sailed from Spain with 400 men, cruised along the whole coast of Guiana from the Amazon to the Orinoco, proceeded up the Orinoco for a distance of 200 leagues (Herrera, General History; London edition of 1726, vol. 4, pp. 182-186). In 1541 Francisco de Orellana went down the Amazon, taking possession as he went, and passing out into the Atlantic sailed northward and westward along the entire sea-coast of Guiana (Herrera, General History; translated by C. R. Markham for the Hakluyt Society, vol. 24, pp. 24, 26 *et passim*). In 1560 Pedro de Ursua started from Peru with an expedition in search of El Dorado. He started down one of the affluents of the Amazon. Lope de Aguirre, one of his officers, after Ursua's death, led the expedition down the Amazon to the Rio Negro, and thence reached the sea by way of the Orinoco, thus completing the circumnavigation of Guiana island, begun by Orellana above twenty years before. (Fray Pedro Simon, Noticias Historiales; 1627, translated by C. R. Markham for the Hakluyt Society, vol. —, 1861). In 1568 a Spanish colony of 126 families settled at Cayenne (B. C., I, p. 169). Prior to 1581 Gonzalo Jimenez de Quesada had undertaken expeditions into Guiana, expending 50,000 pesos in connection therewith. Before his death Antonio de Berrio succeeded him, and in the course of ten years made three expeditions in search of El Dorado, expending 100,000 pesos, and settling Trinidad in 1591 "for depot and entrance to these provinces" (B. C., I, p. 8). In 1591 or 1592 he founded Santo Thome. In 1594 Berrio thus wrote to the King of Spain:

"Last year I wrote to your Majesty how the Maestro de Campo, Domingo de Vera y Ybargoien, . . . had entered and seen the beginning of the magnificence of these provinces which it was impossible to do by force *according to the many people who have tried it*, with 500 men, etc." (*ib.*, p. 8).

On April 23, 1593, Maestro de Campo Domingo de Vera, on behalf of Antonio de Berrio, "Gouernour and Captaine generall

for our Lorde the King, betwixt the riuers of . . . *Orenoque* and *Marannon*," took very formal possession. A copy of the document reciting this formal taking of possession is printed in the Case of Venezuela (pp. 38-41).

In 1598 Cabeliau, who reported on the first official Dutch voyage known to historical records, says:

"the Spaniards . . . have commenced to make a road through the rocks and hills of the mountains of Weyana, about six days' journey south of the River Worinoque, which road is about 1600 'stadien' long, and so broad that they can march five horses abreast through it, and they think by these means to conquer the country" (B. C, I, p. 20).

Major John Scott, writing in [? 1666], says:

"I shall now only mencion those brave Spaniards that from the first discoveries of the West Indies to the yeare 1647—some with great force, others with few followers—have attempted the discovery of the many provinces in the mayne of Guiana, as well up the Great River Amazones as from the Atlantique Ocean, and from the River Oranoque, most of which perished in their designes, and have left little behinde them saveing the remembrance of their brave undertakings.

1. Diego Deordas.
2. Juan Corteza.
3. Jasper d'Sylva.
4. Juan Gonsales.
5. Phillip Duverne.
6. Pedro d'Lympas.
7. Geronimo d'Ortel.
8. Ximenes.
9. Pedro d'Orsua.
10. Father Iala.
11. Fernandez Diserpa.
12. Diego d'Vorgas.
13. Cacerez.
14. Alonzo d'Herera.
15. Antonio Sedenno.
16. Augustine Delgado.
17. Diego d'Lozada.
18. Rineso.
19. Pedro d'Orsua, jun.
20. Montiseno.
21. Philip d'Fonta.
22. Juan d'Palma."

(B. C. I, p. 171.)

These are a few of the Spanish expeditions and settlements prior to the year 1600. After that time, and possibly before Essequibo itself was settled by Spaniards, and for many years prior to the first Dutch establishment in that river, the Spaniards were accustomed to traverse the coast region between the Orinoco and

Essequibo, and to trade with the Indians in Barima, Pomeroon and Moruca.

It appears, then, conclusively, from the admissions of Great Britain and from historical records, that Spain discovered the Province of Guiana, a well defined territorial unit; circumnavigated the "island"; took a most formal and public ceremonial possession of it in 1593, accompanied by a public declaration of her purpose to appropriate the whole region from the Amazon to the Orinoco, and further accompanied by the submission of certain of the savage tribes within the region, and by the appointment of a governor; entered its principal rivers; sent her exploring expeditions into the interior; founded settlements, that were never abandoned, at Trinidad and Santo Thome, and another that was maintained for a time on the Essequibo; another at Parema "southward of Oranoque"; and yet another at Cayenne; that this was done at an enormous cost and with the publicly avowed intention of appropriating the Province of Guiana—and all this before any Dutch settlement, within the bounds of Guiana, was made or attempted.

It may be safely said that no title by discovery to any part of the *terra firma* of the New World was more distinctly and naturally defined as to its limits, or more safely rested upon a full exploration of all its boundaries and upon a public and persistently maintained assertion of a purpose to appropriate it.

It is not objected by Great Britain here, as it has been in other cases, that the discovery was only from the sea; or that it was casual; or that the land was not visited or explored; or that Guiana was too vast to be appropriated by one nation; or that the ceremonial occupation was not by the national authority, or, for any other reason, imperfect. The evidence presented by the British Case alone shows that all the necessary incidents of a good discovery of Guiana and of a good ceremonial occupation were complete.

But, if anything is lacking, the evidence presented by Venezuela, taken with the admissions of the British Case, we submit,

establishes beyond debate that the Spanish discovery of Guiana was accompanied by every incident necessary to give to Spain whatever right and title a discoverer may have to a region, every boundary of which he was the first to traverse, and into the interior of which he has sent many official expeditions.

Let us now try to ascertain what place and what scope the writers upon international law and the usage of the great nations give to discovery as a source of title. We may confidently declare, at the outset, that every important commentator upon international law admits discovery to be a good source of title and that every one of the great nations has asserted and defended territorial rights based upon discovery. The writers are not at one, perhaps, as to all the necessary incidents of this title; but all agree that a good discovery gives a title to the thing discovered—a primary and exclusive right to appropriate it, and that the second comer enters rightfully only when there has been an abandonment, *de facto* or *de jure*, by the discoverer.

Before examining the authorities and the precedents it may be well to ascertain, if we can, just what is the position taken by Great Britain in the pending controversy upon this subject; and we have therefore assembled these extracts from the "Principles of Law" stated in the British Case:

"Discovery of new territory, apart from possession and effective occupation, does not establish an absolute and permanent right to dominion; it only gives to the discovering country a right (which, if the intention to exercise it is openly asserted, remains for a reasonable time the best right) to effectively occupy the newly-discovered territory" (B. C., p. 149).

Again:

"Newly-discovered territories, if not effectively occupied within a reasonable time by the discoverer, are open to the occupation of other Powers, and the first power effectively occupying such territory obtains an absolute right to the sovereignty of the territory occupied" (B. C., p. 149).

Again:

"In the passage cited above from Vattel, the true effect of discovery is for the first time pointed out, namely, that it gives to the discoverer an

opportunity, by taking formal but notorious possession, to acquire an inchoate title, which he may perfect by actual occupation within a reasonable time. . . . However, all writers, both before and since Vattel, whether they do or do not expressly concede the discoverer an inchoate title, agree that mere discovery, apart from occupation, can of itself give no permanent dominion" (B. C., p. 151).

Again:

"The absolute right of the discoverer has never been asserted by Great Britain. It is true that in some early charters, such as that to the Hudson's Bay Company in 1670, it is recited that the territory to be occupied was a British discovery, but this, not being intended to justify the dispossession of any actual occupant, is not material" (B. C., p. 152).

Again:

"The right of the discoverer during the time which elapses before effective occupation being a merely inchoate right, it follows that there must come a time when it lapses *de jure*, whether the discoverer, in fact, acquiesces or not. Where this is the case the country may be occupied by others, whose title is in that case rightful from the beginning.

"Sir Travers Twiss says:

'Settlement when it has supervened on discovery constitutes a perfect title, but a title by settlement when not combined with a title by discovery is in itself imperfect, and its immediate validity will depend upon one or other condition that the right of discovery has been waived *de jure* by nonuser, or that the right of occupancy has been renounced *de facto* by the abandonment of the territory.'

"No hard and fast rule can be laid down as to the period during which this right remains alive. Hall suggests 'such time as, allowing for accidental circumstances or moderate negligence, might elapse before a force or a colony were sent out to some part of the land intended to be occupied." The period may well vary with the circumstances of the territory and of the discoverer, and it would not be reasonable to allow as long for the completion of effective occupation at the present day as might have been allowable some centuries ago" (B. C., pp. 153–154).

And then we have:

"The inchoate right of the discoverer, as appears from the passage already cited from Vattel, and as is also made clear by Hall, is based theoretically on his formally taking possession. That the form should for the moment be accepted as equivalent to the fact is only reasonable in the application of the theory to the circumstances of a discoverer and the nature of the subject-matter. But formal acts of possession become unreal

and unmeaning from the commencement when they have been left to stand alone for a longer period than the reasonable indulgence above mentioned requires" (B. C., p. 154).

We derive from these statements these distinct concessions:

FIRST.—That the discoverer acquires, by his discovery and public ceremonial occupation, the best—which we take to mean the exclusive—right to occupy the *territory discovered*.

SECOND.—That the ceremonial possession taken by the discoverer is for a time accepted as an actual possession of the territory discovered and retains that equivalency until a time when the form becomes "unreal and unmeaning," and that this point is reached if the ceremonial possession is "left to stand alone" for an unreasonable period.

THIRD.—That the reasonable period is not to be determined by any "hard and fast rule," but by all the circumstances surrounding the discoverer and the territory; that the rule of to-day is not the rule of the sixteenth century; but that within that reasonable period, when thus ascertained, the fact must supersede the form.

FOURTH.—That where a discovery has been made and the "inchoate right" has accrued to a nation, the second comer must found his right upon an abandonment by the discoverer of the territory, and this abandonment may be derived either from a presumption of law drawn from the attendant circumstances, or from a formal renunciation by the discoverer of his title.

FIFTH.—If the British Case may be taken to approve the extract from Hall—and it is apparently quoted with approbation—that the duty to be discharged by the discoverer within the reasonable time mentioned by the law writers is to send out "a force or colony" "to some part of the land" discovered.

But Great Britain does not seem to allow to Spain the use of Hall's rule, though quoting it with approval; and we therefore proceed to discuss the question: What must the discoverer do to prevent his ceremonial occupancy from becoming "unreal and unmeaning"? It is not claimed that the ceremonial occupation—

the setting up of the flag or cross, and the accompanying proclamation—is effectual only as to the spot or locality where the ceremony takes place. The discovery and the proclamation furnish us with the limits of the ceremonial occupation, and the question that remains to be debated is: Does an actual occupation within the bounds of the ceremonial occupation, and made with reference to that ceremonial occupation, have the same limits, or is it narrowed to the region actually occupied? Must the ceremonial occupation be replaced throughout its whole extent by an actual, effective occupation, in order to save the title of the discoverer?

When the discoverer has made and maintains some settlement within the limits of his ceremonial occupation, and is publicly and continuously asserting sovereignty over the whole, an actual intent to abandon is excluded. If in such case abandonment is decreed, it must be because of a controlling legal presumption,—one that cannot be overcome by evidence. The British Case makes, so far as we can see, no question that Spain sent forces to and made permanent settlement in Guiana, within a reasonable period, and before any settlements were made or forces sent thither by any other nation. We think we are then justified in saying that the case has been brought to this: That Spain acquired a discoverer's title to the whole of Guiana; that this title gave her the exclusive right to occupy that whole territory within a reasonable time thereafter; and that, before this indeterminate period expired, and before any other nation, Spain sent her forces there and made actual settlements within the discovered territory.

Why, then, is not Spain's title that perfect title of which Sir Travers Twiss speaks? Settlement has "supervened on discovery," and that before any other nation had made any settlement within the bounds of Guiana. We are answered that Spain did not *effectively* occupy the whole of Guiana; that she perfected, by an actual occupation, her title to a part of it, but abandoned another part—not in fact, nor because she did not continue to

proclaim an intent and make efforts to occupy all of it, but by a conclusive presumption of law, one that is not to be shaken by her vehement and persistent assertions of her rights, nor by the repeated expulsions by her armed forces of those who entered adversely. The intruders knew there had been no abandonment as a matter of fact by Spain; she had done everything else that was possible to maintain her title; and if she failed it was because she did not effectively occupy every part of Guiana before the Dutch came in.

We address ourselves therefore to the question: Did a conclusive legal presumption of an abandonment by Spain of her title, as a discoverer, to the disputed territory, arise from the fact that she had not "effectively occupied" every part of it before the Dutch came in?

Before proceeding to consider the legal rules applicable to this particular question, it may be well to look into the history of discovery as a source of title and to examine the general rules applicable to it, as given by the courts and by writers upon international law. We shall in the first place undertake to show that every nation that has ever claimed an original title to territory in North America has put forward discovery as a good source of title.

Chief Justice Marshall, in the opinion delivered by him in the case of Johnson *v.* McIntosh, decided by the Supreme Court of the United States in 1823, and reported in 8 Wheaton (p. 528), deals at length with this question, and the opinion has been cited with approval by writers on international law.

We quote from this distinguished jurist this clear and comprehensive discussion of the law of discovery and occupation, as applied by all the great powers of Europe in the settlement of America:

"On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition

and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made an ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

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In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate right to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain and with the

United States, all show that she placed it on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title.

France, also, founded her title to the vast territories she claimed in America on discovery. However conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country not actually settled by Frenchmen, and her exclusive right to acquire and dispose of the soil which remained in the occupation of Indians. Her monarch claimed all Canada and Acadie, as colonies of France, at a time when the French population was very inconsiderable, and the Indians occupied almost the whole country. He also claimed Louisiana, comprehending the immense territories watered by the Mississippi, and the rivers which empty into it, by the title of discovery. The letters patent granted to the Sieur Demonts, in 1603, constitute him lieutenant-general and the representative of the king in Acadie, which is described as stretching from the 40th to the 46th degree of north latitude; with authority to extend the power of the French over that country, and its inhabitants, to give laws to the people, to treat with the natives, and enforce the observance of treaties, and to parcel out, and give title to lands, according to his own judgment.

The States of Holland also made acquisitions in America, and sustained their right on the common principle adopted by all Europe. They allege, as we are told by Smith, in his History of New York, that Henry Hudson, who sailed, as they say, under the orders of their East India Company, discovered the country from the Delaware to the Hudson, up which he sailed, to the 43d degree of north latitude; and this country they claimed under the title acquired by this voyage. Their first object was commercial, as appears by a grant made to a company of merchants in 1614; but in 1621, the states-general made, as we are told by Mr. Smith, a grant of the country to the West India Company, by the name of New Netherlands.

The claim of the Dutch was always contested by the English; not because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that title. Their pretensions were finally decided by the sword.

No one of the powers of Europe gave its full assent to this principle more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots to discover countries then unknown to Christian people, and to take possession of them in the name of the king of England. Two years afterwards, Cabot proceeded on his voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.

In this first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle which has been mentioned. The right of discovery given by this commission is confined to countries "then unknown to all Christian people"; and of those countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.

The same principle continued to be recognised. The charter granted to sir Humphrey Gilbert, in 1578, authorizes him to discover and take possession of such remote, heathen, and barbarous lands as were not actually possessed by any Christian prince or people. This charter was afterwards renewed to Sir Walter Raleigh in nearly the same terms.

By the charter of 1606, under which the first permanent English settlement on this continent was made, James I. granted to Sir Thomas Gates and others, those territories in America lying on the seacoast, between the 34th and 45th degrees of north latitude, and which either belonged to that monarch, or were not then possessed by any other Christian prince or people. The grantees were divided into two companies at their own request. The first, or southern colony, was directed to settle between the 34th and 41st degrees of north latitude; and the second, or northern colony, between the 38th and 45th degrees.

In 1609, after some expensive and not very successful attempts at settlement had been made, a new and more enlarged charter was given by the crown to the first colony, in which the king granted to the "Treasurer and Company of Adventurers of the City of London for the first colony in Virginia," in absolute property, the lands extending along the seacoast four hundred miles, and into the land throughout from sea to sea. This charter, which is a part of the special verdict in this cause, was annulled, so far as respected the rights of the company, by the judgment of the court of king's bench on a writ of *quo warranto;* but the whole effect allowed to this judgment was, to revest in the crown the powers of government, and the title to the lands within its limits.

At the solicitation of those who held under the grant to the second or northern colony, a new and more enlarged charter, was granted to the Duke of Lenox and others, in 1620, who were denominated the Plymouth Company, conveying to them in absolute property all the lands between the 40th and 48th degrees of north latitude.

Under this patent, New England has been in a great measure settled.

The company conveyed to Henry Rosewell and others, in 1627, that territory which is now Massachusetts; and in 1628, a charter of incorporation, comprehending the powers of government, was granted to the purchasers.

Great part of New England was granted by this company, which, at length, divided their remaining lands among themselves; and, in 1635, surrendered their charter to the crown. A patent was granted to Gorges for Maine, which was allotted to him in the division of property.

All the grants made by the Plymouth Company, so far as we can learn, have been respected. In pursuance of the same principle, the king, in 1664, granted to the Duke of York the country of New England as far south as the Delaware Bay. His royal highness transferred New Jersey to Lord Berkeley and Sir George Carteret.

In 1663, the crown granted to Lord Clarendon and others, the country lying between the thirty-sixth degree of north latitude and the river St. Mathes; and, in 1666, the proprietors obtained from the crown a new charter, granting to them that province in the king's dominions in North America which lies from thirty-six degrees thirty minutes north latitude to the twenty-ninth degree, and from the Atlantic ocean to the South sea.

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Further proofs of the extent to which this principle has been recognised will be found in the history of the wars, negotiations and treaties, which the different nations, claiming territory in America, have carried on, and held with each other.

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The treaty of Aix la Chapelle, which was made on the principle of the *status ante bellum*, did not remove this subject of controversy. Commissioners for its adjustment were appointed, whose very able and elaborate, though unsuccessful arguments, in favour of the title of their respective sovereigns, show how entirely each relied on the title given by discovery to lands remaining in the possession of the Indians.

After the termination of this fruitless discussion. the subject was transferred to Europe, and taken up by the cabinets of Versailles and London. This controversy embraced not only the boundaries of New England, Nova Scotia, and that part of Canada which adjoined those colonies, but embraced our whole western country also. France contended not only that the St. Lawrence was to be considered as the centre of Canada, but that the Ohio was within that colony. She founded this claim on discovery, and on having used that river for the transportation of troops, in a war with some southern Indians.

This river was comprehended in the chartered limits of Virginia; but, though the right of England to a reasonable extent of country, in virtue of her discovery of the seacoast, and of the settlements she made on it, was not to be questioned; her claim of all the lands to the Pacific ocean, because she had discovered the country washed by the Atlantic, might, without derogating from the principle recognised by all, be deemed extravagant. It interfered, too, with the claims of France, founded on the same principle. She therefore sought to strengthen her original title to the lands in controversy, by insisting that it had been acknowledged by France in the fifteenth article of the treaty of Utrecht. The dispute respecting the construction of that article, has no tendency to impair the principle, that discovery gave a title to lands still remaining in the possession of the Indians. Whichever title prevailed, it was still a title to lands occupied by the Indians, whose right of occupancy neither controverted, and neither had then extinguished.

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Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians.

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This opinion conforms precisely to the principle which has been supposed to be recognised by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring."

Hume (Hist. England, Chap. 48) gives this account of the view taken by the Protestant nations:

"The more scrupulous Protestants, who acknowledged not the authority of the Roman pontiff, established the first discovery as the foundation of their title."

Spite, then, of the declaration of the British Case that "there has never been any question among legal writers that the title of European nations to territory in new countries rests not upon discovery, but upon occupation," it is historically true that Great Britain based all of her original titles on the Atlantic coast of America upon discovery; that she in the most formal and serious state papers claimed title as the discoverer, granted that title to

companies of her subjects while the lands were in whole or in great part not only unoccupied, but absolutely unexplored, and, by these grants became a warrantor of the title and made good that warranty by her arms.

The British Case disposes of these historical incidents in a way that is not British. It is true that in these charters the Nation, by its sovereign Head and under its Great Seal, recited that the lands granted were English lands by the right of discovery, "but all this," says the British Case (p. 152), "not being intended to justify the dispossession of any actual occupant, is not material." Is it meant that Great Britain was putting forward a title that she was ready to surrender to any contesting occupant—one that she would not support in behalf of her grantees; that, while asserting a title by discovery, she did not believe that any title could be rested on discovery? Is it meant that the lands granted to be settled were not British territory until made such by the effective occupation, by the grantees, of every part of the vast regions described? The only title Great Britain had to grant was the discoverer's title, for the lands covered vast tracts—in the watershed of the Mississippi and beyond the seacoast ranges—upon which no British foot had trod, and which no rule of constructive possession would have assigned to her as appurtenant to any actual occupation.

A map of the British possessions in North America in 1609, or in 1620, laid down on the principles she now seeks to apply to Venezuela, would be a most interesting exhibit.

But if these British Charters are to be construed as granting only the lands settled and those appurtenant to such settlements, we shall have occasion at a later stage of the argument to show what a tremendous scope Great Britain gave to a feeble coast settlement, and how little regard she then paid to natural boundaries and watersheds.

The statement that the claim to a title by discovery, put forward in these British charters, was not "intended to justify the

dispossession of any actual occupant," is not true. The claim was put forward in the controversy with the Dutch over New Netherland, to dispossess the Dutch who were in actual occupation.

In 1632, England, by a paper sent to Holland, asserted a right "for first discovery, occupation and the possession which they have taken thereof, and by the concession and Letters Patent they have had from our sovereigns" (Brodhead Papers, i, 55).

Later in the discussion (February 9, 1665) it was said on behalf of the Dutch Company, to the Dutch States-General, and through that body to the English Government:

"The right which the English found on the Letters Patent, wherein their king grants such vast extent to the limits of the English so as to include also all the possessions of this nation, is as ridiculous as if your High Mightinesses [the States-General] bethought yourselves of including all New England in the patent you would grant to the [Dutch] West India Company. Therefore, a continued possession for such a long series of years must confer on this nation a title which cannot be questioned with any appearance of reason." (Brodhead Papers, i, 325.)

In his reply (April 7, 1665) the British Ambassador said:

"The Deputies do not deny that this Land called New Netherland is within the patents granted by his Majesty to his subjects, and he, the said Envoy doth affirm that it is.

"And as to the point of Possession, there is nothing more clear and certain than that the English did take possession of and inhabited the Lands, within the Limits of the said patents, *long before any Dutch were there.* 'Tis not to say (nor is it requisite that it should be said) that they did inhabit every Individuall Spot, within the limits of them. It is enough that their patent is the first, and that in pursuance thereof, they had taken possession, and did inhabit and dwell within the same, and made considerable Towns, Forts and Plantations therein before the Dutch came to dwell there. Is it to be imagined that the Dutch East-Indie Company have fully peopled and cultivated the Island of Ceylon, and other of their great Colonies in the East-Indie, and yet if the English should, upon such pretence, endeavor to settle there without their consent, Would they approve thereof, or suffer the same or accomp their title there to be good, or other than Precarious?" (Brodhead Papers, i, 332.)

The Dutch set up a double title by discovery to the New Netherlands (New York); a discovery, by Spain, of the New World, to

which they had succeeded, as to the New Netherlands, by the Treaty of Munster; and a discovery of this particular region by their own navigators. In the charter granted to the West India Company in 1664, a title by discovery is also set up. We quote:

"Now, therefore, we, being hereby desirous of assuring all and sundry whom it may in any way concern, of our intention in the aforewritten Charter, do declare our meaning to have been expressly, and still to be, that the aforementioned Company, in conformity with the aforewritten Charter, was empowered, and still is empowered, to establish colonies and settlements of people on lands which are not occupied by others, to extend themselves so far as the limits hereinbefore related, and especially since the same is necessary for preservation of the right which is due to them, by virtue of the aforewritten Charter, *by discovery and occupation on the fresh river, and other places situated more easterly in* New Netherland, up to Cape Cod, and from Cape Hinloopen, and 15 miles southerly, both along the coast, provisionally, and pending further agreement, respecting the limits to be made between the King of Great Britain and ourselves." (B. C., I, p. 151.)

Russia, too, has brought forward a title by discovery as applicable to her former American possessions. Sir Travers Twiss says (Oregon Case, p. 162) that as to Alaska, Russia claimed "the title of first discoverer; the title of first occupation; and in the last place that which results from a peaceable and uncontested possession of more than half a century."

As we have already seen, France "founded her title to the vast territories she claimed in America on discovery."

That Spain and Portugal asserted the right of the discoverer, from the earliest times, cannot be denied.

The statements we have quoted from Chief Justice Marshall, and the following from Wheaton's International Law (Sec. 166) are historically indisputable:

"Independent of this papal grant, the right of prior discovery was the foundation upon which the different European nations, by whom conquests and settlements were successively made on the American continent, rested their respective claims to appropriate its territory to the exclusive use of each nation. Even Spain did not found her pretensions solely on the papal grant."

The United States presented a claim to Oregon based on discovery. And Cobbett (Int. Law Cases, 2d Ed., p. 357) says:

"In support of the British claim stress was laid on the discovery of Meares and Vancouver and other Englishmen who had made explorations inland."

It appears then that England, Holland, Spain, Portugal, France, Russia and the United States—the only nations that have claimed original titles to American territory—have all rested their rights to such territory upon discovery, and have, as we shall see, treated this title as perfected, by feeble settlements, to vast regions not only not "effectively occupied" but largely unexplored.

Let us now see, somewhat in detail, what the writers upon international law say as to the two forms of title by appropriation—that of the discoverer, and that of the second comer—and particularly the rules they give us for determining whether there has been such an abandonment by the discoverer as to give another the right to enter and appropriate.

It is clear that a right to appropriate property can only exist, *first*, when the property has never had an owner, and, *second*, when, having had an owner, it has been abandoned. The first is the discoverer's appropriation, and is a perfect title from the beginning. The appropriation of the second comer gives an imperfect title, especially if the abandonment upon which it rests for its validity is a mere implication.

The British Case, in the extract already given (p. 153), quotes Sir Travers Twiss as saying:

"Settlement, when it has supervened on discovery, constitutes a perfect title, but a title by settlement when not combined with a title by discovery is in itself imperfect, and its immediate validity will depend upon one or other condition that the right of discovery has been waived *de jure* by non-user, or that the right of occupancy has been renounced *de facto* by the abandonment of the territory" (Twiss, Law of Nations, 2d ed., p. 210).

The proposition of law propounded by Great Britain as applicable here, is that in order to perfect his title the discoverer must,

"within a reasonable time," "effectively occupy" all of the territory discovered; and that if he does not do so the "first power effectively occupying such territory obtains an absolute right to the sovereignty of the territory occupied" (B. C., p. 149).

The effective occupation which it is claimed the discoverer must accomplish within a reasonable time after discovery is thus defined in the British Case:

"Effective occupation means the use and employment of the resources of the country and the general control of its inhabitants under the protection and by the authority of a government claiming and exercising jurisdiction in that behalf" (B. C., p. 149).

This is to say that the discoverer's title is not perfected until he has brought into use the resources of the whole territory discovered, and has subjected its savage inhabitants to his control.

Upon this, we remark, in passing, *first*, that it is not a correct statement of the law; *second*, that if it were it would involve a very great extension of "the reasonable period"; and, *third*, that it will hardly be claimed that a less strict rule must be applied to the second comer.

This last difficulty Great Britain has not failed to observe. If the rule were to be applied to the Dutch in all its strictness, it was obvious to the compilers of the British Case that the Dutch possessions in Guiana would be very limited; and so we find some labored attempts to introduce ameliorations of its strictness, adapted to British needs. Thus it is said (p. 155), that while settlement and cultivation are always present in effective occupation, "of course the area occupied will not be confined to the actual sites appropriated for residence or cultivation"; and a quotation from Field, used approvingly, allows that an "effective control" of a region raises a legal presumption of occupation—effective occupation, of course—and this with or without the use of its resources. Again, it is said that the assertion and maintenance of an exclusive

right to trade "*in any specific area*, surrounding its settlements," is "effective control."

And if the right to trade is used (we suppose a use is implied), though it be the merest and most primitive barter of beads for skins, in a land capable of producing enormous crops of the best cereals to feed a hungry world, or of producing the precious metals, that is a sufficient use of the "resources of the country" to complete effective control. In other words, if the discoverer, or the second comer, claims and enforces a right to dispose of the trade with the savages within "any specific area (he may fix his own limits) surrounding his settlements," that is the control of the inhabitants—one element of "effective occupation"; and, if he uses this primitive trade in any degree, he has perfected his title, by an effective occupation, to the "specific area," however vast.

In another statement upon this subject (B. C., p. 156) an "effective occupation" is allowed without the use of either of the elements of the formal definition we have been discussing. We quote:

"Again, when the Government of a settlement acquires the exclusive ascendancy over, and alliance with, surrounding tribes, and by that means excludes foreign influence from the territory which they inhabit, that territory is effectively occupied as against the colonizing enterprise of any other country."

Here no control of the inhabitants is required, for the "ascendancy" goes with an "alliance;" no use of the resources of the country, but only the exclusion of "foreign influence," and that effected by alliances with the savage tribes. If by the gift of three pints of glass beads a native chief can be made to keep out "foreign influence," an "effective occupation" has been perfected. In other words, a commercial treaty with a savage chief, by which an exclusive right to the foreign trade of a region is secured, may constitute "effective occupation," without a post or a settlement,

or indeed without any right to establish one; for the acceptance of a treaty grant to exclusive trade rights from a native chief is an acknowledgment of his sovereignty.

It seems to have been overlooked that Rule (*a*) of our Arbitration Treaty contains an implied admission that even an "exclusive political control," which is much larger than a trade alliance, is not, by the rules of international law, an "effective occupation," else it would not have been left in the Tribunal's discretion whether it should be taken as such.

But, without further comment upon these impossible and irreconcilable definitions, let us see what a discoverer is required to do, after his ceremonial occupation, to save his title. It should be first stated—a proposition that we think will not be controverted—that a good ceremonial possession extends to the entire region discovered. There was no rule of international law when the New World was discovered and was being occupied, by which the regions appropriated by discovery could be limited. The mere sighting of a continent from the sea, or a single landing upon its shores, might not support a title by discovery to the entire continent. But, if not, it was because there had not been a good discovery of the continent. We do not need here to discuss that point, however, for the region in question is only the "province of Guiana," and the discovery was accompanied by many landings and very extensive explorations, including every part of all its boundaries.

The claim of Spain, by her ceremonial possession, included the province of Guiana, and her title, as the discoverer covered the whole of it. No other nation could thereafter found any right to any part of the province upon discovery; for Spain had left no part undiscovered.

Twiss says:

"There can be no second discovery of a country. In this respect title by discovery differs from title by settlement" (Oregon Case, p. 166).

International law offers only three titles to a second comer: A title by conquest, a title by treaty, a title by prescription—the last including the title based upon the discoverer's abandonment.

It seems to be the contention of the British Case that if the discoverer fails to accomplish an "effective occupation," according to one of the various definitions of those terms given, within a reasonable time, his title absolutely fails, and that whether any other nation has entered or not. This we deny, and assert the rule and the reason to be that no matter what time has elapsed after discovery, if the discoverer makes an actual occupation before any other nation his "title by settlement is superadded to title by discovery."

And, first, as to the reason of the rule requiring occupation. It is that the vacant lands of the world may not indefinitely be kept out of use; that, failing such a use by the discoverer, a presumption of abandonment arises, and any other nation may take and use them. The reason only requires that the title of the discoverer be subordinate to a possible public need of the lands. But, if their non-occupation refutes this presumption, and the discoverer, after any time, becomes the first settler, why should any forfeiture be enforced against him. Indeed how can a forfeiture be enforced against him in his own behalf. Can he prescribe against himself in his own behalf?

Vattel (pp. 99-100) has this to say of the title by discovery:

"All mankind have an equal right to things that have not yet fallen into the possession of any one; and those things belong to the person who first takes possession of them. When therefore a nation finds a country uninhabited and without an owner, it may lawfully take possession of it: and after it has sufficiently made known its will in this respect it cannot be deprived of it by another 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 this title has been usually respected, provided it was soon after followed by a *real possession*. But it is questioned whether a nation can, by the bare act of taking possession, appropriate to

itself countries which it does not really occupy and thus engross a much greater extent of territory than it is able to people or cultivate. It is not difficult to determine that such a pretension would be an absolute infringement of the natural rights of men, and repugnant to the views of nature, which, having destined the whole earth to supply the wants of mankind in general, gives no nation a right to appropriate to itself a country, except for the purpose of making use of it, and not of hindering others from deriving advantage from it. The law of nations will, therefore, not acknowledge the property and sovereignty of a nation over any uninhabited countries, except those of which it has really taken actual possession, *in which* it has formed settlements, or *of which* it makes actual use."

In view of this quotation (partially given in the British Case, p. 150), we cannot understand how Great Britain can justify the assertion that "Vattel never even notices the claim of a discoverer as such; nor does he appear to regard newly discovered territory as subject to any other rule as regards their appropriation than other vacant lands." For, to the most casual reader, it must be plain that this author speaks first of a ceremonial possession by the discoverer, the nation thus making known its purpose to appropriate the region, and declares that the title, acquired by these acts, which is that of a discoverer, has been usually respected, "provided it was *soon after* followed by a real possession." If this is not to affirm that, pending the "soon after," the discoverer has a title, what is it? And if for "soon after" we read "within a reasonable time," do we not have the rule as to title by discovery stated much as other writers state it? No one has claimed that a ceremonial possession gives to the discoverer an indefeasible title. We should notice, also, that the reason given by Vattel for this rule is precisely what we stated it to be, namely, that for one nation indefinitely to exclude others from territory that it does not attempt to occupy is repugnant to the law of nature, which destined the earth to supply the wants of mankind. A title defeasible by the effective appropriation of another nation fully responds to this law of nature. It is the hindering of others from using what you do not yourself use that is not allowable; and a defeasi-

ble title removes the hindrance. It is not, however, a question of the fullest or the best use of the territory. That would be a perilous test of dominion. Great Britain has much territory that is not settled.

We thus find that Vattel, who is supposed by our opponents to be less favorable than other writers to title by discovery, only requires that the ceremonial possession shall "soon after" be followed by an actual possession. Some settlement, or some actual use makes the title good, that is, perfects it. He does not at all support the doctrine that every part of the territory must be "effectively occupied," its resources appropriated and its inhabitants brought under control before the discoverer's title is perfected. On the contrary, he allows title to *the territory "in which"* settlements have been made. We shall find upon a fuller examination, we think, that the requirement is that, within a reasonable time, such acts shall be done as give evidence of an intention in good faith to carry out the implication of the ceremonial possession; that is, to appropriate the region to actual uses. This does not require the occupation of every part—at once or at any time

The quotations from Martens and Kluber, given in the British Case (p. 151) not only do not support the theory that the discoverer's title can only be perfected by an effective occupation of the whole territory, but are to the contrary. Martens speaks of the case where the discoverer of an island, &c., immediately abandons it, leaving no "permanent traces of possession and of his *intent.*" What is demanded here is evidence, in the territory, of an intent—enough to be notice that there is a *bona fide* purpose to occupy.

So Kluber only disallows intention as a mere mental process, and requires that it shall have a tangible expression. This we allow, but insist that Trinidad, Santo Thome and Essequibo, and the armed expeditions of Spain, the expulsion of the Dutch, etc.,

furnish the required indicia of possession and of intent—the tangible expressions that these distinguished writers insist upon.

The British Case (p. 153) quotes, as we have seen, with apparent approval, from Hall, this definition of the time limit, and of the occupancy to be accomplished within it:

"Such time as, allowing for accidental circumstances or moderate negligence, might elapse before a force or a colony were sent out to *some part* of the land intended to be occupied" (Hall, Int. Law, 4th Ed., p. 106).

As is well said by Hall (*Id.*, p. 118):

"When voyages of discovery extended over years, when the coasts and archipelagos lying open to occupation seemed inexhaustible in their vastness, when states knew little of what their agents or the agents of other countries might be doing, and when communication with established posts was rare and slow, isolated and imperfect acts were properly held to have meaning and value. When therefore it first became worth while to question rights to a given area, or to dispute over its boundaries, the tests of effective occupation were necessarily lax."

There is no period to which these words can apply so forcibly as during the century and a half immediately following the discovery of America by Columbus; and we believe it to be true that in no case has the title to extensive regions on the Continent of America been established and perfected by a more complete series of acts of occupation than those of the Spanish in Guiana during the first century and a half.

That the views of this writer may be better understood, we quote from him more at length. He says (*ib.*, pp. 106–109):

"§ 32. When a state does some act with reference to territory unappropriated by a civilised or semi-civilised state, which amounts to an actual taking of possession, and at the same time indicates an intention to keep the territory seized, it is held that a right is gained as against other states, which are bound to recognise the intention to acquire property, accompanied by the fact of possession, as a sufficient ground of proprietary right. The title which is thus obtained, and which is called title by occupation, being based solely upon the fact of appropriation, would in strictness come into existence with the commencement of effective control, and would last only while it continued, unless the territory occupied had been so long held

that title by occupation had become merged in title by prescription. Hence occupation in its perfect form would suppose an act equivalent to a declaration that a particular territory had been seized as property, and a subsequent continuous use of it either by residence or by taking from it its natural products.

States have not however been content to assert a right of property over territory actually occupied at a given moment, and consequently to extend their dominion *pari passu* with the settlement of unappropriated lands. The earth-hunger of colonising nations has not been so readily satisfied; and it would besides be often inconvenient and sometimes fatal to the growth or perilous to the safety of a colony to confine the property of an occupying state within these narrow limits. Hence it has been common, with a view to future effective appropriation, to endeavour to obtain an exclusive right to territory by acts which indicate intention and show momentary possession, but which do not amount to continued enjoyment or control; and it has become the practice in making settlements upon continents or large islands to regard vast tracts of country in which no act of ownership has been done as attendant upon the appropriated land.*

In the early days of European exploration it was held, or at least every state maintained with respect to territories discovered by itself, that the discovery of previously unknown land conferred an absolute title to it upon the state by whose agents the discovery was made. But it has now been long settled that the bare fact of discovery is an insufficient ground of proprietary right. It is only so far useful that it gives additional value to acts in themselves doubtful or inadequate. Thus when an unoccupied country is formally annexed an inchoate title is acquired, whether it has or has not been discovered by the state annexing it; but when the formal act of taking possession is not shortly succeeded by further acts of ownership, *the claim of a discoverer to exclude other states is looked upon with more respect than that of a mere appropriator, and when discovery has been made by persons competent to act as agents of a state for the purpose of annexation, it will be presumed that they have used their powers, so that in an indirect manner discovery may be alone enough to set up an inchoate title.*

An inchoate title acts as a temporary bar to occupation by another state, but it must either be converted into a definitive title within reasonable time by *planting settlements or military posts, or it must at least be kept alive by repeated local acts, showing an intention of continual claim.* What acts

*Some writers (*e. g.*, Klüber, § 126; Ortolan, Domaine International, 45–47; Bluntschli, §§ 278, 281) refuse to acknowledge that title can be acquired without continuous occupation, but their doctrine is independent of the facts of universal practice.

are sufficient for the latter purpose, and what constitutes a reasonable time, it would be idle to attempt to determine. The effect of acts and of the lapse of time must be judged by the light of the circumstances of each case as a whole. It can only be said, in a broad way, that when territory has been duly annexed, and the fact has either been published or has been recorded by monuments or inscriptions on the spot, a good title has always been held to have been acquired as against a state making settlements within such time as, allowing for accidental circumstances or moderate negligence, might elapse before a force or a colony were sent out to some part of the land intended to be occupied; but that in the course of a few years the presumption of permanent intention afforded by such acts has died away, if they stood alone, and that more continuous acts or actual settlement by another power became a stronger root of title. On the other hand, when discovery, coupled with the public assertion of ownership, has been followed up from time to time by further exploration or by temporary lodgments in the country, the existence of a continued interest in it is evident, and the extinction of a proprietary claim may be prevented over a long space of time, unless more definite acts of appropriation by another state are effected without protest or opposition."

It will be seen that Hall strongly supports the contention of Venezuela. He holds that the inchoate title of the discoverer may be converted into a definitive title by planting settlements or military posts, and may even be kept alive by repeated local acts of less moment, but showing "an intention of continual claim"; and that vast tracts of country, in which no act of ownership has been done, may be effectively appropriated by very limited settlements. It is only where the ceremonial occupancy has "stood alone"—has not been followed by expeditions, explorations, settlements or other like acts—that it becomes unmeaning.

Discussing the inchoate title by discovery or occupation, Westlake says (Int. Law, pp. 160-161):

"The first of the questions of detail which have been alluded to is *under what conditions did discovery formerly, or does a commencement of occupation now, confer an inchoate title to territorial sovereignty—that is, the right of occupying or completing the occupation within a reasonable time, and of subjecting or expelling the settlements which other civilized powers or their subjects may have made in the interval?* The most important con-

dition is that the state claiming an inchoate title shall make known its intention of deriving the full benefit from the discovery made or occupation commenced by itself or its subjects, or at least that there shall be no reasonable doubt about the intention in the circumstances. Were this not the case, another state or its subjects might enter the country under a reasonable belief that it had not been appropriated by a foreign power, and might justifiably complain if an inchoate title claiming precedence over theirs was afterwards sprung on them. Accordingly it has always been usual for the state which intends to claim an inchoate title to make its intention known from the beginning. 'In newly discovered countries,' Lord Stowell said, 'where a title is meant to be established for the first time, some act of possession is usually done and proclaimed as a notification of the fact.' (In the Fama, 5 C. Robinson 115.) Here notification is to be understood in the general sense of making known, and not in the special sense of an express communication to other powers, in which it is used in Art. 34 of the general act of the Conference of Berlin.

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What has been deemed sufficient to make known the intention of appropriating the sovereignty has naturally varied with the circumstances of different times. It never was thought that a discovery might be kept secret and the benefit of it retained."

This writer does not attempt here to specify the particular things that a discoverer must do, for there is no fixed schedule. He must do such things as will make known his intention "of deriving the full benefit from the discovery;" such things as will be reasonable notice to other States, so that they may not enter in the reasonable belief that the lands are unappropriated. In the case in hearing no inchoate title was "sprung" upon the Dutch. They entered in disregard of Spain's well known intention to claim the full benefit of her discovery.

Surely it cannot be contended that a post or colony, established by a discoverer within a reasonable time, can have no reference to the extent of his discovery and of his ceremonial occupation; that the discoverer gets no more by his settlement than a second comer would get—only so much as he actually occupies—or as is appurtenant to it by the ordinary rules of law; that to this extent only the inchoate title is perfected,

and, as to all else, lost to any comer; that the discoverer's first actual settlement is not to be accepted as a beginning only, but a beginning and an end. Hall says: "The claim of a discoverer to exclude other States is looked upon with more respect than that of a *mere appropriator*." Or does Great Britain mean that the discoverer has a reasonable time to make a first, a second and a third settlement, and so on until he has "effectively occupied" his whole discovery?

Do the nations stand by, hour glasses in hand, timing these intervals, and ready to intervene and seize when the interval between settlements is fancied to be unreasonable? Not so. If the discovery of Guiana by the Spaniards was a good discovery—and it is not challenged--the inchoate title derived therefrom was to Guiana; and a firm settlement within that region, and within a reasonable time, or before any other nation had entered, perfected that title—not in part, but in its entirety. Spanish Santo Thome is not to be limited by the rules that apply to Dutch Essequibo. Spain was the discoverer; the Dutch "mere appropriators." What else can Hall mean when he speaks of sending a force or a colony "to some part of the land intended to be occupied"? Such an act is completely expressive of the discoverer's "intention," as Westlake says, "of deriving the full benefit from the discovery made."

Legal possession, which may form the basis of a title, may exceed the limits of actual physical occupation. The mere *act*, considered by itself, is possession only of the land physically occupied. But the occupation of part of a tract, *in the name of the whole*, constitutes an entry into and possession of the whole. The contemporaneous manifestation of intent will define the legal effect of the act.

In private law an entry, under a deed describing certain metes and bounds, upon any part of the land, is a possession of the whole, if there is then no adverse possession.

In Ellicott *v.* Pearl (10 Peters, 441-2), the Supreme Court of the United States says:

"An entry into possession of a tract of land, under a deed containing specific metes and bounds, gives a constructive possession of the whole tract, if not in any adverse possession, although there may be no fence or enclosure around the ambit of the tract, and an actual residence only on a part of it."

And again in Hunnicutt *v.* Peyton (102 U. S. Sup. Crt., 333, 368), that Court says:

"When the owner of the Basquez title entered upon the tract, took actual possession of a part by his tenant, and retained it, claiming the whole, the law gave to that owner the constructive possession of all that was not in the actual adverse possession or occupancy of another."

The entry of the discoverer upon a part, under a claim to the whole, is, upon the same principle, an occupation of the whole. His claim is to the territory discovered; and, when that territory as here has well-defined bounds, his entry is to be referred to that claim, precisely as if he had entered under a deed or patent.

That an entry upon a part for the whole is good, Great Britain asserted distinctly, as we have seen, in her controversy with the Dutch over New Netherland. The British colonies were settled under patents from the King defining vast territorial limits and Great Britain claimed that a few settlements within those limits effected a good possession of the whole.

We quote again the words of the British Ambassador:

"And as to the point of Possession, there is nothing more clear and certain than that the English did take possession of and inhabit the Lands, within the Limits of the said patents, *long before any Dutch were there.* 'Tis not to say (nor is it requisite that it should be said) that they did inhabit every Individuall Spot within the limits of them. *It is enough that their patent is the first, and that in pursuance thereof, they had taken possession, and did inhabit and dwell within the same,* and made considerable Towns, Forts and Plantations therein before the Dutch came to dwell there." (Brodhead Papers, i, 332.)

If the principle thus invoked by Great Britain be applied to the case at bar, it is difficult to see how, in view of the Spanish grant to Berrio, Great Britain can avoid admitting that Guiana was *possessed* by Spain. The evidence regarding this grant is as follows:

> "The Audiencia of the new kingdom of Granada made a contract . . . with Captain Antonio de Berrio respecting the exploration and settlement of *El Dorado* . . . They gave him the government of THOSE PROVINCES for two lives . . . His Majesty was pleased to approve, and ordered arrangement to be sanctioned in 1586; thereupon the said Berrio entered on the work and founded in . . . Trinidad the town of San Joseph de Aruna and inland that of Santo Thome. He died in 1597, and was succeeded by his son Fernando de Berrio." (V. C.-C., vol, iii, p. 5.)

This Berrio grant was prior to any Dutch grant; it was, therefore, so far as the Dutch were concerned, a "*first patent*"; it was "*in pursuance thereof*" that Berrio took "*possession and did inhabit and dwell within the same*," making "*considerable towns, forts and plantations therein before the Dutch came to dwell there.*" Does not such a grant, and do not such acts, meet the requirements of the law as stated by the British Ambassador?

It is well shown, as matter of fact, that the settlements at Trinidad and at Santo Thome had a direct reference to the occupation of the Province of Guiana. The letter of Berrio to the King of Spain, written in January, 1593 (B. C., I., p. 1), shows that the occupation of Guiana was the great object for the attainment of which he endured so many perils, privations and losses. Speaking of Trinidad, he says:

> "I saw clearly that if that island were not settled it would be impossible to settle Guayana" (*Id.*, p. 3).

And, in December, 1594, he wrote:

> "And this Island of Trinidad, which I settled three years ago for depôt and entrance to these great provinces" (*Id.*, p. 8).

In these letters we have such further expressions of his purpose as these:

"I shall attempt to penetrate into the interior of Guayana."

"I will enter immediately into Guayana: and if it is one-twentieth of what is supposed, it will be richer than Peru."

The account given by de Vera of the possession taken in April, 1593 (V. C., vol. i., p. 381), refers to Berrio as Governor and Captain-General for the King between the Amazon and the Orinoco, and of Trinidad; recites that Berrio had discovered "the noble provinces of Guiana and Dorado," and had taken "possession to govern the same;" that he (de Vera) had been sent to find out and discover the way "to enter and to people the said provinces," etc. The publicity which these proceedings were intended to have was promoted by the fact that the letter of de Vera fell into the hands of the British by capture at sea. So that Great Britain had, in 1593, the most formal and effective notice of Spain's purpose to occupy the whole of Guiana; that her entry on the Orinoco was to be referred to that intent, and that Guiana had been constituted a Spanish Province, and a Governor appointed over it.

In furtherance of this purpose to occupy Guiana, which did not originate with Berrio, Trinidad and Santo Thome were settled and fortified, and for a time a settlement was maintained at Essequibo.

Access to the interior—the Caroni and Cuyuni basins—was then believed to be only by the Orinoco, from its south bank, at some point below and near to the mouth of the Caroni.

If, then, settlements made by the discoverer of a defined territory within that territory, and having for their expressed purpose the appropriation of that territory, can in any case have that effect, we have that case here.

Our adversaries are driven to maintain the proposition that the discoverer must, within the reasonable time given for the substitution of an actual for a ceremonial possession, accomplish the

"effective occupation" of the whole region; that the settlements of the discoverer can have no larger constructive extent or effect, than those of a nation coming afterwards into the territory. Which is to say that the possession of one entering under a deed cannot be larger than that of a squatter. These propositions, we believe, have never been put forward before, and they are on their face untenable and unreasonable. It is certain that they do not square with the former practice and diplomatic pretensions of Great Britain.

Twiss (Oregon Case, pp. 164-5), quotes from a note of Messrs. Huskisson and Addington, the British Commissioners in the Oregon dispute, under date of December, 1826;

> "Upon the question how far prior discovery constitutes a legal claim to sovereignty, the law of nations is somewhat vague and undefined. It is, however, admitted by the most approved writers, that mere accidental discovery, unattended by exploration—by formally taking possession in the name of the discoverer's sovereign—by occupation and settlement more or less permanent—by purchase of the territory, or receiving the sovereignty from the natives—constitutes the lowest degree of title; and that it is only in proportion as first discovery is followed by any or all of these that such title is strengthened and confirmed."

Here the Spanish discovery of Guiana was not accidental; it was attended by extended and costly explorations, by the formal taking of possession, in the name of the discoverer's sovereign, by the formal submission of certain tribes on the Orinoco and in the interior, and by permanent occupation and settlement. These British Commissioners did not venture to suggest that the actual occupation must cover the whole region; indeed, what they say is quite to the contrary. If they had advanced such a contention to defeat the claim of the United States, they would have left no ground for the British claim to rest upon.

And Twiss himself says (Oregon Case, p. 165):

> "It thus seems to be universally acknowledged that discovery, though it gives a right of occupancy, does not found the same perfect and exclusive title which grows out of occupation, and that unless discovery be followed

within a reasonable time *by some sort of settlement*, it will be presumed either to have been originally inoperative, or to have been subsequently abandoned."

If followed by "some sort of settlement," there is no inference of abandonment. Now, much as Great Britain minimizes the Spanish settlements, she will hardly contend that they did not meet this description.

In his Law of Nations (Sec. 128), Twiss distinctly rests the title of the second comer, upon an abandonment by the discoverer, upon his implied acquiescence. He also quotes Wheaton to the same effect. He says:

"Settlement when it has supervened on discovery constitutes a perfect title, but a title by settlement, when not combined with a title by discovery, is in itself imperfect, and its immediate validity will depend on one or other condition; that the right of discovery has been waived *de jure* by non-user, or that the right of occupancy has been renounced *de facto* by the abandonment of the territory. When title by settlement is superadded to title by discovery the law of nations will acknowledge the settlers to have a perfect title, but when title by settlement is opposed to title by discovery, although no convention can be appealed to in proof of the discovery having been waived, still a tacit acquiescence on the part of the nation that asserts the discovery, during a reasonable lapse of time since the settlement has taken place, will bar its claim to disturb the settlement."

Again he says (Sec. 129):

"Title by settlement, then, as distinguished from title by discovery, when set up as a perfect title, resolves itself into title by usucaption or prescription."

This shows that any settlement by the discoverer has this special effect and significance: it refutes the implication of an intent to abandon his discovery. It does more--it is the affirmative expression of his purpose to make good his title, not to a part, but to the whole. No other can enter until the discoverer has in fact or by implication abandoned his right, and no such implication can arise after he has taken an actual possession of a part for the whole. It is most important also to notice that in the

opinion of this author the Dutch title here must be rested on prescription.

The following from a dispatch by Lord Salisbury, December 26, 1889, to the Portuguese Government (Blue Book, Africa, No. 2, 1890), recognizes the difference between a paper occupancy and one where there are acts that express the intention:

"It is not, indeed, required by international law that the whole extent of a country occupied by a civilized power should be reclaimed from barbarism at once; time is necessary for the full completion of a process which depends upon the gradual increase of wealth and population; but, on the other hand, no paper annexation of territory can pretend to any validity as a bar to the enterprise of other nations, if it has never, through vast periods of time, *been accompanied by any indication of an intention to make the occupation a reality, and has been suffered to be ineffective and unused for centuries.*"

This is to say that if Spain, by actual settlement within Guiana, made her occupation "a reality," and, by her expeditions into the country and the expulsion of others, continued to assert her purpose, her appropriation of Guiana was good. She did not loose to any comer the regions which she had not reclaimed from barbarism.

Field, in his National Code (p. 29), proposes that the right of the discoverer shall be decreed to be abandoned "if the *intent to exercise it* is not manifested within twenty-five years after discovery."

This recognizes the principle that before a second comer can have a perfect title, the right of the discoverer must be gotten out of the way, and the further principle that an abandonment cannot be inferred while he continues to manifest, by suitable acts there, the intent to appropriate the territory. A settlement or a post in any part of the land—especially when it has, or is given, a definite relation to a specific discovery—is an efficient and open manifestation of that intent.

If Great Britain might completely withdraw from the Falkland Islands, leaving them without any semblance of occupation

for over fifty years, and still maintain that she had not abandoned them, with what show of reason can she claim an abandonment of any part of Guiana, as against Spain, in the face of her actual and maintained settlements, of her constant and public assertion of her rights, of the frequent marches of her armed forces through the interior, and of the expulsion by her of intruders from time to time? No; unless it results from some inexorable rule of law, that will not take any account of these things; that will accept nothing less than the effective occupation of every part, no title can be maintained against Spain to any part of Guiana upon the theory of an abandonment.

So Grotius (War and Peace, Book 2, Ch. 4, p. 86) allows that the *intention* of the rightful owner may be manifested by "some external sign." It is the intent to abandon upon which the right of the other rests, and this is rebutted by express and visible acts showing an intent to keep. A settlement in any part of the country may be that.

That an "effective occupation" of the whole territory is not necessary to perfect the title of a discoverer (for surely the rule is not less liberal in his case) seems to be admitted by Lord Salisbury in his despatch to Sir Julian Pauncefote, of May 18, 1896. He said:

"All the great nations in both hemispheres claim and are prepared to defend their right to vast tracts of territory which they have in no sense occupied and often have not fully explored."

There may be, in some cases, a question as to the extent of the discovery; for the discovery of a locality is not necessarily a discovery of all the contiguous lands without regard to their extent; but there can be no such question here. Guiana was a unit, and the discovery included all of its boundaries.

This question is discussed by Twiss (Law of Nations, Sec. 122-3). He says:

"Prior discovery gave a right to occupy, provided that occupancy took place within a reasonable time, and was ultimately followed by permanent settlement and by cultivation of the soil."

"The question as to the extent of territory over which the discovery of a part gives rise to the right of occupancy, may receive a solution by reference to the principles of law, which decide to what extent natural possession must go in order to give a title to more than is actually inhabited. It is not necessary, in order to constitute the occupant of a thing the legal proprietor of it, that he should have natural possession of the whole of it; if he has possession of a part, which cannot be separated from the whole, he is in possession of the whole."

He next quotes from Vattel (Sec. 124):

"It may happen that a nation is contented with possessing only certain places, or appropriating to itself certain rights in a country which has not an owner, without being solicitous to take possession of the whole country. In this case, another nation may take possession of what the first has neglected; but this cannot be done without allowing all the rights acquired by the first to subsist in their full and absolute independence."

It is not a question of the right of the discoverer to possess all that he has discovered—that cannot be questioned; but of his right to extend the limits of his discovery, to go beyond to a natural boundary, or to include a place, beyond the limits of the discovery, that is necessary to the security of the discovered region.

Twiss speaks of "*the discovery of a part*," and of the lands beyond the part discovered, that may be regarded as attendant.

But in the case of Guiana the Spanish discovery embraced the whole of it. The great rivers that define its eastern and western limits—the Amazon and the Orinoco—and the Essequibo between them, had been entered and navigated, and landings made upon their banks. In the search for Eldorado Spain had sent many expeditions into the interior. It seems that as early as 1561 Aguirre, a Spanish explorer, passed by boat from the Amazon to the Orinoco, through that "double-ended stream, the Casiquiare," and down the Orinoco to the sea. The Amazon had already been followed to its mouth by other Spanish explorers, and the entire seacoast had been traced, thus completing the circumnavigation of Guiana.

These acts, we maintain, effected not only a discovery, but an appropriation of the whole province; but, if they can be treated

only as completing the discovery of the province, they at least prove discovery of the whole of Guiana; and the settlements afterwards made are to be taken as an entry upon a part for the whole. It is not, then, a question as to "the extent of territory over which the discovery of a part gives rise to the right of occupancy," for here was no discovery of a part. *No other nation has ventured to claim the discovery of any part of Guiana.* The Dutch title and the British title must be rested upon Spain's abandonment or upon a conquest and cession.

Our object here is to show that Spain's settlements and all of her acts of sovereignty had reference, not to *localities* in Guiana, but to Guiana. The world at that time was afire with the lust of gold, more than of fields. It was Guiana—not its borders, not localities—the possession of which was sought. The Eldorado, whose fabled riches drew Raleigh and other adventurers again and again to the Orinoco, was in the interior; every recorded attempt to reach it was from the Orinoco, and that entrance was promptly occupied by Spain.

Santo Thome, often attacked, sometimes destroyed, always restored and strengthened, was declared by the acts of all European navigators to be Eldorado's gateway, and its destruction a condition of every successful foray into the interior.

Can there be found, in this shortly told story of Spain's relations to Guiana, anything that can be made the basis of an inference that she intended to or had abandoned any part of the province? On the other hand, did not these facts make it plain to every other European nation that any settlement by any of them in Guiana would be an invasion of Spanish territory? In fact all the expeditions of other nations that went there went in contemplation of an armed conflict with the Spanish forces. Spain complied with the conditions named by Westlake (*ante*, pp. 204-5); made known her "intention of deriving the full benefit" of her discovery. The Dutch did not enter "under a reasonable belief that

it (the province of Guiana) had not been appropriated by a foreign power." Spain's title was not "sprung" on them.

Having now considered the rules relating to title by discovery, and the perfecting of that title by an actual occupancy, let us next see how the rule as to occupation has been applied by the Great Powers; what they have regarded as a sufficient occupation of new countries, and the constructive reach they have given to their settlements. This subject is discussed by Chief Justice Marshall in the extracts we have given, but some further illustrations may be useful.

We affirm that no one of the great nations that participated in the settlement of America ever allowed, as applicable to its own discoveries and settlements, the limitations which Great Britain seeks to apply to the Spanish settlements in Guiana.

Edmund Burke, speaking of the European settlements in America, in 1757, said:

> "We derive our rights in America from the discovery of Sebastian Cabot, who first made the Northern Continent in 1497. The fact is sufficiently certain to establish a right to our settlements in North America." (Winsor, Nar. and Crit. Hist, vol. iii, p. 1.)

But Great Britain effected no permanent settlement within the limits of the discovery until 1607, when the colony at Jamestown was founded—followed by Plymouth in 1620. More than a full century elapsed after discovery before Great Britain effected her first permanent settlement in North America.

These English settlements were, for a long time, mere spots on the coast, many hundred miles apart, and reaching only a few miles into the interior. And two centuries later, down to the era (say 1850-60) when transcontinental roads and railways became near certainties, the explorer might journey for a thousand or fifteen hundred miles west of the Mississippi and in the corresponding portion of Canada without encountering traces of civilized man, and in constant peril from unsubjected savages. Down to the period of the discovery of gold (1848), the Pacific coast,

north of what is now San Francisco, for some thousand miles had no white inhabitants save two or three small settlements, as at the mouth of the Columbia, and in the Vancouver region, with one or two Russian posts farther north.

In 1845 an Englishman could have entered from Canada and gone to Mexico without encountering a single white man, unless it might be the Mormons at Salt Lake City. A Russian could, in the same way, have traversed British Columbia from Alaska to Winnipeg.

In 1870 the vast continent of Australia, which the English had held or claimed to have held for one hundred years, had never been traversed from east to west; only one or two attempts at exploration had reached over a hundred miles from salt water; even its coasts, except in one or two stretches, were virtually unknown and unvisited. Leaving the coast settlements, the explorer could go fifteen hundred miles in almost any direction towards the interior without touching ground previously trod by a white man, and if he could reach the northern or western seacoast he would, in most parts, find no white man nearer than those whom he had left. The area of the continent of Australia is 3,000,000 square miles, about eight times that of Venezuela.

"Western Australia" has an area of 975,000 square miles (two and a half times that of Venezuela), but in 1892 its population was only 60,000. The newspapers of a very recent date contain a report of an address delivered by M. de Rougemont before the Anthropological section of the British Association, in London, in which he gives an account of his long residence among the Indians of the Cambridge Gulf region of Australia. He found there a vast region into which no trace of British occupation or influence had penetrated.

Yet no one supposes that these uninhabited stretches constitute *terra nullius*, or unpossessed land, open to be acquired by whatever nation might choose to go there. For they formed part of a territory which, as a whole, the dominant nation possessed.

The whole Oregon dispute, from 1817 onwards, was based by both sides upon the proposition that all the northwest belonged to England or to the United States, save only the seacoast strip which Russia held; and they consecrated this idea by the boundary treaty of 1846.

This division of 1846 rested on the rights of 1817 or earlier; yet even in 1846 the entire partitioned region was less marked by the white man's presence and the white man's power than Guiana had been marked by Spain in 1620.

The English view about effectivity of occupation is also specifically illustrated in New Zealand. The area of the two islands is a trifle over 100,000 square miles, that is, almost exactly the same as that of the Kingdom of Italy, including Sicily. In 1843 its European population was 13,000, collected in a few centres (Stanford, p. 578). But England has always insisted that it had a title to the two islands by "occupation"; and it took this ground during the first year of actual occupation.

But we have specific instances of the recognition by England and Holland, in dealing with America between 1580 and 1680, that a new country held as a whole is, in law, deemed to be "occupied" in all its parts, though its actual settlements are few and far apart. The value of such a recognition by our two opponents, for that country and at that time, is obvious.

Raleigh's charter was dated March 25, 1584, and confirmed by Parliament, with some modifications, in December, 1584 (Maine Hist. Soc. Coll., N. S., ii, 172; Jeze, p. 126, note). It named no *locus*, but purported, in the language almost invariably used for two hundred years and substantially copied from the Bull of 1494, to authorize him to plant colonies upon "such remote, heathen and barbarous lands, not actually possessed by any Christian prince nor inhabited by Christian people," as he might discover. But what is the limit of the "possession" secured by settlement? The patent proceeds to express English official views in the same way that the Gilbert patent of 1578 had expressed them. It

authorizes him, in language repeated from Gilbert's patent, to "repel" all persons who come to inhabit within *two hundred leagues* of the places where he or his colonists should make their dwelling, and gives him "jurisdiction" within those limits.

These two charters were given by Queen Elizabeth; the one two years before and the other four years after the announcement by her of Great Britain's position, as given in the British Counter-Case (p. 44).

Such was England's view of the "scope" of a settlement and the title it would confer. Now from Santo Thome to the Essequibo was about one hundred leagues; that is, *half the distance named in the English charters;* and other Spanish occupation soon much diminished that distance.

On April 10, 1606, on the petition of Hukluyt, James I. granted to new companies, successors of Raleigh's original, the territory from 34° to 45° latitude; that is, from Cape Fear, at the southern boundary of North Carolina, to New Brunswick;—from 34° to 40° to the "London" or Virginia Co., and from 40° northward to the *northern*, then or afterwards the "New England Co.," established at Plymouth, New England (Palfrey *Hist. N. E.*, i, 190, *note*). These grants covered, say 760 miles in latitude, and over 1,100 on the coast (Winsor, iii, 127). But the only settlements to hold it were those on or close to the James.

If this goes beyond the just limits of the law of that period, it is not for Great Britain to say so. Her views of international law ought not to be wholly governed by her interests. It certainly goes far beyond any claim that can arise in reference to Guiana. For it is one thing to hold a width of 760 miles by one group of settlements at its middle point, with no other settlements by the claiming nation on the whole continent—which is the case of the King James and Hakluyt charters—and it is quite another thing to assert against Spain, possessing and holding virtually the whole northern part of South America, that a corner piece, itself containing settlements and frequently overrun by its

expeditions, was *terra nullius.* It should also be kept in mind that when the Dutch settled at the Essequibo, Portugal was under the Spanish crown, and the Portuguese settlements on the Amazon are therefore to be accounted at that time as Spanish settlements.

When we read these three English charters we must agree that the Spanish claim for Guiana *falls far within the doctrine of the period as asserted and put in practice by England.*

It is true that it might be physically possible for another nation to settle on a part of one of these large tracts and maintain its possession for a long term of years; and in such a case it would get a title. But it would be by prescription, in derogation of the first, and adverse to it; it would not be an *occupation* as of *terra nullius.*

Between 1626 and 1670 the question of the limits of attributive legal possession and right beyond an actual settlement arose between England and Holland, the latter claiming on behalf of the very Dutch West India Company which made the Guiana settlements.

Here, therefore, we have our two consecutive opposing interests declaring the law of the period upon the questions we have to consider; and while they differed as to the application of the rules and neither was always consistent, yet they agreed that a settlement, small in actual extent, would constitute *occupation* of a large region if *it had no previous occupant*, actual or constructive; that is, if it were *terra nullius.* The documents we shall refer to are printed in "*Documents relating to the Colonial History of the State of New York,*" vols. i, ii, published by the State, and edited by Mr. Brodhead. Some of the papers are also in *Aitzema.*

England claimed title from Carolina to the extreme north by virtue of the discoveries of Cabot.

Virginia claimed, under the first English charter, of 1584, two hundred leagues north from the James River settlement in Virginia, and under the second charter as far as Halifax.

Now the mouth of the Hudson River (New York) is a little less than one hundred leagues (three hundred miles) from the Virginia settlement.

In 1620-21 England had established Plymouth Colony on Massachusetts Bay, a trifle under two hundred miles from New York, in a direct line, and about three hundred by water along the coast. The Royal Grant of Nov. 3, 1620, to *The Council for New England*, was from 40° to 48° latitude, and from the Atlantic to the Pacific; the colony at Plymouth, Mass., got its territorial rights by a subgrant under this (June 1/11, 1621), approved by the King (Palfrey, *Hist. New Eng.*, i, 190-4; Winsor, iii, 275, 295), as did also the colony of Massachusetts Bay on March 19, 1628 (Palfrey, i, 288, 290; Winsor, iii, 309-10).

Hendrick Hudson, in 1609, was the first white man to enter New York Harbor and the Hudson. After some inconsiderable efforts the Dutch West India Company settled "New Netherland," now New York. Their main settlement was where New York City now is, but after a time they built small forts as far east as the Connecticut River, "took possession" of Long Island and established some villages at its western end (Brodhead, Docs., vol. ii, pp. 133 *et seq.*).

The English antagonized them from the outset. Before 1620 they had warned off the few Dutch at Manhattan (Palfrey, *Hist. New Eng.*, i, 236); and in 1622 the English Government addressed a formal remonstrance to the States General "against intrusions in New England" (*ib.*, 237). In 1627 the Plymouth Governor warned the Dutch that the Plymouth territory reached to 40° latitude (a few miles north of the southern boundary of Pennsylvania and about one hundred and fifty miles south of New York), and forbade them to intrude upon it. The English also, but after the Dutch had actually made their permanent settlement, approached it as far as Providence and New Haven, the latter seventy miles from New York (*ib.*, 236). They took possession of Long Island, tore down the Dutch Company's coat-of-arms from their posses-

sion posts, and set a fool's head in their place, and founded two villages at the east end of Long Island (Brodhead, Docs., vol. ii, p. 135).

Each of the contending parties claimed priority of discovery for its nation; but *each also claimed that its settlement gave it, in law, the possession and the title to all the unsettled land between the actual towns of Plymouth, New York and Jamestown.*

The discussion just referred to was terminated by what was called the "Treaty of 1650," that is, a local agreement forced upon the Dutch by the strength of the New England colonies. This agreement secured to the English a peaceful occupation *east* of the Connecticut, though it did not formally recognize their title. (*See* Brodhead, Docs., vol. i, pp. 459, 541, 567, 611).

In 1660 the discussion between the two governments became acrimonious; the principal papers are in *Brodhead*, vol. ii, and *Aitzema.* The controversy was ended in the general war, when England conquered New Netherland, and the peace of Breda, which terminated it (1667), left this region in the possession of England. But the papers exchanged in the course of the discussion make it clear that both parties admitted as sound certain principles of law, among which are these:

Both parties claimed by right of discovery; the English under Cabot and the Dutch as originally subjects of the King of Spain, and as holding the right of Spain by the cession contained in the peace of Munster (1648). Neither of these discoveries was followed by any occupation north of Florida or Virginia until 1600; that is, for more than a hundred years.

Each also relied on *occupation*, after 1600; and they referred both to *occupatio* or primitive occupation of a *terra nullius*, and long continued occupation constituting title by prescription. They both asserted or admitted that one or a very few actual settlements would or might constitute, in law, a possession or occupation, perfecting title to a large region of *terra nullius*. This, they conceived, did not apply to the case of a nation which was

the *second* to make its entry on lands which the rule had already placed in such constructive possession of another; such second entry was in the nature of a dispossession; and it extended in law no further than it did in fact. When, in the course of discussion, the shoe pinched a little on the one party or the other, neither was very consistent; but the papers show that each side appreciated the *law* to be as we have stated it.

On November 5, 1660, the Dutch West India Company sent to the States General a long account of the controversy, as a basis for complaints about the English usurpations.

New Netherland originally, they say, began at latitude 38°—which is in Virginia, south of Washington, and half way between that city and James River, the seat of Raleigh's colony. Its true northern limit, they allege, included Cape Cod; that is, it reached to Massachusetts Bay, which they had entered and explored. The paper, in Brodhead, Docs., vol. ii, pp. 133–134, says:

"This province of New Netherland was then immediately occupied and taken possession of by the said Company, *according as circumstances permitted, as is the case in all new undertakings.** For which purpose they caused to be built there, since the year 1623, four forts, to wit: two on the North river, namely, Amsterdam and Orange; one on the South river, called Nassaw, and the last on the Fresh [Connecticut] river, called the Hope. From the beginning a garrison has been always stationed and maintained in all these forts.

The Company had created these forts both Southward and Northward, not only with a view to close and appropriate the aforesaid rivers, but likewise as far as title by occupation tends, the lands around them and within their borders (being then about sixty leagues along the coast), and *on the other side of the rivers*, to possess, to declare as their own and to preserve against all foreign or domestic nations, who would endeavor to usurp the same, contrary to the Companys will and pleasure."

They intended, they say, to build forts behind Cape Cod, but their circumstances did not permit of this, and they never did it.

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*The phrase is a happy one to express the requirements of the law; and therefore when Spain, beginning with true discovery, and ending with making the country Spanish, progressed with a vigor which has astonished the world, it complied with the strictest rules of the law. The Dutch intruded in Guayana and acquired a title; but conquest, cession, or prescription supports this, not *occupatio*.

The New England English have usurped upon them, claiming under a patent from Charles I.; but this they assert cannot displace the earlier title of the Dutch. Elsewhere the Dutch Co. mentions 41½° as their limit.

Such an extent of right from a single settlement was evidently then a familiar if not an accepted doctrine; but a prior *occupatio* based on the James River settlement was impliedly admitted to be extensive enough in law to restrict the later New Netherland claim.

But even in that view the Dutch say that they had a better title; for they came to America while "subjects of the King of Spain, first finder and founder of this new American world, who by the conclusion of the peace" (Munster, 1648) made over to them his title. But this argument, which extended Spain's right by discovery to the whole of the new world, they admit to be "rather forced," and is, they say, unnecessary, for they have a title of their own as "first discoverers and possessors."

January 21, 1664 (*ib.*, p. 226), they ask the States General to fix the limits of New Netherland "along the coast from 37½ degrees unto 41½, and, furthermore, landward as far as men can travel." Latitude 37½ degrees marks, virtually, the actual Virginia settlement; 41½ degrees means Plymouth, that is, their view is that the first *occupatio* (which was what they claimed) is displaced by the second comer only so far as the latter physically extends, which is good law.

Sir George Downing, British Ambassador, sent a memorial in reply. In answer the States General, on February 9, 1665, transmitted these comments, addressed to them by their Committee on Relations with England (*ib.*, p. 325):

"The English have no other title to the possession of what they hold; namely, New Belgium, than those of this nation have to New Netherland; to wit, the right of occupation; because all those countries being desert, uninhabited and waste, as if belonging to nobody, became the property of those who have been the first occupants of them. 'Tis thus the English

have occupied, and this is the title by which they possess New England, as those of this nation, New Netherland. The right which the English found on the letters patent, wherein their king grants such a vast extent to the limits of the English so as to include also all the possessions of this nation, is as ridiculous as if your High Mightinesses bethought yourselves of including all New England in the patent you would grant to the West India Company. Therefore, a continued possession for such a long series of years must confer on this nation a title which cannot be questioned with any appearance of reason."

The reply of the British Ambassador, April 7, 1665 (*ib.*, p. 332), has been used in another connection (*ante*, p. 193). He asserted that the English had entered under patents, and that their settlements were to be taken as a possession of all lands within the bounds described in the patents; that it was not necessary that every part should be effectively occupied.

The States General rejoined (*ib.*, p. 379):

The patent of the King of England cannot "prejudice the rights of the subjects of other Kings and States;" neither does the patent prove possession.

The States General next turn to the question we have before us. They first quote (*ib.*, p. 380) from the British Ambassador's paper:

"'But,' he says: ''tis not requisite that men should inhabit every individual spot; it is enough that they had taken possession of a part within the limits of their Patent, and so acquire the remainder mentioned in their Patent.' This would well apply to any places which are not taken possession of, and *not embraced within those parts that are possessed;* * but inasmuch as another has full fifty years' adverse possession, it does not enter into consideration, except to gloze over such violent usurpations as are here perpetrated; it being notorious that a thing can be possessed by only one. We shall willingly concede to the Ambassador, if the English in Ceylon or other Dutch Colonies, possessed a country as the Dutch have in

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* *I. e.*, the rule of extended possession of a *universitas* applies to regions where there is no previous possession in law by another. But when it encounters previous possession by another it must yield; and it must do this equally whether that previous possession be by actual physical occupation, or be merely legal possession by the rule of extension from a settlement.

the Northern part of America, that the sole right which is here claimed, should belong to them.'

That Great Britain gave her full consent to the doctrine that a possession of a part, in the name of the whole, effected a good occupation of the whole, and herself sought to apply the doctrine to Guiana itself, appears from this incident: In 1608 Harcourt visited the coast of Guiana and attempted to seize it for his sovereign. This is his account of the method used:

"I took possession of the Land, by Turfe and Twigge, in behalfe of our Sovereigne Lord King James; I took the said possession of *a part, in name of the whole* Continent of Guiana, lying betwixt the rivers of Amazones, and Orenoque, not beeing actually possessed, and inhabited by any other Christian Prince or State; wherewith the Indians seemed to be well content and pleased" (V. C-C., vol. ii, p. 55).

Upon the strength of this, the King (James I.), granted to Harcourt a charter, but, manifestly recognizing at the time that the territory west of the Essequibo was Spanish, he limited the grant to the territory between the Amazon and the Essequibo.

It appears also, from the later history of this incident, that the claim which Great Britain is now, as the successor of the Dutch, setting forward—that in the early years of the 17th century the coast of Guiana was *terra nullius* and not Spanish—Great Britain at that time did not maintain in behalf of her own subjects, who had attempted settlements on that coast.

Upon a protest from the Spanish ambassador, based upon the ground that Spain had before appropriated the region to which the Harcourt grant related, proceedings under it were suspended. Later (1623–25) a communication was addressed to the King on behalf of these patentees, setting forth reasons for maintaining the rights of England, in which it was said:

"Your Majesty's subjects many yeares since found that countrie free from any Christian Prince or State or the subjects of any of them." "Your Majesty's subjects with the faire leave and good liking of the native inhabitants have theis 13 or 14 yeares continuallie remayned in the said River [the Amazon] and also in the River of Wiapoco, being upon the

same Coaste." "Your Matie hath bine pleased to graunte severall Commissions for these parts, and (wth good advice of your Councell) hath granted two severall letters Pattents the one in the 11th of your Raigne of England, the other, the 17th." "The Count of Gondomer [the Spanish Ambassador] did bouldlie and most confidentlie affirme that his Master had the actuall and present possession of theis parts: whereupon he obtained of your Matie a suspence and stay of all our proceedings for a tyme. About two yeares and a halfe afterward the said Embassadour caused about 300 men to be sent into the River of Amazones, then to beginn the foresaid possession and to destroy the English and Dutch there abideinge" (V. C-C., vol. ii, p. 55).

In 1626 Harcourt, in a new edition of his "Relations" gives this account of the incident (p. 7):

"And here I think it fit to give notice of the dealing of a *Spanish Ambassadour* (whilst he resided in *England*) against these men [the English colonists in Guiana], after he had procured them to bee altogether abandoned by their owne Country, by his false suggessions, and violent importunity."

These historical incidents illustrate the stretch that was given, both by Great Britain and the Netherlands, to the constructive possession attributable to a small actual occupation when the New World was being settled. No one of the great powers is more distinctly committed to the doctrine that vast stretches of unoccupied territory may be rightfully claimed by constructive occupation, as appurtenant to small settlements, than Great Britain. Nor has she ever failed, when the facts offered any justification for it, to put forward a title by discovery. In the present case she insists upon a very strict rule as to Spanish settlements, but she saves her record, in part, by demanding for herself the broad effect she has been wont to give to her own settlements.

Perhaps we should say a word here about the reasonable period, though we hold that if the discoverer is the first to make an actual settlement the question cannot be raised.

As we have suggested already, the thing to be done by the discoverer must be defined before we can say what time should be allotted for the doing of it. Is the thing to be done by the dis-

coverer, in order to perfect his title to the whole region discovered, the sending of "a force or a colony to some part of the land intended to be occupied"—the entry upon a part for the whole—(as Hall says); or is it the bringing into use, by the discoverer, of the resources of the whole territory and the subjecting of all its savage inhabitants to his jurisdiction and control, as Great Britain now contends. If the rule is as first stated, and 1500 is taken as the date of the discovery of Guiana, Spain sent out a force to that region as early as 1530, and in 1591 established a permanent settlement.

This was a very much earlier actual occupation after discovery than that made by Great Britain in North America—the timeliness and effectiveness of which she has asserted and maintained.

But if the discoverer cannot enter upon a part for the whole, but must appropriate the resources and subject the inhabitants of the whole region in order to perfect his title, the reasonable time during which no other nation can intrude must be greatly extended. And, in view of the slow development of the British colonies in North America, it can hardly be contended here that Spain should have appropriated the resources of the whole of Guiana and subdued all of its savage tribes before 1613, which is the date assigned by Great Britain to the first appearance of the Dutch in Guiana. Such a demand would be preposterous. The colonization of America did not proceed on such a schedule.

Is it to be claimed here that Spain lost Guiana because within *twenty years* after her first permanent settlement—if Santo Thome is to be taken as the first—she had not used the resources of the entire region, and subdued all of its savage tribes? Santo Thome, settled in 1591, was a timely first settlement; and can the entry of the Dutch in 1613 be defended upon the ground that Spain had forfeited her inchoate title, because she had not, within twenty years, so ex-

tended her settlements as to effectively occupy the whole of Guiana? Upon any conceivable estimate of the "reasonable period," the Dutch entry into Guiana was premature and wrongful.

As we have seen, the British Case concedes that all of the conditions and circumstances affecting the territory and the discoverer are to be allowed for in determining whether he has been reasonably diligent.

Of some only of these retarding conditions we shall speak briefly. In the aggregate they were so great that, but for the stimulus received from the belief that fabulous stores of gold were to be found, they would have further delayed the settlement of the New World for at least a century. The seas were uncharted; no coast lights gave friendly warning. The ships were, at the first, so frail that one like them could not now find a crew, even for a coast voyage, without a convoy. A voyage from Cadiz to Santo Thome occupied from two to three or more months, and one hundred tons was a large cargo.* All of these wild lands were peopled by wilder men. Every tree and jungle was a citadel of fear. The painted brave, the poisoned arrow, the scalping knife, the fire—for the torture or for the feast—and the burning home, were waiting in fact, or in the fears of those who were sought as colonists. In Guiana a Spanish force of 470 men was repulsed by the Indians with a loss of 350. In St. Lucia a British colony was utterly destroyed by the Caribs. In all the American settlements the colonists carried their rifles to the

* "The course from here (Holland), thither and back, is very much easier than from Spain, for it takes our ships usually six weeks or two months to sail from here thither." (See U. S. Com. Rep., vol. ii, p. 81.) Cabeliau set sail from Trinidad "for this country" (Holland) on October 13, 1598, reached Plymouth, England, Dec. 11, and Middelburg, in Zeeland, Dec. 28, 1598; the voyage thus taking about 11 weeks. On the way they spoke, in the West Indies, an English galley of 25 tons. Cabeliau's vessels were the *Zeeridder*, 160 tons, and *Jonas*, 120 tons. (B. C. I, p. 18.)

Considerable delay was usually experienced in getting from the Orinoco's mouth up to Santo Thomé. Cabeliau spent 20 days in ascending the Orinoco to Santo Thomé—about forty (Dutch) miles, with a *ship* of "about 72 tons," a yacht "of about 18 tons," and another yacht; altogether carrying "about 80 persons." (B. C. I, p. 20.)

fields and to the meeting house. The forests of Guiana were dark and limitless, and the making of fields was a work that bowed the backs of many generations of pioneers, even in the northern colonies. In the tropics the woods had no paths, save the streams, and even these had sometimes to be cleared with the axe for the passage of a canoe. The interlacing and matted vines stopped the feet as effectually as a stone wall. The wild vegetation speedily recovered the possession of which the settler had by vast labor robbed it - if he at all relaxed his vigilance. To cut a path through the forests was, as Courthial said, a work for a colony, not for a man. Piracy, attracted by the gold that Spain was taking from her colonies, threatened all of her ships and all of her settlements. The Dutch West India Company counted these captures as its richest perquisite. Raleigh apparently thought himself entitled to divide this source of wealth with the Dutch. In 1614 the Dutch with the Caribs invested Trinidad (B. C., p. 22). In 1618 Raleigh destroyed Santo Thome (B. C., p. 49). In 1629 the English and the Dutch made a combined attack on Santo Thome (B. C. I, p. 70). In 1637 the Dutch and the Caribs captured, burned and plundered Santo Thome (B. C. I, p. 88).

These acts delayed Spanish settlement, and it would seem to be contrary to familiar rules of law that the Dutch and British, who so much contributed to the delay, should acquire an advantage from their own wrongs.

About the year 1748 a diplomatic controversy between England and France, as to the ownership of St. Lucia Island, was referred to commissioners for adjustment. The English had settled there in 1639, but were driven out the following year by the Caribs, many of the settlers being killed. The French seized the island in 1650, upon the claim that Great Britain had abandoned it. Phillimore (vol. i, p. 368), says,

"the English negotiators contended that their dereliction had been the result of violence * * * and that it was not competent for France to

profit by this act of violenceand surreptitiously obtain the territory of another state."

Well, was not Spain's colonization of Guiana also retarded by these Caribs—set on often by the secret machinations of the Dutch, and by Dutch attacks upon the Spanish posts, and by the piratical raids of Raleigh? Was not Spain's dereliction the result of violence? And have we not here an attempt to profit by this violence, and to "surreptitiously obtain the territory of another state"? Can the Dutch, keeping themselves under cover, send the Caribs to destroy a Spanish mission, and then base a claim to the territory upon the failure of Spain to re-establish it promptly? England's settlements on the New England coasts grew, not out of the attractiveness of that region, but out of the unattractiveness of England to men who valued religious liberty more than personal comfort and riches. Men were punished for crimes by deportation to the colonies. The slave trade was put under requisition for laborers that Europe could not supply. This was especially true of the tropics, where white men could not do the work of the fields. The Dutch Guiana colonies depended absolutely upon their slaves to work their plantations, so much so that the slaves far outnumbered the colonists and, though unarmed, were a constant menace to the peace and safety of the settlements. So inexorable was the demand for slaves that the Dutch stimulated the Caribs to make war upon the interior tribes, that the captives taken might be enslaved. Europe was not wanting "lands for the landless." England had appropriated an extent of territory so great that free lands of the best quality were offered, three hundred and seventy-five years after Cabot's discovery, both in the United States and Canada, to all who would settle upon them. Bureaus were established and agents sent to Europe to seek for emigrants, and the supply of free lands has not yet been fully exhausted. No other nation was hindered or kept out of the present use of lands that it was then waiting to cultivate. So far as there were contentions, they were for power, for points of future advantage, for gold--

not for settlement. The Dutch were not kept by Spain out of a territory they were ready to settle. The small region they had seized as an act of war, on the coast of Guiana, was in excess of their ability to settle, and so remained up to the cession to Great Britain, two hundred and one years after the date of the first Dutch settlement, as fixed by the British Case.

It is to this period and to these conditions that the doctrine of a "reasonable time" is to be applied; and in the further light of the practical definition given by the other great nations in those parts of America claimed by them.

Before concluding this discussion, we think it well to say that it is the law and the international usage of the 16th and 17th centuries, and not the stricter modern view of occupation, expressed in the Berlin Convention of 1884, that must govern in this case.

This is admitted in the British Case (p. 154) to be the rule as applied to the reasonable period given for actual settlement, and by the same reason it must be the rule as to the character of the settlement required, and the constructive extent given to such settlements.

Ch. Soloman, in his "Occupation of territories without an owner," takes the view that the occupations effected in former times cannot be considered by the standard of principles admitted in Berlin, but according to the principles ruling at the time. As an example, the author presents the case of the Caroline Islands, and asserts that the question was settled with as much wisdom as impartiality by the Pope. Germany alleged the existence on the islands of commercial establishments of her subjects; the steps taken by the founders of such establishments to induce the German Government to establish a protectorate over the island; the absence of sovereignty of Spain, who did not have even subjects engaged in commerce in that region; the want of indications to the powers that there was a nation exercising right of sovereignty over the territory, and the participation of Spain in the Berlin Congress. The exceptions taken by Germany and Great Britain in 1875 were

also alleged respecting the case of a consul having claimed as Spanish subjects some natives of the Caroline Islands, saved by an English vessel from a shipwreck, an exception over which Spain remained silent, as though she did not pretend to rights of sovereignty over those islands.

Spain alleged that effective occupation was not applicable to the island of Tap; first, on account of its geographical position; second, because it was not an object of new occupation. There had been a prior occupation; Spanish officers were on land engaged in building a small fort when the German officers arrived; the Spanish flag had floated over the Caroline Islands since 1526. From that time forward and in the 16th, 17th and 18th centuries, Spain had sent to those islands a great number of military expeditions and many religious missions, and had made repeated attempts at colonization. In 1731 the Philippine missionaries succeeded in reaching the archipelago. Spain had the monopoly of missions, the diffusion of religion, and of the planting of civilization in those remote islands. In 1885 the frigate *Velasco* visited the island of Tap, and the Minister for the islands informed the Senate that it was the intention to renew those visits, and that the manifestation of sovereignty seemed expedient; that the natives knew the name of His Majesty Alfonso XII., and knew also that they were under Spanish control.

Appointed as a mediator, the Pope recognized the sovereignty of Spain over the Caroline and Palaos Islands, based on the fact of discovery, and the acts performed there by the Spanish Government, though these acts did not give it the character of effective occupation.

In 1843 Mr. Upshar, Secretary of State of the United States, in a letter of instructions to Mr. Everett, our Minister to Great Britain, said. (Wharton, Int. Law, i, 5):

"How far the mere discovery of a territory which is either unsettled, or settled only by savages, 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."

But, if it is still said that the whole of Guiana cannot be claimed by Spain under her title as a discoverer, notwithstanding the law of that time and the practice of the nations in the settlement of America, surely the limited claim here involved cannot be denied.

In the Case of Venezuela (vol. i, pp. 231, 233; paragraphs 9, 17) there are described as having the characteristics of geographical units, certain regions less than the whole of Guiana, to which it is claimed the occupation of Spain, at the least, extended. The British Counter-Case denies that either of these regions was a geographical unit, and denies a Spanish actual or attributive occupation, with this reservation as to the region described in paragraph 9: "and except so far as Mission stations constituted occupation, it is not true that Spain occupied any part of such region." (B. C.-C., pp. 139-140; paragraphs 9, 17.)

It is further said that the Dutch "occupied or controlled the rest of that region."

The Spanish missions constituted an official occupation in a most distinct sense, and looked directly to the use of the soil for crops and grazing. It is a small claim that Venezuela—the successor of the discoverer—puts forward when she suggests these limited areas as the scope of Spain's occupancy and title. If the British claim to Barima were granted, not one foot of the sea coast of Guiana would remain to the discoverer.

If Venezuela's claim is allowed to the Essequibo she will then take less than one-third of Guiana.

Before the Dutch settled in Guiana Spain had occupied the region to the north and west of the Orinoco. She had traversed the Orinoco from the sea to its head waters, and from its sources to the sea. She had settled Trinidad as a base of supplies and defense for her contemplated river settlements, and for her projected occupation of Eldorado. She had founded Santo Thome at the most available point on the east bank of the river—above the marsh lands—as a nearer base for her inland occupation. All the region to the north and west of the Orinoco River she had actually appropriated. Spain had also appropriated the Pacific coast, and her occupation there cut off the approach of other nations from that direction to the head waters of the Amazon and of the Orinoco; while her own people came from the Pacific to the Atlantic by way of those rivers. Portugal, which from 1580 to 1640 was under the crown of Spain, had occupied and appropriated the Amazon, and thus Spain held the approaches to Guiana on three sides, when the Dutch entered the Essequibo. But Spain's coast occupation was not limited to the Amazon and the Orinoco. She had occupied the Essequibo before the Dutch came.

It will hardly be denied by Great Britain that the line of the Essequibo might have been well and rightfully claimed by Spain when the Dutch entered there, if, as we claim, there had been an earlier Spanish settlement on the Essequibo, even if it was not then maintained. Spain was, in other places, and by other public and effective acts, prosecuting and proclaiming her purpose to occupy Guiana, and the withdrawal for a time of the Essequibo settlement did not work an abandonment. In view of her own contentions in the St. Lucia and Falkland Island cases, Great Britain can not be heard to say that it did. The evidence of a Spanish settlement in the Essequibo is, we think, complete.

The constructive effect which Great Britain gives to the Dutch settlement on the Essequibo certainly cannot be denied to the earlier Spanish settlement there, and, given that scope, the whole interior was in Spanish occupation.

But if there had never been a Spanish settlement on the Essequibo, the settlements at Trinidad and Santo Thome, taken in connection with the explorations and acts of dominion by Spain on the coast and in the interior, surely had a larger effect than to give to her, as the discoverer of Guiana, a mere strip on the eastern bank of the Orinoco below the Caroni, and even that strip broken on the lowest stretch of the river, so as to wrest from her the control of that great water way and isolate her settlements. It would be an unprecedented application of the rules and usages of the time to limit Spain to the Essequibo line. To give less effect than that to her discovery and occupation would be to say that discovery is so reprehensible that no large constructive extension of its bounds can be allowed; that all such beneficial constructive effects are reserved for the meritorious second comer.

We have limited our discussion under this head to the question of Spain's title by discovery, and have chiefly referred to such Spanish explorations and settlements as antedated the first Dutch settlement on the Essequibo. Our purpose has been to show that Spain's title covered that region, and that the Dutch could not enter there as upon lands *terra nullius;* that they could only displace Spain's title by conquest, by cession or by prescription. At a later period in our argument we will discuss the limitations that attach to those forms of title, and the extent of territory that must be allotted to Spain, even if her just claims as the discoverer of Guiana are ignored.

We have maintained, we think, these propositions:

FIRST.—That Spain discovered and took a good ceremonial occupation of Guiana, which was then a distinct geographical unit, a region every boundary of which could be traversed by a continuous boat journey; that the geographical separateness of the region was further emphasized by the fact that in its centre the Eldorado was, in the belief of the time, located.

SECOND.—That Spain's discovery and ceremonial occupation of Guiana were followed, within a reasonable time, by the organiza-

tion of a number of strong and costly exploring expeditions, which fought their way against the Indians into many parts of the interior, entered every important river and coasted every boundary, and that the avowed purpose of all these labors was the occupation of Guiana.

THIRD.—That before any settlement within the bounds of Guiana had been made by another nation, Spain had established permanent settlements on the Island of Trinidad and at Santo Thome, had for a time maintained a settlement on the Essequibo, and had appointed a Governor of the "Province of Guiana."

FOURTH.—That these acts and settlements were, and were publicly known to be, a part of Spain's scheme for the occupation of Guiana, and, in the belief of the time, closed the only practicable entrance to the Eldorado in the interior of that Province.

FIFTH.—That Spain's purpose to occupy and hold Guiana, and her presence there, were so well known to the Dutch and to the English, that when they came there, with any intent to enter or to occupy, it was in the expectation of an armed conflict with Spain.

SIXTH.—That when the Dutch settled on the Essequibo, they well knew that Spain claimed Guiana, and especially had not abandoned her claim to Essequibo. They were at war with Spain and seized her territory. They held Essequibo just as they would have held Trinidad and Santo Thome if they had been able to maintain themselves there.

SEVENTH.—That Spain had perfected her title to Guiana by the rules of law and the practice of the nations then prevailing, and had never abandoned any part of it. But that even if Spain's acts were inadequate to confirm her title to the whole of Guiana, they were certainly adequate to confirm her title to the territory in dispute; that the Dutch could not therefore rightfully occupy, as *terra nullius*, Essequibo or any part of the disputed territory, and that any title acquired by the Dutch there must be rested either upon conquest, cession or prescription.

EIGHTH.—That if by Spain's dereliction any part of her discovery became subject to appropriation by another nation, Spain's inchoate title was not lost until—and only so far as—that other nation first accomplished a competent, *actual* occupation.

We state here, for elaboration hereafter, these further propositions:

(A.) That as Spain was the discoverer and made the first settlements, she is entitled to claim the full benefit of every rule, giving a constructive extension to the limits of her actual occupation, before any of these rules can be invoked to aid the Dutch.

(B.) That titles by conquest, cession and prescription are not helped by the large rules of constructive occupation, but are strictly limited.

Before, however, discussing the boundary upon the theory propounded by Great Britain, namely, that Spain must be limited to her actual occupation, we desire to discuss the Dutch-British title; to show that it has its origin either in conquest, cession or prescription, and to point out the limitations of those forms of title.

CHAPTER VII.

THE CONSTITUTION OF THE DUTCH WEST INDIA COMPANY AS BEARING ON THE QUESTION OF TITLE.

Allusion has already been made to the peculiar character of the Dutch West India Company as a private trading corporation engaged in the government of a colony. In order to establish fully the character of its acts as influencing the question of title, it is necessary to examine separately the constitution of the Company, the purposes for which it was organized, and the mode in which these purposes were carried out.

The Dutch West India Company was originally chartered in 1621, at the close of the truce between Spain and the Netherlands. Its charter was renewed in 1647, a year before the war came to an end.

The Company, as stated in its original charter, was created for purposes of trade. It was considered by the States-General that the maritime and commercial enterprise of the Dutch would be wasted if left to individual enterprise. It was in order to concentrate all the efforts of such individuals and to direct them in a single channel that the West India Company was formed. So says the preamble of the charter (V. C. vol. iii, p. 1):

"And being desirous that the aforesaid inhabitants not only be maintained in their navigation, commerce and trade, but also that their commerce should increase as much as possible, especially in conformity with the Treaties, Alliances, Conventions, and Agreements formerly made concerning the commerce and navigation with other Princes, Republics and nations, which Treaties we intend shall be punctually kept and observed in all their parts:

And we, finding by experience that without the common help, aid and means of a General Company no profitable business can be carried on, protected and maintained in the parts hereafter enumerated, on account of the great risks from sea pirates, extortions and other things of the same kind, which are incurred upon such long and distant journeys:

We, therefore, being moved by many different and pregnant considerations, have, after mature deliberation of the Council and for very pressing causes, decided that the navigation, trade and commerce in the West Indies, Africa, and other countries hereafter enumerated, shall henceforth not be carried on otherwise than with the common united strength of the merchants and inhabitants of these lands, and that to this end there shall be established a General Company which, on account of our great love for the common welfare, and in order to preserve the inhabitants of these lands in full prosperity, we shall maintain and strengthen with our assistance, favour and help, as far as the present state and condition of this country will in any way allow, and which we shall furnish with a proper Charter, and endow with the privileges and exemptions hereafter enumerated, to wit:

I.

That for a period of twenty-four years no native or inhabitant of this country shall be permitted, except in the name of this United Company, either from the United Netherlands or from any place outside them, to sail upon or to trade with the coasts and lands of Africa, from the Tropic of Cancer to the Cape of Good Hope, nor with the countries of America and the West Indies, beginning from the southern extremity of Newfoundland through the Straits of Magellan, Le Maire, and other straits and channels lying thereabouts, to the Strait of Anjan, neither on the North nor on the South Sea, nor with any of the islands situated either on the one side or the other, or between them both; nor with the Australian and southern lands extending and lying between the two meridians, reaching in the east to the Cape of Good Hope, and in the west to the east end of New Guinea, inclusive."

The object of the charter was not to make that a public enterprise which had theretofore been private. The West Indian commerce of the Dutch was to be concentrated; but it was concentrated in the hands of a private corporation. Other corporations and individuals could only engage in it through and under the Company which had the monopoly.

The monopoly of trade so given to the Company did not give it any rights as against other States, or the subjects of other States, and asserted no rights on the part of the Netherlands as against other States or their subjects. The territory to which it re-

ferred included the whole of North and South America, a part of Africa, the whole of Australia and the islands of the South Sea. At the date of the charter, a large part of this territory had already been taken up by various European States; and obviously the charter never meant, nor was intended to mean, a conveyance to the West India Company of rights which had been acquired by such States, except in so far as such acquisitions might be made from the enemy of the Republic as an incident of war. To infer otherwise would be to suppose that the Dutch West India Company was a gigantic scheme of land piracy, by which a private corporation created by the Dutch Government was to rob all the other States of Europe of the soil which they had acquired and occupied. It is true that proclamations issued later forbade all the world to trade with the countries named in the charter, but these proclamations, which, according to their terms, would have prohibited England, France and Spain from visiting or trading with their own colonies, otherwise than through the Company, must be set down as mere Dutch rhodomontade. The object and purpose of the West India Company in 1621 was the development of Dutch trade with Africa, Australia and the countries of the New World. While the company was ostensibly a trading company, it was also, from the beginning, used as a part of the military organization of the Netherlands in the war with Spain.

In the sixteenth and seventeenth centuries, at any time when a war was in progress, there was no more important incident of oversea trade than privateering. Merchant ships found it necessary to go armed for defense, and being so armed they took out commissions as privateers, and used their armaments for offensive operations as well. Privateering against Spain was the real source of the great profits of the Dutch West India Company during the Thirty Years' War. According to Bancroft (V. C., vol. i, p. 75, note):

"Reprisals on Spanish commerce were the great object of the West India Company. . . . The Spanish prizes, taken by the chartered

privateers, on a single occasion in 1628, were almost eighty-fold more valuable than the whole amount of exports from New Netherlands for the four preceding years."

For the purpose of injuring Spanish commerce in the seas which it most frequented, and incidentally to enlarge the profits of privateering, the States-General, in the course of the war, relaxed its trade prohibitions as to that part of the American coast within the circuit of the West Indian Islands, including the Orinoco and the coast line extending around to Florida. These waters were known to all the world as the Spanish Main. The British Case appears to lay some stress upon these "Sailing Regulations," as they were called, as if they were in some sense the definition of a territorial frontier. Such, however, was not their character or purpose. They were simply the opening to privateering enterprise of a part of the territory in which the chartered Company had theretofore been given a trade monopoly, and their object, as stated in Article I (B. C., I, p. 73), was:

"In order to injure and offer hostility to the King of Spain, his subjects, and adherents, both on land and water."

For this purpose the Netherlands threw open to all its subjects those parts of the coast west of the Orinoco "in order there to carry on all manner of warfare by sea and by land against the King of Spain, her subjects and allies." (V. C., vol. ii, p. 20.) A share of the prizes taken in this region was, however, reserved to the West India Company. The mention of the Orinoco in these regulations only indicates that it was recognized as a centre of Spanish commerce in that region, which included also the important and neighboring ports of Carthagena, Portobello and La Guayra.

The charter was from the first essentially a war measure. Efforts had for some years been made to obtain such a concession, but the Dutch Government refused to grant any charter during the Twelve Years' Truce from 1609 to 1621, and the attempts of the Dutch to make colonies on the coast of Guiana before that

date had been individual attempts, and had been checked, as in the case of the Corentin settlement, in 1613, by repressive measures on the part of Spain. As soon as the Truce was ended, however, the charter was granted (V. C., vol. i, pp. 69, 75). It doubtless contemplated the possibility that by the success of the Dutch arms during the war a foothold might be acquired at some point in the vast territories named in the Company's charter, in America, Africa or elsewhere, by conquest from Spain, a part of which might still remain in occupation at its close and be ceded by Spain in the treaty of peace, as was actually done, on the basis of *uti possidetis.* Ordinarily, such a foothold, if preserved at all during war, is preserved by a military occupation. The charter, however, having given the Dutch Company the trade monopoly in all territories that might possibly be subject to conquest, also provided for occupation by the West India Company, which was allowed to build "fortresses and strongholds, appoint Governors, soldiers, and officers of justice, and do everything necessary for the preservation of the places and the maintenance of good order, police, and justice" (V. C., vol. iii, p. 2). These are attributes of internal sovereignty, delegated by a Government for specific purposes to a private corporation. It was also allowed, within the limits named in the charter, to make "contracts, leagues and alliances with the Princes and natives of the lands therein comprised." The only limitation upon it was that "the representatives of the Company shall successively communicate to us and hand over such contracts and alliances as they shall have made with the aforesaid Princes and natives, together with the situation of the fortresses, strongholds, and settlements taken in hand by them."

These powers were renewed in the charter of 1647, and thereby projected into the period of peace following the Thirty Years' War, and they were substantially repeated in the charter of 1674, given to the new West India Company, which only terminated in

1791, but limited in terms to the two geographical points of Essequibo and Pomeroon.

It will thus be seen that, under their charters, the West India Company held certain deputed and delegated powers over the settlements comprised in their charters and over the colonists of which these settlements were formed. It not only held these powers, but it exercised them. The authority over Essequibo and Pomeroon was thereafter entirely in the hands of the Company. The Dutch Government never interfered with it except to settle the occasional quarrels as to their respective powers between different Chambers of the Company. The States General had given powers of government to the Company, and they left them to the Company. The acts of the Company during this period, therefore, in the exercise of these powers were the acts of the Dutch Government. Its admissions and claims in reference to territorial rights were the admissions and claims of the Government. The Dutch title, whatever it may have been, could be asserted only through the Company. It was in fact asserted only by the Company, except on the three formal occasions when the Company applied to the States General to cause representations to be made to the Spanish Government by their Ambassador at Madrid, and upon all of these occasions the Company had already been acting directly by means of correspondence with the Spanish authorities on the spot.

Whatever Dutch claims, therefore, may be asserted to territory in Guiana, no such claim ever was, and cannot now be suggested apart from the Company, and the admissions of the Company are the admissions of the Netherlands themselves.

The programme outlined in the charter of the Company was substantially carried out. Dutch expeditions made incursions at various points in the Spanish territory, as on the Orinoco and in Trinidad, which, however, they did not hold. Under cover of these incursions, the Dutch established themselves at points to the eastward, including Berbice and Essequibo, in which latter river they

found the remains of a Spanish fort ready to their hand, on the island of Kykoveral.

At the close of the war, when an adjustment came to be made on the principle of present possession, the westernmost of these establishments, as is clearly shown by the evidence, was this fort in the Essequibo, marking what was still called, as late as 1814, the "Establishment" of that name. It is conclusively shown by the evidence that at this date the Dutch neither held nor possessed anything to the west of the Essequibo.

By the Treaty of Munster, therefore, the "Establishment" at Kykoveral, with all the other possessions to the eastward, was ceded to the Netherlands, and, as will presently be shown, the West India Company expressly admitted that they held these possessions under a grant of the Spanish title.

As might be expected from the circumstances leading to the creation of the Company, the necessity for its existence, at least in the form in which it had been originally constituted, ended with the close of the war. Its first charter had expired, but was renewed in 1647, the limits remaining unchanged, and it was under this charter that the colonies in Guiana were conducted from the conclusion of the Treaty of Peace. In 1674 this charter expired, and the States General resolved to create a new Company. In their resolution they stated, (B. C., I, p. 174) as to the former Company that they had "observed that the affairs of that Company had, through many disasters, fallen into such a state that shareholders in the same have suddenly become unwilling to continue the aforesaid Company."

The charter of the New Dutch West India Company of 1674 was on an entirely new basis. It expressly changed the territorial limits. It said (B. C., I, p. 174):

"None of the natives or inhabitants of this or any other country shall be permitted, other than in the name of this United Company, to sail and trade upon the coasts and lands of Africa, . . . together with the places of Isekepe [Essequibo] and Bauwmerona [Pomeroon], situated on

the continent of America, as well as the Islands of Curacao, Aruba, and Buonaire. . . . So that the further limits of the aforesaid charter shall be open to all the inhabitants of this State without distinction, to be navigated and traded in by them at their pleasure."

While the charter of 1621 took in the whole of the New World, the charter of 1674 was restricted on the mainland of South America, to two points, namely, Essequibo and Pomeroon. Beyond these two points the Company had no rights. The powers of government that were given them applied only to the management of the colony at these two points, and the separate naming of Essequibo and of Pomeroon, the latter a small stream less than forty miles away by the coast, showed that the names were used as specific designations of specific points, and could not be extended by any general interpretation to cover stretches of territory beyond the specific points so expressly named. The charter of 1674 constituted, on the part of the Dutch Government, a delimitation of the Company's frontier.

Under this charter and its renewals, always including the same specific points, and these only, the Company continued during the rest of its history. Of course, it could not take more than was granted under its charter. Nor could it extend its territories. It could not hold adversely to the government creating it, supposing the title to the adjoining lands to have been in that Government; nor could it hold adversely to Spain, if the title were Spanish except within its charter limits of Essequibo and Pomeroon. Its charter was renewed in 1700, 1730, 1760 and 1762, each time without change of limits on the west. The Company was dissolved at the close of the year 1791 (V. C., vol. i, p. 57), and its territories then reverted to the State; but whatever the State may have taken under this reversion, it could take no more than that which the charter had named, to wit, Essequibo and Pomeroon. The boundaries of this reversionary title were, at least by this time, definitely known.

Of course the Dutch Government could not take from the

Company in 1791 more than the territory to which the Company held title, and the Company could not hold title to anything beyond its grant. If the Netherlands possessed territory at the Treaty of Munster beyond that defined in the charter of 1674, they did not give such territory to the Company. They must therefore, unless they abandoned it, have held it themselves. Yet the fact is indisputable that they never held, or imagined they held any territory except that which finally came to them by the reversion. There is no pretense that they ever held a title or claimed or exercised dominion otherwise than to the territory covered by the Company's grant. The Government never did an act, made a claim, or passed a measure, from 1674 to 1791, in reference to this territory otherwise than by or through the West India Company.

Under these circumstances, how can the Netherland's grantee, under a conveyance of the "Establishment of Essequibo," assert a claim to anything beyond the limits of the charter of 1674? She cannot contend that the Company held more than its grant. She cannot contend that the Netherlands held anything, or pretended to hold anything, except their reversionary interest in the Company's territory. Whence comes this British title, spreading out over about one hundred thousand square miles of land west of the Essequibo and the Pomeroon, when Great Britain's grantors held only these two specific "establishments"?

The British Counter-Case attempts to answer by the startling proposition that the territory was *terra nullius*, not only in 1648, in 1674, and in 1814, but even at the date of the Treaty of Arbitration, and that as Great Britain has now got possession of it, in defiance of the Agreement of 1850, she takes it as first occupant, even though her possession may antedate the Treaty only by a day. It says:

"Her Majesty's Government would be entitled to retain the whole territory up to the Schomburgk line, on the simple ground that at the date of the Treaty of Arbitration they were in possession, and that the territory in

question cannot be shown to have ever belonged either to Spain or Venezuela."

The *terra nullius* theory is discussed in other parts of this Argument. Here it is only introduced to show one of the many difficulties it was intended to overcome. It makes its first appearance in the last part (p. 114) of the Counter-Case, and it may be regarded as the last resort in Great Britain's line of defense.

The British Case has, however, another answer to the question of the charter of 1674. This is apparently based on an entire misapprehension of the terms of that instrument. The Case states (pp. 28–9):

> "In 1674 a new Chartered Company was formed *with the same* rights and *limits* as those possessed by the former Dutch Company. Pomeroon and Essequibo are specifically mentioned in the grant."

The above is directly contrary to the fact, as is disclosed by the most casual perusal of the provisions of the charter. The limits were distinctly *not* the same limits. The first charter had included the whole of the New World. The second charter included nothing on the mainland of America except Essequibo and Pomeroon. These points are not named, as the British Case seems to suppose, as mere descriptive or illustrative designations of parts of a larger region, but they are named as the limits of the whole grant as to the mainland of America.

While the charters of the West India Company gave to the Company certain powers of quasi-sovereignty within the limits stated in the charter, namely, Essequibo and Pomeroon, the West India Company, mindful of its character as a private corporation and of the commercial purpose of its existence, adopted an organization entirely in accord with this character and purpose. This organization not only as to the supervisory direction of the Boards at home, but also as to the executive management of colonial affairs on the spot, remained chiefly that of a trading company. The local head at first

called "Commandeur," but later "Director-General" was in the nature of a General Manager. The local advisory body, when it came to be constituted, was a Court of Policy, and the duties of this board were what the name would imply. The functions of the General Manager and his advisory Board related almost exclusively to trade. Police powers he doubtless had and exercised in the colony itself. He took cognizance of offenses committed by the colonists. He settled their disputes, and made regulations for defense, for police, and for the general health and welfare whenever necessary. His relation to the colonists included that sort of disciplinary supervision which is necessary in a new country; but by far the largest part of his acts were, as might be expected, in furtherance of the purpose for which he as well as the Company existed, namely, the regulation and promotion of trade.

As the object of the West India Company was to make money, its interests were to a considerable extent adverse to those of the colonists. A constant struggle went on, which only terminated with the termination of the Company in 1791, for the profits of business in Essequibo. The Company engaged in agriculture to a limited extent, and as a rule rather disastrously. It had three or four plantations, on which sugar, coffee and indigo were more or less raised; but its main profit was from trade, and in order to derive a profit from that source, it was necessary to keep it in its own hands and to exclude the colonists. Wherever it saw a peculiar chance of making money out of a given trade, it reserved the trade to itself and prohibited the colonists from engaging in it. Numerous instances may be cited of such prohibitions, in fact the regulations in reference to trade were constantly changing to meet these considerations of possible profit to the Company. Thus, from time to time the colonists were excluded from the horse trade, the balsam trade, the trade in letter-wood, the Indian slave trade, the annatto trade, or the trade with the Orinoco, and only allowed to engage in it through the Company, or by paying a toll to the Company.

As all the trade of the colony except that over sea was in or across the adjoining territory of Spain which is the subject of the present controversy, these prohibitions became operative upon the movements of the colonists in that territory, and the reserved trade, whatever it might be at a given time, was conducted by the Company's agents. For a long time it employed to carry on this trade certain old negro slaves, who were familiar with the paths of the forest and with the Spanish and Indian traders who were to be found there or beyond the forest in the savannas of Yuruari and Cuyuni, near the Orinoco. Later it employed Dutchmen, more or less, in this work. These employees were of three classes, the Outliers (*Uitleggers*), Byliers (*Bijleggers*) and Outrunners (*Uitlopers*). The Outliers remained at specified points, and constituted the so-called Postholders. The Byliers were their assistants, when they had any. The Outrunners were the employees whose duties corresponded to those of the old negroes above mentioned. Except the diminutive garrison, which in 1769 comprised only 39 men, the crew of the Company's yacht, which watched the mouth of the two rivers, and the Master Planters in charge of the Company's plantations, these were all the persons in the Company's employ. They were official in the sense that they were trading employees of the Company; but they exercised no functions of government.

It has been stated that the Company from time to time reserved to itself certain branches of trade. This reservation, however, only had reference to its own colonists of Essequibo, whom it regarded, and not without reason, as its business competitors. The prohibition of trade did not apply to anybody else, because the General Manager of the colony did not pretend to have either the authority or the ability to enforce such a prohibition against anybody else. The Spaniards and the Indians were, of course, never regarded by the Commandeur or by anybody else, as being affected by such prohibitions. Neither were the other foreigners who frequently visited and traded in the territory, even as far in

the interior as the Pariacot Savanna, especially the French and the English.

In order to enforce the trade prohibitions and other regulations, it was necessary that the Commandeur should know what the colonists were about and their movements to and from the colony. In the exercise of the disciplinary authority which he had as General Manager of the settlement, the Commandeur required them, accordingly, to obtain permission to go out of the territory. This permission was evidenced by a so-called passport. They were simply permits to be absent from the colony, or to go to certain localities, and were for the purpose of enforcing the Company's regulations as to trade.

Much has been said about the establishment of the so-called "posts." Two of these posts, those at Mahaicony and at Demerara, were in the annexed district east of the Essequibo, and therefore have nothing to do with the present controversy. Another post was established for a short time in the interior, and another existed during a greater part of the Dutch period on the Pomeroon or in its immediate neighborhood, at Wakepo or Moruca. These posts were points where an Outlier or a Bylier was placed for purposes of trade and observation. They also served some purpose in connection with the apprehension of runaway slaves, which were regarded precisely, being only a form of property, as strayed animals would be regarded. The post at Pomeroon was of an exceptional character. It was not only a trading depot, but it became the Colony's custom-house, as it lay upon what they clearly regarded as the frontier. All the traffic with the Orinoco, which was extensive for those days, passed through it, and paid a duty there, in cases where duties were levied. The post in Cuyuni was of too short duration and too feebly administered to be an important feature of anything. As far as it went, however, it also was a mere trading station, and it had none of the features of a frontier custom-house which marked the post at Pomeroon.

The relations of the Colony with the Indians will be more fully treated later. They were maintained primarily for purposes of trade, especially the slave trade, which became extensive after 1785. Incidentally, they were conducted, as every colony would conduct them, so as to ward off possible attack and as far as might be to promote the safety of the settlement. With that object the colonial authorities, as in all the other colonies of America, took many precautions to regulate the conduct of the colonists so that offense should not be given to the Indians and peaceful relations thereby disturbed. This fact, which has been used in the British case as the foundation for a claim that the Indians were protected from the settlers, was merely an ordinary and obvious precaution for the protection of the colony from the Indians. It is noticeable here as being an additional reason for maintaining a close and constant supervision of the colonists outside of the limits of the Colony.

As a rule, the trade prohibitions, like all other regulations, were issued in the form of general prohibitions and are so referred to in the Dutch correspondence, and from this fact it is contended that an inference may be drawn as to a general control over trade in the disputed territory. There is nothing to justify such an inference. The colonists were not specifically named in the prohibitions because there was no need of naming them. No one, whether of the Company at home, the Colonial Government and its employees, the colonists, the Spaniards, the Indians, or the other foreigners, ever supposed that they applied to anybody but the colonists. So with all the other general regulations and prohibitions of the Company, such as those relating to passports, the movements and other acts of individuals, and the like. When the Court of Policy issued an order that no one should stop in Barima, in consequence of the scandalous conduct of Van Rosen and his companions, it meant that no one of the colonists should stop in Barima. The trade monopoly of the West India Company, therefore, which is spoken of as an exclusive right of trade,

was only exclusive of other Dutchmen. The exercise of this exclusive right was not territorial in any sense, but personal. It may be added that the charter by its very terms restricting the acts of Dutch subjects in all the territories of the new world, of whatever nation, contemplated this personal jurisdiction over Dutchmen on foreign soil.

It is a well recognized principle that the dominion of a State may extend over its subjects or citizens wherever they may be, and it was this personal jurisdiction or control that the Colonial authorities exercised over the colonists outside of the limits of the colony itself. The union in these authorities of two distinct functions, namely, the government of the colonists and the prosecution of trade in which the colonists were competitors, led to a more extensive application of the principle of personal control than is usually to be found in practice. The Company used its authority over the colonists to sustain its trade monopoly; and it is sometimes difficult to see where the trade functions and the governmental functions respectively begin and end. The point, however, is that the control was in no sense a territorial control except as exercised within the limits of the territory of the colony. Outside of these limits it operated only upon the persons of the colonists. No attempt was ever madeto exercise any supervision or control over anybody except colonists west of the falls of the Cuyuni, in the interior, and west of Moruca, on the coast

This distinction is clearly shown by the controversy which took place, between 1712 and 1718, between the free colonists and the Company with reference to the trading monopoly of the latter. In this the position of the Company was that its powers were in no way restricted by Dutch territorial limits. It contended that its trade monopoly extended to the control of its subjects in foreign territory, because such foreign territory was within the trade limits of the Company's charter, or, as it expressed it, "it is all the Company's territory, though within the power of the Spanish Crown."

By this the Company meant to say simply that, as against other Dutchmen, it had a right to monopolize trade within the territory of Spain. This is fully shown by the correspondence.

Thus, Commandeur Van der Heyden, writing in 1713 (V. C., vol. ii, p. 75) to the Company, said:

In pursuance of your order, the prohibition concerning the trading-in of red slaves, annatto dye, and balsam copaiba, issued by me on 24 July of last year, shall provisionally be left standing, and be executed until I receive counter orders: although this causes great regret among the free, who have complained about this at various times, urging that they did not claim to trade within the territory of the Company, but asked only permission to do so on Spanish territory, such as Orinoco, Trinidad, etc.; which I refused them.

And in a report of the same year he added (V. C., vol. ii, p. 76):

Upon this subject I wrote at much length to the Chamber at the time; therefore, it cannot be denied that copaiba was ere this sent from here to the Fatherland, because this trade has been permitted to be free, as it took place outside of the Company's district and was only carried on upon Spanish territory in the river Orinoco, where the inhabitants of the colonies Berbice and Surinam trade likewise; however, since the prohibition, no copaiba oil has to my knowledge been sent, and it shall remain prohibited until I receive counter orders.

The Company replied on May 14, 1714 (V. C., vol. ii, p. 76):

"We leave it still most urgently recommended to you that you strictly maintain the prohibition of trade in red slaves, annatto dye, and balsam copaiba; for the Company desires as heretofore to keep that trade exclusively for itself, in order thereby in a measure to provide for the costs and heavy expense of keeping up that colony, and we can therefore give no heed to the complaints of the inhabitants.

"And, as for their protestations that they are not going to trade within the territory of the Company, that is absurd indeed; for, although Orinoco, Trinidad, etc., is [*sic*] under the power of the Spaniards, still it also lies within the charter of the Company, where nobody has the right to trade except the Company and those to whom the Company gives permission to do so; so that it all is the territory of the Company, even though we have no forts there. And it is an untruth that an enactment was ever published making that trade free; but the contrary is clearly enough to be seen in the resolution of the Board of Ten. This has there-

fore crept in there only through neglect; for which reason you are instructed, as above stated, to see closely to it that the Company suffer no injury herein."

On May 24, 1717, the ably-written "Memorial of the Free Settlers of the Colony of Essequibo to the Directors of the West India Company" was drawn up, showing clearly the injury that the Company was doing by prohibiting their trade in Spanish territory. The Memorial said (V. C., vol. ii, pp. 77–78):

"It is now nearly five years since we have been prohibited by the Heer Commander Pieter van der Heijden, acting under the orders of Y. N. from trading, as well within as without this Colony in Red Indian slaves, balsam, &c.; through which prohibition we find ourselves deprived not only of the advantages the said business, however small, would have been able to bring to us, but further must see the profits, which were to be expected therefrom, accrue before our eyes to our neighbours, to wit, the colonists of Surinam and Berbice, and seeing that it has pleased Y. N. to make a prohibition of such a character to take effect, we trusted that it, through the serious recommendation of our aforesaid Heer Commandeur would have been suspended, so we take liberty, Y. N., simply and directly to show how little advantage it is for the Noble Company that the aforesaid prohibition continues to remain, how much prejudice we suffer therefrom, and how it favours the inhabitants of Surinam and Berbice, and also encourages them to push on the business more and more to their profit.

"Your Noblenesses are well aware that it is permitted to those of the said colonies to traffic in everything they can get, nothing else is left for us than the bartering for Indian vessels, canoes and corials, and occasionally some hammocks or cacao from the Spaniards in Orinoco; so that we are restricted in a river, which is outside of the territory of the Noble Company, where the same has no more power than a private merchant, which is in the Spanish possession, and where the commonest person of our neighbours is allowed to carry on trade in anything that he pleases, as well as the Noble Company, without exception from what place they come. Y. N. are also aware (or at least we suppose so) that Orinoco is a river which is accounted as the property of the King or Crown of Spain, and consequently that nation there master, and whenever a vessel from Essequibo (we represent the matter truthfully) be now come in Orinoco, whether it be for trading in vessels or otherwise, and likewise a canoe out of Surinam or Berbice find itself there, and that according to the fashion of the Indian traffic one of these Indians with some of his wares (whether it be slaves, balsam,

or anything that for us is contraband, and nevertheless to those of our aforesaid neighbours is allowed), to come alongside of the Essequibo canoe (to which be it said without flattery they also sell more eagerly partly because they have better cargo, partly because they are able to come to an agreement with us more peaceably), then are our settlers obliged to answer the Indians that such merchandize cannot be traded in by them, thus sending them back to the Surinam canoe; in consequence against their will they are obliged to contribute to the profits of the same, or otherwise the French and English barques know well how to pass up. Yet further, whenever a canoe, be it of Surinam or Berbice, having set sail, has in the neighbourhood of this river or elsewhere met any free Indians who have red slaves for sale, they buy the same in, yes, bring the purchased slaves within the river, deliver them to one or another of our inhabitants, proceed on their voyage, traffic in the Rivers Marocco, Weijne, Barima, Pomeroon, Orinoco, Trinidad, and wherever it is convenient to them, aim at the greatest profit, and when they have got everything they can in repassing, take in again their slaves that they had left here, and push on their journey to Surinam, being well pleased that the Essequibo inhabitants were oppressed by those who ought to protect them and their gains (from which the Noble Company can make no profit) taken away and driven into the Surinam purse. That which relates to their business presents itself to us very painfully, seeing that the Indians get just as good payment in cargo, no matter with whom they deal, yet they of Essequibo are much the best supplied, and being the nearest situated have always before the prohibition been on the most friendly terms with them.

"We cannot so far comprehend what is the object of Y. N. in prohibiting the business to us, seeing that you cannot hinder those from Surinam and Berbice—yea, not even French, English, and other foreign nations—it appearing to us as if Y. N. wished to place the yoke on our neck alone, because, so long as Essequibo has been in European hands, there cannot be any instance shown that the inhabitants of this Colony alone were restricted so as not to be able to carry on this traffic, &c."

For the purposes of the present Argument, it makes no difference whether the Company were right or wrong in their theory. The point is that they clearly distinguished between territorial rights and the right of exclusive trade, and that they held the latter to extend, as against Dutch subjects, into what was admittedly the territory of a foreign State. No conclusion, there-

fore, can be drawn as to territorial claims from any assertion of the West India Company to exclusive rights of trading.

Another result of the constitution of the Colonial Government as being in the hands of a trading company is to be noticed in its important bearing upon the evidence in the present case. Owing to the fact that the Company was engaged in commercial business, as well as in governing a colony, and that its representative on the spot was not only the Colonial Governor, but the business agent of the Company, his reports and correspondence describe the course of events with a minuteness and detail which would never be found in the archives of an ordinary Government colony. This correspondence is open to inspection, and has been examined and in large part offered in evidence by both parties. It is so full and detailed that it may almost be said to give the daily record of every event, even of minor importance, in the history of the colony; in some cases it is actually a daily record. It follows that where no mention is to be found in the Dutch archives of an alleged event of importance, it is well-nigh conclusive evidence that no such event took place. Especially as to questions of settlement and political control it may be safely assumed that, whatever other persons may have imagined, there was no such thing as Dutch settlement or Dutch control beyond that which the Dutch archives indicate. If, therefore, the Governor of Cumana or Guayana reports that a rumor, as was now and then the case, of some important act of the Dutch, by way of making settlements or exercising control, had reached his ears, it may safely be assumed that the rumor was without foundation unless it is confirmed by the Dutch archives. It is impossible to read these latter at any point without being struck by their minuteness of detail; and no event, the record of which is omitted in the archives, can be proved in the present proceeding by the mere rumor from another source of its occurrence.

The Spanish Colonial authorities, on the other hand, reported little to the Council of the Indies that can be called a record of

current events, certainly nothing with reference to the course of trade. Substantially everything that we have on this subject, even as to the trade of the Spaniards themselves, comes from the Dutch archives. In 1750 the Spaniards were coming down the Cuyuni in such numbers to trade in Essequibo that a Committee was actually appointed to report a plan by which they could be induced to defer their traffic until they reached the lower Essequibo, where the Company's warehouse and principal plantations were situated. (B. C., App. II, p. 68.) The Spanish trade in hides, tobacco and live stock with Moruca by way of the Barima was likewise a very extensive traffic, carried on wholly, in the later periods, by Spaniards. But as to these two facts, proved conclusively by the Dutch records and of such vital importance in this controversy, not a word is to be found in the Spanish archives. The reports written by the Colonial Governors were always of a general character, in the nature of extended dissertations upon the general welfare of the colony, and it was only when some special occasion arose for it that they dealt with passing events at all. In the construction of these general reports the Governors dealt largely with subjects which they only knew from hearsay, especially in reference to any movements of the Dutch. Under these circumstances, no conclusion is to be drawn from a failure to refer to any given occurrence, for such occurrences, unless there was special occasion for doing it, were rarely or never reported.

CHAPTER VIII.

THE DUTCH TITLE—CONQUEST.

The Dutch title, to such possessions as they had in Guiana in 1648, was acquired by war; is a title by conquest and was confirmed and perfected by the Treaty of Munster.

In the British Case (p. 21) it is said:

"In 1581 the Dutch had formally renounced the sovereignty of Spain, and the war then raging between the two countries continued till 1648, with an interval of partial truce from 1609 till 1621."

The Dutch then entered Guiana while they were in a state of war with Spain, a war for independence on the part of the Dutch, and, on the part of Spain, to reduce its rebellious subjects and to re-establish its sovereignty.

If the Dutch were the victors, all Spanish territory actually held by the Dutch at the close of the war became theirs by conquest—the title to be perfected by a treaty of peace.

If Spain was victorious, the attempt to introduce a new state would fail; there could be no treaty, for there would be but one sovereignty. Spain's old title and sovereignty would be re-established, and Essequibo would be a Spanish colony.

It may be said that to allege a Dutch title to Essequibo by conquest from Spain is to assume a prior Spanish title. We reply that the manner and circumstances of the Dutch occupancy and the cession taken from Spain were a recognition by the Dutch of Spain's prior right.

It is not necessary that Spain's title should have been a perfected title, or that the places seized by the Dutch should have been at the time in the actual occupation of Spain. It is enough that the Dutch entered in war to seize and appropriate Spain's title—whatever it was—by force, and at the close of the war took by treaty a release of that title. As against Spain, the Dutch limits must be

determined by the rules applicable to a conquest, and by the terms of the treaty of peace. The Dutch entry in Guiana was an act of war, not the peaceful appropriation of lands believed to be unappropriated, and, by the treaty of peace, the Dutch asked and took a transfer to themselves of Spain's title to Essequibo, which they had seized in war and then held.

Spain's title was appropriated by conquest, and was extinguished only so far as the actual Dutch occupation extended. The Treaty of Peace runs in those terms, and implies that a title to the territory ceded was derived from Spain, and that beyond the cession the territory was Spain's. In other words, that prior claim or title in Spain, which is necessary to give the Dutch acquisition the character of a conquest, was conceded by the Dutch. They expressly set up a title to their New World possessions based upon conquest from Spain, in the New Netherland controversy, as we shall see. Spain claimed the Essequibo territory and defended that claim by arms. The Dutch, by arms, effected an appropriation of Spain's claims, and so were able to set up, as they did, the Spanish title against other claimants.

They cannot say they took nothing in Essequibo from Spain, either by conquest or cession. Spain parted with her title—deprived herself of the right to recover Essequibo—and the Dutch, while holding that title, cannot free themselves from the limitations that attach to it.

Until the treaty of peace was signed and Dutch independence recognized, Spain's right to take—if she could—every foot of territory possessed by the Dutch, must be conceded. In the Treaty of Munster the Dutch distinctly recognized the fact that Spain, as sovereign of revolted Portugal, had still a title to "the places in Brazil," though they were then as much in the effective control of Portugal as Essequibo was in the control of the Dutch. By that treaty they took an absolute assignment of Spain's title to Essequibo, and a conditional assignment to "the places in Brazil,"

both at the time in the occupation of provinces of Spain that had revolted and declared their independence.

The war between Spain and the States General was waged with a bloody intenstity in the Low Countries, but it was not limited to that region. The Dutch carried it into the distant possessions of Spain; sent out their fleets to capture Spanish Colonies, to harry the coasts of Spain's distant possessions, to destroy her commerce and to seize her ships. This from Brodhead gives a comprehensive sketch of these military operations:

> "The Company laid waste Bahia, which, independent of the incurred damages, cost the King of Spain over ten millions to recover it; and, also, captured, plundered, and destroyed Porto Rico, Margarita, Sancta Martha, St. Thomas, Guiana, and sundry other places;
>
> Took and retained Pernambuco, and Tamarica, whereby the King of Spain hath lost over a million and a half of yearly revenue. . . .
>
> Prevented the Portuguese, by the continual cruizing of our ships on the coast of Brazil, from bringing over their sugars and other produce. . . .
>
> Also, captured his fleet from New Spain, and thrice made prize of the rich Honduras ships; took, moreover, in divers parts of Africa and America, over a hundred of his vessels, most of which had full freights, including several of his best galleons; and burnt and destroyed nearly as many, if not more, that had ran ashore." (Brodhead, Docs., vol. i, p. 63.)

Even the truce of 1609, as the British Case admits, was "partial" and not effective. The Dutch knew that Spain claimed Guiana; that she was engaged in settling it; that she was drawing from her American colonies the wealth that enabled her to continue the war; that some of her treasure-ships rendezvoused in the Orinoco, and that in the interior of that province there was believed to be a fabulous store of gold. Guiana was a vulnerable and exposed point. The Spanish garrisons were not strong, and a "*sedem belli*" there offered great opportunities to harass Spain and to divert from her treasury to the Dutch treasury a great store of the precious metals. It also offered an opportunity to cripple and appropriate the trade of Spain to the

West Indies. It would seem, therefore, unduly to discredit the intelligence and strategy of the Dutch to assume that they did not carry the war thither. We should expect them to do so, and we find that they did.

In a minute made by the Estates of Zeeland, in November, 1599, we read:

> "In the matter of the request of the Burgomaster of Middelburg, Adriaen ten Haeft, setting forth how that in the preceding year, 1598, at heavy cost to himself, he caused to be investigated on the continent of America many different rivers and islands,—and how that in this voyage were discovered various coasts and lands where one could do notable damage to the King of Spain" (V. C., vol. ii, p. 12).

Commenting upon this, Professor Burr, in his report to the American Commission (V. C.-C., vol. ii, p. 46), says:

> "What it seems safe to infer is that this was the beginning of Zeeland's dealings with these unsettled coasts of the West—that the coasts in view were conceived of as belonging to the King of Spain, and that the enterprise was one of hostile aggression."

In a note Professor Burr says:

> "It should perhaps be remembered that it was in this year, 1599, that there sailed forth from the Zeeland port of Flushing the Dutch armada under Pieter van der Does, which, after taking a town in the Canaries and avenging at the Isle de Principe that unsuccessful enterprise of Balthazer de Moucheron in 1598 which Berg van Dussen Muilkerk calls the 'earliest attempt at colonization from out the Netherlands,' sent seven or eight of its ships across the Atlantic to ravage the coast of Brazil. They returned, with great booty of sugar, in the following year" (V. C.-C., vol. ii, p. 46).

We have the report of a Dutch expedition to Guiana—probably the very first—in 1597-8, by Cabeliau, clerk of the expedition. The States General voted aid towards the arming of the expedition, and its destination was "Guiana, in the Kingdom of Peru" (V. C.-C., vol. ii, p. 43).

By the report of Cabeliau the States General were advised that the Spaniards were established at Santo Thome, and that there was then a Spanish Governor over all the coasts to the Amazon.

He further says:

"To sum up briefly, there is up that river (Caroni) in the kingdom of Guiana certainly much gold, as we were told by the Indians from there as well as by our Indians here present, and the Spaniards themselves say so; but for our people busied with trade it is not feasible to expect any good therefrom, unless to that end considerable expeditions were equipped *to attack the Spaniards. This is the only means* of learning the whereabouts of any gold mines from the Indians; for whosoever are enemies, and bear enmity to the Spaniards, are friends with the Indians, and they hope steadily that they shall be delivered from the Spaniards by the Dutch and the English, as they told us" (U. S. Com. Rep., vol. ii, pp. 19–20; for a different translation *see* B. C., I, p. 21).

That is to say, we may get some trade to these coasts, but if we seek to enter the country—to appropriate its mines, &c.—we must fight the Spaniards.

There is an anonymous petition to the States General, given in the British Case (App. I, p. 22), to which the date of 1603 is ascribed (with an interrogation) in the table of contents.

This document was found by Professor Burr in the archives at The Hague and examined by him. He believes it to be the "work of Willem Usselinx, the well-known originator of the Dutch West India Company" (V. C.-C., vol. ii, p. 49). We quote from this document:

"* * * but the most important and principal thing that your Lordships have to observe is the suitable situation in case chance or your Lordships should in the future resolve (in imitation of the Romans) to divert this long war from these lands, and carry it thither. This *province* being the most suitable and best situated place in all America in which to establish an arsenal and a *sedem belli*, where the war could easily feed itself or be carried on and supported by all kinds of foreign nations" (B. C. App. I, p. 25).

To be sure, this writer, in the opening paragraph of his petition, speaks of the region as a country which "has now recently by some of the merchant-ships of this country been discovered situated in America and named the Province of Guiana" (B. C., I,

p. 22); but the States General were too well-informed to bring forward a Dutch discovery.

The petition gives the bounds of the province on the west as including Trinidad and the Punta de Araya salt deposits (U. S. Com. Rep., vol. ii, p. 33). This might seem at first to imply mis-information, but in fact the occupation of the island of Trinidad by the Spanish was, as we have seen, a part of their occupation of Guiana. Berrio indicated it as a secure seat from which the occupation of Guiana might be prosecuted, and it was for a time under the Governor of Guiana.

This anonymous writer does not fail to take note of the danger to be feared from Spain and Portugal, if the Dutch should attempt settlements there. He relies, however, upon the difficulty of access to the harbors, for safety. It must be kept in mind that before the date ascribed to this paper the Spaniards were established at Santo Thome and in the Island of Trinidad. The interest, however, in this petition, is in the suggestion of a war policy, that of the Romans, namely, to carry the war into the enemy's country, and to "establish an arsenal and a *sedem belli*" there; and in the further suggestion that the States General organize an "Indian Chamber" to carry out the scheme. The date assigned to this petition is six years before the truce.

Van Meteren, a contemporary of Usselinx, writing in 1607, represents him as putting forward these views:

"For it was evident (he urged) that the Spaniard had still many foes in America, or the West Indies, who were strong and not easy to conquer, and who, with a little help, would be able to resist the Spaniards, especially if one should furnish them weapons and should teach them to use horses, and also to move and manipulate troops, so as to make the Spaniard show his back" (V. C–C. ii, p. 50).

Van Meteren also refers to a prospectus drawn up by Usselinx in 1604, in which he speaks of the Indians there as

"* * * good and friendly folk desiring the acquaintance and friendship of the Dutch people, whom they knew to be foes of the

Spaniards, in order to be helped by them against the Spanish tyranny, etc., especially the *people of the interior*, these being not barbarians but tolerably civilized and organised, not going naked but clothed, and well disposed." (V. C–C., vol. ii, p. 51.).

This reference to a tribe of semi-civilized Indians, supposed to live in the interior of Guiana, and the reference, in the petition of 1603, to some valuable gold mines that had been discovered, suggests that Usselinx's scheme involved seizing the whole of Guiana when they had made the "Spaniard show his back."

The suggestion that the Indians should be used against the Spaniards was not allowed to wait the expiration of the truce. The British Case (App. I, p. 35 *et seq.*), with the purpose of showing the presence of the Dutch on the Guiana coast, prints an account from Spanish sources of the state of things about 1614 at Trinidad and on the mainland. Some of these statements, probably based on rumor, were unfounded, but so far as the account is taken to prove the presence of the Dutch, it shows a hostile presence—a state of war. The Dutch, allied with the Caribs, were threatening and attacking the Spaniards; and the latter, in return, were attacking the Dutch and seeking to drive them from the coasts. These quotations from the British Case (p. 22) confess a state of war on the Guiana coast:

"In that year (1613) the Spaniards surprised and destroyed one of their (Dutch) Settlements upon the River Corentin."

Again:

"In 1614 the Dutch invested the Island of Trinidad in conjunction with the Caribs. Reinforcements and ammunition were sent from Spain with a view to protecting that island, which was in imminent danger."

The Dutch were trying to possess by arms and hold by force, not only places where the Spaniards were not actually present, but the Spanish posts and forts.

The British Case (p. 23), after referring to the destruction of Santo Thome, in 1618, by Raleigh, says:

"At this period the Spaniards were definitely exclnded from the coast to the eastward of the Orinoco. This appears to have been frequented by them for trading purposes at the close of the sixteenth century; but after the advent of the English in 1595 and of the Dutch in (at the latest) 1598, and the succeeding years, it became more and more inaccessible to them. The English and Dutch allied themselves with the Carib Indians against the Spaniards; and after the sack of Santo Thomé by Raleigh in 1618 the Arawaks, till then the friends of the Spaniards, also turned against them."

This is a highly instructive statement. It concedes that the Spaniards, before 1618, "frequented" the coasts of Guiana "for trading purposes," which was, according to Great Britain's definition of effective occupation, to use the resources of the country. *The Dutch up to this time had no colony on that coast.* So far as *they* were there it was "for trading purposes" only. We learn, in the next place that at this period the Spaniards were definitely "*excluded*" by the arms of the Dutch and English, combined with the Caribs, and the coasts of Guiana made "more and more inaccessible to them."

We digress to remark that it must be a little awkward for Great Britain now to argue that Spain's failure to appropriate the resources of Guiana left these coasts open to a peaceful occupation, as upon an abandonment. The facts stated in the British Case are wholly inconsistent with the theory of a peaceful entry by the Dutch. Spain was "excluded," and by arms; and whether the territory was actually or only constructively a Spanish possession—the title acquired by the Dutch is a title by conquest, and can be no broader than the actual exclusion. A title accomplished by the destruction of Spanish posts and the forcible exclusion of Spaniards, is not a title by *occupatio*, and cannot claim for itself the benefit of the constructive extensions that apply to such a title. The entry of the Dutch at the Essequibo followed the exclusion of the Spaniards. Professor Burr, in his report to the American Commission on "The Dutch in Essequibo" (V. C-C., vol. ii, pp, 58-88), we think conclusively

shows that the Dutch did not occupy Essequibo before 1625. The Spaniards had been there before them.

At the end of the truce, the suggestion of the anonymous petitioner of 1603 was put into effect by the organization of the Dutch West India Company. We are told by the British Case (p. 12) that:

"In 1621, upon the termination of the twelve years' truce between Spain and the Netherlands, a Company, called the West India Company, was formed under a Charter granted by the Dutch Government for the purpose of trade and colonization in the Indies. At this date there were already Dutch settlers in Essequibo. The Company at once established there an *organized* Colony, which was held and governed by Companies under successive Charters until the year 1791."

Berthold Fernow (Winsor, vol. iv, pp. 395-396) says of the Dutch:

"They had studied the weak points of that vast Spanish empire 'where the sun never set,' and found in the war with Spain a good excuse to make use of their knowledge, and to send their ships to the West Indies and the Spanish main to prey upon the commerce of their enemies. The first proposition to make such an expedition, submitted to the States-General in 1581 by an English sea-captain, Beets, and refused by them, was undoubtedly conceived in a purely commercial spirit. Gradually the idea of destroying the transatlantic resources of Spain, and thereby compelling her to submit to the Dutch conditions of peace and to the evacuation of Belgium, caused the formation of a West India Company, which, authorized to trade to and fight the Spaniards in American waters, appears in the light of a necessary political measure, without, however, throwing in the background the necessity of finding a shorter route to the East Indies."

He says that as early as 1606 a plan for the organization of a West India Company was drawn up, but that the project failed:

"A peace or truce with Spain was about to be negotiated, and Oldenbarnevelt, then Advocate of Holland and one of the most prominent and influential members of the peace party, foresaw that the organization of a West India company with the avowed purpose of obtaining most of its profits by preying on Spanish commerce in American waters would only prolong the war. . . . It was only when Oldenbarnevelt, accused of

high treason, had been lodged in prison, and the renewal of the war with Spain had been commended to the public, that the scheme was taken up again, in 1618" (*Id.*, pp. 396–397).

The organization of the West India Company was not consistent with the truce, for it contemplated war upon Spain's colonies and commerce in the West Indies; and, while hostilities were actually allowed there, they could not be thus publicly and officially sanctioned.

About six months before the first charter of the West India Company was granted, Cornelis Janssen Vianen, in a memorial to the Prince of Orange, after referring to his own visits to Guiana, said:

"Sixthly, regarding the opinion sometimes advanced, that notable profits might be obtained through diverse products and fruits which might be found or raised on the mainland of America, between Brazil on the east and the river Orinoco on the west, in and about the river Amazon.

I answer, that several of our Netherlanders have as yet attained little by the aforesaid means, although up to now they engage there in peaceful trade; and if an attempt were made with superior force to gain the land there and by such cultivation introduce products of Brazil and the West Indies, the Spaniards would beyond doubt seek forcibly to prevent this, the more so as thereby their navigation to Brazil and the West Indies would be impeded" (V. C. vol. ii, p. 17).

We are further told in the British Case (p. 12) that, "between 1621 and 1648, during the Thirty Years' War, the Dutch commanded the whole of the coast of Guiana and as far as Trinidad."

Manifestly this means a military control, and of territory claimed by Spain. For no pretense has ever been made that, by a peaceful occupation, the Dutch ever had or claimed such bounds as are here ascribed.

But we are not left to inferences; for the British Case proceeds to inform us (p. 12), that "the Dutch were allied with the Indians against the Spaniards of Sanot Thomé and Trinidad. In 1629 and again in 1637 they sacked the settlement of Santo Thomé, and in

the latter year they also raided the Island of Trinidad and burnt the Spanish settlements there."

And again (p. 25):

"In 1629 the English and Dutch, under the command of Adrian Jansz Pater, attacked and destroyed Santo Thomé, and afterwards fortified themselves in the branches and creeks of the River Orinoco."

This alleged occupation of the Amacura and Barima is put forward as the origin of the Dutch title to that region. But if any title was thus acquired it was clearly one by conquest.

We are further told (p. 18), that "during the whole of this period" the Dutch "were masters of the sea in the neighbourhood of the mouths of the Orinoco."

In the British Counter-Case (p. 131, par. 7) we are told:

"It is true that the earliest relations of the Dutch with Guiana and with the Essequibo related to trade and *hostile operations against the Spaniards,* but these relations immediately *developed into the taking of possession of parts of the country.*"

This seems to us a full admission that the occupation of Essequibo was an act of war.

Winsor gives us this account of Dutch naval operations:

"The Dutchman Spilbergen was raiding here in 1614, and ten years later, and in the years following, the Dutch admirals, to distract the attention of Spain while the patriots of Holland were struggling for their independence, hovered here and on the Gulf coast with their fleets; damaging towns, intercepting Spanish ships, and sometimes making a great capture, as when Admiral Heyn captured the silver fleet near Matanzas, Cuba, in 1628." (Narrative and critical history, vol. viii, p. 198.)

Especial provision was made in the regulations adopted by the West India Company for Colonies, in 1628, for the capture of prizes.

The attack upon Santo Thome by the combined Dutch and British forces in 1629, and the alleged attempts of the Dutch to fortify themselves in the creeks of the Orinoco, show that the Dutch

projet in Guiana was not a peaceful occupation of unappropriated lands, but an attempt to dispossess an enemy.

If the Dutch forces, after the destruction of Santo Thome, in July, tarried for a short time near the mouth of the Orinoco, it was manifestly to prepare for the attack on Trinidad, which followed in October. It was a temporary military occupation, and no right can be predicated upon it after it was let go. Yet Great Britain attempts to use it to support a title by *occupatio*.

In "Documents relative to the Colonial History of New York," edited by Brodhead (vol. i, p. 39), we have a report made by "the nineteen" to the States General, in 1629, in which it is declared that, as they had before represented, to make a truce with the enemy (Spain) would probably ruin the Company. In the course of an account of what had been done in the region of Guiana, it is said:

"From the commencement of our administration we preferred to proceed in a warlike manner against the common enemy," "because we found that the expected service for the welfare of our Fatherland and the destruction of our hereditary enemy could not be accomplished by the trifling trade with the Indians or the tardy cultivation of uninhabited regions, but in reality by acts of hostility against the ships and property of the King of Spain and his subjects, surprising his possessions and preserving them for the public service, which plan has been so graciously blessed by God during these latter years that great wealth has thereby been brought to this State, and the enemy's finances thrown into such arrears and confusion that no improvement is to be expected therein except from cessation of our arms and retaining our fleets at home, out of those countries." "We, therefore, confidently, and of our own certain knowledge, do assert that the entering into a truce must be the ruin of this Company."

Among the sources of wealth, they mention that "the silver coined and in bars received at the beginning of this year, in consequence of the capture of the fleet from New Spain, amounted to so great a treasure that never did any fleet bring such a prize to this or any other country."

In the sailing regulations, of the States General for the West India Company, May 14, 1632, and July 17, 1633, given in the

British Case (App. I, p. 73), and in the Case of Venezuela (vol. ii, pp. 19-20), we have this:

"Firstly, no such ships (*i. e.*, from any part of the United Provinces, other than the Company's) may sail to the coast of Africa, or the New Netherlands, or elsewhere where the Company may trade, on any pretence: but they may sail to the coast of Brazil; likewise into the West Indies, to wit, [from] the River Orinoco westwards along the coast of Cartagena, Portobello, Honduras, Campeche, the Gulf of Mexico, and the coast of Florida, together with all the islands situated within these limits, in order there to carry on all manner of warfare by sea and by land against the King of Spain, his subjects and allies."

The next article made provision for payment to the Company of certain proportions of the proceeds from the sales of prizes taken from the enemy. The Company would conduct the "Warfare by sea and land" to the east of Orinoco for its sole profit, but would open the region to the west to all privateers, for a share in the war booty.

The letter of Jacques Ousiel to the West India Company, in 1637 (B. C. App. I, p. 82) gives an account of a projected Spanish and Indian expedition to besiege the Dutch fort at Essequibo.

But the Dutch military operations against Spain in South America, and the seizure of her territory, were not limited to the Guiana coasts. They were especially aggressive in Brazil, and were there also directed against places actually occupied by the Portuguese—then under the Spanish crown.

In 1623 the Dutch attacked San Salvador or Bahia and took it; and two years later yielded it again to Spain after a fight in which the Dutch fleet was destroyed. The war there against Spain continued until after the Portuguese revolt from Spain, and afterwards against the Portuguese.

When the treaty of Munster was made the Dutch still held some of the captured places in Brazil, and had lost some of them. To these conquered places, held and lost, the Dutch took Spain's cession—just as to the places in Guiana still held by them.

All this may seem to be work of supererogation, but at least it completes the demonstration of the fact that the Dutch attempts to appropriate Guiana were not acts of peaceful occupation, but were acts of war, directed against and intended to weaken an enemy; that the lands appropriated were the prizes of war quite as certainly as the ships taken at sea.

But we are not left to argument to establish our proposition that the Dutch settlements in Guiana were conquests, and that the Treaty of Munster was a grant or cession by Spain confirming the Dutch title to these conquests.

We have a definite and nearly contemporaneous admission of these facts by the Dutch. In the sailing permits of the West India Company—of which one of the year 1653 is given in the British Counter-Case (App., p. 25)—the Dutch possessions in Essequibo are explicitly declared to be "conquests." The language is "except in our *conquests* of Africa, the Wild Coast, Essequibo, Berbice," &c.

In November, 1660, only twelve years after the treaty of Munster, in a "Deductie as to New Netherland, submitted by the West India Company, to the States General" we find this:

"King Charles I (of England), of illustrious memory, being likewise of too just and too generous a nature to give away and present to his subjects lands and places already possessed and governed by other free nations, his allies, and over which, consequently, no disposition in the world appertained to him.

Unless such should be claimed on the ground that the English nation have settled [*hun neergeslagen*] about that region of America (namely, in Virginia), prior to and before the Netherlanders.

If that be given weight, then we think the Dutch nation must instead be preferred, being considered the same as in earlier times, namely, vassals and subjects of the King of Spain, first discoverer and founder of this new American world, who since, at the conclusion of the peace, has made over to the United Netherland Provinces all his right and title to such countries and domains as by them in course of time *had been conquered* in Europe, America, etc. (*als bÿ haer ingevolge van tÿt in Europa, America, etc., waren gecconquesteert*)." (V. C., vol. iii, p. 367.)

Spain's title by discovery is here distinctly admitted, and quite as distinctly the fact that, "at the conclusion of the peace," by the Treaty of Munster, Spain made over to the United Netherland Provinces all her "right and title to such countries and domains as by them in the course of time *had been conquered* in Europe, America, etc."

The Treaty of Munster was a grant by Spain to the Dutch, and the grant was of territory taken in war.

But we have further evidence, from British sources, that the Dutch territorial claims in Guiana, now represented by Great Britain, were based upon conquest from Spain, confirmed by the cession contained in the Treaty of Munster.

In his letter to Senor Rojas, of January 10, 1880 (B. C. App. VII, p. 96), Lord Salisbury, speaking of the boundary dispute, says:

"With regard to the first of these questions, I have the honour to state that Her Majesty's Government are of opinion that to argue the matter on the ground of strict right would involve so many intricate questions connected with the original discovery and settlement of the country, and subsequent conquests, cessions, and Treaties, that it would be very inlikely to lead to a satisfactory solution of the question. . . . The boundary which Her Majesty's Government claim, in virtue of ancient Treaties with the aboriginal tribes and of subsequent cessions from Holland, commences, etc."

Now, here we have a distinct statement that the British title rests in part, at least, upon conquest and cession, and those terms could only be appropriately used of Dutch conquests from Spain and of Spain's cession to the Dutch; for Great Britain does not allege a conquest from Spain or any direct cession from her. As to the reference to "treaties with the aboriginal tribes," it is enough to say that the reference is to treaties that preceded the British acquisitions and that no such treaties have been exhibited —even if sovereignty could have been acquired by that means. All of these references to sources of title must relate to a Dutch title; for Great Britain does not claim to have acquired any direct title as against Spain, either by conquest or cession. If she has

any title referable to such sources it is derived from the Dutch. In his letter of November 26, 1895, to Sir Julian Pauncefote (V. C.-C., vol. iii, p. 275) Lord Salisbury says (p. 276) the British claim is "in accordance with the limits claimed and actually held by the Dutch, and this has always since remained the frontier claimed by Great Britain."

It is elsewhere affirmed by Lord Salisbury that Schomburgk did not "discover or invent any new boundaries," but only laid down the line of Dutch appropriation.

And again, on May 26, 1893, Venezuela, through Tomas Michelena, submitted bases for the conclusion of a Preliminary Convention between Great Britain and Venezula for re-establishing diplomatic relations and the settlement of the questions pending. Article 1 contains this recital:

> "The Government of Great Britain claims certain territory in Guiana as successor in title of the Netherlands, and the Government of Venezuela claims the same territory as being the heir of Spain" (V. C., vol. iii., pp. 286–287).

In his reply, July 3, 1893, Lord Rosebery amends this statement to read as follows:

> "(Whereas) The Government of Great Britain claims certain territory in Guayana as successor in title of the Netherlands and [by right of conquest as against Spain, and whereas] the Government of Venezuela, etc., (V. C. vol. iii, p. 289).

The British Premier inserts the words, "and by right of conquest as against Spain." Now, it is not claimed that Great Britain ever took any part of Guiana from Spain by conquest. We have no hint of such a claim in the whole British Case. The title by conquest here asserted must then have been based upon a conquest by the Dutch, and this conquest must have antedated the Treaty of Munster; for there neither is, nor can be, any claim made of a later conquest "as against Spain."

We have then the distinct admissions of the Dutch and of Great Britain that the territorial titles, which were confirmed to the Dutch by the Treaty of Munster, were acquisitions by conquest.

Let us now inquire what the law is as to the limits of a title by conquest.

The sources of territorial title are thus stated by Phillimore:

"From Grotius we learn that these modes of acquisition were:

1. By occupation (*occupatione derelicti*).

2. By treaty and convention (*pactionibus*).

3. By conquest (*victoriæ jure*). And if acquisition by accession and by prescription be considered as corollaries to occupation, and all cases of transfer be held to fall under the category of treaty and convention, the enumeration may be considered as sufficient and complete" (Phillimore, 3d Ed., i., 328).

Mr. Wheaton (Int. Law, 3d Ed., Sections 545-6) says:

"The treaty of peace leaves everything in the state in which it found it, unless there be some express stipulation to the contrary. The existing state of possession is maintained, except so far as altered by the terms of the treaty. If nothing be said about the conquered country or places, they remain with the conqueror, and his title cannot afterwards be called in question. During the continuance of the war, the conqueror in possession has only a usufructuary right, and the latent title of the former sovereign continues, until the treaty of peace, by its silent operation, or express provisions, extinguishes his title forever.

The restoration of the conquered territory to its original sovereign, by the treaty of peace, carries with it the restoration of all persons and things which have been temporarily under the enemy's dominion, to their original state. This general rule is applied, without exception, to real property or immovables. The title acquired in war to this species of property, until confirmed by a treaty of peace, confers a mere temporary right of possession. The proprietary right cannot be transferred by the conqueror to a third party, so as to entitle him to claim against the former owner, on the restoration of the territory to the original sovereign. If, on the other hand, the conquered territory is ceded by the treaty of peace to the conqueror, such an intermediate transfer is thereby confirmed, and the title of the purchaser becomes valid and complete."

In a note (346c), Mr. Boyd, the editor of the edition of Wheaton to which we refer, says:

"Firm military occupation transfers all the rights of the displaced sovereignty to the victor, and he may therefore use the public property of the former as he thinks fit, and may appropriate to himself the rates and taxes

due to it. But this is the case only so long as the occupation lasts; as soon as the district is lost, the rights of military occupation over it are also lost. If the district is retaken by its original sovereign, it reverts to the same state it was in before it was lost."

Grotius (Peace and War, iii, par. 4, 219), says:

"Lands are not understood to become a lawful possession and absolute conquest from the moment they are invaded. For although it is true, that an army takes immediate and violent possession of the country which it has invaded, yet that can only be considered as a temporary possession, unaccompanied with any of the rights and consequences alluded to in this work, till it has been ratified and secured by some durable means, by cession or treaty. For this reason, the land without the gates of Rome, where Hannibal encamped, was so far from being judged entirely lost, that it was sold for the same price that it would have been sold for before that period. Now land will be considered as completely conquered, when it is enclosed or secured by permanent fortifications, so that no other state or sovereign can have free access to it, without first making themselves masters of those fortifications."

This author (*Id.*, par. 5, 221), further says:

"The right of making things change their owners by force is of too odious a nature to admit of any extension."

And (*Id.*, p. 353), speaking of treaties of peace that leave things in the "state to which the war has reduced them," he further says:

"And lands are said to be so possessed, when inclosed or defended by fortifications, for a temporary occupation by an encampment is not regarded in this case. Hence Demosthenes in his speech for Ctesiphon, says that Philip was anxious to make himself master of all the places he could seize, as he knew that upon the conclusion of a peace, he should retain them."

The military occupation must have the character of a firm holding and of a permanent, not a transitory, occupation.

Field (Int. Code, p. 482), proposes this rule:

"Military or belligerent occupation, as used in this book, is a possession by the military power of a belligerent *sufficiently firm to enable such belligerent* to execute its will within the limits of the occupation, either by force

or by acquiescence of the people for an indefinite future, subject only to the chances of war."

He further proposes that:

"The allegiance of the members of a belligerent nation resident within the limits of the military occupation of the enemy is suspended."

This suggestion furnishes a good test of the limits of a military occupation. The subjects of the power from whose control the territory has been taken may, during and within the occupation, recognize the military control of the enemy, and may submit themselves to and even take part in the local administration, without treason to their sovereign.

Could a Spaniard in the Pomeroon, or in the Barima region, or above the first falls of Cuyuni, have taken office under the Dutch, without treason to his King, in 1648?

Phillimore (vol. iii., p. 814), says of title by conquest:

"Conquest and occupation are distinct things, governed as to their legal effects in various respects by different principles and attended with different consequences. Nevertheless there is an analogy between the two, and, in some respects, rules of occupation are applicable to the case of conquest. Conquest is often defined as *occupatio bellica*; and it so far partakes of the nature of occupation that unless the conqueror has actual possession of the things conquered he can exercise no right over it. . . . It has been already seen that, in the case of immovable property, even actual possession by the conqueror does not confer a right of alienation, which, after the conqueror has departed, will inure to oust the original owner, unless such a result has formed part of the stipulations of a treaty or been ratified by some public act of the state."

Eugene Ortolan, in a treatise entitled "On the means of acquiring international dominion or state ownership between nations, according to the public law of nations, compared with the means of acquiring ownership between private persons according to private law, and followed by the principles of political equilibrium," says:

"But leaving aside this usual exception, which at the end of a very short time and before any Treaty gave recognition to the right of property, to booty or maritime spoils, we must be certain of the fact acknowledged

by the laws of nations ruling to-day in Europe, that war is a method of procedure where there is no definite sentence valid as in law in reference to property, except by virtue of a Treaty ending the war, and from the moment that this has been agreed to."

Military occupation, he further says,

"constitutes a valid possession; the victor may perform in the territory by him occupied the acts of a *bona fide* possessor; may collect taxes, exercise authority, jurisdiction. The foreign nations, if they wish to remain neutral, are under obligation to recognize such possessions, and the belligerent nation itself, upon recovery of the territory, could not derogate such acts that imply not only definitive property but also a passing possession."

"*The* victor, *however, can not validly perform any of the acts which indicate a right to international domain; can not sell the property, mortgage the country, alienate the territory to a foreign nation, dispose of it in any manner whatever. The power of the victor is transient as the probabilities of the success to which it is due, and this power expires at the same time of the possession and nothing of it remains thereafter.*"

In the case of American Insurance Company *v.* Canter (i. Peters, U. S. Sup. Crt., 511) Marshall, *C. J.*, says:

"The usage of the world is, if a nation be not entirely subdued, to consider the holding of the conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession or on such terms as its new master shall impose."

In the case of U. S. *v.* Hayward (2 Gallison, U. S. Cir. Crt., 485), a case growing out of the military occupation of the Town of Castine, in the State of Maine, by the British forces during the war of 1812, Story, Justice, says:

"By the conquest and occupation of Castine that territory passed under the allegiance and sovereignty of the enemy. The sovereignty of the United States over the territory was of course suspended and the laws of the United States could no longer be rightfully enforced, or be obligatory upon the inhabitants who remained and submitted to the conquerors. Castine therefore could not strictly speaking be deemed a post of the United States, for its sovereignty no longer extended over the place. Nor on the other hand, could it strictly speaking be deemed a post

within the dominions of Great Britian, for it has not permanently passed under her sovereignty. The right which existed was the mere right of superior force; the allegiance was temporary and the possession not that firm possession which gives to the conqueror *plenum dominium et utile*—the complete and perfect ownership of property. It could only be by a renunciation, in a treaty of peace, or by possession so long and permanent as should afford conclusive proof that the territory was altogether abandoned by its sovereign, or had been irretrievably subdued, that it could be considered as incorporated into the dominions of the British sovereign."

Castine was at the mouth of the Penobscot River, and the Governor of Nova Scotia, by proclamation, claimed for Great Britain, by conquest, all of the territory east of that river; but the claim was absurd. If General Pakenham had captured New Orleans, Great Britain would hardly have put forward a title by conquest to the whole Mississippi Valley, even if her view of the watershed doctrine had been then what it is now.

The case of United States *v.* Rice (4 Wheaton, 246), also grew out of the military occupation of Castine by the British; the question being whether an importation of goods made into the port, while the British had control, could, after the treaty of peace and the restoration of the port to the United States, be made subject to duties. The Court (Story, *J.*) said:

"Under these circumstances, we are of opinion that the claim for duties cannot be sustained. By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose."

Chief Justice Taney said, in Fleming *v.* Page (9 How., 615):

"For by the laws and usages of nations, conquest is a valid title while the victor maintains the exclusive possession of the conquered territory."

The convenience of an intruder is not to be consulted. A conquest is an actual taking and nothing goes with it. One who, by conquest, takes a river mouth or a line of sea coast, cannot invoke the rule as to the watershed, or as to the middle distance, or the rule of safety, against the dispossessed nation. So a treaty of peace confirming to the conqueror what he has taken—the places then held by him—is not to be taken to give those natural and convenient boundaries that a discoverer, or a first occupier, might have claimed. It gives only those limits that the conquered nation must fight to repossess itself of—*at the time of the treaty.* It is not significant that the conqueror may have sent expeditions into further regions or have had very temporary posts there. It is only that which he has securely possessed himself of that he has title to. Now it is quite certain that the region from which the Dutch had, by armed occupation, excluded Spain, comprised only the very lowest parts of the Essequibo River, within the disputed territory. They had attacked Santo Thome, but withdrew, and there was no part of Guiana, save the lower Essequibo, where the Spanish could not and did not go as they pleased. It was not the stress of war in Guiana, nor Dutch victories or power there, but at home, that brought the peace and the cession.

We conclude this discussion with these propositions:

FIRST.—The Dutch occupation of Guiana was effected as an act of war against Spain upon territory known to be claimed by Spain, and with a view to the appropriation of the Spanish title and the use of the places seized as depots and arsenals in further contemplated attacks upon Spain's ships and settlements.

SECOND.—That as matter of law, the Dutch could by these hostile acts acquire no more territory than was actually and firmly held by them. That the bounds of their military occupation cannot be extended by the use of any of the equitable intendments allowed in behalf of nations that discover and peaceably occupy unappropriated lands.

THIRD.—That the Treaty of Munster is to be read as confirming the Dutch title only to such territory as was thus strictly held.

CHAPTER IX.

THE DUTCH TITLE—TREATY OF MUNSTER A CESSION.

If the Dutch holdings in Guiana, in 1648—and especially Essequibo—were the fruits of conquest from Spain, a purely peace treaty would, *ex re termini*, have the effect of confirming the Dutch title to such places as they then firmly held. The treaty might, by express stipulation, have confirmed this legal consequence of the agreement to terminate the state of war, or it might, by cession, have enlarged the holdings of the Dutch, or have reduced those holdings or required a complete surrender of them to Spain. What the treaty did was, as the British Case admits, to "confirm" the Dutch in their "possessions," to give them that "perfected" title of which the law writers speak. To be sure, Great Britain contends that there is in the treaty a provision for a contingent enlargement of the Dutch possessions; but this, as we shall show, had no operation westward of Essequibo. We think that the treaty is to be read as a cession of territory acquired by conquest, and limited by the rules applicable to conquests. That reading is confirmed, as we have seen, by the unequivocal admissions of the Dutch and of Great Britain. But if the Dutch did not hold by conquest, but by a disputed *occupatio*—disputed by arms—this comprehensive treaty of peace must be so read as to settle that dispute; to leave it open would be to make no peace. And after all, Great Britain's contention of a Dutch right to enlarge the possessions of 1648 is rested *upon the treaty*, which is said to contain a provision *authorizing* it. Unless then that provision does have that effect as to the territory in dispute, the Dutch were limited by the treaty to so much of the disputed territory as they had actually occupied. There was no possible basis for a larger Dutch claim.

We maintain that by the Treaty of Munster, Spain ceded and the Dutch accepted as a grant from Spain, those parts of Guiana then occupied by the Dutch; that the treaty plainly implied that the bounds of the territory ceded and of the territory retained by Spain were co terminous, and that by the treaty the Dutch expressly engaged not to attempt any enlargement of the ceded territory, except as they were specifically allowed so to do by the treaty; that these exceptions related wholly to lands and not to any part of the disputed territory; and that any occupation of territory west of the proper bounds of the Dutch possessions occupied by Portugal, in Essequibo—as they were in 1648—was in violation of the treaty and an encroachment upon Spanish territory.

In the memorandum of the British Foreign Office, July 24, 1890, we have a most formal and definite admission that the Treaty of Munster was a grant. We quote :

"That territory, and by far the greater portion of the large tract of country which the Venezuelan Government seeks to put in question, accrued to the Netherlands under the Treaty of Munster of 1648 by right of previous occupation." (V. C., vol. iii, p. 283.)

The British positions, as disclosed by the British Case and by the Counter-Case, are these:

By the Treaty of Munster the Dutch were "confirmed in the possession of all the lordships, fortresses, commerce, and country which they then held, as well as the places which they should thereafter acquire without infraction of the Treaty" (B. C., p. 13).

In the British Counter-Case (p. 35) it is said that the Treaty of Munster "cannot possibly be regarded as a 'grant' by Spain to the Dutch of their Settlements, and that there was nothing in that Treaty to limit the expansion of the Dutch Settlements, provided they did not encroach upon territory actually held and possessed by Spain."

And, again, of the clause of Article V. of the treaty—

"including also the localities and places which the same Lords States shall hereafter without infraction of the present Treaty come to conquer and possess;"

this is said (B. C–C., pp. 41–42):

"Now, bearing in mind that the only three European Powers in Guiana, the country immediately in question, were Spain, the Dutch, and Portugal, it is obvious that these words were intended to refer to the unconquered and unoccupied territories then in possession of native tribes."

It is not easy to reconcile these propositions. The Counter-Case seems to counter on the Case. It is said in the Case, that the treaty "confirmed" the Dutch title; that is, made it a firm title; which certainly implies a betterment of it, and that derived from Spain. Yet the Counter-Case says it was not a "grant." If no Spanish claim or title was released or passed by the treaty, how could it operate to make the Dutch title better? And, if such a claim or title was given or released to the Dutch it was a "grant." After, and by the treaty, the Dutch were in a position to set up, as grantees, a Spanish title; and this they did, in the dispute with Great Britain over the New Netherlands, as we have seen. The language then used was the "King of Spain . . . has *made over* to the United Netherlands all his *right and title* to such countries, &c." The Dutch accepted the Treaty of Munster as a Spanish "grant."

The British Case (p. 13) admits that, after the conclusion of the Treaty of Munster, "great extensions of their possessions in Guiana were made by the Dutch"—meaning, of course, within the disputed territory.

It contains this further statement in explanation of the Dutch attempts to extend on the west:

"In 1656 the Dutch were driven from Brazil by the Portuguese, and this seems to have had the effect of concentrating their efforts upon Guiana" (B. C., p. 27).

That is, the extensions contemplated and allowed by the treaty, in the *east*, having been balked by reason of the superior power of the Portuguese, the Dutch turned to the prohibited *west* for enlargement.

A discussion of these propositions brings us to a particular consideration of the Treaty of Munster, and our first remark is that it was a treaty of peace. It terminated a long war. During the progress of the war, and as acts of war, the Dutch—revolting provinces of Spain—had seized Spanish towns, fortresses, and provinces; had battled with Spanish fleets, seized Spanish merchant and treasure ships, and had attacked Spanish posts and settlements, not only in Europe but in the East and West India Islands, and on the coast of America. The close of the war found the Dutch in firm possession of some of these places.

Under the next preceding head we have discussed the rules of international law applicable to the situation. As we have seen, the title acquired in war by the Dutch, until confirmed by a treaty of peace, was a mere temporary right of possession, a title that could not be transferred by the victor to a third party. A cession, by which the claim of the original sovereign was transferred, was essential to "confirm" the Dutch title, to give them a dominion that they could transfer to another.

Wheaton (Int. Law, Sec. 545) says:

"The treaty of peace leaves everything in the state in which it found it, unless there be some express stipulation to the contrary. The existing state of possession is maintained except so far as altered by the terms of the treaty."

It appears, then, that even if the treaty of peace between Spain and the Dutch had not contained a distinct cession, the effect would have been to confirm the Dutch in the places actually held by them; the places from which they had excluded the Spaniards, and which the latter could not repossess themselves of without a conflict. Regions into which the conqueror may have sent expeditions or in which he may have established temporary

posts would not be included, nor would any of those beneficial implications which are allowed to some other titles be applicable here. The title is bottomed upon force, and is strictly limited.

Having now found the position in which things were when the plenipotentiaries of Spain and the Netherlands met to frame a treaty of peace, we turn to the treaty itself, to see whether it does not proceed along the lines of the rules of law we have indicated. But, before looking at its particular terms, let us consider some of the rules applicable to the interpretation of treaties.

In the British Counter-Case (p. 39), it is said:

"In considering these Articles, it must be borne in mind, as will be subsequently shown, that the Dutch were at the time in a position to make their own terms, and that the Spaniards were most anxious to agree to a Treaty at any price, and had in fact given instructions to their Plenipotentiaries to that effect."

And again (*id.*, p. 46), it is said:

"It is unnecessary to adduce detailed argument to show that at the time she was negotiating the Treaty of Munster, Spain was practically at the mercy of the Dutch, and that the Dutch, many of whom would have much preferred that the war should continue, could and did dictate their own terms."

And again (*id.*, p. 48):

"Further, an examination of the negotiations prior to the Treaty, shows that the actual terms of Articles V and VI were dictated by the Dutch."

The legal rule applicable to a treaty made under such conditions is that it is to be construed most strongly against the party who was in a position to dictate its terms.

Vattel says (p. 443):

"In case of doubt the interpretation goes against him who prescribes the terms of the treaty."

The victor is always more or less firmly master of the situation, and therefore this author (p. 265) says:

"Everything that contains a penalty is odious."

And again (p. 268):

"Thus the cession of a right or of a province made to a conqueror in order to obtain peace is interpreted in its most confined sense. If it be true that the boundaries of Acadia have always been uncertain and that the French were the lawful possessors of it, that nation will be justified in maintaining that their cession of Acadia to the English by the Treaty of Utrecht did not extend beyond the narrowest limits of that province."

Among the rules submitted by Great Britain to the Arbitrator—The Emperor of Germany—in the dispute with the United States as to the Northwest boundary, were these:

"2. In interpreting any expressions in a treaty, regard must be had to the context and spirit of the whole treaty."

"4. The interpretation should be suitable to the *reason* of the treaty."

"5. Treaties are to be interpreted in a favourable, rather than an odious sense."

"6. Whatever interpretation tends to change the existing state of things at the time the treaty was made is to be ranked in the class of odious things" (Wheaton, Int. Law, Sec. 287a).

We stop here to say, that to so construe a treaty of peace as to allow acts of hostility, or to leave unadjusted claims that would inevitably lead to further conflicts, would be contrary to the spirit of the treaty and "odious." It would be to put Spain in the position of confirming to the Dutch the territory they had taken, while leaving them at liberty—by an express stipulation in a treaty of peace—to seize as much more as they could. This would not be "suitable to the reason of the treaty."

Again Vattel says (p. 246):

"In the interpretation of a treaty or of any other deed whatsoever the question is to discover what the contracting parties have agreed upon."

He further says (p. 252), that an interpretation that would defeat the main purpose of the contract must be rejected; and so, one that leads to an absurdity. And, again (p. 253), that an interpretation "which would render a treaty null and inefficient cannot be admitted."

Phillimore (vol. ii, p. 112) very pertinently says:

"As a general maxim it is true that good faith clings to the spirit, and fraud to the letter of the convention."

In Maryatt *v.* Wilson (i. Bos. & Pul., 439) Eyre, *C. J.*, said:

"We are to construe this treaty as we would construe any other instrument, public or private. We are to collect from the nature of the subject, from the words and from the context, the true intent and meaning of the contracting parties, whether they are A and B, or happen to be two independent states. The judges who administer the municipal laws of one of those states would commit themselves upon very disadvantageous ground, ground which they can have no opportunity of examining, if they were to suffer collateral considerations to mix in their judgment in a case circumstanced as the present one is."

In the case of United States *v.* Arodondo (6 Peters, U. S. Sup. Ct., 740), involving the construction of the treaty between Spain and the United States, a treaty that was expressed both in Spanish and in English, it is said:

"It became, then, of importance to ascertain what was granted by what was excepted. The King of Spain was the grantor, the treaty was his deed, the exception was made by him, and its nature and effect depended upon his intention, expressed by his words, in reference to the thing granted and the thing reserved and excepted in and by the grant. The Spanish version was in his words and expressed his intention, and though the American version showed the intention of this government to be different, we cannot adopt it as the rule by which to decide what was granted, what excepted, and what reserved; the rules of law are too clear to be mistaken and too imperative to be disregarded by this court. We must be governed by the clearly expressed and manifest intention of the grantor, and not the grantee in private, *a fortiori* in public grants."

We come now to a consideration of the Treaty itself, with these points established:

1. The Spanish King was the sovereign of the Netherlands.

2. Those states revolted, made war against Spain, seized her fortresses, cities, and provinces in the Low Countries, and her other possessions wherever they were able.

3. In 1648, the Netherlands having demonstrated their ability to maintain their independence and to retain the places they had seized, Spain yielded and concluded a peace, recognizing the independence of the States General, and renouncing her sovereignty over the places held by the Dutch.

4. The Dutch asserted no claim whatever, had no pretense of a claim to any Spanish territory save that which they had possessed themselves of in the war; but, on the other hand, Spain's claim to the sovereignty of all the territory seized by the Dutch during the war, and possessed by them at its conclusion, was not lost in law.

The preamble of the Treaty declares that the object sought by it was "a good and sincere pacification on both sides and the sweet fruits of an entire and firm repose and quiet." (V. C., vol. 3, p. 5).

Article II declares that the peace "shall be good, firm, faithful and inviolable;" that all acts of hostility of every kind shall cease, by land and sea, in all their lands and dominions, for all persons and places.

It must be assumed, therefore, unless some matter of dispute—some claim by one party against the other—is by the treaty itself distinctly excepted, that all such matters were concluded by the treaty.

If, therefore, it was known to the Dutch at the time of the signing of the Treaty that Spain claimed the whole of the disputed territory, and that she would regard any attempt by the Dutch to extend the bounds of their possessions there as an encroachment upon her rights, it must be assumed that it was the purpose of both parties to settle that controversy.

In this connection it is not important to determine whether Spain's claim was strictly well founded in law. It is enough that she strenuously and in good faith claimed the territory; that an invasion of it would be regarded and treated by her as a hostile act. If this was known to the Dutch when the Treaty was

signed, then the stipulation that they were not to extend their bounds in derogation of the Treaty must be construed to be an engagement not to invade or appropriate territory thus claimed by Spain.

An interpretation that would allow the Dutch, immediately after the signing of the Treaty, to send expeditions and settlements into territory claimed by Spain, and not expressly ceded by the Treaty, would be an illustration of that hateful bad faith mentioned by Grotius (Vol. II, p. 144), where he says:

> "The cavil of Brasidas, therefore, is highly abominable, who, promising that he would evacuate the Boeotian territory, said he did not consider that as Boeotian territory which he occupied with his army; as if the ancient bounds were not intended, but only what remained unconquered, an evasion, which entirely annulled the treaty."

The adjustment of differences between Spain and the Dutch was so comprehensive in the Treaty that not only national claims, but a long list of individual claims were taken account of and settled. It seems to us, therefore, to be "highly abominable" to construe any disputable clause of a treaty, introduced by such a declaration of its purpose, to mean that the Dutch were given liberty to "conquer and possess" territory then claimed by Spain; that is, to make war upon Spain if she defended her claims. It involves the grossest absurdity and the grossest injustice to the Dutch negotiators to assume that they intended to cover, by such a phrase, a right to appropriate territory claimed by Spain—and that without limits.

Article III of the Treaty refers to Europe exclusively, and we do not suppose that as to the lands, fortresses and cities, described therein, it will be denied that there was a cession of them by Spain to the Dutch. The Treaty was the formal renunciation of Spanish sovereignty, and the transfer of dominion to the States General. It was a necessary act to divest Spain's title, and to convert the Dutch seizure in war into a perfect title.

But, on the other hand, the stipulation in behalf of Spain was

neither a Dutch cession nor a limitation of Spain's possessions; but was to say, "What you have taken you shall keep; what you have not taken I retain." It was not a mutual cession. Spain's title was not "confirmed." The two stipulations did not stand upon the same basis at all. It was simply a method of drawing a line. It was to put the case both affirmatively and negatively: What is on that side I grant to you; what is on this side I do not grant, but keep.

Now, this being the plain effect and meaning of the Treaty, as to the European possessions of the Dutch, why shall a different construction be placed upon a similar stipulation in Article V, relating to other places which the Dutch had occupied during the war? It should be noticed that in Article III, "as to the three-quarters of the Over-Maze" it was provided that they "shall remain in the State they are in at present." But there seems to have been some reason to think that a controversy might arise as to what that "state" was, and a special provision was made for settling such a controversy if it arose—a further manifestation of a purpose by the Treaty to settle all possible causes of controversy.

The situation then as to the lands and places mentioned in Article III was this: After the Treaty the Dutch could support their title as assignees of Spain's title, precisely as Great Britain now supports her title to Guiana by the Dutch cession of 1814.

We come now to the consideration of Article V which deals with the Dutch possessions in Guiana. The provision is as follows:

"V.—The navigation and trade to the East and West Indies shall be kept up and comformably to the grants made or to be made for that effect; for the security whereof the present treaty shall serve, and the Ratification thereof on both sides, which shall be obtained; and in the said treaty shall be comprehended all potentates, nations, and people, with whom the said Lords the States, or members of the East and West India Companies in their name, within the limits of their said grants, or in friendship and alliance. And each one, that is to say, the said Lords the King and States respectively, shall remain in possession of and enjoy such lordships, towns,

castles, fortresses, commerce and countries of the East and West Indies, as well as of Brazil, and on the coasts of Asia, Africa and America respectively, which the said Lords the King and States respectively hold and possess, in this being specially comprised the spots and places which the Portuguese since the year 1641, have taken from the said Lords the States and occupied: comprising also the spots and places which the said Lords the States hereafter without infraction of the present treaty shall come to conquer and possess."

We quote here also Article VI of the Treaty:

"VI.—And as to the West Indies, the subjects and inhabitants of the kingdoms, provinces and lands of the said Lords, the King and States respectively, shall forbear sailing to, and trading in any of the harbours, places, forts, lodgments or castles, and all others possessed by the one or the other party, viz., the subjects of the said Lord the King shall not sail to, or trade in those held and possessed by the said Lords and States, nor the subjects of the said Lords and States sail to or trade in those held and possessed by the said Lord the King. And among the places held by the said Lords the States, shall be comprehended the places in Brazil, which the Portuguese took out of the hands of the States, and have been in possession of ever since the year 1641, as also all the other places which they possess at present, so long as they shall continue in the hands of the said Portuguese, anything contained in the preceding article notwithstanding."

Of this last article, the British Counter-Case (p. 43) says:

"The object of Article VI was entirely different from that of Article V. It related to trade."

Not so; for Article V also relates to trade. It opens with a most important trade stipulation, and closes with another. Neither article relates exclusively to trade. The trade limits prescribed by Article VI are the respective "possessions" of the Dutch and of Spain; and the definitions of those Dutch possessions, actual and contingent, there given, are effective, standing alone, to confirm an exclusive Dutch claim to dominion as well as to trade. It seems, for some reason, to have been thought necessary by the Dutch—who, we are told, were dictating the Treaty—that the description of the Dutch

"possessions" in the West Indies and Brazil, contained in Article V, should be more clearly stated.

Articles V and VI must therefore be read together, for both contain a description of places that were to be taken to be held and possessed by the Dutch, though not actually so possessed. Indeed, the description in Article VI is declared to be the more authoritative, for it is to prevail "anything contained in the preceding article notwithstanding." Article V declared that the places possessed by the Dutch should be held to comprise—

"the spots and places which the Portuguese since the year 1641, have taken from the said Lords the States and occupied: comprising also the spots and places which the said Lords the States hereafter without infraction of the present treaty shall come to conquer and possess."

This apparently left it an open question whether the Dutch could seize Portuguese possessions, other than those which the Portuguese had taken from them, "without infraction of the present treaty," and that was to be made plain by Article VI, which was to prevail, "anything contained in the preceding article notwithstanding."

The thought here manifestly was: Portugal had been under the Spanish crown; had revolted in 1640, but Spain had not yet recognized her independence and still had a claim to Portugal and to all Portuguese settlements. An attempt, therefore, by the Dutch to seize Portuguese possessions, other than those which the Portuguese had taken from them, and which were specifically provided for in Article VI, might be construed to be the taking of territory to which Spain had a claim. Therefore, the added stipulation in Article VI:

"As also all other places which they possess at present, so long as they shall continue in the hands of the said Portuguese."

The Dutch thought of expansion for their Guiana settlements was towards the east, and against Portugal, and they wanted the

consent of Spain that they might seize these Portuguese possessions, else Spain might claim that such a seizure was an infraction of the Treaty. But even this right was not conceded fully. It was to continue only so long as these lands remained "in the hands of the said Portuguese." In other words, if Spain succeeded in recovering them first, the Dutch right to possess them under the Treaty was at an end. Spain was quite willing that the Dutch might raid the settlements of her revolted province, and that manifestly was the purpose. A permit to do so was plainly what was intended by this paragraph in Article V:—

"comprising also the spots and places which the said Lords the States hereafter without infraction of the present treaty shall come to conquer and possess."

But the purpose was veiled. Portugal was not named, and the cautious Dutchmen, it seems, upon reflection, concluded that it was necessary to have a specific consent from Spain; and this Spain was willing to grant, but not absolutely. She desired to weaken Portugal, and was willing to stimulate the Dutch to a raid upon her settlements; but she reserved her rights if she should be so fortunate as to be able to seize them first.

Article VI deals completely with the subject of the possessions of the respective parties in the West Indies and Brazil. Neither is to trade to the places possessed by the other; which is to say, as in Article V, that each shall hold what it possesses. But it was not thought to be enough to leave the places which might thereafter be possessed by the Dutch as they were defined in Article V; and a new definition is attempted, which must be taken to include all of the future acquisitions which were to be allowed by Spain to the Dutch in the regions referred to. It is, therefore, we think, according to the rules of construction, to be taken as the final and authoritative declaration—as a revised restatement, of those places which might be added to the actual Dutch possessions. The language of Article VI as to such possessions carries a grant, and would be complete

and effectual as such even if nothing had been said about these places in Article V. Indeed this description in Article VI of the places to be contingently possessed by the Dutch is expressly declared to be the one that shall prevail—not as to trade merely, but as to dominion. It is manifestly intended to be a full description and not a partial one. Why, therefore, if, by Article V, the places which "the Lords and States shall come to conquer and possess" in the West Indies and Brazil were other than those places which they might conquer from Portugal, were they not also included in Article VI? Was it not intended to secure the trade of such places to the Dutch? Why was not the language of Article V, as to the respective possessions of the parties, repeated in Article VI? Especially why was the stipulation of Article V, as to the places that they should come to conquer and possess, not included in Article VI, if it was intended to extend to any other places than those which might be taken from Portugal? Here the Dutch were so particular as to secure a cession from Spain, not only of the territory they then possessed in Guiana, and of territory that had been taken from them by Portugal, but to procure title from Spain to other territory then held by the Portuguese, with the purpose to treat the title so procured as justifying them in seizing other lands from Portugal.

If Article VI did not have the effect of releasing Spain's claim to dominion as well as to trade, the seizing of dominion by the Dutch would have been an infraction of the treaty. And, further, if there were other contingent possessions of the Dutch, than those in Brazil—if they were given a right to take, by conquest from the Indians territory claimed by Spain—why were not the trade stipulations of Article VI extended to such places?

Article VI of the Treaty, as a trade regulation, would have been complete with a statement that the trade of each nation was to be confined to its own possessions, actual and constructive as scheduled in Article V; but, for some reason, the Dutch do not seem to have been content to leave it so. The schedule of the

constructive possessions of the Dutch, in the West Indies and Brazil, is restated. And, in the restatement, the provision of Article V as to lands to be conquered and possessed is omitted, and in the place of it we have the item relating to the conquest of places from the Portuguese. Plainly this was intended to be substituted for, or to furnish an explanation and limitation of, the clause in Article V. In this revised schedule these words, "as also all the other places which they possess at present, so long as they shall continue in the hands of said Portuguese," are substituted for the words, "comprising also the places which the said Lords, the States hereafter, without infraction of the present treaty, shall come to conquer and possess." The new schedule defines the places that may be conquered and possessed, and the definition is a limitation.

If, as the British Case affirms, Spain was "practically at the mercy of the Dutch," so that the Dutch could and did dictate their own terms in the treaty, there could be no possible reason, so far as Spain was concerned, for any veiled or doubtful expression of any concession exacted from her. If the Dutch demanded a right to extend the bounds of their existing settlements to the south and west, and the demand was yielded, we should look for a clear statement of the concession, and not for the obscure and doubtful clause to which that effect is given by Great Britain. If a veiled expression is used, instead of a plain and direct one, we must conclude that the Dutch had some reason for it, and one that related to some other power than Spain. No reason can be found, if Spain only was to be affected; but a most natural one is found when the purpose to secure a release from Spain to territory that was to be wrested from Portugal is disclosed. The Dutch did not desire that Portugal should know, in advance, of the contemplated raid upon Brazil, and Spain was quite willing that Portugal should be taken unawares. It was not simply that the Dutch contemplated the recovery of the territory Portugal had taken from them. That, perhaps, could not be hidden. The driv-

ing of Portugal out of Brazil was a thing that did need cover. But, when the next section came to be framed the cautious Dutchmen who were dictating the treaty apparently concluded that the veil was too heavy; that Spain might, with good reason, claim that an attempt to seize the territory of Portugal was an infraction of the treaty, and this must be provided against. The clause introduced in Article VI makes this provision, but in such a way that it might be said—as it is now said—that it was only a grant of an exclusive Dutch right to trade to Brazil, while it was really effective to estop Spain from treating the conquest of Brazil as an infraction of the treaty, and to transfer the Spanish title.

We remark further that—in view of the great care taken to specify that the recovery from Portugal of settlements made by the Dutch in Brazil, and even the seizure of the whole of Brazil from the Portuguese, should not be treated as an infraction of the treaty—it is impossible to believe that the question of the seizure of territory directly from Spain, up to the very banks of the Orinoco, would not also have been provided for if such a project had then been contemplated. The Dutch knew that such a seizure would be regarded as an infraction of the treaty, even more certainly than the recovery of the lost Dutch settlements or the seizure of other Portuguese territory from which Spain had already been driven. The contemporaneous acts of the Dutch confirm our contention; for, as Great Britain concedes, it was not until the allowed extension on the Amazon had been balked that the Dutch turned their eyes to the prohibited west.

It is not capable of belief that, while taking such care to acquire the cession of Spain to territories in the actual possession of Portugal, and which could not be recovered except by war, the Dutch were left at liberty, without any infraction of the treaty, and without any stipulation that it should not be so regarded, to extend their possession on the west, even to the Orinoco itself.

In the British Counter-Case (p. 41), it is said:

"In the absence of provision to the contrary Spain might have claimed the right to possess any territory won back from Portugal. This concession to the Dutch was a recognition of their right to acquire, if they could, territory which Spain had at one time hoped to regain. But the words which immediately follow—'including also the localities and places which the same Lords States shall hereafter without infraction of the present Treaty come to conquer and possess,' clearly introduce and refer to a completely new subject. They contemplate something beyond, and in addition to, the recaptures to be made from Portugal; they are unnecessary if they only refer to territory occupied by Portugal."

The fault here is, that the fact that there were two classes of "territory occupied by Portugal" is suppressed. Article V. expressly provides for one class, namely, lands taken from the Dutch by Portugal; but the other class, namely, lands of the Portuguese, that the Dutch had never possessed, are only included by reference to the general clause. Those lands were the "new subject" referred to in that clause.

Portugal itself and all these Portuguese settlements were claimed by Spain; and the seizure of them by any other sovereign would have been an act of war against Spain, precisely as the seizure of the State of Florida by Great Britain, during the Civil War in America, would have been an act of war against the United States. The revolt of Portugal had not destroyed the Spanish title, and the Dutch plenipotentiaries at Munster did not make the mistake of supposing that they could seize territory from Portugal without the consent of Spain. Indeed, but for the purpose of the Dutch to seize those lands from Portugal, the words referred to would have been unnecessary, and not only unnecessary, but an insult to Dutch sovereignty. Can it be supposed that the Dutch—whose sovereignty was acknowledged by the Treaty—found it necessary to stipulate with Spain that they might possess and own lands that they should thereafter conquer from England, or lands that they should discover and settle? Such rights are inherent in sovereignty, and it cannot be supposed that the proud Dutch plenipotentiaries, dictating a treaty of peace—as

we are told—thought it necessary to stipulate for the consent of Spain that they might in the future acquire title to territory to which Spain had no claim, through those ordinary sources of title by which national dominion is acquired. The stipulation that their possessions should extend to places that they should thereafter conquer and possess must have relation to Spain and to the taking of some territory to which Spain had a claim; else it is not only senseless but derogatory to Dutch sovereignty.

In the absence of a further provision to the contrary, Spain might rightly have regarded any attempt to seize, from Portugal, territory other than such as had been taken from the Dutch, as an invasion of Spain's rights and an infraction of the treaty. The words quoted were necessary to cover the case if the Dutch desired to have the right to seize from Portugal territory other than that which they (the Dutch) had once possessed. So these words are given a meaning. They are interpreted by Article VI. Why should they be supposed to give the right to seize territory anywhere claimed by Spain at the date of the Treaty? They cannot have such a meaning. A treaty of peace cannot be construed to give liberty to one nation to conquer territory claimed by others; nor can any reasonable, disinterested man persuade himself that it was the purpose of the treaty, either expressed or implied, that the Dutch—after being secured in the places they then possessed—were given permission to extend their bounds indefinitely into territory claimed by Spain. It would be to say, "Keep all you have taken from us and take all you can. It was never in the contemplation of either party to the Treaty of Munster that the Dutch should be at liberty to spread their possessions westward and in the interior, so as to possess "the Dardanelles of the Orinoco" and to "approach to the very heart of Spanish Guiana."

The United States Commission requested Prof. George Lincoln Burr, of Cornell University, to prepare and submit a report as to the meaning of the clause "comprising the places which the said

Lords the States hereafter without infraction of the present treaty shall come to conquer and possess," found in Article V of the Treaty of Munster. The report submitted by him is printed in volume 2 of the Counter-Case of Venezuela. Professor Burr, after making the report, was sent by the Commission to make an examination of the Dutch Archives, and found nothing inconsistent with the conclusions he had reached. He shows:

1. That the only places mentioned or suggested by the record we have of the negotiations that led up to the treaty, as being in the minds of the Plenipotentiaries in the use of the terms other "places" that the Dutch might "conquer and possess," were those to be won from the Portuguese in Brazil.

2. That in all the controversies and conflicts that followed the treaty as to territorial rights, the Dutch never appealed to the Treaty of Munster in support of any aggressions on territory claimed by Spain; never sought to use the treaty as Great Britain is now seeking to use it.*

3. That among all the authorities consulted by him he had found no other interpretation of the clause under consideration than that it refers to Portuguese possessions. (V. C.-C., vol. ii, p. 13.)

The failure of the Dutch Governors of Essequibo and of the States General, in any of their conflicts with Spain, to refer to this clause of Article V of the treaty as justifying the attempted extensions of the Dutch boundaries should, we think, be accepted as a conclusive construction of the clause. If it had the meaning now contended for, it was the sole basis upon which such extensions could be justified. If the Dutch limits had depended upon conquests from the natives, the resident Governors who had made the conquests would have known their limits and would not have

* In a note (V. C.-C., vol. ii, p. 13) written after his examination at The Hague, Professor Burr says: "To other clauses of the Treaty I find the Dutch appealing; to this never." In the same note he gives an instance where Spain did appeal to it in a protest against a proposed Dutch settlement in the region of Darien; and in a postscript (*ib.*, p. 14) he gives another Spanish exposition of the treaty addressed to the Dutch Government in 1786.

been appealing to the home authorities to give them a boundary. Every act of resistance by Spain to the extension of the limits of Essequibo was a disaffirmance of the construction of the Treaty now set up. And the failure of the Dutch at any time to set up the Treaty as a justification of such extension gives us a contemporaneous construction by both the parties to the Treaty.

We then have Great Britain insisting upon a construction of this clause that was never claimed for it by the Dutch; that was always repudiated by Spain; and that is inconsistent with the reason and spirit, and, indeed, with the very words of the treaty. It should be noted that if the British construction is admitted, this clause of Article V cannot be limited to Guiana, but embraces the whole world, and gives to the Dutch the right to "conquer and possess" any lands claimed by Spain the world around, that they might assume were not "effectively occupied" by her, in the sense of those terms given in the British Case. There is no limitation of the clause that can be suggested, save that it related to the Portuguese possession.

It is said (B. C.-C., p. 44) that before 1648 the Dutch did not recognize Spain's title to territory not effectively occupied by her, but expressly repudiated such title, whether based upon the Papal Bull or upon discovery. As to title by discovery, this is not a correct statement of the Dutch position. Discovery, as a source of title, was recognized by the Dutch as by every other European nation; and the doctrine of the British Case, as to the character of the occupation necessary to perfect that title, was never put forward by the Dutch, or by Great Britain, in the seventeenth century. The views expressed by the Dutch in the New Netherland controversy were, as we have seen, such as would give to Spain a wide claim in Guiana.

Spain's claim to the whole of Guiana might be contested, but it was not to be treated as baseless or fictitious, and was not so treated by the Dutch. They well knew that the Spanish claim made their rights insecure. They demanded and secured a release

of that title and afterwards set up that cession as a muniment of the Dutch title. They were careful to get a release to all territory claimed by Spain that they then occupied, to all that they had once occupied and had lost to Portugal, and to any further territory they might be able to take from Portugal in the future.

Now, as to lands on the west; they *knew* them to be claimed by Spain; they knew that any occupancy of them would be treated by Spain as an infraction of the treaty; they took pains in Article VI to specify against a seizure from Portugal being so construed, and would have taken the same precaution on the west if they had supposed they were securing the right to occupy them. They left Spain's claim there untouched, and not thereafter to be contested by them.

The British use made of the clause of Article V of the treaty relating to places to be thereafter conquered, involves the concession that without it the Dutch could not have extended their bounds without an infraction of the treaty. It conferred the right to take territory somewhere that could not otherwise have been taken. Great Britain says it was the disputed territory—if it was, then the Dutch acknowledged Spanish rights there.

This statement, made in the British Counter-Case (p. 132, par. 14) seems to commit Great Britain definitely to the proposition that any Dutch right to extend their possessions in Guiana is derived from the Treaty of Munster:

> "These settlements [on the Pomeroon] were not in violation of the Treaty of Munster, but were *expressly* in accordance with the rights reserved to the Dutch by the Vth Article of that Treaty."

It follows that unless the British contention as to the meaning of the disputed clause of Article V is allowed, the Dutch had no right to extend their possessions in Guiana.

The treaty must be construed in the light of the known claims of the parties to it. These were: Spain's direct claim to the whole of Guiana and to Brazil through Portugal; and a Dutch claim to what they had taken and then occupied in Brazil and in Guiana,

and to what they had lost in Brazil, after occupation, to Portugal since her revolt. The Dutch made no claim to any lands in Guiana beyond the proper line of their then possessions. These claims made all of the disputed territory to belong to one or to the other, and the adjustment of these claims required the drawing of a boundary; there was no other way. And it must be presumed, if not expressly left open for a future adjustment, that these claims were adjusted by the treaty. The Dutch dictated the treaty, and it must be construed strictly against them. Spain is not to be taken to have released any territorial claim by implication; nor can the Dutch rest a claim to make future "great extensions" of their possessions upon implications or doubtful phrases. A specific enumeration of what the Dutch were to have cannot be enlarged by implication. It is equivalent to saying they shall have nothing else at the cost of Spain. If, before the treaty, the Dutch might have disputed Spain's claim to adjoining territory not within her effective occupation, they could not do so afterwards. The consideration for Spain's confirmation of the Dutch title was the limitation of the Dutch title to their actual possessions. Spain claimed that she possessed the whole of Guiana by a perfected discoverer's title, and the treaty adjusted that claim. Unless, therefore, it contains an express stipulation that the Dutch may further limit Spain's claims, such extensions were wrongful. The phrase as to other places to be conquered and possessed, having by the treaty been given an express application to the Portuguese possessions, cannot by implication be construed to further restrict Spain's claims or to take from her territory not specified. A construction that would authorize the Dutch to build a post at Barima the next day after the signing, would violate every rule of construction and make the treaty a trick and a fraud.

If the Dutch did not regard Spain as having any claim to the settlements they possessed in 1648, in Guiana, and did not ask or take any grant or release from Spain as to them, why

should they be so careful to get the consent of Spain to the reconquest of what they had lost to Portugual? What had Spain to do with that? If the Dutch occupation of those places gave them a perfect title—and it was the same title they had to Essequibo—the right to retake them was equally perfect. It is only because, back of the Dutch occupation of all these places—those held as well as those lost—there was Spain's claim and right, which the Dutch insisted must be released to them. Now they knew that this same Spanish claim covered all of Guiana, and that as to the region now in dispute no other nation had then any pretense of dominion or settlement. Is it then to be supposed that, while taking a transfer of the Spanish title to lands that Spain had lost to them, either by conquest or occupation, and to other lands lost to the Portuguese in war, the Dutch were left at liberty to appropriate, at their pleasure, Spain's title to lands she had never lost, without an express cession? The title the Dutch took from Spain to the lands they possessed was precisely the same title that Spain had to the adjoining lands, and if they had contemplated seizing the latter they would not have left their right to do so without a clear expression.

The effect of the treaty was to cut off, from a region claimed by Spain, specified parts thereof. If the boundaries of the parts given to the Dutch had been definitely laid down in the treaty, the legal effect would not have been different. Yet, if the treaty had fixed the Essequibo as the western boundary of the Dutch possessions, would we still have had a claim that the Dutch were at liberty to go beyond it? That the Essequibo was not the boundary between Spain and the Dutch?

Spain was not releasing any claim, save to the Dutch. She was not making a cession to mankind, or establishing a world's common. The Dutch were seeking advantages for themselves—to acquire territory, not to open a region to settlement by their active trade rivals on their own borders. If the Essequibo was their western boundary, by the treaty, it was not to their interest to

require Spain to open the west bank to an English or a Swedish settlement. The protest against a Swedish settlement in 1734 on the Barima, shows that the Dutch did not then hold that the region was *terra nullius*, but that Dutch bounds and Spanish bounds were co-terminous; that there was no room for strangers.

We think it must be clear then that, unless the Treaty of Munster expressly and clearly gives to the Dutch the right to extend their possessions in Guiana in derogation of Spain's claims, any such extensions would be an infraction of the treaty. This conclusion seems to be accepted by Great Britain, for she seeks to find in the treaty a stipulation authorizing such an extension. The contention is that Article V of the Treaty of Munster, in the clause so much disputed, gave to the Dutch the right to extend their possessions over "the unconquered and unoccupied territories then in the possession of native tribes" (B. C.-C., pp. 41–42).

Is it meant that this right to "conquer and possess" the lands between the Dutch and the Spanish settlements was a special, exclusive right given by Spain to the Dutch, or only a recognition of Spain's want of title to these lands; that they were *res nullius*, and so open to the occupation of all nations? The propositions are inconsistent, and one of them must be abandoned. If the first is maintained, these things are involved:

1. A further contingent cession by Spain of territory on the west of the Dutch settlements.

2. The recognition by the Dutch of an *exclusive Spanish right to this territory. For Spain could not grant what she did not have.* If the Dutch derived from the treaty an exclusive right to occupy the disputed territory, then Spain before had that exclusive right.

3. That the contingent right given could only be perfected by a conquest of the native tribes, followed by an effective occupation, and that until so perfected, it remained Spanish.

4. That the boundary was a common, but a shifting and indeterminate one.

We think we are quite safe in saying that, from the very beginning, neither the Dutch nor Spain ever allowed that there was any territory between the Essequibo and the Orinoco that was not either Dutch or Spanish territory; and that since the cession to Great Britain that government and Spain have held the same view. Neither party to this contest—either by itself or its predecessor—has ever justified its entry or its presence in any part of the disputed territory upon the claim that it was "*terra nullius*," after 1648. The Dutch said, "You have crossed the line into our territory." Spain's answer was, "No, the line is not there, but here." Both agreed that there was at all times a common boundary; though it had not been laid down. They differed as to its location, but neither claimed at any time that the line of right was a shifting one—here to-day, there to-morrow. In all these disputes, the Dutch never defended any post or shelter, expedition or trade, upon the theory that the original bounds of the colony, as prescribed by the Treaty of Munster, had been enlarged by conquest, or that any adjoining territory, outside those bounds, was not Spanish. Nor did they ever claim that the bounds of the treaty had been or could rightfully be enlarged within the disputed territory, by virtue of any provision in the treaty itself.

We are not quite sure whether the British case is rested upon the proposition that the privilege to "conquer and possess" is to be taken as a general renunciation of all of the vast regions claimed by Spain throughout the world, but not yet "effectively occupied" (in the sense of the British contention), or only as a special permit to the Dutch to take what they wanted. And it does not matter much—for neither is tenable.

The construction that the right to acquire by conquest related to native tribes, is contrary to the accepted European view of the relation of these tribes to the territory they occupied. Such lands were not treated as accessions by conquest, but by discovery or settlement; and only a nation having already an original title

could, either by conquest or treaty, acquire the possessory right of the tribes. To make war on the tribes was to make war on the nation having that original title, if there were such. And if there were none such, it was to take title to lands *terra nullius* – not title by conquest. The terms "conquer and possess" were appropriate if applied to territory held by Portugal, and wholly inappropriate if applied to lands occupied by savage tribes and owned by no civilized nation.

But, if the British construction of the disputed clause of Article VI could be allowed, what would result? That construction is, as we understand, that the earlier provisions of the treaty confirmed the Dutch title absolutely to the places in Guiana then possessed by them, and that the clause in question gave them the right to conquer from the native tribes and to possess further territory not then "effectually occupied" by Spain. It cannot be claimed that this clause could have any effect to make the then possessions of the Dutch any larger than they would have been without it. The bounds of Essequibo were not enlarged. New territory could only be acquired by new conquests and new settlements. The Dutch objection to the Spanish title, as we are told, was that Spain's occupation of the territory was only a constructive occupation, and it will hardly be argued that a constructive Dutch occupation was to be made effective. The necessary conclusion from the British premises is, that the Dutch could acquire new territory only by an effective conquest and an actual occupation. Now, as we shall show in another place, the Dutch never subdued any one of the tribes, and never made a permanent new settlement within the disputed territory, except in the Pomeroon-Moruca region.

As Mr. Blaine said, in one of his despatches, the claims of Great Britain in Guiana have been rested on a "shifting foot"; but we are now fairly entitled to know from her whether her claims in the Cuyuni basin are rested upon the proposition that the Dutch settlement at Essequibo made that basin a Dutch pos-

session in 1648—one that was confirmed by the general clause of the treaty; or upon the ground that the basin was part of that region that the Dutch were given the right thereafter to "conquer and possess." To affirm the latter proposition is to abandon the water shed claim, for it involves a Dutch admission by treaty that the basin was not appurtenant to Essequibo. Our answer to the water shed claim will be made in another place.

We have perhaps already spent too much time in this discussion, and we therefore conclude it by saying:

FIRST.—That both of the signatories to the Treaty of Munster treated it as a cession by Spain to the Netherlands.

SECOND.—That the absolute cession was of lands actually possessed by the Dutch at the date of signing.

THIRD.—That the contingent cession related wholly to places occupied by the Portuguese.

FOURTH.—That the treaty established a common Dutch-Spanish boundary, and neither interposed a *terra nullius*, nor gave to the Dutch any special license to extend their possessions to the north or west.

FIFTH.—That Great Britain's construction of the treaty, taken in connection with her contention as to effective occupation, involves the monstrous and impossible conclusion that Spain gave to the Dutch, or opened to the world, the right to seize the mouth of the Orinoco, and to isolate all of her settlements in the interior.

SIXTH.—That to give a disputable phrase in a treaty of peace a construction that would leave unadjusted so important and so threatening a question is absolutely inadmissible.

SEVENTH.—That any extension, within the disputed territory, of the actual Dutch occupation of 1648, was an occupation of territory that the Dutch had admitted to be Spanish territory and not *terra nullius*.

CHAPTER X.

ADVERSE HOLDING—DUTCH BOUNDARY.

There is no more important branch of this investigation than the examination of the territorial claim of the Dutch authorities during the century and a half of their possession of the Colony of Essequibo.

By the Treaty of Munster the title of the Netherlands was confirmed to the possessions which they had carved out of the territory of Spain, and the two European States were thus brought into territorial contact. The Treaty had failed to state by geographical points or lines the Dutch boundary, and a temptation was thus offered to the manufacture of pretensions and claims, which few States situated as the Netherlands then were have found themselves able to resist, and to which the latter would no doubt have yielded had their new charter in 1764 not restricted them in terms to the Essequibo and Pomeroon.

The situation was somewhat exceptional, by reason of the fact that Essequibo was governed not by officers reporting directly to the national executive, but by a private trading corporation, to which vague powers of government had been delegated. These powers, as has been explained, included the ordinary management of the foreign relations of the colony as they arose in and near the colony itself. During the whole period of one hundred and sixty-six years from the Treaty of Munster to the Treaty of London, by which the "Establishment of Essequibo" was ceded to Great Britain, but three occasions are recorded in the evidence where the Dutch West India Company called upon the Government of the Netherlands to intervene, and upon these occasions the local authorities of the colony had already taken international action. During all the period, the Company, as far as the evidence shows, were, with these exceptions, left by the States-General to

manage their affairs as they pleased. Even on the three occasions referred to, when representations were made to the Spanish Government, the States-General took the facts and the law as the Company presented them, and confined their action to directing the Dutch Ambassador at Madrid to give formal expression to the request or remonstrance which the Company set up.

In view of these facts, the question of importance is not what the States-General thought and claimed, but what that branch of the Government of the Netherlands thought and claimed, in which resided the powers which the States-General had set apart and delegated for the purpose of managing and controlling the colony. Owing to their deputed powers of quasi-sovereignty, the Company's claims and the Company's admissions were the claims and admissions of the State itself.

The importance of this inquiry in a boundary dispute is obvious. The question is, What are the rights of the parties to the dispute? A court cannot take their respective pretensions as evidence of their rights, but it can and must take the limits of their pretensions as evidence of that to which they have no right. When one State claims a certain point as marking the boundary between it and another State, it admits the title of the other State to all beyond the point claimed, and it is bound by the admission. In making a claim of right, what it does not claim as of right it concedes as of right.

Next in importance to the actual claims are the grounds upon which the claims are advanced.

As has been already shown, the Treaty of Munster was a treaty between Spain and the Netherlands, and the question is not what interpretation Great Britain, who was not a party to it, puts upon the Treaty, but what was the understanding of it by the parties themselves. The British case is at pains to quote Major Scott (p. 28), the commander of the force that captured Pomeroon and Essequibo in 1665, as saying that by his conquest English possessions were extended from Cayenne to the Orinoco. Apart

from Scott's tendency to braggadocio, he is a discredited authority; but the objection to his testimony lies deeper. The question is not what a British officer thought should have been the Dutch claim, but what was the Dutch claim. For this we must look to the Dutch themselves, and we must look to what they said and did in reference to it. We must look to their acts as well as to their words, and not only to the words found in their formal international communications, but still more to the words of their unrestrained and confidential intercourse and correspondence, when they settled down for that long period of a century and a half with the Spanish as their neighbors on a common frontier. This correspondence we possess, and it is in evidence in this case. It is a correspondence between the directing head of this quasi-sovereign company in Holland and its directing head in the colony. It was carried on with that unrestricted freedom with which men write when possessed of the firm belief that their letters will never be seen except by those to whom they are addressed. It lays before us, as in an open book, the thoughts, purposes, claims and reasonings of the sovereigns of Essequibo. After reading it we know exactly where they stood on the question of boundary.

The first position taken by the Dutch West India Company on the question of American titles is perhaps the most important. It is contained in the "*Deductie*" formally presented by the Company to the States-General November 5, 1660 (V. C., vol. iii, p. 367), and already referred to.

Their words are:

". . . the Dutch nation must instead be preferred, being considered the same as in earlier times, namely, vassals and subjects of the King of Spain, first discoverer and founder of this new American world, who since, at the conclusion of the peace, has made over to the United Netherland Provinces all his right and title to such countries and domains as by them in course of time had been conquered in Europe, America, etc."

Two vital points are established by this document. First, it was a solemn recognition by the West India Company of the

Spanish title to the King's possessions in America by discovery and "founding" or occupation. Secondly, it was a solemn recognition that what the Netherlands had taken by the Treaty of Munster, and what the King of Spain had made over, was "all *his* right and title" to such territories as the Dutch had conquered in America. It was a declaration that the Treaty of Munster was, not as the British Case contends, a mere mutual acknowledgement of title, but that it was an actual cession to the Netherlands of the title of the King of Spain. It was a declaration that the West India Company were his grantees, and it was an absolute and unqualified admission that the title to all the territory not so ceded was still in the Spanish Crown. It even went so far in its reliance upon the prior Spanish title as to make a "far-fetched" appeal to it as a ground of priority over the English in North America, in that the Dutch at the time of the first discovery and occupation were themselves the vassals of the King of Spain. It established the fact that the Dutch could not extend their possessions beyond those ceded by the Treaty of Munster, except by encroachment upon Spanish territory, and that, therefore, the only claim which they could ever raise to such territorial extensions was a claim of adverse possession.

In the face of this document there is no escape from the position that the Netherlands, as represented by the Dutch West India Company, could not acquire one foot of territory, and that their grantees in this controversy could not be entitled to one foot of territory, beyond that which the Dutch acquired in 1648, except in accordance with the rules governing adverse holding.

This declaration alone finally disposes of the ultimate British contention of a *terra nullius*, to which any possession prior to the Treaty of Arbitration, however recent, may give title.

In 1674, as already stated, the old Dutch West India Company came to an end and a new Company was created, with a new charter, by which the operations of the West India Company, on the mainland of South America, were confined to two

points, namely, Essequibo and Pomeroon. Beyond these two points the Company possessed no authority under the charter.

The charter of 1674 (B. C. I, 173) therefore, shows conclusively that any territorial claim made by or through the Dutch West India Company—and, as we have seen, there could be no other Dutch claim—by reason of operations wholly or in part subsequent to 1674 must be confined to the Essequibo and the Pomeroon, because from this date down to the final termination of its existence, in 1791, the West India Company had, under the terms of the act creating it, no power to operate on the mainland of South America beyond these points. It would, therefore, make no difference what settlements they created, or what control they exercised, other than at these points; any such settlement or control was *ultra vires*.

Starting with these two formal declarations—one of the Dutch Government, the other of the Dutch Company; one defining the points at which alone the charter was operative, the other recognizing the prior Spanish title by discovery and occupation, we find for a hundred years after the Treaty of Munster not a whisper of territorial extension, much less of territorial claim, outside of the chartered limits. Neither in the mind of the Company at home nor in that of the Commandeur in the colony can any trace of such a proposition be discovered.

On the contrary, upon the only occasion during this period when the question arose, the Dutch Governor admitted the territorial title of Spain and her right to exercise territorial dominion in the now disputed territory, and the Company passed over the report of his admission without comment. This was the occasion of the prohibition of the Dutch horse trade in the Cuyuni, one of the most important episodes in the history of the Guiana boundary question.

Horses and other live stock were then, as for more than a century after, the principal product of the colony of Spanish Guayana, and its principal article of trade. The horse trade with the

Spanish was most essential to the Dutch colonists, because at the time it was their main, if not their only reliance, for these animals so indispensable in the production of sugar, the staple of the colony of Essequibo.

The trade is first mentioned in 1693 (V. C. II, 63), when the Company writes to the Commandeur that

"No slight advantage, moreover, has been brought to the Company through you by your having found out, *up in the river of Cuyuni*, a trade in horses."

The locality here referred to, as already explained (p.), is the Cuyuni valley above the falls.

This trade is spoken of from time to time during the following years—in 1697 (*Id.*, 65), when reference is made to the price "paid for the horses bought for you *up in Cuyuni*," and again in 1701 (*Id.*, 65), at which latter date it is reported that

"The trade in horses *up in Cuyuni* does not go as briskly as it used to do."

In 1702 the reason for this change becomes apparent. War was then about to break out in Europe, and the Cuyuni horse trade suffered in consequence. The Spanish authorities prohibited the trade, as they were entitled to do, in the Cuyuni basin, which was their territory, and the testimony to both these facts, namely, the territorial rights of Spain and the exercise of these rights by prohibiting the horse trade is given by the Dutch Governor himself (V. C. II, 68). In proposing to the Council that they should purchase horses out of a Rhode Island ship, a thing forbidden by the Company, he advises, in view of the urgent necessity of the colonists, "that they agree and consent hereto, the more so because *all the lands* where we carry on our horse-trade, are under the King of Spain"; and the following year, 1702, he reports to the Company the death of horses, which "truly is a great loss to the Colony, the more so since the Spaniards will no longer permit any trafficking for horses *on their territory*" (V. C. II, 68).

In the following year he renews his complaint and puts the cause of the trouble on the same ground as before, saying that "owing to the present war, no horses are to be had *above here* as formerly, inasmuch as those Indians think they stand under the crowns of Spain and France, and this trade is thereby crippled. We cannot, however, get on without these and attain our object, having lately lost many of them by sickness" (V. C. II, 69).

What is the significance of the above citations? Here are three statements made by the Governor of Essequibo, in three separate years, which assert in terms as plain as can be framed: First, that the territory of the Cuyuni valley is the territory of the Spaniards—not merely that they claim it to be their territory, but that it is their territory—that there is no question about it; and, secondly, that upon their territory, namely, "up in Cuyuni," "above here," the Spanish authorities assert their territorial rights and prohibit the Dutch from engaging in a trade of the utmost importance to the latter. At this early day, in the opening years of the eighteenth century, Spanish control was sufficiently active to command and enforce a prohibition of trade in this wilderness.

What does the Dutch Governor do when his colony is thus cut off from an article so essential to its existence? Does he protest to the Spanish authorities? Does he suggest a protest to his own Government? Does he claim either to his own Government or to the Spanish that this is Dutch territory, even when he knows and himself reports that the prohibition is based on a territorial claim? So far from disputing the rights of Spain in the territory, he states and admits them as an established fact, and acquiesces in their enforcement on this ground. The action of the Dutch Governor is more than an admission of the absence of any territorial right in the Netherlands; it is an express recognition of the territorial rights of Spain.

A recognition of Spanish sovereignty in the Coast Territory was made in a letter of the Dutch Governor in 1694, where he

said "Most of the red slaves come from the rivers Barima and Orinoco, which lies [*sic*] under the dominion of the Spaniard"—evidently referring to the region in the neighborhood of the two rivers.

Not for half a century afterwards was any reference made to territorial claims or territorial extension west of the Essequibo and the Pomeroon.

The attitude of Spain during this period was that of a territorial sovereign holding possession of and dominion over the territory in question up to the Pomeroon and the Essequibo. When the occasion arose it did not hesitate to assert its dominion, as in the Cuyuni horse trade and in the lower Orinoco, where from time to time Dutch traders were arrested for a violation of its regulations (B. C.,).

Upon such occasions the assertion of dominion was received with entire acquiescence. The sovereignty of Spain was not only unquestioned but admitted.

As time wore on, however, the more farsighted of the Spanish officials, who were familiar with the conditions in Guayana, perceived that a time might come when the Dutch, under the lead of an aggressive Governor, would attempt to encroach upon their territories.

In the *Memorias* of the Marquis de Torrenueva on the Commission in Seville in 1743, this possibility seems to have been seriously considered for the first time (B. C. II, 41).

Torrenueva was looking broadly at the condition of the Spanish colonies in America, and had observed the importance of checking the "usurpations" of Brazil in South America and of the French on the Mississippi, and he remarked that equal attention is due to "the object with which the Dutch established themselves to the windward of the River Orinoco." Of this object, he says: "And this could be no other than to get nearer to the mouth and banks of the said river, and to found thereon plantations, which might facilitate their traffic with the New

Kingdom and enable them to penetrate by that part to those places and districts which their avarice might dictate until they made themselves masters of the mouth of the Orinoco, and the nations that dwell there, in a vast extent of 260 leagues from there to the 'villa' of San Juan de Los Llanos."

He recommends that to check this advance the mouth of the Orinoco should be occupied by a fort and a town. He does not refer to any act of encroachment that has already taken place, and he evidently has no such act in mind. His recommendation is based wholly on the possibility of what may happen in the future, but he suggests an inquiry as to the points then occupied by the Dutch in Guayana, "to consider whether they were in possession of those territories at the time the Treaty of Munster or Westphalia was signed in 1648, taking the necessary measures for the purpose, in connection with what was stipulated and is deduced from Article V. of the said Treaty,"—whether, in other words, the treaty included anything on the Essequibo beyond Kykoveral—a suggestion which shows that in Spain the basis of determining the boundary line was clearly understood, and that it was suspected that the early Pomeroon settlement was an unwarrantable intrusion.

It is worthy of remark that this first expression of apprehension on the part of a Spanish statesmen as to the possibility of Dutch aggression in Guayana was coincident with the appointment as Commandeur of the colony of the first Dutch official, and it may be said the only Dutch official, to conceive a policy of territorial acquisition by means of encroachment. This was Storm van 's Gravesande, whose administration as Commandeur and Director-General lasted from 1742 to 1782, and who is the sole author of the Dutch boundary dispute. The history of that dispute is confined to Storm's administration. It came to an end with his retirement from office, only to be revived in the next century as a British dispute by the geographer Schomburgk.

Storm's theory on the question of boundaries was a theory

not of territorial right, but of territorial encroachment. Like Schomburgk, he believed in the rectification of frontiers. The Company did not believe in his plans, and refused to adopt them. On the question of right, they decided that they could find no ground for a claim to territory to the westward, and their suggestion of such a claim in their First Remonstrance of 1759 was based upon a misapprehension of the facts upon the discovery of which it was quickly withdrawn.

I. Interior Territory.

The question first came up in Storm's mind when the progress of the Spanish missions in the savannas near the Cuyuni gradually attracted his attention. The missions had been at work in the 17th century, but the founding of permanent settlements had begun in 1724. Before 1746, when he wrote his first letter on the subject, several of these settlements, such as Cupapuy, Alta Gracia, Divina Pastora, with its immense cattle farm, Cunuri, and Tupuquen had been established on the rivers tributary to the Cuyuni, while others had been founded in adjoining territory on the south of the Orinoco. From that time on Storm makes the boundary the subject of continual letters and appeals to the Company. He represents that he is unable to do anything as to the Spanish settlements, because he does not know at what point to set up a western boundary.

This new boundary he wishes the Company to fix. The question that he presents is not a question of title. In that he takes no interest. What he proposes is territorial extension, but he wishes definite authority from the Company as to the point to which he shall extend. Finding that the Spanish settlements are moving eastward, he desires, if possible, to erect a barrier. Being unable to extend his settlements, the next best thing is to extend his boundaries. For topographical and other reasons, plantations cannot be created beyond the actual boundary at the Cuyuni falls. His plan is, therefore, to set up a territorial claim; but he cannot

set up such a claim because he does not know what boundaries the Company will set for it. He has no reason for supposing that the boundary is beyond the falls. No such claim had even been set up or even heard of before; but in view of the Spanish approach, he is satisfied that such a claim is desirable, and that it must and will be made by the Company. Will the Company tell him what it is?

That the above correctly states the position of the Colonial authorities is shown by the correspondence.

In July, 1746 (B. C. II, 45), when Storm had received word that the Spaniards had established a new mission on the settlement, he writes:

> "I feel not the least diffidence as to dislodging them from that place and capturing those forts, but such a step being one of great consequence, I dare not take anything upon myself, especially as the proper frontier-line there is unknown to me."

On December 7, 1746 (B. C. II, 46), the Commandeur again writes about the Spanish fort and mission up in the Cuyuni, and states that the inhabitants are very much aggrieved thereat;

> "and the Carib Indians a great deal more so, since it perfectly closes the Slave Traffic in that direction from which alone that nation derive their livelihood. They have also expressed a desire to surprise the Mission and level it to the ground, which I not without trouble, have prevented, because they belong to our jurisdiction, and all their trade being carried on in the Dutch Colonies" [that is, the slave trade], "such a step would certainly be revenged upon us by the Spaniards. It is very perilous for this Colony to have *such neighbours so close* by, who in time of war would be able to come and visit us overland, and especially to make fortifications in our own land is in breach of all custom. I say upon our own land—I cannot lay this down, however, with full certainty, because *the limits west of this river are unknown to me.*"

The above shows clearly that in this Colony of Essequibo, which had been in existence for a century, there was no knowledge of any territory belonging to the colony west of the river. As the Commandeur says, "The limits west of this river are un-

known to me." He knows that the plantations are on the river below the falls, but beyond that he knows nothing.

One significant conclusion to be drawn from this is that there could have been no settlements west of the Essequibo. If there had been, the Commandeur would not have said that he had no knowledge of the limits west of the river.

In a report of Storm, dated March 23, 1747 (B. C., II, 48), is a statement that "the Spaniards had made a journey in the southwestern direction right behind us, and had there discovered the origin of the Rivers Cuyuni and Massaruni," flowing out of a great lake, and that their intention was to establish a permanent settlement. The letter concludes:

"I should already long ago have removed and demolished the first fort up in Cuyuni (*which even now is easy of accomplishment on my part through the Caribs*), if I were but rightly conscious how far the limits of your Honours' territories extend, both on the eastern and northern sides, as well as south and westwards, *for the decision whereof not the least help is to be got in this office here.* I therefore earnestly request your Honours to be pleased to send hither the necessary information concerning that matter, because an error in this might lead to quite too evil consequences."

It is significant that the Commandeur, especially as intelligent a man as Storm, could get no information whatever on the boundary question in the records of the colony. It is a conclusive proof that the Dutch had at this time never made a claim or established a settlement in the territory now in question.

The Company considered the question presented to it, and ordered that a map be made of the colony. This map was prepared and sent by Storm in 1750.

It shows no occupation west of the Essequibo, except the post at Moruka.

It was further decided by the Council of the Company (Sept. 6, 1747) that all the Chambers should investigate each by itself "whether it can be discovered how far the limits of the Company in Rio Essequibo do extend," and report to their respective Chambers what they found and discovered. The Commandeur

was directed that "if in the meantime, he can *by indirect means and without himself appearing therein*, bring it about that the Spaniards be dislodged from the forts and dwellings which they have, as he maintains, made on the territory of the Company and be prevented from further extending themselves there, he shall be permitted to carry this out" (B. C. II, 51).

It appears from this reply of the Company that they were equally ignorant with the Commandeur as to any Dutch territory west of the Essequibo. Nor were they willing that he should assert any claim to such territory as against the Spanish, for they direct him, not to protest, not to write to the Spanish authorities not to attack the intruder, not to raise the question himself in any form, but "if he can by indirect means and without himself appearing therein, bring it about that the Spaniards be dislodged," he may do so.

Any territorial claim, therefore, made by Storm after 1747 in reference to the Spanish missions, is made not only without authority, but in contravention of the Company's orders.

On December 2, 1748, Storm wrote (B. C. II, 57) that "the Spaniards were beginning to gradually approach the Upper Cuyuni," and he added: "I wish however, that, if it were possible, I might know the proper boundaries."

A curious phase of the dispute which Storm, against the express instructions of the Company, attempted to create appears in a communication to the Company of September 8, 1749 (B. C. II, 63), in which he reported a correspondence with the Governor of Cumaná. As we have only Storm's version of what was said, it is difficult to know exactly what was the position of the two parties. Storm says:

"Having written to the Governor of Cumaná that, if he persisted in the design of founding a Mission in the River Cuyuni, I should be obliged to oppose myself there against effectually, he has replied to me that such was without his knowledge (not the founding of the new [Mission], but the site), and that it should not be progressed with, as in reality nothing has been done."

Storm carefully refrains from saying that he asserted any territorial claim, and from enclosing either his letter or that of the Governor, from which the Company might have been informed exactly what had been done. No trace of these letters has been found. Storm represented to the Company that the Governor had said that the mission "should not be progressed with," but with the additional statement that "in reality nothing has been done." This would seem to imply that all the Governor had said was that he did not intend to build such a mission, and that, in fact, Storm had been misinformed. Whether he took any ground as to Spanish rights in the territory Storm fails to state, and as far as the evidence shows the correspondence raised no such question. The letter, however, was clearly a violation of the Company's orders given two years before.

Some years later, that is to say, on September 2, 1754 (B. C. II, 93), Storm had occasion to refer to this matter, and he admitted that the letter was contrary to the "command that I must try to hinder it, but without appearing therein." He said: "I did not agree in the reasons which have actuated your Honours to command this secretly;" but he justified himself on the ground that his letter had been written before the instructions were received, in which statement he was in error. He added that he took the statements of the Governor as "sterling coin," but that since then, instead of stopping the establishment of missions or moving them back, the Spanish authorities had founded two new settlements at a point lower down the Cuyuni valley.

This outcome of Storm's attempt at independent action shows that he never made any claim of territorial right. He never again addressed the Spanish authorities on the subject of their settlements, though he did not agree in the reasons that had actuated the Company; and it was this presumptuous desire of a subordinate to impose upon the Company his policy of territorial extension that was at the root of the whole difficulty. The Company did not believe that they had a claim, and acting on that be-

ief refused to assert it. Storm tenaciously adhered to his purpose, however, and at last succeeded in getting the Company nvolved in a position from which they were only too glad subsequently to withdraw.

In a report presented personally by Storm at his visit to Holland in 1750 (B. C. II, 67), the Commandeur again called attention to the boundary, and said:

"It is necessary that the limits of the Company's territory should be known, in order successfully to oppose the continual approach of the neighbouring Spaniards, who, if they are not checked, will at last shut us in on all sides, and who, under pretext of establishing their missions, are fortifying themselves everywhere. And *because the limits are unknown, we dare not openly oppose them*, as might very easily be done by means of the Carib nation, their sworn enemies."

This is at least the fifth time that the question of boundaries had been brought up by the Company's principal agent at the colony and had remained unanswered by the Company. It remained unanswered because the Company knew that none of this territory had ever been acquired by the Netherlands, while their own charter limited their possessions to Essequibo and Pomeroon.

By report of the Committee of the Company July 27, 1750 (B. C. II, 68), it appears that the question of the boundary had been called to the attention of "His Highness," but apparently without result.

On September 8, 1750, the Acting Commandeur, who evidently had not grasped Storm's theory of rectification of frontiers, reported to the Company (B. C. II, 69), in reference to information that the Spanish had begun to construct a new mission "close by here," that he had carefully informed himself about it, and that in his opinion the last mission which was being constructed "is directly far outside the concern of this colony."

Even Storm's visit to Holland had not resulted in any adoption of his boundary theories, but he had no intention of dropping the subject. Two years after his return, having as yet received no

answer, he sent, on September 2, 1754, his sixth appeal to the Company for information as to the boundary (B. C. II, 93):

"I have the honour to assure your Honours that I shall not slumber in this matter, but shall do everything in my power, and meanwhile await your Honours' orders, respecting the so long sought definition of frontier, so that I may go to work with certainty. (Has not this been regulated by the Treaty of Münster ?)"

It was in the same letter that he referred to the establishment of two new missions, notwithstanding his former letter to the Governor, and to the fact that he did not agree with the Company in their policy of non-interference.

The answer of the Company was finally given January 6, 1755 (B. C. II, 101). It was not an answer at all. After nine years of investigation and discussion, the Company acknowledge their inability to state any specific boundary, and fall back upon the terms of the charter. They say (B. C. II, 102):

"We would we were able to give you an exact and precise definition of the real limits of the river of Essequibo, such as you have several times asked of us; but we greatly doubt whether any precise and accurate definition can anywhere be found, save and except the general limits of the Company's territories stated in the preambles of the respective Charters granted to the West India Company at various times by the States-General, and except the description thereof which is found in the respective memorials drawn up, printed and published when the well-known differences arose concerning the exclusive navigation of the inhabitants of Zeeland to those parts, wherein it is defined as follows: 'That region lying between those two well-known great rivers, namely, on the one side, that far-stretching and wide-spreading river, the Amazon, and on the other side, the great and mightily-flowing river, the Orinoco, occupying an intermediate space of ten degrees of north latitude from the Equator, together with the islands adjacent thereto.' For neither in the Treaty of Munster, concerning which you gave us your own opinions, nor in any other is there to our knowledge anything to be found about this. The only thing we have discovered up to this time by our search is a definite boundary-line made in the West Indies between New Netherland and New England in the year 1650, but nothing more or further.

"For which aforesaid reasons, it is therefore our opinion that one ought to proceed with all circumspection in defining the Company's territory, and in disputing about its jurisdiction, in case this may have led to the aforesaid preparations of the Spaniards, and that it would be best in all befitting and amicable ways to guard against all estrangements and hostile acts arising therefrom."

The above letter is conclusive evidence that in 1755 the West India Company did not claim any part of the territory now in dispute above the falls or west of Pomeroon. It begins by saying: "We would we were able to give you an exact and precise definition of the real limits," which plainly shows that they were unable to do so; and it adds that they "greatly doubt whether any precise and accurate definition can anywhere be found," excepting in the charters.

In this statement the Company were correct; and if they had only read the charter of 1674, they would at once have found what they were seeking, namely, the limits of the Dutch claim. This charter gave the Company two places on the continent of America, namely, Essequibo and Pomeroon. Whether the Dutch Government had a title that enabled it to make this grant may be a question, but that this was all that it granted is beyond question.

The Memorial from which the Zeeland Chamber, writing this letter, quotes a vague and grandiose phrase referring to a "region" lying between the Amazon and the Orinoco, and which it cites as the only indication of a boundary, was a memorial prepared by itself three years before, in 1751, in a dispute between the different Chambers of the Company. Such a statment made by one or the other of the contending parties in the Company, in a brief in support of rival pretensions could indicate nothing as to the limits of chartered rights; still less could it be used in an international controversy as a definition of specific frontiers, especially when the individuals who made it were the same as those who were now referring to it as the only suggestion they could find as to colonial limits. Such phrases could certainly never

be the foundation of title and the Company evidently did not rely upon them as such.

The Company sagely observe in conclusion that the only thing which their search has discovered so far is a boundary line made between New Netherland and New England, "but nothing more or further." It would seem that there could not well be anything further from the question then under consideration.

Finally, in answer to Storm's intimation that he did not agree with them in abstaining from territorial claims, they made the significant statement:

> "For which aforesaid reasons, it is therefore our opinion that one ought to proceed circumspectly in defining the Company's territory and in disputing about its jurisdiction,"

and that it would be best to guard against all entanglements. Not only were the Company ignorant of any claim to extended territories, but they distinctly refused to make such a claim, and most solemnly enjoined upon their agent in the colony that he should do nothing to raise the question, an injunction that was all the more emphatic in view of the letter to which it was a reply.

The destruction by the Spaniards of the Dutch post at Quive-Kuru in 1758 led the Director to write a long and emphatic protest to the Spanish Governor (B. C. II, 154).

In examining this letter, it must be remembered that Storm was precluded from setting up any territorial claim, first, by the want of any foundation for such a claim, as was repeatedly admitted in his letters, and, secondly, by the express prohibition of the Company. All such claims are, therefore, carefully avoided in the letter. The Director-General expresses his surprise at the attack, at the imprisonment of the occupants of the post, and the destruction of the house. He refers to it as an offense "directly opposed to the law of nations, and to the Treaties of Peace and Alliance." He asks how such violence could be committed "without previously making a complaint." He dwells upon it as

an unfriendly act and even an outrage. But he says no word to indicate that it was performed on Dutch territory, or that it was in breach of the territorial rights of Essequibo. The letter is in every word such a letter as might have been written had the acts complained of been committed on the other side of the Orinoco in the heart of Venezuelan territory; in fact, the absence of any reference to a violation of territorial rights as the gravamen of the offence is so studied and marked as virtually to amount to a disclaimer.

Storm's letter having been delivered by the Commandant of Guayana to Don Nicolas de Castro, Governor of Cumaná, under whose administrative supervision the province of Guayana at that time was placed, the latter replied to it in terms about which there was no ambiguity. The letter was as follows (B. C. II, 169–70):

"The Commandant of Guayana has forwarded to me, among other documents, a letter which you sent him claiming the two Dutch prisoners, a negro slave, and a half-breed woman with her children, whom the guard dispatched from that fort seized in an island of the River Cuyuni, established there in a house, and carrying on the unjust traffic of slavery among the Indians, in the dominions of the King my Sovereign. As this same River Cuyuni and all its territory is included in those dominions, it is incredible that their High Mightinesses the States-General should have authorized you to penetrate into those dominions, and still less to carry on a traffic in the persons of the Indians belonging to the settlements and territories of the Spaniards. I therefore consider myself justified in approving the conduct of this expedition."

Storm chose to consider himself affronted by De Castro's letter, because it was addressed "To the Dutch Commandant residing in Essequibo," and he conceived the idea of having the letter answered by the officer who commanded his little garrison. The answer begins (B. C. II, 173):

"I duly received the letter which was written to me by Mr. Don Nicolas de Castro, whose person or quality I do not have the honour to know, in answer to the letter which our Governor had written to you."

This arrangement served two purposes: it enabled Storm to resent the supposed affront to himself, and also to evade the prohibition of the Company as to a territorial claim, by making it in the name of an irresponsible subordinate.

In this letter the act of the Spaniards is characterized as a "violation and insult done to the territory of his Sovereigns." It adds that

"Since it seems to him, according to the letter in question, that in Guayana and at Cumaná there is ignorance of the boundaries of the territory of His Catholic Majesty and those of the States-General according to the Treaties at present subsisting, he has ordered me to send you the inclosed map, on which you will be able to see them very distinctly."

The only comment to be made on this statement is that the ignorance of the Spaniards in reference to the boundary, however great it might be, could not exceed that of the Dutch themselves, as plainly admitted by the letters both of the Director-General and of the Company.

This letter was sent back unopened by the Spanish Commandant, the latter stating that he was "forbidden to enter into any correspondence concerning the matter of Cuyuni" (B. C. II, 175).

Storm reported the facts in two letters, one of September 9, 1758 (V. C. II, 125), the other undated, but written in the following year, 1759 (*Id.*, 129).

In the first of these letters he merely said that the claim that the post was on Spanish ground was "utterly and indisputably untrue," and referred to D'Anville's map as authority for the boundaries.

In his second letter he was more specific. He said:

"There not being the slightest difficulty or doubt concerning the ownership of this *branch** of Essequibo, most undoubtedly belonging, as it does, to the West India Company, this unexpected and unheard of act is a violation of all existing Treaties."

The position taken in the above letters must be looked at in the light of Storm's previous correspondence, which abundantly

* Erroneously translated *portion* in B. C., II, 172.

shows that he was ignorant of any Dutch claim of right west of the Essequibo River and of any ground for such a claim. We have six letters, from 1746 to 1754, stating that he knew no boundaries. He suggests, however, that he has found them in D'Anville's map. Now, D'Anville's map (Br. Atlas, p. 16) is a map of the whole of South America, and a glance will show that the boundary therein traced is an arbitrary line, representing the mere speculation of the geographers. It was enough for Storm, however, and he adopted it and passed it on to the Company.

In his second letter he suggests the theory that the river belongs to the Company because it is a branch of the Essequibo. This which amounted to saying that because the Dutch were settled for a dozen miles along the Essequibo, their occupation was constructively extended to include an immense lateral territory, 300 miles in width, to within 20 miles of the banks of the Orinoco, a territory which at that moment was occupied by numerous Spanish settlements controlled and governed by the King of Spain; a territory, moreover, whose natural outlet and natural entrance were on the Spanish or western side and which the Dutch were precluded from settling, according to their own statement, by natural barriers (p.). So far as Storm is concerned, all this was mere matter of suggestion. Up to this time he had repeatedly affirmed his ignorance of any ground of right, and had declared that there was nothing in his possession upon which to base a territorial claim. His letters amount to a denial of any ground of claim. He does not base such a claim upon anything now. He merely suggests that a French geographer has laid down a boundary, and that the branches of the Essequibo are indisputably the Company's territory. The methods of "rectifying frontiers" are alike in all ages. Substitute "Schomburgk" for "D'Anville" and the sentence describes the process of reasoning which has led to the present "extreme British claim."

The West India Company were far from being satisfied. They wanted something as a ground of right, which as yet the

Director-General had not furnished them. They therefore replied on May 31, 1759, asking (B. C. II., 174)—

"what grounds you might be able to give us to further support our right to the possession of the aforesaid Post—perhaps a declaration by the oldest inhabitants of the Colony could in this connection be handed in, which might be of service."

The reply of the Director-General to the Company's inquiry as to what he knew about the boundary shows, as do his previous letters, that he knew nothing. He justified his claim by the statement (Report of September 1, 1759, B. C. II, 180):

"That Cuyuni being one of the three arms which constitute this river, and your Lordships having had for very many years the coffee and indigo plantation there, also that the mining master, with his men, having worked on the Blue Mountain in that river without the least opposition, the possession of that river, as far, too, as this side of the Wayne, which is pretended to be the boundary line (although I think the latter ought to be extended as far as Barima), cannot be questioned in the least possible way, and your Lordships' right of ownership is indisputable, and beyond all doubt."

In reply to the Company's inquiry as to the location of the post, he stated that it "was situated about fifteen hours above the place where Cuyuni unites with Massaruni," and he adds:

"But this has little to do with the matter, even if the Post had been situated fifty hours further up, it was a matter which did not concern the Spaniards, and in the same way as they are masters upon their territory to do what pleases them, so your Lordships are also masters upon yours."

Here we get the real underlying idea of Storm's territorial claims. He is not concerning himself with any question of right or of title. The questions which he is considering are questions of expediency or convenience. His argument is: "The territory is ours because we want it." He says that the Waini is pretended to be the boundary line (by whom he does not say), but that he thinks the boundary "ought to be extended" as far as the Barima. It is an extension of boundaries on grounds of expediency to which Storm is looking, not to a definition of boundaries on grounds of right. The fact that the Dutch had plantations on the 12-mile

stretch of the Cuyuni below the falls, and that for a few months a Dutchman had prospected for minerals in the Blue Mountains, near the same falls, did not constitute possession of a territory three hundred miles to the westward. Storm's real contention is not that the post was placed on Dutch territory, but that the establishment of the post made it Dutch territory. He says it was "fifteen hours" from Essequibo, but if it had been fifty hours it would have made no difference.

Before the receipt of this letter, and while its own inquiry for further information remained unanswered, the Company made their First Remonstrance (V. C. II, 133), that of 1759, to the States-General, and the States-General, through their Ambassador at Madrid, presented it to the Spanish Government (V. C. II, 135). The extent of the claim advanced in this Remonstrance is to the Essequibo and to "all the branches and tributaries which flow into it, and especially of the northernmost arm of that river, named Cuyuni." This the Company, in singular ignorance of the facts of history, bases on the ground of immemorial possession, though just before they had been searching for an old inhabitant to prove the possession. The Remonstrance is exceedingly cautious in its terms. It uses the most guarded and hesitating language. It nowhere states that the territory referred to, which includes the whole drainage basin of the Cuyuni, was Dutch territory or territory belonging to the Company. It only says that it has been "possessed from time immemorial" and that they "in virtue of that possession, have always considered the said river of Cuyuni as a domain of this State."

This is not a claim, but an exceedingly deferential expression of opinion.

Referring to the attack on the post, it complains of the outrage, appends De Castro's letter asserting that the post was "in the dominions of the King my Sovereign" (V. C. II, 324)—a statement, it may be remarked, very different from that which

says that the Company having been in possession of the Cuyuni from time immemorial, "have always considered said river of Cuyuni as a domain of this State,"—and it asks that reparation may be made for the attack; that the Company may be reinstated in the quiet possession of the post, and that a proper delimitation between the Colony of Essequibo and the River Orinoco may be laid down by authority, so as to prevent any future dispute.

The same position is taken by the Ambassador in his written protest. He said (V. C. II, 135):

> "His masters have been from time immemorial in undisturbed possession of the River Essequibo, and *all the little rivers* which flow into it, and especially of the right arm of the said river, which flows northwards, and is called the Cuyuni; that, in virtue of the said possession, his masters have for a very long time considered the whole of the said river as a domain belonging to them,"

and that they have consequently erected a post, etc.

Here, again, the suggestion is not put forward in language which suggests a claim. It is rather an invitation to a discussion, especially in connection with the proposal for a delimitation. Spain, however, refused to discuss it. No answer was made to the Remonstrance, as it required none. The letter of the Governor of Cumaná declared that the Spanish dominion included the whole Cuyuni and its territory. This letter was expressly referred to in the communication of the Dutch Ambassador to the Spanish Government, and the latter were therefore apprised of the fact that the position taken by the Spanish authorities in Guayana had been communicated to the States-General. Spain had nothing to add to that statement.

Under these circumstances, the statement in the British Case (p. 54), upon which so much stress is laid, that "this claim the Spanish Government never denied and never rebutted," is evidently an error, and the statement in the Counter-Case (p. 102) that of "'assertion of sovereign rights' . . . by Spain in the territory now in dispute there was none," is equally an error.

When the Dutch Government, in making its complaint, annexed to the complaint a complete answer from one of the highest officers in the Spanish-American colonies, nothing remained to be done by Spain. The Dutch had had their answer. They had had their denial. Nothing more was necessary unless Spain proposed to disavow the declarations of the Governor of Cumaná, which it certainly had no intention of doing.

Moreover, the claim was not pressed. It was never heard of again. In its original terms it had been not so much a claim as the expression, in very doubtful and halting terms, of an opinion on the part of the Company and of the States-General. The only ground of the opinion, namely, immemorial possession, was so marvelously wide of the truth as to the Cuyuni valley as hardly to be open to discussion, and the claim, if claim it was, was presently contradicted and withdrawn.

The Second Remonstrance was presented to the Spanish Government in 1769 (B. C. IV, 29), when complaint was made of a number of acts on the part of Spain, which will be considered later. It is desired here only to trace the relation between the two Remonstrances.

Nothing had been done at this time about the Remonstrance of 1759. Spain had paid no heed to it. There is no suggestion that it had ever been made the subject even of a conversation between the Dutch Ambassador and the Spanish Ministers. This in itself is enough, according to diplomatic usage, to show that the Remonstrance was not regarded by its makers as a serious claim.

But the Second Remonstrance goes further than mere silence as to the prior claim. It is an entire waiver and abandonment of the old cause of complaint. It does not pass it by in silence. It refers to it, but as a thing long since past and done with. Speaking of the new causes of complaint, it says that "the Remonstrants, especially after what had happened in 1759, had been extremely surprised to learn by a letter" from the Director-General certain facts, etc.

Certainly, after this reference, nothing more needed to be said by Spain about "what had happened in 1759." The only remaining importance of the occurrences of 1759 was that they caused additional surprise in the Dutch at learning of something that had happened ten years later.

But the Second Remonstrance went further than this. It took up the territorial question. It alluded to "the establishment of two Spanish missions, occupied by a strong force, one not far above the Company's said Post in Cuyuni (apparently, however, on Spanish territory), and the other a little higher up on a creek which flows into the aforesaid Cuyuni River."

This is all that is said about these missions. No complaint is made of them. No suggestion is made that they are displeasing to the Dutch Government. They constitute a mere flourish in the document.

The extraordinary fact about the allusion, however, is: first, that it is made at all, as it is not made with a view to protest; and, secondly, that it is coupled with the statement that the lowest of the missions is "apparently, however, on Spanish territory."

This is a complete reversal of the previous position of the Company. The claim, if it was a claim, in the Remonstrance of 1759 was a claim to the tributaries of the Essequibo and especially the river of Cuyuni. Here it is distinctly admitted, and the admission is entirely gratuitous, that a point not far above the Company's post in Cuyuni is in Spanish territory, and that the establishment by the Spanish Government of a settlement there, as well as at a higher point on a tributary of the Cuyuni, is not a subject for complaint. There was no purpose in saying that the mission was on Spanish territory except to withdraw the claim which they had previously advanced to the Cuyuni. This claim they in terms abandoned. All that was left was a cloudy statement possibly implying a Dutch claim to the post, and to the territory in the rear of it. As this was the lowest post, and was but a

short distance above the falls of Cuyuni, it conceded substantially all that had been made the subject of the First Remonstrance.

As is evident from the tone of the First Remonstrance, the Company, after sending it, were very far from being satisfied with the position in which their Director-General had involved them, and the remaining correspondence shows how they came to abandon their position.

On December 3, 1759 (B. C. II, 181), five months after the Remonstrance had been sent, they for the second time wrote to the Director, saying:

"We *still* request you to lay before us everything that might in any way be of service in proof of our right of ownership to, or possession of, the aforesaid river [Cuyuni]."

On May 2, 1760 (B. C. II, 184), the Director replied:

"I have very little to add to what I have already had the honour of submitting to your Lordships in several of my despatches [on the boundary question] and, although I am aware, as your Lordships are pleased to inform me, that no Treaties have been made which decided that the dividing boundary in South America should run inland in a direct line from the seacoast, . . . the rivers themselves, which have been in the possession of your Lordships for such a large number of years, and have been inhabited by subjects of the State without any or the least opposition on the part of the Spanish, are most certainly the property of your Lordships."

Storm's reiteration of this claim, when the Company so evidently questioned it, and asked for proofs of title, again shows that he was only suggesting to the Company the point where they ought to make their frontiers. Historical facts, questionsof discovery, title, occupation, political control, had no interest for him. Even the Company's modest suggestion that he should furnish declarations of the oldest inhabitants was treated with neglect. The only argument he could advance was that the Cuyuni was a branch of the Essequibo, and was indisputably company territory. This is the explanation of his persistent nagging of the Company about the Spanish missions, in which the Company never took

any interest, and which, in Storm's absence, the Acting Commandeur, who evidently did not share Storm's theory of the rectification of territorial frontiers, intimated were matters with which the colony of Essequibo had nothing to do.

In 1764 Storm claimed he transmitted to the Company (B. C. III, 106) "a brief treatise concerning the Honourable Company's outposts." In this he mentioned (p. 109) the post which "was on the river of Cuyuni," and described its destruction by "the Spaniards of Guayana." He added (p. 110),

"that [the bend of] this river is a tract of land along which the Spaniards spread themselves from year to year, and gradually come closer by means of their missions, the small parties sent out by them coming close to the place where the Honourable Company's indigo plantation stood" [below the lowest fall], "and being certain to try and establish themselves if they are not stopped in time."

Later in the same letter he said (pp. 111–12):

"What can we expect from the numerous arrivals of settlers in Cayenne and the removal of Spanish people and plantations in Guayana *so much nearer to our boundaries?*"

Here is the Director-General of Essequibo, as late as 1764, referring to the movements of the Spaniards to the falls of the Cuyuni as a removal of Spanish people and plantations "so much nearer to our boundaries." There is no claim here that the Spaniards are encroaching upon Dutch territory. The claim made by Storm and the point which was really at the bottom of all his complaints and asseverations was that it was dangerous to have the Spaniards establishing themselves *near* the Dutch colony and occupying the Cuyuni. His last statement is an unconscious admission, that, in his opinion, the boundary really was at the falls of the Cuyuni, twelve miles from its mouth. The letter shows above all how preposterous was the claim of immemorial possession of the river.

In view of this last admission, it is no wonder that the Company in 1769 receded entirely from the territorial suggestions of 1759. The Second Remonstrance, at the later date, is the last ref-

erence ever made by the Dutch authorities to a boundary in the interior west of the falls of the Cuyuni. As with the earlier Remonstrance, nothing further was heard of it.

II. Coast Territory.

As in the interior, so in the coast territory the question of boundaries was first actively pressed by Storm. Beekman, in 1683, had suggested to the Company to "take possession" of the Barima, but the Company had not approved the suggestion. Evidently at this time there was no immemorial or other possession of Barima by the Dutch. Except this proposition, which was a virtual disclaimer, and the allusion already cited (p.), in 1894, to the region "which lies under the dominion of the Spaniard, nothing more is heard of territorial rights in Barima until Storm's administration."

Storm applied his ideas on the subject of boundaries. Put in limitation to both the interior and the coast districts, but only in his correspondence with the Company. He thus alludes to the latter (V. C. II, 101) (1748):

> "According to the talk of the old people and of the Indians, this jurisdiction should begin to the east at the creek Abary and extend westward as far as the river Barima, where in old times a post existed; *but this talk gives not the slightest certainty.*"

This is the first and original suggestion put forth by the Commandeur of Essequibo as the boundary of the colony on the coast. It originated in talk with "old people and Indians." Storm says that according to "this talk" the jurisdiction should extend as far as the Barima. He does not say that it does extend; in fact, his words imply the contrary. He states that according to "this talk" in old times a post existed there, but we know, from the documents that we have and which he had not, that this talk was unfounded. But he says himself that "this talk gives not the slightest certainty." Doubtless, it was for this reason that he omitted to obtain depositions composed of "this talk" for the

Company when they asked for them in reference to Cuyuni. It is apparent that in 1748 Storm was entirely ignorant as to any boundaries or possessions of the Company in the coast territory beyond Moruca.

The next year an incident happened which is only touched upon in the Dutch correspondence, the loss of the "Baskensburg." This was a Dutch ship wrecked on the coast, between the Moruka and the Waini. In a letter of September 8, 1749 (V. C. II, 105), Storm referred to his having taken possession of the ship, and said that he sent the question over and "took advice on it from the foremost jurists in the province of Holland," and that he was astonished to find out from the opinion that was rendered that "I had for their sake risked my honor, reputation and property, inasmuch as this ship had been stranded at Pechy, and therefore on the territory of Spain, and I had had no right to touch it. Of this I had absolutely no thought, and it shall make me in the future somewhat more prudent."

The Bouchenroeder map (British Atlas, Map 35) shows the Gulf of Pechy on the sea-coast between the Waini and Moruka, and therefore far within the line to which Storm wished to "extend the boundary."

This opinion of "the foremost jurists in the province of Holland" is one or the most significent facts in this case in reference to the boundary of the coast territory. The opinion of Storm, an able Colonial administrator, but evidently unversed in the most elementary principles of jurisprudence, could not be of much value as to territorial claims, or as embodying principles of law. That of the Company's Directors, whose occupations were essentially mercantile, although their admissions had important effects, was not much better. But here we have an authority, unnamed, it is true, but nevertheless so characterized as to entitle it to the highest respect, consisting not of one man alone, but of several, whom Storm could designate as "the foremost jurists in the province of Holland," delivering a professional opinion,

in 1749, on the legal aspects of the question of the boundary between the West India Company's territory and that of Spain on the coast of Guiana. This opinion is not lightly to be thrown aside by the Tribunal now considering the same question. The facts on which the opinion was based were those furnished by Storm himself, supplemented by the Treaty and the Charter. The statement of the opinion is so clear that if these very jurists were themselves here as witnesses, they could not make their conclusion clearer. A point is named between Moruka and Waini, and that point, in the opinion of the foremost jurists of Holland in the middle of the eighteenth century, was Spanish territory. In the face of this authority, what consideration is to be given to the ever-shifting claims of Storm and the Company? Their admissions of course bind them; but their claims are as naught beside the weight of this contemporaneous and authoritative professional opinion, from the standpoint of Dutch law.

In the contrite spirit shown by Storm over his mistake in the affair of the "Baskensburg," nothing can be seen of any territorial claim to Barima. There is no idea of a boundary even at the Waini, much less at the Barima or the Amakuru. The boundary in his mind at this time is the Moruka, and the ship is stranded on the territory of Spain, because it is stranded between Moruka and Waini.

It will be remembered that three years before this, in 1746, Storm had spoken of his ignorance of the boundaries in the interior; that behad repeatedly asked for instructions on the point, "regarding which no documents whatever are to be found in this office" (V. C. II, 98); that in 1755 the Company, after a nine years' investigation (V. C. II, 99), had been unable to discover any ground of territorial claim. Storm, thereupon, entered upon the same domain of speculation in reference to the coast. Notwithstanding the opinion of the jurists and the conclusion of the Company, he was still in doubt. He wrote, on September 1,

1759, speaking of the Cuyuni River and the boundary in that quarter (V. C. II, 137):

"That river being so far on this side of Waini (which people claim to be the boundary, although I think it must be extended as far as Barima), the ownership thereof cannot be involved in the slightest question."

In 1759, therefore, according to Storm, "people claimed" the Waini to be the boundary. This is a considerable step beyond the Gulf of Pechy, which ten years before Storm had learned was Spanish territory, which fact was to make him more prudent in future. Nevertheless, he was not satisfied with it. He wanted the Barima, but did not suggest that there was any claim to the Barima. On the contrary, he admitted that there was none.

As far as tradition went, he thought that the boundary stopped at the Waini; but he said: "I think it must be *extended* as far as Barima," by which he meant that it was the policy of the Company to acquire that territory. A nation does not extend its boundary when it only claims the territory up to its established boundary. To extend the boundary is to acquire territory beyond the established boundary.

In this letter, Storm refers again to D'Anville's map as indicating the boundary. This map (Br. Atlas, map 16) is a map of the whole of South America, and was published in 1748. In 1760 D'Anville published a second map (Br. Atlas, map 23). As might be expected from its date and from its extent, it is exceedingly imperfect in details. It marks a boundary line somewhere between the rivers Waini and Barima (Amakuru, as he calls it). The entire course of both the Amakuru and the Barima is put on the Spanish side of the boundary. The position of the Waini is in doubt. The boundary, however, is placed onthe coast line well to the *east of the mouth of the Orinoco.* D'Anville's borrowing of the line from an earlier map has been already referred to (p.).

To this letter the Company replied December 3, 1759 (V. C. II,

138–9), asking Storm to lay before them everything which might be of service in proof of ownership of the Cuyuni, and they added:

"We see from your letter that you make the boundary of the Colony toward the side of Orinoco to extend not only to Waini, but even as far as Barima. We should like to be informed of the grounds upon which you base this claim, and especially your inference that, Cuyuni being situate on this side of Waini, it must therefore necessarily belong to the Colony; for, so far as we know, there exist no conventions [to the effect] that the boundary lines in South America run in a straight line from the seacoast inland, as do most of the frontier lines of the English colonies in North America."

The Company had evidently been led to believe from its previous correspondence with Storm that the Waini was the boundary. Now they say he is making the boundary extend to Barima, and they wish to know the grounds. Grounds, however, were precisely what Storm was in no position to furnish. In his reply, May 2, 1760 (V. C. II, 140), he stated:

"The rivers themselves, which have been in the possession of your Lordships for such a large number of years, and have been inhabited by subjects of the State without any or the least opposition on the part of the Spanish, are most certainly the property of your Lordships."

He went on to say:

"I am strengthened in my view of this matter by the fact that Cajoeny is not a separate river like Weyne and Pouwaron (which last has been settled, and still contains the foundations of your Lordships' fortresses), but an actual part of the River Essequibo," etc.

The argument here is confined to the Cuyuni, but its negative application to the coast territory is most significant. It does not refer to Barima, and its allusion to Waini is directly against a claim of rights to that river. Cuyuni, Storm reasons, is Dutch, on the ground of possession and also it is a branch of the Essequibo. Pomeroon is a separate river, but it has been settled; therefore it is Dutch territory. But Waini, which is neither a banch of the Essequibo nor settled by Dutchmen, would seem to be entirely excluded.

The question of the boundary in the coast territory could not, however, be settled in this manner. It was sure to come up, and that shortly. In 1760 Lieutenant Flores made his capture of boats in the Barima, and Storm, in reporting the fact, said (V. C. II, 142):

"They also took some canoes on this side of Barima, and thus within the Honorable Company's territory."

The Company replied in the next year, asking Storm (V. C. II, 143)

"the reasons why you deem that everything which has happened on this side of Barima must be deemed to have occurred on territory of the Company; in order that, when we shall have examined all this, we may take further resolution as to what it behooves us to do in this matter."

The answer of the Secretary in Essequibo, Spoors, dated August 5, 1761 (V. C. II, 144), is not very satisfactory. He said:

"In compliance with these your orders, I respectfully reply that the aforesaid boats, having been seized by those robbers between the rivers of Barima and Waini, were absolutely on the Company's coast, for this is certain (not to enter upon the various opinions which exist about the limits of the Company's domains) that the river of Waini indisputably belongs to the Company."

In this rather incoherent reasoning we have still another claim, and return for the moment to the Waini. But this letter was evidently sent in Storm's absence, for a week later, on August 12, he modified the claim, but in such a way as to reduce the subject to hopeless confusion. He said (V. C. II, 145):

"The latter having been captured this side of Barima I am of opinion that it was captured upon the Honourable Company's territory, for although there are no positive proofs to be found here, such has always been so considered by the oldest settlers, as also by all the free Indians. Amongst the latter I have spoken with some very old Caraibans, who told me that they remember the time when the Honourable Company had a Post in Barima, for the re-establishment of which they had often asked, in order that they might be relieved from the annoyance of the Surinama traders; and then, lastly, because the boundaries are always thus defined by foreigners, as may be seen on the map prepared by D'Anville, the Frenchman."

In 1759 Storm was expressing the opinion that the boundary "must be extended as far as Barima." In 1761 he apparently has extended it to the Barima, "although there are no positive proofs." That makes no difference; in such a process proofs are superfluous. If proofs were needed, they are supplied by the fact that it "has always been so considered by the oldest settlers." Yet it was of "this talk" that Storm said, in 1748, that it "gives not the slightest certainty." Who the settlers were it is difficult to say. They certainly were not settlers in Barima, for there were no such settlers.

There remains the fact that "the boundaries are always thus defined by foreigners, as may be seen on the map prepared by D'Anville." But unfortunately in D'Anville's map, which we have in the British Atlas, the line is not on the Barima. The Barima is entirely included in Spanish territory. So is the Amakuru.

How little Storm knew about the geography of the Barima and how little he was qualified to pass on these questions may be inferred from a statement in his letter of August 27, 1772 (V. C. II, 219), which describes a map that a surveyor has just made for him, and in reference to which he remarked:

"What astonished me most, my lords, was to see in these exact plans the situation of the Post in Maroco; I could never have imagined that it lay so far up the creek from the sea-coast."

But this is not the last word from Storm about the boundary. Within three years after the letter last quoted, that is, in 1764, Storm wrote to the Governor of Surinam, which place was not included in the charter or under the control of the Dutch West India Company (V. C. II, 158), in reference to the Surinam rovers who were provided with passes by the Governor to go to Barima. He made the following extraordinary statement:

"At this opportunity, since I am speaking of this, I take the liberty to inform you, that your naming in those passes the river Barima causes complaints from the Spaniards, who, maintaining that that river is theirs,

WHEREIN I BELIEVE THEY ARE RIGHT, have already sent some of these passes to the Court of Spain."

Upon this letter the British Case (p. 51) makes the following comments:

> "But while claiming as Dutch all the territory up to the right bank of the Barima, the Director-General appears to have thought it inexpedient that the Dutch passes to traders should purport to include that river. In a copy of a letter, said to have been sent by him on the 18th of August, 1764, to the Governor of Surinam. the latter is requested not to name Barima in his passes, as that gave offense to the Spaniards."

The explanation by which the British Case, in the above cited passage, attempts to do away with the effect of Storm's conclusive statement, is that, while claiming the territory as Dutch, the Director-General thought it inexpedient that the Dutch passes should purport to include that river. But where was it that Storm was making any claim? He never suggested any claim to the Spaniards; on the contrary, when the Spaniards were, year in and year out, doing acts in the territory that showed exclusive control, neither Storm, nor the Company, nor the Government, ever raised a word of protest. In fact, Storm was expressly avoiding claims, and, as the very letter in question plainly shows, was endeavoring to convince the Spaniards that he was making none. Why is it that he asks the Governor of Surinam not to name the Barima in his passes? Because "your naming in those passes the river Barima causes complaints from the Spaniards, who, maintaining that that river is theirs, wherein I believe they are right, have already sent some of these passes to the Court of Spain." The whole object of his communication to the Governor of Surinam is to prevent any suggestion of a claim which the Spanish dispute.

The British Case goes on to say of Storm's letter:

> "The writer adds that they " [the Spaniards] " maintained that that river was theirs, and expresses an opinion in their favor upon this point, which, in one view, might be said to be inconsistent with the claim of the Director-General to the territory up to the right bank."

What is the "opinion expressed by the writer" here referred to? It is a frank and unqualified statement of his belief in the merits of the Spanish claim. And what are the words in which he utters it? "WHEREIN I BELIEVE THEY ARE RIGHT." It is certainly safe to say that, in one view, these words might be said to be inconsistent with the Dutch claim of territory to the Barima. It would be more correct to say that, in every view, they not only might be, but they are, in direct contradiction of any such Dutch claim; and being, as they are, a contemporaneous statement of the belief existing in the writer's own mind, they constitute an utter dismissal and rejection of all doubt or uncertainty as far as his personal views are concerned in a form than which none could be more forcible.

Neither the Company nor Storm had ever claimed Barima. In his correspondence he had advised the Company "to extend their boundary" to the Barima; and when the Company had asked him what grounds he had for the suggestion, he was unable to give any except a map, which was directly against his contention, the chance opinions of ancient Indians and colonists, and the mythical tradition of a Dutch post of which he had no record. Anything in the nature of sending a claim to the Spaniards he discouraged.

No doubt it was with the same feeling in mind that he wrote two years later, in 1766, to the Governor of Guayana, in reference to the Rosen matter (B. C. III, 131), that a party of Dutch colonists, the offscourings of the colony of Essequibo, were leading a lawless life in Barima and that he feared bloodshed and murder would come of it. To the Company he said:

> "The west side of Barima being certainly Spanish territory (and that is where they are), I can use no violent measures to destroy this nest, not wishing to give any grounds for complaint; wherefore I think of proposing to the Governor . . . to carry this out hand-in-hand, or to permit me to do so, or as and in what manner he shall consider best."

Even in the above letter Storm does not say that the east side of Barima is Dutch territory. About the Spanish claim to the river

he believed, as we know from his previous utterances, that the Spaniards were right. But he does say that there is no doubt that the west side is Spanish; and with the same idea of avoiding anything that might cause offence to the Spaniards, and expressly for that reason, he applied in the first instance to the Spanish Governor.

The history of this matter will be referred to later. Here we are only concerned with the claim. The occurrence led the Court of Policy to make an order "forbidding any one to stop in Barima," meaning thereby, of course, any Dutch colonist, as is shown by the instruction to the Postholder of Moruka to see that the order was carried out, "because in time this would become a den of thieves, and expose us to the danger of getting mixed up in a quarrel with our neighbours the Spaniards" (B. C. III, 132).

The Governor of Orinoco having intimated that he had no objection, Storm had brought the offenders into Essequibo. The Company's comment on his action is to be noticed, as frankly showing how entirely in the dark it was on the question of territorial claims. It said (B. C. III, 137):

"If that place is really Spanish territory, then you have acted very imprudently and irregularly; and, on the contrary, if that place forms part of the Colony, and you had previously been in error as to the territory, then you have done very well, and we must fully approve of your course, as also of the Court's Resolution that henceforth no one shall be at liberty to stay on the Barima."

Storm's reply is characteristic. He boldly asserts (B. C. III, 141):

"The east bank being in our jurisdiction, the Court can enforce its order there."

Apparently however he has some doubt about it, for he adds, as a second reason:

"Because I think that the Court certainly has the power to forbid its citizens and colonists to go to any places when such is considered to be inexpedient or dangerous for the Colony."

This is an excellent reason, but it negatives the idea of a territorial claim.

It is idle, however, to try to thread the mazes of Storm's mind in reference to the boundary in the coast territory. His suggestions, from beginning to end, are a mass of contradictions, and it is hardly to be wondered at that the Company was involved in like contradictions itself.

Already, in 1764, Storm had taken another position on the boundary question, by which the whole subject was reduced to hopeless confusion. In that year the Director-General had published what purported to be a "Register of the Colony of Essequibo and Demerary" (V. C. II, 159). In this "Register," with that singular variableness which characterized the colonial utterances in reference to the boundary, the Colony was described as extending "from the creek Abari on the east to the River Amacura on the north." This is an entirely new suggestion, never made in Storm's reports to the Company, for in these the Amacura was never mentioned. It is the only suggestion made during the period of Dutch history by anybody, official or unofficial, that this particular river marked the extent of the Dutch territories. It of course has reference to the erroneous position of the Amakuru in D'Auville's map, although even in this map the boundary not go to that river.

The West India Company, however, took small account of the various suggestions as to the boundary, either on or beyond the Waini, or on or beyond the Barima, and least of all to the suggestion in the "Register" about the Amacura. It disposed of all of them in short order in its Memorial to the States-General, November 26, 1765 (V. C. II, 162), where it stated that

> Demerara "is situate between the two extremest trading places or posts in Essequibo, namely, the one, to the north, on the river Moruca, and the other, to the south, on the river Mahaicony, both of which rivers, as well as the others situate between, pertain to that Colony; which of course shows undeniably that Demerara is one and the same Colony with Essequibo."

This statement, of the territorial limits, occurs in an official communication from the Company to the Government of the

Netherlands. There is no mistaking the meaning of these words, "the two extremest trading places or posts in Essequibo, namely, the one, to the north, on the river Moruca, and the other, to the south, on the river Mahaicony;" and still more the next phrase, "both of which rivers, as well as the others situate between, pertain to that Colony." In view of this statement alone, it is impossible for anybody to say that in 1765 the Dutch authorities were claiming anything for their territorial possessions beyond the post of Moruka.

This, however, does not prevent Storm from going on with his suggestions. The very last reference made by him to the boundary is an allusion, in September, 1768, to the capture of a salting vessel by the Spaniards (V. C. II, 177), "before the River Wayni (indisputably the company's territory)."

This occurrence was referred to in the Remonstrance (V. C. II, 200) to Spain in 1769 drawn up by the States-General, and it is spoken of as undertaking "to prevent the fishery upon the territory of the State itself, extending from the river Marowyn to beyond the river Waini, not far from the mouth of the river Orinoco, according to the existing maps thereof, particularly that of M. d'Anville."

This is the furthest territorial claim ever asserted by the West India Company in the coast territory. It is important not for what it claims, but for what it disclaims. It fixes the claim of boundary of the territory not at the Amakuru, not at the Barima, but "beyond the river Waini," a term which can only be understood to mean a claim of territory to both banks of the Waini. It is only a claim of coast line. It is contradicted by the Memorial of 1765, also presented to the States-General, naming the Moruka as the boundary. How far the claim was supported by acts of occupation will be considered in another place. Here it is only mentioned to show what the claim was, and what it was not.

Although from this time on the Spanish guard-boats and police authorities constantly patrolled the coast territory, fre-

quently apprehending Dutchmen therein, no remonstrance was ever made again by the Director-General of the colony to the end of its history, or by the West India Company or the Dutch Government. No reference was ever made to the boundary which Storm had sought to establish, and the claim which never went beyond the Waini was never again heard of.

So completely was the claim abandoned that in 1794 the first Governor-General of Essequibo, after the final termination of the West India Company's charter, Sirtema van Grovestins, in reporting a voyage of exploration in the Pomeroon and neighboring districts, stated (V. C. II, 248):

"Went on as far as the Creek of Moruca, WHICH UP TO NOW HAS BEEN MAINTAINED TO BE THE BOUNDARY OF OUR TERRITORY WITH THAT OF SPAIN.

In 1808, according to the British Case (p. 63):

"Two Protectors of the Indians were appointed *for the Colony, which was divided into two districts for the purpose.*"

One of these districts was the Essequibo, with the rivers and creeks flowing into it. The other district was stated to be (B. C. V. 191):

"The west coast of the aforesaid Colony from the Creek Supename right up to the Spanish boundary, the River Pomeroon being included therein."

During all this period the Spanish claim was well known. That claim extended throughout the whole territory and as far as the Essequibo.

The boundary claimed by the Spanish authorities is shown more by their acts than by their words. They never had occasion to discuss the question for they were not only *de jure*, but *de facto* masters of Barima, as well as of the interior, and the Dutch never once disputed their innumerable acts of dominion on this territory unless the reference to the fishing vessel captured "before the river Wayni" can be so considered. Nor did they ever find Esse-

quibo Dutchmen settled in this territory, except in the case of Rosen, when Storm asked their consent to act, and in the case of La Riviere, when they expelled the intruders themselves. In the interior there never was the slightest semblance of a Dutch settlement.

During all this period the Spaniards exercised control in both districts. In the interior they destroyed the Dutch post and captured its occupants, and they patrolled the river to the falls of the Cuyuni, finally establishing a fort on its southern bank at the mouth of the Curumo. In the coast territory their coastguard vessels were constantly patrolling the rivers, and they frequently exercised jurisdiction over Dutchmen found in the territory.

Under these circumstances there was little call for the Spanish Government to express in terms their territorial claims. They had asserted them in the beginning of the century in reference to the horse trade, and they had been admitted. They had asserted them when Storm protested against the destruction of the post in Cuyuni, in Governor De Castro's letter stating that the post was "in the dominions of the King my Sovereign," and adding that "this same River Cuyuni and all its territory is included in those dominions."

When the colonist Pinet, whom Storm sent in 1748 to Orinoco on a mission of observation, addressed the Spanish Governor on the subject of his treatment of the Indians, the latter had replied "that the whole of America belonged to the King of Spain, and that he should do what suited himself, without troubling about us." These words are not so grandiose as they sound. Except for the territories which had been ceded, they claimed the original title to the whole of Guiana,—a title not only anterior in date to every other, but one which had been effectively enforced.

So also, when an emissary was sent to the Orinoco, in 1769, to recover fugitive slaves. The Governor bade him return with this message (V. C. II, 197):

"That the land belonged to His Catholic Majesty as far as the bank of Oene, and that he would come and seize those plantations which lay on Spanish territory."

So when Don Matheo Beltran carried off a number of Indians from Moruka, in 1775, he said to the Postholder (V. C. II, 229):

"That his lord and master would shortly set a guard in the arm of the Weene called the Barmani, and that the whole of Maroekka belonged to the Spaniards."

The real and positive assertion, however, of the Spanish claims lies in the acts performed by the Spaniards in Barima, which will be described in subsequent chapters.

CHAPTER XI.

THE LAW OF ADVERSE HOLDING.

Title to real property may be obtained by original acquisition, that is to say, by the occupation of unoccupied land to which no one had theretofore any claim of title.

As has been shown in an earlier chapter, the Spanish acquired by a perfected discovery an original and perfect title to the whole of Guiana.

After original acquisition, the next form of acquisition is where the property acquired had been the property of another before the acquisition, but where the person acquiring the property does not in any way base his ownership on the title of the former owner, or of any former owner, but acquires a title adversely to that of the former owner. This is known as acquisition of title by "prescription" or "adverse holding."

This mode of acquiring title is thus defined by F. de Martens (Int. Law, pp. 460-461):

"*b.*—Prescription (*usucapio*). Contrary to the principle of private law, international law admits the rule of prescription only in a very limited degree. A *résumé* of its importance is given in the following:

"1. International law does not recognize a limit to prescription, for a state is master of a territory so long as it is able and wishes to maintain its authority therein.

"2. In the domain of international relations nothing can interrupt the continuance of an ancient right. A government may in fact lose a possession, but it is always legal to attempt recovery of the same in one way or another.

"3. In international law no real importance is attached to anything but *immemorial antiquity* (*antiquitas, vetustas, cujus contraria memoria non existit*). This it is which forms the foundation of all jural relations, both for the existence of barbaric and civilized states. Length of time and the sanction of history impose silence on all claims and charges that might have been justified in the beginning by the violence and injustice committed at the time of gaining territory. In this sense it may especially be said of

states: '*Beati possidentes!*' The accomplished fact covered by immemorial antiquity becomes legitimate in the age of international law."

The Dutch-English claim in the present case is not a claim of immemorial possession. It lacks this quality, which, as the learned author says, is the most essential ingredient of prescriptive rights in international law. On the contrary, everything relating to the origin of the Dutch title is a matter of history. That title was acquired by cession from Spain, and the question here is whether, by the subsequent acts of the Dutch, territories not included in the cession could by prescription have been acquired from Spain. As the learned author intimates, such a mode of acquisition is favored by international law only to a limited degree, and the law does not recognize a limit of time.

It was in view of this principle of international law that it was necessary, in order to give effect to alleged acts of Dutch occupation, if any there were, that the limitation of fifty years was prescribed by the Treaty. It stated an exception to the general tendencies and spirit of international law. It was a concession to Great Britain. It provided that if Great Britain could prove an adverse possession, by the Dutch, for fifty years of some part of this terrritory beyond that which they had acquired by cession, such proof should be admitted as vesting a title in the Netherlands.

The question here, therefore, is not a question of present possession supported by immemorial antiquity, but a question whether at any time during the period of Dutch rule an adverse holding for fifty years by that nation can be shown in any part of the territory in dispute; in other words, what, if any, territory west of Essequibo, the Netherlands acquired subsequently by an adverse holding of fifty years.

Vattel, Book II, Ch. XI (Chitty's Transn., Phila., Ed. 1859), says, § 140 (p. 187):

"*Usucaption* is the acquisition of domain founded on a long possession, uninterrupted and undisputed—that is to say, an acquisition solely

proved by this possession. Wolf defines it, an acquisition of domain founded on a presumed desertion. His definition explains the manner in which a long and peaceful possession may serve to establish the acquisition of domain. Modestinus, *Digest*, lib. 3, *de Usurp. et Usucap.*, says, in conformity to the principles of Roman law, that *usucaption* is the acquisition of domain by possession continued during a certain period prescribed by law. These three definitions are by no means incompatible with each other; and it is easy to reconcile them by setting aside what relates to the civil law in the last of the three. In the first of them we have endeavored clearly to express the idea commonly affixed to the term *usucaption*.

"*Prescription* is the exclusion of all the pretensions to a right—an exclusion founded on the length of time during which that right has been neglected, or, according to Wolf's definition, it is the loss of an inherent right by virtue of a presumed consent. This definition, too, is just; that is, it explains how a right may be forfeited by long neglect; and it agrees with the nominal definition we give to the term *prescription*, in which we confine ourselves to the meaning usually annexed to the word."

The claim of "prescription" or "adverse holding," meaning a naked holding or possession by which title may be acquired, adversely or in opposition to the holder of the prior title, as applied by the Treaty to the present controversy between two sovereign States, has been already discussed. It has been shown that it necessarily presupposes the prior title, as is admitted in the British Counter Case (page 114), as follows:

"But no question of adverse holding or prescription can arise except where one Power has occupied territory by right belonging to the other."

It has been further shown that in a case of adverse holding between States, the possession indicated must be a national possession. This is characteristic of all occupation upon which public title is based. Thus F. de Martens says (Int. Law, p. 463):

"From a subjective point of view, the occupation must necessarily be made in the name and with the assent of a government. If this is effected by officials representing a state, there is no doubt as to the nation which should be considered as the rightful proprietor of the occupied land. An occupation undertaken by individuals should be sanctioned by the government on whose behalf it has been accomplished."

It has also been shown that, under the Treaty as well as under the general principles of law, nothing less can be held to indicate possession than an actual settlement, established by national authority and remaining under national control; and that, in this particular case, the Treaty has, further, authorized the Arbitrators to consider what, if any, effect shall be given to the exercise of an exclusive political control, if they find such control, lasting for a period of fifty years, but without actual settlement.

Apart from these conditions, however, as the term "adverse holding" or "adverse possession" is one of familiar use in modern jurisprudence, and has been made the subject of adjudications in English and American courts, certain well-recognized principles have been established to describe and define the conditions of adverse holding in general requisite to establish a title. These principles are inherent in the common acceptation of the term, and must be considered in ascertaining its meaning and its application in this arbitration, in addition to and in connection with the definitions stated in the Treaty.

According to Phillimore (International Law, 3rd edition, vol. I, p. 367), these are not only required in the case of an adverse holding by individuals under municipal law, but in the case of a prescriptive holding by States under international law. He says that the proofs of prescriptive possession are

> ". . . principally publicity, continued occupation, absence of interruption (*usurpatio*), aided no doubt generally, both morally and legally speaking, by the employment of labor and capital upon the possession by the new possessor during the period of the silence, or the passiveness (*inertia*), or the absence of any attempt to exercise proprietary rights, by the former possessor. The period of time, as has been repeatedly said, cannot be fixed by international law between nations as it may be by private law between individuals; it must depend upon variable and varying circumstances; but in all cases these proofs would be required."

He adds that it is only in cases where dereliction is capable of proof that "the new possessor may found his claim upon original occupation alone, without calling in the aid of prescription."

In another place, speaking of possession, Phillimore says (Int. Law, 3rd edition, vol. I, p. 325):

"That person is properly said to possess a thing who both actually and corporally retains it, and who desires and intends at the same time to make it his own.

"That person who, having no such desire or intention, by mere corporal act retains a thing, is, only in a gross and inaccurate sense, said to possess it."

Again (p. 327), he says:

"As dominion is acquired by the combination of the two elements of *fact* and *intention*, so, by the dissolution of these elements, or by the *contrary* fact and *intention*, it may be lost or extinguished."

These requirements, as laid down by Phillimore for International Law, are based upon the Roman Law, and have likewise been adopted by the English Common Law for an adverse holding—requirements which are inherent in the meaning of the term as used and understood by the negotiators of the Treaty of Arbitration. These requirements will now be discussed in detail.

I. In establishing a Claim of Adverse Holding, the Burden of Proof is upon the Party setting up the Claim.

As a claim of adverse holding is admittedly and necessarily a claim to found a title, upon a state of facts, in opposition to that of the prior owner, which but for these facts would be conclusive and paramount, the burden of proof is upon the party setting up the claim. If there were no claim of adverse holding, this prior title would stand good against all the world. The attempt to dispute this title must be based upon a certain state of facts, amounting to adverse holding by the claimant, which the claimant is bound to prove. His claim is an admission of a prior title.

The burden is, therefore, in the present controversy, upon Great Britain, as the representative of the Dutch title, of showing that she, or those to whom she has succeeded in right, acquired title to the land in dispute by an adverse holding of fifty years, within the meaning of the Treaty and within the principles not in

contravention of the Treaty which the law has laid down to govern the determination of such a claim.

Venezuela is not called upon to prove the absence of settlement or of political control on the part of the Dutch in the territory in question, but Great Britain is called upon to show such settlement or control affirmatively.

II. After Title has once been fully acquired, no Obligation rests upon its Holder, in order to maintain it, of showing a continuous succession of Affirmative Acts of Occupation.

On the other hand, the holder of the prior title, holding the property as owner by a right which, except for this claim of adverse holding, is good against all the world, is under no necessity of setting up or proving the continuance of actual occupation. His title is an established fact, and all the presumptions are in his favor. Whatever may be the conditions required to establish prescription, the holder of the original title is not affected by these requirements. He is not called upon to show either actual settlement or political control. Having established his prior title, all that is necessary to continue ownership is presumed in the holder of the title. There is no duty upon the holder of the title to wild land to settle upon his land in order to maintain his title, or even to enclose it, or to perform any act upon it or in reference to it of any kind whatever.

Still less is there any obligation upon States, in order to maintain their public title, once acquired, of sovereignty or dominion to territory, actually to people the territory, or to assert an active political control by the performance of specific acts, for which no occasion may arise. Even authors who admit the principle of voluntary dereliction insist that the abandonment must be shown by the most conclusive evidence. Such abandonment certainly cannot be shown by the absence of settlement, or by the absence of affirmative acts of jurisdiction. If it could, a large part of the

territories held to-day by civilized States under unimpeachable titles would be considered as in a condition of abandonment, open to the first comer.

As was well said by the Court of Appeals of the State of New York:

"The settled principles of law require courts to consider the true owner as constructively in possession of the land to which he holds the title, unless they are in the actual hostile occupation of another under a claim of title; and this rule is still more imperative in the case of wild and uncultivated tracts or lands, which are not susceptible of actual occupation and cultivation."

Bliss v. *Johnson*, 94 New York Reports, 235, 242, (1883).

Applying these principles to the present controversy and beginning with the starting point of 1648, it has been shown that at that date Spain held a title to all the territory west of Essequibo. It matters not, therefore, as far as this controversy is concerned, whether during the one hundred and sixty-six years following the date of the treaty down to 1814, the date as of which these boundaries are to be ascertained, Spain actually maintained settlements, in the territory in dispute, or how much of it she settled, or whether she settled any of it. It matters not whether, during that period, she exercised affirmative control over a large or a small part of it, whether this was a political or non-political control, or in fact whether she performed upon it any acts of control at all. As we shall show from the evidence in this case, the Spanish actually exercised a complete and exclusive political control over the whole of this territory, and for more than a century after the Treaty the Dutch never questioned or disputed it, west of Moruca and the falls of Cuyuni; but this proof is not necessary to the maintenance of the Spanish title. The question here is not what the Spaniards did to assert their title to territory to which they had title any more than it is a question what the Russian Goverment does in Kamchatka to assert its title, or the English in the wilds of British Columbia. The fact that the title existed in Spain is enough, just as the fact that the title to the other territories mentioned

exists in Russia or in Great Britain. The question is what was done in the territory in dispute by the Dutch adversely or in opposition to the Spanish title, to establish in them a new title as against the prior title of Spain, within the rules of the Treaty, and the principles of law governing prescription.

Nor is it necessary, even where adverse possession has been maintained, however fully and completely, during a part of the required time and then interrupted, for the original owner to do any act in order to resume his possession. The temporary disseisin cannot invalidate his title. It is simply as if it had not occurred, and his title revives in all its original force. This doctrine is firmly established by a decision of the Privy Council in England, in a comparatively recent case, *Agency Company* v. *Short* (1888) 13 Appeal Cases, 793, 798, Privy Council. The case arose in New South Wales. Here the adverse holder and those whom he succeeded in title failed to prove continuous possession for the whole of the statutory period. The Colonial Court held that as there was no evidence that the legal owner during the statutory period retook possession, the statute when set running continued to run, notwithstanding the fact that there was a break in the chain of adverse possessors. This decision was reversed by the Privy Council, on appeal, and it was held by the highest Court in Great Britain, that the abandonment of possession by the intruders left the rightful owner in all respects as he was before the intrusion took place. The Court said:

"Their Lordships are unable to concur in this view [the view of the Colonial Court]. They are of opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary."

Applying the principle, thus laid down by the highest judicial authority in Great Britain, to the present case, it appears that even if the Dutch had entered into possession at some point and the possession came to an end before the period of fifty years had elapsed, the original holder of the title immediately resumed possession and his title revived in all its original vigor. It was not necessary for Spain, under such circumstances, to do any act which should indicate such resumption. Mere discontinuance of possession before the expiration of the fifty years, supposing that there had been possession by the Netherlands during a part of that time, left the Spanish title in all respects as it was before the intrusion took place. Thus, where a so-called "post in Cuyuni," that of Quive-Kuru, was maintained from 1755 to 1758 and broken up at the latter date, assuming that the "post" fulfilled in other respects the conditions of adverse holding, which, however, is denied, its discontinuance served as an interruption of the adverse holding, and any consequences that flowed from such holding came to an end. The Spanish title revived when it ceased.

So with the second of the so-called "posts in Cuyuni," which was established in 1765, and abandoned in consequence of a threatened attack. So with the third "post," at which the bylier who had been driven from the post above, finally took refuge, and which, after dragging out a feeble existence for two or three years, was finally and entirely abandoned in 1772. It was unnecessary that any act should be performed by Spain in order to resume her original and paramount title. If adverse holding had in any sense begun to run through the temporary sojourn of these Dutch trading-employees, it ceased to run when the post was abandoned, and so far as this ephemeral occupation was concerned, the Spanish title was in no way affected. It revived as of course upon abandonment.

In the case of the first of these posts, that of Quive Kuru, the case was not even one of voluntary abandonment, as the Dutch

were captured and the post was destroyed by the force under Captain Bonalde, sent for that purpose by the Spanish Commandant. Supposing that Spanish possession had been interrupted by the post (which is denied), there was a forcible resumption of possession on the part of Spain, constituting a most emphatic reassertion of the Spanish title and of Spanish jurisdiction. But in neither case, under this decision of the Privy Council, can that title be held to have been affected by the so-called "posts in Cuyuni," and they may be absolutely thrown out of consideration in this inquiry.

III. Adverse Holding must be evidenced by actual Possession and Control.

The object of adverse holding, in law, being to establish a title by possession, in opposition to a prior title, the law looks closely at the evidence of possession and exacts that the facts which are advanced to sustain it shall be such as amount to actual possession and control. These may be considered in two aspects, as to

(1) Extent of possession.

(2) Character of possession.

(1) *Extent of Possession.*

In reference to the extent of territory to which title may be asserted by adverse holding, it is a general principle of law that only such extent of territory may be thus acquired as is actually possessed. A party who relies on adverse possession must, in the language of Chief Justice (afterwards Chancellor) Kent, show a "substantial inclosure, an actual occupancy, a *pedis possessio*, which is definite, positive and notorious, to constitute an adverse possession, when that is the only defence, and is to countervail a legal title" (*Jackson* v. *Shoonmaker*, 2 Johnson (N. Y.), 230, 234 (1807).

The only extension of this rule that is admitted by law in the case of private individuals is where the adverse holder, entering under a deed which, though as a deed it may in itself be worthless, defines the bounds of his territory, takes actual possession only of a part of the territory included in the deed, yet is held to be in constructive possession of the whole. The reason for this extension of the rule is plain. As the adverse holder takes his possession, such as it is, under a paper title which defines larger boundaries, the taking of possession is to be considered in connection with the boundaries of the deed, and he is presumed to take possession of the whole which is included in the paper title under which he took actual possession of a part; in other words, he is presumed to enter according to his title, and his deed is notice to all the world that the possession which he has taken is, by implication, a possession of that which was defined by metes and bounds therein. He is then said to be in actual possession of a part and, by reason of the boundaries stated in the deed, to be in possession of the whole.

Says Mr. Justice Woodworth:

"When a party claims to hold, adversely, a lot of land, by proving actual occupancy of a part only, his claim must be under a deed or paper title. This distinction has been uniformly recognized, and acted upon in this Court."

Jackson v. *Woodruff* (1823), 1 Cowen's Reports (New York), 276, 285.

No such claim of constructive possession can be made in the present case. The Dutch, whatever rights they may have had, never had a title, worthless or otherwise, to which any limits other than those of actual occupation could be assigned. If, therefore, they acquired actual possession in any part, which is not admitted, this is no ground for allowing a constructive possession to any other part. What they take by adverse holding is that which they actually occupy; that of which they have an actual *pedis possessio*.

Such is the doctrine fully recognized by English as well as by American courts. Says Lord Justice Bramwell:

"It is difficult to say that there is a *de facto* possession, when there is no possession except of those parts of lane which are in actual possession, and there is an interference with the enjoyment of the parts which are not in actual possession My meaning is this, if there were an inclosed field and a man turned his cattle into it, and locked the gate, he might well claim to have a *de facto* possession of the whole field; but if there were an uninclosed common of a mile in length, and he turned one horse on one end of the common, he could not be said to have a *de facto* possession of the whole length of the common. If it would not be a *de facto* possession it would be a nominal possession. If no right were attached to it" (meaning no definition of boundaries by paper title), "it would not be a constructive possession. That I look upon as being the condition of things, and consequently the plaintiff had not a *de facto* possession beyond the spots where his animals were grazing."

Coverdale v. *Charlton* (1878), Law Reports 4, Queen's Bench Division, 104, 118.

If there were any such thing as constructive Dutch possession in the present case, there is no possibility of assigning any limits to it.

Spain as the discover and first occupier of Guiana entered under defined bounds, upon a part for the whole. Her settlements had reference to those bounds. The Dutch entered under no claim or charter defining any limits.

Says Chief Justice Parker:

"But no presumption of a claim, and of color of title beyond the actual occupation could arise respecting other lots than that of which the party was in possession. And where the possession was in a township, or other large tract of land, which had never been divided into lots for settlement, no particular claim, beyond the actual occupation, would be indicated, and of course no notice of any such claim of title should be presumed."

Bailey v. *Carleton* (1841), 12 New Hampshire Reports, 9, 16, 17.

Says Mr. Justice McLean:

"The plaintiff in error contends, that as the lessors of the plaintiff have shown no paper title emanating from the Government, they must be considered as trespassers; and that their right is strictly limited to the *pedis*

possessio of the occupants under whom they claim. That a mere trespasser cannot set up the right of a riparian proprietor unless his enclosures are extended so as to include the alluvial formation. . . .

"The position assumed by the plaintiff's counsel, that a mere intruder is limited to his actual possession; and that the rights of a riparian proprietor do not attach to him, is correct. He can have no rights beyond his possession. The doctrines of the common law on this subject have been taken substantially from the civil law.

Watkins v. *Holman* (1842), 16 Peters' U. S. Sup. C. Rep., 25, 54, 55.

Even if the Dutch had entered under a title to which definite constructive limits would otherwise have attached, these constructive effects could not operate in the disputed territory, because Spain had already a good actual and constructive possession.

Says Woodworth, Justice:

"Thus, if A takes a lease or conveyance for a lot of sixty-three acres, and improves a part, his possession is valid for the whole lot; not on the ground of having title; which draws the possession after it; until an actual adverse possession commences; but on the ground of a claim of title to the whole; and a possession of a part, which constitutes a good adverse possession. When a valid possession is acquired in the latter mode, it cannot be defeated by a subsequent entry on the same lot, making an improvement of a part; and obtaining title to the whole. The effect of such subsequent entry would be; to give the person so entering a possession of the part actually occupied and improved; but no farther. A constructive possession to the unimproved part of the lot, would remain in him who made the first entry under claim of title and improved a part."

Jackson v. *Vermilyea* (1827), 6 Cowen's Reports (New York), 677, 680.

Moreover, constructive possession cannot be inferred even from possession under a deed with metes and bounds, where the acts of the claimant are not such as to indicate an intention to occupy up to the boundaries of his deed, and still more where they are such as to actually negative such an intention. As was well said by Chief Justice Parker, of New Hampshire:

"If the occupation is not of a character to indicate a claim which may be coextensive with the limits of the deed, then the principle that the party

is presumed to enter adversely according to his title, has no sound application, and the adverse possession may be limited to the actual occupation."

Bailey v. Carleton (1841), 12 New Hampshire Reports, 9, 16.

In the case at bar, the facts indisputably show that, even if they could have done so, the Dutch never entered with any view to the limits now claimed. The correspondence alone which has been recited is enough to show this; but besides the correspondence, there are scattered through the evidence a multitude of acts, which will be noted in their proper place, indicating that the Dutch never on any occasion intended to hold any territory west of Moruca or west of the falls of Cuyuni.

(2) *Character of Possession.*

The possession must be actual, not only as to the extent of the territory covered, but as to the character of the possession itself. The person claiming to hold adversely must claim and exercise control as an owner. Many acts may be performed upon the territory of another, especially wild and uncultivated territory, which do not imply any claim of title. To constitute adverse holding, the acts must be such as would amount to a disseisin of the true owner.

The Case of Great Britain contains, both in the text of the Case itself, and in the voluminous appendices, reference to a great many acts which were performed by the Dutch on the territory in dispute, and which are put forward as evidence of possession. These include principally the transit of Dutchmen over the territory, the trading of the Dutch with Spaniards and with Indians therein, the maintenance of an outlier in the Cuyuni for trading purposes, and the maintenance of relations with the Indian tribes, principally for the purpose of obtaining slaves by the capture of Indians of other tribes and for the purpose of inciting the Indians to attacks upon the Spaniards.

It is claimed that these acts in some way or other constitute or indicate possession of the soil. As a matter of fact, they indicate

neither settlement nor control, nor occupation nor territorial sovereignty, nor even claim of sovereignty. Most of them are acts which even in civilized countries anybody may perform without any territorial significance whatever. All of them are acts which foreigners are frequently permitted to do even in a comparatively civilized country as well as natives, and still more when the country is wild and unsettled.

The most extravagant of these claims is that transit over a territory, especially such a territory as this, constitutes possession. Thus, it is stated in the British Case (p. 14) that the Dutch, at a very early period, had "penetrated far into the interior;" that "negro traders were employed by the Company to travel among the Indians and obtain by barter the products of the country;" and that "in 1683 and onwards these traders are mentioned as periodically visiting the Pariacot Savannah."

Suppose that they did all this, what conclusion is to be drawn from it? Does this constitute—we do not say "actual settlement" or "political control," as prescribed by the Treaty—but does it constitute possession in any sense? The fact that an individual subject of one country "penetrates" the wilderness on the frontier of another does not give his country any rights of possession, even though he be an agent of the Government. That may be done in civilized countries, and much more so in territory which is as yet unsettled.

So also with trade and the maintenance of trading establishments. Trading cannot form the basis of adverse holding so as to create a territorial title. Neither can the maintenance of trading establishments, which the citizens of one State are constantly maintaining on the territory of other States, nor the appointment of agents to conduct such a trade, have any such effect.

The relations of the Dutch with the Indians, which will be treated further on, were inspired by the necessity which is imposed on every colony of keeping on friendly terms with the savage neighbors on its frontier. It is true that the Dutch promoted wars be-

tween these savages and other savages, whom when taken prisoners by the first, they could purchase as slaves. It is true that while the Dutch never attacked the Spanish themselves, they secretly conspired with the Indians and incited the latter to attack them, and particularly the Spanish missions. Nevertheless, these do not constitute acts of ownership performed upon the foreign territory. As far as acquisition of property or dominion in that State is concerned, they have no significance.

So of alliances and understandings with Indians, and even grants by Indians—though of these last it is not pretended that any existed. Such acts on the part of natives can confer no territorial rights. Says Westlake (Int. Law, p. 144):

"We have seen that natives in the rudimentary condition supposed have no rights under international law. . . . Hence, it follows that no document in which such natives are made to cede sovereignty over any territory can be exhibited as an international title. . . . A stream cannot rise higher than its source, and the right to establish the full system of civilized government, which in these cases is the essence of sovereignty, cannot be based on the consent of those who at the utmost know but a few of the needs which such a government is intended to meet."

IV. Adverse holding must be exclusive.

Under the well-recognized principles of the English common law, an adverse holding, to be valid, must amount to a disseisin of the true owner. The term "disseisin" is thus defined by Coke upon Littleton (153*b*):

"A disseisin is where one enters, intending to usurp the possession and to oust another of his freehold."

Says Chief Justice Hosmer:

"By adverse possession is meant a possession hostile to the title of another; or, in other words, a disseisin of the premises; and by a disseisin is understood an unwarrantable entry, putting the true owner out of his seisin."

French v. *Pearce*, 8 Connecticut Reports, 439, 442 (1831), citing Coke upon Littleton, 153*b*, 181.

In order to sustain a claim of adverse possession, it is necessary that the true owner should be ousted; in other words, that the possession should be exercised in exclusion of the true owner.

If the two parties are settled in the territory, though in different settlements, the adverse holder can claim only the part occupied by his own settlements. As a matter of fact, the only place outside of the Essequibo plantations where Dutch settlement was in any degree exclusive, or even where there was any settlement, was in Pomeroon, and this existed only for a short time.

Any act or acts upon which a claim of an adverse holding is based must have the element of exclusiveness.

Thus, the miscellaneous classes of acts so much dwelt upon in the British Case, upon which comment has already been made, namely, transit, trade, relations with the Indians, capture of runaways, etc.—if these acts are brought forward by Great Britain, to sustain a claim of adverse holding, they must meet the test of exclusiveness. It is not enough to show that the Dutch performed these acts; it must also be shown that the Dutch excluded their performance by the Spanish. Insignificant as they are in any aspect, they may here be thrown out upon this point alone, that they were not exclusive. It is shown again and again in the evidence that all this disputed territory was not only as free to the Spaniards as to the Dutch, but that it was much freer; for while the Dutch never excluded the Spaniards, the Spaniards did on numerous occasions exclude the Dutch. The Dutch themselves testify that Spanish traders were all through this territory; that Spaniards came down to the falls of the Cuyuni as a habitual practice; (B. C., II, p. 68) that the trade in the Barima between the Orinoco and Moruca was largely conducted by Spaniards; that the Spaniards drove out the settlers on the La Riviere plantation, in Barima, and confiscated their goods; that the Spaniards arrested Dutchmen on the lower Orinoco and in Barima; that Spaniards patrolled the interior and the coast rivers; that the Spaniards had

alliances and understandings with the Indians, and that they drove other Indians away repeatedly, and on other occasions brought them in to their settlements, where thousands of them were governed, instructed and civilized; and finally that so far from these acts being performed by the Dutch to the exclusion of the Spaniards, the Dutch were frequently excluded by the Spaniards from the performance of them.

There is not a single instance in the record where the Dutch questioned the right of the Spaniards to do any of these things.

But if two parties may be said to be in possession of land at the same time, he is held to be the true owner who has the better title. Where they are in possession of different parts of the land, the party having the better title is held to be in constructive possession of all that is not actually possessed by the other.

As was well said by Chief Justice Marshall:

"The defendant also relies on an adversary possession in himself and those under whom he claims, for more than twenty years. His proof of this fact is sufficient; and it is well settled, both in the courts of Kentucky and in this court, that a possession which will bar an ejectment, is also a bar in equity. But in this case the plaintiffs also have been in possession. . . . Each of the parties then has held possession of distinct parts of the land in controversy. In this state of things, it is well settled that the party having the better right is in constructive possession of all the land not occupied in fact by his adversary. If then the plaintiffs in this case have the better title, that title is barred by the possession of the defendant, so far as that possession was actual, but not farther."

Hunt v. *Wickliffe* (1829), 2 Peters' [U. S. Sup. Ct.] Reports, 201, 211, 212.

So also Mr. Justice Story:

"Where two persons are in possession of land at the same time, under different titles, the law adjudges him to have the seisin of the estate who has the better title. Both cannot be seized, and, therefore, the seisin follows the title . . . The disseisin of Coburn under a junior title did not extend beyond the limits of his actual occupancy."

Barr v. *Gratz* (1819), 4 Wheaton's [U. S. Sup. Ct.] Reports, 213, 223.

V. THE CLAIM OF ADVERSE HOLDING MUST BE DEFINITE.

Courts of justice universally and absolutely refuse to consider loose and vague claims to indefinite areas as a foundation for adverse holding.

Thus the Supreme Court of New York:

"Adverse possession must be marked by definite boundaries and be regularly continued down to render it availing."

Doe v. *Campbell*, 10 Johnson's Reports, 477.

Says Mr. Justice Spencer:

"In order to bar the recovery of a plaintiff who has title, by a possession in the defendant, . . . it is also requisite that such possession should be marked by definite boundaries."

Brandt v. *Ogden* (1806), 1 Johnson's New York Reports, 156, 158.

Says Woodworth, Justice:

Boundaries, therefore, including the premises were indispensable in order to give this defense the semblance of plausibility. The defendants stand on the same ground as if no deed had been produced; and then the possession cannot extend beyond the place actually occupied."

Jackson v. *Woodruff*, 1 Cowen's Reports, 276 (A. D. 1823).

See also *Coverdale* v. *Charlton* (1878), 4 Q. B. Div., 104, per Bramwell, *L. J.*, and *Bailey* v. *Carleton*, 12 New Hampshire Reports, 9 (A. D. 1841).

It is therefore well settled that the claim of title, which is the necessary accompaniment of adverse holding, must be to a territory which has fixed and definite boundaries. When the boundaries are not fixed by grant they are fixed by the limits of actual occupation. There was not even a semblance of occupation by the Dutch west of the Moruca and the falls of Cuyuni.

It is one of the most singular facts in the present case that, while it is claimed that a title has been established in the Dutch and their successors, the British, by an adverse holding established prior to 1814, there is not in the whole history of the disputed territory, (at least up to 1839,) and of the Dutch colony which adjoined

it and of the Spanish colony which, as Venezuela claims, included it, nor in that of the two countries to which these two colonies respectively belonged, as set forth in the vast mass of evidence annexed to the Cases presented by the respective parties, any definition of the boundaries of the territory claimed by the Dutch. During the one hundred and sixty-six years that this situation had lasted, from the date of the Treaty of Munster, the Dutch never undertook to state the limits of their claim. Not until 1840, after the Dutch had long disappeared from the territory and after the British had been in possession for nearly thirty years, was any definition made of the boundaries which are the present subject of claim, and the line put forward at this late date, nearly two centuries after the Treaty of Munster, was a pure figment of the imagination, assumed by the caprice of the person employed to make a survey, and without reference in fact to any question of settlement, or political control, or possession, or occupation of any kind whatever. This recent invention of the geographer Schomburgk is the only line that is talked about in the British Case, except indeed that still more recent invention, known as the "Extreme British Claim." There is no statement or suggestion in that Case, or in the Counter-Case, as to what the boundaries of fifty years' adverse possession are. There is, of course, no statement that there had been fifty years' possession up to the Schomburgk line, for such a statement would be entirely destitute of foundation. We are left still in absolute ignorance as to what territory is claimed by an adverse holding.

Of course, the Dutch never knew or imagined any such line as that which now appears as the Schomburgk line, or even that which was published by the British authorities as the Schomburgk line from 1840 to 1886. Even in those innumerable discussions and suggestions between the Company and Director-General Storm recited in the last chapter there was nothing that approached anywhere near this line. At various times, in the coast territory, these suggestions name the Moruca, the Waini,

the Barima and the line of D'Anville, which excluded the Barima and which was entirely on this side of the mouth of the Orinoco. In the interior territory no point or points were ever suggested as a boundary. One may read the whole of the Company's correspondence from beginning to end, with the map lying before him, and yet be absolutely unable to make a line anywhere on that map that shows the boundary between the two territories as the Director-General or the Company at any time thought either that it was or that it ought to be. It is not only the variety of his suggestions, but their vagueness, which is to be noticed. He never speaks of a line except the line in D'Anville's map, and he evidently only speaks of that line because he finds it in the map. Except for its presence in the map it represents nothing. Moreover, he no sooner refers to it, than he makes a suggestion inconsistent with it. The boundary claim, so far as it was Dutch, therefore, fails in this most essential particular, that its extent was never definitely ascertained.

VI. Adverse Holding must be under a Claim of Right.

The mere possession of the land of another for twenty years is not enough to give title. A person coming upon the land of another and taking possession of it is a mere trespasser, and his trespass, though continued for the length of time prescribed by the statute, will not give him a title unless his possession is in pursuance of a claim to the ownership of the land.

According to Phillimore (Int. Law, 3rd ed., vol. I, p. 327):

> "Dominion is acquired by the combination of the two elements of fact and intention."

The intent must be to exclude the true owner. A transient entry upon land for a temporary purpose can never amount to an ouster of the true owner. In such case, there is no intent to hold the land.

Says Mr. Justice Story, of the Supreme Court of the United States:

"An ouster or disseisin is not indeed to be presumed from the mere fact of sole possession; but it may be proved by such possession, accompanied with a notorious claim of an exclusive right."

Ricard v. *Williams*, 7 Wheaton's [U. S Sup. Ct.] Reports, 59, 121.

Says Mr. Justice Baldwin, of the same Court:

"An entry by one man on the land of another, is an ouster of the legal possession arising from the title or not, *according to the intention with which it is done;* if made under claim and color of right, it is an ouster; otherwise, it is a mere trespass; in legal language, *the intention guides the entry, and fixes its character.*"

Ewing v. *Burnet*, 11 Peters' [U. S. Sup. Ct.] Reports, 41, 52.

In a later case in the same court, Mr. Justice Miller says:

"We think this law is too well settled to need argument to sustain it. There must be title somewhere to all land in this country. Either in the Government, or in some one deriving title from the Government, State or National. Any one in possession, *with no claim to the land whatever must in presumption of law be in possession in amity* with and in *subservience to that title.* Where there is no claim of right, the possession cannot be adverse to the true title."

Harvey v. *Tyler*, 2 Wallace's [U. S. Sup. Ct.] Reports, 328, 349.

If there is no claim of right, there can be no adverse possession. Under such circumstances, it is in law deemed to be a possession under the true owner. This principle has been well expressed by Chief Justice Beck, of Iowa. He says:

"An essential ingredient of adverse possession is a *claim of right* hostile to the true owner. So, if one enter upon the land of another, without any color of title or claim of right, the possession thus acquired is not adverse, but the possessor will be deemed by the law to hold under the legal owner. In such a case no length of possession will make it adverse. . . .

"The *quo animo* in which the possession was taken and held is the test of its adverse character. The inquiry, therefore, as to the intention of the possessor, is essential in order to determine the nature of his possession, and

before his possession may be pronounced adverse it must be fonnd that he intended to hold in hostility to the true owner."

Grube v. *Wells* (1871), 34 Iowa Reports, 148, 149.

Of course a holding by consent cannot be in hostility to the true owner, but the possession must be in subservience to the true title.

Says Mr. Justice Wells:

"A mere possession of land of itself does not necessarily imply a claim of right. The tenant may hold in subjection to the lawful owner, not intending to deny his right or to assert a dominion over the fee. But the terms open, notorious, adverse and exclusive, when applied to the mode in which one holds lands, must be understood as indicating a claim of right. They constitute an appropriate definition of a disseizin, and the acts which they describe will have that effect if not controlled or explained by other testimony.

"An adverse possession entirely excludes the idea of a holding by consent."

Winthrop v. *Benson* (1850), 31 Maine Reports, 381, 384.

The general principles requiring a claim of right in order to make adverse holding as between individuals apply with still greater force where the question is one as between States. In the case of individuals, the question is only of private title or ownership; in the case of States, the question is one of public title, dominion or sovereignty.

A private individual entering upon the land of another cannot establish a claim of adverse holding unless both the ouster and the possession are under a claim of right. Nor can a State endeavoring to acquire a title by adverse holding establish it unless both the ouster and the possession are likewise made under a claim of right.

In the case of private holdings, the act of the private holder sometimes speaks for itself, and may be enough without anything else to give notice of a claim of right; but in the case of States, where public title is concerned, the acts of private individuals on the territory which is sought to be held adversely show nothing

with reference to the State of which they are subjects; no presumption can arise from anything they do as to the claim of the State. The fact that a squatter, or any number of squatters, establish themselves upon the territory of another State does not indicate a claim of right sufficient to establish even a private title; much less does it indicate a claim on the part of the State to which they belong to assert a public title. The State itself must take some action in reference to the territory so claimed. Unless it does so by exclusive acts of dominion necessarily implying a claim of right, the occupation cannot be deemed to have been made under such a claim; and no matter how long it continues, it is void and ineffectual as establishing a public title adversely to the prior sovereign.

Nor is it enough that the State seeking to acquire title through the acts of its citizens should extend its jurisdiction merely over such citizens, because jurisdiction may be personal in its character, and may follow the citizen wherever he goes. The jurisdiction which the adverse State maintains must be distinctly a territorial jurisdiction, one which implies dominion or claim of dominion over the soil and all who dwell thereon, whether its own subjects, or natives of the territory, or foreigners sojourning there.

If the acts performed by the Dutch on this territory had been much more strongly indicative of possession than they were, they would not, in the absence of a claim of right, amount to a disseisin of Spain. As has been several times suggested, there is nothing in these acts to indicate possession. There was no settlement and there was no control in the territory in question. If there had been, they might possibly have been of such a character as, in the absence of evidence to the contrary, to have implied a claim of right, because such a claim may be inferred from the facts, if the facts sufficiently warrant it. But there being no settlement and no control, the British Case is compelled to fall back upon acts of such slight significance as trading, the establishment of relations with the Indians, hunt-

ing, fishing, transit, the capture of runaway slaves, and the like. Such acts can never be said to indicate a claim of right, because they are perfectly consistent with ownership in another. They have no territorial quality. The supervision which the Dutch authorities exercised over them was merely a supervision to secure the profits of the trade, or to control the movements of the "free colonists," or to insure the colony against Indian attack. There is not one of them that constitutes in any sense an act of territorial jurisdiction, whether it was performed by colonists or by the old negro traders or by the Outliers or Outrunners employed by the Company. They are void of significance in this inquiry, for the reason, if for no other, that they import no claim of territorial sovereignty, and therefore no claim of right.

In the present case, not only do the acts related fall short of implying any claim, but there is a mass of evidence of the most significant character which absolutely negatives the existence of such a claim.

The history of the deliberations of the West India Company on the boundary question has already been dwelt upon at length. It is enough to say here that it shows repeated applications on the part of the Director-General of the colony to the Company for instructions as to the boundary which he was to claim. It shows that these applications took the form of earnest appeals, urgently demanding an answer. It shows that the request for instructions was based on a critical condition of affairs in the colony, namely, the fact that the Spanish authorities were actively enlarging their actual settlement of the territory in which the Dutch had been travelling and trading to the Orinoco and in which dwelt the Indians who carried on the slave trade and otherwise contributed to promote the interests of the traders of Essequibo. It shows that the Director-General looked with the gravest apprehension upon the erection of new Spanish settlements in the territory, chiefly, no doubt, because it would reduce the facilities and profits

of the trade there maintained. It shows, finally, that the Director-General desired to check this development of Spanish settlement in the territory by setting up a claim to dominion over it, or over some part of it, but that he required the authority of the Company to do so, and he also required information as to what territory, if any, the Company claimed.

What did the Company do under these circumstances? As to the location of the boundary, they refused to give any instructions whatever. They stated the result of their nine years' deliberations and investigations in a letter which showed that they were without result. They stated in terms that they were unable to form an opinion upon the subject, and they calmly referred to the boundary question between New Netherland and New England as the only fact in the history of the New World bearing on the subject.

It would seem to be impossible to conceive of a territorial claim where the party interested in making it was so entirely in the dark as to what he was claiming. If the West India Company never could determine what territory they should claim, they cannot be said to have made a claim, because the idea of a claim to territory by one who does not know what territory he is claiming is a contradiction in terms. Yet the fact is quite certain from these letters that whatever territorial extension the Director-General may have thought the interests of the Company demanded, he never was able to reach any conclusion as to the territory which should be claimed. Certainly he had no knowledge of the limits; nor, as appears from the letters of the Company, were they ever able to inform him. Moreover, the correspondence itself plainly shows that there was no claim of right, and no intention to claim as of right. The Director-General's suggestions were not in the direction of claiming on grounds of right, but of claiming upon grounds of expediency, in other words, of simple territorial extension; and the Company, while they would have been willing to claim anything for which they could have found a basis

of right, being unable to find such a basis, refused to assert any claim.

But they did more than this. Having stated that they could come to no conclusion on the question of boundary claim, they expressly enjoined upon the Director-General that he should not raise the question, and should make no open or direct opposition to the extension of the Spanish settlements. The Company had received his hint, ingeniously conveyed, in his letter of December 7, 1746 (B. C., II, p. 46), that the Indians were much aggrieved at the Spanish settlements, since they closed the slave traffic in that direction, and that they expressed a desire to surprise the one last established and level it to the ground, "which I, not without trouble, have prevented." They had received a further hint from him, in his letter of March 25, 1747 (B. C., II, p. 49): "I should already long ago have removed and demolished the first fort up in Cuyuni (*which even now is easy of accomplishment on my part through the Caribs*), if I were but rightly conscious how far the limits of your Honours' territory extend," and they had answered, in the following September (B. C., II, p. 51), that they had started the inquiry about the boundary, adding this remarkable instruction, which has a double significance, in view of the letters that preceded it: "Nevertheless, if in the meantime you can, *by indirect means, and without yourself appearing therein*, bring it about that the Spaniards be dislodged from the forts and buildings which, *according to your assertions*, they have made upon the territory of the Company, and can prevent them from spreading further in that quarter, you will do well to accomplish this,"—an instruction whose meaning is evident, and which Storm showed that he understood, by his statement in the following year (B. C., II, p. 58) that "I intend to tell the Chiefs of the Indians, when they come to me, that I can provide no redress for them and that they must take measures for their own security. Then I feel assured that in a short time no Spaniard will be visible any more above in Cuyuni."

The Director-General fully understood why the Company were unwilling to make any claim, and why, instead of openly opposing the extension of Spanish settlements, they covertly aimed at their destruction by means of the Indians. In his report in 1750 (B. C., II, p. 67), he says: "Because the limits are unknown, we dare not openly oppose them."

Finally, the Company, in their remarkable letter of January 6, 1755 (B. C., II, p. 101), which sums up the boundary question, and explains why they cannot reach a conclusion, warned the Director-General against attempting to define the Company's territory and disputing about its jurisdiction, for the very reason that the Company cannot find any ground for asserting a territorial claim.

Mindful of these instructions, the Director-General, when in 1758 he wrote his protest to the Spanish Governor in reference to the capture of the Cuyuni post (B. C., II, p. 154), carefully refrained from suggesting that any question of territorial jurisdiction was involved in the attack, and left it entirely as an unwarranted molestation of the persons of Dutch subjects. The only allusion to territorial rights which he allowed was in the letter of his irresponsible subordinate, which was returned unopened.

Under these circumstances, it is evident not only that the Dutch made no claim of right, but that they intended to make no claim, and that they expressly instructed their Managing Agent to make no claim, with which instruction he complied; and their reason for doing this was the best of all possible reasons, namely, that they had investigated the subject and that they could not find that they had any claim at all.

The evidence upon which these facts rest is incontrovertible. It is the best evidence that could possibly be had, namely, the very instructions, with the reasons for them, which the Company gave to the Director-General on the spot. After the most careful investigation, extending over nine years, they failed utterly to reach a conclusion. As admissions, the letters of Storm and of the Company are conclusive. As evidence of what was in the minds

of the parties,—of that "intention" of which the judicial authorities speak in connection with adverse holding,—they are likewise conclusive; for they lay bare the inner workings of the minds of those who conducted the Company's affairs, and in such a way as to forbid any idea of intention to claim any particular limits.

It would be impossible to find a more absolute negation of all claim of right than is to be seen in this correspondence between the West India Company and the Director-General. But there were other facts which negative a claim of right. There was the express admission of Beekman, in connection with the horse trade, at the beginning of the century, that the territory up in Cuyuni, that is to say, beyond the falls, was Spanish territory, and his submission and acquiescence when such a right was asserted by prohibitions against Dutch trade. There was the suggestion made by Storm in 1766 to the Spanish Governor that the latter should deal with the Dutch outlaws in Barima. There was the entire absence of any exercise of jurisdiction or control by the Dutch over the territory west of Moruca and above the falls of the Cuyuni, and entire acquiescence, without a word of protest, in the assertion of Spanish jurisdiction by innumerable acts in the same territory. These matters belong more particularly to the discussion of the question of political control. They are only mentioned here as proof of the absence of a claim of right.

On two occasions, and two only, did the Dutch undertake to make anything resembling a claim. These were in the two Remonstrances of 1759 and 1769, already considered in the chapter on the Dutch Claim. The first of these was so expressed that it could hardly be considered a claim at all. It was confined to saying that the tributaries of the Essequibo had been "possessed from time immemorial," and that the Company "in virtue of that possession have always considered the said river of Cuyuni as a domain of this state." It protested against the attack on the Postholder and the destruction of the post; but such a

protest might have been made, had the post been situated on the other side of the Orinoco; for the protest was not inconsistent with the admission of Spanish sovereignty over the territory. Finally, it invited a discussion to bring about a delimitation of frontiers. Such a statement as this cannot be said to be a claim of right. In considering its force and effect in the present controversy, we must read it in connection with the correspondence of the Company and their officers which lay behind it, and we must interpret it in the light of this correspondence. Viewed in this light, it is clear that the Company were unwilling to make a positive claim, because, first, they felt that they had no ground of claim, and, secondly, if they had a ground they could not tell to what territory it extended. They therefore sent their paper for what it was worth, and the paper was well called a "Remonstrance," for it was nothing more. Such as it was, however, it was withdrawn ten years later.

The Company had hoped, when they made their first Remonstrance, that they might shortly discover some facts that would justify a claim, and it was in this hope that they had invited a discussion of the boundary question, and had written repeated letters to the Director-General asking for further information. This further information they had never been able to get, and when the occasion arose for them to "remonstrate" a second time about fugitive slaves and other matters, they referred to Spanish settlements which they understood were placed in the Cuyuni, and referred to them solely for the purpose of disclaiming any territorial rights in that neighborhood; as a result of which the only effect of the second Remonstrance on territorial claims in the Cuyuni was that it admitted the Spanish claim to the Cuyuni Valley in general and denied the Company's previous position that "they had always considered the said river of Cuyuni as a domain of the state." This left the matter substantially as if no claim had ever been made.

They did, however, make a specific claim in the second Re-

monstrance to territory of the State "extending from the river Marowyn to beyond the river Waini."

This is the only intelligible claim ever made by the Dutch Government or by the West India Company. It may, of course, be assumed to state the full limit of the claim, and thus included only the left bank of the Waini.

With the exception of this claim to Waini—and the important fact is to be noticed that this is only a claim *along the coast* to the mouth of the Waini--there is nothing to indicate a claim of right on the part of the Dutch to the territory in dispute, and there is everything to indicate the contrary. It is even a question whether, in view of the conflicting suggestions put forth in the correspondence, any importance can be attached to the claim to the Waini. This claim, however, was likewise abandoned, as appears from the often-quoted statement of Governor-General Van Grovestins in 1794—and it cannot be quoted too often—in which he names the Moruka as the line (V. C. II, 248) "which up to now has been maintained to be the boundary of our territory with that of Spain."

Two incidental points are to be noticed in connection with the requirement of a claim of right. These relate (1) to the time of making the claim, and (2) to the extent of the claim.

(1.) *The time of making the claim.*

The claim of right must be contemporaneous with the adverse holding. If it begins without a claim of right, it is not an adverse holding, and a subsequent claim of right will not refer back to the beginning of the possession. Nor can prescription run after the claim is actually or by implication withdrawn.

Adverse holding can only begin with an ouster or disseisin accompanied by a claim of right. If there is no claim of right at the time of the first entry, the entry is no ouster, and he who so enters holds, in contemplation of law, in subservience to the legal title. It follows that one may be in possession for any number of

years, but such a possession is not an adverse possession until a claim of right is set up, and the duration of the possession anterior to the setting up of the claim is immaterial. This doctrine has been repeatedly affirmed.

Says Mr. Justice Spencer:

> "In order to bar the recovery of a plaintiff who has title, by a possession in the defendant, strict proof has always been required, not only that *the first possession was taken under a claim* hostile to the real owner, but that such hostility has existed on the part of the succeeding tenants."
>
> *Brandt* v. *Ogden* (1806), 1 Johnson's New York Reports, 156, 158.

Says Mr. Justice Baldwin, in a case already cited:

> "It suffices for this purpose" (adverse possession) "that visible and notorious acts of ownership are exercised over the premises in controversy for twenty-one years, *after an entry under claim and color of title.*"
>
> *Ewing* v. *Burnet* (1837), 11 Peters' [U. S. Sup. Ct.] Reports 41–52.

We have seen from our examination of the Dutch remonstrances that their alleged claims, which could only be construed as relating to portions of the territory now claimed by Great Britain, were made in such qualified terms that they could hardly be considered as claims at all; that, such as they were, they were in great part withdrawn; that the Dutch never made any entry thereunder; and that of the territory which it is alleged they claimed they had no possession.

We have seen further that the acts and papers of the Dutch during the 110 or 120 years before these Remonstrances expressly admitted Spanish dominion in the Cuyuni and in Barima.

It may be worth while to notice in this connection that no claim of right was ever made by the English until long after their acquisition of British Guiana. Even after the Schomburgk line had been laid down, the British Government in 1841 expressly disclaimed it as a line of right, and it was not until later that there could be said to have been any such claim in existence.

(2.) *The extent of the claim.*

Not only must a claim of right be contemporaneous with the entry in order to constitute an ouster, but it must be co-extensive with the entry. An entry upon a tract of land, where there is a claim of right only to a part of the tract, even though there may be actual possession of the whole, constitutes an ouster or disseisin only of that part, and consequently an adverse possession only of that part. The adverse holding cannot be larger than the claim of right. A holding that is less than the claim is limited to the holding; a holding that is greater than the claim is limited to the claim. Possession outside of the limits of the claim is not adverse possession.

Says Chief Justice Parker, in a case already cited:

"And where the possession was in a township, or other large tract of land, which had never been divided into lots for settlement, no particular claim, beyond the actual occupation would be indicated, and of course no notice of any such claim of title should be presumed."

Bailey v. *Carleton* (1841), 12 New Hampshire Reports, 9, 16.

Says Mr. Justice Story, also in a case cited above, referring to the claim of a life tenant:

"His title being evidenced only by possession, it must be limited in its extent to the claim which he asserted."

Ricard v. *Williams* (1822), 7 Wheaton's [U. S. Sup. Ct.] Reports, 59, 111.

Applying this principle to the present case, it establishes that no matter what acts of occupation the Dutch may have performed in the territory in question, the effect of these acts as constituting an adverse possession is restricted to that portion of the territory to which they made a claim of right. Whatever may have been the character of their possession, to make an adverse holding it must be included within the limits of their claim.

VII. Adverse Holding must be Continuous and Uninterrupted.

The term of adverse holding necessary to give title being fixed by the Treaty at fifty years, the general principle requiring continuity of possession must be applied to this period. No principle is better established than that such possession, in order to give title, must be continuous. A possession for a few years, interrupted either by forcible dispossession or by voluntary abandonment, although resumed at intervals, is not such a possession as the law requires to give title to an adverse holder. The holding must continue during the whole period, without a break. If it is broken, the holding comes to an end, and the existence of new conditions at a later period, which amount to adverse holding, cannot be deemed a continuance of the first holding, but must be considered by themselves as beginning a new period of fifty years, which, in order to be effective, must also be continuous.

In *Agency Co.* v. *Short* (1888), 13 Appeal Cases, 793, 798, 799, (Privy Council), previously cited as to another principle, the plaintiff sought to recover land in Botany Bay, New South Wales. The defendant set up an adverse possession for the statutory period, but failed to prove that he and the persons through whom he claimed had been in continuous possession during that period. It was held by the Supreme Court of New South Wales, that there being no evidence that the legal owner during the statutory period retook possession, the statute when set running continued to run, notwithstanding the fact that there was a break in the chain of adverse possessors. Upon appeal to the Privy Council, it was held that the abandonment of possession by the trespassers left the rightful owner in the same position in all respects as he was before the intrusion took place. Lord Macnaghten, delivering the judgment of the Privy Council, and referring to the decision of the Colonial Court, said:

"Their Lordships are unable to concur in this view. They are of opinion that if a person enters upon the land of another and holds pos-

session for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. . . . The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant.

"There is not, in their Lordships' opinion, any analogy between the case supposed and the case of successive disabilities mentioned in the statute. There the statute 'continues to run' because there is a person in possession in whose favor it is running.

The effect is the same whether the possession is terminated by a voluntary abandonment, or by a forcible dispossession. If the possession depends upon settlement and the settlement is abandoned, the adverse holding, in so far as it is based on that settlement, comes to an end. A new settlement will not continue it.

It may or may not be the beginning of a new adverse holding, according to whether or not it fulfills the conditions of adverse holding; but the adverse holding based on the previous settlement is determined forever. The occasional existence, therefore, during a long period—two hundred years, for example—of settlements lasting a short time, when there are long intervals of abandonment during the period, count for nothing unless some one of the settlements shows a continuous existence during the whole period of fifty years.

A fortiori, the adverse holding is terminated by a forcible dispossession by the former owner. There is no more effectual mode of putting an end to adverse possession on the part of a State than by forcibly ousting the intruder. It is not only a cessation of the possession, but it is notice at the same time, and that of the clearest kind, that the claim, if any, is not only disputed, but is to be resisted by all means at the disposal of the sovereign.

Applying these principles to the present case, it is found that the settlements or other establishments relied on to prove adverse holding were from time to time totally abandoned. Such was

the case with the first Pomeroon colony in 1665, after an existence of seven years; the second Pomeroon colony in 1689, after an existence of three years, and the second and third posts in Cuyuni, each of which lasted three years. The destruction of the first post in 1758 was a forcible dispossession by the holder of the prior sovereignty. Each of these brought to an end the running of the 50-year rule, as to that particular establishment, and each required a new act of settlement, in order to begin adverse holding again.

The same rule holds good as to political control. Political control is by the Treaty made, with certain reservations, a possible foundation for adverse holding; but the political control must be continuous for fifty years. A fitful control, exercised spasmodically and capriciously from time to time, with long intervals of apparent abandonment of control, cannot be deemed to be sufficient under the Treaty.

Whatever the Dutch did that had a shadow of resemblance to political control in the disputed territory they did in this spasmodic way. There was no such thing as a systematic administration of any district. There was no such thing as a continuous control of any district. Of political control in the real meaning of the word there was none whatever. Even the acts upon which the British Case relies to prove some sort of control, and especially those relating to the Indians, had about them no element of continuity.

VIII. Adverse Holding must be Open and Notorious.

The theory upon which an adverse holding is allowed to make title is that if the true owner, knowing the fact of the entry upon and adverse possession of his land, nevertheless sleeps upon his title and allows the encroachment to go unchecked for a long period of time, he shall be held to have forfeited his rights. But in order that such a principle may apply, the adverse possession must be of such a character that the owner is chargeable with

actual or constructive knowledge of the possession, and of the claim under which it is taken. A silent and secret taking of possession, in the case of individuals, cannot create an adverse title. Much more is this true in the case of States; above all, in territories such as those now in dispute, which were in considerable part a trackless wilderness, where the opportunity for secret and obscure acts by individuals in remote and unfrequented localities was exceptionally great.

So, too, with the claim of right. It is not only the facts which are alleged to constitute possession that must be notorious, but the claim must also be notorious. It must be brought to the knowledge of the prior holder, actually or constructively, not only that the adverse holder has possession, but that he has possession under a claim of right.

No principle of the law of adverse holding is more clearly recognized than this, and notoriety is one of the most necessary elements of any definition or the term. Thus, the definition of Chief Justice Kent, already quoted, is:

"A real and substantial inclosure, an actual occupancy, a *possessio pedis*, which is definite, positive and notorious."

> *Jackson* v. *Shoonmaker*, 2 Johnson's New York Reports, 230, 234 (1807).

So also says the United States Supreme Court, by Mr. Justice Baldwin:

"It suffices for this purpose, that visible and notorious acts of ownership are exercised over the premises in controversy, for twenty-one years, after an entry under claim and color of title."

> *Ewing* v. *Burnet* (1837), 11 Peters' [U. S. Sup. Ct.] Reports, 41, 52.

Says Mr. Justice Story:

"An ouster, or disseisin, is not, indeed, to be presumed from the mere fact of sole possession; but it may be proved by such possession, accompanied with a notorious claim of an exclusive right."

> *Ricard* v. *Williams* (1822), 7 Wheaton's [U. S. Sup. Ct.] Reports. 59, 121.

See also Chief Justice Parker:

"There should be something more than the deed itself, and a mere entry under it—something from which a presumption of actual notice may reasonably arise. It is not necessary to show actual knowledge of the deed. Acts of ownership, raising a reasonable presumption that the owner, with knowledge of them, must have understood that there was a claim of title, may be held to be constructive notice."

Bailey v. *Carleton* (1841), 12 New Hampshire Reports, 9, 16.

Applying this principle to the present case, it is admitted that many of the acts which are adduced in the British Case to indicate possession on the part of the Dutch were of sufficient notoriety. The fact that Dutch colonists and traders passed over the territory, for example, and that they passed over it for purposes of trade, was doubtless well known, for the reason, if for no other, that a large part of this trade was carried on by or with the Spaniards themselves, who, in like manner and to an equal extent, frequented the territory for the same purpose; in fact, much of the trade which is spoken of was a direct trade between the Spaniards and the Dutch themselves, and the fact has been noted that, especially during the seventeenth century, comprising the largest part of the period, the trade between the two colonies, particularly in Barima, was almost wholly carried on by the Spaniards, who came to the Dutch post and settlement, and but little by the Dutch going to the Orinoco. It was the distinct and avowed policy of the authorities of Essequibo to have the trade proceed in this way. The question of trade, however, is wholly unimportant, because there is no possible way in which it can be made the foundation of adverse holding, for it fulfills none of the requirements of adverse holding.

As for the other acts upon which the claim is made, there is no evidence that any of these had the notoriety which the law requires to establish adverse holding. So as to the two or three instances referred to of alleged cutting of timber, although no timber was cut. So with the prospecting of Hildebrandt in the Blue Mountains, of which some mention is made. Nothing of

importance was ever discovered there, and it was, for that reason, abandoned by the Company. The Spaniards never knew that it had been carried on.

As to the maintenance of "posts," so-called, there was no post west of the line connecting the falls of the Cuyuni, in the Interior, with Moruka, on the Coast, which the Spaniards did not break up as soon as its existence became known. We know with what rapidity and thoroughness they acted upon the report of Fray Benito as to the post at Quive-Kuru; and as to the second, the Spaniards were preparing to attack it when the post was moved, and as to the third, there is no evidence that the Spaniards were even aware of its existence. If they were, its pretensions were so slight and its activities so feeble and harmless that it might well have been left, as it was, to the natural death which was its fate after three years of precarious existence.

Finally, in reference to the relations with the Indians. Apart from all the other considerations excluding these relations from the question of adverse holding, they entirely lack the element of notoriety. They were carried on by secret intrigues and conspiracies. The most pronounced effect of them in this controversy, namely, the attacks upon Spanish missions, which the Dutch instigated, were of so secret and sinister a character that the Company, even in its correspondence with the Director, referred to them with guarded indirectness of speech, but in phrases beneath which lay an unmistakable meaning. The Director hinted that he could bring about an attack. The Company adopted the hint, and hinted back that he should do it, but cautioned him that it must be done covertly and secretly. "If you can," says their extraordinary letter of September 9, 1749 (B. C. II, 51), "by indirect means and without yourself appearing therein, bring it about that the Spaniards be dislodged from the forts and buildings . . . you will do well to accomplish this." And the burning of the missions and the murder of the missionaries followed in due course. Certainly these acts, however else they may be charac-

terized, purposely and actively shunned that notoriety which is required to establish adverse holding.

The process, of acquiring prescriptive rights by stealth is precisely what the law forbids, and it is to prevent this that it exacts that adverse holding shall be under a notorious claim. It is the laches of the owner that justifies the rule by which a wrongful possession may grow into a title; but the owner is not chargeable with laches unless he has notice that the possession is held under a claim, and he has no such notice where the acts by which the possession is sought to be established are not inconsistent with the ownership of another, or where the adverse claimant studiously refrains from advancing his claim and is silent where he ought to speak.

Before dismissing this subject it may be well to contrast the Spanish claim and their method of enforcing it with that which the Dutch Company imposed upon the Director-General. According to the latter's own testimony in his Memorandum of 1764 (V. C. II, 157), he says:

> "What can we expect from . . . the removal of the Spanish colonies in Guayana so much nearer to our boundaries? The latter go to work openly, like a proud nation, and they can therefore be better opposed, an open enemy never being so dangerous as a secret one."