

### MARCUS ISLAND AFFAIRS.

#### ACTION DETERMINED ON AFTER THE ARRIVAL OF SCHOONER "JULIA E. WHALEN."

Honolulu, Sept. 12—After exactly two months' absence the schooner *Julia E. Whalen* returned to Honolulu yesterday afternoon from Marcus Island, Captain Rosehill and party failing to obtain possession. Sixteen armed Japanese from the Japanese warship *Kasagi* were found on guard on the island, under command of Lieut. Akimoto. The party was refused a landing except in small detachments. Mr. Sedwick of the Bishop Museum and three sailors obtained specimens and samples of the guano and phosphates which average quite high. After remaining on the island six days the little party was ordered off and instructions given to Captain Rosehill to sail away, which he did. A claim for indemnity against the Japanese government will be presented by the Marcus Island Company through the State Department at Washington. Lastly, the *Julia E. Whalen* will be sold.

#### THE VOYAGE OF "THE WHALEN."

The schooner *Julia E. Whalen* which sailed from Honolulu on July 10 for Marcus Island arrived there July 30, losing one day in crossing the meridian and making the run of 2,800 miles in nineteen days, actual time. At 2 o'clock in the afternoon a boat containing Captain Rosehill and Messrs. Bryan and Sedgwick of the Bishop Museum with two sailors effected a landing. They were received by Lieut. Akimoto of the Royal Japanese navy and sixteen armed marines drawn up in line at the landing. Captain Rosehill presented to Lieut. Akimoto, who could speak English, his license under the seal of the Department of State giving him the right to remove the guano deposits on Marcus and to occupy the island for that purpose. He also presented a document in Japanese obtained in Honolulu stating that he visited the

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ス影響

- (5) 最惠國條款
- (6) 自國犯罪人ヲ引渡スコトヲ認ムベキヤ
- (7) 美術品ノ輸出禁止

- (8) 主權 (Sovereignty; suprematus; souveraineté; souveraineté) territorial superioritiz; landeshoheit; suzerainty; oberlehensherrschafft トノ區別

- (9) 輕氣球乗ト國際法

上記問題ヲ此日ノ出席者雄本朗造、小川郷太郎、岩井尊文、二上兵治、太田一郎、堀田貢、山田春邇、田中崎太郎、田岡増猪、清水賢一郎、山内四郎、今井喜幸、阿部龜彦、北田彦三郎、平塚益雄、奥山清治、保田次郎、江崎春澄、大塚伸次郎、梅野盛之助、常吉徳壽、夏秋十郎、中條庸本多二郎、諸氏ニ頒テ、次ニ當日ノ問題ノ討議ニ移ル

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高橋教授先ツ立テ事件ノ大要ヲ述ベラル其要領左ノ如シ  
 本人ローズヒルナルモノマカス島即チ南島島ニ關シ權利ヲ主張セント欲シ爲  
 メニ近來内外新聞ニ此事件ヲ報ス其中布哇ガセツトノ記スル所ハ文書ノ原文ヲ  
 シンマ、ニ記載セルニヨリ事件ノ真相ヲ知ルニ便ナレハ此原文ニテ報告ニ如カ  
 スト信ス即チ原文ニ曰ク

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the *Kasagi* of the Imperial Navy was ordered to this island under the command of Captain Sakamoto and that I was commissioned here on board her.

On the eve of our start, Colonel Buck, the United States Minister to Japan under instructions of his Government asked Baron Komura, the Imperial Minister for Foreign Affairs, for the transmission of his dispatch addressed to you through the official he was then sending. I was accordingly instructed to hand you the despatch which I now beg to enclose to you herewith.

The *Kasagi* left the Bay of Tokyo on the 23rd inst. and it was on Sunday last that we arrived at this island.

Upon your arrival which we estimated would soon follow ours, supposing you had left the Hawaiian portion the 11th as reported, I was particularly instructed to see you and explain to you our title to the island based as it does on the following facts:—

“The island popularly known as Marcus Island has been since comparatively early times, not unfrequently spoken of among the Japanese sailors of the adjacent regions; and since 1879 the island has been continually and almost regularly visited by Japanese fishing and hunting vessels: and on all such visits, the island was found to be entirely uninhabited and unoccupied. In 1896 these periodical visits were turned out in a permanent occupation, more than twenty of our Ogasawara (Bonin) islanders having now resolutely settled in the island; and ever since then the island has been in the continuous and undisputed occupation of Japan.

In view of such continued activity on the part of our enterprising people and of the growing importance of, and considerable dimensions assumed by, our interests in these waters, the Imperial Government felt the necessity of taking certain official and formal steps so as to prevent any international complications which long negligence on their part in respect might possibly give rise to. And in fact such official and formal step was taken in 1898. In the Tokyo Prefectural Ordinance under date of the 24th July of the same year, the island was incorporated in the Ogasawara

island for the purpose of examining the extent and value of the guano beds and also to collect specimens of flora and fauna for the Bishop Museum, and that no interference would be made with any rights that the government of Japan or the Japanese fishermen on the island might have.

The lieutenant received him courteously in turn a letter from Minister Buck, the American representative at Tokio, which letter Captain Rosehill has mislaid. The substance of the letter was to the effect the Captain Rosehill should precipitate no conflict between the representatives of the Japanese government and the officers and crew of the *Whalen*, and as far as possible remit all questions of ownership to the island—or his rights there in—for settlement by the State departments of the two governments. Captain Rosehill was also presented with the following communication from the Japanese Imperial Minister of Foreign Affairs:

#### JAPAN'S OFFICIAL COMMUNICATION.

The Minami, Torishima, July 29th, 1902.

Dear Sir,

Toward the middle of this month Mr. Takahira His Imperial Japanese Majesty's Minister at Washington wired to his government reporting that according to some American papers you were leaving Honolulu on the 11th inst. in an expedition to Marcus Island to which you had just been granted title by your government.

Immediately on receipt of the above intelligence, the Imperial Government on the one hand telegraphed to their representative at Washington instructing him to inform the United States Government of the legitimate previous acquisition by Japanese of the Island, and have decided, on the other hand, to dispatch to the spot a fast cruiser with an official of the Foreign Office on board her, for the protection of their rights and in order to meet you and explain to you an account of our acquisition of the Island and also in order to avoid any possible misunderstanding between the Japanese subject on the island and your crew.

It was under such circumstances and with such ends in view that

Sakanoto of the Imperial Japanese ship *Kasagi*, and a copy of these instructions was accordingly furnished. The instructions read as follows:

“Order to the Second Lieutenant Akimoto: Our ship shall return to the naval port Yokosuka for the purpose of coaling. I will remain you here; you shall do your duty fully according the order which is written after.

(Signed) CAPTAIN SAKAMOTO.

Minamitorishima, July 27, Meiji 35.

“1. When Captain Rosehill arrive at this island give him the letters of the American Ambassador and of Mr. Ishii. 2. If you see that he will not leave the island after you give two letters to the Captain, ask him to leave there as soon as he can, but give him your maximum facilities and kindness to him when he ask you to mend the wrecks of his ship. 3. If he ask to land on the island do not permit it, but when he ask you the landing of his crew for the health, permit it five men at a time with some responsible man. 4. I will stay here fifteen seamen under your control.”

After some conferences the Japanese lieutenant, who seemed disposed to be accommodating, agreed to allow Messrs. Bryan and Sedwick to stop on the island for a short time, but would not permit any of the sailors or officers of the *Whalen* to remain. The lieutenant gave them a small wooden house in which to reside. They had their own provisions and were allowed to purchase water from the Japanese fishermen.

Two days later further representations being made, the Japanese lieutenant permitted three of the sailors to land and remain for the purpose of aiding Mr. Sedgwick in the work of examining the guano deposits. The men and Mr. Sedgwick were attended during their subsequent labors by one of the guard of marines. The work of drilling and blasting holes through the rock phosphate deposits down to the coral required considerable time. A few holes were sunk in different parts of the island and deposits

(Bonin) Group and put under the jurisdiction of the Tokyo Prefecture, and official name of the Minami Torishima (South Birds Island) was given to it. Encouraged by this Governmental measure, the Japanese settlers set firmer foot in the soil and the consequence was gradual and steady progress of the colonization and extension of the industry in this Japanese possession beyond seas.”

It is now about three days that we have been staying off the island vainly waiting your arrival. We were finally led to suspect that you might not have left Honolulu on the 11th inst. as reported. The coal, moreover, beginning to fall short, it was with much reluctance that we decided to return for coaling without being able to meet with you. I accordingly have to recapitulate in this note what I should have personally pointed out to you.

I sincerely hope that you will agree with me in thinking that the facts of the case of above stated would conclusively establish the validity of our title. Should they however fail to secure your adhesion, I need scarcely call your attention to the fact that the matter should be negotiated through the diplomatic channel between the two Governments and that no measure in compatible with our right of prior possession and occupation should be taken in the meantime. I have to ask you for the sake of precaution that you should take necessary steps against your crew resorting to any hostile acts. On this side Captain Sakamoto and myself have not failed to give order both to the inhabitants and the men whom the Captain temporarily leaves on the island that confident upon your sense of justice they should under no circumstance provoke the citizens of a country with which Japan entertains of so cordial neighborhood.

Believe me, dear sir,

Yours most sincerely, K. ISHII,

Secretary to the Imperial Ministry of Foreign Affairs.

To Captain A. A. ROSEHILL.

A demand was upon Lieut. Akimoto that he give to Captain Resehill a translation of the instructions left with him by Captain

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enforce the orders left with him by the captain of the Japanese warship not to permit the Captain and his party to land or to remain on the island. As there were sixteen men beside the lieutenant and about fifty stalwart Japanese fishermen, Captain Rosehill concluded that his instructions from the company which were to yield to a superior force, required him to depart. So gathering what few samples they had been able to obtain, the *Whalen* party rejoined their vessel for Honolulu stopping one day at Midway Island and making the return trip in twenty-eight day.

The officers of the Marcus Island company, Col. Thomas Fitch and W. C. Peacock, will at once report the circumstances with the papers to the State Department at Washington with a claim against the government of Japan for indemnity, and a demand that the possession of Marcus Island be restored. Captain Rosehill says that the statement of Secretary Ishii that in 1896 the periodical visits of Japanese fishermen there were turned a permanent occupation, is incorrect, for he last visited the island in 1897 and at that time it was still unoccupied.

Col. Fitch says that the questions presented for diplomatic consideration are not many or complicated. The contention of Col. Fitch is that when Captain Rosehill put up the American flag on the island in 1889 and made formal claim in writing to it on behalf of the United States, built a house and left a member of the crew there with a year's supply of provisions, two rights were created; one a right of sovereignty in the United States which became perfected upon the Secretary of State subsequently filing in the Department of State at Washington copies of the claim of Captain Rosehill made in the name of the United States to the island, and that this right of sovereignty thus vested could not subsequently be divested by any failure or delay on the part of Rosehill.

The other right created by the notice of acquirement of the island was an inchoate right which Rosehill might have lost through neglect and that was a matter between the United States

of crown mould guano averaging about forty per cent. and of rock phosphates averaging something over seventy per cent. were found. They had been engaged in this work about five days and desired to make a camp and land four more men so as to push the work at different points at the same time, when they received from Lieut. Akimoto the following communication:

"Minamitorishima, Japan, Aug. 5, 1902.

"Captain A. ROSEHILL, Dear Sir:

"I do not like to write to you such matters as follows, but I must tell you that from my duty. I permitted two gentlemen to stop on this island for one week—that is to-morrow, and to your crew a week on this island for their health. Now it is the time to please you that you and your crew will not land on this island and two gentlemen will return to your ship, and also you will leave this island as soon as you possible because the people of this island are so ignorant that they are anxious for seeing foreigners and now they do not do their industry.

"Please tell me the date on which you will leave this island. I know a little about English as you know, therefore, there may be some impolite words in this letter. Please excuse me if there are such words."

"Your obedient servant,

"(Signed) H. AKIMOTO."

"Captain Rosehill upon receipt of this last communication informed Lieut. Akimoto that it would take several weeks' time to make a satisfactory exploration of the guano deposits of the island and that no idea of their extent or value could be obtained from the limited amount of work he had been able to do with three men in five days. He asked the lieutenant what he would consider it his right or duty to do in the event that he (Captain Rosehill) would insist upon remaining. The lieutenant shrugged his shoulders, glanced significantly at the sixteen armed marines drawn up in line and indicated that he would be compelled to

ment. It is claimed now that the Japanese lieutenant committed an overt act in ordering the members of the expedition to leave the island before their work had been completed, for even though they made no claim to the island, yet as citizens of a friendly power Japan should have allowed the scientific men to pursue their investigations without molestation. Besides the value of Marcus Island for its guano deposits, and as a cable landing place, it is said now, that its principal value is for a coaling station for the United States. The formation of the coral reef about the island with plenty of deep water to the shore line, would permit of an entrance being cut in the reef sufficient to allow a large vessel to come in and coal. The open space within the reef while not sufficient to allow a big ship to turn would permit the island to be circled on the inside of the harbor.

The question of indemnity is also one which will probably cause considerable trouble before it is settled. The Marcus Island Guano Co. claims to have expended in the neighborhood of \$10,000 for the purchase of the schooner and investigations already made, which are rendered useless because of the refusal of Japan to allow the work to be finished. The samples of guano brought back were found to be all that had been expected, though as the party was not allowed to finish its investigations the extent of the deposits are still unknown.

The Marcus Island Guano Co. was organized with a capital of one million dollars, divided into shares of ten dollars each, and the stock was reported to be selling at anywhere from four to six dollars per share, though it had not been placed on the open market. The company also had contract for furnishing 30,000 tons of guano annually to California parties, and expected to do almost as well in Hawaii. The guano was to be sold for fourteen dollars per ton, and there was an estimated profit of eight dollars per ton. On these figures the company, in case it is refused possession of the island, will demand an indemnity of a sum in the neighborhood of four million dollars.

The claim of the company that a warship should be sent to

and Rosehill, the United States having subsequently accepted as proof of the notices by exacting of him a bond of \$50,000 and issued him the papers which he carried with him to Marcus Island, fully recognizing his right, and that it cannot honorably fail to protect both the rights of its citizen and its own sovereignty over the island; that if it be possible for a nation to lose territory by non-user of it, and such non-user or abandonment should continue for at least as long a time it would be required by the statute of limitations to create adverse title by possession to real estate, and that at common law is twenty years, there would be much international trouble. If the contention of the Japanese government that it made formal proclamation in 1897 of its acquirement of Marcus Island be sustained, there are hundreds of unoccupied islands in the Aleutian group which have never been occupied by men and it could lose the title to these by Japanese settlement and claim for any Japanese who should choose to occupy them.

The matter will now go to Washington and there being no further use for the *Whalen* she will be sold.

#### FIGURE OF FOUR MILLION DOLLAR INDEMNITY CLAIM.

A petition to the Secretary of War for indemnity from Japan with the further request that the United States send a gunboat to Marcus Island to place Captain Rosehill in possession will be the next move in the Marcus Island controversy, according to a statement made yesterday by Col. Thos. Fitch. Mr. Fitch will prepare the records in the case and have them printed and will leave for Washington about the middle of next month to present the matter to the State Department.

The Officers of the Marcus Island Guano Co. are busily engaged in preparing their case for presentation to the United States government. The facts will be set out in a printed brief containing also the maps of the island, photographs taken there and a copy of the communications received from the Japanese govern-

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Marcus Island to place Captain Roschill in possession is based upon a nearly analogous case which occurred during President Buchanan's administration wherean American citizen had taken possession of Navassa, a small guano island off the coast of Hayti. He had been ordered to leave by the Haytian government and appealed to the United States for protection. President Buchanan sent a gunboat to the scene and placed the man in possession of the island, warning the Haytian government that no interference would be tolerated, as the claim was good under the guano laws of Congress. In that case the island had belonged to Spain from time immemorial and had been afterwards ceded to France. When Hayti gained her independence the island was included as belonging to her under the treaty, and the Haytian government set out that it had always possessed the title to Navassa since that day, refusing also several applications for permission to work the guano deposits upon it. In spite of this, and the fact that the citizen had not filed his indemnity bond the United States held that he was entitled to work the island.

Mr. Fitch says also that the letter from Minister Buck was not in such form as to lead to the belief that the United States had given up all claims to the island, but that Captain Rosehill was simply advised not to commit an act of open hostility. Though the State Department is said to have ruled that Japan is rightfully the owner of Marcus Island, no such ruling has been received here, and Col. Fitch does not believed that there has been a decision, or will be until Captain Rosehill has been given an opportunity to present his side of the case.—*Hawaiian Gazette.*

事件ノ大要ハ右ノ如シ宜シク十分ニ討議研究セラルベシト是ニ於テ清水賢一郎氏(政治三回)ハ次ノ報告ヲナス

南鳥島事件

第一節 同島ノ實狀

南鳥島ハ北緯二十四度十四分東經百五十四度ニ位シ即チ小笠原島ヲ去ル東南六百五十海里ニ在リ周圍僅ニ六哩高サ亦六十呎ニ過ギザル小島ナリ一ニ Marcus Island ト云フ同島ニハ信天翁ト稱スル禽鳥群衆スルヲ以テ其鳥糞ヲ採集シ肥料トシテ南米ニ送ランガ爲メ千八百六十年頃ヨリ米國人ハ同島ニ到リシコトアリト云フモ一方ニ於テハ此頃ヨリ日本人モ屢々同島ニ往來シタリト云フ此兩說ハ確固タル記録アルニアラズ單ニ傳説ニ過キズ從テ信ヲ措キ難シ千八百九十六年以後ハ引續キ日本人同島ニ往來シタルハ疑ナキ事實ニシテ現ニ千八百九十八年(即チ明治三十一年)七月十九日ノ内務省令及ビ同年同月二十四日ノ東京府告示ニヨリ同島ヲ南鳥島ト稱シ東京府所屬トナシ小笠原島廳ニ管屬スト定メラレタリ爾來我政府ハ同島ヲ本邦人水谷某ニ數ケノ條件ヲ以テ貸與シ同人ハ魚鳥ノ捕獲其他ノ事業ヲ經營シツ、以テ今日ニ至レリ其間同島ノ占領ニ對シ異議ヲ挾ミシ國アルヲ聞カズ越ヘテ本年八月ニ至リ米國ノキャプテン、ローズホルナル者同島ニ於ケル鳥糞採集ノ目的ヲ以テ一株式會社ヲ組織シ同島ニ向フトノ報ニ接シ我政府ハ軍艦一艘ヲ同島ニ派遣シ彼ノ上陸ヲ拒メリ彼ハ止ムヲ得ズシテ歸國シ我政府ヲ批難シテ曰ク余ガ千八百九十七年ニ同島ニ至リシ時ニハ一人ノ日本人ヲ

清水賢一郎

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モ認メザリキ依テ千八百九十六年ヨリ絶ヘズ同島ニ日本人ガ在住セシヤ否ヤ疑ナキ能ハズ依テ最正確ニ同島ヲ發見シタル者ハ余ト云フベシ故ニ日本ハ同島ノ占領權ヲ有セズ又當時余ハ同島ニ於ケル鳥糞蒐集ノ利ヲ覺リ數人ノ部下ト一年ノ糧食トヲ殘シ置キ直ニ歸國シ右鳥糞輸入ヲ目的トセル會社ノ設立ニ從事シタリ漸クニシテ百萬「ダラー」ヲ資本金トセル一株式會社ノ組織成リ本年八月同島ニ至リシニ日本人在リテ余ノ上陸ヲ拒メリ依テ手ヲ空フシテ歸國セザルノ止ヲ得ザルニ至リシナリ故ニ之レガ爲メニ生スル損害四百萬ダラーハ日本政府ニ於テ賠償セラレタシ云々ト

之レヲ要スルニロロズヘルノ主張スル所ハ同島ノ最モ正確ナル發見者ハ自己ナリ故ニ1898年以後ニ於テ日本ガ占領ノ實ヲ舉ケ居ルトモ其占領權ハ日本ニ無キモノナリト云フニ歸着ス以下占領ノ條件及ビ先例ヲ舉ケテ本件ニ關スル斷案ヲ下サント欲ス

第二節 占領ノ要件如何

國家ガ其版圖ヲ獲得スル方法ニ至リテハ古來種々ノ主義アリキ今 *Cus gentium* ニ依ル財產獲得ノ方法ヲ舉ケレバ(1)占領(2)増添(3)時効之レナリ又 *Cus civile* ニヨル獲得方法ハ(1)法ノ結果(2)裁判ノ判決(3)時効之レナリ近時ニ至リ諸學者(例ヘハ *Phillimore, narten* 等)ノ殆ンド一致スル說ニヨレバ獲得方法ハ大別二種アリトス原始的獲得及ビ由來の獲得之レナリ原始的獲得トシテ舉クル所ハ(1)占領(2)増添(3)時効ノ三者之レナリ由來の獲得トシテ舉クル所ハ(1)賣買(2)交換(3)任意的割讓(4)強制的割讓之レナリ

以上述ヘタル獲得方法ノ中占領ニ就テ少シク研究センニ占領ニ關スル學說紛々タリ先ツ Walker 氏ノ說ヲ紹介スレハ下ノ如シ

(1) 占領ガ有效タル爲メニハ有力ノモノナラサルベカラズ  
 溯テ史ヲ案スルニ十五世紀及ヒ十六世紀ノ前半ハ新領土發見ノ策盛ニ講セラレ各國競テ新領土發見ノ途ニ上ル蓋シ當時ニアリテハ單ニ發見アレバ占領セリトノ主義行ハレ殊ニ海岸一部ノ發見ガ島嶼全部ノ占領ナリトノ主張ノ下ニ葡萄牙ハ亞弗利加全部ヲ自國ノ領地ナリト云ヒ西班牙ハ南米全部ヲ自國ノ領土ナリト主張ス甚シキニ至リテハ英國ノ如キ千四百九十六年自國艦隊ノ一部ガ北緯五十六度乃至三十八度ノ沿海ヲ通航シタルノ事實ヲ以テ北米全部ニ對シ占領權ヲ主張セリ此ノ如キ主義ノ下ニハ各國爭議ノ起ルハ止ヲ得ザル所ナリ此時ニ當リテヤ法王ハ各國君主ノ上ニ位ストノ觀念行ハレシヲ以テ之レガ爭議ノ仲裁ヲ法王ニ乞ヘリ千四百五十四年法王 Nicholas V ハ宣言ヲ發シ Guinea 全部ノ統治權ヲ葡萄牙ニ與ヘタリ (Martens)

1493年法王 Alexander VI ハ有名ノ諭令 (Bull) ヲ發シ Azores ノ西三百哩 (100 leagues) ノ距離ニ一線ヲ引クト假定シ此線ヨリ西ニ於テ發見シタル土地ハ西班牙領トシ東ニ於テ發見シタルモノヲ葡萄牙領トスト定ム又同法王ハ英國ニ與フルニ大西洋ヨリ北極及南極ニ至ル間ニ於テ西班牙ニ屬スル線外ニ於テ發見シ得ル土地ヲ以テセリ

以上ノ主義ハ一モ根據ヲ有セズ從テ Grotius 出ツルニ及ビ此說ヲ攻撃シ爾來彼ノ說ハ大ニ勢力ヲ有スルニ至リ今日ニ於テハ單ニ發見シタリトノ事實ノミヲ以

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テ占領ノ完全ナル口實トスルヲ得ズ完全ナル占領アルガ爲メニハ此最初ニ發見シタリト云フ事實ノ外ニ尙實際ノ占領 (Real Occupation) アルヲ要ス換言スレバ占領ガ有效タル爲メニハ有力ノモノタルヲ要ストノ説ガ一般ニ認メラル之レヲ詳言スレバ單ニ發見シタルト云フ事實ノミヲ以テ其土地及ビ其土地ニ及ブ可キ裁判權ヲ發見者ノ所屬國又ハ其政府ニ與フルヲ得ズ必竟此ノ如キ發見ハ之レヲ占有スルコトニヨリテ持續セザル可カラスト云フニアリ

然ラバ有力ナル占領ヲ構成スベキモノハ何ナリヤト云フニ今日學者ノ一致スル所下ノ如シ

(i) 占領ハ國家行爲タルヲ要ス 占領ガ正當ナル名目ヲ得ルニハ其島ヲ占有スル目的ノ爲メニ任命セラレタル官吏ノ行爲ナルカ又ハ任命セラレザル殖民地民ノナシタル行爲ヲ國家カ追認スルカ孰レカ二者ノ一ニ居ラサルベカラズ

(ii) 占領ハ適當ニ繼續スルモノタルヲ要ス 法律上有效ナル占有ナリトノ形式上ノ推定ヲ下ス爲メニハ適當ナル時期内ニ其領土ニ於テ管轄權ノ行使若クハ實際ノ移住アルヲ必要トス而シテ一度ビ形式上獲得シタル領土ハ任意的又ハ強制的ノ拋棄アルカ若クハ讓渡アルニアラサレバ之レヲ失フコトナシ併シ形式上占有シタル土地ト雖モ若シ或者ヘラル可キ時期ノ間之レヲ借地トモセズ又怠慢ニテ捨テ置キシ時ハ此土地ハ既ニ拋棄シタルモノト推定セラレ其後此土地ニ來リタル者ガ無主物トシテ占領スルヲ得現ニ此主義ハ Santa Lucia 事件ニ於テ明カニ示サレタリ

之レニ反シ占領後引續キ屢々管轄權ノ行使アリシモノナラバ假令暫時占有ノ

中斷アルトモ其國ハ其領土ニ對スル權利ヲ失ハズ之ノ Delagoa Bay 事件ニヨリテ設定セラレタル原則ナリ

(iii) 占領ニヨリテ獲得シ得ル面積ハ占領ヲ行フ所ノ實力ニ比例スルヲ必要トス

或土地ヲ占領スレバ之レガ爲メニ其土地ニ及ブべき權利ノ範圍ハ實際占領シ終リタル土地ヨリモ廣大ナル範圍ニ及ベシ云々之レ本問題ニ直接ノ關係ナキニ付キ省略ス要スルニ小島ノ占領ナラバ之レヲ以テ全島ノ管轄權ヲ得ルモノト知ルベシ

(2) 千八百八十四年ヨリ五年ニ至ル伯林會議ノ範圍内ニ於ケル占領ハ外交的ニ告示セララルコトヲ要ス

西部及中央歐羅巴ノ主要ナル諸國ニ懷カレタル亞弗利加殖民ニ關スル熱望ヨリ生ズル問題ヲ解釋センガ爲メ利害諸國ノ代表者ノ會議ハ千八百八十四年九月 Bismarck 公ニモッ Brussels ニ召集セラレタリ此會議ニ於テ列席シタル使臣等ガ定メタル條約文第三十四條及三十五條ニ於テ次ノ主義ヲ採用シタリ自國ガ現在占領シ居ルモノヲ除ク外亞弗利加大陸ニ於ケル海岸ノ或地方ヲ今後占有ス可キ國若クハ從來カ、ル占有ヲナシ居ラザリシ爲メ改メテ其地方ヲ獲得セントスル國並ニ其地方ニ自己ノ管轄權アリトスル國ハ孰レモ此會議ニ於テ設定シタル條例ニ調印シタル國々ヘ宛テタル告示文ヲ附シテ各自ノ法令ヲ發スヘシ蓋シ之レ此主張ニ對シ現時調印シ居ル中ノ他國ガ必要アル場合ニハ自國領ニ屬スベキモノナリト要求スベクレバナリ

○南島島事件

○南島島事件

此條例ニ調印シタル諸國ハ亞弗利加大陸ノ海岸中調印國ノ占領シタル土地ニ於テ現存ノ權利保護ニ必要ナル權力ノ樹立ヲ保證スヘキ義務ヲ有ス又場合ニヨリテハ互ニ一致協賛シタル條件ヲ附シテ貿易並ニ移轉ノ自由ヲ保證スヘキ義務ヲ有ス

蓋シ此條約タルヤ亞弗利加海岸ニ於テ將來占領ヲナスヘキ場合ニ限ルモノニシテ他ニ及ボスベキ性質ノモノニアラズ又現ニ此會議ニ出席シタル國ノ中ニハ此條約ノ範圍ガ亞弗利加以外ニ及ブコトニ反對ノ意見ヲ有シ他國(調印國中ノ)ノ處置ヲ注意シテ監視シタルモノアリキ然ルニ此條約ノ眞價ハ高大ナルモノトナリ獨リ他國ノ承認ヲ得ル爲メ許多ノ布告ガ發セラレシコトアルノミナラズ場合ニ於テハ自國ガ或土地ヲ占領セン爲メ同シ處置ヲ採用スベキ義務ナキニ係ハラズ然カナルセル國サヘ少ナカラズ例ヘバ佛國ガ Camino Island ノ合併ニ於ケル英國ガ Bechnaland ニ於テ自國ノ利益ヲ主張セル場合ニ於ケル皆然リシナリ以テ本條約ノ各國ニ重要視セララルハ知ルベキナリ

以上ハ主トシテ Walker 氏ノ說ニヨリシモノナリ以下 Martens 氏ノ占領ニ關スル意見ヲ畧述セン氏ハ占領ナル語ノ意味ヲ解シテ曰ク占領トハ或國ガ何人ニモ屬セサル土地即他國ノ權力ノ下ニ服シ居ラザル土地ノ獲得ヲ云フトナシ其必要條件トシテ述ブル所概畧下ノ如シ

(1) 占領ハ國家ガ自己ノ名ニ於テナスカ又ハ自己ノ承諾ヲ得テ爲ス者ノ行爲タルヲ必要トス云云ト之レ Walker 氏ノ所謂國家行爲タルヲ要スト云フト同シト愚考ス

(2) 占領ガ有効タル爲メニハ國家ハ其發見地ニ自己ノ主權ヲ行使シ及ビ其地ニ存在スル物件ヲ占有スルノ意思アルヲ要ス假令或土地ヲ發見スルモ之レヲ占領スルニハ自國ノ主權ヲ行使シ之レヲ占有スルノ意思アルヲ要ス而シテ意思ハ外部ニ表示スルヲ要ス然レドモ其表示ノ形式ハ一定セズ假ハ國旗ヲ掲ケ國標ヲ建ツル等ノ行爲アレバ之レニテ足レリトス又其土地ニ官府ヲ設ケ軍隊ヲ置ク等ノ行爲アレバ愈占有ノ意思ハ明カナリシモノナリ

(3) 占領スヘキ土地ハ何人ニモ屬セサルカ又ハ未開人ノ住セル土地ニ限ルコト開明國人ハ既ニ所有權ノ觀念發達シ居ルヲ以テ假令其國ニシテ未タ國際團牀ニ加入シ居ラズトモ他國人ガ之ヲ占領スルヲ得ズ尙此點ニ關シテ Westlake 第九章參照

(4) 占領ヲ以テ得可キ土地ノ範圍ハ占領國ガ其土地ノ上ニ有シ得ル主權ノ程度及ビ其之レヲ保持シ得ル程度合ヒニヨリテ定マル之レ Walker ノ所謂占領ヲ行フ國ノ實力ニ比例スト云フト大差ナカルベシ此他尙 Hall ノ如キモ其著國際公法(第四版 Page 107)以下ニ於テ占領ニ關シ説ク所アルモ以上二氏ノ說ト大差ナキヲ信ズ

第三節 占領ニ關スル先例

余ガ茲ニ先例ト云フハ過古ノ事實ニシテ外交的談判其他ノ方法ニヨリ終極ヲ告ゲタルモノニシテ外國ニテ之レヲ採用シ終ニ萬國ノ承認ニヨリ國際法ノ淵源トナリタルモノヲ云フノ謂ヒニシテ單ニ過古ニ於ケル事實ト云フノ意味ニアラズ此意味ニ於ケル先例(占領ニ關スル中最モ有名ナルモノニアリ一ハ千八百七十二

○南島島事件

○南島島事件

年ニ於ケル Delagoa Bay 事件ニシテ一ハ千六百五十年ニ於ケル Santa Lucia 事件トス  
第一 Delagoa Bay 事件(Snow 氏著國際公法十一頁)

占領ニ關スル爭議中稍近キ頃ニ起リタルモノハ占領國ノ主權ノ行使ガ其地ニ暫  
時中斷セラレシ場合ニハ其効力如何ト云フニアリキ即チ千八百二十三年ヨリ千  
八百七十五年換言セバ其事件カ仲裁裁判ニヨリ決定セラレシ時ニ至ル迄 Delagoa  
Bay ニ於ケル或領土ニ關シ英國ト Portugal トノ間ニ一ノ争ガ起リ英國ハ 1823 年ニ  
其地ノ酋長ヨリ讓渡ヲ受ケルモノナレバ自國領ナリト主張シ之レニ對シ葡萄牙  
ハ此土地ハ長キ以前ヨリ引キ續キ自國ニ於テ占領シ來リシモノナレバ自國領ナ  
リト主張シタリ而シテ葡萄牙ノ領土ハ Rio de Espirito Santo 一名 England River ノ北岸  
迄達ニ居ルヲ及ヒ其灣頭ニ一港及ビ一村ガ長キ以前ニ設立セラレタルコトハ一  
般ニ認メラレタリ依テ疑問トナル點ハ葡萄牙ノ主權ハ English River ノ南岸ニ迄達  
スベキモノナリヤ將タ南岸ノ地ハ葡萄牙ニ屬セズシテ始メヨリ其地ニ住セシ土  
人ノ所有タルベキモノナリヤノ二點ニアリ英國ノ根據トスル所ハ其地ノ土人ハ  
自カラ千八百二十三年ニ於テ獨立タルヘキコトヲ公言シ獨立者トシテノ行動ヲ  
ナセリ加之其城寨ノ司令官ハ土人ニ對シテ有セシ權力ヲ拋棄セリト云フニアリ  
葡萄牙ノ利益トナルベキ記録ニヨレバ今ヤ争トナリ居ル土地ニ終始 Posts ハ維持  
セラレ居タリ又權力ハ間斷ハアリシモ土人ノ上ニ行ハレ居リシト云フニアリ蓋  
シ此領地ノ面積タルヤ甚タ小ニシテ且ツ其領地全躰ニ迄葡萄牙ノ殖民地占有ノ  
兵力ハ容易ニ及ビ得ルヲ以テ外部ヨリ浸入シテ占有セントスル者ヲ防禦シテ自  
カラ其地ヲ管轄スルニ足ルナリ故ニ葡萄牙ノ要求ヲ正當ト認ムヘキ推定ヲ下ス

ニ難カラズ此ニ於テ本事件ノ仲裁裁判官タリシ佛國政府ハ斷定ヲ下シテ曰ク疑  
モナク千八百二十三年ニハ占領中斷ハアリシニ相違ナキモ之レヲ以テ三世紀以  
前ヨリ(假令間斷アルニセヨ)主權ヲ行使シ來リタル領土ヲ失フ理由トスルヲ得ズ  
依テ今疑問トナリタル領地ハ葡萄牙領タルベシト

第二 Santa Lucia 事件(Hall p. 121)

千六百三十九年 Santa Lucia ハ英國殖民地ノ爲メニ占領セラレシモ翌四十年ニ至リ  
其地ノ土人 Caribs ハ其地ニ在リシ英人ヲ屢殺シタリ然ルニ英國ハ爾來再ヒ殖民ノ  
策ヲモ講セズ等閑ニ附シテ十年間ノ星霜ヲ經過セリ從テ千六百五十年ニ至リ佛  
人ハ此島ヲ以テ執レノ國ニモ屬セザルモノトナシ之レヲ占領シ終レリ越ヘテ千  
六百六十四年ニ至リ此等ノ佛人ハ Lord Willoughby ノ攻撃ヲ受ケ止ムナク山間ニ逃  
レシモ三年ノ後再ビ表ハレ來リ其地ノ回復ニ Willoughby ヲ退ケタリキ其後此等ノ  
佛人ハ如何セシニヤ隱レテ出デズ蓋シ之レ恐ラクハ Utrecht 條約ニヨリ Santa Lucia  
ハ Caribs ノ所有地ニシテ中立國タルベキモノナリト認メラレシニヨリシナラン然  
レドモ佛國人ハ是非此島ヲ我が有トセザルベカラズトナシ談判中モ此島ヲ獲得  
スベキ必要ヲ説キテ止マズ千七百六十三年此談判ガ終局ヲ告グルニ及ヒ終ニ此  
島ハ佛國領タルベシト認メラレタリ要スルニ英國殖民地人民ノ其島ニ滞在セシ  
ハ短期間ナルニモ係ハラズ之レヲ拋棄シテ顧ミザリシハ長時日ナルコトヲ思ヘ  
バ佛國ニ於テ英國ハ此屢殺ノ結果ヲ見ルモ甘ンジ居リシモノナリト想像セシハ  
道理アルコトニシテ從テ佛國ノ占領ハ法律上正當ナリト云フハ一點ノ疑ヲ挾ム  
ベキ餘地ナシト云フニアリ

○南島島事件

○南島島事件

以上二ツノ先例ハ今日各國ニ於テ承認セラレ國際法上占領ニ關スル原則トシテ仰ガルル所ナリ

第四節 結論

以上述ヘタル所ニシテ發見ト占領トヲ混同スルノ說ハ既ニ陳腐ニ屬シ今日之ヲ顧ミル學者アルヲ聞カズ然バ占領ノ要件ヲ具備セサル以上ハ假令無所屬無人ノ島ヲ發見シタレバトテ直チニ之ヲ以テ占領ト稱スルヲ得ズ蓋シ占領トハ未タ開明國ノ所有ニ屬セザル土地ノ獲得ヲ云フモノニシテ其土地ノ上ニ野蠻人ノ住ムルト住セザルトハ問フ所ニアラズ而シテ Berlin 條約ノ結果占領ニハ意思ノ表示ヲ必要トスレバ少クトモ占領ニハ合併(annexation)ト移住(Settlement)トヲ必要トス合併トハ占領ヲ知ラシムル爲メニナス意思表示ノ形式ニテ國旗ヲ掲ゲ國標ヲ立ツルガ如シ而シテ之レヲ行フニハ國家ガ派遣シタル官吏ニヨルコトヲ必要トス又移住トハ其土地ノ一部又ハ全部ニ軍艦又ハ軍隊ヲ駐在セシメ之レカ維持ヲ計ルヲ云フ今南島島問題ニ就テ考フレニ一步ヲ讓リローズホルガ之ヲ發見シタリトスルモ未タ米國政府ガ合併移住ノ舉ニ出デシヲ聞カズ又國務卿ノ記錄ニ登記セシメタリト云フモ之レ國內關係ノコトニシテ敢テ國際法上列國ニ對シテ効力ヲ有スルモノニアラズ之レニ反シ日本ハ千八百九十七年之レヲ小笠原島ニ編入シ水谷某ニ之レヲ貸附シ以テ今日ニ至レル以上ハ疑モナク我國ニ於テ占領ノ實ヲ舉ケシモノニテ米國ハ之レニ對シ異議ヲ挾ムベキ權ナシ尙一步讓リローズホルガ言フ如ク彼ガ千八百九十七年ニ同島ニ到リシ時一人ノ本邦人ヲモ認メズ且ツ此時ヨリ米國政府ガ占領ノ意思ヲ有セシモノト假定スルモ爾來米國ハ千九百二

年ノ今日ニ至ル迄之レヲ借地ヲモセズ又主權ヲモ行使セザリシモノナレバ既ニ此島ハ拋棄シタルモノト推定スベシ(前節Walkerノ說參照)且ツ Santa Lucia ナ佛國カ占領セシ先例ガ國際法ノ一原則トシテ認メラル、以上ハ米國ハ日本ニ殊ニ抗議ヲ中立ツル權利ヲ有セズト云フベシ要スルニ日本ハ少クモ千八百九十八年以來之レガ占領ノ實ヲ舉ゲ來リシモノナレバ所謂要件ヲ具備シタル占領ニシテ同島ハ日本領タルベキモノトス  
次ニ損害賠償ノ問題ニ就テ考フルニ賠償ヲ要求シ得ル爲ニハ相手國ヨリ故意又ハ過失ニヨリ損害ヲ加ヘラレシ場合ニ限ラザル可カラザルハ法理上明カナリト信ズ今此事ニ就テ考フルニ日本ハ千八百九十六年ヨリ之レヲ占領スルモノトシ九十八年小笠原島ニ編入セシモノナレバローズホル者ガ同島ニ來リシヤ否ヤ知ル所ニアラス故ニ故意ト云フヲ得ズ又正當ニ占領シ之レヲ保持シ來リシモノニシテ其間ニ一モ過失ナシ然バローズホルノ招ク所ノ損害ハ自己ノ不注意ヨリ來リシモノニシテ責ヲ他ニ歸スルヲ得ズ又先例ニ就テ考フルモ Delagoa Bay 事件ト云ヒ Santa Lucia 事件ト云ヒ孰レモ一方ヨリ他方ニ損害ノ賠償セシヲ聞カズ然ラバ日本ハ彼ニ對シ損害賠償ノ義務ヲ有セズト云フベシ(以下次號)

○社會問題社會主義ニ關スル歐米新刊書目一斑

ADDAMS (Jane). Democracy and Social Ethics.

社會問題社會主義ニ關スル歐米新刊書目一斑