cating a long stretch of the coast line of the Antarctic Continent, should be replaced by a Wilkes Land, a designated and restricted area "discovered by the Australian Antarctic Expedition in 1912" and so named by Sir Douglas Mawson.

There are difficulties as to the sector doctrine other than objections to claims based on possible future discovery. To what extent does the sector claimed involve jurisdiction over non-land areas where there are perpetual ice fields? To what extent may it permit the control by a country of expeditions for discovery or assumption of monopoly of hunting licenses or the exploitation of the resources of the sea, over ice as well as the land within the area?

The doctrine that discovery is any more than one basis of inchoate title has long been discredited for those portions of the earth's surface which are in fact habitable by man, *i.e.*, susceptible of occupation. Whatever else the decision of the Permanent Court of International Justice may have determined, it added little to the doctrine of effective possession. The status of Greenland was in effect assimilated to that of an historic bay, and the tests of effective possession were minimized in the face of a situation involving territory most of which is uninhabitable by man. In Antarctica the historic factors involved in Greenland are lacking. The long period of uncontested claims to sovereignty (as was the case of Greenland) is also lacking. But the attitude of the court in the East Greenland Case may be of support to a state which is seeking to strengthen its claim to territory upon bases other than effective occupation.

Effective possession is in general necessary for sovereign title to territory, but in Antarctica effective possession is impossible. Therefore, it may be claimed that sovereignty may be acquired without effective possession by means of discovery. Upon discovery, furthermore, a claim may be made to territory supposedly contiguous but not yet discovered within limits which are arbitrary and are surveyable by no present means. It ought to be noted that the claims of Great Britain to the Australian sector have been challenged by Norway.

A different conclusion based upon another theory may be suggested. The Antarctic area, not being susceptible of possession, is not *terra nullius* but, like the oceans, it is *res communis*. Therefore, no title in favor of any state is good, for none has the adequate basis of effective possession. The entire area is essentially international in fact, and its future international character might well be established by general agreement and the conservation of its resources guaranteed.

J. S. Reeves

IMMUNITY OF THE PROPERTY OF FOREIGN STATES AGAINST EXECUTION

The State Department announced on October 5, 1933, that the United States and Sweden had arrived at an agreement through the payment by Sweden of $150,000 in settlement of the claim presented by the United States on behalf of

Dexter & Carpenter, Inc. The claim arose out of a contract entered into by Dexter & Carpenter with Kunglig Jarnvagsstyrelsen, also known as The Royal Administration of the Swedish State Railways, for the sale by the former to the latter of a large quantity of coal, payment to be in cash against documents delivered in New York. Part of the coal contracted for, valued at $125,000, was lost by fire aboard ship in the port of Philadelphia before sailing. The purchase price had been paid for in advance under a letter of credit accepted by a bank as agents for the railways. After the loss, it was discovered that only a broker's insurance certificate, instead of a full policy of insurance, had been provided by the purchasing agents in the dossier of documents, and the loss was therefore not recoverable from insurers. The vital issue was whether this error was attributable to these agents as agents of the vendor or of the vendee. The court held that the vendor was not responsible under the terms of the letter of credit because it was a distinct contract from the underlying contract of sale, and because the vendee had unconditionally accepted the documents tendered under it.[1] Some time after the fire loss, the railways repudiated the contract after only one-third of the quantity of coal contracted for had been delivered, causing an alleged loss to the vendor of $1,250,000, for which the vendor entered a counter-claim against the railways.

It is unnecessary to review the course of the litigation further than to say that the case was tried twice on its merits in the District Court. It was argued twice before the Circuit Court of Appeals, *certiorari* being denied in both cases in the Supreme Court.[2] The complaint alleged that the plaintiff was a Swedish corporation, but after the counter-claim was interposed, the railways claimed immunity from suit on the counter-claim upon the ground that they were an "agency" of the Kingdom of Sweden. It was held, however, that a mere allegation of agency unsupported by any claim of immunity proceeding directly from the sovereign and vouched for by the government of the forum, was insufficient.[3] Not until a judgment upon the counter-claim in the sum of $411,203.72 was affirmed on appeal was there any direct intervention by the Swedish Government in the person of the Swedish Minister. He presented a certificate that the railways were, in reality, not a corporation, but an organic part of the Swedish Government; that the plaintiff had no capital stock or stockholders and that it was "an integral part of the government itself." An injunction in supplementary proceedings was applied for by the plaintiff against funds of the Swedish Government in New York, and the Swedish Minister thereupon lodged a formal protest with the Department of State. Under instructions from the Department of Justice, the United States Attorney at New York presented to the court the claim of immunity in the form of a "suggestion as a matter of comity between the United States Government and the Swedish Government for such consideration as the court may deem

[1] Kunglig Jarnvagsstyrelsen *v.* National City Bank (1927) 20 Fed. (2d), 307, 308.

[2] (1927) 20 Fed. (2d), 307; (1927) 275 U. S. 497; (1929) 32 Fed. (2nd), 195; (1929) 280 U. S. 579.

[3] (1924) 300 Fed. 891.

necessary and proper." This procedure had been indicated as the proper form by the Supreme Court in *Ex parte* Muir.[4] Upon this protest and intervention, the Circuit Court of Appeals decided that, though the Swedish Government had constructively consented to be cross-sued by itself seeking the jurisdiction of the court, it did not thereby consent to a seizure of its property. "To so hold," said the court, "is not depriving our own courts of any attribute of jurisdiction." [5]

The present settlement on the diplomatic claim presented by the United States against Sweden at a figure only slightly above one-third of the amount of the judgment may perhaps be disappointing to the claimant. In the opinion rendered by the court at the time of allowing the claim for immunity, it was recognized that the claimant had been misled into the belief that the railways were a separate entity apart from the government, and that only when a sufficient number of years had passed making possible a plea of limitation or laches against suing in Sweden, was the plea of sovereign immunity interposed.[6] On the other hand, the judgment was one rendered on a claim for unliquidated damages, and even an international tribunal would probably have appraised the loss for breach of the contract at a more modest figure than that arrived at by the national court of the complaining party. Furthermore, the Government of Sweden was nonsuited upon its original claim by reason of a technical point of law which might well have been decided otherwise in some other jurisdiction. These are considerations weighing in support of the fairness of the settlement.

The extension of governmental activity into the field of private business has been proceeding at a rapid pace during the past two decades. The extreme application of this trend is, of course, to be found in the communistic state, but fascist states have also absorbed many economic activities formerly left in private hands. Even democratic governments are drifting in the same direction, not as a political end in itself but in execution of various plans of social and economic welfare. In view of this tendency, it is not surprising that efforts should be made to regulate by international convention the competence of courts in regard to foreign states. Illustrations are to be found in certain clauses of the peace treaties, in the Brussels Convention of 1926 on the Immunity of State-owned Ships and Cargoes, and in bipartite treaties made between the Soviet Republic and certain European countries. The League of Nations Committee of Experts for the Progressive Codification of International Law recommended the subject as ripe for codification in its report of April 2, 1927. A draft convention covering the subject was prepared by the Harvard Re-

[4] (1921) 254 U. S. 522, at p. 533.

[5] (1931) 43 Fed. (2d), 705 at p. 708. Opinion by Manton, Circuit Judge. Certiorari denied (1931) 51 Supreme Ct., 181. The decision was reported in full in this JOURNAL, Vol. 25 (1931), p. 360, and an analytical comment in the light of the decisions of foreign courts, by Philip C. Jessup and Francis Deák, appeared in this JOURNAL, Vol. 25 (1931), p. 335.

[6] Opinion by Manton, C. J., *ut cit.*, at p. 710.

search in International Law in 1932 and published in a Supplement of this JOURNAL.[7] Under this draft, a state may permit orders or judgments of its courts to be enforced against the property of another state not used for diplomatic or consular purposes when the property is employed in connection with the conduct of private enterprise as therein defined.[8]

In view of the present settlement, it is interesting to observe that the Swedish Government, in its reply to the Committee of Experts, favored the conclusion of an international convention upon this subject. Indeed Swedish courts have displayed a tendency not to recognize immunity from suit in cases such as the present, and the Swedish Government is not itself immune before its own courts in connection with acts of business administration.[9] But the Swedish Government in the instant dispute drew a sharp distinction between immunity from suit and judgment, and immunity from execution against property, a distinction which our own courts, following the initiative of the Department of State, confirmed. The final settlement of the diplomatic claim against Sweden should serve as a reminder that the question of enforcement should be regulated at the same time as that of jurisdiction for suit and judgment, to the end that the entry of judgment in properly instituted suits against foreign states in national courts shall cease to be a futile procedure with at most a moral significance.

ARTHUR K. KUHN

BRITISH COMMONWEALTH RELATIONS CONFERENCE [1]

While it cannot be said that the British Commonwealth Relations Conference which met at Toronto, September 11 to 21, 1933, finally settled the question of whether the Commonwealth is a state or a league of nations, its proceedings contain material of very great interest with respect to the tendencies within this extraordinary political organization. The meeting was unofficial, but included about fifty members from Australia, Canada, India, New Zealand, South Africa and the United Kingdom. The presence of India and the absence of the Irish Free State is to be noted. Among the members were ministers, parliamentary leaders, publicists, professors and business men. The opinions which prevailed, while wholly unofficial, will doubtless have much influence. It was proposed to have a second conference of similar type in the future. It may be anticipated that these unofficial conferences will precede and prepare for the official meetings of the Imperial Conference.

This conference discussed the nature of the British Commonwealth, its common policies and its organization.

On the first topic opinions differed as to whether "the Commonwealth was a

[7] Supplement, Vol. 26 (1932), pp. 455–736. [8] *Ibid.*, see Articles 11, 23, 25.

[9] League of Nations Publications, A. 15, 1928, V, pp. 83–84.

[1] See Canadian Institute of International Affairs, British Commonwealth Relations Conference, Toronto, September 11–21, 1933, Report of the Conference Steering Committee on the Work of the Conference, and appended documents.