government of another country as being due to its nationals. This undertaking is, however, not applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, renders the settlement of the *compromis* impossible or, after the arbitration, fails to submit to the award.

In the discussion of this important convention, nothing was said about the Monroe Doctrine, but it would seem that compliance with the terms of the convention would prevent intervention, occupation or colonization of territory or any interference with the internal and governmental systems of the debtor state in disputes arising out of contract debts, that is to say, that the observance of the convention in this class of cases at least would in effect prevent the violation of the doctrine. It was, however, stated in private conversation outside of the conference that the adoption of the convention was in reality an acceptance of the Monroe Doctrine by the Powers voting for the convention. This may or may not be so, but the United States will doubtless continue to apply the doctrine whether it be regarded by the family of nations as law or as mere traditional policy of the United States.

THE CONSULAR CONVENTION BETWEEN THE UNITED STATES AND SWEDEN.

On March 20, 1911, President Taft proclaimed the consular convention between the United States and Sweden which was signed by Secretary Knox and the Swedish Minister on June 1, 1909.[1] It is modeled after the consular convention of 1880 between the United States and Belgium, the important differences being the omission of Article 13 of the Belgian convention, providing that consuls shall decide questions of damages suffered at sea by vessels, and the addition of clauses relating to the settlement of decedents' estates.

The evident object of a consular convention is to enlarge and define the rather vague and limited powers, privileges and immunities enjoyed by consular officers under the rules of international law. In the absence of such treaties, consuls, as is well known, have nothing like the status of ambassadors or other public ministers. For example, consuls are not exempt from the civil or criminal jurisdiction of the courts, although it seems that they may refuse to divulge official information; their dwellings, and probably their offices, are not inviolable; they are subject to the same rules as natives in regard to taxation on their property or in

[1] Printed in SUPPLEMENT, p. 227.

consequence of their engaging in commercial pursuits; and they are not exempt from customs duties to the same extent as diplomatic agents. On the other hand, however, it is stated generally that according to international usage the consular archives are inviolable, although personal papers are not; that consuls have the right to the custody of the effects of their deceased countrymen, but probably have no right to administer on their estates (7 Op. Atty.-Gen. 274; 2 Curtis 241; 8 Op. Atty.-Gen. 98; 6 Wheat. 168; but see Wheaton, Dana's ed. 177); that they may intervene to a certain extent in behalf of their countrymen, though they do not represent their sovereign (2 Wall. Jr. 59); and in general they may claim, subject to their exequatur, such privileges and exemptions as are necessary to the performance of their official duties (U. S. Consular Regulations, 1896, § 74; Vattel II, Chap. 2, § 34).

The new Swedish convention, after providing that each country "agrees to receive" the various grades of consular officers "in all its ports, cities and places except those where it may not be convenient to recognize such officers" (Art. 1), states that they shall be "admitted to the exercise of their functions and the enjoyment of the immunities thereto pertaining" upon presenting their commissions and receiving the "necessary exequatur free" (Art. 2). Ordinarily the inspection of the original commission is a prerequisite to the issuance of an exequatur, while the extent of the right to exercise consular privileges at all depends largely, if not entirely, upon the scope of the exequatur, the withdrawal of that instrument suspending the authority of the consular officer to perform the duties of his office. There is no provision in this convention for the cancellation of exequaturs such as occurs in the recent treaty of commerce and navigation of February 21, 1911, between the United States and Japan. But this right is in effect granted, so far as consuls, vice-consuls and commercial agents are concerned, by the treaty with Sweden and Norway of July 4, 1827. Indeed, as a rule of international intercourse, it is believed a government can withdraw an exequatur even without assigning any reason therefor (7 Wall. 542; 2 Op. Atty.-Gen. 725).

The immunities and privileges which consular officers are entitled to enjoy upon the issuance of exequaturs are those enjoyed by officers of the "most favored nation" (Art. 2). It should be noted that this clause is practically the same as that in Article 17 of the consular convention of May 8, 1878, between the United States and Italy, under which Italian consular officers have several times claimed the right to

administer upon decedents' estates in accordance with Article 9 of the treaty of July 27, 1853, between the United States and the Argentine Republic. How the courts have supported this claim will be discussed below.

The next fourteen articles of the treaty define the privileges, exemptions and immunities granted to the consular officers of the two countries, in addition to those received by favored nation treatment. In the first place, they are made exempt from military billetings and military service, and from arrest, except in cases of crimes; they are also free from "direct taxes," either "capitation tax or in respect to their property" except on real estate or invested capital in the country where they exercise their functions. A peculiar exception, not found in the Belgian treaty, is further made of "income from pensions of public or private nature enjoyed from said country" (Art. 3). It must be very seldom that a consul would enjoy such a public pension, and a private pension must generally represent invested capital and so come within the terms of the general exception. But if the consular officer engages in any profession, business, or trade, the exemption from taxation does not apply (Art. 3). Judging from the construction placed by the Department of State on similar clauses in other treaties, it is probable that a consular officer would be subject to customs duties on importations after the usual customs courtesies have been accorded him at the time of arriving at his post. A question arises as to whether consular officers under the above provisions are exempt from income tax. It would seem fair to say that incomes derived from property owned or investments made in the country to which such officers are accredited should be subject to taxation, and it has been so held by the Department of State (V. Moore, Digest, 88). The inference is that incomes derived from sources in other countries should not be taxed.

Not only are consuls subject to arrest in criminal cases, as already stated, but they may be compelled to appear in court as witnesses in such cases in accordance with the right secured by the Sixth Amendment to the Constitution of the United States (Art. 4). The treaty of 1853 between the United States and France, Article 2, makes the exemption absolute, both in criminal and civil suits. This fact gave rise to the case of *In re Dillon* (7 Sawyer 561), which occurred in California in 1854. In that case the French consul at San Francisco, standing on the exemption in the treaty, refused to answer a *subpœna*, and the court granted compulsory process against the absent witness, saying that the

treaty could not override the Sixth Amendment to the Constitution. But on the consul's appearance under protest, the court dismissed him on the ground that so long as the accused and the prosecution were given equal rights in securing the attendance of witnesses, the Sixth Amendment was not violated. But the court strongly intimated that if the treaty contravened the Constitution, the former was void to that extent. This is one of the few cases touching closely upon the question of unconstitutional treaties (see 133 U. S. 258). France, however, in this case held that the Sixth Amendment could not qualify the absolute terms of a treaty. In view of the doubt on this point, Secretary Fish in 1872 recommended "that in any future consular convention no such oversight should be committed" (V. Moore, Digest, 81).

In either criminal or civil suits, however, consular officers can not be required to produce the official archives in court, as by *subpœna duces tecum,* or to testify as to their contents (Art. 6). This provision does not occur in the Belgian treaty. The inference is, and the general rule appears to be, that they may be compelled to produce their personal papers and to testify as to matters which have come within their knowledge or observation in their private capacity. In civil cases, however, the officer "who is engaged in no commercial business" need not appear in court to give testimony, but the duty is imposed upon him to give it at his residence orally or in writing (Art. 6). It would seem that if he is engaged in business he may not enjoy this privilege, and it has so been held (1 Johnson 363; 1 Dallas 305; 3 C. Rob. 29). The above exemptions apply, it seems, only to officers who are citizens of the appointing country, and so can not serve to exempt American citizens holding Swedish consular positions in the United States from the process of the courts.

Besides expressly confirming the generally conceded right of consular officers to place the arms of their nation over the outer door of their offices, and granting the doubtful privilege of raising the flag of their country over their offices and over the boat employed by them in the port, the Swedish treaty states that the "consular offices shall at all times be inviolable," they shall not be invaded by the local authorities under any pretext, neither shall the papers therein be examined or seized. On the other hand, the offices may not be used as places of asylum (Art. 6). Forcibly tearing down the flag, scattering the archives about the offices, carrying away parcels of official papers, or trespassing upon the premises by local officers have been regarded as grave breaches of similar provisions in other treaties (V. Moore, Digest, 51, 52, 54).

The well-recognized right of consuls to address the local authorities in regard to the protection of their countrymen is limited in the Swedish treaty to complaints regarding "infraction of the treaties and conventions * * * and for the purpose of protecting the rights and interests of their countrymen" (Art. 9). A similar clause has been held not to include the right to request local authorities to furnish certain census statistics (V. Moore, Digest, 107). The words "administrative and judicial" limiting "authorities," which occur in the Belgian treaty, are omitted from the Swedish convention, apparently leaving consuls free to address the legislative bodies as well as the administrative and judicial authorities.

Consular officers may, so far as compatible with the laws of their own country, take depositions and draw up and certify or authenticate private instruments. Such documents duly authenticated under the official seal are to be received as evidence in both countries, and documents executed before consular officers are given the same value as if executed before a notary or similar officer of their own country (Art. 10). This article contains several clauses which do not appear in the Belgian treaty. The federal laws require American consular officers to perform any notarial act which a notary public is authorized to do within the United States, and this would seem to include authority derived from State statutes (Act of April 5, 1906, 34 Stat. L. 101).

By Article 11 consular officers shall have "exclusive charge of the internal order of the merchant vessels of their nation and shall alone take cognizance of all differences which may arise either at sea or in port between the captains, officers and crews without exception, particularly in reference to the adjustment of wages and the execution of contracts." A question arises whether this provision covers American owned but foreign built vessels, as well as American owned and American built vessels which latter enjoy special privileges under our municipal navigation laws. The courts have not entirely agreed on the status of these two classes of vessels in international law, and one judge has said vessels of the first class have no more value as American vessels than so much wood and iron out of which they are built, but it would seem that internationally both classes of vessels merit the same consideration and protection. (2 Johns. 531; 8 Johns. 307; 7 Wall. 655; 2 Op. Atty.-Gen. 448; II. Moore, Digest, 1055–1058.)

Article 11 further provides that the local authorities shall not interfere unless the disorder on board disturbs the "tranquility and public

order on shore or in port, or when a person of the country or not belonging to the crew shall be concerned therein." In the *Wildenhus Case* (120 U. S. 1), it will be recalled, under the like article in the Belgian treaty, the local courts took jurisdiction, to the exclusion of the Belgian consul, of a murder committed on a Belgian vessel at Jersey City by one member of the crew upon another, both being Belgian subjects. (See also 29 Fed. 534.) "If they are requested to do so," however, the local authorities may arrest and imprison "any person whose name is inscribed on the crew list." The enforcement of such provisions in consular treaties is provided for in Revised Statutes, sections 4079–4081 and Act of June 23, 1874 (18 Stat. L. 253; see 197 U. S. 169).

The extraterritorial jurisdiction conferred on consuls by Article 11 no doubt extends to their countrymen, but query, whether consuls may exercise jurisdiction over foreigners who are members of the crew of a merchant vessel of the consul's country. Our courts have answered this query in the affirmative on the ground that such sailors owe temporary allegiance to the flag under which they serve (140 U. S. 453; 5 Wheat. 412; 42 Fed. 608; 49 Fed. 286; 55 Fed. 80; 10 Phila. Rep. 414; 3 Moore Arb. 2536; L. R. 1 C. C. Res. 161). But whether the answer would be the same if the vessels were American owned but foreign built and so not entitled to registry in the United States, does not appear to have been definitely determined as yet by American courts. Two of the last-cited cases relate to offenses by American citizens shipped as seamen on Norwegian vessels and the Norwegian consul was accorded jurisdiction under the treaty of 1827 between the United States and Sweden and Norway.

The last important article of the treaty relates to the disposition of real and personal property, and the custody and administration of decedents' estates (Art. 14). Citizens of either country may dispose of their personal property "by sale, donation, testament or otherwise," and their representatives or heirs may "dispose of the same at their will" paying only such dues as natives are required to pay in like cases. As to real estate, the nationals of either party are granted most-favored-nation treatment, regardless of how the property is acquired. No mention is made of the duty called "droit de détraction," which is abolished by Article 6 of the Swedish-Norwegian treaty of 1783.

In the event of citizens of either country dying intestate in the territory of the other, consular officers "shall, so far as the laws of each country will permit and pending the appointment of an administrator * * * take charge of the property left by the deceased * * * and,

moreover, have the right to be appointed as administrator of such estate." When a consular officer is acting as executor or administrator under this provision he is made "as fully subject to the jurisdiction of the courts" as if he were a citizen of the country.

The wording of this part of the article should be carefully compared with that of the corresponding article in the treaty of 1853 between the United States and the Argentine Republic, which states that consular officers "shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased conformably with the laws of the country." The interpretation of this clause of the Argentine treaty has been before the courts in several cases (33 Misc. N. Y. 18; 12 Misc. N. Y. 245; 38 Misc. N. Y. 415 (1902); 191 Mass. 276 (1906);[2] 55 So. Rep. (Ala.) 248 (1911);[3] 34 Misc. N. Y. 31; 108 Pac. (Cal.) 516 (1910),[4] now before U. S. Sup. Ct. See also 9 La. Ann. 96 (1854) Swedish treaty; 47 La. Ann. 1454 (1895) Belgian treaty). Though various Secretaries of State have doubted, even as recently as 1894, whether the control of the States over the administration and settlement of estates of deceased persons could be modified or eliminated as regards aliens by means of treaty stipulations, the courts in the first five cases held that the consular officer had under this clause a right to administer upon the estate of his deceased nationals, paramount to that of a public administrator, one New York court and the Alabama court saying "conformably with the laws," did not modify the right to intervene, but provided merely for the mode of procedure, the obligations of the administrator, etc. The next two cases support the contrary view on the ground that the word "intervene" means simply to be heard with others or to interpose so as to become a party to a suit pending between other persons. The New York court took the further ground that "conformably with the laws" meant subject to the State laws relating to administration. The weight of authority, therefore, and it is believed of reason also, is apparent, though it must be borne in mind that the New York cases were tried only before surrogate courts of that State. With this interpretation of the admittedly ambiguous wording of the Argentine treaty there would appear to be little doubt as to how the courts should construe the plain word-

[2] Printed in JOURNAL, Vol. I, p. 520.
[3] See JUDICIAL DECISIONS, p. 778.
[4] Printed in JOURNAL, Vol. 4, pp. 716, 727.

ing of the Swedish provision on this point. If the negotiators, knowing the present conflict of authority, had desired to give the courts a discretionary power in appointing administrators, they could easily have used the words "may have the right" instead of "shall have the right." That they did not use the former phrase under the circumstances should, it is believed, be decisive of the intention of the parties to the convention. Moreover, the latter phrase is comparable to the words "shall be *ex officio* the executors or administrators" used in the treaties of 1851 and 1870 between the United States and Peru, both now obsolete. These words were given their plain meaning by Attorney-General Black and an international court of arbitration (9 Op. Atty.-Gen. 383; 4 Moore Arb. 390). If the evident meaning of the Swedish convention be that finally given to it by the courts, it will set at rest the present doubt as to the meaning of the Argentine treaty in regard to decedents' estates, for by means of the most-favored-nation clause most countries may claim the provision in the new Swedish convention.

It is observed that the convention contains no superseding clause, so that consular articles in preceding treaties stand for what they are worth. It is questioned whether articles defining the application of customs duties to consular importations, declaring the inviolability of correspondence in *transitu,* and obtaining the right to visit vessels of the consul's country without special permits from the local authorities, might not have been added with advantage to this already excellent convention.

THE THIRD NATIONAL PEACE CONFERENCE

On May 3–6, 1911, the Third National Peace Congress, representing all the leading societies of the United States devoted to the settlement of international disputes by means other than war, held an important and interesting meeting at Baltimore. The attendance was large, including the President of the United States, Cardinal Gibbons and many distinguished partisans of the cause of peace. Its proceedings were valuable and will form a goodly volume full of instruction to those interested and who might not be interested in the settlement of international disputes by means other than war.

Where the addresses were all of such a high order, it would be an invidious task to mention some without referring to others, but the spirit which pervaded the meeting and, it is to be hoped, the American people,