title requires effective occupation. As was said by Mr. Hughes, Secretary of State, May 13, 1924, in a passage often quoted:

> It is the opinion of the Department that the discovery of lands unknown to civilization, even when coupled with a formal taking of possession, does not support a valid claim of sovereignty unless the discovery is followed by an actual settlement of the discovered country.

But since this assertion of the doctrine of effective occupation in the sense of the Berlin Congo General Act of 1885, the question as to the criteria of territorial title over lands not susceptible of human habitation has been much discussed, and the rigidity of the rule relaxed. Certainly the trend away from the strict adherence of the principle of the Congo Act has been quite obvious, and the Eastern Greenland decision is evidence of this trend. Antarctica might possibly have been internationalized and a system of international administration set up for the conservation of the marine and other resources of that area. But that time is long past. Whatever may be the economic and strategic factors ultimately to be disclosed, the adoption of the sector principle may assist greatly in the regulation and preservation of the whale industries. The United States has shown its interest in this matter by its ratification of the temporary treaty for the regulation of whaling. One may assert that the sector principle as applied at least to Antarctica is now a part of the accepted international legal order.

Upon the basis of the work of Byrd and Ellsworth, it is to be hoped that the current rumors are correct, namely, that the United States will assert its claim to sovereignty over the entire sector lying between the Falkland Islands Dependencies sector and the Ross sector. Whether the claim is made by the President (for which there is ample precedent) or by a joint resolution of Congress is, after all, not a matter of international law, but of constitutional theory and practice. But time is an important factor. On the basis of scientific achievement and an interest at least comparable with those of the Powers now having sector possessions, a claim to an American sector would be justified. It would probably be recognized as valid by other Powers.

J. S. REEVES

AGREEMENT OVER CANTON AND ENDERBURY ISLANDS

De minimis non curat lex is an ancient maxim of the law, but during the processes of history what were once minima cease to be "unconsidered trifles" and the "snapper-up" appears in the offing. What was rejected by the builders may become the chief cornerstone of the temple of Transportation, stream-lined in the new style. What were once, if shown at all, indistinguishable from fly-specks upon the map may emerge as of vast importance in permitting man to move quickly from one hemisphere to another. They cease to be of no value when they come to serve as stepping stones and resting places necessary for the successful operation of air clippers over the vast expanses of the Pacific. The fundamental considerations

which led to the doctrines of international law governing the original acquisition of territory are then to be reëxamined in the light of new elements of value which modern invention and changed ways of life have brought into being.

Considerations such as these come to mind as one reads the terms of the recent agreement effected by identic notes between the United States and Great Britain of April 6, 1939, which, omitting the formal parts, is as follows:

> 1. The Government of the United States and the Government of the United Kingdom, without prejudice to their respective claims to Canton and Enderbury Islands, agree to a joint control over these islands.
>
> 2. The islands shall, during the period of joint control, be administered by a United States and a British official appointed by their respective Governments. The manner in which these two officials shall exercise the powers of administration reserved to them under this paragraph shall be determined by the two Governments in consultation as occasion may require.
>
> 3. The islands shall, during the period of joint control, be subject to a special joint *ad hoc* régime the details of which shall be determined by the two Governments in consultation from time to time.
>
> 4. The islands shall be available for communications and for use as airports for international aviation, but only civil aviation companies incorporated in the United States of America or in any part of the British Commonwealth of Nations shall be permitted to use them for the purpose of scheduled air services.
>
> 5. The use of any part of either of the islands or their territorial waters for aviation purposes, except as herein agreed upon, or for any other purpose, shall be the subject of agreement between the two Governments.
>
> 6. An airport may be constructed and operated on Canton Island by an American company or companies, satisfactory to the United States Government, which, in return for an agreed fee, shall provide facilities for British aircraft and British civil aviation companies equal to those enjoyed by United States aircraft and by such American company or companies. In case of dispute as to fees, or the conditions of use by British aircraft or by British civil aviation companies, the matter shall be settled by arbitration.
>
> 7. The joint control hereby set up shall have a duration of fifty years from this day's date. If no agreement to the contrary is reached before the expiration of that period the joint control shall continue thereafter until such time as it may be modified or terminated by the mutual consent of the two Governments.

This important arrangement is the outcome of the action taken by the United States through the executive order of the President of March 3, 1938, by which Canton and Enderbury Islands were placed under the administrative control of the Secretary of the Interior, as follows:

> By virtue of and pursuant to the authority vested in me as President of the United States, it is ordered that Canton Island, an atoll of coral formation, 50 to 600 yards wide and surrounding a lagoon about nine

miles long, which is located in the Pacific Ocean approximately in Lat. 2 degrees 49 minutes S. and Long. 171 degrees 43 minutes W. from Greenwich; also Enderbury Island, 2.5 miles long and one mile wide, located in the Pacific Ocean approximately in Lat. 3 degrees 07 minutes N. and Long. 171 degrees 03 minutes W. from Greenwich, be, and are hereby reserved, set aside and placed under the control and jurisdiction of the Secretary of the Interior for administration purposes.

FRANKLIN D. ROOSEVELT

March 3, 1938

What is the basis for the claim here made to two islands in the Pacific which appear upon the maps pretty generally as members of the Phoenix Island group, a group claimed by Great Britain since 1892? Of the Phoenix Group, McKean, Gardner, and Hull Islands were discovered by American whalers. These, together with Phoenix, Enderbury and Canton (or Mary) Islands—all in the same group—have names of American origin and were for the first time accurately mapped by Americans, principally by Wilkes between 1838 and 1842.[1]

The importance of guano as a commercial asset led to the Act of 1856, as a result of which the laws of the United States were extended over about one hundred islands, rocks and keys in the Caribbean and the Pacific. The phrasing of this Act is peculiar. It does not necessarily involve the assertion of the sovereignty of the United States over the islands brought within its jurisdiction, although in some instances sovereignty has been asserted. In others it has apparently not been raised or insisted upon. In this respect the Act is not unlike those acts of Congress implementing the various treaties providing for extraterritorial jurisdiction. On the other hand, such islands must be *terra nullius:* "not within the lawful jurisdiction of any other government and not occupied by the citizens of any other government." In order that the jurisdiction of the United States be extended over an island as described there must have been a "discovery," not of the island (it might have been discovered long before), but a discovery by a citizen of the United States of a "deposit of guano" upon such an "island, rock or key." The citizen of the United States must then take "peaceable possession of it," and "occupy the same." Next the citizen must file with the Department of State a verified statement of his "discovery, occupation and possession" and a bond for the proper operation of his claim. The statute placed upon the "discoverer" of the guano deposit the burden of proving that the island of his guano discovery was not in the possession or occupation of any other government or of its citizens.

Nothing in the statute explicitly authorized the President to make proclamation of acquisitions of such islands. The practice was introduced of certification by the Secretary of State, and apparently this has been consistently followed and interpreted as the act of the President. The familiar

[1] See S. W. Boggs, "American Contributions to Geographical Knowledge of the Central Pacific," Geographical Review, XXVIII, 177–192 (April, 1938).

case of Jones *v.* the United States (137 U. S. 202, 1890) abundantly shows the finality of the executive action so far as the extending of the laws of the United States is concerned. The purpose of the entire Act was to regularize and to bring the guano industry under the laws of the United States, and that alone, where it was operating in the type of islands as the statute described. While the President was authorized to use the forces of the United States to protect "the rights of the discoverer, or of his widow, heir, executor, administrator or assigns," there was no necessary imputation of sovereignty—something to be lost only by treaty or Congressional action, or perhaps by executive abandonment—for the Act concludes very significantly with the caution that "nothing in this chapter contained shall be construed as *obliging* the United States to retain possession of the islands, rocks or keys after the guano shall have been removed from the same."

Many items have been stricken from the list of the Secretary of the Treasury on the ground of abandonment by the claimants. Others have been admitted as within the jurisdiction of another state (*e.g.*, Alta Vela to Santo Domingo) or by treaty (*e.g.*, Bird Island to Venezuela). Over others there have been diplomatic controversies, as over Christmas, Fanning and Penrhyn Islands which appear upon the maps as British. The limited scope of the Act of 1856 is fully shown by its text, its operation and its interpretation by the courts, and by the Departments of State, Treasury and Justice for many years.

The original foundation of the claims of the United States to Canton and Enderbury Islands rests upon the assertion of jurisdiction over them under the Act of 1856. Enderbury Island was proclaimed as under the laws of the United States in 1859. Canton, otherwise known as Mary Island (the name by which it is listed among the Phoenix Island group as claimed by Great Britain), was likewise possessed in 1860.

It may be assumed that the action of the British Government first by "annexing" and then by incorporating Canton or Mary Island and Enderbury Island within the Phoenix Island group for purposes of administration, was based upon the alleged abandonment by the earlier occupant,—a *de facto* abandonment because over a long period there had been in neither of the islands any sign of activity, commercial or governmental. The situation presented thus resembled that of Fanning Island, "annexed" by Great Britain in 1888, the United States apparently abandoning its claim.

The method of acquisition of territory by the United States in the form of unoccupied islands is, however, not limited by the Guano Act of 1856. There are abundant precedents for acquisition by executive act and these have usually been ratified by some form of Congressional legislation. Formal possession of Midway Islands was taken by Captain Reynolds of the U.S.S. *Lackawanna* in 1867. Congress afterwards made appropriations for its improvement for naval purposes. By an executive order of President Theodore Roosevelt, January 20, 1903, public lands upon these islands were

placed under the "jurisdiction and control of the Navy Department." Possession of Wake Island was taken by Commander Taussig of the U.S.S. *Bennington* in 1899. Apparently there has never been any confirmatory action by Congress of this action, but there has never been any challenge to the title of the United States. By an executive order of December 29, 1934, President Roosevelt placed Wake Island "under the control and jurisdiction of the Secretary of the Navy for administrative purposes," pursuant to authority under the Acts of Congress to set aside lands for public purposes (Title 43 U. S. Code, Sections 141 and 142) "and as President of the United States." By an executive order of May 13, 1936, similar action was taken with respect to Jarvis, Howland and Baker Islands, all of which were originally possessed under the Guano Act of 1856, placing them under the jurisdiction, not of the Secretary of the Navy, but of the Secretary of the Interior. Following the order, four men were placed upon each island to serve as "permanent population." The order of March 3, 1938, similarly placing Canton and Enderbury Islands under the administration of the Secretary of the Interior, did not recite legislative authority for the action, for which there are obvious precedents. Both of these executive orders have been further ratified by Congress in the Second Deficiency Act of June 25, 1938. To complete the record, it should be noted that there are bills pending in Congress to extend the jurisdiction of the United States District Court for Hawaii over Midway, Wake, Johnston, Sand, Kure, Baker, Howland, Jarvis, Canton and Enderbury Islands.

Particular attention was drawn to Canton and Enderbury Islands when it was announced that these islets were among the few places upon the earth for favorable observations of the total solar eclipse of June 8, 1937. The American eclipse expedition, a joint undertaking of the United States Navy and the National Geographic Society, had planned to make Enderbury Island its base of operations, but finding no anchorage there the scene was shifted to Canton Island less than 50 miles distant. The United States flag was raised over Canton Island. Shortly afterwards H.M.S. *Wellington* arrived bearing an eclipse expedition from New Zealand. There seems to have been no dispute between them over rights to Canton Island. Following the executive order of March 3, 1938, and as had been done with reference to Howland, Jarvis, and Baker Islands, permanent occupation became complete by the settlement upon Canton Island of some Hawaiians as "permanent residents," and Pan American Airways made extensive surveys for aviation purposes.

The position of the United States thus becomes clear. Canton and Enderbury Islands were originally possessed under the Guano Act of 1856. Work in removing guano was discontinued by the American holders. In the eighties of the last century the guano deposits on both islands were worked by a London company. In a few years the London company ceased operations. Both islands were annexed by the British, but Canton

Island was never settled with population. The eclipse expeditions found it uninhabited. Enderbury Island is said to have had a small population since it became a member of the Phoenix group.

To what extent has there been abandonment by the United States? To what extent abandonment by the British? Or, if not abandonment, was there failure to institute or to maintain those administrative activities which are the badges of sovereign possession? And just what *indicia* are necessary to preserve title as against abandonment in the case of a small island incapable of sustaining human life, once valuable for its guano deposits, then becoming worthless, only to become again of value for purposes undreamt of until very recently?

The agreement with Great Britain is a sensible arrangement. Progress in commercial aviation might have been hindered by bickering over questions of title. The agreement provides for joint uses for purposes of aviation. If not designed solely to advance commercial or civil aviation, the agreement certainly stresses it, limiting the use for such purposes to British and American companies. Joint control for 50 years is set up and there is no prejudice to the territorial claims of either country. The experience of the United States with joint control and joint occupation has not been wholly satisfactory, as witness Oregon, 1818–1846, and Samoa, 1889–1899. Canton and Enderbury Islands having value for one purpose only, the present agreement is *ad hoc* and encourages their use for that purpose. Logical and strained arguments over "sovereignty" would have served no good purpose. This arrangement becomes of even greater interest now that it has been acclaimed by President Roosevelt, June 8, in his toast to His Majesty George VI, as a symbol of international understanding:

> If this illustration of the use of methods of peace, divorced from aggression, could only be universally followed, relations between all countries would rest upon a sure foundation, and men and women everywhere could once more look upon a happy, a prosperous and a peaceful world.

J. S. REEVES

THE JAPANESE IN KULANGSU

After Japanese terrorism in China during nearly two years of unsuccessful warfare, the landing of Japanese forces at the International Settlement of Kulangsu Island in the harbor of Amoy is not surprising. On the night of May 11 last 150 Japanese troops were landed in the Settlement, blockaded the Settlement by placing guards on all the jetties, and made numerous arrests in the Settlement. The excuse given to the press was the killing on the day before of a Chinese member of some organization which was cooperating with the Japanese, although this is admittedly the only disturbance which has occurred and is presumably the result of inflamed feeling aroused by the Japanese invasion. Coincidently the Japanese made certain demands as to the administration of the Settlement. These demands, as presented