contemplating the grant of such a power in the future will give long and earnest consideration to the competing public interests involved. The free criticism of existing institutions by newspapers and others should not lightly be put in jeopardy.

C. MASTERMAN, B.A. (Oxon.) — Fourth Year Student.

HEARD AND MACDONALD ISLANDS ACT, 1953

The Heard and Macdonald Islands Act of 1953, proclaiming Australian sovereignty over these islands, was passed as a result of the 1948 Australian National Antarctic Research Expedition, which had been sent to the Antarctic for the purpose of choosing suitable bases for meteorological stations, and to strengthen Australia's claim to her southern territories[1] by a display of governmental activity.

However, the mere proclamation of sovereignty, even where it is supported by discovery[2], does not, in the absence of effective occupation, confer territorial sovereignty upon the proclaiming State. But actual settlement or use of the territory is not essential for effective occupation; indeed, this condition is satisfied by the establishment of any organisation, however rudimentary, or by any system of control which, having regard to the nature and condition of the particular territory, is sufficient to maintain order among such persons as might go there or to exploit such of its resources as are capable of exploitation.[3] In modern international law, the requirement of effectiveness of occupation is so much a matter of degree that the borderline between this attenuated condition of effectiveness of occupation and the total abandonment of the condition has become "blurred to the point of obliteration".[4]

International law now predicates a reasonably continuous display of state activity as an essential requirement for that effective occupation which confers a title to territorial sovereignty. It involves two elements, both of which must be shown to exist.[5] There must be (1) an intention and will to act as sovereign,

---

the Governor and notified by proclamation in the Gazette. A proclamation in the Government Gazette (N.S.W.) No. 41 of 1954, duly appointed March 12, 1954, as the date on which the Act was to cease.

[1] These comprise all the islands and territories, — other than Adelie Land which is claimed by the French — situated south of the 60th degree south latitude and lying between the 160th degree east longitude and the 45th degree of east longitude.

[2] Discovery may, however, confer an inchoate title in which case such a title exists without external manifestations of sovereignty. But unless perfected, an inchoate title has the same vice as a sphere of influence, in that it seeks to exclude the sovereignty of others without providing any of the guarantees for the observance of International Law which sovereignty entails. However, since the 19th century the view of International Lawyers has been that an inchoate title based upon discovery must be completed within a reasonable period to be effective occupation of the region claimed to have been discovered. But in any case, an inchoate title could not be made to prevail over the continuous and powerful display of authority by another state.

Hall suggests that an inchoate title is good as against another occupying state, for such time as "allowing for accidental circumstances or moderate negligence might elapse before a force or a colony are sent out to some part of the land intended to be occupied." (*International Law* (3 ed. 1890) 106). But that in the course of a few years the presumption of permanent intention afforded by such act dies away.

Britain, Norway and France have all put forward claims on the basis of discovery as creating an inchoate title which prevents others from acquiring possession until this prior right is lost.

[3] Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926) 4-6.

[4] Lauterpacht, "Sovereignty over Submarine Areas" (1950) *B.Y.B.* 376.

However, Hackworth argues that any relaxation of the strict requirement of effective occupation should be kept within rigid bounds limited to the waiving of the necessity of settlement as a condition for perfecting a right of sovereignty, provided, however, that the claimant State can establish its ability to exercise control (1 *Digest* (1940) 449).

[5] P.C.I.J. Series A/B No. 53. See also *Island of Palmas* (1928) 22 *A.J.* 867.

i.e. there must be *animus occupandi*, and (2) some actual exercise of authority, i.e. there must be *corpus occupandi*, which (a) must be peaceful; (b) must be actual; (c) must consist of acts (relied upon as evidencing the exercise of authority) which are in their nature capable of supporting a claim to sovereignty; and (d) must be continuous. However, judicial and arbitral decisions have qualified these requirements. Although the International Court requires real acts of sovereignty, in the form of either a genuine exercise of jurisdiction in relation to the territory, or a *bona fide* international assertion of claim to it, as essential for effective occupation, the Court has in fact been satisfied, in the absence of competing claims and where the area was uninhabited, with very much less, and it would appear that in appropriate circumstances the condition may be satisfied by the bare existence of a claim.[6] Thus, in the *Clipperton Island Arbitration*[7] the necessity for effective occupation was virtually dispensed with altogether, so that apparently the conception of "occupation" as traditionally understood, may be valueless, in relation to some areas, for the purpose of acquiring sovereignty.[8] In these circumstances, the concept of "occupation" will be a more or less deceptive figure of speech.[9]

Similarly, the necessity for an express intention and will to act as sovereign in relation to the territory claimed, as a condition for the acquisition of territorial sovereignty, has not been rigidly insisted upon, since the claimant State need not have a single permanent officer within the area. It is sufficient if the claimant State assumes responsibility for the local administration and exercises such State functions as may be appropriate to the condition of the territory, when occasion demands.

Because territorial sovereignty is essentially the exclusive right to display the activity of a State within a given area,[10] the International Court has formally insisted upon the necessity of a continuous and peaceful display of actual power in relation to the territory claimed, to support a claim to territorial sovereignty. However, the Court has conceded that territorial sovereignty, although continuous in theory, manifests itself in different forms, according to the circumstances of time and place, with the result that it may not be possible to exercise it at every moment of time throughout the territory. The degree of relaxation, compatible with the maintenance of the right, permitted in any given case, depends upon the character of the territory concerned, e.g. upon whether the area is inhabited or uninhabited.[11]

It would appear that the recognition of the acquisition of sovereignty, rather than of property, as the essence of occupation, has caused the emphasis to shift from the taking of physical possession of land, as the criterion for acquisition of title by occupation, to the manifestation and exercise of the functions of government over territory. The actual state activity may be slight, provided the territory is uninhabited, and there is no competing state activity. It must, however, be real and would not include purely symbolic annexation,[12]

---

[6] P.C.I.J. Series A/B No. 53, 45, 46.

[7] (1933) 26 *A.J.* 390.

[8] Lauterpacht ("Sovereignty Over Submarine Areas" (1950) *B.Y.B.* 376) says these areas include not only those which are uninhabited, but also those which are normally uninhabitable.

[9] *Id.* at 421.

[10] Right of territorial sovereignty has its corollary duty, *viz.* "the obligation to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and war, together with the rights each state may claim for its nationals in foreign territory, without manifesting its territorial sovereignty in a manner corresponding to circumstances the state cannot fulfil this duty. Territorial sovereignty then cannot limit itself to its negative side, i.e. to excluding the authority of other states" (*Island of Palmas, Hudson's Cases* (2 ed. 1936) 363).

[11] Max Huber, *Island of Palmas* (1928) 22 *A.J.* at 867, 877.

[12] C. H. M. Waldock ("Disputed sovereignty in the Falkland Islands Dependencies" (1948) *B.Y.B.* 311, 335) claims that it is improbable that any formal state annexations that may be proved in the 19th century could have greater legal effect than to reinforce a more recent display of state activity in the present century by some state.

but although continuity in the exercise of sovereignty is usually insisted upon, the fact that the Polar areas are desolate and susceptible only of a very limited form of human activity inevitably diminishes the degree of continuity to be expected.[13]

On the other hand the United States[14] has consistently adhered to the classical position and has resolutely refused to recognise any claims put forward to Antarctic territory unsupported by effective occupation in the sense of colonisation and use. It is suggested, however, that the Americans are wrong and that it is, possible to acquire territorial sovereignty over the Antarctic without the necessity for colonisation, provided the claimant State carries out sufficient state activity to show its intention and ability to act as sovereign in relation to the area. In no circumstances will purely symbolic annexation on the basis of discovery satisfy the condition; but it does confer a merely inchoate title which is capable of perfectability within a reasonable time by due activity.[15]

The Australian Government has not rested content with a barren proclamation of Australian sovereignty over Heard and Macdonald Islands, but has followed it up by establishing scientific stations not only on Heard Island and Macquarie Island but also by setting up a base upon the Antarctic mainland of MacRobertson Land. These bases have been set up not only for scientific purposes, but also to demonstrate administrative activity evidencing Australia's intention and ability to act as sovereign in relation to these territories, and it is submitted that what has been done in relation to the Islands is sufficient to establish Australia's claim. The effect of the establishment of the base at MacRobertson Land is more difficult to assess, and it may be disputed whether a single base constitutes sufficient state activity to support Australia's claim to this area of the Antarctic Mainland. However, having regard to the fact that the whole area claimed is uninhabited and that, as yet, there are no acts of competing state activity being performed by other states within the territory, it may well be that Australia has complied with the requirements of international law relating to acquisition. It is submitted that such a conclusion would be supported by the *Eastern Greenland Case*[16] which held that settlement on the coastline of a country, which was inaccessible by the nature of its geography, but which formed a single geographic unit, was sufficient to give a valid title of sovereignty over the interior.

Those countries which have made claims to areas in the Arctic and the Antarctic have sought to support their claims by the sector theory, which was first formulated by Senator Poirier of Canada. Under this theory sovereignty is claimed over any land which might be discovered within the sectors lying between these countries and the respective Poles and bounded laterally by the meridians of longitude which bounded the countries themselves.[17] Indeed there

---

[13] Effectiveness of occupation is a matter of degree, in that all things being equal it constitutes, except against a lawful sovereign, a title superior to all competing titles. To this extent only it is, therefore, true to say that International Law has discarded discovery, purely symbolic occupation, and similar claims, as valid sources of international law.

[14] "It is the opinion of the Department that the discovery of lands unknown to civilisation 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." (Mr. Secretary Hughes (1939) 33 *A.J.* 519.)

The *Sydney Morning Herald*, Monday, August 23, 1954, quoting United Press sources, reports that President Eisenhower has rejected an Inter-Departmental recommendation that the United States should lodge a formal claim to those areas of the Antarctic formed by the Palmer Peninsula and the coastal area of the Polar Cap. He reiterated that the United States does not recognise existing claims made to the Antarctic, and that the United States reserves the right to make a claim in the future based upon the discoveries of American explorers in the Antarctic.

[15] Hall, *International Law* (8 ed. 1925) 106.

[16] (1931) P.C.I.J. Series A/B No. 53.

[17] In spherical geometry, a sector is part of the surface of a sphere limited by a piece of curve line and two great circles crossing each other and drawn through the extreme points of a curve line. When applied to the surface of the globe, a polar sector is a special instance

has been such an impressive volume of state practice relating to these sectors that some writers[18] regard them as an accepted mode of acquisition under international law. However, the view is also open that the state practice has been too uncertain to be capable of establishing a new customary rule of international law; at best it is a convenient but temporary *modus vivendi* drawing its value not from international law, but from comity.[19]

Lauterpacht[20] suggests that Arctic sectors are based upon the principle of contiguity, by which areas have been embraced by the projection northwards of the areas bordering the respective maritime states.[21] For this reason claims to Arctic areas based upon the sector principle are strong, because the sovereign of the contiguous territory projecting into the Arctic, is by reason of that fact in a position to exercise the requisite control over an extensive area, or at least it is in a position to offer proof of that fact.[22] However, the remoteness of the Antarctic from settled land weakens the validity of the theory when applied to the acquisition of territory in the Antarctic; indeed any contiguity of the claimant state with the area is, in view of the given geographical disposition of the area, purely symbolic.[23]

It would appear then that the sector principle, unsupported by acts of state sovereignty is not sufficient evidence of effective occupation for the purpose of a claim to territorial sovereignty over Antarctic lands. It should, therefore, not be allowed to supplant the need for proof of the possession of the power of effective control i.e. of the power and intention to act as sovereign in relation to the area sought to be acquired.

This is the general framework of international doctrine into which the Heard and Macdonald Islands Act must be placed. By s. 3 of the Act the Islands[24]

---

of this general definition limited by a piece of curve line, e.g. a Coast line and the meridians through the extreme points of a curve line." (Smedal, *Acquisition of Sovereignty over Polar Regions* (1931) 54.)

[18] J. S. Reeves "Antarctic Sectors" (1939) 33 *A.J.* 519-521.

In practice, the principle has been invoked on behalf of Australia's claim to Adelie Land as against the French claim based upon discovery and in support of Australia's claim is the fact that the principle was already in operation in the Antarctic in the case of the Falkland Islands Dependency set up by Orders-in-Council 1908 and 1917; in the case of the Ross Dependency, set up by Order-in-Council of 1923; although in both cases the areas claimed fell ouside the respective sectors, strictly defined. The principle was also relied upon by Norway to support her claims to the Antarctic mainland in 1939 and by Argentina in 1940 and by Chile in 1942.

[19] In fact, none of the sector states has relied solely upon this principle, but each has sought to reinforce its claim to territorial sovereignty by acts of state sovereignty over its own particular territory.

For Russian and Canadian practice see Lakhtine "Rights Over The Arctic" (1930) 24 *A.J.* 703. For New Zealand practice relating to the Ross Barrier and the Ross Sea see Professor Charteris, 11 *Journal of Comparative Legislation and International Law* (3 ser. 1929) 226-232. For British practice relating to the Falkland Islands Dependency see Waldock (1948) *B.Y.B.* 335, and E. W. Hunter Christie, *The Antarctic Problems* (1951, London).

[20] (1950) *B.Y.B.* 376.

[21] When in 1916 Russia first claimed the islands to the north of her, she referred to them as constituting an extension of the Continental Tableland of Siberia.

[22] Lakhtine ((1930) 24 *A.J.* 703) goes further than the division of land masses on the basis of the sector principle, in that he seeks to divide up the Arctic Ocean together with any ice areas, whether drift or permanent, between the contiguous states. There is, however, general agreement that the High Seas belong to all, and that drift ice being merely part of the High Seas is incapable of acquisition. This applies specially to the area around the North Pole, which is an area of sea covered by ice. Any other solution would involve the recognition of a closed sea principle for the area around the North Pole.

If our conclusion, that it is impossible to acquire sovereignty over the area of the North Pole, is correct, then it can be used for the passage of the armed forces of any belligerent, or for any strategic purpose, e.g. its use as landing grounds or refuelling stations for military aircraft.

[23] Sector claims in the Antarctic are not based upon the principle of contiguity except in the case of the claims of Argentina and Chile, but are based fundamentally on the principle of geographical continuity of territory, indeed, they are nothing more nor less than new examples of the old *hinterland* doctrine.

[24] The Islands are within the area bounded by the parallels 52° 3' and 53° 30' south

are declared to be part of the territory of the Commonwealth under the title of the Territory of Heard Island and Macdonald Island, and since both Islands are outside the region delimited as the Australian Antarctic Sector in the Order-in-Council of 1933,[25] their acquisition is the first proclamation of Australian Sovereignty over territory[26] previously unoccupied by any power.

The Act was passed under s.122 of the Constitution.[27] In the exercise of these powers the Commonwealth has the same authority which the Parliament of a State had before Federation.[28] One important consequence of this is that the Commonwealth Parliament may set up Courts in the Islands, which do not satisfy the requirements of Chapter III of the Constitution. In fact however the Islands have been placed under the jurisdiction of the Supreme Court of the Australian Capital Territory by s.9; and a person who commits an offence against the laws of the Commonwealth may, despite the provisions of s.80 of the Constitution, providing for trial by jury, be tried summarily upon indictment.[29] Finally the Governor-General will be able to regulate activities in the territory uninhibited by the Constitutional prohibitions, e.g. s. 92.

The Act makes provision for the establishment of a governmental and legal system for the territory; s.4 provides for the abrogation of the law previously in force; s.5 (1) replaces it with the law of the Australian Capital Territory,[30] including the principles of common law and equity in so far as they are applicable to the condition of the new territory.[31] All the provisions may go to proof of Australia's intention to act as sovereign in relation to the territory.

At common law, when British subjects found a new colony, they carry with them so much of their domestic law as is applicable to their new situation. However s.5(1) is not directed to this problem, but to what law was to be applied to govern the relations of a group of scientific personnel who were not colonists in the strict sense for the purpose of the common law rule, so that there may be some doubt whether or not the common law applied automatically from the date of the new settlements. As a result of the passing of s.5 (1) the difficulties associated with the application of the common law to the early settlement of N.S.W. are unlikely to arise in relation to Heard and Macdonald

---

latitude and the meridians 72° and 74° 30' east longitude.

[25] The territories were accepted by the Australian Parliament on June 13, 1953.

[26] Australian territories comprise — apart from the Australian Capital Territory and Northern Territory — the Antarctic Territories; the Ashmore and Cartier Islands, situated in the Indian Ocean off the north-west coast of Australia, which were accepted on May 3, 1934, in accordance with the Order-in-Council of July 23, 1931; Nauru and New Guinea, which are mandated territories; Papua, which was taken over by the Commonwealth in 1905 from Queensland; Cocos-Keeling Islands, which were acquired from the British Government in 1951 for use as an air-base.

[27] "The Parliament may make laws for the government of any territory surrendered by any state to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of Parliament to the extent and on the terms which it thinks fit."

[28] "The Commonwealth legislative power in respect of a territory to-day includes all the power of a State Parliament in respect of that State, but includes that power as if it were not limited by the co-existence of the Commonwealth with certain paramount powers." *Per* Latham, C.J. in *Australian National Airways Pty. Ltd.* v. *Commonwealth* (1945) 71 C.L.R. 29, at 62.

[29] *R.* v. *Bernasconi* (1915) 19 C.L.R. 629, but *cf. Waters* v. *Commonwealth* (1951) 82 C.L.R. 118. The Act, however, provides that Commonwealth Law, unless otherwise provided, is not applicable to the new territory except ss. 6 and 9 of the Seat of Government Acceptance Act, 1909-1939, and ss. 3, 4, and 12(c) of the Seat of Government (Administration) Act, 1910-1947, and the schedule to that Act.

[30] The Law of the Australian Capital Territory is the Law of New South Wales, as amended by ordinance.

[31] "It hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being which are the birthright of every English subject are immediately in force. But this must be understood with very many and very great restrictions. Such colonists carry with them so much of the English Law as is applicable to their new situation and the condition of the infant colony, such for instance as the general rules of inheritance and of protection from personal injuries. The artificial distinction and refinements incident to the property of a great commercial people . . . are

Islands.[32]

The Government of the Islands is vested in the Governor-General. Section 8 provides that any law in force in the territory may be amended or repealed by any ordinance or any regulation made under any ordinance, provided it is not disallowed by either House of Parliament within 15 days of its having been tabled.

One final point remains to be considered. The Crown's power of legislating with respect to settled colonies was very limited at common law. The Crown could grant representative institutions with powers of taxation, but it could not impose taxation or take away any rights, and it possessed no general powers of legislating for the colony other than in Parliament. On the other hand, the Crown's powers in relation to conquered or ceded territories[33] were unlimited. In 1887 this distinction was removed by 50 & 51 Vict. c. 54, and the same powers were conferred upon the Crown in relation to settled colonies that it already possessed in connection with conquered and ceded territories. However since the Act was stated to apply only to those settled colonies which were not at that time within the jurisdiction of a colonial legislature it would not appear to have any operation in relation to these Australian Territories, which would, therefore, in the absence of s.5 (1) be regulated by the common law prior to 1887.

D. J. MILLARD, Legislation Editor — Third Year Student.

TASMANIAN CONSTITUTION AND ELECTORAL AMENDMENT ACTS 1953

The recent amendments to the Tasmanian Constitution and Electoral Acts of 1907[1] at first sight appear to contain provisions which are alien to the principles of government usually observed in British countries. The amendments provide, inter alia, that if two parties only are returned to the House of Assembly (Lower House of the Tasmanian Legislature), each party being equally represented in the House, the Governor may issue a proclamation which will have the effect of appointing another member to the House.

To appreciate the significance of these provisions it is necessary to consider them in the light of the background of Tasmania's political history. Election to the Tasmanian House of Assembly is based upon a system of proportional representation. The State is divided into five electoral divisions, each returning six members to the Lower House. From these thirty members the Speaker is elected with a casting, but not a deliberative vote. There are, moreover, only two political parties, namely Liberal and Labour, represented in the State Parliament, who between them hold the balance of political power. Experience over a number of years has shown that the system is finely drawn and that neither party can command a clear majority in the House. This means that the Government, during its period of office, may be severely hampered in passing the legislation that it may desire, and may even be forced to depend on the support of an Independent for its majority.

Since 1945 the position has become more acute with the parties having almost equal strength on the floor of the House and the possibility of a deadlock becoming increasingly real. A crisis was precipitated in 1948 when the con-

---

neither necessary nor convenient for them and therefore are not in force." Blackstone's *Commentaries:* Introduction, Section 4, and see *Cooper* v. *Stuart* (1889) 14 App. Cas. 286.

[32] The position was not finally clarified until s.24 of 9, Geo. 4, c.83.

[33] In the case of conquered or ceded territories English Law does not automatically apply, but the law existing before such conquest or cession remains in force until modified.

[1] Act to amend the Tasmanian Constitution Act 1953 (No. 88, 1953); Act to amend the Tasmanian Electoral Act 1953 (No. 76, 1953).