

STATELESSNESS

AS A CONSEQUENCE OF THE CHANGE OF SOVEREIGNTY OVER TERRITORY AFTER THE LAST WAR.

By RUDOLF GRAUPNER, LL.B. (Lond.)

I.—PRESENT PROBLEMS OF STATELESSNESS.

Among the multitude of problems which will have to be dealt with in the coming peace settlement, that of the nationality of a great number of people will be of the utmost importance and urgency. As distinct from the situation at the close of the last war the future peace makers will not only be called upon to readjust the nationality of people affected by territorial changes, but additional questions in this sphere of law await solution. Even where certain territories will not change sovereignty, movements of more or less large populations, voluntary or forcible, are to be expected. Moreover, the practice of various States since the last war up to the present date has added further complications in this field. The numerous denationalisations decreed by Turkey in 1923, by Soviet Russia in the first decade of the formation of the Soviet State and later by Italy and Germany, and subsequently copied by many of their satellites, have created hundreds of thousands of stateless persons. And again, there are still a certain number of people in that unfortunate condition of statelessness who owe their fate to the Peace Treaties of 1919-1923, particularly to the Treaties of St. Germain and Trianon. Finally, the upheavals of the present war which has seen unprecedented movements of populations of nearly all States of Continental Europe by deportations or by the more or less voluntary entering into labour contracts to be performed in Germany or in countries occupied by her will make the ascertainment of the true nationality of a great number of persons very difficult. The destruction of records by air and land warfare will, in many cases render this task hardly possible.

Yet, however complex the problems of nationality may be which will confront the draftsmen of the Peace Treaties, the determination of the nationality of persons affected by territorial changes will certainly again constitute a major issue. Bearing in mind the consequences of the creation by the last Peace Treaties of hundreds of thousands of stateless individuals with all the misery resulting from this condition and its contribution to political unrest in general, it would not seem inopportune to re-examine this subject at this juncture. In this paper we will limit our discussion to a single one—namely, to the phenomenon of statelessness brought about by change of sovereignty over territory.

That a Jewish body should feel it necessary to pay attention to this subject is not difficult to justify. As was the case after the last war, questions of nationality will again be of particular significance for Jews. Although at present the main Jewish problem in this respect concerns the regulation of the national status of the Jews from many European countries who have been deprived of their nationality by unilateral act of State, the provisions in the coming peace settlement relative to the position of individuals in case of State succession or exchange of populations will undoubtedly be of great moment for many of those Jews who have found refuge in the free world or are still in enemy or enemy occupied countries. Whilst for the majority of Jews of Continental Europe the question will merely be that of re-instatement into their former status (subject to options for remaining stateless in certain cases), a small but not unimportant minority will face this issue complicated by their being affected by territorial changes or exchanges of populations. In such cases re-acquisition of the former nationality lost by deprivation (and the suggested option of remaining stateless) might become secondary to the ascertainment of the position under the relevant provisions of the coming Peace Treaties.

Before turning to our immediate subject, a few words must be said on statelessness in general and on the various types of this abnormal political status. Although some 50 years ago* statelessness was sometimes regarded almost as an enviable position from the point of view of the individual because such a person was not subject to the many duties of a national of a State (particularly to military service), and this opinion might perhaps have been maintained in the liberal world before the last war, in the last 30 years the political and economic conditions, especially in Europe, have changed all this. Mass unemployment and the resulting measures for the protection of the national labour market, the financial strain put on the treasuries of many States, sharp economic competition and national, racial and religious prejudices tended to exclude that group of individuals not only from the political but frequently also from the economic life of the nation. A stateless person has no political rights; he has, as a rule, no passport enabling him to leave his country of residence, or to enter other countries, not even for quite temporary purposes, unless there be special agreements in which States agree to issue and recognise papers for stateless persons like the so-called Nansen-passport for certain categories of refugees from Russia or the Certificates of Identity issued in pursuance of the Conventions of October 28th, 1933, and of February 10th, 1938 (Environ Conference) relating to refugees from Germany. A stateless individual is liable to arbitrary expulsion, though no other State will admit him; if he is expelled from State A and forcibly brought into State B, the latter will usually imprison him for the crime of having unlawfully entered its territory, and later repeat the action of State A. Even if he resides unmolested in a country he will be under great disabilities. Most States do not grant poor relief and other social benefits to stateless persons. Such persons are nearly everywhere excluded from the liberal professions or only allowed to practise under restrictions; e.g., in Germany, former Russian doctors were only allowed to attend to their former compatriots. And, worst of all, the economic policy of most States in the last few decades prohibited or at least rendered difficult the employment of stateless persons or their establishment in a business of their own. Further, they are not entitled to pensions for former services—a consequence which caused great sufferings particularly to some of the former Austrian or Hungarian officers and civil servants who had become stateless after the dissolution of the Austro-Hungarian Monarchy. Stateless persons will in general not be admitted to Government employment. On the other hand, many States call up stateless persons for military service but do not grant them naturalisation afterwards.

Although the negative status of statelessness is as old as the positive one of possessing a nationality, it did not constitute either a serious political or economic problem until the close of the last war. In the comparatively safe and well-ordered world of the second part of the nineteenth and the beginning of this century, Courts of Justice, if they came across a case of statelessness at all, were not prepared, or were at least reluctant, to recognise the existence of such a status in law. For example, the United States Supreme Court† has said: "The existence of a man without a country is not recognised." Similarly, French Courts for a long time regarded statelessness as a legal impossibility until they hesitantly changed their view after the last war.‡ English Courts likewise saw difficulties in recognising such a status. Yet they ultimately acknowledged the existence of statelessness as a consequence of conflicts of nationality laws as well as of the deprivation of nationality by unilateral act of State.§ To-day, the frequency of statelessness on the one hand and its recognition and even furtherance by not a few Governments and, on the other hand, certain slight alleviations in the condition

* See e.g. André Weiss, *Droit International Privé*, Vol. I. (1892), p. 20.

† *Wong Kim Ark v. U.S.* (1898) 169, U.S. 649, at p. 720 (per Fuller, C. J., and Harlan, J. in their dissenting opinion).

‡ See Schätzel, *Die elsass-lothringische Staatsangehörigkeitsregelung und das Völkerrecht* (1929), p. 83.

§ See *Stoeck v. Public Trustee* (1921), 2 Ch. 67.

of stateless persons (such as the issue of special passports) would appear to have somewhat lessened the apprehension that mass statelessness is utterly repugnant to a well-ordered International Community. It is to be hoped that in the coming peace settlement the problem of statelessness will receive careful attention. Not only must the inadvertent creation of new cases of statelessness be avoided under any circumstances, but also existing cases, being the legacy of the last Peace Treaties, or the result of recent State practice, should be re-examined and remedied. A brief review of the main reasons for the occurrence of this abnormal condition as the result of changes of sovereignty over territory may therefore be of interest.

The Different Types of Statelessness.

Although in a well-ordered International Community composed of independent States the circumstance that an individual belongs to no State ought not to occur, cases of genuine statelessness (as distinct from those where merely the true nationality of a person cannot be ascertained with certainty) have been known since the modern law of nationality came into existence. At present, three large categories can be distinguished.

(a) *Statelessness as a consequence of divergent systems of nationality laws.*

One of the reasons for such occurrences is that different principles are chosen by different States for the acquisition of nationality by birth—viz., *jus sanguinis*, on the one hand, and *jus soli*, on the other hand. Although the pure *jus soli* is to-day hardly applied by any country, the limitation of the transmission of nationality by descent may also bring about statelessness of the children of a person who is a national of a country mainly adhering to the *jus soli*. (Examples: the illegitimate child of a British woman born in Germany, British nationality being transmitted only to children legitimately born abroad of British subjects; a child of a British father who himself was born abroad of a father born within the British dominion.)

Another case within this category is that of a woman who loses her nationality through marriage with a foreigner without acquiring the nationality of her husband by the law of the latter's country. These (negative) conflicts of laws, which were the subject-matter of several international discussions and conferences, have been modified to some extent by recent legislative measures in various States.

(b) *Statelessness as a consequence of unilateral State action for penal or political reasons.*

The laws of a great number of States provide for the denationalisation of their nationals as penalty for certain crimes, particularly for evading compulsory military service. In earlier times emigration without special authorisation sometimes caused forfeiture of nationality (e.g., in the Austrian Monarchy by virtue of a decree of March 24, 1832). Whereas denationalisations in such cases were comparatively rare and created no serious international problems, the mass deprivations of nationality on political, religious or racial grounds (often coinciding with persecutions and expulsions of minorities) made the phenomenon of statelessness a political question of the first magnitude. It must be clearly understood that the origin of this kind of statelessness is in itself completely different from statelessness owing to territorial changes; but, as we shall see shortly, the border line between these two kinds can be blurred if a State which is obliged to accept new nationals by territorial acquisitions refuses to comply with its international obligations by withholding conferment of its nationality or later cancelling of its previous acquisition. Denationalisation on political, religious or racial grounds need neither be restricted to nationals being abroad (as was generally the case in the State practice of Turkey, Soviet Russia, Italy and Germany and lately also of several other States), nor does it always presuppose the prior enjoyment of the nationality of the denationalising State. A well-known instance was the position of the Jews in Rumania from the formation of that State in the middle of the last

century when Jews inhabiting the territory of the new Rumanian State were declared foreigners, which meant practically stateless persons, by the Civil Code of 1864 and later by the Rumanian Constitution of 1886.

(c) *Statelessness as a consequence of changes of sovereignty over territory.*

This type of statelessness has a comparatively long history. We venture to submit that almost every territorial change—cession, annexation of a part or incorporation of the whole of a State—has necessarily the effect of making stateless such individuals who would come under a new sovereignty but for their residing outside the two States concerned. This problem has hitherto only casually engaged the attention of publicists, and the few relevant decisions of Courts or international tribunals have mostly expressed the view—thereby disregarding the rules of International Law—that such persons become automatically the nationals of the successor State, though it cannot be explained how an annexing State, or the two States concerned in case of cession, can validly act within the jurisdiction of a third State, particularly if the individual in question does not consent to having imposed upon him a new nationality.*

Yet the great number of stateless persons owe their unfortunate condition to incomplete or defective drafting of the relevant clauses in many peace treaties. Sometimes a real gap was left with the result that certain categories of inhabitants were not covered by the provisions of the treaty in question, sometimes bad drafting enabled ill-willed Governments to refuse admission as nationals to undesired individuals or whole groups. Moreover, experience has shown (especially where an option for retaining the old nationality was provided for) that technical mistakes in exercising the option led to statelessness.

Leaving aside earlier instances, we will discuss as briefly as possible the peace settlement after the last war in its bearing on our subject.

II.—THE PEACE TREATIES AFTER 1918.

(1) THE TREATY OF VERSAILLES.

The principle prevailing in this Treaty that those people who were "habitually resident" in the ceded areas were to change their nationality, was indeed the most effective one to prevent the rise of statelessness. However, two modifications of this principle caused some writers to argue that a number of German nationals did become stateless. First, according to the provisions of Articles 91, I, III, and 84 not only German inhabitants residing in the areas ceded to Poland or Czechoslovakia but also German nationals residing in other territories of the newly formed Polish or Czechoslovak States lost their German nationality and acquired the nationality of their State of residence. Since both Poland and Czechoslovakia disliked any avoidable increase of nationals of German origin, they refused to confer their nationality on the latter category, thereby contravening the Peace Treaty. Since Germany regarded those people as having become Polish or Czechoslovak nationals, the curious situation arose that they were treated as Poles or Czechoslovaks by Germany, and as Germans by Poland or Czechoslovakia—which meant in practice that they were stateless. Endeavours were, however, soon made to clear up this unbearable situation. By the German-Czechoslovak Convention of June 29, 1920, Germany agreed to continue to regard such persons as German nationals—*i.e.*, speaking strictly juridically, they became German nationals again with retrospective effect from January 10, 1920. The negotiations with Poland were only brought to a conclusion by the Viennese

* In two recent decisions, the United States Court of Appeals for the Second Circuit held that former Austrian nationals who had been living outside Austria (and Germany) at the date of the annexation of Austria, in March, 1938, and had not returned to Germany afterwards nor applied for German nationality had not become German nationals. See *American Journal of International Law*, 1943, pp. 634-640.

Convention of August 30, 1924 ; briefly it can be summarised by stating that the German view prevailed.

Secondly, that only such German nationals who were already habitually resident in some of the ceded areas at certain dates (as regards Poland : January 1st, 1908 ; Belgium : August 1st, 1914 ; Denmark : October 1st, 1918) acquired the new nationality *ipso facto* and without any formality whilst others could only acquire it by special authorisation of the successor State concerned, gave rise to the opinion that the latter category of inhabitants became stateless on the coming into force of the Treaty of Versailles on January 10th, 1920, unless and until they obtained the nationality of the cessionary State in the aforementioned way. A German writer, C. G. Bruns*, has asserted that those people lost their original German nationality in any case on the cession of the territory and became thus stateless, permanently or temporarily until the acquisition of the new one. But this theory was strongly disputed, and we are not able to subscribe to this rather artificial doctrine.

The quite special regulation of the return of Alsace-Lorraine to France resulted in statelessness of a large number of Germans ; at least this was the view prevailing with German authorities, law courts and many publicists. As the Peace Treaty was based upon the French doctrine that those provinces had virtually never ceased to be French territory it was merely the logical consequence that those German nationals who or whose ancestors did not live there in 1871, did not become French nationals by way of reintegration. Now, according to the German nationality laws those Germans possessed German nationality by the fact that they had the special Alsace-Lorraine citizenship (Elsass-Lothringische Landesangehörigkeit) this being the nationality of a political member body similar to the "nationality" of a member State in a federal State. By the extinction of Alsace-Lorraine as a component of the German Reich in 1918, this special citizenship necessarily came to an end with the result that those persons who did not acquire French nationality lost their Alsace-Lorraine citizenship which was the only medium for possessing the nationality of the German Reich. However doubtful the correctness of this argument may be, it was accepted by the German Supreme Court.† Consequently these former Germans had to apply for re-naturalisation, which, it seems, has been granted in all cases.

(2) THE TREATIES OF ST. GERMAIN AND TRIANON.

Whereas the principle of Habitual Residence in the Treaty of Versailles worked on the whole satisfactorily enough, the completely different scheme chosen for the determination of the nationality of the approximately 55 million inhabitants of the dissolved Austro-Hungarian Monarchy proved a failure as we can safely maintain now after more than two decades' experience.

The provisions for the change of nationality are contained not only in the Treaties of St. Germain and Trianon, but also in the Minorities Treaties‡ concluded between the Principal Allied and Associated Powers and Poland (June 28th, 1919), Czechoslovakia (September 9th, 1919), Yugoslavia (September 9th, 1919), and Rumania (December 9th, 1919). The Polish Treaty came into force together with the Versailles Treaty on January 10th, 1920, the other Treaties on September 26th, 1920. The execution of these Minorities Treaties was laid down in each of the respective Peace Treaties. Italy, however, was not bound

* C. G. Bruns, Staatsangehörigkeitswechsel und Option im Friedensvertrag von Versailles (1921).

† Official Collection of Decisions in Civil Matters, Vol. 120 (1928), p. 202. (Annual Digest, 1927-28, Case No. 190.)

‡ It is true that as far as Germany is concerned the Treaty of Versailles is not the exclusive basis for the change of nationality, for the Polish and Czechoslovak Minorities Treaties are also applicable to German nationals. But as the main principle of Habitual Residence is the same in the Versailles Treaty and in the Minorities Treaties the difficulties of reconciling these two sources were far less serious than in the Austrian and Hungarian Peace Treaties.

by a minorities treaty. No minorities treaties were imposed upon Austria and Hungary, but the Treaties of St. Germain (Arts. 62 *et seq.*) and Trianon (Art. 54) contained stipulations for the protection of minorities. It ought to have been plain from the beginning that the regulation of the nationality of former Austrians and Hungarians by divergent principles contained in a multitude of treaties would lead to complications. Cases both of double nationality and of statelessness were bound to arise. But as we shall see this complicated scheme might nevertheless have worked not too badly if the Succession States had not thwarted many of the provisions laid down in those international treaties by the introduction of municipal laws of nationality. By availing themselves of loopholes in, and of inconsistencies between, treaty provisions, by artificial interpretations and even open disregard of treaty stipulations they deprived a large number of people of the nationality to which they were entitled.

Let us consider now this question in more detail.

The Principles of Allocation.

Originally it had been the intention of the Allied Powers to apply the test of Habitual Residence as a general rule as was done in the Versailles Treaty. But on request of the Czechoslovak delegation which was seconded by the Austrian representatives, another scheme was chosen. As the administrative laws of the old Austro-Hungarian Monarchy were largely based upon the so-called "Heimatsrecht" (also called *indigénat* or *pertinenz*), which means Rights of Citizenship (or, more accurately, Communal Rights) in a certain commune or parish, it was urged that the future nationality of each national of the dissolved Monarchy should be determined by the situation of that commune after the redistribution of territory among the various Succession States. This suggestion was accepted as the primary mode for the determination of nationality. (According to the correct opinion the principle of Heimatsrecht was not to apply to acquisition of Rumanian nationality.) But as it seems to have been obvious from the beginning that this principle would not for various reasons guarantee that all people concerned would acquire a new nationality, the Minorities Treaties laid down secondary principles for the allocation of inhabitants of the dissolved Monarchy to the Succession States. These principles are, in order of their intended application: (1) Redintegrated Rights of Citizenship in a Commune; (2) Place of Birth qualified by the requirement of Habitual Residence of Parents or Parents' Rights of Citizenship in that place; (3) Place of Birth (Ordinary Birth).

Art. 70 of the Austrian and Art. 61 of the Hungarian Peace Treaty provide that "every person possessing Rights of Citizenship (*pertinenz*) in territory which formed part of the territories of the former Austro-Hungarian Monarchy shall obtain *ipso facto* to the exclusion of Austrian (Hungarian) nationality the nationality of the State exercising sovereignty over such territory." This conception of Heimatsrecht which is peculiar to the old Dual Monarchy proved to be the main source of statelessness. Heimatsrecht according to Austrian law meant originally the possession of Rights of Citizenship in a Commune (the main purpose being the right to poor law relief) which is acquired by descent* from a person who possessed these rights (Heimatsgesetz of December 3rd, 1863). In the middle of the last century birth and domicile in a certain community coincided in nearly all cases with Heimatsrecht therein, but the increasing movements of the population in the second half of the last and in the first decades of the present century made the possession of those rights for about half of the population a mere fiction, having regard to the real points of contact between a person and the commune in which he possessed such Heimatsrecht. Even the Austrian (amending) Law of 1896 which provided for the acquisition of a Heimatsrecht in the commune in which an individual had lived for ten years without having become a public charge during

* The Law of 1863 provided further for acquisition of Heimatsrecht: (a) For women through marriage; (b) For officials by taking up of a Government post; (c) By voluntary acceptance into a commune.

that time, by application of either the individual or the former commune concerned, did not remedy this state of things materially. It should be noticed that only Austrians or Hungarians could possess these Rights of Citizenship; on the other hand, possession of these Rights was not necessary for the possession of Austrian or Hungarian nationality though it was a postulate that every Austrian or Hungarian national should have Heimatsrecht in an Austrian or Hungarian commune respectively. But there were a number of Austrians or Hungarians who had no such Rights of Citizenship, though they were undoubtedly Austrian or Hungarian nationals, and there were the inhabitants of Bosnia-Herzegovina where this institution never existed at all. Bosnia-Herzegovinians were neither Austrian nor Hungarian nationals proper but had a Bosnia-Herzegovinian citizenship of their own (bosnisch-herzegovinische Landesangehörigkeit). There was further a multitude of people belonging to all classes of the population whose Heimatsrecht could either not be proved or was contested between two communities; whilst up to the dissolution of the Dual-Monarchy the Supreme Administrative Courts in Vienna and Budapest had jurisdiction to decide such disputes, they lost this competence as a matter of course with regard to disputes where a commune now outside the new Austrian Republic or Hungary respectively was involved.

Whereas an Agreement between Austria and Czechoslovakia signed at Brünn on June 7th, 1920, removed the danger of a petrification of statelessness of former Austrians to a considerable extent, the position of a large Hungarian minority in Slovakia remained unsatisfactory. According to the Treaty of Trianon these people were to become Czechoslovaks if they could prove that they possessed Rights of Citizenship in a commune now forming part of Czechoslovak territory. By Hungarian law as interpreted by Hungarian courts (as distinct from Austrian law) the fact of four years' residence in a commune and the payment of a single contribution to the communal fund resulted in the automatic acquisition of Heimatsrecht in that commune. There is no doubt that the overwhelming majority of the inhabitants of the aforementioned communes did comply with this requirement. But in two decisions of 1921 and 1923 the Supreme Administrative Court of Czechoslovakia by way of a new interpretation of the Hungarian law required continuing payments to the communal fund during the four years as well as express admission of the persons concerned by the commune. As in many cases the fulfilment of these conditions could not be shown, those people became stateless from the Czechoslovak point of view. True, in 1926 the "Lex Derer"* provided for remedies in many cases, but as late as 1928, according to Professor Seton Watson,† there were twenty to thirty thousand stateless persons in Slovakia, and in 1931 the British Foreign Office put this figure as high as between twenty and fifty thousand persons. C. A. Macartney‡ reports that from 1929 to 1935 about 19,000 former Hungarians were granted Czechoslovak nationality. Although this state of affairs was thus slowly remedied, there must still have been a fair number of stateless persons in Slovakia when Czechoslovakia was broken up by Germany in 1939.

One might think that where the principle of Heimatsrecht was found insufficient to determine the new nationality of a former Austrian or Hungarian, the secondary principles of allocation would furnish a satisfactory solution. But this was by no means true in all cases. We will try to set out the facts and reasons why these secondary principles likewise did not succeed in preventing the occurrence of statelessness.

There were, in the first place, a number of Austrian and Hungarian nationals by naturalisation who were born outside the Monarchy and the then existing Succession States, say, in Switzerland or Germany. If their Heimatsrecht was contested or could not be proved, no secondary principle could be relied upon. The result was statelessness. This was one of the genuine gaps in the Treaties.

* See Flournoy, *Collection of Nationality Laws* (1929), p. 205.

† Slovakia: *Then and Now* (1931), p. 56.

‡ *Hungary and Her Successors* (1937), p. 164.

Another category of stateless people came into existence as a consequence of the right granted to Italy, Czechoslovakia, and Yugoslavia to refuse to accept Austrians, and in the case of the two latter States also Hungarians, who had acquired Heimatsrecht after a certain date in one of the communes which now formed part of their territory. This date was in respect of Italy, May 24th, 1915, when that country entered the War. As regards the other two States, January 1st, 1910, was the decisive date (Arts. 76 St. Germain, 62 Trianon). Such persons only had the right to claim the nationality of the Succession State in question, but if they did not apply for it or if the application was refused, they were to obtain *ipso facto* the nationality of the State exercising sovereignty over the territory in which they previously possessed Rights of Citizenship (Arts. 77 and 62 respectively). This is the (secondary) principle of the "Redintegrated Rights of Citizenship." It is clear that the ascertainment of this previous Heimatsrecht, if any, was still more difficult, and as experience has indeed shown, in a very great number of cases impossible. This applies particularly to Hungary, where only a few large communes kept registers evidencing Rights of Citizenship (here called *Gemeindezugehörigkeit*). In many a case old contests relating to a person's Heimatsrecht revived, and as long as such controversies were not settled—a task which had become far more complicated by the absence of a central judicial authority having jurisdiction over the communes involved and now situate in different Succession States—no further secondary principle was allowed to be applied. But even the secondary principles of Qualified Birth or Ordinary Birth could not secure a nationality to a man whose place of birth was situate in an area ceded to Italy if that country rejected him because he was unable to prove his Heimatsrecht there and a previous one in another Succession State. This is the consequence of the regulation that birth by itself in new Italian territory is not sufficient for acquiring Italian nationality, since possession of a Heimatsrecht in that territory established before May 24th, 1915 had to be proved. And owing to his birth-place being situate in new Italian territory the provisions of the Minorities Treaties regarding birth do not come into play.

The next principle of allocation is that of the birth of a person in the ceded territory qualified by the additional requirement of the Heimatsrecht therein of his parents in the case of Czechoslovakia and Yugoslavia, and of habitual residence of his parents in the case of Poland and Rumania (Arts. 4 of the respective Minorities Treaties). Difficulties as regards the interpretation of this principle arose through the attitude of Poland which took the view that the parents must have been resident there at the date when the Minorities Treaty came into force. The Permanent Court of International Justice,* to whom this dispute was submitted, held, however, that the date of the birth of the individual in question is the only material one. Whereas Poland thereupon changed her attitude, it seems that the other three States were not prepared to depart from a similar practice and continued to follow the earlier Polish interpretation of that provision. It is obvious that insistence on the date of the coming into force of the Minorities Treaty (July 16th, 1920) must necessarily make this principle of allocation ineffective in the majority of cases involved.

The last secondary principle of allocation is that of mere birth in the transferred territory. Art. 6 of all the Minorities Treaties reads as follows: "All persons born in Polish (Czechoslovak, Yugoslav, Rumanian) territory who are not born nationals of another State shall, *ipso facto*, become Polish (Czechoslovak, etc.) nationals." It would seem that this provision would indeed solve all difficulties which the peacemakers imagined. But, as we have already pointed out, even this clause of last refuge is inapplicable to naturalised Austrians or Hungarians who were born outside the Succession States, or to persons whose place of birth is not known. And as regards Italy, it did not apply at all, as Italy was not bound by a Minorities Treaty; moreover, birth in new Italian territory did not secure Italian nationality unless possession of Rights of Citizenship acquired before

* Advisory Opinion, Series B, No. 7 (September 15, 1923).

May 24th, 1915 could be established. But, apart from these special cases, the interpretation of Art. 6, as adopted by all the Succession States which were bound by the Minorities Treaties, made this clause largely unworkable. It was conceived as a mere supplementary device, which was only to be used when any other principle had been found wanting after extensive and thus very lengthy scrutiny. Thus Art. 5 of the Czechoslovak-Austrian Agreement, signed at Brünn on June 7th, 1920, which was entered into for the purpose of settling controversial questions of nationality and protection of Minorities arising out of the Peace Treaty and the Minorities Treaty, provides that Article 6 of the Minorities Treaty "shall constitute a *presumptio juris sed non de jure* in favour of a nationality corresponding to the place of birth, which shall hold good in so far as no proof of nationality of another State *by parentage* (italics are the author's) is produced. The words at the end of Article 65 (St. Germain) '*par sa naissance d'une autre nationalité*,' and at the end of Art. 6 (Czechoslovak Minorities Treaty) '*d'une autre nationalité de naissance*,' are, therefore, in practice to be interpreted not according to the place of birth, but according to parentage." This somewhat obscure wording would seem to express the desire of the two contracting governments to avoid, as far as possible, having the nationality of any person in question determined by the mere fact that he was born in the respective territory. Art. 65 of the Treaty of St. Germain and Art. 6 of the Minorities Treaties are only to be material if all endeavours to find the true nationality of the *de cuius* by the tests of *jus sanguinis* (*i.e.*, Heimatsrecht, Qualified Birth) have proved futile. It is obvious that such a practice, which presumably has its root in the dislike of the principle of *jus soli* in Central Europe, stultified the intention of a speedy and comprehensive solution of the nationality question in former Austria-Hungary, for it might and actually often did take years before the question was decided whether a person possessed a certain nationality by parentage or whether this could not be definitely established.*

Options.

The clauses relating to option contained in the Austrian and Hungarian Peace Treaties were a further source of numerous cases of statelessness. There were three kinds of options :

(1) Option provided for the inhabitants of a plebiscite area ; inhabitants of such an area could opt for the nationality of the State to which that area was not adjudicated ;

(2) Option provided for those persons who were to acquire a new nationality by virtue of Arts. 70 or 61 respectively ; such persons had the right to opt for the nationality of the Succession State where the commune was situate in which they previously possessed Rights of Citizenship. (This provision did not apply to options for Austria on account of Art. 64 of the Treaty of St. Germain.)

(3) Option based on language and race : Persons possessing Rights of Citizenship in territory forming part of the former Monarchy who differed in race and language from the majority of the population of such territory could opt for the nationality of one of the Succession States "if the majority of population of the State selected is of the same race and language as the person exercising the right to opt." (Arts. 80 and 62 respectively.)

The Peace Treaties do not contain any particulars regarding the exercise of options, but leave it to the different States to provide therefore unilaterally.

It is common experience that the technicalities inherent in the institution of options prevent in many cases the acquisition or retention of the desired nationality. But the scheme of the Peace Treaties and particularly the practice adopted

* This interpretation of Art. 6 of the Minorities Treaties would appear to be the ultimate reason for the statelessness of the Magyar minority in Slovakia ; see *supra*, p. 15. (second part of these proofs).

by the Succession States resulted in a further evil—statelessness. If persons entitled to opt exercised this right too late or not in the prescribed form or addressed their declaration to an incompetent authority, their option was not only invalid, but, since their old States frequently regarded such declarations, though they were ineffective as options, as renunciations of the existing nationality, those persons became stateless. Such invalid options occurred particularly frequently in the case of Yugoslavia. Whilst generally declarations of option have to be directed to the authorities of the State whose nationality the optant desires to obtain, Yugoslavia decreed that options for Yugoslav nationality had to be addressed to the authorities of the country where an optant possessed the Rights of Citizenship. This deviation from a firmly established practice led to great confusion. Many of the wrongly addressed declarations (*i.e.*, to Yugoslav authorities) were refused as invalid, the optants being regarded as not having acquired the new, whilst having lost the old, nationality. In the similar case of reclamations for Italian, Czechoslovak or Yugoslav nationality many of the persons concerned who lived in another territory did not or not in time obtain knowledge of the often intricate regulations enacted by the States whose nationality they could claim. The result was that they failed to exercise their right or that they did it too late, or did not comply with the form or conditions required. By their failure they were compelled to rely on one of the other secondary principles of allocation, meeting thereby the difficulties described above. Again, the practice of Italy and Yugoslavia to regard options in favour of Italian or Yugoslav nationality as mere applications which require their consent, would appear to be a violation of the Peace Treaties, as these employ the conception of the option in the sense universally recognised in International Law, *viz.*, as a unilateral declaration of a constitutive character which does not require the consent of the State concerned. Refusal of this consent was bound to create new cases of statelessness, inasmuch as the old States frequently regarded such applications as renunciations of their hitherto existing nationality.

The last category of option, *i.e.*, the option based on language and race, led to difficulties in the new Republic of Austria. During the war many thousands of people, mostly Jews, had fled from Galicia when the Russians occupied that part of the Monarchy. They had lived for about five years mainly in Vienna, when, in 1919, the Austrian Government, denying their (new) Austrian nationality on account of their possession of Rights of Citizenship in the territory transferred to Poland, expelled them from Austria. Austria thereby violated not only Articles 228 and 229 of the St. Germain Treaty, which granted to the nationals of an Allied or Associated Power (*i.e.*, Poland) the right of fair treatment under a most favoured nation clause and constant protection for their person, property rights and interests, but also prevented these people from exercising the aforementioned option in favour of Austria. Moreover, when Jews of this category opted for Austrian nationality, the Austrian Supreme Court—after first interpreting the language and race condition in a liberal sense—later refused admission to Austrian nationality on the grounds that those Jews could not satisfy the Austrian authorities as to the requirement of race. This term, which was used in the Peace Treaty in the English sense as synonymous with nation, was interpreted in the pseudo-biological sense of the contemporaneous German racial theories. Thus Jews could in many cases not establish that they belonged to the Austrian race even if their mother tongue was German. Several endeavours by Jewish political bodies to alter this practice seem to have been unavailing. Even though a considerable part of those Jews succeeded at last in obtaining Austrian nationality by option, there were still a fair number who remained stateless, as they could for some reason or other not establish Rights of Citizenship in Polish territory and were also not admitted to Austrian nationality.

State Legislation.

The cases of statelessness are, however, not exhausted by the aforementioned causes. By the Peace Treaties and the Minorities Treaties the Succession States

were bound to accept parts of the population of the dissolved Austro-Hungarian Monarchy which had certain points of contact with each Succession State. But it became plain very soon that these States tried from the beginning of their existence or the acquisition of the new territory respectively to avoid the nationality stipulations of the peace settlement because these compelled them to absorb groups of persons whom they did not want as nationals. This was easily done by the enactment of nationality laws determining unilaterally the conditions for the acquisition of their nationality. In spite of elaborate arguments to the contrary, it cannot be seriously doubted that *e.g.* the Polish Nationality Law of January 20th, 1920, the Yugoslav decrees of November 25th, 1920, and August 30th, 1921, various Italian decrees from 1920 to 1926, and the Austrian decrees of September 9th, 1919, November 27th, 1920, and June 28th, 1921, cannot be reconciled with the letter and spirit of the Peace Treaties and the Minorities Treaties. A particularly serious effect resulted from the Rumanian Nationality Law of February 23rd, 1924. The Rumanian Minorities Treaty provided in Art. 3 for the acquisition of Rumanian nationality for all persons habitually resident at the date of the coming into force of the Minorities Treaty on December 9th, 1919 in the whole territory of (enlarged) Rumania if such persons were not at that date nationals of a foreign State other than Austria or Hungary. Arts. 4 and 6 oblige Rumania to confer her nationality *ipso facto* and without the requirement of any formality upon all persons born in the territory annexed to Rumania, Art. 7—which has no counterpart in the other Minorities Treaties—provides that “Rumania undertakes to recognise as Rumanian nationals *ipso facto* and without the requirement of any formality, Jews inhabiting any Rumanian territory who do not possess another nationality.” In spite of these plain treaty stipulations the Rumanian Government asserted that owing to the introductory words of Art. 3 of the Minorities Treaty, which reads “Subject to the special provisions of the Treaties mentioned below, Rumania admits and declares to be Rumanian nationals . . . all persons habitually resident . . .,” Art. 3 has become inapplicable. It was argued that this reservation must have some meaning, and though there are no such special provisions in the Peace Treaties regarding Rumania, the Rumanian Government found this to be a reference to the principle of Heimatsrecht laid down in the Treaties of St. Germain and Trianon. Outside Rumania, however, it seems to have been the universally accepted opinion that this was a misinterpretation of the Minorities Treaty. Rumania introduced a Law of Nationality on February 23rd, 1924, Art. 56 of which provides that “all the inhabitants of the provinces acquired from the Austro-Hungarian Monarchy who on November 18th, 1918, possessed Rights of Citizenship in those provinces, and who up to the date of the promulgation of the new Law of Nationality have not opted for any other nationality, shall be Rumanian nationals without the requirement of any formality.” Thereby not only the relevant articles of the Minorities Treaty were abrogated but the date chosen in that Law was fixed as December 1st, 1918, when the actual annexations took place, and not as September 26th, 1920, when the Minorities Treaty came into force. Yet there was still another serious consequence. The numerous former Austrian or Hungarian nationals who could not prove possession of the required Rights of Citizenship could not opt for the nationality of another Succession State according to Art. 80 of the Treaty of St. Germain (Art. 64 of the Treaty of Trianon) since the period of six months after the coming into force of the Peace Treaties had already elapsed. Neither could they opt for the State where they had previously possessed Rights of Citizenship for no such provision was made in regard to Rumania. As these persons were regarded as having become Rumanians on the strength of the Minorities Treaties by the other Succession States concerned, this discrepancy of views made them practically stateless.* As regards Art. 7 of the Rumanian Minor-

* As to the number of persons affected, the Rumanian Government gave the figure of more than 16,000 in Ardeal and the Bukovina, only two out of the six provinces involved. The Joint Foreign Committee estimated, in 1925, the number of Jews left without nationality in the Bukovina alone as 16,000.

ities Treaty the Rumanian Government declared in a Memorandum addressed to the Joint Foreign Committee of the Board of Jewish Deputies and the Anglo-Jewish Association in 1925 that this Article as well as Art. 3 are inapplicable for the same reasons.

(3) BESSARABIA.

The Peace Treaties and the Rumanian Minorities Treaty do not relate to Bessarabia, which was annexed to Rumania in April, 1918. The position of that annexed territory was peculiar in that Great Britain, France, Italy and Japan, notwithstanding Russia's refusal to recognise the Rumanian annexation, consented thereto in March, 1918, and by a special Treaty of October 28th, 1920 a Minorities Treaty regarding Bessarabia was signed in Paris. But owing to the non-ratification of that Treaty by Japan it never came into force. This Treaty imposed upon Rumania the obligation to confer her nationality on all former Russian nationals established in Bessarabia. Yet the aforementioned Rumanian Law of Nationality (Art. 56 (6)) is not in full conformity with the provisions of the special Minorities Treaty, for Art. 56 (2) requires proof of a "legal domicile" in accordance with the laws in force in that province. Although no special clause was thought necessary in that Minorities Treaty with regard to Jews, Rumanian Courts of Justice and administrative authorities found ways to prevent Jewish inhabitants of Bessarabia from obtaining Rumanian nationality, particularly by refusing to acknowledge that they had the "domiciliul administrative" in Bessarabia in the beginning of 1918. It must, however, be admitted that after the annexation of Bessarabia by Rumania numerous refugees from Russia, the great majority of whom were Jews, crossed the border* ; as regards these persons Rumania was under no obligation to admit them to her nationality.

(4) THE TREATY OF RIGA.

Among the Treaties of Peace concluded between Soviet Russia and her western neighbour States the Treaty of Riga of March 18th, 1921, with Poland is one of the most important. Under this Treaty, whereby Poland acquired certain territories from Russia, the nationality of the people concerned was determined by registration in corporate bodies or in census books or by the right to such registration, habitual residence being of no moment (Art. 6). If persons habitually resident in the new Polish territory were not thus registered there, they continued to be Russians. A great number of such persons decided, however, to remain in Poland and, refusing to be regarded as Russians, claimed Polish nationality under the Polish Minorities Treaty of June 28th, 1919. Although Arts. 3, 4 and 6 of this Minorities Treaty include Russian nationals, Poland declared the Minorities Treaty not applicable to that territorial enlargement. Later, however, Poland promised to remedy this situation, which affected a large number of people, among them many Jews. Yet we should not fail to mention that the Polish Government's endeavours to confer Polish nationality on all former Russians who were habitually resident in the territories in question met with some difficulties. Particularly during the first years after the cessation of Polish-Russian hostilities there was an infiltration on a considerable scale by people coming from Soviet Russian territory. These persons had obviously no right to Polish nationality. This circumstance caused the Polish authorities to scrutinise each application for Polish nationality. This had the effect that not only many recent refugees from Russia but also many former Russians who could not prove habitual residence at the date of the coming into force of the Minorities Treaty, although they had been settled there for a long time, were not admitted to Polish nationality and became thus stateless. No figures as to the number of persons affected are available, but it seems that up to the last few years before the present war that portion of the population in the Eastern provinces of Poland was not insignificant.

* Babel, *La Bessarabie* (1925), gives the figure of 38,116 refugees who came from Russia during the years 1918-1922. The Nansen Committee estimated their number as 100,000.

(5) THE SPECIAL POSITION OF JEWS.

We have frequently noticed in the foregoing discussions, especially when dealing with the Treaties of St. Germain, Trianon and Riga, that the Jewish portion of the populations affected by the territorial changes was particularly exposed to the danger of becoming stateless. The reasons for this phenomenon appear to be twofold. First, migrations of Jews in Eastern and South-Eastern Europe were relatively much larger and more frequent than the movements of other ethnic or religious groups. Jews were often compelled by political or economic reasons to leave the places of their birth in order to seek refuge from persecutions or to find their living in other provinces of the same State or even in other countries. Again, their exclusion from the free acquisition of rural property, and the legal or at least practical impossibility of carrying on farming, together with their forcible restriction to certain occupations, mainly in trade, made them in general less permanent than the rest of the population in that predominantly agrarian part of Europe. Thus provisions which might well be regarded as an appropriate basis for the determination of the nationality for the majority of the population in case of territorial changes were therefore often hardly suitable for a just and expedient solution of the national fate of the Jewish population in territory changing sovereignty. This applies particularly to the principle of Heimatsrecht and any similar system as well as to that of Habitual Residence of Parents. Yet the second reason is of far more serious character. The desire of some of the Succession States to keep as small as possible national or other minorities within their frontiers or a purely anti-Jewish attitude as shown by Rumania caused those Governments to avail themselves of the loopholes, doubtful interpretations and numerous technicalities of the Peace Treaties and Minorities Treaties with the object of refusing to admit Jews as nationals. We have seen this signally practised by Rumania; yet even the new Austrian Republic was guilty of such a policy in the case of the many Jews who, having fled to the capital of their country during the War, met with difficulties in obtaining Austrian nationality by option to which they were entitled by right.

III.—CONCLUSION.

Although most of the special problems which we have discussed appear at first sight to be primarily of historical interest, it is yet not inopportune from the practical point of view to recall at this juncture this legal aftermath of the first World War. Even though the problems of nationality which await solution in the future peace settlement will be different, particularly inasmuch as there will be no event like the breaking up of the Austro-Hungarian Monarchy, each resettlement of frontiers and populations raises the question by what principle the fate of the individuals affected by territorial changes is to be determined. We may be permitted to assert that the basis for the determination of the new nationality must, above all, be a real one—viz., one corresponding to the actualities of life and not to legal conceptions which may have become purely fictions owing to development in space and time. Thus the principle of Heimatsrecht and any similar system of ascribing people to a certain territory by some kind of administrative registration should be avoided. The principle of Habitual Residence would seem to comply best with the aforementioned requirements as habitual residence is the closest point of contact between individual and territory. Even birth alone will frequently only furnish a rather arbitrary basis, and it was therefore justly neglected in the State practice of the last century. At the most, Ordinary Birth may be chosen as a supplementary principle, particularly if artificial movements of populations instigated by a State for political reasons have falsified the original character of a territory in dispute. But even in such a case we would prefer the method adopted in the Versailles Treaty—namely, to fix the requirement of Habitual Residence for a date some years prior to the change of the territory. The principle of option, once rightly hailed as the realisation of the individual's right of self-determination, should be retained. In one case in the

last peace settlement—namely, the transfer of a part of Upper Silesia to Poland—optants were granted a Right of Residence for a period of fifteen years, but a highly authoritative observer* has thrown some doubts on the value of such a stipulation. It is possible that exchanges of populations—which we experienced after the last War (between Greece and Bulgaria in 1921, and between Greece and Turkey in 1923)—will be insisted upon by some Powers. As far as such exchanges take place without preceding or accompanying territorial changes, they do not fall within the scope of our discussion. We want only to emphasise that they are by their nature the reverse of the long-established rule that populations of a transferred area acquire as a matter of course the nationality of the successor State. In this case Habitual Residence should be the test. For if some artificial principle, as, *e.g.*, that of Heimatsrecht, is chosen, people residing in other countries who by mere accident are still ascribed to that territory would have to share the national fate of the transferred population, to which they may stand in no relation whatsoever. This is particularly important in regard to the expected multilateral peace settlement whereby a multitude of States will be bound to observe treaty stipulations primarily concerning two States.

Lastly, the urgency of one provision should be emphatically stressed. Most of the difficulties arising from the regulation of the nationality question in the Treaties of St. Germain and Trianon and in the Minorities Treaties might have been overcome if a central international judicial authority for deciding disputes of nationality had been created. Unlike to the jurisdiction and procedure of the Permanent Court of International Justice (which was once called upon in such a controversy†) and more along the lines of the Mixed Arbitral Tribunals set up under the Peace Treaties, individuals concerned ought to have immediate access to such an international tribunal. This is the opinion of all the numerous critics of those treaty provisions. Neither the most careful and well-founded scheme for determining nationality in the case of State succession, especially in a far-reaching peace settlement, nor bilateral agreements are able to solve all problems arising unless an international tribunal, the decisions of which are binding on all States, is set up as the final arbiter. If such a tribunal had been established under the last Peace Treaties, it is almost certain that practically no former Austrians or Hungarians would have been left without a nationality, for the overwhelming majority of cases of statelessness owe their origin to the refusal of the Succession States to fulfil the obligations imposed upon them by the Treaties. There were only an insignificant number of people who had been born as stateless persons or had become such before the conclusion of the last war. Moreover, even these cases might have been satisfactorily solved by an international tribunal by way of a reasonable interpretation of the Treaties.

Although clear and careful drafting of legal provisions is of the greatest importance, yet the most satisfactory stipulations will prove futile if the respective Governments are not prepared to abide by their international obligations. We can only hope that a later historian will not be in the same position as an impartial observer who found himself compelled to state with regard to the phenomenon of statelessness in Central Europe, that "it is almost impossible to attack the question except by appealing to the good will of the Governments concerned; and that good will seem to be non-existent."‡

* Kaeckenbeeck, *The International Experiment of Upper Silesia* (1942), p. 213.

† See *supra*, p. 16. (part one of these proofs).

‡ C. A. Macartney, *National States and National Minorities* (1934), p. 509.