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UNCERTAIN NATIONALITY STATUS
OF GERMAN REFUGEES

*By Lester N. Salwin**

THE PRESENT inquiry deals with the uncertain nationality status of refugees emigrating from Germany, before or after Pearl Harbor, who were deprived of German nationality by the Nazi decree of November 25, 1941. In most cases, such individuals residing in England, France, Belgium, Holland and other places thereupon became stateless persons. Except for naturalization in these countries, their nationality status remained undisturbed until the American Military Government on September 18, 1944 issued Abrogation Law No. 1, rescinding a group of discriminatory Nazi laws. By this action, the November 25, 1941 decree was specifically "deprived of effect" in the occupied territory. A serious question now arises whether the abrogation law, properly construed, reinstated the German citizenship of expatriated refugees, or merely applied inside the Reich to those who elected to return and resume German nationality.

I

The denationalization program which the Nazis enforced against Jews and other officially discredited groups was embodied in a series of three laws adopted in 1933, 1935 and 1941. On July 14, 1933, the Reichstag enacted a law authorizing the Minister of Interior to denationalize, by individual decree, German citizens who had conducted themselves in a manner deemed inimical to the State.¹ One provision, directed primarily against Eastern Jews (Polish and Austro-Hungarian), permitted the cancellation of naturalization certificates granted between 1918 and the creation of the Third Reich on January 30, 1933.² On July 26, 1933, a supplementary decree announced administrative standards for

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¹Cancellation of Citizenship and Denaturalization, July 14, 1933. I Reichsgesetzblatt 480 (1933). This will be referred to hereinafter by the initials RGB.

²Persons who were front-line troops with the German army in the last war, or who otherwise rendered special services to the Reich, were excepted.

enforcement of the act in terms of racial and political concepts.³ The law also authorized the expatriation of native-born German citizens living abroad (1) who "have so conducted themselves that German interests have been injured and they have broken faith with the German people" or (2) who "have not obeyed a summons to return issued by the Reich Minister of Interior." It was carried out by the publication of a number of individual decrees. Persons of pronounced liberal views (such as Thomas Mann and Albert Einstein) were listed among those deprived of citizenship.⁴

On September 15, 1935, the Reichstag promulgated the Reich Citizenship Law.⁵ By its terms, Jews were reduced in status from full citizens (Reichsbuerger) to citizens second-class (Staatsangehoeriger)—commonly translated as "national" or "subject." The law declared:

"Article 1. (1) A subject of the State is a person who belongs to the protective union of the German Reich and who, therefore, has particular obligations toward the Reich.

(2) The status of the subject is acquired in accordance with the provisions of the Reich and State Law of Citizenship.

Article 2. (1) A citizen of the Reich is only that subject who is of German or cognate blood and who, through his conduct, shows that he is both desirous and fit to serve faithfully the German people and the Reich.

(2) The right to citizenship is acquired by the granting of Reich citizenship papers.

(3) Only the citizen of the Reich enjoys full political rights . . ."

On November 14, 1935, the first order issued in execution of the citizenship law defined "Jewish person" as follows:

"Article 5. (1) A Jew is anyone who is descended from at least three grandparents who were racially full Jews.

(2) A Jew is also one who is descended from two full-Jewish grandparents if:

(a) he belonged to the Jewish religious community at the time this law was issued . . .

(b) at the time the law was issued, he was married to a person who was a Jew or was subsequently married to a Jew.

(c) he is the offspring from a marriage with a Jew, . . . which was contracted after the coming into effect of the Law for

³I RGB 538 (1933).

⁴See Kempner, *Who is Expatriated by Hitler*, (1942) 90 U. of Pa. L. Rev. 824.

⁵I RGB 1146 (1935).

the Protection of German Blood and Honor of September 15, 1935.

(d) he is the offspring of an extramarital relationship with a Jew . . . and will be born out of wedlock after July 31, 1936."⁶

On November 25, 1941, immediately prior to our entry into the war, the Nazis put into effect a wholesale denationalization of Jewish refugees. By the eleventh order issued under the citizenship law, Jews maintaining "an ordinary abode abroad" were denationalized and their property confiscated.⁷ The provisions were also made applicable to Jews subsequently emigrating from the Reich. By this decree against Jews "living abroad," effectuated without publication of names, they were shorn of the last vestiges of German nationality, reserved for non-Aryans under the Reich Citizenship Law and other Nazi measures.

"Living abroad" simply referred to those maintaining their

⁶Article 2 (2) declared that grandparents shall be deemed full-blooded Jews if they "belonged to the Jewish religious community." I RGB 1333 (1935). It is interesting to compare the definition of "Jewish person" appearing in the discriminatory laws later enacted by Italy and Hungary in 1938 and 1939: Hungarian Law to Restrict Jewish Participation in Public and Economic Life, Art. 1, May 4, 1939; Italian Royal Decree Law for the Defense of the Italian Race, Art. 8, November 17, 1938. Weinryb, *Jewish Emancipation Under Attack*, pp. 70, 82 (American Jewish Committee, 1942).

⁷I RGB 722, No. 133 (1941). The order read, in part, as follows:

"Sec. 1. A Jew who has his ordinary residence abroad cannot be a member of the German State (Staatsangehoeriger). Ordinary residence abroad is presumed when a Jew lives abroad under circumstances which indicate that his stay is not merely a temporary one.

"Sec. 2. A Jew loses his status as a member of the German State:

"(a) on the day this decree goes in effect, if on that day he has his ordinary residence abroad.

"(b) at the time he takes up residence in a foreign country, if he takes up ordinary residence abroad later.

"Sec. 3 (1) The assets of the Jew who loses his German State membership * * * are expropriated by the Reich * * * . * * *

"(2) Assets thus expropriated shall serve to further all purposes connected with the solution of the Jewish question.

"Sec. 4 (1) Persons whose assets are expropriated * * * must not acquire anything from a member of the German State by reason of death.

"(2) Gifts from members of the German State * * * are forbidden.

* * *

"Sec. 12. This decree applies also to the Protectorates of Bohemia and Moravia and the annexed Eastern territories."

In 1938, Italy issued a Royal Decree expatriating naturalized Jewish citizens and expelling from the realm those who entered after 1919. See Simpson, *The Refugee Problem*, p. 234 (London, 1939) for decree of Italian Council of Ministers issued September 1, 1938; and *Medvedieff v. Cities Service Oil Co.*, (S. D. N. Y., 1940) 35 Fed. Supp. 999. Hungary also authorized the invalidation of naturalization certificates issued since July 1, 1914. Law to Restrict Jewish Participation in Public and Economic Life, Art. 3, May 4, 1939, Weinryb, *loc. cit.*, p. 70.

abode (gewöhnlicher Aufenthalt) outside the Reich on November 26, 1941 for general residential purposes, as distinguished from a temporary stay. The decree applied to the Reich, the protectorates of Bohemia and Moravia, and the incorporated Eastern territories, which were treated as a part of Germany for the purposes of the order. Jewish refugees outside the Reich, even those in overrun countries then under German occupation (Belgium, Holland, etc.) were intentionally expatriated.⁸ One interesting feature of the order was that it did not affect the "non-Jewish" spouse or children of the refugee.

The decree prohibited refugees from receiving or inheriting anything of value from persons in Germany. Property confiscated was to be used for any purpose connected with a solution of the Jewish question.⁹

Under the Reich Citizenship Law, Jews residing in Germany retained German nationality and were regarded, at least outwardly, as distinct from aliens. They were not classified as foreigners but were accorded a definite nationality status with a continuing obligation of allegiance. They were deemed nationals owing permanent allegiance to the State.¹⁰ Jews were called, euphemistically enough, "subjects" of the Reich, even though it may be difficult to discover the affirmative rights to which they were entitled by virtue of their status. Prior to the era of mass deportations, concentration camps, and gas chambers, they were stripped of civil and political rights; eliminated from public office, the civil service, and the schools and universities; deprived of government pensions; restricted as to the right to appear in public; compelled to wear arm-bands with the Star of David insignia; regulated as to religious communities and school attendance; prohibited from marrying Aryans; subjected to a mass fine of one billion marks; forced to add "Jewish" given names; forbidden to wear military decorations or display the national colors; barred from almost all ordinary trades, occupations, businesses or professions; denied

⁸See Abel, Denationalization, (London, 1942) 6 Modern Law R. 57, 60. For further discussion of the 1941 decree, see Kauffmann, Denationalization and Expropriation, (London, 1942) 92 Law J. 93, and Abel, Effect of the German Denationalization Decree of November 25th, 1941, (London, 1945), 8 Modern Law R. 77.

⁹The Chief of the Security Police was authorized to determine, wherever necessary, whether property was subject to confiscation under the order. (Sec. 8(1)).

¹⁰Cf. Sec. 204 of the Nationality Act of 1940 (8 U. S. C. A. Sec. 604) which provides that inhabitants of outlying American possessions shall be nationals but not citizens of the United States.

the right to bequeath property at death; deprived of licenses to practice law and medicine; forced to report domestic and foreign-owned property, to deliver up articles made of gold, silver or platinum or containing precious stones or pearls, and to liquidate "non-Aryan" business enterprises.¹¹

Some writers have openly questioned whether such persons, lowered to the level of unwelcome guests, were to be considered members of the Reich even under the law itself.¹² After the

¹¹The following German measures, which are now largely matters of historical interest, illustrate the legalistic manner in which the Nazis went about their anti-Jewish task: Reich Flight Tax Law, December 8, 1931, as amended to December 24, 1941, I RGB 699 (1931), I RGB 571, 572 (1932), I RGB 392, 941 (1934), I RGB 844, 850 (1935), I RGB 961, 975 (1936), I RGB 1385 (1937), I RGB 125, 2443 (1939), I RGB 1605 (1940), I RGB 801 (1941); Law for the Restoration of the Professional Civil Service, Sec. 3(1), April 7, 1933, as amended to July 20, 1933, I RGB 175, 518 (1933), together with the First Regulation thereunder, April 11, 1933, I RGB 195 (1933); Law Against Overcrowding of German Schools and Higher Institutions, April 25, 1933, I RGB 225 (1933); Law Changing the Regulations Regarding Public Officers, June 30, 1933, I RGB 433 (1933); Reich Homestead Law, September 29, 1933, I RGB 685 (1933); Law for the Protection of German Blood and Honor, September 15, 1935, I RGB 1146 (1935); Reich Citizenship Law, September 15, 1935, I RGB 1146 (1935), together with the following Regulations issued thereunder: First, November 14, 1935, I RGB 1333 (1935); Second, December 21, 1935, I RGB 1524 (1935) (physicians); Third, June 14, 1938, I RGB 627 (1938); Fourth, July 25, 1938, I RGB 969 (1938); Fifth, September 27, 1938, I RGB 1403 (1938) (lawyers); Sixth, October 31, 1938, I RGB 1545 (1938) (patent bar); Eighth, January 17, 1939, I RGB 47, (1939) (dentists, veterinarians, pharmacists); Tenth, July 4, 1939, I RGB 1097 (1939) (Jewish schools and welfare administration); Eleventh, November 25, 1941, I RGB 722 (1941); Twelfth, April 15, 1943, I RGB 268 (1943); Thirteenth, July 1, 1943, I RGB 372 (1943) (confiscation of property at death); Law Regarding the Legal Status of Jewish Religious Communities, March 28, 1938, I RGB 338 (1938); Law Amending Regulations of Industrial Enterprises, July 6, 1938, I RGB 823 (1938); Second Regulation under Law Regarding Changing of Family and Given Names, August 18, 1938, I RGB 1044 (1938); Decree for Reporting of Jewish Owned Property, April 26, 1938, I RGB 414 (1938), together with Third Regulation thereunder, February 21, 1939, I RGB 282 (1939); Regulation Prohibiting Possession of Arms by Jews, November 11, 1938, I RGB 1573 (1938); Decree Imposing Atonement Fine, November 12, 1938, I RGB 1579 (1938), together with Regulation thereunder, November 21, 1938, I RGB 1638 (1938); Decree for Restoration of Street Appearances by Jewish Enterprise, November 12, 1938, I RGB 1581 (1938); Decree Ousting Jews from German Economic Life, November 12, 1938, I RGB 1580 (1938); Police Regulation of Appearance of Jews in Public, November 28, 1938, I RGB 1676 (1938); Decree for the Use of Jewish Property, December 3, 1938, I RGB 1709 (1938); Law Concerning Jewish Tenants, April 30, 1939, I RGB 864 (1939); Police Regulation of the Identification of Jews, September 1, 1941, I RGB 547 (1941).

¹²"It is even questionable whether by the law persons of 'non-German' blood are considered to be 'nationals' of the German State, that is, entitled to the diplomatic protection of the Reich. German nationality is granted * * * only to those who belong to the 'protective association' of the German Reich." Janowsky and Fagen, *International Aspects of German Racial Policies*, p. 60 (1937).

Nazi literature casts a revealing light on the kind of nationality status

November 1938 pogroms and imposition of the billion mark fine, Jews lost all semblance of governmental protection. It is quite clear, however, that the municipal law of Germany formally regarded them as subjects of the State. They were never absolved from their ties of loyalty to the Reich. For example, the mass fine was levied against "Jewish subjects of the State" (*der Juden deutsche Staatsangehoerigkeit*).¹³ In decrees directed against non-Aryans, it was customary to distinguish between Jewish "subjects" and "Jews of foreign nationality."¹⁴ Notwithstanding our inability to discern any reciprocal rights of protection, ordinarily associated with a nationality status, the Nazis retained their hold over the Jews as "subjects."

II

On September 18, 1944, immediately upon our invasion of Germany, the American Military Government issued Abrogation Law No. 1, revoking a series of discriminatory Nazi laws, including the citizenship law of September 15, 1935,¹⁵ and the denationalization decree of November 25, 1941.¹⁶ They were "de-

intended for German Jews. As early as 1920, the fourth and fifth points of the official National Socialist Party program declared—

"(4) * * * No Jew * * * may be a member of the nation.

"(5) Anyone who is not a member of the nation may live only as a guest, and must be regarded as being subject to laws pertaining to foreigners."

Alfred Rosenberg wrote in 1932 that—

"The Jew * * * must be regarded as a visitor, and falls under alien law like the subjects of a foreign state * * *"

See Bentwich, *The Refugees from Germany*, pp. 23-24 (London, 1936).

¹³Decree Imposing Atonement Fine on Jewish Subjects, November 12, 1938, I RGB 1579 (1938) and Regulation for Administration of Decree Imposing Fine, November 21, 1938, I RGB 1638 (1938).

¹⁴For example, Decree for the Reporting of Jewish Owned Property, Art. 1, April 26, 1938, I RGB 414 (1938); Third Regulation under Decree for Reporting of Jewish Property, Sec. 1 (2), February 21, 1939, I RGB 282 (1939); Second Regulation under Law in Regard to Changing Family and Given Names, Art. 1(2), August 18, 1938, I RGB 1044 (1938); Regulation Prohibiting Possession of Arms by Jews, Art. 3, November 11, 1938, I RGB 1573 (1938); Thirteenth Regulation under the Reich Citizenship Law, Sec. 2(1), July 1, 1943, I RGB 372 (1943). Some decrees were limited to "Jewish subjects" or "Jewish subjects and stateless Jews"; e.g., Decree Imposing Atonement Fine on Jewish Subjects, November 12, 1938, *supra*, and Police Regulation of the Appearance of Jews in Public, November 28, 1938, I RGB 1676 (1938).

¹⁵Military Government Gazette, Germany, Sixth Army Group Area of Control, No. 1, pp. 11-12. Law No. 1 is also reprinted in *Commerce Clearing House, War Law Service*, (2nd ed.), Foreign Supp., p. 75, 451.

¹⁶The Regulation issued under Abrogation Law No. 1 listed the November 25, 1941 decree as being supplementary to the Reich Citizenship Law and, therefore, "deprived of effect." *Military Government Gazette, Germany, U. S. Zone, Eastern Military District, No. 3, July 14, 1945, p. 44.*

prived of effect . . . within the occupied territory." (Art. I) Did the repeal automatically reinstate the citizenship of refugees expatriated by the November 25, 1941 order? If so, the result may involve compulsory repatriation, regardless of intervening change of personal situation or refugees' wishes to the contrary. In construing the abrogation law, therefore, it would seem advisable not to impose on the victims of Nazi oppression the burdens of enemy nationality, without providing any right of election. If possible, we should respect the individual's right to appraise his own interests in the light of present circumstances and decide for himself whether he shall reacquire German citizenship.

From the terms of the abrogation law itself, it is doubtful whether it was intended to apply outside Germany to refugees already settled in other countries, who did not wish to return or resume German citizenship. It is entirely possible, therefore, that refugees in England, France, Holland and other sanctuary nations were not directly affected. Article II merely declared that discriminatory German laws shall not be "applied judicially or administratively within the occupied territory." It is arguable that upon issuance of the military order, only Jews in the Reich were, without more, restored to German nationality.

As will presently appear, a determination whether German Jewish refugees again became German nationals, by virtue of our abrogation of the Nazi decrees on September 18, 1944, is of practical importance in a number of situations. They were either reinstated as German citizens, or if unaffected by the repeal, continued in most instances as stateless persons. If stateless, they would avoid the disadvantages of enemy nationality. Since we are still at war with Germany, hostilities not having yet been legally terminated, enemy nationality would attach to any resumption of German citizenship.¹⁷

III

Various State and federal statutes, dealing with such matters as internment of enemy aliens, naturalization of aliens of enemy nationality, inheritance of realty by aliens, jurisdiction of the federal courts over suits between citizens and foreign subjects,

¹⁷Although the combat phase of the last war closed with the signing of the armistice on November 11, 1918, the United States remained at war with Germany until the passage of the Joint Resolution of July 2, 1921 declaring it at an end. (42 Stat. 105). The treaty of peace with Germany was signed August 25, 1921. (42 Stat. 1939).

and eligibility to receive a return of property vested by the Alien Property Custodian, refer to "foreign citizen or subject," "citizen or subject of a nation with which the United States has been at war since December 7, 1941," "native, citizen, denizen or subject of the hostile nation," and "friendly alien." Under such laws, questions arise whether German refugees fall into the category of stateless persons (aliens of no particular nationality), or German citizens or subjects. The following list is illustrative of the type of legal issues encountered:

(1) Would federal courts having original jurisdiction over controversies between a citizen and a "foreign State, citizen or subject" have jurisdiction over a suit between an American citizen and a German refugee, as a "foreign subject"?¹⁸ If the refugee were stateless, and not the subject of any foreign country, it has been held that he would not be a "foreign subject" under the Judicial Code.¹⁹ The case would have to be tried in the State courts and could not be removed to the district court.

(2) Could a Polish-born Jew naturalized in Germany prior to 1933, and later denationalized by the Nazi decree of November 25, 1941, be interned as a "native, citizen, denizen or subject of the hostile nation" under the Alien Enemy Act?²⁰ The question would necessarily arise if he applied for a writ of habeas corpus to effect his release on the ground that he was not an enemy alien, but a stateless person.²¹

(3) Could a refugee, formerly a naturalized German citizen, who filed his declaration of intention less than two years before Pearl Harbor claim that he was not an enemy alien and, therefore, eligible for naturalization? Section 326(a) of the Nationality Act of 1940 (8 U. S. C. A. Sec. 726(a)) limits the naturalization

¹⁸Sec. 24(1)(c) of the Judicial Code, as amended, (28 U. S. C. A. Sec. 41 (1)(c)) provides for original jurisdiction of the district courts over all suits of a civil nature where the matter in controversy "is between citizens of a State and foreign States, citizens, or subjects." Sec. 28 of the Judicial Code, as amended (28 U. S. C. A. Sec. 71) permits a defendant in any suit of which the district court has original jurisdiction to remove the proceeding to the federal court.

¹⁹*Medvedieff v. Cities Service Oil Co.*, (S. D. N. Y., 1940) 35 Fed. Supp. 999.

²⁰The Alien Enemy Act authorizes "all natives, citizens, denizens, or subjects of the hostile nation" to be apprehended and interned as "alien enemies." Act of April 16, 1918, 40 Stat. 531, 50 U. S. C. A. Sec. 21, derived from Act of July 6, 1798, 1 Stat. 577.

²¹*United States ex. rel. Schwarzkopf v. Uhl*, (C. C. A. 2, 1943) 137 F. (2d) 898.

of enemy aliens to those who became declarants at least two years before the beginning of the war.²²

(4) Could a refugee inherit realty in those States which limit the right to take, hold and transmit land to "friendly aliens?"²³ An alien of enemy nationality would probably not be a "friendly alien" but a stateless person would very likely qualify.²⁴

(a) If the State authorities ruled that the refugee was barred from taking because he was a German citizen and, therefore, not a "friendly alien," question would still remain whether such action would automatically determine that the power-of-sale provisions of the German treaty (1923) were then available to him as a German national.²⁵

(5) Would a non-resident refugee living in England, France, Holland, etc., who became an heir to realty located in a State which prohibited or restricted the taking or holding of land by non-resident aliens,²⁶ be entitled to exercise the power to sell and

²²The Act declares: "An alien who is a native, citizen, subject, or denizen of any country * * * with which the United States is at war may be naturalized * * * if such alien's declaration of intention was made not less than two years prior to the beginning of the state of war * * *"

²³E.g., Ga. Code Ann., Ch. 79, Sec. 303; Md. Ann. Code (1939), Art. 3, Sec. 1; N. J. Rev. Stat. (1937), Sec. 46: 3-18, amended in 1943: R. S. Cum. Supp. (1944), p. 541; Purdon's Penn. Stat. Ann. (1931), Title 68, Sec. 28; Va. Code Ann. (1942), Sec. 66.

²⁴*Techt v. Hughes*, (1920) 229 N. Y. 222, 128 N. E. 185, cert. denied, 254 U. S. 643.

On July 1, 1942, prior to the military abrogation measures of September 18, 1944, the Attorney General of New York ruled that expatriated German refugees were eligible to take and hold real estate under Sec. 10 of the New York Real Property Law as "friendly aliens." 49 McKinney's Consol. Laws of New York, Ann., p. 25. The state statute was later changed in 1944 by amendment abolishing the limitation as to "friendly aliens," and extending the right to acquire realty to all aliens. *Id.* p. 11.

²⁵For the German treaty provisions, see point (5), P. 381 *infra*.

²⁶E.g., Purdon's Penn. Stat. Ann. (1931), Title 68, Sec. 32; Hawaii Rev. Laws (1935), Secs. 1592, 1596. Many States limit the amount of property or the length of time that land may be held by aliens other than those who are residents or declarants. A term varying from five to twenty-one years is usually allowed for disposition of the property. Ark. Const. (1874), Art. II, Sec. 20, Ark. Stat. (1937), Sec. 272; Conn. Gen. Stat. (1930), Secs. 5055-5056; Burn's Ind. Stat. Ann. (1933), Ch. 5, Secs. 56-501, 56-505; Iowa Const., Art. I, Sec. 22, Iowa Code (1939), Ch. 447, Sec. 10214; Ky. Rev. Stat. (1944), Sec. 381.330; Minn. Stat. (1941), Sec. 500.22, as amended, L. 1945, C. 280; Miss. Code Ann. (1942), Sec. 842; Mo. Rev. Stat. Ann. (1943), Sec. 15230; Mont. Rev. Codes (1935), Sec. 7088; N. H. Rev. Laws (1942), Ch. 259, Sec. 19; Okla. Stat. Ann. (Perm. ed.), Title 84, Sec. 229, Title 60, Sec. 123; Oreg. Comp. L. Ann. (1940), Title 61, Sec. 107; Vernon's Tex. Civil Stat. Ann. (1935), Arts. 166, 167-168, 170; Wash. Const., Art. 2, Sec. 33, Remington's Wash. Rev. Stat. Ann. (1933), Secs. 10581 (a), 10582, 10584; Wyo. Const., Art. I, Sec. 29, Wyo. Rev. Stat. (1931), Sec. 88-4004. Some States which totally disqualify non-resident aliens, or limit the amount of realty owned by them, except land acquired by descent or devise. It is commonly provided that property obtained by succession or testamentary dispo-

remove the proceeds, reserved in such cases to German "nationals" by the treaty with Germany, signed December 8, 1923? (44 Stat. 2132)²⁷

Many States preserve to some extent the common law rule against aliens owning land by disqualifying those who are non-residents, "non-friendly," ineligible for citizenship, or who have not declared their intention of becoming citizens, from taking, holding or transmitting title to real estate. Others merely limit the amount of property acquired or restrict the tenure of holding.

To relieve against the bar of alienage, the Treaty of Friendship and Commerce with Germany (1923) provided:

"Where, on the death of any person holding real . . . property . . . within the territories of one High Contracting Party, such property . . . would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property . . . is . . . situated, such national shall be allowed a term of three years in which to sell the same . . . and withdraw the proceeds thereof. . . ." (Article IV)²⁸

Private rights under such treaties are not abrogated by war.²⁹ The purpose of the treaty provision was to confer on the foreign heir a power-of-sale where he was ineligible to take on account of

sition may be owned or held by them for a prescribed term of years. It seems improbable that any conflict could arise between the 3-year power-of-sale provision of the German treaty and those statutes which allow three or more years in which the realty may be sold.

²⁷As to effect of treaties on disability of non-resident aliens to take realty at common law, and under statutory regulations, see annotation, 4 A. L. R. 1377, 1391-1395 (1919).

²⁸Of the six countries with which we have been at war since December 7, 1941 (Germany, Italy, Japan, Hungary, Roumania and Bulgaria), such treaty provisions were in effect only with Germany, 1923, *supra*, and Hungary, 1925 (Art. IV), 44 Stat. 2443. Power-of-sale provisions are also found in existing treaties with Brazil (1828, 8 Stat. 392), Switzerland (1850, 11 Stat. 590, Bolivia (1858, 12 Stat. 1010), Great Britain (1899, 31 Stat. 1939), Guatemala (1901, 32 Stat. 1945), Spain (1902, 33 Stat. 2107), Canada (1921, 42 Stat. 2147), Salvador (1926, 46 Stat. 2820), Honduras (1927, 45 Stat. 2620), Norway (1928, 47 Stat. 2138), Austria (1928, 47 Stat. 1879), and Poland (1931, 48 Stat. 1507, 1510-1511). They were also incorporated into the treaties with Esthonia (1925, 44 Stat. 2380), Latvia (1928, 45 Stat. 2642), and the Free City of Danzig (1934, 48 Stat. 1680). See *Treaties in Force* on December 31, 1941, State Department, Washington, D. C. (1944).

²⁹*Techt v. Hughes* (1920) 229 N. Y. 222, 128 N. E. 185, cert. denied, 254 U. S. 643; annotation, *Effect of War on Treaty Rights* (1921) 11 A. L. R. 180. Survival of the reciprocal inheritance provisions of the German treaty (1923) following the outbreak of World War II has been the subject of recent litigation pending in the federal courts: *Crowley v. Allen*, (D. Ct. Cal., 1943) 52 F. Supp. 850, reversed in *Allen v. Markham*, (C. C. A. 9, 1946) 14 LW 2771, after federal jurisdiction had been sustained by the Supreme Court and the cause remanded to the Circuit Court of Appeals for decision on the merits. *Markham v. Allen*, (1946) 326 U. S. 490, 66 S. Ct. 296, 90 L. Ed. 254, reversing (C. C. A. 9, 1945) 147 F. (2d) 136.

alienage. It was intended that if barred from outright ownership of the property itself, he might have its money equivalent. The treaty power-of-sale constituted an original, independent right in land, not dependent on local law but operative regardless of conflicting State statutes.³⁰ It has also been held to include the right to enter into exclusive possession, receive the rents and profits, and make improvements preparatory to consummating a sale within the prescribed period.³¹ The power-of-sale would be available in those States which disqualified non-resident or "non-friendly" aliens from taking or holding any interest in land.

(a) Question could also arise whether the treaty power-of-sale provisions would be available to a resident refugee confronted with local restrictions against aliens generally owning land. Although in a majority of States no restriction is imposed on the resident alien, and he is allowed to take and hold, by purchase or descent, on a par with citizens,³² a substantial number disqualify or condition his capacity in terms of such factors as amount of property acquired, tenure of holding, and whether he is "friendly," eligible for citizenship, or a declarant.³³ Could a resident German

³⁰*Techt v. Hughes*, Footnote 29, *supra*; *Hauenstein v. Lynham*, (1879) 100 U. S. 483, 25 L. Ed. 628; *Blythe v. Hinckley*, (1901) 180 U. S. 333, 341, 21 S. Ct. 390, 45 L. Ed. 557; *Jecker v. Magee*, (1870) 9 Wall. 32, 19 L. Ed. 571; *Sullivan v. Kidd*, (1921) 254 U. S. 433, 440, 41 S. Ct. 158, 65 L. Ed. 344.

The treaty confers an interest in land. The power of sale may be exercised even where the non-resident alien is disqualified from taking under state law; *Hauenstein v. Lynham*, *supra*; *In re Beck*, (Surr. 1890) 11 N. Y. S. 199; *Goos v. Brooks*, (1929) 117 Neb. 750, 223 N. W. 13, 15; *Bahaud v. Bize*, (C. C. D. Neb. 1901) 105 Fed. 485, 487; *Butschkowski v. Brecks*, (1913) 94 Neb. 532, 143 N. W. 923; *Yeaker's Heirs*, (1862) 61 Ky. 33, 39, *aff'd*, (1870) 9 Wall. 32, 19 L. Ed. 571; *Dockstader v. Kershaw*, (Del. 1903) 4 Pennewill's 398; *Doehral v. Hillmer*, (1897) 102 Ia. 169, 71 N. W. 204; *Opel v. Shoup*, (1896) 100 Ia. 407, 69 N. W. 560, 562; *Colson v. Carlson*, (1924) 116 Kan. 953, 227 P. 360, 362; *Miller v. Clausen*, (C. C. A. 8, 1924) 299 Fed. 723; *Ripley v. Sutherland*, (App. D. C. 1930) 40 F. (2d) 785, 786, *cert. den.* (1930) 282 U. S. 865.

³¹*Kull v. Kull*, (N. Y. 1885) 37 Hun. 476, 479, 480; *Schultze v. Schultze*, (1893) 144 Ill. 290, 297, 33 N. E. 201; *Ahrens v. Ahrens*, (1909) 144 Ia. 486, 489, 123 N. W. 164; *Pierson v. Lawler*, (1917) 100 Neb. 783, 161 N. W. 419.

³²*Rev. Mont. Codes* (1935), Sec. 7088; *Okla. Stat.* (1941), Title 84, Sec. 229; *State v. Boston, Concord & Montreal Railroad*, (1853) 25 Vt. 433, 439-440; *Wyo. Const.*, Art. I, Sec. 29. Some states permit aliens eligible for citizenship to own realty as freely as citizens: *Florida Const.*, Dec. of Rights, Sec. 18, *Florida Stat. Ann.* (1944), Sec. 731.28; *Idaho Code Ann.* (1932), Ch. 1, Sec. 23-101; *N. Mex. Const.*, Art. II, Sec. 22, *N. Mex. Stat. Ann.* (1941), Ch. 75, Sec. 121.

³³Treaty questions could arise where limitations are placed on the amount of realty that may be held by a resident alien, or where enemy nationality totally disqualifies him from acquiring land. *Purdon's Penn. Stat. Ann.* (1931), Title 68, Sec. 32; *Hawaii Rev. Laws*, (1935), Sec. 1592, 1596; and "friendly alien" statutes listed in footnote 23. It would seem that a conflict with the treaty provisions could not possibly arise in those States where resident, non-

refugee, interested as an heir or devisee, exercise the treaty power-of-sale with respect to land located in such States?

(6) Under some State statutes, the right of non-resident aliens to inherit realty may be dependent on the existence of a reciprocal right in favor of American citizens under the laws of the country of which the alien heir is a "citizen and inhabitant."³⁴ Where the alien heir is a German refugee of uncertain nationality living in Belgium, Holland, etc., it is doubtful whether he is a "citizen and inhabitant" of any country. Is the reciprocity requirement applicable in his case, and if so, would the refugee be entitled to inherit?

(7) Would a German refugee living in a former occupied country, whose real or personal property had been vested by the Alien Property Custodian, be eligible to receive a return under Sections 32(a)(2)(C) and 32(a)(2)(D) of the Trading with the enemy Act, as amended, as being neither a person "voluntarily resident within" enemy territory since December 7, 1941, nor a "citizen or subject of a nation with which the United States has . . . been at war"?³⁵

declarant aliens are allowed a term of more than three years in which to hold or sell. *Ariz. Code Ann.* (1939), Ch. 39, Sec. 111; *Smith-Hurd Ill. Stat. Ann.* (Perm. ed.), Ch. 6, Sec. 1-2; *Burn's Ind. Stat. Ann.* (1933), Ch. 5, Secs. 56-501, 56-505; *Ky. Rev. Stat.* (1944), Sec. 381.320; *Minn. Stat.* (1941), Sec. 500.22, as amended, L. 1945, Ch. 280; *Mo. Rev. Stat. Ann.* (1943), Sec. 15230; *S. C. Code* (1942), Secs. 7790, 8907; *Vernon's Tex. Civil Stat. Ann.* (1931), Arts. 166, 167, 170; *Wash. Const.*, Art. 2, Sec. 33; *Remington's Wash. Rev. Stat. Ann.* (1933), Secs. 10581(a), 10582, 10584. It is unlikely that statutes limiting the ownership of land to aliens eligible for citizenship would be applicable to persons originating from Germany. *Ariz. Code Ann.* (1939), Ch. 71, Sec. 201-210; *Cal. Gen. Laws*, Act 261, Sec. 1; *Florida Const.*, Dec. of Rights, Sec. 18; *Florida Stat. Ann.* (1944), Sec. 321.28; *Idaho Code Ann.* (1932), Ch. 1, Sec. 23-101; *La. Const.*, Art. 20, Sec. 1; *Mont. Rev. Codes* (1935), Secs. 6802.1(a), 6802.2; *N. Mex. Const.*, Art. II, Sec. 22, *N. Mex. Stat.* (1941), Ch. 75, Sec. 121; *Oreg. Laws Ann.* (1940), Title 61, Sec. 101.

³⁴E.g., Sec. 259 of the California Probate Code: *Deering, Civil Proced. and Probate Codes of Cal.* (1941), p. 32, footnote 38, *infra*; cf. *Oreg. Comp. L. Ann.* (1940), Title 61, Sec. 107.

³⁵Trading with the enemy Act, as amended, 50 U. S. C. A. App., Secs. 1-31, pp. 189-311 (1928), with Sec. 5(b), as amended by Title III of the First War Powers Act, 1941, in the Pocket Part. Sec. 32(a)(2) was added March 8, 1946 by Pub. Law 322, 79th Cong. See House Rep. No. 1269, November 20, 1945, and Sen. Rep. No. 920, February 4, 1946, 79th Cong. ("Return of Alien Property to Persons Not Hostile to the United States")

Prior to 1922, an American woman marrying an alien lost her citizenship and acquired the nationality of her husband. Prior to 1933, the same rule applied in England to British women marrying foreigners. Sec. 10(2) of the British Nationality and Status of Aliens Act, 1914. See Kauffmann, *Denationalization and Expropriation*, (London, 1942) 92 *Law J.* 93; Simpson, *The Refugee Problem*, p. 237 (London, 1939). Had such statutes been in effect during World War II, question would have arisen whether an American or British woman marrying a refugee thereby lost her citizenship on the ground that he was a German citizen, or retained it because he possessed none which she could assume.

IV

It is conceivable that German refugees may be regarded for some purposes as "subjects" of the countries where they have acquired permanent domiciles. In *The Pizzaro case*,³⁶ Justice Story held that an alien of enemy nationality may, under international law, be a "subject" of another country where he resides and carries on business. During the war of 1812, British subjects resident in Spanish territory had established themselves in the shipping trade there. One of their vessels flying Spanish colors, while en route from Liverpool with a cargo of non-contraband merchandise, was captured as a prize by an American merchantman. The Spanish treaty of 1795 granted "subjects" of Spain, and citizens and inhabitants of the United States, a reciprocal right to carry on non-contraband trade from belligerent ports in the event either nation were engaged in war. In ordering the vessel released, the court ruled that the British owners, although enemy aliens, were also "subjects" of Spain. It is well established that such resident alien "subjects," bound by ties of local allegiance to the country where they reside and whose protection they enjoy, may even be tried for acts of treason.³⁷

It is conceivable that State authorities may allow a German refugee of uncertain nationality residing in Belgium, Holland, etc., to inherit realty as a "friendly alien" on the ground that he is a Belgian, Dutch, etc. "subject." It would seem, however, that if he is a German citizen, the fact that he may also be a "subject" of Holland, in the sense of owing temporary allegiance, would not prevent his being an enemy alien for other statutory purposes.³⁸ A

³⁶(1817) 2 Wheat. 227, 246, 4 L. Ed. 226.

³⁷*Carlisle v. United States*, (1872) 16 Wall. 147, 154, 155, 21 L. Ed. 426; *United States v. Wong Kim Ark*, (1896) 169 U. S. 649, 694, 695, 18 S. Ct. 456, 42 L. Ed. 890. See also Cockburn, *Nationality*, p. 139 (London, 1869).

³⁸There is an ever-present possibility of conflict between the views of State officials and the Alien Property Custodian. Cf. *Estate of Knutzen*, (Cal. App. 1945) 70 A. C. A. 856, where the Custodian vested the right, title and interest of a non-resident German heir to an intestate estate comprising realty. State authorities held that the alien heir did not succeed to any interest which the Custodian could take over because of a California statute which prohibited non-resident aliens from acquiring realty unless a reciprocal right existed in favor of American citizens under the laws of the country of which such aliens were citizens and inhabitants. Sec. 259 of the California Probate Code, footnote 34, *supra*. It seemed rather clear, however, from the language of the German treaty (1923), and the purpose it was designed to serve, that, independently of local statute, a proprietary interest incident to the power-of-sale had been conferred. The District Court of Appeal nevertheless adopted a unique construction which seemingly rendered the treaty provisions meaningless. It ruled that rights under the treaty depended on State statutes first authorizing alien heirs to take title to land. (p. 861) The opinion made no reference to

State may consider the refugee a "friendly alien" on the supposition that he is stateless, or the subject of the country where he resides while the Alien Property Custodian may wish to treat him as a "national of a designated enemy country (Germany)." It is true that under Sec. 5(b) of the Trading with the enemy Act, as amended by Title III of the First War Powers Act, 1941, (55 Stat. 838), and Executive Order No. 9095, as amended, (7 Fed. Reg. 1971, 5205; 10 Fed. Reg. 6917), the Custodian's vesting powers are not confined to enemy aliens, but extend to foreign nationals. He could vest the interest of a stateless refugee simply as that of a foreign national.³⁹ If for some reason, however, the Custodian vested on the basis of a determination that it represented property of a "national of a designated enemy country (Germany)," a question might then arise whether it would later prejudice eligibility to receive a return under Sec. 32(a)(2)(D) of the Act, as amended, as a person not a "citizen or subject" of Germany.

Another occasion for conflict could arise over the inheritance rights of refugees of uncertain nationality under the German treaty of 1923. Under statutes prohibiting ownership of realty by non-resident aliens, title ordinarily descends to resident heirs, or in their absence, escheats to the State.⁴⁰ State authorities, finding that a refugee heir living in Belgium, Holland, etc., is a non-resident alien of no nationality (stateless), may declare title vested in resident American heirs, or forfeited to the State. The Cus-

a California case holding that under treaty power-of-sale provisions alien heirs, incapable of taking under local law, "may freely exercise the privileges guaranteed by the treaty." *Siemessen v. Bofer*, (1858) 6 Cal. 250. It also omitted any mention of *People v. Gerke and Clark*, (1855) 5 Cal. 381, 383, where the court pointed out that not only had many cases arisen where aliens claimed to inherit by virtue of such treaties, but that "in all of them * * * the stipulations were enforced in favor of the foreign claimants," notwithstanding "disability to succeed to property" due to alienage. The *Knutzen* case is now pending on appeal in the Supreme Court of California, 3 Civil No. 7122. The California statute was recently amended so that the alien heir's right to take was made dependent upon the existence of reciprocity under the laws of the country of which he is a "resident" instead of a "citizen and inhabitant." The burden of proof was also changed. *Stat. and Amend. to the Codes, Cal.* (1945), Ch. 1160.

³⁹*Cf. Medvedieff v. Cities Service Oil Co.*, (S. D. N. Y., 1940) 35 Fed. Supp. 999, where it was held that statelessness prevented a refugee from being a "foreign subject" under the Judicial Code.

⁴⁰E.g., Sec. 259.2 of the California Probate Code: *Deering Cal. Civil Proced. and Probate Codes* (1941), p. 32, prior to repeal in 1945. The following statutes expressly declare that title shall escheat to the State upon the alien's failure to sell during the statutory period of holding, become a citizen, or comply with other conditions precedent to eligibility. *Ky. Rev. Stat.* (1944), Sec. 381.300; *Miss. Code Ann.* (1942), Sec. 842; *Mo. Rev. Stat. Ann.* (1943), Sec. 15232; *Mont. Rev. Codes*, Secs. 7089-7090; *Okla. Stat. Ann.* (Perm. ed.), Title 60, Secs. 124-127; *Vernon's Tex. Civil Stat. Ann.* (1935), Art. 172.

todian, however, could conceivably determine that he is a German citizen whose right, title and interest, by virtue of the German treaty, may be vested as property belonging to a "national of a designated enemy country."

V

As a result of the military abrogation of discriminatory Nazi laws, as well as the acquisition of new domiciles by refugees settled in other countries, we are left with the question whether they must now be regarded as repatriated German citizens or subjects. If their status were to depend on German municipal law as it existed at the time of Pearl Harbor, and until the defeat of Germany, German nationality could not be attributed to them.⁴¹ While the abrogation proceeded from the highest of humane motives, it nevertheless raised novel legal questions regarding military revision of enemy nationality laws. The Hague Regulations of 1899 and 1907 concerning the rules and customs of war on land, enjoin upon the occupying power a duty to respect existing laws.⁴² It may not be immediately apparent how a fundamental change in the German nationality code tied in with military necessity. Putting aside any attempt at a definitive conclusion on that score, we are obliged to consider whether German refugees are again German nationals as an inevitable consequence of our rescinding the Nazi decrees. If it is at all possible to avoid compulsory changes in nationality, and instead recognize an individual right of election, the result would be in keeping with the special regard for

⁴¹On the right of each nation to determine, according to its own municipal law, who shall be its nationals, see *MacKenzie v. Hare* (1915) 239 U. S. 299, 36 S. Ct. 106, 60 L. Ed. 297; *United States ex rel. Schwarzkopf v. Uhl*, (C. C. A. 2, 1943) 137 F. (2d) 898; *Medvedieff v. Cities Service Oil Co.*, (S. D. N. Y., 1940) 35 Fed. Supp. 999; I Oppenheim, *International Law* (5th ed.), Sec. 302; Art. 1 of Convention on Nationality adopted at Hague Conference for the Codification of International Law (1930): *Meetings of the Committees*, vol. 2, *Acts of the Conference for the Codification of International Law*, p. 244; *Minutes of the First Committee, Nationality, Society of League of Nation's Publications*, V, Legal (1930), V, 15.

⁴²Art. 43 of the Hague Conventions authorize the occupying power to restore public order, "while respecting * * * the laws in force in the country." See Hague Conventions of 1899 and 1907, 32 Stat. 1821, 36 Stat. 2277. Articles 42 to 56 deal with "Military Authority over Hostile Territory." Scott, *The Hague Conventions and Declarations of 1899 and 1907*, pp. 100-132 (1915). Cf. *Ochoa v. Hernandez*, (1913) 230 U. S. 139, where the court refused to recognize the validity of a regulation issued by the commanding officer of American forces occupying Puerto Rico during the Spanish-American war. The military order reduced the period required for acquisition of title by prescription from 20 years to 6 years. It ruled that the change in existing law was beyond the power of the military governor and violative of due process.

refugees already shown by various nations working toward a solution of their peculiar problems.⁴³

A comprehensive definition of "refugees coming from Germany" was incorporated in a Convention concerning their status, signed in 1938. On February 7-10, 1938, an Inter-Governmental Conference convened at Geneva under the auspices of the League of Nations. It adopted a "Convention concerning the status of refugees coming from Germany,"—signed February 10, 1938 and put into effect by Great Britain, France, Belgium, Holland, Denmark, Norway and Spain. Although not a signatory, the United States sent official observers to the Conference. Sweden, Czechoslovakia and the Soviet Union, as well as the United States, later observed and enforced its provisions in practice as much as possible.

The Convention continued the issuance of Nansen certificates of identification and travel to refugees, and provided for privileges of sojourn and residence, access to the courts, labor conditions, taxation, welfare, and protection against expulsion and forced repatriation.⁴⁴ It defined "refugees coming from Germany" as—

"Article 5. (a) Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or in fact, the protection of the German Government.

(b) Stateless persons . . . who have left German territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the German Government."⁴⁵

It would seem that renationalization of such refugees now residing in allied and liberated areas should not come as an unavoidable result of our military occupation of Germany. It is submitted that the abrogation of Nazi laws, apart from its intricate legal basis, need not necessarily preclude a right of election by the

⁴³See Holborn, *The Legal Status of Political Refugees: 1920-1938*, 32 *Am. J. Int. Law* 680 (1938); Simpson, *The Refugee Problem*, pp. 227-261 (London, 1939). As to the role played by the League of Nations and the High Commissioner for Refugees from Germany, see Bentwich, *The Refugees from Germany*, pp. 219-228 (London, 1936). The Evian and Bermuda conferences of 1938 and 1943 are reported in Tartakower and Grossman, *The Jewish Refugee*, pp. 401-428 (1944).

⁴⁴The office of High Commissioner for Refugees Coming from Germany had been created in 1933 under League sponsorship. On July 4, 1936, a Provisional Arrangement concerning the status of such refugees was adopted at an Inter-Governmental Conference held under League auspices. Six countries (France, Belgium, Holland, Switzerland, Denmark, and Norway) signed the arrangement and it became effective August 4, 1936. Later, Great Britain and Spain adopted the provisions relating to Nansen certificates. The Provisional Arrangement defined "refugees" and provided for Nansen "passports," i.e. certificates of identification and travel.

⁴⁵See Holborn, *The Legal Status of Political Refugees: 1920-1938*, loc. cit., pp. 695-696.

refugee, permitting him, if he so desires, to continue in his status of no- or non-German nationality. Many would doubtless be horrified at the thought that they were again German subjects. A right of election, to relieve against the rigors of automatic changes in nationality, has been accorded judicial protection in the following instances: (1) inhabitants of territory annexed as a result of war,⁴⁶ (2) loyal subjects residing in colonies engaged in revolution and declaring their independence from the mother country,⁴⁷ (3) native-born minor child of naturalized parents who return to their country of origin and take steps to repatriate themselves.⁴⁸ The right of subjects residing in territory ceded to another nation to retain their original nationality was recognized in the treaty by which the United States acquired the Virgin Islands from Denmark in 1917 (Art. 6, 39 Stat. 1706), and in the treaties of peace terminating the Spanish-American (Art. IX, 30 Stat. 1754), Franco-Prussian, and Russo-Japanese wars.⁴⁹

Obviously, the repeal of the German nationality code was prompted by a desire to remove the stigma inflicted on innocent persons who were the first to endure Nazi oppression. It sought to reinstate their dignity as human beings. However, our zeal in carrying out this purpose should not foreclose a right of election not to resume German nationality. Otherwise, the result would be equivalent to compulsory repatriation and, in some instances, saddling the objects of our benevolence with the doubtful benefits and certain burdens of enemy nationality.⁵⁰

Recognition of a right of election would be in line with long-standing American policy favoring an inherent right of expatriation. ". . . the right of expatriation is a natural and inherent right of all people . . . (and) any . . . order or decision of any officer of

⁴⁶Boyd v. Thayer, (1892) 143 U. S. 135, 162, 12 S. Ct. 375, 36 L. Ed. 103; United States ex. rel. Schwarzkopf, (C. C. A. 2, 1943) 137 F. (2d) 898, 902.

⁴⁷Inglis v. The Trustees, etc., (1830) 3 Pet. 99, 121, 122, 126, 7 L. Ed. 617.

⁴⁸Perkins v. Elg, (1939) 307 U. S. 325, 59 S. Ct. 884, 83 L. Ed. 1320. See also Sec. 407 of the Nationality Act of 1940, 8 U. S. C. A., Sec. 807.

⁴⁹For the treaties of peace ending the Franco-Prussian and Russo-Japanese wars, see Bentwich, *Law of Private Property in War*, p. 65 (London, 1907).

The right of election is recognized in the return provisions of Sec. 9(b) of the Trading with the enemy Act. The concluding paragraph of Sec. 9(b), added June 5, 1920 (41 Stat. 977), speaks of German subjects who, "through exercise of option," become citizens or subjects of another country under the treaties of peace. 50 U. S. C. A. App., Sec. 9(b), p. 245 (1928).

⁵⁰For example, Sec. 32(a)(2)(D) of the Trading with the enemy Act, as amended, bars a "citizen or subject of a nation with which the United States has at any time since December 7, 1941 been at war" from eligibility to receive a return of property vested by the Alien Property Custodian.

the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic." Act of July 27, 1868, 15 Stat. 223, 8 U. S. C. A. Sec. 800.⁵¹ A right of election would also be in keeping with the special consideration shown refugees by inter-governmental committees and conventions, and in the operating procedures of immigration authorities and officials charged with enforcement of wartime restrictions against aliens.

Hay, an early writer, argued forcefully in favor of a right of election and against compulsory repatriation of emigrants. He declared—

"Nor can it be deemed of any consequence that the emigrant may be permitted . . . to return and to resume his rights . . .

* * * *

. . . to return to one's native country must be a matter of duty or of choice. That it is a matter of duty has never yet been affirmed. If it be a matter of choice, his rights cannot revert to him until the choice be made. The truth, however, is that a different election has been made. The argument supposes that an emigrant has quitted his country with a determination to return no more, and he is content that the door shall be shut against him forever. The privilege of returning he does not ask. If it be granted as a privilege, he may waive it, according to the well-known maxim. . . , no man is bound to accept a benefit."⁵²

Although the 1938 Convention on German refugees dealt specifically with the plight of stateless and other refugees, municipal legislation of various nations during the war, except for a relatively few instances, did not accord them preferential treatment.

⁵¹See Talbot v. Janson (1795) 3 Dall. 133, 162, 1 L. Ed. 540; Hay, Treatise on Expatriation (1814). Lord Chief Justice Cockburn, in his careful study of nationality problems, supported the right of expatriation. He wrote—

"Shall a person who quits his own country * * * with the intention * * * of finally and forever renouncing his own, still continue to be a subject of the old country during the probationary period * * * before he can be admitted as a subject of the new? The answer should unhesitatingly be in the negative * * *. * * * the subject, who thus quits his country, *sans esprit de retour*, * * * has done all that in him lay to sever the ties that bound him to his original country; has removed himself from the sphere of its laws and its authority * * *. * * *

"* * * it should be free to everyone to * * * denationalize himself, and to transfer his allegiance to another country. * * * emigration with the intention of expatriation and of becoming a citizen of another State should have the effect of putting an end to the relation of subject * * *. * * * By a system of law, * * * giving effect to these principles, aliens would be placed on the footing which a generous comity should dictate; * * * every one would be at liberty to act upon the maxim *ubi bene, ibi patria*, and to seek fortune and happiness where he thought he was most likely to find it * * *." Cockburn, Nationality: or the Law Relating to Subjects and Aliens, pp. 202-203, 214, 216. (London, 1869).

⁵²Hay, A Treatise on Expatriation, p. 14, 15 (1814).

Our Alien Enemy Act, for example, covered even stateless refugees since it extended not only to "citizens, denizens or subjects" but "natives" of the hostile nation. (50 U. S. C. A. Sec. 21). Administrative practice of visa and immigration authorities, however, permitted some relaxation: e.g., affidavits were accepted in explanation of a refugee's inability to obtain a passport; Nansen certificates were recognized; affidavits were permitted in lieu of the customary birth certificate or police certificate attesting to lack of criminal record; literacy tests were waived; and an exemption was granted excluding refugees from classification as criminals liable to exclusion because of political offenses.⁵³

No special provisions on refugees were incorporated in Executive Order No. 8389, as amended, imposing freezing and blocking controls against nationals of foreign countries, including Germany.⁵⁴ Licenses and orders issued by the Treasury thus far have omitted exemptions in their favor.⁵⁵ Refugees were also not specially pro-

⁵³In Australia, the National Security (Aliens Service) Regulations made special provision for "refugee aliens" under a definition embracing persons of no nationality, uncertain nationality, or enemy nationality, in respect of whom it was determined that they had been "forced to emigrate from enemy territory on account of * * * religious, racial or political persecution * * *." Manual of National Security Legislation, v. 1, p. 51 (Commonwealth of Australia, Canberra, 4th ed. 1943). Some of the South American countries (e.g. Brazil) excepted the property of German refugees from confiscatory and other restrictive measures against enemy aliens.

⁵⁴6 Fed. Reg. 1400; 6 Fed. Reg. 2897.

⁵⁵German refugees in this country, along with other resident aliens, of enemy or non-enemy nationality, were generally licensed by the Treasury. General License No. 42, issued June 14, 1941 and amended February 23, 1942, provided: "A general license is hereby granted (a) Licensing as a generally licensed national any individual residing in the United States on February 23, 1942. * * *" 6 Fed. Reg. 2907; 7 Fed. Reg. 1492. The wide scope of Foreign Funds Control activities is indicated in Census of Foreign-Owned Assets in the United States, Treasury Department, Washington, D. C. (1945). Since the defeat of Germany, an application may be filed with the Treasury Department to have the special restrictions imposed against German "citizens or subjects," by General Ruling No. 11A and other orders and licenses, lifted in the case of a refugee. General Ruling No. 11A, issued May 15, 1945 (10 Fed. Reg. 5573), explicitly provided that no license shall be deemed to authorize any payment from a blocked account where—

"Any * * * citizen or subject of Germany or Japan * * * who * * * since December 7, 1941 has been within the territory of either country or within * * * 'enemy territory' * * *"

had an interest in the funds. If, upon Treasury investigation, it is established that the applicant is a bona-fide refugee and, as such, he is permitted an exception from General Ruling No. 11A, he would generally acquire the eligibility status of inhabitants of the country where he resides, as far as withdrawals are concerned.

The Treasury Department is now engaged in a program of unblocking and permitting transfers from the accounts of foreign nationals of various specified countries: See General License No. 94, issued December 7, 1945,

vided for in the Trading with the enemy Act, as amended by Title III of the First War Powers Act, 1941 (50 U. S. C. A. App., Pocket Part, Sec. 5(b)) or Executive Order No. 9095, as amended (7 Fed. Reg. 1971, 5205; 10 Fed. Reg. 6917), which conferred on the Alien Property Custodian broad authority to vest the property of "foreign nationals" and "nationals of designated enemy countries." The Custodian, however, has not vested the assets of resident Jewish refugees or other resident German aliens, unless it has been determined that the person was acting as a cloak for enemy interests, or other circumstances established that it was "in the national interest" to vest.⁵⁶

It seems fair to conclude that Jewish refugees who were deprived of German nationality should not be considered citizens or subjects of the Reich, if they do not take steps to become repatriated. The fact that a person may be of no nationality (i.e., stateless) as

10 Fed. Reg. 14814, and General License No. 95, issued December 29, 1945, 10 Fed. Reg. 15414 (France, Belgium, Norway and Finland), which superseded General Licenses Nos. 90 and 92, previously issued April 14, 1945 and October 5, 1945, respectively, as to France (10 Fed. Reg. 4062, 12599), and General Licenses Nos. 91 and 93, issued May 15, 1945 and November 20, 1945, respectively, as to Belgium (10 Fed. Reg. 5573, 14289). By amendment to General License No. 95, the Netherlands was added to the list of unblocked countries on February 13, 1946 (11 Fed. Reg. 1586); Czechoslovakia and Luxembourg on April 26, 1946 (11 Fed. Reg. 4601); and Denmark on June 14, 1946 (11 Fed. Reg. 6537). By Public Circular No. 30, issued July 4, 1946, Korea was similarly unblocked and no longer deemed enemy territory. (11 Fed. Reg. 7460)

If the German refugee awarded an exemption from General Ruling No. 11A lives in an unblocked country, he may, upon certification by the government thereof that the property is not enemy-tainted or affected by an interest of a national of a blocked country, withdraw his frozen accounts. If he resides in a satellite country (Italy, Roumania, Hungary or Bulgaria), he may qualify for the benefits of General License No. 32A (11 Fed. Reg. 6907); viz., a right to draw from his blocked accounts up to \$1000 per month for necessary living expenses of himself and members of his household. If he has become a citizen or subject of the satellite nation, however, the monthly allowance is limited to \$100 for himself and \$25 for each member of his household—the total in no event to exceed \$200 in any one calendar month.

Thus, under existing procedures, refugees whose funds in this country have been frozen may, in given cases, receive special treatment distinct from ordinary German nationals. However, favorable administrative action does not seem to rest so much on technical determinations that they may or may not be German "citizens or subjects" as broad equitable considerations that they are actually refugees.

⁵⁶Sec. 10(a) of Executive Order No. 9095, as amended, provides in part: "*** persons not within designated enemy countries *** shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or *** (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country."

a result of a right of election presents no insurmountable obstacles.⁵⁷

In order to reach an equitable result, American, English, Swiss and French courts have recognized statelessness due to voluntary expatriation or denationalization decrees. In *United States ex rel. Schwarzkopf v. Uhl*,⁵⁸ an Austrian Jew was ordered released from internment as an alien enemy on the ground that, even if German nationality were acquired upon the annexation of Austria, it had been lost under the November 25, 1941 Nazi decree.⁵⁹ Statelessness was recognized in order to effect his release from custody.⁶⁰

⁵⁷The return provisions of Sec. 9(b) of the Trading with the enemy Act clearly recognized the possible existence of stateless claimants. Paragraphs (9) and (14), added March 4, 1923 (42 Stat. 1511) and March 10, 1928 (45 Stat. 270), and paragraph (3a) added May 7, 1926 (44 Stat. 406), referred to an owner who was a citizen or subject of Germany, or "not a citizen or subject of any nation * * *." 50 U. S. C. A. App., Paragraphs (3a), (9), and (14) of Sec. 9(b), pp. 242-244 (1928). The expatriation provisions of the Nationality Act of 1940 contemplate the possibility of statelessness. American nationality may be lost where acquisition of citizenship in another country may not necessarily be involved. See 8 U. S. C. A. Secs. 801 (e), (f), (g) and (h). See also Bentwich, *Statelessness Through the Peace Treaties after the First World War*, 21 Brit. Yrbk. of Int. L. 171 (1944); Williams, *Denationalization*, Brit. Yrbk. of Int. L., 1927, 45; Bisschop, *Nationality in International Law*, 37 Am. J. Int. L. 320 (1943).

⁵⁸(C. C. A. 2, 1943) 137 F. (2d) 898.

⁵⁹The court declared: "* * * when territory is transferred to a new sovereign by conquest or cession, the inhabitants * * * become nationals of the new government only by their own consent * * *. * * * If they have voluntarily departed before the annexation and have never elected to accept the sovereignty of the new government, their allegiance is not so transferred. (Citing cases) * * * If the invaded country has ceased to exist as an independent state, there would seem to be all the more reason for allowing its former nationals who have fled * * * and established a residence abroad, the right of voluntarily electing a new nationality and remaining 'stateless' until they can acquire it. * * * If it be assumed that he (the refugee) acquired German citizenship by the annexation of Austria and the decree of July 3rd (1938), said citizenship was lost under German law in November, 1941. There is no public policy of this country to preclude an American court from recognizing the power of Germany to disclaim Schwarzkopf as a German citizen." (pp. 902-903) Schwarzkopf's petition alleged that he was neither a citizen nor subject of Germany. The court, in upholding his position, refused to accept the view of the State Department, expressed in one of the letters attached to the return of the District Director of Immigration and Naturalization, that he "should be regarded as a German citizen or subject." The Schwarzkopf case is commented on in 57 Harv. L. R. 251 (1943); 37 Am. J. Int. L. 634 (1943); 12 Geo. W. L. Rev. 238 (1944).

⁶⁰In *re The King v. The Home Secretary* (1945) 1 K. B. 7, the Divisional Court arrived at a result directly contrary to that in the Schwarzkopf case, supra. Two Austrian Jews who emigrated prior to the Anschluss were apprehended in Trinidad in 1942, en route from France to South America, brought to England, and interned as enemy aliens. The English court stressed the fact that Great Britain was already at war with Germany when the Nazi denationalization decree of November 25, 1941 was issued. It refused to recognize the right of an enemy belligerent to change the nationality status of its subjects in the midst of war. It is significant that the British Aliens Order, 1920, as amended, ruled out any consideration of statelessness. Sec. 21(1) provided that an alien shall be deemed to retain the nationality acquired at birth, unless he subsequently became naturalized in another country.

In *Medvedieff v. Cities Service Oil Co.*⁶¹ the court ruled that a naturalized Italian Jew who had become expatriated in 1938 under a Royal Italian decree, was a stateless person and, therefore, not a "foreign subject" under the Judicial Code. In *Stoeck v. Public Trustee*,⁶² statelessness was recognized in a case involving a German subject who voluntarily expatriated himself. The court held that he was not a "national of Germany" under the Treaty of Peace Order. It declared that "the condition of a stateless person is not a condition unrecognized by the municipal law of this country." In *Lempert v. Bonfol*, the Swiss Federal court left undisturbed the statelessness of a native Russian deprived of nationality by a Soviet decree. A child born of the marriage of such stateless person with a Swiss woman was held not to be a Russian subject, liable to expulsion.⁶³ After France formally recognized Soviet Russia, French courts acknowledged the statelessness of Russian emigres expatriated by Soviet decrees.⁶⁴

In view of the complex questions arising under State and federal laws as well as the German treaty, involving a determination whether an individual is a German citizen or a stateless person, the nationality status of refugees should not be left entirely to implication. Steps should be taken to promote uniformity of decision. Clarifying, amendatory legislation⁶⁵ or an official announcement from the State Department would be desirable in indicating whether, and upon what conditions, they should be treated as German nationals.⁶⁶

An interesting example is afforded by Military Law No. 5 issued October 30, 1945 by the Allied Control Council for Germany, regulating the marshalling of German external assets.⁶⁷ Article 3 defined "person of German nationality" in terms of one "who has

⁶¹(S. D. N. Y. 1940) 35 Fed. Supp. 999.

⁶²(1921) 2 Ch. 67, 78, 82.

⁶³See Abel, Denationalization, (London, 1942). 6 Modern Law R. 57, 65.

⁶⁴Abel, loc. cit., p. 66.

⁶⁵For example, see S. 2039, 79th Cong., 2d Sess., introduced by Senator Mead of New York on April 8, 1946 amending Sections 32(a)(2)(C) and 32(a)(2)(D) of the Trading with the enemy Act to insure that refugees shall be eligible to receive a return of property vested by the Alien Property Custodian. These sections bar any person "voluntarily resident within" enemy territory since December 7, 1941, or a "citizen or subject" of Germany present in enemy territory since that date. The bill provides that ineligibility shall not affect "a person who was a victim of religious or racial persecution in the country of his origin or residence."

⁶⁶Federal courts attribute great weight to the views of the State Department in matters affecting the conduct of foreign relations and construction of treaties. *Sullivan v. Kidd*, (1921) 254 U. S. 433.

⁶⁷Official Gazette, Control Council for Germany, Berlin Allied Secretariat, No. 2, November 30, 1945, p. 27.

enjoyed full rights of German citizenship under Reich law at any time since September 1, 1939 . . ." Thus, German Jews were not included as German nationals as far as the seizure of external assets was concerned. Another example worthy of our consideration consists of British legislation growing out of the last war. Section 3 of the British Nationality and Status of Aliens Act, 1918, prohibited the naturalization of enemy aliens for a period of ten years after the war. An exception, however, designed to protect Poles and Armenians, was made in the case of—

“. . . a member of a race or community known to be opposed to the enemy governments.”⁶⁸

⁶⁸McNair, *Legal Effects of War*, p. 18 (London, 1944). In *United States ex rel. D'Esquiva v. Uhl*, (C. C. A. 2, 1943) 137 F. (2) 903, the court pointed out that "native, citizen, denizen, or subject of the hostile nation," found in the Alien Enemy Act, referred to all those who, by reason of nativity or allegiance, would be likely to favor the enemy nation. Conversely, it would seem that persons known for their hostility to the enemy government because of their having been victims of its oppression ought not to fall under the various bans designed to keep out enemy adherents.