I.

Some Opinions, Articles and Reports

bearing upon the

Treaty of Trianon

and the

Claims

of the

Hungarian Nationals

with regard to their

Lands in Transylvania

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Printed by
W. P. Griffith & Sons Ltd.,
Old Bailey Press, E.C.4.

EXPROPRIATION AND INTERNATIONAL LAW

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In the period that has elapsed since the termination of the war, legislation has been introduced in several countries, more particularly the new or reconstituted states that have emerged as a consequence of the European upheaval, providing for the redistribution of land on terms which involve the total or partial confiscation of private property. The purpose of this article is to examine the question whether such legislation, in so far as it applies to the subjects of a foreign state, gives rise under international law to any remedy available to such state for the protection of its subjects from the resulting injury and loss. In the obscurity which hangs over the subject an attempt will be made to ascertain what are the principles to be applied, and, especially, whether the recognized rules of international law and practice afford a sufficient basis for the conclusion that such action amounts to a breach of international law entitling the state which, through its subjects, is affected, to demand reparation as of right.

The legislation in question, although varying in many respects according to the economic conditions and political views prevailing in the different countries where it has been adopted, has certain broad characteristics in common. These may be described as follows: Large landed properties are expropriated or "nationalized" for the purpose of being divided up for the benefit of small cultivators—principally ex-soldiers—and the former owners are either given an inadequate "indemnity," in cash or in bonds, or, though this is rarer, no compensation at all. The proportion by which the "indemnity" falls short of the value varies under the different laws, but in each case there is an element of confiscation, in the sense that the amount of the compensation provided cannot on any fair basis be regarded as commensurate with the real value of the property. Finally, the laws do not in terms discriminate between nationals and foreigners.

Taking the above as the point of departure, let us consider whether there is any, and if so what, rule of international law to which recourse can be had.

Two propositions can, it is submitted, be laid down as forming part of the law of nations:

1. A state is entitled to protect its subjects in another state from injury to their property resulting from measures in the application of which there is discrimination between them and the subjects of such other state.

2. A state is entitled to protect its subjects in another state from *gross injustice* at the hands of such other state, even if the measure complained of is applied equally to the subjects of such other state.

The subject of protection is mostly dealt with in general and guarded terms by writers on international law, but it may be useful to refer to a few of the more illuminating passages. Westlake in the

first of his Collected Papers[1] shows how the treatment of aliens, within the state, forms part of international law. He says this:

"International law is the body of rules prevailing between states. It may be described as the body of rules governing the relations of a state to all outside it, whether other states or private persons not its subjects. These definitions are not inconsistent, because where international law allows a state to have direct relations with a private person not its own subject, it is only by virtue of a rule prevailing between states that this is so. Any state may capture, try and execute a pirate, whether its own subject or not. Any belligerent state may capture, try and condemn a ship belonging to a neutral owner for violating a blockade established by it. This is so because it is a rule between states that his own state may not interfere for the protection of the pirate or the blockade-runner. If a state presumes to act directly against a private foreigner in a case in which no international rule excludes the state to which the latter belongs from protecting him, the matter becomes one between the two states; the foreigner's state is injured even though it may not seek redress."

In a later passage[2] the learned author, explaining the nature of private international law, says this:

"Hence arises the necessity of determining, at least to some extent, the limits of a state's jurisdiction and of the application of its laws to private matters. The science of those limits is called private international law. . . . It is true that the international society leaves to the states which are its members considerable latitude with regard to that science, but not an unlimited latitude. A state might depart so widely from any accredited principles, in its claim to exercise jurisdiction or apply its laws, that a foreigner who suffered by such departure would be considered to have suffered an international wrong and his state would resent it. Therefore, state rules affecting the interests of individuals are in some degree concerned with international principles, and a part of the body of law which regulates those interests is common ground to a state and to the society of states."

Finally, after showing that international law arose among states having a common and in that sense an equal civilization, Westlake proceeds:[3]

"The common civilization then, explained as it has here been explained, contains the principle that the institutions, whether of Government or of Justice, which the inhabitants of a state find suitable to themselves, must normally be accepted as sufficient for the protection of foreigners among them. These foreigners are subject to the local Courts and Authorities . . . and their own Governments will not, *normally*, interfere for their protection so long as they enjoy equal treatment with natives";

and by illustrations from actual practice[4] he makes good the two rules referred to above: viz. no discrimination; no gross injustice even without discrimination.

Hall[5] deals with the subject thus:

"States possess a right of protecting their subjects abroad which is correlative to their responsibility in respect of injuries inflicted upon foreigners within their dominions. . . . Broadly, all persons entering a

1 Collected Papers on Public International Law, pp. 1—2.
2 Ibid., pp. 9, 10.
3 Collected Papers on Public International Law, p. 103.
4 Ibid., pp. 104—10.
5 International Law, 7th ed., § 87.

foreign country must submit to the laws of that country; provided that the laws are fairly administered they cannot as a rule complain of the effects upon themselves, however great may be the practical injustice which may result to them; it is only when those laws are not fairly administered, or when they provide no remedy for wrongs, *or when they are such,* as might happen in very exceptional cases, *as to constitute grievous oppression in themselves,* that the state to which the individual belongs has the right to interfere in his behalf."

Oppenheim treats the question as follows:

"Although aliens fall at once under the territorial supremacy of the state they enter, they remain nevertheless under the protection of their home state. By a universally recognized customary rule of the law of Nations every state holds the right of protection over its citizens abroad, to which corresponds the duty of every state to treat foreigners on its territory with a certain consideration."[1]

"In consequence of the right of protection over its subjects abroad which every state enjoys and the corresponding duty of every state to treat aliens in its territory with a certain consideration, an alien, provided he owns some nationality, cannot be outlawed in foreign countries, but must be afforded protection for his person and property. The home state of the alien has, by its right of protection, a claim upon such state as allows him to enter its territory that such protection shall be afforded and it is no excuse that such state does not provide any protection whatever for its own subjects."[2]

Calvo, who, as a member of one of the South American Republics which have suffered in a special degree from foreign intervention, takes a narrow view of the occasions justifying it,[3] recognizes that

"à ceux-ci (les étrangers) l'État, par le seul fait qu'il leur a permis l'accès chez lui, doit l'assurance qu'ils ne seront ni lésés ni maltraités tant qu'ils y séjourneront; ils conservent du reste la faculté d'invoquer la protection de l'État auquel ils appartiennent."[4]

Bonfils[5] says this:

"Un État peut-il contraindre un autre État à modifier sa législation, quand celle-ci, dans son contenu actuel, peut être pour cet État ou pour ses sujets une cause de dommages? Non . . . *le droit de l'État étranger . . . lésé dans [la personne] de ses sujets, se réduit à formuler des réclamations et à exiger une réparation.*"

The United States have always taken a high view of their duty of protection, and their right to intervene in order to make such protection effective. Numerous instances are given in Moore's *Digest,*[6] from which it will be seen that the principle is consistently adhered to that measures affecting the property of American citizens are, in proper cases, a ground of intervention and that equality of treatment with natives is not a conclusive answer. One or two passages from diplomatic correspondence will serve to make the American attitude clear:

[1] International Law, 3rd ed., Vol. I, § 319.
[2] International Law, 3rd ed., Vol. I, § 320.
[3] See Droit International, Livre XV, §§ 1276, 1278.
[4] Ibid., Livre VII, § 514.
[5] Droit Int. Pub., 5th ed., § 262.
[6] See Vol. VI, pp. 247—324.

"The United States believe it to be their duty, and they mean to execute it, to watch over the persons and property of their citizens visiting foreign countries, and to intervene for their protection when such action is justified by existing circumstances and by the law of nations."[1] "It cannot be admitted that in every case the rights of a foreigner in that country [Peru] may be measured by the extent of the protection to person and property which a citizen might obtain. . . . it not infrequently happens that citizens of a country are compelled to endure injuries which would afford ample basis for international intervention, if they were inflicted on foreigners."[2] "It may in general be true that when foreigners take up their abode in a country they must expect to share the fortune of the other inhabitants and cannot expect a preference over them. While, however, a Government may construe according to its pleasure its obligations to protect its own citizens from injury, foreign Governments have a right, and it is their duty, to judge whether their citizens have received the protection due to them pursuant to public law and treaties."[3] "If a Government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name, and would afford no protection either to states or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a Government cannot appeal to its municipal regulations as an answer to demands for the fulfilment of international duties."[4] "The duty is always incumbent upon a Government to exercise a just and proper guardianship over its citizens whether at home or abroad. A municipal act of another state cannot abridge this duty. . . No country is exempted from the necessity of examining into the correctness of its own acts. A sovereign who departs from the principles of public law cannot find excuse therefor in his own municipal code."[5]

The existence of the two rules mentioned above thus seems sufficiently clear, but the difficulty lies in ascertaining the scope of the second. Apart from general statements of principle, such as those just referred to, authority in the way of actual precedents relevant to the subject of this article is scanty. But it is not entirely lacking and some light is to be derived from the following cases:

In the year 1836 the Sicilian Government proposed to grant to a French company a monopoly for purchasing and exporting whatever sulphur was produced in the country.[6] When this became known to the British Government strong protests were made on the ground that the rights of British subjects trading in sulphur were infringed by the monopoly, and a long diplomatic correspondence ensued.[7] The protest was based primarily upon the Treaty of 1816 between Great Britain and the Kingdom of the Two Sicilies, which contained a most favoured nation clause and also a provision (Art. V) conferring upon British subjects the right to dispose of their personal property of every kind in any way without the smallest loss or hindrance. The Sicilian

1 Sec. of State Case of Mr. Body, March 3, 1860, cited in Moore's Digest, Vol. VI, p. 287.

2 Sec. of State Bayard to Mr. Buck, August 24, 1886, ibid., p. 252.

3 Sec. of State Fish to Mr. Foster, December 16, 1873, ibid., p. 265.

4 Sec. of State Bayard to Mr. Connery, November 1, 1887, Compilation of Reports of Committee on Foreign Relations, U.S. Senate, 1887, pp. 751, 753.

5 Sec. of State Frelinghuysen to Mr. Morgan, February 17, 1885, Moore's Digest, Vol. VI, p. 312.

6 See State Papers, Vol. 28, 1839—40, p. 1163.

7 Ibid., pp. 1163—1242; Vol. 29, 1840—1, pp. 175—204; Vol. 30, 1841—2, pp. 111—20.

Government, notwithstanding the protest, granted the monopoly and, after considerable vacillation, declined to withdraw it. Matters reached such a serious pass that H.M. Government went to the length of ordering warships to be held in readiness to proceed to Naples, whereupon the Sicilian Government gave in, abolished the monopoly and agreed to the setting up of a Commission for the purpose of liquidating the claims of British subjects against the Government for losses sustained by them in consequence of the offending contract.[1] It is to be noticed that the claims fell under three categories: (1) Proprietors and lessees of mines who suffered impediments in raising or exporting sulphur by reason of the monopoly; (2) Persons who were prevented from fulfilling their contracts for the delivery of sulphur, and (3) Persons who having bought sulphur were forbidden to export it. The sums awarded by the Commission were duly paid.[2]

The first comment that may be made upon this case as a precedent is, of course, that the act complained of was the breach of a treaty. This point will be dealt with separately later, but in the meanwhile it should be noticed that it was not so much the most favoured nation clause as Art. V of the treaty which was relied upon by the British Government,[3] and, further, that in addition to treaty provisions the complaint was based upon the interference with the right of British subjects under the laws of the country to dispose freely of their property.[4] It may also be mentioned that the Sicilian Government raised the arguments (1) that foreigners could not be entitled to greater privileges than subjects, and (2) that they must submit to the law of the land,[5] both of which were disputed by the British Government.[6]

In 1853 the Rev. Jonas King, an American citizen, complained of the action of the Greek Government on account of (1) the appropriation of his land to public purposes, and (2) his trial and banishment for alleged offences against the established religion of the state. The Government of the United States declined to take action in regard to (2), but sent their Minister to Turkey, Mr. Marsh, to Greece with instructions to demand compensation for the expropriation. The Greek Government appear to have readily agreed to this course in principle, and after some negotiation as to the amount due, paid the sum of $25,000, which Mr. King himself regarded as satisfactory.[7] This case does not appear to be one where it was claimed to deprive an individual of compensation for his property by law—apparently it was a question rather of delay and evasion on the part of the Greek authorities—but nevertheless the incident has some relevance as showing that the confiscation of an alien's property gives rise, in itself, to a claim by his state to equitable compensation.

The next case to be noticed is that of the Delagoa Bay Railway, which formed the subject of arbitration proceedings in 1900 between the United States and Great Britain on the one hand and Portugal on the other. The facts were somewhat complicated, but so far as material for the present purpose they may be briefly outlined as follows:[8] Col. MacMurdo, an American citizen, obtained from the Portuguese Govern-

1 State Papers, Vol. 30, 1841—2, p. 111.
2 Ibid., pp. 114—20.
3 See, e. g., State Papers, Vol. 29, p. 197.
4 See, e. g., ibid., Vol. 28, pp. 1183, 1221.
5 Ibid., pp. 1214—15.
6 Ibid., pp. 1218—20.
7 See Moore's Digest, Vol. VI, pp. 262—4.
8 See Sentence finale du Tribunal Arbitral de Delagoa, Berne, 1900.

ment in 1883 a concession for a railway from Lourenço Marques to the Transvaal Frontier, including the grant of the lands necessary for that purpose. MacMurdo transferred his concession to a Portuguese company in return for fully paid shares and cash, and the rights of this company were in turn acquired by an English company registered in London. In the course of time a portion of the line was built, but, owing to a number of intricate circumstances which it is not necessary to go into, on June 25, 1889, the Portuguese Government issued a decree cancelling the concession and ordering the taking possession of the whole enterprise, in pursuance of which the railway was seized. Thereupon the British and American Governments took the matter up and on September 10, 1889, Lord Salisbury addressed a note to the Portuguese Government which contained the following passages:

"The question at issue is not the motive but the justice of the seizure. Her Majesty's Government are of opinion that the Portuguese Government had no right to cancel the concession, nor to forfeit the line already constructed. . . . In their judgment, the British investors have suffered a grievous wrong in consequence of the possible confiscation by the Portuguese Government of the line and the materials belonging to the British Company . . . and for that wrong Her Majesty's Government are bound to ask for compensation from the Government of Portugal. . . . If the Portuguese Government admit their liability to compensate the British Company for an injury to which their interests or property have been subjected by the confiscation of the line and the seizure of the materials upon it, Her Majesty's Government will admit that the amount of that compensation is a proper matter for arbitration."[1]

A similar protest was made by the United States Government in a note dated November 8, 1889,[2] and after some negotiation the Portuguese Government admitted its liability to pay compensation and an arbitral tribunal was set up in Switzerland to fix the amount. The *compromis* dated June 13, 1891, makes it quite clear that the principle of compensation was conceded, Art. I stating that

"le mandat que les trois gouvernements sont convenus de confier au Tribunal arbitral est de fixer, comme il jugera le plus juste, le montant de la compensation due par le gouvernement portugais aux ayants droit des deux autres pays par suite de la rescission de la concession du chemin de fer de Lourenço Marques et de la prise de possession de ce chemin de fer par le gouvernement portugais, et de trancher ainsi le différend existant entre les trois gouvernements."[3]

In the result a sum of about 15½ millions of francs was awarded as compensation to be distributed proportionally among the shareholders of the English Company, including the widow of the original concessionnaire, Col. MacMurdo.[4]

Attention may be called to the following points upon this case: (1) although primarily a claim in respect of the breach of concessionary (i. e. contractual) rights, the seizure and confiscation of property was put in the forefront of the British and American protests; (2) the obligation of Portugal to indemnify the owners in respect of the seizure of specific property is recognized; (3) on the other hand, the "cause of

[1] State Papers, Vol. 81, 1888—9, p. 691.
[2] Moore's International Arbitrations, Vol. II, pp. 1866—70.
[3] See Sentence finale du Tribunal Arbitral de Delagoa, p. 89.
[4] Ibid., p. 199.

action" was not a law of general application, but an administrative decree—no doubt perfectly valid in itself—directed against a particular undertaking.

The next case to be noticed is that of the Italian Life Insurance Monopoly. In 1911 a bill was laid before the Italian Chamber providing for the creation of a National Institute to which the entire life insurance business of the country was to be entrusted, and that no compensation could be claimed by existing insurance companies for pecuniary damage which they might suffer from the operation of this law. Protests were made by the Austro-Hungarian, French, German, and United States Governments, and H.M. Government addressed a Note to the Italian Government in which it was claimed that compensation ought to be provided for British insurance companies in respect of the loss which would be entailed, *inter alia,* by the compulsory disposal of valuable property for which they would have no further use, inasmuch as expropriation was universally recognized as constituting a title to compensation. In consequence, it may be presumed, of these protests certain amendments were introduced into the original Bill, of which the most important was the authorization for foreign insurance companies to continue business for ten years on certain conditions, and the Bill as amended became law in 1912. Formal reservations were made by the British Government, but it is to be observed that the Italian Government pointed out that as regards real property held by the foreign companies no loss was likely to result in view of the general appreciation in value of such property. In connexion with this case it will be noticed that the "expropriation" in so far as specific property was concerned, was merely an indirect effect of the prohibition to continue business, and that an opportunity was in fact afforded to the owners of disposing of their property in fair conditions.

The last case to which reference will be made is the important one of the Portuguese Religious Properties. After the revolution of 1910 the Provisional Government of the Republic enacted a law, dated October 8, 1910, whereby all the property of the religious associations in Portugal was confiscated to the state. The British, French, and Spanish Governments protested on behalf of their nationals affected by this law and ultimately it was agreed to submit their claims to arbitration. The *compromis*, dated July 31, 1913, provides:

Art. 1: "Un tribunal arbitral, composé comme il est dit ci-après, est chargé de statuer sur les réclamations relatives aux biens des nationaux britanniques, espagnols et français saisis par le Gouvernement de la République portugaise à la suite de la proclamation de la république . . ." Art. 3: "Le tribunal examinera et réglera lesdites réclamations d'après le droit conventionnel éventuellement applicable, et, à défaut, d'après les dispositions et les principes généraux du droit et de l'équité."

It is clear, therefore, that the questions whether there had been any breach of international law, and, if so, whether compensation was payable, were left entirely open for decision. It is important to observe that in the course of the arbitral proceedings there is no mention of, or reliance upon, treaty engagements. In the "Observations générales" presented by H.M. Government to the Tribunal, emphasis is laid upon the fact that the confiscatory measure contravened the acquired rights and expropriated the property of foreigners who had established themselves in the country on the faith of a legal system guaranteeing protection in these respects. The following passages may be cited:

"The Government of His Britannic Majesty do not in any way intend to constitute themselves judges of the legality or validity, from the point of view of the internal law of Portugal, of the acts of the Portuguese Government. That is a matter of internal politics with which they have no concern. But His Majesty's Government are of opinion that the Portuguese State in taking possession, as it has done, of property legally acquired by British nationals in conformity with the legislation of Portugal and under the cover and protection of its public and private law, has acted *contrary to the principles of the law of nations* which governs the relations between states. It is part of the generally recognized principles of international law that foreigners are subject to the laws of police and security of the state upon the territory of which they find themselves, and that the laws of that state also govern the rights of immovable property which they acquire there. In return for this subjection, foreigners are entitled to count upon the legal protection and guarantees under the cover of which they came into the country and acquired their rights."

"Respect of property, respect of acquired rights, these are the legal principles of all civilized countries. It is upon the security which they assure and the confidence they inspire that the relations entertained by nations with each other are based. It cannot be objected here that it is ill founded for a foreigner to complain of the measures applied to him when those measures are equally applicable to the nationals of the state on the territory of which he finds himself; the position in the two cases is not the same. Foreigners neither have nor had in Portugal the enjoyment of political rights; they neither have nor had any part in the public affairs of the country. When the nation demands, or lets its Government take, such and such a political measure, it has no right to complain. As a celebrated Portuguese jurist said: 'It is the nation's own act; but the foreigner who had no part therein, cannot be placed upon the same footing.' Finally, it will be observed that if the Portuguese Government had alleged that the dispossessions were due to *force majeure* riots or civil war, there might be a question as to whether and what responsibility they incurred. But that is not the case here. The Portuguese State either took action itself, or else covered the spoliations complained of with its authority; it has, itself, voluntarily assumed the responsibility."[1]

The other Governments associated with Great Britain as "plaintiffs" presented similar observations. To these arguments, the relevancy of which to the subject of the present article is obvious, what was the answer of the Portuguese Government? In their "Observations générales" they say this: "The Government of the Portuguese Republic reply that far from contesting the legal principles upon which the three Governments base these arguments, they approve them without reserve, respectful of law and equity." The defence of the Portuguese Government was founded upon a different consideration: viz., that the properties did not belong to the individual claimants but to their religious associations, and ultimately the case was settled and judgment given by consent; but this does not affect the value of the case as a precedent in view of the arguments put forward on the one side and accepted by the other.

Having considered the question from the point of view of authority it may be well to return to the actual matter under discussion, namely, the agrarian legislation referred to at the beginning of this

[1] The above quotations are the writer's translation of the original French.

article. It is plain that if this legislation were contrary to express treaty stipulations the soundness of a claim by the state whose subjects were affected would be incontrovertible. In old days the treaties between European Powers used to contain elaborate clauses for the purpose of assuring to their respective subjects the right of acquiring, enjoying, and disposing of various kinds of property in each other's dominions. One example of a provision of this nature has been noticed in connexion with the case of the Sicilian Sulphur Monopoly, but an examination of seventeenth- and eighteenth-century treaties reveals a great variety of stipulations, either general, or directed to exclude a particular municipal rule, such as the *droit d'aubaine*. In their relations with semi-barbarous countries it is still customary for civilized states to make express treaty provision for the protection and inviolability of their subjects' property, but in their treaties with one another the advanced nations have abandoned this course. Why? Surely not because it is intended to diminish the protection of subjects in foreign civilized countries, but because such express stipulations have become unnecessary by reason of the universal recognition and adoption in these countries of certain legal principles.[1] Among these principles is the right of aliens to possess and deal with property, including land, and the inviolability of such property in the sense that expropriation is only permissible for public purposes and then only on payment of full compensation by the state. This situation is well expressed by the British observations in the Portuguese Religious Properties arbitration cited above. Foreigners establish themselves in a given European country upon the faith of a known system of law and civilization, and it does not lie with that country, even if it be recently erected into an independent state, to alter that system to their detriment and then to say: this is legislation of general application; neither you nor your Government are entitled to complain or interfere.

On the other hand, it is indisputable that full scope is allowed under international law to the internal organization of the state for the purpose of securing its progress and well being—or what the competent authorities regard as such—and that foreign states are not in general entitled to intervene even if the measures taken are prejudicial to their subjects. The problem is to reconcile the two principles. It is submitted that the solution may perhaps be found in applying this test:—does the measure in dispute substantially violate a legal principle accepted by the society of civilized states as a whole, so that the detriment caused to the individuals concerned can be regarded as a breach of a binding obligation, or to put it in another way, as a breach of international law?

It may be said: what is the distinction between the expropriation of land involving the confiscation of part of its value, and a capital levy, or even death duties such as are imposed in England? The answer is that it is a question of degree. There might be a capital tax so high in rate as to be contrary to international law as interpreted above; on the other hand, the rate might be such as to render the impost indistinguishable in essence from a tax on income. The question in each case would be: is this, in substance and in fact, confiscation? And, further, it may well be that a distinction is to be drawn between a tax upon

[1] An instructive illustration is afforded by the abolition of the *droit d'aubaine* in France in 1819, after which the series of treaties excluding the operation of this right fell into abeyance, and were not renewed because unnecessary. See De Martens and De Cussy's Recueil des Traités, Vol. I, pp. xvii—xxii.

property in general and the expropriation of specific property, especially land.

The conclusion to which the writer has arrived, and which he ventures, not without diffidence, to submit as a humble contribution to this difficult subject, is that if a claim were referred to judicial settlement by an international court in respect of the expropriation of a foreigner's land under the legislation described at the beginning of this article, the plaintiff state would have a reasonable prospect of success if one of two conditions were fulfilled and proved : (1) that there had been discrimination against its subject as compared with natives in the application of the legislation, *or* (2) that no compensation was given in respect of the expropriation, or if there was compensation, that it was so inadequate as to involve a substantial degree of confiscation.

INTERNATIONAL LAW ASSOCIATION.

VIENNA CONFERENCE, 1926.

REPORT OF THE PROTECTION OF PRIVATE PROPERTY COMMITTEE.

Your Committee was appointed by the Executive Council on the 10th August, 1925, to consider and report to the next Conference of the International Law Association whether there exists any, and, if so, what, limitation upon the power of a sovereign State to expropriate private property within its jurisdiction belonging to its nationals or foreigners without adequate compensation.

Your Committee is constituted as follows :—

The Hon. Mr. Justice Russell (Chairman), the Rt. Hon. Sir Frederick Pollock, Bart., K.C., Mr. Roland Vaughan Williams, K.C., Brig.-General Sir Charles Delmé-Radcliffe, K.C.M.G., C.B., C.V.O., Professor René Brunet, Professor J. Leslie Brierly, B.C.L., Mr. Wyndham A. Bewes, LL.B., Mr. Arnold D. McNair, C.B.E., LL.D., Mr. A. P. Fachiri, Mr. Thompkins McIlvaine, and Hugh H. L. Bellot, D.C.L. (Hon. Secretary).

Your Committee has considered very fully how far the principle of the inviolability of private property is recognised under :—

(1) The municipal law of civilised States.

(2) International Law.

(3) The Peace Treaties.

I.—Municipal Law.

In every civilised State the property of the individual citizen is guaranteed by its Constitution, written or unwritten, by its civil code, or by the common law ; and every civilised State accords to aliens commorant within its territory similar rights as a minimum. The latter will be considered later. For the moment we are concerned to indicate the provisions under which private property may be acquired by the State, and upon what terms.

England.—Land may be acquired compulsorily by the State, by municipal corporations, by county councils, district and parish councils, and by companies for purposes of public utility, upon payment of adequate compensation. Compensation is provided by the Land Clauses Consolidation Act, 1845, under the provisions of which the amount, failing agreement, is settled by arbitration. In addition to the value thus ascertained, the arbitrator is empowered to award 10 per cent. for disturbance.

During the late war the Crown took possession of an hotel for administrative purposes, and denied the suppliants' claim to full compensation as of right upon the ground that the Crown under its prerogative was entitled to take private property for the defence of the realm without payment of compensation. Upon examination of the records from a very early period, it appeared that the Crown had never taken the subject's land without payment, and that there was no trace of such claim by the Crown. It was held by the House of Lords that the prerogative of the Crown was merged in the Defence Act, 1842, and that the suppliants

were entitled as of right to compensation under the provisions of that statute. (See *In re De Keyser's Royal Hotel, Lim.; De Keyser's Royal Hotel, Lim.* v. *The King*, [1920] A. C. 508.)

Thus, it is a well-established principle of English law that when the Crown takes the property of its subjects, the dispossessed owner is, as of right, entitled to full compensation.

This principle is also recognised in Scottish law. (See *Bell's Principles of the Law of Scotland*, pp. 173-4.)

The United States.—The same principle is equally well established in the United States under the doctrine of "eminent domain." The Legislature is empowered to take private property for public uses, and for public uses only, but by the Constitution of the United States, and of most of the States of the Union, private property cannot be so taken without just compensation. (See *Withers* v. *Buckley*, 20 How. U. S. 84.)

By the Fifth Amendment to the Constitution, in lieu of a Bill of Rights, "no person shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken for public uses without just compensation."

"A provision," says Chancellor Kent, "for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent; and this principle in American constitutional jurisprudence is founded in natural equity and is laid down by jurists as an acknowledged principle of universal law." (*Commentaries on American Law*, Vol. II, pp. 425-6).

Thus by the common law and by the Constitutions of the Federal Government and of most of the States of the Union it was the settled and fundamental doctrine that a Government had *no right* to take private property for public purposes without giving a just compensation; and in *Thompson* v. *Grand Gulf R.R. and Banking Co.* (3 How. Miss. R. 240), and in other cases, it was even decided that compensation must precede the seizure of private property for public uses. And in those States in which no provision for compensation was contained in their Constitutions it was held by their State Courts that private property could only be taken for public purposes upon making due compensation.

Undoubtedly it is for the Legislature to determine when public uses require the taking of private property; but if they should take it for a purpose not of a public nature, if, as Chancellor Kent puts it, the Legislature should take the property of A and give it to B under the pretext of some public use or service, such cases would be gross abuses of their discretion and fraudulent attacks on private rights, and the law would be clearly unconstitutional and void. And so in numerous cases the American Courts decided. In *Varick* v. *Smith* (5 Paige, 146), for instance, the Vice-Chancellor delivered a spirited vindication of the constitutional sanctity of private property against the abuses of the right of eminent domain. (See *United States* v. *Lynah*, 188 U. S. Rep., at pp. 464-9; *Long Island Water Supply* v. *Brooklyn*, 166 U. S. Rep., at p. 685; *Monongahela Navigation Co.* v. *United States*, 148 U. S. Rep., at p. 312; *United States* v. *Welch*, 217 U. S. Rep., at p. 333; Lewis, *Eminent Domain*, sects. 684, 686, 706; Nichols, *Eminent Domain*, p. 695.)

France.—Whether the ideas underlying this right were derived from Rousseau, or whether, as appears more probable, they were derived from Locke, they also find expression in the French Constitution and in

those which imitated its provisions. Art. 545 of the French Civil Code provides : " Nul de peut-être contraint de céder sa propriété, si ce n'est pas pour cause d'utilité publique, et moyennant une juste préalable indemnité." (See the French Constitution, Art. 17 ; *Dictionnaire Général de Droit et de Jurisprudence*, H. Bertheau, Tome VIII, p. 108 ; *Répertoire du Droit Administratif*, Garsonnet, Tome XVI, p. 219.)

Belgium.—By Art. 11 of the Belgian Constitution of 1893, " Nul ne peut être privé de sa propriété que pour cause d'utilitié publique, dans les cas et de la manière établie par la loi, et moyennant une juste et préalable indemnité." (See *Collection des Codes Belges* by Sorvais et Mechelynck, p. 8 ; Picard, *General Treatise on Expropriation for Public Utility*, pp. 102, 108-9.)

Italy.—So Art. 438 of the Italian Code declares that no one shall be constrained to surrender his property or to allow another to make use thereof, except for cause of public utility duly recognised and declared and subject to the previous payment of just indemnity.

Spain.—The Spanish Civil Code provides that no one may be deprived of his property, except by the competent authority and for approved cause of public utility, subject always to previous corresponding indemnity. This provision is expanded by Art. 3 of the Law of 1879, whereby expropriation shall be inoperative unless preceded by the following requisites :—(1) Declaration of public utility ; (2) declaration that the effectuation is indispensably required of the whole or part of the immovable which it is proposed to expropriate ; (3) just valuation of what is to be alienated or granted ; (4) payment of the price which represents the indemnity for that which is compulsorily alienated or granted.

South America.—The provisions for the protection of private property in the South American Constitutions embody these provisions and those contained in the Constitution of the United States. For instance, the Argentine Constitution provides that property is inviolable, and no one may be deprived thereof, except by virtue of a judgment based on the law. Expropriation for cause of public utility must be authorised by the law and previously indemnified. The provisions of the Peruvian Constitution, 1919, and of that of Chile, 1925, are to the same effect.

By Art. 146 of the Constitution of Uruguay, 1917, the inhabitants of the republic have the right to be protected in the enjoyment of life, honour, liberty, security, and property. No one may be deprived of these rights, except in accordance with the law. By Art. 169 the right of property is sacred and inviolable. No one may be deprived thereof, except in conformity with the law, in cases of necessity or public utility, recovering from the national treasury a just compensation.

Holland.—The Netherlands Civil Code, Art. 625, provides that property is the right of freely enjoying a thing, and of disposing thereof in the most absolute manner, provided that one does not use it in a way prohibited by the law or public regulations emanating from a competent authority according to the fundamental law, and always reserving the right to third persons, and saving expropriation for cause of public utility under sufficient indemnity in conformity with the fundamental law.

Denmark.—By Art. 80 of the Danish Constitution the right of private property is inviolable. No one can be compelled to part with his property unless it is for the public benefit. It can only be taken under an Act of Parliament and with complete compensation. When a Bill, which allows expropriation of property, has been agreed to by the Houses

of Parliament, one-third of the Lower House's members may, within fourteen days after the final agreement have elapsed, demand that the Royal Assent be not given before new elections to the Lower House have taken place, and the Bill is agreed by the new Parliament.

There are Acts of Parliament legalising expropriation for roads, railways, churchyards, and in some special cases for agricultural, military, harbour, and some other purposes.

The compensation is fixed by an independent Commission appointed partly by the Government and partly by the local authorities in each case, according to the Act of Parliament which authorises the expropriation.

Sweden.—By the Swedish Law of Expropriation of the 12th May, 1917, land may be expropriated by the King for military and public purposes upon payment of the full value of the property. Every case is remitted to a Court of first instance, sitting with a jury of five persons, viz., a chairman appointed by the Lieut.-Governor, two members appointed by the Court, and one each by the parties. The compensation is found by the jury, and this amount, subject to the discretion of the Court, forms part of the order of the Court.

Norway.—By Art. 104 of the Constitution of Norway, 1814, " neither landed nor movable property can in any case be confiscated " ; and by Art. 105, " if the welfare of the State shall demand that any person shall surrender his movable or immovable property for the public use, he shall receive full compensation from the Exchequer." (See Scheel, *Norwegian Expropriation Law*, sect. 29, VII, VIII ; Morgenstierna, *Norwegian Constitutional Law*, pp. 659, 663, 668-670.)

Germany.—By Art. 153 of the Constitution of the German Federation property is guaranteed. Expropriation is admissible only in the public interest, and so far as authorised by law. Adequate compensation must be given, unless a federal law otherwise determines. Jurisdiction is given to the Courts to determine the amount. Expropriation by the Federal Government as against States, local communities and associations serving public interests is permitted only if accompanied by compensation. (See Georg Mayer, *Text-book of German Administrative Law*, pp. 230, 234 ; the Prussian Expropriation Law of 11/6/1874 ; the Saxon Law of 24/6/1902 ; *Judgments of the Imperial Court*, Vol. 16, p. 158 ; Vol. 61, p. 102.)

Switzerland.—By the Swiss Constitution of 1874 the territory, the Constitution embodying the rights of the citizens, and the sovereignty of each of the twenty-two cantons are guaranteed by the Confederation, provided they are not contrary to the provisions of the Federal Constitution. Expropriation of private property must be accompanied by adequate compensation.

II.—International Law.

The above examples suffice to illustrate the manner in which private property is protected by the legislation of civilised States ; they are not exhaustive, but it can be fairly stated that the principle that private property is inviolable is generally recognised and observed throughout the civilised world. The principle in question thus forms part of what Chancellor Kent has called " universal law," *i.e.*, legal conceptions universally recognised. But does confiscatory legislation involve a breach of International Law ? In so far as the legislation in question

applies to the State's own subjects, the answer, speaking generally, is No. In the absence of treaty stipulations or other conditions introducing the element of international obligation, International Law, properly so called, is not as a rule concerned with the manner in which a State, in the exercise of its own internal sovereignty, treats its own subjects. The qualification as regards treaties, though an important one, does not call for discussion here, but a word or two may be said with respect to the international obligations which may arise apart from treaty. It may happen that a transfer of territory involves certain limitations upon the exercise of the transferee's sovereign powers as against its own subjects. This topic comes within the purview of International Law under the head of State succession. The principle is now well established that where the territory of one State, either in whole or in part, is transferred to another, whether by cession or conquest, the private rights and particularly the property of the inhabitants are not affected by the transfer. This rule has been generally observed in practice and has been repeatedly adopted by judicial authorities, notably in America (see, *e.g.*, *U.S.* v. *Perchman*, 7 Peters, 51 ; *Strothers* v. *Lucas*, 12 Peters, 410). It would be contrary to the Law of Nations for the successor State to expropriate the property of its new subjects on the pretence that their proprietary rights had been ceded or had passed to it. " The cession of a territory . . . from one Sovereign to another . . . would be necessarily understood to pass the sovereignty only and not to interfere with private property " (per Marshall, C.J., in *U.S.* v. *Perchman*). By International Law the inhabitants of the transferred territory fall under the new sovereignty subject to all the private rights which they enjoyed before the transfer. Thereafter it is, however, open to the successor State, subject always to any treaty obligations, to exercise the sovereign right of legislation in the territory within the limits of its own constitution.

So far we have dealt with the position as between the State and its own nationals. It is now proposed to consider the question of expropriation as against the subjects of a foreign State. There can be no doubt that International Law places a limit upon the rights exercisable by a State in regard to the subjects of another State. The latter remain under the protection of their own Sovereign, who is entitled to demand that a certain standard of conduct shall be observed towards them by the State in whose territory they find themselves. The precise limits of the rule are difficult to define, but two general propositions can be laid down as representing the law on the subject :

1. A State is entitled to protect its subjects in another State from injury to their property resulting from measures in the application of which there is *discrimination* between them and the subjects of such other State.

2. A State is entitled to protect its subjects in another State from *actual injustice* at the hands of such other State even if the measure complained of is applied equally to the subjects of such other State.

The normal rule is that foreigners must be satisfied with the same treatment as the citizens of the country where they reside. If they are subjected to exceptional measures of a damnatory kind, whether executive or legislative, their own Government is entitled to demand satisfaction—International Law has been violated because the foreign State has been injured in the person of its subject. But the mere fact that an injurious measure is general and applies equally to the State's own nationals is not a conclusive answer. International Law arose among States having a similar civilisation based upon common ideas of right and justice,

and if these be violated in the person of a foreigner, his State is not precluded from protesting merely because the natives received the same treatment. They as subjects of the territorial sovereignty whose acts are, so to speak, their own, have to submit, whereas the foreign State has a right to demand that its subject should be treated in accordance with the standard of civilisation on the faith of which he entered the country. " The duty is always incumbent upon a Government to exercise a just and proper guardianship over its citizens, whether at home or abroad. A municipal act of another State cannot abridge this duty . . . No country is exempted from the necessity of examining into the correctness of its own acts. A Sovereign who departs from the principles of public law cannot find excuse therefor in his own municipal code." (Secretary of State Frelinghuysen to Mr. Morgan, Feb. 17, 1885, quoted in Moore's *Digest*, Vol. VI, p. 312.)

The above summary represents in outline the principles expounded by the authorities,† but there are, in addition, a number of precedents in the shape of diplomatic incidents and international arbitrations which support the view that the expropriation of the property of foreigners is contrary to International Law. To some of these it may be well to refer :

Sicilian Sulphur Monopoly.

In the year 1836 the Sicilian Government proposed to grant to a French company a monopoly for purchasing and exporting whatever sulphur was produced in the country (*a*). When this became known to the British Government, strong protests were made on the ground that the rights of British subjects trading in the commodity would be infringed, and a long diplomatic correspondence ensued (*b*). The protest was based primarily upon the Treaty of 1816 between Great Britain and the Kingdom of the Two Sicilies, which contained, in addition to a most favoured nation clause, a provision (Art. V) conferring upon British subjects the right to " dispose of their personal property of every kind in any way without the smallest loss or hindrance." The Sicilian Government, notwithstanding the protest, proceeded to grant the monopoly, and, after considerable vacillation, declined to withdraw it. Matters reached such a serious pass that the British Government went to the length of threatening forcible measures, whereupon the Sicilian Government gave way, abolished the monopoly, and agreed to the setting up of a Commission for the purpose of liquidating the claims of British subjects (*c*). The sums awarded by the Commission were duly paid (*d*).

It will be observed that there was a Treaty in question in this case of which the act complained of was a breach. It is, however, to be noted that the provision upon which the British Government mainly relied was Art. V, referred to above, a provision which, as will be shown below, is of a kind that has now fallen into desuetude, because the principle embodied in it has become part of the general Law of Nations.

The Rev. Jonas King.

In 1853 this gentleman, an American citizen, complained of the action of the Greek Government in regard to (1) the appropriation of his

† See Westlake, *Collected Papers*, pp. 1-2, 9, 10, 103-110 ; Hall (7th ed.), 87 ; Oppenheim (3rd ed.), Vol. I, 319, 320 ; Calvo, Livre VII, 514 ; Bonfils (5th ed.), 262 ; Moore's *Digest*, Vol. VI, pp. 247-324. See also the recent decision of the Permanent Court of International Justice in the case concerning Polish Upper Silesia, Series A, No. 7, at p. 22.

(*a*) See *State Papers*, vol. 28, 1839-40, p. 1163.

(*b*) *State Papers*, vol. 28, 1839-40, pp. 1163-1242 ; vol. 29, 1840-1, pp. 175-204 ; vol. 30, 1841-2, pp. 111-120.

(*c*) *Ibid.*, vol. 30, 1841-2, p. 111. (*d*) *Ibid.*, pp. 114-120.

land for public purposes; and (2) his trial and banishment for alleged offences against the established religion of the State. The Government of the United States declined to take action with respect to (2), but demanded compensation for the expropriation of their national's property. The Greek Government seem readily to have agreed with the principle involved, and after some negotiation as to the amount due paid $25,000, which Mr. King himself regarded as satisfactory (*e*).

This case does not appear to be one where it was claimed to confiscate the property of an individual by law; it was a question rather of delay and evasion on the part of the Greek authorities in making compensation. But nevertheless the incident is relevant as showing that the expropriation of a foreigner's property gives rise in itself to a claim by his State to equitable compensation.

Delagoa Bay Railway Arbitration.

The facts of this case are somewhat complicated, but, so far as material for the present purpose, they may be summarised as follows (*f*):—

In 1883 Colonel MacMurdo, an American citizen, obtained from the Portuguese Government a concession for a railway from Lourenço Marques to the Transvaal frontier, including the grant of the lands necessary for that purpose. He transferred his concession to a Portuguese company in return for fully-paid shares and cash, and the rights of this company were in turn acquired by an English company registered in London. In the course of time a portion of the railway was built; but owing to a number of intricate circumstances, which it is not necessary to go into, the Portuguese Government, on the 25th June, 1889, issued a decree cancelling the concession and ordering the taking possession of the whole enterprise, and the railway was accordingly seized. Thereupon the British and American Governments took up the matter, and on the 10th September, 1889, Lord Salisbury addressed a Note to the Portuguese Government which contained the following passages:—

"The question at issue is not the motive but the justice of the seizure. Her Majesty's Government are of opinion that the Portuguese Government had no right to cancel the concession, nor to forfeit the line already constructed . . . . In their judgment, the British investors have suffered a grievous wrong in consequence of the possible confiscation by the Portuguese Government of the line and the materials belonging to the British company . . . and for that wrong Her Majesty's Government are bound to ask for compensation from the Government of Portugal . . . . If the Portuguese Government admit their liability to compensate the British company for an injury to which their interests or property have been subjected by the confiscation of the line and the seizure of the materials upon it, Her Majesty's Government will admit that the amount of that compensation is a proper matter for arbitration" (*g*).

A similar protest was made by the United States Government in a Note dated the 8th November, 1889 (*h*); and after some negotiation the Portuguese Government admitted liability to pay compensation, and an arbitral tribunal was set up in Switzerland to fix the amount. The *compromis* dated the 13th June, 1891, makes it quite clear that the principle of compensation was conceded, Art. I stating that:—"Le

(*e*) See Moore's *Digest*, Vol. VI, pp. 262-4.
(*f*) The facts are fully stated in *Sentence Finale du Tribunal Arbitral de Delagoa* (Berne, 1900).
(*g*) *State Papers*, vol. 81, 1888-9, p. 691.
(*h*) Moore's *International Arbitrations*, Vol. II, pp. 1866-1870.

mandat que les trois gouvernements sont convenus de confier au Tribunal arbitral est de fixer, comme il jugera le plus juste, le montant de la compensation due par le gouvernement portugais aux ayants droit des deux autres pays par suite de la rescission de la concession du chemin de fer de Lourenço Marques et de la prise de possession de ce chemin de fer par le gouvernement portugais, et de trancher ainsi le différend existant entre les trois gouvernements " (*i*).

In the result a sum of about 15½ millions of francs was awarded as compensation to be distributed proportionally among the shareholders of the English company, including the widow of the original concessionnaire, Colonel MacMurdo (*k*).

It will be noticed that, although this case was primarily a claim in respect of the breach of concessionary (*i.e.*, contractual) rights the seizure and confiscation of specific property was made a matter of particular complaint both by the British and American Governments, and the obligation to compensate the owners therefor was expressly recognised by Portugal.

Italian Life Insurance Monopoly.

This matter calls for reference because the attitude of the Powers, and the concessions made by Italy in consequence thereof, go to confirm the principle under discussion. In 1911 a Bill was laid before the Italian Chamber providing for the creation of a National Institute, which was to have the exclusive right of transacting the business of life insurance, and stating that no compensation could be claimed by existing insurance companies for pecuniary damage resulting from the operation of this law. Protests were immediately made by the Austro-Hungarian, British, French, German, and United States Governments, and it is to be observed that, to take one example, the British representation claimed that compensation ought to be provided for British companies in respect of the loss that would be entailed by (*inter alia*) the compulsory disposal of valuable property for which they would have no further use, inasmuch as expropriation was universally recognised as constituting a title to compensation. Following upon these protests, certain amendments were introduced into the original Bill, of which the most important was the authorisation given to foreign companies to continue business for ten years on certain conditions. The Bill, as amended, became law in 1912. Formal reservations were made by the Governments concerned, but it is to be observed that the Italian Government pointed out that, as regards real property held by foreign companies, no loss was likely to result in view of the general appreciation in the value of such property. It will be noticed that the " expropriation " in this case was merely an indirect effect of the prohibition to continue business, and that the period of grace allowed in fact afforded the owners ample opportunity of disposing of their property under fair conditions.

Portuguese Religious Properties Arbitration.

After the revolution of 1910 the Provisional Government of the Portuguese Republic passed a law dated 8th October, 1910, whereby all the property of religious associations was confiscated to the State. The British, French and Spanish Governments protested on behalf of their nationals who, as members of the associations, were affected by this law, and after negotiation it was ultimately agreed to submit the matter to the Permanent Court of Arbitration at the Hague. The *compromis*, dated 31st July, 1913, makes it plain that the questions whether a breach

(*i*) See *Sentence Finale du Tribunal Arbitral de Delagoa*, p. 89.
(*k*) *Sentence Finale du Tribunal Arbitral de Delagoa, p.* 199.

of International Law had been committed by the seizure of the property and whether compensation was payable in respect thereof were left entirely open for decision by the tribunal (*l*). It is important to observe that throughout the course of the arbitral proceedings there is no mention of or reliance upon treaty engagements. The argument of the claimant Powers is based upon the fact that the confiscatory measure contravened the acquired rights and expropriated the property of foreigners who had established themselves in the country on the faith of a legal system guaranteeing protection in these respects. The following passages from the " Observations Générales " presented to the Tribunal by the British Government are so material that it seems desirable to quote them :

" The Government of His Britannic Majesty do not in any way intend to constitute themselves judges of the legality or validity, from the point of view of the internal law of Portugal, of the acts of the Portuguese Government. That is a matter of internal politics with which they have no concern. But His Majesty's Government are of opinion that the Portuguese State in taking possession, as it has done, of property legally acquired by British nationals in conformity with the legislation of Portugal and under the cover and protection of its public and private law, has acted contrary to the principles of the Law of Nations which governs the relations between States. It is part of the generally recognised principles of International Law that foreigners are subject to the laws of police and security of the State upon the territory of which they find themselves, and that the laws of that State also govern the rights of immovable property which they acquire there. In return for this subjection foreigners are entitled to count upon the legal protection and guarantees under the cover of which they came into the country and acquired their rights."

" Respect of property, respect of acquired rights, these are the legal principles of all civilised countries. It is upon the security which they assure and the confidence they inspire that the relations entertained by nations with each other are based. It cannot be objected here that it is ill founded for a foreigner to complain of the measures applied to him when those measures are equally applicable to the nationals of the State in the territory of which he finds himself ; the position in the two cases is not the same. Foreigners neither have nor had in Portugal the enjoyment of political rights ; they neither have nor had any part in the public affairs of the country. When the nation demands, or lets its Government take, such and such a political measure, it has no right to complain. As a celebrated Portuguese Jurist said : ' It is the nation's own act ; but the foreigner, who had no part therein, cannot be placed upon the same footing.' "

The other Governments associated with Great Britain adopted similar reasoning. To these contentions what answer did the Portuguese Government return ? In their " Observations Générales " they say this :

" The Government of the Portuguese Republic reply that far from contesting the legal principles upon which the three Governments base these arguments, they approve them without reserve, respectful of law and equity."

(*l*) See *Compromis, protocoles, &c., du tribunal d'arbitrage constitué en vertu du compromis signé à Lisbonne le* 13 *Juillet*, 1913, *entre la grande Bretagne, l'Espagne, la France et le Portugal* (The Hague, 1920

The defence of Portugal was founded upon an entirely different consideration, namely, that the properties in question did not belong to the individual subjects of the three Powers, but to the religious associations themselves. Ultimately a settlement was arrived at to which the decision of the Tribunal gave effect, certain agreed sums being awarded for the benefit of the individuals concerned. For this reason the Tribunal did not have to concern itself with the question of principle, but there can be no doubt whatever that if it had arisen for decision the Tribunal would have adopted and given effect to the view put forward by the claimant Powers and expressly accepted by the respondent State.

Norwegian Ships Arbitration.

This case arose out of the requisition by the United States during the late war of a number of ships which were being built in American shipyards for Norwegian subjects. Claims for compensation were made by the Norwegian Government to which the Government of the United States did not accede and ultimately the whole matter was submitted for decision to the Permanent Court of Arbitration at The Hague. The United States admitted that just compensation was payable in respect of any property taken, but they maintained that the Tribunal was bound to give effect exclusively to the municipal law of the United States. The Tribunal in their Award rejected this contention and held that they must apply International Law ; if the public law of one of the parties was contrary to International Law they were not bound by that public law (*n*).

The following passage from the Award merits attention : " The Fifth Amendment to the Constitution of the United States provides : ' No person . . . shall . . . be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.' It is common ground that in this respect the public law of the parties is in complete accord with the international public law of all civilised countries . . . whether the action of the United States was lawful or not, just compensation is due to the claimants under the municipal law of the United States, as well as under International Law, based upon the respect for private property . . . . Just compensation implies a complete restitution of the *status quo ante*, based not upon the future gains of the United States or other Powers, but upon the loss of profits of the Norwegian owners as compared with owners of similar property."

In the result the Tribunal awarded to the Norwegian Government, in respect of the claims of its nationals, a sum of $12,239,852, which was but little short of the amount asked for.

Although the American member of the Tribunal challenged the validity of the Award (*o*), the Government of the United States loyally complied with it. It is true that in his note transmitting the sum in question the Secretary of State took occasion to say that his Government " could not accept certain apparent bases of the award as being declaratory of the principles of International Law or as hereafter binding upon this Government as a precedent " (*p*), but this obviously cannot have been intended to refer to the principle of International Law that

(*n*) *American Journal of International Law*, April, 1923, pp. 362-383.
(*o*) *American Journal of International Law*, April, 1923.
(*p*) See *British Year Book of International Law*, 1923-24, p. 162.

fair compensation is payable in respect of the private property of a foreigner seized by the State, inasmuch as that principle was not only recognised by the United States in this very arbitration, but has been over and over again affirmed in unmistakable terms by their accredited representatives (see *e.g.*, Moore's *Digest*, Vol. VI, pp. 247-324).

These cases confirm, in a striking manner, the existence of a rule of International Law of the kind formulated in this Report. It is submitted that such a rule has become part of what may be called international "common law." A glance back at an earlier period when the notions upon which modern civilisation is based were not so clearly defined as they are now will show that the protection that is now left to the operation of this rule of "common law" was sought in express treaty stipulations. One has been noted in the case of the Sicilian Sulphur Monopoly, but the treaties of the seventeenth and eighteenth centuries contain a great variety of provisions designed to safeguard the property of the nationals of the contracting Powers from spoliation in each other's territory. Sometimes the treaty is directed to secure the exclusion of a particular rule of municipal law, such as the *droit d'aubaine* (*q*). Gradually all such stipulations have disappeared from treaties concluded between civilised States, although they are still to be found in those to which barbarous or semi-civilised Powers are parties. What has led to the abandonment of these express contractual safeguards? It cannot be supposed that the civilised Powers of to-day intended to lessen the security of their subjects' property in each other's territory. The reason clearly must be that with the acceptance by the community of civilised nations of certain fundamental principles of law, of which the inviolability of private property is one, all such treaty stipulations have become unnecessary.

III—The Peace Treaties.

The principle of compensation upon the expropriation of private property is recognised in the Peace Treaties arising out of the late war. Thus Art. 16 of the Brest-Litovsk Peace Treaty of 3rd March, 1918, declares that property rights may not be confiscated without adequate compensation, and it was laid down by Art. 18 of the German-Russian Peace Treaty of 27th August, 1918, that "Property of Germans in Russia will in future only be confiscated or otherwise withdrawn from the owner's power of disposal if such confiscation or privation of rights is carried out in the interest of the State or community in accordance with a law applying equally to all subjects of the country, and to the nationals of a third country, and to all similar property, *provided that the owner is compensated at once in cash.*" The amount of the compensation is to be fixed by an impartial commission. How far the provisions of these Treaties have been observed we are not aware.

The Peace Treaties between the Allies and the Central Powers contain provisions for the protection of private property, which can be conveniently grouped under four heads:

(1) The first set of provisions is contained in Arts. 297—298 of the Treaty of Versailles, Arts, 249—250 of the Treaty of St. Germain, Arts. 232—233 of the Treaty of Trianon, and Arts. 177—178 of the Treaty of Neuilly. These Articles provide (*inter alia*) for the restoration to Allied nationals of such of their property in the enemy State as has not been completely liquidated at the date of the treaty. When the

(*q*) See De Martens and De Cussy, *Recueil des Traités*, Vol. I, pp. xvii-xxii, for list of Treaties and observations upon the abolition of the *droit d'aubaine*.

latter event has occurred the owner is granted compensation at the expense of the enemy State, but in regard to the restored property it expressly laid down that it shall not be subjected to any measures in derogation of property rights which are not applied equally to the property of the State's own nationals and, *in the event of the application of such measures, that adequate compensation shall be paid.*

This provision clearly limits the power of the State concerned (Germany, Austria, &c.) to pass confiscatory legislation applicable to the property of the nationals of its former enemies.

A similar stipulation is made by Art. 272 of the Treaty of St. Germain, and Art. 255 of the Treaty of Trianon in regard to Allied insurance companies, for the period of ten years during which they are empowered to carry on business in Austria and Hungary.

(2) The treaties introduce a departure from modern international practice in empowering the victorious Powers to retain and liquidate the property of enemy nationals, but the principle that such property should not be confiscated is recognised by Art. 297 (i) of the Treaty of Versailles, which throws upon Germany the obligation of compensating her nationals in respect of their loss. Corresponding provisions are contained in the Treaties of St. Germain, Art. 249 (j), Trianon, Art. 232 (j), and Neuilly, Art. 177 (j).

(3) The third group consists of Arts. 85, para. 4, 91, paras. 7 and 8, 113 of the Treaty of Versailles ; Art. 78, paras. 4 and 5, of the Treaty of St. Germain, and Art. 63, paras. 4 and 5, of the Treaty of Trianon. By these provisions the right is accorded to certain categories of persons who by the operation of the treaty acquire the nationality of an opposing State to opt for their original nationality and, if they exercise this right, their property in such State is inviolable ; they are entitled to retain their immovable property and to remove, without duty, their movable property.

(4) Finally, it is provided by Art. 267 of the Treaty of St. Germain and Art. 250 of the Treaty of Trianon that the property of Austrian (Hungarian) nationals in territory detached from Austria (Hungary) by the Treaty may not be retained or liquidated by the Allied Powers, but must be restored to the owner. The scope of these Articles is shown by two letters addressed by the President of the Peace Conference to the Austrian and the Jugoslav Delegation respectively on September 2, 1919, and March 1, 1920. In the former it is stated that by Art. 267 " les biens des ressortissants autrichiens dans les territoires cédés aux Puissances alliées seront rendues à leur proprietaires ; ces biens seront libres de toute mesure de liquidation ou de transfert prise depuis l'armistice, et une exemption semblable de toute mesure de saisie ou de liquidation *leur est garantie pour l'avenir.*" In the latter it is said with reference to Art. 250 of the Treaty of Trianon that although the Jugoslav State retains the sovereign right to regulate the transmission and enjoyment of property in the territory transferred to it and is therefore free to take the measures which it thinks necessary or useful, nevertheless this liberty is limited by the provisions of the treaty—" pourvu naturellement qu'elles n'aboutissent, par une confiscation deguisié des biens en question, à éluder la défense stipulé par le Traité."

It appears from the above examples that the Peace Treaties eal com prehensively with the question of the treatment to be accorded

to enemy private property, that confiscation is in no instance countenanced and that safeguards are provided in particular cases for protecting such property from expropriation.

Conclusions :—Your Committee has therefore come to the conclusion that although there is juridically no limitation to the power of a sovereign State to expropriate without compensation property of its own nationals, nevertheless

1. It is generally recognised by the constitutions, civil codes, or common law of civilised States that private property may not be expropriated without compensation.

2. In so far as the question of the immunity of private property from confiscation arises in international relations the same principle is generally accepted.

3. A State is by the Law of Nations entitled to intervene to protect its nationals in another State (a) from injury to their property resulting from measures which discriminate between them and the nationals of such other State ; (b) from actual injustice even if there is no such discrimination.

4. The principle that private property ought to be inviolable is recognised by the Peace Treaties which contain express provisions for the purpose of preventing the expropriation of ex-enemy private property without compensation.

(Signed)

FRANK RUSSELL,
Chairman.

FREDERICK POLLOCK.
ROLAND E. L. VAUGHAN WILLIAMS.
CHARLES DELMÉ-RADCLIFFE.
RENÉ BRUNET.
WYNDHAM A. BEWES.
A. P. FACHIRI.

HUGH H. L. BELLOT,
Hon. Secretary.
22nd June, 1926.

RESERVATIONS.

The undersigned members do not agree with the above statement that " there is juridically no limitation to the power of the sovereign State to expropriate without compensation the property of its own nationals."

On the contrary they are of opinion that although a State under its constitution may possess the *power* to do so, it does not possess the *right*. They regard the right to private property as one of the fundamental rights of the individual in a civilised State. Consequently they are of opinion that the inviolability of private property is based upon a legal principle which is and has been generally recognised and applied by modern and ancient civilisations.

Their conclusion, therefore, is as follows :—

" Although, in the absence of a constitutional limitation, the power of a sovereign State to expropriate the private property of its own

nationals may not be disputable by process of law within its own jurisdiction nevertheless such expropriation is contrary to law (droit)."

This conclusion is in accord with the law of France, and with the common law of England as declared by Magna Carta, c. 39, " no freeman shall be deprived of his freehold " ; by the Petition of Right, " the ancient and undoubted right of every freeman is, that he hath a full and absolute property in his goods and estate," and by the Bill of Rights, " whereas by the common law and statutes every freeman hath a proprietie in his goods and estate."

(Signed)

FREDERICK POLLOCK.
HUGH H. L. BELLOT.
WYNDHAM A. BEWES.
RENÉ BRUNET.
CHARLES DELMÉ-RADCLIFFE.

* * * * * * *

" As regards the position of the property of foreigners we are in substantial agreement with this Report. The relation of a State to the property of its nationals (in the absence of treaty obligations) not being a question of International Law, we prefer to abstain from expressing an opinion upon it."

(Signed)

J. LESLIE BRIERLY.
ARNOLD D. MCNAIR.

RESOLUTIONS PASSED BY THE CONFERENCE.

1. It is generally recognised by the constitutions, civil codes or common law of civilised States that private property may not be expropriated without compensation.

2. In so far as the question of the immunity of private property from confiscation arises in international relations the same principle is generally accepted.

3. A State is by the Law of Nations entitled to intervene to protect its nationals in another State (a) from injury to their property resulting from measures which discriminate between them and the nationals of such other State ; (b) from actual injustice even if there is no such discrimination.

4. The principle that private property ought to be inviolable is recognised by the Peace Trustees (although the mode of carrying it out is unsatisfactory) which contain express provisions for the purpose of preventing the expropriation of ex-enemy private property without compensation.

5. It is contrary to the principles of International Law to deprive a foreigner, or a member of a protected minority, of the fundamental rights to which he is entitled as owner, through indirect ways which, though not in law, but in fact, lead to an expropriation without real compensation.

Further resolved that the Committee continue its labours.

PLEADING of MAÎTRE RÉNÉ BRUNET before the ROUMANIAN-HUNGARIAN MIXED ARBITRAL TRIBUNAL in the case of EMERIC KULIN AND OTHERS *versus* THE ROUMANIAN STATE, 10th Jan., 1927.

The Hungarian nationals, whose case I have the honour of putting before you, are private individuals who once owned estates, large and small, in Transylvania. These estates have been expropriated by the Roumanian Government. All that they now claim is the restoration of their lands, basing their claim exclusively on Article 250 of the Treaty of Trianon.

One must, therefore, in my opinion, first of all set aside all irrelevant matter which has been intentionally introduced by our opponents.

It seems to me necessary, as a start, to rid this discussion of anything which concerns the negotiations, conversations, and pseudo-agreements of Geneva or Brussels.

For reasons which are not hard to guess, our opponents have introduced into these proceedings allegations which were more or less correct. It was necessary that we should follow them over this ground, and we have shown that in all these so-called agreements, discussions, and conversations there was nothing definite or damaging to our case. Be that as it may, those were proceedings to which we were not a party. The points in question were quite different from those now under discussion, since they were based on Article 63, and we base our claim solely on Article 250 of the Treaty of Trianon. Those proceedings were in another court and between parties other, as I have said, than those represented in this suit, therefore, they cannot, legally, be taken into account here.

The discussions must be freed too from the problem of minorities, to which reference has been made . . .

THE ROUMANIAN AGENT : Never !

PROFESSOR POLITIS : Not by us.

ME. BRUNET : We have the shorthand notes, and, in reading them, I shall show that mention has been made here of the Treaty of Minorities. But if you agree that this matter should be kept out of the discussion, I am, for once, in agreement with you.

Also all criticism or expressions of opinion, favourable or unfavourable, on the agrarian reforms in Roumania must be avoided. We agree that Roumania has the right to make an agrarian reform. Whether such reform were indispensable, necessary or superfluous is of no importance, and we will ignore the question. We have no intention of asking the Tribunal to pass judgment on the merits of these reforms. All that we ask is that justice be done to us in respect of certain lands of which, in our opinion, we have been illegally deprived.

Here and now, too, I must object to the suggestion which has been made by the other side that we are trying to reach political ends under the mask of legal action. Not in the least. It is said that the Hungarian

Government has taken to political action in order to preserve, more or less, a certain responsibility as regards its nationals and which it feels it has towards them. Nothing is further from our intentions.

A political operation ? Why ? We are merely certain Hungarian nationals who have the right under the Treaty of Trianon, I would say the subjective right, to plead as individuals in a court of justice, and we are exercising that right.

Political operations under the guise of legal action ? Why should we travesty judicial proceedings here ? Our case is of the very type of the cases which are heard before National Courts, or before the Mixed Arbitral Tribunals. We claim the restoration of lands. It is what in national law is called a real action. It is the real action, purely and simply, and not something else. For example : M. Zoltan Deseo (case R.H. 138) was the owner of a plot of land, three jugars in extent, situated in Transylvania. It was taken away from him. He claims its restoration. Where in this can political action be seen under the cloak of legal proceedings ?

Our case here is essentially a private one, and you should completely dismiss from your thoughts and deliberations all political, social, and economic considerations.

Furthermore, according to the wish of our opponents, we have only carried on up to now a plea to the jurisdiction. The question here is still only one of jurisdiction, an action for powers, and the only question on which you are called upon to deliberate is as to whether you have jurisdiction to hear the private action which has been brought before you.

In order to decide this question, you have to consider—and this is our only demand—the Treaty of Trianon, and in that treaty only Article 250. Paragraph 3 of this article reads :—

> " Claims made by Hungarian nationals under this article shall be submitted to the Mixed Arbitral Tribunal."

Therefore you certainly have jurisdiction if the claims put before you are based on measures of seizure, liquidation, or others provided for by Article 250.

I recognise that it will not be sufficient, in order that your jurisdiction may be established, for any random claimant to come before you and assert that he has been the victim of a measure of seizure, liquidation, or whatever it may be. But conversely we have not now, as has been repeatedly pleaded in this court, to prove definitely and irrefutably that we have been the victims of a measure of seizure, liquidation, or the like, since we plead to your jurisdiction to deal with the matter.

All that we have to show you here is proof that there exists the possibility of seizure or liquidation, and it is this proof only which matters in the present proceedings.

As soon as we have shown the possibility of seizure or liquidation, then you will have jurisdiction, and we will have the right to your jurisdiction.

Therefore, gentlemen, in deciding the only problem put to you to-day, you have to answer two questions. Two questions only are submitted for your examination.

1st. What are the essential elements in liquidation ?

2nd. Are these elements to be found in the measures taken by the Roumanian Government in putting into effect their agrarian reforms in Transylvania ?

As soon as there exists the possibility of an answer in the affirmative to this last question, your jurisdiction (competence) will be established.

It has been put to you quite convincingly what constitutes liquidation. I will not repeat what was said. I take it that the definition of liquidation given yesterday by my learned friend M. Gidel is accepted ; the same can be said of the definition given by my learned friend Me. d'Egry to-day. I hold that, on this point, the discussion is closed.

My task to-day will be to show, very briefly, that the constituent elements of liquidation, as have been enumerated to you, are clearly to be found in the measures taken by Roumania in effecting her agrarian reforms in Transylvania.

As has been stated to you, liquidation in the sense of Article 250 of the Treaty of Trianon is a measure contrary to general international law. That is the definition given by the Permanent Court of International Justice in their judgment No. 7, and I do not expect that anyone here would oppose the authority of such a decision.

On the other hand, we were shown, yesterday, that general international law demands that when a state believes itself obliged to expropriate a foreigner, it shall indemnify him fairly. If then, the Government of Roumania, in carrying out their agrarian reforms in Transylvania, do not pay just indemnities to Hungarian nationals, they commit a measure of liquidation. To my way of thinking, the syllogism is impeccable.

Now, does the Roumanian State pay this indemnity ? For some days, gentlemen, you have been told that the compensation paid by the Roumanian Government is illusory and ridiculously small. I will now show you in a very few words that this is so.

This question is dealt with in Article 50 of the Roumanian law providing for agrarian reforms in Transylvania. This article is worded as follows :—

> " The value of land liable to confiscation under the present law is fixed on the basis of jugars, by categories, and according to the quality of the land. It will be calculated by taking into account all assessment factors, such as : the selling-price of land in the locality and neighbourhood in 1913, rent capitalised at 5% of the price of farm lands in the district at that time ; valuations fixed by loan societies ; net return per jugar ; land tax and other data relating to the land during the five years previous to 1913 ; but prices in no cases to be higher than those ruling in 1913. Values will be calculated in lei. For the purpose of the assessment, one Leu shall be considered to be equivalent to one Crown.".

Thus land values, assessed under this particular article of the law, are fixed at the values obtaining in 1913 in gold crowns. And landowners are paid compensation at the moment of expropriation in paper lei, equal in number to the gold crowns which the land was worth in 1913.

In other words, for an estate valued at 100,000 gold crowns in 1913, the owner should, in principle, receive 100,000 paper lei to-day. In consequence the first loss he suffers is equal to the depreciation of paper lei in comparison with the pre-war value of gold crowns.

Now, this first loss is easily calculated. The paper lei is worth about one fortieth of what the crown was worth, after allowing for the difference of about 5% between the intrinsic values of gold crowns and lei, in favour of the crown. This means that the dispossessed owner can receive as compensation under this law only one-fortieth of the real value of his land, or roughly 2·5% of its value, while the remaining 97·5% is purely and simply confiscated.

As regards the second loss, the following must be taken into consideration :—

In accordance with article 85 of the same agrarian law, the Roumanian State pays the compensation calculated, as said above, only in 5% Government Bonds, redeemable in 50 years and non-transferable.

Now, Roumanian credit being low, the bonds, even when negotiable and quoted in stable foreign currency, cannot generally be dealt in at more than 30% of their face value. From this it follows that the theoretical compensation of 2·5% mentioned previously dwindles to 30% of that figure, or to ·8% of the true value of the land confiscated. That is, to less than 1%.

But that is not all. The calculation I have just made is based on the hypothesis of the Bonds being transferable, but, as far as I know, they are not. Since the Bonds given to the owners are not transferable, they are obviously of much lower value, and the compensation received by the owners is much less than even the ·8% mentioned. In fact, compensation paid by the Roumanian State is so small that owners do not at present trouble themselves to claim it, especially as a Government Order, dated 3rd April, 1924, lays it down that a dispossessed owner shall, at the moment of claiming his Bonds, sign a declaration in which he states that he is satisfied with the amount of compensation allotted to him and that he waives any further claims.

So you see, gentlemen, the dispossessed Hungarian owners do not, in reality, receive any compensation ; or, to speak more exactly, they voluntarily renounce that which is not worth having.

Therefore we can take it that the compensation theoretically allowed by the Roumanian Government is reduced in practice to nothing at all, and that the dispossessed owners in Transylvania receive no indemnity.

There, gentlemen, I have established my first point, namely that since, contrary to general international law, Hungarian owners of land in Transylvania do not receive the compensation to which they are entitled under that law, we find ourselves confronted by a case of liquidation in the sense of judgment No. 7 of the Permanent Court of International Justice, and you have the necessary jurisdiction.

But I beg leave to continue my analysis.

It has been maintained by the other side—and this has been the leitmotiv of all the explanations given—that a measure can be called " liquidation " only when it is differential. We contest, in the most formal manner possible, the accuracy of such a criterion ; we have always maintained and we maintain to-day more than ever that a measure of liquidation is a measure of liquidation, even when it is not differential. But I admit that, when a measure is differential, there is a great possibility that it does constitute a liquidation.

Now, I maintain that an agrarian reform, such as has taken place in Roumania, is a differential measure or a system of differential measures. In the first place it is differential in the sense that, by its definition even, no distribution of land is made to Hungarian nationals. That goes by itself.

I maintain, pending proof to the contrary—but, Monsieur l'Agent du Gouvernment Roumain, this would be a question of the merits—I maintain, pending proof to the contrary, that the Roumanian State cannot distribute land made available by the agrarian reform to Hungarian nationals who do not even inhabit, who cannot inhabit Transylvanian territory.

THE ROUMANIAN GOVERNMENT AGENT : No more do the Chinese !

ME. BRUNET : That is a point which we will discuss when we get nearer to the question of the merits of the case.

There is, again, a second cause of differentiation. The Roumanian State has made and published four agrarian laws :—

One law for the old kingdom,
One for Bukovina,
One for Bessarabia,
And, finally, one for Transylvania.

The theses which have been put forward here is that the treatment received by Hungarian nationals in Transylvania was equal, first to the treatment of all Roumanians in general, secondly to that of all Roumanians in Transylvania.

First of all, was there complete equality of treatment between Hungarians in Transylvania and Roumanians in general or, if it is preferred, Roumanians of the old Kingdom of Roumania ? There are considerable differences between the law for the old Kingdom and that for Transylvania. This cannot be contradicted, and it is enough to read the two laws. In most cases the conditions of expropriation are more severe in Transylvania than in Roumania. But I do not hesitate to admit quite freely that a few rare exceptions can be found to the contrary.

To explain this difference, it has been said that the geographica as well as the economic situations of Transylvania and Roumania are different, and that it is necessary in legislative enactments to take these differences into account.

I agree with that. But where I begin to disagree is in pointing out that if a difference exists between Transylvania and Roumania on the point of the just distribution of land, that difference is in favour of Transylvania.

It has been stated by the other side how necessary—historically necessary—agrarian reform has been for some centuries in the old Kingdom of Roumania ; and we have been told about all the efforts made by different Governments both before and after the war to effect adequate agrarian reforms in Roumania. I admit that agrarian reforms were very urgently required in the old Kingdom. But I deny that such was the situation in Transylvania, because reforms had been carried out in Transylvania a long time before, particularly in 1848-1849, when a great distribution of land took place.

I see, for example, in a document which I have before me, that in 1848 and 1851 more than a million and a half jugars were taken from 3,000 owners and distributed in more than 300,000 plots. These statements, gentlemen, are no invention of mine. I find, for example, in a work which is, in general, very favourable towards the Roumanian Government—" The Agrarian Reform in Roumania," by Ifor Evans (Cambridge, 1924)—the following statement. This short passage occurs on pages 105 and 106 :—

> " Events moved more slowly in Transylvania and Bukovina. It was felt there that the necessity for action was less urgent, particularly because there was very little ' latifundia ' there, and the danger of Russian propaganda was noticeably less in Transylvania."

Therefore, gentlemen, I agree that there may be differences between the agrarian laws of the old Kingdom and Transylvania. But, if they had to be made, I contend that the reforms should have been carried out with less severity and brutality in Transylvania than in Roumania, and what happened was the reverse.

But what is of most importance is to find out whether, really, equal treatment was meted out to Hungarian and Roumanian owners in Transylvania. It is what occurred there which matters.

You have been told, gentlemen, what modifications were made in the original texts of the two Decree-Laws of 1919 and 1920, and how the final text was arrived at in 1921. What was the spirit moving the Roumanian Government when it essayed different Decrees to arrive at one law in 1921 ?

Here, gentlemen, I am in the happy position of being able to read to you extracts from a book, whose author cannot be questioned. His authority on agrarian matters is such that, in my opinion, his statements are beyond dispute. This writer is M. Mitita Constantinesco, who is a nephew of M. Alexandre Constantinesco, the Minister of Agriculture ; and M. Mitita Constantinesco is not only the nephew of the Minister who put into effect the agrarian reforms, but was also the Secretary-General of the Agrarian Committee in Roumania. Thus he is the highest authority on agrarian matters.

He has written a book in which the burden of his argument is that through the centuries the landed properties in Transylvania had been taken from the Roumanian peasants by the conquering Magyars, sometimes by trickery, sometimes by force ; and that one of the happiest consequences of the war is that the Roumanian people are now able to regain their lands.

Here, gentlemen, are some typical passages. I read, for instance, on pages 249 and 250 :—

> " The regime of oppression was at its height all over Transylvania. The Roumanian peasants were despoiled of their property. The huts of the former yomagi . . . . "

I think this means " former peasants."

A VOICE : " Former serfs."

ME. BRUNET : " Who toiled through the centuries, passed into the swollen patrimonies of the Magyar proprietors.

" By these offences against the law, against civilisation, and against humanity itself, the outcome only of the harsh egoism of the chauvinistic Magyars, the Roumanians lost a large number of their landed properties and were reduced to impotence from the point of view of their public national life. Socially they always constituted the great mass of the Transylvanian population, disturbing on account of its size and which had to be reduced to a state of serfdom.

" This was really brought about by the persistent oppression and injustice of the Magyars till the hour of universal liberty and justice in Europe was struck on the clock of the Great War in 1914. And the victory of the Allies and of justice over oppressors and usurpers definitely assured the liberty of the Roumanian nation."

And again, on page 258 :—

" The war of 1916 was not waged solely for the platonic idea of national unity, but also for the liberation, an instant sooner, of brothers oppressed by the merciless, unrelenting tyranny of the Magyars.

" A stop had to be put to the deeds of these usurpers, marked by the red brand of history ; and it was necessary to bring to the long unhappy land of Transylvania the consolation of liberty and the benefits of justice.

" Also, the ministers of tyranny had to be chastised. The allied victory and the bravery of the Roumanian troops, who carried the charter of the Judgment of Providence within the walls of Budapest, were charged with the realisation of international justice in proclaiming the union of all the Roumanian people, and the guarantees of protection against the Magyars. Thus this realisation was made definite and permanent."

Further on I find in this work a table of statistics which shows that 3,316,000 Roumanians possessed 5,598,000 arpents, while 1,800,000 Magyars possessed 11 million arpents.

And M. Mitita Constantinesco follows up this table with the following remark :—

" These data were, by their official and mathematical objectivity, the greatest protagonists in favour of a modification of the economic and, above all, of the agrarian position of the country. They were evidence of the spoliation registered by history to the detriment of the Roumanians and, at the same time, gave the surest indication of the economic disease which was wasting the country. The remedy could only be agrarian reform."

And, finally, a last passage. In it the author sums up the work of agrarian reform.

" The economic equilibrium of these provinces resulting from a more equal distribution of land among the agricultural population is assured, and, at the same time, all injustices and spoliations of a whole feudal damaging past are adjusted. For the firm stability of order, etc . . . . "

There, gentlemen, are some passages which throw very clear light on the motives which drove the Roumanian State to effect agrarian reforms under the conditions in which they were carried out. It had the right, I repeat, to bring about agrarian reforms ; it had the right, if it wished,

to take back the land from the conquering and oppressing Magyars (assuming that there had been conquest and oppression) ; but it had no right to do it by the methods it adopted. If it wanted the land, it ought to have paid just compensation, instead of which it created artificially, introduced into its legislation and mingled among its laws, dispositions which have nothing whatever to do with agrarian reform—and on the strength of which it has been able to proceed to measures which, so far as Hungarian nationals are concerned, are measures of liquidation.

This becomes apparent if one studies a little closer the measures taken in agrarian legislation in Transylvania relating to absenteeism. Our opponents have said :—

> " On the subject of absenteeism, the plaintiffs raise an objection which has really no value. Hungarians claim that the Treaty forces them, if they opt for Hungary, to emigrate, and that the law, profiting by this obligatory emigration, declares them to be absentees and allows the confiscation of their property." Now they say, " that the argument is valueless because the period chosen for fixing absenteeism is quite different from and well antecedent to the period fixed by the Treaty for exercising the right of option."

This reasoning, gentlemen, has been gratuitously attributed to us, but it has never been put forward by us. We have never criticised the measures relating to absenteeism either here or by Note or by any document.

On the contrary, we have appealed and are continuing to appeal against these measures. We claim that the regulations concerning absenteeism are the very keystone of the system of liquidation in Transylvania, but you will see, gentlemen, that our argument is altogether different from what it has been represented to be.

We claim, gentlemen, that absenteeism as conceived and applied in Transylvania constitutes a genuine measure of differentiation to the detriment of Hungarian owners in Transylvania. We claim that the measures taken as a result of absentee legislation, result in dispossessing the vast majority of Hungarian owners in Transylvania and apply only to them, thus conforming to the essential criterion of liquidation as laid down by you.

How does this question of absenteeism appear in the legislative texts of Roumania ? It will be sufficient to read the article relating to absenteeism, first in the law of the old Kingdom, then in the law for Transylvania.

The law for the old Kingdom, article 7, reads :—

> " Landed properties of absentees shall be expropriated to their full extent.
>
> " In this category shall be included all properties which, in conformity with the special laws, have been subject to a double land tax uninterruptedly during the last five years."

Thus, to be judged an absentee it is necessary to have paid the special Roumanian tax on absentees for an uninterrupted period of five years.

The Transylvanian law, article 6, reads :—

> " Landed properties of absentees shall be expropriated to the full extent ; within the meaning of this Act, a person is judged absent who, without any official mission abroad, has been out of the country between 1st December, 1918, down to the date of presentation of the present Act (21st March, 1921). Landed estates of less than 50 jugars are exempt."

So you see, gentlemen, to what extent each country has a different definition of absenteeism. We shall be told, perhaps, that in Transylvania there were no double land taxes on absentees, and therefore the criterion applicable in the old Kingdom could not be transferred, purely and simply, to Transylvania. This may be ; but I expect an answer to the question why five years are required to make an absentee in the old kingdom when 27 months suffice in Transylvania.

In fact, gentlemen, there are two distinct conceptions of absenteeism, and the real truth must be examined into carefully.

What is absenteeism ? Absenteeism is the custom of landowners of living and spending in foreign countries the revenues derived from the soil of their own country. All over the world this is called " absenteeism." That is the definition, the true definition, of absenteeism, and there is no doubt that it is this form of absenteeism which is aimed at in the law of the old kingdom of Roumania.

I do not say, as has been wrongly alleged by the other side, that absenteeism is the keystone of agrarian reform. It has been held that at the present time there is no agrarian reform which does not contain special provisions against absenteeism. This is incorrect, because notably, without looking further, it is a fact that Czecho-Slovakia and Serbia have both instituted, and are still carrying out, agrarian reforms without including the idea of absenteeism in their agrarian laws. Be that as it may, I recognise that it is normal for the matter to be included, and that Roumania had included it in the law for the old kingdom in a correct and acceptable manner ; but the position is quite different in Transylvania.

There an artificial absenteeism has been invented, which has nothing in common with the normal and regular absenteeism such as has been embodied in the law for the old kingdom. To begin with, 27 months are enough to make an absentee. But, I ask you, is this a time sufficiently long to prove that a landowner has the fixed habit of normally residing in and spending the revenues which he draws from his property in a foreign country, which is the characteristic element which constitutes absenteeism ?

And then, why these particular dates ? Why was the period of from 1st November, 1918, to 21st March, 1921, specially chosen ?

The Honourable M. Titulesco once demonstrated in Geneva, with that fertility of argument in which he has no equal, that some dates had to be fixed, so these were chosen.

Let us think for a moment, gentlemen. With what event of history does this date correspond ? November, 1918, that is the armistice. It was the moment when the Roumanian troops began their occupation of Transylvania. On 21st March, 1921 (27 months later), the draft of the

agrarian law, which ruled that persons absent, who had been absent up to that date, should be totally expropriated, was placed before Parliament ? Why should those dates have been chosen, gentlemen ? Was there really no other reason than the desire to take two dates, a date to begin and a date to end ?

Let us look at the situation created for the Hungarians by the choice of these dates. In the first place, were the Hungarians who lived in Hungary—in pre-war Hungary—whose properties were situated in Transylvania, living in a foreign country ? We are dealing with the time of the armistice, during the occupation of Transylvania. Transylvania was to be transferred to Roumania from the date the Treaty became operative, that is to say, at the end of July, 1921. But up to that date Transylvania was Hungarian territory, and, therefore, a Hungarian, who lived in Budapest at that time but whose land was in Transylvania, was in his own country. He was not abroad. He could not be absent.

Gentlemen, the situation is much more absured still if we consider the Hungarians who were actually living on their land in Transylvania itself. We shall see that it is precisely against these, most frequently, that the absentee clause operated. We are in November, 1918. A terrible war has just ended, and it is known that the belligerent armies had not spared the civilian populations. At this moment, the Roumanian troops invade and occupy Transylvania progressively. There were people in a state of more or less terror who recoiled towards Hungary in proportion to the Roumanian advance, to take refuge, say, in Budapest.

Thus, there were large numbers of people who, very naturally, retired before the Roumanian advance to seek safety in the heart of their own country. Thus, for example, we see in a case of which you have been informed, that the Countess Nicolas Szécsen fled to Budapest at the end of November, 1918, when the revolution broke out and the Roumanian troops arrived in Transylvania. The number of Hungarian nationals who thus flowed back towards the centre of their own country was very large.

There is also another category of persons. Those who remained on the spot in spite of the advance of the Roumanian troops and in spite of the Roumanian occupation. But they were subjected to such treatment that they preferred in the end to leave, providing they had not already been expelled. Because, from the beginning of the occupation, a great number of them were expelled in one way or another. For instance, this is what happened in a case of which you are seized. It is case 301, Baron Petrichévich-Horváth versus The Roumanian State.

M. Petrichévich-Horváth was the owner of real estate in Koppand, Transylvania, where he owned about 2,000 cadastral jugars. On 7th June, 1920—I ask you to make careful note of the date, gentlemen—the Departmental Expropriation Commission of Torda expropriated his property under article 2, § 1, of the agrarian law, of the agrarian decree-law of 1919, and taking into consideration articles 5 and 6 of the Ordinance relating to repatriation published in the Official Journal, No. 44.

This ordinance, gentlemen, enacts that those persons who, though natives of Roumanian soil, have declared that they do not desire to opt for Roumanian nationality shall be repatriated (that is to say, conducted to Hungary), and shall be considered absentees although actually at the time in Transylvania.

And, in accordance with this ordinance on repatriation, Baron Petrichévich-Horváth was completely expropriated of his land.

Here, gentlemen, are the " Minutes drawn up dealing with the matter of the expropriation in the commune of Koppand in the Hall of Meetings of the local Committee of the Departmental Commission on 7th June, 1920 :—

" Subject :

" The real estate of Baron Emile Horváth has been expropriated under paragraph 2, sub-paragraph 1 of the agrarian law (decree-law), since, under the terms of articles 5 and 6 of the Ordinance on Repatriation, published in the Official Journal, No. 44, all persons are held to be repatriated who have declared themselves unwilling to claim Roumanian nationality, even though they are natives of Roumanian soil. On these grounds the absenteeism of M. Emile Horváth is established, following his own delcaration that he does not wish to claim Roumanian nationality."

This is a most interesting case, gentlemen, and which I ask you to make particular note of. Baron Petrichévich-Horváth was expropriated on 7th June, 1920, before the Treaty came into force (July, 1921), before the law on Roumanian nationality, which was to allow option, was promulgated, and before promulgation of the law on agrarian reform, which was to regulate absenteeism.

How, then, was he expropriated, and why ?

Let us say that he was repatriated ; he was expelled and, as he was repatriated, he was absent—he was considered to be absent.

Is that a liquidation ? Has a Roumanian been treated in that manner ? Is it logically and fundamentally possible to think that similar action could have been taken against a Roumanian ? In my opinion we have there typical liquidation itself, even if adopting the definition of differentiation laid down by the other side.

This is not the only case. I have the case of Pierre Ekes. Mme. Pierre Ekes versus the Roumanian State, case No. 153. It is similar. Here again, this lady was expelled, and, after expulsion, she was expropriated because she was absent.

Is this not equally an essentially constructive differential measure, as defined by yourselves, a measure of liquidation ?

There is still another case. We have considered people who went away ; we have considered people who were expelled ; there were also those who were prevented from returning, because at the disturbed period of the armistice, Roumania had no legation in Vienna, and when there was a Minister in Vienna he refused to give passports to Hungarians who wanted to return to Transylvania to look after their properties. I am not inventing, gentlemen. Listen to this :—

On many occasions Count Raphael de Zichy applied repeatedly at the Roumanian Legation in Vienna, as soon as it had been established, for a visa to enable him to return to Transylvania. This visa was always refused. For his own protection, he asked at least for a certificate that he had been refused a visa. He was given this certificate. I have it in my dossier, and I will read it to you.

" The Roumanian Legation, Vienna.

" Certificate.

" At the request of M. the Count Raphael de Zichy, the Royal Legation of Roumania in Vienna certifies hereby that it has been forbidden to issue visas to passports to Hungarian subjects from the date of the dissolution of the Austro-Hungarian monarchy up to 16th February, 1921.

" Several times between the months of May and August, 1920, M. the Count Raphael de Zichy has begged the Royal Commissariat of Roumania to obtain from the Roumanian Government permission for him to enter the kingdom, and for him to be given the necessary visa. But the Royal Commissariat has not acceded to this request.

" Vienna, 28th May, 1923."

THE AGENT OF THE ROUMANIAN GOVERNMENT : It is very regrettable that we were not informed of these certificates delivered in Roumania. We have only just seen them here. I demand at least that they be put before us before to-morrow, in order that we may be able to study them and make suitable reply to such things. It is to be hoped that this will not occur again !

ME. BRUNET : With pleasure. You shall have it this very evening.

THE ROUMANIAN AGENT : It ought to have been shown before.

THE PRESIDENT : You are willing to communicate it ?

ME. BRUNET : Certainly, Sir.

Well, gentlemen, there you have the situation during the period under discussion. There were persons who were forced to go away. There were persons who were expelled. There were persons who were prevented from returning to Transylvania. They were then declared absent, and were expropriated from all their land, on account of their absence from Transylvania. There you have the general rule, and, briefly sketched out, a picture of the general situation in Transylvania during the Roumanian occupation after the armistice.

Now we will see in closer detail how the provisions which I have analysed bear on certain cases.

I read to you, just now, the article of the Transylvanian law concerning absence, and you will no doubt have noticed that, contrary to what happens in the original Kingdom, absentees are, nevertheless, allowed to keep at least 50 jugars of land. It is their right. In practice all their land is taken from them. You will see, among the instances put before you, cases of the confiscation of estates of 2, 2½, 6, 10, &c., jugars . . . Not even the 50 jugars, which are allowed by the formal text of the law, are left to the supposed absentees, voluntary or otherwise. As an example, there is the case of the widow, Madame Ambroise Grózá, No. 142.

Mme. Grózá, whose husband was killed by the enemy in 1917, inherited from her mother in 1918, before the occupation of the Transylvania territories by the Roumanians, an estate which amounted to 6 cadastral jugars. Since 1911, Mme. Ambroise Grózá was domiciled in Budapest, where her husband was a locksmith. After her husband's death, Mme. Grózá, who has three children aged 10, 12 and 14, became a charwoman, having no other means of support.

Then, after the death of her husband, and having no other means than the 6 jugars she owned in Transylvania, she tried to draw the rents thereof. Before the Roumanian occupation, she had leased the land to a Roumanian Pope named John Kunpian, who paid her rent. But, from the day of the Roumanian occupation of Transylvania, the Roumanian Pope in question ceased all payments, and Mme. Grózá, a widow with three children, was left penniless.

In the end, she was, naturally, declared an absentee, and her 6 jugars were completely expropriated.

There is also this provision arrived at by an interpretation of the law in virtue of which absence is sufficient reason for expropriation, whether the absence was only temporary, or whether it was for several weeks or several days. One might have thought that the 27 months, which, under the law constitutes absence, would at least have had to be spent entirely in a foreign country. Not at all. If you live on a Transylvanian territory for 20 months or 25 months or even 26 months, you can nevertheless be declared absent, if you have been absent for a few days no matter for how legitimate a reason.

Here, gentlemen, is the circular which regulates the question by the interpretation of the law of 1921 :—

> " Ministry of Agriculture, Kingdom of Roumania, General Directorate of Cluj, No. 16—126 R. H. 14th August, 1922, to the President of the Expropriation Commission. Monsieur le President, paragraph c. of article 6 of the law lays down that, in the meaning of the act, any proprietor shall be considered absent who has been out of the country, except in the case of being charged with an official mission to a foreign country, from 1st December, 1918, to the date of the presentation of the law."

And here is the interpretation :—

> " . . . for an owner not to be classed as an absentee, liable to a measure of total expropriation, he must have lived in the country *continuously* during the whole period from 1st December, 1918, to 23rd March, 1921, the date of the presentation of the law.
>
> " Since the law demands continuous residence in the country during the above-mentioned period, you cannot accept evidence proving that an owner has spent at least part of his time in the country, even if he has not been present the whole time."

Thus, gentlemen, if a Hungarian owner has been absent, for reasons no matter how legitimate, during the period under consideration, it is sufficient for him to be treated as an absentee, even though he has passed the greater part, or nearly all, of the time under consideration on his property in Transylvania.

Example : The case of Baroness Elek Nopcsa versus the Roumanian State, No. 313. The Baroness Nopcsa owned an estate in the county of Hunyad. The Expropriation Commission of first instance expropriated a very large part of it, firstly in order to complete the pasturage of the Communes in which the estate in question was situated ; secondly for absenteeism under article 6, paragraph c.

An appeal was lodged against this decision. It was heard before the Commission of second degree, and the Commission of second degree of the County of Hunyad declared all the estate to be expropriated on the ground of absence.

And what, if you please, was the cause of the absence ? The Baron, the original owner, was consumptive, and on account of his pulmonary malady had to spend the winter at Davos. Then, because he was not present on his land for the whole 27 months under consideration, he was declared absent. He has since died of this disease, and his widow has been completely expropriated.

The proof, gentlemen, lies in a medical certificate which I have in my dossier (which I beg to be excused for not having shown before). But documents proving the reasons for absence of necessity are not accepted. There the paper is. It is a medical certificate declaring that the Baron must go to Davos every winter. The certificate was rejected, and all the land was expropriated.

Still another example is the case of Baroness Sztojanovits versus the Roumanian State, case No. 137. This is the case of a widow with two little daughters. She was expropriated in the first place under article 8, paragraph a., of the agrarian law, because her land had been leased for a certain period before the war. On appeal, this was discovered to be an error, and the Commission of second degree reversed the finding of the Commission of first degree, but, on the ground of the text relating to absence, it confiscated all the Baroness Sztojanovits' property. Why ? Because her husband, Baron Sztojanovits, was absent for some time during the period under consideration. And do you know why he was absent ? He went in the autumn of 1921, once, to Budapest to undergo a surgical operation, which proved fatal. Nevertheless, all his land was expropriated on the grounds of absenteeism.

There are also dispositions relating to usufruct, for a distinction is made between property belonging absolutely to one person, or property in usufruct to another. For the total expropriation of the property it is sufficient that either the absolute owner or the person enjoying the usufruct shall be either absent or a Hungarian subject (for I have shown that these amount to the same thing).

I do not want to waste the time of the Court, but I will call its attention to the cases of Alexandre Jakó versus the Roumanian State, case 266 ; of Charles Haller versus the Roumanian State, No. 267. You will see that in these cases the land was expropriated because the absolute proprietor was absent, although the person enjoying the usufruct was present and himself managing the property.

Here again is another case. It sometimes happens, paradoxical though it may seem, that the authorities expropriate land for absenteeism without knowing what to do with it. So they lease it. Do you know to whom ? To the original owner ! Where is there agrarian reform in that ? This is the particular case. It was that of Emile Benard versus the Roumanian State, No. 268. M. Benard was a ministerial counsellor during the critical times in Budapest. Since he was an official, he, very naturally, was not living on his land. Consequently he was absent, and, therefore, he was dispossessed of his property.

Then he retired. He returned to Transylvania and, to save some vineyards which he had there from being cut up, he became their lessee. The land then belonged to the Roumanian State, but it was the original owner who rented it from the State. And on what conditions, gentlemen ? These also are interesting.

The compensation for expropriation paid to M. Emile Benard was fixed, on an average, at between 1,000 and 2,000 lei per jugar according to the quality of the land, say, 1,500 lei per jugar if you will. And do you know how much rent he had to pay now ? 710 lei per jugar. There you have a man who was paid 1,500 lei per jugar for his land, and how now had to pay 710 lei per jugar annually for the right to work it as a tenant.

Finally, gentlemen, I will go a little further, but this will be my last example.

The case of Etienne Czárán versus the Roumanian State concerned a landed estate which belonged to two brothers—the brothers Czárán. The plaintiff, M. Etienne Czárán, was a Hungarian national ; the other, his brother had become a Roumanian. The property of the Hungarian was expropriated, while that of the Roumanian subject was left alone.

Another case is that of M. Emeric Kulin, President of the Court of Appeal at Debreczen. M. Emeric Kulin was the owner of a fairly good estate in the territory transferred to Roumania. Naturally he lived at Debreczen, where he carried out his duties as President of the Court of Appeal. But during his vacations, when there were no sessions, he went to his property, which he managed himself without a tenant.

M. Kulin has eleven children. At the beginning of the occupation his movable property was requisitioned by the Roumanian Army, without any compensation, by the way. But we will take no notice of that. His furniture being requisitioned, M. Kulin, in order to live and to replace the furniture, sold part of his land to his eldest son, who thereupon indemnified his brothers and sisters.

What happened, gentlemen, under these circumstances ? M. Kulin was dispossessed, but his eldest son, being a Roumanian, was allowed to keep the part belonging to this eldest son.

Gentlemen, I ask you is not this the measure of the differentiation you look for. Is there liquidation in that ? If there is no liquidation in the cases I have cited, putting myself in your position, adopting your criterion, then there never will be liquidation in any part of the world.

I must also, always from the same point of view, acquaint you with the peculiar way in which vineyards are dealt with in Transylvania. In accordance with the law of agrarian reform in Transylvania, proprietors of vineyards could not be dispossessed, for this is a business requiring capital, and is not easily divided up. Consequently the law specified that vineyards and orchards should be respected. But, as always, in addition to the law there is an Ordinance, dated 21st November, 1922, Official Monitor, page 8,510, which reads :—

> " The Council of Ministers, at its session of 3rd November, 1922, deliberated on the report of the Minister of Agriculture and Lands, No. 13,034, 1922.

"After considering the matter of the report, the Council decided :—

"Article I. The Minister of Agriculture and Lands is authorised to sell privately or by auction all vineyards or plantations of vines expropriated, or about to be expropriated under the agrarian law of Transylvania, either as a whole or subdivided, and with all buildings and structures standing thereon, under the conditions mentioned in the report.

"The Council . . . . approves of the report of the Minister of Agriculture, and authorises him to lease all lands in Transylvania remaining after the expropriation, and destined for colonisation under the conditions fixed in the report."

So, Gentlemen, contrary to the law, vineyards and orchards were to be confiscated in Transylvania. Why ? To be resold. This is liquidation.

What happens in France when the property of an ex-enemy is liquidated ? It is offered for sale by auction, and the State takes the proceeds of the sale. This is what the Roumanian State did in Transylvania, and this is, exactly, liquidation. Either this is liquidation, or there is no such thing as liquidation in the world.

Gentlemen, I always support my statements by proof. I refer you to the case of Valentin Szenti and his wife versus the Roumanian State, case No. 174. It is another interesting case.

M. Valentin Szenti owned a vineyard of a total extent of precisely two cadastral jugars. These two cadastral jugars were confiscated by the Roumanian Agrarian Committee on the ground of absenteeism. Then it offered them for sale first, then leased them on its own account, then again offered them for sale.

There, Gentlemen, end the statements concerning absenteeism which I wished to put before you. Really, I believe that I am right in saying, regarding the whole of these measures, taken together, that they, at least, constitute, incontestably, measures of liquidation, even if one looks at the facts with the eyes of our opponents.

I will sum up.

First, 27 months of absence suffice in Transylvania, although 5 years are necessary in the old Kingdom. Then, these 27 months are reduced, as I have shown, to a few days by Ministerial Ordinances. So we have the first difference : the difference of the period constituting absenteeism in Transylvania and in Roumania.

Second difference : the choice of the date. In reality the general effect of the date chosen was that the greater part, I might say nearly all Hungarians in Transylvania who remained Hungarian nationals had to be considered absent. The Roumanians of Transylvania remained where they were, had no need to fly or to return. Consequently, for them absenteeism had a very different effect as compared with that which it had for the Hungarian nationals.

In the third place, the interpretation and application of the law have been much more severe for Hungarian nationals than for Roumanian nationals, by reason of the measures of expulsion, of refusal of passport visas, of total expropriation instead of partial, etc.

So, Gentlemen, I was right in stating that absenteeism, at the least, constitutes a differential measure. On this point, at any rate, no doubt or difficulty can arise.

I should like to mention a final characteristic of the agrarian legislation in Transylvania.

I have said—but I now want to dwell somewhat longer on this point—that the agrarian law in Transylvania has, without doubt, an agrarian object, and results in an agrarian reform. I do not deny it. It does not affect my argument. But in it are mixed up so many different elements which have nothing to do with agrarian reform, that in effect if not in intention, it does at least result in permitting more severe treatment to the detriment of the Hungarian nationals.

The result of these measures is to permit local administrative authorities to completely eliminate any remnant of Hungarian elements, once absenteeism has been brought into play.

What, Gentlemen, is an agrarian reform ? It is a reform with the object of splitting up the big estates, and of distributing small holdings among the agricultural workers and peasants. That is the definition which you yourselves have given. By definition, agrarian reform is the redistribution of land, taken from some large landowners, among a large number of future small holders. That is what agrarian reform is, and it can be nothing else.

Any element in the agrarian law, having for its object something other than the splitting up of properties and their redistribution among small owners, would not be an agrarian measure.

Having said this, Gentlemen, let us read only two articles from the Transylvanian agrarian law :—

> " Article I. In conformity with paragraph 5 of article 3 of the Resolution of the National Assembly of all the Roumanians in Transylvania, of the Banat . . . we declare the right of the State to expropriate for reasons of the public interest, within the measure and under the conditions defined by the present law :—
>
> > " 1. For the purpose of augmenting and completing the rural properties of the peasants, as well as the communal pasturages and forests."

We are agreed that that is agrarian reform. And if Article 1 stopped here, I should have nothing more to say. But I read on :—

> > " 2. In order to facilitate the development of national industries by reserving the land necessary for industries already in existence, or of which the future existence appears indubitably assured by geographical, topographical, and zoological circumstances . . .
> >
> > " 4. In order to provide for the needs of the general interest, cultural, economic, social, and of physical education . . "

And further on :—

> " Article 40. The State may reserve such area of expropriated lands as is necessary for the needs of the general interest, cultural, economic, social, military, educational . . . . for building schools and churches in rural Communes, it may expropriate up to two jugars or more of any class of land."

Is this an agrarian law? Of what purpose then is the right of expropriation under the ordinary law? Following such an enumeration, everything can be taken away. Not only can people be dispossessed for the benefit of general, economic, etc., interests, but the State can take for itself whatever properties it desires. Is this agrarian reform? Is this the redistribution of land to the peasants? It has nothing, absolutely nothing, to do with agrarian reform.

Now let us see what applications have been made of such rules.

Take for example the case of Zoltan Dezsö. M. Zoltan Dezsö, a judge and a poor man owns about three jugars consisting entirely of vineyards. In the middle of the vines is a little house, consisting of three rooms and a kitchen, a cellar, and a stable.

As from the month of August, 1921, that is some days after the promulgation of the agrarian reform law in Transylvania, his property was requisitioned—I say requisitioned—in order to instal in it a communal school.

The house is exactly in the middle of the vines. During their free time it is natural the children should play about among the vines, and they soon ruined everything. That is hardly surprising.

One day M. Zoltan Dezsö came and got into touch with the Minister of Public Instruction with a view to selling this property to him, of which, since it had been requisitioned, he was dispossessed, and which, moreover, had been ruined by the children. The price at which an agreement was under consideration was 125,000 lei. But meanwhile the Minister of Agriculture, responsible for the agrarian reform, intervened. He expropriated the whole property, allowing only 15,000 lei as total compensation.

The authority for this was the article which I have read to you, giving the Roumanian State the right to reserve land needed for the interests of culture, education, &c.

Another example is the case of Lukacs versus the Roumanian State, No. 1502.

The situation is exactly the same. The plaintiff is the owner of real estate situated in the middle of a village. The property was requisitioned and expropriated in order to establish in it a communal school for girls.

So much for schools.

Let us now look at other objects which the agrarian reform may aim at.

I will start at article 14, because I should never finish if I went through all the articles of the agrarian law which give occasion for confusion and arbitrary treatment. Article 14 reads:—

> "Where the housing problem cannot be solved with the land made available by this expropriation, steps shall be taken, according to requirements, to expropriate successively further land, that is to say . . . &c.

"Those who benefit by this redistribution of lots must start building within, at most, five years from the date of entering into possession; otherwise they will lose the lots and the distributed properties.

You see the situation. Bare land is expropriated and distributed to beneficiaries who are obliged to build on it in order to establish their right to it. That is the rule.

But this is what happens in practice.

The case of Etienne Papp—Mme. Endre Toth, No. 144.

In this case a building plot was expropriated. But it was in a wealthy part of the town. There is no doubt that land in this quarter is most expensive. One cannot understand why the Roumanian State should expropriate the most expensive land in the most expensive part of the town for the building of dwelling-houses.

But the case of André Bartha is much more interesting. It is numbered 141. This is the case of a Hungarian subject who was a town clerk in the county of Szilagy, in Roumania. He had benefited by the repatriation ordinance. That is to say, he had been expelled when the Roumanian troops arrived in Transylvania, and, naturally, he was expropriated for absence.

He owns a property, which consisted of a house and an orchard, in the middle of the town. The whole area of this is hardly 2½ jugars.

Without doubt he was absent (in the sense of the agrarian law), but his mother, who had a life interest in the property, lived there and occupied it.

Once expelled, the plaintiff had his house expropriated on the grounds, firstly, of absence; secondly, the authority being article 14 which I have just read to you, in consequence of the excessive shortage of accommodation in the town and because there were no means of meeting the exigencies of the situation.

The expropriated property was given to two Roumanian nationals, neither of whom is a cultivator. One is a butcher, the other an inn-keeper.

Is this agrarian reform? Is this the redistributing of land to satisfy the needs of peasants and agriculturists?

It is even a violation of article 14, since there is no question of expropriating land for building purposes. In this case a house already built was expropriated.

Here is a final touch. The expropriated orchard was leased to the mother of the plaintiff, the original life-holder. She is remaining on the property, but now she pays rent to the Roumanian State.

I was speaking just now of vineyards; I have spoken also of houses and building land. Now I will describe what happens to the forests in Roumania.

According to the definition, forests are a type of property as little as possible suitable for sub-division. Everyone knows that to make profit from a forest it is necessary to have a large property, and the greater the extent, the more rational, scientific, and productive can its exploitation be made.

Under Roumanian law in Transylvania, however, forests are expropriated all the same, but not for redistribution, as the State appropriates the expropriated forests to itself by virtue of the agrarian law.

I can understand that the State may wish to nationalise forests, if it thinks fit. But it has no right to carry out this translation of property on the basis of the agrarian law, of which the purpose is to redistribute the land, not to accumulate lands into the hands of the State.

This practice is all the more astonishing, since nothing of the kind is done in Old Roumania. There is an agrarian law in Old Roumania, but it spares the forests in a normal and reasonable manner.

A law was passed quite recently allowing the State to expropriate forests, but not by virtue of the agrarian law. In the old kingdom of Roumania, when the state requires a forest it expropriates it under the terms of the Common Law, and pays compensation. While in Transylvania if it requires a forest, it takes it without paying for it. This, in my opinion, is sufficient to indicate the differential character.

Thus we have liquidation, even if we accept our opponents view and admit that the differentiation is an essential and distinguishing characteristic of liquidation.

In conclusion, Gentlemen, I would like to make a brief statement as to the claims of the plaintiffs.

The other side has asserted with considerable emphasis that : " What the plaintiffs ask for is not the restoration of their land ; what they desire, in reality, is compensation. And they have demanded that this compensation should be fixed by the Mixed Arbitral Tribunal, *ex aequo et bono* and taking all the circumstances into account. This is not a juridical claim, it is not a demand which comes within your jurisdiction. This alone suffices for you to declare your lack of jurisdiction."

Gentlemen, this is a misinterpretation. We have never aimed at the allocation of an indemnity. May I read my conclusions ? That will be enough to put an end to this objection.

" Conclusions :

" 1. To state and declare that the measures restrictive of property rights applied by the Roumanian State against the real estate of the plaintiff are contrary to the stipulations of article 250 of the Treaty of Trianon, and therefore in violation thereof.

" 2. Consequently, to condemn the Roumanian State to restore to the plaintiff the real estate in question, freed of all measures restricting the rights of property and having a confiscatory or spoliatory character ; the property to be restored in the state it was in before the application of the said measures ; to restore also the original condition in the Land Registers.

" 3. To condemn the Roumanian State to pay full compensation to the plaintiff for deteriorations and for loss of enjoyment of the property while taken out of his possession, as well as the costs and expenditures incurred by the plaintiff in consequence of the measures unlawfully applied.

" 4. Subsidiarily, to condemn the Roumanian State to pay, equally, full indemnity to the plaintiff for any missing articles, when it can be proved directly in the course of the action that the property, or any part of it, cannot, by any possibility, be restored to the plaintiff.

" 5. Finally, to lay down, in each case the amount of compensation *ex aequo et bono*, taking all the circumstances into account."

Those are our conclusions.

We have not claimed that we should be assigned an indemnity *ex aequo et bono*. We claim full compensation, equal to the loss suffered.

Furthermore, gentlemen, in order to save you the trouble and ourselves the delay of expert valuation, we ask that you give a ruling, *ex aequo et bono*, for the calculation of the full compensation which we claim.

It has been said : " But the Tribunal cannot take into account all the circumstances accompanying the agrarian law ; that is not its mission."

This is not what we have asked for. We ask you to take into account all the circumstances of *the* case in question : conclusion No. 5. That is to say, we put before you an action for a private right. And we ask of you that, in fixing the indemnity which we claim, to take into account the circumstances of each particular case, not the general circumstances surrounding the development of the agrarian reforms in Roumania.

Gentlemen, I have finished. I have arrived, I believe, at the result that most, I may say almost all, of the land owners of Transylvania have been driven away from this country and have seen themselves dispossessed of their property without receiving the least compensation worth mentioning.

It has been said : " But the agrarian reform in Roumania is a work of social justice."

Perhaps. But the idea is a very relative one.

Perhaps it is a measure admirably just and of great social importance in the eyes of the peasants who have received land for nothing, or very nearly nothing.

But, from the point of view of the owners dispossessed without compensation, from the point of view of the widows who have had to become charwomen or typists, like Baroness Nopcsa, from the point of view of the orphans deprived of their heritage, is it a measure of such high social importance ?

For in the end, Gentlemen, you will have to take account, in everything, of law and justice.

Above all, this question is not submitted, for the moment at least, to your consideration. What is asked of you is that you shall declare that you have jurisdiction to deal with it. And you have jurisdiction if there has been liquidation, or even only the possibility of liquidation.

I hold that I have proved that there has been liquidation. First, because there has been no compensation; secondly, because certain measures, such as absenteeism, establish, with perfect clearness, the differential character of the agrarian measures in Transylvania; and finally because all the collection of diverse measures which have been mixed up with the agrarian law, while they ought to have been kept out of it, permit the complete elimination of the Hungarian elements of Transylvania.

And if I have not proved the existence of liquidation, I have at least proved, amply, its possibility, and that must suffice.

HUNGARIAN PROPERTY RIGHTS UNDER THE TREATY OF TRIANON,

By THE RT. HON. SIR FREDERICK POLLOCK, BART., K.C.,
and ROLAND E. L. VAUGHAN-WILLIAMS, K.C.

By the Treaties of St. Germain and Trianon certain territories which had belonged to the former Monarchy of Austria-Hungary were ceded to Roumania, with the result that numbers of the subjects of the present States of Austria and of Hungary find that property of which they were before the War, and still are, possessed, is situate in a foreign State. We are asked to advise as to the rights of Hungarians with respect to that property under the Treaty of Trianon.

The questions raised do not relate at all to the position of those who were formerly subjects of the old Monarchy of Austria and Hungary and are now, by virtue of the transfer of territory, Nationals of Roumania, though in other cases the position and rights of such people have had to be considered. Nor, in our opinion, is it material to the present question whether the Hungarian subjects referred to are such by reason of their having opted for Hungarian nationality under the provisions of Article 63, or simply by reason of the fact that they never lost, and had no opportunity under the Treaty of changing, their Hungarian nationality. Certainly those who opted are in no worse position than these last, for it is expressly provided by Article 63.

Article 63.

> Les personnes âgrées de plus de 18 ans, perdant leur nationalité hongroise et acquérant de plien droit une nouvelle nationalité en vertu de l'article 61, auront le faculté, pendant une période d'un an á dater de la mise en vigueur du présent Traité, d'opter pour la nationalité de l'État dans lequel elles avaient leur indigénat avant d'aquérir leur indigénat dans le territoire transfére.
>
> L'option du mari entraînera celle de la femme et l'option des parents entraînera celle de leurs enfants âgés de moins de 18 ans.
>
> Les personnes ayant exercé le droit d'option ci-dessus prévu devront, dans les douze mois qui suivront, transporter leur domicile dans l'État en faveur duquell alles auront opté.
>
> Elles seront libres de conserver les biens immobiliers qu'elles possèdent sur le territoire de l'autre État où elles auraient eu leur domicile antérieurement à leur option.
>
> Elles pourrant emporter leurs biens meubles de toute nature. Il ne leur sera imposé, de ce fait, aucun droit ou taxe soit de sortie, soit d'entrée.

that they are in no way to suffer any loss of property by reason of their opting for Hungarian nationality: but we are of opinion that these provisions do not substantially alter the position: for if the expropriation of property of a person who has opted were a breach of these provisions it would also, in our opinion, be a breach of the provisions of Article 250, while on the other hand, in our view, the acquisition, even compulsory, of the property of a Hungarian subject which did not infringe Article 250 would not be rendered wrongful

or improper by reason of the provisions of Article 63. Consequently we think that the Article to be considered is Article 250.

Article 250.

Nonobstant les dispositions de l'article 232 et de l'Annexe de la Section IV les biens, droites et intérêts des ressortissants hongrois ou des sociétés contrôlés par eux, situés sur les territoires de l'ancienne monarchie austro-hongroise ne seront pas sujets à saisie ou liquidation en conformité de ces dispositions.

Ces biens, droites et intérêts seront retsitués aux ayants droit libérés de toute mesure de ce genre ou toute autre mesure de disposition, d'administration forcée ou de séquestre prises depuis le 3 novembre 1918 jusqu'à la mise en vigueur du présent Traité. Ils seront resitués dans l'état ou ils se trouvaient avant l'application des mesures en question.

Les réclamations, qui pourraient etre introduites par les ressortissants hongrois en vertu du présent article, seront soumises au Tribunal arbitral mixte prévu a l'article 239.

Les biens, droits et intérêts visés par le présent article ne comprennent pas les biens soumis à l'article 191, Partie IX (clauses financières).

Rien dans le présent article ne portera atteinte aux dispositions de l'Annexe III à la Section I, de la Partie VIII (Reparations) relativement à la propriété des ressortissants hongrois sur les navaires et bateaux.

In terms it amounts, in our opinion, to an engagement by Roumania not to apply the measures envisaged by Article 232 to the property of Hungarian subjects which is situate in the ceded territory, and also to annul any such measures of that kind which were taken by the Roumanian authorities in that territory between the dates of the Armistice and of the coming into force of the Treaty.

The measures contemplated by Article 232 1 (*b*) are measures which dispossess the private individual of his property, the possession of which is in normal circumstances guaranteed to him by the laws of civilized states, whether he owes allegiance to that state or not; for the fact that a foreigner is permitted by the laws of any state to acquire and hold property in the territory of that state must in itself involve the principle that his rights in relation to that property will be duly recognised and upheld by those laws. The state is entitled to say that foreigners shall not be entitled to hold property or any given species of property in the state, but if it allows them to hold property they are entitled to the same treatment and to the same security as citizens of the state in question.

At first sight the provisions of this Article seem to disregard this principle : but if the matter is more carefully considered, it will be seen that the principle is recognised and accepted. The taking of the property is subject to the further provisions of the Treaty that the state, the property of whose national is thus taken, shall indemnify the national for the loss he thereby sustains (Article 232 (*j*)), and thus the property which is used in the settlement between the two states is not to be so taken and so used at the expense of the owner, but at the expense of the state which benefits by its use in the settlement with the other state. The owner of the property is to receive compensation for his loss : the state of which he is a national, which has thus used his

property, engages vis-à-vis the other state that it will indemnify the owner.

On the other hand, the Article is very wide in its terms and is sufficient to cover every kind of dispossession, with the result that Article 250 by forbidding such measures in the ceded territory in fact forbids all measures which amount to measures of expropriation or confiscation of the property of Hungarian nationals in that territory. It does not appear to us that there are any such measures which do not fall within Article 232 and consequently are impliedly allowed by Article 250. This would be a somewhat cynical interpretation of the Article, even if it were possible, but in our view it is not even possible: consequently the undertaking by Roumania contained in this Article is an absolute undertaking not to confiscate the property in question. We have arrived at this conclusion on consideration of the actual terms of Articles 232 and 250.

The result is that we are of opinion that Roumania has expressly undertaken by Article 250 that Hungarian subjects shall be allowed to hold their property free from any liability to have it expropriated otherwise than in accordance with the ordinary rules of law which prevail in civilized states. Needless to say, those laws permit of the compulsory taking of property in certain circumstances: property may, for instance, be taken in execution under judicial process; and again, it may be acquired by the State, or by those whom the State authorised to acquire it, for public or quasi-public purposes, in which may be included a scheme for providing or building railways, small holdings, public offices, recreation grounds and the like. But in these cases it is a fundamental principle that the dispossessed owner shall receive the value of the property with which he is thus compelled to part: and in fact it is usual to make some addition to the market value by way of compensation for the purchase being compulsory. This is the familiar doctrine of Eminent Domain.

Such transactions, however, are, in our opinion, in no way prohibited by the Treaty, which has in view measures of a totally different nature. No doubt again a sovereign State, in the exercise of its sovereign rights may, as a matter of strict right, take away or acquire for itself for these or any other purposes, any property without compensation or for merely nominal compensation.

In such cases the citizens of such a State have no juridical remedy: but if citizens of a foreign State owning property within the State in question were to be deprived of it in such a manner, diplomatic action by their State would naturally follow. That would be the position in Roumania to-day, if Articles 232 and 250 had been omitted from the Treaty, and the Roumanian Government had passed a law that all land to whomsoever it belonged should be nationalised without the payment of any compensation to the dispossessed owners.

As it is, however, such an action would be in direct conflict with the undertaking given in Article 250, and none the less so because the citizens of Roumania were being treated in the same way as the foreigners whose rights of property Roumania had undertaken to respect.

It is, no doubt, easy to imagine cases where diplomatic action would be the only remedy even if an express Treaty obligation to respect the rights of foreigners were broken—a breach by Hungary of the terms of Article 211 would be an instance. In the present case,

however, not only is there this express undertaking by Roumania, but the Article in which it is contained also provides a remedy to any individual who claims that action has been taken against his property in conflict with the Treaty obligations. The remedy provided is recourse to the Mixed Arbitral Tribunal, established by Article 239.

Our conclusion therefore is (to summarise what we have already written) that there is a specific undertaking by Roumania to respect the rights of property in the ceded territory of Hungarian nationals and that if any act of the Roumanian State is considered by any individual or any number of individuals to be an infringement of that undertaking he or they are entitled to bring the matter before the Mixed Arbitral Tribunal, and the Tribunal is competent and therefore bound to entertain the question and pronounce upon it.

It now remains therefore to consider whether the Agrarian Laws passed by the Roumanian Government are or are not an infringement of the stipulations and undertakings solemnly expressed and given in Article 250 to which Roumania has assented by signing the Treaty.

The general policy of these laws is not for us to discuss; it is a matter wholly within the province of the legislative assembly in Roumania.

The sole question is whether they amount to confiscation or are such measures as, according to the accepted juridical principles in civilized States, any Government is entitled to carry out without objection. If they are within the limits of the normal legislation of a civilized State there is no infringement of the Treaty. If they are not, and their execution involves confiscation of property, then, in our opinion, there is infringement of the Treaty, and it is no answer to say that all other owners of property are subjected to the same treatment.

Further, if it appears from the law that the property of foreigners is treated differently from that of subjects to the disadvantage of the foreigner, the argument that there is an infringement of the Treaty is much strengthened. In other words, differentiation unfavourable to the foreigner would be an almost conclusive circumstance against the law being consistent with the Treaty; but the mere absence of such differentiation is in itself by no means conclusive in favour of the law.

One of the critical questions to be considered is whether or not the owner to be dispossessed is adequately compensated.

To constitute adequate compensation the owner must receive in exchange for the property taken its full value: and in order to arrive at a conclusion on this point it is necessary to consider the terms upon which the dispossessed owner is compensated for the loss of the property of which he is deprived.

In our view when the terms contained in this Agrarian Law are considered it will be found that adequate compensation is not given and therefore the taking of property under that law is not according to the accepted juridical principles in civilized States, and the execution of the law therefore involves a confiscation.

In the first place compensation is given not for the present value of the land but for the estimated value in 1913, whereas in order to assure adequate compensation, the value of the land at the time when it is taken, and not what is estimated to have been its value many years before, should be the test.

In the next place the nominal compensation to be given for the property taken is fixed by an arbitrary standard which bears no relation to the present circumstances. The paper Lei is assumed to be of the same value as the gold Lei of 1913, though it is notorious that at the present moment the depreciation of the paper Lei is so great that it can scarcely be compared to the gold Lei. Their values in truth bear no practical relation to each other.

Further, this sum arrived at in paper Lei is not to be paid at once, but at some future date, and nothing which could be held as security for its payment is given or pretended to be given: for the right to receive this money at this future time has no market value and cannot be negotiated: in other words it is not an exchangeable commodity.

The same remarks apply to the interest which is payable in the meantime. In the first place it is at a quite inadequate rate (the Roumanian Government itself could not possibly borrow money at such a rate anywhere) and in the second place, as we are informed it is not paid in fact.

The man, therefore, who has his property taken away from him is in a far worse position than Glaucus, whom Zeus deprived of his wits in that he exchanged his armour with Diomede, son of Tydeus, gold for bronze, the worth of a hundred oxen for the worth of nine.

It is not, however, merely for the inadequacy, which amounts almost to a denial of compensation which condemns this law. It contains other provisions which in our opinion directly infringe the undertaking given by Roumania in Article 250. By its express terms property in certain cases may be taken from its owner without the payment of compensation, and this is done under the guise of making provisions concerning absenteeism. It is to be doubted whether, in face of Article 250, the Roumanian State is entitled to impose as a term of holding property in the ceded territory qualifications as to residence. Such a term certainly detracts from the beneficial enjoyment of property and further of necessity has the vice of discriminating against foreigners, for it is obvious that a foreigner can less readily comply with such a requirement than a native citizen. The objections to such a law are further increased when it is found that the law is not only prospective but retrospective, and the result of this may be that a man may lose his property for doing, or not doing, something which he was not enjoined from doing or compelled to do by any law at the time of the act or its omission.

Such proceedings can scarcely be described as the proceedings of a civilized State, and have every appearance of being a deliberate attempt of depriving people of their property without any justification, are evidence of a fixed determination to obtain property and to invent a pretext for taking it. If it is possible for such proceedings to be more indefensible in one case than another, that case has arisen here, for the period to which these retrospective provisions relate was a period of war, when in all probability the owner could not by any possibility have fulfilled the conditions of residence which they thus *ex post facto* impose. Finally it cannot be overlooked that the provisions with reference to absenteeism are far more rigorous in the case of the ceded territories than they are in the case of the rest of Roumania, and only one conclusion can be drawn from this fact, namely that they are intended to differentiate against Hungarian nationals who naturally own more property in what once was part of Hungary than they owned in what was always part of Roumania.

The general result is, in our opinion, that these laws in so far as they affect the property of Hungarian subjects are a direct infringement of the Treaty, and it remains to consider what if any are the rights of an aggrieved individual.

In our opinion Article 250 confers upon him the right to bring the case before the Mixed Arbitral Tribunal, and an effective remedy is to be found in the powers of that Tribunal. It is open to it to declare that the taking of the land of Hungarian nationals in the ceded territory under these laws is a violation of Article 250, and that to proceed to take land not already taken is illegal; but that as regards land already taken, as it was taken illegally it must be restored, and if and in so far as complete restoration is impossible, full compensation must be paid for prejudice suffered by the owners. The amount is a matter to be fixed by the Tribunal in each individual case.

The Tribunal would, of course, confine itself to the matters before it, and would not attempt to define or determine in what manner an agrarian law could be framed so as to comply with the provisions of the Treaty. It would merely decide whether the law in question complied with those provisions or not.

OPINION of HUGH H. L. BELLOT,

Barrister-at-Law; Doctor of Civil Law in the University of Oxford; Associé de l'Institut de Droit International; Professeur à l'Academie de Droit International de la Haye; Hon. Secretary of the International Law Association; Formerly Acting Professor of Constitutional Law in the University of London

As to the Rights of Hungarian Subjects with Regard to their Lands Situated in Territories Transferred to Roumania.

I am asked to advise:

1. Whether the Roumanian Law of Agrarian Reform—applicable to Transylvania, the Banat and the districts of the Crisana and the Maramures—published on 30th July 1921, and the prior and subsequent decrees of 12th September 1919, 12th January 1920, 12th July 1922, etc., are applicable to the property in these territories (formerly part of the Austro-Hungarian Monarchy and transferred to the Kingdom of Roumania by the Treaty of Trianon of 4th June 1920), belonging to persons who had their rights of citizenship (pertinenza) in these territories, and who opted for Hungarian nationality either in accordance with Art. 63 or Art. 64 of the Treaty of Trianon, or to persons who remained ipso facto Hungarian nationals under the Treaty of Trianon, and whether or not such Law and Decrees are inconsistent with and contrary to the provisions of Art. 250 of the Treaty of Trianon.

2. Whether, if such Law of Agrarian Reform is not so applicable, and is inconsistent with and contrary to the provisions of the Treaty of Trianon, the Hungarian-Roumanian Mixed Arbitral Tribunal is competent to hear and determine the claims of Hungarian nationals.

3. Whether, apart from the above mentioned Peace Treaty, the Roumanian Law of Agrarian Reform is not contrary to the principles of International Law.

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1. At the risk of tedious repetition it is necessary to set out the relevant provisions of the Treaty.

Art. 250 of the Treaty of Trianon provides:

"Notwithstanding the provisions of Article 232 and the Annex to Section IV the property, rights, and interests of Hungarian nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with these provisions.

Such property, rights, and interests shall be restored to their owners freed from any measure of this kind, or from any measure of transfer, compulsory administration or sequestration, taken since November 3, 1918, until the coming into force of the present Treaty, in the condition in which they were before the application of the measures in question."

Art. 267 of the Treaty of St. Germain between the Allied and Associated Powers and Austria of 10 September 1920, is precisely similar to Art. 250 of the Treaty of Trianon.

The intention and scope of these Articles is clearly stated in two letters addressed by the President of the Peace Conference to the Austrian and the Jugoslav Delegations respectively on 2 September 1919 and 1 March 1920. In the former it is said that by Art. 267 "les biens des ressortissants autrichiens dans les territoires cédés aux Puissances alliées seront rendus à leurs proprietaires; ces biens seront libres de toute mesure de liquidation ou de transfert prise depuis l'armistice, et une exemption semblable de toute mesure de saisie ou de liquidation *leur est garantie pour l'avenir.*" In the latter it is said with reference to Art. 250 that although the Jugoslav State retains the sovereign right to regulate the transmission and enjoyment of property in the territory transferred to it, and is therefore free to take the measures which it thinks necessary or useful, nevertheless this liberty is limited by the provisions of the Treaty—"pourvu naturellement qu'elles n'aboutissent, par une confiscation déguisée des biens en question, à éluder la défense stipulêe par le Traité."

This policy of the Allied and Associated Powers to protect the private property of ex-enemies from confiscation permeates the Peace Treaties of Versailles, St. Germain, Trianon and Neuilly.

It is true that these Treaties introduce a departure from modern international practice in empowering the Allied and Associated Powers to retain and liquidate the private property of ex-enemies, but the principle that such property should not be confiscated is expressly recognised. For instance, by Art. 297 (i) of the Treaty of Versailles "Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights, or interests in Allied or Associated States."

Corresponding provisions are contained in the Treaties of St. Germain, Art. 249 (j); of Trianon, Art. 232 (j); and of Neuilly Art. 177 (j).

The same policy of the protection of the private property of ex-enemy nationals is to be found expressly stated in the Peace Treaties between the Allied and Associated Powers and the new Succession States.

By Art. 3 of the Treaty of Paris of 20 December 1919, former Austrian and Hungarian nationals who opt for Austrian and Hungarian nationality respectively are entitled to retain their immovable property in Roumanian territory and to carry with them their movable property of every description.

By Art. 1 of this Treaty "Roumania undertakes that the stipulations contained in Articles 2 to 8 of this Chapter shall be recognised as fundamental laws, and that no law, regulation or official action shall conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them."

Consequently, it would appear to be clear that any subsequent legislation or official action infringing the right of Austrian and Hungarian optants to their immovable and movable property in Roumania is of no legal effect whatever. This would also be true of such legislation or official action conflicting with Art. 250 of the Treaty of Trianon relating to all Hungarian nationals. National legislation

cannot override the stipulations contained in a Treaty, and the contention of the Roumanian Government that such legislation (even if it were true of the ceded territories, which it is not) is an economic and social necessity is quite irrelevant.

However irrelevant this contention may be, it appears to me worth while in the circumstances to interpolate some observations upon this point.

By four different laws of Agrarian Reform, the State of Roumania has decided to transfer almost the whole of the cultivable land (about six million hectares) to the peasants, who form the great bulk of the population. The first agrarian law was passed for the former territory of the old Kingdom of Roumania, the three others for the new provinces, that is, Bessarabia, Bukovina and Transylvania. The conditions in the old Kingdom and in Transylvania must be noted. In the former, small holdings up to five jugars represented 8.58% of the total area; small estates from 5 to 85 jugars represented 40.6%; medium estates from 85 to 850 jugars represented 12.56%; and large estates exceeding 850 jugars represented 38.26%. In the latter small holdings up to 10 jugars represented 39% of the total area of Transylvania; 10 to 100 jugars represented 44%; and the large estates exceeding 100 jugars represented only 17%. (See League of Nations Official Journal 1923, pp. 887—8).

Thus it will be seen that although there was in the former a real necessity for agrarian reform, in the latter there was little room for any very drastic measures.

With the motives for this reform I am not concerned, although they constitute a large part of the arguments put forward by the Roumanian Government in its replies to the Claims of the Hungarian nationals. Nevertheless, since they have been adduced by the Roumanian Government as part of their defence, viz. : that the reform was inevitable and unavoidable, the above figures may be noted as showing that if inevitable and unavoidable in the territory of the old Kingdom of Roumania, it was not so in the new provinces of the enlarged Kingdom.

Returning to the consideration of the main question, although Art. 250 of the Treaty of Trianon, respectively Art. 3 of the Treaty of Paris and Art. 63 of the Treaty of Trianon, would appear to leave no room for misinterpretation, Art. 6 (c) of the Roumanian Law of Agrarian Reform of July 1921 contains the following provisions :

" The whole of the rural estates of absentees shall be expropriated.

" For the purposes of this law, an absentee shall be any person who was absent from the country from December 1st, 1918, until the date when this law was placed on the table of the Parliament, unless such person was discharging official duties abroad. Rural estates not exceeding 50 jugars shall be exempt from the operation of this Law."

It is useful to trace the history of this Article. The first Decree Law of the Roumanian Governing Council for Transylvania of 12th September, 1919, is as follows :

Art. 2 " Now therefore :

(1) The property herewith defined shall be expropriated.

(a) Immovable property belonging to subjects of foreign States irrespective of the nature and extent of such property. Any person who has become the subject of a foreign State by reason of his descent or by marriage or in any other manner shall be regarded as the subject of a foreign State. All the inhabitants of the whole country of Roumania who opt for the nationality of another State on the basis of a future law designed to regulate questions of citizenship must therefore be regarded as subjects of a foreign State."

In the second Decree Law of 12 June 1920, the terms of this para. were amended as follows :

Art. 2.

(a) " All immovable property shall be expropriated, irrespective of the nature or extent of the property, belonging to subjects of a foreign State. Any person who has become the subject of a foreign State by reason of his descent or by marriage or in any other manner shall be regarded as the subject of a foreign State. According to these provisions all inhabitants of Roumania who opt for the nationality of another State on the basis of a future law designed to regulate questions of citizenship shall also be regarded as subjects of a foreign State, provided that these *provisions do not conflict* with the stipulations in the Treaty of Peace concluded between the Allies and Austria-Hungary."

This proviso clearly shows that the Roumanian Government at this moment felt that these provisions of the Agrarian Law were at variance with the provisions of the Treaty of Trianon of June 4, 1920, just signed, and with the terms of the two letters from the President of the Peace Conference of September 2, 1919, and March 1, 1920, cited above.

Moreover, the Roumanian Government in 1921 gave an official interpretation of Art. 6 (c) which was favourable to foreigners. In a general Executive Decree issued in pursuance of this Law and published on 4th November 1921 it was declared as follows :

" For the purposes of this Law an absentee shall be any person who was absent from the country from December 1st, 1918, until the date on which the law was placed on the table of the Parliament, unless such person was then discharging official duties abroad *or is a subject of a foreign State.*"

Clearly persons opting for Austrian or Hungarian nationality are subjects of a foreign State. Had this interpretation of Art. 6 (c) been retained and applied by the Roumanian Government there would have arisen upon this point no conflict between this Law and the Peace Treaty. But the Roumanian Government shortly afterwards issued a second General Executive Decree dated 12th July, 1922, which commenting on Art. 6 (c) merely reproduces the text of the original law without any reference to foreigners.

And at the end of the month it made the position quite definite by the issue of three Government Orders to the executive authorities containing the following directions :

"As the Law draws no distinction of nationality between property owners, it follows that the question of their Roumanian or other nationality does not arise; the differential application of the Law must therefore cease."

"Estates which are subject to expropriation shall be considered as belonging to absentees, irrespective of nationality or domicile of the owners."

"No consideration shall be given to applications for exemption of absentees who claim that they never were or are no longer Roumanian subjects; for the law defines the owner as an absentee in virtue of his absence during a certain fixed period and irrespective of his nationality."

It is obvious from these official interpretations and Government Orders that the Roumanian Government itself recognised that the Law of Agrarian Reform conflicted with the Treaty and that in fact in its administration there was at some period or another a "differential application of the Law" in the case of Austrian and Hungarian optants. The Roumanian Government would appear to be convicted on this point out of its own mouth.

In this connection attention may be drawn to the interpretation placed upon the definition of an absentee by a Government Order which reads as follows:

"Seeing that the Law requires residence in the country during this period (i.e., from December 1st, 1918, to 23rd March, 1921), you cannot accept any document designed to prove that the owner has passed at least a certain time there although he has not been there during the whole time. The only exception is when the owner has been entrusted with an official mission abroad and this mission has been entrusted to him by the Government."

The exception "or is the subject of a foreign State" is omitted from this order.

Art. 6 (c) has therefore been interpretated to mean a continuous presence of the Hungarian optants and other Hungarian nationals in later Roumanian territories respectively during the whole of the prescribed period. Absence for a single day may constitute absenteeism.

It is alleged that during this period many Hungarian nationals (and among them future optants) were driven out of the territory during the occupation by the Roumanian forces, a period which coincides with the critical time when the frontiers between the two States, Roumania and Hungary, had not been determined, and when persons in the territories subsequently ceded to Roumania were uncertain of their nationality. It is further alleged that when such Hungarian nationals desired to return to their properties they were refused visas by the Roumanian authorities and were thus unable to do so.

Whatever the truth of these allegations may be, there remains the serious fact that this law is retrospective. No notice was given to these Hungarian land owners prior to the coming into force of the law of 30th July 1921, that their properties would be expropriated if they had absented themselves after December 1st 1918. Nor in fact could

such notice be legally given, since the territories in which they resided then belonged, and continued to belong, to Hungary until the 26th July 1921, when the transfer by the Treaty of Trianon took place.

The first Decree Law of 12 September, 1919, no doubt purported to expropriate from that date all immovable property in Transylvania belonging to non-Roumanians and this, too, so far as it expropriated for cause of absence prior to 12 September 1919, was retrospective.

The second Decree Law of 12 June 1920, as we have seen, contained the proviso that its provisions should not apply if they conflicted with the stipulations in the Peace Treaty, which they clearly did. In any case expropriation for cause of absence before the 12 June 1920 would also be retrospective.

And expropriation for cause of absence before the Law of Agrarian Reform of 30 July 1921 came into operation would also be retrospective.

To expropriate the private property of an individual for a cause which was not an offence at the time, and of which he had no notice, is so contrary to every principle of justice that I cannot conceive any Court of Justice in any civilized State enforcing such laws unless they are expressly declared to be retrospective in their operation, and such retroactivity is not contrary to the Constitution of the State.

And yet from the report of the appeal of George Sztojanovits heard on 12 June 1923 we find the owner deprived of his entire estate of 228,137 jugars upon the ground that he had not been in permanent residence upon his estate within the period fixed by the Law of Agrarian Reform, viz. : from 1st December 1918 to the end of 1920 with many interruptions, when on account of illness he had departed for Budapest to undergo an operation.

Further until the 4th June 1920 the Roumanian Government had no sovereign rights over the territories ceded by the Treaty. How then is it possible for that Government to make its legislation retrospective in territories over which it had no jurisdiction?

A legislature may, no doubt, do so far for its own subjects in certain circumstances, but surely it cannot by such retrospective legislation bind persons who never were and are not now its subjects.

Although during part of this period Roumania was in military occupation of the ceded territories, these were still legally Hungarian territories. Consequently, Hungarians domiciled there could not legally be regarded as absentees. They owed no duties to Roumania. They still owed allegiance to Hungary. They only owed obedience to military orders given by the occupying authority. Military occupation gives no right of civil jurisdiction until the occupation is recognised as a cession, conquest or annexation.

It is contended by the Roumanian Government that the period prescribed by the Art. 6 (c) of the Law of Agrarian Reform does not coincide with that fixed by the Treaty of Trianon in Art. 63 whereby the optant must within twelve months from the date of the Treaty transfer his domicil to the country for which he opts. It is true that the period prescribed by Art. 6 (c) commences on 1st December 1918,

and that fixed by Art. 63 on the day when each optant has opted, that is much later. Consequently, it was not legally impossible for the optants to remain in residence during this period. But in a great number of cases owing to various reasons future optants were obliged to anticipate the transfer of their domicil and others who were absent and wished to return were prevented by *force majeure*.

This point, however, is not of much importance since I am clearly of opinion that the Law of Agrarian Reform is inconsistent with the Treaties of Trianon and St. Germain, so far as Hungarian and Austrian nationals are concerned.

It is contended by the Roumanian Government that an independent sovereign State is entitled to expropriate all private property within its jurisdiction for purposes of public utility, and that agrarian reform is included in the term public utility. This is true, but the actual necessity for agrarian reform and its definite scope must exist, and as will appear later any expropriation for such purposes must be accompanied by adequate compensation.

But if a State agrees by treaty that a named class of persons shall retain their immovable property in Roumania, that the right to retain it shall be recognised as a fundamental law, that no law, regulation, or official action shall conflict or interfere with these stipulations, and that no law, regulation, or official action shall prevail over them, then the sovereign right of the State to expropriate such property for any purposes whatever does not exist. Moreover the doctrine of expropriation for purposes of public utility must be closely examined and most strictly applied. So far as Hungarians are concerned Roumania by agreement gave up her sovereign right to apply a law of expropriation of an indefinite extent to all property. If she had not done so, the transfer of the ceded territories might not have been made upon the conditions actually imposed, or might not have been made at all.

But assuming that the Roumanian Government is entitled to apply a law of expropriation for purposes of public utility, in view of the general principles of International law, it can only be properly applied if accompanied by adequate compensation. Otherwise such expropriation would only be a cloak for confiscation. To say that a person shall retain his immovable property is surely at least to guarantee that if for reasons of State he is deprived of it, he shall receive in its stead adequate compensation.

The compensation offered to the Hungarian nationals who have been expropriated, of 1% of the market value of their land, amounts to confiscation. It is consequently inconsistent with the express provisions of the Treaty and a negation of the principle of the right to private property recognised in all the other Peace Treaties.

By Art. 19 (now Art. 18) of the Roumanian Constitution of 27 January 1923, another law was passed which conflicts with the provisions of the Peace Treaties. This Article contains the following provisions : " Under no circumstances can any but Roumanians acquire and retain landed property in Roumania. Foreigners will only be entitled to an indemnity." So far as this Article affects Austrian and Hungarian nationals, it is in direct conflict with the provisions of Art. 267 of the Treaty of Saint-Germain and with Art. 250 of the Treaty of Trianon.

The contention of the Roumanian Government that the Law of Agrarian Reform is a domestic matter with which no international body is entitled to interefere cannot be maintained. The same contention was put forward by the Polish Government in the case of the German Colonists in Poland heard by the Permanent Court of International Justice. This Court held that it was competent to hear and determine the questions submitted to it by the Council of the League of Nations for its opinion. 2. Art. 250 of the Treaty of Trianon provides that "Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Art. 239."

It is maintained by the Roumanian Government that the Mixed Arbitral Tribunal so provided is not competent to entertain claims made by Hungarian nationals in respect of their property expropriated under the Law of Agrarian Reform by reason of the following grounds:

It is contended that para. 1 of Art. 250 is limited by para. 2, since the measures of transfer, compulsory administration or sequestration are limited to those taken during the period, 3 November 1918, to the coming into force of the Treaty, and that consequently the Law of Agrarian Reform which subsequently came into force on 23rd March 1921 is not within the mischief of para. 1 and that consequently claims made in respect of the Law are not within the competence of the Mixed Arbitral Tribunal. This contention is clearly untenable and I understand it has been withdrawn.

Para. 1 simply declares that the property rights and interests of Hungarian nationals situate in the ceded territories shall not be subject to retention or liquidation *at all*: Para 2 declares that if they have been retained or liquidated by any measures taken during a specified period they shall be restored in the same condition as they were before such retention or liquidation. Para. 1 is unlimited in its operation; but only after the coming into force of the Treaty; Para. 2 is naturally limited because it gives retroactivity to the main rule contained in Para. 1 from the coming into force of the Treaty until the first moment when it was practically possible to Powers to which territories of the former Austro-Hungarian Monarchy were transferred to take any measures against the properties of Austrian and Hungarian citizens, viz.: the collapse of the Monarchy which was followed by the invasion of these Powers on its territories formerly free from any occupation by those Powers.

It is further contended by the Roumanian Government that in order that a measure may be a measure prohibited by Art. 250, it must be of a differential character, i.e., it must discriminate between nationals of the Roumanian State and Hungarian nationals, in other words, it must be a measure taken exclusively against former Hungarian enemies who remained Hungarian nationals; and if such measure were not of a differential character, the Mixed Arbitral Tribunals had no competence. The Law of Agrarian Reform, it is claimed, is of a general character and in its application makes no distinction between Roumanian nationals and Hungarian nationals or foreigners. Consequently, claims under it are not within the competence of the Mixed Arbitral Tribunal. Art. 250, it is claimed, in analogous to Art. 232, and that all the measures with which it deals are measures of a differential character.

But from the beginning the Mixed Arbitral Tribunals recognised that the distinction between enemy nationals and a State's own nationals was not a constituent element in the measures referred to in Art. 297 of

the Treaty of Versailles, Art. 249 of the Treaty of St. Germain, Art. 177 of the Treaty of Neuilly, and in Art. 232 of the Treaty of Trianon.

For instance, in the case of *Jaillant C. Spitzer et Etat Hongrois* (Recueil, T. IV. p. 448) the French-Hungarian Mixed Arbitral Tribunal declared as follows :

"Qu'il n'a pas lieu d'examiner si cette mesure s'appliquait en même temps qu'aux étrangers aux sujets hongrois eux-mêmes;

"Que le Traité de paix vise les mesures exceptionnelles de guerre, de quelque nature qu'elles soient, sans se preoccuper de savoir si ces mesures ont un caractère differentiel, c'est-a-dire concernant les ressortissants ennemis comme tels ou non."

Similarly in Art. 250 there is no suggestion of measures of a differential character. Art. 232 deals with the property, rights, and interests of Hungarian nationals situate in an enemy country. It therefore includes the property of Hungarian nationals situated in the old Kingdom of Roumania. Art. 250 deals with the property of Hungarian nationals situated in the territories ceded to other States. There is no question of differential treatment of such property, rights and interests if they are retained or liquidated by these other States. They are not to be retained or liquidated at all. They are to be restored, if they have been taken or liquidated, in their original condition. Art. 250, therefore, is dealing with an entirely different proposition. It is intended to protect a particular class of persons in a particular district, which apart from this Article would be protected only by the general international law from encroachments upon their property by its former enemies. And as already stated, consideration for this additional protection, agreed to be given by Roumania, was the transfer of the former territories of the Kingdom of Hungary to that State. It was for this very purpose that Art. 250 was framed.

Consequently, I am clearly of opinion that Art. 250 applies to the property of Hungarian nationals or Hungarian optants situate in the transferred territories and that all claims in respect thereof by such nationals or optants are within the competence of the Roumanian-Hungarian Mixed Arbitral Tribunal.

3. It remains to consider very briefly how far the principle of the inviolability of private property is recognised (a) in the municipal law of civilised States and (b) in International law.

(a) It may be shortly stated as a fact beyond cavil that in all civilised States the property of the individual citizen is guaranteed by its Constitutions, written or unwritten, or by its civil code or by the common law; and that every civilised State accords to foreigners commorant within its territory similar rights as a minimum. Upon examination it will be found that in all civilised States by customary law or by statute, land belonging to private individuals may be acquired compulsorily by the State, or by local authorities for purposes of public utility, provided always adequate compensation is paid therefor.

In England, although the Crown may in time of emergency take private property without compensation, it appeared upon an examination of the records from a very early period, that in practice the Crown had never done so without payment of compensation.—*See De. Keyser's Royal Hotel v. The King* 1920 A. C. 508.

This principle is equally well established in the United States. By the Fifth Amendment to the Constitution "private property shall not be taken for public uses without just compensation."

"A provision," said Chancellor Kent, "for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent; and his principle in American constitutional jurisprudence is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law."—Commentaries on American Law, Vol. II. p. 425—6.

It is for the Legislature to determine when public uses require the taking of private property; but if the Legislature should take it for a purpose only nominally of a public nature, if, as Chancellor Kent puts it, the Legislature should take the property of A. and give it to B. under the pretext of some public use or service, such cases would be gross abuses of its discretion and fraudulent attacks on private rights and the law would be clearly unconstitutional and void. And so in numerous cases the American Courts decided—for instance, In *Varick v. Smith,* 5 Page 146; the Vice-Chancellor delivered a spirited vindication of the constitutional sanctity of private property against the abuse of the right of expropriation for purposes of public utility. See also *United States v. Lynah,* 188 U. S. Rep at pp. 464—9; *Long Island Water Supply v. Brooklyn,* 166 U. S. Rep. at p. 685; *Monongahela Navigation Coy. v. United States,* 148, U. S. Rep. at p. 312; *United States v. Welch,* 217 U. S. Rep. at 333; Lewis, *Eminent Domain,* §§ 684, 686, 706; Nichols, *Eminent Domain,* p. 698.

This principle finds expression in Art. 17 of the French Constitution, and in those which imitated its provisions. Art. 545 of the French Civil Code provides "Nul ne peut-être contraint de céder sa propriétê, si ce n'est pas pour cause d'utilité publique, et moyennant une juste et préalable indemnité"—See Dictionnaire Général de Droit et de Jurisprudence, H. Bertheau, T. VIII. p. 108; Repetoire du Droit Administratif, Garsonnet, T. S. VI, p. 219.

By Art. 11 of the Belgian Constitution of 1893, "Nul ne peut-être privé de sa propriété que pour cause d'utilité publique, dans les cas et de la manière établie par la loi, et moyennant une juste et préalable indemnité." (See Collection des Codes Belges by Sorvais et Mechelynck, p. 8; Picard, General Treatise on Expropriation for Public Utility, pp. 102, 108—9.

So Art. 438 of the Italian Code declares that no one shall be constrained to surrender his property or to allow another to make use thereof, except for cause of public utility duly recognised and declared and subject to the previous payment of just indemnity.

The Spanish Civil Code provides that no one may be deprived of his property, except by the competent authority and for approved cause of public utility, subject always to previous corresponding indemnity. This provision is expanded by Art. 3 of the Law of 1879, whereby expropriation shall be inoperative unless preceded by the following requisites: (1) Declaration of public utility; (2) declaration that the effectuation is indispensably required of the whole or part of the immovable which it is proposed to expropriate; (3) just valuation of

what is to be alienated or granted; (4) payment of the price which represents the indemnity for that which is compulsorily alienated or granted.

The provisions for the protection of private property in the South American Constitutions embody these provisions and those contained in the Constitution of the United States. For instance, the Argentine Constitution provides that property is inviolable, and no one may be deprived thereof, except by virtue of a judgment based on the law. Expropriation for cause of public utility must be authorised by the law and previously indemnified. The provisions of the Peruvian Constitution, 1919, and of that of Chile, 1925, are to the same effect.

By Art. 146 of the Constitution of Uruguay, 1917, the inhabitants of the republic have the right to be protected in the enjoyment of life, honour, liberty, security, and property. No one may be deprived of these rights, except in accordance with the law. By Art. 169 the right of property is sacred and inviolable. No one may be deprived thereof, except in conformity with the law, in cases of necessity or public utility, recovering from the national treasury a just compensation.

The Netherlands Civil Code, Art. 625, provides that property is the right of freely enjoying a thing, and of disposing thereof in the most absolute manner, provided that one does not use it in a way prohibited by the law or public regulations emanating from a competent authority according to the fundamental law, and always reserving the right to third persons, and saving expropriation for cause of public utility under sufficient indemnity in conformity with the fundamental law.

By Art. 80 of the Danish Constitution the right of private property is inviolable. No one can be compelled to part with his property unless it is for the public benefit. It can only be taken under an Act of Parliament and with complete compensation.

By the Swedish Law of Expropriation of the 12th May, 1917, land may be expropriated by the King for military and public purposes upon payment of the full value of the property. Every case is remitted to a Court of first instance, sitting with a jury of five persons, viz., a chairman appointed by the Lieut. Governor, two members appointed by the Court, and one each by the parties. The compensation is found by the jury, and this amount, subject to the discretion of the Court, forms part of the order of the Court.

By Art. 104 of the Constitution of Norway, 1814, "neither landed nor movable property can in any case be confiscated"; and by Art. 105, "if the welfare of the State shall demand that any person shall surrender his movable or immovable property for the public use, he shall receive full compensation from the Exchequer." (See Scheel, *Norwegian Expropriation Law,* sect. 29 VII., VIII.; Morgenstierna, *Norwegian Constitutional Law,* pp. 659, 663, 668—670).

By Art. 153 of the Constitution of the German Federation property is guaranteed. Expropriation is admissible only in the public interest, and so far as authorised by law. Adequate compensation must be given, unless a federal law otherwise determines. Jurisdiction is given to the Courts to determine the amount. Expropriation by the Federal

Government as against States, local communities and associations serving interests is permitted only if accompanied by compensation. (See Georg Mayer, *Text-book of German Administrative Law*, pp. 230, 234; the Prussian Expropriation Law of 11/6/1874; the Saxon Law of 24/6/1902; *Judgments of the Imperial Court*, vol. 16, p. 158; vol. 61, p. 102).

By the Swiss Constitution of 1874 expropriation of private property must be accompanied by adequate compensation.

These illustrations of the principle of the inviolablity of private property might be multiplied, but they are sufficient to show that the principle is generally recognised and observed throughout the civilised world. It forms part of what Chancellor Kent has called "universal law," i.e., legal conceptions universally recognised.

(b) Does confiscatory legislation involve a breach of International Law? In so far as such legislation applies to a State's own subjects the answer, generally speaking, is No. In the absence of treaty stipulations or other conditions introducing the element of international obligation, International Law is not as a rule concerned with the manner in which a State, in the exercise of its sovereign powers, treats its own subjects. In the present case we are not concerned with the manner in which Roumania is treating its own subjects, whether ex-Hungarians or not, and whether in the old Kingdom or the new.

This is a distinct question upon which much might be said both from the point of view of constitutional law, i.e., how far a State is entitled to confiscate the private property of its own subjects, and from the point of view of International Law, i.e., how far it may do so within the limits of the Minorities Clauses in the Peace Treaties. But in the present case we are not concerned with either of these points of view. We are only concerned with the rights of the Hungarian nationals who for this purpose are to be regarded as foreigners.

Such rights come within the sphere of International Law under the title of State succession. It is now a rule of International Law, too well-established to be disputed, that when the territory of one State, either in whole or in part, has been transferred to another State, whether by conquest or cession the private property, rights, and interests of all persons whomsoever in the conquered or ceded territory remain unaffected by the transfer.

This rule for the protection of the fundamental rights of the individual has been generally observed in practice, and has been repeatedly adopted by courts of law, notably so in the United States. For instance, in *United States v. Percheman*, 7 Peters, 51, this rule was said to be complied with in the Treaty between the United States and Spain of 22nd February, 1819, whereby Florida was ceded to the United States. In delivering the opinion of the Supreme Court, Chief Justice Marshall said, "It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than displace the sovereign and assume dominion over the country. *The modern usage of nations, which has become law, would be violated, the sense of justice and of right which is acknowledged and felt by the whole civilised world would be outraged if private property should be generally confiscated and private rights annulled.* The people change

their allegiance, their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application in the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the New Government would have been unaffected by the change; it would have remained the same as under the ancient sovereign. . . . A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The King cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilised world. The cession of a territory by its name from one sovereign to another, conveying the idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property."

If for Spain, Florida, and the United States we substitute Hungary, Transylvania and Roumania, this judgment applies word for word to the present case.

Upon another point the case of *Strother v. Lucas,* 12 Peters, 410 (1838) is very instructive. The Court defined in this case, property to be "any right, legal or equitable, inceptive, inchoate, or imperfect," which before the transfer had so attached to any land as to affect the conscience of the former sovereign and make him a trustee for an individual owner according to the law of nations.

Quite apart from Treaties, it has long been recognised that a State is entitled to protect and to demand satisfaction when its subjects resident in another State and/or possessing property there, are injured in their person or property. And it has also long been recognised that such a protest may properly be made without the offending State being entitled to resist the demand for satisfaction as an attempted encroachment upon her sovereign rights. There is no doubt that there is a limit imposed by International law upon the rights exercisable by a State in relation to the subjects of another State. The latter remain under the protection of their own Government which is entitled to demand that a certain standard of conduct shall be observed towards them by the State in whose territory they are resident or have been permitted to acquire property.

The following propositions may be laid down as fairly representing the law on the subject: viz.:

1. A State is entitled to protect its nationals resident in another State and/or owning property therein according to the laws of such State, from injury to their property resulting from measures in the application of which there is *discrimination* between them and the nationals of such other State.

2. A State is entitled to protect its nationals resident in another State and/or owning property therein according to the laws of such State, from *actual injustice* at the hands of such other State, even if the measure complained of is applied equally to the nationals of such other State.

As a general rule foreigners can only expect the same treatment as that accorded to the nationals of the country where they reside, own property or carry on business. But if they are subjected to exceptional measures of an injurious character, whether legislative, executive, or administrative, their own Government is entitled to intervene on their behalf and to demand satisfaction.

In the present case the Roumanian Government maintains that the Law of Agrarian Reform is a measure of general character making no distinctions of nationality, and that it is administered impartially. This may be true of its application in the old Kingdom, but the Hungarian nationals contend that discrimination between Roumanian nationals and Hungarian nationals is made in the transferred territories. In these territories the majority of the landowners were Hungarians or former Hungarian nationals. Whilst all these have been expropriated, only a few Roumanian nationals have been similarly treated. This situation is precisely similar to that of the German Colonists in Poland. In that case the Polish Government was only able to prove one case where a colonist of Polish race was expropriated. The Permanent Court of International Justice found that the action of the Polish Government was substantially discriminatory and thus inconsistent with the Minorities Clauses of the Peace Treaties. A Court of Justice requires not only the letter but also the spirit of the law to be observed. But even if the measure is of a general character, and is applied equally to the State's own nationals and foreigners, this is but a conclusive answer. Modern civilisation is based upon the principle of the sanctity of life, liberty and property. It is based upon common ideas of right and wrong conduct. Consequently, if these be violated in the person of a foreigner, his State is not precluded from protesting, merely because the natives received the same treatment.

The opinions of jurists supporting these propositions are cited by Mr. Fachiri in his paper entitled "Expropriation and International Law," British Year Book of International Law, 1925, pp. 159—171. The following are the references: Westlake, *Collected Papers*, pp. 1—2, 9, 10, 103—110; Hall (7th Ed.), Oppenheim (3rd Ed.), Vol. I., 319, 320; Calvo, Livre VII, 514; Bonfils (5th Ed.) 262. In one of the American cases on this topic, collected in Moore's Digest, Vol. VI, 312, of International Law occurs the following significant passage in a letter dated 17 February 1885, from the Secretary of State Freylinghuysen to Mr. Morgan:—"The duty is always incumbent upon a Government to exercise a just and proper guardianship over its citizens, whether at home or abroad. A municipal act of another State cannot abridge this duty. No country is exempted from the necessity of examining into the correctness of its own acts. *A sovereign who departs from the principles of public law cannot find excuse therefor in his own municipal code.*"

And in a letter from Secretary of State Fish to Mr. Foster of 16th December 1873, it was said "It may in general be true that when foreigners take up their abode in a country they must expect to share the fortune of the other inhabitants and cannot expect a preference over them. While, however, a Government may construe according to its pleasure its obligations to protect its own citizens from injury, foreign Governments have a right, and it is their duty, to judge whether their citizens have received the protection due to them pursuant to public law and treaties."

And in a letter from Secretary of State Case to Mr. Body of 3rd March, 1860, it was said "The United States believe it to be their duty, and they mean to execute it, to watch over the persons and property of their citizens visiting foreign countries, and to intervene for their protection, when such is justified by existing circumstances and by the law of nations."

In further support of these propositions may be cited the following diplomatic incidents and international arbitrations:—The Sicilian Sulphur Monopoly (*State Papers,* Vols. 28, 29 and 30); The Case of the Rev. Jonas King (Moore's Digest, Vol. VI, pp. 262—4); The Delagoa Bay Railway Arbitration (Sentence Finale du Tribunal Arbitral de Delagoa; Moore's Digest, Vol. II, pp. 1866—70; *State Papers,* Vol. 81, p. 691); The Italian Life Insurance Monopoly, and Opinion of Me Eduard Clunet, *Recueil des Actes et Documents Relatifs a l'Affaire de l'Expropriation par le Royaume de Romanie,* etc., pp. 152—6); The Portuguese Religious Properties Arbitration (See Compromis of 31st July 1913); and the Norwegian Ships Arbitration (*American Journal of International Law, April* 1923).

In the latter case the United States Government by virtue of the right of angary seized certain vessels the property of Norwegian nationals under construction in the United States and refused to pay full compensation. The dispute was submitted to the Permanent Court of Arbitration at The Hague. On 13th October, 1923, the Court issued its Award condemning the United States to pay full compensation.

The United States admitted that just compensation was due in respect of any property taken, but maintained that the Court was bound to give effect exclusively to the municipal law of the United States. The Court in their Award rejected this contention and held that it must apply International Law; if the municipal law of one of the parties was contrary to International Law, it was not bound by such municipal law.

The following passage from the Award is very much to the present purpose: "The Fifth Amendment to the Constitution of the United States provides: "No person . . . shall . . . be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation. It is common ground that in this respect the public law of the parties is in complete accord with the international public law of all civilised countries . . . whether the action of the United States was lawful or not, just compensation is due to the claimants under the municipal law of the United States, as well as under International Law, based upon the respect for private property . . . Just compensation implies a complete restitution of the *status quo ante,* based not upon the future gains of the United States or other Powers, but upon the loss of profits of the Norwegian owners as compared with owners of similar property."

The judgment of the Permanent Court of International Justice in the recent case of *The German Government v. The Government of the Polish Republic Concerning Certain German Interests in Polish Upper Silesia* (Publication of the Permanent Court of International Justice, Series A. Collection of Judgments, No. 7, 1926) is peculiarly instructive and to the point. The German Government claimed that the application

of Articles 2 and 5 of the Polish Law of July 14, 1920, in Polish Upper Silesia, decreed by the law of June 16th, 1922, constituted a measure of liquidation within the meaning of Art. 6 and the subsequent articles of the Convention of Geneva of 15th May, 1922, in the sense that, in so far as the said articles of the Geneva Convention authorised liquidation, that application must be accomplished by the consequences attached to it by the said Convention, in particular the entry into operation of Articles 92 and 297 of the Treaty of Versailles prescribed by the said Convention and that in so far as those articles did not authorise liquidation that application was illegal.

The Law of July 14th, 1920, deals with the transfer of the rights of the German Treasury and members of reigning German Houses to the Polish Treasury. Art. 1 provides that in all cases where the former are or were entered after November 11th, 1918, in the land registers of the former Prussian Provinces—either as owners or as possessors of real rights—the Polish Courts shall, on the basis of the Treaty of Peace of Versailles of 28th June, 1919, in their place automatically enter the Polish Treasury. Art. 2, par. 1, provides that if the former have after November 11th 1918, either alienated or charged the landed property in question or ceded their real rights, the Polish Courts shall treat such alienation or cession as null and void.

By Art. 5 " The Polish Treasury having been entered in accordance with Art. 1 as owner of a landed property, may require the eviction of persons who as a result of a contract concluded with one of the persons or institutions mentioned in Art. 1 remain in occupation of such property after the coming into force of this law."

" It appears from the wording of Art. 2 itself," says the Court in its Judgment, " that Poland regards as null and non-existing, rights which private persons may have acquired by deeds of alienation or other deeds, mentioned in the article, if such deeds were executed after November 11th, 1918. And by authorising the Polish Treasury to demand the eviction of any persons who after the coming into force of the law remain in virtue of a contract of the kind contemplated in Art. 5, in occupation of one of the landed properties in question this article recognises a right to disregard even private rights derived from contracts previous to November 11th, 1918.

" These articles are applied automatically without any investigation as to the title of ownership or validity of each transfer or contract; any alienation or creation of real rights subsequent to November 11th, 1918, is null and void, under Art. 2 without regard to the nature or circumstance of the transaction any contract concluded with the persons or institutions mentioned in Art. 1 at any date whatsoever and giving to a private person a right to the possession or occupation of a landed property may be annulled at the mere will of the Polish Treasury under Art. 5.

" No redress by legal action is open to the interested Parties and no indemnification is provided for by the law."

The first part of the Geneva Convention includes three headings. The first is intended to secure for a certain time and under certain reservations, the maintenance of the German law in force in the Polish portion of the plebiscite area; the second secures the protection of

vested rights, and the third establishes Poland's right to expropriate in Polish Upper Silesia certain property of German nationals or of companies controlled by them, under certain conditions.

In its Judgment the Court pointed out that whereas Head II is general in scope and confirms the obligation of Germany and Poland in their respective portions of the Upper Silesian territory to recognise and respect rights of every kind acquired before the transfer of sovereignty, by private individuals, companies or juristic persons, Head III only refers to Polish Upper Silesia and established in favour of Poland a right of expropriation which constitute an exception to the general principle of respect for vested rights.

Head III is entitled "Expropriation." It includes a general rule (Art. 6) and three chapters, the first (Arts. 7—11) and second (Arts. 12—16) which respectively determine the condition under which Poland may expropriate large industrial undertakings and large rural estates; whilst the third (Arts. 17—24) contains provisions applying both to large industries and large rural estates.

Art. 6 is as follows:—"Poland may expropriate in Polish Upper Silesia in conformity with the provisions of Articles 7 to 23, undertakings belonging to the category of major industries including mineral deposits and rural estates. Except as provided in these clauses the property, rights, and interests of German nationals may not be liquidated in Polish Upper Silesia."

"Having regard to the context," continues the Judgment, "it seems reasonable to suppose that the intention was, bearing in mind the régime of liquidation instituted by the peace treaties of 1919, to convey the meaning that, subject to the provisions authorising expropriation, the treatment accorded to German private property, rights, and interests in Polish Upper Silesia is to be the treatment recognised by the generally accepted principles of international law. However that may be, it is certain that expropriation is only lawful in the cases and under the conditions provided for in Art. 7 and the following articles; apart from these cases or if these conditions are not present, expropriation is unlawful."

"Further, there can be no doubt that the expropriation allowed under Head III of the Convention is a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights. As this derogation itself is strictly in the nature of an exception, it is permissible to conclude that no further derogation is allowed. Any measure affecting the property, rights, and interests of German subjects covered by Head III of the Convention, which is not justified on special grounds taking precedence over the Convention, and which oversteps the limits set by the generally accepted principles of international law, is therefore incompatible with the régime established under the Convention. The legal designation applied by one or other of the interested Parties to the act in dispute is irrelevant if the measure in fact affects German nationals in a manner contrary to the principles enunciated above.

It follows from these same principles that the only measures prohibited are those which generally accepted international law does

not sanction in respect of foreigners; expropriation for reasons of public utility, judicial liquidation and similar measures are not affected by the Convention." (See pp. 21 and 22).

Apart from other questions the Court found that the application of Articles 2 and 5 of the Polish Law of July 14, 1920, in Upper Silesia was not compatible with the system established by Head III of the Geneva Convention. For on the one hand, these articles may affect private property and withdraw it from the protective régime instituted by Articles 6 to 22, subjecting it to more serious measures prohibited by the Convention. On the other hand, they make no provision for any investigation concerning the validity of a title to eliminate any previous investigation of an individual case, though such investigation is necessary for a correct application of the Convention.

The Polish Government further contended that the provisions of the Polish law of July 14th, 1920, had no connection with Head III of the Convention, since first they merely give effect to rights which Poland derives from the Treaty of Versailles and other international instruments connected with that Treaty, e.g., the Armistice Convention of November 11th, 1918, and the Protocol of Spa of December 1st, 1918; rights which are not affected by the Geneva Convention. And secondly, even supposing that this was not the case, the measures taken in application of Articles 2 and 5 of the Law of July 14th, 1920, cannot be regarded as measures of liquidation within the meaning of Articles 6 to 22 of the Geneva Convention.

Upon the first point the Court found that no title of international law had been cited by Poland which enables Articles 2 and 5 of the law of July 14th, 1920, to be regarded as the exercise of a right overriding her obligations under Head III of the Geneva Convention.

Upon the second point the Court noted the Polish contention that there was no ground for a decision as to the conformity or non-conformity with the provisions of the Geneva Convention since no measures of liquidation had been taken by Poland; and the German contention that liquidation within the meaning of the Treaty of Versailles includes any measures contrary to generally accepted international law affecting the property of German nationals no matter whether such measure is authorised by treaty provision (authorised liquidation), or whether it is not (unauthorised liquidation). And upon these conflicting contentions the Court made the following observations:

In the German view, "authorised liquidation" includes any measure involving a derogation from generally accepted international law, in so far as such measure is expressly sanctioned by an international agreement. The Court has already observed that it has no need to stop to consider this theory, of which it notes merely the essential element, namely the fact that any such measure constituted a derogation from generally accepted international law. A fortiori this is an element in the notion of "unauthorised liquidation."

Now, the idea which clearly emerges from Head III of the Geneva Convention is, as has already been stated, that expropriation, in the cases and under the conditions mentioned therein, is the only measure not allowed by generally accepted international law which may be taken in regard to German private property in Polish Upper Silesia.

On the other hand, as regards the Polish submission referred to above, the Court, though in no way denying that the liquidation régime established by the Treaty of Versailles and the actual measures of expropriation permitted by Head III of the Geneva Convention apply to German private property as such, cannot attach to the fact that Articles 2 and 5 of the law of July 14th, 1920, apply to a certain class of property, no matter what the nationality of the owners may be, the importance and effect which are attributed to that fact by Poland. Even if it were proved—a point which the Court does not think it necessary to consider—that, in actual fact, the law applies equally to Polish and German nationals, it would by no means follow that the abrogation of private rights effected by it in respect of German nationals would not be contrary to Head III of the Geneva Convention. Expropriation without indemnity is certainly contrary to Head III of the Convention; and a measure prohibited by the Convention cannot become lawful under this instrument by reason of the fact that the State applies it to its own natianals. (See pp. 25—33).

These cases it is submitted clearly demonstrate that where nationals of one State have been deprived of their property situate in another State, their own State has successfully intervened.

It is further submitted that this rule has been embodied in the common law of nations.

It was formerly customary to introduce express stipulations in treaties designed to protect the property of the nationals of contracting Parties from confiscatory measures in each other's territories. Gradually such stipulations ceased to be inserted in treaties between civilised States, not because civilised States desire to lessen the security of their nationals' property but because, with the acceptance by civilised nations of certain fundamental principles of law, of which the inviolability of private property is one, all such stipulations are now deemed unnecessary.

The expropriation of the property of the Hungarian nationals accompanied by compensation of barely 1% of its real value can only be regarded as confiscatory. Consequently, even if this compensation only is given to Roumanian nationals, and no distinction in the amount payable is made, this derisory compensation, which amounts to confiscation, constitutes a gross injustice to Hungarian and other foreign nationals.

This derisory compensation is due to two causes. By the Garoflid Law the market price in 1913 is taken as the maximum for compensation and this is computed in paper lei. In 1913 a leu note was equal to a gold leu, whereas to-day 40 lei notes equal a gold leu, so that the owner only receives about 2½ per cent. of the real value. But this is payable in non-transferable Roumanian 5% bonds which at the current rate of exchange are only valued at 40% of their nominal value. The result is that the owner receives only one fortieth of 2½%, i.e., less than 1% of the real value. (See League of Nations Official Journal, 1922, pp. 732—3; Actes et Documents, pp. 8 and 9).

I am therefore of opinion that the claims of the Hungarian nationals to the Mixed Arbitral Tribunal ought to succeed provided the Petitioners prove: (1) that in the application of the Law of Agrarian

Reform discrimination has been shown against the Petitioners as compared with Roumanian nationals; or (2) that no compensation has been given to the Petitioners, or only such derisory compensation as to amount to confiscation.

It is not without great significance to note that even in time of war the inviolability of private property has in modern times been recognised and observed by civilised States.

In recognising the right of the sovereign authority to take private property, Grotius declared that it was limited to occasions of danger to the public safety. This doctrine of eminent domain—*super-eminens jus dominii*—he added, should also be applied in time of war with the proviso "That where the public safety required that this sovereign right should be made use of, satisfaction ought to be given out of the public funds to such particular persons as shall be thereby damnified." (*De Jure Belli ac Pacis,* III, XIX, S. 7).

Pufendorff, *De Jure Naturas et gentium,* VIII, V. § 3, 7, and Bynkershock, *Quaest, Jur. Pub.* II, XV, are to the same effect.

This right of the nationals of a belligerent to compensation has been extended to enemy aliens. "The establishment," says Mr. Edwin M. Borhard, "of the limits of rights which the State must grant to aliens is the result of the operation of customs and treaties . . . it has secured to the alien a certain minimum of rights necessary to the enjoyment of life, liberty and property of an alien who by war has become an alien enemy." (*Protection of Citizens Abroad,* p. 39).

Private property, belonging to alien enemies which is of a kind likely to be of immediate use in war and which is found within the jurisdiction of the belligerent on the outbreak of hostilities, is liable to seizure, but on the analogy of the rules now governing the treatment of similar property found in occupied territory such seizure would be subject to an obligation of restitution or of compensation if restitution was impossible.

It may be said that probably down to the 16th century all private property of whatever kind found by a belligerent within his own territory, was subject to confiscation. After this date we observe a gradual relaxation due, no doubt, to the perception of a common interest. Sequestration of land was substituted for confiscation, whilst the practice of confiscation of private property was greatly mitigated, first by the bestowal on aliens, either by treaty or municipal law, of a right of withdrawal, which was invariably coupled with a right to remove or dispose of their property, and next by a custom to that effect apart from treaty. Nevertheless, down to the end of the 18th century, instances of confiscation of movable property occur in a variety of cases not covered by treaty.

But as the more liberal practice of allowing alien enemies to remain during good behaviour grew in strength, this necessarily carried an immunity from interference with their property. So ultimately all private property not being of a noxious character came to enjoy a virtual immunity from confiscation; and this whether it consisted of land or goods or property of an incorporeal nature, such as debts and credits.

Enemy merchantmen found in a belligerent port on the outbreak of war, by reason of the peculiar character of such property, stood on a different footing, and remained liable to confiscation until the middle of the 19th century, when a more liberal usage arose by which merchantmen whether in or on their way to a belligerent port were allowed to depart, or to enter and depart within some fixed period known as "days of grace." The usage was embodied in The Hague Convention, VI, of 1907, whereby if a vessel is unable to leave within the specified days of grace the belligerent may detain it, subject to restoration upon the conclusion of peace, or may requisition it on payment of compensation for its use or loss.

Subject to this exception of merchantmen we find from the commencement of the 19th century only two instances of confiscation. The first was the sequestration and ultimately the confiscation of the property of British subjects in Denmark in 1807, a proceeding, however, which was really a measure of reprisal. This measure, indeed, was in the case of *Wolf v. Oxholm* (6 M. et S. 92; Scott's Cases on International Law, 550 (1817) declared by Chief Justice Ellenborough to be contrary to the usage of nations and unsupported by precedent or the example of any other State. Such an instance of confiscation was not to be found for more than a century.

The second incident occurred in 1861 when the Southern Confederacy issued a decree confiscating all property of whatsoever kind except public stocks and securities held by alien enemies since the 1st May, 1861. But this again was a measure of retaliation against the parent State. The proposal to extend this decree to the property belonging to all persons domiciled in the Northern States was abandoned in consequence of a protest from the British Government and of a general expression of opinion condemning it.

Two theories upon this subject are current to-day. According to the Continental theory private property is inviolable and may only be taken or destroyed in cases of military necessity, public safety or by way of reprisal.

According to the Anglo-Saxon theory, although the outbreak of war does not of itself work a confiscation, yet it confers on the sovereign authority a right to decree its confiscation, if this should be found necessary. But in practice both theories recognise the exemption of private property as a policy to be followed save in exceptional emergencies, and both recognise that when taken or destroyed adequate compensation should be paid. (See Pitt Cobbett, *Leading Cases* on International Law (4th Ed.), by Bellot, Vol. II, pp. 68, 80—2, 192—3, 243—50).

Upon the whole case I have come to the following general conclusions :

1. That the Roumanian Law of Agrarian Reform of the 30th July, 1921, and the prior and subsequent Decrees are inconsistent with, and contrary to, the provisions of the Treaty of Trianon, and consequently cannot be applied to the Hungarian nationals.

2. That the Hungarian-Roumanian Mixed Arbitral Tribunal is competent to hear and determine the claims of the Petitioners, the

Hungarian nationals whether optants or non-optants, in respect of their property situate in the transferred territories, and used by the Roumanian Government for the purposes of its Agrarian Reform.

3. That apart from the said Treaty the Roumanian Law of Agrarian Reform is of a confiscatory character and is a violation of the general principles of International Law.

Hugh H. L. Bellot.

2, King's Bench Walk,
Temple, E.C. 4.

13*th September,* 1926.

OPINION of M. A. de LAPRADELLE

Professor of International Law at the Paris University on

The Agrarian Cases of Hungarian Nationals before the Mixed Roumano-Hungarian Arbitral Tribunal

(Jurisdiction).

The undersigned Counsel, Professor of International Law at the Paris University, Editor of the "Review of International Arbitration," of the "General Review of Public International Law," of the "Review of International Private Law and International Penal Law," Member and formerly Vice-President of the Institute of International Law.

Seized of this question:

Has a Hungarian proprietor, subjected in Transylvania to measures under the Roumanian Agrarian Law, which he complains of concealing, under an apparent generality, the characteristics of expropriation without compensation, or at least without sufficient compensation, the right to make application to the jurisdiction of the Mixed Arbitral Tribunals (in this case, the Roumano-Hungarian Mixed Arbitral Tribunal), for the upsetting of these measures, or for the reparation of their effect, as far as and including, recovery in kind?

Expresses this opinion:

According to the terms of Article 250 of the Treaty of Trianon:

Notwithstanding the provisions of Article 232 and the Appendix to Section 4, the properties, rights, and interests of Hungarian Nationals or of companies controlled by them, situated on the territories of the former Austro-Hungarian Monarchy shall not be subject to seizure or liquidation in conformity with these provisions.

* * * * *

"Claims which may be brought forward by Hungarian Nationals, in virtue of the present article, shall be submitted to the Mixed Arbitral Tribunals provided for by Article 239."

Three consequences result from this text, namely:

1. That in transferred territory (Transylvania in this case), the nationals of the dismembered State cannot, in any case, be deprived of their property by any procedure whatsoever, except on condition that the successor State pays the full value to them.

2. That in transferred territory (Transylvania in this case), the nationals of the dismembered State cannot be deprived of the right to retain their property in kind.

3. That, in order to ensure that these provisions are respected, if the nationals of the dismembered State claim that they have been violated by the annexing State, the settlement of the dispute depends upon the jurisdiction of the Mixed Arbitral Tribunals.

FIRST PROPOSITION.

In transferred territory the nationals of the dismembered State cannot in any case be deprived of their property, by any procedure whatsoever which may take place, except on condition that the successor State pays the full value to them.

This solution is derived :

1. From the general principles of law ;
2. From the Treaty of Trianon.

General Principles of Law.

I.

In International Law it is a fixed principle that a foreigner cannot be deprived of his property (except for a penal offence, which is not suggested here) without receiving just compensation for it.

" Men are born free and with equal rights. These rights are . . . . . property." (Declaration of 1789, Articles 1 and 2.) " Property is an inviolable and sacred right ; no one can be deprived of it except when public necessity, legally established, obviously demands it, and under the condition of just and prepaid compensation." (Declaration of 1789, Article 17.) These principles being fixed, the Constitution of 1791 (Chapter I, para. 4) declares the guarantee " of the inviolability of properties, or the just and prepaid compensation for such as legally established public necessity demands the sacrifice of." The rights of property are affirmed in analogous terms by the Declaration of 1793, Article 19, and the Constitution of 1793, Article 122. The Declaration of Rights of the year III (Articles 1 and 4), the Constitution of the year III, Article 358, the Charter of 1814, Article 19, the Charter of 1830, Article 8, the Constitution of 1848, pr. Articles 4, 8 and Article 11, the Constitution of 1852, Article 1 and Article 26, contain the same principles.

Outside France the same holds good.

Europe.—Thus, in Belgium, in the terms of Article 11 of the Constitution of 1893 ; in Denmark, in the terms of Article 80 of the Constitution ; in Norway, in the terms of Articles 104 and 105 of the Constitution of 1814; in Germany, in the terms of Article 153 of the Federal Constitution ; in Switzerland, in virtue of the Constitution of 1874. Where the Constitution is silent, common law, a particular law, a civil code, jurisprudence lay down the same principles (England : *Land Clauses Consolidation Act*, 1845 ; *Defence Act*, 1842, and *in re de Keyser's Royal Hotel, Lim. v. The King* (1920), A.C. 508. Italy : Article 438 of the Civil Code. Spain : law of 1879, Article 3. Netherlands : Civil Code, Article 625. Sweden : law of 12th May, 1917.)

In the United States, the important principle : " no expropriation without just compensation " is affirmed by 5th Amendment to the Constitution : " no person shall be . . . . . deprived of life, liberty or property without due process of law ; nor shall private property be taken for public uses without just compensation." Comp. Kent, *Commentaries on American Law*, II., p. 425-26 ; *Thompson v. Grand Gulf R.R. and Banking Co.* (3 *How. Miss. R.* 250). The same maxim is found in other Constitutions, notably in those of the Argentine, of Peru (1919), of Chili (1925), of Uruguay (1917, Articles 146 and 169).

These indications, given by way of examples, emphasise the breadth and fixity of the principle of the inviolability of private property, and of its natural corollary—no expropriation, except for public necessity, and under condition only of just (and even previous) indemnity. When a rule with this permanent character is found in national laws, the right which it establishes is not a particular right, pertaining to a particular nationality, but a general and universal right, belonging strictly to man as such ; from this it follows that even should the foreigner not have in the matter of property—particularly landed property—absolutely the same rights as the national, in the case, for example, of the denial of the right to acquire immovable property in the interest of military or political security (American law of 3rd March, 1887 ; Japanese law, *Journal of International Private Law*, 1901, p. 603), the foreigner would at least always have the right to the same property computed not in kind, but in value. So that the rule of " no expropriation without just compensation," a corollary to the law of property, has the character of a rule applicable, not only to all nationals in all countries, but to the foreigner in whatsoever country he may be. In brief, it is not only the rule—*universal legislation*, using the expression of Chancellor Kent, *loc. cit.*—of all national legislations of all States participating in the modern legal communality, but that of positive international law itself.

Whereas Montesquieu, in the *Esprit des Lois*, Book 26, chapter 15, lays down the maxim, "that, while the public good is under consideration, it is never in the public interest to deprive an individual of his property, or to take from him the least part of it by a law or by a political regulation ; it is necessary in this case to keep strictly to civil law, which is the defender of property ; thus, when the public needs the property of an individual, action should never be taken under the rigour of political law ; it is just in such cases that civil law ought to triumph," Vattel, in *Droit des Gens*, Book II, chapter 7, para. 81, transposes this rule from national law to international law : " It is the duty of each political society to establish within itself the communality of property, as did Campanella in her Republic of the Sun. The others never enquired what she did in regard to this ; her domestic regulations change nothing in law concerning foreigners." Further, in chapter 8, para. 109 : " The property of an individual does not cease to belong to him because it happens to be in a foreign country, and it still forms part of the total of the property of his nation (para. 81). Any claim which the lord of the territory might wish to lay to the property of a foreigner, would be contrary both to the rights of the owner and to the rights of the nation of which he is a member."

Affirmed by Vattel, these views have only continued to develop since, in the doctrine in all countries. A grand theory of international law is slowly being elaborated ; that of international rights enjoyed by every individual in every civilised country, and which are normally accorded diplomatic protection by each State of the international family. Fiore enumerates these rights, including : the right of liberty, the right of *property*, the right of religious belief. Martens counts among the imprescriptable rights of man that of life, that of being respected in his person, his life, his honour, his health, his *property*. Corresponding to the universality of the rights of the individual, is that which Stoerk and others with him call the *Völkerrechtsindigenat* corresponding to the *Citizenship of the World* of Bentham.

It would be tedious to enumerate here all the authors in regard to the inviolability of private property, in international law, being a fixed principle (to take only the most recent : Oppenheim, *International Law*, 3rd edition, vol. I., para. 320 ; Calvo, *Droit international*, vol. XV, para.

1276-1278 ; Clunet, in a celebrated *Opinion for the foreign Life Assurance Companies in Italy* ; Anzilotti, Asser, de Bar, Gabba, Holland, Lammasch, Lyon-Caen, Roguin, Rolin, in appendix to this opinion.). In the course of a long review of the doctrinal authorities (comp. Article 36 of the Statute of the Permanent Court of International Justice), it can only be said with Paul Fauchille, *Traité de Droit international public*, Paris, Rousseau, 1922, Tome the 1st, first part, p. 934 : " If many think that a State, while organising its national government, can, without provoking the intervention of other States, take from their Nationals *rights which form the base of modern civilisation, for example the right of property*, the majority, after all, consider that it will not be able to act thus towards foreigners within its territory *without raising legitimate complaints* from the State to which they belong."

And this is not only a doctrinal view, fortified since this date by new adherents (Verdross, *On the Confiscation of the private property of foreigners in accordance with international law in peace time. Journal of Public Law*, 1924, P. Fachiri, *Expropriation and international law, Year Book of international law*, 1925. Hugh Bellot, *The protection of private property, Revue de droit international*, Geneva, 1926), but a principle resulting from diplomatic practice and international jurisprudence.

In diplomatic practice, examples abound : the case of the Reverend Jonas King, expropriation without indemnity, between the United States and Greece, Moore, *Digest of international law*, I, p. 262-264 : the case of Savage, between the United States and Salvador, *Journal of international arbitration*, II, p. XIII. ; the case of the Delagoa Bay Railway, *Final Judgment*, Berne, 1900 ; the case of the expropriation of the English and French congregations in Portugal in 1910-1913. In this case submitted to the Permanent Court of Arbitration at the Hague, the English Governmend declared : " *Respect of property, respect of acquired rights, these are the legal principles of all civilised countries. It is upon the security which they assure and the confidence they inspire that the relations entertained by nations with each other are based.*" The other Governments (French and Spanish), associated with Great Britain in the case, accepted the same point of view. And how did Portugal reply ? Placing herself on ground other than that of respect for the property of foreigners, she declared that, far from contesting these principles, she approved of them.

These principles are consecrated by so many treaties, that even the Russia of the Soviets is sometimes forced to recognise them. In the Treaty of Brest-Litowsk, *additional treaty concerning financial relations*, etc., of 2nd August, 1918, Article 11, it is said that "the property of German Nationals in Russia shall only be expropriated . . . . . if the owner is immediately compensated in full " (Strupp, *Documents pour servir a l'histoire du droit des gens*, III, p. 113). And later, at the Treaty of Rapallo, Germany only renounced, as regards the past, the application of these principles in the cases in which Russia would not compensate Nationals of third powers. At the conferences at Genoa and the Hague in 1922, the Powers pursued the recognition of this principle, in accordance with which diplomatic relations were later resumed. All the treaties of *modus vivendi* concluded with Russia on the lines of the MacDonald-Tchitcherine type, preserved, at least for the future, the inviolability of the property of foreigners. Similar conceptions denote, even for Nationals, *a total want of legal communality* (Pillet-Niboyet, *Droit international privé*, p. 739, in reference to the finding of the tribunal of the Seine in the case of Bouniatian, 5th Ch., 12th December, 1923). Even when the French Government was trying to find a more conciliatory attitude, as regards the Soviets, between the conference at Genoa and that at the Hague,

M. Poincaré declared : " In all that concerns the private property of our expropriated Nationals, if the persevering efforts of the French delegation are to succeed in causing restitution to be admitted, it is necessary, nevertheless, to forsee the case in which restitution will in fact be impossible. Some reforms, such as restitution of land, the consequence of agrarian reform, are of a kind which may be difficult to put into effect. In this case, the Soviets would propose a system of compensation for expropriated owners in lieu of the restoration of the property. It would be necessary to watch carefully that this system were sincere and led to full compensation." (M. Poincaré, President of the Council, in the Chamber on 2nd June, 1922).

More recently Mexico has started an exaggerated agrarian reform, in the course of which she has tried to appropriate to herself the landed estates of nationals of the United States of America without sufficient compensation. The United States protested immediately, in the name of international law, against the violation of the rights of property of their Nationals (Cf. Le Temps, 17th August, 1925).

Also, from the point of view of diplomatic action, one can repeat with Moore : *A Digest of international law*, t. V, p. 5. Aliens, Property rights : " There is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of a country in friendship with their own to the protection of its sovereign by all the efforts in his power."

International jurisprudence has pronounced itself, unvaryingly, to be of the same mind : the case of the Delagoa Railway, *Final judgment*, Berne, 1900 ; the case of the religious congregations in Portugal, *Permanent Court of Arbitration at the Hague*, 1920 : the case of the Norwegian ships, *Permanent Court of Arbitration at the Hague, American Journal of international law*, April, 1921, p. 362-383. In accordance with this last decree : " The 5th Amendment to the Constitution of the United States lays it down that : ' No person can be deprived of life, liberty, or property without the application of legal process, nor can any property be taken away for a purpose of ' public utility without just compensation.' " " It is a recognised principle that in this respect the public right of the parties is in *complete accord with public international law.*" " *It is a common ground that in this respect the public law of the parties is in complete accord with the international public law.*"

In the case relating to certain German interests in Polish Upper Silesia, Judgment No. 7, of 25th May, 1926, the Court, interpreting the Geneva convention of 15th May, 1922, which allows the Polish Government to expropriate, under certain conditions, large industrial enterprises and large landed estates, declared that such a " measure passes the limits of international common law " (*Publications of the Court*, series A. No. 7, p. 22). And nevertheless, in the terms of the Convention (Article 22) : " The accomplishment of the expropriation in the sense of Article 10, line 2 and of Article 15, para. 1, line 2, entails, among other things, the payment of the fixed compensation." (*Publication of the Court*, series A., No. 7, p. 32.)

The law of property is, therefore, an international law of man, enjoining the respect of the State. Not only has the State, to which the foreigner belongs, the right of claiming and obtaining for its national, just reparation for any tort done to his patrimony, but it can happen that a State may intervene to assure respect for the right to property, ignored by another State, even at the cost of the nationals of the latter. Under the headings of intervention in the cause of humanity are grouped

all attacks on the rights of man ; and these rights of man include not only life and liberty, but also property (Note of Secretary of State, John Hay, Sept., 1902, *General review of public international law*, X, 1903, p. 49).

The international value of this law is so great that it is expressed, explicitly or tacitly, not only in treaties of minorities, where it appears by doctrine and jurisprudence (Cf. Fauchille and Sibert, *General review of public international law*, 1925 ; A. de Lapradelle, *Agrarian reform in Latvia, and the rights of minorities. Consultative opinion of the Permanent Court of International Justice* of 10th September, 1923, Appendix to the *Petition of the Lettish Land Owners to the Council of the League of Nations*, Geneva, Sonor, 1925) ; but, in the law of war itself, it has not ceased to be proclaimed by the recent Peace Treaties.

II.

The Treaty.

Article 63 of the Treaty of Trianon states, in categorical terms, that " (the optants) shall be free to keep the immovable property which (they) possess on the territory of the other State where they had their domicile before their option." What does this text signify? That, at variance with the treaties which force optants to sell their immovable property (Article 21 of the Peace of San Stefano ; Article 7 of the Treaty of Constantinople of 1879, Stoerk, *Option and Plebicite*, 1879, p. 176 ; Article 5 of the Peace of Shimonosaki), the Treaty of Trianon, like so many others, allows them (Turin, Article 6 ; Paris, Article 7 ; Vienna, 1864, Article 19 ; Vienna, 1866, Article 14 ; Frankfort, Article 2 ; Paris, 1898. Vienna, 26th February, 1909, Article 3 ; Constantinople, 1913, Article 7 ; Athens, 1913, Article 6) the right to keep their property : *they are no longer forced to sell.* But, if they are not forced to sell, *a fortiori* they cannot be expropriated. Such is the consequence which follows, during a curious epoch of transition between the two regimes, from the Russo-Japanese Peace Treaty, the Peace of Portsmouth, 27th August—5th September, 1905. " *Article X.*—Russian subjects inhabiting territory ceded to Japan shall have the faculty of selling their real estate and of returning to their own country ; but, if they prefer to remain in the ceded territory, they will be maintained and protected in the full exercise of their industries and rights of property, on the condition that they submit to Japanese laws and jurisdiction. Japan shall have full liberty to withdraw the right of residence or to deport from her territories all inhabitants upon whom a political or administrative punishment has been inflicted. *Meanwhile she guarantees that the rights of property of these inhabitants shall be fully respected.*

From Article 63 of the Treaty of Trianon this consequence is to be deduced, that the optants, not being forced to sell their properties, could, even less, find themselves forced by an agrarian reform law to sell them, either to individuals or to the State, at rates notoriously insufficient, not to say microscopic.

On the other hand, in the case of the nationals of the central powers, whether optants or non-optants, or subjected to liquidation, at the time when any of the treaties (Versailles, Article 297 ; Saint-Germain, Article 249 ; Trianon, Article 232) were being elaborated, it was never provided for that an expropriation without compensation could be carried out.

Article 232 i (otherwise not applicable between Hungary and Roumania, which, on the one hand, is not a new State, and on the other, has access to the Reparations Commission), provides for compensation to be paid direct to proprietors in cases of liquidation. And it adds: " If the proprietor establishes before the Mixed Arbitral Tribunal provided for by Section VI of the present Part, or before an arbitrator nominated by this Tribunal, that the conditions of the sale, or measures taken by the Government of the State in question, outside its general legislation, have been unjustly prejudicial as to the price, the Tribunal or the Arbitrator shall have the power to grant to the interested party equitable compensation which must be paid by the said State."

Finally, it follows from Article 232 j, similar to Article 249 j of the Treaty of Saint-Germain, that: " Hungary undertakes to compensate her nationals on account of liquidation or detention of their property, rights, or interests in Allied or Associated Countries."

Thus, the peace treaty remains always in full accord with the general principles of the law.

There is more.

Whereas in the Treaty of Versailles the dismemberment never results in giving the Allies less rights over German property, rights, and interests in ceded territory than in the remainder of the territories subjected to their authority, in the Treaties of Saint-Germain and Trianon they lose this right.

Treaty of Saint-Germain, Article 267: " Notwithstanding the provisions of Article 249 and the Appendix to Section IV, the property, rights, and interests of Austrian Nationals or of companies controlled by them situated on territories of the old Monarchy of Austro-Hungary, shall not be subject to seizure or liquidation in conformity with these provisions."

Treaty of Trianon, Article 250: " Notwithstanding the provisions of Article 232 and of the Appendix to Section IV, the properties, rights, and interests of Hungarian Nationals or of companies controlled by them, situated on the territories of the old Monarchy of Austro-Hungary, shall not be subject to seizure or liquidation in conformity with these provisions."

From these texts it results that they have the right to keep *their property in kind.*

On the other hand, Austria and Hungary have, among other arguments, insisted before the Powers that, deprived of property in ceded territory, they could not pay the value of them to their owners.

Note from the President of the Delegation from German-Austria to the President of the Peace Conference, Saint-Germains, 23rd June, 1919:

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" The peace treaty provides, it is true, that German-Austria shall compensate her nationals evicted from their lands; but this provision would seem to us a piece of bitter sarcasm, if it did not only show, on the contrary, that the Allied and Associated Powers—occupied till now with more important questions, no doubt—have not been able to devote themselves to examining a question which is one of life and death for us. After having taken from the German-Austrians the major part of their properties, and thus deprived the State, in the same proportion, of its

national fortune, its sole source of revenue, it is pretended that this State is in a position to compensate its nationals for their losses. It is evident that this clause exacts the impossible ; the attempt to put it into execution would destroy—by itself alone, apart from the more than precarious economic situation of the German-Austrian Republic—our material life, public and private.

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" In consequence, we are obliged to address to the Peace Conference an urgent appeal for the cancellation of Article 49 of the Peace Conditions and for the enforcement of respect for the private property of our nationals in all parts of old Austria-Hungary."

To this appeal the powers expressly rendered full justice.

How can it be supposed after this, for a single instant that, in the face of such terms, the right not to expropriate without just indemnity, a right which issues for all foreigners from the general principles of law and appears, with still greater precision in favour of ex-enemies from the very stipulations of the Treaty, can, for any reason whatsoever, be denied them in any degree, not only *equitably*, but *juridically*, when, on the other hand, it is certain that the State of which they are nationals is not in a position to indemnify them ?

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But it may happen that, without claiming to act by way of liquidation against the nationals of the dismembered State, the successor State declares its intention to expropriate them by a general measure, without compensation. Has it the right to do this, even if it proceeds in the same fashion against its own nationals ?

In the course of the labours of the Peace Conference and while the Treaty of Trianon was being drawn up, the Hungarian delegation gave much thought to the point of ascertaining "whether Article 250 gave sufficient protection against the Roumanian law, which stipulated a general expropriation of the property of foreign subjects, but was directed specially against Hungarian subjects, and was destined to be applied only at the expense of these latter."

The same delegation " fears that the provisions contained in the first paragraph of Article 250 might be eluded by means of legal dispositions which apply, in principle, it is true, to the nationals of the legislating country, but which, in practice, are found to be applied only against Hungarian Nationals. Therefore, to attain the end aimed at by the first paragraph of Article 250, we ask for a reassuring declaration to the effect that no property belonging to nationals and situated on the territories of the old Monarchy of Austria-Hungary shall be sequestered, liquidated, or expropriated, in virtue of a legal disposition, or by a special measure, which, under the same conditions, does not apply to the subjects of the legislating State, or of the State which puts the measure into force."

There follows another observation, on the merits, not pertinent to our question.

To the one and the other of these two observations, the Powers reply :

" *Article* 250.—The several observations presented by the Hungarian Delegation bearing on the treatment applied by Roumania and Czeco-Slovakia to immovable property constitute a question of interpretation of the peace treaty, which cannot be settled now."

Thus, to the question put by the Hungarian Delegation, there was no other answer than to refer its examination to the authority charged with the interpretation of the treaty.

In other words, it is the treaty which must give the reply.

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In fact the treaty suffices for itself.

Already, on one delicate point, an opinion of the Permanent Court of International Justice assists in the formation of the interpretation.

By the terms of this opinion, in the case of the colonists of Poland, it is said that, in order to be contrary to the law of minorities, it is not necessary for the law of the State, to which the minorities belong, to be expressly and specially directed against them. " The fact that the text of the law does not establish any express distinction and that, in some isolated cases, this law applies to nationals . . . . . changes nothing in reality. There must be *equality of fact* and not only merely formal equality in law, in the sense that the terms of the law avoid establishing differential treatment." (Consultative opinion of 10th September, 1923. *Publications of the Court*, series B., No. 6, p. 24.) Therefore, it is not the letter of the laws which must be looked at, but their consequences. If ten just men sufficed to save a whole people, it is not enough to strike several nationals to reach the mass of the foreigners. The terms of the law matter little, because they can be skilfully calculated to permit the change. Its appearance of generality should not be a check, because most often it will be only a piece of skill destined to mask the true character of the measure. It is by its fact, *by its consequences*, and also, one may say, by its circumstances, that the character of the measure is judged.

That, plainly, is the opinion of the Court—an opinion re-affirmed in decree No. 7 (*supra cit.*, p. 22). " The juridical name given, by one or the other of the parties interested, to the legal action is not pertinent."

If now, coming out of the light cast on the rights of the foreigner in the League of States by the law of minorities in the League of Nations, one applies oneself to extract this solution *by interpretation*, which the Conference leaves to the future, the trouble of formulating, one can immediately state, as the rule, that all expropriation, which takes the form of a measure of this sort, should at least be solved, for the Hungarian National expropriated in transferred territory, by the obtaining of damages.

In vain one might be tempted to reply that he could not have more right than the national, and that, consequently if the latter has only a little right or even none, the ex-enemy could not, *a fortiori*, claim any.

In fact, in this respect, a previous examination is imperative. The date of coming into force of the Treaty of Trianon, which alone brings about the displacement of sovereignty necessary to the change of legislative jurisdiction, is 26th July, 1921 ; the date of coming into force of the

Roumanian law of agrarian reform is 30th July, 1921 : in this law is to be found a whole series of provisions relating to absenteeism, which, by a fiction, begins more than two years previously, when it could only have existed, regularly, after the treaty was put into force. Can it be imagined that four days' interval are enough to institute and establish true absenteeism ? In short, does absenteeism, which can be understood as applying to the National, apply also to the foreigner, especially when, by option (Article 63), he is authorised to leave the country while retaining his property there ? And if, contrary to the principle of non-retroactivity of the law, which is essential to the safeguarding of acquired rights it, is desired, at any cost, to make absenteeism retroactive in the past, why should the Hungarian, who was forced to emigrate before the Roumanian invasion, be reproached for it in the same way as Roumanian might be ?

There is more.

It is by the principle even, in law, of the imaginary rule that the foreigner can never claim more right than the national, that it is well to oppose this negation of the modern law of Nations.

In regard to this, considering the point of development reached at this moment by the doctrine, by diplomatic practice and by jurisprudence, no doubt should be allowed.

The doctrine is clear : " When a State, carried away by the contemplation of its own interests, establishes an internal law which is contrary to elementary notions of justice, it has no warrant to decline the consequences of its acts by saying that foreigners, which remain its unresigned victims, are treated, in this circumstance, on the same footing as nationals." Thus is expressed the seventh conclusion of the *Consultation*, enriched by the agreements of Mm. Anzilotti, Asser, de Bar, Gabba, Holland, Lammasch, Lyon-Caen, Roguin, Rolin, de M. Clunet, *for the foreign Life Assurance Companies established in Italy*, Paris, 28th January, 1912. The position of the foreigner is determined in the law of nations, not according to the internal law applicable to natives, but directly by application of international law. Thus, it may happen that the foreigner receives better treatment than the national, that he will find against the arbitrariness of Judges, guarantees which the national has not, in countries with capitulations for example, or that he can obtain damages when, in the event of civil war, the national could not claim them. (Wiese, *International law applied to civil war*, Lausanne, 1898, p. 45 et s. ; Rivier, *Principles of the law of nations*, II, p. 43).

" To say that the foreigner cannot be better treated than the national is an inexact formula, because the treatment received by the national is determined by internal law, whereas the treatment of the foreigner is determined by international law, and the substance of the rules of the latter, although generally more restricted, might, on certain points be, exceptionally, more extended than the substance of the first." (A de Lapradelle and N. Politis, *Collection of International arbitrations*, II, p. 278.) " If it happens, rightly says Anzilotti, at present a Judge of the Permanent Court of International Justice, that the State takes measures incompatible with the minimum imposed upon it by international justice, the fact that these measures affect equally nationals and foreigners is not enough to make them lawful." Note on the arbitral finding of 2-4th September, 1920, in *the Rivista di dirilto internazionale*, 1921-1922, p. 176-199.

The history of diplomatic protection abounds in cases of interventions against a measure, an act, a law, which, without discrimination, affects the national in the same way as the foreigner. " A Sovereign who departs from the principles of public law cannot find excuse therefore in his own municipal code " wrote Secretary of State Frelinghuysen to Mr. Morgan, 17th February, 1885, quoted by Moore, *Digest* , t. I., p. 312. *Equality of alien and national not always internationally sufficient*, thus runs the rubric of a paragraph (44) of the classic work of E. N. Borchard, *The diplomatic protection of citizens abroad*, New York, 1919, p. 104. On the 24th August, 1886, Secretary of State Bayard wrote to the United States Minister in Peru : " It cannot be admitted that in every case the rights of a foreigner in that country (Peru) may be measured by the extent of the protection and property which a citizen might obtain." Moore, *Digest*, t. I, p. 252. *Adde*, prof. Wambaugh. *The place of denial of justice in the matter of protection* (*Proceedings of the American Society of International Law*, 1910, p. 126-137), E. Root, *The basis of protection to citizens abroad*, p. 157. Ellery C. Stowell *Favoured treatment for aliens*, in *Intervention in International law*, Washington, 1921, p. 154.—In 1851 France demanded preferential treatment for her nationals of Jewish religion, in Switzerland—and obtained it. (*Foreign Relations*, 1864, p. 401). Later, in Portugal, she claimed, after the revolution of 1910, for her dispossessed congregations, an indemnity which was refused to nationals and obtained it—the arbitration at the Hague in 1920, was in this case, hardly more than the formal introduction of an agreement. Great Britain proceeded many times in the same way, from the case of the Reverend King to that of the English religious bodies in Portugal. It has never happened—all these examples prove it—that diplomatic action has been arrested solely by the objection of equal treatment for nationals and foreigners.

Jurisprudence is equally firm. Without going back to more distant sources, a series of judgments of the greatest international Courts gives evidence of it.

The arbitral finding of 2-4th September, 1910, in the case of the " claims relating to the properties of French, British and Spanish nationals (properties of the Congregations) seized by the Portuguese Government, following upon the proclamation of the Republic " rests on this double foundation : 1st—Portugal acted within her rights when she suppressed the religious Congregations and attached to the State the properties claimed ; 2nd—*the legitimacy of this procedure is always subordinate to the condition of suitable compensation to the affected individuals.* Thus, the Portuguese Congregations, not having the means of making good their rights of property against their own government, found themselves deprived of the legitimate compensation, which the foreign Congregations received, when supported by the diplomatic action of their governments.

In the case of the Norwegian ships, when the United States put forward their national law, in order to evade the just compensation due from them, the judgment of the Permanent Court of Arbitration at the Hague decided that the point as to whether the situation would be different for the nationals under the internal law as compared with that for foreigners under international law, mattered little. " It is common ground that in this respect the public law of the parties is in complete accord with the international public law of all civilised countries . . . . whether the action of the United States was lawful or not, just compensation is due to the claimants under municipal law of the United States,

as well as under international law, based upon the respect for private property." (*American Journal of international law*, April, 1923, pp. 362-383.)

In the terms of the judgment of the Permanent Court of International Justice, of 25th May, 1926, in the affair relating to certain German interests in Polish Upper-Silesia (land), it is expressly declared: " Even if it were proved—a question into which the Court does not consider it necessary to enquire—that, in fact, the law applies equally to Polish and German Nationals, it does not follow at all that the suppression of private rights which it brings about in respect of the German Nationals is not contrary to Heading III of the Geneva Convention. Expropriation without compensation is certainly contrary to Heading III of the Convention: and, *a measure forbidden by the Convention does not become lawful in respect of this instrument by the fact that the State applies it also to its own nationals.*" (*Publications of the Court*, series A, No. 7, p. 32-33.)

" Each political society, Vattel had said (Law of Nations, Volume II, c. 7, para. 81), is responsible for the establishment within its own boundaries of the communality of property, as did Campanella in her republic of the sun ; its domestic rules change nothing in the law towards foreigners." " Suppose, said M. Ed. Clunet in his *Opinion for the Life Assurance Companies established in Italy*, delivered in Paris on 28th January, 1912, that to-morrow a European—or American—State were to decree, in a wrong-headed collectivist experiment, that all individual fortunes exceeding 100,000 francs of capital, should be handed back to the State, or that all real estates, valued at more than 50,000 francs, should be taken over by the community for the undivided enjoyment of the inhabitants, and this without compensation to the owners, only too glad to be left with their eyes to weep with. Would the fact that these economic novelties were regularly voted by the Parliament of the experimenting country, and that the subjects of this country saluted with transports of joy this redistribution of the general wealth, impose silence on the protestations of the foreigners ? Could the country with a collectivist regime set aside their claims on the pretext that this regime is henceforth that for its own citizens, and that no foreigner could complain of being placed on the same footing as the national ? "

Assuredly not.

From the general principles of law it follows also that agrarian reform, though equal for all, but without compensation, or at least with insufficient compensation (Cf. Fachiri, *Expropriation and International law*, loc. cit.), is not applicable to foreigners, even when nationals are subjected to it.

Why talk of inequality ?

The reform is voted by the nationals ; it is the result of the majority exercising political rights in which foreigners do not co-operate, the effect, may be, of their enthusiasm, may be of their resignation—but anyhow, their action. But, it is not the same thing in so far as it concerns foreigners. It is not *their action.*

On the other hand, the reform is voted by the nationals ; it is between them that the benefits are distributed, to the exclusion of foreigners.

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Will it be said that the treaty, especially Article 250, only provides protection against the right of the Allies to " retain and to liquidate," in conformity with the dispositions of Article 232, which removes

us from the case of the application to foreigners of a general reform, called agrarian reform, to place us in the limited case of a pure and simple application of a special, discriminatory, measure, called " an act of economic warfare ? "

To reason thus is to lose sight of the fact that Article 250, Section 1, visualises not the past but the future (v. *shall not be*). " *Shall not be* ; " thus speaks the peace treaty ; but this manifestly applies only to the period following upon its being brought into force. It is not a matter then of a defence of the Hungarians against the Allies, from the point of view of a policy of war, but on the contrary, of a policy of peace, in which the memories of a policy of war tend to fade away. It is no longer a matter of hostilities and preparation for the success of armies, but of annexation, and thence of the organisation, by the annexing power, of its conquest. Master of the country, he may have a tendency not only to drive the inhabitants out, but to take away their land when they have become his subjects. In the second case, the law of minorities protects them incontestably. In the first case another form of protection is necessary : the treaty allows them, on leaving the country, to keep their land (Article 63). But, by the " right to retain and to liquidate " it must not be taken from them, whether under one pretext or another.

In order to make this idea more tangible, let us pass from the properties of optants in transferred territory to those of Allies in any part of enemy country. The properties which have been returned to them cannot be taken away again (Article 233) : *to give and to retain are not compatible*. They have been protected, retroactively, against measures of liquidation in the past (Article 232, a, e, f). Similarly, they must be protected against measures of Liquidation in the future. But what measures ? These will no longer be economic operations of war ; the war is over ; these will be acts of political revenge, of rancour, or of bad temper. Is the danger great ? It does not matter. It is possible : the Allies guard themselves against it. Let an agrarian reform interfere with one of the central powers (for this text has distant origins, Article 298, Versailles), and let it, although introduced generally against all alike, ex-enemies and nationals, be applied *unequally* to one or the other, with ex-enemies receiving the severer treatment, then, based upon Article 232, the Allied nationals will be seen recognising the right to raise a claim followed by an effect and, if the nationals keep their property in kind in such cases, the allied nationals can themselves lay a claim ; then, if the measure, drawn up in the abstract, *equally* conceived and *equally* applied, is not accompanied by *suitable compensation*, in virtue of Article 233, the Allied nationals can protest again. It would be in vain to oppose them by saying that the nationals received only an insufficient indemnity (1/3, 1/8, or even less, for example). They have a right to full compensation, not only by virtue of the general principle of the Law of Nations, quoted above, but by virtue of a precise text, which is not open to discussion : " to pay suitable indemnities in cases where these measures (equal measures) are taken."

Such being the incontestable position of the Allies when they are protected against the " right to retain and to liquidate," which the ex-enemy State would try to resume in one way or another, how would the position of the nationals of an ex-enemy State be different ? In regard to the past (Article 250, Section 2), they are both in the same situation. The same is true in regard to the future (Article 250, Section 1). How can one but deduce from this analogy of the situations, the consequence deriving from these two elementary maxims : *you cannot give and retain ; what cannot be done directly cannot be done indirectly* ?

Will it be said that Article 233 provides a protection " against *all* measures *violating* the rights of property," while our texts speak of measures by which the right of retaining and liquidating is exercised. But there is no measure violating the right of property which is not covered by this formula " to retain and liquidate."

" Retain and liquidate " and " attacking the rights of property " are not different expressions. In the language of the peace treaties, when measures anterior to the cessation of hostilities are under consideration, the name under which they figure—" exceptional measures of war and of disposal "—enumerates a whole series of acts to which it is necessary afterwards to give definition, in Section 3, paragraphs 1 and 2, of the Appendix to Section IV. Then, when measures taken after the cessation of hostilities are under consideration, (which are so much more disquieting in that they refer no longer to the past but to the future), one single expression appears : " to retain and liquidate " and whilst exceptional war or disposal measures ought to be the object of the most detailed enumerative definition, the expression " right to retain and liquidate " should not, on the contrary, be used in any annex in view of any kind of explanation. In fact, these expressions " retain and liquidate " are as expressive as possible by themselves. To retain is to place under sequestration, in some fashion. To liquidate is to realise a real right by a forced sale in any manner. But, if these terms are well-known in the language of the law, in that of the treaty, which has in view here an exceptional right, derived out of the rights of war by the exceptionally aggravating stipulation of a special clause, " retain and liquidate " means to proceed with the deprivation, either temporary (retaining) or permanent (liquidating) of the rights of property, under conditions which common international law does not recognise. Following the eminently authorised definition of the Permanent Court of International Justice, in its Decree No. 7, of 25th May, 1920 (*Publications of the Court*, Series A, No. 7, p. 20) : " All attacks on rights, properties, or interests . . . . . which pass the limits of international common law, are liquidations."

From this it results that expropriation without compensation, if applicable to nationals, is not so to foreigners, because it would exceed the limits of international common law.

The external aspect under which this expropriation is presented is of small importance.

By the terms of Article 233b, Hungary undertakes not to subject the property, rights, or interests of nationals of the Allied States to any measure affecting property, which is not applied equally to the property, rights, and interests of Hungarian Nationals, and to *pay suitable compensation in cases where these measures may take place.* The terms of Article 233 b aim at legislation of any sort (otherwise there would be an exception to *all measures*). It is not necessary that this legislation should bear specially on ex-enemies, allied nationals : it is enough for it to be applied unequally : this can be then the effect of a general legislation, laid down for all persons in all the country. The measure, therefore, is not connected with the war, which is the past, but to the future, which is the organisation of the sequels to the war. It might be very far from " exceptional measures of war or of disposal," and yet return there after the detour, fortuitous, even if foreign to the initial design of the law, of an inequality of application. That is enough for the treaty to give a basis for the claim of the allied national.

Finally, even if the treatment is rigorously equal, there still remains that " the compensation should be suitable." This simple hypothesis indicates at what distance the treaty is placed, in its provisions relating

to the future, from a war measure, specially turned against the Allies by the point of its disposition or the incidence of its applications. It is so far from the war spirit that there is not even *inequality*. And yet, it suffices that the compensation should be insufficient, the national being obliged to content himself, for the ex-enemy foreigner to be able to claim the just compensation, in conformity with international law, which this law gives to him and which the treaty confirms.

The preceding reasoning is founded on Article 233 b.

But no more must Article 233 a be neglected.

By this Article, letter *a*, Hungary undertakes " to place and maintain . . . . . the property, rights, and interests of the nationals of the Allied or Associated powers in the legal situation in which, by the law in force before the war, were the goods, rights, and interests of nationals of the old Kingdom of Hungary." It is a matter not only of " placing," but of " maintaining." Now, before the war, the goods, rights, and interests of nationals of the old kingdom of Hungary were placed under the individualist regime of the inviolability of private property, based not only on public law, but on international public law of the States which then formed the juridical communality. From that time it is not only by the terms of Article 233, letter *b*, but by the terms of Article 233, letter *a*, that the Allies would be protected against all attempts of legislation more or less collectivist in character, or otherwise threatening towards the inviolability of private property, of which the nature is of not being liable to seizure, even for purposes of public use, without just compensation.

If Article 233 operates thus for the Allies in respect to Hungary, how can it do otherwise in Article 250 for the Hungarians, in transferred territory, in respect to the Allies themselves ? Obviously Article 233 is only a corollary to Article 232, as is attested by its preamble " by application of Article 232 " ; a guarantee that Article 232 cannot be circumvented. Now, by Article 250, which refers expressly to Article 232 (" Notwithstanding the provisions of Article 232, etc."), the property of Hungarian Nationals in transferred territory are in the same position in regard to compensation as the property of allied nationals in any territory whatsoever. If this position can neither be carried by assault by a legislation, whose point would directly threaten Allied property, nor turned by an insidious manœuvre, nor even neutralised by the simple and altogether accidental deviation of a measure impartial in original design, why should it be otherwise for Hungarian property in transferred territory ? If an equation is established between Article 232 a, relating to the prohibition of retaining and liquidating in the past, and Article 250, relating to the prohibition of retaining and liquidating, not only in the past, but in the future, the complementary measure, which does not allow the rule of immunity for Allied property from " the right to retain and liquidate " by the enemy to be circumvented, would not depart from the symmetrical rule of the immunity of their adversaries in transferred territory, especially as, whilst Article 232 a only considers for the property of Allies measures taken in the past, Article 250 provides, for the property of Hungarian Nationals, against measures which may be taken in the future.

Hence, Hungarian Nationals in transferred countries have *at least :*

1. The right to be relieved of the unequal application of an equal measure, even though it be very general, which is far removed from the problems of the war ;

2. Or, in the case of the equal application of a measure conceived as rigorously equal, the right to be relieved from an insufficiency of compensation.

Thus we arrive at a second proposition.

SECOND PROPOSITION.

In transferred territory the nationals of the dismembered State cannot be deprived of the right to retain their property in kind, either individually, or, above all, collectively.

Such is the conclusion arrived at:

1. from the preparatory work;
2. from the actual wording of the treaties.

I.

Preparatory Work.

In the terms of Article 250 of the Treaty of Trianon:

"Notwithstanding the provisions of Article 232 and the appendix to Section IV, the property, rights, and interests of the Hungarian Nationals, or of companies controlled by them, situated in the territories of the Austro-Hungarian old Monarchy, shall not be subject to seizure or liquidation in conformity with these provisions.

"These properties, rights, and interests shall be restored to their rightful owners freed from any measure of this sort, or from any other measure of disposal, forced administration or sequestration, taken since the 3rd November, 1918, up to the coming into force of the present Treaty. They shall be restored in the state in which they were before the measures in question were applied."

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In default of this article, one might have asked if Article 63, which permits optants to keep their immovable property, should be understood to apply to the single case in which the Allies do not claim to exercise the right of retaining and liquidating, to do which the Treaties simply allow them the faculty.

No doubt is possible in face of this categorical text: in transferred territory, the Allies renounce the right to retain and liquidate.

It is not the simple right to retain and liquidate without suitable compensation that they thus renounce, without which the rule of Article 232*i* would have sufficed; it is to the right, reserved in the Treaty of Versailles as regards Germany, to hunt out of transferred territory the property of nationals of the dismembered State, that they express, categorically, a formal renunciation.

An essential difference exists between Germany in the Treaty of Versailles, and Austria and Hungary in the Treaties of Saint-Germain and of Trianon.

In the dismembered territory of the German Empire, the annexing power preserves the right to retain and liquidate, in consideration of just compensation, the payment of which was laid upon Germany.

In the dismembered territory of Austria and of Hungary, the annexing State was forbidden to act in the same fashion. On the one hand it undertook to respect the private property of nationals of the dismembered State. On the other, it did not arrogate to itself the right to limit its respect for this property to the payment of an indemnity.

This double conclusion emerges from the history itself of the preparatory work of the Treaties of Saint-Germain and Trianon, of which the Articles 267 (Saint-Germain) and 250 (Trianon) were conceived in terms rigourously identical (paragraphs 1 and 2 of these Treaties).

From the Treaty of Trianon the interpreter is brought back to the Treaty of Saint-Germain in consequence of this identity of terms, as also by the identity of the situation of the two States of the old Danubian Monarchy.

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The conditions of peace with Austria, presented by the Allied Powers at Saint-Germain-en-Laye on 2nd June, 1919, originally contained an article worded thus : " Each Government of the Allied or Associated Powers reserves to itself the right to retain and to liquidate, in conformity with Article 32 and the appendix to Section IV, all property and interests possessed, on 1st November, 1918, by the Austrian Nationals, or by companies controlled by them on the territory of the old monarchy of Austria-Hungary, transferred to it by the present Treaty.

" Austria shall compensate Austrian Nationals dispossessed by the said liquidations."

(*Report on the proceedings of the German-Austrian Peace Delegation at Saint-Germain-en-Laye,* published by the Austrian Government in two volumes).

The German-Austrian delegation presented some lively and pressing complaints concerning this article to the President of the Peace Conference, M. Georges Clemenceau :

" The German-Austrian delegation has lost no time in addressing itself to the examination of the economic clauses which have been transmitted to it by the Allied and Associated Powers. It finds itself compelled to call the attention of the Peace Conference, at once, to a question upon which depends *German-Austria's ability to carry out the peace conditions from the economic and financial point of view.*

" According to the provisions of Article 49 (Part X, Section VIII) the States which have divided amongst themselves the domain of the Austro-Hungarian Monarchy, in that they are considered to-day as Allied and Associated Powers, shall have the power to retain or liquidate all the property possessed on their territories on the date of the 1st November, 1918, by Austrian nationals, or companies controlled by them. For centuries, up to the month of November, 1918, these territories were united in the single system of the Austro-Hungarian Monarchy with the provinces which, to-day, form German-Austria. *In the different parts of this Monarchy, the German-Austrians have their factories, their lands, their immovable property, their credits, in short everything of value composing their fortune,* with the exception of that which was placed in foreign countries. By the peace conditions German-Austria is to retain a population of six millions out of the fifty-two millions included in the old Danubian Monarchy ; *to take away from these six million German-Austrians all of their property which lies on territory of the newly-formed States would amount, or nearly so, to the loss of the totality of their private fortune.* Meanwhile, one cannot estimate the gravity of these measures, and the deplorable consequences which they would

inflict on the economic life of German-Austria, without taking into account the importance of Vienna, the capital and financial centre of the old Monarchy. It is in Vienna that the banks, the land-banks and the other financial institutions have their principal establishments and the industrial enterprises their central offices, while the factories themselves and other real and movable property are to be found in all parts of the old Monarchy. Thus, if the provision under consideration comes into effect, all German-Austrian property situated beyond the frontier, which passes within a few miles only of Vienna, will be condemned to annihilation. Without wishing to enter into the details of the question, it is evident that *such a proceeding necessarily entails the complete ruin of the capital of the State, of all financial institutions, and of most of the private enterprises.* By far the most considerable part of the private property of our nationals would be liquidated by the Governments of the newly constituted States, a despoiling which would be carried out in regions with which we were united up to the end of the war. It goes so far even as to authorise the liquidation of our property in the German territory of the old Monarchy, in German Bohemia, for example. *No Government would have either the right or the power to subscribe to stipulations implying such injury to the private rights of its nationals, an injury, moreover, without precedent in history.*

"It seems to us impossible that the insertion of this Article in the peace conditions was the consequence of reasoning based on the reality of the facts. We find ourselves absolutely incapable of seeing here anything other than the application to the relations existing between us and the other successor States of provisions destined to regulate the relations between Germany and the victorious States. But, our legal and economic situation, vis-à-vis the other States newly constituted on the territory of the Austro-Hungarian Monarchy, does *not show the least analogy with that of Germany in respect of the Allied and Associated Powers.* Only German wealth, lying in their territory and constituting, in consequence, a part of the foreign wealth of Germany, will be liquidated by these Powers, and not the private property lying in Germany itself. It is certainly from this consideration that the Allied and Associated Powers set out to express, in their reply to the German delegation, dated 16th June, 1919, their conviction that, in spite of the liquidation of her wealth in foreign lands, *Germany,* who would be keeping at home her national fortune, *could cede the properties demanded without any profound trouble resulting in her interior life.* By this reasoning, the Allied and Associated Powers have themselves clearly shown that, in drawing up Article 49 (Part X), they were far from taking into account the consequences which, for us, would result from the fact that our citizens would be deprived of the major part of their property situated in the territory of the Monarchy itself. *Would it be necessary, in fact, to prove that this proceeding would involve financial collapse and economic chaos?* . .

"The Peace Treaty provides, it is true, that German-Austria shall compensate her nationals deprived of their properties; but this provision would have for us the effect of a bitter sarcasm if it did not show—on the contrary—that the Allied and Associated Powers—occupied, no doubt, with more urgent questions up till now—have not been able yet to devote themselves to the examination of *circumstances which represent a question of life and death for us.* After having taken away from the German-Austrians the major part of their property, and thus deprived the State of its national fortune—its sole source of revenue—in the same proportion it is desired to claim that this State is still in a position to compensate its nationals for their losses.

It is evident that this clause exacts the impossible: *an attempt to put it into execution would annihilate*—by itself alone, and leaving out of account the more than precarious economic situation of the German-Austrian Republic—*our material life, public and private.* At the end of its strength in consequence of the war, German-Austria has suffered much more cruelly than any other successor State of the old Monarchy by the dissolution of this Empire and *by the upset in Hungary which has, to a great extent, reduced to nothing, or exposed to grave dangers, what is left of her fortune.* In this literally desperate situation, it is only with the help of the Great Powers that we can procure for our population, exhausted by hunger and the default of foodstuffs and of the most indispensable raw materials. But with what, the question arises, are we to pay for these materials, since, by retaining the greater part of what was left of our national fortune, the Governments of the new States will have made it impossible for us to meet our liabilities, whether by the export of our products, or by handing over a part of our capital? The publication of these provisions of the Treaty has been enough to shake the confidence of our people in the existing social and juridical system, by creating the most serious obstacles to the unceasing efforts of our Government to reorganise our economic life. The enforcement of the clauses in question would make impossible the maintenance of economic and social order.

"In consequence, we are obliged to address to the Peace Conference the urgent appeal to cancel Article 49 of the Peace Conditions, and to cause the private property of our nationals in all parts of old Austria-Hungary to be respected."

(Signed): RENNER.

Thus did Austria address to the Allied and Associated Powers the desperate appeal of a nation which, cut to pieces herself, would have been stricken to the heart of her economic life if, in transferred territories, the Allies had been able to retain and liquidate the property of nationals of the dismembered State.

To a treatment other than that accorded to Germany (Art. 297 b of the Treaty of Versailles), she invoked a right deduced from multiple reasons.

1. Of these reasons, one was that the liquidation of property and interests ought to be accompanied by an indemnity from their Government to the individuals. "Bitter sarcasm," said Chancellor Renner. "After having taken from the German-Austrians the major part of their property, and thus deprived the State of its national fortune—its sole source of revenue—in the same proportion it was desired to claim that this State is still in a position to compensate its nationals for their losses. It is evident that this clause exacts the impossible: an attempt to put it into execution would annihilate our material life, public and private."

2. But, of these reasons, the other was that Austria had all the elements of her economic life in the different provinces of the old Monarchy of Austria-Hungary. "It is in Vienna that the banks, the land-banks and the other financial institutions have their principal establishments and the industrial enterprises their head offices, while the workshops themselves and the other real and movable properties are to be found in all parts of the old Monarchy." How were the Austrian Nationals to be compensated? By the liquidation of the enterprises of

her nationals, it is not individuals only whose patrimony is struck at, it is a whole nation which, deprived of the resources of its commerce and industry, is stricken to death by " the annihilation of its material life, public and private."

The first of these reasons could be satisfied *theoretically* by a clause which put the annexing power under an obligation to compensate the owner of the property liquidated; *theoretically,* because the indemnities would be so many and so large that it is difficult to see how the annexing power, with finances still feeble, could possibly face it.

The second of these reasons could only be satisfied by Austria maintaining her activity in the dismembered territories of the old Austro-Hungarian Monarchy, under the same economic conditions as before, and the first of these economic conditions would be the retention of the property in kind.

In fact, if not in law, the first reason would exact more than the strict application of the principle " no expropriation without compensation."

In fact and in law, the second reason would exact the conservation of the property in kind.

Instead of limiting itself to transferring the responsibility for compensating dispossessed owners from German-Austria to the successor States, as in Article 32 i of the scheme (Article 249 i of the Treaty of Saint-Germain), the Conference, moved by the distress of Austria, and, perhaps, also desirous of marking a certain difference of degree as between Austria and Germany in the order of responsibility decided " to suppress Article 49 of the part (economic clauses) of the draft Treaty previously communicated, and to substitute for it the following Article which gives *full satisfaction* to the desire expressed by the Austrian delegation in this matter, in the note mentioned above :

" Notwithstanding the provisions of Article 32 and of the Appendix to Section IV of Part X (economic clauses), all property rights, and interests of Austrian Nationals, or of companies controlled by them, situated in territories which formed part of the old Austro-Hungarian Monarchy *shall not be subject to retention or liquidation by application of the said provisions."*

And the Austrian delegation replied :

" We permit ourselves to express the sentiments of sincere satisfaction which have been aroused in us through the suppression, by the High Peace Conference, of Article 49 and *the insertion of a clause which excludes the sequestration and the confiscation of the property of our Nationals in the territory of old Austria-Hungary.* The rapid solution of this question has banished an element of uneasiness which was gravely menacing the economic activity of our country."

The conditions of peace with Austria, presented on 20th July, 1919, contain, in consequence, an Article 261, worded thus :

" Notwithstanding the provisions of Article 244 and of the Appendix to Section IV, the property, rights, and interests of Austrian Nationals or of companies controlled by them, situated in territories of the old Austro-Hungarian Monarchy, shall not be subject to seizure or liquidation in conformity with these provisions."

But can this prohibition, pronounced for the future, not be annihilated in its beneficial effects if the successor State were to liquidate under cover of the occupation, and if the effects of this liquidation had to be respected? The Austrian delegation experiences some fears in this direction. It informs the Allied and Associated Powers of them. And these replied (Report, II, p. 360):

"To yield to the observations of the Austrian Government, according to which, in view of the measures taken before the coming into force of the Peace Treaty, that the provisions of Article 267, which forbids the seizure or liquidation of the property of Austrian Nationals in transferred territory, might, in fact, be made illusory, the Allied and Associated Powers have added to this Article a stipulation providing that all property shall be restored to its owners, freed from all these measures or from any measure of transfer taken between 3rd November, 1918, and the date of the coming into force of the Treaty. To effect this, they have decided to add to the end of paragraph 1 of Article 267 the following words:

"These properties, rights, and interests shall be restored to their rightful owners free of any measure of this sort or of any other measure of disposal, of forced administration or of sequestration, taken between 3rd November, 1918, and the coming into force of the present Treaty. They shall be restored in the state in which they were before the application of the measures in question."

The Peace Treaty of Saint-Germain runs thus:

"Article 267.—Notwithstanding the provisions of Article 249 and the Appendix to Section IV, the property, rights, and interests of Austrian Nationals, or of companies controlled by them, situated in the territories of the old Austro-Hungarian Monarchy, shall not be subject to seizure or liquidation in conformity with these provisions.

"These properties, rights, and interests are restored to their rightful owners free of any measure of this sort or of any other measure of disposal, of forced administration or of sequestration taken between 3rd November, 1918, and the date of coming into force of the present Treaty. They shall be restored in the state in which they were before the application of the measures in question.

* * * * * *

And the letter to the President of the Austrian Delegation covering the reply of the Allied and Associated Powers, Paris, 2nd September, 1919, *Report,* II, p. 313-14, is expressed thus:

"The Allied and Associated Powers . . have no desire to aggravate the unhappy situation of Austria. Quite to the contrary, they have a lively desire to do all in their power to help her people to adjust themselves to the new situation and to recover their prosperity, always on condition that this shall not be at the expense of the new States which have issued from the old Empire.

"The submerging of the Monarchy has given birth to many difficult problems in the relations between the new States which, through the Treaty, are its heirs. It has always been considered reasonable that the relations between the citizens of the new States should be regulated, in some respects, otherwise than the relations between the citizens of Austria and those of the Allied and Associated Powers. *But, by reason of the observations presented by the Austrian delegation, the Allied and Associated Powers, while adhering to the general lines of the Treaty, have introduced considerable modifications in its economic*

stipulations. The property of Austrian Nationals in territory ceded to Allied Powers *shall be restored to their owners;* these properties will be free of all measures of liquidation or of transfer made since the Armistice, and *a like exemption from any measure of seizure or liquidation is guaranteed to them for the future."*

Later, Hungary obtained, in her turn, and for the same reasons, the mark of benevolent equity which Austria had received from the Allies.

Article 250 of the Treaty of Trianon reproduces, in its two paragraphs, Article 267 of the Treaty of Saint-Germain.

The same interpretation applies to these two identical texts.

II.

Treaty.

In the two cases there is a guarantee against *any* measure, without any exception, no matter from how far it may come, or by what detours and envelopments it is accompanied: letter from the President of the Peace Conference, dated 2nd September, 1919: "The property of Austrian Nationals in territories ceded to the Allied Powers shall be restored to their owners; these properties are free of *any* measure of liquidation or of transfer taken since the Armistice, and a like *exemption* (the circle of measures is as wide as possible) from any measure of seizure or of liquidation is guaranteed for the future (the protection has no limits as to time.)"

Will it be said that the measures of liquidation, here provided for, taken in conformity with Article 232 and the Appendix to Section IV, do not cover all the cases of expropriation contrary to the law?

To argue thus is to displace the problem.

The question at the moment is not to ascertain whether the Allies are permitted to do in transferred territory indirectly, under the name of agrarian reform, that which they could not do under the particular heading of war measure. If the demonstration still remained to be furnished within the framework of the first proposition, it would be easy to reply simply that, by the terms of Article 232 and the Appendix to Section IV, the exceptional measures of war or of disposal comprise the measures of any nature which will be taken, the first with a view to taking from the owner the disposal of his property, the second with a view to transferring the whole or part to somebody other than the owner without his consent. It would suffice, equally, to recall that the Permanent Court of International Justice has not hesitated, in judgment No. 7 to declare that "the fact for a measure to be opposed to international common law" gives to this measure the character of a liquidation; "on the other hand, what juridical name is given, by liquidation; "what, on the other hand, is the juridical name given, by one or the other parties interested, to the act of litigation is not pertinent;" so that, among the provisions of Article 232 is found, under letter *b*, the reservation by the Allied Powers of the right to liquidate all the property, rights, and interests of nationals of the old Kingdom of Hungary, in any manner and under whatever pretext whatsoever, so that immunity from the right to retain and liquidate, inserted in Article 250, should be in perfect harmony with the power to retain and liquidate, inserted under letter *b*. As the Allied Powers would have had, incontestably, without Article 250 of the Treaty, the right,

under the terms of Article 232 b, to render valid acts performed in pursuance of an agrarian reform law previous to the coming into force of the Peace Treaty, it is clear, conversely, that the Hungarian Nationals have the right to take advantage of Article 250 to protect themselves against the consequences of an agrarian reform which the Allied Power, to whom the transferred territory had been ceded, might try to impose on them, after the coming into force of the Treaty. But we had to consider this problem above, in our first proposition.

The question which now presents itself for our examination is quite different. It is that of establishing whether, under the terms of Article 250, in all the cases in which the national of the dismembered State would have the right, in transferred territory, not to be expropriated without just compensation, he would not have, in addition, that of not being expropriated at all. In other words, the problem is not to ascertain if the right to liquidate does not exist—that is already recognised—but to establish whether the sanction for the irregular exercise of such a right is not greater than the payment of compensation; that is to say, if it is not the restoration, or, in a more general way, the conservation of the property in kind which is imposed.

In this respect Article 250 contains a categoric provision, in para. 2, thus conceived: "These properties, rights, and interests shall be restored to their rightful owners, free from any measure of this nature or other measure of disposal. . . They shall be restored in the state in which they were before the application of the measures in question."

From this, one need not ask if, in cases of seizure or liquidation of the property of nationals of the dismembered State in transferred territory, the sanction for such a measure is, either compensation or *restitutio in integrum.*

From the moment that the property, rights, and interests seized or liquidated before the coming into force of the Peace Treaties, must be restored to the rightful owners *free of any measure of this nature or of other measure of disposal,* it is clear that the restoration in kind, and not in value, is essentially prescribed, as the only and true remedy for the immunity, in transferred territory, of property, rights, and interests.

So, Article 250, para. 2, at first absent from the text (in its first Austrian form) has been inserted during the elaboration of the Treaty only in order to prevent the fundamental rule (that of Article 250, para. 1) from being evaded by measures taken between the Armistice and the Peace Treaty.

Every sanction of Article 250, para. 2, must be equally recognised as sanction of Article 250, para. 1. Now, Article 250, para. 2, provides for restoration in kind. Hence Article 250, para. 1, gives Hungarian Nationals in transferred territory the right to reclaim in kind their property seized later on.

In the contrary case there would have been no need for Article 250, para. 1; Article 232, letter *i*, would have been sufficient.

Finally, in the terms of Article 63, optants can retain the immobile property which they possess in transferred territory. It already results from this text that they cannot be deprived of the right of keeping their property. Since they cannot be forced to sell it within a particular space of time, for all the more reason they cannot be constrained to lose it without any sort of compensation.

But in the case where it might have been doubted whether the exercise of the option might have resulted in property, in transferred territory, being safeguarded against any act of expropriation, Article 250 affirms the right for nationals of the old Kingdom, opting for the new, to be free from liquidation in the territory of the old. It is not by the application of Article 63, in order to assure the liberty of option, but in an independent manner that Article 250 sets free, in transferred territory, the property of nationals of dismembered States from seizure or liquidation. It is a direct, immediate text, carrying immunity.

But if this immunity should be from expropriation without compensation, such a text would have been useless. It was suitable that it should give to people interested the right to claim, not only the just value of their property, but the property itself.

Restoration in kind, in the terms of Article 250, emerges thus from the wording of the text.

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Another demonstration leads, by another way, to the same conclusion.

The situation of the Allies in foreign territory is scarcely different from that of the nationals of the dismembered State in transferred territory.

No doubt in the case of a measure applied equally to nationals and foreigners alike, they have not got the right to retain their property in kind; and must be satisfied with a suitable compensation. But, on the other hand, they must be put back into the situation in which were, under the laws in force before the war, the property, rights, and interests of the nationals of the dismembered State. "*Under the laws in force before the war,*" the precision is significant. It gives to the law itself, constitutive of the control of property, the character of an acquired right.

If the Allied Nationals are protected thus against the change of legislation in an ex-enemy State, in the same way the nationals of the dismembered State should be specially protected against the change of legislation of the annexing State in transferred territory.

Let us pursue it further.

Article 232 i provides that the product of the liquidations effected by the new States must be paid direct to the owners. If the owner proves that the conditions of the sale or the measures taken by the Government in question outside its general legislation have been unjustly prejudicial to the price, the tribunal or the arbitrator will have the power to accord to the rightful owner the equitable compensation which should be paid by the said State. Thus, anyhow, in a case of expropriation, for a cause other than general legislation, that is to say, for a cause of public utility, compensation is imposed, as in the case of expropriation for the cause of public utility.

But, from the express terms of the Treaty, it results that Article 250 has the effect of modifying such a rule: "Under the reserve of the provisions of Article 250," says Article 232 i. "Notwithstanding the provisions of Article 232," commences Article 250. This indicates the connection which unites them. In concordance with each other these

two texts present themselves, the first as a text of rule, the second as a text of exception; but as, in this matter, all of exception, the pretended rule is a derogation from common law, it follows that here the exception is the rule. It follows, therefore, that here the second text, instead of being of a strict interpretation, must be of a wide one. On the other hand, it is a favour, a measure of benevolent equity due to the situation, particularly distressing from the economic point of view, of Austria and Hungary. If then, a difference exists between Articles 250 and 252, this can only be by the amelioration in Article 250 of the condition regulated by Article 232. But Article 232 provides, in our hypothesis, for the payment of compensation. Hence, Article 250 can only have sense on condition of converting or, more exactly, of removing the right to compensation, that is to say of replacing property by money, up to the complete compensation, which, with the reserve of the complementary damages, results from the restoration of the property itself in kind.

In this manner the situation of the property of nationals of dismembered States in transferred countries is, in regard to agrarian reform, comparable to that of the property of Allies, in ex-enemy countries, in regard to the former enemy.

* * * * * *

There is more.

In view of this treatment of his property in a transferred country the national of the dismembered State has rights, not only equal to those of the Allies, but even greater ones.

Let us suppose, for an instant, that Article 233 does not assure to Allied Nationals protection for their property in kind, at least against measures applied equally to the nationals of dismembered States. Even then, the nationals of dismembered States would deserve to retain their property in kind, in transferred countries.

Between the two there exists in effect a profound difference of situation.

When Allied Nationals acquired properties in foreign countries, destined later to become enemy countries, and must then content themselves with their value, what can they complain about? By establishing their industry on its territory they have put their confidence in the State whose measures injure them.

When, on the contrary, the nationals of the transferred State see their properties menaced by the effect of laws and acts, even though they be impartial of the annexing State, can it be forgotten that they have not come of their own free will to acquire immobile property in the territory of the ex-enemy State?

The Allied Nationals have put their confidence in the State which attacks them. The others, not having placed any such confidence, are in quite a different situation as towards it: one understands then that, even if the first had a right only to the value of the thing, the others have a right, further, to the thing itself.

The Allied Nationals have gone to the territory of the ex-enemy State and have thus submitted, in advance, to its uniform land laws, with the sole reserve of the general principles of the law of nations.

The nationals of the dismembered State have seen the law of the annexing State impose itself on the territory where lie their properties, without their ever having placed themselves under this law of their own free will.

In the first case it is the Allied Nationals who come into the adversary State, by crossing the frontier.

In the second case the nationals of the dismembered State see the annexing State coming unbidden to them, not they crossing, but the latter causing the frontier to recede.

The difference is already great between these situations, for the nationals of the dismembered State.

But still greater is it for the dismembered State itself.

Let us take the typical case, the example and precedent, of Austria, because of the correlation of Article 267 of the Treaty of Saint-Germain and Article 250 of the Treaty of Trianon.

She cannot live without her properties in foreign countries, in the dismembered parts of her old territory.

Can the value of these properties ever replace the properties themselves? Obviously not.

Also, must the properties be retained in kind, in the interest, not only of the individuals, but in that of the State, too?

The property must be restored in kind: that is the condition itself of her economic life.

Without doubt, the circumstances may change.

Then, in the terms of Article 19 of the Convention, it will be time to consider about altering the Treaty. Till then its provisions are the law of the parties: *pacta sunt servanda.*

There is more still. A third difference to add to the two first: when it is a matter of protecting the property of the Allies against any offensive return of the old bellicose, discriminatory spirit, it will be necessary to face a danger which touches only a few individuals, in view of their small number, their scattered position, their isolation, being, in fact, engaged on their commercial adventure; but when it is a matter of protecting the property of nationals of dismembered States, the menace is graver: it is that of a danger which does not only touch the patrimony of a few scattered individuals, but one which affects the mass of industrial, commercial, and agricultural enterprises, and, through this mass, the State. In the first case the matter is one of some clause in a Peace Treaty; in the second case it is a matter of a condition attached to the transfer of a territory.

In the first draft of the Treaty, the annexation, not content to substitute one sovereign for another sovereign, was intended to have the effect, a fact without precedence, of putting into operation in the dismembered territory the substitution of a new series of owners for the old ones. As is shown by the observations of the Austrian Delegation to the Peace Conference, Article 267 of the Treaty of Saint-Germain,

prototype of Article 250 of the Treaty of Trianon, is formal. It gives the nationals of the dismembered State in transferred territory the safeguard of a clause guaranteeing the property, and particularly the landed property, the least easily convertible into cash, of the nationals of the dismembered State. Change of sovereign? Yes. Change of owners? No.

Articles 250 and 267 of the Treaties of Saint-Germain and Trianon are conceived in such a manner that the conservation, and eventually the restoration, of the properties in kind are the condition itself of the transfer of the territories, that is to say of annexation.

Only one question remains : that of which jurisdiction to put the question before.

We arrive thus at a third and last proposition.

THIRD PROPOSITION.

In order to ensure respect for the clauses relating to the safeguarding of the property of nationals of the dismembered State in transferred territory, the reply directed by the nationals of this State is based upon the competence of the Roumano-Hungarian Mixed Arbitral Tribunal.

Such is the solution which is derived from :

1. the principles;
2. the preparatory labours of the Peace;
3. the text of Article 250 itself.

I.

The Principles.

Recourse to the Mixed Arbitral Tribunal is the sanction of the respect for rights, property and interests.

In this connection the jurisdiction of the Mixed Arbitral Tribunal has power, at least while no other jurisdiction is expressly or tacitly recognised—such, for example, as that of the Reparations Commission—or that the right of restoration is not refused by Section IV : which explains the declaration of the lack of jurisdiction of the Mixed Arbitral Tribunals in the affair of the exceptional war measures in regard to property, rights, and interests in occupied countries.

In the present case, however, it is not claimed that any jurisdiction, that of the Reparations Commission or any other of an international character, has received or could exercise jurisdiction.

On the other hand, it cannot be sustained that the case of the optant, *ratione personæ,* nor the case of agrarian reform, *ratione materiæ,* are excluded from the application of Article 250.

Is it necessary for a special text to pronounce here the jurisdiction of the Mixed Arbitral Tribunal?

The interest of the question lies in regard to three categories of persons :

1. The nationals of Austria under Article 267 of the Treaty of Saint-Germain, which lacks the complement of an express affirmation of the jurisdiction of the Mixed Arbitral Tribunal;

2. Allied Nationals, in the terms of Articles 298 of the Treaty of Versailles, 250 of the Treaty of Saint-Germain, and 233 of the Treaty of Trianon.

3. Hungarian optants, Article 63 of the Treaty of Trianon.

In all of these cases, where the text is lacking, the principles are enough.

The Mixed Arbitral Tribunals have jurisdiction in the terms of Sections III, relating to liquid and demandable credits, V, relating to contracts, VII, relating to industrial property, IV, relating to property, rights, and interests. But, if in III, V, and VII there are common law and competent jurisdictions, in IV, on the contrary, without the creation of the Mixed Arbitral Tribunals, none will be found. In IV the jurisdiction of the offices, and consequently that of the Mixed Arbitral Tribunals, is referred by the Treaty to the general optional decision of the States, in V, to the individual optional decision of the claimant. But in IV there is neither the faculty of abandonment for the States nor the faculty of option for the claimants. In this section IV, the Mixed Arbitral Tribunal stands forth, as a protector, in a high and sovereign manner (Cf. Art. 242 of the Treaty of Versailles).

By virtue of Articles 304 of the Treaty of Versailles; 256 of the Treaty of Saint-Germain; 239 b of the Treaty of Trianon, the Mixed Arbitral Tribunals will judge the disputes which are within their jurisdiction in the terms of Sections III, IV, V and VII.

By the terms of Article 249 e of the Treaty of Saint-Germain, the nationals of the Allied or Associated Powers will have a right to compensation for damages or prejudices caused to their properties. The claims formulated by the nationals on this subject will be examined and the amount of compensation fixed by the Mixed Arbitral Tribunal.

In the terms of Article 249 f, "every time that a national of an Allied or Associated Power, the owner of a property, right, or interest which has been affected by a measure of disposal in territory of the old kingdom, expresses the desire, he shall be satisfied as to the claim provided for in paragraph e, by the restitution of the said property if it still exists in kind."

In this paragraph f, the Mixed Arbitral Tribunals are no longer mentioned. Their jurisdiction is none the less certain for this. Because, if they have jurisdiction for the restitution in value, how should they not have jurisdiction as to the restitution in kind?

In the terms of Article 249 i, it is provided by the same Treaty that, in the case where compensation should be paid direct to the owner who had been liquidated, the owner can apply to the Mixed Arbitral Tribunal to obtain an indemnity.

Thus, whenever the allocation of compensation is provided for in Section IV, the competence to fix it rests with the Mixed Tribunal, and the jurisdiction competent for the restitution in value is still so for the jurisdiction in kind.

If it is thus for the Allies, in the case of Article 242 f, and for the non-Allies, in the case of Article 249 i, it is clear that the Mixed Arbitral Tribunal is a jurisdiction which, in the case of liquidation, acts in both directions, as well against the Allies and Associated Powers as against the Powers with which the Allies made peace.

The fact that the action leads to restitution either in kind or in value, against the Allies, is not an obstacle to the application of the jurisdiction of the Mixed Arbitral Tribunal.

The fact is that all restitution in value or kind of this order depends upon this jurisdiction.

Will it be said, in an interpretation which would recall the exigencies of the old Roman law, that except for the text conferring this right to restitution, to nominate, immediately, the Mixed Arbitral Tribunal, this latter has no jurisdiction? Not only would such rigour be incompatible with the drawing up of international Treaties, which never has anything sacramental about it; but, besides depriving the conquerors or the conquered of an equal right, it would be in contradiction to this idea that the right to jurisdiction, being expressly proclaimed in the case of Article 249 b and in that of Article 249 i, must, similarly, be recognised in all cases of the same nature, without which, the law remaining deprived of sanction, the guarantee of the Treaty would be null.

And so—an observation which, by itself, is and remains sufficient—as does the text of Article 249 f, creates the jurisdiction of the Mixed Arbitral Tribunals by a simple positive reference to Article 249 e, Article 267 creates the same jurisdiction by a simple reference, even negative, to the same article—the negative reference having the effect of putting the nationals of the dismembered State, in respect of their property in transferred territory, in the position of the Allied States, in the cases of Article 249, e and f.

Hence, by virtue of Article 267 of the Treaty of Saint-Germain, the nationals of Austria have the right of applying to the Mixed Arbitral Tribunals to obtain the respect for the rights in transferred territory which this Article gives them.

The same ruling applies to Allied Nationals, by the terms of Articles 298 of the Treaty of Versailles, 250 of the Treaty of Saint-Germain, and 233 of the Treaty of Trianon, because it should not be understood: 1. that they might be treated otherwise when the relationship of the right to be considered is the same; 2. that, as conquerors, they should be less well treated than the conquered, and, on the other hand, a formal reference being made here to Articles 297 of Versailles, 249 of Saint-Germain, 232 of Trianon, the connection is marked between 297, 249, 232 e and f, of which these Articles are only "the application," and Articles 298, 250, 233 themselves.

Finally, in the case of the optants, Articles 78 of the Treaty of Saint-Germain, and 63 of the Treaty of Trianon, do not expressly provide sanction; but if the obstacle to their application (respect of the right of the optant to retain his immovable property) lies in the exercise of the right to liquidate (a term the meaning of which we have already had occasion to establish), the question reverts, in the case of Article 78,

to the application of Article 267. This point gained, the jurisdiction of the Mixed Arbitral Tribunals, being certain for the Austrian optant, in the case of Article 78, should also be so for the Hungarian optant (Article 63, Trianon).

Nothing could be more just than this special jurisdiction of the Mixed Arbitral Tribunals in all the cases of protection against measures affecting property, under whatsoever procedure they may be.

These Tribunals, in fact, are the best qualified to enquire into this sort of case; they have constant practice; therefore they are the best fitted to judge them.

Is there reason in the claims of the plaintiffs? No justice could better appreciate them.

Do they deceive themselves? No justice could better make them understand their error.

It must not be said that any case is too grave to be taken before the Mixed Arbitral Tribunals. If a State should wish to proceed to open liquidation, *en masse,* without any exception and without any sort of indemnity, of the property of the optants and other nationals of the old kingdom in transferred territory, who would have jurisdiction to oppose this measure? The Mixed Arbitral Tribunal.

And now, supposing that, instead of acting openly, the same State were to adopt round-about methods, could the solution be different? Certainly not.

Would the necessities of the internal peace or of economic prosperity, the vital interests of the State in short, be invoked? Doubtless, but, to keep the action of international justice in check, the reservation of vital interests must be inscribed in the convention of arbitration, and it is the duty especially of the instituted jurisdiction to pronounce on the applicability of the limit which it is sought to put to its competence. Here there is no reservation of vital interests: because no vital interest, no right deduced from *necessity* could prevail against the inviolability of private property, solemnly recognised, nor the respect, without loss of honour, of the promise given by the Allies in these formal terms: "And a similar exemption from *every measure* of seizure or liquidation is guaranteed to them for the future."

Should it be represented that, between States which are members of the League of Nations, there are questions which can, in no case, without the assent of the State interested, be submitted, either to arbitration (Article 13 of the Pact), or to the examination of the Council (Article 15, para. 1 of the Convention): those, for instance, which international law leaves to the exclusive jurisdiction of each State (Article 15, para. 8)? But if agrarian reform is a matter of public order, of the first importance concerning nationals, it could not, as concerning foreigners, be of "exclusive jurisdiction," except in so far as it were not opposed to the principles of the law of nations. It suffices even for a question to raise a point of international law, or, following the jurisprudence of the Permanent Court of International Justice, that it should be the object of a Treaty, for it to lose its municipal character and take on an international character (Permanent Court of International Justice, consultative opinion on the question of the decrees of nationality in Tunisia and Morocco).

Would it be alleged that the respect, not only as to value but as to kind, in transferred territories, for the private property belonging to nationals of the dismembered State, forms a condition of annexation, that the annexation is a relation between States, and that a relation between States could not be discussed before a jurisdiction set up to hear the claims of an individual against a State—and not by a State against a State? But it is necessary to distinguish the action tending to the nullity of the transfer of territories from the action in nullity of "sequestrations and expropriations." The first alone confronts State with State; the second only opposes an individual to a State.

II.

Preparatory Labours.

Did the question pass unperceived at the time of the peace negotiations?

In connection with the peace with Austria, perhaps; here, it is necessary, as for the protection of the Allies (Article 298, Versailles; 250, Saint-Germain; 233, Trianon) to limit the application, simple as it is, of the general principles of law; principles which have just been recalled.

As connected with the peace with Hungary?

Not in any way.

The observations of the Hungarian Peace Delegation, Note XXXVII, Appendix 6, Special provisions for transferred territories, Article 250, provide evidence (*The Hungarian Peace Negotiations, Account of the work of the Hungarian Peace Delegation at Neuilly-sur-Seine from January to March,* 1920, volume II, pp. 460 and 571).

"In accordance with a decree-law of Roumania, sanctioned on 10th September, 1919 (paras. 1 and 2 of Article 2), all the immovable property in territory transferred from Hungary to Roumania, belonging to foreign nationals or to persons whose domicile and sphere of activity lie outside Roumania, shall be expropriated.

"Paragraph 9 of the Czeco-Slovakian law of 16th June, 1919, relating to the requisitioning of large landed estates, decrees the passing of a law by the terms of which immovable property belonging to subjects of enemy States shall be confiscated without any indemnity.

"The point of these two laws is, at bottom, directed against Hungarian subjects, it being understood that these latter have large properties in the territories to be detached. The above-mentioned laws also form part of the arbitrary measures by which the States to which the territories of Hungary are to be assigned, wish, so to speak, to dispossess the Hungarians.

"It appears that the High Allied and Associated Powers themselves had the intention of excluding the use of measures such as the laws in question, by decreeing in the first paragraph of Article 250 that the properties of our nationals in territories of one of the two States of the old Austro-Hungarian Monarchy are not subjected to the requisition and liquidation laid down in Section IV of Part X.

"In view of the treatment of Hungarians by the invading neighbouring States during their occupations, we doubt whether Article 250 would give enough protection against, above all, the Roumanian law, *which stipulates in general the expropriation of the property of foreign subjects, but which is directed especially against Hungarian subjects and is destined to be applied only at the expense of these latter.*

"Further, in our opinion, the provisions contained in the first paragraph of Article 250 can be eluded by means of legal provisions which apply in principle, it is true, *to the legislating State's own nationals, but which in practice are applied only against our nationals.*

"Therefore to attain the object aimed at in paragraph 1 of Article 250, we demand a reassuring declaration, stating that no property belonging to our nationals, situated in territory of the old Austro-Hungarian Monarchy, shall be sequestrated, liquidated, or expropriated by virtue of a legal disposition or by any special measure which, under the same conditions, does not apply to the subject of the legislating State, or of the State executing this measure.

"Moreover, Article 250 does not assure, either, the well-founded and equitable interests of our nationals which the Peace Treaty would also be called upon to protect, for this reason that it contains no provision relating to the reparation of the damages caused by arbitrary measures, not even in the case where restitution *in natura* of the sequestrated property is no longer possible.

"We believe in this matter that it will be necessary, in cases where a discussion might arise about the obligation of restoration, to be able to address the Mixed Arbitral Tribunal provided for in Part X, Section VI; this Tribunal should be authorised to establish compensation in favour of the aggrieved party in a case where the Power interested did not satisfy the obligation as to restoration. It goes without saying that we will recognise the decision of this Tribunal. In consequence, we ask that the following stipulations be inserted as a new Article, following Article 250:

"*Article* . . .—The disputes arising on the subject of the obligation of restitution, provided for in Article 249, first paragraph, and in Article 250, also that, should they arise, all questions of damages connected with it, shall be judged by the Mixed Arbitral Tribunal, constituted in the terms of Section VI."

The Allied and Associated Powers replied to these observations:

Reply of the Allied and Associated Powers to the remarks of the Hungarian Delegation on the Conditions of Peace.

"*Article* 250.—The several observations presented by the Hungarian Delegation relating to the treatment applied by Roumania and Czeco-Slovakia to immovable property, constitute a question of interpretation of the Peace Treaty, which cannot be settled now.

"The Allied Powers have not, however, any objection to recourse to the Mixed Tribunal proposed by the Hungarian Delegation for the settlement of disputes relating to the restitution to nationals of the old Kingdom of Hungary of their property, rights, and interests situated in transferred territory, such as has been provided for in Article 250 of the Treaty.

"In consequence they are agreed to complete this Article by means of the following words:

"The claims which may be introduced by Hungarian Nationals by virtue of the present Article will be arbitrated upon by the Mixed Arbitral Tribunal provided for in Article 239."

From the preceding provisions it results that the question of establishing whether it should be allowed, under pretence of agrarian reform, to confiscate in transferred territory, without limit and without control, did not pass unnoticed, but was put, and put in connection with *Article* 250 of the Treaty.

In the course of the drawing up of the Treaty of Saint-Germain, after (letter of 16th July, 1919, *Report,* I, p. 421) " the insertion of a clause which excludes the *sequestration* and *expropriation* of the property of nationals of Austria in the territory of the old Austria-Hungary" had been obtained, the Austrian Delegation became uneasy. "To do justice to the observations of the Austrian Government, according to which and taking into consideration the measures taken before the coming into force of the Peace Treaty, the provisions of Article 267, which forbids the seizure or liquidation of the property of Austrian Nationals in transferred territory can, in fact, *be rendered illusory.*" The Allied and Associated Powers add to this Article a stipulation providing that all these properties shall be restored to their owners, free from all these measures or from any measure of transfer taken between the 3rd November, 1918, and the coming into force of the Treaty" (*Report,* II, p. 360). This is para. 2 of Article 267 of the Treaty of Saint-Germain become, by transposition, para. 2 of Article 250 of the Treaty of Trianon.

In the course of the drawing up of the Treaty of Trianon, when the same Article 267, here 250, reappeared, the fear of seeing it "rendered illusory" carried further. For the first time it extended to measures of agrarian reform: a guarantee is demanded against it in terms which leave no doubt about the fact that it is regarded as one of the means of circumventing Article 250, paras. 1 and 2. As para. 2 of Article 267 (250) was claimed and obtained, as a means of preventing para. 1 from being rendered illusory, a complementary text is claimed, as a means of preventing para. 2 from being made illusory. This complementary text is desired, not in the form of an Article—the fear, which is due only to a false interpretation of the text, does not go as far as that—but in the form of a "reassuring declaration."

Then, another text, equally complementary is demanded, this time in the form of an Article: The sanction of the measures of protection obtained for the property of the nationals of the dismembered State in transferred territory; a sanction which should be assured by the Mixed Arbitral Tribunal.

To this double request, detailed and precise, of an attentive Delegation, the Allies replied:

1. On the question of the "reassuring declaration," it is a question of interpretation of the Peace Treaty: therefore neither agreement nor engagement on the basis of the Hungarian request, but the reference back of this request, or of all others of a similar order, to the interpretation of the Peace Treaty;

2. On the question of the "settlement of the disputes relating to the restoration to the nationals of the old kingdom of Hungary of their property, rights, and interests situated in transferred territory, as is provided in Article 250 of the Treaty, *no difficulty* : 'The Allied Powers have *no objection* to recourse to the Mixed Arbitral Tribunal.'"

"No objection," this term is significant. It shows that the Powers think the Mixed Arbitral Tribunals to have naturally jurisdiction to assure the protection of the property, rights, and interests considered in Section IV, Part X of the Treaty. "No objection" : that is to say that this solution, even with the whole text, emerges from the general principles of law which permit, in all justice, as in all logic, to extend the jurisdiction of the Mixed Arbitral Tribunals, by way of interpretation, from Article 250 of the Treaty of Trianon to Article 267 of the Treaty of Saint-Germain and from those two Articles to Articles 233 of Trianon and 250 of Saint-Germain. "No objection," which signifies that the text, the application of general principles, must be read broadly, without any petty or jealous meaning.

It would be a narrow interpretation to restrict the jurisdiction of the Mixed Arbitral Tribunal to the single case of Article 250, para. 2, which it would then be easy to answer, *if only by the silence of the texts,* which, applicable to measures taken in the past, the same juridical sanction is still so in regard to measures taken in the future, insomuch as the Tribunal thus formed remains in function or would be (the Treaty always remaining in force) in a position, with the eventual assistance of the League of Nations, to resume an activity which, until the modification, by common accord of the terms of the Treaty, could not be held as definitely and juridically interrupted. There is, therefore, no doubt but that, while the Hungarian note insists on the measures taken in the past (Article 250 para. 2), the jurisdiction accorded in response to this note, aims equally at the future (Article 250 para. 1), without which it would once more lead to the illusory—which would be so much the less understood in that Article 250 para. 2 is intended to prevent Article 250 para. 1 from being rendered "illusory." This means that any measure taken to prevent Article 250 para. 2 from being rendered illusory must of necessity be extended to Article 250 para. 1.

But another thing still is wanted in order not to render Article 250 "illusory" : in the words of the Hungarian Delegation what is wanted is a "reassuring declaration" preventing the possibility of that being done by means of the "agrarian reform," which could not be done by means of the "war measure." What do the Powers reply here? That agrarian reform makes appeal to other principles, depends upon the exclusive jurisdiction of the State which operates it? No, they limit themselves to saying that "it is a *question of interpretation* of the Peace Treaty. But this interpretation they do not give.

Who will give it, in conformity with the purpose of the Treaty, which is not to render "illusory" the immunity of Article 250, if this is not the jurisdiction, which itself is created not to render "illusory" the protection of property, rights, and interests of the nationals of the dismembered State in transferred countries?

Article 250 para. 2 is the text about which the Hungarian Delegation has raised the question of the jurisdiction of the Mixed Arbitral Tribunal. But Article 250 para. 2 is also the text on which rests the question of agrarian reform, by reason of the measures taken between the Armistice and the coming into force of the Peace Treaty.

But what is said of Article 250 para. 2 can be said with all the more reason of Article 250 para. 1, that Article 250 para. 2 has the purpose "of not rendering illusory."

Thus the question of establishing whether the agrarian reform of the future, like the agrarian reform of the past, might defeat the inviolability of private property in transferred territory, but for the application of Article 250 of the Treaty, is, like the rule of Article 250 itself, subject to the sanctioning authority of the jurisdiction of the Mixed Arbitral Tribunal.

III.

THE TEXT.

The text itself says so in the most precise manner.

Article 250 para. 3.—The claims which may be introduced by Hungarian Nationals *by virtue of the present Article* shall be submitted to the Mixed Arbitral Tribunal, provided by Article 239.

On the other hand, these two propositions have been previously demonstrated that *in virtue of the present Article* :

1. In transferred territory the nationals of the dismembered State cannot, in any case, be deprived of their property by any procedure whatsoever, except on condition of the successor State paying them the full value of it.

2. In transferred territory the nationals of the dismembered State have the right accorded to them of retaining their property in kind.

Hence, the claim of the injured individual depends upon the jurisdiction of the Mixed Arbitral Tribunal, without the exception deduced from the qualification "agrarian reform" being able to change anything, either as regards respect for property, rights, and interests, nor in the jurisdiction which guarantees this respect.

Considered in Paris on 27th November, 1926.

(Signed) A. DE LAPRADELLE.

THE AGRARIAN REFORM and HUNGARIAN PRIVATE INTERESTS IN TRANSYLVANIA

By

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The Mixed Roumanian-Hungarian Arbitral Tribunal gave a decision on January 10th, 1927 : Emeric Kulin v. Roumanian State, which deserves to hold our attention for a moment.

A certain number of Hungarian landowners in Transylvania requested the Mixed Arbitral Tribunal to order the Roumanian State to return to them the lands which had been taken from them by virtue of the Agrarian legislation and without the payment to them of any appreciable compensation.

The Mixed Arbitral Tribunal had, it is true, confined itself in the judgment of January 10th, 1927, to a declaration of its own competence, reserving its judgment on the subject matter of the case for a subsequent pronouncement.

But, as often happens, it was obliged to deal, in its interlocutory decision, with the greater part of the difficulties of principle with which it was confronted.

In the first place it was necessary to understand exactly what was meant, in the law of the peace treaties, by " liquidation after the War." Up to now the Mixed Arbitral Tribunals have had only to pronounce upon cases of liquidations carried out by the Central Powers during the war, and they had given to this idea a concordant definition which, in the end, came to be unanimously accepted. Are the liquidations carried out by the Allied Powers after the war of the same character and do they conform to the same definition ?

In a more general sense the question to be determined was whether the principles recognised in international law concerning respect for private property and for acquired rights are, or are not, accepted by the peace treaties and whether these treaties had incorporated them or not.

Finally it was necessary to establish what should be the status of the private property of foreigners in post-war Europe, suffering from the economic upheavals with which we are familiar, and especially in the States of Central Europe where more or less radical agrarian reforms have been carried out.

The Permanent Court of International Justice, in its judgments Nos. 6 and 7 upon certain German interests in Polish Upper Silesia, had already given a ruling on these different points. The judgment of January 10th, 1927, has, by adopting the opinions of the Permanent Court, probably consecrated their definite introduction into the jurisprudence of the Mixed Arbitral Tribunals.

* * *

By a law dated July 30th, 1921, a law which was preceded and followed by a certain number of legal decrees, laws and ordinances issued in 1919, 1922, 1923 . . . . the Roumanian State introduced an agrarian reform of an extremely radical character in Transylvania, the Banat, the regions of the Crishana and of the Maramures, all territories which had been ceded by Hungary under the Treaty of Trianon.

This legislation decrees the expropriation of all the agrarian property situated in the above territory, sometimes in its totality, sometimes up to varying maxima, and it declares nul and void, with retroactive effect, any contrary sale or alienation effected since December 1st, 1918.

According to the terms of Articles 6 and 7 of the law of July 30th, 1921, the following are liable to total expropriation :—

(*a*) Property vested in entities of a public character, such as corporations, foundations, churches, monasteries, chapters, schools, hospitals, etc. . . ; (*b*) the property of absentees ; (*c*) property held by private legal right as by limited liability companies, banks, associations, etc. ; (*d*) landed estates of the incurably insane ; (*e*) cultivable property disposed of by free or forced sale between August 1st, 1914, and the date of promulgation of the agrarian law ; (*f*) all landed estates which had changed hands owing to application of the Hungarian Ministerial Ordinance of November 1st, 1917, No. 4,000, relating to the restrictions applied to the transfer of real estate.

By Article 8 of the same law all other rural or suburban property can be expropriated up to the following maxima : (*a*) If the property was leased for ten years in the course of the years 1914—1918, up to 30 jugars in rural parishes and up to 10 jugars in urban parishes ; (*b*) if the property was let on May 1st, 1921, up to 50 jugars in mountain districts and up to 100 jugars in the plains ; (*c*) if the property is under the direct management of the owner, up to 50 jugars in mountain districts and up to 100 jugars in the plains ; (*c*) in the property plains there are three maxima, viz. :—200, 300 and 500 jugars, according to the degree of demand for the land.

The owners whose lands have been expropriated have a right to compensation as fixed by Article 50, thus : The price of the land liable to expropriation under this law is fixed per unit of cadastral jugar, by category and by quality of land. It is determined by taking into account all the factors of valuation such as : the selling price of land in the locality and in the neighbourhood in 1913, rates capitalised at the rate of 5% of the district price of farm lands at the time, the valuation arrived at by the credit institutions, the nett revenue per jugar, the land tax and other data concerning the land for the five years prior to 1913, but the price under no circumstances is to be higher than that of 1913. The price will be calculated in *lei*. In fixing the price the *leu* is to be considered equal to the crown.

Thus the price of the expropriated lands is fixed at the value they had in 1913 in gold crowns, and the owner should receive, at the time of the expropriation, as compensation, a number of paper *lei* equal to the number of gold crowns which his land was worth in 1913. In other words the owner suffers a loss equal to the difference resulting from the depreciation of the present day paper leu as compared with the pre-war value of the gold-crown.

It is easy to calculate this loss : the paper leu at present is worth forty times less than the gold-crown before the war (omitting the difference of about 5% which existed between the intrinsic value of the gold-crown and of the gold-leu in favour of the crown). This means that the dispossessed owner can only receive as compensation, under the application of the law, one-fortieth of the real value of his property, say about 2½% of its real value, whilst 97½% of its value are taken without compensation.

The following must, further, be kept in mind : According to Art. 85 of the agrarian law the Roumanian States pays the compensation calculated as stated above, only in State bonds bearing interest at 5% and redeemable in 50 years. Now, in reality, and as a consequence of the bad credit of Roumania, its State bonds can generally be sold only on the basis of 30% of their nominal value : it follows that the theoretical compensation of 2½% is in fact reduced to 30% of the 2½%, or about 0·8% of the real value of the expropriated lands.

In consequence of these facts, the Hungarian Government, basing its action on Art. 11 of the League of Nations Covenant, in a petition dated March 15th, 1923, drew the attention of the Council to the measures decreed by the Roumanian State concerning the Hungarian Nationals ; it requested the Council to recognise that the legislative and administrative dispositions taken by the Roumanian State in virtue of the agrarian legislation, are contrary to the treaty, and to order the restitution of the real estate of the Hungarian optants with full compensation for the losses suffered.

In consequence of this application, the Council, after having heard the representatives of the two Governments in its sittings of April 20th and 23rd, 1923, decided to postpone the examination of the case to its July session and invited the parties to make all efforts in order to arrive, during the interval, at an amicable settlement.

In order to facilitate this arrangement, Mr. Adatci, the Japanese Ambassador in Belgium, convoked the representatives of the Roumanian and Hungarian Governments in order to undertake, under his own auspices, negotiations for the purpose of reaching an agreement. The meetings which were held in May, 1923, resulted in the issue of two documents :—

(*a*) A report of the conversations which took place on May 27th, 1923, at the Palace Hotel in Brussels between the representatives of Hungary and the representative of Roumania, in the presence of various officials of the Secretariat of the League of Nations. This report, drawn up by one of those officials, contains a resumé of the discussions which took place during the meeting, as well as the textual reproduction of two declarations made respectively by one Hungarian and the Roumanian delegate. It remained unsigned.

(*b*) A draft of the resolution, of which Mr. Adatci proposed to ask the Council to vote the text at the next session. One of the paragraphs of this draft bore the initials of Mr. Adatci, as well as those of one of the Hungarian representatives and of the Roumanian delegate.

These two documents were laid before the Council which adopted, in its sitting of July 5th, 1923, the resolution proposed by Mr. Adatci, which runs as follows :—

" The Council having examined the report of Mr. Adatci dated June 5th, 1923, and the accompanying documents, approves the report.

" It takes note of the various declarations in the procès-verbal, and hopes that the two Governments will do their utmost to prevent the question of the Hungarian optants from becoming a cause of trouble in the good neighbourly relations of the two countries.

" It is persuaded that the Hungarian Government, after the efforts on both sides to remove any misunderstanding on the question of the optants, will do its best to calm the minds of its nationals ;

" And that the Roumanian Government, on its side, faithful to the treaties and to the principle of justice upon which it declares to have founded its Agrarian legislation, will prove its good will towards the Hungarian optants."

On the other hand, a certain number of Hungarian subjects whose properties had been expropriated by the Roumanian State in virtue of the agrarian legislation, had seized the Roumano-Hungarian Mixed Arbitral Tribunal of their claims that the Roumanian State should be condemned to restitute the confiscated lands, free from any measure restricting the right of property having a confiscatory or despoiling character.

These pleas were based on Art. 250 of the Trianon Treaty, which reads :—

" Notwithstanding the dispositions of Art. 232 and of the Annex to Section IV, the properties, rights and interests of Hungarian subjects and of companies controlled by them, situated on the territory of the former Austro-Hungarian Monarchy, will not be subject to seizure or liquidation in conformity with these dispositions.

" These properties, rights and interests will be restored to their legal owners, freed from any measure of this kind or any other measure of disposition, forced administration or sequestration taken since November 3rd, 1918, and up till the entering into force of the present treaty. They will be restituted in the condi ion in which they were before the application of the measures in question.

" The claims which might be made by the Hungarian subjects in virtue of this Article will be submitted to the Mixed Arbitral Tribunal provided for in Art. 239."

The thesis of the applicants was that the measures taken by the Roumanian State to carry out its agrarian reform constituted for them measures of seizure or liquidation prohibited by the Treaty of Trianon ; the Roumanian State, therefore, should be condemned to make restitution to them of the possessions which it had taken from them contrary to the dispositions of that treaty.

The Roumanian State replied to these pleas by an exceptional demand in which it argued that the Mixed Arbitral Tribunal should declare itself incompetent, and this for the following two reasons :—

(*a*) The only measures which Article 250 forbids are those which were taken between October 3rd, 1918, and the coming into force of the Treaty. But the law of agrarian reform is posterior to the coming into force of the Treaty.

(*b*) The measures of seizure or liquidation intended by Art. 250 are exclusively exceptional war measures, that is, measures aimed at enemies only and without any indemnity. The agrarian reform in Roumania applies to all landowners without distinction of any sort, and compensation for expropriation is paid to all those whose property has been expropriated.

Since the oral debates the Roumanian Government has modified its original position in the sense that, first, it abandoned the pretension that Art. 250 protected the Hungarian subjects only against measures taken before the coming into force of the Treaty, and then, afterwards, it raised a new argument in support of its plea of incompetence ; it declared that the negotiations of Brussels in May, 1923, ended in a real accord between the Roumanian and Hungarian Governments—an accord subsequently sanctioned by the Council of the League of Nations at its sitting of July 5th, 1923—the said accord recognising the compatability of the Roumanian agrarian legislation with the Treaty of Trianon.

The Tribunal, having been seized of an exceptional demand and the case as regards the subject-matter having been suspended in conformity with Art. 22 of the Rules of Procedure of the Roumano-Hungarian Mixed Arbitral Tribunal until the end of the hearing on the above-mentioned exceptional demand, had therefore to decide only on its competence.

After discussions which were carried on during eight hearings with unusual amplitude, the Tribunal gave a judgment on January 10th, 1927, by which it declares itself competent.

It must be noted that this judgment is signed by the President, the Hungarian arbitrator and, in the name of the Roumanian arbitrator, by the President. As to the Roumanian arbitrator, he expressed a dissentient opinion, in which he arrived at the conclusion of the incompetence of the Tribunal.

* * *

The task of a judge before whom a plea of incompetence is raised, is, in general, extremely delicate. On the one hand it is often very difficult for him to decide upon his competence without touching upon the subject-matter of the case. On the other hand he cannot deal with the subject-matter without first recognising his own competence.

Such a difficulty confronted the Roumano-Hungarian Mixed Arbitral Tribunal.

The plaintiffs, against whom was raised the plea of incompetence, considered it useless to enter into an examination of the conditions under which the agrarian reform had been realized in Transylvania. This examination would involve, they held, the discussion of the subject-matter of the case. It appeared to them that the terms of paragraph 3 of Art. 250 of the Treaty of Trianon amply sufficed to justify the competence of the Mixed Arbitral Tribunal (²).

(²) See the pleadings of Messrs. Lakatos and d'Egry. Recueil de la jurisprudence des Tribunaux Arbitraires Mixtes créés par les traités de paix, par A. de Lapradelle, t. IV Competence, p. 186, and follow : 270 and foll.

The Roumanian State, on the contrary, in support of its denial of the competence of the Mixed Arbitral Tribunal, insisted that it should proceed to such an examination, at least provisional and preliminary, of the subject-matter of the case in order to establish that the measures objected to do not come under the provisions of Art. 250, as they do not form a liquidation in the sense of that article (3).

In support of their respective arguments the parties searched in French jurisprudence, and especially in international jurisprudence, for precedents which appeared to be of a nature to make their arguments prevail.

On the Roumanian side reliance was placed chiefly on judgment No. 2, given by the Permanent Court of International Justice in the Mavrommatis case. After having demonstrated the similarity from a juridical point of view of the Mavrommatis case with the affairs under discussion, Mr. Politis recalled to mind that the Tribunal had not thought " it possible to be satisfied with a provisional conclusion on the point of knowing whether the disagreement arose out of the particulars of the charge : that it had been led to declare, before deciding upon the subject-matter of the case, that the disagreement as it appeared at first sight and on the basis of the facts established from the beginning, did come under the application of the particulars of the charge, and that, finally, before being able to decide about its competence the Court should have entered into an investigation of the subject-matter of the case." (4)

To these arguments the lawyers of the Hungarian subjects responded by first calling to mind the jurisprudence of the French Tribunal of the conflict of laws. (5) " A tribunal," remarked M. Joseph-Barthelemy, " which is a tribunal of competence only, a tribunal which decides only about competence and which when a case of competence is laid before it, decides, without itself examining the alleged facts and simply *for the case where these have been established,* the jurisdiction before which the plea should be carried."

They invoked also the authority of the Permanent Court of International Justice. In Notice No. 4, in particular, the Court declared that the competence of the Council of the League of Nations should be admitted as soon as the titles invoked by the parties were such as to admit of the provisional conclusion that they might have a juridical importance for the case in dispute.

But it was especially judgment No. 6 of the Permanent Court which seemed decisive to the plaintiffs, and it is necessary to recall here in a few words the dispute in connection with which it was given, by reason precisely of its importance as bearing upon the case in point.

It was the litigation between the German and the Polish Governments regarding certain German interests in Polish Upper-Silesia. A convention signed at Geneva on May 15th, 1922, by the German and Polish Governments contains an Art. 6 thus expressed :—

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(3) Op. cit. p. 140 and foll. ; 178 and foll.

(4) Recueil des arrêts de la Cour Permanente de justice internationale arrêt, No. 2, p. 16—17.

(5) Recueil de la jurisprudence des Tribunaux Arbitraux Mixtes créés par les traités de paix, par A. de Lapradelle, t. IV Competence, p. 398.

" Poland can expropriate in Polish Upper-Silesia business enterprises belonging to the great industries, including deposits of minerals and large landed estates, in conformity with the dispositions of Art. 7 to 23. Under the reserve of these dispositions the possessions, rights and interests of German subjects or companies controlled by German subjects cannot be liquidated in Polish Upper-Silesia."

Further, by the terms of Art. 23 of the same Convention : " if differences of opinion resulting from the interpretation and application of Art. 6 to 22 should arise between the German and the Polish Governments they will be submitted to the decision of the Permanent Court of International Justice."

When the Polish Government laid hands on certain German property in Upper-Silesia, the German Government, relying on paragraph 3 of Art. 23, quoted above from the Convention of Geneva, brought the case before the Permanent Court of International Justice, requesting to have the seizure judged to be a measure of liquidation contrary to the dispositions of Art. 92 and 297 of the Versailles Treaty.

The Polish Government answered this request chiefly with a plea of incompetence, because it said the measures objected to did not come within the stipulations of Art. 23 of the Geneva Convention ; they did not constitute; in any way, a measure of liquidation.

It is evident how much the case laid before the Hague Court resembles that which was debated before the Roumano-Hungarian Mixed Arbitral Tribunal. The Court, like the Mixed Arbitral Tribunal, had to deal with a claim based on the fact that certain measures, juridically characterised as liquidations, had been taken by the defendant Government. The Polish Government before the Court, as the German Government before the Mixed Arbitral Tribunal, raised the plea of incompetence, claiming that the measures in question did not constitute measures of liquidation.

The question before the one as well as the other jurisdiction was to decide if it should by an examination, at least provisional of the subject-matter of the case, inquire to what extent the impeached measures bore the essential character of measures of liquidation, or whether on the contrary it would be sufficient for the preservation of its competence to affirm that, if the claim of the plaintiffs were justified, this claim would come under its competence.

Now what did the Permanent Court of International Justice decide in its judgment No. 6 ?

The Court had, first of all, declared that it is clear its competence could not depend only on the manner in which the application is formulated ; that on the other hand this competence cannot be put aside by the sole fact that the defendant party maintains that the rules of law applicable to the particular case in question do not belong to that category for which the competence of the Court is recognised. It had, therefore, decided that it ought first to proceed to the examination referred to above (examination of the plea) " even if this examination should lead to touching upon subjects affecting the subject-matter of the case." Analysing then Art. 6 of the Geneva Convention the Court had recognised that this Article is destined to set limits to the powers of Poland as regards the matters under discussion and within the territory concerned. It follows, concludes the Court, " that the *divergences of*

opinion viewed by Art. 23, which refer to Art. 6 to 22, *may mean equally well divergences of opinion as to the extent of the field of application of those Articles*, and consequently that existing in the present instance between the parties " (6) which had led it to declare itself competent.

The same reasoning applied in the cases laid before the Roumano-Hungarian Mixed Arbitral Tribunal. Art 250 of the Treaty of Trianon is also intended to put limits to the power of Roumania in regard to the Hungarian properties and in the territories detached from the Austro-Hungarian Monarchy. There were certainly, between the plaintiffs and the Roumanian State, divergences of opinion *as to the extent of the field of application of this Article*. The competence of the Roumano-Hungarian Mixed Arbitral Tribunal was thus even established by this circumstance.

And such is, in truth, the essential result emerging from the judgment of January 10th, 1927 : " Considering that under the terms of Art. 250 there are laid before the Mixed Arbitral Tribunal claims introduced by Hungarian subjects, optants or non-optants, concerning properties, rights and interests situated in the territories of the former Austro-Hungarian Monarchy, as soon as those properties, rights and interests are subjected to measures confirmed in the said Article ; *that it is precisely to the latter point that apply, in this case, the contrary statements of the defence*, the defendant maintaining that there is no question here of measures of seizure or of liquidation in the sense of Art. 250."

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Strictly speaking, the preceding consideration would have been sufficed for the Roumano-Hungarian Mixed Arbitral Tribunal to establish its competence. It did not, however, think fit to remain at that.

As the defendant maintained that the Tribunal could not declare itself competent unless it had first recognised that the measures impeached amounted to liquidation measures and as, in the course of the oral debates, light had been thrown upon the conditions under which the agrarian reform was carried through in Transylvania, the Tribunal rightly considered itself justified in following the parties into that domain and in examining whether, in reality, the constituant elements of liquidation were to be found in the measures taken by the Roumanian State in the application of its agrarian reform.

It was the less reluctant to enter upon this discussion as in the month of May, 1926, the Permanent Court of International Justice had in its judgment No. 7 decided precisely on the subject-matter in the case of certain German interests in Polish Upper-Silesia which had already been the subject of the judgment No. 6, recalled above, and as in that judgment it had given a definition in principle of the meaning of liquidation. The Roumano-Hungarian Mixed Tribunal was therefore freed from the necessity of seeking for itself this definition which it need only consider as established. Its inquiry should limit itself simply to ascertaining whether, in fact, the conditions under which the agrarian reform in Transylvania had been carried through, allowed it to trace in the measures taken by the Roumanian State the essential elements of liquidation, such as had just been set forth by the Permanent Court of International Justice.

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(6) Recueil des arrêts de la Cour Permanente de Justice Internationale, arrêt, No. 6, p. 16.

In doing this the Tribunal would undoubtedly have to touch slightly, according to the expression of the Permanent Court itself, upon the subject-matter of the case, but only in so far as would be necessary to complete the investigation it had undertaken. Besides, it did not thus risk exposing itself to any criticism from the defendant, as it was precisely at his suggestion that it was taking this course, the Roumanian State having maintained, as we have seen, that, in this case a decision as to competence could only be justified after a previous enquiry into the subject-matter.

Only one obligation imposed itself : not to touch upon the subject-matter of the case except within the limits strictly necessary to establish whether or no the measures objected to presented the characteristic elements of liquidation, and, to reserve for an ulterior examination into the subject-matter of the case all other questions raised by them.

We shall see that such, in fact, has been the attitude of the Tribunal.

* * *

The Roumanian State maintained, and this was one of its two essential theses, that the Mixed Arbitral Tribunal had no competence, as the measures taken by it for the execution of the agrarian reform were no measures of liquidation.

The Roumanian State presented the following arguments in support of this thesis :

1° The liquidation, it said, has essentially the object " of mobilising the credit of the allied Powers against the enemy Powers under the title of reparations . . . . reparation of war damages caused to Allied possessions in enemy territory." . . . . " It is to repair the war damages that the allied Powers repay themselves, as much as they are able, out of the possessions of the subjects of ex-enemy Powers." (7)

This point of view is also clearly expressed in the dissentient opinion of the Roumanian arbitrator, " Considering," he says, " that the right to retain and liquidate accorded to the Allied Powers, has a strictly defined and regulated purpose as to its effects by various dispositions contained chiefly in section IV, part X of the Treaty (cf., Art. 232, h.i. ; § § 4, 9, 15 of the Annex, and Art. 173 of part VIII) ; that this purpose is the reparation of war damages suffered by the allied States and their subjects and for which Hungary has declared herself responsible. (Art. 161)." (8)

2° From this primary character of the liquidation the Roumanian State deduced a second : that it is essentially a differential measure. " Liquidation," says M. Millerand, " striking only the possessions of enemies under the special mechanism set up for compensation . . . . constitutes, in the first place, a measure of circumstance, an exceptional measure directed against the ex-enemy with the clearly characterised purpose of reparation of war damages and involving by definition a differential character." (9)

( ) Recueil de la jurisprudence des Tribunaux Arbitraux Mixtes Créés par les traités de paix, plaidoire de M. Millerand, p. 144.

(8) Op. cit., p. 433.

(9) Op. cit., p. 144.

Following up this argument the Roumanian arbitrator writes : " Considering that apart from the characteristic arising out of their purpose, the permitted measures of retention and of liquidation have another distinctive feature which results from their very nature and which is that of being, in essence, differential measures, that is they strike certain properties, rights and interests in so far as they belong to ex-enemies and only because of the nationality of their owners." ([10])

Undoubtedly it was recognised on the Roumanian side that the jurisprudence of the Mixed Arbitral Tribunals had unanimously taken this line as measures of a general order, applying, without distinction, to nationals and foreigners, may constitute liquidations. But, it was added, this jurisprudence had never had in view other than measures taken by the enemy Powers during the war against the possessions of allied subjects and it cannot be invoked at all when the question is one of post-war measures taken by the allied Powers against ex-enemy possessions.

In the first case the differentiality is not indispensable to give it the character of a war measure. It is sufficient for the recognition of a characterised war measure that it should be a measure prejudicial to allies.

In the second case, on the contrary, the spirit and the terms even of the jurisprudence of the Mixed Arbitral Tribunals lead to the belief that if it had to pronounce itself it would have insisted upon the differential character. ([11])

3° In the third place the Roumanian State maintained that if the thesis of the Hungarian subjects were admitted a veritable privilege would be created, contrary to the principles of international law, and the text even of the treaties, in favour of those subjects. Their property in Transylvania would in future escape from the control of Roumanian laws ; they would enjoy a regime of favour whilst international law lays down the principle of equality of treatment of the property of foreigners and of nationals ; further, these ex-enemy properties would be better treated even than allied property in Hungarian territory, as under the terms of, notably, Art. 233, par. (*b*) of the Treaty of Trianon Hungary promises " not to submit the possessions, rights and interests of the allied and associated Powers to any measure against property which will not be applied equally to the possessions, rights and interests of Hungarian subjects." " To admit here your competence," exclaims M. Politis, " would be, gentlemen, not only a privilege : it would be to recognise that the Treaty of Trianon has subjected Roumania, Czecho-Slovakia and Yugoslavia, for the exclusive benefit of Hungary, to a sort of regime of capitulations, more extended as it would apply to real estate, more humiliating as it would apply to the countries of the conquerors, than ever was laid upon any country outside Christendom." ([12])

To these arguments the Hungarian subjects replied :—

1° It is, first of all, incorrect to maintain that liquidation can be only a measure exclusively destined to ensure the payment of war damages caused to allied possessions in enemy territory. Liquidation cannot be

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([10]) Op. cit., p. 433.

([11]) The dissentient opinion of the Roumanian Arbitrator. Op. cit., p. 433-34.

([12]) Op. cit., p. 176.

defined by its purpose. " Peace treaties," declares M. Gidel with reason, " do not allow of assigning to liquidation any criterium of purpose. There is . . . . in the treaties a great variety of purposes which the one and the same measure may serve." (13) Beside liquidation, which serves to make private wealth contribute to the acquittal of State obligations, and which may be called liquidation of reparation, there is another which may be defined as a liquidation of elimination of which the object is to permit the allied Powers to eliminate ex-enemy elements from their territories.

The fact that a measure constitutes or not an instalment on account of reparations must not therefore be counted as the essential element of the idea of liquidation ; it is the nature itself of the measure and not its purpose that should be kept in view in deciding whether it is a measure of liquidation or not.

2° The thesis in virtue of which there is liquidation only where there is a differential measure, the Hungarian subjects added, finds justification neither in the text of the peace treaties nor in the rules of international common law.

Art. 250 of the Treaty of Trianon prohibits as regards Hungarian possessions in Transylvania that which Art. 232 permits as regards Hungarian possessions in the old Roumanian territory ; but the measures prohibited in one place and authorised in another are the same. And however carefully Art. 232 may be read and re-read it is impossible to find in it the pretended differential character which the Roumanian Government claims to see in it. Measures of seizure and liquidation are simply mentioned in Art. 232 ; they are enumerated in an indicative sense rather than really defined, by § § 1 and 3 of the Annex to Art. 232—233. Nowhere in any of these places is it written that the measures in question pre-suppose a differential element which assigns to enemy or ex-enemy subjects a disadvantageous situation in comparison with the allied nationals.

As to international common law, one of its fundamental principles is that the position of the foreigner on the territory of any given State is directly determined by the rules of international law and not by comparison with the position created by that State for its own nationals.

The lawyers of the claimants did not fail in this connection to quote the opinion, decisive in this matter, expressed by MM. de Lapradelle and Politis in the " *Recueil des Arbitrages Internationaux*," t. I, p. 278 : " The position of a foreigner is determined in international law not by the municipal law applicable to nationals but directly by the application of international law. It is possible, therefore, for a foreigner to be treated better than a national, that he will find guarantees against the arbitrariness of judges which a national would lack, or that he can obtain damages which, in the case of civil war, for instance, a national could not claim. To affirm that a foreigner cannot be treated better than a national would be to make an incorrect statement, because the treatment of a national is determined by municipal law, whilst the treatment of a foreigner is determined by international law, and the scope of the rules of the latter, which though generally more restricted, may be in certain directions exceptionally more extended than that of the rules of the former."

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(13) Op. cit., p. 241.

In addition the same lawyers referred on this question of differentiality to certain passages, which appeared to them to be decisive, of the judgment No. 7 of the Permanent Court of International Justice. The Court, says the judgment ([14]), " Without in any way contesting that the regime of liquidation instituted by the Versailles Treaty and even the measures of expropriation admitted under Chapter III of the Geneva Convention, refers to German property as such, cannot attach to the circumstance that the Art. 2 and 5 of the law of July 14th, 1920, apply to a certain category of possessions, whatever the nationality of the owners, the importance and the effect which the Polish Government attribute to it. Even if it were proved—a question which the Court does not think necessary to examine—that, in fact, the law applies equally to Polish and German subjects it would not follow at all that the suppression of private rights which it entails for German subjects would not be contrary to the provisions under Chapter III of the Geneva Convention. Expropriation without indemnity is certainly contrary to Chapter III of the Convention ; but *a measure prohibited by the Convention cannot become legitimate in relation to this instrument by the fact that the State applies it also to its own subjects.*"

In the same way affirmed the claimants, a measure prohibited by Art. 250 of the Treaty of Trianon cannot become legitimate in relation to this Article by the fact that the Roumanian State applies it also to its own subjects. Hence it follows that, even admitting that the Roumanian agrarian legislation makes no distinction between Hungarian and Roumanian subjects and that the dispositions of this law are applied in fact without any distinction whatsoever between the same subjects and the same nationals, the measures complained of constitute none the less measures of liquidation if otherwise the characteristic features of these measures are to be found in them.

Finally, carrying their arguments on this point further, the Hungarian subjects demonstrated to superfluity that the Roumanian legislation presents from many points of view a real character of differentiality." ([15])

3° The claim in virtue of which the treatment demanded by the Hungarian subjects constitutes a privilege cannot be upheld any longer averred the Hungarian subjects.

Not only is it inexact to maintain as does the Roumanian Government that Hungarian as well as foreign property is governed in international common law by the principle of equality of treatment with the property of nationals, but one cannot draw from Art. 233 of the Treaty of Trianon the deductions which are drawn by the Roumanian Government. The comparison which this Government makes between the regime assured for the allied possessions in Hungary by Art. 232 and the regime provided in Transylvania for the Hungarian possessions by Art. 250 pre-supposes, according to the Hungarian subjects a complete misunderstanding of the positions regulated by those Articles and an erroneous interpretation of Art. 233 itself. They pointed out that in Hungarian territory allied property is quite naturally subjected to the traditional regime provided by international law for private property on foreign territory. In Transylvania on the other hand, one is on a territory which has changed in sovereignty and where it is necessary, considering the

([14]) Recueil des Arrêts de la Cour Permanante de Justice Internationale, arrêt, No. 7, p. 32-33.

([15]) Pleadings of M. Rene Brunet, Op. cit., p. 285 and foll.

dangers inherent to such changes, to guarantee to the owners of property situated on this territory a particularly efficacious protection. Especially they insisted on the necessity of paying regard to the whole of the dispositions of Art. 233 and not only to one of them.

Article 233 contains a paragraph (*a*) according to which Hungary undertakes to maintain the possessions restituted to allied subjects in the legal position in which were " in face of the laws in force before the war " the properties of Hungarian subjects. In other words, the Hungarian Government is not free, whilst restituting the properties in question to their owners, to make new laws which completely or even notably alter the juridical regime under which those possessions were formerly placed ; and still less could it, simply and purely, confiscate them.

The same Article 233 in its paragraph (*b*) lays down not only that property restituted to the allies is subject to the same treatment as Hungarian property, but it adds that in case damage has been inflicted on the property, even by the effect of a non-differential measure, compensation will be due to the owner who suffers the damage.

Admitting, therefore, that the dispositions of Art. 233 may be applied to Hungarian property in Transylvania, we come to the conclusion first of all that the Roumanian State would have been prevented by para. (*a*) from proceeding with its agrarian reform, as this regime changes the pre-war juridical regime of private property, and that, in any case, this reform would be contrary to para. (*b*), as it does not give any adequate compensation to the dispossessed owners.

The arguments developed by the claimants on the various preceding points could not fail to convince the Tribunal. For this reason it condemned the thesis of the Roumanian Government as follows : " considering that it is clear from the terms of Art. 232 and 250 as well as of § 3 of the Annex of Section IV that liquidation in the sense of Art. 250 can be either a war-liquidation or a post-war-liquidation ; that the sense of both liquidations is the same and that they differ only by their purposes . . . . : that the question of knowing whether the expropriations under discussion are or are not differential measures touches specially upon the subject-matter of the case and that, therefore, no reason exists to examine into it at the moment."

It must be noted that in the first of the considerations the Tribunal expressly states that the measure of liquidation is characterised by its nature and not by its purpose ; in the second it postpones until the examination into the subject-matter of the case the question of fact as to whether the measures taken for the execution of the agrarian reforms in Transylvania are or are not differential. But as it does not hold back, to be examined in its judgment on competence, the question of knowing whether, in law, differentiality is or is not one of the characteristic elements of liquidation and as it recognises that the measures laid before it are measures of liquidation, therefore, in its eyes, differentiality is in law not one of the conditions necessary for these measures.

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After having discussed the arguments which the Roumanian Government presented to prove that the measures taken by it in the application of its gararian reform do not constitute measures of liquidation, the Hungarian subjects endeavoured to show in a positive fashion that the measures in question do present all the characteristics of liquidation.

But on this point their task was singularly facilitated : it sufficed them to refer to judgment No. 7 delivered by the Permanent Court of International Justice and to appropriate its terms, which set forth in luminous fashion what are the characteristic elements of the conception of liquidation.

The peace treaties have been conceived and set out within the framework of general international law of which the fundamental principles were naturally taken in them as the basis of the dispositions which they laid down.

One of these principles is that of respect for private property. Undoubtedly the authors of the treaties have admitted important exceptions to this principle, since they have permitted in certain cases and under certain conditions private property to be liquidated, but this authorisation is accompanied always by the obligation laid upon the State to which the owner belongs or upon the State which carries out the liquidation, to pay equitable compensation to the liquidated owner.

The Court states, several times, in its judgment No. 7 that the inviolability of private property and, in case of change of sovereignty, respect for acquired rights, have been incorporated in the peace treaties and form an integral part of those treaties. " Though the Treaty (of Versailles) does not expressly and formally pronounce the principle according to which, in case of change of sovereignty, private rights must be respected, this principle is clearly admitted by the treaty. Nothing has been brought forward during the present proceedings which could shake the opinion of the Court on this point." ([16])

Or again : " It is that which arises out of the principle of respect for acquired rights—a principle which, as the Court has had occasion to state on several occasions, forms part of international common law—which, on this point among others, lies at the basis of the Geneva Convention." ([17])

From this follows the consequence that the dispositions restrictive of the right of property inscribed in the treaties must be interpreted in a limitative fashion, as the rules of common international law resume, outside the hypotheses foreseen in the treaties, their full authority. " It is not at all doubtful," declares the Court, " that the expropriation admitted under Chapter III of the Geneva Convention is a derogation of the rules generally applied in so far as concerns the treatment of foreigners and to the principle of respect for acquired rights. But, as this derogation itself has a strictly exceptional character it is permissable to conclude that no other derogation is allowed." ([18])

It is evident of what the essence of the reasoning of the Court actually consists :

By the fact itself that the treaties permit a State to liquidate ex-enemy properties situated on its territory, they recognise, implicitly, that without this permission it could not take possession of those properties.

([16]) Recueil de arrcts de la Cour Permanente de Justice Internationale arrêt, No. 7, p. 31.

([17]) Same collection, p. 42.

([18]) Same collection, p. 32.

By the fact itself that the treaties subordinate the right to liquidate attributed by them to a State under certain conditions which they specify, they forbid that State to take possession, outside these conditions, of the properties of which the liquidation is, exceptionally, authorised.

When, finally, the treaties formally prohibit a State to liquidate ex-enemy property on its own territory they direct it, purely and simply, to observe the rules of common international law concerning the respect for private property and for acquired rights.

The Court thus leads up to the definition of liquidation : *Any measure contrary to the rules of common international law :* " Any attack," the Court writes, " upon the property, rights and interests of German subjects, coming under Chapter III of the Convention, which is not justified by a special title overruling the Convention and which exceeds the limits of international common law is, of course, incompatible with the regime established by the Convention." ([19]) And further on : " The Court has already stated that it does not need to dwell upon this theoretical construction of which it retains only the essential element, viz. : the fact to derogate, by a measure, international common law." ([20])

The Hungarian subjects confined themselves before the Roumano-Hungarian Mixed Arbitral Tribunal, simply and purely, to applying to their cases the definition thus given by the Permanent Court of International Justice.

" Art. 250 of the Trianon Treaty," they argued, " forbids the liquidation of Hungarian property situated on territory detached from the former Austo-Hungarian Monarchy, that is to say, it orders the Roumanian State to treat the property, rights and interests in question in conformity with the rules of international common law. If we demonstrate that the treatment of our property, rights and interests has been contrary to the principles of international common law we shall thereby prove that our property, rights and interests have been subjected to a measure of liquidation."

The Roumanian State, which did not hide from itself the strength of this argument, tried to destroy its effect by maintaining that the jurisprudence of the Permanent Court of International Justice could not be invoked before the Mixed Arbitral Tribunal owing to the differences between the facts which the Court had decided upon in its judgment No. 7 and those submitted to the Roumano-Hungarian Mixed Arbitral Tribunal. These differences, pleaded M. Politis, are three in number :

The first is that Art. 250 of the Treaty of Trianon is a special text, whilst Art. 6 of the Germano-Polish Convention of 1922 is an infinitely wider text.

The second is the result of the fact that the Mixed Arbitral Tribunal has to deal with the agrarian reform, which has a general character, whilst the Court had to decide upon a Polish law which has a special character and which, by its title, is aimed expressly at ex-enemy property.

([19]) Recueil des arrêts, etc. Judgment No. 7, p. 22.

([20]) Same coll., p. 32.

Finally, the third difference : the Court has been invested with a wide unlimited competence, contained in Art. 23 of the Convention of 1922, while Art. 250, par. 3, confers upon the Mixed Arbitral Tribunal an extremely limited competence only. ([21])

This analysis, however great the talent with which it was presented, was not of a nature to destory the strong position which the claimants derived from the jurisprudence of the Permanent Court of International Justice.

It is first of all incorrect, they said, that Art. 250 is more special than Art. 6 of the Geneva Convention, as the terms of the one and of the other of the two texts seem closely fitted upon each other. By Art. 250 " The property, rights and interests of Hungarian subjects or of companies controlled by them, situated on the territories of the former Austro-Hungarian Monarchy, are not subject to seizure or liquidation in conformity with these dispositions " and Art. 6 of the Convention lays down that " the property, rights and interests of German subjects or of companies controlled by them cannot be liquidated in Polish Upper-Silesia." Text identical, meaning identical.

The fact, secondly, that the Roumanian Agrarian law has a general character, whilst the Polish law submitted to the Court has only a special character, cannot have an influence on the juridical nature of the measures taken in virtue of one or of the other of these two laws.

Finally, it is not evident how the conception of liquidation can vary, because of the Court having been invested by the Geneva Convention with a wider competence than that which Art. 250 conferred upon the Mixed Arbitral Tribunal.

There is no need to consider further the inaccuracy of the assertion—again and again put forward from the Roumanian side—that the competence of Mixed Arbitral Tribunals is rigorously limited and particularly exceptional ; the Mixed Arbitral Tribunals undoubtedly are not judges of common law, but they constitute a jurisdiction of authority to which must be submitted all the difficulties which accrue to them from a formal text, which is here precisely that of par. 3 of Art. 250.

Therefore the claimants rightly relied upon the definition of the conception of liquidation given by the Permanent Court of International Justice. They were right in claiming that their property had been liquidated if the measures applied to them were contrary to the principle of international common law. And on this point again the Mixed Arbitral Tribunal was not in a position to support their thesis.

Considering it necessary to point out that by inserting Art. 250 of the Treaty of Trianon, the Allied and Associated Powers wished to protect completely the property, rights and interests of Hungarian subjects situated in the territories of the former Austro-Hungarian Monarchy against all measures mentioned in Art. 232 and the Annex of Section IV, as well as in Art. 250 itself, and to place such property, rights and interests under the authority of international common law . . . . It is therefore the principles of international common law which must inspire the Tribunal every time it is called upon to decide upon a claim based upon Art. 250.

([21]) Recueil de la jurisprudence des Tribunaux Arbitraux Mixtes créés par les traités de paix, par. A. de Lapradelle, t. IV Compétence, p. 378.

Arrived at this point of the discussion, the question put before the Tribunal became extremely simple : the question was to know whether the treatment applied to Hungarian property in Transylvania by the Roumanian State in virtue of its agrarian law was or was not in conformity with international common law.

The Hungarian subjects limited themselves to pointing to the fundamental principle of international common law in virtue of which the private property of foreigners must be respected and to that other principle in virtue of which, in case of change of sovereignty, the annexing State must respect acquired rights in the ceded territory ; they quoted an imposing mass of professional opinions of doctrine and of practical precedents to demonstrate the general and indisputable character of these principles.

This demonstration, in particular, was accomplished in a masterly fashion in the pleadings of M. Gidel. ([22])

It was difficult, on the Roumanian side, to combat the decisive character of these arguments. They limited themselves to quoting the contrary opinion of two authors, MM. de Louter and Borchart, according to whom the rule of respect for private property is, at the present time, weakening in the States of Western Europe, and who maintain that a foreigner in any given State cannot have rights superior to those of the nationals. They added that international common law authorises expropriation for reasons of public utility, and that the measures applied to the property of Hungarian subjects in Transylvania are nothing but measures of expropriation.

This last statement seemed surprising at first sight. The essential character of expropriation, in fact, is that it is always accompanied by an equitable compensation which usually is paid in cash and in advance, which was evidently not the case in the dispossessions in which the claimants had been the victims and to whom no appreciable compensation had ever been paid.

Undoubtedly the Roumanian Government maintained that in its original intention the compensation which it proposed to allot was adequate and that only ulterior economic circumstances had reduced this compensation to the present figure. It maintained further that the agrarian reform constituted in reality expropriation for national utility being of vital interest for the very existence of the State and that it was not possible to apply in this case purely and simply the strict rules of normal expropriation for reasons of public utility.

But the Hungarian subjects refused to admit such a defence, because, on the one hand, what matters to the dispossessed owners is not the intentions animating the State at the moment that it voted the law but the actual sum which it pays in fact at the moment of dispossession, and because, on the other hand, admitting even—though it might be contested—that the agrarian reform were a vital necessity for the Roumanian State, this necessity might perhaps justify the dispossession of Roumanian nationals, but it could only leave foreign subjects indifferent.

These are, after all, questions completely outside the simple problem of competence put before the Tribunal.

([22]) Recueil, etc., p. 251, etc.—See also Gidel, L'arrêt, No. 7 de la Cour Permanente de Justice Internationale, p. 36 and foll.

This is why, and very wisely, the Tribunal refused to follow the parties on to this ground ; it limited itself to stating that the measures applied by the Roumanian State to property owners of Transylvania in the execution of the agrarian reform being contrary to international common law, constituted measures of liquidation and thus came within its competence. All other questions raised before it which formed questions dealing with the subject-matter of the case were reserved for an ulterior investigation.

" Considering," it said, " that what is important to form a just appreciation of the question of the competence of the Tribunal is . . . . to find out whether the measures complained of in the case, present or do not present, the characteristic features of one or the other of the measures which, under the terms of Art. 250, may give cause for claims which are susceptible of being laid before the Mixed Arbitral Tribunal . . . . ; that the measures of which the applicants complain constitute a violation of the general principle of respect for acquired rights and go beyond the limits of international common law and that they have all the character of a liquidation in the sense of Art. 250 and by their nature itself come within the measures covered by the said Article."

* * *

The second argument developed by the Roumanian State to support its denial of competence was drawn from the Brussels negotiations.

This part of the discussion and the part of the decision to which it gave rise, not possessing so much general interest as the discussion relating to the other elements of the litigation, a more succinct description only of them will be given.

The Roumanian Government claimed that an agreement, a real contract, had been concluded at Brussels between the representatives of the Hungarian State and its own representative. This agreement, to which it was sought to give the value of an official interpretation by both parties to the Treaty of Trianon, recognised the compatability of the Roumanian agrarian legislation with the dispositions of Art. 250 of the Trianon Treaty.

The consequence was that the Hungarian subjects, bound by the interpretation which their own Government had accepted, were deprived of the right to bring before the Mixed Arbitral Tribunal a thesis based on a different interpretation of the same article.

The claimants strongly objected to such a theory.

They denied first of all that any agreement had been reached at Brussels. Of the two documents which had issued from these deliberations, one " a report of the conversations " was simply a summary, drawn up by the officials of the Secretariat of League of Nations, of the discussion which had taken place in their presence between the Hungarian and the Roumanian representatives. This summary ascribed certain declarations to those representatives, but, with the exception of the parts drawn up by the representatives themselves and inserted into the report between inverted commas, it offered no guarantee of accuracy, and it could not in any case have any binding character, as it had neither been accepted nor initialled by the representatives of the two Governments.

The second document was the draft of a report which Mr. Adatci proposed to submit to the Council in its July session and which actually became the resolution of the Council on July 5th, 1924. It is sufficient

to consult the text of this resolution to see that it was, as Mr. Adatci said, a project " which has the very serious defect of not solving the question of the subject-matter of the case," and constitutes only (the expression is that of Monsieur Hanotaux) " a first act of conciliation."

The passage in the report upon which the Roumanian argument is based, the Hungarian subjects continued, is thus conceived : " On the question of incompatability between the Roumanian law and the dispositions of the treaty concerning the rights of the Hungarian optants, it is admitted and not contested by the Hungarian representatives, that the treaty does not oppose an expropriation of the property of the optants on the ground of public utility, including the social necessities of an agrarian reform."

It would thus appear that the Hungarian delegates, in admitting that the passage exactly reflects their declaration—which is not proved and which the claimants contest—have recognised that the Roumanian State had the right, in order to carry out its agrarian reform, to expropriate the property of Hungarians, evidently meaning by this an expropriation as it is generally understood in the law of civilized countries, that is dispossession accompanied by just indemnity. The proof of it is specially clear in a few lines further on, when the same report gives stress to a declaration of the Hungarian delegate according to the terms of which " in matters of expropriation only payment in cash is justified," and states that the representatives of the two Governments considered that, as no conciliation between their respective theses seemed possible, they ought not to prolong the discussion on the question of price.

And supposing even, the claimants continued, that there was at Brussels a certain recognition of the compatability between Art. 250 of the Trianon treaty and the Roumanian agricultural legislation, it is impossible to detach the passage containing this pretended recognition from the whole of the report in the middle of which it appears. The delegates of the two Governments at Brussels carried on negotiations in view of an amicable arrangement, and it cannot be admitted that such or such a declaration of this or that delegate can be detached from the whole of their declarations and considered separately as a binding clause when the transaction itself had not been concluded. Even if one wished to admit that at the beginning of the discussion the Hungarian delegate, in an effort at conciliation had recognised the legitimacy of a certain agrarian reform in Roumania, this recognition was subordinated in his mind, as the sequence of the report makes clear, to an allocation in favour of the Hungarian nationals of just and immediate compensation. From the moment when the right to this compensation was not accepted by the Roumanian Government the recognition made in view of this eventual acceptance necessarily also falls to the ground.

It is with reason that the Tribunal rejected, on this point again, the arguments of the Roumanian Government.

* * *

The keen interest which the decision analysed above has excited is evident, and also that its importance singularly exceeds the limits of the interests involved, however important they may be in themselves.

The Roumano-Hungarian Mixed Arbitral Tribunal has been the first among the Mixed Arbitral Tribunals to give a decision of principle, clear and categorical, on the difficult problems which the post-war liquidations are giving rise to.

The opinions to which it has subscribed are the same which were were adopted by the Permanent Court of International Justice some months ago. The view that these problems are definitely solved in the jurisprudence of the Permanent Court itself, as well as in that of the Mixed Arbitral Tribunals, is thus justified.

There is also reason for congratulation, because the adopted solutions are excellent.

By giving the idea of liquidation a purely objective definition, which discards all inquiry into purpose or intention, the Permanent Court and the Mixed Arbitral Tribunal have introduced rigorous order and decisive clarity into a juridical domain hitherto uncertain and confused.

By basing this definition on the principles of international common law the two jurisdictions have, with the full authority which attaches to their decision, recognised the indissoluble bond which connects the conventional law of the peace treaties with general international law, and have proclaimed in an indisputable fashion that the interpretation of treaties can be only effected on the basis of international law.

The two high jurisdictions, finally, when they admit that an agrarian reform such as that carried out by Roumania in Transylvania constitutes a measure of liquidation, recall the imperious obligation for the States, which might have too much tendency to forget it, to adhere in their internal legislation to the most certain principles of international law.

OPINION of SIR ALFRED HOPKINSON, K.C., M.P.,

As to the Rights of Persons of Hungarian Nationality entitled to Property in Territories formerly belonging to Hungary and which now form part of the Territory of Roumania.

Having earlier in the year written an opinion as to the legal position of Hungarian Nationals entitled to property in the territories ceded to Jugo Slavia by the Treaty of Trianon, I understand that my opinion is now desired as to that of Hungarian Nationals who held property in the territories ceded by that treaty to Roumania.

The rules of International Law and the Clauses of the Treaty of Trianon which apply in the two cases are, of course, the same, but it is necessary to consider fully the question of their relation to the Acts of the Roumanian Government, to examine the legislation of that Government, and the manner in which the property of the *ressortissants* has been dealt with in the ceded territories.

It appears that a large number of claims have been presented to the Mixed Tribunal constituted under the Treaty of Trianon (Article 239) by Hungarian *ressortissants* in respect of their property in these territories. Of the *Requêtes* thus presented for the decision of that Tribunal it will be convenient to take one, that of *Emeric Kulin père* as an example. He is entitled to a half-share in a property situated in a district taken over by Roumania under the Treaty. According to the allegations in his *Requête,* this property has been seized and he has been deprived entirely of any benefit from it, and, though a long period has elapsed since the seizure, no compensation has, in fact, been paid and the compensation suggested is only a very small fraction of the true value of the property taken. He accordingly has presented his case before the Mixed Tribunal constituted by the Treaty and claims relief.

He and others whose *Requêtes* are pending before the Mixed Tribunal, allege that their rights which have been violated are rights guaranteed to them by the Treaty and are of the character provided for in Article 250, and that the remedy for such violations is an appeal to that Tribunal. A preliminary objection was taken to the competence of the Tribunal. It was contended that the Mixed Tribunal had no jurisdiction unless what the Plaintiff complained of had the double character of :—

1° Mesure de saisie ou liquidation de disposition, d'administration forcée ou de séquestre, c'est à-dire mesure exceptionelle de guerre, ou autrement dit une mesure ayant frappé seuls *les ennemis et sans indemnité aucune;*

2° Mesure prise le 3 novembre 1918 *jusqu'a la mise en vigueur du Traité.*

The question of competence was argued before the Tribunal which gave its decision in a considered judgment on 10th January this year. The reasons therein set forth appear conclusive that the Mixed Tribunal has the power, and the duty, to entertain the case, and decide whether, having regard to the provisions of the Treaty, the rights of the Hungarian *ressortissants* have in fact been violated.

The second objection appears to have been practically given up. Reading the whole of Clause 250 of the Treaty it was impossible to hold that the protection given by it ceased when the Treaty came into force, and did not apply to anything after that date. The second paragraph of the Clause provided that lands already taken before that date should be restored, but did not curtail the general effect of the Treaty or limit the protection given by it to acts done before it came into force.

As regards the first objection, it is clear that the very reason for the institution of the Mixed Tribunal was to decide in each case presented to it whether in fact an injury to the rights of Hungarian Nationals recognised by the Treaty had in fact been violated, and if so what remedy should be awarded.

When the Tribunal had given its decision on the preliminary objection the Roumanian Government withdrew its judge on the Tribunal from further participation in the hearing of claims by Hungarian Nationals arising out of the scheme of the Agrarian Reform. If the fact that a decision is given on any point adverse to the party which appointed a particular judge were held to be sufficient reason for him to retire and thereby stop the proceedings, the whole system of deciding questions by legal methods provided by agreement in treaties would be destroyed. The attempt to substitute law for force would be frustrated.

The Treaty of Trianon, Clause 239 (a) paragraph 3, makes express provision to meet such circumstances and a case has clearly arisen for the exercise of this power to fill up the vacancy.

The Court should be reconstituted accordingly and the case of Emeric Kulin and other Hungarian Nationals in which *Requêtes* have been presented to the Mixed Tribunal should then be considered au fond.

It is to be noted that by Clause 239, f. tq. all the High Contracting Parties agree that their Courts and authorities shall render to the Mixed Arbitral Tribunals all assistance in their power and to regard their decisions as final and conclusive and to render them binding upon their nationals.

The title of the Roumanian Government to the territories in which the properties in question are situate, depends wholly on the Treaty of Trianon by which those territories were ceded. The cession is made subject to the conditions expressed or implied in that Treaty. The sovereignty of Roumania in the acquired territories is limited as regards other States and their nationals by these conditions and they are fundamental, an integral part of the arrangement without which, the Roumanian Government would have no right to the territories in question.

These statements do not affect the sovereignty of the cessionary State in the ceded territories as regards their own nationals, but relate only to the protection which its international obligations afford to other nationals. It may indeed be admitted that the State acquiring these properties may have the right for some definite public purpose, such as the completion of a railway or acquiring a site for some public works, to take specific private property of others as well as of their own subjects, but it is a universally recognised principle that where private property is then taken, adequate compensation (or indemnity) must be paid before or concurrently with the taking of the property. It is usual in civilized States to provide for such compensation, but it is not contended that in the exercise of its sovereign rights a State may not, by legislative action, take away the property of its own subjects —but not the property of others—without such compensation.

With the question of the policy of the Roumanian legislation as regards its own nationals, International Tribunals have nothing to do.

It is alleged on behalf of the Roumanian Government as justifying the seizure of the properties in question, that they are taken in pursuance of an elaborate general scheme of Agrarian Reform contained in the Law of July, 1921, for Transylvania, Banat, Körös and Maramoros.

In view of the fact that no State can, by its legislation, override its obligations to other States and their nationals, whether such obligations are imposed by general International Law or by express Treaty, it is not necessary to consider in detail the clauses of this law. It will be sufficient to note two points : first, that the Absentees are put in a position of exceptional hardship. Clause 6 actually provides for the expropriation of their property, as follows :—

> "Absentéiste aux sens de la presente loi est celui qui, depuis le 1er décémbre 1918 jusqu'à la déposition de la prêsente loi, a été absent du pays sans avoir une mission officielle à l'ètranger. Font excéption les propriétés rurales jusqu'à 50 jugars."

Secondly, that the compensation proposed to be given is, in fact, but a very small fraction of the true value of the property taken (see Clauses 50 and 85 of the Law). It is to be calculated in lei and even for the utterly inadequate amount so calculated, securities of greatly depreciated value are to be given instead of cash.

It is not necessary to cite at length the numerous authorities, establishing the principle that on a cession of territory, the private property of the nationals of the State making the cession is to remain "sacred and inviolable."

Clear statements on the subject will be found in Moore's Digest (1906) vol. 1, p. 414, or in any text-book dealing with the subject, such as Phillipson on Termination of War and Treaties of Peace, p. 332. As examples, the following may be quoted :—

> "In harmony with the rules of international law, as well as with the terms of treaties of cession, the change of sovereignty should work no change in respect of rights and titles—that which was good before should be good after.
>
> "Title to land and landed improvements is by the law of nations a continuous right, not subject to be divested by any retroactive legislation of new governments taking the place of that by which such title was lawfully granted.
>
> "The change of sovereignty through territorial cession cannot affect the private rights already vested in individuals or corporations. Private property of any kind remains sacred and inviolable. The modern usage of nations which has become law would be violated, that sense of justice and of right which is acknowledged and felt by the whole civilised world would be outraged if private property should be generally confiscated and private rights annulled."

The following resolutions passed at the conference of the International Law Association last summer show that these principles are fully recognised by the jurists who have recently devoted attention to the subject :—

> "A State is by the Law of Nations entitled to intervene to protect its nationals in another State (*a*) from injury to their property resulting from measures which discriminate between them and the nationals of such other State; (*b*) from actual injustice even if there is no such discrimination.
>
> "It is contrary to the principles of International Law to deprive a foreigner, or a member of a protected minority, of the fundamental rights to which he is entitled as owner, through indirect ways, which, though not in law, but in fact, lead to an expropriation without real compensation."

It is a well-established rule of International Law that the treaties of cession are generally to be taken as declaratory, that as between the cessionary State and the nationals of other States, the general rules of International Law apply, unless there is some definite stipulation to the contrary as regards any specific question. No doubt the maxim "Expressum facit cessare tacitum" applies in this as in other cases, but to exclude the general principles a clear and definite statement is required.

Does the Treaty of Trianon contain express provisions altering what would otherwise be the rights as to property in the ceded territory? It must be agreed that in some cases it does, as for example, as regards those dealt with in Clauses 190 and 191, but these do not deal with the private rights of the *ressortissants*. So far from such rights being taken away, they are expressly reserved by Clauses 61 and 63, especially by Clause 250, and it is definitely stated that the elaborate provisions of Clause 232 as regards retention and liquidation of property are "subject to any contrary stipulations contained in the Treaty".

The treaty, therefore, so far from taking away what would have been the rights of the Hungarian *ressortissants* under the present rules of International Law, expressly recognises them. To take away their property in the ceded territories at all events without paying proper *préalable* compensation would clearly be a violation of the Treaty which binds all the parties to it. No legislation of the cessionary State can legally deprive the Hungarian Nationals of these rights.

To sum up what has been already indicated, I am of opinion for the reasons above stated, and after full consideration of the Treaty and of the Roumanian Law of July 23rd, 1921 :—

1. That under the rules of International Law and under the express provisions of the Treaty, the Hungarian *ressortissants* are entitled to retain their rights of property in the ceded territories.

2. That the Roumanian Agrarian legislation and à fortiori administrative acts of the Roumanian Government, cannot lawfully deprive them of those rights or be accepted as a defence to the *Requêtes*, although such legislation may be taken as binding in its effect on property of Roumanian subjects.

3. This would be so, even if equal treatment were given to the *ressortissants* by the provisions of that legislation and in the manner in which it is carried into effect.

4. That that law of July, 1921, however, does in fact put the Hungarian *ressortissants* in a worse position than the Roumanian subjects, in particular to the clauses relating to absentees operate differentially against them, as some of these *ressortissants*, such, for example, as Emeric Kulin, whose case is above alluded to, are open

to objection on this ground. It was clearly impossible for such persons never to be absent, indeed, Clause 6, c of the law appears to be intended to operate retrospectively and to apply to those who had been absent at any period between December, 1918, and the date of the Agrarian Law.

Going through the provisions of the law as to the ceded territories they appear to bear with special hardship on the Hungarian owners of estates in the ceded territories, and in some respects to differ from the law relating to the original Roumanian territory. Any differentiation against the *ressortissants* is contrary to the principles of International Law and to the form and spirit of the Treaty.

5. If restoration of the property has become impossible, or if for some specific purpose some special property is regained for some definite public object, it is clear, according to established usage, that compensation must be paid, that such compensation must be a real compensation equivalent to the value of what has been taken and ought to be paid before, or concurrently with, the taking of the property for such public purpose—to use a well known French phrase—must be *préalable.*

The Clauses as to compensation in the Roumanian law of July, 1921, are clearly not in compliance with the acknowledged rules on the subject. The claim on the part of the Roumanian Government to reckon compensation in paper lei at the present depreciated rate as proposed by Article 50 of the law is clearly contrary to these rules. Such compensation would only be a small fraction of the true value, and is quite illusory. The case is made still worse by the provision that even this fractional part of the true value is not to be paid in cash but in depreciated securities; see Article 85 of the Law.

6. That the Mixed Tribunal has the power and the duty to entertain and decide on the claims that have been presented, and that its position as regards jurisdiction ought to be respected and maintained by all parties to the Treaty, as thereby provided.

7. That any defences au fond pleaded by the Defendants should be considered by the Tribunal in each case, but unless some further ground of defence other than those above dealt with is established and if the facts stated in the *Requête* of Emeric Kulin are proved, he is entitled to the relief he claims.

These conclusions apply to other *Requêtes* pending before the Mixed Tribunal.

ALFRED HOPKINSON.

June 13th, 1927.

OBSERVATIONS ON THE SESSION OF THE COUNCIL OF THE LEAGUE OF NATIONS

of March 7th, 1927, and on the

ROUMANIAN AND HUNGARIAN THESES

By CHARLES DUPUIS,

Member of The Institute of France. Member and former Vice-President of the Institute of International Law. Professor of International Law at the Free School of Political Sciences.

Roumania, after having notified the President of the Roumania-Hungarian Mixed Arbitral Tribunal, that she forbids her Arbitrator to sit in judgment in those cases in which its agrarian law of July 30th, 1921, is under discussion, has found it necessary to lay before the Council of the League of Nations, seized in virtue of Art. 11 of the Covenant, the motives by which she believes she can justify this violation of Art. 239 of the Treaty of Trianon.

Her representative, Monsieur Titulesco, in a vehement speech, intended to discredit the judgments of competence of January 10th, 1927, displayed excessive skill in that, in order to incriminate those judgments of an abuse of power, he was obliged to perpetrate the gravest inaccuracies in fact and in law. It is necessary in order to put matters in their right aspect, to point out some, at least, of these inaccuracies.

* * *

Monsieur Titulesco began by drawing a dramatic picture of the reasons which, according to him, had dictated the various agrarian laws enacted for the different parts of Roumania, and of the sacrifices which, he says, were accepted by everybody, Roumanians or foreigners, with the sole exception of the Hungarian subjects. But he failed to recall the differences of the conditions under which the agrarian reform laws had been enacted for the former Kingdom of Roumania and for Transylvania, as well as the difference in the sacrifices imposed upon the land-owners in the old Kingdom and on those of Transylvania, on the Hungarians, land-owners in Transylvania and the British and French owners of properties in Bessarabia. This omission, by itself, allowed him to allege that the Hungarian subjects, alone, demanded a privileged position.

It appears that the reasons which, even from before the war, determined Roumania to carry out agrarian reforms in the old Kingdom, did not obtain at all in Transylvania. The old Kingdom was under the regime of the great land-ownership ; rural property holding in Transylvania seemed to present a reasonable equilibrium between large, medium and small holdings. Nevertheless, the agrarian law for Transylvania is harsher, in some respects, for the owners than the agrarian law in the old Kingdom, especially in that it fixes a lower maximum for the land left to the former owners (not much more than half), and in that it inflicts total expropriation by right of forfeiture for absenteeism, defining absenteeism in a quite peculiar sense, suitable for making the forfeiture applicable, particularly, if not exclusively, to Hungarian subjects.

" By decree of H.M. the King, of December, 1918," says Monsieur Titulesco, " the agrarian reform was applied in the old Kingdom, and by decree of H.M. the King, dated September 10th, 1919, on the advice of the Council of Government, the first local government of Transylvania, the agrarian law was applied to that province. Bessarabia was the

nearest neighbour of powerful Russia. She became ours with the agrarian reform already accomplished. As to Transylvania, you remember the sad events which occurred in Hungary during the summer of 1919. I will not dwell on it, but simply ask if it would have been possible, considering the social disorders which took place on the Western frontier of Transylvania, not to take within that province the same measures of social defence which the social disorders on the Eastern frontier forced upon the Mother Country." But Monsieur Titulesco forgets that the Bolshevik regime had come to an end in Hungary in August, that since August 1st, Bela Kun had lost his power, that on August 4th the Roumanian troops entered into Budapest. It is difficult to understand how the somewhat homœopathic remedy of the agrarian reform could have become necessary against the Bolshevik evil in Transylvania owing to the occurrences in Hungary.

On the other hand, it is the fact that Hungarian subjects have been treated more harshly than the other Transylvanian land-owners, in so far as, in fact, they were the only ones, or nearly the only ones, to suffer total expropriation on account of absenteeism. The agrarian law of July 30th, 1921, for Transylvania, enacted the total expropriation of the land-owners who had been absent during the period from December 1st, 1918, to March 23rd, 1921, the date when the bill for the agrarian reform law for Transylvania was brought in. The Roumanian authorities applied forfeiture for reasons of absenteeism, not only to the owners absent during the whole period from December 1st, 1918, to March 23rd, 1921, but also to those owners who had been absent during any fraction of that period. The Hungarians who had some connection with Hungarian territory outside Transylvania had every reason to flee before the Roumanian invasion, and during the greater part of the period between December 1st, 1918, and March 23rd, 1921, they were, in fact, forbidden by the Roumanian authorities to return to Transylvania. Thus the dispositions concerning forfeiture for reasons of absenteeism seem to have been framed with the principal, if not sole, object of ensuring the total expropriation of the Hungarian subjects. It is, at the very least, strange that forfeiture was proclaimed on account of facts prior to the acquisition of Roumanian sovereignity over Transylvania, which dates only from the coming into force of the treaty of Trianon, signed on August 4th, 1920, and ratified on July 26th, 1921. It is certain that this forfeiture has struck Hungarian subjects especially if not exclusively.

Finally, Roumania has not applied to all foreigners the system of the derisory compensations which resulted from her various agrarian laws. The memorandum of the Roumanian Government on the present situation of Roumania in relation to the general question of reparations, communicated in June, 1923, to the Allied and Associated Governments by the Minister of Finance in the name of the Roumanian Government, contains the following passage :

> " Expropriation of British and French subjects in Bessarabia. The obligation of the payment of the compensation, resulting from the recognition by the Allies of the annexation of Bessarabia to Roumania, amounts to over one million pounds sterling, counting the interest accrued since January 1st, 1919. If the rules laid down for Roumanian subjects had been applied, this sum would not have exceeded twenty-two million lei."

* * *

The agrarian reform was applied in Transylvania by Royal decree, dated September 10th, 1919. This is an avowal that Roumania introduced this reform at a moment when she had no right at all to do so, as she became

the sovereign power in Transylvania only by the ratification of the Treaty of Trianon on July 26th, 1921. Before that date she could only take provisional administrative measures. She had no right whatsoever to order expropriations for reasons of agrarian reforms. She did so nevertheless, first by the decree-law published on September 12th, 1919, ordering total expropriation of foreigners, including those who would become such by way of option, then by the decree-law published on June 12th, 1920, which admitted a reservation on the supposition that these dispositions will not be contrary to the stipulations of the treaty of peace concluded by the Allies with Austro-Hungary. This reservation disappeared from the law of agrarian reform published on July 30th, 1921. It is evident that the Roumanian law published four days after the coming into force of the Treaty of Trianon, could not be a valid contradiction of this treaty. The treaty having stipulated, in Articles 63 and 250, respect for the property of the Hungarian optants and subjects, the Roumanian law could not, in four days after the coming into force of the treaty, despoil these Hungarian subjects of the property for which the Treaty assured them respect.

* * *

The attitude of Roumania towards the Roumano-Hungarian Mixed Arbitral Tribunal is incomprehensible. Under the terms of Art. 239 of the Treaty of Trianon, the decisions of the Mixed Arbitral Tribunal are definitive for both parties. Therefore, no recourse can be had, to any authority, against the decisions given either on the competence or the subject matter of the case. Roumania committed a strange imprudence by pleading incompetence, because Art. 250 of the Treaty of Trianon clearly affirms the competence of the Mixed Arbitral Tribunal to deal with any claim formulated—rightly or wrongly—by a Hungarian subject against the infringement of Art. 250. The question whether the measures of which the Hungarian subjects complain are measures of seizure or liquidation forbidden under Art. 250, is a question of the subject matter of the case. In order to obtain a decision of incompetence it would have been necessary for Roumania to prove, not that these measures were not measures of liquidation, but that it was impossible for them to be considered as such. And such proof was really impossible after judgment No. 7 of the Permanent Court of International Justice.

It seems difficult to admit that Roumania pleaded incompetence out of deference to the Tribunal because the same deference would have decided her to bow before the decision, and to plead upon the subject matter of the case. And it would seem a strange deference which consisted in declaring to the Tribunal that, if it declared itself competent, Roumania will not plead upon the subject matter of the case. It is permissible to recognize in this attitude an attempt to apply a very incorrect form of pressure to the Tribunal, and it must be stated that by acting in this fashion, Roumania wanted to reserve for herself the chance—however improbable—of a decision of incompetence at the same time as the certitude of evading the sentence if the Tribunal should affirm its competence. It is certain that the attitude of Roumania, if it had been approved by the Council of the League of Nations, would tend to ruin the whole system of the pacific solution of international conflicts set up by the Covenant of the League of Nations. This system is very clear ; every dispute must be subjected to an examination either by way of Arbitration or by way of a procedure before the Council. Arbitration is not imposed : it supposes the consent of the parties in the case. Such consent may be given either in connection with a dispute already existing or as regards future disputes by a compromissory clause or by a permanent Treaty of Arbitration. If the

way of Arbitration has been chosen, every other way is excluded. The reason for this is simple, because, owing to the difference of procedure of the Council which can only reach a solution inasmuch as it embodies the unanimity of the Council, the way of arbitration leads necessarily to a sentence obligatory on the parties in the dispute ; it gives juridically the certainty of a pacific solution of the conflict.

Undoubtedly the States which accept obligatory arbitration are exposed to the risk of seeing the use they may have made of their sovereignty, limited and condemned by the Arbitrators ; they risk seeing objections raised before the Arbitrators which they consider—perhaps rightly—to be without foundation. States, therefore, should not lightly bind themselves by compromissory clauses or by permanent treaties of arbitration. But when they have bound themselves, they must keep their engagements. If it were sufficient for a State to be discontented with an arbitral decision in order to be able to evade it, obligatory arbitration would be but an empty word and a dead institution.

* * *

Monsieur Titulesco claimed, it is true, to justify Roumania by alleging that Art. 250 of the Treaty of Trianon had been abrogated by an agreement concluded at Brussels in May, 1923, and sanctioned by the resolution of the Council of the League of Nations, dated July 5th, 1923.

This claim is simply unsustainable.

There was no agreement at all at Brussels between Roumania and Hungary. There was a recognition of a fundamental disagreement on the subject matter of the litigation, followed by an attempt at conciliation by Mr. Adatci, on a formula of which the last part, initialled by one of the representatives of Hungary, has been disavowed by the Hungarian Government ; then there was a resolution of the Council of the League of Nations approving the report and the draft of a resolution prepared by Mr. Adatci.

It is incumbent, for the appreciation of these facts, to recall certain principles which cannot be departed from without depriving negotiations and international relations of all security, and then to specify the sense and the scope of the formulas of Brussels and Geneva.

Before all, it is important not to confuse pourparlers, negotiations and agreements. It is with good reason that international practice admits the validity of treaties only when they are ratified, and in virtue of their ratification alone. The necessity of ratification is explained by the need for the State to protect itself against errors and possible yielding to influences on the part of its negotiators. Contemporary experience offers most remarkable examples in this respect. Nobody can gainsay that President Wilson exercised a very great influence, which seems even to have been preponderant, in the elaboration of the Covenant of the League of Nations and of the Treaty of Versailles. Nevertheless, the American Senate refused to approve his acts and, lacking ratification, the United States are not bound by the acts of which their President is considered to be the principal author.

The protocol of Geneva of October 2nd, 1924, for the peaceful solution of international conflicts, though adopted unanimously by the assembly of the League of Nations, has not been ratified. The protocol of September 29th, 1924, concerning the protection of Bulgarian Minorities in Greece, though approved and accepted unanimously by the Council of the League of Nations, signed by the representative of Greece, the President and the

General Secretary of the League of Nations, has not been ratified owing to its rejection by the Hellenic National Assembly, and the Council of the League of Nations approved the report of its President, which stated :

" Though this document embodied, at the moment of its signature, the character of a complete agreement from a legal point of view, the Council would, however, not desire to impose upon Greece new obligations which were not foreseen in the treaties and to which the National Assembly had to refuse its consent."

The Hungarian Government might, therefore, have refused to ratify any agreement arrived at in Brussels if one had been concluded. And even though the paragraph initialled by one of her two representatives might have been inoffensive in itself, she thought it to be her duty to disavow that representative, and has done so in order to emphasize clearly that she did not intend to accept any appearance of agreement.

On the other hand, the Council of the League of Nations, acting by virtue of Art. 11 of the Covenant, can only offer suggestions, give advice, act as mediator ; it cannot impose any decision. It can take no decision unless it seized in virtue of Art. 15, in which case the representatives of the States in dispute, have no right to vote. However, in the sitting of the Council of July 5th, 1923, the representative of Hungary was invited to vote, and if he abstained from voting, owing to an undoubtedly exaggerated sentiment of delicacy, he first made all reservations concerning the necessity of a judicial solution of the dispute, the non-existence of the so-called agreement of Brussels and the absence of any decision on the subject matter of the case, in the resolution proposed to the Council and adopted by it, thanks to the abstention of Count Apponyi.

In the terms of this resolution :

" The Council having examined the report of Mr. Adatci, dated June 5th, 1923, and annexed documents :

" Approves this report ;

" Takes note of the various declarations contained in the procès-verbal attached, and expresses the wish that the two governments will do their utmost possible to prevent the question of the Hungarian optants from becoming a cause of disturbance of the good neighbourly relations between the two countries.

" It is convinced that the Hungarian Government, after the efforts made on both sides to remove any misunderstanding upon the question of the optants, will do its best to appease the minds of its subjects ;

" And that the Roumanian Government, on its side, faithful to the treaties and the principle of justice upon which it declares to have based its agrarian legislation, will prove its good-will towards the interests of the Hungarian optants."

This resolution, in reality, does three things : (1) it approves the report of Mr. Adatci ; (2) it takes note of the various declarations contained in the attached procès-verbal ; (3) it expresses a hope and contains advice.

1. What says Mr. Adatci's report ?

" The Council, by its resolution of April 23rd, 1923, had charged its reporter to prepare the elements for a new deliberation upon the question of the Hungarian optants, expressing the hope that in the interval between the two sessions, the governments of Hungary and of Roumania would do their best to come to an agreement.

"The representatives of the two interested governments—Count Csâki and Dr. Gajzâgô for Hungary, and Monsieur Titulesco for Roumania—met on May 26th at Brussels, having been called together by me. The application of the Hungarian Government, dated March 15th, 1923, was again studied and discussed.

"This discussion is reported in the procès-verbal of which the text accompanies the present report, after having been submitted to the examination of the interested parties.

"Your reporter trusts that he has fulfilled his mission by having made, with the valuable aid of the Hungarian and Roumanian representatives, every effort, if not to harmonize the opposing theses, to obtain at least, every possible approximation between the two parties. The Council has been notified of the question which, to-day, is laid before it in application of Art. 11, §2 of the Covenant, which is intended to remove any circumstances which may affect, adversely, international relations, and disturb the good understanding between nations. What it must search for in such a case as the present, is not a solution of an abstract juridical nature, the difficulty of which is clearly evident upon reading the attached procès-verbal, but the whole measure of practical satisfaction which it can obtain in view of a settlement.

"I propose to the Council to take note to-day of the confirmation of the declarations announced in the procès-verbal, and to add to it a general recommendation tending towards conciliation."

The report thus indicated very clearly that it was not a question of the Council solving a dispute by a juridical solution, but to make a recommendation tending towards conciliation.

2. What were the declarations announced in the procès-verbal of which the report proposed that that note should be taken ?

The one to which Monsieur Titulesco attaches decisive importance, the one in which he pretends to see a renunciation by Hungary of Art. 250 of the Treaty of Trianon, in connection with the agrarian reform in Transylvania, runs thus :

"On the question of incompatability between the Roumanian law and the dispositions of the treaty relating to the rights of the Hungarian optants, it is admitted, and the Hungarian representatives do not contest that ;

"The treaty does not oppose an expropriation of property of optants for reasons of public utility, including the social necessities of an agrarian reform."

Even if this text is separated from the rest of the text of the procès-verbal, with which it has evident points of connection, it is clear that one cannot deduce from it the conclusions which Monsieur Titulesco draws from it. There is a shade in the meaning which, in reality, is a contradiction between the first and the second sentence of the text.

On the question of the incompatability between the Roumanian law and the dispositions of the treaty relating to the rights of the Hungarian optants, it is admitted, not that the treaty does not oppose expropriation as enacted by the Roumanian law, a formula which the Hungarian representatives certainly would not have accepted, but that the treaty *does not oppose an expropriation* of the property of the optants for reasons of public utility, including the social necessities of an agrarian reform, a

formula which the Hungarian representatives could perfectly well accept as Hungary has never claimed that the property of her subjects in Transylvania should be exempt from all expropriation, not even—which might, however, been upheld—that that property should be exempt from a general expropriation on account of an agrarian reform enacted four days after the coming into force of the treaty which promised respect for that property. Hungary has always admitted the possibility of expropriation for reasons of public utility, on condition that there be expropriation but not confiscation.

As the judgments of competence of January 10th, 1927, very rightly emphasize, the above Protocol was a formula, both conciliating and prudent, and which opened the door to negotiations aiming at an understanding, but which did not, in any way, solve the legal question at stake. When an attempt was made to solve the litigious point, the disagreement became evident. The Hungarian delegate expressly said: "In matters of expropriation, payment in cash only justifies itself . . . . . Hungary demands complete compensation. She cannot consider that payment at the rate of 1913 is equivalent to an indemnity. If there is no indemnification equal to zero, which is confiscation, Hungary considers that compensation at 1% is equivalent to a confiscation of 99%." The Hungarian delegate admits, therefore, that there is no incompatibility between the treaty and *an* expropriation, even for reasons of an agrarian reform, but that there is incompatibility between the treaty and the confiscation of 99% of the value of the property affected by the agrarian law.

The contradiction between the Hungarian and the Roumanian theses is, therefore, irreducible.

Nevertheless, the Hungarian delegate without having given way on the legal principle, declared himself willing to make concessions in reality. He was ready to accept, in the hope of an understanding, a proposal of compensation inferior to one hundred per cent. in consideration of the present difficulties of Roumania, but he could not accept indemnification at the rate of one per cent.

The Roumanian delegate remains immovable. And the procès-verbal concludes:

> "Both representatives consider it unnecessary to prolong the discussion on the question of the redemption price; no conciliation between their respective theses seemed possible as, on the one hand, the Hungarian delegate considered the compensation too insignificant and demanded that the value of the expropriated lands should be taken into account, and, on the other, the Roumanian representative denied that the Hungarian optants could be given a higher compensation than that accorded to the Roumanian subjects."

It was, therefore, very rightly that the judgments on competence decide that there had not been agreement, but disagreement, at Brussels, on the question which forms the object of the litigation. Any negotiation would become impossible if every formula admitted in order to facilitate discussions which fail to end in an agreement, should be considered as binding upon whoever admitted it, and especially as binding upon him in the sense desired by his adversary by twisting the words out of their exact meaning.

3. The Council expresses a hope and wishes for conciliation, and the wish, initialled by Count Czáki at Brussels, had nothing in it which could compromise the Hungarian thesis.

"And that the Roumanian Government, on its side, faithful to the treaties—Hungary demands nothing more than the fidelity of Roumania to the treaty of Trianon—and to the principle of justice which it declares to have made the basis of its agrarian legislation—Hungary considers that the principle of justice which the Roumanian Government declares to have made the basis of its agrarian legislation, is incompatible with the confiscation of 99% of the value of expropriated property—will prove its good will towards the interests of the Hungarian optants."

In any case, Count Apponyi is determined to avoid any misunderstanding. He declares that, in his opinion, the question remains unsolved.

"The question of the Hungarian optants of the territories detached from Hungary and annexed to Roumania, being a question of a juridical order, he says, the Hungarian Government persists in believing that, failing an agreement which, up till now, could not be arrived at, the only solution capable of ending it and producing the relief desired by everybody, is a decision upon the subject matter with judicial authority. He cannot recognize that the summary report of the pourparlers of Brussels, which did not end in a final arrangement (on the subject-matter of the case), could lay any obligations upon him.

"The profound respect towards the Council of the League of Nations by which he is animated, makes it his duty to say frankly that it is impossible for him, just as it would be impossible for any other government placed in a similar position, to act efficaciously in the sense of appeasing his optants, who consider themselves, and whom he considers, to be wronged in the rights guaranteed by the treaties so long as they are denied the judge whom they claim.

"The resolution accepted by the Council, further, does not contain, as the report of His Excellency Mr. Adatci expressly declares, any decision upon the subject-matter; the Hungarian Government reserves to itself, therefore, the right to take, in future, such steps as are permitted to it by the treaties and the Covenant of the League of Nations, in order to obtain justice for those whom it has the right and duty to represent."

Monsieur Titulesco, in order to prove that there was an agreement at Brussels, gives prominence to certain observations of Mr. Adatci and of Lord Robert Cecil. Neither Mr. Adatci, nor Lord Robert Cecil, nor the resolution of the Council of July 5th, 1923, say that there was an agreement on the main point; is the Roumanian agrarian reform compatible with the treaty of Trianon?

There is, further, one essential point which Monsieur Titulesco ignores. The representatives of a State can only bind the State—conditionally and not definitely, on condition of ratification by the authority constitutionally qualified for the purpose—within the limits of the power conferred upon them. Now what were the powers of Count Czáki and Dr. Gajzágó at Brussels? Their powers were defined thus by the Minister in charge of the Foreign Affairs of Hungary:

"The undersigned Royal Hungarian Minister of Justice, in charge of the management of the Ministry of Foreign Affairs, certifies hereby that the Royal Government of Hungary has charged His Excellency Count Eméric Csáky, former Minister of Foreign Affairs, in the capacity of Delegate, and Monsieur Ladislas Gajzágó, Ministerial Councillor at the Ministry of Foreign Affairs, in the capacity of Assistant-delegate, to represent the Kingdom of Hungary in the course

of the negotiations which will be opened upon the subject of the expropriation of the immovable property of the Hungarian optants, the 26th of May of the current year, at Brussels, between the Kingdom of Hungary and the Kingdom of Roumania.

" The above-mentioned delegates are provided with plenary powers to treat and to sign, in the name of the Royal Hungarian Government, the stipulations of the convention to be concluded."

The declaration of Monsieur Gajzágó, inserted in the report on the discussions at Brussels, alludes to these plenary powers :

" The Hungarian delegate," it is said therein, " desires to state that the meeting at Brussels took place precisely to give proof of conciliation and to seek for a solution of the case by way of agreement, in which both parties should show good will. He seizes this opportunity to declare solemnly in the name of his government, that he is very desirous of entering into negotiations with the representative of Roumania on the two essential points of the dispute, that is to say, the limit of the expropriation and the scale of compensation applicable to the Hungarian optants. He assures the Roumanian representative that he will find the best will and the most conciliatory spirit in the Hungarian negotiators who are armed with full powers to treat upon those questions."

But this advance of the Hungarian delegate was repelled by the Roumanian delegate. The convention which the Hungarian delegates had full powers to conclude, became impossible, owing to the Roumanian refusal. There was, therefore, no agreement in the terms defined in the plenary powers, and it can be easily understood that the Hungarian Government believed it to be necessary to point out that : " the plenary powers given to its negotiators only authorized them to negotiate directly with Roumania, and not to prepare the report of the reporter, as the Royal Hungarian Government had not been warned of such an eventuality."

Besides, the resolution of the Council mentions no agreement, and in the discussion, it seems that the members who thought that there had been an agreement of which they did not indicate the scope, considered that this agreement applied only to the acceptance of the last paragraph of the resolution. Mr. Adatci recognized, on July 5th, 1923, that his draft resolution " has the very serious defect of not solving the fundamental question." Monsieur Hanotaux declared : " that an extremely delicate situation has been created by the fact that a signed report of proceedings—Monsieur Hanotaux was mistaken ; the report of the proceedings was neither signed nor initialled—has been disavowed. But this is not the principal point, and here Monsieur Hanotaux adheres entirely to the views of Lord Robert Cecil and of Monsieur Branting. The Council plays the part of mediator. It is as such that its rôle is interesting and useful. It has had already the satisfaction, on several occasions, to smooth over disputes at the very moment when they threatened to extend and to have consequences. The Council cannot say " a signature which had been given has been disavowed ; my rôle is finished." Such an attitude does not correspond to the rôle of the League of Nations.

" The help of the Council had been demanded ; it was granted. Its reporter had succeeded, with the collaboration of the plenipotentaries of the two governments, in establishing a statement which was itself a first act of conciliation.

" Such was certainly the purpose of the Council, and its members address themselves in all good faith and with a sense of amicable conciliation to a government which the League of Nations had had the great happiness of welcoming into its midst last year. The Council addresses itself to the representative of Hungary and begs him simply to wait before taking resolutions which might entail complications and fresh conflicts. The Council was told that the populations would await a solution. The position was such that, with a little reflection, the advice given by the Council and the situation, so painful for everybody, should have impressed the Hungarian Government. Therefore, the members of the Council addressed themselves to this government, saying to it that they could not depart from the proposals suggested by the Japanese representative. Monsieur Hanotaux, for his part, rallies to these propositions."

Monsieur Hanotaux does not speak of an agreement. He defines very correctly the rôle of the Council, which is the rôle of a mediator and the sense of the draft of the resolution, the writing of which was a first act of conciliation. It is a matter only of " advice given by the Council."

In the affair of the protocol of September 29th, 1924, concerning the protection of the Bulgarian minorities in Greece, the Council of the League of Nations approved the report of its President, in which it was said :

" The Council of the League of Nations, in signing the protocol of September 29th, 1924, with the representative of Greece, had the right to believe that it was signing a document perfectly legal in all its bearings and dispositions, including the clause according to which the proposal made by Greece would come into force as soon as the stipulations would have been accepted by the Council of the League of Nations.

" It appears, however, to-day, from the official affirmations of the Hellenic delegate to the Council of the League of Nations, that the representative who signed the protocol had not been authorised to add the final clause by the inclusion of which the protocol in question was deprived of the parliamentary sanction necessary for every international act of this nature, in accordance with the fundamental law of the country and the ruling custom prevailing therein.

" The Council of the League of Nations expresses its keen regrets at having been led to proceed, through its President, to the signature of a document which it was justified in considering as a contract between itself and the Hellenic government. Though this document bore, for the Council, at the moment of its signature, the character of a complete agreement, from a legal point of view, the Council nevertheless would not wish to impose upon Greece new obligations not foreseen in the treaties and to which the National Assembly had already refused its consent."

Thus it appears that the representative of Greece had exceeded his powers on one point. The Hellenic National Assembly rejected the protocol by a resolution which did not even mention the lack of powers on one point. The whole protocol falls to the ground. The Council expressed its regrets at having been led to proceed to the signature between it and Greece. Nor did it claim to retain anything. It thus applied exactly those principles which the Hungarian government relies upon under conditions which are assuredly not less but even more favorable.

* * *

a treaty, even by way of internal legislation, cannot be tolerated, because it is inadmissible that a state which has pledged its responsibility and its honour in signing a treaty, should use the machinery of its internal legislation in order to evade its obligations.

" but the Tribunal will not even have to find, expressly, fraud in this case, because expropriation without compensation, and moreover, in most cases, by way of a differentiation against the property of Hungarian subjects, manifestly constitutes ' seizure ' and ' liquidation ' without the necessity of looking for either the intentions and motives of the internal legislation or the ulterior use made by the State of the properties thus expropriated, that is to say, whether it uses them to carry out another re-distribution of the land by way of an agrarian reform."

* * *

Monsieur Titulesco confuses under the altogether improperly called Agreement of Brussels, two quite distinct questions : the declaration of the report on the proceedings according to which there is no incompatability between the treaty of Trianon and *an* expropriation, and the last paragraph of the resolution of the Council. And this confusion vitiates his whole argument.

" You see," he says, " that I am not the only one to say that an agreement recognising the compatibility of the agrarian law and the treaty of Trianon was concluded at Brussels. I am in good company, beside Monsieur Daruvary, who, by his disavowal, recognised the existence of the agreement, and beside Mr. Adatci, who by his determined language, upheld it."

Now, the disavowal of Monsieur Daruvary applied solely, to the last paragraph of the draft of the resolution of the Council, wrongly initialled by Count Csáky.

" The Arbitral Tribunal," Monsieur Titulesco adds, " has not put this agreement aside this by saying that it does not apply to the Hungarian subjects. It has interpreted it at length."

The Tribunal has not interpreted the agreement. It judged that there had been no agreement which recognised the compatibility of the agrarian law with the Trianon Treaty—" only it opens by a consideration which makes it unnecessary for me to read what follows." It is, however, that which follows which is most important, and which has even a decisive importance. He qualifies as " doubtful " the declarations of the Hungarian representative.

" Considering that the above-mentioned Report on the Proceedings relating to the conversations which took place at Brussels between the representatives of the two governments, clearly indicates everywhere by whom the declarations contained in it were made, either by reproducing textually those declarations, or simply by giving the sense of them ; that the passage invoked by the defender contain no such indication, and that, if only for this reason alone, it is at least doubtful whether a formal declaration really exists, at least on the side of the Hungarian representatives."

" Doubtful the procès-verbal of Brussels, when the Minister of Foreign Affairs disavows ? Doubtful when Mr. Adatci writes in his memorandum that the procès-verbal has obtained the formal assent of the two parties ? Doubtful when the procès-verbal is mentioned in the resolution of Mr. Adatci, which the delegates of the two governments signed in virtue of their full powers ? "

Monsieur Titulesco commits a serious mistake when he alleges that the Mixed Arbitral Tribunal has, by its judgments of competence, bound itself to the alternative of either condemning the Roumanian State or of retracting former judgments, because it did not pronounce on the questions constituting the characteristic differences between the liquidation for which it is competent and the expropriation for which the Hungarian subjects recognize it to be incompetent.

The Tribunal should declare itself competent for the fact alone that Hungarian subjects had appealed to it with applications based upon infraction of Art. 250 on account of seizures or liquidations. The question of ascertaining whether in each case the application was well founded or not, whether there was or not forbidden seizure or liquidation, is a fundamental question. And Monsieur Titulesco admits this himself when he criticizes the examples quoted by Monsieur Gajzágó, and alleges, particularly, that in the village where Madame Groza complains of being the victim of an illicit expropriation, no property was inscribed in the name of Groza. The Roumanian State has only to establish this fact before the Mixed Arbitral Tribunal for this Tribunal. without retracting its judgment, after having affirmed its competence, to declare the claim to have no foundation.

The Mixed Abritral Tribunal has admitted, after the Permanent Court of International Justice, that forbidden seizure and liquidation include any dispossession against the will of the owner contrary to international common law, unless the State which carries out the dispossession produces a title justifying in this matter an exception to international common law. It invited the Roumanian State to produce such titles if it had any. The stating of this principle freed it from the necessity of examining the question whether the agrarian law for Transylvania had, or had not, been enacted in breach of the treaty of Trianon, as Monsieur Pillet maintains in his opinion of November 30th, 1926.

Mr. Pillet had no doubt whatever about the intentions of Roumania.

> "In this law," he wrote, "made, in appearance, for all Roumanians, it is visible that, in the first place, it was the Hungarians whom it was intended to strike, and that the government never had any intention other than to despoil them."

He sees the proof of this in the differences, entirely to the disadvantage of the owners in Transylvania, between the law for Transylvania and that for the old Kingdom! He adds further on:

> "The Tribunal will see if there are grounds for taking into account the fact that the money raised by the expropriations enforced against the Hungarian subjects who owned property in Transylvania, is not paid into the common reparations fund, but benefits directly either the public services or the agricultural labourers, whose condition the said expropriations were supposed to be aimed at improving. On this point the Roumano-Hungarian Mixed Arbitral Tribunal will not fail to reply that the good done to one party is illegal when it is done by harming the other. Charity is not practised by injuring the rights of others.
>
> "Here presents itself, in reality, a question of a fraudulent breach of a treaty. Nobody is unaware that questions of the effect of defrauding the law are dealt with by civil law. The question of defrauding a treaty has, as far as we know, not been discussed till now; it is, however, of a much more certain influence. Fraud against

Monsieur Titulesco is here guilty again of several confusions, notably in the interpretation of the sentence which he quotes of the judgments on competence. These judgments do not say that the procès-verbal of Brussels is doubtful. They say that assuming that the procès-verbal indicates everywhere, in a clear manner, by whom the declarations in it were made, it is at least doubtful that the Hungarian representatives have made a formal declaration that " the treaty is not opposed to an expropriation of the property of the optants for reasons of public utility, including the social necessities of an agrarian reform." This is the evidence itself. The procès-verbal states : It is admitted that the Hungarian representatives do not contest that the treaty, etc. . . . . ." These terms seem clearly to exclude any formal declaration by indicating that the formula proposed by a person not mentioned, had not given rise to objections on the part of the Hungarian representatives. The Tribunal was, therefore, quite justified in saying that it was at least doubtful whether there had been, really, a formal declaration on the part of the Hungarian representatives.

If Monsieur Titulesco is pleased with the confusions, it is in order to deduce from the last paragraph of the resolution of the Council an interpretation which the terms of that paragraph do not cover, and which is contradicted by the whole attitude of the Hungarian delegates, of Count Csáky as well as of Monsieur Gajzágó.

Monsieur Titulesco wants to give this paragraph a sense which would require the addition of two words which Count Csáky would not have accepted because he could not accept them without contradicting himself. Monsieur Titulesco reads as if the Council had written :

> " The Council is persuaded that the Roumanian Government on its side '*which is*' faithful to the treaties and the principle of justice on which it declares to have based its agrarian law, will prove its good will towards the interests of the Hungarian optants."

The words "*which is*" are not in the resolution, and they could not be there because if they were there, the resolution would have solved the fundamental question of the subject-matter of the case. This, however, it did not do, as Mr. Adatci stated it could not have done without exceeding the powers of the Council.

The natural sense of the text is that the Council, inviting the parties to be conciliated, is persuaded " that the Roumanian Government " showing itself " faithful " according to the wish and hope of the Council, " to the treaties and the principle of justice which it declares itself to have made the basis of the agrarian legislation "—the Council does not say which *it has made*, but which *it declares itself to have made* :—" will prove its good will towards the interests of the Hungarian optants."

* * *

> " The case of the Hungarian subjects ? Judged four times ! " Says Monsieur Titulesco. " A first time by the Hungarian Government at the Peace Conference ; the second time by the Hungarian Government on the occasion of the Brussels Agreement ; a third time by the Council of the League of Nations on the basis of that agreement ; a fourth time by a Roumanian Court freely chosen by them."

What is the value of these affirmations ?

At the Peace Conference the Hungarian Government judged nothing at all. It asked for " a reassuring declaration that property belonging to its subjects and situated in territory of the old Austro-Hungarian Monarchy should not be sequestrated, liquidated or expropriated in virtue

of a legal decision or by a special measure which does not apply in the same conditions to the subjects of the legislating State, or of the State carrying out that measure." Why did it make this request? Because the Roumanian decree of September 12th, 1919, ordered the total expropriation of the immovable property of all foreign subjects whatsoever. The Hungarian Government begged at the same time—which Monsieur Titulesco omits to say—the guarantee of the jurisdiction of the Mixed Arbitral Tribunal, to assure the promised institutions.

The Allied and Associated Powers do not grant the definitions asked for, but do even better; they give even wider guarantees:

> "The different observations presented by the Hungarian Delegation relating to the treatment applied by Roumania and Czecho-Slovakia to immovable property," they say "is a question of interpretation of the peace treaty, which cannot be dealt with at present.
>
> "The Allied and Associated Powers have, further, no objection to recourse to the Mixed Arbitral Tribunal as proposed by the Hungarian Delegation for the settlement of disputes relating to the restitution to the subjects of the former Kingdom of Hungary of their property, rights and interests situated on transferred territory, as provided for by Art. 250 of the Treaty."

The Hungarian Government asked for a definition of the national treatment so as to be protected against the exclusion resulting from the Roumanian decree of 1919 against foreigners. The Allied and Associated Powers replied: "The treatment of the immovable property which arouses your uneasiness as regards Roumania and Czecho-Slovakia, raises a question of interpretation of the treaty. It is not for us to settle that. It will be dealt with by the Mixed Arbitral Tribunal which will give you all the guarantees you can desire."

No privilege of jurisdiction, proclaims Monsieur Titulesco. The letter of the Commission of the new States, dated April 13th, 1919, is opposed to it. What does this letter say? It relates to the treaty of minorities, not to the treaty of Trianon; that is why the Mixed Arbitral Tribunal put it aside as extraneous to the debate. How so, says Monsieur Titulesco, as it considers a text identical with that of Art. 63; Monsieur Benes demanded that it should be laid down that the immovable property of the optants should be subjected to the same rules as the property of the Czecho-Slovakian subjects. The Commission for the new States replied that it was happy to be able to express the opinion that the interpretation of Monsieur Benes was correct, and that it "had not appeared necessary to the Commission to insert a supplementary clause to safeguard, without preference of any kind, under the regime of the Czecho-Slovakian law, all goods and property on the territory of the Republic."

> "And the text being identical," adds Monsieur Titulesco, "this interpretation is valid for all the interested States."
>
> "Without preference of any kind means neither privilege as to the conditions of expropriation nor privilege as to price, nor privilege as to jurisdiction."

Monsieur Titulesco triumphs too much, for he triumphs by placing the Commission for the new States in contradiction with Art. 250 of the Trianon Treaty. As between the precise and formal test of a treaty, and an interpretation emitted by a commission of preparation of this treaty—a fortiori if of another treaty—it is the precise and formal text which is authoritative.

The interpretation of the Commission of the new States can have, after all, a meaning in harmony with the Treaty. It is sufficient to take it as signifying—which is a sure solution—that the properties conserved by the optants will be subjected without preference of any kind, to the regime of the Czecho-Slovakian laws in so far as this law itself is not in contradiction with the treaties; but, in virtue of Art. 267 of the Saint-Germain treaty—of which the definite text is of later date than the letter of the Commission for the new States(1)—as well as according to Art. 250 of the Treaty of Trianon, the properties of Austrian subjects—like the properties of Hungarian subjects—are exempt from seizure and liquidation if they are situated on territories formerly belonging to the old Austro-Hungarian Monarchy, and Art. 250 of the Trianon Treaty states that the Roumano-Hungarian Mixed Arbitral Tribunal has to judge whether there has been, or not, seizure or liquidation of property belonging to Hungarian subjects on the territories of the old Monarchy ceded to Roumania.

A second time by the Hungarian Government on the occasion of the Brussels Agreement? The Hungarian Government has not judged and condemned its subjects at Brussels because, if it has admitted the compatability of the Trianon Treaty with *an* expropriation for reason of public utility, even of agrarian reform, it refused to admit the compatability of the Trianon Treaty with *the* law of agrarian reform for Transylvania.

A third time by the Council of the League of Nations on the basis of the Brussels Agreement? No, the Council of the League of Nations did not judge anything and it had nothing to judge. In its rôle of mediator it gave advice which was not followed—as might easily have been foreseen—by either of the parties.

A fourth time by a Roumanian Court, freely chosen by the Hungarian subjects? The Mixed Arbitral Tribunal has justly condemned this allegation.

> "Considering," state the judgments of January 10th, 1927, "that the defender alleges that the claimant has voluntarily gone to the Roumanian Tribunals without pleading exception to Art. 250, that he presented arguments of defence concerning the subject-matter of the question, and thus recognised that the measures, impeached to-day, do constitute acts of expropriation, and then having recognised before the Roumanian Courts that the agrarian laws constitute an expropriation, the applicant cannot maintain, now, before an international tribunal, that those same laws constitute liquidations in the sense of Art. 250.
>
> "Considering that the defender cannot invoke any principle of law in support of these allegations, which, in fact, are contrary to the universally recognised thesis, to wit, that in cases of international jurisdiction there is nothing against a private person beginning by exhausting the means of recourse offered by the National law before addressing himself to the international courts; that the fact of having invoked internal law only before the Roumanian tribunals would not deprive him of the right of availing himself before this tribunal of the provisions of an international treaty."

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(1) See the note of Mr. de Lapradelle, Recueil de la jurisprudence des Tribunaux Arbitraux Mixtes Créés par les Traités de paix, IV., Compétence, p. 563, note 1.

In reality the question of the interpretation of Art. 250 has never been judged fundamentally. The Hungarian Government and subjects have asked that it should be. After a thousand difficulties they found at last the judges required in the Roumano-Hungarian Mixed Arbitral Tribunal. It is the duty of the Council of the League of Nations to see to it that it should not be made impossible for this Tribunal to do its duty by the resignation of the Roumanian arbitrator. It is its duty to provide for this by nominating two neutral arbitrators in conformity with Art. 239 of the Treaty of Trianon. It is not its duty to substitute its own decisions for those which the Roumano-Hungarian Mixed Arbitral Tribunal has already given on competence, and which it will give on the subject-matter of the question. No Article of the Covenant or of the treaties confers upon it such power, which would be nothing else than the supreme power in a League of Nations, become a super-state.

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Whilst the speech of Monsieur Titulesco had the object of explaining the reasons why Roumania refused to bow before the judgments of competence, in spite of Art. 239 of the Treaty of Trianon, according to which " the High Contracting Parties agree to consider the decisions of Mixed Arbitral Tribunal as definite," the statement, sober and substantial at the same time, of Monsieur Gajzágó, had the object of asking for the nomination, by the Council of the League of Nations, " of two subjects of states which had remained neutral during the War, as substitute arbitrators, so that each State may have the possibility of selecting, in case of necessity, the substitute for the missing National Arbitrator of the adversary State." This demand was the consequence of the strange attitude adopted by Roumania, which, after having pleaded incompetence, had declared that the Roumanian Arbitrator would no longer sit in cases in which the agrarian reform would be under discussion. Roumania claimed to be able to justify this attitude by alleging that the judgments of competence of the Roumano-Hungarian Mixed Arbitral Tribunal should be considered as nul and void for the reason that they were vitiated by an excess, or usurpation, of power. Monsieur Gajzágó replied to this allegation that the accusation of abuse brought against the Mixed Tribunal " Could only be considered as serious in case that Roumania would consent to lay the question as to whether there had been an excessive use of power or not by the Roumano-Hungarian Mixed Arbitral Tribunal," by special compromise before the Permanent Court of International Justice, to be settled by the latter by way of a judgment. He invited Monsieur Titulesco to accept this offer of arbitration. The invitation was declined, or rather eluded, Monsieur Titulesco alleging that " with the question of incompetence, of excess of power, the whole juridical problem retired into the background," as the Brussels agreement paralysed every juridical discussion between Hungarians and Roumanians and as the Council of the League of Nations could not proceed with the designation of neutral arbitrators without retracting what it had decided in 1923 by the resolution related above.

The allegation of Monsieur Titulesco was purely specious, as the Council had taken no decision in 1923, as demonstrated above, and could not, anyhow, to contradict itself, or retract, by proceeding to the nomination of arbitrators as demanded by Monsieur Gajzágó.

The duty of the Council was very simple and very clearly indicated by the Treaty of Trianon, and by the Covenant of the League of Nations. If the Council has failed to perform it, this is evidently because the custom has established itself, in a very improper fashion, in many states, of delegating at the Council, instead of to permanent representatives—able to

consecrate their whole activity to the heavy task of personally studying and following all the matters referred to the Council—to chance representatives, temporary and variable, often chosen from among ministers or politicians, too much occupied to have time to examine, before the sessions, the problems they are called upon to solve. The delegates at the Council in March, 1927, were not the same as the delegates in March and July, 1923. They did not know, and could not know, exactly what had taken place in 1923. Surprised by the fireworks of the impetuous, daring and specious eloquence of Monsieur Titulesco, impressed by the solid statement of Monsieur Gajzágó, they concluded—and doubtless they could not come to any other conclusion—that they had to deal with a complicated problem and that they would need to study it.

> " It is a question, in this case, not only of a dispute between two Members of the League of Nations," said the President. " The question is one concerning the competence of the Arbitral Tribunals in relation with the municipal law and international law on the same subject. It is impossible for the Council to undertake now a profound examination of this question. It will be necessary to study the documents which have been cited, and the statements which have been made."

In consequence, the Council charged Sir Austen Chamberlain, Viscount Ishii and Monsieur de Villegas to report on the question at its next session.

In reality, the question was much simpler and much more serious than the Council imagined ; much simpler because the duty of the Council to nominate the neutral arbitrators, demanded by Monsieur Gajzágó, was laid down by the Treaty of Trianon ; much more serious because, if the Council entered into the subject-matter of the case with the intention of giving a decision upon it, it would destroy all the machinery set up by the Covenant of the League of Nations for the peaceable solution of international conflicts.

Under the terms of Art. 230(g) of the Treaty of Trianon, " the High Contracting Parties agree to consider the decisions of the Mixed Arbitral Tribunal as definitive, and to make them obligatory upon their subjects." These terms are clear. Every decision of the Mixed Arbitral Tribunal is definitive. No distinction is drawn between the decisions on the subject-matter of the case and decisions on competence. And, very rightly, the Signatory Powers have made no distinction because they intended to assure the settlement of all the causes referred to the Mixed Arbitral Tribunals, and because, to authorize a refusal to acknowledge judgments of competence would have been the surest means to leave undecided any litigation in which the plea of incompetence might be raised. The Treaty of Trianon thus only enforced the application of the principle contained in Art. 48 of the Hague Convention of July 29th, 1899, for the peaceable settlement of international conflicts, and reproduced in Art. 73 of the Hague Convention of October 18th, 1907 : " The tribunal—Arbitral—is authorised to determine its competence by interpreting the compromise as well as the other treaties which may be invoked in the matter, and by applying the principles of international law."

To give the Arbitral Tribunal the right to pronounce definitive sentences means to forbid every recourse as well as every refusal of execution for any reason or on any pretext whatsoever, on account of exceeding its powers as well as on account of error of the judge. That,

undoubtedly, might mean exposure to the risk of a misuse of powers, or of an error on the part of the judge. But it is necessary to run the risk, either of an undecided case, or of an abuse of power, or of an error of the judge.

By agreeing, beforehand, to the definitive character of the sentences, the contracting parties make their choice between the two risks, and that choice itself is definitive. Further, the contracting Powers have limited the chosen risk so far as to eliminate it nearly, if not entirely, by the guarantees stipulated for the purpose of assuring the good composition of the tribunal. According to Art. 239 of the Treaty of Trianon, of the three members of the tribunal, each of the two Powers appoint one, and both together appoint the president. If no agreement can be reached as to the choice of the president, " the president of the tribunal and two other persons, both qualified, in case of need, to replace him, will be chosen by the Council of the League of Nations." In this case, the president of the Mixed Arbitral Tribunal was chosen by agreement between the Hungarian and the Roumanian Governments. By his double career as a diplomat in the Swedish service, and as a magistrate of the Mixed tribunals in Egypt, Monsieur de Cedercrantz presented all the guarantees that could be desired, and singular daring is needed to accuse of abuse of power, judgments which are affirmed by a competence, concerning which no doubt should be raised. In fact, Art. 250 of the Treaty of Trianon exempts from seizure and liquidation the property of Hungarian subjects situated on the territories of the former Austro-Hungarian Monarchy, and stipulates that " the claims which might be presented by Hungarian subjects in virtue of the present Article, will be submitted to a Mixed Arbitral Tribunal provided for in Art. 239." As the competence is determined, not by the application being well founded, which is the subject-matter of the case, but by its nature, it suffices for the Roumano-Hungarian Mixed Arbitral Tribunal to be competent for an application to be made to it by a Hungarian subject complaining of an infraction—real or imaginary—of Art. 250 of the Treaty of Trianon. Roumania, trying to set the competence aside, alleged that the Hungarian subjects complained of having been expropriated in virtue of the law of agrarian reform of July 30th, 1921, and that, as expropriation is not liquidation, the Mixed Arbitral tribunal, competent in cases of liquidation, was not so in matters of expropriation. But after judgment No. 7 of the Permanent Court of International Justice, from which it results that an expropriation can, in some cases, constitute liquidation, it would have been really an impertinence from the Mixed Arbitral Tribunal towards the Permanent Court of International Justice, to declare itself incompetent. This would have amounted to saying that the solution pronounced by that Court was not even worth examination, and that it was impossible for an expropriation, without adequate compensation, ever to be a liquidation. Not only did the Mixed Arbitral Tribunal not commit any abuse of its powers by affirming its competence, but, in addition, it was impossible for it to declare itself incompetent under pain of condemning, as quite absurd, judgment No. 7 of the Permanent Court of International Justice, or of examining—which it ought not to do—the whole subject-matter of the suit in order to pronounce upon its competence.

Roumania, having recalled her arbitrator, the Council of the League of Nations, very evidently has the duty and the sole duty of proceeding with the nomination of neutral arbitrators, who will enable the tribunal to be reconstituted.

" If, in case of a vacancy, a government does not appoint within the period of one month, a member of a tribunal as provided for above, this member will be selected by the adversary government from among the two persons mentioned above (neutral arbitrators)."

Thus Art. 239 of the Trianon Treaty is expressed.

Monsieur Titulesco seems to have reserved to himself the faculty of contesting that there is a vacancy. The vacancy is, nevertheless, not doubtful. By a curious anomaly it is only a partial vacancy. Roumania has not completely withdrawn her arbitrator from the tribunal which it accuses of exceeding its powers ; she withdrew him only for these causes, wherein the agrarian law would be in question, causes for which she denies competence to the tribunal, usurping thus the right to pronounce upon competence which the Treaty of Trianon invested in the tribunal.

But the sense of Art. 239 of the Treaty of Trianon is clear, as is clear the thought which inspired this article. The contracting Powers did not wish that the bad will of an interested State should be able to put an obstacle to the functioning of the Mixed Arbitral Tribunals. They created a procedure to overcome this bad will in case it should manifest itself. The tribunal must be composed, if possible, according to the wishes of the interested Powers; for that reason each Power nominates one arbitrator and the president is nominated by the agreement of the two. Should there be disagreement as to the choice of the president, the Council of the League of Nations remedies this by designating the president, and designates at the same time two other neutrals from among whom " the adversary Government " will select one to replace the withdrawn arbitrator of the other party.

Art. 239 does not foresee, *in terminis*, the case in which the agreement, at first, permitted the choice of the president and thus relieved the Council from intervention, but in which, later on, one of the arbitrators failed to act. Even in the absence of any other prescription, the Council of the League of Nations would be justified in intervening by designating, if an absence should arise, the two neutral arbitrators intended to permit the completion of the tribunal which had become incomplete. But there is another text which confirms and specifies at the same time the procedure indicated in Art. 239, and the meaning of the word vacancy. It is paragraph 1 of the annex to Art. 239 thus formulated : " In case of decease, or of resignation, or if a member of the tribunal is for any reason unable to carry out his functions, the procedure which was followed for his nomination will be employed to provide for his substitution." The text clearly indicates that for whatever reason a member of the tribunal may find himself in the impossibility of fulfilling his functions, he must be replaced, and to replace him, the procedure must be followed which was, or might have been, employed for his nomination. From the combination of Art. 239 and of paragraph 1 of the annex, it appears that for the replacing as for the first nomination, agreement between the parties is preferable, but, failing this, the Council must supplement the lacking good will of one or the other of the interested powers by proceeding with the designations indicated in Art. 239.

It is the interpretation which is dictated by reason, and imposed by common sense ; it is the interpretation which the Council of the League of Nations gave in 1923 when in its sessions of January-February and of April, it designated the substitute members for the Franco-German, Franco-Austrian, Franco-Hungarian, Franco-Bulgarian, Belgo-German, Belgo-Austrian, Belgo-Hungarian and Belgo-Bulgarian, Mixed Arbitral Tribunals. The reports of Monsieur Blaneo (laid before the Council on

February 3rd, 1923) and of Monsieur Guani, adopted by the Council on April 17th, 1923, similarly recall that " for the choice of the presidents of the Mixed Arbitral Tribunals there is no need to have recourse to the intervention of the League of Nations. But it always remains necessary, they add, to provide for the choice of the substitutes mentioned in the treaties."

The Council of the League of Nations could, therefore, not refuse to designate the neutral arbitrators demanded by Hungary without retracting its own judgment, and without violating Art. 239 and paragraph 1 of the annex to Art. 239 of the Treaty of Trianon.

It would be altogether vain to maintain that there is no vacancy when an arbitrator consents to sit for certain matters and refuses to sit for others. There is a vacancy for the matters for which the arbitrator refuses to sit, and, for those matters, a substitute is necessary; it is prescribed by paragraph 1 of the annex of Art. 239. One might even maintain that the arbitrator who refuses to act in certain cases, on his own initiative, or by order of his Government, fails in his duty, and should be *replaced*, not only for those cases, but for all, that he has abandoned his functions as arbitrator, and that he can no longer carry them out. This is, perhaps, even the solution which might appear most natural according to the text of Art. 239 and paragraph 1 of the annex of that Article. Besides, it would be quite logical to provide for the definitive replacing of an arbitrator who, by refusing to act in some cases, refuses to perform the functions with which he was invested.

But, on the other hand, the spirit of Art. 239 seems really to be that the tribunals should, as far as possible, be composed according to the choice of the interested Powers and, in consequence, should have recourse to the substitutes designated by the Council of the League only in case of default by one of these Powers. It was this principle which prevailed when Germany, after having withdrawn her arbitrators from certain Mixed Arbitral Tribunals owing to the occupation of the Ruhr, afterwards permitted them to act again.

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The Council of the League of Nations could not refuse to designate the neutral arbitrators demanded by Hungary, without violating the Treaty of Trianon and, at the same time, even the Covenant of the League of Nations.

In fact, the Council could not refuse the designation demanded without bringing up the whole subject-matter of the litigation for decision, which the Covenant forbids it to do. Seized by Roumania in virtue of Art. 11, the Council is invested, under this article only, with the power of a mediator. It has exercised this power already, and played the rôle of mediator in 1923. It did so without success, and the present circumstances are more unfavorable than those in 1923 to any attempt at conciliation. Hungary has always asked that the dispute should be settled by the judgment of a Court; she has obtained the judgment of competence; she wants judgment on the subject-matter of the question; the Hungarian Government cannot renounce the right of obtaining the judgments which Roumania claims to set aside. There is, therefore, no chance of success for a mediation by the Council.

But the Council of the League of Nations has no right whatever to settle the case of the subject-matter of the dispute. The rules of the Covenant concerning the solution of international disputes are very clearly defined. As was said before, every dispute that cannot be settled by diplomatic means must be submitted to an examination.

This examination can take either of these two forms : Arbitration or proceedings before the Council. The way of Arbitration implies the consent of the two States in dispute ; this consent can be given either on a dispute already existing, or for future differences by treaty stipulation. But when the consent has been given, arbitration becomes exclusive of anything else ; there is no longer place for proceedings before the Council. And the reason for it is simple : arbitration gives the certainty of a juridically obligatory solution ; proceedings before the Council do not give this certitude as the Council can only take decision by unanimity.

The Treaty of Trianon stipulated the obligation of arbitration before the Mixed Arbitral Tribunals. The Council of the League of Nations cannot substitute its decision for that of this arbitral tribunal. It can only reply to the Roumanian charge by a plea in bar ; it can say but one thing to Roumania : you have signed and ratified the Treaty of Trianon ; you have accepted the arbitration of the Mixed Arbitral Tribunal as defined by Art. 250 of the Treaty of Trianon ; the tribunal has declared itself competent ; its judgments on competence are definitive ; you can only plead on the subject-matter of the case. I have no competence to examine, reform or annul, the judgments of which you complain. I have no competence to examine, reform or annul, the judgments of international courts, and the Roumano-Hungarian Mixed Arbitral Tribunal is an international court with the same right and rank as the Permanent Court of International Justice. You have no more right ground to protest before me against the judgments of competence of the Roumano-Hungarian Mixed Arbitral Tribunal than Poland would have had to do so against the judgment of competence by the Permanent Court of International Justice, or against judgment No. 7 of this Court in the Germano-Polish dispute, a dispute analoguous in some points with your dispute with Hungary. I am neither an appeal court nor a court of cessation in international cases. I am not a judiciary authority and I have no sort of power of control over international courts. I can only, in virtue of Art. 11, give you advice, and the only advice which I can give you now, is to bow before a judgment which you have engaged yourself to consider as definitive.

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Monsieur Gajzágó in his statement preceding the application for the designation of the two neutral arbitrators, incidentally invited the Roumanian representative to accept an offer of arbitration, tending, by a special compromise, to bring the question before the Permanent Court of International Justice, the question to be settled by the latter by means of a judgment as to whether or not the Roumanian-Hungarian Mixed Arbitral Tribunal exceeded its powers in the 22 decisions of competence of January 10th, 1927. The offer, not having been accepted, can be withdrawn ; it may even be asked if it has not become void by the very fact, that no answer was made. It might be renewed, because it is too certain that the Tribunal did not exceed its powers for Hungary to be in any doubt about the decision which the Permanent Court of International Justice would pronounce. If the offer remained open, the Council of the League of Nations could, without violating the Treaty of Trianon or the Covenant of the League of Nations, advise the two powers in dispute, as mediator in virtue of Art. 11 of the Covenant, to sign a compromise to the effect that they would seize the Permanent Court of International Justice the question whether the Mixed Arbitral Tribunal had or had not exceeded its powers. Does this mean that the Council of the League of Nations had reason to request Roumania to accept the Hungarian offer ? I do not think so.

It would be, evidently, a moral satisfaction for Hungary, and also, undoubtedly, for the Mixed Arbitral Tribunal, to see the Permanent Court of International Justice condemn the accusation of exceeding powers formulated against the judgment of competence of January 10th, 1927. But would it be advisable for the Council to encourage the creation of a precedent which, under the guise of increasing the moral authority of judgments, which have no need at all of this increase, would really risk—contrary to the very certain intention of the author of the offer—the institution, in fact, of a sort of hierarchy among International courts, and initiate, so to say, appeals against arbitral courts on account of their exceeding their powers before the Permanent Court of International Justice. I take it that such appeals would be subordinated to the consent of the powers in dispute, but the precedent once created, what would be the moral position of the power refusing its consent? Would that consent not be, to some extent, forced?

The preamble of the Covenant states that it is necessary " to respect scrupulously all treaty obligations in the mutual relations of organised peoples." Art. 239(g) says that " The High Contracting Parties agree to consider the decisions of the Mixed Arbitral Tribunals as definitive." Can the Council of the League of Nations, guardian of the Covenant, say to the Powers in dispute: You have bound yourselves to regard the decisions of the Mixed Arbitral Tribunal as definitive, but I ask you to consider them as definitive only if—one among you having refused to consider them as definitive by accusing them of acting in excess of powers—the Permanent Court of International Justice judges that there has been no exceeding of powers.

Without doubt, Monsieur Gajzágó's offer is a homage rendered to the Mixed Arbitral Tribunal, evidence of confidence in the perfect correctness and excellence of judgments pronounced, but is it advisable for the Council to encourage the possibility to call into question again that which, according to the treaties, should not be called into question.

Would the Council be faithful to its rôle of guardian of the Covenant and treaties if it encouraged an infraction of the scrupulous respect for the treaties, even if this infraction were inspired by the desire to make still more evident the correctness of sentences which, obviously, are correct?

It is necessary that the authority of arbitral judgments should not be discussed, and in endeavouring to increase it, that one does not expose oneself to the risk of diminishing it. If a judgment, impeached of being in excess of powers, were deferred to the examination of the Permanent Court of International Justice, by agreement of both parties, it would have to be feared that, in future, such a charge would be sufficient to throw suspicion upon the judgment and to put the winning party to the alternative of either proposing to return the case to the Permanent Court of International Justice, or to avail itself only of a judgment depreciated by itself if it did not propose this return.

The Permanent Court of Arbitration at the Hague, having given its first judgment by the unanimous votes of the arbitrators, thought fit to mention this unanimity in its judgment. On this point it was criticised for having involuntarily, unconsciously, created, to some extent, two classes of judgments; judgment by unanimity and judgment by majority. The increase in authority, which it thought to give to the first, had the drawback of depreciating the others. The Hague Conference

of 1907, thought fit to curb the excessive zeal of the Court. The Convention of October 18th, 1907, specified in its article 78 that all the deliberations would be taken by a majority, which would exclude any mention of unanimity.

For reasons of the same order, the Council of the League of Nations would be well inspired if it checked the Hungarian zeal by saying to Hungary : The sentiment which has guided you is assuredly praiseworthy in itself ; but the offer which you have made to Roumania risks creating, unless I call a halt, a dangerous precedent, an encouragement to flout the authority of definitive judgment. Withdraw your offer, if it is still open ; I shall immediately designate the two neutral arbitrators you claim and whom I am bound to designate ?

CHARLES DUPUIS.

HOUSE OF LORDS,

Thursday, 17th November, 1927. *[Extract from Official Report].*

Roumania and the Mixed Arbitral Court.

LORD NEWTON asked if it is the case that the Roumanian Government has officially declared that it refuses to submit to the decisions of the Mixed Arbitral Tribunal set up under the Trianon Treaty. The noble Lord said: My Lords, this Question, which has been on the Paper for some time, is in itself of a very trivial nature, because it only concerns the question relating to the property of various Hungarians in Transylvania, and the answer to it is obvious. But as a matter of fact very important issues are involved, and it raises a question of very considerable complexity. And the complexity of this matter has been increased owing to the fact that a concurrent agitation, so to speak, has been going on recently advocating the revision of the Treaty of Trianon. I have not a good word to say for the Treaty of Trianon, but at the same time I should like it to be clearly understood that I and the other persons who are interested in this question are not asking for the revision of the Treaty of Trianon; what we are asking for is that the conditions of that Treaty shall be fulfilled.

After the War, as everybody knows, many questions arose regarding the disposal of property of various kinds in the new countries, and in all the Treaties which were signed at Paris articles were introduced safeguarding the property of foreign subjects in the new dominions and arbitral tribunals were created in every instance in order to consider this particular subject. These arbitral tribunals are functioning in every country in Europe, so far as I know, and their work has been uniformly successful. The particular Article in the Trianon Treaty which deals with this question is Article 250, which read as follows:—

"Notwithstanding the provisions of Article 232 and the annex to Section IV the property, rights and interests of Hungarian nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with these provisions.

"Such property, rights and interests shall be restored to their owners freed from any measure of this kind, or from any other measure of transfer, compulsory administration or sequestration, taken since November 3, 1918, until the coming into force of the present Treaty, in the condition in which they were before the application of the measures in question.

"Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239." All that seems perfectly plain; I do not think anything could be plainer.

But I will ask the House to follow exactly what has taken place. The Trianon Treaty was signed in June, 1920, and I may remind the House that we were parties to that Treaty ourselves. Subsequently to the Treaty the Roumanians passed an agrarian law of a confiscatory character. When the Arbitral Tribunal proposed to set to work upon this question last year the Roumanian Government protested that the

Arbitral Tribunal was not competent to deal with this question, although it had been expressly constituted for this particular purpose. On January 10 of this year the Tribunal, after long discussion, affirmed its competence. On January 7 the Roumanians declared officially that they would not submit to the decisions of the Tribunal and announced that they would appeal to the League in virtue of Article 11 of the Covenant, which deals with the danger of war. Later on, on February 24, the Roumanian Government announced that it would withdraw its representative from the Tribunal. In March the League of Nations met, the Roumanians categorically repeated their refusal to submit to the decision and on the same day, March 7, the Hungarians asked that the Roumanian Judge should be replaced by a neutral; but as a compromise and in order to settle the matter as pacifically as possible, they suggested that the question of the competence of the Tribunal should be referred to the International Court of Justice at The Hague. This was at once refused by the Roumanians.

The Hungarians thereupon made a formal request to the League that a neutral substitute should be appointed on the Tribunal at once, otherwise there would be interminable delay. For some reason which I personally am quite unable to understand, this request was refused by the League, and a Committee was appointed, of which Sir Austen Chamberlain was named as the *rapporteur*. Sir Austen Chamberlain, no doubt very unwillingly and no doubt from a strong desire to settle this matter if he could, accepted this very invidious post and I imagine that he has bitterly regretted it ever since. Then the League adjourned until September, and when September arrived Sir Austen Chamberlain announced the decision of the Committee. The decision amounted to this, that the appeal to the International Court of Justice at The Hague must be refused because the Roumanians objected. But what is far more important is that they laid down the doctrine that the Roumanian agrarian law superseded the Treaty obligations of that country, and that they would only appoint the substitute on the Tribunal asked for on condition that the Hungarians admitted this principle. In other words, they gave the Hungarians their Judge on the condition that judgment went against them. Naturally this offer was refused by the Hungarians, and a deadlock ensued, which remains at the present moment.

I may point out that this deadlock does not exist only in connection with Roumania and Hungary, but it exists everywhere else, because all the other Tribunals are waiting to see what the decision is going to be in this case. This decision of Sir Austen Chamberlain has naturally excited a great deal of surprise, and I might add that it has probably excited a great deal of disquiet as well. Looking at it casually it seems to me ominously reminiscent of the "scrap of paper" theory. But what is more serious, at least so it appears to me as a layman, is that the adoption of the principle that domestic legislation is to supersede and over-ride Treaties is a most dangerous doctrine, and, so far as I know, a new one. If the world is going to accept this doctrine, what becomes of our case against the Soviet Government, or the Mexican Government, or any other predatory Government which proposes to confiscate foreign property? And what a principle it affords for the evasion of all Treaty provisions! I can imagine an ingenious Government devising methods by which it would escape paying reparations, or, in fact, doing anything contrary to its own wishes.

It is true that Sir Austen Chamberlain, in making this remarkable decision, announced that it had received the concurrence of a number of legal experts who happened to be present in Geneva at the time. I

dare say that he had not much difficulty in obtaining their concurrence, but I need hardly point out that a very short time elapsed before the Hungarians on their part were able to discover any number of far more eminent legal experts who pronounced that their judgment was all wrong, and I hope we may hear something upon this point this afternoon. What I particularly want to elicit from my noble friend Lord Cushendun is why there should be a differentiation between the case of Hungary and Roumania and cases of other countries. As I said at the beginning of my remarks, these Arbitral Tribunals are functioning everywhere and functioning with great success; but there have been numerous occasions upon which their proceedings have been interrupted and it has been necessary to appoint substitutes. I might remind the House that when the French occupied the Ruhr the Germans withdrew their representatives from all the Mixed Arbitral Tribunals. They were at once automatically replaced by neutrals and no harm has resulted at all. But it is not only a case of the Ruhr. There have been cases in connection with the Franco-Hungarian Tribunal, the Franco-Austrian Tribunal, the Franco-Bulgarian Tribunal, the Belgo-Hungarian Tribunal and the Belgo-Austrian and Belgo-Bulgarian Tribunals and many others as well. In each case, as I say, substitutes were appointed automatically and the Tribunals continued to function with perfect efficiency. The system, in fact, has worked remarkably well up to the present moment.

As I stated at the beginning of my remarks, everybody interested is waiting at this moment, and it is easy to see that there are other nations which are only waiting to adopt equally confiscatory measures as soon as they get an opportunity and this case is decided. I do not wish to discuss the legal aspect of the question. I leave that to others who are more competent than I am; but it seems to me that the real gravity of the case is that one of the signatories to a Treaty has taken upon itself to say that it shall be the judge in its own case. It also appears to me that the system of arbitration has received a very serious, if not a fatal blow. Surely it must be obvious to everybody who supports the League of Nations—and everybody professes to be a supporter of the League—that nothing more injurious could happen to it than that there should appear to be any denial of justice. I do not think the position has been much improved by the speech which Sir Austen Chamberlain made in September last, when he openely admitted that his decision had been largely influenced by political considerations.

Those are the facts of the case. Before I conclude my remarks I cannot help expressing the opinion that this action comes with singularly ill-grace from the Roumanian Government. The Roumanian Government is one of those Governments which, to use the language of Mr. Lloyd George, waited to see who was going to win before coming into the War. When the Roumanian Government came into the War they not only met with disaster themselves but they were the means of inflicting very heavy disaster upon the Allied forces generally, because the Germans were able, owing to the much-needed supplies which they obtained from Roumania, to continue the contest much longer than otherwise they would have been able to do. Neither is the post-War history of Roumania one to excite much admiration. Under the guise of suppressing Bolshevism they occupied Hungary and steadily and thoroughly pillaged that unfortunate country for about six months and only left it after they had received about a dozen ultimatums from the Allies at Paris.

I confess that I do not approach this question in as detached a frame of mind as I should like or as perhaps is desirable. It so happens that I have been in Transylvania myself, which is the scene of

the present trouble, and I have been a witness with others of the abominable mis-government which takes place in that country. I do not think I am exaggerating when I assert that I do not think there is any district in Europe which is so badly governed, with the exception of Soviet Russia, a country with which I have also some slight acquaintance, as Transylvania. In the circumstances it seems to me that instead of allowing the Roumanian Government to evade their obligations under the Treaty we should be much better occupied in making them carry out the obligations which they solemnly entered into under the Trianon Treaty and fulfil the Articles of that Treaty to which we, amongst others, are parties.

THE CHANCELLOR OF THE DUCHY OF LANCASTER (LORD CUSHENDUN): My Lords, it would be presumption on my part to complain of my noble friend for having put the Question and made the speech he has addressed to your Lordships. But I hope I may express my regret that he has thought it necessary to do so at this moment, because I gave him notice that it would not be in my power to make any reply on behalf of the Government to the case that he has made. The matter stands in this way. A precisely similar Question was put by my noble friend last May to my noble friend Lord Cecil, who then occupied the office that I have now the honour to fill. In reply to that inquiry he was told that the whole question as between Roumania and Hungary on this matter was *sub judice,* that it had all been referred to the Council of the League of Nations and that the Foreign Secretary of this country, as he has repeated to your Lordships, was asked to act as *rapporteur* in the case. The position is precisely the same to-day as it was then. Owing to delays which I do not think I am called upon to explain, but which are not surprising in the circumstances, the matter has not yet been decided. The Report will come before the Council next month and we hope it will be possible then to have the matter decided one way or the other by the Council.

I hope that your Lordships will take the view I certainly submit to you—that in these circumstances, with our own Foreign Secretary appointed to take judicial action in an international dispute, it would neither be possible nor proper for the Government, in anticipation of what may there occur, to go into the merits of the case and to express any opinion at all. Therefore, I am afraid that all I can do, as I told my noble friend would be the case, is to repeat the statement that was made by my noble friend Lord Cecil in May, that the Government are not yet in a position to give a reply. There is one word I must add to that by way of caution. If I make no reply to my noble friend's speech I hope that no one will suppose that I at all admit or accept the statement he has made as an accurate statement of the facts of the case. In one part of his speech, dealing with the nature of the dispute, he said that up to the present point all is perfectly clear. I have tried to get to the bottom of this extremely complex and difficult dispute, and I have found no part of it yet which could be described as perfectly clear. It appears to me to be fraught with every conceivable sort of tangle and complexity of Treaties and counter-Treaties and to require the most careful judicial investigation and decision. I therefore must not be taken as accepting either the facts of the case as detailed by my noble friend or the decisions which have been taken by the various bodies before whom this dispute has come up to the present time.

LORD BUCKMASTER: My Lords, I feel sure that every one would be anxious to avoid causing unnecessary embarrassment to the Government's conduct of these delicate and difficult proceedings, but I cannot help thinking that the noble Lord who has just sat down has

overlooked the Question which formed the text for the speech of the noble Lord, Lord Newton, for the Question asks a perfectly simple matter. It asks if it be the case "that the Roumanian Government has officially declared that it refuses to submit to the decisions of the Mixed Arbitral Tribunal set up under the Trianon Treaty." That is a matter which the Government can answer without any difficulty or embarrassment whatever, but the noble Lord has deftly, and probably designedly, avoided even referring to the form of the Question which the noble Lord has just asked.

He has pointed out to us that the matter is, as he calls it, *sub judice*. There is nothing *sub judice* in it. It is a simple question of fact. I think it may very well be that the matter to come before the Mixed Arbitral Tribunal is one upon which we ought not prematurely to express any opinion, but I cannot quite agree with the noble Lord that this matter is involved in such mystery and complexity, for, as I understand it, the proposition is reasonably plain. Hungary presents a spectacle which I think must call for the pity of us all. It was a nation with whom we had no manner of quarrel from beginning to end and when War concluded I very much doubt if there was any person in this country who entertained the slightest feeling of hostility towards people who had formerly been members of the Austro-Hungarian Empire. Our relations remained unharmed by the horrors and excesses of the War, and the Peace, which by universal tradition is supposed to assume the aspect of a dove, descended upon Hungary in the form of a vulture and tore her limb from limb, tore her in pieces without the least regard to the economic interests of what were left and left this unhappy country absolutely paralysed and impotent in the face of ancient and determined foes.

What the noble Lord has said is perfectly true. She first of all suffered depredations from a victorious enemy and then she had the humiliation of having to undergo the *régime* of the Bolsheviks. But the unfortunate country when it suffered the excesses of the Peace Treaty was surely at least at liberty to rely upon the provisions that that Treaty had created in its favour. Why I think this matter is reasonably plain is because when those provisions are examined it seems perfectly clear that there is a case for discussion. What the merits may be, I entirely agree with the noble Lord, is not for us to say, but there is a matter for discussion, a matter for judgment, and that is what it is that Hungary seeks to assert.

The Peace Treaty contained many other provisions, against one of which I have never ceased to protest. It was the provision that expropriated within the territory of any Allied country all the property of the people who were called ex-enemy aliens. I need not hesitate to refer to my protests here, because your Lordships' House passed a Resolution requiring a material modification of the terms of that Treaty in favour of the enemy aliens, but recognising that the clause was directed only against enemy aliens who possessed property in one of the allied countries as constituted at the outbreak of war, there was a provision inserted that this clause should not apply in cases where new national boundaries were created. It is in relation to precisely that case that this question has arisen. Part of the Hungarian territory was taken away and was possessed and occupied by Roumania, and what has happened, as I understand it, is that an agrarian law has been passed in Roumania which enables acquisitions to be made of the big landed estates there on certain terms of valuation which it is wholly unnecessary to discuss.

It sought to apply that to the property of people who were formerly Hungarian subjects, and they say: "No, we are entitled by

virtue of the Treaty to retain rights in that property, which you cannot get round by passing a domestic Act of Parliament which gives us something less than the full value of our estate." I repeat that that is a question upon which I do not intend for a moment to pass an opinion, but I say it is eminently a case to be decided and the Peace Treaty set up the very Tribunal for the purpose of determining this kind of question. It was the Mixed Arbitral Tribunal, which was to be established by the appointment of a representative from each of the two disputing countries with an independent Chairman. It is to this Tribunal that the Hungarians seek to refer this question, and it is, as I understand it, from that Tribunal that the Roumanian Government has withdrawn their representative, so that the Tribunal cannot function. So far as that is concerned that appears to me a perfectly simple, plain, comprehensible question that is not involved or entangled with any of the difficulties to which the noble Lord referred. All that the Question asked was: Is it the fact, is it true that this Tribunal has been rendered incapable of functioning by virtue of the Roumanians removing their appointed representative from its body?

I am not so sure that the matter quite ends there. The noble Lord has said that this Question was asked in May and that nothing has happened since. Is that the case? It may be so. I should like to know for certain whether it is. Is not this what has occurred? In the event of one of the disputing parties declining to put their representative on this Mixed Arbitral Tribunal, the Council of the League of Nations has the power to appoint one in its place. Is it not the fact that Hungary has applied to the Council of the League and asked that such representative should be appointed in the circumstances that have arisen, and is it not true that the Council have referred this to a Committee, which reported in September of this year that they would only do that in the event of the Hungarians accepting the statement of the law that the Committee itself prepared? If that is the case the Council of the League, as it seems to me, has taken upon itself a duty which is entirely outside the provisions of the Treaty and never was contemplated. Their function was to appoint the arbitrator. Their function was not to impose terms upon the person who asked them that such an arbitrator should be appointed and it was the function of the Mixed Arbitral Tribunal to determine this question. I cannot see by what means it is possible to avoid that conclusion.

I have most carefully avoided saying anything about the merits of the dispute. It may well be, when the matter is argued before this Tribunal, that the Hungarians will be found to be wrong. It may be that what they believe to be the protection given them by the Treaty of Trianon has in the result been taken away. That is not a matter for us to consider or discuss. The thing which I think is of the greatest consequence is that in a question of this kind the League of Nations should act in strict accordance with the duties that are established by the Covenant by which it is set up, and that we should do all in our power to support the League in order that its authority may be unimpeached and its reputation undimmed.

VISCOUNT HALDANE: My Lords, I have listened to the debate, and I have listened to my noble friend Lord Buckmaster, and I am not sure that I take quite the highly-coloured view that he does on the position of Hungary. Hungary is a nation, it is quite true, with which we are at profound peace, and Hungary is a nation against whom we have no grievance and no criticism other than that she is singularly bad at getting on with her neighbours. If you ask the rest of the Yugo-Slavs you will hear a good deal about that. That has nothing whatever to do with the Question we are discussing, nor has it to do with it that

Roumania also, according to the information which I have accumulated, has been anything but an easy neighbour for Hungary in their transactions. None of that touches the points which Lord Buckmaster made and in which I find myself in the main in agreement with him. It began with the Question which my noble friend Lord Newton put, which was, in effect, whether Roumania had declined to recognise the jurisdiction of the Tribunal and to have anything to do with it. Then there was the second question, whether this was such a question as would naturally go to the Arbitral Tribunal and whether it was not in the power of the Council of the League to appoint somebody to take the place of the missing arbitrator.

It seems to me that both these are simple questions on which the noble Lord, Lord Cushendun, could properly have given us information. He made a temperate speech, well worded, a speech which makes one look forward to other parts which he may take in the debates before this House, but though I appreciated the tone of the Lord Cushendun's speech, I do not think that he made an answer to the point which Lord Newton has put before us rather forcibly to-day. I think we owe a good deal to Lord Newton for having brought this matter up. I am quite aware of the difficulties of Sir Austen Chamberlain. I am quite aware of the inexpediency of saying a word which could pre-judge the issue which has to be determined. But on the other hand, it is a matter about which we are entitled to be informed, whether Roumania has made the refusal which is referred to in Lord Newton's Question. We are entitled to be informed why the Council of the League thought it right to take this somewhat circuitous method of coming to a conclusion instead of simply appointing another arbitrator. I only wish to add that, although this is a small question, it is one which has caused a great deal of interest in this country and to which a great deal of attention has been given. I do not see that the volume of that interest and attention is diminishing, and although I appreciate the reserve with which Lord Cushendun has spoken, I think it is desirable that the British public should be informed as to what is the real situation.

LORD CARSON: My Lords, I do not profess that I shall be able to add anything to what Lord Buckmaster has so very well stated upon the Question of my noble friend Lord Newton, which seems to me to be a very simple Question. I am very sorry so early in his career in this House to differ from my noble friend regarding the action he has taken as representing the Government, but I think it is a very disappointing thing on a question of this kind, which rouses the most intense national feeling, naturally, upon the part of Hungarians, and no doubt upon the part of others who under the Treaty of Trianon are similarly situated in relation not to Roumania but to other countries, to be told that we ought to be satisfied with an answer that was given as far back as the month of May, this being the month of November.

I think it would be a great mistake to attempt in any wise to press the case of Hungary upon the merits. I am certainly not competent to do so. I know that very eminent lawyers have given opinions—I have one in my hand at the present moment—upon the meaning of the Treaty. I dare say the Roumanian Government may have had certain opinions given to them in a different direction from that which I hold myself and that which I know very eminent men in this country who are acquainted with International Law and who are accustomed to consider Treaties hold. But that is not the question. The claim of Hungary—and I think it is an unanswerable claim—is: We want to have our case tried under the Treaty which took away our lands. The Treaty is good enough to give possession of the lands to the Roumanians. They took the lands upon the conditions of the Treaty. Hungary

alleges that while they keep the lands they refuse to carry out the other parts of the Treaty, and all Hungary asks is that the Tribunal which is set up under the Treaty should decide. Was there ever a more reasonable request? Surely to goodness if the League of Nations are not able to do that much, or are not able to support a Tribunal set up by themselves for the purpose of carrying out the Treaty, one begins to despair as to what the League of Nations can ever do at all.

The questions asked are simple and we might very well get an answer to them on this occasion. The first is: Have the Hungarians asked to be heard? Secondly, was there a Tribunal set up under the Treaty by the League of Nations? Thirdly, the moment it was set up did the Roumanians say, "Although we will keep the land under the Treaty we refuse to recognize the Tribunal"? Is that true? Did they then in order to enforce that view withdraw their representatives? These are all more or less ancient facts now. They have nothing to do with anything that is *sub judice* at the present time. Is it also true that, as a sort of compromise to bring about peace, Sir Austen Chamberlain and a Committee were asked to make a certain Report? I do not know. I am not sufficiently acquainted with the methods of the League of Nations, as to their ways of getting out of appointing members of the Tribunal under the plain terms of the Treaty. But was it done, and if it was done is it a fact that in September the Committee presided over by Sir Austen Chamberlain reported that a Judge ought to be appointed presuming that the Hungarian Government were willing to admit that they were bound by the domestic laws of Roumania? I do not know whether that Report was ever made. I do not know how such a Report could ever come to be made. I do not know how any nation could be asked to accept such a Report because what it means is this: Do you admit that the Roumanians had the power to do what they did do?—which is the question that the Hungarians asked to have tried, and which they were willing to submit to the Tribunal, accepting whatever was decided.

All these seem to me to be very plain questions. I think the public ought to know them, but where the facts can be found I do not know. I have a very strong suspicion that it is one of the weaknesses of the League of Nations that it will always yield to a greater Power, and I think that at the very outset of these proceedings of the League of Nations this House, this country and the Government of this country ought to proclaim that they will see fair play in the carrying out of these Treaties for the people whose territory has been handed over, though I understand that they were allowed to maintain their Hungarian nationality. It is all very well for Roumania, for Sir Austen Chamberlain and for other nations to say these things, but the people who are suffering from day to day are the Hungarians, whose claim is that they should be heard. That claim has been refused.

LORD PHILLIMORE: My Lords, I think the answer to the observation made by Lord Cushendun, that the Question put in May and then answered ought not to have been pressed in November, is that since the Question was asked in May something has been done, and something prejudicial to the Hungarians, which possibly might have been prevented if my noble friend Lord Newton had not been put off asking his Question in May. The noble Lord who has answered for the Government has said that there is great uncertainty about these facts, great difficulty and great complexity. I take leave to say that there is no difficulty and no complexity except for those who want to have it made complicated. Of course it is a familiar device of the

injuring person to establish a sort of cuttlefish fluid around the facts. The facts, as Lord Buckmaster and others have stated, are quite simple. I have them all here under my hand, and I have verified them.

The Hungarians had a right under the Treaty of Trianon to bring a question of this kind before the Mixed Arbitral Tribunal. The Mixed Arbitral Tribunal did not decide it, but they decided that they had competence for jurisdiction to decide it, and thereupon, on that preliminary point, the Roumanian Government withdrew its arbitrator. To complete the Tribunal it was necessary to have a substitute. Provision was made under the Treaty of Trianon by which that substitute should be appointed, or two persons from whom a substitute could be chosen could be appointed, by the League of Nations, and the Hungarian Government went to the Council of the League of Nations and asked it to perform that duty which it was requested by the Treaty of Trianon to perform. The Roumanians protested, and the Hungarian Government then went below its strict rights and suggested that the Permanent Court of International Justice should be asked whether they were, in the terms of the Treaty, right or wrong.

Then a most remarkable think happened. Sir Austen Chamberlain said: "You cannot go to the Permanent Court of International Justice unless the Roumanians agree to go there." But Article 15 of the Treaty, the very Article that the noble Lord was relying upon last night, decides that you can make a unilateral application, that it is possible for the Council to refer a matter that has been brought before it unilaterally to the Permanent Court of International Justice. There is an excellent precedent for this in a case which I am shortly going to mention—that of the German farmers in Poland. I cannot see why this procedure has not been followed. However, this proposal was dropped for the moment and then the Hungarian Government went back upon their rights and asked for the appointment of a Judge. Instead of a Judge being appointed, they were told: "We will appoint a Judge only if you will consent that the Judge shall have his hands tied by some previous proposition of law"—the very thing that he was there to try. I cannot understand, except on the view that it was a very awkward job and the sooner they washed their hands of it the better, why the members of the Committee of the League of Nations did not at once proceed to do their business.

This has now been a matter of international discussion, and international legal discussion, for a long period of time. Most eminent lawyers, not only in this country but in others, have given their opinion upon it. There are Mr. Vaughan Williams and Sir Frederick Pollock, names which are known all over Europe and the United States for competency in International Law. There is Dr. Bellot, also a very competent international jurist, and we have since had the opinion of Sir John Simon and of Mr. Sutton on a similar point. Then there is M. Pillet, a distinguished Parisian lawyer, and I think I am right in naming also M. Lapradelle, who was sent by the French Government as their representative on the Committee which constituted the Permanent Court of International Justice. All these men have expressed their opinion that the Mixed Arbitral Tribunal had jurisdiction or competence to hear this question. They have not expressed their opinion that the Tribunal had to decide it in any particular manner. The Hungarians may be wrong, and very possibly are, but all these great lawyers have agreed that it is within the competence of the Mixed Arbitral Tribunal to decide this question, and they ought to be allowed to decide it.

Before I sit down I want to know what is the distinction between this case and the Polish case. In Poland there were a large number of very aggravating German settlements put there by the Germans with a view to the Germanisation of Prussian Poland. These farmers were encouraged to settle there on very easy terms by the German Government. The Poles wanted to get rid of them, and they passed an agrarian law the effect of which was to turn out all these German farmers, who had only inchoate rights and had not paid all their money. The law was carefully drawn to touch them. The Germans complained. This was at a time when Germany was not a Member of the League of Nations—unlike Hungary, which is a Member—and they got their complaint heard by the Council. The Poles said, just as the Roumanians say now: "This is a matter of internal legislation; it is our agrarian law." What did the Council do? It sent the matter to the Permanent Court of International Justice. The Court heard it and said that the Poles were wrong and that this was only a device to injure the German minority, who were protected. Thereupon the Poles, though they could not reinstate the farmers because they had put other tenants in, consented to have determined by the Council of the League the amount of damages that they were to pay.

I speak with great knowledge on the subject because at the time the Labour Government was in power the noble Lord, Lord Parmoor, asked me to take his place for the moment as representative on the Council of the League and, with the Brazilian and Italian representatives, we sat in Paris and arrived at a determination which was ultimately worked out as to the amount of compensation to be paid to these German farmers in Poland. I fail to see the difference between the case of the German farmers in Poland and the Hungarian landowners in Transylvania. By hook or by crook it seems to me that they ought to have their case heard, and that, strictly speaking, they are entitled to be heard by the Mixed Arbitral Tribunal. If there be a question whether that Tribunal is competent, then it should go before the Permanent Court of International Justice.

THE LORD PRESIDENT OF THE COUNCIL (THE EARL OF BALFOUR): My Lords, I am sure you will sympathise with me, because in the first place I know nothing about the question on which I am going to say a word in a moment, except what I have learnt from this debate, and in the second place I find the Government are the object of an attack by four of the most eminent ornaments of the highest Court of Justice in the Kingdom. It is a very serious thing to get up and express, upon a question which they declare to be a legal question, any opinion which is inconsistent with what they have stated. As everybody who knows me is aware, I have the most profound respect for the legal intellect, but I am not sure that the legal intellect has been displaying itself to the best advantage in the course of this debate.

What is the position? The position is that the representative of the Government who speaks for the League of Nations has got up and clearly indicated to your Lordships that this is an extremely complicated question, and a question which with all its complications is going to be thoroughly investigated by a competent Tribunal in about three weeks' or a month's time. Thereupon four of the most eminent legal authorities in the world get up and explain that the matter is as simple as possible, and that you have only got to say "Yes" or "No" to a series of questions—hardly any of which, I may say, are on the Paper—and everything will be plain. I used to be told that nothing was more misleading than to suppose that every question that could be put could

have a perfectly clear answer given to it, "Aye," or "No." Everybody is aware that there are innumerable questions which cannot be answered "Aye" or "No" without leaving a very misleading impression upon those who listen to that answer.

My noble friend near me, who is acquainted with this problem, tells me that this question cannot be answered quite simply, clearly and explicitly, so as to cause no misapprehension in your Lordships' House or in the mind of the public who reads our debates by simply an answer of "Aye" or "No." But if your Lordships can restrain your impatience for three weeks or a month it then appears that you would, with full knowledge, be able to say what questions could be answered simply "Aye" or "No," and what questions would require qualification or amplification in order to make their real bearing known to the public. Surely the legal talent in this House can restrain its impatience for that time. We cannot, I am told, give your Lordships any further information on the present occasion, and in those circumstances I hope that none of the eminent and learned noble Lords who have spoken to-day, and certainly no other member of the House, will think I am guilty of any disrespect either to them or to the cause that they are advocating, if I venture to suggest that we had better refrain from further debate on this subject until we are able to debate it with full knowledge.

LORD CHARNWOOD: My Lords, it is only the fact that I am not a lawyer which emboldens me to rise after that appeal. The noble Earl has told us to restrain our impatience, on the ground that this matter is going to be investigated, I understand, by a competent legal tribunal in the course of a few weeks. Most unfortunately that is precisely what we learn from the Official Report of the Council of the League of Nations is not going to happen, and the simple point which noble and learned Lords have been trying to impress upon the attention of the Government is that a matter, a complicated matter doubtless, which does require legal sifting, seems to be deprived of any chance of ever being sifted at all upon what I venture to suggest are the legal grounds which alone should apply to it.

May I briefly put what seems to the ordinary unlearned reader of the Reports of the Council of the League to be the clear sequence of events? Here was *primâ facie* evidence that a wrong had been done, contrary to the provisions of the Treaty of Trianon. Here was a Tribunal set up by that Treaty which was the proper body to sift these things and if it were going to sift them all of us would be well content. The action of that Tribunal is paralysed for the moment by the withdrawal on the part of the Roumanians of their representative. It was within the power, and it had been the practice, of the Council of the League of Nations, in such a case, to set the Tribunal upon its legs again by the appointment of another member of the Tribunal. That simple course, after prolonged debate, the Council of the League of Nations has omitted to take, and it was conveyed to us that they refused to do so not because of any consideration of the rights or wrongs of this matter, but because of larger political considerations beyond it, which affected the peace of Europe.

I am not going to ask what those considerations are. I am sure they are weighty ones, but on the other hand, may I venture to say this, that, apart from any legal wrong done, surely from the point of view of international politics it is a grave and, if a necessary, a most melancholy step, that this plain question of legal right or wrong should apparently be kept from coming before the Courts that are competent

to decide it, for fear of what the consequences might be of faithfully adhering to, and enforcing, the provisions of the Treaty. I have some idea of what the difficulties are to which the Foreign Secretary, to whom all supporters of the League are most grateful for the work he is doing on the Council of the League, has alluded, but at least we would ask that the Government would bear in mind, and would cause to be represented in the Council of the League, what grave consequences the course now being pursued by that Council is likely to have, not only upon opinion in Hungary but in other countries as well, in regard both to the belief which those countries hold in the capacity and the reliability of the League of Nations, and in the respect which they will hereafter entertain for the Treaties by which they and we are bound.

LORD NEWTON: My Lords, I cannot pretend that I am disappointed with the result of the discussion, because I never imagined that I should get any satisfactory statement, so to speak, out of the Government, but I think my noble friend Lord Balfour somewhat incorrectly described the discussion. He complained that a concerted attack had been made upon the Government by four most eminent lawyers. I submit with respect that nothing of the kind has taken place. There has been no attack upon the Government at all. There has been criticism—not, I hope, of too unfriendly a kind—of Sir Austen Chamberlain and the League of Nations. Sir Austen Chamberlain is not here to give his own explanation of his position, and apparently has not thought it worth while to take the trouble to instruct anyone here to speak for him, and therefore we remain as we were. Personally I am at the end of my resources. I have made two attempts to elicit information, and there is nothing more to be done as far as I am concerned. But I do take some consolation from this fact, that, strange though it may sound, the debates in this place on foreign questions are followed with great attention on the Continent, and I am convinced that what has been said here this afternoon has not been a waste of time. I cherish the hope that the views which have been expressed by the eminent lawyers already alluded to will carry some weight in other countries besides this, and that they may exercise some effect on the ultimate decision of the League of Nations in regard to this matter.

EXTRACT FROM THE MEMORANDUM OF THE HUNGARIAN GOVERNMENT

Addressed on 29th November, 1927, to the Council of the League of Nations, setting forth the Reasons which render impossible the Acceptance of the Three Principles of the Jurists of the Committee of Three in the matter of the withdrawal by Roumania of her National Arbitrator on the Roumano-Hungarian Mixed Arbitral Tribunal.

In the Roumano-Hungarian incident concerning the functioning of the Mixed Arbitral Tribunal in the so-called agrarian affairs, the Council of the League of Nations invited Hungary and Roumania, the two States, parties to the case, " to defer their formal opinion till the month of December," on the first part of the report ; more especially on the three principles of the Jurists included therein, adopted by the Committee of Three and recommended by the Members of the Council disinterested in the litigation, for acceptance by the parties concerned, and also " as early as possible before that meeting of the Council, to communicate to the Secretary-General their final decision, so that the Council might have the opportunity of considering what further steps should be taken, if any were necessary."

The Hungarian Government has just submitted to a new and very minute examination, both the first part of the report, and, most particularly, the three principles of the Jurists. But, to its great regret, it must again state that it is impossible for it to accept them. It permits itself to communicate the reasons for this impossibility to the Council of the League of Nations, which are as follows :—

The Hungarian Government can find no relationship between the various stipulations in the treaties relating to measures prohibited by them and the three principles contained in the report. Neither the text of the report, nor the verbal explanations of a member of the Committee of Three have even attempted to justify these three principles, although the Hungarian representative before the Council has asked for some justification.

On the contrary, the Hungarian Government is fully conscious of the great difference existing between the interpretation given to the stipulations in question of the Treaty by the Mixed Arbitral Tribunals and by the Permanent Court of Justice itself and the three principles. Consequently it is fully conscious that it is not in this case a matter of interpreting the stipulations in question of the Treaty, but of their modification to the sole detriment of Hungary. It is this modification of the Treaty which ought to have been obtained with the consent of Hungary. But, on the one hand, the Hungarian Government is not prepared to consent to any modification of the Treaty of Trianon which is unilaterally to its disadvantage ; on the other hand, it does not hold that it can create a precedent fatal to a system under which international obligations could be modified contrary to the terms of article 19 of the Pact, and which would give to article 11 of the same Pact a misinterpreta-

tion enabling a State which itself threatens to disturb friendly relations, to utilize these menaces to its own advantage. If such a precedent were once created, no international convention would be proof against attempts to upset it on the part of a State which wished to be rid of it. It would then only have to threaten the friendly relations itself.

Nor is the Hungarian Government disposed to allow the decision of an international judicial court to be so easily cancelled, by the simple expedient which consists in the State inconvenienced by a decision alleging that it is vitiated by being a usurpation of jurisdiction. If the Hungarian Government were to give way on this point, it would make itself guilty of creating a much more fatal precedent. If Hungary were to follow Roumania down this descent, no State would ever accept an unfavourable arbitral decision, but would always endeavour to raise an objection to the jurisdiction.

However, usurpation of jurisdiction is a ground for nullity which very seldom occurs. It is not enough to allege its existence, as does Roumania ; it must be proved by new arbitration before its discussion can be continued. Roumania has refused to submit to this fresh arbitration. She wishes to be judge in her own case. No one will be surprised, therefore, that Hungary does not wish to follow her on such a road.

The Council of the League of Nations is obliged to nominate deputy judges in accordance with article 239 of the Treaty of Trianon, without having the right to substitute itself for the Mixed Arbitral Tribunal, by wishing to examine beforehand whether the latter is giving judgment in accordance with its wishes, or to prescribe how it should give judgment. In the course of the history of international law, it has often occurred that sovereigns, or other exalted persons, have been charged with the nomination of arbitrators between nations, or with the supplementing of the lack of a court of arbitration, but never have these personages interfered with the jurisdiction of the arbitrators appointed by them. Neither the existence of article 11 in the Pact of the League of Nations, nor its function of preventing wars, alters this situation in any way. Article 11 of the Pact is simply the article which imposes upon the Members of the League of Nations the procedure of compulsory conciliation. In so far as war is concerned, there is, first of all, no threat of it in this case ; secondly, admitting that it were a menace, it would be a peculiar method of preventing it, to give full and entire satisfaction to such States as do not wish to accept the decision of a Judicial Court but wish to destroy it. This destruction is, even, the main object of Roumania.

The Hungarian Government is all the less able to accept the three principles of the Jurists as the Jurists themselves have been obliged, in their examination, to recognise the jurisdiction of the Mixed Arbitral Tribunals. The preamble of their three principles contains the following :—

> " If it could be established in any particular case that the property of a Hungarian national has been the object of seizure, of liquidation, or of any other measure of disposal in the terms of article 232 and 250 in consequence of the application of the Roumanian agrarian law to the said property, *and if a petition were presented with a view to obtaining its restitution, the Mixed Arbitral Tribunal would have jurisdiction to accede to the claim.*

"The Mixed Arbitral Tribunal has no jurisdiction to recognise claims resulting from the application of an agrarian law as such, unless the hypothesis mentioned in the preceding paragraph is realised. In this latter case, the *jurisdiction of the Mixed Arbitral Tribunal would not be excluded by the fact that the application of an agrarian law was in question.*

"As it results from the above that the claim of a Hungarian national to obtain the restoration of his property, in accordance with article 250, might again come within the jurisdiction of the Mixed Arbitral Tribunal, even if the claim originated out of the application of the Roumanian agrarian law, we will pass to the definition of the principles which the acceptance of the Treaty of Trianon has rendered obligatory upon Roumania and Hungary."

It is the recognition of the jurisdiction of the Mixed Arbitral Tribunals to the exclusion of all usurpation of jurisdiction.

The three principles which follow the preamble are already solutions of the questions of merit. Now, nobody can substitute himself for the Mixed Arbitral Tribunal to settle questions of merit which may occur during the course of a suit aimed at establishing what are the prohibited measures. It is sufficient—and the Jurists recognise this—that it should be possible for the prohibited measures to be hidden behind measures of agrarian reform, for the Mixed Arbitral Tribunals to their jurisdiction as regards these affairs, and to have the power to search out these hidden prohibited measures. They cannot say, until after the proceedings are over, if they have discovered any prohibited measures, and by what, by which characteristic features, they have recognised them. These characteristic features are multiple, and, it would appear, alternative. To wish to dictate in advance the principles according to which they should proceed in their investigations would be a grave interference with their functions. They sit with the Treaty before them. Its text is enough for them.

Moreover, the Mixed Arbitral Tribunals would be authorised not to take into account the directions which two States, contracting parties to the Treaty of Trianon, even if alone interested in the case, might wish to give to them by a special agreement. The Mixed Arbitral Tribunals could consider themselves as having the duty to give effect to the respective parts of the Treaties, as they were accepted by all the signatories. The judicial interpretation of those parts of the Treaties belongs to them, and an authentic interpretation could only emanate from all the signatories of the Treaty in question.

As regards the Jurists' three principles when examined in detail, it appears from the legal practice of the Mixed Arbitral Tribunals, as well as from that of the Permanent Court of International Justice, that the absence of compensation is one of the characteristic features of the prohibited measure. If the indemnity is lacking, you have a prohibited measure. In its decrees numbered 7 and 8 on this subject, the Permanent Court of International Justice expresses itself as follows :—

"*Even if it were proved—a question into which the Court does not consider it necessary to enquire—that in fact the law applies equally to Polish and German nationals, it by no means follows that the suppression of private rights which it brings about as regards German*

nationals may not be contrary to heading II of the Convention of Geneva. Expropriation without compensation is certainly contrary to heading II of the Convention; but a measure forbidden by the Convention could not become legitimate as regards this instrument from the fact that the State applied it also to its own nationals."
(Judgment 7, page 33.)

"If, in contradiction of what the Court has just set forth, it were alleged that the measures taken by the Polish Government in regard to the Oberschlesische and Bayerische did not constitute an expropriation in the sense of heading III of the Geneva Convention, the Court would have to repeat what it has had occasion to state already, not only in its Judgment, number 7, but equally in the present Judgment, namely that, if the expropriation combined with compensation is forbidden under the above mentioned heading, *a fortiori, would it be so in the case of a taking of possession without compensation to the persons interested.*" (Judgment No. 8, page 31.)

The differentiality and the special intention to strike at the properties of ex-enemies, of which the Jurists' three principles would make the characteristic and indispensable features, are only alternative and contingent characteristic features, the same as is the absence of compensation. If one of these characteristic features is present, then you have a prohibited measure. It is altogether wrong to wish to exclude the absence of compensation from among the characteristic features, and to wish to make characteristic features out of differentiality and of special intention, which are also contingent, cumulatively indispensable characteristic features, as do the principles of the Jurists.

In view of the jurisprudence of the Permanent Court of International Justice quoted above, one cannot say what the text of the three principles of the Jurists contains :—

"The question of compensation does not come into account here, *no matter how important it may be from other points of view.*"

Nor can one say that the three principles of the Jurists were "principles which were rendered obligatory upon Roumania and Hungary by the Treaty of Trianon."

Nor can one say that what the Roumanian Representative has ventured to assert, namely, that the Jurists of the Committee of Three had drawn upon the jurisprudence of the Court of Permanent Justice. Quite the contrary.

The cumulative effect of the useless proof of differentiation and special intention as indispensable characteristic features, in cases where the existence of the prohibited measure is already proved by the complete absence of compensation—and this is the rule in the Roumanian law, even as it affects the poorest people, widows and orphans—would practically signify that no lawsuit could have been carried further, and this by reason of the exorbitant charges on account of expensive and useless proofs, rendered necessary by the three principles and not even in the ordinary course of the hearing, but *in limine litis*, to obtain jurisdiction. It is absolutely useless to require proof of differentiality from a claimant, when he can prove the absence of compensation. It is still more unjust to render inoperative the proof of absence of compensation, and to exact from him, after he has given proof of differentiality, that he shall further prove the special intention of the differentiality.

In addition to all this, with new principles of this sort, it would be necessary to begin each case over again, and if Roumania causes the same slowness in the functioning of the Mixed Arbitral Tribunal as she has done up to the present, the new hearings on jurisdiction could not begin for three years.

In reality the three principles of the Jurists make, in favour of Roumania and under the doubtless attractive appearance of solutions which pretend to be just, the whole continuation of the lawsuits absolutely impossible.

The Hungarian Government believes that no one will be surprised if it is not disposed to accept a solution of this description.

In the course of the proceedings on the merits, the Mixed Arbitral Tribunal alone would have the right to oblige the Hungarian petitioners to prove either differentiation or special intention, if, for any detail, it should consider this to be necessary. But, in general, there would not be a question of any such proofs when once the existence of the prohibited measure is proved by the absence of compensation.

It must not be forgotten that Roumania is not carrying out agrarian reforms in Transylvania such as have been known everywhere in the course of history, that is to say, such as affect only large properties, but an agrarian reform which, in Transylvania, affects the medium and small properties equally, and which does not allot any real compensation to the dispossessed persons. Certain categories of properties (forests, orchards, vineyards, buildings), Roumania keeps for herself without distributing them, or sells them at a full price or, at any rate, at a price considerably higher than the 1% of the value for which she has expropriated them. She believed that she could permit herself to indulge in such an agrarian reform by a means of law altogether different to that which she had passed for her original territory, and enforced on the fourth day after the Treaty of Trianon became operative.

In such circumstances it is necessary to give the judge entire liberty to look for any prohibited measures which may be hidden behind the frontispieces. It would be a grave mistake to tie his hands in advance by formally setting up the principles which have been invented by the Jurists, while having before their eyes an agrarian reform quite different to the one in question.

The Hungarian Government has never been of the opinion that this dispute was incapable, in all circumstances, of settlement by arrangement. It was the way of arrangement which it tried in Brussels in 1923. It has affirmed its possibility on this occasion also, by the mouth of its Representative both at the meetings of the Committee of Three and at the table of the Council. But it does not understand by arrangement a settlement which is purely formal, and which in practice would mean that Roumania would have the possibility of continuing in the violation of the rights of the Hungarian nationals up to 100%, as would have been the case had the attempt in Brussels succeeded, and which would be the case too if the present attempt, based on the three so-called juridical principles, were to succeed.

The representatives of the Hungarian Government have not tired of repeating their opinion of the advantages of agreements arrived at by the litigants themselves—instead of a modification of the Treaty, even by interpretation. Now, the litigant parties are not the Roumanian State and the Hungarian State, but the Roumanian State and about 350 Hungarian

nationals. It is to them, personally, that the Treaty gives the rights which are in dispute. The outlines of such transactions as have to be carried through between the litigants were even sketched out by the Hungarian Minister for Foreign Affairs before the Committee of Three in the month of September. The Hungarian Government cannot but regret that the historical part of the report of the Committee of Three contains no mention of this offer.

Nevertheless the Hungarian Government has thought proper to continue its attempts to arrive at such a settlement. With this end in view it even addressed itself, during, and after, the Session of the Council in the month of September, direct to Roumania, as is set out in the Appendix.

APPENDIX.

BUCAREST,
15th November, 1927.

Monsieur le Ministre,

In accordance with the instructions of my Government, I have the honour of informing Your Excellency of the following:—

In the case of the appointment of the substitute judges to the Roumano-Hungarian Mixed Arbitral Tribunal, the Council of the League of Nations, at its session on 19th September, last, invited Hungary and Roumania to "defer till the month of December their opinion" on the three principles of the report, and only then to communicate their "definite decision" to the Secretary-General.

The Hungarian Government is aware, that it will be impossible for it to accept the three principles contained in the report, even after a fresh examination in great detail of the question. The Hungarian Government will not fail to acquaint the Council with the reasons for this impossibility.

But it desires to give proof now, once again, of its good intention and of its spirit of conciliation in hereby addressing the Roumanian Government direct, in order to reach an amicable settlement of the affair with it by the conclusion of an agreement.

This agreement should and could, in the opinion of the Hungarian Government, avoid touching questions of principle, but it should be based on exact knowledge of the reality of the facts and on practical considerations. This because it aims at practical results only.

In any case it remains understood that this step of the Hungarian Government must not be interpreted to imply in any way, an abandonment by it of the principles and rights claimed or sustained in these proceedings up to the present.

The agreement to be concluded can, none the less, comprise a definite settlement of the difference; one which would be in the interests of all parties to the case. A modification of the Treaty of Trianon is not envisaged, but it should be a simple transaction concluded between the litigant parties themselves, namely, between the Roumanian Government

and the Hungarian petitioners, in whose place, however, the Hungarian Government would be ready to act towards the conclusion of an agreement as their mandatory. This, above all, to guarantee full efficacy for them.

The general lines of the transaction might be as follows :—

The Hungarian petitioners would not demand the restoration of their arable and pasture land, which might be in possession of assigns. Forests, vineyards, orchards, buildings and other structures, would not be included in general in this benefice, in view of the fact that they were not expropriated, in the course of agrarian reform, in the other provinces of Roumania, but only in Transylvania, and because they were not distributed among the peasants, but for the most part are, and still remain, in the hands of the State.

The parcels of land and other properties which were used by Roumania in pursuit of her agrarian reform, and which, in accordance with the preceding, would not be subject to restitution, should be compensated for at lower rates than the full amounts, the fixing of which should be the subject of more detailed discussions. During these discussions, an equitable arrangement could be arrived at, as to the method of payment of the indemnity also.

The Hungarian Government looks for a sincere spirit of conciliation on the part of Roumania Government, corresponding to that which animates Hungary, and, in view of the near approach of the next Session of the Council, it begs the Roumanian Government to reply as soon as possible to its present step.

I beg Your Excellency to accept the assurances of my highest consideration.

(Signed) F. VILLANI,
Minister Plenipotentiary of Hungary.

His Excellency,
M. Nicolas Titulesco,
Minister for Foreign Affairs of Roumania,
Bucarest.

HUNGARIAN INTERESTS IN ROUMANIA.
JOINT OPINION of Sir HENRY SLESSER, K.C., M.P. and Mr. RALPH SUTTON.

Certain Hungarian nationals, who at the date of the coming into force of the Treaty of Trianon, were owners of land in Transylvania, have lodged claims before the Roumano-Hungarian Mixed Arbitral Tribunal alleging that measures have been taken against their property which amount to a violation of the terms of the Treaty. In so doing they claim to be exercising the right expressly conferred upon them by Article 250 of the Treaty of Trianon. The provisions of Article 250 prohibit the liquidation of property of Hungarian nationals situate in that province which would otherwise have been permissible under Article 232, and also require the restoration to the Hungarian owner of all property which has been subjected to measures of that kind between the dates of the Armistice and of the coming into force of the Treaty freed from all such measures and in the state in which it was before such measures had been taken against it.

Transylvania was ceded to Roumania by Hungary under the Treaty of Trianon, and there can therefore be no doubt that the provisions of Article 250 apply to the property of Hungarian nationals situate in that province; and for this purpose it is immaterial whether the owners of that property remain Hungarian nationals by reason of or independently of the exercise of the right of option conferred by Articles 63 and 64.

The measures which the Hungarian nationals complain of are measures taken against their property under and by virtue of a certain law passed by the Roumanian Government which came into force on the 30th July, 1921, that is to say four days after the coming into force of the Treaty, and this fact appears on the face of the claim presented by the Claimants, or such of the claims as we have seen. The law in question is an Agrarian Reform Law having for its ostensible object the distribution of land amongst peasant proprietors, which involves the necessity of expropriating the owners of the land, and also the taking over of such things as forests by the Roumanian State. The law, on the face of it, applies to all owners of land regardless of their nationality, but in fact must operate to the detriment of the claimants, *inter alios,* who therefore complain that their rights under Article 250 have been abrogated.

The Roumanian Government in these circumstances did not put in an answer to the claims of the Hungarian claimants dealing with the merits of the case, but filed a plea objecting to the jurisdiction of the Tribunal to entertain the claims at all.

The Tribunal is a Court owing its existence to the Treaty itself; it is of limited jurisdiction, and, like any court of limited jurisdiction, must from time to time be called upon to enquire and determine whether it has jurisdiction to try a particular case which has been brought before it. This principle must apply whether the court in question be a Municipal or an International court. If it be a Municipal court, its decision on this point of jurisdiction is usually subject to the review of

some higher court in some shape or form: though sometimes, in England at any rate, the legislature may in terms exclude any right of appeal from such a court, in which case the decision which it gives upon its jurisdiction may be final and conclusive. In the case of an International court finality is the usual case and the decision of such a court on its own jurisdiction cannot be reviewed by any other court, at any rate without the consent of the sovereign powers who are parties to the dispute submitted to it. That this is the position in the case of the Mixed Arbitral Tribunal established under the Treaty is reasonably clear from the provisions of Article 239: for no court is either expressly or by necessary implication constituted to review the decisions of such Tribunals, on the contrary, the contracting powers expressly agree that those decisions shall be regarded as final and conclusive. From this it seems to follow that, since one of the matters on which a Mixed Arbitral Tribunal, in common with any other International Tribunal, has both the power and indeed the duty to adjudicate, is the question of its jurisdiction, the decision of any such Tribunal on this point also is final and conclusive, whether it affirms or denies its jurisdiction in any particular case. It is important, however, to keep clearly in mind what is meant by a decision on a question of jurisdiction, for it is easy to fall into confusion of thought on this point. The jurisdiction of the Tribunal to entertain a claim presented before it does not depend upon the truth or falsity of the claim but upon its nature, and the question of jurisdiction is determinable at the commencement and not at the conclusion of the enquiry. No doubt in this particular instance the Tribunal will have to decide, before it can give relief to the claimants, that the measures complained of belong to the class of measure covered by Article 250, and it is easy therefore to slip into the fallacy of assuming that that fact which the Tribunal has to decide is that which constitutes its jurisdiction. This however is not the case. In order to oust the jurisdiction of the Tribunal it must be shewn that the complaint does not, on the face of it, disclose matter over which the Treaty gives the Tribunal jurisdiction, as would be the case if, for instance, an Hungarian national were to bring before the Tribunal a claim for damages because his property had during the year 1923 been taken in execution to satisfy a judgment obtained against him by a Roumanian subject in a Roumanian Court of Justice: and if the Tribunal were to call such execution *saisie ou liquidation* in the terms of the Treaty it would not avail to give the Tribunal jurisdiction: that is to say a case would have been presented to the Tribunal over which on the face of it, *in limine*, the Tribunal would have had no jurisdiction. In such circumstances it would have no power to entertain the question or to commence any enquiries into the merits and its proceedings to a conclusion would not give it jurisdiction.

But when a complaint is well laid, being *prima facie* within the Tribunal's jurisdiction, the Tribunal is bound to commence the enquiry and in so doing it undoubtedly acts within its jurisdiction: but in the course of the enquiry evidence being offered in support of and against the complaint, the proper conclusion to be drawn may be that the alleged infraction of the Treaty has not been committed and so that the case in that sense (and hence the possibility of confusion) was not within the jurisdiction of the Tribunal. This however is not to say that in proceeding with the enquiry the Tribunal was acting without jurisdiction, for in every stage of the enquiry up to the conclusion the Tribunal could not but have proceeded, and if it dismissed the claim the judgment of dismissal would be a binding judgment and one within

its jurisdiction : and even if it upheld the claim, though the judgment might be said to be erroneous, it still would be a judgment on a matter within its jurisdiction.

When therefore an objection is taken to the jurisdiction of the Tribunal by the method of a *demande exceptionelle,* the matter to be enquired into is the nature of the claim presented before the Tribunal and not its truth : and in order to oust the jurisdiction of the Tribunal the claim must be one which cannot be adjudicated upon by the Tribunal, even assuming that every statement made in it is true, for at this stage it is not possible to enquire into the truth of such statements. The Roumanian Government pleaded that, in order that a complaint should be capable of presentation before the Tribunal, it was necessary that the measure of which complaint was made should have the *double character* of

(1) a measure of seisure and liquidation, disposition forced administration or sequestration, that is to say an exceptional war measure, or in other words a measure which had effected enemies only and without any indemnity :

(2) a measure taken from the 3rd November, 1918, to the date of the coming into force of the Treaty and not thereafter,

and then proceeded to plead that, as regards the measure of which the complainant complained, we are confronted not with an exceptional war measure affecting enemies only but a measure of expropriation for the purpose of agrarian reform, that is to say a measure having for its object general social justice, applying to all landed proprietors and in the whole kingdom, without any kind of distinction and to Roumanians equally, and providing further that an indemnity is to be paid to all those who are expropriated.

Had the contention been sustainable that the claims under Article 250 could only be presented in respect of matters which had occurred before the coming into force of the Treaty, it might well have been that the plea would have been unanswerable : but this contention was formally abandoned by the Roumanian advocates at the hearing before the Tribunal : and it therefore became necessary for the Roumanian Government to take its stand upon the position that the measures complained of could not be within the competence of the Tribunal because they were taken under the Agrarian Reform Law and were therefore incapable of being treated as measures of saisie or liquidation within the meaning of Article 250.

The difficulty however that the Roumanian representatives found themselves in was that though they were able to advance arguments to show that these measures complained of were not in fact of that class of measure which was prohibited by Article 250, they were not able to show that they *could* not be of that class, which it was necessary for them to establish in order to oust the jurisdiction of the Tribunal : in fact there was the confusion already pointed out between the two senses in which the word " jurisdiction " is used. It was indeed impossible at that stage of the proceedings to show that the Tribunal had no jurisdiction. In the first place it is possible and may be established as a fact that the Agrarian Law though ostensibly applying to

everybody yet from the circumstances existing in Transylvania would only apply in substance to Hungarians even if administered with absolute strictness, still more so if in its administration it was made to apply to Hungarians only. All this raises questions of fact to be determined. In the second place, as regards the question of indemnity, it does not appear on an examination of the terms of the Agrarian Law itself that an indemnity is in fact assured: all that is provided is that a certain amount of paper shall be handed to the expropriated owners in return for their land which is valued, not in terms of paper, but in terms of gold, in other words the value of the land and the value of the paper which is handed over in exchange for it are not commensurable: the paper may have some value or it may have none, and in fact at the present time it may be said to have no value. It may therefore be very seriously contended that an act which provides for the handing over of something which may be valueless in exchange for valuable property does not provide for the payment of an indemnity, and therefore it may be a measure which expropriates property from Hungarians without the payment to them of an indemnity by the expropriating Government, and that is at any rate one of the features of a liquidation which is prohibited by Article 250.

It therefore becomes a question of fact in each case whether an indemnity has been paid, but being a question of fact it is not one which can be enquired into on the preliminary issue whether the Tribunal has jurisdiction to entertain the complaint. It must also be pointed out that, even if it be shown as a fact that an indemnity is paid, it will not even so conclude the question. A certain class of liquidation is permitted by Article 232 (i) which contemplates the payment of an indemnity by the expropriating State direct to the expropriated owner and it may be that the law in question falls within that class of liquidation. This form of liquidation however is as much prohibited by Article 250 as is the other form of liquidation which is permitted by Article 232 (b).

It must also be pointed out that the Agrarian Law, on the face of it, contains provisions which are capable of being construed on the face of them as affecting ex-enemies only, which the Roumanian Government itself concedes would give it the character of a measure prohibited by Article 250, now that the contention concerning the date of the measure has been abandoned: such as the provisions which relate to the so-called absentees. In truth when the provisions are examined it will be found that they are not dealing with absentees in any real sense of that term, for the effect of those provisions as officially interpreted is that the property of anyone who was absent from Transylvania during the period between 1st December, 1918, and 23rd March, 1921, for however short a time or for whatever reason (except some state mission) is to be expropriated in toto. As during this period large numbers of Hungarians fled before or were driven out of the country by the invading armies, while those (it is more than likely) who were in sympathy with the conquering nation would remain, it is not possible to say that the law on the face of it cannot be construed as directed against Hungarians because they were Hungarians.

In view of these considerations—and they are not necessarily the only considerations, though they are sufficient for the present purpose—it seems that it would have been well nigh impossible for the Tribunal

to have declared that it had no jurisdiction to enquire into the claims: and it must be remembered that all it has done at present is to entertain jurisdiction to the extent of saying that the claims presented before it by the Hungarian nationals in the twenty-two cases, which were selected (as we are informed) as test cases and typical of some 350 cases which have been lodged before the Tribunal were of such a nature that they might arguably come within Article 250. It has reserved, as it was its duty to do, the question whether in fact they are within that Article: indeed the Tribunal has been scrupulously careful not in any way to deal with or express any opinion upon the various points raised which go to the merits of the case and which therefore ought not to have been raised on the argument relating to the jurisdiction.

When the decision of the Tribunal was given the Roumanian Government let it be known that it would not obey the decree of the Tribunal ordering the Government to file its defence on the merits and also announced that it would withdraw the Roumanian arbitrator whenever any claim involving the Reform Law came before the Tribunal, thereby preventing the Tribunal from functioning (see the report of the Privy Council in the Irish Boundary Commission Case, 1924): and it also brought the matter before the Council of the League of Nations under Article 11 of the Covenant, though it is not quite clear what circumstances the Roumanian Government alleged were threatening "to disturb peace or the good understanding between nations on which peace depends," whether for instance those circumstances were that Hungarian nationals were claiming to exercise rights under the Treaty, or the judgment of the Tribunal that they were entitled to do so, or the refusal of the Roumanian Government to abide by that decision. But whatever the reason, the Council of the League of Nations felt it to be their duty to exercise the mediatory functions under the covenant and appointed a Committee of three to report upon the matter.

Independently of Article 11, however, the Hungarian Government requested the Council to fulfil what is, in our opinion, a purely ministerial function under Article 239 and to appoint two persons from whom the Hungarian Government might select one to fill the vacancy on the Tribunal caused by the withdrawal of the Roumanian arbitrator as provided in the Treaty. The Council therefore found themselves asked to perform two duties under the Treaty which are and must be kept distinct: for the one duty under Article 11 is to act as a mediator and to endeavour to effect a settlement of the dispute between two members of the League; the other under Article 239 is merely the duty to act in a purely ministerial manner, that is to appoint to vacancies, in order to enable the Tribunal set up by the Treaty, quite independently of the Council of the League of Nations, to carry out the functions prescribed by the Treaty.

It must also be remembered that the functions of a mediator are in no sense judicial, the mediator can make suggestions and give advice, but he can decide nothing: he can propose but he cannot dispose.

The Committee appointed by the Council made numerous efforts to produce an agreement between the two parties without however effecting any result. Amongst other things with a view, no doubt, to limiting the dispute it attempted to obtain the assent of both parties

to certain views which it expressed on the interpretation of the Treaty. In so far as this represented an effort at mediation no objection can be taken to the course pursued, nor for this purpose is it really relevant to enquire whether the propositions laid down by the Committee are or are not a correct interpretation of the Treaty; if the parties chose to do so there was no reason why they should not agree that the enquiry before the Tribunal should be conducted on the basis that those propositions were to be looked upon as the meaning of the Treaty for the purpose of that litigation, though how far the jurisdiction of the Tribunal could be limited as between the claimants by an extraneous interpretation by the Council or the respective Governments is not so clear.

The Committee do not appear to have had before their minds the distinction which we think ought to be drawn between litigation in which the Hungarian Government are a party and litigation in which there is a particular claimant. If the Hungarian Government were themselves parties to the claim, it might well be that, by agreement in the manner suggested by the Committee or otherwise, they might have precluded themselves from raising some particular matter or pressing some particular construction of law upon the Tribunal.

Apart from some modification of the Treaty itself, however, when once a claim not proceeding from the Hungarian Government as such has raised an issue before the Tribunal, then, though the Tribunal has come to be re-constituted as a result of certain admissions made by the Hungarian Government, it by no means follows that an individual claimant will be precluded from urging facts or a construction of law which the Hungarian Government directly or by implication have agreed shall not be considered by the Tribunal.

It is very doubtful whether in such a case the Tribunal could properly refuse to entertain jurisdiction of a particular claim or refuse to give any particular interpretation of any issue because of an admission made, not by a claimant, but by the Hungarian Government.

In an issue between a particular claimant and the Roumanian Government, the Hungarian Government might well be considered by the Tribunal to be a stranger to the litigation, not competent to limit the jurisdiction of the Tribunal in any way.

Unfortunately the report has not been framed in very felicitous language, with the result that it is at least open to an interpretation which would suggest that the Committee have confused the ministerial function of the Council under Article 239 with its mediatory function under Article 11 of the Covenant, and also have confused mediatory and judicial functions, with the result that they considered that the Council of the League of Nations was in some shape or form a quasi-judicial body entrusted with the power of reviewing the decisions of the Mixed Arbitral Tribunal or of prescribing to that Tribunal the limits within which it was to exercise its jurisdiction. It is clear however that neither the Council nor the League itself has any such powers, and many of the matters on which the Committee have expressed an opinion are matters of interpretation of the Treaty which has been entrusted to the Tribunal and to the Tribunal alone. Opinions on such a difficult point may legitimately differ, as they do on many difficult points of law, indeed in some cases it cannot properly be said

that one opinion is right and the opposite opinion is wrong: both may be permissible though only one can prevail, and in such cases the Court has to decide which shall prevail, and the Court in this particular instance is the Tribunal. What however is noticeable is that there is no suggestion in the Report of the Committee that the Tribunal was wrong in overruling the Roumanian plea, and entertaining jurisdiction; on the contrary, it is quite clear from what is said in the Report that the Committee consider that that plea was rightly overruled. The Council are not therefore faced with the difficult position which might arise if a Tribunal had with obvious perverseness embarked on an enquiry into which it had no jurisdiction to enter, for it is conceded that no such thing has happened here.

In these circumstances it may be respectfully suggested that the Council have done all in their power in their character of mediators to bring the parties to an agreement, which would either dispose of or limit the extent of the dispute, and having failed to do this they have discharged their duty under the covenant. Without the consent of both parties they cannot exercise any arbitral or judicial functions, and if and in so far as the Report of the Committee suggests that they should do so the Report shows how easy it is to confuse the two duties, which makes it all the more important that the Council should keep the two functions clearly distinct: and, if they do so, they will no doubt find that the only course now open to them is to discharge the ministerial function under Article 239 without imposing any conditions for its performance. That is to say the Hungarian Government should now ask in terms that Article 239 be carried out and that the Council should proceed by the machinery there provided to reconstitute the Tribunal sine conditione.

HENRY SLESSER.

RALPH SUTTON.

THE TEMPLE,

The 12th day of January, 1928.

THE TREATY OF TRIANON and the Caims of HUNGARIAN NATIONALS with regard to their Lands in TRANSYLVANIA.

OPINION

By the Right Hon. Sir LESLIE SCOTT, K.C., M.P.

1. WHETHER UPON THE CORRECT INTERPRETATION OF THE TREATY OF TRIANON, AND PARTICULARLY OF THE ARTICLES OF THE COVENANT, THE LEAGUE OF NATIONS, WHEN ACTING UNDER ARTICLE 11 OF THE COVENANT, HAS ANY JUDICIAL POWERS; OR PERFORMS ANY JURIDICAL FUNCTION.

QUESTION 1.

If I understand the first Question rightly, the answer to it is in the negative.

By the first part of the Question (judicial powers) I understand that I am asked to advise whether the High Contracting Parties have conferred upon the League of Nations a consensual jurisdiction of an arbitral character to adjudicate upon any question that may be brought before it under Art. 11 of the Covenant, so as in any way to bind the Powers themselves by its decision. To make any exhaustive definition of the different kinds of action which the High Contracting Parties, by their Treaty, have authorised the League of Nations to take with the object of preserving peace would be a difficult task, and one which it is unwise to undertake in the abstract. As various problems present themselves in the course of time it will be possible, often without difficulty, to answer such a question in relation to, and limited by the facts of the particular case.

But limiting my answer to the aspects which are relevant to the broad questions of the controversy in relation to which I am asked to advise, my opinion is that whereas the League of Nations is under Art. 11 free to take whatever action it considers best suited to attain the ends contemplated by that Art., viz. : to safeguard the peace of nations, to deal with matters which may affect international relations prejudicially, and generally to preserve goodwill between nations, judicial determination is the one form of action which is definitely excluded from their powers. Their main function is consultation and mediation, but not to decide which side is right and which wrong. This distinction is brought into prominence by Art. 12.

The second part of the Question (juridical functions) I understand means—" is the function of legal interpretation of the provisions of the Treaty to any, and what, extent and in what aspect, committed to the League of Nations? " If this be the meaning intended, my answer again is in the negative, in this sense, that the duty is not entrusted to the League of interpreting the Treaty for the purpose of guiding any legal tribunal, whether the Permanent Court of International Justice, a Mixed Arbitral Tribunal, or a national court. Whilst expressing this definite opinion, I must guard myself from being thought to mean that the League is not entitled for the purpose of taking such action as falls within its powers and duties to interpret the Treaty for its own guidance. It is obvious that it ought and must do so—for instance, for the purpose of conciliation under Art. 11. Without forming a clear opinion as to the meaning of the Treaty, and it may be as to the meaning of some other document, whether Treaty or rules of international law or National law, it could not in many cases take action effectively under Art. 11 in order to bring disputing parties together unless it has a clear understanding of what it conceives

to be the legal rights and obligations of those parties; and for this purpose it is entitled to utilise the assistance of jurists to the fullest possible extent. None the less, this duty must be clearly distinguished from the duty either of adjudication or of guiding a legal tribunal on legal matters.

The fundamental ground for the opinion that on the true interpretation of the Treaty the League of Nations has no judicial powers or legal functions in connection with any question which falls within Art. 11 of the Covenant, is that in order to found such a jurisdiction the intention of the Parties to the Treaty to confer it must be manifested in the language of the Treaty itself; and I can detect no words which either expressly or by necessary implication indicate such an intention.

2. WHETHER UNDER ARTICLE 239 OF THE TREATY OF TRIANON WHEN AN ARBITRATOR DIES, OR FROM ANY OTHER CAUSE CEASES TO ACT, AND THE VACANCY IS NOT FILLED BY THE GOVERNMENT WHICH NOMINATED THE ARBITRATOR SO CEASING, THE COUNCIL OF THE LEAGUE OF NATIONS

(*a*) HAS A DUTY, UNDER PARA. 1 OF THE ANNEX TO THAT ARTICLE, TO MAKE THE NECESSARY NOMINATIONS IN ORDER THAT THE TRIBUNAL MAY BE RECONSTITUTED, AND

(*b*) HAS ANY AND WHAT DISCRETION IN THE MATTER, BEYOND THAT OF SELECTING SUITABLE PERSONS; AND IN PARTICULAR WHETHER

(*c*) IT IS ENTITLED TO IMPOSE ANY SANCTIONS AS A CONDITION OF ITS AGREEING TO MAKE SUCH NOMINATIONS.

My answers to the different parts of this question are as follows :—

(*a*) Yes.
(*b*) No.
(*c*) No.

My reasons are as follows :—

Article 239 Par. (*b*) provides that the Mixed Arbitral Tribunals constituted in accordance with the provisions of Par. (*a*) are to perform the function of adjudicating upon differences which are assigned to their jurisdiction by Sections III., IV., V., and VII. of the Treaty. This provision is in terms mandatory, and confers an exclusive jurisdiction over the subject matters so defined. Article 250 is equally mandatory and exclusive. By it the Powers entrust the judicial settlement of disputes within the Article to the exclusive jurisdiction of the Mixed Arbitral Tribunal, thereby making an express addition to the categories of subject matters mentioned in Article 239 (*b*).

By Article 239 (*g*) the High Contracting Parties enter into an express contract that they will each and all treat the decision of the Mixed Arbitral Tribunal as "définitive," a word which, in my opinion, means both final and binding; and in order to make this meaning doubly clear, they have each and all undertaken by the same paragraph to make such decisions binding on their nationals—an undertaking which imports a promise that they will pass such legislation as may be necessary for the purpose.

Whatever duty rests upon the League of Nations in regard to the Mixed Arbitral Tribunal, the source of obligation is the contractual undertaking imposed in the Treaty itself by reason of its execution by the High Contracting Parties to it. This observation may seem a truism, but if it be borne in mind it is of assistance in appreciating the true answers to the questions now under consideration. The duties of the League under Art. 11 of the Covenant and Art. 239 of the Treaty, being referable to the contract of the High Contracting Parties, the question is one of the true interpretation of the written instrument.

Article 239 (*a*) imposes, in unambiguous language, a duty upon the High Contracting Parties to constitute the Tribunal in the first instance ("un tribunal arbitral mixte *sera constitué.*") Such tribunals are to be constituted as between Hungary on the one side and each of the Allied and Associated Powers on the other. In regard to each such tribunal, each of the two Governments concerned gave, by signing the Treaty, an absolute undertaking to designate one of the three members of the tribunal, the President being chosen by agreement between the two Governments concerned. In default of such agreement, the Council of the League is directed to nominate a President and two other persons, nationals of neutral Powers, who shall be capable of acting as President if required.

If, on a vacancy occurring, a Government concerned (*i.e.*, the Government whose nominee has ceased to act) does not within a month nominate a successor, the opposing Government has the right to fill the vacancy by choosing one of the two persons nominated as above by the Council of the League (although they were in fact nominated in the first instance in order to replace the President, if required).

Paragraph 1 of the Annexe provides that in case of a member of the tribunal ceasing to act for any reason whatsoever ("pour une raison quelconque") the same procedure has to be followed as is provided for by Par. (*a*) of Article 239 in the case of an initial vacancy —*i.e.*, upon the original constitution of the tribunal.

The above provisions are plain and unequivocal; absolute and not conditional. The duty of the Council to nominate two neutral persons from whom the opposing Government may choose one to act as arbitrator in place of the arbitrator who has ceased to function, is not made contingent upon any event, nor is it expressed to be permissive or discretionary. The moment a vacancy occurs, the duty of the League attaches, in order that the tribunal may be reconstituted and function again. No discretion is given to the Council; neither the Article nor the Annexe contains any language from which an intention to confer such a discretion can be inferred.

If the duty of the Council be absolute and not discretionary, it follows that it is *ministerial* in character—a duty imposed in order that the continuous functioning of the arbitral tribunal may not be interrupted by the death of one of its members, or by any other cause whatsoever which may prevent his continuing to act.

It follows equally that the High Contracting Parties have not by their agreement conferred upon the Council any power to attach any conditions to the performance of its duties in connection with the reconstitution of the tribunal; still less has the Council power to impose any sanctions as a condition of doing that which the Article directs it to do. That any such rights should be vested in the Council would require express language in the Treaty, and no such language is to be found there.

The above opinion rests upon the language employed in Article 239 and its Annexe; and it is unnecessary for the purpose of such opinion to look elsewhere in the Treaty. But it is to be observed that the general conclusion indicated by a perusal of Article 239 and its Annexe is in conformity with the general principles of the Covenant by which all members of the League, and all signatories to the Treaty, are encouraged to refer their differences to arbitration or to the Permanent Court of International Justice, and the Council itself is given no such arbitral powers (see particularly Articles 13, 14 and 15). Neither the Council nor the Assembly have arbitral power. Indeed the greatest possible care is taken in Article 15 to make it clear that the League, both through its Council and through its Assembly, is strictly limited to the function of rendering advisory assistance. In my opinion it would be inconsistent with these fundamental principles upon which the League of Nations rests, that the Treaty should be interpreted as conferring upon the Council any power to attach conditions or sanctions to the performance of its ministerial duty in regard to the reconstitution of a Mixed Arbitral Tribunal.

3. WHETHER THE MIXED ARBITRAL TRIBUNAL IS BOUND BY ANY LEGAL OR OTHER OPINIONS EXPRESSED BY THE LEAGUE OF NATIONS THROUGH ITS ASSEMBLY OR COUNCIL: OR ON THE CONTRARY HAS A JUDICIAL DUTY TO EXERCISE ITS OWN INDEPENDENT JUDGMENT ON ALL MATTERS PENDING BEFORE IT WHETHER RELATING TO QUESTIONS OF COMPETENCE OR MERITS —(DU FOND).

QUESTION 3.

My answer to the first part of this question is in the negative, and to the second part in the affirmative.

Similar reasoning to that expressed by me in the latter part of my answer to Question No. 2 is applicable to the first part of this question. It would be inconsistent with the fundamental principles of the Covenant, on the true legal interpretation of its language, that a Mixed Arbitral Tribunal should be bound or in any way affected by, any legal or other opinions expressed by either the Assembly or the Council of the League. Such a function, in any national system of justice, belongs either to a Court of Appeal, particularly a "cour de cessation," by way of correction of the legal errors of subordinate tribunals. In our English system it belongs to the King's Bench Division of the High Court of Justice, by way of appeal from arbitrators on questions of law, or of supervision of inferior courts by way of prohibition against excessive jurisdiction or by certiorari, *i.e.*, a quashing of decisions by inferior courts when they are erroneous in law.

For the creation of such an appellate or supervisory jurisdiction it is obvious that express enacting words are required. It suffices to say that there are none such in the Treaty of Trianon.

But whilst expressing a categorical opinion that neither the Assembly nor the Council can bind the Mixed Arbitral Tribunal by the expression of any opinion, and that the tribunal must judge in complete independence of any such outside influence applying its own mind to the questions of law and fact which arise for its determination in any case before it; I desire to guard myself from possible mis-

conception. The duty incumbent upon the Council of the League to use every possible effort by way of conciliation and mediation, and to prevent disputes, or to bring about their solution by agreement between the Parties, entitles it—and indeed may well impose a duty upon it in an appropriate case—for the purpose of conciliation—to form and to express legal opinions, and to convey those opinions to the disputing Parties or to the Governments interested in the dispute and even to invite the Parties to accept them. Provided that no attempt is made by the Council to pass beyond the function of conciliation and mediation, and that it does not seek directly or indirectly to interfere with the independent jurisdiction of the Mixed Arbitral Tribunal or to impose such sanctions as in answer to the last question I have said are, in my opinion, forbidden by the language of the Treaty, no occasion for criticism arises.

4. WHETHER THE DECISION OF THE MIXED ARBITRAL TRIBUNAL GIVEN ON THE 10TH JANUARY, 1927, THAT IT IS COMPETENT TO ENTERTAIN CERTAIN CLAIMS OF HUNGARIAN NATIONALS UNDER ARTICLE 250 OF THE TREATY OF TRIANON IS FINAL, OR WHETHER THE TREATY OF TRIANON CONTAINS ANY PROVISION WHICH DIRECTLY OR INDIRECTLY SUBJECTS THAT DECISION TO THE POSSIBILITY OF REVIEW EITHER BY THE ASSEMBLY OR COUNCIL OF THE LEAGUE OF NATIONS OR BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE.

QUESTION 4.

The answer to the first part of this question is in the affirmative, and to the second part in the negative.

On general principles, *i.e.*, on the general question of the interpretation of the Treaty, I have sufficiently dealt with both parts of this question in my answers to questions 2 and 3.

All that remains is the particular question of the form of the decision of the Mixed Arbitral Tribunal dated the 20th of January, 1927. I have perused it carefully. It purports to be final. Its language is clear and I see no reason for thinking there can be any doubt as to its validity or finality. The question of competence is disposed of irrevocably. The Treaty contains no machinery by which that decision can be impeached, modified or in any way reviewed.

5. COUNSEL IS ALSO REQUESTED TO ADVISE IN PRINCIPLE IN REGARD TO THE MORE IMPORTANT QUESTIONS OF LAW AND FACT UPON WHICH THE SUCCESS OF THE HUNGARIAN CLAIMANTS WILL DEPEND UPON THE TRIAL OF THE MERITS (LA QUESTION DU FOND), WHEN THE MIXED ARBITRAL TRIBUNAL IS RECONSTITUTED. FOR THIS PURPOSE COUNSEL IS NOT ASKED TO ADVISE UPON THE EVIDENCE IN DETAIL.

QUESTION 5.

(1) *The meaning of "saisie ou liquidation" under Article* 250.

As Article 250 is an exception from the general scope of provisions of Article 232, and that Article is either by reference or expressly made subject to the provisions of Article 250 in the case of certain liquidations (see Clause 1 paras. (*b*) and (*i*), it is both legitimate and proper to look to Article 232 for assistance in arriving at the correct interpretation of "saisie ou liquidation" in Article 250.

(2) "Mesures exceptionelles de guerre" and "Mesures de Disposition," referred to in Article 232 (1) (*a*) and defined by Par. 3 of the Annexe to that Article, are clearly intended to be included within the two general words "retenir" and "liquider" under Article 232 (1) (*b*). It follows necessarily, in my opinion, from the premises that the words "saisie" and "liquidation" in Article 250 are the substantives corresponding with the verbs "retenir" and "liquider" and must be regarded as covering all the operations mentioned in Par. 3 of the Annexe to Article 232.

The provision of Article 250, second paragraph, that Hungarian property situate in territory of the old Austro-Hungarian Monarchy shall be restored to its owners "libérés de toute mesure de ce genre" would have been sufficiently wide to cover everything intended, but lest anything should have been omitted from the categories enumerated in Par. 3 of the Annexe to Article 232, express words are inserted in the second paragraph Article 250 (*ex abundanti cautela*) in order to sweep in every similar measure: "ou de toute autre mesure de disposition, d'administration forcée ou de séquestre."

It follows that any compulsory expropriation of property falls within the generality of the language of Article 250.

But it is common ground that an expropriation "pour cause d'utilité publique" on payment of full compensation would not fall within the real ambit of the Article, and an Agrarian Law might involve an expropriation of this character. In such a case no breach of Article 250 would result. A criterion is afforded by a consideration of the essential character of the Treaty. It is a Treaty of Peace. Primarily Articles 232 and 250 deal with War measures, but they both speak of the future (Article 232 (1) (*b*) and Par. 3 of the Annexe and Article 250, first par.); that is to say the measures with which they deal include measures to be taken or not to be taken after the ratification of the Treaty of Peace. But both Articles assume that such measures are similar in character to measures previously taken during the War. The element of hostility between the two sides is thus made relevant and whereas Article 232 authorises the Allied Powers to liquidate the property of Hungarians generally, obviously in their capacity of ex-enemies responsible to make reparations for the damage done by them as enemies, so by Article 250 Roumania for instance is forbidden within any territory which was once part of the ancient Austro-Hungarian Monarchy to take any such measures against their old enemies, the Hungarians. "Liquidation" therefore presupposes what has been called, for brevity, an element of "connexité" with the War; with an "expropiation pour cause d'utilité publique contre compensation equitable," Article 250 has no concern. But if on consideration of the whole of the facts of the case, including the history of the negotiations which led up to the Treaty, the history of the conduct of Roumania since the Armistice towards Hungarians having property in Transylvania, whether before or after the ratification of the Treaty of Peace; of the character of Roumanian legislation or administration concerning land in Transylvania as compared with her legislation or administrative action in other parts of Roumania; of the character of the so-called Law of Agrarian Reform as judged by its terms and its application in practice; of the broad Agrarian facts in regard to landholding historically and actually in Transylvania, and the comparative number of Hungarians, Roumanians and other nationals owning land in Transylvania and the small extent of "latifundia" in Transylvania as compared with other parts of Roumania—if on such a consideration of all the facts of the case (and I do not suggest that

the above list is exhaustive or anything more than illustrative), it appears that the Agrarian Law in question has in its operation been directed against Hungarians, with the result of eliminating the Hungarian owners and transferring their property to Roumanians, then the facts would clearly disclose a case of "liquidation" in breach of Article 250.

For the purpose of answering the question put to me it is necessary to point out that the Hungarian claimants may succeed in proving their case by establishing one or more of the evidential facts above enumerated and without establishing them all or even most of them. Their case is cumulative. It may well be that, as many distinguished jurists consulted in the case have said, one or more points are individually sufficient to entitle the Hungarian claimants to judgment. But I desire to emphasise the view which on a perusal of the large mass of opinions and arguments presented in the case seems sometimes to have been lost sight of, that the question whether there has been a "liquidation" of the kind forbidden by Article 250 depends on an issue of fact, and that on this there is already a large mass of evidence from different points of view which, taken cumulatively, points irresistably to one judicial inference, viz. : that there has been a plain case of forbidden "liquidation" entitling the claimants to relief under Art. 250.

If I were asked to select any one point of fact which is more strongly in favour of the Hungarian contention than the others, I should select the provision of the Agrarian Law itself in Article 6, that the land of all absentee landlords (above 50 jugars) is to be subjected to total expropriation. In the light of the Statutory and subsequent administrative definitions of the word "absent" it seems to me quite impossible to avoid the inference that this section of the Law was directed against Hungarians as such (see for instance the reasoned statement by M. Charles Dupuis, Recueil edited by M. Lapradelle, p. 73, and the history of the previous legislation traced by Mr. Bellot, Recueil, pp. 538—540). This matter is also dealt with powerfully by several of the other jurists who gave opinions or argued on the side of the claimants. I select the two former merely as illustrations.

It may be possible to call additional evidence before the Mixed Arbitral Tribunal, but as the facts of the case, in my opinion, constitute a cumulative case which no other evidence adduced by Roumania could answer, it may well be that the Tribunal will consider that the case is proved, and that it would be idle to permit under its rules of procedure a "contre-preuve" when by reason of the inability of Roumania to challenge the main facts already admitted or proved, such "contre-preuve" could not affect the final decision of the case.

It may perhaps be worth while to deal with one or two matters which seem to me to have been looked at from the wrong angle, and to have been treated as matters of law, when on the real issue between the Parties they should have been regarded rather as matters of fact. Let me take three illustrations.

(*a*) It has been said that the derisory amount of compensation recoverable, viz. : less than 1%, shows an expropriation of private property of foreigners which is contrary to the recognised rules of international law. The observation is no doubt sound, but the relevance of this point to the issue is that as a matter of evidence it helps to prove a liquidation in fact. It shows that the Agrarian Law was of a most exceptional character, and therefore not likely to have been an expropriation "pour cause d'utilité publique."

(*b*) In the second place, the Agrarian law discloses differentiation against proprietors in Transylvania who were almost wholly Hungarians. When its terms are compared with the Agrarian Laws for other parts of Roumania and when the full compensation in gold given for instance to Allied Nationals in Bessarabia is contrasted with it, it is difficult to avoid such a conclusion. But although proof of differentiation is affirmative evidence that the "Agrarian reform" in fact amounts to "liquidation" within the meaning of the Treaty, to avoid any misconception I wish to add that it does not follow, and I do not assent to the proposition that if there were no differentiation there would be no liquidation.

(*c*) It is said by some of the Jurists supporting the Hungarian claimants that a breach by Roumania of the provisions of Article 63 of the Treaty

(i) by expropriating the Hungarians under the Hungarian law

(ii) by the amendment of the Roumanian Constitution so as to forbid foreigners to hold land in Roumania

shows that the action of Roumania is necessarily and as a matter of law, not merely of fact, a "liquidation" forbidden by Article 250. My own view is that no conclusion of law can be drawn from the above-mentioned facts, but that they have probative force of considerable weight on the question of fact. If Roumania was prepared to disregard her Treaty obligations in regard to Hungarians, in a matter so inextricably interwoven with her Agrarian law, it surely is evidence of that element of "commexité" which I agree is involved in the conception of "liquidation" under Article 250.

In answering question No. 5 I desire to repeat what I have already said, that I have only given illustrations and made no attempt to cover the whole ground. I desire also to repeat that in each of my illustrations I have only drawn attention to certain aspects of each point; there may be many others that will be equally relevant at the trial. Finally, I desire to emphasise that my opinion expresses a preference for a particular legal method of approach, rather than disagreement with certain legal opinions which have been already advanced by other jurists on behalf of Hungary, who regarded the case as concluded as a matter of law, by certain considerations upon which they rely. They might be right, but even if the Tribunal should not agree with some of their legal views, the cumulative case of facts seems to me likely to prove irresistible.

Goldsmith Building,

TEMPLE, LONDON, E.C.4.

29th November, 1927.

THE VACANCY IN THE HUNGARIAN-ROUMANIAN MIXED ARBITRAL TRIBUNAL

JOINT OPINION

of the Right Hon. Sir JOHN A. SIMON, K.C.V.O., P.C., K.C., M.P. and Mr. RALPH SUTTON

In common with other treaties which terminated the Great War, the Treaty of Trianon incorporates "the covenant of the League of Nations," and the provisions relating thereto constitute the first part of the Treaty. Articles 11 to 16 of the covenant deal particularly with those matters which threaten to disturb international peace or the good understanding between nations upon which peace depends, and contain elaborate provisions to prevent such matters leading to rupture and war, by causing them to be submitted to arbitration or enquiry by the Council, as representing the League, who shall "endeavour to effect a settlement of the dispute" and, if necessary, may refer the matter to the Assembly. In short, the mediation of the Council can be sought besides arbitration, but it must be borne in mind that the objects of arbitration and mediation are different.

"These matters are often discussed as if they were practically the same: but in reality they are fundamentally different. Mediation is an advisory, Arbitration a judicial, function: mediation recommends, arbitration decides. While nations who might for this reason accept mediation might be unwilling or reluctant to arbitrate, it is also true that they have often settled by arbitration questions which mediation could not have adjusted."

Moore. Digest of International Law (1906) Vol. VII. Paragraph 1069.

In addition to these powers to act as mediator, under Article 239 of the Treaty certain functions are assigned to the Council of the League of Nations with reference to an arbitral Tribunal, known as the Mixed Arbitral Tribunal, established by that Article between each of the Allied and Associated Powers on the one hand and Hungary on the other, for the purpose of deciding certain questions under different parts of the Treaty. Each of the Governments concerned is to appoint one of the three members constituting the Tribunal and the President is to be appointed by agreement: and "in case of failure to reach agreement "the President of the Tribunal and two other persons either of whom "may in case of need take his place shall be chosen by the Council of "the League of Nations, or until this is set up by M. Gustave Ador "if he is willing.

"If in case there is a vacancy a Government does not proceed "within a period of one month to appoint as provided a member of "the Tribunal, such member shall be chosen by the other Government "from the two persons mentioned above other than the President."

And by paragraph 1 of the Annex to the Article "Should one of "the members of the Tribunal either die, retire or be unable for any "reason whatever to discharge his functions the same procedure will "be followed for filling the vacancy as was followed for appointing him."

Under this Article it is reasonably clear that the functions of the Council are in no sense mediatory or advisory. There is in fact nothing on which they can mediate, nor are they called upon to advise or determine whether there should or should not be an arbitral Tribunal. The Treaty has provided that it shall be established, and the signatory powers have agreed that certain matters should be referred to its

arbitrament: and the functions of the Council are, like those of M. Gustave Ador—for there is no difference between the two—purely ministerial, and are entirely analogous to the powers conferred by numerous agreements to submit future disputes to arbitration on some designated person to appoint the arbitrator or arbitrators if one of the parties refuses to appoint or concur in appointing according to his agreement, or by the Arbitration Act, 1889, upon the Court so to appoint in like circumstances. The phrase "if he is willing" applies only to M. Ador: the Council by nominating is merely discharging a duty. Being purely ministerial, the function is not discretionary in the sense that the Council can in their discretion refuse to act under the Treaty or refuse to act except upon conditions which they think fit to impose.

The functions therefore of the Council under this particular Article of the Treaty are distinct from, and are not in any way to be confused with, their functions under the Articles of the Covenant.

The Tribunal itself is, no doubt, in a somewhat peculiar position; its jurisdiction is limited, and cases therefore must occur in which the questions fall for decision whether or not they are within the jurisdiction of the Tribunal, and the Tribunal has to decide that question. This particular difficulty occurs frequently enough in municipal law, and it has also arisen before in international matters. In this country, for instance, the legislature may entrust any tribunal with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists, as well as the jurisdiction, on finding that it does exist, to proceed further or do something more, and may enact that there shall be no appeal from their decision: and in such a case the tribunal has jurisdiction to determine all the facts including the existence of the preliminary facts upon which the further exercise of its jurisdiction depends, and there is no appeal from the exercise of their jurisdiction.

In international matters again the difficulty occurred in an arbitration under the Jay Treaty between England and the United States, relating to various actions taken against American shipping during the Napoleonic wars, and the question arose whether the Tribunal had jurisdiction to enquire into claims on which the Lords Commissioners of Appeal in England had already adjudicated: and the answer of Lord Loughborough, who was then Lord Chancellor, was "that the doubt respecting the authority of the Commissioners (as the arbitrators were called) to settle their own jurisdiction was absurd and that they must necessarily decide upon cases being within or without their competency" (Moore: Digest of International Law (1906) Vol. VII. Par. 1073) and similarly in another arbitration between the United States and Mexico in 1839, where the question again arose, Mr. Daniel Webster was equally emphatic, "The mixed commission under the convention with Mexico has always been considered by the Government essentially a judicial tribunal with independent attributes and powers in regard to its peculiar functions. Its rights and duty therefore, like those of other juridical bodies, are to determine upon the nature and extent of its own jurisdiction, as well as to consider and decide upon the merits of the claims that might be laid before it." Moore: International Arbitrations (1898) Vol. II. P. 1242.

A perusal of Article 239 of the Treaty leads irresistably to the conclusion that the powers of the Mixed Arbitral Tribunal are the same. No court is established either expressly or by necessary implication which can exercise any control over it, or act as a court of appeal from its decisions; on the contrary the High Contracting parties

agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive: and this in itself seems to be merely applying the general maxim that "the decision of an international Tribunal over matters as to which it is made the supreme arbiter is final, and is not the subject of revision, except by the consent of the contesting sovereigns." Moore: Digest of International Law (1906) Vol. VII. Par. 1081.

Whether therefore the Tribunal affirms or denies its jurisdiction in any particular instance, it appears that there is no means of questioning its decision, apart from a fresh agreement to refer the matter to some other Court—a proposal which in fact was made in this particular instance, but not accepted.

Among the matters referred to the Mixed Arbitral Tribunal are claims by Hungarian Nationals under Article 250 of the Treaty. Such claims have in fact been preferred, and the Roumanian Government in answer thereto put in a "demande exceptionelle" raising the point that the Tribunal had no jurisdiction to entertain them, on the ground that the measure under which the acts complained of were taken, that is the Roumanian Reform Law of July 30th, 1921, by its nature did not constitute a measure of "saisie ou liquidation" within the meaning of Article 250. The Tribunal however decided that it could not on *a priori* grounds reject the claims submitted by the Hungarians, or declare itself incompetent to entertain them, and therefore overruled the "demande exceptionelle."

Thereupon Roumania withdrew her arbitrator, thus creating a vacancy which is alleged to prevent the Tribunal from functioning, and brought the matter before the Council under Article 11 of the Covenant; Hungary on the other hand requested the Council to exercise its functions under Article 239.

In these circumstances the Council thought it proper to attempt to act as mediator under the covenant, and appointed a Committee to report upon the whole matter.

The Committee in fact made numerous efforts to bring the parties to an agreement, but those efforts have proved fruitless. Amongst other things it sought to narrow the dispute by obtaining the assent of both parties to certain principles which it laid down; or at any rate recommended the Council to endeavour to obtain the adherence of both parties to these principles. So far this has not been effected, and if it cannot be effected the efforts at mediation by the Council will have failed.

The success or failure, however, of the Council's efforts as mediator does not and cannot in any way affect the exercise of its functions under Article 239, which remain, as they always have been, ministerial, nor from the purely juridical point of view has anything occurred which can alter the position created by that Article. It is possible to conceive a case in which a Mixed Arbitral Tribunal, under colour of deciding on the question of its jurisdiction to entertain a claim, might perversely arrogate to itself power to deal with matters which are not within its jurisdiction. It is, however, quite unnecessary to consider what the position of the Council would be in such a case, for there is and can be no suggestion that anything of the kind has occurred in this instance. The Tribunal has done nothing more than declare that it cannot at the present stage of the proceedings decide that it is incompetent to entertain the claims submitted to it, as it was invited to do by the Roumanian Government. None will venture to say that this is a perverse decision and not one which could be legitimately

given by a Tribunal which, amongst other things, has "necessarily to decide upon cases being within or without its competency," for the conclusion at which it has arrived has the support of eminent jurists and is also the conclusion of the above-mentioned Committee. Indeed, the report of the Committee recognises that the Roumanian objection to competency was rightly overruled.

In the face of these considerations it is impossible for any one to say that the preliminary decision given by the Tribunal on the "demande exceptionelle," however much he may dispute its correctness, was perverse or one which it had no jurisdiction to give, so as to make its decision a nullity—for no doubt a decision of an international arbitration court given entirely outside its jurisdiction is a nullity, as, for instance, the so-called award of the King of the Netherlands in 1831 purporting to define the boundary between Canada and the United States.

The position therefore is that the Mixed Arbitral Tribunal has, at a preliminary stage of the case, investigated the question of its jurisdiction, a question which it has power to investigate and is under an obligation to investigate, and on this question has decided that it could not at that stage of the proceedings refuse to entertain the claims presented to it as being without its jurisdiction, a decision which cannot be treated as a nullity: a vacancy now exists on the Tribunal which can only be filled by the Council taking action under Article 239: it is more than permissible for the Council now to say that they have discharged the duty laid upon them by Article 11 of the covenant, and therefore, as far as relates to the carrying out of the provisions of the Treaty, their only duty is to exercise the ministerial function assigned to them by Article 239.

In this connection, perhaps, the Report of the Committee is open to slight criticism, for the performance of a ministerial act does not require justification, since it is, or ought to be, automatic: and it may be respectfully suggested that the imposition of terms as a condition of performing a ministerial act is not therefore legitimate.

JOHN SIMON.
RALPH SUTTON.

Temple,
30/xi/1927.

OPINION

On the Roumanian-Hungarian Dispute before the Council of the League of Nations, arising out of the Application to Hungarian Nationals in Transylvania of the Roumanian Agrarian Law of 1921,

BY

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I.

By the Treaty of Trianon, ratified July 26, 1921, the province of Transylvania and other Hungarian territories were transferred from Hungary to Roumania. Hungarian nationals resident in old Roumania and those resident in the annexed provinces, were dealt with differently.

With respect to those in old Roumania or who had property there, Art. 232 of the Treaty of Trianon (Peace Treaty) gave Roumania the privilege of confiscating their property—called "seizure," or "retention" and "liquidation"—and after paying certain obligations due to Roumanian nationals, of turning the balance over to the Reparation Commission or to the original owners. Hungary was to compensate the dispossessed owners.

With respect to those Hungarians domiciled in the Hungarian provinces ceded to Roumania or who had property there, a different arrangement was made. Those who were domiciled in the annexed provinces were given the privilege of opting for Hungarian nationality and removing their domicil within a year, but by Art. 63 of the Treaty of Trianon they were "entitled to retain their immovable property." With respect to these optants as well as to those Hungarians not domiciled in the annexed provinces, but who had property there, a special protective provision was inserted in the Treaty, namely, Art. 250, by which it was provided that notwithstanding the provision for confiscation in Art. 232, the property of these Hungarian nationals "shall not be subject to retention (seizure) or liquidation."

It was further provided in a separate paragraph of Art. 250 that "such property, rights and interests shall be restored to their owners freed from any measure of this kind, or from any other measure of transfer, compulsory administration or sequestration taken since the 3rd November, 1918, until the coming into force of the present Treaty, in the condition in which they were before the application of the measures in question.

Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal, provided for in Art. 239."[1]

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[1] In addition, the Minority Treaty of December 9, 1919, between the Allied Powers and Roumania provides, Art. 3, parag. 3, that
"persons who have exercised the above right to opt. . . . will be entitled to retain their immovable property in Roumanian territory."
By Art. 1 of the same Minority Treaty,
"Roumania undertakes that the stipulations contained in Articles 2 to 8 of this Chapter shall be recognized as fundamental laws, and that no law, regulation, or official action shall conflict or interfere with these stipulations, nor shall any law, regulation, or official action prevail over them."

II.

On July 30th, 1921, Roumania enacted a so-called Agrarian Reform Law for Transylvania designed, as alleged, to subdivide large estates and distribute the subdivisions among the peasants. Laws of somewhat the same kind were enacted on May 15th, 1920, for Bessarabia, on July 17th, 1921, for old Roumania, and on July 30th, 1921, for Bukowina.

The effect of these laws in the former Hungarian provinces, with their peculiar provisions for the expropriation of those who had been absent at any time between December 1, 1918, and March 23rd, 1921—necessarily primarily Hungarians—was to deprive of their property the several hundred owners of land in the annexed provinces. In the land registers covering this property, amounting to several hundred thousand jugars—a jugar is about 1.42 acres—the Roumanian State was entered as the owner, without any adversary proceeding. The owners were remitted to the acceptance of Roumanian bonds in paper lei, estimated to have a value of approximately one per cent. of the original gold value of the property.

The Hungarian owners at once invoked the aid of the Hungarian Government against this alleged confiscation, which for the most part occurred in 1923. That Government raised the issue with Roumania through diplomatic channels, charging a violation of Art. 250 of the Treaty of Trianon which, it was claimed, was designed to assure Hungarian optants and nationals of the continued possession and ownership of their immovable property. The good offices of the Council of the League of Nations were invoked by Hungary, and at Brussels and Geneva in 1923 efforts were made to find a formula which would reconcile the differences between the parties. While these negotiations, which ultimately proved abortive, were proceeding, a number of Hungarian nationals owning estates of varying size[2] brought their claims before the Mixed Arbitral Tribunal between Roumania and Hungary, established by Art. 239 of the Treaty, for a declaration that the seizure of their property under the Agrarian Law and its supplementary ordinances was a "retention or liquidation" of this property in violation of Art. 250 of the Treaty and hence invalid. They also asked for indemnity.

Roumania filed a demurrer to the jurisdiction of the Tribunal, asserting that an "expropriation" under the terms of the Agrarian Law and applying to both Roumanians and Hungarians could not be a "retention or liquidation" under Art. 250, which was designed, it was argued, to prevent only certain war measures directed for war purposes against Hungarian nationals "as such."

The Tribunal in a decision of January 10th, 1927, decided, contrary to the Roumanian contention, that it had jurisdiction of the case on the ground that an "expropriation" under the Agrarian Law might by its application be deemed a "retention or liquidation" under

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[2] Up to December, 1926, 285 claims had been filed with the Roumanian-Hungarian Mixed Arbitral Tribunal. 170 of these cases are brought under the allegation that the claimants were poverty stricken through the loss of their property. In size, the estates sued for vary as follows: 15 are under 5 jugars (about 7½ acres), 15 are from 5 to 20 jugars, 49 are from 20 to 100 jugars, 47 are from 100 to 200 jugars, 56 are from 200 to 500 jugars, 35 are from 500 to 1000 jugars, and 68 are above 1000 jugars. Of the 22 claims passed upon in the test cases, decided on the jurisdictional issue on January 10, 1927, 5 are for less than 5 jugars, 2 for less than 10 jugars, 2 for estates between 10 and 100 jugars, 6 for estates between 100 and 200 jugars, and 7 above 200 jugars.

Art. 250, that that Article was designed to place the property of Hungarian nationals in the annexed provinces under the régime of general international law, that an expropriation without consent and by implication without compensation was a measure of "liquidation" under Art. 250, and that it was necessary to examine each case independently on the merits to determine whether actually the expropriation or seizure in question constituted a "retention or liquidation." The Roumanian Government was given two months within which to answer the complaints of the Hungarian nationals on the merits. (See Appendix, p. 35.)

Instead of filing an answer within the allotted time, the Roumanian Government on February 24th, 1927, through its Counsel, M. Millerand, notified the Court that it would "decline to accede" to the decision, and that "it will refrain from submitting any answer regarding the merits of these suits, and that, in consequence, its arbitrator will no longer sit on the Mixed Roumanian-Hungarian Arbitral Tribunal in any of the agrarian cases submitted by the Hungarian nationals."[3]

Both Roumania and Hungary then appealed to the Council of the League of Nations, but for different reasons. Roumania invoked the aid of the Council under Art. 11 on the ground that it was the right of each member of the League "to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends."

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3 The letter of M. Millerand, Counsel for the Roumanian Government, to the President of the Mixed Arbitral Tribunal, reads as follows:

"On December 15, 1926, I had the honor to state before the Mixed Roumano-Hungarian Arbitral Tribunal our reasons for considering that the requests of the Hungarian nationals, optants and non-optants—claiming that the steps taken in pursuance of the agrarian reform, carried out a few years ago by Roumania to the lasting credit of her sovereign, her statesmen and her governing classes, fell within the category of measures of liquidation prohibited under Article 250 of the Treaty of Trianon—constituted a purely political move with only a thin disguise of legal justification.

I hastened to add that it was only out of deference for international justice that we appeared before the Mixed Arbitral Tribunal to offer these explanations, and that on no consideration whatever could we consent to discuss the substance of these suits, and that therefore as the legal proceedings were in this case merely a formality, I must expressly reserve my right, on behalf of the Roumanian Government, to adopt any decision or attitude which, having regard to the course of events, it might consider advisable.

The decision which the Mixed Arbitral Tribunal rendered, by a mjority, on January 10th shows only too well how fully these reservations were justified.

The decision which the Mixed Arbitral Tribunal rendered, by a majority, on its competence, it need only satisfy itself that the case before it is one of the expropriation of a Hungarian estate without the consent of the owner, and that the fact that the measures complained of were taken under the Agrarian Reform Law and were not of a discriminatory character is a point which does not affect its competence and must be argued when the substance of the case is examined.

Thus, when invited to state whether or not it is competent, the Tribunal declines, by a majority, to express an opinion on the points which constitute the essential distinction between measures of liquidation, in respect of which it is competent, and measures of expropriation, in respect of which it is not competent.

The Tribunal summons the Roumanian Government to its bar with a view to the discussion of a national law which has been recognized as consistent with the Treaty of Trianon by the Hungarian Government in an agreement concluded under the auspices of the League of Nations and forming the basis of the Council's resolution of July 5, 1923—a national law which, by its very nature, can be referred to no other jurisdiction than that of the Roumanian courts. The results of the agrarian legislation, which was the fruit of prolonged struggles and of a compromise between the interests of classes and which has already been enforced for a number of years,

Hungary invoked the aid of the Council under Art. 239 of the Treaty of Trianon which provides that in the event of a vacancy in the arbitrators on the Mixed Arbitral Tribunal, of which Tribunals there are some forty now operating in Europe, the Council "shall" choose two other persons, nationals of countries that remained neutral in the war, from whom the other Government (Hungary here) may select one to fill the vacancy.[4]

The Council at its meeting in March, 1927, heard at length the representatives of Roumania and Hungary. Instead of nominating the two "neutral" nationals, the Council appointed a Committee of Three from among its membership to study the problem and make a recommendation to the Council for its consideration. The Committee of Three consisted of Sir Austen Chamberlain, Chairman or Reporter, and Viscount Ishii of Japan and Mr. Villegas of Chile. The Committee of Three invoked the aid of certain unnamed jurists and at the September meeting of the Council brought in a Report. (Appendix, p. 58.) This document constituted the basis of prolonged discussions at the meetings of September 17th and 19th, at which representatives of the two countries were heard.

The Report discusses briefly the historical background of the dispute, points out the failure theretofore to reach a satisfactory conclusion through direct conciliation, and continues:

"The Committee was, therefore, obliged to seek a solution by other methods. A minute examination of the question of the Mixed Arbitral Tribunal's jurisdiction seems to be of primary importance. It, therefore, formulated the following questions:

1. Is the Roumanian-Hungarian Mixed Arbitral Tribunal competent to take cognizance of complaints resulting from the application of the Roumanian Agrarian Law to Hungarian optants and citizens?

2. If so, to what extent and under what circumstances is it competent to do so?"

The Committee then undertakes to make an examination of what it believes to be the jurisdiction of the Tribunal and undertakes to set forth certain "principles" "which the acceptance of the Treaty of Trianon has made obligatory for Roumania and Hungary."

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could not be called in question for a moment without jeopardizing social peace in Roumania and even the peace of Europe.

You will not, I am sure, be surprised that, for the different reasons that I had the honor to state before the Mixed Arbitral Tribunal as well as for those which were advanced by my colleagues, the Roumanian Government, abiding loyally by the Treaty of Trianon and conscious alike of its rights and its obligations, should decline to accede to such a ruling.

I have the honor to add that I am instructed by the Roumanian Government to inform you that it will refrain from submitting any reply regarding the substance of these suits, and that, in consequence, its arbitrator will no longer sit on the Mixed Roumanian-Hungarian Arbitral Tribunal in any of the agrarian cases submitted by the Hungarian nationals."

[4] Article 239 reads: . . . Each such Tribunal shall consist of three members. Each of the Governments concerned shall appoint one of these members. The President shall be chosen by agreement between the two Governments concerned.

In case of failure to reach agreement, the President of the Tribunal and two other persons, either of whom may in case of need take his place, shall be chosen by the Council of the League of Nations, ... These persons shall be nationals of Powers that remained neutral during the war.

If in case there is a vacancy a Government does not proceed within a period of one month to appoint as provided above a member of the Tribunal, such member shall be chosen by the other Government from the two persons mentioned above other than the President" . . . . .

The Committee then comes to the following conclusion :

"(1) The provisions of the Peace Settlement effected after the war of 1914-18 do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform.

(2) There must be no inequality between Roumanians and Hungarians, either in the terms of the Agrarian Law or in the way in which it is enforced.

(3) The words 'retention and liquidation' mentioned in Art. 250, which relates only to the territory ceded by Hungary, applies solely to the measures taken against the property of an Hungarian in the said territories, and in so far as such owner is an Hungarian national."

The Committee of Three then suggests that the Council should :

"(a) Invite both parties to comply with these three principles;

(b) Invite Roumania to reinstate her Judge on the Mixed Arbitral Tribunal."

The Committee then recommends certain alternative sanctions as follows :

(1) In case of refusal by Hungary, the Council would not be justified to proceed to the nomination of substitute judges in conformity with the Treaty of Trianon.

(2) In case of refusal by Roumania, the Council would be justified in taking the necessary steps to assure the functioning of the Mixed Arbitral Tribunal.

(3) If both parties refuse, the Committee thinks that the Council has exhausted the rôle incumbent on it by virtue of Art. 11 of the Covenant."

Hungary, represented at the September meeting by Count Apponyi, renewing a demand made on several previous occasions, requested that the Report be not adopted by the Council, on the ground that the issue as to whether the Mixed Arbitral Tribunal had jurisdiction was purely a legal one and not political; and that, though Hungary could insist that Roumania be bound to adhere to its agreement to regard the decision of the Mixed Arbitral Tribunal as "final" (Art. 239 of the Treaty), Hungary offered to have the case submitted to the Permanent Court of International Justice at The Hague, to have that Court determine whether or not the Mixed Arbitral Tribunal had jurisdiction of the claims of the Hungarian nationals. It was asserted that it was not the function of the Council to sit as a court of appeal from the Mixed Arbitral Tribunal. Roumania, represented by M. Titulesco, requested that the Report be adopted, arguing that the acceptance of the decision of the Mixed Arbitral Tribunal would have created social disturbances in Roumania, and perhaps even threatened international peace, and that on the adoption of the principles suggested by the Report, Roumania would proceed with the case as recommended in the Report. Sir Austen Chamberlain, the Reporter, argued for the adoption of the Report, on the ground that the Council, having been invoked under Art. 11, could not decline to offer a suggestion which might settle the dispute between the two nations, and that while the Council had no power to compel the acceptance of its proposals, it should adopt the proposals as a recommendation to the two powers concerned, and upon their acceptance the Council might then proceed to appoint the two substitute Judges as Hungary had requested.

Although in submitting the matter to the Council on final motion, the "sanctions" recommended by the Committee of Three were omitted from the proposal, the Council was much divided as to what course it should pursue. It failed to adopt the recommendations of the Committee of Three. The matter was, therefore, adjourned to the December, 1927, meeting of the Council with certain verbal suggestions to the representatives of Roumania and Hungary to seek in the meantime to compose the differences between the two nations on the basis of the Report of the Committee or otherwise.

III.

Thus the matter stands to-day and the questions on which an Opinion is desired are:

(1) Did the Mixed Arbitral Tribunal have jurisdiction of the issue presented by the complaint of the Hungarian property owners,

(a) If the Agrarian Law was applied discriminatorily against Hungarians,

(b) If it was applied without discrimination against Hungarians?

(2) What is the jurisdiction and the power of the Council of the League in the premises?

IV.

To understand the issue raised by the Roumanian expropriation of the land of Hungarians in Transylvania and other annexed provinces, it is necessary to recur to the origin of certain clauses of Art. 232 and 250 of the Treaty of Trianon, and the identical Articles 49 and 267 of the Treaty of St. Germain between Austria and the Allied Powers.

Article 232 (b) of the Treaty of Trianon like Art. 49 of the Treaty of St. Germain provides that:

"Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests which belong at the date of the coming into force of the present Treaty to nationals of the former Kingdom of Hungary or companies controlled by them, and are within the Territories, Colonies, Possessions and Protectorates of such Powers (*including Territories ceded to them by the present Treaty*) or which are under the control of those Powers" (italics ours).

Whatever might be said of the confiscation of the private property of the citizens of Austria or Hungary situated in the Allied countries—and from the point of view of an ordered development of human affairs under the reign of law, very little, if anything, can be said in its favor—[5], the confiscation of the private property of Austrians

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5 This view of the unwisdom of the precedent mentioned, created for the first time in modern history on any such scale, is not weakened by the relegation of expropriated nationals to their own Governments for redress. Those Governments were in no position to make compensation on such a vast scale, but in fact their effort in some measure to do so has been interfered with by the Powers on the ground that reparations would thereby be impaired. Under eminent domain or legal expropriation the taking Government must pay; to assign the duty of payment to some other Government, especially a bankrupt one, is to evade compensation. See (1924) 18 American Journal of Int. Law, 523, and the Resolution of the International Law Association at Stockholm, 1924, reading:

"*Resolved*, that this Conference is firmly of opinion that the revived practice of warring states by which they confiscate the available private property of alien citizens is a relic of barbarism worthy of the most severe condemnation."

and Hungarians in the Austrian and Hungarian territories transferred in 1918 to the several succession states, seemed to the Austrian and Hungarian delegations at the Peace Conference not only a startling assault on the institution of private property and on a fundamental principle of international law and morality, but one so exceptionally unjust that on June 23rd, 1919, the Austrian delegation made a protest against the proposed provision. The delegation asserted that the principal properties of the six million Austrian nationals were in territories about to be transferred to the succession states, that such a vast confiscation would impoverish many of them, and that "no Government would have either the right or power to subscribe to stipulations constituting so violent an impairment of the private rights of its citizens, an impairment without precedent in history." They added that the liquidation of the Austro-Hungarian Monarchy based upon a liquidation of all the property belonging to Austrian citizens in the succession states, would constitute a physical impossibility, and that Austria could not possibly make compensation for such confiscation after the loss of most of its assets, including those of its citizens abroad. They, therefore, requested that Art. 49 (Trianon 232) be struck from the Peace Treaty.

The protest was heeded. By a note of July 8th, 1919, the Allied Powers advised the Austrian delegation that Art. 49 would be modified. It was supplemented by Art. 267, identical with the first two paragraphs of Art. 250 of the Treaty of Trianon, which prohibited all "retention or liquidation" of the property of Austrian citizens by the Governments of the succession states, and required the return of all that had been sequestered, seized or controlled between November 1st, 1918, and the coming into force of the Peace Treaty. In a note of September 2nd, 1919, addressed by the Powers to the Austrian delegation, it was stated that "the property of Austrian nationals in the territories ceded to the Allied Powers will be returned to its owners; this property will be free from all measures of liquidation or transfer adopted since the Armistice and a similar exemption from all measures of seizure or liquidation is guaranteed them for the future."[6]

The first two paragraphs of Art. 267 as applied to the Treaty of Trianon (Art. 250) read as follows:

"Notwithstanding the provisions of Art. 232 and the annex to section IV, the property, rights and interests of Hungarian nationals and companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy, shall not be subject to retention or liquidation in accordance with these provisions.

Such property, rights and interests shall be restored to their owners freed from any measure of this kind, or from any other measure of transfer, compulsory administration or sequestration taken since the 3rd of November, 1918, until the coming into force of the present Treaty, in the condition in which they were before the application of the measures in question."

Inasmuch as the first two paragraphs of Art. 250 of the Treaty of Trianon are identical with the first two paragraphs of Art. 267 of the Treaty of St. Germain and were drafted by the same body, their interpretation, made in the letter of September 2nd, 1919, by the draftsmen of both treaties, is doubtless to be deemed identical.

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6 Bericht über die Tätigkeit der deutsch-österreichischen Friedensdelegation in St. Germain au Laye, Wien, 1919, II, 313, cited by Ch. Dupuis, Georges Scelle and others, in De Lapradelle, Recueil de la jurisprudence des Tribunaux Arbitraux Mixtes. IV, Competence, Paris, 1927.

Notwithstanding the concession made by Art. 250 (267 of the Treaty of St. Germain), the Hungarian delegation was fearful of the effect upon Hungarian nationals of certain measures, then recently enacted by Czechoslovakia and Roumania, looking to the confiscation of the rural property of aliens situated in the territories ceded to them by Hungary. The Roumanian Law of September 10th, 1919, provided that all the immovables located in territory ceded by Hungary to Roumania and belonging to aliens or to persons whose domicil or place of business was outside of Roumania shall be "expropriated."

Inasmuch as Hungarians were practically the only aliens who had any considerable property in these ceded territories, the Hungarian delegation demanded guarantees from the Peace Conference that the property of Hungarian nationals would not be subjected to these confiscatory measures. Art. 250 seemed to assure these owners against the application of such laws. Yet inasmuch as Hungary had then been but recently (1919) invaded by Roumanian troops and property estimated at a value of five hundred million dollars carried off, the Hungarians asked for further protection against any Roumanian law which might confiscate the property of their nationals. The delegation added that the provisions of paragraph 1 of Art. 250 might be evaded by laws which, while in appearance directed against nationals as well, would in practice be applied only against Hungarian nationals. They, therefore, asked for a special reassuring declaration to the effect that no Hungarian property in Roumania (Czechoslovakia) would be sequestrated or expropriated by virtue of any legal provision or special measure which under the same circumstances did not apply to Roumanians. They also stated that Art. 250 contained no provision for compensation for injurious measures taken against Hungarian nationals contrary to the Treaty, by failure to return sequestrated property or by other arbitrary measures. They asked that the Arbitral Tribunal established by the Treaty be given power to award such damages.

The Allied Powers instead of allaying or removing these apprehensions in detail, stated that they involved "a question of the interpretation of the Treaty of Peace"; but they consented to add to Art. 250 a paragraph giving jurisdiction to the Mixed Arbitral Tribunal provided for in Art. 239 of the Treaty, of all complaints of Hungarian nationals against any measure "relating to the restitution . . . of their property, rights and interests situated in the ceded territory, as provided for in Art. 250 of the Treaty."

The added paragraph reads:

"Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Art. 239."

In a note addressed by the President of the Peace Conference to the Jugoslav delegation, March 1st, 1920, it is stated that while the Jugoslav State retains the sovereign right to regulate the transmission and enjoyment of property in the territory transferred to it, and is, therefore, free to take the measures which it thinks necessary or useful, nevertheless this liberty is limited by the provisions of the Treaty and "provided naturally that the measures do not result by a disguised confiscation of the property in question, in evading the prohibition stipulated in the Treaty."

Although the note from the Peace Conference to the Hungarian delegation mentioned only "restitution," it cannot be doubted that reference was intended to all complaints arising out of "liquidations or retentions" of the property of Hungarian nationals.

The text and the purport of Art. 250 were unquestionably intended to preserve intact, in accordance with the rules of international law, and thus in contrast to the provisions of Art. 232, the property owned by Hungarian nationals in the ceded Hungarian territory.

V.

The law of September 10th, 1919, expropriating the property of all aliens in the annexed territories was not enforced by Roumania because it was in flagrant contradiction to Art. 250 of the Treaty. By Art. 3 of the Minority Treaty with Roumania of December 20th, 1919, Austrian and Hungarian nationals opting for Austrian and Hungarian nationality are entitled "to retain their immovable property in Roumanian territory." By Art. 1 of that Treaty, Roumania recognizes the provisions of the Treaty as "fundamental laws" with which no municipal law or regulation may conflict or interfere.

Roumania on July 30th, 1921, enacted its so-called Agrarian Reform Law for Transylvania. It provides, among other things, that the property of *"absentees"* shall be completely expropriated, and "absenteeism" is defined as follows:

"An absentee is any person who is absent from the country between December 1st, 1918, and [March 23rd, 1921], unless such person was then discharging official duties abroad." (Art. 6, c.)

It appears in the record that this was the period during which Transylvanian territory was overrun by Roumanian troops and that most Hungarians were either compelled to flee or found it desirable to do so. It appears, moreover, that those who desired to return to the territory from abroad were refused visés to do so by Roumanian consuls abroad, acting under instructions from their Government, and that even a short absence within the prohibited period sufficed to bring about a seizure of the property of the person in question for "absenteeism" (Ordinances of July 29th, 1922, and August 14th, 1922, carrying out Art. 6, c). The absentee provision was not to apply to the owners of estates under 50 jugars.

These measures of expropriation for absenteeism would appear to have been imposed for supposedly wrongful acts committed in Transylvania some months or years prior to the time when Roumanian sovereignty commenced in the territory, namely, July 26th, 1921.

It appears in the record that eighty-seven per cent. of the property in Transylvania was owned by Hungarians, about equally divided among large, intermediate and small estates. The Law, therefore, even though applied to everybody, would necessarily strike Hungarians primarily. In the rest of Roumania, by the Constitution of 1860, renewed in the Constitution of 1923, foreigners were not permitted to own rural land.

The compensation to be made to the expropriated owners was measured by the assessed value of the land in 1913. This gold lei valuation was then to be paid in paper lei, which had a value only one-fortieth or two and one-half per cent. of the gold value. The amount thus due was not paid in cash but in Roumanian fifty year bonds, which, it is said, have a market value of only thirty to forty per cent. of their face value, so that in fact the owner was to receive something less than one per cent. of the value of his property. The Hungarian Government has, therefore, asserted in a Request upon the League of Nations that this "expropriation on these lines differs very slightly from confiscation pure and simple."

VI.

Nearly three hundred expropriated Hungarian owners brought their claims before the Mixed Arbitral Tribunal between 1923 and 1926, alleging that the Roumanian measures of expropriation were contrary to Art. 250 of the Treaty of Trianon, and asking either for the restitution of their property or for indemnity. The Roumanian Government demurred to the jurisdiction of the Tribunal on the ground that Art. 250 applied only to property seized by way of "exceptional war measures," that the Agrarian Laws are not such, but were enacted "in the interest of social justice" and affect equally foreigners and nationals, and that the owners receive "full and just" compensation.

The Mixed Arbitral Tribunal decided that it had jurisdiction over the cases submitted, in the following paragraphs:

"Whereas, in order to appreciate the import of this measure it is not necessary to examine whether the indemnity promised to the Claimant was or was not to be considered as an adequate indemnity, which, moreover, is essentially a question of merits; whereas indeed the other facts brought forward by the Claimant are sufficient to show that the measure concerned in the case is one which affects the property of an ex-enemy by removing it in its entirety from the owner and without his consent; and this measure constitutes a violation of the general principle of the respect of acquired rights and oversteps the limits of common international law and fully presents the character of a liquidation within the meaning of Art. 250 and is by its very nature to be classed among the measures referred to in the said Article;

Whereas, the Respondent holds that the measure referred to in Art. 250 under the name of "liquidation" is a war measure taken for war purposes, the most characteristic feature thereof being that it affects ex-enemy property "as such," whereas the expropriations arising under the agrarian reform, from their very nature are not liquidations, since they are not in any respect differential measures, and, at any rate, are not measures taken for any war purpose, and therefore are not in any way incompatible with Art. 250;

Whereas, it results clearly from the terms of Articles 232 and 250, as well as from para. 3 of the Annex to Section IV that the liquidation within the meaning of Art. 250 may be either a war liquidation or a post-war liquidation, and the meaning of either of such liquidations is the same and it is only by their object that they are differentiated; and whereas either case involves subjecting ex-enemy property, rights or interests to a treatment which constitutes a derogation from the rules generally applied as regards the treatment of aliens and the principle of respect of acquired rights" . . .

VII.

The question therefore arises whether the Mixed Arbitral Tribunal may be properly deemed to have had jurisdiction.

The Tribunal claimed jurisdiction to determine whether under paragraph 1 of Art. 250 the Agrarian measures of Roumania constituted a "retention or liquidation" of the property of Hungarians. The Roumanian Government has argued that the terms "retention or liquidation" refer, first, to exceptional war measures only; and second, to measures taken against Hungarians alone "as such." The Committee of Three, in their Report to the Council, state that the provisions

of the Treaty "do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform," but that "there must be no inequality between Roumanians and Hungarians, either in the terms of the Agrarian Law or the way in which it is enforced"; and that the words "retention and liquidation . . . apply solely to the measures taken against the property of an Hungarian in the said territories, and in so far as such owner is an Hungarian national."

The Report states that:

"If it could be established in a particular case that the property of an Hungarian national was the object of a seizure or liquidation or of any other measure of disposition in the terms of Articles 232 and 250 as a consequence of the application to the said property of the Agrarian Law, and if a request was presented to obtain restitution, the Mixed Arbitral Tribunal would have jurisdiction to accord satisfaction."

The contingency contemplated in the last quoted paragraph appears to accord with the view of the Mixed Arbitral Tribunal itself. The Tribunal determined that the measures of seizure or liquidation of Hungarian property, though executed by virtue of an agrarian law, would or might constitute a violation of the terms of Art. 250 of the Treaty of Trianon. As it was alleged in the claimants' petition that the law and its particular application to them did constitute a violation of Art. 250, and as the Mixed Arbitral Tribunal found that the measures taken under the Agrarian Law might or would, under certain circumstances, constitute a seizure or liquidation in violation of that Article, the Tribunal would seem to have had jurisdiction over the case. That jurisdiction will depend upon the meaning assigned to the words "retention or liquidation" and under paragraph 2 of Art. 250 to the words "measure of this kind." The Tribunal also added that any expropriation of ex-enemy property in its entirety, without the owner's consent, constitutes a violation of vested rights and of common international law, and thus presents the character of a liquidation within the terms of Art. 250. It is to this conclusion that the Roumanian Government has particularly objected in its arguments before the Council.

The Tribunal reserved for future examination on the merits the determination whether in fact such acts or measures had been carried into effect.

VIII.

Jurisdiction has been defined as "the power conferred on the courts by constitution or statute, to take cognizance of the subject-matter of a litigation and the parties brought before it, and to legally hear, try and determine issues, and render judgment according to the general rules of law upon the issues joined, be they either of law or of fact or both."[7]

The United States Supreme Court has defined jurisdiction as follows:

"The power to hear and determine a cause is jurisdiction; it is '*coram judice*' whenever a case is presented which brings this power into action; if the petitioner states such a case in his petition that on a demurrer the court would render judgment in his favor, it is an

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7 See Brown, T. Commentaries on the jurisdiction of courts. 2nd ed. Chicago, 1901, p. 5 and cases there cited.

undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the *exercise of jurisdiction* conferred by the filing of a petition containing all the requisites and in the manner prescribed by law."[8]

The question of jurisdiction does not depend upon the truth or falsehood of the charge but on its nature; it is determinable on the commencement and not at the conclusion of the inquiry.[9]

Jurisdiction has also been defined as "the power to hear and determine a cause, and it exists whenever an officer or tribunal is by law clothed with the capacity to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power."[10]

The mere fact that a case is brought before an international tribunal, having necessarily a limited jurisdiction, on the assertion that the nature of the case brings it within the jurisdiction of the court, is not alone sufficient, it is believed, to give such court jurisdiction. There must also be a possibility that the allegation of jurisdiction over the subject-matter is sustained by the facts to be proved, and for that reason a preliminary examination of those facts may become necessary to determine whether there is a possibility of their coming within the limits prescribed for the tribunal's jurisdiction. So in the Mavrommatis case, Judgment No. 2, the Permanent Court of International Justice declared:

"The preliminary question to be decided is not merely whether the nature and subject of the dispute laid before the court are such that the court derives from them jurisdiction to entertain it, but also whether the conclusions upon which the exercise of this jurisdiction is dependent are all fulfilled in the present case."

Again in Advisory Opinion, No. 4, involving the question of citizenship in Tunis and Morocco, the Permanent Court of International Justice said:

"It is certain—and this has been recognized by the Council in the case of the Aaland Islands—that the mere fact that a State brings a dispute before the League of Nations does not suffice to give this dispute an international character calculated to except it from the application of paragraph 8 of Article 15."

It is also possible that the protocol or treaty conferring jurisdiction may be so grossly misinterpreted that an excess of jurisdiction rather than a mere error of law could be charged. So, for example, it was said by the Permanent Court of Arbitration at The Hague in the Orinoco Steamship Company case that:

"Excessive exercise of power may consist, not alone in deciding a question not submitted to the arbitrators, but also in misinterpreting the express provisions of the agreement in respect to the way in which they are to reach their decision, notably with regard to the legislation or the principles of the law to be applied."[11]

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[8] United States v. Arredondo (1832) 6 Peters 691, at 709.

[9] Regina v. Bolton (1841) 1 Q. B. 66, 74, 113 English Reports, Full Reprint, 1054, 1057.

[10] Woodruff v. Stewart (1879) 63 Alabama 206, 211; Lamar v. Gunter (1864) 39 Alabama 324, 334.

[11] (1911) 5 Amer. Journal of Int. Law, 233.

In the present case Roumania implicitly appears to object not merely to the fact that the Court exercised jurisdiction to decide the case submitted, but that in determining that the Court had jurisdiction it was of necessity compelled to determine whether there was a plausible chance that the Agrarian Law in its application to Hungarians might constitute a "liquidation" of their property. The Court evidently decided that it might, and then went further to add that if any seizures under the Agrarian Law breached the rules of international law, it would constitute a "liquidation." It may be inferred that this tentative and preliminary conclusion on the merits rather than the mere assumption of jurisdiction caused Roumania's dissatisfaction with the decision and resulted in the withdrawal of its Judge. It might even be assumed, by hypothesis, that the preliminary conclusion of the Court on the merits was erroneous, though this is by no means conceded. But in view of the allegations of the complaint and the possibility that those allegations might be sustained by the facts, and that the application of the Agrarian Law might result in so violent a confiscation as to constitute a "liquidation" within the terms of Art. 250, it would be difficult to say that the Tribunal did not have jurisdiction over the case.

Every international tribunal has in first instance the duty to decide on its own jurisdiction. This was well stated by Commissioner Gore, sitting on the Commission under the Seventh Article of the Jay Treaty, in the case of the *Betsey*. Commissioner Gore stated:

"A power to decide whether a claim preferred to this board is within its jurisdiction, appears to me inherent in its very constitution, and indispensably necessary to the discharge of any of its duties . . . To decide on the justice of the claim, it is absolutely necessary to decide whether it is a case described in the article. It is the first quality to be sought for in the examination. To say that power is given to decide on the justice of the claim, and according to all the merits of the case, and yet no power to decide or examine if the claim has any justice, any merit even sufficient to be the subject of consideration, is to offer in terms a substance, in truth a phantom . . . .

To say that the board has authority to decide that a cause is not within its jurisdiction, and yet on authority to decide that a case is within its jurisdiction, appears to be a contradiction too glaring to be persisted in. That the commissioners have a right to decide in favor of one party only—in favor of the party complained against, but not in favor of the complainant—cannot be true."[12]

The issue as to whether the Commissioners had jurisdiction, having been laid before Lord Chancellor Loughborough, that jurist stated:

"The doubt respecting the authority of the Commission to settle their own jurisdiction was absurd; and they must necessarily decide upon cases being within or without their competency."[13]

Secretary of State Webster, in speaking of the functions of the Mixed Claims Commission, United States and Mexico, under the Treaty of 1839, stated:

"Its right and duty, therefore, like those of other judicial bodies, are to determine upon the nature and extent of its own jurisdiction, as well as to consider and decide upon the merits of the claims which might be laid before it."[14]

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[12] Moore's Arbitrations, 2278, 2282, 2289.
[13] Ibid., 327.
[14] Ibid., 1242.

In our municipal courts, an allegation of absence or excess of jurisdiction is always deemed a judicial question to be determined, if challenged, by appellate courts. In the case of international tribunals where there may be no appellate court, a difference on the jurisdiction of an arbitral tribunal must often be settled diplomatically. Where, however, there is an appellate court, or at least a forum of the highest rank, for which provision is made by the Covenant of the League of Nations, such a distinctly legal issue as the alleged abuse of jurisdiction of an arbitral tribunal can and should be placed, in case of doubt, before the Permanent Court of International Justice. To refuse to permit it to be decided judicially and to insist that the difference is political seems an unusual proceeding.

IX.

(a) Let it now be assumed that the application of the Agrarian Law was accompanied by discrimination against Hungarians. Such discriminatory application of the law has been alleged by the claimants. If verified by the facts, it would seem to constitute a "retention or liquidation" of the property of those to whom it is applied, within Art. 250 of the Treaty of Trianon. The Report of the Committee of Three admits that such discriminatory application would be a violation of Art. 250, though this may seem to be more of a determination on the merits than on jurisdiction. The Report states:

"Every execution of a general plan of agrarian reform which might create expressly or by necessary implication a special position for Hungarians to their prejudice, and to the advantage of Roumanians, or of citizens of other states in general, would be of a kind to create a presumption of a disguised retention or liquidation directed against the property of Hungarian nationals *as such* in violation of Article 250 and would thus authorize the Mixed Arbitral Tribunal to assume jurisdiction. The same result would follow in the event of a differential application of the Agrarian Law.

A prohibition to Hungarians to possess immovable property in the territories transferred to Roumania, even though extended to all aliens, would not be in conformity with the obligation which Roumania contracted by the Treaty of permitting Hungarian optants to retain their immovable property, though that would be a question outside of Art. 250."

There are numerous allegations in the Record to the effect that the Law was applied unequally and discriminatorily against Hungarians. Whether this is in fact true can only be determined by an examination of each case, and possibly by a detailed examination of the terms of the Law and of the persons whom it strikes.

It has been suggested by the Roumanian Government that the motives back of the law were, not to deprive Hungarian nationals of their property, but to institute a much needed social reform. There is some material in the Record which would indicate that in view of the many small estates in Transylvania, there was no such necessity of an agrarian reform in Transylvania as in old Roumania.[15] But in fact the motives actuating the Law have little to do with the practical or legal results. The immateriality of motives or even of method is evident from the description or definition of "measures of disposition,"

[15] Székely, János. La reforme agraire en Transylvanie et l'histoire. Paris, 1927.

" measures of transfer," and " exceptional war measures " contained in the Annex, Section 3 to Art. 232 of the Treaty of Trianon, reading as follows :

" In Article 232 and this Annex, the expression ' exceptional war measures ' includes measures of all kinds, legislative, administrative, judicial or others, that have been or will be taken hereafter with regard to enemy property, and which had had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motives, under whatsoever form, or in whatsoever place. Acts in the execution of these measures include all retentions, instructions, orders or decrees of Government Department or Courts applying these measures to enemy property, as well as Acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges or expenses or the collecting of fees.

' Measures of transfer ' are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such measures directing the sale, liquidation or devolution of ownership in enemy property or the cancelling of titles or securities."

Inasmuch as by paragraph 2 of Art. 250, Hungarian owners in Transylvania are safeguarded against the application of any measures of retention or liquidation or " measures of this kind," it is perhaps proper to assume that the terms " seizure " (retention) or " liquidation " are broad enough in their scope to include all such measures of transfer as are described in the Annex, section 3, to Art. 232 above quoted. These prohibitions are directed to the result rather than to motive or mere method. Any method of accomplishing the illegal result is condemned.

X.

(b) Assume now that the Law is applied without discrimination to Hungarians and Roumanians. Here we are on more difficult ground and must make distinctions. Two different situations must be taken into consideration :

(1) Even though the Law is applied without discrimination, it may so happen that its terms strike peculiarly those of Hungarian nationality and few others. In that event, the mere fact that it is applied without discrimination would not save it from constituting an unequal measure, and it would be justly condemned as resulting in a " liquidation " of property. It was this type of law which the President of the Peace Conference doubtless had in mind when he stated to the Jugoslav delegation in his letter of March 1st, 1920, that there must be no disguised seizures or liquidations of Hungarian property. We may call this ostensible equality, but actual inequality.

(2) The Law may be applied equally to every one without distinction, and it does not by its peculiar terms strike Hungarians any more severely than it does Roumanians or foreigners generally. This would be actual equality.

1. *Ostensible Equality.* If there is discrimination against Hungarians, either expressly or by the necessary implication of the statute of July 30th, 1921, there can be no doubt that it is inhibited by

the Treaty. This is recognized in the Report of the Committee of Three in the paragraph quoted above. Diplomatic records are full of protests against discriminatory legislation or judicial procedure, as constituting violations of international law or of treaty.[16]

A case of peculiar interest in this connection arose a few years ago before the United States Supreme Court. An amendment to the Oklahoma Constitution provided that no person was to be registered as an elector unless he be able to read and write any section of the Constitution; "but no person who was on January 1st, 1866, or any time prior thereto entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution." On its face, this statute exhibits no discrimination against anyone. By the Fourteenth Amendment, the states must extend the equal protection of the laws to the persons within their jurisdiction, and by the Fifteenth Amendment they may not deny to citizens of the United States the right to vote "on account of race, color or previous condition of servitude." Some of the Southern states had, by various provisions of their election laws, sought to find methods of preventing negroes from voting. Oklahoma adopted the particular method above described. Its purpose was not to apply the literacy test to those who could vote prior to January 1st, 1866. Practically no negro could vote before that date. The Supreme Court, speaking through Chief Justice White, concluded that the Constitutional provision was obviously discriminatory against the negro and on that account was unconstitutional. The Chief Justice added:

"It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude prohibited by the Fifteenth Amendment, but the standard itself inherently brings that result into existence, since it is based purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage."[17]

So in the present case, the provision for "absentees" upon whom the penalty of expropriation is visited can, it has been charged, apply practically only to Hungarians who were forced to flee from their Transylvanian homes during the period of the Roumanian occupation. Professor Pillet, the eminent French jurist, who has studied this question, has reached the conclusion that:

"In this Law, made in appearance for all Roumanians, it is apparent that, in the first place, it was the Hungarians whom it was intended to strike and that the Government never had any intention other than to despoil them."[17a]

I am not prepared to express so vigorous a conclusion. Nevertheless there is evidence in the Record which warrants the closest examination of the statute itself, and of its application, to determine whether it does, though in appearance uniform, strike particularly Hungarian nationals. It is not even certain that the mere fact that eighty-seven per cent. of the property owners of Transylvania are Hungarians would not, if true, alone serve to condemn the law on the ground of its discriminatory application against Hungarians. If in

[16] Borchard, Diplomatic Protection of Citizens Abroad, New York, 1915, pp. 95, 100, 291, 333, 334 *et seq.*

[17] Guinn v. United States (1915), 238 U. S. 347, 364.

[17a] See De Lapradelle, *op. cit. supra*, note 6, p. 61.

practical effect, therefore, the law discriminates against Hungarians, there seems little difficulty in concluding that it constitutes a "seizure" ("retention") or "liquidation" of their property in violation of Art. 250.

2. *Actual Equality.* Assuming that the Law of July 30, 1921, was applied equally to Roumanians and Hungarians and others, and that there was no discrimination expressed or implied against Hungarians, we face the question whether under such circumstances, the Law could constitute a "liquidation" contrary to Art. 250, and whether the mere fact that the Mixed Arbitral Tribunal concludes that the application of the statute violates the rules of general international law would make of it a "liquidation."

As a general rule an alien must abide by the local law. He can, as a general rule, and under ordinary circumstances, claim no privileges as against nationals. The only exception to this rule would arise if the local law falls below the standard of civilized justice or international due process of law. No state may by domestic legislation violate the rules of international law. Should it do so, the result would be that even though the national can invoke no remedy except the local political or legal one, the alien may make complaint internationally and invoke the diplomatic protection of his own government, and the international forum if necessary.[18] It is, however, not at all settled, and cannot be by any general rule, when a particular measure of legislation falls below the standard of civilized justice or international due process of law.

If the Roumanian Agrarian Law is a sustainable "general scheme of agrarian reform," as the Committee of Three seems possibly to assume, regardless of its results in confiscating private property, the question arises whether it escapes by virtue of its generality the condemnation of international law. If it does, then the rather extreme Soviet legislation confiscating private property and the milder Mexican legislation, which is said to have somewhat the same effect, would require only general application to citizens and aliens alike to be deemed valid. The fact is, however, that the question how far a nation may go in depriving a foreigner of his vested rights without violating international law, when it also deprives nationals of those rights, is far from settled, and can only be settled by an authoritative determination of an impartial tribunal whose decision must be accepted by an international community which boasts of its civilization. Such a question involves matters of degree, and civilized society leaves such questions to be determined not by force, but by impartial tribunals.[19] In the United States we are continually faced with this issue, and the United States Supreme Court is almost daily asked to determine the line of division between the police power of the states and the Fourteenth Amendment of the Federal Constitution, between federal and state power in the matter of interstate commerce and similar questions. In international affairs, such questions of degree are most appropriately submitted to the Permanent Court of International Justice, or other international

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[18] It appears in the record that France and Great Britain protested against the application to French and British nationals of the Roumanian agrarian reform in the province of Bessarabia. French and British nationals thereupon were paid forty times as much as Roumanian nationals, receiving thereby practically full compensation for their property. The Roumanian Government has stated that this was part of the price paid for the recognition by France and Great Britain of the annexation of Bessarabia.

[19] See Proceedings of the 21st Annual Meeting of the American Society of International Law (1927) p. 23.

court, to determine whether particular acts of alleged confiscation constitute merely police power measures to which all foreigners like nationals must submit, or whether admitted acts of confiscation, when uniformly applied, constitute or not violations of international law. The Committee of Three seem to have reached a definite conclusion on this issue, and thus to foreclose a very doubtful and difficult question of international law. In my judgment, such a question can only be determined by an authorized judicial body, unless the world is already prepared to admit that the confiscation of all private property in a country, when applied both to natives and aliens, is not a violation of international law. At this moment it would seem preferable to reserve judgment on this important issue until an international court has had opportunity to examine it in its application perhaps to Soviet Russia and other countries.

But in the instant case, the Hungarians complaining before the Mixed Arbitral Tribunal had the protection not only of international law but of a specific treaty. In that respect they have a Treaty privilege which Roumanians have not. It was evidently the purpose of the Treaty to preserve to Hungarians in the annexed provinces their immovable property, and it seems doubtful whether it could have been intended to submit that property to expropriation with practically no compensation, four days after the coming into force of the Peace Treaty, by an agrarian law. The protection of the Treaty would thus prove a delusion. The Mixed Arbitral Tribunal evidently concluded that confiscation, if proved, was in violation of the Treaty, and was prepared to find (a) that confiscation constitutes "liquidation" and (b) that any violation of international law in dealing with the property constitutes "liquidation."

In the latter conclusion, the Tribunal would seem to be sustained by the decision of the Permanent Court of International Justice, in Judgment No. 7, Polish Upper Silesia. In that case Poland had concluded the Geneva Convention with Germany for the protection of private property in Polish Upper Silesia against liquidation, with a certain single exception. (Art. 6.) The question was whether Articles 2 and 5 of the Polish Law of July 14th, 1920, violated this Treaty and thus effected the prohibited liquidation. The Permanent Court held that any violation of international law in dealing with German property in the territory in question, outside the permitted limit, constituted a "liquidation" prohibited by the Treaty.

Poland, like Roumania, demurred to the jurisdiction of the Court in passing upon the Law of July 14th, 1920, which, it was said, applied to everyone in the territory, and that it could not, therefore, constitute a "liquidation" within the terms of the Geneva Convention. The Court decided (page 19):

"There is nothing to prevent the Court's giving judgment on the question whether or not in applying that Law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention."

The Geneva Convention (Art. 6) permitted to Poland certain "expropriations" of major industrial undertakings and large rural estates. Inasmuch as this Convention is well known and inasmuch as, according to the claim of Roumania, her Agrarian Reform Law had long been in contemplation, the question naturally arises why Roumania did not endeavour to reserve to herself the right to expropriate the Hungarian land in the annexed provinces. Quite possibly the attempt

would not have been successful, but the effect of the Roumanian legislation, without permission or reservation, would seem to be somewhat analogous to that accomplished by Poland with special and express permission. In so far as concerns property other than that mentioned in Art. 6 of the Geneva Convention, permitting expropriations of certain property, the Permanent Court took the view that such property was protected by the rules of international law, and that any violation of these rules would constitute "liquidation." The Court said (Judgment, page 21):

"Having regard to the context, it seems reasonable to suppose that the intention was, bearing in mind the régime of liquidation instituted by the Peace Treaties of 1919, to convey the meaning that, subject to the provisions authorizing expropriation, the treatment accorded to German private property, rights and interests in Polish Upper Silesia is to be the treatment recognized by the generally accepted principles of international law. . . .

Any measure . . . . which is not justified on special grounds taking precedence over the Convention, and which oversteps the limits set by the generally accepted principles of international law, is, therefore, incompatible with the régime established under the Convention." (Judgment, page 22.)

With respect to the allegation that the law applied to everybody, without regard to nationality, the Court said: (pages 32—33)

"Even if it were proved—a point which the Court does not think it necessary to consider—that in actual fact, the Law applied equally to Polish and German nationals, it would by no means follow that the abrogation of private rights effected by it in respect of German nationals would not be contrary to Head III of the Geneva Convention. Expropriation without indemnity is certainly contrary to Head III of the Convention; and a measure prohibited by the Convention cannot become lawful under this instrument by reason of the fact that the State applies it to its own nationals."[20]

Similar conclusions follow from Judgment No. 6 and Judgment No. 9, relating to certain expropriations at Chorzow, Upper Silesia, in which cases indemnities were allowed.

XI.

Roumania raised certain objections to the jurisdiction of the Mixed Arbitral Tribunal, on the argument of the demurrer, which deserve brief consideration. The argument that the "expropriation" was effected under an agrarian law and not by war legislation directed against enemies or ex-enemies "as such" is answered by the Tribunal, correctly, it is believed, by the statement that the name assigned to a measure cannot be determinative of its legality. Whether "liquidation" prohibited by Art. 250 applied only to measures directed against ex-enemies (Hungarians) "as such," as the Committee of Three seems to assume, is a question of the interpretation of the Treaty. In first instance, that function would undoubtedly rest upon the Mixed Arbitral Tribunal, for in passing upon its jurisdiction it must of necessity determine the question. It has already been observed that if discriminatory in practical effect, though not necessarily in express terms, the law would be obnoxious to the Treaty, and the Committee of Three approves this conclusion. The interpretation of treaties is a legal and not a political function, and courts if in existence or capable of being created, should be permitted to determine such questions.

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[20] See, for other illustrations, Borchard, *op. cit.*, Section 44.

The meaning to be assigned to the term "liquidation," which is the main issue between the parties, is also essentially a legal question. In the light of the jurisprudence of the Permanent Court of International Justice, it would seem improper to remove the question to the political forum, especially when one of the parties insists that it be submitted to judicial determination.

Roumania has objected that an agreement had been reached in 1923 at Brussels and Geneva by which Hungary had accepted the view that Art. 250 did not prevent the expropriation of Hungarian private property. The Mixed Arbitral Tribunal in its decision of January 10th, 1927, disposes of this allegation by pointing out that there was no agreement and that the willingness of the Hungarian negotiator to admit that expropriation might take place for public purposes, was conditioned upon payment in full for the expropriated property. The question might be raised whether the Treaty provision, as a necessary limitation on Roumanian sovereignty, as were also the Minority Treaties, was not intended to prevent the expropriation under any circumstances of such Hungarian-owned real property; but in any event it can hardly be supposed that the Treaty did not prevent an expropriation without compensation four days after its ratification. The term "expropriation" is not always clear, for it is used sometimes as implying compensation, and at other times as the equivalent of confiscation. It can hardly be supposed, however, that Hungary ever intended to permit the confiscation of this property.

XII.

The question now arises as to the function of the Council of the League of Nations. Hungary invoked the powers of the Council under Art. 239 of the Treaty of Trianon, which provides that when a vacancy occurs in the Mixed Arbitral Tribunal, the Council "shall" appoint substitute judges from whom selection may be made to fill the vacancy. This function has been performed on numerous occasions by the Council and seems mandatory. To refuse to perform it seems a violation of the Treaty, and an improper interference with the judicial process.

Roumania invoked the good offices of the Council under Art. 11 of the Covenant, after having taken the unusual step of withdrawing its judge from the Tribunal and refusing to abide by the decision. A withdrawal from certain cases can hardly be deemed otherwise than a refusal to permit the Court to function. Such withdrawal is a most exceptional measure and can hardly be justified under any circumstances. The question arises what is the "circumstance . . . affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends." (Art. 11.) One circumstance may be deemed the decision of the Court; another, Roumania's withdrawal of its judge. The only argument advanced by M. Titulesco, the Roumanian Government's delegate before the Council in September, 1927, though unsupported by evidence was, that the acceptance of the decision would cause social unrest in Roumania; and we have M. Millerand's letter to the President of the Tribunal, February, 1927, that the "peace of Europe" would be jeopardized by the acceptance of the decision. Inasmuch as Hungary was not threatening the peace, it may be inferred that only Roumania was in a position or mood to threaten it. Is it possible that a country may decline to accept the decision of a Mixed Arbitral Tribunal on a question of law, and then because that country threatens to break the peace, may invoke the intervention of the Council of the League to set the decision aside? If so, international arbitration has experienced an

unfortunate setback. As a matter of fact, Roumania can hardly be permitted to break the peace of Europe to escape the execution of the Treaty of Trianon or the decision of a competent court, and it is questionable whether the Council should have heard the case at all until Roumania had reinstated its judge or until the Council had nominated substitute judges.

The Covenant of the League of Nations gives the members of the League and the Council ample power to deal with legal cases, and particularly cases involving the interpretation of a Treaty. By Art. 13, the members of the League, which includes both Roumania and Hungary, agree that:

"Disputes as to the interpretation of a Treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration."

The issue here involved comes directly within these terms, and the question naturally arises why the Council did not use its influence to have Art. 13 carried into effect. Were the Council to accept the Report of the Committee of Three, it would, in affect, overrule the decision of a Mixed Arbitral Tribunal. One of the parties having declined to approve the Report, the Council should make no effort to compel its acceptance. It can hardly be deemed a useful extension of the functions of the Council, a purely political body, to overrule the decision of a tribunal established by treaty and dealing with a purely legal question, whenever an influential member of the League objects to an unfavorable decision of such tribunal. This is especially so when there is in existence an appellate court, the Permanent Court of International Justice, before which questions of the interpretation of a treaty may be brought. Hungary, though standing on its legal rights to the effect that the Mixed Arbitral Tribunal had complete jurisdiction over the cases before it, and that the decision was *res judicata,* nevertheless conceded and requested that the Council submit the matter of jurisdiction and of necessity the interpretation of the Treaty to the Permanent Court of International Justice, either by a request for an Advisory Opinion or by recommending formal submission to the two parties. Such a proceeding seems obviously natural and one calculated to preserve confidence in the Council and in the arbitral process. The Permanent Court has itself said in Judgment, No. 7 (page 18):

"There is no lack of clauses which refer solely to the interpretation of a treaty; for example, letter a of paragraph 2 of Art. 36 of the Court's Statute. There seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty; rather would it appear that this is one of the most important functions which it can fulfil. It has in fact already had occasion to do so in Judgment No. 3."

The jurisdiction of the Permanent Court has been invoked most frequently for the very purpose of interpreting disputed clauses of the several treaties of peace.

The Report of the Committee of Three would seem to contain "principles" designed either to overrule the decision of the Mixed Arbitral Tribunal or to foreclose its decision on the merits. It is questionable whether the Committee of Three should have ventured upon this perilous enterprise. But to make the acceptance of these

"principles" a condition precedent to the performance of the Council's duty of nominating substitute judges, as recommended in the Report, would seem to be a somewhat unusual proceeding for the Council to adopt. It was stated by Sir Austen Chamberlain that the question would not be submitted to the Permanent Court for Advisory Opinion, because Roumania objected. It is not without interest to Americans to note that when the United States reserved the privilege of raising such objection to the submission of requests for Advisory Opinion, the representatives of certain European powers seemed to oppose the American policy.

Hungary has thus far refused to accept the proposals of the Report on the ground that they purport to overrule or foreclose the decision of a Tribunal having jurisdiction. It has not been denied by the Council or by any member of it outside the Roumanian delegate, that the Mixed Arbitral Tribunal did have jurisdiction of the case. In fact the recommendations of the Committee of Three presuppose such jurisdiction, for if the "principles" suggested are accepted by both parties, the Council is requested to invite Roumania to reinstate her judge, whereas if Roumania refuses to accept the "principles," the Council is asked to proceed to the nomination of substitute judges "in conformity with the Treaty of Trianon." If Hungary refuses, the Council is asked not to fulfil this function. While the Council may, abstractly speaking, be deemed to have the power of making any recommendation for the purpose of adjusting differences between nations, it seems a somewhat unusual conception of its function to suppose that it would be justified in overruling the decision of a Tribunal admitted to have jurisdiction over a case involving the interpretation of a treaty and to make the acceptance of such decision of its own a necessary condition of the performance of its duty to appoint substitute judges on a Mixed Arbitral Tribunal from which a dissatisfied party has withdrawn its national judge.

EDWIN M. BORCHARD.

New Haven, Conn., November 15, 1927.

APPENDIX.

ROUMANO-HUNGARIAN MIXED ARBITRAL TRIBUNAL

In the matter of: Emeric Kulin senior.

The Roumanian Government No. R. H. 139.

The Roumano-Hungarian Mixed Arbitral Tribunal regularly composed of Mr. De Cedercrantz, President, Mr. Székács and Mr. Antoniade, Arbitrators, assisted by Mr. Zarb, Secretary, sitting with all members present at 57, rue de Varenne, in Paris, and deliberating with closed doors;

Considering the request lodged on the 29th of December, 1923, by Mr. Emeric Kulin Senior, of 28, Rue Komlóssy, Debreczen, Hungary, which request asks that it may please the Tribunal:

1. To state and declare that the measures in restriction of the right of ownership applied to the landed property and chattels of the Claimant by the Roumanian Government are contrary to the stipulations of Art. 250 of the Treaty of Trianon;

2. To condemn the Roumanian Government to return to the Claimant his personal and real property free from all incumbrances and in the same condition in which the same was before the measures in question were carried out; and to reinstate the said landed property in its previous status in the land registers;

3. To condemn the Roumanian Government to pay to the Claimant an indemnity fully representing the damage suffered in consequence of the deteriorations occasioned to the said personal and real property by the deprivation of possession, and to refund all expenses and disbursements incurred in consequence of the application of the measures complained of by the Claimant;

4. Alternatively to condemn the Roumanian Government to pay to the Claimant the replacement value of all or part of the real property in question and of all or part of its appurtenances in the event of it being proved that it is impossible for the Roumanian Government to return the same;

5. To compute the amount of the indemnities referred to above ex aequo et bono;

6. To condemn the Respondent to pay all the costs and expenses;

7. To invite the Roumanian Government to suspend the execution of all measures in restriction of the right of ownership likely to affect the property in question;

Considering the demurrer registered on the 16th of June, 1925, by which the Respondent alleges incompetence of the Tribunal;

Considering the reply to the demurrer entered on the 26th of September, 1925;

Considering the rejoinder filed on the 4th of January, 1926;

Considering the counter-rejoinder entered on the 15th of April, 1926;

Considering the amending vote of the Roumanian Government entered on the 27th of November, 1926;

Considering the documents relating to the case;

Considering the minutes of the sittings held in Paris on the 15th, 16th, 17th, 20th, 21st, 22nd and 23rd of December, 1926;

Having heard at the said sittings Maître Millerand, barrister at the Court of Appeal of Paris, Professor Politis, and Maître Rosenthal, barrister at Bucarest, for the Roumanian Government;

Having heard Professors Gidel and Brunet, barristers at the Court of Appeal of Paris, for the Claimant;

Having heard Mr. Popesco-Pion and Mr. Gajzágó, Agents General respectively of the Roumanian and Hungarian Governments;

Whereas in their demurrer the Respondent submits that the measures complained of by the Claimant were taken under the Agrarian Law in Transylvania and are measures of expropriation by way of agrarian reform which apply to all landowners irrespective of their being nationals or aliens; that, moreover, an expropriation indemnity is paid to all expropriated parties; that the measures in this case are not measures of seizure or liquidation within the meaning of Art. 250 of the Treaty of Trianon and that, consequently, they are not within the competence of the Tribunal;

Whereas the Respondent began by submitting also that, in order that a claim under Art. 250 may be introduced before the Tribunal, it is necessary that the measure complained of should have been taken between the 3rd of November, 1918, and the date on which the Treaty came into force, viz. the 26th of July, 1921;

Whereas this defence, which was developed by the Respondent in the written proceedings, was dropped in the course of the oral argument, which fact should be borne in mind;

Whereas it is proper first to point out that in inserting Art. 250 in the Treaty of Trianon, the Allied and Associated Powers intended to place the property, rights and interests of Hungarian nationals situated within territories of the former Austro-Hungarian Monarchy entirely outside the effect of all the measures mentioned in Art. 232 and in the Annex to Section IV as well as in Art. 250 itself, and to place such property, rights and interests under the government of common international law;

Whereas this clearly results from the preparatory work relating to Art. 267 of the Treaty of St. Germain and Art. 250 of the Treaty of Trianon, as well as from the very text of this latter article;

And therefore the Tribunal should refer to the principles of common international law whenever it is called upon to decide on a claim under Art. 250;

Whereas pursuant to Art. 250 those claims are to be submitted to the Mixed Arbitral Tribunal which are introduced by Hungarian nationals, whether so by option or otherwise, in respect of property, rights and interests situated on territories of the former Austro-Hungarian Monarchy, where such property, rights and interests have been subjected to any of the measures mentioned in the said Article;

Whereas it is precisely on this latter point that the defence put forward in the case turns, the Respondent maintaining, as previously stated, that the measures were not measures of seizure and liquidation within the meaning of Art. 250;

Whereas what is material in arriving at a just appreciation of the question of the competence of the Tribunal is therefore to ascertain whether the measures complained of herein present or not the characteristic features of one or other of the measures which, under Art. 250,

may give rise to claims that can be submitted to the Mixed Arbitral Tribunal; and whereas if the Tribunal finds that such is the case there are already sufficient facts to establish its competence, but it is only by examining the merits of the claim that it will be in a position to ascertain whether really the circumstances of the case are such as to come within the application of Art. 250;

Whereas the fact put forward by the Respondent that the measures in question had been taken in execution of the law on agrarian reform in Transylvania, Banat, Crishana and Maramures, has no bearing on the question of competence; and whereas it is only in the event of the Tribunal retaining jurisdiction in the matter that the Respondent will be able, in presenting its defence against the merits, to make use of the pleas drawn from the legislation on agrarian reform as well as of any other plea as to the merits, of which it may care to avail itself in order to show that Art. 250 must be inoperative in this case;

Whereas, with regard to the measures complained of by the Claimant, his allegations in this respect have not been contested by the opposing party, and it is therefore established that the Claimant was the owner of one half of a rural estate, owned jointly with his son, situate at Erendréd, in the Comitat of Szatmár, having a total area of one half of about 312 cadastral jugars, the said property being well equipped and including numerous head of cattle; and the Claimant's share was at first subjected to formal seizure and subsequently was taken from him under the agrarian law; and the Roumanian Government was registered in his place as owner in the land registers; and a small indemnity was promised to him, but has not been paid yet; and his cattle, implements and agricultural products were taken away;

Whereas in order to appreciate the import of this measure it is not necessary to examine whether the indemnity promised to the Claimant was or was not to be considered as an adequate indemnity, which, moreover, is essentially a question of merits; whereas indeed the other facts brought forward by the Claimant are sufficient to show that the measure concerned in the case is one which affects the property of an ex-enemy by removing it in its entirety from the owner and without his consent; and this measure constitutes a violation of the general principle of the respect of acquired rights and oversteps the limits of common international law and fully presents the character of a liquidation within the meaning of Art. 250 and is by its very nature to be classed among the measures referred to in the said Article;

Whereas the Respondent holds that the measure referred to in Art. 250 under the name of "liquidation" is a war measure taken for war purposes, the most characteristic feature thereof being that it affects ex-enemy property "as such," whereas the expropriations arising under the agrarian reform, from their very nature are not liquidations, since they are not in any respect differential measures and, at any rate, are not measures taken for any war purpose, and therefore are not in any way incompatible with Art. 250;

Whereas it results clearly from the terms of Articles 232 and 250, as well as from paragraph 3 of the Annex to Section IV that the liquidation within the meaning of Art. 250 may be either a war liquidation or a post-war liquidation, and the meaning of either of such liquidations is the same and it is only by their object that they are differentiated; and whereas either case involves subjecting ex-enemy property, rights or interests to a treatment which constitutes a derogation from the rules generally applied as regards the treatment of aliens and the principle of respect of acquired rights;

Whereas the question as to whether the expropriations in question in this case are or are not differential measures concerns essentially the merits of the case, and consequently it is not necessary to examine it at present;

Whereas in these conditions there is no doubt that the Tribunal is competent to deal with claims arising from this measure and submitted by a Hungarian national; and it is by an examination of the merits of the case that it can be ascertained whether, in applying this measure, the Respondent had or had not sufficient ground to authorise them to depart from common international law;

Whereas at the time of the oral argument the Respondent brought forward a new defence by maintaining that the compatibility of the expropriations with the Treaty of Trianon had been recognised by the representative of the Hungarian Government in the course of certain conversations which took place at Brussels on the 27th of May, 1923, between representatives of the two Governments, as well as by the Council of the League of Nations in their Resolution of July 5th, 1923;

Whereas it appears from the official texts published in the Journal of the League of Nations that, by a request dated the 15th of March, 1923, the Hungarian Government, referring to the second paragraph of Art. 11 of the Covenant of the League of Nations, drew the attention of the Council of the League to the expropriation which was being carried out by the Roumanian Government on the real property of owners who had opted for the Hungarian nationality subsequently to the transfer of Hungarian territories to the Kingdom of Roumania, and that it formulated certain demands in this connection; that after the Council had dealt with the question at the meetings of the 20th and 23rd of April, 1923, the said question had been the subject of negotiations at Brussels between representatives of the two Governments in the following month of May, and that at their meeting of July 5th, 1923, the Council, after examining their Reporter's report concerning the conversations held at Brussels as well as the documents annexed thereto, among which was an account of the said conversations, approved the report and placed on record the various declarations contained in the said account;

Whereas the thesis of the Respondent is based on the following passage of said account:

"As to the question of incompatibility between the Roumanian law and the provisions of the Treaty relating to the rights of persons having opted for Hungarian nationality, it is admitted, and the Hungarian representatives do not contest this, that the Treaty does not oppose any expropriation of the property of such persons for reasons of public utility including the social necessities of an agrarian reform";

Whereas the said account, which relates to conversations held at Brussels between representatives of the two Governments, exactly specifies in every case by whom the declarations therein contained were made, either in textually reproducing such declarations or in merely giving the sense thereof; and whereas the passage referred to by the Respondent does not contain any indication of this nature, and for this reason alone it is at any rate doubtful whether the passage is really a formal declaration by the Hungarian representatives; and whereas on the other hand the account states a little further on that on examining the question of indemnity "the Hungarian delegate is of opinion that a so-called deferred gold payment cannot be taken into consideration. In matters of expropriation payment in cash alone is justified," which gives

ground for assuming that in no case did the Hungarian delegates understand by the word "expropriation" as occurring in the passage quoted above the taking away without an adequate indemnity of the property of persons having opted for Hungarian nationality; and whereas it results from the foregoing that the acknowledgment of the compatibility of the expropriations with the Treaty necessarily presupposes therefore, in the Hungarian representatives' opinion, compliance with all the ordinary rules of expropriation, one of which is the immediate payment of an adequate indemnity; and whereas the above considerations knock the bottom from this part of the Respondent's argument;

Whereas, moreover—assuming hypothetically that the passage quoted is a real acknowledgment—it should be borne in mind that the fact occurred in the course of negotiations between representatives of the two Governments with the object of arriving at an understanding concerning the matter forming the subject of the request dated the 15th of March, 1923, and for this purpose the conversation dealt with five different points which formed together the very subject of the dispute between the two Governments, and the passage quoted above refers to the first of these points; that if a conciliatory declaration was made at the beginning of the negotiations by the Hungarian representatives, it must of necessity be interpreted only as the expression of a desire to arrive at an understanding, or as a concession made in the hope of obtaining concessions from the opposing party on other points, with a view to arriving ultimately, through mutual concessions, at an agreement on all the five points and thus on the whole matter in dispute; that in any case a concession made under such circumstances could not be alleged against the party making same except where it formed an integral part of an agreement concluded subsequently and bearing on the whole matter in dispute, which has not occurred; that in fact the account states, as regards point No. 3—fixation and nature of the indemnification—that after an exhaustive conversation and declarations by both sides, "both representatives deemed it inadvisable to prolong the discussion on the question of purchase price, no agreement between their respective theses appearing possible"; that if at Brussels agreement was reached on other litigious points—a question the Tribunal has no reason to concern itself with—in any case it is acknowledged that on one point at least, which is of capital importance, the account had to record that there was absolute divergence between the representatives; that is is not admissible in law to detach, as is done by the Respondent, from the text of the account, an isolated declaration and, without consideration of the circumstances in which it was made, to put it forward as an official acknowledgment from the Hungarian Government, capable of binding all Hungarian nationals and depriving them consequently of the right which is absolutely guaranteed to them by Art. 250 and which enables them to submit to this Tribunal any claim arising under the said article; that in these circumstances, even if the declaration in question was really an acknowledgment made by the representatives of the Hungarian Government, it must be admitted that it is of no value as regards the settlement of the present dispute;

Whereas the Respondent submits also that the Claimant voluntarily presented himself before the Roumanian court without pleading an objection under Art. 250, that he submitted his defence as to the facts and thus recognised that the measures now complained of constituted acts of expropriation; that having thus acknowledged before the Roumanian courts that the agrarian laws constituted an expropriation, the Claimant cannot pretend to-day before an international Tribunal that the same laws constituted liquidations within the meaning of Art. 250;

Whereas the Respondent cannot invoke any principle of law in support of these allegations, which, in fact, are contrary to the opinion universally held, namely, that in matters of international jurisdiction nothing prevents an interested party from first exhausting the means of redress offered by the national law before appealing to the international forum; and whereas the fact that before the Roumanian courts he only claimed under the internal law cannot deprive him of the right to claim before this Tribunal under the provisions of an international treaty;

Whereas, as already stated, the question of indemnity is essentially a question of the merits, and consequently the Tribunal is not prepared to take into consideration, at the present stage of the case, the observations submitted by the Respondent in this respect;

Whereas it is incorrect for the Respondent to invoke in support of its contention a letter dated the 13th of August, 1923, and addressed to the President of the Czecho-Slovakian Delegation, alleging that it emanated from the Peace Conference whereas this letter is in fact signed by the President of the Commission of the New States and Protection of Minorities and has nothing to do with the preparatory work in connection with the Treaty of Trianon, but refers only to the wording of some articles of the Treaty on the protection of minorities, and is no conclusive proof in this case;

ON THESE GROUNDS

I. Declares itself competent.

II. Requests the Respondent to submit its reply on the merits within a period of two months from the date of notification of this judgment.

III. Reserves the costs.

Paris, the 10th of January, 1927.

Signed : CEDERCRANTZ

Signed : SZÉKÁCS

On behalf of the Roumanian Arbitrator :

Signed : CEDERCRANTZ

Dissenting Opinion of the Roumanian Arbitrator in the cases before the Roumanian-Hungarian Mixed Arbitral Tribunal on the Demurrer to the Jurisdicton.

The undersigned Roumanian Arbitrator dissents from the opinion of the majority of the Tribunal concerning the competence of the latter in the case of Docket No . . . ., a question concerning which the Roumanian Government, guided by deference for international justice, gave explanations to the Tribunal, declaring nevertheless that it will not lay down conclusions as to the merits and that it reserves full liberty of action with respect to the future (see among others the pleadings of M. Millerand).

Subject to the preceding reservation, the undersigned Roumanian arbitrator sets forth the following :

Whereas, by the original petition, the claimant asked the Tribunal to state and declare that the measure of expropriation applied to his landed property situated in Transylvania, by virtue of the Roumanian agrarian law is contrary to the stipulations of Art. 250 of the Treaty of Trianon; to order the Roumanian State to return to him his property free from all incumbrances and to pay to him all damages suffered in consequence of the expropriation : alternatively, in the event of it being proved that restitution in kind is impossible, to pay him a complete indemnity, the amount of which should be computed *ex aequo et bono* with cost and expenses;

Whereas, before any answer was made as to the merits the Roumanian Government filed a demurrer, seeking to have the Tribunal declare its incompetence in view of the fact that the measures applied to the property of the applicant do not come within the provisions of Art. 250, which alone determines the competence of the Tribunal in the case in issue, these measures being measures of expropriation by way of agrarian reform for the purpose of national welfare which cannot be compared to a measure of seizure or liquidation within the meaning of that article;

Whereas, the rule of competence of the Tribunal is set out in Art. 250 in the following terms : " Claims made by Hungarian nationals under this article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239," the whole dispute is reduced to this— whether the measure of which the claimant complains is a measure of seizure or liquidation within the meaning of that article;

Whereas, before arriving at the examination of this question, it is important to note that Mixed Arbitral Tribunals, whenever they have to determine their own competence always show the greatest discretion, and that exceptional international forums with limited jurisdiction always refuse broad interpretations in order not to deprive the defendants of their proper judges;

Whereas, this cautious attitude is the more required when the question is, as in the present instance, of a jurisdiction exceptional in several respects, first, due to the exceptional nature of this Tribunal; in the next place, due to the exceptional terms of Art. 250 which derogates from the general rule of the Treaties in matters of the seizure and liquidation of ex-enemy property in favor of one single category of Allied countries, namely, the succession states; finally, due to the

character of the defendant, which as a Sovereign State cannot be brought before an exceptional forum, no matter of what dignity, for acts done in the free exercise of its sovereignty, without its formal consent;

Whereas, Art. 250 containing a derogation from a principle previously incorporated in the same Treaty (which is common in all the treaties concluded at the end of the Great War) and stipulating that "notwithstanding the provisions of article 232 and the Annex to section 4, the property, rights, and interests of Hungarians nationals or companies controlled by them, situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with these provisions" it is necessary to refer to the general rule of which this new stipulation is a derogation in order to appreciate the sense and the purport of this limitation, to see what is permitted by virtue of the general rule to which the new provision is an exception;

Whereas, the derogation contained in Art. 250 in favor of Hungarian nationals relates to the provisions of Art. 232, paragraph (b) which gives the Allied and Associated Powers the right to retain and liquidate all property, rights and interests of nationals of the former Kingdom of Hungary or companies controlled by them and situated in the territories of these powers, in their colonies, etc. . . ;

Whereas, that which is permitted by this provision which—it must be admitted—constitutes an important derogation from common international law and a privilege in favor of the Allied and Associated Powers which has been characterized as excessive, and is an exceptional measure, the nature and purpose of which has to be determined as it proceeds from the text and spirit of the Treaty;

Whereas, the right to retain and to liquidate accorded to the Allied Powers has a purpose strictly defined and regulated in its effects, by various provisions contained especially in section IV part X of the Treaty (cf. Art. 232, *h, j:* sec. 4, 9, 15 of the Annex, and Art. 174 of part VIII); that this purpose is the reparation for damages suffered by the Allied Powers and their Nationals in the War, for which Hungary declared herself responsible (Art. 161);

Whereas, aside from the characteristics inferred from their purpose, the measures permitting retention and liquidation have another distinguishing trait which results from their very nature, namely, that they are in substance discriminatory measures, to wit, that they affect certain properties, rights and interests in so far as they belong to ex-enemies and only because of the nationality of their owners; that this distinguishing character has been recognized by the Permanent Court of International Justice which in its seventh judgment declares (p. 32) "that it is indisputable that the liquidational régime established by the Treaty of Versailles (as well as by the other Treaties) *applies to German property as such*";

Whereas, the claimants in the written proceedings as well as during the oral argument contested the discriminatory character of the measures of seizure and liquidation and to support their contention invoked the decisions of the Mixed Arbitral Tribunal which in case of exceptional measures of war and dispositions taken by the ex-enemy governments on their territory against the property, rights, and interests of nationals of the Allied and Associated Powers does not require the discriminatory character of such measures in order to pass upon damages suffered by such nationals, an event foreseen especially by paragraph (e) of Art. 232 (corresponding to 297e of the Treaty of Versailles) which decisions they wish to expand by analogy, to the cases of liquidation defined by Art. 232, section (b), and 250;

Whereas, Art. 232 of the Treaty of Trianon (297 of the Treaty of Versailles) contains two different types of ideas: on the one hand, the measures taken by the ex-enemy governments in time of war against the property, rights and interests of Allied and Associated nationals (paragraphs a, e, f, g): on the other hand, the measures taken during or after the war by the Allied and Associated governments against the property, rights and interests of ex-enemies in their territories and for the purpose of reparation (paragraphs b, c, d, h, i, j); that the decisions cited have only established that in so far as concerns the first hypothesis where the Tribunals, finding themselves faced with the necessity of indemnifying an Allied national, associated, in spite of himself, by war measures, in the war against his country, could only logically consider as essential the belligerent character of the injurious act, its discriminatory nature is not essential to give it the character of a war measure; that it is an established fact that all these decisions do not dispense with the necessity of seeking a discriminatory character except when we are faced with a measure characterized as a war measure;

Whereas, if the Tribunals have not yet had the opportunity to rule as to the other hypothesis, where the question is not a question of reparation for war measures, it is nevertheless true that it follows from the spirit and likewise from the terms of their decisions that if they had had the opportunity to rule as to the second hypothesis they would have required a discriminatory trait, above all when it was a matter of measures of liquidation taken after the war (cf. the type of decision, which consequnetly all others have followed; " T.A.M. germano-belge: Rymenans et Co. v. Germany, Recueil, I, p. 878 and especially the considerations 1 and 2, page 885, consideration 3, page 887, consideration 4, page 888, and consideration 1, page 891); that, therefore, the objection casually confusing two different ideas should be discarded and the discriminatory character of the measure of liquidation should be maintained;

Whereas, such being the characteristic traits of the measure permitted by Art. 232*b*, the same traits should be found again when it is a question of a measure prohibited by Art. 250;

Whereas, the measure of expropriation of which applicant complains can in no way be compared with liquidation, this measure being irrelevant to all notion of reparation for war damages, and independent of all discriminatory treatment; that it follows from the history of the agrarian reform in Roumania as well as from the different laws for the different provinces of the Kingdom—and in this particular case which at present engages our attention, from the agrarian reform law applicable to Transylvania, etc. . .—that the question turns around a great social and economic reform aiming at the creation of a class of peasant proprietors, a reform the principle of which was decreed by the Roumanian government before the war and has been incorporated in the Constitution of the Kingdom by the fundamental law of July 20, 1917—hence, a measure of public order, dictated by the needs of a sovereign State, the only judge of its vital interests, and applicable to all land owners without a single distinction as to nationality—to Roumanian nationals as well as to all foreigners, neutrals, allies, or ex-enemies, under the same legal conditions, in the matter of the portion to be expropriated, the indemnity to be paid, and the method of payment;

Whereas, under these conditions one cannot say, as has been affirmed in the written proceedings, that the agrarian reform in Transylvania will simply be an indirect means to strike only the Hun-

garian proprietors and to arrive by the use of false means at a veritable liquidation of their immovable property; that the problem would be, then, to put in question the good faith of a State which, following all the principles and conforming to the decisions of the Permanent Court of International Justice (judgment No. 7, p. 30) should always be presumed, and concerning which it is incumbent upon him who contests to furnish proof of his allegation;

Whereas, in view of these considerations the expropriation for a social purpose cannot be compared to the juristic institution of liquidation; the measures taken by the Roumanian government are not incompatible with Art. 250 of the Treaty and the Tribunal might, without further reason, decline jurisdiction;

Whereas, moreover, the compatibility of these agrarian expropriations in Roumania with the Treaty of Trianon has been formally recognized by the Hungarian government in an agreement at Brussels, on May 27, 1923, between her plenipotentiaries and the plenipotentiary of the Roumanian government, an agreement of which the Council of the League of Nations has taken note by its resolution of July 5, 1923, in Geneva;

Whereas, so far as this agreement is concerned, it results from the official documents published in the Journal of the League of Nations, that by a request of March 15, 1923, the Hungarian Government, under the terms of Art. 11 of the Covenant, called the attention of the Council of the League of Nations to the expropriation in Transylvania by the Roumanian government of immovable property belonging to her subjects who had opted for Hungarian nationality, and demanded that said Council rule that the legislative and administrative provisions of the Roumanian government are contrary to the Treaties, and to order that the immovable property of the Hungarian optants be restored to them with complete indemnity for damages suffered; that following that request the Council, after having heard the representatives of the two governments in their meetings of April 20 and 23, 1923, decided to postpone the examination of the case until its July meeting and invited the parties to make every effort with a view to arriving, in the meantime, at an amicable arrangement; that in the interim, the reporter of the Case, Ambassador Adatci, having invited the representatives of the two governments to undertake under his auspices negotiations aiming at an agreement, these representatives went to Brussels where their negotiations resulted on May 27, 1923, in the draft of a *procès verbal* which deals with five points which constituted the subject of dispute between the two governments and which recorded the statements of the parties concerning each of these points; that concerning the first point which bears on the question of the incompatibility between the Roumanian agarian law and the provision of the Treaty of Trianon with respect to the rights of Hungarian optants, *" it has been admitted and the Hungarian representatives do not contest that the Treaty does not exclude an expropriation of the property of optants for public purposes including therein the social necessities of an agrarian reform";* that as a result of this act of Brussels and in spite of the disavowal of its plenipotentiaries by the Hungarian government, a disavowal of which the Council of the League did not feel that they ought to take account, the reporter believing that *" the two parties have in common accord reached certain conclusions upon several points constituting the basis of the Hungarian request, and that* it ought not to be admitted that the positive results achieved should be placed in question " proposed to the Council to take action upon the declarations contained in the act of Brussels; that the Council in its session of July 5, 1923, after having

heard the representatives of the two governments, the reporter, as well as the declarations of several of its members, who all believed in the existence of the accord of Brussels which settled the litigation pending between the two governments, approved the report of Ambassador Adatci, and took account of the various declarations contained in the minutes annexed to the report adding " that it hoped that the two governments will do everything possible in order that the question of the Hungarian optants may not become a cause of disturbance in the good neighborly relations between the two countries ";

Whereas, this accord in so far as it recognized the compatibility of the Roumanian agrarian law with the Treaty of Trianon has the character of an official interpretation which the two interested governments have given to the provisions of this Treaty in so far as concerns the immovable property of Hungarian nationals in the ceded territory by admitting that the protection of such property does not exclude an agrarian reform dictated by social necessities;

Whereas, it is incontestable that the states which signed a Treaty are qualified and able to interpret it and to determine the sense and purport which their plenipotentiaries gave to its clauses; that this interpretation has an official character and shares the obligatory force of the act with which it is incorporated; that hence it binds not only the governments which gave and which cannot withdraw their interpretation, but also their nationals who cannot give any other interpretation than that given by their governments;

Whereas, for the validity of such an interpretation there is no need, as was maintained during the oral argument, for a solemn form or for a subsequent ratification according to the general rule, both doctrine and diplomatic practice recognizing that it suffices if an interpretation adopted be drafted in a protocol terminating a conference or established by a concurrent exchange of notes or that it be consigned to the form of reciprocal declarations (cf. Fauchille, *Traité de Droit International Public,* I, 373 *et seq.* and the examples there cited);

Whereas, the claimants, defendants on the demurrer, contest in the first place that there was any accord whatever at Brussels and assert that the document of May 27, 1923, merely established disagreements; that in any case if there is a declaration on the part of the Hungarian plenipotentiaries concerning the compatibility of the Roumanian agrarian reform with the Treaty, in making such declaration the latter understood only an expropriation with adequate indemnity according to the rules of international law; that finally, the declarations of Brussels constitute an indivisible whole from which one cannot detach an isolated declaration and use it; that this isolated declaration which was only made with a view to obtaining concessions on other points in dispute loses all its importance from the moment when the principal point of dispute, the amount of the indemnity to be accorded the expropriated owners, did not result in an agreement;

Whereas to the first objection—the non-existence of the agreement—the documents make sufficient answer; that if there could not have been an agreement it is not comprehended why the Hungarian government felt the need of disavowing its plenipotentiary, a disavowal which the Council did not consider it necessary to take into account; that in any case it cannot be conceived that an international organism having the importance and prestige of the Council of the League of Nations would take into consideration, discuss at length, and finally ratify a non-existent thing;

Whereas, so far as concerns the second objection, it is established that during the Brussels debates they were not discussing an abstract agrarian reform and fixing the general principles of international law, but in fact the Roumanian agrarian reform of which all parts were known to the two parties—a reform which was the basis, with all its concrete conditions, of the petition of the Hungarian government to the Council of the League;

Whereas, so far as concerns the last objection—the indivisibility of the Agreements of Brussels—this argument loses all value in view of the fact that the plenipotentiaries having agreed to discuss in their logical order all the reasons advanced in the Hungarian petition gave first place to the question of principle dominating the entire debate, namely, the compatibility or incompatibility of the agrarian law with the Treaty, which was the only question of an international character which divided the parties, the other questions to be discussed, namely absenteeism, the mode of payment of the indemnity and its amount, the provisions of Art. 18 of the Roumanian Constitution, various other provisions of detail of the agrarian law being merely questions of internal Roumanian legislation; that if hence an accord was reached on the primary question and if it was recognized that the Roumanian government had not infringed the Treaty of Trianon—which happened—the question in its entirety lost its international character and became an internal question reserved to the sovereignty of Roumania so long as it cannot be asserted that the central point of the dispute was any other; that that was recognized by the Council of the League which was content to take note of the fact and to make the following recommendation to the parties:

"It, (the Council) is convinced that the Hungarian government after the efforts made on various occasions to remove any misunderstanding on the question of the optants will use its best endeavors to reassure its nationals and that the Roumanian government on its part, loyal to the Treaties and to the principles of justice upon which it declares its agrarian legislation is founded, will give proof of its good will with respect to the Hungarian optants";

Whereas, in view of this accord on the compatibility of the agrarian expropriations with the Treaty of Trianon the question of the jurisdiction of this Tribunal is definitely decided in the sense of a radical incompetence and hence any further examination becomes superfluous;

Whereas, beyond the admissions of the Hungarian government the Hungarian claimants themselves recognize explicitly that the measure which affected them had the legal character of an expropriation and not that of a liquidation forbidden by Art. 250, and that on the occasion of their proceeding before the Roumanian courts competent in matters of expropriation, a remedy which they all exhausted in presenting their detailed defence on the merits without pleading Art. 250 and without making the least reservation on the nature of that measure; that hence these claimants having recognized in the matter of property and on the basis of a judicial contract freely entered into resulting in a judicial decision having the authority of *res judicata,* that the agrarian laws which were applied to them constituted an expropriation and not a liquidation, cannot now claim before an international forum that the same agrarian laws constitute a liquidation in the sense of Art. 250;

Whereas, one cannot invoke in order to annul these decisions having the authority of *res judicata,* the rule of international law according to which it is imperative to exhaust national remedies before having recourse to international remedies, in view of the fact that the rule presupposes that it is the same subject which is brought before the

international tribunal; that in the present case at issue the applicants, finding themselves opposed in virtue of a judicial contract freely entered, by decisions having the authority of *res judicata* with respect to the nature of the measures taken, seek to begin a new suit having a new cause, namely, a "liquidation," before the international tribunal;

Whereas, in answering these juridical arguments the Hungarian applicants in order to invoke at any price the competence of the tribunal, assert that by the fact of returning to common international law brought about by the insertion of Art. 250 in so far as it is an exception to the provisions of Art. 232 b, the property of Hungarian nationals situated in the ceded territories has acquired a special status which shelters it perpetually from any injury whatsoever, and that consequently, and always according to Art. 250, the Mixed Arbitral Tribunal will be competent whenever there is a question of such an injury; that therefore the measures of seizure and liquidation prohibited by Art. 250 are all those which in any way whatsoever violate the rules of common international law and in order to establish the competence of the tribunal it will be sufficient that a measure applying to Hungarian property should have only the appearance or should offer the theoretic possibility of violating any rule whatever of common international law;

Whereas, it is important to examine this double thesis from the point of view of positive provisions of the Treaty and the principles of international law;

Whereas, if it is true that Art. 250 annulling the prerogative of Art. 232 b returns, so far as it concerns Hungarian property in the ceded territories, to common international law, it does not necessarily follow from this return that a privileged status has been created for this property, but simply this much, that this property will have the protection accorded to all alien property;

Whereas, the doctrine of international law as well as of customary law which governs the relation of State to State in this field admits that aliens have a right to protection of their persons and their property to the extent to which the laws secure such protection to nationals; that this equality of treatment implies that the landed property of an alien is subject to the laws which regulate the landed property in the country where it is situated; that although there has been lately a tendency among certain writers to request for the property of aliens a greater protection than that which is accorded to nationals, this tendency has not been followed by the majority of the doctrine nor has it become the customary law (cf. Fauchille, I, 930-944; de Louter, *Le droit international positif*, I, 206; Lectures of Professor Borchard in Bibl. Visseriana, III, 19 et seq.);

Whereas, the Hungarian property, like all foreign property, being governed, under the domain of general international law, by the principle of equality of treatment with the property of nationals, the expropriation for a public purpose of the state (public or national), a vital and necessary institution for the state, cannot be excluded in principle and may be applied to foreigners as to nationals;

Whereas, moreover, the propriety of expropriation for public purposes, according to general international law, is recognized formally by the Permanent Court of International Justice in its Judgment, No. 7 (page 22);

Whereas, the principle of national treatment being the rule generally admitted in international law is the principle which was inscribed in the Treaty of Trianon (as moreover in all the Treaties) when

it concerns the property, rights or interests of Allies on Hungarian territory, in several of its stipulations and notably in line c of Art. 211, in which Hungary engages itself " not to subject the nationals of allied and associated states, their property, rights and interests . . . . to any charge, tax or impost, direct or indirect, other or greater than those which are or may be imposed upon nationals or upon their property, rights or interests "; and in Art. 233 b which has its correlative in all the other Treaties (Versailles, 298, St. Germain, 250, Neuilly, 178) in which Hungary engages itself " not to subject the property, rights or interests of the allied or associated powers to any measures infringing property rights which are not equally applied to the property rights or interests of Hungarian nationals "; that if the same line adds " and to pay appropriate indemnities whenever such measures may be taken," it may be remarked that this does not contemplate as a sanction the jurisdiction of the Mixed Arbitral Tribunal, which would only constitute a just counterpart if this competence had been accorded to take cognizance of expropriations sustained by Hungarian subjects in ceded territory, and if these Tribunals had to take cognizance of every violation of common international law;

Whereas, the application of the principle of equality of treatment was demanded by the Hungarian Government itself at the preliminary negotiations preceding the conclusion of the Treaty of Trianon; that first, in the note No. 8 of January 14th, 1920, which advised the Peace Conference of the dangers which would result for Hungarian property in ceded territory from certain projects of agrarian reform in Czechoslovakia and in Roumania, the Hungarian Government demanded so far as concerns Roumania an express stipulation in which it was said that " physical persons or corporations belonging to the Hungarian minority shall not suffer, either in law or in fact, any treatment different from the point of view of their material interests from that of Roumanian nationals having Roumanian nationality "; that as a result of the observations presented by the Hungarian delegation on Art. 250 (Note 37 in the Public Acts of the Hungarian Minister of Foreign Affairs, Budapest, 1921, 2 v. under the title " Hungarian Peace Negotiations "), the latter, containing the tenor of Art. 250 so far as concerns the exemption from seizure and liquidation, believing that these provisions did not protect Hungarian property against an eventual Roumanian or Czechoslovakian expropriation demanded " a reassuring declaration providing that no property belonging to our nationals and located on the territory of the former Austro-Hungarian Monarchy shall be sequestrated, liquidated or expropriated in virtue of a legal provision or by any special measure which, under the same circumstances, does not apply to the subjects of the legislating state or to the state executing such measure—a reassuring declaration which moreover was refused by the Conference (letter from the President of the Conference);—that it follows from all these acts that national treatment constituted the maximum of the demands of the Hungarian Government itself so far as concerns the protection of Hungarian property in ceded territory;

Whereas a further proof of the spirit which dominated the drafting of the Treaty so far as concerns the status of ex-enemy property in allied countries, is found in the letter of August 13th, 1919, addressed by the President of the Commission of New States and the Protection of Minorities to the Czechoslovak delegation, a letter cited in the argument; that this delegation at the time of the drafting of Art. 3 of the Minority Treaty (whose content corresponds to Art. 63, paragraph 4 of the Treaty of Trianon) which contemplates that Hungarian optants shall be free to retain the immovable property which they possess in Czechoslovak territory, having demanded the subordination of this

right of optants to the condition that their property shall be subjected to the same régime as that of Czechoslovak nationals, reply was made to them "that it did not seem to the Commission that the insertion of a supplementary clause was necessary to maintain without preference of any kind under the régime of Czechoslovak law, all the goods and property situated on Czechoslovak territory";

Whereas, therefore, it can nowhere be deduced that a special privilege of any kind was established in favor of Hungarian property in ceded territory, and that it is necessary to deny, as at least hazardous, the extreme thesis presented in the written proceedings and advanced during the oral argument that the immovable property of Hungarians in Transylvania enjoys beyond international common law a vertiable privilege or a kind of mortgage on Transylvania which has been accorded them as a compensation for the dismemberment of Hungary and as a condition of the transfer of the territory;

Whereas, the radical vice of the thesis of privilege consists in the dangerous affirmation that Art. 250 refers, by the exclusion of liquidation, to international common law, by which that Article forbids, under sanction, every violation of that law; that in order for that to be true it would follow that every violation of international common law constitutes a luiquidation—which cannot be demonstrated for the good reason that the scope of the two concepts is not identical, the idea of "violation of international law" being far wider than that of "liquidation";

Whereas this thesis, resting upon a *petitio principii,* because it assumes what is was necessary to prove, is unacceptable, its consequence, namely, the complementary thesis which attributes to the Mixed Arbitral Tribunal jurisdiction to take cognizance not only of every violation of or affront to international common law, but also of every appearance or possibility of violation, is equally invalid;

Whereas the theory of the Mixed Arbitral Tribunals as the perpetual guardians of international common law, invalidates itself by the inadmissible consequences to which it leads; that by admitting this theory, these Tribunals, exceptional courts with limited jurisdiction, would become by this fact courts of the widest international competence known, this jurisdiction having no other limits than the vague concept of international law; that by this formidable extension of jurisdiction, these Tribunals would have to take cognizance not only of everything which touches lightly or severely property rights and interests of Hungarian nationals in ceded territories but they would also be able to exercise control over all internal legislation of the succession states, from their fiscal laws and their application to their most vital social laws, and to their constitution itself, which would be the equivalent in last resort of admitting that the Treaty of Trianon subjected Roumania, Czechoslovakia, the Jugoslav State, for the benefit of Hungary, to a kind of régime of capitulations, more extended and more humiliating than that which was placed upon the non-Christian countries;

Whereas, from all these considerations it follows that Art. 250 can only be applied on the hypothesis that it involved a seizure and liquidation with a view to reparation; that a measure of expropriation by way of agrarian reform, non-differential in character, cannot be regarded as a liquidation, which alone is within the jurisdiction of the Mixed Arbitral Tribunal; that even if one regards such an expropriation as an affront to international law by the fact that the indemnity allowed to the expropriated owners is insufficient, the examination of the cases before us showed that the rules which determined indemnity are the

same for Roumanian and for Hungarian owners, and that in any case it is not within the jurisdiction of this Tribunal to take cognizance of such an affront to international law;

Whereas, under these conditions the Tribunal cannot, contrary to specific texts and contrary to the principles which ought to govern, extend its jurisdiction without committing a manifest abuse of power;

For these reasons,
The undersigned arbitrator is of the Opinion that the Mixed Arbitral Tribunal is not competent to take jurisdiction for the purpose of examining on the merits, the cases now submitted for its consideration.

(Signed) ANTONIADE.

Paris, January 10th, 1927.

REPORT OF THE COMMITTEE OF THREE TO THE COUNCIL OF THE LEAGUE OF NATIONS.

2025. **Request of the Roumanian Government, under Paragraph 2 of Article 11 of the Covenant, regarding its Communication addressed to the President of the Mixed Roumano-Hungarian Arbitral Tribunal on February 24th 1927,—Request of the Hungarian Government for the Appointment by the Council, in virtue of Article 239 of the Treaty of Trianon, of two Deputy Judges for the Mixed Roumano-Hungarian Arbitral Tribunal.**

Count Apponyi, representative of Hungary, came to the Council table.

Sir Austen CHAMBERLAIN, Rapporteur, read the following report[1] of the Committee of Three:

"This question, as set out in the above titles, is only one aspect of the question which was submitted successively to the Conference of Ambassadors and the Council of the League of Nations in 1922 and 1923.

"On August 16th, 1922, the Hungarian Government applied to the Conference of Ambassadors in regard to the expropriation—undertaken by Roumania in connection with the scheme of agrarian reform—of the immovable property of persons who, while possessing rights of citizenship (*indigénat*) in the territories transferred to the Kingdom of Roumania by the Treaty of Trianon, had opted for Hungarian nationality under Articles 63 or 64 of that Treaty, and also under Article 3 of the Roumanian Minorities Treaty. The Conference of Ambassadors, in a note dated August 31st, 1922, informed the Hungarian Government that its claims related entirely to the stipulations of the Treaty between Roumania and the Principal Allied and Associated Powers concerning minorities, and should, under the Treaty, be addressed to the League of Nations. On a further request by the Hungarian Government, the Conference of Ambassadors, in a letter dated February 27th, 1923, informed Hungary that she, or another Member of the League, should take the initiative in bringing the matter before the Council.

"Hungary therefore applied to the League of Nations, stating

[1] Document C. 489. 1927. VII.

that a satisfactory solution had not been obtained by direct negotiations, and formulating the following demands :

"(1) That the Council should deal with the substance of the question, in view of the urgency of the matter, at its next session;

"(2) That it should give a ruling on the substance of the question by declaring that the Roumanian legislative and administrative enactments in question were contrary to the Treaties; by ensuring, as regards the future, that Roumania should act in conformity with the provisions of the Treaties; by ordering that the immovable property of Hungarian optants should be restored to them and that it should in future be free from all charges contrary to the provisions of the Treaties; and, finally, that full compensation for damage should be given to the injured parties.

"The Council considered this question in April and July 1923. The proposals made at the April session to refer the question to the Permanent Court to obtain a decision, or even an advisory opinion, were not accepted by the Roumanian representative.

"M. Adatci, the Rapporteur, was then requested to prepare the ground for a fresh discussion before the July session of the Council, and the Council expressed the hope that, in the interval between the sessions, the two Governments would do their best to reach an agreement. With this object, the representatives of Hungary and Roumania proceeded, on the invitation of M. Adatci, to Brussels on May 6th, 1923. The results of these negotiations will be found in a report to which a draft recommendation and a summary of the conversations were appended (see Annex 533*a*, page 1011, of the *Official Journal,* August 1923).

"On July 5th, 1923, during the twenty-fifth session of the Council, the Brussels negotiations were the subject of protracted discussions, the Roumanian delegate appealing to the Brussels 'Agreements' and the Hungarian delegate stating that no agreement had been reached. The following resolution was then proposed :

"The Council,

"'After examining the report by M. Adatci dated June 5th, 1923, and the documents annexed thereto;

"'Approves the report;

"'Takes note of the various declarations contained in the Minutes attached to the report of the Japanese representative, and hopes that both Governments will do their utmost to prevent the question of Hungarian optants from becoming a disturbing influence in the relations between the neighbouring two countries.

"'The Council is convinced that the Hungarian Government, after the efforts made by both parties to avoid any misunderstanding on the question of optants, will do its best to reassure its nationals;

"'And that the Roumanian Government will remain faithful to the Treaty, and to the principle of justice upon which it declares that its agrarian legislation is founded, by giving proof of its good will in regard to the interests of the Hungarian optants.'

"The resolution was adopted by all the members of the Council, with the exception of the Hungarian delegate, who refrained from voting and stated that, in his opinion, the whole problem remained open; he added, *inter alia,* that his Government reserved the right to

take any further steps which the Treaties and the Covenant of the League of Nations might allow in order to obtain justice for those whom he had the right and the duty to represent.

"From December 1923 onwards, a number of applications from Hungarian nationals or optants owning lands in the territories transferred to Roumania were submitted to the secretariat of the Roumano-Hungarian Mixed Arbitral Tribunal, provided for in Article 239 of the Treaty of Trianon, asking, among other matters, that the Tribunal should declare that the measures restricting their right of ownership, which had been applied to their movable and immovable property by the Roumanian State, were contrary to the provisions of Article 250 of the Treaty of Trianon, and that it should order the Roumanian State to make restitution.

"In 1925, the Roumanian Government submitted applications objecting to the jurisdiction of the Tribunal. After hearing the counsel of the two parties between December 15th and 23rd, 1926, the Tribunal, on January 10th, 1927, declared itself competent, in virtue of Article 250, paragraph 3, of the Treaty of Trianon, and called upon the defendant (Roumania) to forward her reply within a period of two months.

"On February 24th, 1927, Roumania informed the Tribunal that she would refrain from submitting her reply regarding the substance of the question and that, consequently, her arbitrator would no longer sit in connection with any of the agrarian matters brought forward by Hungarian nationals. At the same time, she submitted to the Council, in virtue of Article 11, paragraph 2, of the Covenant, a request to allow her to acquaint the Council with the reasons on which her attitude was based.

"This question came before the Council on March 7th, 1927.

"The Roumanian representative explained the reasons which had led the Roumanian Government to withdraw its arbitrator from the Tribunal.

"The Hungarian representative asked the Council to appoint, in accordance with the Treaty of Peace, two deputy members to enable the Tribunal to continue its work.

"The Council, on the proposal of the President, requested the British representative to report on this question at its next session. Sir Austen Chamberlain having expressed the desire that two of his colleagues should be appointed to act with him for the purpose of examining the question, the Council requested the representative of Japan and the representative of Chile to assist Sir Austen Chamberlain in preparing a report for the next session. The two parties to the dispute accepted this proposal, which was adopted by the Council.

"On May 31st, Sir Austen Chamberlain, on behalf of the Committee of Three, convened the Roumanian and Hungarian representatives in London. The conversations took place on May 31st and June 1st. The delegates of both countries stated at the outset that they could not definitely bind their Governments. The Committee first of all heard the additional statements of the two parties and certain particulars which they furnished. The Committee thought it its duty to try all possible means of reaching a final solution by conciliation. In doing so, it was confident that it was fulfiling the wishes of the Council and conforming to the established practice of that body. It therefore asked the delegates to obtain from their respective Governments all possible concessions with a view to reaching a satisfactory solution. On the

proposal of the Committee, the delegates of the two Governments agreed to inform the Committee of the point of view of their respective Governments at the June session of the Council.

"At the June session of the Council, the Committee of Three met on several occasions at Geneva and maintained close contact with the representatives of the two Governments.

"Looking at the problem as a whole, the Committee desired to find a solution which would allay discontent. It could not forget that the matter had originally been submitted to the Council not under Article 239 of the Treaty of Trianon but under Article 11 of the Covenant, and that its intervention had been asked for, on that occasion, first of all by Roumania and then by Hungary. In these circumstances, it could not evade the duty imposed on it by the Covenant and confine itself simply to the election of the two deputy members for the Mixed Arbitral Tribunal, which the Hungarian representatives had as a result of the proceedings demanded.

"If it did so, it would have failed to discharge its political duties as a mediator and conciliator in a dispute which extended far beyond the actual terms in which it had been originally submitted by the two parties.

"Moreover, the Committee could not take a purely and strictly legal view of the Council's duties, especially as it realised that the election of the two deputy members would not have finally ended a difference which had been successively submitted to three international authorities.

"On the contrary, it attempted on more than one occasion to bring about a general settlement which would have terminated the controversy and led to better feelings.

"The Council, however, had further reasons for not playing a purely mechanical part.

"In 1923—as to-day—the two parties stated their points of view at great length and dealt with all aspects of the dispute both as regards substance and form.

"The Council has merely followed the discussions of the two parties, and, having regard to the complexity of the problem, it recommended them in 1923 to do everything possible to prevent the question of the optants from becoming a disturbing influence in the relations between the two neighbouring countries.

"It recommended Hungary to reassure her nationals and Roumania to give evidence of good will in regard to the interests of the Hungarian optants.

"Would the question with which we have been dealing since our session last March have arisen if the two parties had followed these recommendations?

"The Committee of the Council during its June session submitted certain formulas to the two parties, always with a view to conciliation and in the hope that the two Governments would agree.

"The Committee is forced to confess that it hopes have been disappointed and that the two parties have been unable to accept the conciliatory formulas which it proposed.

"As the two parties rejected the compromise proposed by the

Committee of Three, the latter convened them again on September 2nd, with a view to a final attempt at conciliation. During these fresh conversations, the representatives of the two countries communicated certain proposals to the Committee. The Hungarian representative renewed the offer made in March that the question of jurisdiction of the Mixed Arbitral Tribunal should be referred to the Permanent Court of International Justice, but declared that he was unable to make new concessions. This offer was not accepted by the Roumanian representative, who in his turn submitted certain formulas based on the proposals made by the Committee of Three with a view to compromise. These formulas were rejected by the Hungarian representative. Under these circumstances, the Committee of Three was compelled to abandon its hope of reaching a settlement by direct conciliation.

"The Committee was therefore obliged to seek a solution by other methods. A minute examination of the question of the Mixed Arbitral Tribunal's jurisdiction seemed to be of primary importance. It therefore asked the following questions:

"1. Is the Roumano-Hungarian Mixed Arbitral Tribunal entitled to entertain claims arising out of the application of the Roumanian Agrarian Law to Hungarian optants and nationals?

"2. If the answer to that question be in the affirmative, to what extent and in what circumstances is it entitled to do so?

"The Committee, after examining these questions and having them examined by eminent legal authorities, arrived at the following conclusions:

"The Mixed Roumano-Hungarian Arbitral Tribunal owes its establishment to the Treaty of Trianon. It is an international tribunal and its jurisdiction is therefore fixed by the terms of the Treaty which created it. It has no jurisdiction beyond that which the agreement of the contracting parties has conferred on it. The limits of its jurisdiction are defined by Articles 239 and 250 of the Treaty of Trianon.

"The question at present submitted to the Council for examination relates to the claims addressed under Article 250 to the Mixed Arbitral Tribunal by Hungarian nationals. The provisions of this article prohibit the retention and liquidation, dealt with in Article 232 and in the Annex to Section IV of Part X of the Treaty, of the property of Hungarian nationals situated in the territory of the former Austro-Hungarian Monarchy. They also provide for the restitution to their owners of goods freed from any measure of this kind and from any other measure of disposal, of administration or of sequestration taken in the period which elapsed between the Armistice and the entry into force of the Treaty. They authorise the submission of claims, by claimants who are Hungarian nationals, to the Mixed Roumano-Hungarian Arbitral Tribunal provided for in Article 239.

"If it could be established in any particular case that the property of a Hungarian national suffered retention or liquidation or any other measure of disposal under the terms of Articles 232 and 250 as a result of the application to the said property of the Roumanian Agrarian Law and if a claim were submitted with a view to obtaining restitution, it would be within the jurisdiction of the Mixed Arbitral Tribunal to give relief.

"The Mixed Arbitral Tribunal is not competent to give decisions on claims arising out of the application of an agrarian law as such unless

the case mentioned in the preceding paragraph arises. In this latter case, the jurisdiction of the Mixed Arbitral Tribunal would not be ousted on the ground that the application of an agrarian law was involved.

"Since these considerations show that the claim of a Hungarian national for restitution of property in accordance with Article 250 might come within the jurisdiction of the Mixed Arbitral Tribunal even if the claim arises out of the application of the Roumanian Agrarian Law, we shall proceed to the definition of the principles which the acceptance of the Treaty of Trianon has made obligatory for Roumania and Hungary.

"1. *The provisions of the peace settlement effected after the war of* 1914-18 *do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform.*

"Article 250 forbids the application of Article 232 to the property of Hungarian nationals in the transferred territory. Under the terms of Article 250, the prohibition to retain and liquidate cannot restrict Roumania's freedom of action beyond what it would have been if Articles 232 and 250 had not existed. Even if none of these provisions appeared in the Treaty, Roumania would none the less be entitled to enact any agrarian law she might consider suitable for the requirements of her people, subject to the obligations resulting from the rules of international law. There is, however, no rule of international law exempting Hungarian nationals from a general scheme of agrarian reform.

"The question of compensation, whatever its importance from other points of view, does not here come under consideration.

"2. *There must be no inequality between Roumanians and Hungarians, either in the terms of the Agrarian Law or in the way in which it is enforced.*

"Any provision in a general scheme of agrarian reform which either expressly or by necessary implication singled out Hungarians for more onerous treatment than that accorded to Roumanians, or to the nationals of other States generally, would create a presumption that it was intended to disguise a retention or liquidation of the property of Hungarian nationals *as such* in violation of Article 250 and would entitle the Mixed Arbitral Tribunal to give relief. The same would apply in the case of a discriminatory application of the Agrarian Law.

"The prohibition against the holding of immovable property by Hungarians in the territories transferred to Roumania, even if applied to all foreigners, would not be in accordance with the obligation which Roumania has contracted by the Treaty to permit Hungarian optants to keep their immovable property, but this is a question which does not come within Article 250.

"3. *The words 'retention and liquidation' mentioned in Article 250, which relates only to the territories ceded by Hungary, apply solely to the measures taken against the property of a Hungarian in the said territories and in so far as such owner is a Hungarian national.*

"The right which the Allied Powers reserved to themselves under Article 232 to retain and liquidate Hungarian property within their territory at the time of the entry into force of the Treaty applies to the property of a Hungarian inasmuch as he is a national of an ex-enemy country. It is not sufficient that these measures entail the retention of Hungarian property by the Government and that the owner of this property is a Hungarian. The measure must be one which would not

have been enacted or which would not have been applied as it was if the owner of the property were not a Hungarian.

"The Committee of the Council therefore ventures to suggest that the Council should make the following recommendations:

"(*a*) To request the two parties to conform to the three principles enumerated above;

"(*b*) To request Roumania to reinstate her judge on the Mixed Arbitral Tribunal.

"The Committee of the Council hopes that the two parties, in so far as each is concerned, will accept these proposals."

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Before reading the three concluding paragraphs of his report, Sir Austen Chamberlain said:

The Committee would have been glad if it could terminate its report at this point, where it proposes a solution honourable alike to both parties and securing justice for both alike; a solution which further permits the normal functioning of the Mixed Arbitral Tribunal—to which we attach great importance, for there are many such international tribunals in existence —to continue with the assent and good will of both parties. But it is possible that one or other party, or even both parties, may, even if the Council adopts the report, refuse to accept these proposals, and we have therefore reluctantly and with the hope that it may never be necessary to have recourse to them, felt it our duty to suggest to the Council in what way they should deal with any one of these three contingencies.

Sir Austen Chamberlain then read the last three paragraphs:

— "In the event of a refusal by Hungary, the Committee considers that the Council would not be justified in appointing two deputy members in accordance with Article 239 of the Treaty of Trianon.

"In the event of a refusal by Roumania, in spite of the acceptance by Hungary of the above proposals, the Committee considers that the Council would be justified in taking appropriate measures to ensure in any case the satisfactory working of the Mixed Arbitral Tribunal.

"In the event of a refusal of the above recommendations by both parties, the Committee considers that the Council will have discharged the duty laid upon it by Article 11 of the Covenant."[1]

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1 Extract from the Minutes of the Forty-Seventh Session of the Council, held at Geneva, September 17, 1927. C/47th Session /P.V.1 (1), pp. 2-6.

DISPUTES AS TO JURISDICTION IN INTERNATIONAL ARBITRATION.

A Contribution to the Discussion on the Agrarian Case between Hungary and Roumania.

BY

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Member of the Institute of International Law, Budapest.

Although international arbitration can point to notable progress of recent times, it still suffers from serious imperfections, the removal of which is one of the most important tasks to be performed. A striking proof of this is furnished by the controversy between Hungary and Roumania with regard to the jurisdiction of the International Mixed Arbitral Tribunal in the proceedings instituted by the Hungarian optants against the Roumanian state.

By the terms of Article 250 of the Peace Treaty of Trianon, Roumania has assumed the obligation to maintain the immunity from sequestration and expropriation for any property whatsoever belonging to Hungarian nationals or to such persons as have opted for Hungarian nationality, which is situated in the territory ceded to her by Hungary. The Article adds that disputes which may arise out of it shall be decided by the Roumano-Hungarian Mixed Arbitral Tribunal. In the meantime Roumania has carried out an agrarian reform, in consequence of which Hungarian nationals were dispossessed of their estates in a very peculiar manner. The persons affected by this reform received by way of compensation hardly as much as one per cent. of the value of the confiscated property! It goes without saying that these persons could not rest satisfied with an indemnity of this kind; consequently, after long drawn-out fruitless negotiations, some three hundred of them, most of whom were owners of medium-sized and small properties, instituted legal proceedings against Roumania before the Mixed Arbitral Tribunal. It is, therefore, quite incorrect to have stated that the dispute only centres round the latifundia of a few Hungarian magnates. The Roumanian Government raised an objection to the Court on the ground of jurisdiction, but, nevertheless, after lengthy discussions, the Court, in a judgment rendered at the beginning of 1927, declared itself competent. As Roumania was firmly determined to frustrate a decision on the merits of the case in these legal actions, she recalled her arbitrator without appointing anyone to replace him, and, moreover, made this case the occasion for an appeal to the League of Nations under paragraph 2 of Article 11 of the League Covenant. Hungary, on her part, insisted that the judicial procedure should take its course and accordingly made a request to the League Council that the latter body, in accordance with Article 239 of the Peace Treaty, should make the necessary selection to fill the vacant arbitrator's place. As a result of this, the dispute between the two states entered a new phase. After further lengthy negotiations the Council, during its September meeting,

laid down those three principles, according to which the parties were to leave the decision on the merits of the case to the Arbitral Tribunal. These three principles, which the Council adopted on the advice of an improvised committee of jurists, have attracted a certain degree of attention in the world and, as they are sufficiently well known, need no further description. Only the most important of them, the second, may perhaps be mentioned here.

According to this principle, Hungary was required to make an admission that the Hungarian optants should not be entitled to claim any greater compensation for their expropriated property than Roumanian nationals, and, since the latter were deprived of their property ostensibly without any compensation whatever, the Hungarian optants, also, would go away empty-handed. The December session of the Council brought no new element into the dispute. A decision was to be reached at the March meeting, unless by then the two parties had come to some agreement, a course which was urged very strongly upon them both. It may be seen from this recapitulation of the affair that the fundamental issue of the whole dispute is the question whether the Mixed Arbitral Tribunal had authority to pronounce judgment with regard to its own jurisdiction and whether or not its decision has acquired the force of law. This question shall now be examined here from a general point of view.

It is accepted as a common principle in legal procedure that, when the jurisdiction of a court is questioned, it is the court itself which has to decide on its own jurisdiction. This practice of the court deciding on its own jurisdiction is an essential constituent element of all legal procedure, without which no judicial action can be properly performed. This principle must, therefore, necessarily also hold good in international arbitration. It is expressly recognised in Article 36 of the Statute of the Permanent Court of International Justice. This particular court has been compelled to give decisions as to its own jurisdiction in some important cases, for instance, in the Mawromatis case and in the dispute concerning German interests in Upper Silesia. But this principle must also hold good in the case of other international courts of arbitration. It is recognised as a rule of law of general validity in the legal procedure of the mixed arbitral tribunals, as is evident from copious examples in the course of their judicature. Accordingly, the Roumano-Hungarian Mixed Arbitral Tribunal proceeded with perfect correctness when it gave a decision on its own jurisdiction and declared this to be established. As a matter of fact, this right of the Arbitral Tribunal was also recognised on the Roumanian side, by the fact that Roumania entered into the discussion on jurisdiction before this Tribunal, whose decision Roumania refuses to recognise for the reason that its decision proved to be unfavourable for her interests.

Having established this point, we must turn to the question of the legal recourse which can be claimed against the decision by a court as to its own jurisdiction. The laws of the various states admit, in most cases, a legal remedy against decisions as to jurisdiction. If, by way of exception, no such legal remedy is admitted, or if all the admitted legal

remedies have already been tried, then the decision as to jurisdiction at once takes on the force of law. It represents, therefore, an immovable basis for the discussion of the merits of the case and, further, it cannot be examined into any more by any other administrative authority. As is common knowledge, in international arbitration, courts for examination of legal remedies in matters of jurisdiction have not yet been provided for; there is, accordingly, no means available by which a decision as to jurisdiction by an international court of arbitration can be called in question on the basis of a legal remedy. It follows that its decision as to jurisdiction acquires immediately the force of law; which means that it must be accepted as an incontestable basis for the further procedure. In respect of the Permanent Court of International Justice, scarcely anyone is likely to dispute the accuracy of this thesis. If this court of justice declares itself to have, or not to have, jurisdiction, everyone must accept this as *res judicata*; there is no organ which could be qualified to test the legality of this decision. This principle, however, must also be recognised as applying to all other international courts of arbitration. I must once more emphasize the fact that decisions as to jurisdiction of any and every international court of arbitration acquire forthwith the force of law. The same is true also of the Mixed Arbitral Tribunals. If we examine the legal judgments of these courts we find, until this Roumano-Hungarian case, the fact that legality of their decisions as to jurisdiction was always unreservedly acknowledged. Therefore, when Roumania refused to bow to the decision as to jurisdiction of the Mixed Arbitral Tribunal, she was transgressing a recognised rule of international law.

If this principle is not recognised, the greatest disturbances in the whole system of international arbitration will be palpably evident, as is shown by this dispute between Hungary and Roumania. Roumania was determined to evade, under all circumstances, a decision as to jurisdiction which might be inconvenient to her; in order to resist it she chose the path of self-help; she took it upon herself to oppose an arrangement which had been come to with her approval and to which she had subjected herself. In order to give her action the semblance of legality, she brought the case before the League Council under Article 11 of the League Covenant. The Council, in the sense of the clear provisions of Article 239 of the Peace Treaty, had the single duty of carrying out the prescribed selection of arbitrators; instead of which the Council formulated the three principles, in the light of which a decision on the merits of the case should be reached. The most peculiar feature in this confusion of ideas is the fact that Article 11 of the League Covenant should be dragged into the affair. Paragraph 2 of that article entitles Members of the League to bring, in friendly fashion, to the attention of the League any circumstance whatever "which threatens to disturb" the peace. The question is, who has disturbed the peace in this case? Certainly not the Tribunal which simply established its jurisdiction. Nor Hungary either, for she only wishes for a regular continuation of the judicial procedure. It would be nonsense to represent a state as a peace-breaker, which demands nothing else but that the legally prescribed judicial proceedings should be continued.

Hence it can only be Roumania, the party which illegally opposes the judicial decision, which can be regarded as the one whose conduct is disturbing the peace of the world. And she, Roumania, invokes Article 11, which manifestly was not embodied in the League Covenant for the benefit of disturbers of the peace. The Council was feeble enough to pass over Roumania's offence ; and not only that, it also accepted, as a principle, that its task did not conclude with the automatic selection of arbitrators, but that, further, in virtue of the article quoted, it should also determine the fundamentals on which a decision on the merits of the case should be based. This view can find no trace of justification in the Covenant. It is perfectly clear that Article 11 gives no authority to any organ of the League of Nations to formulate any definite principles, according to which an international court of arbitration must settle any given dispute. Indeed, the organs of the League of Nations must exercise no influence whatever on the course of any international arbitration procedure based upon that article. It is absolutely inadmissible that political organs should in any way influence the course of justice. In the case under discussion, this is all the more inadmissible since it is definitely clear that, thereby, one of the parties would be prejudiced to the highest degree. The second of the principles formulated by the Council would certainly bring about the defeat of the Hungarian optants. With the assistance of this principle, Roumania would achieve that which has been her aim all along, namely, to obtain possession of the landed property belonging to Hungarians without making any payment in return. On this point, moreover, it should not be forgotten, that, in the case under discussion, the Council has usurped much more power than would be within the rights of a court of appeal dealing with the question of jurisdiction. Such a court would have had simply to decide whether or not the Court of Arbitration had jurisdiction. The Council, however, went much further and, in addition, laid down definite practical criteria to be applied in the formulation of the judgment. This is absolutely inadmissible.

The only right solution of the difficult situation would be for the Council to carry out its selection of arbitrators quite simply in accordance with the original Hungarian request. Hungary wished, however, to make the decision easier for the Council by putting forward the alternative proposal that the Council should first submit the case, for an opinion, to the Permanent Court of Justice. If this proposal should not be adopted, or should the parties not reach an agreement meanwhile, it is inconceivable how the tangle is to be unravelled.

All who are earnestly convinced that international arbitration is the most honourable and effective means of preserving peace must learn wisdom for the future from the present case. Every effort must be made to prevent anything similar from ever happening again. The more frequently international arbitration is called upon the more numerous are likely to be the controversies arising on the question of jurisdiction. It would be a bad omen for the future of international arbitration if the parties should be allowed to oppose, unhindered, such decisions as to jurisdiction as did not happen to suit them, and if it were admitted that non-judicial

bodies, however important they might otherwise be, could influence, in any way, the decisions of the international courts of arbitration. The efficacy of the decisions of international courts of arbitration and the independence of these organs must be safeguarded under all circumstances. The only way to attain this object under the present conditions of international arbitration is through a deeper ethical conception of it. More confidence in international arbitration and a greater respect for the decisions of the courts of arbitration, that is what is necessary, above all, in order to give greater vitality to international arbitration.

At any rate, consideration might certainly be given to the question of elaborating a system of legal recourse in regard to problems of jurisdiction. As a court of appeal in questions of jurisdiction, the Permanent Court of International Justice would seem to be the most appropriate. This Court, which by reason of its profound juridical knowledge, its absolute impartiality and its lofty spirit of humanity, enjoys an unsuspected measure of confidence, would, undoubtedly, serve excellently as a court of appeal in questions of jurisdiction. But, however desirable such a consummation may be, I scarcely believe that it could be realized under present conditions. For the present we must direct all our efforts towards the development of the ethical foundation of international arbitration, in order to make it more serviceable for the welfare of mankind.

THE USURPATION OF JURISDICTION

BY

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Revue de Droit International, No. 5—January, February, March, 1928.

In the course of a recent sitting of the Council of the League of Nations (1) which dealt with a judgment on jurisdiction of the Roumano-Hungarian Mixed Arbitral Tribunal on the 10th January, 1927, it was, in grave circumstances, definitely and dogmatically affirmed that, in the case of usurpation of jurisdiction of the arbitrator, or to speak still more precisely, " when an international tribunal has delivered judgment on a matter which is not within its jurisdiction," " there is not only lack of jurisdiction; there is usurpation of powers " and that " the sanction of usurpation of powers is non-existence " :—

M. Titulesco: In regard to this point of view, permit me to quote you some lines from an opinion of Professors Basdevant, Jèze and Politis.

After having laid down the rule that every Tribunal must examine its own jurisdiction, but that, after all, if a Tribunal exceeds its jurisdiction in international law, the matter is less grave, for each legal dispute has a judge, these eminent Professors add :—

In public international law the situation is altogether different. When an international tribunal has judged a matter which is not within its jurisdiction, it has not delivered judgment in the place of another tribunal, it has usurped the function of judge. There is not only lack of jurisdiction; there is usurpation of powers. The international tribunal, which exceeds its jurisdiction, usurps a power which does not belong to any other tribunal. It violates the fundamental principle of public international law that disputes are not settled by Courts.

And these Professors conclude that the sanction of the usurpation of powers is non-existence. As regards the characteristic of non-existence it is that there is no need for a public authority, a judge, to assert this non-existence. The act will produce none of the juridical effects desired by its author. Anyone interested will be able to invoke this non-existence by any means (action or objection) at any time. The irregularity never can be covered in any manner . . ."

* * * * * *

Under the signatures of MM. Basdevant, Jèze and Politis, a declaration of this kind is impressive.

But we are no longer in an age when one swore by the word of the masters. It is not enough to affirm, we must prove.

The learned authors invoked the following considerations :—

The difference between juridical nullity and non-existence is considerable.

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(1) September, 1927. Cf. this Revue, 1927, I., p. 940, and the Article by M. Charles Dupuis.

In internal public law, the distinction between lack of jurisdiction and usurpation of powers is admitted without difficulty; it is shown in practice by the various juridical consequences which they involve.

In his *Principes généraux du Droit administratif* (Third Edition, Paris, Vol. I, 1925, p. 76 et seq.), Professor Jèze has described as follows the effects of the *non-existence* itself juridical act: "The act must be held to be non-existing as a juridical act; it is not necessary for a public authority, a judge, to establish this non-existence. The act will produce *none of the juridical effects* desired by its author. Anyone interested will be able to invoke this non-existence *by any means* (action or objection) *at any time. The irregularity never can be covered in any manner.* No prescription, no ratification can make the irregularity disappear. If the author of the action is a public agent and he attempts to put it into execution, he *commits, necessarily, a wrongful act,* with all the consequences attached to this idea, in particular, if it is a question of possession. *The return is possible; peaceful resistance is lawful. The personal responsibility* (criminal or only civil) of the agent of the execution is involved."

The juridical rule of non-existence is, in essential, the same in public international law. The sentence of an international tribunal which gives decisions beyond its jurisdiction is vitiated by usurpation of power. It is non-existent. It will produce no juridical effect. This non-existence may be invoked by any means, "action or objection," at any time. The irregularity can never be covered; no prescription can make the irregularity disappear. Only the ratification of the defendant State can cover the irregularity. This ratification, provided that it emanates from the public authority competent to create the tribunal, or to invest it with jurisdiction, is equivalent to the attribution of jurisdiction which was wanting to the international tribunal.

This is the solution taught by Professor Politis in his book on *International Justice* (Paris, 1924, pp. 91 and 92). The possibility of a refusal of execution is inconceivable except when the sentence is vitiated by nullity. It has this character in the hypothesis of an irregular compromise, and in that of an usurpation of jurisdiction on the part of the arbitrator. Usurpation of jurisdiction can originate in various ways. It is thus, first of all, in the case of a wrongful interpretation of the compromise. It is the same if the arbitrator has undertaken the examination of points not included in the compromise, or of points already settled, of which only the application has to be determined or the consequences deduced from it. It is the same also in the case of the ignoring of the imperative dispositions of the compromise concerning the rules to be applied. And he quotes the refusal of the United States to execute the arbitral judgment given on the 10th January, 1831, by the King of the Netherlands, which was vitiated by usurpation of jurisdiction.

In the same way Professor Basdevant has, in the Revue Générale de Droit International Public, 1912, p. 306, established that: "it is admitted that the usurpation of jurisdiction is a cause of nullity of arbitral judgments." He invoked in particular the authority of Professor Weiss, to-day Vice-President of the Permanent Court of International Justice, and of Professor Fiore, both of whom testify to their unanimous agreement in the doctrine on this point, the second adding that this common opinion, in accordance with which "the arbitral sentence has no validity, when the arbitrator has not observed

the prescriptions of the compromise or when he has arrogated to himself a jurisdiction not stipulated therein," is "imposed by the general principle of law and by the nature of things."—Revue Générale de Droit International Public, 1910, p. 118 seq. and p. 247 seq.

This solution is consecrated by international jurisprudence.

In the affair of the *Betsey*, judged as between the United States of America and Great Britain (24th February, 1804), Commissary Gore said: "We owe it to our respective Governments to refuse to them a decision in the cases which have not been entrusted to us, but we are under the same obligation to pronounce on the affairs which form part of our mission. It may be asked how, if the Commission has the power of itself deciding which cases are submitted to it, a nation cannot avoid burdening itself with inconveniences which its contract does not involve. The answer is obvious. It is that of International Law, of the Common Law of England and of common sense: a party is not bound by the decision of the arbitrators when the matter itself does not come within the terms of the compromise: such a decision is a dead letter: it is not a decision." (Vattel, Book II, chap. XVII, p. 329. De Lapradelle and Politis, *Recueil des arbitrages internationaux*, 1, 69). (2)

Thus in turn are invoked, in support of the preceding conclusions, the theories of the authors—Vattel amongst the ancients, Fiore among the moderns—the practice of arbitral jurisprudence, especially in the celebrated case of the Arbitration on the North-Eastern Frontier in 1831 between the United States and Great Britain, and, more especially, at a still earlier date, the opinion of the British Commissary Gore in the affair of the *Betsey*. Of other authors and of their opinions there is no trace. Of the work of the Institute of International Law and of the Conferences of The Hague, of 1899 and 1907, there is no mention. From the jurisprudence of the Court of The Hague, on this same question, there is no quotation: no case is referred to. These are, perhaps, gaps which can be explained, without doubt, by the incidental manner in which the question was dealt with in an opinion given, not even to the Roumanian Government, on the precise question of the usurpation of jurisdiction, but to the Czecho-Slovakian Government, on the question of the jurisdiction of the arbitral tribunals, in respect of an expropriation for which a justification was sought, not under the special legislation of war time, but under the general legislation of the time of peace.

It is none the less remarkable that, on the basis of this brief summary, a declaration as grave as that of Mr. Tituesco, could have come before the Council, and that, since then, in the doctrine the question of the usurpation of jurisdiction, on the basis of this assertion, should have been considered as definitely closed without even the discussion having appeared possible: "To place the Tribunal, by the appointment of a substitute arbitrator in a position to resume the examination of these agrarian affairs"—writes Mr. Sibert (Recueil Roumain p. 377)—"that, without doubt, would mean saving the cause of an arbitration objected to on the ground of being a usurpation of jurisdiction by one of the parties, and which the doctrine of incontestable authorities permits to be recognised as such.

(2) Basdevant, Jèze, Politis, *Consultation sur la compétence du Tribunal arbitral mixte*, in the "*Réforme agraire en Roumanie et les optants hongrois de Transylvanie devant la Société des Nations*. Paris, 1927, p. 506, et seq. We shall henceforward refer to this publication under the title: "*Recueil Roumain.*"

However high such authorities may be, it is nevertheless not permissible at the present moment, as does Mr. Sibert, with such deferential confidence, to cling to the literal word of the masters.

Do not the masters, on whom the authorities invoked rely, namely, Vattel, Fiore, Gore—among others—protest against the doctrine in support of which their names are quoted? Do not other authors, other decisions, the international conventions themselves, give us here other formulæ on the question of usurpation of jurisdiction by the arbitrator? Is the documentary material so slight, the historical erudition so poor, the science of law so faulty?

Rejecting in all circumstances every conclusion not supported by duly verified proofs, could it not be enquired a little more closely what are the titles of this opinion, which, as soon as formulated, has, as by a miracle, been invested, not only with the confidence of a new policy, but with that of a young literature?

Our researches will be devoted to three points: (1) the individual or collective doctrine; (2) the international conventions; (3) the jurisprudence.

They will be pursued successively, from period to period of the League of States to the League of Nations.

I.

LEAGUE OF STATES.

In the League of States, arbitration progresses slowly from the 17th century to the commencement of the 20th.

Its development is divided into three periods:—

1. Up to the Alabama affair;
2. From the Alabama affair to the first Conference of The Hague.
3. From the first Conference of The Hague to the Great War.

First Period.

The Authors.—From the end of the 17th century to the end of the 18th arbitration progresses very slowly, in the midst of innumerable difficulties. The great epoch of imperial arbitration and of pontifical arbitration is past. But arbitration none the less remains an attribute of sovereign power; its peace-making usefulness is manifest; but its juridical value is the more uncertain as the position of the arbitrator is higher. The juris-consultants fear the imperfection of the judgment, which is subject to no appeal, without daring to give to the party which has entrusted itself to a King, the power of resisting a Prince-judge.

It is the supposition of justice that the question can, before the definite judgment, be heard and reheard. This is made possible by internal law, with its many degrees of jurisdiction; even internal arbitration fits into the frame of a series of methods of appeal and recourse; on the contrary, international arbitration, looking for a sovereign judge, whose judgment no one will dare to criticise, only knows definite decisions, without appeal or recourse. Acquiescence is necessary, whatever the error may be. Grotius points this out: "Between kings and peoples," it is not lawful to complain of any injustice being committed by the arbitrators, "for there is here no

superior power which can judge or break the bonds of the promise." "We must, therefore, absolutely adhere to the judgment they have given, be it just or unjust." "It is one thing, in effect, to ask what is the duty of the arbitrator; and another, what is the obligation of the parties agreeing to arbitration?" (3)

Pufendorff, (4) in his turn, declares that a State cannot evade the execution of an arbitral judgment by simply alleging that it is erroneous and contrary to equity: "When, then, the judgment of the arbitrator appears unjust to either of the parties or really is so, there would arise from this circumstance a new trouble, for which, as the decision could not rest either with the arbitrator or the parties, an appeal to another arbitrator would become necessary, and after him, to still another, and so on indefinitely. Hence it follows, that the convention, by which the parties pledge themselves to submit their case to the judgment of an arbitrator, must be absolute and simple and not with the condition that the sentence must be just.

"It is clear also that no appeal is possible from the judgment of an arbitrator, as there is no superior judge to correct the judgment. . .

"Moreover, when it is said that the stage of the arbitral judgment must be gone through, whether the judgment is found to be just or unjust, this must be understood with some reservation. I admit that, whatever good an opinion one party may have formed of the goodness of its cause, that does not suffice to authorise it to renounce any compromise. But if it appears manifest that there has been collusion between the arbitrator and one of the two parties, or that it has gained it by bribery, or that they had together made an agreement to the prejudice of the other party, then this latter is not bound to submit to the sentence of such a judge, who, having shown so obvious a partiality, can no longer play the part of arbitrator."

There is no great difference, in this respect, between the XVII and XVIII centuries.

The doctrine of Vattel (1758) is cited by one of the principal supporters of the Roumanian thesis, M. André Prudhomme (5) in these terms of striking lucidity, but of doubtful style: *"A party is not bound by the decision of the arbtrators, when the case does not come within the terms of the compromise; such a decision is a dead letter."* (*sic*) Vattel, Bk. II and XVII, § 239 (*sic*). Duly examined, the quotation is wrong, taken at second hand in an analysis, which did not give it, in its summary form, the appearance of a concise maxim in clearly coined phrases, which it affects to-day. A vague recalling of ideas: an approximate quotation without literal transcription, no quotation marks, no italics. The italics and quotation marks are by M. A. Prudhomme. Without separating such a formula, with so much emphasis, from its context, it would have been prudent to look up the passage itself. In Book II, Chapter XVIII, *De la manière de terminer les différends entre les Nations,* § 329, *De l'Arbitrage,* Vattel, in 1758, wrote: "When Sovereigns cannot agree on their claims, and when they, nevertheless, desire to maintain or to re-establish peace, they sometimes confide the settlement of their disputes to arbitrators, chosen by common agreement. As soon as the Compromise is laid down,

(3) Grotius, *Le droit de la guerre et de la paix,* book III., chapter XX., para. XLVI.

(4) Pufendorff, V., chapter XIII., para. IV., translated by Barbeyrac, Amsterdam edition, 1734, vol. II., p. 175.

(5) *Recueil Roumain,* p. 297.

the parties must submit to the sentence of the Arbitrators. They have pledged themselves to it, and the faith of the treaties must be maintained. Nevertheless, if by a sentence *manifestly unjust and contrary to reason,* the Arbitrators were, by their own act, to deprive themselves of their quality, *their judgment would merit no attention;* it was only for doubtful questions that submission had been made to it. Supposing that the Arbitrators, for the reparation of some offence, condemned a sovereign State to make itself subject to the offended State, would any man of sense say that the former State must submit? . . . There is no reason to fear that, in granting the parties the liberty of refusing to submit to a sentence, which is *manifestly unjust and contrary to reason,* we should render arbitration useless; and this decision is not contrary to the nature of the submission or of the compromise. There can be difficulty only in the case of vague and unlimited submission, in which the subject of the dispute had not been determined precisely, nor the limits of the opposing claims laid down. It may then happen, as in the example just quoted, that the Arbitrators exceed their powers and pronounce judgment on a point which actually has not been submitted to them. Called upon to judge of the satisfaction which one State owes for an offence they condemn it to become the subject of the State offended. Surely that State never gave them a power so extended, and *their absurd Sentence does not bind it.*"

This then is the "dead letter."

The exceeding of powers which allows the Party to *refuse to pay any attention* to the judgment, is illuminated by an example, and this example, twice repeated: is the absurd annexation, in virtue of the Arbitral Decision of the State, which is charged with an offence, to the offended State. With Vattel in hand—an authentic Vattel!—the exceeding of powers would appear if the decision of the 10th January, 1927, had, in order to repair the injury done by the Roumanian State to some Hungarians, pronounced the annexation of the whole of Roumania to Hungary. "An *absurd* Sentence has no binding force," "the parties are free to refuse to submit to a sentence *manifestly unjust and contrary to reason*"; if by a "Sentence *manifestly unjust and contrary to reason*" "*the Arbitrators had, by their, own act deprived themselves of their quality.*" Twice the same terms are used: "*manifestly unjust and contrary to reason.*" These are the two features of the arbitration which *has no binding force.*

And here the comparison is necessary with the denial of internal justice, which is the foundation of reprisals. Vattel, *infra,* Bk. II, Chap. XVIII, § 350. The same condition, which Vattel lays down—"judgment manifestly unjust and partial," "very evident and palpable injustice"—for the denial of internal justice, he also lays down, symmetrically, for the denial of international justice.

And, to give an example, he repeats the same thing twice: the annexation of the State, which has committed the offence, to the offended State! A stupendous example: the only one which, nevertheless, is indicated, and this at a period when the institution of arbitration, with the birth of the modern political world resulting from the Peace of Westphalia, was very feeble in presence of the all-powerful sovereignty of the State. [6]

It is true that at that time the Arbitrator was a Prince, whom no one dared to insult politically by criticising his opinion.

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[6] Cf. Vattel, *Le Droit des Gens,* Carnegie Edition, Introduction to the photographic reproduction of the first edition, p. XIX.

"Judgment manifestly unjust and contrary to reason"; "what is absurd has no binding force": an annexation in place of pecuniary indemnity, such formulæ, illustrated by such an example, this enormous overstepping of the bounds of the compromise, this is not the juridical formula which the authorities invoked by Roumania thought they had read in Vattel to justify the assertion, necessary for their case, that arbitration, as soon as it surpasses the limits of the compromise, should be a dead letter, or—as Vattel would have said—be quite underserving of attention.

What did the Arbitrator decide on the 10th January, 1927? That he would continue to pursue his examination of the case and nothing more. Is that an injustice? In any case, one of slight consequence and of not absolute evidence. Now, Vattel says, Bk. II, Chap. XVIII, § 329: "If injustice is of small consequence, it must be suffered for the good of peace, and if it is not absolutely evident, it must be borne like an evil to which one has voluntarily exposed oneself. For if it were necessary to be convinced of the justice of a decision before submitting to it, it would be quite useless to appoint Arbitrators."

PRACTICE.—The great decisions of jurisprudence are, at this time, those of the mixed Commissions (which are not, however, without a close relation to the mixed Arbitral Tribunals of to-day). At this moment, when the question of jurisdiction arises, the Commissioners hesitate. In the case of disagreement they have a tendency to turn to the Government which appoints them. For an arbitrator to act in this way is to abdicate his mission: he is not a mandatory, but a judge [7]

Together with this question of jurisdiction arises the question of the overstepping powers. The arbitrator understands that he cannot turn to the Government which appointed him to ask it for further instructions. He must deliver judgment on the objection as regards the jurisdiction: deliver judgment himself by the interpretation of the Compromise. But is there not a danger lest he, the arbitrator, may take cognisance of matters totally irrelevant and, by his decision, bind the Governments? Here we come to the notion of usurpation of jurisdiction:

"There is no greater absurdity," says Mr. Gore (actually quoted by the authorities invoked before the Council), "than to imagine that two nations would nominate Commissioners to examine and judge the complaints of their nationals, would prescribe the rules for their examination, would authorise them to receive evidence . . . with a view to allotting sums of money, and would give, the one to the other, their word that such an arbitration should be final and definite . . ., but without these two nations being able to give to these commissioners the power of saying whether they have before them one of the complaints which are in question. . . . When they admit that the execution of the reparation shall be made on the basis of a precise figure at the exact moment fixed by the Arbitration, they also admit that the party called upon to make payment could always do so at its discretion and, without breaking its word, could prevent a decision contrary to its own interest. . . .

"The interpretation, which would render an act void and of none effect, is therefore inadmissible. . . . It must be interpreted so that

[7] De Lapradelle and Politis, *Recueil des Arbitrages internationaux*, Vol. I., p. 102, et seq.

it can have its effect, and shall not be vain and illusory (Vattel, Bk. II, Chap. XVII, paragraph 283." (8)

But is there not some danger in permitting a decision on jurisdiction by the arbitrators? To this question Gore himself gives the answer by another reference, no longer direct, in the form of an express quotation but in an indirect form.

This reference is to the passage itself from Vattel, which we have reproduced and commented on above. Here, the opinion of Mr. Gore is worth reproducing in its entirety :—

" Supposing that the Commission decides, with two of its members disagreeing, that the matter is not within its jurisdiction, have the dissentients the right to withdraw from the Commission so effectively that no other act of procedure can take place in the matter? If my opinion is correct, that the Commission has the right to declare itself to have jurisdiction, it is evident that all the commissioners are bound by this decision and are under an absolute obligation not to stop the course of procedure by their absence.

" To cease to act, when our duty orders us to act, is a wrong which we have not the licence to commit. We owe it to our respective Governments to refuse them a decision in the cases which are not entrusted to us, but we are under an analogous obligation to pronounce judgment on the affairs which are part of our mission. If this reasoning is correct, the two commissioners have not, in these circumstances, the right to withdraw, for it would be to suppose them to have the right to omit doing their duty, or to do it ill.

" It may be asked how, if the Commission has the power of deciding itself which cases are submitted to it, a nation can avoid burdening itself with troubles which its contract does not involve. The answer is obvious. It is that of the Law of Nations, of English Common Law, and of common-sense : a party is not bound by the decision of the arbitrators when the case itself does not come within the terms of the compromise : such a decision is a dead letter : it is not a decision (Vattel, Bk. II, Chap. XVII, § 329)." (9)

It is curious to notice that, in the Roumanian use of the quotation from Gore (see page 4 above), occurs the passage that is so important : " *Supposing that the Commission decides, with two of its members disagreeing, that a matter is not within its jurisdiction, have the dissentients the right to withdraw from the Commission so effectively that no other act of procedure can take place in the matter?*" This is precisely our case. Decided in the light of the opinion of Mr. Gore, it would be settled in a sense absolutely contrary to the Roumanian claims, for, to have the right to withdraw one's arbitrator " so effectively that no other act of procedure can take place in the matter," it would be necessary that the matter should not come within the terms of the Compromise ; not according to the simple declaration of the party, for that is precisely what Mr. Gore wishes to avoid, but according to the formula of Vattel, i.e. in the hypothesis of an enormous usurpation of jurisdiction, " fantastic," to use the expression of a juridical expert of a a later period, (10) in short, in a case of manifest extravagance, at bottom, and not of simple error on the point of jurisdiction.

(8) De Lapradelle and Politis, *Recueil*, Vol. I., p. 67.
(9) De Lapradelle and Politis, *Recueil*, Vol. I., p. 69.
(10) H. Lammasch, *Rechtskraft internationaler Schiedssprüche*, 1913, p. 136.

But there is more. In the case of Roumania it is not that at the mere sight of the request, elevating the simple denial of jurisdiction to the level of an usurpation of jurisdiction, the Government withdrew its judge; it was after the question had been pleaded, ostensibly out of deference to the Tribunal. A singular deference which allows the judge to pronounce judgment in one sense only and not in another. According to the great mixed arbitral Commissions of the Treaty of Jay, this is not an admissible argument: it is expressly judged by Mr. Gore to ring not true :—

The objection that the board is incompetent to decide whether these cases, or any of them, are within the description submitted, arrests and stops all proceedings and in fact renders the article null and illusive. . . .

To say that the board has authority to decide that a cause is not within its jurisdiction, and yet no authority to decide that a case is within its jurisdiction, appears to be a contradiction too glaring to be persisted in. That the commissioners have a right to decide in favour of one party only—in favour of the party complained against, but not in favour of the complainant—cannot be true. [11]

To reconcile the right of the arbitrators to deliver judgment on their jurisdiction on the one part, and the impossibility for them to usurp entirely different powers, there is only one criterion: the error as regards jurisdiction is not in itself a cause of nullity; it would be different only if the sentence given, on the merits, by a tribunal without jurisdiction, were of a " stupendous, fastastic, inadmissible kind."

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This was exactly the case a little later, in 1831, of the famous judgment of William I, in the matter of the North Eastern Frontier. Here, the arbitrator, King William I of the Netherlands, called upon to settle a difference relating to the tracing of the frontier between the United States (State of Maine) and Canada, gave judgment in such conditions that, from arbitrator, he changed himself into mediator. Instead of causing the frontier to pass over a mountain, he makes it follow the course of a river. Instead of basing himself on the express provisions of the Treaty of 1783, he declares that he cannot rely on them. He attributes to himself, without receiving additional powers, the functions of a friendly peacemaker. Being unwilling to pronounce the *non liquet,* he alters the nature of his attributions. In this case the refusal of acquiescence in the judgment can be understood. And, thereupon, after a slight resistance on the part of Great Britain, the latter bowed before the opposition of the United States. But an essential element, though one, nevertheless, passed over in silence in the Roumanian quotation of the case : the United States have no wish to escape purely and simply from the abritration proved to be in usurpation of jurisdiction. Remembering, no doubt, the fine phrase that Thucydides puts into the mouth of Archidames, *It is impossible ta attack as an enemy one who offers to answer before a tribunal of arbitrators*—they refuse to conform to the arbitral judgment of William I of the Netherlands only in proposing a new arbitration to the other party. After having written : " that no question would have arisen on the validity of the judgment, if the arbitrator had determined and designated the frontier as that

(11) Reproduced by Jackson H. Ralston, *The law and procedure of International Tribunals,* Second Edition, 1926, p. 45.

provided for in the Treaty of 1783; that he had not done so, but seemed to have abandoned the character of arbitrator and assumed that of mediator by advising the two parties to accept, as being the most convenient for both, the frontier which he indicated to them." [12] the American Government proposed to the British Government "a new Commission composed of an equal number of commissioners with an arbitrator chosen by a friendly sovereign from among the most competent persons in Europe." In short, if in this case in practice a refusal is shown to acquiesce in an arbitration obviously vitiated by usurpation of jurisdiction, it is on the condition that the party which takes exception to it immediately proposes the substitution of a new arbitral instance in place of the old.

Further, the two parties recognise the usurpation of jurisdiction: without which, naturally, the proposal would have been to bring the matter before an arbitrator on this preliminary point. In no case, on the admission of the party itself, can the result of disputing the arbitral sentence be to restore full and entire liberty to it. It withdraws itself from one arbitrator only to find another.

Whoever invokes usurpation of jurisdiction must, in the light of this precedent, either offer another arbitration on the merits, or, at least, in the case of dispute on the nature of the usurpation of jurisdiction, accept a new arbitration on this preliminary point.

Besides, according to the actual terms of the mixed Commission in the affair of the *Betsey,* the existence is necessary of a manifest injustice, of a flagrant error and not only of a simple error of judgment: "for, if it were necessary to be convinced of the justice of a judgment before submitting to it, it would be quite useless to appoint arbitrators." (Vattel, Bk. II, Chap. XVIII.)

SECOND PERIOD.

The great notoriety of the Alabama affair, the increase of zeal with which it inspired pacific societies, the growing influence which from that moment arbitration assumed in public opinion, gave rise to many theoretical works on the subject. But at this moment the authors found international law in a singular condition. When, with G. F. de Martens, they said: "Arbitration is rare," the causes for rejection of a judgment might be so equally. But when arbitration, passing from the Prince to the mixed Commission, ceased to be royal and became technical, the jurists no longer conceived it as an infallible sovereign, floating majestically in a respect which permitted of no criticism. When the arbitrators of kings and peoples, according to the saying of Grotius, are no longer kings, their tendency is to treat arbitration in public law in the same way as judgments under private law, of which the procedure has many degrees: concerned for the absolute character of definite judgments, which are the less rare work of more modest authorities, they strove to liberate the party from its arbitral obligation, in all cases where the absence of a second degree of jurisdiction involves the risk of placing it at the mercy of an error. Generously, the United States, in the case of an unjust judgment, to the advantage of their own nationals, refused or returned the money resulting from the condemnation pronounced [13], The cases of fraud and corruption, which are unfortunately not without their application in some more or less distant arbitrations, must free the

[12] Mr. Livingston to Mr. Bankhead, 21st July, 1832, de Lapradelle and Politis, I., p. 395.

[13] See specially the Pelletier affair, *Journal de droit int. privé* (Clunet), 1999, p. 375.

parties: this is not new. It will be the same with cases of exceeding the compromise. It is only the error, which, if essential, may allow the parties to refuse the execution of the arbitration.

According to the just remark of Lammasch [14]: "The authorities on international law, who wrote between the middle of the XIXth century and the First Conference of The Hague, make great efforts to seek cases in which the States could evade the execution of arbitral judgments. Every one of these authorities makes it a point of honour to find a new case. The enumerations approach more and more closely to those under the laws of civil procedure in the different States." In the opinion of Heffter [15]:—

The arbitral sentence is open to attack in the following cases: (a) *if it has been given without a valid compromise, or outside the terms of the compromise;* (b) if it emanates from absolutely incapable arbitrators; (c) if the arbitrator or the other party has not been in good faith; (d) if the parties, or one of them, have not been heard; (e) if it has been given on a question not submitted; (f) if the decision is absolutely contrary to the rules of justice.

In the opinion of Bluntschli [16], Article 495: The decision of the arbitral tribunal may be considered null and void: (a) *in the measure in which the arbitral tribunal has exceeded its powers;* (b) in the case of unfairness and denial of justice on the part of the arbitrators; (c) if the arbitrators have refused to hear the parties or violated any other fundamental principle of procedure; (d) if the arbitral decision is contrary to international law. But the arbitral decision cannot be attacked on the pretext that it is erroneous or contrary to equity.

According to Pasquale Fiore, whose ideas, which, so to speak, have not varied, are only set out more clearly in his *Droit international codifié* [17]:

The arbitral sentence *shall be considered null*: (a) if the decision has not been taken with the collaboration of all the arbitrators appointed to constitute the arbitral tribunal; (b) if it is entirely lacking in foundation, either of fact or of law; (c) if the disposing part is contradictory; (d) if it has not been drawn up in writing and signed by all the arbitrators, or if a lack of the signature of one of them is not mentioned in the record, stating the presence of the arbitrator who has not signed and his presence at the moment of the decision and of the vote.

The arbitral decision can be attacked by the party which refuses to execute it, and *may be annulled*: (a) *If the arbitrators have pronounced judgments beyond the limits of the compromise,* or in virtue of a compromise which is null, or which should be considered as being extinguished; (b) if it has been given by a person who had not the legal capacity to be an arbitrator, or who had lost it during the hearing, or by an arbitrator who could not legally replace another one who is absent; (c) when, in virtue of a proof duly produced, it must be considered either as based on error, or as extorted by fraud or by violence; (d) when the corruption of one of the arbitrators can be established in a regular and complete manner; (e) when the forms of procedure stipulated in the agreement under penalty of nullity, or those which are established

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[14] *Die Rechtskraft Internationaler Schiedssprüche,* Publication of the Norwegian Nobel Institute, Vol. II., Section II., p. 137.

[15] International law of Europe, p. 210.

[16] *Droit international codifié,* 1st edition, 1869, 3rd edition, 1881, p. 289.

[17] *New edition entirely revised,* translated from the Italian by Charles Antoine, Paris, 1911, p. 619.

according to conventional common law and to which the parties have not expressly declared themselves unwilling to accept, or those which must be considered indispensable according to the general principles of international law, because they are necessary by reason of the nature of the arbitral instance, have not been observed.

According to Mr. Carnazza-Amari : (18)

Arbitral decisions are null : (a) *when the arbitral tribunal has exceeded the powers which it derived from the compromise, and has settled questions which are not within its jurisdiction;* (b) when the arbitrators, instead of deciding according to justice and law, are guilty of deceit or fraud in regard to one of the parties, for example, by receiving a sum of money ; (c) when they have refused to hear the parties, or have failed to observe either the formalities laid down under penalty of nullity by the compromise, or any other fundamental rule of procedure ; (d) when they have violated the fundamental principles of the law of nations, or an essential right of the States, as in the case where they might have decided on the subjection of one nation to the advantage of another."

Bulmerincq (19) admits as many as ten cases of reasons for appeal against the arbitral sentence : (1) When the compromise was null (Heffter) ; (2) When the compromise has been violated (1. 22, para. 21 D. 4, 8); (3) When the sentence is absolutely contrary to law (Vattel, Martens, Twiss),—for it is not sufficient to say that, since there is no superior judge in international law, submission to an unjust sentence is necessary (Wildman, 1, 186); (4) In the case where the Judgment contains an inaccuracy of fact, or when one of the parties, or the arbitrator, has been guilty of error; (5) when the parties have not been heard or when they have not been sufficiently heard ; (6) When the arbitrator has given a partial judgment (Vattel, Pufendorff, Heffter); (7) When one of the parties has used trickery or unfairness (Heffter); (8) When one of the parties has used inadmissable arguments, such, for example, as might be contrary to the honour and independence of a State (Martens, *Guide*) ; (9) When one of the parties has corrupted one of the arbitrators (Pufendorff) ; (10) When one of the parties has used a trick with regard to his adversary (1. 31 D. 4, 8).

But Pradier-Fodéré argues against the opinion which, during a certain period, had, on this point, been dominant among the authorities on international law : "Little restrained by the fear of seeming to multiply the occasions for evading the moral obligation of submitting to the judgments of arbitrators, the most justly famous authorities have drawn up lists of cases which are generally confused one with another." (20) He is careful to unite into four groups the

(18) Carnazza-Amari, *Traite de droit int. public,* translated by Montanari-Revest, I., p. 564.

(19) *Holtzendorffs Rechtslexikon,* III., 557, *Holtzendorffs Handbuch des Völkerrechts,* IV., 43.

(20) Pradier-Fodéré, *Droit international public européen et americain,* Paris, 1894, VI., p. 433. Cpr. Bluntschli, *Le droit international codifié,* French translation by C. Lardy, 1881, art. 495, p. 289 ; Pierantoni, *Gli arbitrati internazionali,* p. 91 and following ; Heffter, *Le droit international de l'Europe,* French translation by J. Bergson, 1873, para. 109, p. 210 ; Calvo, *Le droit international théorique et pratique,* 1881, book X., II., para. 1533, II., p. 575 and following ; Pasquale Fiore, *Nouveau droit international public,* French translation by Antoine, 1882, No. 1215, Vol. II., p. 642 and following ; Kamarowsky, *Le tribunal international,* French translation by Serge de Westman, 1887, book III., chap. II., p. 348 and following ; Travers Twiss, *The Law of Man and of Nations,* 1889, chap. I., No. 5, Vol. II., p. 7 and following, etc.

numerous causes of nullity suggtsted by the various authors: open departure from the terms of the compromise; non-observance of universal and fundamental principles of procedure in general; partiality of the arbitrator, bad faith on the part of the arbitrator or of the parties; decisions absolutely incompatible with the principles of justice and international law.

When the authorities, broadly speaking, include thus the causes of non-obligation to submit to the judgment, what do they conceive them to be?

Do they ratify the formula of the non-existence of the decision which over-steps the limits of the compromise? Not at all. It is here, according to their own expression, a question of cases of appeal, ot grounds of nullity. Bluntschli, for example, says: "The decision of the arbitral Tribunal may be considered as null:

(a) in the measure in which the arbitral Tribunal has exceeded its powers." But he adds, on the same line, "If the arbitral decision is contrary to international law," and, in this case, to demonstrate this contradiction, he is certain that a procedure must be instituted. He ends: "The decision of the arbitrators cannot be attacked on the ground that it is erroneous and contrary to equity."

Attack, it is not in this way that one speaks of non-existence, but only of nullity. Fiore, quoted by the experts consulted by Roumania in the sense that the non-existence of the decision which over-steps the terms of the compromise, expresses himself, on the contrary, in quite a different way. He begins by *"considering as null"* the arbitral sentence in certain cases (for example, if the disposing part is contradictory, if it has not been reduced to writing and signed), then, in the opposite case, he goes on to declare that it *"might be attacked"* by the party which refuses to execute it, and might be annulled: (*a*) if the arbitrators have given a judgment outside the limits of the compromise.

On the other hand, even when they interpret not too strictly the cases of nullity of the arbitral sentence, thus multiplying the possibilities of a re-consideration, the jurisconsultants nevertheless do not fail to state precisely that "the arbitral Tribunal decides on the interpretation of the compromise between the parties, and consequently on its own jurisdiction." (Bluntschli, No. 492 bis.)

Finally, in order to make their system acceptable, the authors understand that it is necessary to provide for a court of nullity or annulment.

Certain authors, like Fiore, go so far as to foresee, in a wisely perfected organisation of international society, the setting up of two authorities, the one, the Congress, which legislates; the other, the Conference, which administers: "The demand for nullity or annulment made by the party which takes exception to this means of refusing to execute the arbitral sentence must be introduced before the Conference." (*Droit international codifie*, No. 1376.)

Others—such as Rolin-Jaequemyns—wish to place the question of the examination of cases of nullity on a juridical basis, and to entrust the validity of the arbitration to a regular jurisdiction: "It is to be desired that international compromises, while immediately constituting the arbitral Tribunal as the only judge on the merits of a case, should provide for the procedure to be followed for the formation of a second Tribunal, which would eventually be judge of the causes of the nullity

alleged against the principal judgment. Perhaps, by the means which we have indicated, it will be possible to arrive at the creation of an international custom which would open a practical road to the constitution of a permanent tribunal of this kind." [21] Later, Kamarowsky [22] will be found to agree to this system.

To reduce to order this theory, which, since Vattel, has been so profoundly transformed, to clear up the too numerous causes of nullity, which would make the conflicts last for ever—and arbitration would thus fail in its object—to fix, in the case of necessity, a procedure of nullity and to determine the relation of the cause of nullity to the court trying the annulment, by making the first dependent on the second, it is necessary to examine, as a whole, the most authoritative and scientific representatives.

This is exactly what was made possible in 1873 by the creation of the Institut de Droit International by Rolin-Jaequemyns.

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The Institute of International Law had scarcely been founded in 1873 for "fostering the progress of international law" and "formulating the general principles of the science," than it devoted itself, from the moment of its first meetings at Ghent, Geneva, and The Hague; to the drawing up of a scheme for regulating international arbitral procedure. At the session of Ghent in September, 1873, where the first work was divided between various commissions, Messrs. Dudley-Field, de Laveleye, Pierantoni, Goldschmidt, and Vernon Harcourt, were entrusted with the duty of examining the following question: The forms to be followed in the use of international arbitration. [23] Appointed Reporter of the Commission, Mr. Goldschmidt presented his draft rules at the session of Geneva [24] (in 34 articles), relating to arbitral tribunals, their formation and their procedure. This draft "complete, detailed, supported by strong reasons" [25] was the subject of a long discussion in which Messrs. Mancini, Pierantoni, Asser, Holtzendorff, Bulmerincq, Martens, Westlake, Esperson, Goldschmidt, and de Parieu took part.

The preparatory discussion took place at the session of Geneva, at the sittings of 31st August and 1st and 2nd September, 1874. [26] The draft which resulted from the deliberations of Geneva [27] included 32 articles. Submitted to a new examination by a commission, of which M. Rivier was to have been the reporter, it was, after modifications, submitted to the Institute in its session of The Hague. Messrs. Bluntschli, Pierantoni, Neumann [28] took part in the discussion on 28th August, 1875.

Articles 1 to 26 were adopted unanimously, Article 27 by a simple majority. [29]

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[21] *Revue de droit international et de legislation comparee*, 1872, p. 139.
[22] *Le Tribunal international*, Paris, 1887, p. 359.
[23] *Revue de droit international*, 1973, p. 667.
[24] The text of these draft rules, accompanied by a remarkable study by Mr. Goldschmidt, dated Leipzig, 20th June, 1874, was published in the *Revue de droit international et de Legislation comparée*, the organ of the Institut de Droit international, VI., 1874, p. 421.
[25] Report of M. Rivier made in 1883, at Munich, on the work done by the Institute since its foundation. *Archives Diplomatiques*, 1882, 1883, IV., p. 399 et seq.
[26] *Revue de droit international*, 1874, p. 587 et seq., V., also *Annuaire de l'Institut*, 1877, p. 46.
[27] *Revue de Droit international*, vol. VII., p. 418 et seq.
[28] *Annuaire de l'Institut*, 1877, p. 84 to 87.
[29] *Revue de Droit international*, 1875, p. 277.

It was a question, according to the proposition of Mr. Moynier,[30] of "proposing an eventual set of rules for the working of the arbitral tribunal." But, as Goldschmidt pointed out in his draft scheme of rules (Revue de droit international, VI., p. 427), "the rules (drawn up by the Institute) are, in the first instance, based on the practice, is not very extensive, it is true, of international law. In the second instance, they are the result of independent deductions in which account has been taken of the juridical principles, accepted in matters of arbitration in various civilised countries." He laid weight on "taking into account the strength of international custom." Addressing himself "to the adversaries of international tribunals, both those who wish to safeguard completely the liberty of States, and those who advocate the creation of a permanent international tribunal," he declared: "They do not see that in fact it is more difficult to refuse obedience to the arbitral sentence delivered than to escape from a claim made unilaterally. . . . *They fail to understand, finally, that it is possible, also in an international action, to attack successfully a judgment given.*"

This last question, as the report of Goldschmidt shows, thus attracted the eager attention of the Institute. In his remarkable report, the erudite Goldschmidt, a consummate jurist, one of the most illustrious masters of modern commercial Law, after learned disquisitions on arbitration in Roman law and the modern codes of procedure, then on their comparison with international arbitral practice, indicates a certain number of fundamental principles:

§18. The arbitral Tribunal is the judge of its own jurisdiction. If the objection of lack of jurisdiction is not opposed at the first opportune moment, or if the objection raised at the proper time has been rejected by the arbitral Tribunal, the parties proceed further, without making any reservation, every later dispute as to the jurisdiction is excluded.

§ 30. The duly pronounced judgment (§ 24-29) decides within the limits of its scope, the dispute between the parties.

"The direct effect of the arbitral award is recognised generally in actual law," continues Goldschmidt. . . . "The great jurists of Rome drew from the nature of the compromise and from the arbitral sentence just conclusions, which modern jurisprudence and practice have often changed in character. If the force of the arbitral award consists, by virtue of the agreement of the parties, in taking the place of a juridical sentence, the result is that effect can be refused to it only in the following cases: when the consent of the parties is lacking; when there has been no real arbitral tribunal; when the award has been given in contradiction to the express or tacit agreement between the parties; when, finally, the maintenance of the award would appear to be a manifest violation of all legal order and of all morality. The grounds for appeal in §32, 1-11, therefore, have, in substance, their sources in Roman Law. . . . . Roman Law allows direct effect to the arbitral award only inexceptionally; Justinian was the first to allow to the award, accepted expressly or tacitly, by both parties, an effect analogous to that of a judgment. It results herefrom that, in Roman Law, the appeal regularly assumes this shape: the payment of the sum, promised in case of non-adherence to the award, is refused, and the judge gives judgment on the justification for this refusal. But in no case is he authorised to examine the arbitral award to decide upon its material correctness or its justice.

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[30] *Revue*, VI., p. 496.

Thus, there is against arbitral awards neither an appeal nor any other legal weapon. These principles, so simple, have been laid down in different ways by jurisprudence and legislation ever since the Middle Ages. It was right to depart from Roman Law and to give to the arbitral award a direct effect analogous to that of a judgment. But further progress was made. The system of methods of appeal against judicial decision was extended to arbitral awards. The appeal was allowed as if it were a matter of a judgment delivered by a judge of the first instance. . . . Further, the action for nullity, or an analogous remedy, was allowed as a defence against certain flagrant cases of illegality. And even in cases where appeal was forbidden, attack on the sentence was permitted on the grounds of gross unfairness, confusing the *arbiter with the arbitrator.* It is only in these later times that German jurisprudence and the Laws of Procedure (Geneva, Bavaria, Germany) have returned to just rules by excluding the appeal in principle and by restricting nullity. The facts, which we have just pointed out, were naturally bound to have an influence on the theory of international arbitration. As there was no apparent way of obtaining a subsequent revision and a decision by the judge, it necessarily seemed all the more equitable to refuse efficacity to an unjust award. There is on this point a great divergence of opinions. The older masters excluded appeal, or allowed it only on a small number of grounds which were incontestably just, but Daries, in his *Observationes juris nationalis socialis et gentium,* Jéna, 1751, Vol. II., Note 13, §13 seq., allows the refusal of obedience to all unjust awards . Vattel, II., 18, §18, 329 (Vol. II., p. 305 of the Edition of M. Pradier Fodéré) is of the same opinion, at least in cases of injustice or evident absurdity. Similarly, Neumann (*l.c.* §21) in case of *dolus illicita vel inhonesta praecepta, aliave nullitas admissa.* Many authors, more recent ones, admit these wide categories. They declare the award to be null : in the case of fraud or manifest partiality of the arbitrator; of fraud of the opposite party; of incomplete hearing of the parties; of a decision the contents of which could not be the valid grounds of a convention; of material falsity; of error caused by the parties or the arbitrator; of flagrant violation of the fundamental principles of all procedure; finally, in the case of an award contrary to the commandments of international law and of humanity.

Discussing the too numerous causes of nullity suggested by the authors, the eminent reporter retains eleven of them, among which are :

(1) If the compromise has not been validly concluded; (2) if the compromise validly concluded was later extinguished; (3) if the arbitral tribunal has not deliberated and delivered judgment with all the members present and voting; (4) if, in spite of the compromise having set forth the grounds, the award has been given without grounds; (5) if the arbitral tribunal has decided without hearing the appellant; (6) *if the arbitral tribunal has exceeded the limits of the jurisdiction which the compromise gave it.*

It is important to define and limit, as far as possible, the causes of nullity, if an attempt is to be made to raise them from the embryonic state of conscientious scruple, not susceptible of control, in which they are at the present moment, in order to raise them to the status of juridical grounds which permit the judgment to be attacked by a regular procedure. If this attempt succeeds, the efficacy which the decisions of the international arbitral tribunal should be able to claim as being judicial international decisions, will be guaranteed as far as is permitted by the present state of international law. But to achieve this end, the creation of a superior instance is necessary.

It is with this instance and with the procedure which should be followed by it that paragraphs 33 and 34 deal :—

§ 33. The appeal should be made before the Tribunal, or the arbitral Tribunal, designated or appointed for this purpose in the compromise, or in a subsequent convention between the two parties. In default of such designation, or appointment, or if it should not be possible to form validly the arbitral tribunal designated, or if the arbitral tribunal validly formed has been dissolved, or if the tribunal designated refuses to decide, the appeal should be brought before the Supreme Court of the State or territory, in which the arbitral Tribunal has sat.

§ 34. The Tribunal pronounces only on the grounds of the appeal indicated in the memorandum supporting the appeal. If it finds them to be well founded, it reverses the arbitral judgment. If the arbitral sentence contains decisions, independent one of the other, on various points in dispute, only the effective decisions attacked will be reversed.

The decision of the Tribunal is definitive.

The dispute can be remitted for new trial to the arbitral Tribunal which has judged it, or to another, only with the consent of the parties.

In commenting on this text Dr. Goldschmidt adds :

The best, without doubt, would be an international or permanent tribunal, or one created *ad hoc* for the particular case. The objections, which might be made to an institution of this kind, cease to have great weight as soon as a material decision is no longer asked for on the points in dispute, but only a judgment on the strictly limited grounds which allow of an attack on an award. . . .

When at Geneva on the 1st and 2nd September, 1874, a discussion arose on the Goldschmidt's drafts, on para. 18, after animated debates, in which Messrs. Mancini, Pierantoni, Asser, Goldschmidt, Esperson, de Parieu and von Holtzendorff took part, the question was gone into as to how far it was possible to declare, in an absolute manner, the arbitrators to be judges of their own jurisdiction. The following report was adopted :—

" The arbitrators must pronounce on the objections based on the lack of jurisdiction of the arbitral Tribunal, subject to the appeal reserved in paragraph 32 No. 6, and in conformity with the provisions of the compromise.

No way of appeal shall be open against preliminary judgments on jurisdiction, except cumulatively with the appeal against the final arbitral judgment.

In case that the doubt on the jurisdiction depends on the interpretation of a clause of the compromise, the parties shall be deemed to have invested the arbitrators with the power of settling the question, subject to any clause to the contrary. [31]

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[31] *Revue*, VI., p. 593.

Finally, when the general discussion was opened on § 32, Messrs. Field, Bulmerincq and Westlake demanded the suppression of these paragraphs. M. de Parieu did not think that the appeal could be organised. He thought that the method suggested by the Commission would often result in preventing the States from agreeing to arbitration. He believed that here, as well as in the question of the bringing of an action, it was not possible to go beyond the indirect invitation to organise a method of appeal. M. Pierantoni advocated the discussion of the draft. M. Mancini proposed the following text, in place of paragraphs 32-34, which was adopted :—

The arbitral award is null in case of nullity of the compromise, of usurpation of jurisdiction, or of proved corruption of one of the arbitrators, if it has influenced the majority, or of essential error caused by the production of false documents.

The compromise will determine before what person, or what faculty of law, or established court, the appeal in nullity shall be brought and within what period.

At the session at The Hague the discussion was resumed [32] M. Goldschmidt, prevented by the state of his health, was no longer present. M. Rivier was the reporter. He read the conclusions on the modification of the draft adopted by the Institute at Geneva.

Paragraph 30 of the original draft (Goldschmidt) must be restored as Article 24 in these terms : " the award duly pronounced decides, within the limits of its scope the dispute between the parties."

This was adopted.

The reporter proposed to make Article 24 of the draft of Geneva, Article 27 and last of the final draft, and to amend the last paragraph of that Article as follows : " The arbitral award is null in case of nullity of the compromise or of usurpation of jurisdiction, or of the proved corruption of one of the arbitrators, or of essential error." The Geneva text wished that the error should have been caused by the production of false documents. The reporter thought that it should be sufficient for it to have another cause. M. Pierantoni disputed this point of view. The amendment proposed by the Commission was put to the vote and adopted.

The provisions of the draft of the rules of the Institute for international arbitration procedure referring to the point under examination are as follows :—

Art. 14, § 2 : The arbitrators must pronounce on the objections based on the lack of jurisdiction of the arbitral Tribunal, subject to the appeal mentioned in Article 24, par. 2, and in conformity with the provisions of the compromise.

§ 3 : No way of appeal shall be open against preliminary judgments on jurisdiction, except cumulatively with the appeal against the final arbitral judgment.

§ 4 : In the case when the doubt on the jurisdiction depends on the interpretation of a clause of the compromise, the parties shall be

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[32] *Annuaire de l'Institut*, I., p. 84-87.

deemed to have invested the arbitrators with the power to settle the question, subject to any clause to the contrary.

Art. 25 : The sentence duly pronounced decides, within the limits of its scope, the dispute between the parties.

Art. 27 : The arbitral sentence is null in case of nullity of the compromise, or of usurpation of jurisdiction, or of proved corruption of one of the arbitrators, or of essential error.

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Applying the principles brought out by the Institute of international law to the case, at present in suspense before the Council of the League of Nations, of the fate of the decision of Mixed Arbitral Tribunal of the 10th January, 1927, which delivered judgment by interpreting the compromise, we are led to the following conclusions :

Jurisdiction is presumed :

Art. 14, § 4 : " In the case when the doubt on jurisdiction depends on the interpretation of one of the clauses of the compromise, the parties shall be deemed to have invested the arbitrators with the power to settle the question subject to any clause to the contrary."

The quite modern authors, whom one should believe to have been converted to the most favourable views with regard to the progress of arbitration, which, since 1873, the Institute of International Law has been striving to assure, Messrs. Basdevant, Jèze, and Politis, signatories of the joint opinion cited by M. Titulesco, write as follows : Second principle. The previous verification of the jurisdiction is quite specially imposed on international tribunals. The jurisdiction of international tribunals is much narrower than that of national tribunals. Not only is it always exceptional, but further it derogates from a fundamental rule of common international law : international disputes are not settled by courts . . . in public international law all international tribunals are exceptional. A State can only be subject to the jurisdiction of an international tribunal of its own free-will." To this narrow point of view, based on the respect of the sovereignty of States, the report of M. Goldschmidt, even in 1874, opposes a very different conception. (33) " M. Rolin-Jaequemyns remarks very justly that the question of jurisdiction must not be solved by a strict interpretation of the compromise, but that, in case of doubt, it must be settled affirmatively. In fact, this affirmation in no way prejudices the cognisance of an ordinary tribunal. On the contrary, it makes a judicial decision possible on a point which without that would remain in dispute."

From still another point of view, the study of the deliberations of the Institute of international law is not without instruction in respect of the present case.

In ordinary procedure the judgment on jurisdiction is a preliminary judgment which however ranks among final judgments because it has the force of a "*chose jugée.*"

But, although in internal procedure a way of appeal is open against the judgment on the jurisdiction, in the Rules of Procedure prepared by the Institute of international law, it is not so :

(33) *Revue*, vol. VI., p. 440,

Art. 14, § 3: "No way of appeal shall be open against preliminary judgments on jurisdiction, except cumulatively with the appeal against the final arbitral judgment."

This is exactly our case. The decision of the 10th January, 1927, in deciding on jurisdiction, still gives no solution in fact of the dispute. Its only result is to allow the tribunal to continue the examination of the requests brought before it. Would there have been usurpation of jurisdiction, or even a simple overstepping of the jurisdiction, if the Arbitral Tribunal had connected the question of jurisdiction with that of the merits? Obviously not. The different reasons on the merits invoked by the Roumanian State for the purpose of evading a possible judgment against herself by the Mixed Arbitral Tribunal, have not yet been judged, nor even, more simply, prejudiced, by the decision of the 10th January, 1927. It has been shown that a large part of the arguments of the Roumanian Government is based on the fact that it would be unable to meet adverse judgments delivered against it, whether they were in the nature of restitution of property or (what is assuredly more practical) pecuniary indemnities, proportionate to the damage caused. Now, in order to discover the amount of these indemnities, it would be necessary to have a judgment, no longer preliminary, but final, which no longer decides in an abstract way on the question of precedure, but concretely, by an affirmative or a negative, and, in the case of admission, with figures, on the merits. Finally, it should be pointed out that the considerations of law, on which the Roumanian Government relies for the purpose of opposing a possible condemnation, are only enumerated without yet having been examined in the judgment of 10th January, 1927, which limits itself to indicating, without deciding on them. What advantage would these have been in having recourse, then, to the grave procedure of usurpation of jurisdiction, when no injury, as yet, was threatening? "In order that a usurpation of jurisdiction should render refusal of execution legitimate, it must be certain and indisputable. There must also be a real interest in taking advantage of it. A double condition . . ." Thus reasons the excellent juris-consult, M. Politis, outside the joint Opinion, in his scientific work (*La justice internationale*, p. 92). There his ideas are in agreement with those of his great predecessors of 1873. In effect, if, in order to attack a decision on the grounds of usurpation of jurisdiction, it is necessary : "*to have a real interest in taking advantage of it,*" this cannot be the case here, since the condemnation is still only problematical, in no way certain, and in any case has not yet occurred. Unless the Roumanian Government has particular reasons, which we cannot believe, for withdrawing from all judicial discussion the application to ex-enemies of its Agrarian Law, we cannot see how there could be, at the present moment, "*real interest.*" It has, as the rules of the Institute demand, made all reserves on the jurisdiction of the tribunal. Thus it rights have been preserved in view of the possible later proceedings for nullity. But the moment has not yet come, since these rights have been reserved, of arguing against the decision, which is only problematical, of a nullity, of which the coming into force at the present moment, would be premature.

Further, one important consequence follows from the work of the Institute of international law when, in Art. 27, it is provided in its draft scheme of the rules that the arbitral award is null in case of nullity of the compromise, or of usurpation of jurisdiction, or of proved corruption of one of the arbitrators, or of essential error, it was, in the intention of the Institute, to be only an indication destined to induce the interested

States, in conformity moreover with previous practice, to form a new tribunal to judge on the merits of the case, or, in accordance with the suggestion of Goldschmidt, a new tribunal to judge the special point of the alleged nullity.

To the illustrious Mancini is due the substitution for § § 32-34 in the Goldschmidt draft, of a version, which regards, as the cause of nullity, only nullity of the compromise, usurpation of jurisdiction, corruption and essential error. Now, he adds this : " The compromise shall determine before what person or faculty of law, or established court, the appeal for nullity shall be brought, and within what period." This phrase has been dropped. M. Parieu, who *presided,* did not believe that the appeal could be organised. He thought that the method suggested by the Commission would often result in preventing States from consenting to arbitration. He thought that here, as in the question of the bringing of an action, it was impossible to go beyond the direct invitation to organise a method of appeal.

Now, if we compare these declarations together with those of the *indisputable* Opinion, cited as an affirmation of law by M. Tituesco, we shall discover that, between the point of view of the consultants and that of the great predecessors of 1873, consummate jurist-consults, each of whom had been a specialist in an important branch of law before becoming one in international law, there is an essential difference. For M. Jèze, particularly, the sanction of the violation of the rules of jurisdiction is non-existence : " When it is a question," the Opinion says, " of a national tribunal, the violation of the rules of jurisdiction has not in principle the effect of causing the judgment to be considered as an action performed by simple private persons absolutely devoid of authority. In public international law the situation is entirely different. There is not only lack of jurisdiction ; there is usurpation of powers, which is much stronger than lack of jurisdiction. The sanction of the violation of the rule of jurisdiction is the juridical nullity of the decision. The sanction of the usurpation of power is the juridicial non-existence of the decision." And all this, although a certain looseness of language may cause doubt, under this trenchant formula that any overstepping of jurisdiction is an usurpation of power : " The international Tribunal must, before examining into the merits, very carefully verify its jurisdiction. If it does not do so, the sanction will be much graver than in public internal law. The award must be considered not as emanating from a tribunal, but as emanating from a personality absolutely without authority." And lower down : " The award of an international tribunal, which delivers judgment outside its jurisdiction, is vitiated by usurpation of power. It is non-existent. It will produce no juridical effect." Therefore, following this entirely new theory, the lack of jurisdiction of the judge, who goes beyond the terms of the compromise in judging that which the latter, according to the allegation of one of the parties, does not permit him to judge, renders the decision, by which he affirms his jurisdiction, absolutely non-existent.

It was, perhaps, not useless to oppose to these entirely new ideas, hitherto unknown to international law, the point of view of the Institute of international law, in 1873. Whereas, nowadays non-existence is claimed, at that time nullity was considered sufficient. If there is any reason for this change between 1873 and the present moment, it would be interesting to know it.

In any case, to shake the authority of the Institute of international law, it would, at least, be necessary not to pass it over in silence, but to recall it, examine it and discuss it.

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Finally, it is interesting, on a last point to consider together the work of the Institute of international law with the present question and the new formula.

In the terms of article 25 of the draft of rules of the institute: "The award *duly* pronounced decides, within the limits of its scope, the dispute between the parties."

If the limits fixed to the jurisdiction by the compromise have been overstepped, at least according to the allegation of one of the parties, this is sufficient, it is hinted, for the award to be not *duly* pronounced, and that, consequently, it does not decide the dispute.

Simple lack of jurisdiction, without usurpation of jurisdiction, would therefore be a reason for nullity of the sentence. Our eminent colleague M. Walther Schücking who passes very quickly over the work of the Institute of international law (*Recueil roumain,* p. 621), is careful not to omit this detail. We quote: "The Institute of international law occupied itself in 1877 with the question of the validity in law of the awards of the international arbitral court, and passed the following resolution: "the sentence *duly pronounced* decides, within the limits of its scope, the dispute between the parties." (Art. 25: *Annuaire,* I., p. 133.) Unduly pronounced, it decides nothing.

Lack of jurisdiction would, therefore, come to be the same as usurpation of powers, and perhaps would go beyond it.

It is very regrettable that in the circumstances, our learned colleague should have adhered to the letter of the rules of the Institute without re-considering in detail the elaboration of these rules, on the basis of the remarkable draft of his eminent compatriot Goldschmidt.

Article 25 of the rules of the Institute is word for word § 30 of Goldschmidt's draft: "The sentence duly pronounced (§§ 24 to 29) decides, within the limits of its scope, the dispute between the parties." [34]

Thanks to this precision (§§ 24 to 29), we know what is to be understood by "duly pronounced." § 24: "The pronouncement of the final decision must take place within the period fixed by the compromise or by subsequent agreement." § 25: "Every decision, final or provisional, shall be taken by the majority of all the arbitrators. The discussion and decision must take place in common, etc." § 26: "If the arbitral Tribunal does not find the claim of either of the parties to be well-founded, it must make a declaration to that effect, and if it is not limited in this respect by the compromise establish the real state of the law (case in which the arbitrator acts, subject to contrary prescription, really as *arbiter finium regundorum*—the affair of San Juan)." § 27: "The arbitral judgment must be drawn up in writing, etc."; and, similarly, in § 28: statement of facts. § 29: notification to the parties.

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[34] *Revue de droit international,* VI., p. 446.

Thus, when the Institute of international law speaks of an award duly pronounced, it takes into consideration conditions quite other than those of jurisdiction, which are expressly regulated by § 18 of Goldschmidt's draft.

It is therefore an obvious error to interpret " duly pronounced " as implying, on the part of the arbitrator, the fact that he has not exceeded his jurisdiction.

From this follows a very important consequence : it is that, in the case of the jurisdiction being exceeded, the award is not to be considered as null, as soon as the usurpation of jurisdiction on the ground of the jurisdiction having been exceeded, is invoked. In fact, if article 27 foresees causes of nullity, among which is usurpation of jurisdiction, and that, although vitiated according to the allegation of one of the parties, by one of the causes of nullity foreseen in this article, the award is none the less considered, however, as, duly pronounced (since, in the consideration of the due pronouncement, only elements of pure form enter, which have, anyhow, been fulfilled, art. 24 to 29 of Goldschmidt's draft, having become articles 20 to 24 of the present rules), it results therefrom that, as long as it has not been dropped, it retains its obligatory force.

The situation for the State which alleges usurpation of jurisdiction is, therefore, this : it is face to face with a decision which has the force of a *" chose jugée,"* before which it must bow, unless it can establish that the cause of nullity which it alleges is well-founded.

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On what basis?

Usurpation of jurisdiction; but usurpation of jurisdiction is not to be confused with the error on jurisdiction : it requires more than a lack of exact harmony between the award and the compromise; it needs a grave error, born of a flagrant injustice, on the merits.

Usurpation of jurisdiction thus exists only in the injustice of the condemnation, not in the faulty judgment on the jurisdiction.

How, then, finally to establish usurpation of jurisdiction?

By what procedure?

The rules of the Institute discreetly indicate the causes of nullity (Art. 27).

It looks no further.

But the result, both of the report of Goldschmidt and of the explanations of Mancini, whose text was substituted for that of Goldschmidt, when finally analysed, at Geneva, is that a new instance must then be organised by the common wish of the parties.

In order to conform to the discussions and the resolution of the Institute of international law, which was their conclusion, the Government, which alleges usurpation of jurisdiction, must offer to bring the question of this excess of powers before another tribunal and obtain the consent of the other party to the constitution of this tribunal : in the present circumstances, the Hungarian State, since it is that State which,

by creating a mixed arbitral Tribunal, has made it possible for its petitioners to find access to the tribunals which it had stipulated, first under article 239, then under article 250 of the Treaty of Trianon.

The conclusion can therefore admit of no doubt :

1. It is only a final judgment, not a preliminary judgment on jurisdiction, which, according to the Institute of international law, can be the subject of procedure for usurpation of jurisdiction;

2. Usurpation of jurisdiction, on a point of jurisdiction, must not be presumed more than in any other matter, for, in the case where the doubt regarding jurisdiction depends on the interpretation of a clause of a compromise, the parties are deemed to have invested the arbitrators with the power of setting the question saving any clause to the contrary;

3. The sentence is " duly pronounced " even when the arbitrator has, by error, gone beyond the limits of his jurisdiction;

4. Usurpation of jurisdiction, whatever may be its source (and it is by no means certain that an error on judisdiction suffices to constitute an usurpation of jurisdiction), is a cause of nullity, not of non-existence;

5. The party alleging the nullity must propose the arbitration.

THIRD PERIOD.

With the convocation of the Peace Conferences of 1899 and 1907, arbitration entered into a new phase. Internal justice is characterised by these two essential traits, so familiar that, finally, they are no longer noticed : permanence and obligation. International justice has a tendency to model itself on it. But the obstacles are great. Great to the principle of obligation, great even to the principle of permanence. The Conference of 1899 only with great difficulty succeeded in giving it a first form, more apparent than real : of temporary tribunals in a permanent frame. The second Conference, that of 1907, incapable of finding true permanence, in the arbitral Court of Justice, could still less realise the great design of an obligatory arbitration, scarcely admitted, by some special conventions, in certain limited cases. The moment has come, nevertheless, for fixing in advance the features of the institution of arbitration, in the purely optional framework : not only to give it a Court, but to create for it statutes to which, in the absence of any more precise ordinance, the fate of the arbitrations between the signatory States should be entrusted. Together with the institution of the permanent arbitration Court, accepted, from that moment, saving express reserves, by the parties signatories of the Convention relating to the specific solution of international conflicts, these rules of arbitral procedure are, in a great measure, inspired by those of the Institute of international law.

The draft of the rules of the Institute read, article 27 : " The arbitral sentence is null in the case of nullity of compromise, or of usurpation of jurisdiction, or of proved corruption on the part of one of the arbitrators, or of essential error."

Article 26 of the Russian draft lays down : " The arbitral sentence is null in the case of nullity of compromise, or of usurpation of jurisdiction, or of proved corruption on the part of one of the arbitrators."

Thus, already, Russian initiative placed itself, among causes of nullity, on a more restricted, a more limited, terrain.

Still less could it envisage, for the different causes of nullity, any other sanction than the offer, as soon as one of these causes had been invoked, to prove its accuracy before a new tribunal.

Among the members of The Hague Conference, there were some who, being members of the Institute of international law, had enjoyed the happy privilege of assisting at the alaboration of the rules of 1875. Amongst them was Mr. Asser. When the Russian project came to be discussed (tenth sitting, 26 June, 1899, p. 143, *et seq.*, particularly p. 149), the minutes state :

Art. 26 (question of nullity).—Mr. Asser asked whether it was not possible to find an authority to entrust with the mission of declaring the award null, so as not to leave this weighty consideration to the irresponsible will or initiative of the State which had lost the case. *If, as he thought it was not possible to find this authority, then Mr. Asser was of the opinion that Article 26 should be suppressed.*

The President was of the opinion that the observation of Mr. Asser *should call for the most serious attention* of the Committee.

M. le Chevalier Descamps thought that this was just the great service which a permanent Court of Arbitration could render.

Mr. Odier observed that the drafting of this article was subordinate to the question of deciding whether or not there should be a permanent Court.

The President did not think that it would be possible to foresee cases of nullity, without at the same time knowing who would be the judge to consider these cases. It was unthinkable, on the other hand, to impose on the parties the decision of the permanent Tribunal in Courts in respect of which they had not contemplated having recourse to this jurisdiction.

M. le Chevalier Descamps asked that this so serious question of *nullity* should be reserved, as well as that of *revision.*

Paragraph 1 of article 26 was reserved.

The two other paragraphs of article 26 formed later article 27.

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There was nothing more remarkable than this exchange of views.

None of the members present suggested that the cause of nullity could exist without the party opposing it being exempted from offering a new arbitration in order to decide it.

The bond which historically had thus been formed, in theory, as in practice, between the cause of nullity and the Court, a bond which had been thrown into relief by the work of the Intsitute of international law, is here very particularly emphasised.

But, while at the Institute of international law it had appeared that the cause of nullity could be indicated, subject to the subsequent creation of a Court, here, on the other hand, it seems that the cause of nullity can no longer be accepted, or even mentioned, as soon as there is, at the same time, no determination of an instance.

In the solution of the Institute of international law, the party which alleged usurpation of jurisdiction, or, more generally speaking, the cause of nullity, could invoke it, on condition of coming to plead it.

In the formula, much more favourable to the final character of the awards, of the Hague Conference in 1899, the cause of nullity was not even to be named, because, in order to make it effective, it was necessary to imagine a superior jurisdiction.

Are cases of nullity to be admitted?

Three hypotheses present themselves.

1. To allow the losing State to withdraw from the arbitration by invoking the cause of nullity, but by declaring itself the only judge : that is what Mr. Asser calls the *arbitrary proceeding* of the losing State ;

2. To permit the losing State to take the initiative in setting up a new arbitration, dealing with the alleged nullity : that is what Mr. Asser calls, in a word, the *initiative*.

3. To allow the winning State to refuse any kind of negotiations on the question, entrenching itself behind the final character of the sentence : that is the solution accepted by the Hague Conference.

According to the formula of the President of the Commission, Mr. Leon Bourgeois, himself, *it is impossible to foresee cases of nullity without organising a tribunal* : it is impossible to impose on the parties, on the other hand, the jurisdiction, in these matters, of the permanent Court of arbitration, which was just about to be created at the end of the work of the Conference.

It is therefore as much out of respect for the final character of the sentence and the authority of arbitration, on the one part, as out of regard for the optional character, in all matters, even of procedure, of the new Court, that the Hague Convention of 1899 refused categorically to make a place for article 27 of the draft rules of the Institute, which, in substance, became article 26 of the Russian draft.

According to the declarations of the reporter himself, the Chevalier Descamps :

" So far as concerns the general question of causes of nullity of the arbitral award, the Russian draft included the following disposition : ' The arbitral sentence is null in the case of nullity of compromise, or of usurpation of jurisdiction, or of proved corruption of one of the arbitrators.' Mr. Asser, for his part, asked whether it would not be possible to find an authority which might be entrusted with the mission of declaring the award null, so as not to leave so serious a decision to the arbitrary action or to the initiative of the State which would have been condemned,

" The Committee hesitated in the examination of this question, *before the embarrassment of foreseeing cases of nullity without, at the same time, determining who should be the judge to consider these cases.* It was, at the same time, remarked that the permanent Court of arbitration could guide the States on the road to a solution in this sense."

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These categorical declarations leave no room for doubt.

It would be vain to attempt to say that, in the terms of the Convention (art. 54 of 1899, art. 81 of 1907), it was a question of an award duly pronounced. [35]

We know what is understood by these terms : *award duly pronounced.* For, we have seen, these terms were in the draft rules of the Hague, and in the rules of Dr. Goldschmidt, before forming part of article 25 of the draft rules of the Institute. Now, as we have said, Dr. Goldschmidt himself was careful to explain what was to be understood by award duly pronounced.[35*] It is a question of an award pronounced in prescribed forms, without regard to its contents, in respect of the merits.

In vain it might be suggested, with the regretted Paul Fauchille : " The Hague Conventions of 1899 and 1907 did not contemplate the case of nullity of an arbitral award. They thus left matters in their former state. The jurisconsults can thus continue to teach, as before, that, in certain cases, without stating which, an arbitral award is obviously null." [36]

To reason thus is to assume, that, by the non-insertion of article 26 of the Russian draft, the Conference had intended to leave the trouble of recognising and enumerating the causes of nullity to doctrinal controversy.

The motive of this non-insertion is quite different.

It did not constitute, on the part of the Conference, as abandonment, by reason of failure to come to an understanding, as in the famous case of a levy in mass in an invaded country [36*], but on the contrary, a formal solution.

Will it be said that the will which manifested itself, without any doubt whatever, at the Hague, is obligatory only in the measure in which it has found expression in the text of the Convention? " Obligatory contractual stipulations exist, according to a representative of the new Austrian school, only in the measure in which the will of the persons drawing up the rules has received a corresponding expression in the text of the treaty, for it is not the simple will, but the *declared will* which creates the right.[36**]

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[35] Walther Schücking *Recueil roumain,* p. 620.

[35*] Cpr. *supra,* p. 24.

[36] Traité de droit international public, 1926, vol. 1, part 3, p. 565. In the same sense, Ch. Meurer, *Die Haager Friedenskonferenz,* 1905, p. 349. According to Meurer, the fact that one of the parties can demand the question of nullity of the award being brought before a tribunal, implies that each party decides by itself whether the award is valid or not, *Friedensrecht,* p. 349.

[36*] A. de Lapradelle, *La Conference de la Paix,* 18th May-22nd July, 1899, Paris, 1900, p. 99.

[36**] Verdross, *Die Verbindlichkeit der Entscheidungen internationaler Schiedsgerichte,* 1928,

Even then, it would be necessary to recognise that a text does exist.

> Article 48.—The Tribunal is authorised to determine its jurisdiction by interpreting the compromise, as well as the other treaties which may be invoked in the matter and by applying the principles of law.

From this text it follows that if the arbitrator declares, in his award, that he has interpreted the compromise, the award cannot be attacked on the ground of over-stepping of jurisdiction. Usurpation of jurisdiction is never in an interpretation of the rule of law (jurisdiction or merits, but in an omission of procedure: for want of motives, for example, and especially liberty taken with the compromise, as in the case where the arbitrator refuses to take account of a treaty text which the compromise demands that he should apply. In short, in the light of the law of the Hague, the decision of the commissioners, in the affair of the Betsey (and, consequently, in the present Roumano-Hungarian affair) would be unattackable, and the commissioners or the judge of the minority would not have the right to withdraw. But the award of the King of the Netherlands in the affair of the North-East frontier would remain subject to procedure of nullity on the ground of usurpation of jurisdiction. It would be the same case with an award of which the motives had not been set forth or which was controdictory.

The concession is important: it is not sufficient. If article 48 expresses the will of the Conference, article 54 expresses it in the same way by attributing a definite character to the award duly pronounced. "The act of the Hague has rejected not only the appeal for reasons of the injustice of the sentence, but also the demand for annulment by reason of violation of the award and it has recognised the *immutability* of arbitral awards," declares H. Lammasch.[37] And, similarly, Nippold: "One may think what one likes of the stipulations of the Hague, they constitute the law in force." And later: "Various causes of nullity have often been defended in doctrine and in practice, but up to the present they have not been recognised by positive common international law."[37]

Too much importance was attached, even before he became a member, and, later, President of the permanent Court of international Justice, to the juridical doctrines of M. D. Anzilotti, to allow us to pass over in silence the feeling which he expressed on this point in 1915 in a book which, too modestly, is stated to be for the use of students, as it is, on the contrary, rich in instruction for the masters.[38]

According to him, in order that the will of the authors of the Hague Convention should have a juridical value, it is not enough that the history of this Convention should prove that such was the design of its authors: a conception, however clear it may be, expressed in the work in preparatory of a law, or of a collection of juridical rules, does not suffice to justify an interpretation which is not supported by the rule itself. The authors of the Convention started from inaccurate ideas on the nature of the arbitral award, and have deduced from it, in order to exclude the grounds of nullity, a reason which, if it were true, would be equally valid for every juridical act between States, suppressing between

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[37] Die Rechtskraft internationaler Schiedssprüche, p. 162, Das Werk vom Haag, 2nd series: Die gerichtlichen Entscheidungen, vol. I., part 3 (1914), p. 48, and Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten, 1907, p. 347.

[38] *Corso di diritto internazionale, Appunti ad uso degli studenti,* III., part I., p. 110 and following, especially p. 128 and following.

them even the conception of nullity. It is not, after that, possible to follow Lammasch and Nippold. For their system would lead to absurdity if, for example, the arbitrator were to judge that which he should not judge, or to condemn a party to a physically or juridically impossible payment, etc.

These considerations are, naturally, of the gravest kind. If their consequence must be that the law of the Hague can serve here only as conventional law, not as common international law, it is, assuredly, permitted to subscribe to it, in order to return to the previous law, which the author very justly presents as follows : *if the parties are agreed in recognising the existence of the motive of nullity, well and good; otherwise we are faced with a new controversy, which may eventually be submitted to another arbitration, of which, indeed, international practice offers examples.*

For it is clear that with an authority such as that of this eminent jurisconsult, there could be no question of the non-existence of the simple discretion of the party which, alleging that it has been wrongly interpreted in its compromise, might, on the ground of overstepping of jurisdiction, entrench itself behind the fortress of its sovereignity, and would not quit it. The agreement of the award with the compromise is a contractual right, based on the agreement of the wishes which serve as the basis of the judgment, a right which the party appearing before the tribunal could not lose without changing the essential contractual nature of the arbitration. But that which the will creates, the will can extend. " And it is perhaps useless to add that the parties can renounce, expressly or tacitly, the objection of nullity." [39] Moreover, the rights of the arbitrator, arising out of the very nature of his role, to the jurisdiction of his jurisdiction, must be reserved.[40]

It is only within these limits, which are precisely those of the positive law of nations, that the usurpation of jurisdiction of the arbitrator had to produce its effect before the Hague Conference.

It is within the same limits that it would have to do so now.

From the suppression of article 26 of the Russian draft, it would therefore not result that the award charged with usurpation of jurisdiction would be delivered to the arbitrary action, as claimed by the partisans of *non-existence,* but to the *initiative* of the party which alleges and which can, appealing to the sentiment of justice, the good faith, and the honour of the adversary, induce him to recognise the cause of nullity, or, in case of dispute, to organise, for the purpose of remedying it, by common agreement, a new and special Court : a point of view the more reasonable because it is precisely that of positive law commonly received before the Hague Conference.

But the question is not one of ascertaining what the States signatory to the Hague Convention ought to have desired.

It is of ascertaining what they did desire.

What they desired, they have said.

First, no nullity without a tribunal : thus is eliminated the arbitrary action of the claimant in usurpation of jurisdiction.

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[39] *Op. Cit.,* p. 130.
[40] Op. cit., p. 105.

Further, no instance without a previously constituted Tribunal.

Finally, no chance tribunal, but, as far as possible, a constant jurisdiction : by preference, the Court.

But, no previously constituted Court without acceptation, in this case, of its jurisdiction, and in the general, not to say unanimous, opinion in 1899, no Court except an entirely optional one.

At this critical moment of its development, where it approaches *Permanence,* the Institution of arbitration runs the risk of shipwreck on the question of *Obligation.* Permanence, obligation : international justice can grasp these two fundamental characteristics of internal justice only slowly, prudently, one by one. To possess itself of the first, it must, for the moment, renounce the second. It is to the permanent Court that, from then, the Powers sacrifice, for the moment, at the same time as obligatory arbitration, *in any case whatever*, the causes of nullity which can be understood only in a system, even partial, of obligatory arbitration.

Right or wrong, such is their reasoning.

Correct or not, such is their will.[41]

By the Hague Convention, of 1899, on the pacific settlement of international differences, the signatory Powers pledged themselves, in the interest itself of arbitration, to submit themselves to it when there had been usurpation of jurisdiction on the part of the arbitrator.

Strickly speaking, the losing party cannot be heard refusing the execution of the sentence of the arbitrator which it has appointed, because he had committed an usurpation of jurisdiction. The putting forward of this reproach, which could not, in any case, bring about the dropping of the award, does not even place on its adversary the necessity of coming to an agreement with it to organise an instance on this point, in such a fashion that, if it deliberately puts obstacles in the way, the responsibilities would be shifted. No : to such proposals, emanating from the initiative of one party only, no effect can, in any degree, attach : the other party, strictly speaking, can leave them out of account. In order that the Permanent Court, on which the Conference relies, above all others, for regulating the question of nullity (and particularly of usurpation of jurisdiction) may take cognisance of this, without the entirely facultative character of its competence being prejudiced thereby, it is necessary that, once the award has been rendered, the party which profits by it should be *entirely free* to refuse the organisation of a new instance to deal with the usurpation of jurisdiction.

If, then, it accepts it, it is without being bound to do so by any legal right.

Such is the solution of the Hague Convention, brought by the sequence of its contingencies, and, for this very reason, back to the

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[41] In this sense, independently of the authors quoted, H. Lammasch, G. Scelle, *add* Nippold, *Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten,* 1907, p. 347 ; and *Das Werk vom Haag,* Series 2 ; *Die gerichtlichen Entscheidungen, Erster Band, dritter Teil,* 1914, p. 48 ; Frede Castberg, *La competence des tribunaux inter nationaux,* in *Revue de droit international et de legislation comparés,* 1925, p. 347.

truth of its formula. A text cannot, without danger, be read isolated, detached from its precedents, its period and its circumstances.

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A not less clear application of these very clear principles cannot be long delayed. In 1907 the Second Hague Conference, following the Russo-Japanese War, should have occupied itself with problems of belligerency and neutrality by land and more particularly by sea : it nevertheless attempted, in regard to the *Permanency* as well as in regard to the *Obligation* of the International Law, a double effort which met with a double failure : that of the Court of arbitral justice (by failure to agree as to the manner of appointing the judges) and that of the general treaty of obligatory arbitration. From that time, but little attention has been given to the Rules for arbitral procedure of 1899. The time had not yet come for perfecting it by the examination of the causes of nullity in combination with an instance naturally based on the obligatory jurisdiction of the *permanent Court,* as a court of cassation, or better still, because more clearly judicial of the *Court of arbitral justice.* The construction of this jurisdiction was still too controversial and too difficult for such consequences to be deduced from its organisation which was still doubtful. Also the texts of the Convention revised, of the 18th October, 1907, retained in this respect, although numbered differently, their original phraseology :

Article 37.—Submission to arbitration implies the pledge to submit, in good faith, to the sentence.

Article 73.—The Tribunal is authorised to determine its jurisdiction by interpreting the compromise, as well as the other treaties which may be invoked in the matter and by applying the principles of law.

Article 81.—The arbitral award, duly pronounced and notified to the Agents of the Parties to the dispute, decides the case definitely and without appeal.

Among the signatories of the Convention, which is signed by so many the more States as at the Second Conference the summoning of Central and South America had increased the number of the nations represented to forty-four, are the United States of America and the United States of Venezuela. Now, against an arbitration, previously carried out between the two States by a mixed Commission, with an outside third chief-umpire (M. Barge, nominated by the Queen of Holland), Venezuela raised the objection of usurpation of jurisdiction of the chief-umpire. How was the incident to be settled? The Chief Umpire was a Dutchman, the two parties were signatories of the Convention of the 18th October, 1907 and had ratified it. The only thing to do was to apply between them the law of The Hague. Venezuela did not allege that the United States were bound by the allegation of usurpation of jurisdiction alone to lose the benefit of the "*chose jugée*" : this would be, according to the formula of M. Asser, *arbitrariness,* discarded at once by the Conference. Venezuela did not even claim that the United States were, because of the allegation of excess of powers, under an *obligation* to come to an understanding with Venezuela to give to the dispute as to usurpation of jurisdiction the solution of an arbitral instance : that would have been, according to the formula of M. Asser, the initiative of the losing party, equally discarded by the Conference. The United States,

by an initiative, which does not astonish us on the part of a nation which of its own accord revises judgments given to the benefit of its own nationals (Pelletier affair), out of benevolence granted a new instance to Venezuela. And what instance? The only permanent instance that yet exists. The Court of arbitration of the Hague.

Everything happened therefore in conformity with the solutions previously given.

The authorities did not think that one of them had the right to invoke the Hague Convention in order to evade the execution, purely and simply, by putting forward the objection of usurpation of jurisdiction.

The parties did not think that one of them had the right to impose on the other the formation of an arbitral instance to decide on the usurpation of jurisdiction.

But the two parties came to an understanding to organise this jurisdiction by common agreement.

Three members of the Permanent court of arbitration of The Hague, of which one had taken part in the work of the Conference, namely M. H. Lammasch, were called upon here to take cognisance of the question of the justification for the charge of usurpation of jurisdiction.

In interpreting the compromise, which calls on them to judge, they, at the same time, gave an interpretation of the Convention of the 18th October, 1907, i.e., the interpretation of the law of the Hague by the Court of the Hague.[41*]

What do they say?

First of all this :

" Whereas it is assuredly in the interests of peace and of the development of the institute of international arbitration, so essential to the well-being of nations, that such a decision should be accepted in principle, respected and executed by the parties without any reserve, as is prescribed in Article 81 of the Convention for the peaceful settlement of international conflicts, dated the 18th October, 1907 ; whereas, further, no jurisdiction has been instituted for revising similar decisions."

Thus The Hague Court, in its judgment, lays it down that, according to the law of The Hague, the usurpation of jurisdiction of the award is not a cause of nullity, for, once given, the sentence is final, without any party being able to avail itself of a cause of nullity. It is the principle of respect for the decision, whatever may be its defect, whether it be overstepping, or non-accomplishment—by reason of a wrong interpretation, or failure to apply the compromise—of the powers of the arbitrator. Article 81 is precise. It is a text which, as far as the Court is concerned, leave no room for doubt.

The Court does not invoke the Preliminary Work of the Convention. The Text (article 81) suffices for it, in what it affirms. Incidentally, it does invoke it in denying : " Further (this is here only a

(41*) Affair of the *Orinico Steamship Company*, cf. Lammasch, *Die Rechtskraft internationaler Schiedssprüche*, 1913, p. 192. G. Scelle, *Une instance en révision devant la Cour de La Haye. L'affaire de la Orinico-Steamship Company, Revue générale de droit international public*, 1911, p. 164. William Cullen Dennis, *The Orinico-Steamship Company Case, American Journal of International Law*, V., p. 35.

subsidiary) no jurisdiction has been instituted for revising similar decisions."

No right without action. No nullity without a judge: to this formula, which we have seen develop and in particular affirm itself to its full extent at the Hague Conference of 1899 [42], the Court of The Hague in 1910 gave its formal adhesion.

Not only then is it not permissible to claim the existence of usurpation of jurisdiction, without offering a new instance, to take cognisance of it, but the other party is not bound to reply to this offer of a tribunal.

This is the law of The Hague: a strict law, but all the more favourable to the development of the permanent Court in that the obligatory jurisdiction of the permanent Court is imposed in view of the necessity for a superior judge at law. Whoever may consider the solution too rigorous, although the parties are definitely responsible for the judges whom they appoint, must not forget that the authors of the text conceived of it as a provisional solution.

It is further always lawful for the parties to come to an understanding for creating a new instance by which alone the first decision can be *revised,* according to the terms of the decree. Until it has been revised, this decision remains valid. But although the fact of invoking a cause of nullity does not confer the right to create this instance, the party benefiting by the decision may be willing to institute it to decide whether the award is not, for reasons of fact and law, vitiated by nullity.

This is precisely the object of the agreement between the United States of America and the United States of Venezuela, dated the 13th February, 1909.

What does the decree say?

"Whereas, in the case, the award having been charged with nullity, *a new compromise was made between the parties under date of the 13th February,* 1909, in accordance with which, without taking into account the final character of the first award, this tribunal is called upon to decide whether the award of the Umpire Barge, is not, in virtue of all the circumstances, and in accordance with the principles of international law, vitiated by nullity, and whether it is to be considered as so conclusive as to exclude any new examination of the merits."

There is more: it is not only the instance which the parties are to create for making nullity possible; it is the cause of nullity formally invoked by one of them, which they must, the one as well as the other, accept in derogation of the Hague Convention which binds them and does not admit it.

The decree specifies:

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(42) Cf. *supra,* p. 35.

"Whereas by the compromise of the 13th February, 1909, the two parties admit, at least implicity, usurpation of jurisdiction and essential error as defects involving nullity of an arbitral award."

Finally, the Court, after having pointed out that the parties here admit usurpation of jurisdiction, analyses its elements as follows : "The usurpation of jurisdiction may consist *not only in deciding a question not submitted to the arbitrators,* but also in misinterpreting the imperative decisions of the compromise with regard to the manner in which they must arrive at their decisions."

Even when the arbitrators go so far as to decide *a question not submitted to them,* their award, given according to the rules of the Hague, has the force of law unless the parties come to an undestanding to create a new instance, and thus soften, by the acceptance of a precise cause of nullity, the rigor of the Hague Convention, which disallows them all by a silence of rejection—a considered, intentional, deliberately eliminatory silence.[42]

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No more precise interpretation could be given. Nor any more authoritative interpretation either.

M. Lammasch, later, had to include it in a book of theory [42*]. The author's book will confirm the decision of the judge.

But the decision of the judge gives to the interpretation which has become a decree of the Court, in motives which are the very foundation of the disposing portion, an authority which none of the Powers signatories, to the Convention of the 18th October, 1907, can henceforward ignore.

Other States are bound, even as the United States and Venezuela, by the Convention of the 18th October, 1907.[43]

The Hague Court has interpreted it in the sense that the signatory Parties can only have arbitrations arranged for their benefit, attacked on the ground of usurpation of jurisdiction, on condition of waiving the "*chose jugée* by the arbitral tribunal. This renunciation has for its condition the willing acceptance of a new tribunal. Until the constitution of this new tribunal, in accordance with the Hague Convention, the presumption *res judicata pro veritate habetur,* except in the case of express stipulation, holds good.

Such is the interpretation of the Hague Convention.

Now, the Hague Convention relating to the pacific solution of international conflicts is at present in force between Roumania and

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[42*] Cf. *supra,* p. 43.

[43] J. Brown Scott, *The Hague Conventions and Declarations of* 1899 *and* 1907, *accompanied by tables of signatures and adhesions of the various Powers and texts of reservations,* New York, 1915, pp. 84 and 85.

Hungary. Roumania has not only signed, but ratified it [44]. Hungary is here confronted with the rights and obligations of Austria-Hungary, which, formerly, had done the same.[45]

The interpretation of the Convention by the Court of The Hague (Orinico affair) applies to every State bound by this convention, if not with the authority of the *" chose jugée,"* since this has no effect with regard to third parties, at least with the authority of an official reading in an authentic document, by recognised authorities.

This interpretation has the more force because the award emanated from judges, of whom two out of three [46] had been members of the Conference, whose work had resulted in the Convention, of which the application was in question.

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Finally, it is advisable to make some additional comments.

(1) The questions of jurisdiction are not, in accordance with the Conventions, practice and judgment, separable from the merits of the case. In the *Orinico* case usurpation of jurisdiction was only alleged after the decision pronouncing the final condemnation. The Court specified that the question was to determine " whether (the award) should be considered as so conclusive as to exclude any new examination of the merits.

(2) A wrong judgment on the question of jurisdiction must not be confused with usurpation of jurisdiction. This solution arises from Article 73 of the Convention, which is in the following terms: " The Tribunal is authorised to determine its jurisdiction in interpreting the compromise." It may, further, invoke the decision of the 25th October, 1910, in its statement of reasons: " Whereas the appreciation of the facts of the case, and the interpretation of the documents was *within the jurisdiction of the Chief Umpire, and his decisions in so far as they are founded on such interpretation are not subject to revision by this tribunal whose duty is not to say whether the judgment is right or wrong, but whether the judgment should be annulled."*

(3) Every point on which the Parties plead may be settled by the judge in one sense or the other without usurpation of jurisdiction, since this can only arise at the moment when the judge touches on a point which the party does not propose to discuss before him; in fact, every discussion which may lead to the answer " lack of jurisdiction " has, as its logical corollary, the rejoiner " jurisdiction " whatever may be the previous denial of the party, a unilateral, comminatory denial, irreconcilable with the equality of the claimants and the dignity of the judge.

For all these reasons it can be explained why the partisans of the Roumanian thesis on usurpation of jurisdiction of the 10th January have maintained silence with regard to the law of The Hague.

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(45) 27th November, 1909.
(46) Messrs. H. Lammasch and Beernaert.
(44) 1st March, 1912.

Neither the Conferences, nor the Hague Conventions, were favourable to their views. Quite on the contrary, they pronounced formal condemnation of them [47] in very many respects.

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But it is not with any individual question—but with a question of principle—that we are concerned here.

It is on this question of principle that, ignoring the too easy question of particular cases, that an opinion must be pronounced by a conclusion that makes it possible at the end of the third period of the problem—the last before the League of Nations—to take stock of the progress accomplished.

More severe than the Institute of international law, the Hague Conferences only admit very limited causes of nullity. Like the Institute they only accept causes of nullity subject to the reserve of a court. More strict than the Institute, they take it that the losing party has no right, in offering arbitration, to have its claim accepted in proof of usurpation of jurisdiction. Moreover, no more than the Institute, do they admit that the decision on jurisdiction, after discussion of the latter by both parties, can be described as usurpation of jurisdiction, but only as an error of law. No more than the Institute will they tolerate that the error of law on jurisdiction should ever be confused with usurpation of jurisdiction.

In affirming these principles, historical criticism recognises the persistance here, since the end of the XVIIIth century, of three invariable ideas.

The first invariable idea : no interruption of the instance by reason of usurpation of jurisdiction in a preliminary judgment before the procedure has run the whole of its course and reached its term, i.e., the final judgment on the merits.

The second invariable idea : no usurpation of jurisdiction because of a decision on jurisdiction by the application, even incorrect, of the text of the compromise, the error of law being, even when essential, in every case distinct from excess usurpation of jurisdiction.

The third invariable idea : no usurpation of jurisdiction in the answer made, by yes or no, to the question of jurisdiction pleaded before the judge.

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[47] M. Georges Scelle, *Une sentence de révision devant la Cour de la Haye, Revue générale international public,* XVIII., 1911, p. 186, writes : " The solutions adopted at The Hague in 1899 and 1907 are not those of the majority of the writers." And further, p. 188 : " Can it be said that The Hague Convention is really the expression of international law? It seems that it is only a fragment of the expression of it." Between non-signatory Powers this observation may have some value. As between signatory Powers it obviously has none. Mérignhac, quoted by the writer, *Traité de l'arbitrage international,* p. 312, writes (1896) before the law of The Hague. He recommends, however, the submission to arbitration of the dispute on the question of nullity : an excellent argument, which he does not fail to develop, in favour of a Permanent Court. Weiss, quoted, same *Revue,* 1910, p. 105 et seq., *L'arbitrage de* 1909 *entre la Bolivie et le Pérou,* did not think it necessary to make use of the Convention of 1899. From what precedes it would result that certain authors, and certain practices do not interpret the law of The Hague differently from previous laws. This is an error into which M. Scelle is careful not to fall : " It is no longer a question of usurpation of jurisdiction," he says, p. 188. His interpretation of the Law of The Hague agrees, therefore, in all points with that which later the President of the Arbitral Tribunal of 1910 will be found to give very fully in *Rechtskraft.*

To escape this triple result, there is only one way : that used by the Powers in the Alabama affair in respect of the celebrated question of indirect damages, i.e., to discuss the question apart from the judge.[48]

About these three invariable ideas there is, as from now, nothing more to be said.

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But, subject to these invariable ideas, which are also subsidiary, there remains the principal question : that of usurpation of jurisdiction properly so-called.

To this question the law before that of The Hague gave as answer what M. Asser called the initiative : in case of obvious usurpation of jurisdiction the liberty for the party pleading to refuse the execution of the award, provided he offers a new arbitration, either on the question of alleged usurpation of jurisdiction, or of the merits, or on both. To this same question the law of The Hague answers by refusing even this faculty. The award, whatever it may be, remains unassailable : respect for arbitration, its pacific virtue which desires that it should be absolute, final and without possibility of return or revision, demands it. But the law of The Hague does not hide the fact that the rigour of this system is only a *pis-aller,* an interim solution in the hope that a Court may possibly be formed which, at least with regard to the question of law, will have a jurisdiction for annulation attributed to it in advance : a pre-established, obligatory jurisdiction.

That which the League of States, delayed by the intransigeance of sovereignty to the optional jurisdiction of the permanent Court, could not do, the League of Nations, equipped with greater resources, should, logically, tend to realise.

II.

In the League of Nations.

With the League of Nations, the old problem, almost insoluble in the League of States—that of nullity by reason of usurpation of jurisdiction—may in the future find a solution. When an arbitral tribunal, of whatever nature it may be, finds itself reproached with having committed infractions against the compromise, it is indispensable that a new instance, superior to the first, should be seized in order to take cognisance of the alleged nullity. No nullity without another jurisdiction, which normally should be organised as a superior jurisdiction : that was the conclusion of the Peace Conferences of 1899 and 1907. But in order to fulfil the expectation of the parties affected, such a Court should be to a greater and better extent than the Permanent court of arbitration a Court of law, like that Court of arbitral Justice with which the Powers, at the second Conference, had attempted to supplement the first. Goldschmidt had already pointed it out [48*]. The examination of the cases of nullity, less grave than those of the examination on the merits, could,

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[48] A. de Lapradelle and N. Politis, *Recueil des Arbitrages Internationaux,* vol. II.

[48*] *Supra,* p. 24.

more easily than the question of the merits, be submitted to obligatory arbitration, always on condition that this examination, which was of an exclusively juridical order, should be the work of a court specialising in law.

An American, Morris [49], happily remarked, immediately after the Orinico affair, that the examination of an award, from the point of view of nullity, is an essentially jurisdictional act. Donker Curtius, a Dutchman, insisted, immediately after the Second Conference, on the creation of a Court of law, and pushed the idea as far as the hypothesis of an international Court of cessation.[50]

Now, it was just this Court, which is really a Court and really permanent, which was created. Article 14 provided for it. The Council prepared for it, the Assembly voted for it and the Powers accepted it. It was created; it judges; it gives consultative opinions to the Council and, eventually, to the Assembly. Not only does its composition, eminently juridical suit it to take cognisance of causes of nullity, but its jurisdiction, without being obligatory, even in questions of a purely juridical character extends itself, none the less, step by step, to a large number of problems [51], so that the actual progress of arbitration must bestow on it, first of all the optional and then the obligatory cognisance of the causes in nullity. The Court of arbitration of The Hague could not do it; being neither sufficiently *permanent*, nor sufficiently *judical*, it was born during a period in the history of international arbitration, when the latter could only tend towards permanence without claiming obligatory force. Now the circumstances are entirely different. Even as within this new framework of the League of Nations (where the equality of the members is not in contradiction to the co-existence of the Assembly and of the Council) it became lawful to have Judges elected simultaneously by the Assembly and by the Council, and thus o solve one problem—the nomination of judges—which had remained without solution in the League of States, even as, thanks to the creation of the permanent Court of international Justice, a real Court and really permanent, it is henceforward possible to conceive of an instance dealing with nullity.

Hitherto nothing decisive has been either provided for or asked for in this respect.

But, already, instinctively, a movement is stirring in this direction.

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In 1926, in the question of the Maritza, between Greece and Turkey, the Council of the League of Nations had an opportunity of witnessing it.[52]

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[49] Robert C. Morris, *International arbitration and procedure*, New-Haven, 1911, p. 156.

[50] Cf. Donker Curtius, *Revue de Droit International*, 1910, p. 33: " It is not another instance that we wish to introduce into the case; it is an instance that is placed above it. The regularising Court will not decide on the right of the parties; it will decide on objective law with the principal duty of stating the law as it actually is. The cassation of the decree would be the equivalent of a new fact."

[51] With regard to this extension see de Franqueville, *La Cour permanente de justice internationale et son œuvre*, I., Annexes, *Adde, infra*, p. 456.

[52] *Société des Nations, Journal official*, VIIth year, No. 4, April 1926 (Minutes of the Council), p. 511.

Article 5 of the Treaty of Lausanne of 24th July, 1923, entrusted to a Commission of delimitation the duty of tracing on the spot the frontier described in article 2 of the Treaty. This Commission, composed of the representatives of Greece and Turkey, with one representative for each Power, and a President chosen by them from among the nationals of a third Power, takes binding decisions by a majority of votes. While it was proceeding to its operations, the question arose whether the western arm or the eastern arm of the Maritza, considered as the principal arm, should form the frontier. Greece and Turkey here did not agree. Now, even before the Commission had pronounced judgment, the Hellenic Government, being of opinion that if it were to make the boundary on the western arm, the Commission would exceed its powers, and would thus render itself guilty of a violation of the rights established by the Treaty. Consequently, it brought to the knowledge of the president of the Commission that, in this case it would be obliged to have recourse to the Court to demand the interpretation of the Treaty on the point in dispute. As can be seen in the minutes of the thirty-sixth session of the Commission, the latter decided to suspend its work on the ground to wait for the opinion of the permanent Court. At the same time, the Hellenic Government did not fail to propose to the Turkish Government to defer this question, which is connected with the interpretation of the Treaty of Lausanne, to the permanent Court of The Hague. The Turkish Government declined this proposal.

On 24th February, 1926, the Greek Minister of Foreign Affairs telegraphed to the Council : " If the Commission provided for by article 5 of the Treaty of Lausanne has discretionary power in a matter of delimination, it is on condition that it operates within the bounds of the Treaty. It cannot, without usurpation of jurisdiction, infringe those provisions. The Government of the Republic, desirous of finding a common ground of agreement, has proposed to the Government of Angora to have their difference which affects a point of interpretation of a treaty, solved by the permanent Court of international justice at the Hague. The proposal having been declined, the Hellenic Government has the honour to seize the Council of the League of Nations of the above-mentioned difference, and begs it to refer the same to the Court of the Hague for a consultative opinion, in conformity with article 14 of the Covenant." On 16th March, 1926, before the Council, the representative of Greece, Mr. Dendramis, developed the Greek point of view. He said in particular : " The delimitation commission can decide authoritatively by a majority only with the limits indicated by the Treaty; it cannot therefore *revise* them arbitrarily; it would commit an *evident usurpation of jurisdiction* and *it would infringe upon the sovereign rights of Greece.*"

Greece was not content with invoking the error in law, but (*a*) the attack on territorial sovereignty; (*b*) the contradiction of texts, carried to the point of revising the treaties; (*c*) the flagrant error : which its representative calls the *evident* usurpation of jurisdiction, which is a hardly noticeable variation of the formula at which, according to Vattel, Mr. Politis stopped short in his *Justice internationale* (*exces de pouvoir flagrant*).

Nothing is more significant than this manner of interpreting procedure. On the other hand, Greece does not wait for this " usurpation of jurisdiction " to occur before asking the Commission to suspend its labours. *In contrast to Roumania, which, in our case, having allowed the mixed arbitral tribunal to give judgments,* attempts to stop the

mixed commission before it has declared itself by a formal decision, obligatory binding the parties. In proposing to refer the question of arbitration to the permanent Court at once, she recognises that, the decision once given, she would not be confronted with nothingness (in spite of the *usurpation* of power, a usurpation bordering on the *revision of treaties* which would infringe the sovereign, territorial) rights of Greece. This proposal, previous to the pronouncement of the award, would have been made by Greece after the pronouncement, if it had been what she feared. Hence, for anyone following the course of history, this consequence, which, forming part of the series of historic precedents, the demand of Greece recognises—not only that usurpation of jurisdiction is not to be confused with wrong judgment, especially on a point of jurisdiction, but that no one can claim usurpation of jurisdiction without formulating that which, in our case, Roumania does not do—the proposal for an instance.

A proposal declined by the Turkish Government.

Chukri Kaya bey, the representative of Turkey, declared to the Council: "The Treaty of Peace, having instituted a jurisdiction with the power of taking decisions obligatory to both Parties, these decisions must be observed. . . . . The Commission of delimitation being entrusted by article 5 of the Treaty of Peace with the duty of tracing the frontier on the spot, and having the right of taking obligatory decisions, it is obvious that it has to play the role of arbitrator in everything concerning disputes relative to the tracing of the frontier.

"As regards the intervention of the permanent Court of international Justice, I content myself with observing that the creation of a special jurisdiction contemplated above excludes any other contentious methods."

Speaking again, Mr. Dendramis then explained that "the Commission of delimitation does not constitute a jurisdiction, but an organ of execution, composed of technical experts and not of jurists."

Munir bey replied: "The Treaty of Lausanne has instituted a jurisdiction."

Mr. de Mello-Franco, the reporter, proposed to the Council that it should be allowed to obtain the assistance of two or three jurists belonging to various delegations.

"In the opinion of the jurists, it is the function of the Commission itself, under the terms of articles 2, 4, 5, and 6 of the Treaty of Lausanne, to determine the frontier in conformity with the indications of the Treaty. . . . The Commission has power to take its decisions by a majority of votes. It is also its function, as well as that of each one of its members, to assist itself if it judges it necessary for the accomplishment of its mission, by means of the opinions of persons competent for the examination of any special questions which may arise. It is only when, having exhausted all these means of information, the Commission should declare that it has doubts too serious to allow it to pronounce judgment on the questions before it, or when it had committed a *flagrant usurpation of jurisdiction,* that it would be the duty of the parties to seek a way of settlement of these difficulties, in conformity with international law."

Messrs. Botella, Krcmar and Rolin detached themselves from this opinion of the jurisconsults called into consultation by the Council, and confirmed a certain number of principles: (1) arbitral jurisdiction is called upon to decide on its own jurisdiction, and its decision, even if erroneous, is binding; (2) From the point of view of the grievance of usurpation of jurisdiction, the examination of a jurisdiction is not a preliminary question to be detached from the whole of the dispute, it can only arise within the limit of the duties of the judge, and in view of a solution on the merits; (3) To attack the decision, neither the error on jurisdiction nor even any kind of usurpation of jurisdiction is sufficient, but, in accordance with the words of the representative of Greece, an *evident usurpation of jurisdiction,* and according to the three jurists of the Council—a still stronger term—a *flagrant usurpation of jurisdiction.*

(4) This flagrant usurpation of jurisdiction could not be abandoned to the discretion of the parties.

This last solution would moreover result from the practice of the Council and the jurisprudence of the permanent Court: both in effect refuse to leave to the parties the exclusive, unilateral definition of the acts to which they claimed to attribute or deny effect.

(5) In the case of a *flagrant usurpation of jurisdiction,* it would be the duty of the parties to seek a *method of settlement,* in conformity with international law.

This last formula is prudent, vague, It affirms that there is not, here, in advance, any pre-constituted jurisdiction.

The permanent Court is naturally called upon to play this part.

It has not yet done so.

The law of the Hague remains in force.

It supposes, in such case, a common effort to find a method of settlement.

If not, the decision remains in force.

In this rule the Commissioners neither acquiesce, nor do they contradict it.

They refer it to international law.

The moment has not come, for them, to define it precisely.

But it is one point on which the three jurisconsults, asked for their opinion, speak in formal terms. The institution of the League of Nations must not weaken the force of arbitration.

Greece had believed it possible to beg the Council to ask the opinion of the permanent Court of international justice on the question, not of a possible usurpation of jurisdiction, but of the merits (the two problems, moreover, being in fact connected), that is to say, of choice between the two arms of the Maritza.

Turkey opposed this.

Chukry Kaze Bey: " It will not escape the enlightened attention of the members of the Council that in virtue of the resolution adopted by it on 24th January, 1924, the request of the Hellenic Government should be rejected. In effect, according to this resolution, when a

difference is, contrary to the terms of Article 15, para. 1, brought before the Council at the request of one of the parties, even when this dispute is already the object of arbitral or judicial proceedings of any kind, the Council must refuse to proceed with the examination of the request.

The jurists agree : It is not possible for the Council to consider *at the present moment* the question according to the terms of Article 11, para. 2, of the Covenant.

For this, it is necessary to await the end of the work of the Commission and the flagrant usurpation of jurisdiction.

And the delegate of Greece acquiesced in his turn : " In the case, which is hard to conceive, that the Commission should commit a usurpation of jurisidiction, the Hellenic Government will use the means provided by international law."

But he added : " Among these means appears recourse to the Council of the League of Nations."

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What, then, would be the powers of the Council?

Here appears the difference between the League of States and the League of Nations.

In the League of States, it is each one of the disputing States which must assure the execution of the arbitral decision by the means at its own disposal.

In the League of Nations, on the contrary, the formation of a central organ, the Council, makes it possible to give to the execution of the arbitral sentence a character no longer individual, but social, with, consequently, a guarantee of collective action.

Article 13, Section 4, para. 2 : In default of the execution of the sentence, the Council proposes the measures which must ensure its effect.

But, as soon as this question of execution arises, is not the Council called upon to cast an eye on the award, and, naturally, be induced to consider its force? From that moment, there might be temptation to say that in the League of Nations the causes of nullity of the award, and notably usurpation of jurisdiction are assured of finding, by the Council, an instance.

Should it appear to the Council that the usurpation of jurisdiction is flagrant, it would not propose any measure for assuring the effect of the decision.

A dangerous temptation, a grave abuse.

To act in this way would be, on the part of the Council, to constitute itself the judge.

The whole League of Nations is, essentially, based on a fundamental distinction : written in the drafts of the League of Nations, from the *League to enforce peace* to the last official texts, English and American, of the Covenant, the distinction between the judicial and the executive is fundamental. The Council prepares the project of the permanent

Court. The Council and the Assembly, in accordance with the statutes of the Court, appoint the judges. The Council procures the execution of the award. An organiser of justice, it is not the judge; it cannot give judgments.

Is an example desired?

According to the terms of the statute of the permanent Court, this Court, in sovereign fashion, decides (Art. 31 and others of the Statutes of the Court, Geneva, 16th September, 1920).

Now, if the Council, entrusted with the duty of assuring the execution of the decisions of the Court, were able not only to postpone the putting of them into effect for reasons of convenience, but deliberately to prevent their execution by reason of lack of jurisdiction or of usurpation of jurisdiction, the authority of the Court would be subordinated to that of the Council, the judgment of the Court would become assimilated to a simple opinion—a manifestly inacceptable solution and one which could not be discussed.

The solution could not be different in regard to the other arbitral tribunals.

In effect, they derive from their rules the same power of deciding on its jurisdiction which the statutes allow to the Court.

It is particularly so in the case of the mixed arbitral tribunals. According to the terms of their rules, they are the only masters of their jurisdiction, exactly in the same terms as is the permanent Court, according to its statutes. [53]

No decision, on the merits, given by them, can, any more than a decision of the Court, be followed, on the grounds of over-stepping of jurisdiction, by a refusal of legal execution on any authority whatsoever.

From the moment when the Council cannot deliberately refuse to execute a decision of the Court (subject to its seeing in what manner, at what moment and by what means to assure it), it can no longer refuse the execution of the decision of a mixed arbitral Tribunal.

What has just been said of mixed arbitral Tribunals should be said also of every arbitral jurisdiction.

What has been said of the cause of nullity on account of lack of jurisdiction ought to be said equally of the cause of nullity for any other motive.

This is the consequence of the great principle of the independence of the judge.

Without doubt, the independence of the judge is only the sovereignty of justice, and this the sovereignty of right and equity.

With doubt this sovereignty is only exercised by the creation of a *chose jugée,* which declares the law, without going as far as the injunction directly addressed by the judge to an authority which makes it effective : the arbitral decision has no executory force.

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[53] A. de Lapradelle, *Recueil de la jurisprudence des tribunaux arbitraux mixtes,* vol. II., Cpr. Trianon, art. 239 *g.*

But, as the authority which pronounces the award cannot execute it, nor enjoinder for its execution, there still remains the fact that it exists. The force of a *chose jugée* has its authority independently of the executory formula.

It would be to attack the value of the award to allow the person exercising the power of constraint to arrogate to himself, at the moment of bringing it into execution, a right other than that to verify its authenticity.

It is manifestly contrary to the authority of the *chose jugée* to profit by Art. 13, § 4, in order to give to the Council the incidental right of re-examining the causes.

At most, when there are contradictory motives, conflicting enacting clauses, the question might arise of remitting the matter for interpretation to the judges from whom the award emanates.

At most, again, the Council could, in case of flagrant usurpation of jurisdiction, use its persuasive influence to induce the winning party either to re-examine the evidence of usurpation of jurisdiction or, at least, to come to an understanding with the other party for accepting, on this point, the judge whom the other party must propose, and whom, strictly speaking, the winning party can refuse.

Finally, what is new in regard to usurpation of jurisdiction in the League of Nations is that an executory agent, i.e., the Council, can, before proceeding to act urge on the parties the organisation of a judicial procedure.

In this respect the law of the Covenant is at a certain distance from the law of The Hague. Not only does it create a Court, entirely optional, a judicial Court, to which it is easy for the parties to address themselves, but on the other hand it creates, if occasion arises, a persuasive authority, with a certain power of constraint, since the Council may consider it not advisable to proceed to the execution as long as a serious doubt, not judicially settled, can exist concerning the obligatory force of the award.

According to the Hague Conventions, the signatories have the right to refuse to organise a new instance for the purpose of taking cognisance of the cause of nullity, notably in the case of usurpation of jurisdiction. The Council may, in its capacity of ultimate executant, persuade them to organise arbitration, in notifying to one of the parties, in advance, that, in the contrary case, it would postpone giving satisfaction to its demand of execution.

If, in fact, the parties are bound by the Hague Convention, and cannot, at once, seize the Council of their dispute with regard to the obligatory force of the award, the Council can always, *ex-officio,* seize itself of it, if not directly, at least on the demand of any member of the League, within the meaning of Art. 11, § 2.

It is only by the intervention of a third party that the question could be raised, under this form : the interest which lies in persuading one of them that there is reason to accept the arbitration.

But, in the terms of Art. 13, arbitration being optional, there is no way of imposing it on the parties.

Besides, the Council can undertake nothing against a decision of a Court of Justice.

Respect for the *chose jugée* dominates everything in the League of States, as in the League of Nations.

It is therefore not the institution of the Council, an executive organ, not a judicial one, that can give to the usurpation of jurisdiction the sanction of an effective nullity.

It would be in vain to assert that, in what concerns the mixed arbitral tribunals, the Council has special powers derived from the treaties, according to the terms of which it must in the interests of its mission itself, accomplish certain obligations which are laid down for it.

Thus it is that the Council is called upon to appoint judges to complete the tribunal (Art. 239—Treaty of Trianon).

Can it use this mission to give a sanction to a recognised usurpation of jurisdiction?

Let us take the question in the case of the *Betsey,* or in that of the Roumano-Hungarian affair : one party withdraws its arbitrator; can the Council sanction this act by refusing to appoint a substitute? What the party that opposes the appointment asks from the Council is to act as an instance in the case of usurpation of jurisdiction.

Now, the Council has nothing but the right of nomination of the judge; that is to say, a right to participate in the organisation of the Court. It has not the right to deliberate on the judgments, nor to draw them up, nor to revise them. The judge depends on it for his appointment. The judgment does not depend on it for the drawing up of the award.

The Council cannot deduce the right of revising the judgment from the right of appointment. If, for the purpose of sanctioning a usurpation of jurisdiction, the Council could really refuse to appoint a judge, it would itself commit an abuse of power. The famous theory of abuse of power in French administrative law is well known. It is not possible to use a jurisdiction granted for a certain object in order thereby to satisfy another one, however legitimate it may be. For example, it is not permissible to avail oneself of a police power in the interests of the Exchequer.

The powers of the Council in the matter of completing the mixed arbitral Tribunal are powers of appointment.

The person nominating the judge cannot attach to this appointment any condition to judge in one sense or another.

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To a certain number of questions put by the Hungarian Delegation at the Peace Conference, the Allied and Associated Powers replied :—

Article 250.—The various observations presented by the Hungarian Delegation relative to the treatment given by Roumania and Czecho-Slovakia to immovable property constitute a question of an interpretation of the Treaty of Peace which cannot be settled at the moment.

The Allied Powers have, further, no objection against recourse to the Mixed Tribunal proposed by the Hungarian Delegation for the settlement of disputes relating to the restitution to the nationals of the

former Kingdom of Hungary of their property, rights and interests situated in transferred territory, as is provided for by Art. 250 of the Treaty.

In consequence they are in agreement to complete this Article by means of the following words :

" Complaints which may be introduced by Hungarian nationals in virtue of the present Article shall be arbitrated upon by the mixed arbitral tribunal provided for in Article 239."

However narrow may be the conception of the maxim *extra compromissum arbiter nil facere potest,* it is clear that the solution of the question put, as to the application of the agrarian reform, constitutes a question of interpretation of Article 250 of the Treaty. It is impossible therefore that there could be the slightest usurpation of jurisdiction in accepting it.

The jurisprudence of another mixed arbitral tribunal, the Hungarian-Czecho-Slovakian Tribunal, the only one which, apart from the Roumano-Hungarian one, can be seized of the same question, has expressly recognised it.

It has done so in characteristic terms.

A Hungarian, suffering from the application of the law on Czecho-Slovakian agrarian reform, asked the Tribunal to take preserving measures for the protection of his rights. The jurisprudence of the mixed arbitral tribunals admits that, without previously pronouncing on the question of jurisdiction, the president and, should the case arise, the tribunal may order all measures of this kind, even when it is not yet itself certain that it has jurisdiction. It is sufficient that the question should be doubtful, but, precisely, as soon as the question is doubtful it becomes part of the compromise without which there would never be according to the saying of Vattel, any arbitration. Such is the solution of President Schreiber (Order of the 17th October, 1927) and of the whole tribunal (judgment of the 28th January, 1928). [54] The terms of the award of the 28th January are characteristic. Having carefully weighed them, it declares : " It suffices that the lack of jurisdiction should not be manifest, evident. It is clear that in this case the tribunal cannot discuss the matter, but in this case the tribunal is seized of a demand emanating from persons possessing Hungarian nationality, and based on Art. 250 of the Treaty of Trianon, in which the jurisdiction of the tribunal is expressly laid down."

In this thesis, there is, moreover, no trace of an opposition, in the form of a dissentient opinion, from the Czecho-Slovakian Arbitrator. There is therefore, in the decision of the 10th January, 1927, no usurpation of jurisdiction even according to statements of another tribunal, implicitly seized with the question.

Besides, how could it have been decided otherwise?

Is it not the members of the Council of the League of Nations themselves who have recognised this in declaring themselves, after the anonymous opinion of eminent jurists, ready to proceed to the appointment of supplementary arbitrators, limiting their jurisdiction, as regards the application of Art. 250 to the cases of agrarian reform, to the search for a differential treatment. To limit this jurisdiction, denied

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[54] Cf. *infra*, p. 459.

by the Roumanian arbitrator in his dissentient opinion, is to recognise it. It is not the function of the Council to give instructions to the judge; still less to subordinate the nomination of arbitrators, in the terms of Art. 239 of the Treaty of Trianon, to instructions which would constitute an indescribable attack on their independence. As soon as the examination of the agrarian reform enters, to whatever extent, in whatever manner, and from whatever point of view, into the jurisdiction of the arbitrator, it is clear that it enters into it absolutely, with regard to the whole, since the restriction proposed by the jurists, whose opinion the Council has followed, not basing itself upon any precise text, can only be the result of the interpretation of Art. 250, that is to say, the work of the judge.

In deciding thus, the members of the Council of the League of Nations have themselves recognised that there was in the decision of the 10th January, 1927, in spite of the Roumanian accusations, no usurpation of jurisdiction.

In delivering judgment on the question which the Allies expressly entrusted to him, and in which, eventually, the Council, except for directing it there—which is inadmissable—supported him, the judge remains within the terms of the compromise.

None the less, it is the fact that, on the occasion of the arbitral decision of the 10th January, 1927, the question of usurpation of jurisdiction was directly put in terms which go beyond the horizon, however wide it may be, of the far-reaching Roumano-Hungarian conflict.

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From the manner in which the highest authorities on international law have treated it, it has been possible to see how this question still remains, at the present moment, almost unknown, misunderstood, obscure.

In the League of States, the individual and collective theory of the practice of States, the decision of the great Conferences have laid down principles, which, however, cannot be misunderstood.

I.—First, *the principle that the judge has the jurisdiction of his jurisdiction,* with these three consequences :—

1st. That he remains within the terms of the compromise when, whether *ratione personæ,* or *ratione materiæ,* he rejects the objection formulated by the defending side, when basing himself, in discarding it, on the terms of the compromise (here Article 250 of the Treaty of Trianon);

2nd. That every question pleaded before him, by one side or the other, is by this very fact submitted to his jurisdiction, so that his decision on a question of jurisdiction, is, in advance, accepted in that it affirms, by the very fact that it has been claimed in what it denies : without which there would be neither equality of parties nor indeof the judge;

3rd. That, consequently, every reserve made by the party as to the application of the preceding rule is null, as implying an intolerable pressure on the judge, a pressure which, even in the case of a declaration denying jurisdiction, would raise the question of nullity of the award by reason of moral constraint (more grave and more practical

than corruption), exercised not only on a judge but on a court : usurpation of jurisdiction would then exist, but by the party on trial, not by the judge.

II. Next, the principle that as soon as the judge, or better still, the tribunal, is appointed, in virtue of a compromise, by common agreement, duly made between the parties, all the acts of this judge or of this tribunal, at the seat of its jurisdiction, are official acts which, even in the case where powers are exceeded, are of themselves valid until they are disputed; the right to dispute may, by an understanding between the parties, be expressly denied, in the very interests of arbitral justice, either in virtue of a special convention, or in virtue of a general convention, like that of The Hague (18th October, 1907); but which, if it has not been refused, by a previous agreement, or at least by a subsequent one (in the case of ratification), supposes :—

1st. That the party which raises the cause of nullity finds itself in the presence of an attack, not abstract, but concrete, not hypothetical, eventual, but certain and present on its rights, whence follows the consequence that a preliminary judgment, whatever it may be, and especially on jurisdiction, cannot, subject to a disposition to the contrary in the compromise, be the subject of any appeal;

2nd. That the party which invokes the cause of nullity cannot, without contradiction or arbitrariness, itself so describe this cause and escape, on that ground, the obligatory character of the arbitral award, and is from that moment, bound to offer the other party a new arbitration and *cause it to be accepted by it* (which offer M. Gajzago, the Hungarian representative, made, without being bound to do so, in the best spirit of conciliation, on 7th March, 1927);

3rd. That, in case of doubt, the cause of nullity, in fact or in law, is not presumed.

III. Finally, a third and last principle : to invoke usurpation of jurisdiction, the judge must have gone beyond his mission, not by a simple error, but by a grave, manifest default, in a case on which doubt is not even conceivable, whence these two consequences :—

1st. That there must be, in case of doubt, a presumption in favour of validity, as regards the merits, of the sentence which, in other respects, is valid in its form;

2nd. That, in order to prevent one party from availing itself of the alleged nullity of the sentence, in order, indirectly, to dispute its validity, there must be, according to the saying of Vattel, an abdication by the judge of his quality of judge : that is to say, a professional fault so serious that he can, in any case, no longer judge, whence this application that every demand which leaves expressly to the judge, between the same parties, in other matters, before a mixed Commission or a mixed arbitral tribunal, the power of sitting, is an implicit renunciation of the right to invoke the usurpation of jurisdiction which, by reason of a manifest error, or abdication of the mission, according to Vattel, supposes a grave fault.

Such principles are, and remain, settled.

Certain brief affirmations, such as we recalled at the beginning of this study, cannot shake them.

It none the less remains that, in the present state of positive law, one difficulty persists.

The great rule : " No claim without judgment ; no nullity without an instance " leads to this dilemma :

Either nullity must be renounced, for lack of a previous organisation of the instance, or reliance placed on the goodwill of the parties to organise this instance.

The Hague Conferences chose the first alternative : excessive, heroic, sacrificing the juridical value of the sentence of any arbitral tribunal to the essentially optional character of the permanent Court of arbitration of The Hague.

The practice of the States, before and after The Hague Conferences, showed their preference for the second alternative : less unyielding and more just, better adapted.

But, if the parties were not to come to an understanding, and one of them could not lodge a claim or had seen the application of the law of The Hague refused to it, the situation, in the League of States, would have been without issue. Here, the League of Nations shows its superiority. It exercises a beneficent function.

In a case of disagreement between the parties as to the admission of the cause of nullity, the League of Nations offers in effect two resources :

The one is already open.

It has three branches, or, if one prefers it, three degrees :

1st. The good offices of the Council to help the parties to look for and find their judge (Art. 11 § 2) ;

2nd. In default of success in these steps, the reminder pure and simple, of the existence of the permanent Court of International Justice, following a procedure similar to that which was included in Article 27 of The Hague Convention of 1899 in favour of the Court of arbitration ;

3rd. The spontaneous official consultation of the permanent Court of international justice, in virtue of Article 14 of the Covenant.

The Council, confronted by a usurpation of jurisdiction seriously alleged, could take no other action.

There remains a second resource : it concerns the present less than the future.

The League of Nations, having supplemented the permanent Court, somewhat diplomatic, of Arbitration of The Hague, with a permanent Court, more technically juridical, of international justice, the parties can, with confidence, address themselves to it, as to a Court which, technically, has a tendency to become obligatory. The progresses of its jurisdiction are great. As a Court of law, regulating proceedings and sovereign mistress of jurisdictions [55], they are unlimited.

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[55] Example of the question of the jurisdiction of a tribunal submitted to the permanent Court of International Justice : the dispute between Bulgaria and Greece on the point of the jurisdiction of an arbitrator appointed in virtue of article 4 of the annex to section IV. of part IX. of the Treaty of Peace of Neuilly of 27th November, 1919, a question settled by the Permanent Court in a chamber of summary procedure on 12th September, 1924.

It is to be recommended to the parties, in their general conventions for arbitration, to provide for the cases of nullity, in accordance with the terms of Article 27 of the Resolution of the Institute of international law, or, better still, of Article 26 of the Russian draft at the first Peace Conference, and to submit them, by obligation, to the arbitration of the Court.

A. de LAPRADELLE.

OPINION REGARDING THE RIGHTS OF HUNGARY AND OF CERTAIN HUNGARIAN NATIONALS UNDER THE TREATY OF TRIANON

BY

GEORGE W. WICKERSHAM.

The controversy between Roumania and Hungary respecting the consequences of the expropriation by Roumania of lands belonging to nationals of Hungary situated in territory which by the Peace Treaty of Trianon was added to the Kingdom of Roumania, has been before the Council of the League of Nations in various forms for nearly five years. The fundamental question involved is whether or not, through the exercise of the power of expropriation, in carrying out a plan of so-called Agrarian Reform, Roumania may take the immovable property within her enlarged domain belonging to citizens of Hungary, formerly occupants of the territory now ceded to Roumania, but who have elected to remain Hungarian citizens, making compensation which is so inconsiderable as to be illusory; or whether these Hungarian citizens are entitled to protection against such confiscation by the terms of the Peace Treaty.

There are a number of subsidiary questions involved, the principal one being the jurisdiction of the Mixed Arbitral Tribunal, created by the Treaty of Trianon, to pass upon the claims of Hungarian optants, and its competence in the first instance to determine the question of its own jurisdiction and the exercise by the Council of the League of Nations of the duty imposed upon it by the Treaty of Trianon to appoint substitutes from whom a vacancy in the Mixed Arbitral Tribunal may be filled; and the power or the propriety of the Council of the League to make the exercise of this duty depend upon the acceptance by Hungary of principles of construction of the Treaty and of the powers of the Mixed Arbitral Tribunal contrary to those which it accepts.

Without setting forth at length the history of this controversy I may say that I have carefully examined all that appears on the subject in the Journals of the Proceedings of the Council of the League of Nations and the reports made to it by Mr. Adatci and by Sir Austen Chamberlain, as Chairman of the Special Committee. I have also examined the decision of the Mixed Arbitral Tribunal and have carefully studied the provisions of the Treaty of Trianon, and the Minority Treaty of December 9, 1919, and I have read the arguments addressed to the Council by the representatives of Roumania and Hungary, respectively. After careful consideration of all of those matters, my opinion upon what I understand to be the crucial points in the controversy is as follows:

I.

The Provisions of the Treaty of Trianon as well as those of the Minorities Treaty protect from Confiscation by Roumania the immovable Property of Hungarian Nationals who owned such Property in that Part of the former Kingdom of Hungary which was ceded to Roumania and who elect to retain their Hungarian Nationality.

The protection intended to be given by the Treaty of Trianon to nationals of Hungary owning land in Transylvania and other parts of that country, which by the Treaty of Trianon are ceded to Roumania, but who elect to retain their Hungarian citizenship, appears from the text of the treaty itself as well as from the history of its formulation.

Article 232 deals with the rights of the Allied and Associated Powers over property of the nationals of the former Kingdom of Hungary. It stipulates that, subject to any contrary stipulations in the Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property which belonged at the date of the coming in force of the Treaty to nationals of the former Kingdom of Hungary and were within the territories of such powers, including the territories ceded to them by the Treaty, or which were under the control of such Powers, and to apply the proceeds in payment to the nationals of the Allied and Associated Powers, as compensation in respect of damage or injury inflicted upon them during the war. The claims made in this respect by such nationals are to be investigated and the total compensation determined by the Mixed Arbitral Tribunal provided for in Section VI, or by an arbitrator appointed by that Tribunal. In other words, by this Section, all of the property of Hungarian nationals which was found in the territory of any of the Allied or Associated Powers, including that part of the former territory of Hungary which by the Treaty was ceded to Roumania, was in effect confiscated by the victorious power and the owner was obliged to look to his own country to indemnify him for its loss.

Section 250, however, provided that the property, etc., of Hungarian nationals situated in the territories which formed part of the former Austro-Hungarian Monarchy should not be subject to retention or liquidation in accordance with these provisions, but should be restored to their owners freed from any measures of this kind—

> " or from any other measure of transfer, compulsory administration or sequestration taken since November 3, 1918, until the coming into force of the present Treaty, in the condition in which they were before, the application of the measures in question."

This provision, read in connection with the provisions of Article 63, giving persons who otherwise would lose their Hungarian nationality under Article 61, the period of one year from the coming into force of the Treaty of Trianon, to opt for the nationality of the state in which they possessed rights of citizenship before acquiring such rights in the territory transferred, with a guaranty that

> " they will be entitled to retain their immovable property in the territory of the other state where they had their place of residence before exercising their right to opt ",

was intended to secure to those Hungarian nationals the absolute right to their property, freed from either the exceptional measures of liquidation for the purpose of paying war claims,

> " or from any other measure of transfer, compulsory administration or sequestration ",

until one year from the date of the coming into force of the Treaty of Trianon, which was July 26, 1921.

By a further treaty, known as the Minorities Treaty, signed at Paris, December 9, 1919, between the Principal Allied and Associated Powers and Roumania, the latter again repeated the stipulation giving the right to the Austrian and Hungarian nationals, who, by the terms

of the Treaty of Peace, would have become citizens of Roumania *ipso facto*, upon the coming into effect of these treaties, the right to opt for any other nationality which might be open to them, and declared

" they will be entitled to retain their immovable property in Roumanian territory."

Roumania further agreed that the stipulations in the Minorities Treaty, so far as they affected persons belonging to racial, religious or linguistic minorities, constituted obligations of international concern, and should be placed under the guarantee of the League of Nations. They should not be modified without the assent of the majority of the League of Nations. Any member of the Council of the League should have the right to bring to the attention of the Council any infraction or any danger of infraction of any of these obligations, and the Council might thereupon take such action and give such direction as it might deem proper and effective in the circumstances.

Roumania further agreed :

" That any difference of opinion as to questions of law or fact arising out of these articles between the Roumanian Government and any one of the Principal Allied and Associated Powers or any other Power a member of the Council of the League of Nations shall be held to be a dispute of an international character under Article XIV of the Covenant of the League of Nations."

Roumania especially consented that any such dispute, if the other party thereto should so demand, should be referred to the Permanent Court of International Justice. The decision of the Permanent Court should be final and should have the same force and effect as an award under Article XIII of the Covenant .[1]

All of these provisions had for their purpose the protection of the persons and properties of the Hungarian citizens who might continue to reside within the enlarged territories of Roumania—for the period permitted by the Treaties—, from confiscation or destruction, whether in carrying out the measures of liquidation for the purpose of settling the damages of war,

" *or from any other measure of transfer, compulsory administration or sequestration,*"

taken between November 3, 1918, and the coming into effect of the Treaty of Trianon.

The provision in Article 250 that

" claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239,"

was, as has been pointed out, inserted by the representatives of the Allied and Associated Powers engaged in the formulation of the Treaty, in response to the earnest protest of the Hungarian delegation, dated February 9, 1920, that Roumania already was engaged in a process of expropriation, had issued an edict on September 10, 1919, making subject to expropriation all the real estate situated in territories transferred from Hungary to Roumania which belonged to foreign nationals, etc., and by an act passed June 16, 1919, had authorized the confiscation of the real

[1] British and Foreign State Papers, Vol. 112, pp. 538, 543.

estate of the nationals of enemy states without payment of any compensation. The Hungarian delegation pointed out that

> " both these laws are really measures against Hungarian nationals, for the latter possess very extensive estates in the territories to be transferred from us, and they may be included among those arbitrary measures by which the states receiving portions of our territory aim at practically dispossessing the Magyars."

The Hungarian delegates expressed doubt as to whether the provisions of Article 250, as drafted, would afford adequate protection against those of the Roumanian law, which, while providing in general for the expropriation of the property of foreign nationals, was undoubtedly aimed first and foremost at Hungarian nationals, and was evidently to be applied exclusively against them.

The reply of the Allied and Associated Powers, dated May 6, 1920, was to the effect that the observations of the Hungarian delegation

> " constitute a question of the interpretation of the Treaty of Peace."

In other words, they interpreted the question so raised in precisely the same sense in which it has been interpreted by the Mixed Arbitral Tribunal, and precisely the way in which the Hungarian Government throughout the negotiations since 1923 has insisted it should be interpreted. The reply of the Allied and Associated Powers, however, added that these Powers

> " have no objection to recourse to the Mixed Tribunal proposed by the Hungarian delegation for settling the conflicts relative to the restitution of their property, rights and interests situated on transferred territory to Hungarian nationals as provided by Article 250 of the Treaty."

They, therefore, agreed to complete that Article by inserting the words,

> " the claims which may be put forward by Hungarian nationals in virtue of the present Article shall be arbitrated by the Mixed Arbitral Tribunal provided in Article 239."

This was a distinct recognition on the part of the framers of the Treaty tendered by the victorious Powers to the vanquished, of an intention to provide a means of protecting the nationals of the latter against the confiscation by Roumania, apprehended by Hungary.

A similar question arose respecting the Treaty of Saint-Germain, between Austria and the Allied Powers. Article 49 of that Treaty, as originally proposed, contained provisions similar to those of Section 232 of the Treaty of Trianon. On June 23, 1919, the Austrian delegation made a protest against the proposed provision, asserting that the principal properties of the 6,000,000 Austrian nationals were in territories about to be transferred to the succession states; that such a vast confiscation would impoverish many of them, and that

> " no government would have either the right or power to subscribe to stipulations sonstituting so violent an impairment of the private rights of its citizens, an impairment without precedent in history.

They added that liquidation of the Austro-Hungarian Monarchy, based upon all the property belonging to Austrian citizens in the succession states would constitute a confiscation, and that Austria could not possibly make compensation to its nationals for such confiscation after the loss

of most of its assets, including those of its states abroad. They, therefore, requested that Article 49 be stricken from the Peace Treaty. This protest was heeded.

By a note of July 8, 1919, the Allied Powers advised the Austrian delegation that Article 49 would be modified. It was supplemented by Article 267, which is identical with the first two paragraphs of Article 250 of the Treaty of Trianon, which prohibited the " retention or liquidation " of the property of Austrian citizens by the governments of the succession states, and required the return of all that had been sequestered, seized or controlled between November 1, 1918, and the coming into force of the Peace Treaty.

In a note of September 2, 1919, addressed by the Powers to the Austrian delegation, it was stated that

> " the property of Austrian nationals in the territory ceded to the Allied Powers will be returned to its owners; this property will be free from all measures of liquidation or transfer adopted since the Armistice, and a similar exemption from all measures of seizure or liquidation is guaranteed them for the future."

The first two paragraphs of Article 267 of the Treaty of St. Germain are identical with the first two paragraphs of Article 250 of the Treaty of Trianon, and inasmuch as they were drafted by the same body, their interpretation made in the letter of September 2, 1919, by the draftsmen of both, perhaps may be taken as applicable to both. As we have seen, the Hungarian delegation was still fearful of the possible application to their nationals of the provisions in the Treaty of Trianon, and in response to their protest the paragraph above quoted was inserted in the Treaty of Trianon, which is not found in that of St. Germain, giving to the Mixed Arbitral Tribunal jurisdiction of claims made by Hungarian Nationals under Article 250.

In a note addressed by the President of the Peace Conference to the Yugo-Slav delegation on March 1, 1920, it is stated that while the Yugo-Slav state retains the sovereign right to regulate the transmission and enjoyment of property in the territory transferred to it, and is, therefore, free to take the measures which it thinks necessary or useful, nevertheless, this liberty is limited by the provisions of the Treaty, and

> " provided naturally that the measures do not result by a disguised confiscation of the property in question in evading the prohibition stipulated in the Treaty."

There would seem to be no possible doubt from this history that the purpose of these provisions was to protect the Hungarian optants in Roumanian territory from spoliation of their property by any measure which, under whatever guise, took their property without just and adequate compensation.

II.

The Sequestration of the immovable Property of the Hungarian Optants by Virtue of the so-called Agrarian Reform Legislation of Roumania, was in Violation of the Protection extended to them by the Treaty of Trianon and the Minorities Treaty.

The Roumanian Land Reform Law, called the Goroflid Law, came into force July 30, 1921, four days after the Treaty of Trianon. It modified the previous laws of September 12, 1919, and June 12, 1920, which frankly confiscated under the name of " expropriation," without compensation, the property of all subjects of foreign States, including

inhabitants of the larger Roumania who should opt for another nationality. While the new law in terms purported to apply alike to citizens and foreigners it contained three distinctive provisions which must be considered in determining its effect as an invasion of the Treaty rights secured to Hungarian optants by the Treaty of Trianon.

(1) It provided that the estates of absentees shall be subject to expropriation in their entirety, defining for the purposes of the law an absentee as

> " any person who was absent from the country from December 1, 1918, until the date when this law was placed on the table of the Parliament, unless such person was discharging official duties abroad."

As it was only on July 26, 1921, that Roumania obtained sovereignty over Transylvania, although she previously had occupied the territory with her military forces, this law in effect provided for the expropriation in its entirety of all immovable property owned by an Hungarian national who had been driven out by the war, and who, during the military occupation of the territory by Roumanian troops, had not returned. This in itself was wholly contrary at least to the spirit of the Peace Treaty. It necessarily discriminated against all those Hungarian citizens who had been driven out by the military occupation.

It violated the provision of the Minorities Treaty which purported to secure to the Hungarian optants the right to retain their immovable property in Roumanian territory for one year until one year from the coming in force of the treaty.

(2) The compensation to be paid to the owners of the expropriated land was fixed by the law,

(*a*) as the sale price of land in the community and district in 1913—eight years previously—irrespective of what was its value at the time of expropriation.

(*b*) The price was to be calculated in lei, the lei being considered as equal to the crown.

(3) The artificial price thus fixed was provided, by Article 85 of the law, to be payable in cash, that is, in the depreciated lei, or in bonds redeemable in fifty years and bearing interest at 5%, the face value being considered as equal to the market value. Payment on the assessed value of the land in 1913, which was then in gold lei, would now be payable in paper lei, which had a value of about 1/40th or 2½% of the gold lei, and the amount thus due was to be made payable in Roumanian fifty-year bonds, having a market value of from 30% to 40% of their face value ; so that the unfortunate owner of the property would receive in actual value about one per cent. of the value of his property in 1913 ! If this is not confiscation, it comes so near to it that for all intents and purposes it may be considered as such. If upheld, it would render illusory the protection which the provisions of the Treaty of Trianon and the Minorities Treaty were intended to give the Hungarian optants.

Roumania, however, contends that because the property is taken under a scheme of Agrarian reform, which by its terms is applicable alike to Roumanian and Hungarian citizens, the Hungarians are not within the protection of the Treaties. But this is not enough. The expropriation to bind the citizens foreign to Roumania must conform to the principles of international law which require adequate compensation. This principle was recognised by the Permanent Court of International Justice in two judgments (Nos. 6 and 7) rendered by it, concerning certain German

interests in Polish Upper Silesia. The issue in the Polish-German case, with all its incidents, affords a close analogy with the questions involved in the Roumano-Hunga ian dispute. Germany contended that a proposed expropriation of certain factories and large rural estates under the Polish law of July 14, 1920, was contrary to designated articles of the Treaty of Versailles, and the Geneva Convention, concluded between Germany and Poland. This Convention provided, in Article 6, that Poland might expropriate in Polish Upper Silesia certain industrial undertakings and large rural estates, subject to the reservations in Articles 7-23 of the Convention. Article 23 provided for the submission to the Permanent Court of disputes arising out of the application of interpretation of Articles 6-23. In accordance with Article 23, Germany asked the Permanent Court to declare that the Polish law of July 14, 1920, constituted a measure of liquidation, and was contrary to the provisions of the Treaty of Versailles and to the Geneva Convention. This was the exact situation in the Roumano-Hungarian dispute, where the claimants before the Mixed Arbitral Tribunal contended that expropriation in accordance with the Roumanian law of July 30, 1921, constitutes a measure of liquidation and was contrary to the Treaty of Trianon. The wording of Article 297 of the Treaty of Versailles and Article 6 of the Geneva Convention is substantially the same as that of Articles 232 and 250 of the Treaty of Trianon. By these articles the property, rights and interests of German and Hungarian nationals, respectively, are safeguarded, and disputes relative to such property, rights and interests made referable to the Permanent Court of International Justice and the Mixed Arbitral Tribunal, respectively. The Polish Government interposed a plea to the jurisdiction of the Permanent Court of International Justice, as the Roumanian Government demurred to the jurisdiction of the Mixed Arbitral Tribunal. Poland alleged that Article 23 of the Geneva Convention limited the jurisdiction of the Court to cases of liquidation—just as Roumania alleged that the Tribunal's jurisdiction is limited by Article 250 of the Treaty of Trianon to cases of retention and liquidation. Nevertheless, the Permanent Court declared its competency, saying :

> " It is clear that the Court's jurisdiction cannot depend solely on the wording of the Application ; *on the other hand it cannot be ousted merely because the respondent Party maintains that the rules of law applicable to the case are not amongst those in regard to which* the Court's jurisdiction is recognised . . . . [2]

The Court rendered no decision on the merits of the German application, just as the Mixed Arbitral Tribunal reserved judgment on the merits of the Hungarian claims. Neither judgment asserted jurisdiction on the ground that expropriation in accordance with the Polish and Roumanian laws, respectively constituted liquidation within the terms of the corresponding articles of the Treaties and the Geneva Convention. The fact that such expropriation *might* constitute liquidation was considered sufficient both by the Court and by the Tribunal, for the exercise of their jurisdiction, in order to determine whether liquidation had, contrary to the terms of the treaties, in reality taken place.

In the German-Polish case, the first question considered was the meaning of the word " *expropriation,*" as used in the text of the Geneva Convention. The Court said :

> " Having regard to the context, it seems reasonable to suppose that the intention was, bearing in mind the regime of liquidation instituted by the Peace Treaties of 1919, to convey the meaning that, subject to the provisions authorising expropriation, the treatment

[2] Publications of Permanent Court of International Justice, Series A, No. 6, p. 15.

accorded to German private property, rights and interests in Polish Upper Silesia is to be the treatment recognised by the generally accepted principles of international law."

(Series A, Collection of Judgments, No. 7, Permanent Court of International Justice.)

Referring further to these principles, the Court said:

"Head III" (of the Convention) "only refers to Polish Upper Silesia and established in favour of Poland the right of expropriation which constitutes an exception to the general principles of respect for vested rights .... Further there can be no doubt that the expropriation allowed under Head III of the Convention is a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights."
(Id., pp. 21, 22.)

Two other cardinal principles are laid down in this judgment of the Permanent Court:

First: Expropriation, if not in conformity with the agreement upon which it proceeds, or if otherwise overstepping the limits set by international law, is unlawful, regardless of the name—land reform, or anything else—which is given it.

"The legal designation applied by one or other of the interested parties to the act in dispute is irrelevant, if the measure in fact affects German nationals in a manner contrary to the principles enunciated above .... "
(Id., p. 22.)

Second: Expropriation without compensation cannot be justified by its application to nationals as well as aliens. The Court said:

"Even if it were proved .... that in actual fact, the law applies equally to Polish and German nationals, it would by no means follow that the abrogation of private rights affected by it in respect to German nationals would not be contrary to Head III of the Geneva Convention. Expropriation without indemnity is certainly contrary to Head III of the Convention; and a measure prohibited by the Convention cannot become lawful under this instrument by reason of the fact that the state applies it to its own nationals."
(Id., p. 33.)

Head III of the Treaty thus referred to is entitled "Expropriation." Article 6 provided:

"Poland may expropriate in Polish Upper Silesia in conformity with the provisions of Articles 7 to 23 undertakings belonging to the category of major industries including mineral deposits and rural estates. Except as provided in this clause the property, rights and interests of German nationals or of companies controlled by German nationals may not be liquidated in Polish Upper Silesia."

The Court held that having regard to the context, it was reasonable to suppose that the intention was, bearing in mind the regime of liquidation instituted by the Peace Treaties of 1919, to convey the meaning that, subject to the provisions authorising expropriation, the treatment to be accorded to German private property, rights and interests in Polish Upper Silesia, is to be the treatment recognised by the generally accepted

principles of international law. The natural inference from this decision is that expropriation without an agreement such as the Geneva Convention, allowing expropriation in specific cases and under specific conditions, or expropriation without a reason recognised by international law, such as public interest or judicial liquidation, is contrary to the generally accepted principles of international law. Bearing in mind that in exercising jurisdiction, the Permanent Court of International Justice applies " international custom as evidence by general practice accepted as law," and " general principles of law recognised by civilised nations," [3] the principles laid down in this judgment may be accepted as generally applicable to similar questions, such as those in the Roumano-Hungarian dispute, and be taken as evidence that as a general principle of international law, the mere fact that a measure affecting foreigners of a character prohibited by international law is applied by a State to its own nationals, is no defence to claims by such foreigners.

It is not necessary to challenge the proposition in the " Memorandum of Conversations at Brussels,"

> " that the treaty does not preclude an expropriation of the property of optants for reasons of public welfare, including social requirements of Agrarian reform."

Such expropriation, as a matter of international law, implies adequate compensation. It implies, under the Peace Treaties, the absence of undue discrimination between the nationals of the expropriating State and those of other States parties to the Treaty. Whether as a matter of fact compensation in the given case is illusory ; whether as a matter of fact, in the application of the law, actual discrimination is or is not made otherwise, are questions for decision by a court. It is not an answer to the asserted right of an Hungarian optant or of the Government on his behalf, to have recourse to the tribunal provided in the Treaty for his protection, to say that the law by its terms applies to Hungarians and Roumanians alike, and, therefore, the matter is one in which he must seek his only remedy in the courts of Roumania. This would be to reduce the Treaty protection to a shadow without substance.

This principle of compensation was enforced by the British and French Governments in connection with the Treaty of October 28, 1920, recognising the annexation of Bessarabia by Roumania. It was not until Roumania had agreed to pay the nationals of Great Britain and France in Bessarabia whose lands had been expropriated by the Roumanian Agrarian Reform Laws, practically the full value of their land, or about forty times the amount of compensation received by Roumanian citizens that this recognition was conceded. Without contending that the same ratio of compensation should be adopted in view of the Hungarian optants, it is sufficient to point out the enforcement of the principle of compensation by these powers on behalf of their nationals.

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[3] Statute, Permanent Court of Internationale Justice, Art. 38.

III.

The Attempts at Conciliation undertaken by the Council at the instance of Hungary in March, 1923, resulting at first in a Report by Mr. Adatci, the Japanese Representative on the Council, recommending the Submission of the Dispute to the Permanent Court of International Justice, and, when Roumania refused to concur, that the Council should ask for an Advisory Opinion from the Court, finally came to an end with the Adoption by the Council on July 5, 1923, of a Minute approving Mr. Adatci's Report, and expressing the hope that both Governments " will do their utmost to prevent the Question of Hungarian Optants from becoming a disturbing Influence in the Relations between the two Neighbourhood Countries."[4]

In this connection reference should be made to the so-called agreement of Brussels, made at Brussels in May, 1923. In the course of the negotiations which were there carried on, and in conformity with common practice, a memorandum was made of various points of difference and agreement between the parties in the effort to reach a basis of final agreement. There is annexed to the report of Mr. Adatci a document entitled :

" Account of the Conversations which took place on May 27, 1923, at the Palace Hotel, Brussels, between Count Csaky and M. Gajzago, representatives of Hungary, and M. Titulesco, representative of Roumania, in the presence of Dr. van Hammel, Director of the Legal Section, M. Mantoux, Director of the Political Section, and M. Ascarate and M. de Montenach, members of the Secretariat of the League of Nations." [5]

A part of the memorandum contains the following paragraph :

" (1) As regards the questions of the discrepancy between the Roumanian law and the provisions of the Treaty which deal with the rights of Hungarian optants, it is admitted—and the Hungarian representatives do not dispute the point—that the Treaty does not preclude the expropriation of the property of optants for reasons of public welfare, including social requirements of Agrarian reform.

It seems that the Hungarian government sensed a danger to its case in this clause, and shortly after the Brussels Conference disavowed the act of its representative in making the concession embodied in it, and there has been a great deal of controversy over that subject. It does not appear to me to be a material point. The proporition in and by itself appears quite unobjectionable. The right of Roumania to enact laws expropriating all immovable property within its jurisdiction for reasons of public welfare, including social requirements of Agrarian reform, can hardly be controverted. The question is whether it can expropriate the immovable property belonging to aliens without being liable under principles of International Law to properly compensate them, and in the case of the Hungarian optants whether it is under an additional obligation to them by virtue of the provisions of the Treaty of Trianon. When Mr. Titulesco later argued to the Council that this provision above quoted was " a judgment signed by the Hungarian representative," basing upon that his claim to exclusion from any liability on the part of

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[4] League of Nations Official Journal, Vol. IV, No. 8, p. 907.
[5] League of Nations Official Journal, Aug., 1923, p. 1012.

his government to treat the Hungarian optants in any way different from the citizens of Roumania, I think any judicial tribunal would dispose of the contention in the same way in which the Mixed Arbitral Tribunal did when it was brought before it. The concession, made as it was, in the effort to reach an agreement under the conciliatory processes of the Council of the League, was certainly not a judicial judgment such as Mr. Titulesco envisages, and I cannot think that the Brussels episode cuts any material figure in determining rights of the parties under present consideration.

IV.

The Mixed Arbitral Tribunal properly had Jurisdiction to entertain the Complaints of Hungarian Optants against Roumania for the Expropriation of their Property under the Law of July 30, 1921.

What has been previously said anticipates the views entertained respecting the jurisdiction of the Mixed Arbitral Tribunal. That tribunal was confronted with the question of jurisdiction, just as the Permanent Court of International Justice, in the case concerning German citizens in Polish Upper Silesia (No. 6), was confronted with the question of jurisdiction. The reasoning of the majority opinion of the Roumano-Hungarian Mixed Arbitral Tribunal appears conclusive. It appeared from the facts presented in the cases under consideration.

> "that the measure concerned in the case is one which affects the property of an ex-enemy by removing it in its entirety from the owner and without his consent, and this measure constitutes a violation of the general principle of respect for acquired rights and oversteps the limits of common international law and fully presents the character of a liquidation within the meaning of Article 250 and is by its very nature to be classed among the measures referred to in the said Article."

The Court declined, in considering the question of jurisdiction, to consider the question whether the expropriations in question in the cases were or were not differential measures, as that concerned essentially the merits of the cases. It was sufficient that the facts presented by the complainant, uncontradicted by any allegations of defence, showed a complete confiscation, without indemnity, of the property of the claimant under the ostensible authority of a measure of expropriation to carry out a general revolutionary scheme of land reform. The Court very properly held that the mere allegation that the law thus applied operated upon nationals and foreigners alike did not deprive it of the jurisdiction conferred upon it by treaty.

An arbitral tribunal must of necessity have jurisdiction, in the first instance at least, to determine its own competency. This is generally recognised throughout the history of arbitral proceedings. More than one hundred years ago the question arose regarding the competence of the Mixed Claims Commissions organised under Article VI and VII of the Treaty of November 19, 1794, between the United States and Great Britain. In the case of *The Betsy*, the British Commissioner demurred to the jurisdiction of the Commission and withdrew therefrom in order to prevent a decision upon that issue. The American Commissioner, Mr. Gore, in his opinion, filed on the question of competence, made the following statement:

> "A power to decide whether a claim referred to this Board is within its jurisdiction appears to me inherent in its very constitution and indispensably necessary to the discharge of any of its duties .... To decide on the justice of a claim it is absolutely necessary to decide whether it is a case described in the article. It is the first quality to

be sought for in the examination. To say that power is given to decide on the justice of a claim and according to the merits of the case and yet no power to decide on examination if that claim has any justice, any merit even, sufficient to be the subject of consideration, is to offer in terms a substance, in truth phantom . . . . To my mind there can be no greater absurdity to concede that these two nations appointed commissioners with power to examine and decide claims ; prescribed the rules by which they were to examine them ; authorised them for this purpose to receive books, papers and testimony ; examine persons on oath ; award sums of money, and solemnly pledge their faith to each other that the award should be final and conclusive . . . . and yet give them no power to decide whether there was any claim in question . . . [6]

After a series of conversations between the two Governments, Great Britain denounced the withdrawal of its commissioners. Lord Chancellor Loughborough expressed the opinion ;

" The doubt respecting the authority of the Commission to settle their own jurisdiction was absurd ; and they must necessarily decide upon the cases being within or without their competency." [7]

These opinions were rendered when arbitration was still in its infancy. Since that time there has been a marked development in the whole process of arbitration. Towards the end of the 19th Century, a controversy arose between the United States of America and Chile as to certain claims which, it was asserted by the Chilean Government, should be barred from the consideration of a Mixed Claims Commission.

Mr. Olney, then Secretary of State of the United States, wrote that :

" The question whether any particular claim is a proper one for the consideration and decision of the international commission is necessarily one which the commission itself must determine. The conventions under which such commissions are organised usually describe in general terms the class of cases of which the commission is to take jurisdiction and whether any particular case presented to it comes within this class the commission must, of course, determine . . . " [8]

A project for international tribunals and their procedure, presented by Dr. Goldschmidt to the Institut de Droit International, in 1874, averred that arbitral tribunals have jurisdiction to determine their competence.[9] A similar provision was inserted by Bluntschli in his proposed international code.[10]

Fiore, Pasquale ; in *Nouveau Droit International Public*, 2me éd., Paris, 1885, Vol. II, page 641, § 1213, states the rule as follows :

" . . . . Le Tribunal arbitral a le droit de statuer sur sa propre compétence, de la même manière que tout tribunal même d'exception est autorisé à le faire par la nature même de sa mission. C'est, en

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[6] Moore, History and Digest of International Arbitration, Vol. 3, pp. 2278, 2282, 2284.

[7] Moore, History and Digest of Int. Arbitration, Vol. I, p. 327.

[8] Moore, Digest of Int. Law, Vol. 7, pp. 34-5.

[9] See Project in 6 Revue de Droit International et de Législation comparée (1874) 421, 440.

[10] Bluntschli, M., Le Droit International Codifié, 3rd ed., Paris, 1881, Art. 492 bis.

effet, un attribut naturel de toute autorité que l'affirmation de ses pouvoirs. Il est aussi certain que la règle de droit commun, que le juge de l'action est aussi juge de l'exception, doit être applicable devant le tribunal arbitral. On ne pourrait dès lors pas refuser à ce tribunal la compétence nécessaire pour statuer sur toutes les contestations qui pourraient être soulevées, par l'une ou l'autre des parties, même en ce qui concerne les mesures d'instruction qu'il aurait ordonnées, et exécution de ces mesures . . . "

Merignhac A., *Traité théorique et pratique de l'arbitrage international*, Paris, 1895, p. 254, § 257, says :

" Que faut-il penser d'une exception d'incompétence soulevée devant le Tribunal arbitral ? Si, en disant que les arbitres sont juges de leur compétence, on veut entendre qu'ils ont le droit de décider qu'une difficulté que l'on veut soustraire à leur examen, neutre ou non dans les termes du compromis, on émet certainement une vérité incontestable. L'arbitre constitué juge du fond doit en effet, *ipso facto*, être considéré comme investi du droit de déterminer en quoi il consiste ; s'il en était autrement, il serait obligé de se dessaisir dès qu'une partie élèverait la prétention qu'il ne peut connaître d'une question, alors même que celle-ci serait comprise d'une manière évidente dans le traité. L'arbitre a donc le droit de décider quels sont les points qui rentrent ou non dans le compromis et qu'il peut dès lors ou non juger ; ce n'est pas question de compétence, mais question de fond et ceci est vrai devant la juridiction ordinaire comme devant le tribunal international.."

Mr. Lammasch points out in his work on international law[11] that a denial of this power would make it possible for either of the parties to obstruct the function of arbitral tribunals whenever a plea to the jurisdiction is filed.

The necessity of granting such powers to international tribunals is even more strongly emphasised by Messrs. De Lapradelle and Politis. In the *note doctrinale* concerning the Betsy case, it is pointed out that the renunciation of the power to decide their competence would destroy the independence of judges of international courts ; it would put arbitration under tutelage, with the consequence that incompetence would have to be admitted whenever a plea to the jurisdiction is entered.[12]

The principle that international tribunals have the power to determine their own jurisdiction has been inserted in several statutes establishing such tribunals. The Hague Convention for the Pacific Settlement of International Disputes of July 29, 1899, created the Permanent Court of Arbitration. Article 48 of this Convention, reproduced in Article 73 of the Convention of October 18, 1907, provided that :

" The Tribunal is authorised to declare its competence in interpreting the *compromis* as well as the other treaties which may be invoked and in applying the principles of law."

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[11] Lammasch, Die Rechtskraft Internationaler Rechtspruche, Kristiania 1913, Sec. 16, p. 67.

[12] A. de Lapradelle-N. Politis, *Recueil des Arbitrages Internationaux*, Vol. 1, Padrone, Paris, 1905, at pp. 103-105 :

" . . . permettre aux parties d'élever l'exception sans en faire juge le tribunal, c'est leur permettre de s'évader purement et simplement du litige et faire aussi des plaideurs, ou plus exactement de l'un d'eux, le maître souverain des pouvoirs du tribunal . . . Refuser à l'arbitre le droit de statuer sur sa propre compétence, c'est restreindre les arbitres dans leur indépendance et les atteindre dans leur dignité . . . Dire que le juge international ne peut pas statuer sur l'exception d'incompétence, c'est répondre, en déffnitive, qu'à chaque fois que cette exception se présente, il doit l'admettre. Forcer les juges a renvoyer le litige aux parties, c'est mettre l'arbitrage en tutelle et, de cette tutelle, choisir la partie la pire de toutes : celle des plaideurs . . ."

Several of the arbitration treaties expressly stipulated that the determination of jurisdiction is reserved to the tribunal itself.[13]

The Mixed Claims Commission, established in pursuance of the agreement of August 10, 1922, between the United States and Germany in its Administrative Decision No. II, sets forth its power to adjudicate its jurisdiction in the following terms :

> " . . . . At the threshold of the consideration of each claim is presented the question of jurisdiction, which obviously the commission must determine prior to fixing the amount of Germany's financial obligations, if any, in each case . . . . The Commission's task is to apply the terms of the Treaty of Berlin to each case presented, decide those which it holds are within its jurisdiction and dismiss all others." [14]

A similar rule of procedure was adopted by the Tripartite Claims Commission established under the agreement between the United States, Austria and Hungary, [15] under its Administrative Decision No. 1. [16]

Finally, it may be pointed out that the Statute of the Permanent Court of International Justice, by Article 36, among other things provides :

> " In the event of a dispute as to whether the Court has jurisdiction the matter shall be settled by the decision of the Court."

All of these provisions referred to, in the different Treaties, are in recognition of the common law of nations as interpreted in the earlier cases, and are merely expressing established international law and practice. If a different rule is to be recognised respecting the operations of the many mixed tribunals created by the various Peace Treaties and the agreements flowing from them, it will introduce a confusion into international law and practice which must have regrettable consequences

It appears that the objection to the jurisdiction of the Mixed Arbitral Tribunal was argued by learned counsel on both sides for a period of eight days, after which a majority of the Tribunal held that it was possessed of jurisdiction over the cases.

It need not be contended that if such a tribunal should attempt to exercise jurisdiction without any appearance of right, litigants should be compellable to proceed before it or be bound by its judgments ; but where, as in this case, the tribunal is, by a treaty binding upon both parties, given jurisdiction of " claims made by Hungarian nationals under this article," *i.e.*, Article 250, of the Treaty of Trianon, and the question is whether acts of the Roumanian Government complained of constitute a violation of that Article or not, it would seem clear that the decision of the Tribunal upholding its jurisdiction must be binding upon both parties, especially in view of the provision in paragraph (*g*) of Article 239, whereby :

> " the right contracting parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive and to render them binding upon their nationals."

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[13] See also Special Agreement between the United States and Great Britain of August 18, 1910 (British and Foreign State Papers, Vol. 103, pp. 322, 328).

[14] See Mixed Claims Com., U.S. and Germany, Adm. Decision No. II, Nov. 1, 1923, pp. 6-7.

[15] U.S. Series, Treaty No. 730.

[16] Id.

The withdrawal under these conditions by one of the parties of a member of the court nominated by it, by reason of dissatisfaction with the decision of the court, would, under ordinary conditions, merely result in the case proceeding before the remaining arbitrators, and the judgment would be as binding upon the party withdrawing as though it had continued to take part in the proceedings, and had not withdrawn its nominee. But the Treaty makes provision for this case, by providing in the Annex to Section 239 that should one of the members of the Tribunal retire, the same procedure will be followed for filling the vacancy as was followed for appointing him. That procedure is, when in the case of a vacancy a government does not proceed within a period of one month to appoint as provided a member of the Tribunal, such member shall be chosen by the other government from the two persons mentioned above, other than the President, these two persons being provided for in the following language:

> "In case of failure to reach agreement, the President of the Tribunal and two other persons, either of whom may in case of need take his place, shall be chosen by the Council of the League of Nations . . . . These persons shall be nationals of Powers that have remained neutral during the war."

On several occasions the Council has acted, as Hungary has requested it to do, under the Treaty of Trianon pursuant to provisions of the Treaties of Versailles and St. Germain, which are identical with those contained in Article 239 of the Treaty of Trianon.

Thus, on January 28, 1923, Mr. Poincaré, the Prime Minister of France, in a letter addressed to the President of the Council, called attention to the fact that:

> "it is for the Council of the League of Nations to choose for each Mixed Arbitral Tribunal or for each independent division, two persons who may in case of need, take the place of the President or of the National Arbitrator." [17]

Mr. Poincaré's request was referred by the Council to Mr. Blanco (Uruguay) as rapporteur, and upon his report, the Council at its meeting on February 3, 1923, appointed two additional members for each of the four independent sections of the Franco-German Mixed Arbitral Tribunal, as well as for the Franco-Austrian, Franco-Hungarian and Franco-Bulgarian Mixed Arbitral Tribunals.[18] A similar request was addressed to the League by the Belgian Minister of Foreign Affairs on February 28, 1923, and upon the report of Mr. Guaina (Uruguay) the Council proceeded at its meeting of April 17, 1923, to appoint two additional members for each of the Belgo-German, Belgo-Austrian, Belgo-Hungarian and Belgo-Bulgarian Mixed Arbitral Tribunal.[19] After the occupation of the Ruhr Germany recalled her national judges from the Mixed Arbitral Tribunals. The procedure in Article 304 of the Treaty of Versailles (identical with 239 of the Treaty of Trianon) was followed in the Tribunal. One month after the withdrawal of the German member of the Tribunal, the French Government chose from the persons so appointed by the Council of the League a substitute to replace the German member. The action of the Council so recorded, would seem to furnish controlling precedents for the action which could be taken by it in regard to the Roumano-Hungarian treaties.

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[17] League of Nations Document C, p. 101, 1923.
[18] League of Nations Official Journal, Vol. 4, No. 3, pp. 242-399.
[19] See League of Nations Official Journal, Vol. 4, No. 6, pp. 555, 599, 629.

V.

The Council is not empowered to give a judicial Interpretation to the Peace Treaties binding upon the Parties to them. That judicial function belongs to the Permanent Court.

While for the purpose of determining the rights of the respective parties and of aiding in the process of attempted conciliation, the Council of the League must necessarily place an interpretation upon the treaties, or any other agreements entering into the controversy, and may present its opinion respecting such interpretation in order to justify its atitude or to influence one or both parties to the controversy, it is a strange doctrine to suggest that the Council may consider and overrule the judgment of a mixed arbitral court established by treaty, in order to constrain a state to accept a different conclusion from that of the Court, as a condition to the exercise by the Council of a duty imposed on it by treaty.

The Committee of Three, in their report to the Council in September, 1927, states that in the development of its problem, it was compelled to consider the question,

> " Is the Roumano-Hungarian Mixed Arbitral Tribunal entitled to entertain claims arising out of the application of the Roumanian Agrarian Law to Hungarian optants and nationals ? "

The Committee reports that after examining this question, *and having it examined by eminent legal authorities*, it arrived at conclusions which it announces. Having reached conclusions which they say :

> " show that the claim of an Hungarian national for restitution of property in accordance with Article 250 might come within the jurisdiction of the Mixed Arbitral Tribunal, even if the claim arose out of the application of the Roumanian Agrarian Law "—

which is substantially the decision of the Mixed Arbitral Tribunal—the Committee thereupon proceeds to lay down a definition of principles, the acceptance of which, in its opinion, the Treaty of Trianon has made obligatory for Roumania and Hungary, and it requests the two parties to conform to these principles, and suggests resolutions which in effect provide that if Hungary does not conform, the Council will not appoint two deputy members of the Mixed Arbitral Tribunal, in accordance with Article 239 of the Treaty of Trianon.

Thus the suggestion is that the Council, a political body, should reach a legal construction of the rights of parties which are already *in limine* before a duly constituted judicial tribunal ; that this construction should not be based upon a decision of the Permanent Court of International Justice, but upon the opinions of private jurists consulted by its Committee, and based on those views it is proposed to override the decision of the judicial body duly constituted by treaty with jurisdiction to consider the subject, and it is proposed to make the exercise of a duty imposed upon the Council by the peace treaties, dependent upon the acceptance by the litigants of the principles involved in the legal construction thus reached. It is within the power of the Council, as has been pointed out by Lord Robert Cecil and others, to request an advisory opinion of the Permanent Court on these points, which the Government of Hungary has consistently urged it to do. But in view of the attitude of Roumania the Council has been unwilling to take that course. With the greatest

respect for the Council and the Committee dealing with this subject, I cannot but regard the proposals contained in the report of the Committee as at variance with the whole theory of the organisation of the League of Nations under the Covenant, which contemplates the exercise of such powers of interpretation and construction as judicial functions, vested in the Court established pursuant to Article XIV of the Covenant and not exercisable by one of the political organs of the League.

Mr. Titulesco saw clearly the consequence of such position, and met it in his argument before the Council with the proposition that the duties of the Council were fixed by the Covenant of the League of Nations; that the Treaty of Trianon, except for the first part, is independent of the Covenant, and, therefore, that Article 239 of the Peace Treaty and all similar provisions in other treaties do not impose upon the Council any imperative duty. Upon this basis he sought to justify the Council's refusal to appoint members of the Tribunal, except upon conditions imposed by the Committee of Three.[20]

Mr. Chamberlain followed Mr. Titulesco by adopting the same thesis.[21]

It is a new suggestion, that although all of the Allied and Associated Powers and Hungary are parties to the Treaty of Trianon, and the same, with various other Powers, are parties to other Peace Treaties, and there are provisions in these treaties whereby the League of Nations, through one of its constituent bodies, is to take action, yet the League is not bound to recognise that obligation, except upon such extraneous conditions as it shall see fit to impose. It is submitted that a conception of this character would go far to destroy the solidarity of the public law of Europe, which it has been supposed was created by the Peace Treaties, to be administered through the League of Nations. Moreover, it is at variance with the practical construction placed by the League itself upon identical provisions in the treaties of Versailles and Trianon above referred to.

Doubtless in endeavouring to bring two states into agreement through the exercise of the conciliation offices of the Council, the expression of opinions as to their respective rights as well as concerning their moral attitude is not only permissible, but may be most desirable or effective.

GEORGE W. WICKERSHAM.

Dated, New York, February 24, 1928.

[20] League of Nations Official Journal, Oct. 1927, p. 1392.
[21] Id. 1396.

THE PRESENT POSITION OF THE HUNGARIAN OPTANTS CASE

BY

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So much has been written about this dispute and so many complications have been introduced into the discussion that it may be useful to re-state the facts once more, as simply as possible.

The Treaty of Peace between the Allies and Hungary was signed at Trianon on June 4th, 1920, but owing to delays in obtaining the requisite number of ratifications it did not come into force until July 26th, 1921. By Article 63 persons possessing rights of citizenship in territory detached from Hungary by the Treaty were given the right to opt for Hungarian nationality; in other words, the Hungarians of Transylvania (to confine ourselves to the particular territory with which this dispute is concerned) were entitled, if they so desired, to retain their original allegiance instead of acquiring Roumanian nationality. The same Article goes on to provide that the optants must transfer their place of residence to the State for which they have opted, but expressly stipulates that "they will be entitled to retain their immovable property in the territory of the other State where they had their place of residence before exercising their right to opt."

The Treaty, by Article 232, adopts the general system established by the Treaty of Versailles for the retention and liquidation by the Allied Powers of enemy property situate in their territories, but a special provision is inserted with regard to Hungarian property in territory formerly part of Hungary transferred to the Allies by the Treaty. This is Article 250, which reads as follows:—"Notwithstanding the provisions of Article 232 and the annex to Section IV the property, rights, and interests of Hungarian nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with these provisions.

"Such property, rights, and interests shall be restored to their owners freed from any measure of this kind, or from any other measure of transfer, compulsory administration or sequestration, taken since November 3rd, 1918, until the coming into force of the present Treaty, in the condition in which they were before the application of the measures in question.

"Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239."

It will be observed that so far as Hungarian optants are concerned this Article is in harmony with Article 63 and prevents the inconsistency which would, but for it, exist between Article 63 and Article 232.

On July 30th, 1921, four days after the coming into force of the Treaty, the Roumanian Government promulgated a "Law of Agrarian Reform," applicable to the newly acquired territory of Transylvania. This enacted that all rural estates and all landed property *extra muros* exceeding a certain area should be expropriated, subject to the retention of a small maximum holding, the size of which varied according to

certain conditions, some of which depended upon the discretion of the authorities. In the case of "absentees" the whole property was to be taken and "absenteeism" was defined as absence, however short, between December 1st, 1918, and March 23rd, 1921. The compensation payable to the owners of the property taken was based upon the pre-war value, but the figure was reckoned in post-war paper currency at par and paid in bonds redeemable in 50 years, the result being that, in fact, the amount was equivalent to *about 1 per cent.* of the market value of the land.

The following points are to be noted in regard to this law:— On the one hand, it does not on its face contain any provision discriminating between Roumanian and Hungarian nationals, and its declared object was to effect a more equitable distribution of land. On the other hand, the retrospective provision placing "absentees" in a worse position than other landowners was, in fact, almost exclusively applicable to Hungarians, who had been forced to leave their homes during the specified period by the advance of the Roumanian armies. Moreover, the terms of the Agrarian Law of July 30th, 1921, applicable to newly acquired territory where most of the land was held by Hungarians, were distinctly harsher than the corresponding Agrarian Law applicable to the old Kingdom of Roumania. Finally, it was alleged on the Hungarian side, and denied on the Roumanian, that the law was in practice administered so as to discriminate against Hungarians.

The Hungarian Government protested against the application of the law of July 30th to their nationals and endeavoured to enter into direct negotiation with the Roumanian Government on the subject, but without success. They therefore brought the matter to the attention of the League of Nations by a request dated March 15th, 1923,[1] which was considered by the Council in April, 1923,[2], when the parties were invited to endeavour to reach an agreement. Negotiations took place at Brussels at the instance of M. Adatci, Rapporteur of the Council of the League, and the question was again brought before the Council in July.[3] None of these efforts were, however, successful in effecting a settlement of the dispute. The only bearing of this first intervention of the League upon the subsequent history of the matter is that the Roumanian Government suggests that certain admissions were made by the Hungarian representative during the Brussels negotiations which are claimed to be relevant to the questions in issue. An examination of the record relied upon[4] shows, however, that this contention is wholly untenable. The statement to which the Roumanian Government attach importance is one to the effect that "the Hungarian representative did not dispute that the Treaty does not preclude the expropriation of the property of optants for reasons of public welfare, including the social requirements of agrarian reform," but it is clear that the expression "expropriation for reasons of public welfare" was used in its normal meaning, namely, compulsory acquisition on payment of full compensation. The context makes this quite plain as the record expressly states that "Hungary asked for a full indemnity." Moreover (and this, again, is stated on the face of the document) the negotiations were held for the purpose of reaching a settlement by compromise, and it hardly needs to be pointed out that concessions made in the course of such negotiations can never be regarded as involving admissions as to legal rights.

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[1] League of Nations Official Journal, July, 1923, p. 729.
[2] Ibid, June, 1923, pp. 573, 604.
[3] Ibid, August, 1923, pp. 886, 904.
[4] Ibid, p. 1012.

This first phase of the dispute has been briefly referred to for the sake of completeness, but the starting-point of the present controversy is to be found in the distinct procedure now initiated by the injured individuals themselves for the purpose of obtaining redress. In the latter part of 1923 the dispossessed Hungarians began to submit claims to the Roumano-Hungarian Mixed Arbitral Tribunal under Article 250 of the Treaty, and in due course some 350 of these claims were filed. Almost all the applicants were optants, most of them were "absentees" within the meaning of the Agrarian Law, and a large proportion were small farmers. The claims requested the Tribunal:

1. To declare that the expropriation of the claimant's property is contrary to Article 250.

2. To condemn the Roumanian Government to restore the property in the same condition in which it was before the expropriation.

3. To condemn the Roumanian Government to compensate the claimant for the damage suffered in consequence of the deterioration occasioned by the deprivation of possession.

4. Alternatively to condemn the Roumanian Government to pay to the claimant the replacement value of the property taken in the event of it being proved that it is impossible for the Roumanian Government to return the same, and to compute the amount of the indemnity.

The Roumanian Government filed an objection to the jurisdiction of the Tribunal in each case. In twenty-two cases which were set down for trial the Tribunal, sitting in Paris, after hearing full arguments on behalf of both parties, decided on January 10th, 1927, that it had jurisdiction to entertain the claims, and accordingly reserved them for judgment on the merits. The decision was arrived at by a majority consisting of the President, a distinguished Swedish jurist, and the Hungarian arbitrator. The Roumanian arbitrator dissented.

Shortly after the rendering of this decision the Roumanian Government announced that it would not allow its arbitrator to sit on the Tribunal in any matter relating to the agrarian question, thereby precluding the further consideration of the Hungarian claims, and appealed to the League of Nations. The request was based on Article 11 (2) of the Covenant, and its declared object was to "bring to the knowledge of the Council" the reasons for the Roumanian Government's action in withdrawing its arbitrator.[1] Hungary, on the other hand, denied that Article 11 had any application in the present circumstances and requested the Council to make the necessary appointment to enable the missing arbitrator to be replaced, as provided by Article 239 of the Treaty.[2]

This, then, was the issue before the Council: the Mixed Arbitral Tribunal set up by the Treaty of Trianon and entrusted by the High Contracting Parties with the task of adjudicating upon claims under Article 250 had decided that it possessed jurisdiction to entertain the claims of the Hungarian optants. The decision did not relate to the merits; it did not declare the Hungarian case to be well founded in fact, or call upon the Roumanian Government to take any remedial action. It dealt exclusively with the preliminary question of jurisdiction. Article 239 (g) of the Treaty provides that the "High Contracting

[1] League of Nations Official Journal, April, 1927, p. 350.
[2] Ibid, p. 370.

Parties (i.e., Roumania and Hungary, *inter alia*) agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive." Notwithstanding this express stipulation Roumania had repudiated the decision of the Mixed Arbitral Tribunal and paralysed its further action by withdrawing her arbitrator. She asked the Council to justify her conduct, whereas Hungary asked the Council to exercise the power given to it by Article 239 (a) for the purpose of enabling the Tribunal to function.

As a result of the meeting of the Council on March 7th, 1927, a Committee of Three, presided over by Sir Austen Chamberlain, was appointed to study and report upon the question.[3] Long discussions and negotiations took place between the Committee and representatives of the two Governments, which, however, failed to bring about any agreement, and the matter came up for consideration by the Council on September 17th, 1927, when the report of the Committee was presented.[4] After referring to the various unsuccessful efforts made to arrive at a settlement of the whole dispute by conciliation, the report states that the Committee was obliged to seek a solution by other methods, and had accordingly examined, with the assistance of legal experts, the question of the Mixed Arbitral Tribunal's jurisdiction. As a result of this examination the Committee arrived at certain conclusions. It states in the first place (and this conclusion is, of course, unexceptionable) that the Mixed Arbitral Tribunal being an international tribunal established by the Treaty, has no jurisdiction beyond that which the agreement of the contracting parties conferred upon it, and that the limits of this jurisdiction are defined by Article 250. It then proceeds to interpret this provision as follows :—

" If it could be established in any particular case that the property of a Hungarian national suffered retention or liquidation or any other measure of disposal under the terms of Article 232 and 250 as a result of the application to the said property of the Roumanian Agrarian Law, and if a claim were submitted with a view to obtaining restitution, it would be within the jurisdiction of the Mixed Arbitral Tribunal to give relief.

" The Mixed Arbitral Tribunal is not competent to give decisions on claims arising out of the application of an agrarian law as such unless the case mentioned in the preceding paragraph arises. In this latter case, the jurisdiction of the Mixed Arbitral Tribunal would not be ousted on the ground that the application of an agrarian law was involved.

" Since these considerations show that the claim of a Hungarian national for restitution of property in accordance with Article 250 might come within the jurisdiction of the Mixed Arbitral Tribunal, even if the claim arises out of the application of the Roumanian Agrarian Law, we shall proceed to the definition of the principles which the acceptance of the Treaty of Trianon has made obligatory for Roumania and Hungary.

" 1. *The provisions of the peace settlement effected after the war of* 1914-1918 *do not exclude the application to Hungarian Nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform.*

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3 Ibid, p. 372.
League of Nations Official Journal, October, 1927, p. 1379.

"Article 250 forbids the application of Article 232 to the property of Hungarian nationals in the transferred territory. Under the terms of Article 250, the prohibition to retain and liquidate cannot restrict Roumania's freedom of action beyond what it would have been if Articles 232 and 250 had not existed. Even if none of these provisions appeared in the Treaty, Roumania would none the less be entitled to enact any agrarian law she might consider suitable for the requirements of her people, subject to the obligations resulting from the rules of international law. There is, however, no rule of international law exempting Hungarian nationals from a general scheme of agrarian reform.

"The question of compensation, whatever its importance from other points of view, does not here come under consideration.

"2. *There must be no inequality between Roumanians and Hungarians, either in the terms of the Agrarian Law or in the way in which it is enforced.*

"Any provision in a general scheme of agrarian reform which either expressly or by necessary implication singled out Hungarians for more onerous treatment than that accorded to Roumanians, or to the nationals of other States generally, would create a presumption that it was intended to disguise a retention or liquidation of the property of Hungarian nationals *as such* in violation of Article 250 and would entitle the Mixed Arbitral Tribunal to give relief. The same would apply in the case of a discriminatory application of the Agrarian Law.

"The prohibition against the holding of immovable property by Hungarians in the territories transferred to Roumania, even if applied to all foreigners, would not be in accordance with the obligation which Roumania has contracted by the Treaty to permit Hungarian optants to keep their immovable property, but this is a question which does not come within Article 250.

"3. *The words 'retention and liquidation' mentioned in Article* 250, *which relates only to the territories ceded by Hungary, apply solely to the measures taken against the property of a Hungarian in the said territories and in so far as such owner is a Hungarian national.*

"The right which the Allied Powers reserved to themselves under Article 232 to retain and liquidate Hungarian property within their territory at the time of the entry into force of the Treaty applies to the property of a Hungarian inasmuch as he is a national of an ex-enemy country. It is not sufficient that these measures entail the retention of Hungarian property by the Government and that the owner of this property is a Hungarian. The measure must be one which would not have been enacted or which would not have been applied as it was if the owner of the property were not a Hungarian."

These conclusions of the Committee of Three call for close consideration. It will be appreciated, first of all, that they are entirely legal in character. It has been repeatedly asserted in the course of the dispute that it should not be envisaged from the narrow standpoint of the lawyer, but so far as this passage of the Committee's report is concerned it is clear that it purports to deal with a purely legal question

in a purely legal way. And it is difficult to understand how any other course was possible. The question which the Committee had undertaken to answer being whether or not the Mixed Arbitral Tribunal was right in asserting that it possessed jurisdiction there were no criteria other than legal ones whereby the point could be determined. The conclusions in question must therefore be judged by legal standards.

The first point to be noticed is that the Committee finds, in the earlier part of the passage cited, that the Tribunal *has* jurisdiction to entertain the Hungarian claims, but that the decision on the merits will depend upon the facts proved at the hearing. The obvious result of this finding is that the Tribunal established for the purpose by the parties should be allowed to hear the evidence and decide the cases. The Committee, however, is not content to stop there, but proceeds to lay down the tests by which the decision on the merits should be governed. This is the fundamental error of the report. Having satisfied itself that the claims were within the Tribunal's jurisdiction, it followed that the interpretation of the Treaty for the purpose of deciding those claims was a matter for the Tribunal and the Tribunal alone. The Committee, nevertheless, takes it upon itself to lay down a detailed interpretation, which is, moreover, intrinsically unsound.

Principle No. 1 set out above is misleading in its enunciation of the general proposition by which it begins, and directly wrong in the sentence with which it ends. This view is not a matter of personal opinion, but follows from legal propositions stated by the Permanent Court of International Justice, which is the supreme authority in international law. The fallacy contained in the Committee's finding consists in segregating the question of compensation from the consideration of the Agrarian Law. It may be true that the provisions of the peace settlement would not exclude the application to Hungarian nationals of a general scheme of agrarian reform *provided that the expropriation involved in such scheme was accompanied by full compensation,* but it results from the principles laid down by the International Court in Judgments No. 7 and 8 that the provisions of the peace settlement *do* exclude the application to Hungarian nationals of a general scheme of agrarian reform which involves expropriation without adequate compensation. In those cases the Court had to construe the following provision in the Geneva Convention between Germany and Poland :— "Poland may expropriate in Polish Upper Silesia, in conformity with the provisions of Article 7 to 23 undertakings belonging to the category of major industries, etc. Except as provided in these clauses the property, rights, and interests of German nationals or of companies controlled by German nationals may not be *liquidated* in Polish Upper Silesia." It held that the effect of the second sentence just cited was to preclude any expropriation other than that expressly allowed by the first sentence and subject to this exception to place the property referred to under the regime of general international law (Judgment No. 7, p. 22). The Court expressly stated that seizure without compensation was prohibited (Judgment No. 7, p. 33), and it is clear from the terms of the two Judgments that the Court recognized the principle of respect for the vested rights of foreigners as part of international common law and as precluding the expropriation of their property for any purpose without full compensation.[5]

Principle No. 2 of the Committee's report is correct in itself, but not if it implies that inequality or discrimination is a necessary

5 See on this subject my article on "Expropriation and International Law."

condition for relief. It may be noted in passing that the question whether the Agrarian Law was in fact (as the Hungarian Government alleged) applied so as to discriminate against Hungarians was, as the Mixed Tribunal itself observed in its Judgment, essentially one to be decided on the trial of the merits of the claims. But the condition of inequality is not necessary, as shown below. A curious statement is added under this head of the report to the effect that the prohibition against holding immovable property by Hungarians, even if applied to all foreigners, would not be in accordance with the obligation which Roumania has contracted by the Treaty to permit Hungarian optants to keep their immovable property. This refers to Article 63 of the Treaty cited at the beginning of this paper. If the prohibition to hold property is contrary to Article 63 *a fortiori* is the expropriation of property. The report continues "but this is a question which does not come within Article 250." The interpretation implied by this statement is too narrow, for according to the accepted rules of construction, in interpreting Article 250 the other provisions of the Treaty must be taken into account, and it throws the strongest light on the later Article to see that the earlier one expressly guarantees to the optants the right of retaining their immovable property.

Principle No. 3 is the most fallacious of all. The question in its simplest terms is this: Is the test the effect, or the declared purpose, of the measure complained of? Whether a Hungarian's property is taken from him by an agrarian law or an exceptional war measure the result to him is the same. Did the Treaty intend that he should be protected from the one description of dispossession and not from the other? Common sense seems to dictate the answer, but it has the confirmation of judicial authority, for the Permanent Court in Judgment No. 7 deals with the precise point. The Court observes (p. 31) that the Polish Government contended before it that the Polish Law in regard to which the German Government was complaining in that case could not be regarded as a measure of liquidation because it was based on considerations foreign to the conception of liquidation: it applied to certain property, rights, or interests without regard to the nationality of persons, whereas the regime of liquidation only applies to German private property as such. To this contention the Court replies as follows (p. 32): "The Court, though in no way denying that the liquidation regime established by the Treaty of Versailles and the actual measures of expropriation permitted by Head III of the Geneva Convention apply to German private property as such, cannot attach to the fact that Article 2 and 5 of the law of July 14th, 1920 (i.e., the Polish law in question) apply to a certain class of property, no matter what the nationality of the owners may be, the importance and effect which are attributed to that fact by Poland. Even if it were proved . . . . . that in actual fact the law applies equally to Polish and German Nationals it would by no means follow that the abrogation of private rights effected by it in respect of German nationals would not be contrary to Head III of the Geneva Convention. Expropriation without indemnity is certainly contrary to Head III of the Convention; and a measure prohibited by the Convention cannot become lawful under this instrument by reason of the fact that the State applies it to its own nationals." When it is remembered that "expropriation without indemnity" was contrary to Head III of that Convention because of the provision cited above to the effect that the property of German nationals should not be "liquidated" the precise applicability to the present case of the ruling of the International Court is evident.

Having laid down these principles the Committee took the grave course of recommending that the reconstitution of the Tribunal should be conditional upon their acceptance. If both parties accepted the principles Roumania was to reinstate her judge. If Hungary alone refused them the Council was to decline to reconstitute the Tribunal under Article 239, whereas if Hungary accepted and Roumania refused the Council was to exercise the power conferred by that provision. This proposal meant that if the Tribunal was enabled to function the rules for the determination of the Hungarian claims would be prescribed for it in advance. In other words, instead of the judicial body designated by the Treaty for the purpose adjudicating upon the claims according to its own interpretation of the relevant provisions of the Treaty, it was proposed to make it a condition of its being allowed to function that the interpretation contained in the Committee's report should be the basis of the decision.

Those of us who have the prestige and welfare of the League of Nations at heart were profoundly disturbed by this report, because it seemed to cut at the very root of international arbitration. If the report had become effective a disastrous precedent would have been created. Happily this has been avoided. When the report had been read to the Council a long and lively debate took place. The Hungarian representative (Count Apponyi) refused to accept the principles enunciated by the Committee, because, as he showed in a powerful argument, they were legally unsound. He protested against the course of interfering with a pending arbitration on political grounds, and renewed the offer already made by Hungary, namely, that the question of the jurisdiction of the Mixed Arbitral Tribunal should be referred to the Permanent Court of International Justice. The Roumanian representative (M. Titulesco) accepted the report and refused the Hungarian offer. The other members of the Council took up different attitudes. Some of them accepted the report as it stood. The representatives of Germany, Italy, Holland, and Colombia, on the other hand, expressed doubt on certain points and specifically declined to recognize the correctness of the legal theses contained in the report, whilst other members did not commit themselves one way or the other. The Council as a whole soon realized that it was impossible to force the three principles laid down in the report upon the parties or to carry out the proposal that the reconstitution of the Mixed Arbitral Tribunal should depend upon the acceptance of these principles by them. In view of the divergent views not only of the interested Governments themselves but also among the other members of the Council, it seemed desirable to gain time during which the parties might again reconsider the position and possibly reach an agreement. The Council therefore decided to invite the parties not to give a final answer till the month of December, and in the meanwhile to examine the report in a favourable spirit. The concluding words of the President's proposal as adopted by the Council were these: "I ask my colleagues to join with me in submitting the recommendations contained in the report to the consideration of the Governments interested and to beg them to conform to the principles indicated therein."[6] The representatives of Roumania and Hungary abstained from voting. It is quite clear that this recommendation was not intended to imply that the Council endorsed the intrinsic correctness of the principles in question, for Dr. Stresemann, MM. Scialoja Urrutia, Loudon and Voionmaa each made an express reservation on this point, and stated that the proposal to which they

[6] See League of Nations Official Journal, October, 1927, pp. 1383—1414.

adhered was merely that those principles should be used as a basis for discussion between the parties.

In compliance with the suggestion of the Council the Hungarian Government on November 15th, 1927, made an offer, without prejudice to the legal position, for negotiations with a view to arriving at a compromise based on (1) restitution of the lands expropriated, but not utilised for agrarian reform, and (2) an indemnity, below the full value, in the case of property already allocated to new peasants.[7]

No reply had been made to this offer when the Council met for its December session, and consideration of the dispute was adjourned. When the Roumanian Government replied in February, 1928, they demanded as a preliminary condition of negotiation that Hungary should accept the three principles laid down by the Committee of Three. Even upon that condition the only offer made was to renounce certain reparation payments, representing the merest fraction of the value of the expropriated property. In these circumstances the dispute came before the Council again last March. The Roumanian representative again insisted that Hungary must accept the three principles, whereas the representative of Hungary explained once more why his country could not recognize them, and renewed the offer to refer the question of the jurisdiction of the Mixed Arbitral Tribunal to the International Court, an offer which Roumania again refused. The gulf between the two Governments was as wide as ever. M. Titulesco sought with great vehemence to maintain not only that the principles of the Committee's report were correct, but that they had been approved as such by the Council, whereas Count Apponyi showed by reference to the proceedings that they had merely been recommended as a basis for negotiation, and could not be regarded as legal propositions approved by the Council itself.[8]

After hearing all these arguments a new proposal was made by Sir Austen Chamberlain. He suggested that Hungary and Roumania should agree that the Council should name two neutrals to sit with the Mixed Arbitral Tribunal as constituted under the Treaty (i.e., including the Roumanian member who would be restored by his Government) and that this Arbitral Tribunal of five members should adjudicate upon the Hungarian claims. This proposal was discussed and approved by all the members of the Council other than the interested Parties and then submitted to them for consideration.[9] At the next meeting the Roumanian representative made a long statement in which he insisted that the three principles of the committee's report should be made binding upon the Tribunal, and he only accepted the proposal subject to that condition. He argued that without this condition the new proposal was in contradiction with the Council's September recommendation. The Hungarian representative, after pointing out that this was an amendment, which he could not, of course, accept, declared that his Government gave its complete adherence to the proposal. Sir Austen Chamberlain took note of Hungary's unconditional acceptance, and pointed out that the condition attached to the Roumanian representative's acceptance in fact constituted not an acceptance but a refusal of the Council's recommendation. Sir Austen Chamberlain could not be responsible for making the change proposed. He thought it would be proper as an act of courtesy to the Tribunal to send them the whole

7 Hungarian Memoire of November 29th, 1927, p. 35.
8 Minutes, 49th Session of Council, 5th and 6th meetings.
9 Ibid, 7th meeting, pp. 1—4.

of the minutes of the discussions of the Council on this question. He urgently appealed to M. Titulesco to reconsider his decision and accept the Council's recommendation. The representative of Roumania replied that the question had been so much discussed that his decision was final. Thereupon, M. Briand pressed him to agree, using the argument that the Council's previous resolution would influence the decision of the Tribunal. Dr. Stresemann pointed out that there was no inconsistency between the Council's attitude in September and its present proposal. The September resolution was not the expression by the members of the Council of their conviction on the legal position. They did not discuss the substance of the problem, but offered the Committee's report to the Parties as a basis of discussion. He agreed that the minutes should be sent to the Tribunal so that the character of the resolutions adopted should be clear. After further discussion, in which M. Titulesco maintained his opposition, the Council adopted the following resolution :—

"The Council :

"Considering that the best method of settling the dispute was by friendly negotiation between the two parties, recommended that method to them in September, 1927, and stated three principles which, in its opinion, might serve as an equitable basis for this negotiation.

"Finding, however, that such friendly negotiation has not been possible between the parties, the Council, while considering its recommendations of September 19th, 1927, to be of value, and without modifying its views which are contained in the minutes of its discussions, submits unanimously for the acceptance of the parties the following recommendation :—

"That the Council should name two persons, nationals of States which were neutral in the war, who should be added to the Mixed Arbitral Tribunal as established by Article 239 of the Treaty of Trianon (that is to say, that Tribunal including a Roumanian member, who would be restored to it by his Government), and that to this Arbitral Tribunal of five members there should be submitted the claims which have been filed under Article 250 of the Treaty of Trianon by Hungarian nationals who have been expropriated under the agrarian reform scheme in the territory of the former Austro-Hungarian Monarchy transferred to Roumania.

"The Council requests the representatives of the Hungarian and Roumanian Governments to inform it at its next session of the replies of those Governments, and decides at once to insert the question on the agenda of that session."

Count Apponyi accepted the resolution, whereas M. Titulesco stated that all his previous declarations remained unchanged and he abstained from voting.[10]

That is where matters stand at the present moment. The last resolution of the Council is a step in the right direction inasmuch as it proposes that an Arbitral Tribunal should be set up to deal with the merits of the Hungarian claims. This Tribunal would not be trammelled

[10] Minutes, 49th Session of Council, 8th meeting.

by extraneous rules in giving its decision. No doubt the minutes containing the Council's previous discussions and recommendations would be before the Tribunal, but it would be quite free to appreciate their character for itself, and in view of what has been said above, it is plain that any legal principles referred to in those minutes could not be taken to represent the substantive opinion of the Council.

On the other hand, the proposed Tribunal is not the Mixed Arbitral Tribunal established by the Treaty. The Council does not comply with the Hungarian request to exercise its power of filling a vacancy under Article 239. The resolution requires, in order to become effective, that Roumania should consent to restore her Judge. It is, therefore, a compromise, but a statesmanlike one which does not violate the principles of international arbitration, or prejudice the possibility of future resort to Article 239, if it should prove necessary. Hungary has accepted this compromise, but, as already stated, Roumania has it in her power to make it unworkable, and her representative intimated in the clearest terms that his Government intended to do so. It has been said that each side in this dispute has flouted the authority of the League—Hungary in September, 1927, and Roumania last March—but it is only fair to point out the difference in the two cases. What Hungary did in September was to refuse, quite categorically it is true, to recognize as correct in law the interpretation given by the Committee of Three to Article 250 of the Treaty. But, as we have endeavoured to explain, not only was the opinion of the Hungarian Government in fact right, but the Council itself refrained from endorsing the legal soundness of the Committee's view. With regard to the actual recommendation adopted by the Council, namely, that the parties should endeavour to reach a settlement by negotiation on the basis of the principles laid down by the Committee, Hungary, whilst always maintaining her legal contentions, made an offer for a compromise, which Roumania rejected. M. Titulesco's action in March, 1928, on the other hand, was a direct refusal to comply with the League's proposal that the decision of the dispute should be entrusted to a reconstituted, enlarged and independent Tribunal. It is not immaterial to add that Hungary has over and over again offered to submit either the whole dispute or the question of jurisdiction to the Permanent Court of International Justice, and that Roumania has always declined.

Having outlined the course of this dispute from its inception to the present time, certain general observations fall to be made. What is the real issue? It is whether an international arbitration entered into by the parties shall take its course and the interim decision of the arbitral tribunal be respected, or whether one of the parties may unilaterally paralyse the proceedings and call upon the League of Nations to justify it in so doing. It may be said: You are begging the question in stating the issue in this way, because Roumania claims that the matter submitted to the Tribunal was outside its jurisdiction as defined by the arbitration agreement, namely, Article 250 of the Treaty. The answer is that the Tribunal itself has considered and rejected this plea. It stands to reason that the mere assertion by one party of a preliminary objection to the jurisdiction cannot release it from its obligations under an arbitration agreement. If this were possible, international arbitration would be a farce, and it is comforting to observe that this is the first occasion upon which such a claim has been put forward. There are a few instances in the history of international arbitration of a Government repudiating a final award on the

ground that the tribunal had manifestly exceeded its powers; but there is not a single precedent for the refusal of one party to allow the tribunal to hear the case and render its award. Where a preliminary objection to the jurisdiction is taken the tribunal's decision upon the point binds the parties. This is not only true as a matter of international law,[1] but of good sense. In the present case, however, it is hardly necessary to have recourse to this principle in view of the express stipulation of Article 239 (g) of the Treaty whereby "the High Contracting Parties agree to regard the decision of the Mixed Arbitral Tribunal as final and conclusive." Even if it be conceded that this must be understood as referring only to decisions which are within the Tribunal's jurisdiction, it is impossible to suggest that the decision upon the preliminary objection does not fulfil this condition. There can surely be no question as to the jurisdiction of the Tribunal to decide a point expressly raised by one of the Parties. But there is more. The fact is that it follows from the Roumanian Government's own thesis that the Tribunal possessed jurisdiction, because the question whether the Agrarian Law violates Article 250 of the Treaty admittedly depends upon what its true character and application are proved to be. If, for instance, it were proved at the hearing on the merits that there was discrimination against Hungarians in the application of the law the Roumanian Government itself admits that there would be an infringement of Article 250, and therefore a case where the Mixed Arbitral Tribunal could properly give relief. The Roumanian case is, in effect, that if, as she contends, the Agrarian Law is a general measure of social reform applied equally to Roumanians and foreigners, the Tribunal must reject the Hungarian claims, but if, as Hungary contends, it discriminates between Hungarians and Roumanians the Tribunal can give judgment for the claimants. This is not a plea to the jurisdiction at all, but as the Tribunal states in its preliminary decision, essentially a question of merits, to be dealt with at the trial.

Roumania, having withdrawn her arbitrator from the Tribunal, appealed to the Council of the League of Nations under Article 11, para. 2, of the Covenant, which declares it to be "the friendly right of each member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends." Hungary concurrently applied to the Council under Article 239 (a) of the Treaty, which provides, in effect, that if there is a vacancy in the Tribunal which one Government declines to fill the Council shall choose two neutrals, of whom the other Government shall appoint one to the vacant place.

What in these circumstances was the League's duty? The first observation to be made is that the League has no appellate powers in regard to courts of arbitration. It has no authority either to review the proceedings of such a Tribunal, or to direct it as to the law, or to release a party to an international arbitration from its obligations. The Covenant, on the contrary, recognizes and is based upon the sanctity of arbitration. It distinguishes clearly between the judicial process represented by arbitration and the political action of the League itself—the two things are separate and independent, the one is alternative and exclusive of the other. Article 13, indeed, provides that the Council

[1] See Lapradelle on "L'éxcés de pouvoir de l'arbitre" in Revue de Droit International, January, 1928.

can be called upon to assist in *enforcing* an arbitral award, but it would take a bold man to suggest that the converse is contemplated. On the other hand, the provisions of Article 11 (2) of the Covenant are very wide. They enable the Council to consider and discuss almost any international question, although, be it noted, they do not empower it to give any decision or take any positive action.

Under Article 239 (a) of the Treaty the Council is charged with an obligatory ministerial duty.

The Council had to take both these provisions into account. It might well have decided that, in the circumstances, its task was limited to performing the ministerial act required by Article 239, but, in the writer's respectful submission, it was also a right and proper view that an endeavour should be made, in the first instance, to bring about by conciliation a voluntary agreement between the parties, without, of course, prejudicing in any way the legal position arising out of the pending arbitration. As soon as it was ascertained that a direct agreement between the parties was impracticable, recourse could and should be had to Article 239. If it is said that the Council was entitled under Article 11 and bound under Article 239 to satisfy itself as to the Tribunal's jurisdiction to entertain the claims, the answer is, as we have endeavoured to explain, that this point was clear beyond the possibility of doubt, and it is to be remembered that jurists consulted by the Committee of the Council answered this question in the affirmative. †

It is not the purpose of the present article to criticise the action of the Council, and it is recognized that it was faced with a delicate task in giving due weight both to Article 11 of the Covenant and Article 239 of the Treaty. But the fundamental factor of the whole case was this: that Hungary relied upon an arbitral agreement and decision, which Roumania repudiated. In these circumstances it is unfortunate that by delay and by some of the proceedings of the Council the impression should have been given that the League can be used as an instrument for evading obligations resulting from a submission to arbitration, or that its intervention can be sought to undermine the authority and independence of an international arbitral tribunal. It is to be hoped that if the latest attempt to arrive at a compromise under Article 11 of the Covenant fails, the Council will, without further delay, perform the duty imposed upon it by Article 239 of the Treaty and thereby enable the Mixed Arbitral Tribunal to function and render its final award. By so doing the sanctity of international arbitration will have been upheld and the Hungarian claimants will have obtained the impartial decision upon their claims to which the Treaty entitles them. If the final award is adverse to them, there will be an end to this dispute. If it is in their favour it may be hoped that the Roumanian Government will reconsider the position and decide to comply. Should it not do so the League of Nations might be called upon again to deal with the matter, but it would do so in full possession of the facts judicially investigated and of the Tribunal's final decision, with a better prospect of success.

One word in conclusion. It has been said, on the Roumanian side, that this is a case in which the law may be doubtful, as shown by the conflicting legal opinions obtained, but that what is described as

† See pp. 6, 8 Supra.

"equity" supports the Roumanian contentions. This point of view is entirely unfounded. In the first place there is, in fact, no conflict between law and "equity"—by which is meant in this connection substantial, or natural, justice. "Equity," no less than law, requires that the independent tribunal provided for by Article 250 should be allowed to decide whether or not the expropriation of the Hungarian claimants was contrary to the Treaty. What the Roumanian Government really relies upon and has appealed to throughout this dispute are political considerations, and the issue stripped of all technicalities is simply this: Whether political considerations are to override the legal obligations arising out of the submission to arbitration? The principle involved extends far beyond the interests immediately concerned, and is vital to the League of Nations and the future of international relations, but it is entirely free from difficulty and no amount of legal subtlety can render the answer doubtful. The only legal question of a technical kind in this case is that of the jurisdiction of the Mixed Arbitral Tribunal under the Treaty to entertain the Hungarian claims, and most of the lawyers referred to by the Roumanian Government refrain from dealing with this point on its merits, because the negative view is unarguable. It is idle to suggest that this is an open question admitting of conflicting opinions. If the facts are truly stated only one answer is possible as a matter of law, and once this point is established the other conclusions inevitably follow.

Translated from the Italian.

The functions of the Council of the League of Nations in the controversy between Hungary and Roumania.

OPINION

OF

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Rome, 28th April, 1928.

The present state of the controversy between Hungary and Roumania on the question of the Hungarian optants is as follows:—

The Council of the League of Nations, which had been seized of the question by Roumania on the basis of Article 11, Sec. 2, of the Covenant of the League of Nations, at its meeting of March, 1928, had adopted some recommendations and invited the parties to acquaint it, before its meeting of June next, with their decision concerning the acceptance of the proposals made by the Council for the settlement of the controversy.

The representative of Hungary, at the same meeting in which the Council adopted its Resolution containing the proposal for the settlement of this dispute, declared in the name of his Government that Hungary for her part accepted the said proposals. The representative of Roumania reserved to himself the right of communicating the decision of his Government. Up to the present there are no circumstances that can authorize us to anticipate that the Roumanian Government is disposed to declare that it will give its assent to the proposals recommended by the Council.

In these circumstances, supposing that the Roumanian Government refuses to accept the said proposals, we are faced in the first place by a particularly important and vital question which has, among the many and interesting problems raised by the Hungaro-Roumanian controversy, given rise, as the others have, to differences of views: I refer to the question concerning the task which falls to the Council of the League of Nations on the basis of Article 239 of the Treaty of Versailles, relying on which Hungary had asked the Council to proceed to the appointment of two substitute arbitrators for the Roumano-Hungarian Mixed Tribunal.

This question must be examined, in the first place taking into consideration Article 239 of the Treaty of Trianon by itself, leaving on one side the eventual influences on the working of this Article, of the attributions of the Council in virtue of Article 11, Sec. 2, of the Covenant, which have been invoked in consequence of the request of the Roumanian Government. It may seem that the examination of the question from this first point of view has no practical interest because of the fact that in this way the question is not submitted to examination just as it is raised in the circumstances of the present dispute. I am of opinion, on the contrary, that such an examination is necessary for the finding of a correct answer to the question as it presents itself in fact, *i.e.*, in connection with the exercise by the Council of the powers which are attributed to it by Article 11, Sec. 2, of the Covenant.

(1) The first aspect of the question is to state the precise definition of the character of the provisions of Article 239 of the Treaty

of Trianon, and in particular to ascertain whether the appointment of substitute arbitrators in the cases prescribed by the said Article and by Article 1 of the Annex is an obligatory or optional duty for the Council, the exercise of which may be legitimately subordinated by the Council to a discretionary appreciation and under certain definite conditions.

Within the Council the representative of the Roumanian Government maintained the thesis that Article 239 of the Treaty of Trianon had not imposed on the Council the duty of proceeding to the appointment of the substitute arbitrators. " . . . . le traité," said M. Titulesco at the meeting of the Council of the 17th September, 1927 (*J.O.d.S.d.N.*, 1927, page 1392), " n' a pu créer un devoir impératif en vertu de l'article 239. En effet, les caractères du Conseil ont été fixés par le Traité de Trianon, ni par aucun autre Traité de paix . . . . . indépendent du Pacte. Le Conseil est l'organe de la Société des Nations. Les nombreux Etats membres de la Société ne sont pas liés par le Traité de Trianon, ni par aucun autre Traité de paix . . . . . Ce que les Traités de paix ont pu vouloir, c'est demander aux Etats membres du Conseil d'envisager la désignation de juges suppléants. Il appartient donc au Conseil d'apprécier, en toute liberté, une telle demande, de l'accueillir favorablement si elle lui convient : mais le Conseil reste libre de l'accueillir ou non pour tels motifs qu'il apprécie librement."

According to the opinion of some authors, the meaning of Article 239 of the Treaty of Trianon would be to attribute to the Council a power of control over the functioning of the Mixed Tribunals, and therefore the Council would have, in all that concerns the appointment of substitute arbitrators, the right of subordinating their appointment to opinions regarding the functioning of the Tribunal in the exercise of its powers. " En d'autres termes," wrote M. Prudhomme, " les traités de paix ont remis l'organisation des Tribunaux arbitraux mixtes aux mains du Conseil de la Société des Nations : c'est à cet organe qu'il appartient d'en assurer l'existence. De ce principe découlent alors le droit et le devoir, pour le Conseil de la Société des Nations, de resoudre les difficultés auxquelles peut donner lieu la composition et le fonctionnement du Tribunal arbitral mixte (*Journal de droit international,* 1927, page 867).

These theses are without foundation.

The fact that Article 239 of the Treaty of Trianon is no part of the Covenant of the League of Nations is not, by itself, sufficient to exclude the obligatory character for the Council of the functions attributed to it by the article in question. The Covenant itself, in its fifth article, expressly records that there are some attributions of the Council, as an organ of the League of Nations, which are established by articles of the treaties of peace which are not included in the Covenant of the League. Articles of this category are numerous. Enumeration would be superfluous. No State which has joined the League of Nations without being a signatory of any one of the treaties of peace, has ever raised any doubt that the attributions conferred by the treaties of peace on the organs of the League of Nations were obligatory, on the ground that they were not provided for by articles of the Covenant. Through the historical circumstances in which it was formed, the League of Nations includes among its attributions as an institution also those which refer to the execution of the treaties of peace, which are expressly confided to it by the Clauses of the treaties themselves. The States which have become members of the League of Nations, by adhesion or admission have implicitly, but of necessity, recognised this state of affairs.

The Council of the League of Nations has, nevertheless, no power to decline the attribution which has been conferred on it by Article 239 of the Treaty of Trianon, any more than it could, for instance, decline the attribution which the same Treaty confers on it regarding all that concerns the basin of the Sarre.

On the other hand, there is equally no foundation for the thesis that Article 239 of the Treaty confers on the Council a jurisdiction which invests the Council with a power of control over the functioning of the Mixed Arbitral Tribunals, or leaves to the Council the liberty of deciding, at its own discretion, whether or no it is advisable to act in response to the demand of the State interested and appoint the substitute arbitrators.

Article 239 of the Treaty of Peace attributes to the Council, exclusively, the function of naming definite persons to be the substitute arbitrators. The power of the Council is discretionary only in as far as regards the liberty of choice of the persons, this choice being limited only by the condition that the persons chosen should belong to neutral States; in other words, the Council has a power of choice in making its appointments, but has the obligation to appoint the substitute arbitrators in order to place the Tribunal in a position to function. The fulfilment of this obligation cannot be subordinated on the part of the Council to an opinion regarding the method in which the Arbitral Tribunal should function.

That this is the only correct interpretation of Article 239 is reconfirmed by the following consideration :—

Article 239 of the Treaty of Trianon establishes, as do the identically corresponding articles of the other treaties of peace, that the appointment of substitute arbitrators is made by the Council of the League of Nations, and, " jusqu' au moment où il sera constitué par M. Gustave Ador, s'il y consent." It follows from this article that the function conferred by it on the Council of the League of Nations is, with respect to its extent, the same as that which was attributed to M. Gustave Ador. Now, no one would dare to maintain that, in virtue of Article 239, M. Gustave Ador, having accepted the functions attributed to him by this Article, would have had a power of control over the functioning of the Mixed Arbitral Tribunals, or would have had the power of subordinating in any way whatever the appointments of the substitute arbitrators to conditions concerning in any way the exercise of the jurisdiction of the Mixed Arbitral Tribunals, as fixed by the treaties of peace. The Council of the League of Nations does not receive any different attribution from Article 239. The fact that the competence to appoint substitute arbitrators in conformity with Article 239 is transferred to the Council of the League of Nations does not mean that the extent of its competence is modified. As it is manifestly beside the mark to recall that M. Ador would have had a power of control over the functions of the Mixed Arbitral Tribunals, so also is the idea untenable that such a power belongs to the Council of the League of Nations. Article 239 of the Treaty of Trianon and the corresponding articles in the other treaties of peace are of the same type as the provisions, so frequently found in international practice, which establish that the nomination of arbitrators, in the case of failure of agreement between the interested Governments, is made by a certain Government, or by a person appointed, or by an international organ. All these provisions attribute exclusively the function of nomination. They leave liberty of choice in the proceedings leading up to the

nomination in question, but in no case do they mean a power of subordinating the nomination of the arbitrators to conditions relating to the judgment which these are called upon to give.

For the purpose of correctly defining the character of the jurisdiction which Article 239 of the Treaty of Trianon attributes to the Council, it is well to add the following complementary observations :—

(*a*) The deliberation of the Council to proceed to the appointments provided for in Article 239, does not require unanimous voting.

(*b*) The nomination of substitute arbitrators, in execution of Article 239, is not a question for which, in conformity with Article 5 of the Covenant, the interested States must be invited to have themselves represented at the session of the Council in which this nomination takes place. In 1923, in fact, when, on the demand of the French and Belgian Governments, the Council proceeded to the appointment of substitute arbitrators to the Mixed Franco-Austrian, Franco-Hungarian, Franco-Bulgarian, Belgo-German, Belgo-Austrian, Belgo-Hungarian, and Belgo-Bulgarian Tribunals, the appointments were made by the Council without Austria, Bulgaria and Hungary having been invited to take part in the meeting of the Council.

(*c*) The attribution conferred on the Council by Article 239 of the Treaty of Trianon, finally, is a jurisdiction, independent of the fact that Hungary and Roumania are members of the League of Nations. Such an attribution was, in fact, conferred on the Council of the League of Nations by a disposition of the Treaty of Peace previous to the admission of Hungary to the League of Nations, and would remain confided to the Council, even if Hungary or Roumania, or both these States should cease to be members of the League of Nations.

II. The second aspect of the question which we are examining, presents itself in the following terms : *What influence can the attributions, belonging to the Council in virtue of Article 11, Sec. 2, of the Covenant of the League of Nations, have on the execution on the part of the Council of the functions conferred on it by Article 239 of the Treaty of Trianon?*

The Roumanian Government, by the fact that it had exercised as a member of the League of Nations the option, accorded to it by Article 11, Sec. 2, of the Covenant of the League of Nations, to call the attention of the Council to the question which had arisen with Hungary with regard to the jurisdiction of the Mixed Arbitral Tribunal in connection with the demands of the Hungarian optants, maintained that the Council could not separate Article 239 of the Treaty of Trianon from Article 11 of the Covenant, that is to say, it must subordinate the execution of Article 239, as far as concerns the appointment of substitute arbitrators, to the powers which Article 11, Sec. 2, of the Covenant confers on it.

This thesis was stoutly maintained by the representative of the Roumanian Government at the meeting of the Council of the League of Nations.

" Le Conseil, dans l'exercice de la compétence exceptionnelle que lui confère l'article 239 du Traité de Trianon, ne saurait méconnaître sa tâche essentielle conférée par l'article 11. Organe politique, il ne saurait négliger les contingences politiques. Il doit avoir le droit de refuser une désignation qui lui paraît inopportune ou de nature à nuire à son propre fonctionnement. Contester au Conseil ce droit d'appréciation, conférée par l'article 11, signifierait assimiler à un simple automate un

corps investi de la plus haute et de la plus délicate mission politique." (*J.O. de la S.d.N.*, 1927, page 1392).

The Roumanian thesis, therefore, is the following: The Council being seized with the question, in accordance with Article 11, Sec. 2, of the Covenant, has the right, in virtue of the powers which it derives from that article, to refuse to proceed purely and simply to the appointment of the substitute arbitrators asked for by the Hungarian Government on the basis of Article 239 of the Treaty of Trianon.

Is this connection, or—more correctly—this confusion, between the attributions which belong to the Council in virtue of Article 11 of the Covenant, and those conferred on it by Article 239 of the Treaty of Trianon, admissible?

The answer to this question cannot be given without first recalling what are the powers that belong to the Council of the League of Nations in virtue of Article 11, Sec. 2, of the Covenant.

According to this Clause of the Covenant: " Tout membre de la Société a le droit, à titre amical, d'appeler l'attention de l'Assemblée ou du Conseil sur toute circonstance de nature à affecter les relations internationales et qui menace par suite de troubler la paix ou la bonne entente entre nations, dont la paix dépend."

Article 11 does not define precisely the action which the Assembly or the Council is called upon to display, when a member of the League avails himself of the right laid down in this article. Nor are precise details in this respect to be found in other Articles of the Covenant. Bearing in mind the general principles, by which the constitution of the League of Nations is inspired, this lack of precise dispositions of the Covenant suffices to exclude the possibility of the Council or the Assembly having the power, in virtue of Article 11, Sec. 2, of taking decisions which have, either directly or indirectly, a binding effect on one or the other interested State.

The Council, like the Assembly, when once its " attention " has been called by one member to a certain question in conformity with Article 11, Sec. 2, can exercise only the function of a conciliating mediator. Here a mediator is intended, whose moral authority would have the greatest chances of succeeding in smoothing away the difficulties of the dispute, to which its attention has been called, but in any case nothing more than a mediator. Its powers are limited to those which are proper to a mediator. The Council, on the strength of Article 11, Sec. 2, can recommend to the interested States the proposals which, in its opinion, are likely to smooth away the difficulties to which its attention has been drawn: but it cannot take resolutions which have a binding effect on either one or the other, or on both, of the two interested States. No doubt is possible on this point. We confine ourselves to quoting, by reason of its authority, the following passage from the Report of M. Politis on the project of the Protocol on the Peaceful Settlement of International Disputes, adopted by the League of Nations at the meeting of 1924: " L'art. 11. . . ne confère nullement au Conseil ou à l'Assemblée le droit d'imposer aux Parties, sans leur consentement, une solution du différend. L'action, en vertu de cet article, du Conseil ou de l'Assemblée, ne peut être obligatoire pour les Parties, dans le sens où les recommendations le sont aux termes de l'article 15, à moins qu'elles n'y aient consenti."

Now, the task which the Council had the duty to fulfil in consequence of the request of the Roumanian Government, based on Article 11, Sec. 2, was completed when the Council in the course of the session of March, 1928, after having vainly attempted to obtain an understanding between the interested parties, adopted some proposals recommending them to the acceptance of the two Governments.

If the Roumanian Government does not accept the proposals recommended by the Council, the task of the Council in virtue of Article 11, Sec. 2, will be finished. In particular, the Council, in virtue of Article 11 of the Covenant, will not be able to refuse to proceed to the appointment of substitute arbitrators in fulfilment of Article 239 of the Treaty of Trianon.

The Roumanian request, having previously put in motion the action of the Council, in conformity with Article 11, Sec. 2, of the Covenant, authorised the Council temporarily to suspend the appointment of the substitute arbitrators, when the Hungarian Government, relying upon Article 239 of the Treaty of Trianon, appealed to the Council to that effect; but this does not mean that the Council, in the exercise of the attributions conferred on it by the Covenant in virtue of Article 11, Sec. 2, could avail itself of Article 11 of the Covenant to refuse to execute its duty of appointing the substitute arbitrators in conformity with Article 239 of the Treaty of Trianon, or to subordinate this appointment to conditions affecting the interpretation of the jurisdiction of the Mixed Arbitral Tribunal.

The Report of the Committee of Three, presented to the Council of the League of Nations at the meeting of the 17th September, 1927, after having formulated some proposals for the solution of the difficulty, had deemed that it could suggest to the Council, if the latter had adopted the Report of the Committee of Three, the measures to be taken in the case that one or the other, or both, of the parties should refuse to accept those proposals. The Report of the Committee concluded in the following words :—

" En cas de refus de la Hongrie, le Comité estime que le Conseil ne serait pas justifié de procéder à la nomination des deux membres suppléants, conformément à l'article 239 du Traité de Trianon.

" En cas de refus de la Roumanie, malgré l'acceptation par la Hongrie des propositions ci-dessus, le Comité estime que le Conseil serait justifié à prendre les mesures nécessaires pour assurer en tout cas le fonctionnement du Tribunal arbitral mixte.

" Dans le cas du rejet par les deux parties à la fois des recommendations ci-dessus, le Comité croit que le Conseil aura épuisé le rôle qui lui incombe en vertu de l'article 11 du Pacte."

This part of the Report of the Committee of Three did not fail to call forth within the Council itself certain explicit reserves, which excluded the possibility of the Council adopting the measures proposed by the Committee of Three. Signor Scialoja, with the judicial spirit characteristic of him, pointed out that " dans les propositions qui nous ont été faites par le Comité de Trois, on dépasse peut-être un peu les bornes de l'article 11 en proposant également des sanctions d'ordre juridique." Herr Stresemann declared in terms still more emphatic his disagreement with that which concerned the proposals of the Committee of Three. " D'après ces recommendations, la désignation des juges

suppléants doit dépendre de la question de savoir si la Hongrie accepte ou non les thèses juridiques du rapport. Cette condition péremptoire ne me semble pas justifiée d'après les clauses du Traité de Trianon. Je crois que le comte Apponyi n'a pas tort de faire observer que le fait d'imposer de telles conditions constitue un mélange dangereux de questions politiques et de questions juridiques. Il est tout à fait vrai que le Conseil peut se prononcer sur la situation juridique et recommander aux parties l'acceptation de son opinion : *mais il ne peut pas imposer et faire que l'accomplissement d'une demande juridique en dépende.*"

These observations go to the central point of the question as it appears even in the present state of affairs. The Council, in virtue of Article 11, has only the function of a conciliator. It can make proposals for solutions and recommend them to the acceptance of the parties. It has in this respect a liberty of judgment, to which Article 11 does not put precise limits, but it can do nothing more than make recommendations which the parties are free to accept or not to accept. The Council has no power, in virtue of Article 11, either of making decisions with force binding on the parties, or of establishing sanctions in case that one or the other of the parties, or both, availing themselves of the liberty which they enjoy, should not see fit to accept the proposals recommended by the Council. Now, what would be the effect of a refusal of the Council to proceed to the appointment of substitute arbitrators in the case that one of the parties, or both of them, did not accept its recommendations? Such a refusal would be, on the part of the Council, the adoption of a measure which imposes juridical consequences on one of the parties. This exceeds the powers which belong to the Council, acting in virtue and within the limits of Article 11 of the Covenant. The proof of this usurpation of jurisdiction is in this : The Council could not put forward its refusal to proceed to the appointment of substitute arbitrators as a threat if Article 239, which attributes to the Council itself the function of nominating the substitute arbitrators, did not exist, or if this function were attributed to others. From this it follows that the refusal to nominate the substitute arbitrators is a measure which, in virtue of Article 11 of the Covenant, the Council would not have the possibility of taking. The Council cannot avail itself of Article 239 of the Treaty of Trianon to take, in virtue of Article 11 of the Covenant, the decision to refuse to proceed to the appointment of arbitrators. Article 239 of the Treaty of Trianon, as we have seen, is independent of Article 11 of the Covenant. The Council, acting in virtue of Article 11, cannot whittle away Article 239, and, in particular, cannot transform the obligation to appoint, which is imposed on it by that Article, into a discretionary power which permits it to make of the refusal to appoint the arbitrators a juridical sanction for the case that its recommendations are not accepted. The refusal to nominate is a negative measure, which, however, has a juridical effect in so far as it deprives one of the parties of the right to obtain the placing of the Mixed Arbitral Tribunal in a position to function in conformity with the dispositions of the Treaty of Peace. The adoption of a measure which involves a similar juridical effect exceeds the exclusively mediatory powers which belong to the Council, in virtue of Article 11 of the Covenant.

The Council, availing itself of its powers for the purpose of conciliatory action, provided for in Article 11 of the Covenant, made certain recommendations, suspending in the meantime its assent to the demand of Hungary that it should proceed to the appointment of the arbitrators.

This conciliatory action was exhausted. The Council, acting in virtue of Article 11, has made its proposals. Hungary has declared herself disposed to accept them; Roumania refuses. In these circumstances, the task of the Council in virtue of Article 11 being completed, there is no reason any longer to keep in suspense the execution of Article 239 of the Treaty of Trianon. The Council has no other duty than that of appointing the substitute arbitrators.

The refusal to proceed to the appointment of the substitute arbitrators would be absolutely unjustifiable in law as an usurpatory exercise of the powers of the Council, even though Hungary had declared that she could not accept the proposals contained in the Report of the Committee of Three. Such a refusal would appear to be not only unjustified in law but contrary to juridical good sense, if it took place after Hungary had declared herself disposed to accept the proposals recommended by the Council in its meeting of March, 1928.

It is hardly worth pointing out that the appointment of the substitute arbitrators, in accordance with Article 239 of the Treaty of Trianon, would not imply on the part of the Council any opinion on the merits of the question of the jurisdiction of the Mixed Arbitral Tribunal. The Council, proceeding to the appointments, would only be giving effect to an obligation which is laid upon it by Article 239 of the Treaty of Peace, an obligation which does not mean for the Council any power of interpretation of the limits of the jurisdiction of the Mixed Tribunal, or the functioning of this latter.

One may observe that by acting thus, the Council would fulfil the duty imposed on it by Article 239 of the Treaty of Trianon, but with the appointment of the substitute arbitrators the controversy between Hungary and Roumania would, as regards the merits of the case, still remain open.

No one will contest the accuracy of this observation, but the fact that the controversy remains open until the two parties have come to an agreement to settle it, directly or by arbitration, depends on the principles on which the Covenant of the League of Nations has been built up. Neither the Council, nor the Assembly, can impose the solution of a dispute. Every conflict, in which the interested parties do not accept the proposal of the Council or of the Assembly, remains open. But this does not authorise the Council, in the case of the present controversy between Hungary and Roumania, to refuse to carry out its obligation to appoint the substitute arbitrators, especially because, in virtue of the Covenant as it stands, it is not invested with powers which allow it to impose obligatory measures, such as would be the taking away from Hungary the right that the Mixed Arbitral Tribunal shall be placed in a position to function.

Rome, 28th April, 1928.

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OPINION

On the Obligatory Force of the decision of 10 January, 1927, of the Roumano-Hungarian Mixed Arbitral Tribunal concerning the claims arising out of the Agrarian Expropriations in Transylvania.

BY

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By a decision taken at Paris on 10th January, 1927, the Roumano-Hungarian Mixed Arbitral Tribunal declared its own jurisdiction in respect of a claim presented by Hungarian subjects against measures adopted by the Roumanian Government in Transylvania for the expropriation of their property.

In consequence of this decision the Roumanian Government, through its own representatives, declared that it would abstain from taking any further part in the matter pending before the Mixed Arbitral Tribunal, and that it would not consent that its own arbitrator should continue to be a member of such Tribunal for dealing with the questions concerning the agrarian reform. Further, Roumania brought the question before the Council of the League of Nations, justifying her own attitude with the allegation of a usurpation of jurisdiction on the part of the Mixed Arbitral Tribunal.

The thesis that the Mixed Arbitral Tribunal had, in the judgment recalled above, exceeded the limits of its powers, by usurping jurisdiction which did not pertain to it, was emphatically developed by the Roumanian representative before the Council of the League of Nations, and the opinions of some authoritative jurists were invoked in its support.

In the present opinion, I propose to examine whether the affirmation of a usurpation of jurisdiction on the part of the Mixed Arbitral Tribunal can be considered as having a foundation in law; and whether the allegation of such a defect in the judgment can authorise the Roumanian Government to refuse obedience to the decision.

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To understand exactly the terms of the question, it is first of all necessary to consider the reason and the contents of the rules of the Treaty of Trianon, which refer to it; and then the facts which have given rise to the complaints in question.

It is well known that, in the Treaty of Peace with Germany, the Allied Powers reserved to themselves the right to appropriate and to liquidate all the property belonging to the Germans which, at the date of the entry into force of the Treaty, were within their territory, including the territories ceded to them in virtue of the Treaty itself.

An analogous proposition was inserted in the project of the Treaty with Austria, elaborated by the Conference of Peace. But, consequent on a protest of the Austrian delegation against the extension of the regime of liquidation to the property situated in the former Austro-Hungarian Empire, the Allied Powers consented to modify the rule under discussion, and to recognise respect for private property of the Austrian nationals within the boundaries of the former Monarchy.

And since, already during the Armistice, in some of the Austro-Hungarian territory occupied by the Allied States, restrictive measures against the property of the enemy subjects had been adopted, provision was made, with a special disposition, to establish that the properties in question should be restored to their respective owners, free from all measure of expropriation or of sequestration, and returned in the state in which they had been previously. These dispositions formed the first two paragraphs of Article 267 of the Treaty of St. Germain; and were reproduced, in favour of the Hungarian citizens, in Article 250 of the Treaty of Trianon, in which they are formulated as follows:—

"Notwithstanding the provisions of Article 232 and the Annex to Section IV, the property, rights and interests of Hungarian nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with these provisions."

"Such property, rights and interests shall be restored to their owners freed from any measure of this kind, or from any measure of transfer, compulsory administration or sequestration, taken since 3rd November, 1918, until the coming into force of the present Treaty, in the condition in which they were before the application of the measures in question."

The scope of these provisions is illustrated in a note of 2nd September, 1919, addressed by the Allied Powers to the Austrian delegation. In this Note it was declared: "Les biens des ressortissants autrichiens dans les territoires cédés aux Puissances alliées seront rendus a leurs proprietaires; ces biens seront libres de toute mesure de liquidation ou de transfert prise depuis l'armistice, et une exemption semblable de toute mesure de saisie ou de liquidation leur est garantie pour l'avenir."

These declarations, made with regard to the Treaty of St. Germain (Art. 267), cannot but be valid also for the corresponding rules of the Treaty of Trianon (Art. 250).

Nevertheless, the Hungarian delegates did not appear entirely satisfied by these dispositions, for fear that they might not offer an adequate defence against measures having a character of apparent generality, and in particular against a recent Roumanian law which established the expropriation of all immovable property, belonging to foreigners or to persons residing abroad, and situated in the territories ceded by Hungary. To the demand for more effective guarantees, made by the Hungarian delegation, the Allied Powers replied that, being questions concerning the interpretation of the Treaty of Peace, they could not be disposed of immediately; anyhow, the Powers agreed to the proposal to permit recourse to the Mixed Arbitral Tribunal "for settling the conflicts relative to the restitution of their property, rights and interests situated on transferred territory to Hungarian nationals as provided by Article 250 of the Treaty."

Therefore, it was decided to add to Article 250 a new paragraph in the following terms:—

"Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239."

In this way, while it was recognised explicitly that the provisons denounced by the Hungarian delegation could render dubious the observance of the rules contained in the Treaty, the jurisdiction to give

judgment on the objections raised against such provisions was attributed to the Mixed Arbitral Tribunal.

Finally, in confirmation of the conditions which it was desired to impose on the property of the Hungarian subjects, it is worth remembering that Article 3 of the Treaty with Roumania for the protection of the minorities, of 20th December, 1919, establishes that any Austrians and Hungarians who might opt for Austrian or Hungarian nationality would be authorised to retain their immovable property situated in Roumanian territory. (Compare Art. 63, para. 4 of the Treaty of Trianon.)

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On the basis of the protection accorded to them by these rules of the Treaties, and in particular of the Treaty of Trianon, several Hungarian subjects laid a complaint before the Roumano-Hungarian Mixed Arbitral Tribunal against measures for the expropriation of their agrarian property, adopted in the territories ceded to Roumania.

The facts on which such complaints were founded are too well known for it to be necessary to set them out again. The Roumanian Government, after having, by successive decrees on 12th September, 1919, and 12th June, 1920, predisposed the expropriation of the immovable property belonging to foreign subjects in Transylvania, by a law of 30th July, 1921, regulated and enforced the above-mentioned agrarian reform in Transylvania.

In accordance with the dispositions of this law, the agrarian properties of the absent owners were to be expropriated in their entirety; and to the effect, every person who had been absent from the country between 1st December, 1918, and 23rd March, 1921, unless such person were charged with an official mission abroad, was described as "absent."

In this law, to the criterion of foreign nationality, adopted in the preceding decrees—a criterion which now appeared too evidently in contradiction with the dispositions of the treaties stipulated by Roumania, was substituted the criterion of absenteeism, determined for a period coinciding with the occupation of Transylvania by the Roumanian troops after the armistice.

It seems that this criterion was applied in the most rigorous manner, because, according to the instructions of the Roumanian Government, anyone was to be considered "absent" who could not show that he had remained in the country during the *whole* of the aforesaid period. And since, especially in that period, a large number of Hungarian proprietors of Transylvania had fled before the Roumanian troops, without further ado the expropriation of all their property was inflicted upon them.

If it is remembered that the lands of Transylvania, for the greater part, were the property of Hungarians, it becomes evident that the Roumanian Law of 1921, although in appearance it had the semblance of generality, nevertheless, in its effects, proved itself to be aimed, essentially, at the expropriation of the property of the above-mentioned Hungarians.

In such circumstances can the jurisdiction of the Roumano-Hungarian Mixed Arbitral Tribunal to take cognisance of the complaints presented by Hungarian subjects in respect of the provisions referred to, be regarded as well founded?

It seems to me that an impartial examination of the provisions of the Treaty of Trianon and of the facts now recalled must lead to the acceptance of an affirmative reply. The facts, with which the Mixed Arbitral Tribunal was called upon to occupy itself, are of such a nature that, if they are duly verified, they place in question, essentially, the principle of respect for the private property of Hungarian citizens in the ceded territories, solemnly proclaimed by the Treaty of Trianon. Now, as has been seen, precisely as a guarantee for the observation of such principle on the part of Roumania, as of the other Succession States, the jurisdiction governed by Article 250 of the Treaty of Trianon, was attributed to the Mixed Arbitral Tribunal.

No subtle disquisition on the terms adopted in the Treaty and on the articles of the Roumanian law can succeed in destroying these fundamental data: that the measures taken in Transylvania by the Roumanian Government have deprived a large number of Hungarian owners in this region of their property, whereas the Treaty of Trianon imposed respect for such property. Therefore it cannot be seriously argued that the Mixed Arbitral Tribunal had the right and the duty of declaring its own jurisdiction to take cognisance of the complaints brought before it under this head.

The objection of lack of jurisdiction raised by the Roumanian Government rests on a very insecure basis. The principal argument adopted on this head is that the provisions complained of by the Hungarian subjects were adopted in consequence of the Agrarian Reform which was stated to have been applied to all owners, independently of their nationality; that, further, an indemnity for expropriation would be paid to all the owners involved; and that, therefore, such provisions could not be considered as measures of confiscation and liquidation, in the terms of Article 250 of the Treaty of Trianon.

But, with regard to the first point, it should be observed that, even admitting the alleged equality of treatment of nationals and foreigners by the Roumanian Law of Agrarian Reform, it does not follow automatically therefrom that the dispositions of this law are, in all respects, in agreement with International Law. The most authoritative teaching is in agreement on this point: that equality of treatment of nationals and foreigners, while it is not imposed by the general principles of International Law, does not suffice, on the other hand, to legalise, internationally, any provision which a State may adopt with regard to foreigners. Among the many authors who express themselves in this sense, I will confine myself to recalling the eminent authority of Professor *Anzilotti,* who has written: "If it should happen, exceptionally, that the State takes (with regard to foreigners) measures incompatible with that minimum which International Law imposes on it, the fact that they affect, indiscriminately, nationals and foreigners is not sufficient to make them legitimate." (*Rivista di diritto internazionale,* XIV, p. 176 and foll. Note.)

With regard to international jurisprudence, leaving aside older judgments, we should bear in mind the notable declarations contained in the sentence of the Permanent Court of International Justice of the 25th May, 1926, on the question of certain German interests in Upper Silesia (Decision No. 7): i.e., that "a measure prohibited by the Convention cannot become lawful under this instrument by reason of the fact that the State applies it to its own nationals."

Then, as far as regards the allegation of the Roumanian defence that a just indemnity was given to the persons affected by expropriation,

this is a point which affects the merits of the complaints, and for the establishing of which the Roumanian Government had no better method than of not opposing any objection of lack of jurisdiction.

* * * * * *

The considerations that I have briefly set out seem to me sufficient to prove that the Mixed Arbitral Tribunal has not fallen into error in retaining its own jurisdiction with regard to the complaints of the Hungarian nationals.

In connection with a question of the interpretation of the rules of a treaty there certainly can be some difference of opinion with regard to such interpretation and therefore concerning the accuracy of the thesis indicated above; in particular, it is intelligible that the representatives of the Roumanian Government should have attempted to prove the opposite thesis before the Mixed Arbitral Tribunal.

But the decision of the Mixed Arbitral Tribunal, which defined the preliminary question raised in the matter of jurisdiction, once pronounced, was it in the power of the Roumanian Government to take its stand on a difference of opinion on the interpretation of the Treaty, to refuse to accede to such a decision and to seek to make impossible the further functioning of the Mixed Arbitral Tribunal with regard to the questions under consideration?

To answer such an inquiry, it is advisable, first of all, to recall the doctrinal precedents and the rules of the treaties, which, in one way or another, refer to the problem of the obligatory force of the arbitral decisions.

The doctrine of international law, from the oldest authors onwards, has affirmed the principle that the decision of arbitrators automatically binds the parties. It is true that, beginning from *Vattel,* various authors have believed that the scope of this principle should be limited, by excepting from it some cases, and particularly those in which the sentence was manifestly unjust, or should base itself on a compromise that was void, or should manifestly exceed the terms of the compromise.

But this tendency of doctrine, of which the manifestations are, for the most part, anterior to the Conference of the Hague, was in clear but unconscious antithesis to the very essence of the institution of arbitration, which is directed to defining, and not perpetuating controversies. It is thus, that, when the problem of a positive and systematic regulation of international arbitration began to find its place in the doctrine, the necessity for a different orientation showed itself.

Already the Institute of International Law, in drawing up a scheme of rules for international arbitral procedure, had to affirm the final character, as between the parties, of the arbitral decision duly pronounced; and circumscribed the motives of nullity to the case of a void compromise, or of usurpation of jurisdiction, or of proved corruption of one of the arbitrators, or of essential error (Articles 25 and 27 of the draft). It is important also to notice that, according to the formula proposed by *Mancini,* in order that the nullity might be established, the compromise would have to be determined by the competent instance (a single person, a Faculty of Law, or a constituted Court), and the time within which appeals on grounds of nullity should be lodged.

In the first Peace Conference of 1899, the problem of the obligatory force of arbitral judgments was discussed at length and with spirit. Between the two opposite tendencies, that which tended to affirm the definitive character of the arbitral award, and that which strove to render possible a form of revision of the judgment, the first clearly prevailed, it being held that the institution of arbitration would fail in its function if it did not lead to a definite solution of international controversies. The abstract desirability of a system which offered the means for a revision of arbitral decisions, came into conflict with the consideration of the present state of international justice, which lacked a supreme instance to which the duty of revision could be entrusted. On the other hand, it was felt that there was a sufficient guarantee of justice for the parties in the power of selection of the judges called upon to constitute the arbitral tribunal.

Consequently ,the Conference, having laid down the pirnciple that recourse to the arbitral tribunal implies the pledge to observe the decision loyally (Article 18 of the first Convention of 1899), clearly established the rule that an award, duly pronounced and notified to the parties, decides the controversy definitely and without appeal (Article 54).

The Conference, on the other hand, rejected the proposal contained in the Russian draft (Article 26) which, in less ample terms, introduced the rule already formulated by the Institute of International Law with regard to the nullity of the award. This proposal was in the following form: "The arbitral award is null in case of nullity of compromise, or of usurpation of jurisdiction, or of proved corruption of one of the arbitrators."

The rejection of this proposal by the Conference was specially determined by the consideration of the difficulty "of foreseeing cases of nullity without determining at the same time who shall be the judge to consider these cases." (Report of *Descamps, Conférence internationale,* 1899, I. p. 139).

One special procedure only for revision was admitted for the hypothesis that the parties had expressly reserved it, to be duly submitted to the same Tribunal which had pronounced the award, and only on the strength of the discovery of a new fact, which might form a decisive element in the judgment (Article 55 of the 1st Convention of 1899). The very fact of having brought this means into the rules and of not having forseen any other, confirms the principle of the definitive character of the arbitral award.

The second Peace Conference confirmed the rules already laid down with regard to the obligatory force and the definitive character of arbitral decisions (Articles 37 and 81 of the Convention of 1907), and with regard to the special procedure of revision (Article 83).

Article 81 of the Convention of 1907 declares: "The award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal."

Consequently, the rules of the Hague Conventions, illustrated also by an examination of the discussions which took place at the first Conference, agree in confirming that, from the system of arbitration regulated by these conventions, is excluded not only any appeal from the arbitral award, on account of wrongful appreciation of the facts or error in the application of the law, but also every action of nullity

for defects inherent in the procedure. (Compare *Lammasch, Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange,* Stuttgart, 1914, p. 216-217).

It should be noted that Roumania ratified the Convention of 1907 on 1st March, 1912, making reservations only concerning the principle of obligatory arbitration. (*Compare The Hague Conventions and Declarations of 1899 and 1907, etc., edited by J. B. Scott,* New York, 1915, pp. 82 and 85).—These reserves, which concern only the obligatory nature, or the contrary, of the recourse to the arbitral procedure in general, detract in no way from the value, even for Roumania, of the rules which govern the institution of arbitration, when, in virtue of particular treaties, it has been seized with a given controversy.

With regard to Hungary, it is scarcely worth pointing out that the above-named Convention, which was ratified by Austria-Hungary on 27th November, 1909, is binding on her also.

Finally, it is opportune to recall the dispositions of two, more recent, international acts which, directly or indirectly, are connected with the principles indicated above.

Above all, Article 13 of the Covenant of the League of Nations which, in para. 4, provides that the members of the League shall pledge themselves to the execution in good faith of the arbitral awards rendered in controversies to which they are parties.

Further, the Statutes of the Permanent Court of International Justice, in which, in Article 60, the definitive character of judgments pronounced by the Court is declared: "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party."

Therefore, it may safely be considered that, on the basis of existing international law, the rule of the obligatory force of the decision of the international tribunal has an absolute character, and that such decisions cannot be impugned either for error in the judgment or for defect in the procedure.

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The rule thus enunciated, being in fact general, without a doubt also includes the pronouncement of the arbitral tribunal on its own jurisdiction. It would be superfluous to insist on this point if it had not been a special subject of discussion in the present case.

It may be observed that in general, even in internal legislation, every tribunal has the power to decide the preliminary question of its own jurisdiction. This principle is intimately connected with the nature of the jurisdictional function. If the judge could not give a decision on the objections raised with regard to his own jurisdiction, he would often find it impossible to decide on the merits of a case, and thus to fulfil his proper function. In any case, in the judicial systems of the individual States, in view of the allocation of attributions among the various tribunals, the questions of jurisdiction may be reserved for a special tribunal, or brought by way of appeal or revision before a superior tribunal.

In international legislation it is generally recognised that every arbitral tribunal has the power of deciding as to its own jurisdiction. As there does not exist, up to the present moment, a hierarchy pre-established as an institution of international tribunals, it is necessary to admit that the same tribunal called upon to settle certain disputes, can, and must, pronounce also on any possible objections raised on the point of jurisdiction. If it were not so, the absurdity would result that every time that an objection of lack of jurisdiction is raised, the tribunal would be forced to admit it. (cfr. Lapradelle and Politis, *Recueil des arbitrages internationaux,* I, p. 105; and also Lammasch, *op. cit.,* p. 166,)

The jurisprudence of international tribunals has already, and for a long time past, expressed itself in this sense. We may recall the judgment given in the affair of the *Betsey* between the United States and Great Britain, in which Commissioner Gore had to declare: "The power of deciding whether an appeal submitted to this Commission comes within its jurisdiction seems to me to be inherent in its very constitution, and absolutely necessary for fulfilling every one of its duties. . . . To decide on the justice of an appeal it is absolutely indispensable to decide whether a case provided for in the Treaty is is concerned; and that is the first point to settle in a judgment." (Moore, *International Arbitration,* 2278.)

At the First Conference of The Hague there was agreement on the necessity of allowing to the arbitral tribunal the right of defining the extent of its powers by means of the interpretation of the compromise and of the other Treaties in force between the parties. This rule was established in Article 48 of the Convention of 1899, and was confirmed in Article 73 of the Convention of 1907, which is formulated as follows:—

"The Tribunal is authorised to declare its jurisdiction in interpreting the compromise, as well as the other papers and documents which may be invoked, and in applying the principles of law."

The same principle is established in the Statute of the Permanent Court of International Justice (Article 36, last paragraph):—

"In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." (Cf. Article 53.)

From this rule it must be deduced not only that the arbitral tribunal (or the Court of Justice) has the power to decide on its own jurisdiction, but also that its decision on the point of jurisdiction is invested with the same obligatory force as any other arbitral decision (or sentence of the Court).

If it has been sought to introduce a distinction on this point, deducing it from the expressions used in Article 73 of the Convention of 1907, according to which the examination into the jurisdiction must be conducted on the basis of the compromise and of the other acts and documents which may be invoked in the matter. And it has been said that, when a declaration of jurisdiction on the part of an arbitral tribunal is not based on the interpretation of the compromise, or on any contractual declaration between the parties, there would be a usurpation of jurisdiction in the formal sense, which could be established on the basis of the Convention (Verdross, *Le caractère obligatoire des décisions des Tribunaux internationaux et autres tribunaux concernant*

leur compétence, in *La Réformé agraire Roumanie en Transylvanie devant la justicie internationale, etc., Autres Opinions,* Paris, 1928, p. 145 seq).

This construction is certainly ingenious and makes it possible to take into account, within certain limits, the tendency marked in certain of the oldest writers in respect of the nullity of manifestly unjust awards. In any case, I doubt very much if it can be considered accurate in view of the rules of the Hague Convention, not only because the amplitude of the terms used in Article 73 does not seem to give it an adequate basis, but also, and above all, for the same general reasons for which any action for nullity of the award must be considered as being excluded. On the other hand, in the case of the Roumano-Hungarian Mixed Arbitral Tribunal it cannot be seriously objected that it had established its own jurisdiction by interpreting the rules of the Treaty of Trianon which refer to the controversy under examination. (cf. Verdross, *ibidem,* p. 153 *seq.*).

The necessary conclusion, therefore, seems to be that such a decision has the same obligatory force as any arbitral decision, and, further, cannot be invalidated under the pretext of a usurpation of jurisdiction.

In confirmation of this we may point also to the same obvious inconsistency of the arguments adduced in favour of the thesis of usurpation of jurisdiction. Thus, for the purpose of supporting this thesis, recourse was had to the idea that the Mixed Arbitral Tribunal is a jurisdiction of exceptional character and with the nature of compromise, and as such cannot be considered as "juge souverain de sa propre compétence, etc." (A. Prudhomme, in *Journal du droit international,* 1927, p. 862 seq.)

Apart from a minute analysis with regard to the accuracy of the method with which it was thought possible to define the character of mixed arbitral tribunals, it seems that such definitions should be understood only in this sense : that mixed arbitral tribunals derive their powers from the treaty of peace which has instituted them and must exercise their jurisdiction on the basis of such treaty and of the other obligatory conventions between the parties. Now, these ideas can be stated, in general, in regard to every international arbitral tribunal, and it cannot be seen what is gained by denying to the Mixed Arbitral Tribunals this power of deciding as their own jurisdiction which is recognised by the rules in force for every international tribunal.

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The considerations set out permit the conclusion that the Roumano-Hungarian Mixed Arbitral Tribunal's decision of the 10th January, 1927, must be considered binding on the parties, and that the Roumanian State cannot escape its observance without violation of faith to the treaties which it has ratified.

An action directed to declaring the nullity of such a decision does not seem to be allowed by the rules in force for international arbitration. In any case, there is no doubt that, when a dispute arises on the point whether the decision of an arbitral tribunal has exceeded the limits of its powers, the parties can by common agreement refer to a new jurisdiction the duty of giving judgment on the point in dispute. The consenting to such a reference to a new instance is, as a matter of principle, optional for the parties. But if one of them claims to maintain

the nullity of the decision on account of the defect of usurpation of jurisdiction, it seems that it cannot escape the obligation of proposing or accepting that the judgment of revision be brought before an appropriate tribunal.

An application of such criteria has taken place already in a case which occurred a little after the Second Conference of The Hague between the United States and Venezuela, both of which had ratified the Convention of 1907. The question of usurpation of jurisdiction having arisen with regard to an arbitral award already delivered between the two States, they agreed to refer this question to the Court of Arbitration of The Hague. The Court, by its judgment of the 25th October, 1910 (*The Orinoco Steamship Co.* affair) first of all confirmed, as a matter of principle, the obligatory and definitive character of the arbitral decisions; then, considering that the parties had agreed to consent to a revision of the award already pronounced, it proceeded to an examination of the dispute.

If such a procedure already presented itself as advisable for the States adherent to The Hague Conventions, *a fortiori,* it seems that an analogous procedure should be observed in the relations between the States which have ratified the Convention of the League of Nations and the Statute of the Permanent Court of International Justice. The fact that the jurisdiction attributed to that Court is in general of an optional nature does not prevent it from being formally recognised as the highest instance for the establishment of rights in the relations between States which are members of the League.

On the other hand, as is recorded above, the Covenant of the League of Nations (Article 13) formally declares the obligation of the member States to carry out in complete good faith the award pronounced in controversies to which they are parties. From these dispositions the deduction must be that a State, a Member of the League of Nations, cannot, purely and simply, withdraw from the observance of an arbitral decision by alleging the supposed nullity. But, in order to establish this pretension, it must have recourse to a new judgment, and by preference that of the Permanent Court instituted expressly for the purpose of the declaration of rights as between the members of the League.

It is not within the scope of the present Opinion to examine the attitude of the organs of the League of Nations towards the controversy between Roumania and Hungary in consequence of the decision of the Mixed Arbitral Tribunal. But, in order to complete the analysis of the obligatory force of such decision, I cannot refrain from pointing out that, according to Article 13 of the Covenant, not only is the obligation of the member States of the League of Nations, to carry out arbitral decisions in good faith, recognised, but the duty of the Council, in cases of non-observance of an arbitral award, by the adoption of suitable measures for ensuring its realisation, is sanctioned. Thus, the obligatory force of arbitral decisions, even when derived from individual agreements between separate member States, is assumed in the very constitution of the League of Nations, and is made the basis of a specific duty of the member States and of an ex-officio attribution of the Council of the League.

Given this dependence of the arbitral decisions concerning the member States upon the constitution of the League, the obligation to

observe such decisions cannot be eliminated, either unilaterally by one of the parties, nor by an authoritative act of the Council of the League of Nations, but, at the most, by the finding of a tribunal recognised as the jurisdictional institution appertaining to the League of Nations—that is, by a judgment of the Permanent Court of International Justice.

Therefore, I believe that, as long as the Roumanian State persists in its refusal to submit to the jurisdiction of the Mixed Arbitral Tribunal, there remains for this State no other juridical solution except that of proposing or accepting reference to the Permanent Court of The Hague; and that, in any case, the Council of the League of Nations, if it does not regard it as its duty to restore, officially and immediately, the composition of the Mixed Arbitral Tribunal, should recommend Roumania and Hungary to have recourse to The Hague Court for a juridical settlement of such case.

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Perugia, April, 1928.