to the self-respect of another, which after all forms the basis of amicable international intercourse throughout the civilized world."

It is a question to be decided by Congress whether the "gentlemen's agreement" had failed to secure the results desired and whether the provisions of the new law promised to be more effective. It is the *method of procedure* which is open to just criticism. The "proper susceptibilities" of the Japanese nation, the "just pride" which it feels has been seriously wounded, the "prestige" of Japan in the Far East may seem to the Occidental mind to be somewhat intangible grounds upon which offense could be taken. That these grounds are none the less real makes it imperative that they should be taken into account if mutual confidence and friendly cooperation is to prevail in those other relationships between the United States and Japan which it was undoubtedly not the desire of Congress to interrupt.

C. G. Fenwick.

ENEMY PRIVATE PROPERTY

Probably no rule of international law was regarded in 1914 as more firmly established than the rule that private property within the jurisdiction belonging to citizens of the enemy state is inviolable. The rule was not adopted in any sudden burst of humanitarian sentiment, but was the result of an evolution of centuries. It rests upon a sound development in political and legal theory which was deemed natural and incidental to the evolution of modern civilization, namely, a conviction as to the essential distinction between private property and public property, between enemy-owned private property in one's own jurisdiction and in enemy territory, and between non-combatants and combatants, accompanied by the growing realization that the practice of confiscation was reciprocally unwisely destructive and inconsistent with economic common sense. Possibly also the natural-law school of jurists in the eighteenth century were not without their influence in emphasizing the conviction, of mutual advantage, that those surviving the devastating effects of unmitigated war should have something left with which to take up again the thread of life.

At all events, by the nineteenth century, the ancient practice of confiscation had become obsolete, and though occasional judicial *dicta* may be found to the effect that it was a "strict right" of belligerents, Kent as far back as 1825 had characterized it as a "naked and impolitic right, condemned by the enlightened conscience and judgment of modern times."[1] Marshall in 1814 had said that "the mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of the right, but cannot impair the

[1] Kent, Commentaries, I, 3, 65. Quoted also by Clifford, J. in Hanger *v.* Abbott (1867), 6 Wall. 532, 536.

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right itself. . . ."[2] But whatever doubt Marshall had left as to his views in 1814, by asserting ambiguously that the "exercise" of the right had been "affected" without impairing the "right" itself, was removed in 1833 by his flat denial of the privilege of the conqueror to confiscate private property, on the ground that it would violate "the modern usage of nations, *which has become law*."[3]

Lord Ellenborough in 1817, in refusing to give effect in England to a confiscation by Denmark of a debt due a British enemy subject, said "that the practice of Europe in refraining from the confiscation of debts had become so general that confiscation must be considered as a violation of the public faith."[4] Not a single case of confiscation of private property of enemy citizens occurred during the rest of the nineteenth century, except the Confederate States Act of 1861 which excepted from its operation "public stocks and securities."[5] The Union Acts of 1861 and 1862 were directed against property directly used in aid of the rebellion or against persons who treasonably aided the Confederate cause. They were not general confiscatory measures against enemy private property.[6]

So thoroughly had the principle of immunity of private enemy property within the jurisdiction become established in international law, that discussion of the subject in international conferences became perfunctory; effort was rather confined to insuring the immunity of private property in

[2] Brown *v.* United States (1814), 8 Cranch 110. He added: "It is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace in the course of trade." He also observed that "according to modern usage," private property "ought not" to be confiscated. He said that "this usage . . . cannot be disregarded by [the sovereign] without obloquy."

[3] United States *v.* Percheman (1833), 2 Peters 51. See the celebrated passage in Moore's Digest of International Law, Vol. 7, pp. 312, 313, analyzing the evolution in Marshall's views in this respect, and explaining the inconsistencies embodied in the opinion in Brown *v.* United States, *supra*. Judge Moore there says: "The supposition that usage may render unlawful the exercise of a right, but cannot impair the right itself, is at variance with sound theory."

[4] Wolff *v.* Oxholm (1817), 6 M. & S. 92. The Danish action in 1807 has been explained by an English writer as not really a case of confiscation, but of retorsion, justified by the unprecedented act of the British fleet without war or warning swooping upon the Danish ships of war and capturing them. Latifi, A., Effects of War on Property. London, 1909, p. 47.

[5] Lord Russell, speaking of this Confederate Act, said:

"Whatever may have been the abstract rule of the Law of Nations in former times, the instances of its application in the manner contemplated in the Act of the Confederate Congress in modern and more civilized times are so rare and have been so generally condemned that it may almost be said to have become obsolete." Lord Russell to Acting Consul Cridland, State Papers, 1862, Vol. 62, no. 1, 108, quoted by Hall, International Law, 7th ed., p. 462, note.

[6] See the comment on Miller *v.* United States (1870), 11 Wall. 268 in 23 *Columbia Law Rev.* 383, and Hyde, International Law, II, p. 238: "It is not believed that [the Act of 1862] . . . indicates legislative approval of the confiscation in a foreign war of the property of alien enemies within the national domain."

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enemy territory, except for requisition under compensation. Articles 46 and 47 of the Hague Regulations of 1899 and 1907 expressly stipulate that "private property may not be confiscated" and "pillage is formally prohibited." Latifi, an English specialist writing on the subject in 1909, felt justified in saying:[7]

> Will the conscience of civilized mankind permit a return to what appeared even to the rough Barons who extorted the Great Charter from King John to be too harsh a system, or is the private property of the citizens of the hostile State to remain inviolable within a belligerent's jurisdiction as it practically is in hostile territory under military occupation?
>
> The enormous improvement in the means of communication, and the increased sense of solidarity amongst civilized nations, have made a return to the older principle impossible.

Even during the recent war, as late as 1918, and therefore long after the Trading with the Enemy Acts, the English House of Lords and other courts reiterated the time-honored doctrine that "It is not the law of this country [England] that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claim to have it delivered up to him, but when peace is restored he is considered as entitled to his property with any fruits it may have borne in the meantime."[8]

Such was the state of the law, based upon the soundest of economic principles, when the Peace Conference met in 1919. To the astonishment of many students of international law, somewhat familiar with the history and reasons for the rule dictating the immunity of private enemy-owned property, there issued from the Conference in the form of Article 297 of the Treaty of Versailles, and embodied also in the other peace treaties, the following provision:

> Subject to any 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 belonging . . . to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present treaty.

The proceeds were to be devoted to the payment of private debts and public reparations, and the enemy country was to compensate its expropriated nationals.

Thus, at one stroke of the pen an institution which was deemed impregnable and fundamental to the existing economic order, and the history

[7] Latifi, *op. cit.*, p. 48.

[8] Lord Finlay, now Judge of the Permanent Court of International Justice, in Stevenson *v.* Aktiengesellschaft für Cartonnagenindustrie [1918, H. L.], A. C. 239, 244. See also Lord Haldane in same case, *ibid.*, 247; Lord Parker in Daimler Co. *v.* Continental Tyre and Rubber Co. [1916], 2 A. C. 307, 347; Lord Birkenhead in Fried Krupp A. G. *v.* Ocronera (1917), 88 L. J. Ch. 304, 309; Cardozo, J. in Techt *v.* Hughes (1920), 229 N. Y. 222, 128 N. E. 185.

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and economic basis of which could hardly have been adequately realized by the treaty-makers, was temporarily, at least, undermined. This cannot be deemed a service to mankind, nor in the long run, to the participating countries. If, as is commonly assumed, one of the principal functions of law is to insure the security of acquisitions, one cannot fail to remark how seriously that function has been impaired. Indeed, this reversion on momentary provocation to a primitive custom may well justify the conclusion that probably few of the hard-won victories of civilization establishing the supremacy of law over violence bear any assurance of permanence. For a temporary gain of a few millions within easy reach, the clock has been turned back several hundred years and there has been revived an ancient barbaric practice which is likely to do incalculable harm before a wiser generation will undo it.

It is believed that few provisions of the treaties of peace are more ominous for the future than this measure for the confiscation of privately-owned enemy property within the jurisdiction. In a day when international business depends upon the mobility of capital as never before, foreign investment and property, which for over a century had been protected by law, must now depend for their security, as in ancient times, upon the preponderance of force.[9] The effect of the revolutionary doctrine adopted at Versailles has not yet been fully realized by the trade and banking community, but it seems quite obvious that there can be no serious reduction in armaments in any independent country so long as this subversive doctrine prevails in international affairs. It is a cancer in the system.

Here it is only proper to point out a defense of the treaty practice of confiscation advanced by a British publicist.[10] This writer observes that the older writers conceded the legitimacy of confiscating private property; that the Hague Convention forbidding it was not binding in the late war, because all the belligerents had not ratified it; that the recent practice was not outright confiscation, but rather, provisional or delayed confiscation; that unless the private property of enemy citizens was taken, British creditors would—he asserts it as a fact—have been unable to collect their debts from private German, Austrian, Hungarian, Bulgarian and Turkish debtors; that if someone had to suffer, it was better for the enemy citizens to lose than for one's own nationals; that if the enemy citizens have not been compensated, that is the fault of the enemy governments and not of the British and other confiscating governments; and that inasmuch as most foreign investors and traders are persons of large means and necessarily exert considerable influence on foreign policy, there would be, in the realization that war would

[9] A striking illustration of the correctness of this opinion is found in the Treaty of Lausanne, coming after the Turkish victory at Smyrna. In that treaty (Article 65) the private property of Turks in Allied countries, confiscated under the Treaty of Sèvres, is released from sequestration or confiscation and restored to its owners.

[10] Mr. Claude Mullins in Proceedings of the Grotius Societv. Vol. 8, p. 89.

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sacrifice their foreign investments in enemy countries, a wholesome influence for the prevention of war. It is also true that other writers have sought solace or justification for Article 297 in that provision of the treaties by which the enemy states undertook to compensate their nationals who had been despoiled of their property in Allied countries.

The obvious answer to this argument is that evidence of the antiquity of a particular practice is no evidence that it is now legal;[11] that the Hague Convention was not a new rule of law, but merely codified a rule a century old; that post-war confiscation is as effective and spoliative as confiscation *durante bello;* that there is no evidence that British creditors would have lost their money, but even if they had, to take property from A to pay the debt of B or of his nation is revolutionary in its effects and implications; that confiscation of private property, as an incident of war, may afford an incentive to war rather than a deterrent, and that the realization that the security of private property and investment abroad depends not on law but on force will tend to increase and not diminish armaments and, coincidentally, the chances of war.

Finally, it may be said that a committee of the British Board of Trade has recognized the fact that the provision relegating the expropriated owners to their own governments for compensation was a nearly futile gesture, in view of the incapacity of those governments to meet the obligation and the disability, if not unwillingness, of the Allied Governments to enforce it.[12] The committee has therefore recommended compensation for a considerable number of those ex-enemies who have been deprived of their property by application of Article 297; but while the principles adverted to in the report challenge the wisdom of the whole proceeding, the application of the recommendations is limited to those few whose property has not yet been liquidated. It is therefore likely that Great Britain, which, as a trading and investing nation, must realize the disquieting effects of the doctrine she has been misled into espousing, will go much further in the compensation of the aliens affected. Indeed, the realization of what is involved was made clear when British bankers, demanding of the Russian negotiators for a loan that

[11] See the acute observation of John Bassett Moore in this connection:

"It is true that in certain early writers who reiterated the stern rules of the law of Rome, sweeping generalizations may be found in which the right is asserted on the part of enemies to seize all property and confiscate all debts. The same writers, upon the same authority, assert the lawfulness of treating all subjects of the belligerent as enemies, and as such of killing them, including women and children. These generalizations, even at the time when they were written, neither expressed nor purported to express the actual practice of nations, and it is superfluous to declare that the law of the present day is not to be found in them; for, with the change in the practice of nations, growing out of the advance in human thought, the law also has changed." Moore's Digest of Int. Law, VII, 306.

[12] "Special Report of the Committee appointed by the Board of Trade to advise upon applications for the release of property of ex-enemy aliens in necessitous circumstances." London, 1924. Cmd. 2046. 15 pp.

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foreign property must be made safe in Russia "in all circumstances," were met by the reported inquiry whether this was the custom in England. The force of the Russian reply at Genoa was probably not lost on British statesmen.

We in the United States have a tradition in this matter. At a very early day in our history, we committed ourselves to the wise and enlightened policy of regarding the private property of citizens of enemy states as immune and inviolable. Under the treaty of January 8, 1802, the treaty provision of 1783 restoring British creditors to their legal rights having proved ineffective, we paid to Great Britain some three million dollars to make good acts of confiscation against British subjects practised by some of the States in the Revolutionary War.

Article X of the Jay Treaty of 1794 provided:

> Neither the debts due from individuals of one nation to individuals of the other, nor shares, nor monies, which they have in the public funds, or in the public or private banks, shall ever in any event of war or national differences be sequestrated or confiscated, it being unjust and impolitic that debts and engagements contracted and made by individuals, having confidence in each other and in their respective Governments, should ever be destroyed or impaired by national authority on account of national differences and discontents.

It was in defense of that provision of the treaty that Alexander Hamilton wrote two of his famous Camillus Letters. Hamilton's argument is believed to be unanswerable, and it is hardly conceivable that his sound principles will ever be repudiated by the country. He said:

> The right of holding or having property in a country always implies a duty on the part of its government to protect that property, and to secure to the owner the full enjoyment of it. Whenever, therefore, a government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there, it tacitly promises protection and security.
>
> There is no parity between the case of the person and goods of enemies found in our country and that of the persons and goods of enemies found elsewhere. In the former there is a reliance upon our hospitality and justice; there is an express or implied safe conduct; the individuals and their property are in the custody of our faith; they have no power to resist our will; they can lawfully make no defense against our violence; they are deemed to owe a temporary allegiance; and for endeavoring resistance would be punished as criminals, a character inconsistent with that of an enemy. To make them a prey is, therefore, to infringe every rule of generosity and equity; it is to add cowardice to treachery. . . .
>
> Moreover, the property of the foreigners within our country may be regarded as having paid a valuable consideration for its protection and exemption from forfeiture; that which is brought in commonly enriches the revenue by a duty of entry. All that is within our territory, whether acquired there or brought there, is liable to contributions to

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> the treasury, in common with other similar property. Does there not result an obligation to protect that which contributes to the expense of its protection? Will justice sanction, upon the breaking out of a war, the confiscation of a property which, during peace, serves to augment the resources and nourish the prosperity of a state?
>
> The property of a foreigner placed in another country, by permission of its laws, may justly be regarded as a deposit, of which the society is the trustee. How can it be reconciled with the idea of a trust, to take the property from its owner, when he has personally given no cause for its deprivation?[13]

In his Camillus Letter XVIII, he added:

> No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which, in an authorized intercourse in time of peace has been confided to the faith of our government and laws, on account of controversy between nation and nation. In my view, every moral and every political sense unite to consign it to execration.

Hamilton expressed what has been deemed to be the permanent policy of the United States. Numerous treaties have reaffirmed it. If it was sound in an agricultural age, it is far more valid and essential in this industrial era. At every international conference in which the subject was discussed, we exerted our influence in behalf of the sanctity of private property and even sought adherence, with some limited success, to the doctrine of immunity of private property at sea.[14]

Under the Trading with the Enemy Act of October 6, 1917, the United States sequestrated the property belonging to citizens of Germany, Austria and Hungary. It was understood that this was done solely to prevent the hostile use of the property against the United States during the war, and the Alien Property Custodian was designated as a "common-law trustee."[15] Though sales were permitted, first to preserve the trust and then, as alleged by one custodian, to avoid making profits for the absent enemy, the trust nature of the relationship has never ceased. The Supreme Court of the United States[16] and some of the lower federal courts have therefore, it is believed, committed a serious error of a fundamental nature in regarding the sequestration as a "capture" in exercise of the power of Congress "to make rules concerning captures on land and water."

[13] See Works of Alexander Hamilton (Lodge's edition), Vol. V, pp. 412 *et seq.* See the extended quotations from Hamilton and the references to the treaties concluded by the United States in Moore, John Bassett, International Law and Some Current Illusions (New York, Macmillan, 1924), pp. 14 *et seq.*

[14] See the instructions of Secretary of State Hay to the American delegates at the First Hague Conference. (Scott, Instructions and Reports of United States Delegates to Hague Peace Conference, p. 9.)

[15] Cong. Record, 65th Cong. 1st sess. 4844 *et seq.* Sen. Rep. 113, 65th Cong. 1st sess.; H. R. Rep. 85, 65th Cong. 1st sess.

[16] Stoehr *v.* Wallace (1920), 255 U. S. 239.

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This can be most effectively demonstrated by quoting the words of John Bassett Moore in his recent work *International Law and Some Current Illusions*, a book which should be read by every American citizen. Speaking of the policy of Congress under the Trading with the Enemy Act, he says:

> This was not, nor did it purport to be, an exercise by Congress of its constitutional power "to make rules concerning captures on land and water." The word "capture" is in law a technical term, denoting the hostile seizure of places, persons and things. Men in arms are "captured," but a non-combatant is seized or arrested. A defended city, if taken, is said to be "captured"; if undefended, it is "occupied." Property is said to be "captured," only when seized, in a hostile sense, under claim of forfeiture or confiscation. These distinctions are very elementary. The idea of provisionally holding enemy property in custody in order to prevent its use in the enemy interest is by no means new. In England, it is at least as old as Magna Carta. No one understood the act of Congress to contemplate a hostile seizure. The very terms of the act preclude such an interpretation. It merely authorized the provisional holding of the property in custody, and appropriately styled the official who was to perform this function, the Alien Property Custodian.[17]

Unfortunately, the first Alien Property Custodian, in what may charitably be characterized as an excess of zeal, and in spite of the official announcement of the government that "there is no thought of a dissipation or confiscation of property thus held in trust," departed somewhat from the functions of a trustee by selling out many of the trusts at inadequate prices and for the avowed purpose of injuring the owners. Many of these sales were made long after the armistice, when hostilities at least should have ceased. The first report of the Alien Property Custodian can only be deprecated by Americans interested in the record and future of their country and in the preservation of the institution of private property. No more brilliant exposition of the activities of the early Alien Property Custodians can be presented than that by John Bassett Moore in the work already cited.[18] He says:

> In the original statute the function of the alien property custodian was defined as that of a trustee. Subsequently, however, there came a special revelation, marvelously brilliant but perhaps not divinely inspired, of the staggering discovery that the foreign traders and manufacturers whose property had been taken over had made their investments in the United States not from ordinary motives of profit but in pursuance of a hostile design, so stealthily pursued that it had never before been detected or even suspected, but so deadly in its effects that the American traders and manufacturers were eventually to be engulfed in their own homes and the alien plotters left in grinning possession of the ground. Under the spell engendered by this agitating apparition,

[17] Moore, J. B., International Law and Some Current Illusions, p. 21.
[18] *Ibid.*, p. 22.

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> and its patriotic call to a retributive but profitable war on the malefactor's property, substantial departures were made from the principle of trusteeship.

Fortunately for American history, the United States has not, except for the activities just alluded to, adopted a policy of confiscation with respect to the property taken over by the Alien Property Custodian. The property is still held, however, by virtue of the Knox-Porter Resolution, embodied in the Treaty of Berlin, until Germany and the other ex-enemy countries make "suitable provision for the satisfaction of" the claims of American citizens. It is unfortunate that such a provision was adopted in an American treaty, for it challenges the security of foreign private property. It was accepted, according to the late Senator Knox, to overcome the objection of certain members of Congress to the adoption of the Peace Resolution; but Senator and ex-Secretary of State Knox openly declared that he regarded our further retention of the property as not "decent." Congress has retained full control of the matter, and may dispose of the private property as it sees fit. In the Winslow Act of March 4, 1923, $10,000 as a maximum was returned to each owner, thus disposing of perhaps ninety per cent of the trusts; so that the remaining funds held as security are the property of but a limited number of persons.

In the case of the Austrian property, an unusual situation is presented. The bulk of the Austro-Hungarian private property, owned by persons who were fortunate enough to reside in the succession states, has been returned under the Act of June 5, 1920. The only property still held as security for the obligations of the former Austro-Hungarian Empire belongs to the few persons, owning more than $10,000, who were so unfortunate as to reside in what is now the truncated Republic of Austria. A considerable amount of the entire property still retained, moreover, has come by inheritance or otherwise, into the ownership of persons who were either never, or had ceased before January 10, 1920, to be citizens of ex-enemy states. This is anomalous.

No one has better expressed the underlying reasons for holding inviolate the private property of foreigners under all circumstances than Secretary of State Hughes in his address at Philadelphia, November 23, 1923. He declared:

> A confiscatory policy strikes not only at the interests of particular individuals but at the foundations of international intercourse, for it is only on the basis of the security of property, validly possessed under the laws existing at the time of its acquisition, that the conduct of activities in helpful cooperation, is possible. . . . Rights acquired under its laws by citizens of another State, [a State] is under an international obligation appropriately to recognize. It is the policy of the United States to support these fundamental principles.

There can be little doubt that these principles, though uttered with Russia in mind, apply equally to the foreign sequestrated property in the

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United States. It is regrettable that it has not yet been restored to its owners. There must be feasible ways of securing the payment of the American claims, without violating our national traditions. For example, it has not been made clear why we cannot share, to the limited extent required, in the payments to be effected by Germany under the Dawes Report. It would seem that the United States should be able to obtain the consent of the Allies to permit Germany to pay us the moderate sums involved, without participating in "sanctions." Payment and enforcement are separable. Even payment by Congress of the American claims against long-term German bonds would be preferable to touching the private sequestrated property. Simple respect for our past and a prudent regard for our future, dictate that we cannot, as an inviting and investing nation, jeopardize the security of foreign private property, both of aliens in the United States and of Americans abroad, by the adoption of so destructive and shortsighted a policy as the confiscation of private property for the discharge of a public indebtedness. In the words of Hamilton, it "would disgrace the Government of the country and injure its true interests."

Some comfort may be derived from the profound words of John Bassett Moore who, as chairman of the Commission of Jurists to consider and report upon the revision of the rules of warfare, said, in opening the conference at the Hague in December, 1922:

> I deem it to be inconceivable that a generation accustomed to boast that it is the heir of all the ages, in the foremost files of time, should consciously relinquish the conception that all human affairs, in war as well as in peace, must be regulated by law, and abandon itself to the desperate conclusion that the sense of self-restraint, which is the consummate product and the essence of civilization, has finally succumbed to the passion for unregulated and indiscriminate violence.

EDWIN M. BORCHARD.

THE INDIVIDUAL AND INTERNATIONAL LAW

Philosophy and law have suffered much harm because of the desire of men for rigid classification and definition. There is a naïve yearning to circumscribe carefully a subject and to place it safely within the confines of a letter-file. Men insist on simplicity in their thinking: they abhor the complex and the uncertain. As a wise Frenchman once observed, "One defines a subject in order to avoid the necessity of understanding it."

The law of nations has been thus treated: it has been narrowly restricted and rigidly defined. Various assertions of principles have been so boldly affirmed and reiterated by successive publicists that they have become almost axiomatic. An Attorney-General or a Secretary of State declares that the three-mile limit of maritime jurisdiction has been universally fixed,

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