ARE WE "ENTITLED" TO CONFISCATE ENEMY PRIVATE PROPERTY?—If, as is commonly assumed, one of the principal functions of law is to insure the security of acquisitions,[1] one cannot fail to remark how seriously recent events have weakened that function. The provision of article 297 of the Treaty of Versailles, by which private property of ex-enemy nationals has been taken over by several of the Allied governments, sanctioned a policy of confiscation,[2] a practice which, for the most practical of reasons—its short-sightedness—had been abandoned since 1793, and which few students of international law believed would ever be revived. But the readiness with which reversions to primitive customs acquire acceptance 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. Attention has previously been called to the law and policy of confiscation in its general development;[3] the present comment, confined more particularly to American law and practice, is induced by a *dictum* of Judge Rogers of the Circuit Court of Appeals in *Miller* v. *Kaliwerke Aschersleben Aktiengesellschaft* (C. C. A. 2nd Cir. 1922) 283 Fed. 746, 757, to the effect that "as respects the enemy bona fide holder . . . the government is plainly entitled to confiscate his interest" in an American corporation.

Whether the court intended to convey by the word "entitled" the idea that the United States was legally privileged to confiscate the private property, on general principles or under existing law, is not clear. The court does not appear to have studied the question very closely, but relied for its authority on the Civil War case of *Miller* v. *United States*.[4] It becomes, therefore, of some interest to examine the *Miller* case. Judge Rogers is not the first person who has used it as the American judicial authority for confiscation of enemy private property—mistakenly and unjustifiably, it is believed.

On August 6, 1861, Congress passed an Act[5] to confiscate property which was used or intended to be used in aid of the rebellion; on July 17, 1862, a further Act[6] was passed "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."[7] Contrary to the Act of 1861, the Act of 1862 was designed not to forfeit property unlawfully employed, but to punish individuals who had aided the rebellion by confiscating all their property. The offense was personal. The sixth clause of the fifth section of the Act of 1862 provided that "the property of any person who, owning property in any loyal State. . . shall hereafter assist and give aid and comfort to such rebellion" was to be forfeited. The information against Miller alleged not only that he was a "public enemy" but also that he was a "rebel citizen," and that as owner of certain railroad stock, he had employed it "in aid of the enemy" and had "assisted and given aid to the rebellion against the Government."

Such being the purpose of the statute and the facts under which Miller's property was forfeited, Miller's executor in a subsequent proceeding challenged the validity of the forfeiture

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[1] Pound, *The Spirit of the Common Law* (1921) 144; Pound, *Introduction to the Philosophy of Law* (1922) 72.

[2] "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, possessions and protectorates, including territories ceded to them by the present Treaty."

Referring to the provision in the Treaty by which the German Government undertakes to reimburse its nationals whose property was thus taken, Mr. Hyde says: "Inasmuch, however, as the actual value of that undertaking was necessarily slight by reason of the fiscal burden imposed upon the German territorial sovereign, the agreement signified consent to what amounted to a practical confiscation of private property by its enemies." 2 Hyde, *International Law* (1922) 240, 241.

[3] *Comments* (1921) 30 Yale Law Journ. 845; Cohen, *The Obligation of the United States to Return Enemy Alien Property* (1921) 21 Columbia Law Rev. 666.

[4] (1870) 11 Wall. 268.

[5] (1861) 12 Stat. 319, U. S. Comp. Stat. (1916) § 10150.

[6] (1862) 12 Stat. 589.

[7] The Confiscation Acts of 1861 and 1862, in their judicial aspects, are discussed in 7 Moore, *Digest of International Law* (1906) 290–295.

on the ground that due process had been lacking in that Miller had been denied a jury trial, according to the fifth and sixth amendments. To escape this contention, Justice Strong, for the majority of the Supreme Court, found that the plaintiff's default had made a jury unnecessary, and further held that the Acts were passed under the war powers of Congress, which, he said, relieved Congress from the restrictions of the fifth and sixth amendments. He then undertook to assume what he should have sought to prove; namely, that war authorizes the confiscation of enemy private property found in one's own territory. Justice Strong says:

"Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be *legitimately* prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right." He added "that the right to confiscate the property of all public enemies is a conceded right."[8] (Italics are the author's.)

Had Justice Strong consulted the decisions of Chief Justice Marshall and the political history of the United States he would probably not have come to this conclusion. He reached it apparently without the citation of any authority and seemingly without knowledge that there was any law on the subject in the United States. Justice Field, speaking for the minority, seems to have been far sounder in his judgment, for he said that even the Congressional power "to make rules concerning captures on land and water is a power to make such rules as Congress may prescribe, *subject to the condition that they are within the law of nations*."[9] (Italics are the author's). He concluded that confiscation was contrary to international law and to the decisions of the Supreme Court.[10]

The law of nations on this subject is believed not to be in doubt. Not only our courts, but American political traditions and the authorities on interuational law unite to condemn the ancient practice of confiscation as contrary to the modern law of nations. To take the writers first, the whole law is summarized in a few paragraphs by John Bassett Moore. He says:

"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."[11]

Mr. Moore adds, after reviewing the authorities:

"Finally, without unnecessarily multiplying authorities on a point which is undisputed, we may quote from Hall the following passage:

" 'Property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, may be said to enjoy a practical immunity from confiscation.' "[12]

The American tradition in this matter was laid in the treaties of 1783 and 1794 with Great Britain. Under the former we undertook that the states, some of whom had during the Revolution confiscated British property and credits, would restore the owners in their rights; and under the treaty of 1794 we paid Great Britain some six hundred thousand pounds sterling because of our inability to enforce upon the states the treaty promise of 1783. It was in sup-

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[8] See *Miller* v. *United States, supra*, footnote 4, p. 305.

[9] *Ibid.*, p. 316.

[10] *Conrad* v. *Waples* (1877) 96 U. S. 279; *Oakes* v. *United States* (1899) 174 U. S. 778, 790, 19 Sup. Ct. 864.

[11] 7 Moore, *op. cit.*, p. 306.

[12] *Ibid.*, p. 308. Mr. Hyde, the latest authoritative writer on the subject, declares: "It is unlikely that the United States would at the present time pursue a different course." 2 Hyde, *op. cit.*, p. 239.

port of this provision of the Jay Treaty of 1794 that Hamilton wrote some of his famous Camillus Letters, which have been regarded as the classic American expression of policy.[13]

The courts of the United States, while not always so clear, have, nevertheless, with the possible exception of the *Miller* case, added their authority to sustain the American tradition. As early as 1796 in *Ware* v. *Hylton*,[14] where a confiscatory act of Virginia was denied validity by the Supreme Court, Justice Patterson remarked that even at that date the confiscation of private property was considered "as a relic of barbarism . . . it ought not to have existed among any nations and perhaps is generally exploded at the present day in Europe." He added, speaking of confiscation, "the gain is at most temporary and inconsiderable; whereas the injury is certain and incalculable and the ignominy great and lasting." Justice Wilson added:[15] "By every nation, whatever its form of government, the confiscation of debts has long been considered disreputable." Debts, of course, are merely one form of property.

Chief Justice Marshall in the famous case of *Brown* v. *United States*,[16] not altogether removed from the influences of the eighteenth century and of the fact that he had been counsel for Hylton in *Ware* v. *Hylton* and therefore had sought to defend the validity of a title derived through confiscation, made a somewhat equivocal statement as to the law, which has required some explanation. He said: "Respecting the power of government, no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. 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 this right, but cannot impair the right itself . . . although, in practice, vessels with their cargoes, found in port at the declaration of war, may have been seized, 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. Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war."

He added therefore that "according to modern usage," private property "ought not" to be confiscated. He said "this usage . . . cannot be disregarded by [the sovereign] without obloquy."

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[13] The relevant parts of this document read:

"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 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?" Camillus Letters XIX, 5 Hamilton's *Works* and Wheaton, *International Law* (Phillipson's ed. 1916) 417–419. Numerous treaties of the United States have confirmed this policy.

[14] (1796) 3 Dall. * 199, * 254.

[15] *Ibid.*, p. * 281.

[16] (1814) 8 Cranch 110, 122–4.

Some doubt has been created by this passage because it apparently sanctioned the "right" of confiscation, but condemned its exercise as "affected" by modern usage. In fact, Marshall acted in the case upon the rule that it was contrary to international law to regard private property on land as subject to confiscation. If, however, the "exercise" of a right has become unlawful by usage, it is not easy to see how the right itself could help being impaired. No one has pointed this out more clearly than John Bassett Moore. Speaking of Marshall's professed distinction between a right and the exercise of a right, he has said:

"Referring to the practice of nations and the writings of publicists, [Marshall] declared that, according to 'the modern rule, tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated;' that 'this rule' seemed to be 'totally incompatible with the idea that war does of itself vest the property in the belligerent government;' and consequently, that the declaration of war did not authorize the confiscation. Since effect was thus given to the modern usage of nations, it was unnecessary to declare, as he did in the course of his opinion, that 'war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found,' and that the 'mitigation of this rigid rule which the humane and wise policy of modern times has introduced into practice' though they 'will more or less affect the exercise of this right,' 'can not impair the right itself.' Nor were the two declarations quite consistent. The supposition that usage may render unlawful the exercise of a right, but cannot impair the right itself, is at variance with sound theory. Between the effect of usage on rights, and on the exercise of rights, the law draws no precise distinction. A right derived from custom acquires no immutability or immunity from the fact that the practices out of which it grew were ancient and barbarous. We may, therefore, ascribe the dictum in question to the influence of preconceptions, and turn for the true theory of the law to an opinion [*United States* v. *Percheman* [17]] of the same great judge, delivered twenty years later, in which he denied the right of the conqueror to confiscate private property, on the ground that it would violate 'the modern usage of nations which has become law.' " [18]

Since Marshall's decision in the *Percheman* case, the judicial view as to the illegality of confiscation, confirming as it did the political view of national policy, was regarded as settling the question for the United States.[19] The unsoundness of using the Confiscation Acts of 1861 and 1862 as precedents or authority for the confiscatory treatment of the private property of foreign enemies in a foreign war is pointed out by Mr. Hyde in his recent work.[20] Justice Strong, therefore, in assuming the Acts to have been passed under the alleged "conceded right" of belligerent confiscation fell into error, it is believed, and Judge Rogers, in following that *dictum* without question, would appear to have been misled.

Even under the Knox-Porter Resolution, incorporated in the Treaty of Berlin of August 25, 1921, which provides that the United States shall retain the sequestrated property and make no disposition thereof "except as shall have been heretofore or specifically hereafter shall be provided by law," until the German Government makes "suitable provision for the satisfaction" of the claims of American citizens, no confiscation is authorized. Whether founded on law or treaty, therefore, the *dictum* that the "Government is plainly entitled to confiscate" the private property of an enemy national seems unjustified. If the theory be advanced that each member of the defeated nation must bear the burden of confiscation merely because he is a member, the answer is that the same theory would justify killing or

[17] (1833) 7 Peters *51.

[18] 7 Moore, *op cit.*, pp. 312, 313.

[19] In *Hanger* v. *Abbott* (1867) 6 Wall. 532, 536, Clifford, *J.*, characterized confiscation as "a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times." For further judicial *dicta* to the same effect, see *Comments* (1921) 30 Yale Law Journ. 846, 847.

[20] "It is not believed that, [the Act of 1862] in view of the nature of the conflict then existing, indicates legislative approval of the confiscation in a foreign war of the property of alien enemies within the national domain." 2 Hyde, *op. cit.*, p. 238. Hall is perhaps the only writer who seems to have considered the Act as an instance of belligerent confiscation of private property. *International Law* (6th ed. 1909) 434.

enslaving all civilians, including women and children, whereas advancing civilization had established it as a definite rule, for sound reasons of humanity, policy, and common sense, that individual responsibility for group action would no longer be carried so far as to impose on the civilian the confiscation of his private property. The equanimity with which such a return to mediaeval violence is contemplated by many worthy members of society is not without significance on the trend of human affairs. Perhaps some comfort, however, may be derived from the faith of one of our foremost lawyers and thinkers, John Bassett Moore, who, as chairman of a recent international conference, declared that he refused to believe that the present generation would "consciously relinquish the conception that all human affairs in war and 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 essence of civilization, has finally succumbed to the passion for unregulated and indiscriminate violence.[21]

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[21] Address at opening of the Commission of Jurists at the Hague, Jan. 8, 1923, *New York Times*, Jan. 9, 1923.