neys' fees for services rendered in an international arbitration is found in the Act of Congress approved June 23, 1874, for the creation of the "Court of Commissioners of Alabama Claims" for the distribution of a part of the Geneva award. Section 18 of that Act provides that "at the time of the giving of the judgment the court shall, upon motion of the attorney or counsel for the claimant, allow out of the amount thereby awarded, such reasonable counsel and attorneys' fees" as the court shall determine "is just and reasonable," which allowance shall be entered as part of the judgment in such case, and shall be made specifically payable "to the attorney or counsel, or both."[1]

It will be observed that the present Act does not strictly conform to the precedent furnished by the earlier Act, because their purposes are distinctly different. The authority conferred upon the Alabama Claims Court was designed to protect attorneys by insuring the payment of their fees, as fixed by the court, out of the awards to claimants, whereas in the present case the evident purpose of Congress is to protect claimants against "excessive fees" for attorneys, and no provision is made for securing the payment to attorneys of their fees as fixed by the American Commissioner.

CHANDLER P. ANDERSON.

TREATMENT OF ENEMY PRIVATE PROPERTY IN THE UNITED STATES BEFORE THE WORLD WAR

In a scholarly article published in the April issue of this JOURNAL (Vol. XXII, p. 270), Mr. Edgar Turlington remarked (p. 291) that "It cannot be said that there was in the United States, prior to 1914, any established usage of exempting the property of non-resident enemies from confiscation." This conclusion is reached from the premise that the "function of declaring the law of nations on appropriate occasions devolves under our Constitution upon the courts" (p. 276). By calling attention to certain dicta of the United States Supreme Court, in which the privilege of confiscation was apparently on occasion asserted, though no actual confiscation of private property on land was in any of these cases sustained, the learned author arrives at the conclusion mentioned in the first sentence. The evidence of American policy derived from some forty treaties is dismissed as unsatisfactory and inconsistent, and the practice of Congress and of the Executive is practically left out of consideration.

Without any intention of impugning the author's learning or ability, it must with deference be submitted that in confining his source material of American policy to judicial declarations, the author has not drawn upon the most important sources; and that his conclusion, therefore, seems to the writer unsustainable. It is impossible in the course of an editorial to exam-

[1] Report of John Davis, Clerk of the Court, to the Secretary of State, p. 25.

ine all the assertions made in the article. A few only, therefore, will be commented upon.

First of all, it seems necessary to challenge the major premise that the "function of declaring the law of nations on appropriate occasions devolves under our Constitution upon the courts." On the contrary, it is submitted, the Constitution expressly provides that Congress shall "define and punish . . . offenses against the law of nations." Congress also has power to "make rules concerning captures on land and water," and "to make all laws which shall be necessary and proper for carrying into execution . . . all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof." In the execution of these powers, Congress has passed innumerable statutes, including the Neutrality Acts of 1794 and 1817, the Counterfeiting Act of 1884,[1] extradition statutes, statutes defining the jurisdiction of courts in relation to ambassadors and aliens and over prizes of war, statutes prescribing the functions of ambassadors, ministers and consuls, and of executive, military and naval officers, authorized to perform duties under international law.[2] In the first instance, it would seem, therefore, that Congress is the primary source of definition of the rules of international law for the United States. Certainly the practice concerning the "treatment of enemy private property," as Marshall pointed out in Brown *v.* United States,[3] would seem to require primarily an investigation of what Congress has done, rather than what the courts, by way of dictum, may have said that Congress might do.

Examining the actions of Congress, the learned author admits that in no single foreign war prior to 1914—and one may go further—has Congress confiscated or authorized the confiscation of enemy private property. This would seem rather strong evidence of the "treatment of enemy private property in the United States," and leaves no doubt on the subject, it is believed. The Acts of 1861 and 1862 were directed to the punishment of citizens who had taken up arms against the United States, and to the forfeiture of property actually used against the United States, and were not general confiscatory measures affecting enemy private property as such, in spite of the fact that some persons and even the Supreme Court in one case seemed to believe that they could be justified as such measures.[4]

[1] 23 Statutes at Large 22; United States *v.* Arjona (1886), 120 U. S. 479.

[2] Wright, The Enforcement of International Law Through Municipal Law in the United States, (Urbana, 1916), p. 221.

[3] (1813) 8 Cranch, 110.

[4] The Act of August 6, 1861, 12 Stat. 319, was passed to confiscate property which was used or intended to be used "in aid of the rebellion"; the Act of July 17, 1862 (12 Stat. 589), was passed "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels and for other purposes." These Acts are discussed in 7 Moore's Digest of International Law, 290–295. See the comment on Miller *v.* U. S. (1870), 11 Wallace, 268, in 23 Columbia Law Rev. 383; and Hyde, International Law, II, 238: "It is not believed that [the Act of 1862] . . . indicates legislative approval of the confiscation in a foreign war of

In the second place, the conduct of foreign relations is in large part entrusted to the Executive and the Senate. Evidence of the "treatment of enemy private property" should therefore be sought in treaties and in Executive declarations and instructions. Examining these sources it would be difficult to find a more consistent practice than that followed by the United States. The difficulties arising out of the Revolutionary practice of sequestrating, or in one instance confiscating, debts due to British subjects, induced a national policy to prevent the recurrence of such difficulties again. Article X of the Jay Treaty of 1794, with the convincing arguments of Hamilton in its support,[5] may be said to have laid down a national policy, for similar treaties were during the next half century offered to practically all foreign nations. These treaties exempted debts and other forms of private property from confiscation in time of war, and permitted foreigners in time of war to withdraw with their property from the national territory. These treaties, while they differ somewhat in their phraseology, can hardly be mistaken to reflect other than a consistent national policy against confiscation. The conclusion occasionally drawn to the effect that the exemption of the property of resident foreigners was designed to authorize confiscation of the property of non-residents is not well founded. Marshall pointed out the error of this view in his opinion in Brown *v.* United States.[6] Vattel's reference to the error is not explained by the fact that he was speaking of natural law, but by the fact that he had a broader understanding of the underlying reasons for the rule against confiscation than had certain of his successors, including certain judges.[7] And if the author of the article commented upon suggests that "law and custom have lagged behind logic" (p. 280), and that it is dangerous to argue "from logic to practice in the realm of law" (p. 281), the fact is that practice has been as consistently opposed to confiscation of property owned by non-resident enemies as logic itself.

In the absence of definition by Congress, the President and the Depart-

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the property of alien enemies within the national domain." The sole act of confiscation of enemy property in general in American history is probably the Confederate Act of 1861, which excepted from its provisions "public stock and securities." Of this Act, Earl Russell 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." See Hall, International Law, 7th ed., page 462 note.

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

[6] "Nor can a reason be perceived for maintaining that the public faith is more entirely pledged for the security of property trusted in the territory of the nation in time of peace, if it be accompanied by its owner, than if it be confided to the care of others." (8 Cranch, 124.)

[7] See John Bassett Moore's citation of St. Paul's proverb "the letter killeth but the spirit giveth life," and the illuminating discussion of this very question in his International Law and Some Current Illusions, pages 20, 21.

ment of State often take occasion to declare the law of nations, as the United States understands it. While perhaps not having the same enforceable character in the judicial forum as have laws and treaties, which are the supreme law of the land, the positions taken by the Executive in the definition of international duties of the United States and in the declaration of international law are strong evidence of American understanding of the rules of international law. The Executive policy against confiscation has been as consistent as that of Congress. From 1785 on, efforts were made to bring about the exemption from capture even of private property at sea, in order to bring it into the same position as private property on land. A few treaties to this effect have been concluded, and the instructions to American delegates at international conferences have left no doubt as to the Executive view. The instructions of the President in the Spanish-American War that "private property, whether belonging to individuals or corporations, is to be respected and can be confiscated only for cause" were a reiteration of a uniform policy. The instructions to the American delegates to the Hague Conference that "private property cannot be confiscated" and the Hague Convention ratified by Congress, hardly justify the belief that there was no "established usage" in the United States exempting enemy private property from confiscation.

Coming now to the courts, the evidence of judicial dicta does not establish a "usage" as to "treatment," for treatment is established by deeds rather than by words; but even the dicta, it is submitted, hardly sustain the author's conclusion as to American practice. It is true that Marshall in the Brown case seemed to be doubtful, and therefore ambiguous, as to the rule of international law, and while he appears to have stated that the "rigid rule" permitted confiscation, he added that "according to modern usage" it "ought not" to be done and that it cannot be done "without obloquy." John Bassett Moore has explained these passages [8] and has pointed out that whatever doubts as to the law Marshall may have entertained in 1813, he entertained no doubts in 1833 when he decided the case of United States *v.* Percheman,[9] in which he remarked that to confiscate private property would violate "the modern usage of nations, which has become law."

But even more important evidence as to what Marshall conceived the rule of international law to be, is to be derived from his conclusion on the merits of the Brown case. Had Marshall thought that international law authorized the confiscation of private property on land, he would not have required an Act of Congress as a condition precedent to such confiscation. Inasmuch as international law was deemed part of the common law and hence the law of the land, and inasmuch as evidence of international law is to be found in custom and usage, Marshall would, it seems, have found no difficulty in permitting confiscation as a privilege arising out of international law in time of war, had he thought there was any such usage or law. In practical effect,

[8] 7 Moore's Digest, pp. 312, 313.

[9] (1833) 7 Peters, 51.

he denies the existence of any such usage or rule of international law, for otherwise he would have applied it to the case.

The seizure of enemy private property at sea is no analogy for the seizure of enemy private property on land, but rather indicates the vital and fundamental difference between the two classes of property. Private property at sea may be confiscated by virtue of the outbreak of war without the necessity of any municipal legislation. This is uniformly recognized. Private property on land, however, is by uniform practice exempt from confiscation; but naturally if any country enacts a statute authorizing confiscation, the courts must follow it, regardless of what the rule of international law may be. Moreover, Marshall believed, in discussing the policy of such statutes, which he condemned, that there were circumstances in which they might be justified, for example, as a reprisal against an enemy country confiscating the property of nationals. But he left little doubt, it is believed, as to his view of the policy of confiscation in principle. Yet had he thought that it was an established rule of international law, it would seem that he would have applied it in the Brown case and sustained the confiscation there attempted without demanding an Act of Congress. No such Act had been passed.

Nor is evidence as to the practice with respect to private property in *enemy* territory properly used as an analogy for the treatment of private property in one's own territory. It took a longer time to establish the rule of law as to exemption in the former case than in the latter. Modern treaties do not mention the exemption of enemy private property in one's own territory any more than they do an exemption from slavery. Both institutions have been deemed equally obsolete. When, however, private property in enemy territory is, by convention and international law, exempted from confiscation, *a fortiori*, private property in one's own territory is so exempt.

Nevertheless, it is true that several courts and many writers in the course of the nineteenth century expressed the view that the harsh and strict application of international law permitted the confiscation of enemy private property. This is not evidence as to American policy or of the treatment of enemy private property by the United States, but expresses the writers' and the courts' view as to what was the rule of international law. Opinions as to international law, like opinions as to municipal law, occasionally differ. The learned author of the article commented upon might have mentioned dicta of the Supreme Court opposing confiscation as a rule of international law.[10] All that one can say with respect to the dicta favoring confiscation is that usage and a uniform practice belied any such rule of law throughout the nineteenth century, and that at the very time the authors supported the privilege of

[10] See U. S. *v.* Klein, 13 Wallace, 128, 137, in which Chase, C. J., declared: "The Government recognized to the fullest extent the humane maxims of the modern law of nations which exempt private property of non-combatant enemies from capture as booty of war."

confiscation the practice looked the other way. As John Bassett Moore has suggested:[11]

> 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 belligerents 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.

It is submitted, therefore, that the practice of the United States, as evidenced in Acts of Congress, treaties of the United States, Executive declarations and the uniform abstention from confiscation, notwithstanding occasional dicta of the courts as to the supposed privilege conferred by international law, sustains the view that there was in the United States, prior to 1914, an "established usage of exempting the property of non-resident enemies from confiscation."

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[11] 7 Moore's Digest, 306.