lessee in such a case, nevertheless, still has the lessor at his mercy in the sense that the lessor is powerless to effect a rescission of the contract when it becomes to his interest to do so, whereas the lessee may terminate the agreement at any time upon making compensation for the use of the demised property up to that time.

It seems impossible, at this stage of the development, to formulate any intelligible proposition in respect of the distinction recognized by the court between a strictly private and a quasi-public corporation.

(*To be continued in a subsequent number*).

THE EXEMPTION OF THE PRIVATE PROPERTY OF THE ENEMY FROM CAPTURE IN A MARITIME WAR—A THEORY OF INTERNATIONAL LAW.

By WILLIAM S. ELLIS.

In early times, before the association and intercourse of individuals had brought civilization to the level at which it is familiar to us to-day, and before the development of national life had forced a realization of the necessity of formulated rules to govern various peoples in their relations with one another—in other words, before International Law as a science sprang into existence—it was the custom for a belligerent to seize and appropriate all the property of an enemy state, or of its subjects, no matter of what kind it might be, or in what place or under what circumstances it might be found. The wars of the middle ages were attended by a ruthless destruction of all the property of a conquered people that the victorious invader could not carry away, and a belligerent resorted to every means at his command to cripple the resources of his enemy. States once involved in war found themselves controlled and restrained by no rule or custom, except perhaps, that of extending protection to the persons of ambassadors and

heralds, and even a violation of the sacred character of these representatives usually failed to call down upon the offender the wrath of neutral powers. The wars of those days were fought to the bitter end, and every citizen of a belligerent state considered himself and was regarded as an enemy, and as such liable to the uncertainties of a hostile position. Not only on land, but also at sea, every advantage was taken of a victory, and very little investigation was made as to the ownership of goods found lying in the hold of a prize. The exemption from seizure of neutral goods on an enemy's ship was not known, and vessels the property of some neutral state, were frequently captured if suspected of containing the goods of the enemy, whether contraband of war or not.

But with the advance of civilization and growth of commerce this reckless warfare began to be condemned, and from more than one motive states gradually allowed themselves to accept certain restraints upon the conduct of their armies in the field and their fleets on the sea. From that time until the present day contests between hostile nations have been growing less and less severe. The needless destruction, or even seizure, of goods belonging to a non-combatant member of an enemy state by an invading army is frowned upon to a greater or less extent, and the question is even generally discussed in modern times whether it would not be wise to adopt, as a principle of the law of nations, the custom of exempting from capture the goods found on the ships of the enemy but belonging to private individuals of their state. The writers upon the subject bring arguments of great force and learning to bear upon either side, the continental jurists being almost unanimous in favor of the adoption of the policy of exemption, while the English are equally desirous of retaining the old custom. The American students of International Law incline to the English view.

Before attempting to determine which is at once the most justifiable and practical course for nations to adopt with regard to this question, it is well to examine briefly the history of the theory and observe the practice of the most enlightened states of modern times.

Mr. Hall, in his work on "International Law," has the following: "That the rule of the capture of private property at sea has, until lately, been universally followed, that it is still adhered to by the great majority of states, that it was recognized as law by all the older writers, and is so recognized by many later writers, is uncontested. A certain amount of practice, however, exists of recent date, in which immunity of private property has been agreed to or affirmed." As the instances of the recognition of states, in both early and recent times, of the right to capture private property at sea are too numerous to mention, we will confine ourselves to the consideration of the opposite practice, all of which, as Mr. Hall says, is of recent date.

During the presidency of Mr. Monroe, the United States proposed, through a circular letter to the governments of France, England and Russia, that "merchant vessels and their cargoes belonging to subjects of belligerent powers should be exempted from capture by convention." This was in 1817, Mr. Adams being, at that time, Secretary of State. The proposal was accepted by Russia in principle, but Russia determined that, unless it should be accepted by the maritime states in general, she would not act upon it. The refusal of England to accept even the principle is not to be wondered at, but it is not so easy to perceive the motive which actuated France in adopting the same policy.

The Declaration of Paris of 1856 abolished privateering by a clause inserted by the negotiators without instructions from their respective governments, but which obtained their unqualified approval. Mr. Marcy was then Secretary of State under President Peirce, and when his accession, and that of the United States was sought by the European powers, he refused on the ground that it was a "cardinal principle of national policy that the country should not be burdened with the weight of permanent armaments. The right of employing privateers must be retained unless the safety of the mercantile marine could be legally assured." But he offered to concede this point if it were conceded in return that the private property of the subjects of one or other of the two billig-

erents engaged in a maritime war should not be subject to capture by the vessels of the other party, except in cases of contraband of war."

In 1870 Mr. Fish, Secretary of State, declared to Baron Gerolt that it was his sincere hope that the government and people of the United States may soon be gratified by seeing the principle of the immunity of private property at sea universally recognized "as another restraining and humanizing influence imposed by modern civilization on the art of war."

This principle, which Mr. Fish was so anxious to uphold, he had the good fortune to see put into practice to some extent, through a treaty with Italy in 1871, by which it was stipulated that private property should not be taken possession of or destroyed except for breach of blockade or as contraband of war. Italy had already shown its own disposition in a decisive manner. In 1865 Italy had passed a marine code, according to which all merchant vessels of a hostile nation should be exempt from seizure or molestation, provided, only, that reciprocity should be observed between the two states.

On the outbreak of the war of 1866, Austria and Prussia declared that enemy ships and cargoes should not be captured so long as the enemy state granted a like indulgence, and this was religiously practiced, the war being carried on from beginning to end, both as between Austria and Prussia, as well as between Austria and Italy, without the resort to maritime capture.

The most recent case is that of Prussia, in 1870, when the Prussian government issued an ordinance exempting French vessels from capture without any mention of reciprocity.

These seven examples make up the sum total of the practice to be found in favor of the doctrine of exemption, and in studying them we are forced to the conclusion that they cannot be accepted as *bona fide* declarations of international sentiment. For, in the first place, the view taken of the case by the United States in 1856, by Italy in 1865, by Austria in 1866, and by Prussia in 1870, was very strongly influenced by the fact that each of those states was, at the time, in possession of a weak navy and utterly unable to compete with

nations of maritime supremacy. In the second place, even this small amount of practice is of quite recent date, extending only over a period—if we except the case of the United States under President Monroe—of half a century.

There have been, at various times and in various states, conventions held for the purpose of drawing up resolutions for presentation to their governments, urging the necessity of accepting the new doctrine. But an examination of these petitions of citizens, whose sole idea, apparently, is to foster the humanizing influence of the law of nations and mitigate the hardships and privations of war, reveals the fact that they have usually arisen from the same selfish motives which actuated the states of maritime inferiority to plead the new cause, and that the members of these conventions have, in nine cases out of ten, been the leading merchants and shippers of their country. Perhaps the most noted convention of this character was that held at Bremen, in December, 1859, which M. Bluntchli refers to as "an indication of the modern feeling with regard to the question of exemption." A more recent instance, and one which arose from very different motives, was that of St. Petersburg, in 1874, from which Prince Gortshakoff addressed a circular letter to the other European powers proposing, on behalf of Russia, to form an international code to ameliorate the conditions of war, etc. Lord Derby refused to join, "seeing the ulterior designs" of the Russian Minister, whose plan it was to emphasize the power of the great military nations and reduce whatever influence the maritime states possessed. Thus each of these statesmen contended for a principle which promised the best results for his country; the desire to put into practice an advanced theory of international law was as far from the mind of the Englishman as from that of the Russian.

Since it is thus so difficult to perceive from the limited practice just what the effects of the new doctrines have been, and since the views of congresses and conventions have invariably been of a selfish rather than of a broad international character, it remains to be considered whether or not there is a sound reason for adopting the policy of exemption from either a legal or a moral point of view.

The argument advanced by the continental jurists is, that war being "a relation of a state to a state," and not of an individual to an individual, it results that no individual should suffer because he happens to find himself the perhaps unwilling member of a belligerent community with whose quarrel he may have no sympathy. This doctrine is assumed by Bluntchli as a matter of course, and he thus speaks of it in his chapter on the "propriété privée de l'ennemi:"

"Bien que la guere maritime soit dirigée contre l'état et non contre les particuliers, et que l'on doive en droit naturel respecter la proprieté privée sur mer aussi bien que sur terre, plusiers puissances maritime (and here he refers especially to England, of course) reconaissent encore aujour-d'hui á la marine de guerre le droit de saizir et d'amener les navires qui sont la proprieté de ressortissants de l'état ennemi, et de confisquer les marchandise trouvées a bord de ces navires." Bluntchli then goes on to say that the merchants of an enemy state are no more the enemies of a hostile maritime power than of a hostile continental power, and that the former should respect the rights of private persons just as much as the latter.

The above arguments are brought out in a forcible manner by M. Desjardins and M. Laveleye, and M. Calvo has made strenuous efforts to induce his own and other governments to adopt the "modern and more civilized course."

Thus two assumptions form the basis of the arguments of the continental jurists: (1) That war is exclusively a relation of a state to a state, and (2) that the private property of an enemy is exempt from capture in a continental war. Can these assumptions be supported?

International law takes cognizance of individuals only through their state, the state being the "person" subject to the dictates of that law, and consequently the fortunes of an individual, all indissolubly linked with those of his state, come what may. The individual has no personal, no proprietary rights, except as a member of his state, and while in times of peace, he claims and enjoys all the advantages of citizenship, so in time of war he must bear his share of the responsibility and, perhaps, of the misfortunes of his country, and this, although

he may not approve of the war itself or the cause for which it is waged. Portales, who borrowed his views on the subject from Rousseau (although generally credited with being their originator), maintains that the "private individuals of belligerent nations find themselves enemies by *accident;* they are not so as men, they are not so as citizens, they are so only as soldiers." His idea evidently is that when a state declares war its army should be composed only of those who actively sympathize with the cause, instead of being drawn from the general mass of the people; a very attractive theory, no doubt, and one which at some distant day may be recognized and accepted by the most enlightened state; but it must be confessed that thus far little evidence has appeared of its being put into practice. On the contrary, the armies of a belligerent are usually composed very largely of soldiers, who fight from motives of much lower order than the national cause, or who have been forced into the ranks.

Thus it is impossible to reconcile the various positions, in which an individual finds himself with regard to the government whose protection he claims with the theory that war is a relation of a state to a state. It is far more reasonable to admit that citizens are merely portions of their states, and as such liable to the chances of their good or bad fortune. There is then no reason, from a legal point of view, to exempt the owners of merchandise from subjection to the loss of their goods embarked with the knowledge of the risk to which they may be exposed.

But, laying aside the legal aspect of the question and considering it from a moral, and at the same time, practical point of view, is there any real reason for regarding the seizure of private property at sea as incompatible with the modern standard of justice and humanity, or as of too great severity in comparison with the other measures of war?

"In the battles and campaigns of a (land) war," says Mr. Dana, "exigencies are constantly arising authorizing or even requiring the destruction or, at least, the seizure of all kinds of property." In a hostile country an army must necessarily subsist upon the provisions and resources of the enemy. But

invading armies may go, and frequently do go, much farther. Any property which, if left unmolested, can, in any way, contribute to the resources of the invaded state, is seized and often destroyed. For the loss of such property the owner certainly receives no compensation. And the loss of the property itself is not always the only misfortune. Searches on land necessitates the entering of private dwellings, barns, etc. This naturally leads to resistance on the part of the owner whose isolated position, if he happen to be so located, is an encouragement to acts of cruelty and degradation on the part of soldiers difficult to sustain, and loss of life sometimes occurs.

On the other hand no property is captured at sea, as Mr. Dana remarks, but merchandise held *in commercio*, voluntarily embarked as such, *lucri causâ*. The captured property is transferred to the possession of the capturing power by the decision of a prize court, and such a thing as "booty" or "loot" (terms applied to the possessions of the enemy seized in a land campaign), is not known in maritime warfare. Furthermore, the transfer of private property is accomplished quietly, without loss of life, for it occurs after the fighting is all over. The merchant who entrusts his goods to the care of the captain and crew of the vessel in which they are shipped, knows that he is taking the chances of war and is prepared for either event.

The principal object for which the army of a beligerent state strives, is to cripple the resources of the enemy, in an indirect as well as in a direct way, as severely and as rapidly as possible, without, however, inflicting upon the non-combatant members of the opponent power any more injury or outrage than is necessary and fair. By taking possession of the enemy's merchant ships on the high seas and appropriating the goods of the private citizen found thereon, it is possible to at once cut off the hostile state from communication with the ports of other nations and bring the individual to terms without giving him first cause to complain of the *inhumanity* of war.

Although the Continental school of writers on International Law lay all the blame for the continuance of the old custom