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SOME OBSERVATIONS ON THE PRIVATE INTERNATIONAL LAW OF THE FUTURE[1]

Does one not commit an anachronism in writing on the subject of Private International Law at a time when war is raging round about us? When the attention of everyone is naturally directed towards the great events which interest us powerfully and, alas, fill our hearts with gloom, can there—should there remain in our minds room for the peaceful problems arising from a plurality of laws and the facts of international commerce? Foresight is necessary, however, and to foresee is the duty of the jurist as well as of the true statesman, and in this matter the duty of foresight is all the more imperative as the new world that will arise from the tornado that has shaken Europe for nearly three years will differ in many respects from the world in which we have lived. Certain of these changes are already so probable as to border upon certainty, to one of which I should like to call the attention of the readers of this JOURNAL.

I regard it as certain that the end of the war will bring about a noticeable *rapprochement* between certain nations which have remained, heretofore, very distant toward each other. Is it necessary for me to indicate here that I do not mean to allude

[1] Translated from the French by *Dr. Ernest G. Lorenzen,* Professor of Law in the University of Minnesota; Professor-elect in the Yale University School of Law.

to any plan whatsoever for the reconstruction of society on a rational basis? The persons who do me the honor of reading these lines well know that I regard all projects of this sort as so many idle fancies which cannot be realized. The contemporaneous events, since and inclusive of the Hague Conferences, have only confirmed these views. But when I see, during this war, volunteers from the four corners of the globe, rallying around the flags of the Powers which have the honor of fighting for justice and for the liberty of mankind, and colonies giving their men and money to their mother country unreservedly, I say that the defense of a good cause is not a vain word and that there exists still in the universe a sufficient understanding of good and evil.

The bloody seed will bring its harvest. Do you think that our children and our grandchildren will forget the aid so liberally given to our wounded by the citizens of the United States and those consignments of food without which the Belgians, as well as the French people of the North, would have died of misery? Surely the greatest accomplishments in the national life of a people are achieved through sentiment, and the remembrance of these kind acts will be effective and lasting because they involve sentiment. Unless I am very much mistaken, the United States will be for the French people after the war, no longer what they were before the war—a people distant from ours with whom commercial dealings were above all desirable—but a nation of true friends, of men of heart, whose nobility has been tested in days of adversity, a people whose esteem we desire to retain, and for whom we shall have henceforth the greatest respect. This is only one notable example. There are others which warrant the assertion that between certain peoples the international life will revive with an intensity which it never had before. It is probable that we shall witness then two series of phenomena, the one contrary to the other—a marked separation on the one hand and a constant approach on the other. Let us consider only this approach. There is no doubt that it will increase the task imposed upon Private International Law. The task was already considerable and difficult, and it will become still more so.

I

Here I put the question which I desire to answer: Is the actual Private International Law sufficient to meet these new

needs? No, it certainly is not, and it must be transformed. The spirit which animated it and the ideal which it pursued have now been found to be irreconcilable with the necessities of the life of the peoples. Since the middle of the nineteenth century, the period in which the first of the new doctrines of Private International Law came to light, their development has been in the direction of an almost unlimited cosmopolitanism. It was assumed that the mission of this science was not only to aid in the good administration of private justice among the nations, but that it should lower also, by degrees, the barriers separating subjects from aliens, so as to make of all inhabitants of the civilized countries one people with a view to subjecting them gradually to the same institutions. Hence, the tendency to favor changes in nationality; hence the avowed determination to suppress all differences in the civil status of aliens and subjects; hence, also, the growing frequency of those great conventions which aim to establish, to an appreciable extent, uniformity of legislation.

We believed that progress was to be found in that direction. We all shared, more or less, this mistake, and I am well aware that there are pages in my writings to which I would no longer subscribe. One painful experience has undeceived us. We committed the two-fold mistake of thinking that the juridical consequences attached to the idea of nationality could be weakened without danger and of failing to see that the same *régime* of law does not equally suit all nations. We now know that a people grows stronger by birth and not by naturalization. Equality between subjects and aliens is with us no longer a dogma. The great Conventions have not justified the high hopes reposed in them. The spirit of cosmopolitanism is therefore dead. Warned by experience, the people will be resolutely nationalists. They will live by themselves knowing that by seeking too much foreign collaboration they incur the risk of ending in servitude.

What will be the effect of the new orientation of the public mind upon our science? In my opinion it will bring about a more complete separation between the two great problems with which Private International Law deals—that of the status of aliens, and that of the solution of the Conflict of Laws. The problem of the status of aliens is, in reality, not a part of our international science, at least not an essential part. In this branch of the law the influence of foreign laws will doubtless be almost

nil.[2] If the question be asked within what limits shall a state open its doors to the alien, whether it shall grant to him the same rights which it accords to its own subjects, or whether it shall keep him in this regard, in a state of inequality, one is forced to recognize that each state has the right to decide the question as it may deem best without concerning itself about what the others may do. A decided tendency toward liberalism was noticeable, however, in the juristic writings. The ideal appeared to be contained in Article 3 of the Italian Civil Code which assimilates aliens with subjects as regards the enjoyment of private rights, and he who would have pronounced this idea dangerous and would have suggested its banishment from our laws would have received little thanks. And yet such a person would have been right. To-day it is no longer disputable that a too liberal welcome extended to aliens is the source of very serious danger to a country; for groups of numerous and powerful aliens create a harmful atmosphere about themselves in the country which harbors them, their industry threatens its industry, their riches constitute its poverty, their patriotism degenerates sometimes into habits of espionage, into constant plots, and the time comes quickly when nobody is powerful enough to stop these odious practices.

The state must have a free hand. It must examine cautiously what limits must be set to the hospitality which it consents to extend to aliens, whether individuals, partnerships or corporations. Perhaps it will impose upon them certain incapacities, or subject them to certain taxes. It will doubtless subject them to police regulations which will be minute, but not vexatious. In doing so it will not exceed its right and will injure no one. It is not a question of reducing aliens once more to a kind of servitude which was their original condition, nor through a revival of the right of *aubaine* (escheat) to prevent their inheriting property from, or leaving property to, their relatives upon death. The problem is to avoid the danger which the community may run on account of numerous groups of aliens living within its territory. The state must be acquainted with these aliens and know where they come from and how they live. The police powers may be used toward this end. It has the duty to prevent

[2] It is not absolutely nil, however, for we must inquire into the question whether it is just and expedient to grant to an alien rights which he would not enjoy in his own country. This question is very difficult.

its subjects from being gradually crowded out by aliens from certain branches of industry or commerce, to which end it will levy upon them special taxes. The state cannot tolerate that aliens be in a position seriously to harm the national defense. (Have we not seen them establishing themselves close to an important railway crossing and preparing everything for the blowing up of the tracks at the proper moment?) It may forbid the acquisition on their part of certain kinds of property or industries in particular localities.

Inequality in this regard contains nothing shocking to the mind. An alien may be inferior to the subject in the realm of law without losing on that account his right to engage in international commerce—the only right to which he is entitled. Such inequality is all the more rational since all aliens are no longer to be entitled to the same treatment. There will be desirable aliens before whom the doors will swing wide open, and less desirable ones who will find them more than half closed. This is just, for one should be severe only in proportion to the danger to be feared. That is, to say the least, natural. It would be a strange mistake, indeed, to believe that the peace which will follow this terrible war will be real and complete and without resentment. Thanks to the soothing effect of time, such peace may be established perhaps at last, but we shall not see it, for during long years to come, peace will not be accompanied by reconciliation. The sentiment of the people will speak too loudly for the laws to pretend not to be aware of these facts. Moreover, even aside from the circumstances which are weighing upon us, we must recognize that the attitude of all states with respect to aliens cannot be the same. Certain states desire that aliens establish themselves within their borders, others have no need of them, still others (for example, the United States of America) desire certain aliens but reject others. In the presence of such a variety of conditions the establishment of a general rule is vain. Each state will regulate the status of aliens in conformity with the requirements of its security and a just regard for its interests.

It is probable, therefore, that modifications will be introduced into the different codes now in force and that they will tend to diminish the share of rights left to the aliens. We should wish in particular that Article 11 of our Civil Code were revised. It is obscure, fruitful of controversies, and manifestly incomplete. It will be better to enact in its stead that aliens enjoy in France all the private rights which are not denied to them by law, and

then, by special provisions, to indicate the rights which shall be denied to aliens or those which are to be granted to them only on certain conditions. This principle is better than that of reciprocity, which has also the inconvenience of placing each country in a state of dependence upon foreign countries. As for the assimilation, pure and simple, of aliens and subjects, I believe there can be no question in the future.

This rigor may be tempered. This may be done by means of commercial treaties which must be conceived in a sufficiently particularistic spirit. By this we mean that it would be wise to give up those unions which were framed with a view of introducing uniformity of legislation in certain matters. The Anglo-American countries have generally kept aloof from this movement, and in this they have shown their wisdom. From the fact that there is nothing more natural nor more useful than the organization of literary or artistic property, it does not necessarily follow that I must treat aliens and my own subjects alike in this matter, and even if I am of a liberal disposition, I may deem myself unfaithful in my duty as legislator if I submit to a uniform law which may become disastrous to my country.

We must revert to treaties between nations, and make use of commercial treaties, as was formerly done, not only for the promulgation of customs duties, but also for the fixing of the civil status of aliens belonging to the contracting nations. We must also get rid of the habit of using such general formulas as the equality clause and the favored nation clause, which are less an expression of sincere good-will than a sign of a lack of interest in the questions on the part of the negotiators. This indifference is no longer reasonable. If neglected, these questions cause trouble, and the favored nation clause of Article 11 of the Treaty of Frankfort has cost us more than the loss of several pitched battles would have done. It was this clause which permitted the German infiltration into France, and from this infiltration France nearly died.

Little thanks is ordinarily gained from the suggestion that a practice be adopted which progress appears to have outgrown. We must submit to them, however, if the safety of the state demands it, and we have run such risks that we would be culpable if we persisted in our ante-bellum vagaries.

Another revival is, in our opinion, equally imperative—that of aliens admitted to denizenship, of the old English law. The question of nationality is one requiring the greatest change.

We hope that those ill-considered naturalizations by means of which we wished to set off a deficit in births, will be given up. The acquisition of a new nationality will become rather difficult, perhaps, and the principle of the perennity of subjection which has been so bitterly criticised will again become of value.[3] But doubtless no state will be opposed to the settlement of aliens upon its territory, to their staying there so long as they like, even throughout their lives. As soon as they are known and appreciated such aliens may be granted by the public authorities a fuller participation in the private rights of citizens; in this respect they may then even be assimilated with them without great inconvenience. But it would be wise to extend this favor only with extreme caution and with a reservation of the right to withdraw it in case of necessity.

The list of our desires is by no means completed by the above suggestions, for we should wish to see established in times of peace, the principles of legislation which shall be applied to alien enemies in times of war. Here, it is true, no great precision can be secured at once, and a certain latitude must be left to the executive department. It is important, however, that the principles be laid down. That would free us from the embarrassments caused by a multitude of provisions, enacted one after the other in accordance with existing needs, but without any intimate connection one with the other—a multiplicity with which we are struggling at the present moment.

II

We arrive thus at the limit of the legitimate jurisdiction of the state, where it may act as it likes without injury to the rights of others. Beyond that lies the sphere of Private International Law. It embraces the questions relating to the Conflict of Laws and those concerning the international effect of vested rights. Here the aspect of things inevitably changes; the questions become more involved and the sovereignty of the legislator less certain. It is quite customary to say that the solution of the Conflict of Laws[4] falls within the mission of the local legislator, that the rules he lays down in this respect are laws similar to

[3] In times of war the recognition of nationality by birth only is the best possible protection for the state against criminal acts by aliens.

[4] Wharton, *Conflict of Laws,* sec. 1; Dicey, *Digest,* Introduction, p. 4.

the rest, that when a foreign law is applied in a country, it can be done only through the will of the legislator of such country and that the foreign law thus partakes, in a measure, of the quality of a national law. Such appears to be the view of American authors. I have always regarded, and still regard this theory as not well founded. It is easy to show the great difference separating these questions from those which we have examined heretofore. A legislator acts in the fulness of his authority when he determines the rights open to aliens. Provided he leaves to them those elementary rights, without which existence is impossible, he acts in conformity with reason as well as with the law of nations.

On the other hand, when the question involved is the choice from among several legislative enactments of the one applicable in a given case, the situation is more complex. By what right does he determine the authority of a foreign law which he has not made and which he cannot modify, and how can he regulate the efficacy of rights which have been acquired abroad under laws which are not his own? In the same way where would one go to find the power to fix the jurisdiction of courts in their relation with other courts? Yet in each country the legislator or, if he does not do so, the judge decides these questions. Why? Because each question must be decided and because, in the absence of a common sovereign for nations possessing the power to harmonize their legislative enactments, the national legislator stands in his place and discharges his functions. He is, if you please, a necessary usurper; he fills a rôle which is not his, just as in times of trouble, a simple citizen is seen occupying the place of public authorities that have disappeared, and fulfilling their duties. But it is evident that a rule so promulgated is not an ordinary law, since the sovereign, in fixing the radius of the operation of his own laws, indirectly lays down limits to the authority of foreign laws, and thus exceeds his own jurisdiction. This part of civil legislation resembles constitutional laws in that, like these, it defines the relationship of different authorities which are independent of each other. In a state they are, however, but branches of one and the same sovereignty; they have a superior, the constituent power, while the civil laws of the different peoples have absolutely no common superior. And this will remain so as long as the international society, which has been promised to us so often, has not been organized; and it will never be organized.

The laws, and in the absence thereof, the judicial decisions, dealing with the cases of conflict, are not real and complete solutions of the conflict at all; they are only partial solutions which are good for one country only, and as every conflict involves several laws and affects several countries, every case of this kind runs the risk of receiving a solution which will differ according to the country in which it arises and thus be never really settled.

If these ideas are correct—and, though they may run counter to assertions many times repeated, they will appear upon reflection, to be accurate—it will follow, as a corollary that every question of the Conflict of Laws (or of vested rights) is never truly decided unless it receives the same solution in every country in which it may arise. This requirement, it will be observed, results from the very heart of the subject; it is the direct consequence of the circumstances under which the questions, which are the object of our science, arise. It is not less reasonable from a practical point of view. To say that a person who is regarded as a debtor in one country should be deemed free of every obligation in another country, that a party who is heir in France is to be excluded from the inheritance in Switzerland by another relative, that a man and woman who are considered validly married by one judge are to be denied the rights of husband and wife by another judge, is contradictory and incompatible with every idea of justice. These discordances are at times inevitable. They will never completely disappear, but who does not perceive that if they are too numerous, security in the relations between the inhabitants of different countries would cease to exist? Unity of theory and practice is thus highly desirable in this branch of the Conflict of Laws; it is, as we have shown, dictated by correct principle and constitutes a condition of the very life of Private International Law.

This unity does not exist. The clearest break is the one separating the practice of continental Europe from the Anglo-American practice; it is the struggle between domicile and nationality, between the ancient statutory territoriality and the tendencies more and more pronounced toward the personality of laws, and by an unforeseen turn, between a liberal, just and intelligent system of judicial competency and the antiquated ideas of our code of judicial practice. Even as between the European states, the agreement is far from being complete. Each has its own system of Private International Law, as it has its own civil law.

No one seems to realize that to pretend having a particular international law is the worst juridical heresy which can exist. Here we find the greatest imperfection of our science. Like the cinematographic pictures which are so popular to-day, it exists only on the condition that we are content to look at it and do not attempt to touch it. The certain progression of international relations of a private nature will render this defect more perceptible and will increase the desire to remedy it.

But what remedy will be effective in a matter like this? As it is a question of imposing a certain unity of direction upon states which are not dependent one upon the other, the Convention appeared to be the obvious means. It has been tried and has not led to the desired results. The European jurists have lived for nearly half a century in a state of absolute confidence with respect to diplomatic conventions. Cannot every object be obtained by means of treaties, and why have they not been thought of before? Well, treaties—many treaties—have been made on the subject of civil law, commercial law and procedure. As many nations have been asked to conclude them as possible; adhesions to them have been promised and have been obtained. Vain efforts! These treaties are still recent and yet some of them have been denounced by us already[5]; other denunciations will doubtless follow. Why this failure? It proceeds, in my opinion, from a double source. The treaties have been made too hurriedly and without sufficient care. The persons, though learned and capable, who took part in the drawing up of these treaties, paid attention exclusively to the principles to be sanctioned without thinking of the difficulties which their application might encounter. A convention on the guardianship of minors was made in this manner and, after it had been concluded, it was noticed that it was not known to what minors it was applicable. Again, in the deliberations which precede these great conventions, the same thing always happens. Success is desired at every cost, and because of that, compromises are made more often than necessary, embarrassing questions are put aside and the texts are altered in a manner to satisfy everybody.[6] That is called sometimes, cleverness. For my part I call it a great blunder. Ques-

[5] The Convention of the Hague of 1902.

[6] When the Convention on Marriage was drawn up, and no agreement could be reached with respect to diriment impediments all impediments were made prohibitive.

tions buried under phrases arise always in a more troublesome fashion than before and the Convention is powerless to settle them.

I do not believe that the progress of Private International Law can reasonably be expected from the conclusion of treaties. I do not believe, either, that it will result from legislation. Legislation is always partial. People would not understand it if it did not confer some advantage upon the national law at the expense of the foreign law. Sometimes it is even unacquainted with such foreign law.

The work, so desirable, of the practical unification of Private International Law, will be the work of theoretical writings and of judicial decisions. The theoretical writers discover the roads which may be followed; the judges choose between them. Legal doctrine results from the individual work of the jurists, which I recommend as very useful. Collective work—those of associations—are rarely carried to the same point of precision and depth. Their resolutions, like the clauses in diplomatic conventions, are too frequently lame compromises between opposing views. A judge is worth much more than a legislator in such a collaboration. The judge does not proceed by way of general maxims which leave often the whole task to interpretation; concrete cases come before him; he decides them, fastens them together and ends by making, of these separate stones, an orderly and symmetrical mosaic. The judge is free to choose the grounds for his decisions and to take them wherever he may find the best; he adapts the legal theory to the constant needs of life. When the judges will have developed the habit of looking to foreign decisions, not, to be sure, as obligatory precedents, but as being entitled to certain weight, judicial decisions will work towards unification.

Circumstances will facilitate the task. What are the great divergences at the present time? Do they seem to be without remedy? The greatest of them doubtless is that of domicile and nationality as criteria of personal status. May I venture to express the view that the present war will give new impetus to the idea of nationality? There is no state that will not feel the need of strengthening the national tie after the war, of separating more widely subjects from aliens, and of placing these last upon a different legal basis. The personal status of the inhabitants of a Federation including forty states can, of course, not be subjected to a single law. With them the law of domi-

cile must determine status, but is the same rule to be applied to aliens domiciled within the territory of the Union? It is possible that the experience of the present war will tend to bring about a modification of the judicial decisions in this respect. If a wide separation between aliens and subjects be deemed imperative, a retention by the former of their foreign personal status will not be without significance. Some jurists believe that persons living in the same territory and having constant business dealings should have the same capacity, on grounds of public policy. This contention has not convinced me. Questions of capacity do not arise in connection with every-day contracts; they become important only in connection with larger affairs, and these are not entered into without inquiry into the status of the person with whom one deals. Carelessness does not deserve to be placed under the protection of laws relating to public policy.

The Anglo-American system of the jurisdiction of courts in suits between aliens should, on the other hand, be adopted by our laws and courts. An alien may possess rights that are more or less extensive, but whenever a right is granted to him, he should be allowed to assert it in court upon the same conditions as a subject. That is the Anglo-American practice, and it represents the correct doctrine.

In the important matter of the execution of foreign judgments also, the practice of English and American courts would be a good example to ours.

What more is necessary? There remain evidently deeper traces of the statutory theory on the other side of the ocean than on this side. Hence also a more pronounced tendency towards territoriality. The distinction between real and personal statutes is regarded, however, in America as little as in France, as furnishing the key to the solution of the Conflict of Laws. The doctrine which was formerly accepted universally may have left deeper traces in one country than in another; that is all the difference. It is to be feared that public sentiment after the war will be favorable to a return of the principle of territoriality. We should regret that. The principle of territoriality is suitable for those periods when man is sedentary and lives in the midst of immovable property which constitutes his estate. It is out of place, however, in the present era of travel and immigration, when fortunes consist often of incorporeal property which it is difficult to connect with any particular territory. In such a

case one proceeds from fiction to fiction. The rule *mobilia sequuntur personam,* which was already a fiction, is complicated by the rule which fixes the *situs* of a debt at the domicile of the creditor or that of the debtor, which is another fiction. In matters of inheritance and bankruptcy new fictions are being used. How artificial all that is! Sufficient attention has not been paid to the fact that it is neither persons nor things which are in conflict, but the laws of different states. The solution of the conflicts must be found, therefore, in the laws themselves. Laws, whether they affect persons or property, are always the expression of the sovereignty of the legislator; they have no inherent characteristics; they are neither personal nor real; they are what the authority of a legislator can make them in view of the authority of foreign legislators. The science of the Conflict of Laws in the realm of private law is the science of the limitation of authority of each legislator by the authority of other legislators. It is in this direction that the foundations of the science must be sought.

Without insisting further upon this investigation which we have pursued elsewhere, let us note here only a special point which deserves to govern the entire discussion. It is apparent that among states of an equal civilization the authority of one legislator cannot be different from that of another legislator. There is complete equality between them. This equality on the part of states, which one proclaims in too absolute terms in the books, for it does not exist and has never existed in matters of international politics, is, on the other hand, a reality from the point of view of private law. If a sovereign had only several thousand subjects his laws would not on that account be less real, having the same authority as that possessed by the laws of the most powerful empires. Nobody would deny the truth of this statement; and this teaches us that among laws of equal value there is—there should be, but one system of Private International Law. Each law being similar to the other, ought to have the same limits. Unity in this respect is not only possible; it is the only rational point of view. We need only to discover the best Private International Law, the one that will make the best use of the authority of the laws of the different states for the greatest good of the international society, the one also that will establish international security of law by acquainting each one with the law to which he is subject and in which he will find a guaranty of the rights belonging to him.

The task is not impossible of realization. It will call for effort, which should bring success. In this manner the second object of our science will be attained. If, as regards the condition of aliens, we were forced to admit that it had gone too far on a course strewn with rocks, it may pursue its way with confidence in the matter of the solution of the Conflict of Laws. It is proceeding in the right direction. Private International Law does not exist as yet, but it is in the process of formation, and there is good cause to hope that, thanks to a more ardent collaboration on the part of the legal writers and judges, the twentieth century will not close without having made of Private International Law a reality.

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