

THE NEW ITALIAN SCHOOL OF PRIVATE
INTERNATIONAL LAW.

I.

IT cannot be said that the doctrines of that group of jurists described collectively as the New Italian School have received sufficient attention on this side of the Channel, having regard to the immense effect which the learning, enthusiasm, and high purpose of its members have produced in that branch of legal science. The leading English writers on Private International Law, such as Professor Westlake and Sir Robert Phillimore, adhering rather to Savigny's philosophical conceptions, unmodified by the Italian ideas, do not lay any stress on the new element introduced by the Italian advocacy of Justice, Liberty, and Nationality.

The views of the Italian school are nevertheless a most important element in the evolution of International Law on the inter-territorial application of law in private relations. They have been embodied in the Italian Civil Code of 1865—a result chiefly due to Mancini, the founder of the school, first president of the Institut de Droit International, and Italian Minister of Grace and Justice in 1878. Italy has concluded many international conventions based on their principles. Writers of eminence of all the leading continental states, except Germany, are to be counted among the school. In Italy, Mancini, Esperson, Fiore, Pierantoni, and Lomonaco, are among the best known. In France, its doctrines are upheld by the able pens of Weiss and others. In Belgium, Laurent's monumental work, dedicated to Mancini, has spread its juristic teachings. In Switzerland, Brocher's writings are

in substantial agreement. The school, indeed, might with appropriateness be described as the new Latin, or the Franco-Italian, rather than the Italian school.

It is not so much the originating of its separate theories—nearly all of which were pre-existing—as the combining of them, the deepening of their logical foundations, the application of these theories to facts; and above all the urging forward of the combined system with zeal and eloquence, that mark the rise and influence of these writers.

The origin of this new system of private international law is undoubtedly to be found in that idea of Nationality which has transformed the map of modern Europe. In his striking picture of the connection between the “law of nature” of the French lawyers, and the writings of Rousseau and the principles of 1789, Sir Henry Maine tells us how at that fateful epoch the Law of Nature descended from the forum to the street. The reverse process is to be seen here. The principle of Nationality has ascended from the street to the forum. The political theory of the Italian nation, triumphant in battle, is formulated in the realm of law. (*a*)

RELATION OF THE THEORY TO KANT, ROUSSEAU AND THE
PRINCIPLES OF 1789 ON THE ONE HAND, AND TO THE
NATIONALIST MOVEMENTS OF 1848 ON THE OTHER.
RELATION TO SAVIGNY.

The outcome of the philosophical speculations of the 18th century, in so far as touching on politics and law, are formulated by Kant in his tract “Zum Ewigen Frieden,” 1795, written after the Peace of Basel, and in his “Metaphysik der Politik,” 1797. Kant in his last or practical phase is the link which connects these speculations with the juristic science of to-day.

Taking from Rousseau the truth that there is an irredu-

(*a*) “L'Italia nostra tributò un solenne omaggio al principio di Nazionalità, dopo di avere pel suo trionfo combattuto lunghe e sanguinose lotte.” Esperson, “Il principio di Nazionalità applicato alle relazioni civili internazionali.”

cible minimum of individual right, but abandoning the merely disruptive extremes to which Rousseau pushed his theory of individualism, he upholds the position that justice is the determining, by the aid of reason, of the sphere of the liberty and free development of the individual from the like spheres of liberty of other individuals harmoniously co-existing. It is unnecessary here to enter into the earlier history of these combined conceptions. It is obvious that there are many postulates. The *à priori* equality of individuals, apart from determining facts other than birth, is of course assumed.

Sir Henry Maine, in his interesting study of the later history of the Roman law of nature, has shown us how the Stoic conceptions struck firm root in France, where the decree of King Louis Hutin anticipated by centuries the doctrine of the American declaration of independence—"All men are born free and equal." Natural equality became an article of faith with the French lawyers, who having been for centuries the King's right arm in the consolidation of France, became like their colleagues in America the chief founders of the republican constitution. Assumed also is the theory that the freedom of development of the individual is a thing to be respected; an implication being that the processes of nature are right. Assumed also, and this goes back in its historic roots deep into the past, is the fact of individual existence, involving individual will, and with it individual responsibility. The religion of Europe, always regarding the individual as separately responsible, the modern criminal law of the Aryan races, substituting individual responsibility for that of the group, make these ideas seem self-evident. Assumed too is the necessary but, nevertheless, the most modern idea of internal peace. The peace which was the Empire of Rome, the peace which was the universal church, the peace of the king—the best gift which royal authority has bequeathed to our civilisation—had sunk into men's minds so as to seem natural as the sunlight, and necessary as the air. So deeply had it sunk into men's minds, that the last and greatest assumption seemed hardly to require formulation — that the peace

originates from within rather than from without; that the majority of the community will, without the compulsion of external force, voluntarily respect the liberty and the free development of other members.

It is needless to say that the history of any one of these ideas would be in itself a labour of years. What is relevant to our present subject to remember is that these conceptions of justice, of right, of individual freedom, equality, and responsibility, are the universally assumed basis of all modern juristic discussion.

These ideas were first formally applied to instruments of government in England. They are essentially involved in the English conception of the liberty of the subject, though linked with the idea of historic inheritance rather than *à priori* right. In the English Revolution of 1689, they find articulate expression. The sons were much mightier men than their fathers, and the American revolutionists of 1776 re-assert with redoubled emphasis the rights of the individual, now imprescriptible and independent of a servile past. The English insular idea has cast its shell of exclusiveness, and the Puritan founders of the republic express themselves in the language of the speculative philosophy of the European continent. "All men are born free and equal."

The culmination in the plane of politics of all these ideas is to be found in the famous Declaration of the Rights of Man in the French Revolutionary Convention of 1789. The principles of 1789 are formulated in terms not merely independent of history, but of all political boundaries. The liberty of the individual is not merely asserted but defined. It is imprescriptible and independent of all laws and positive institutions, mere emanations from the will of other individuals each with no higher rights than his own. "The liberty of one citizen ends where the liberty of another citizen begins." The universal fraternity of mankind is not merely an ideal, but a sacred right.

The reaction which followed the singular reception accorded by European Governments to the French pro-

clamoration of fraternity has left its mark to the present day on the French Civil Code. One instance of reaction, though abolished in 1819, was the reintroduction of the *droit d'aubaine*. In the realm of politics the antagonism of the free Republic, fighting for its liberty and its life, and carrying liberty to the oppressed peoples, was transformed by the common-place ambition of a military adventurer into a war of conquest, crushing out the free life of Europe. But the reaction in great part passed away, and in politics and in law the principles of 1789 were heard of again. The "Idéologues" survived their shallow critic.

Fifteen years after Waterloo the French people reasserted their right to the internal ordering of their constitution. Then began that era of the Nationalist movements which has persisted to the present day. In 1848 that movement reached its culmination. Revolutionary Governments in Berlin, in Paris, in Rome, in Naples formulated anew the principles of 1789.

Their success was shortlived. All these Governments passed away. But in Italy the Nationalist movement survived. The ducal house of Savoy, reigning in Sardinia and Piedmont, placed itself at the head of the movement. The United Italy of to-day is the result. This period of storm and stress marked the growth of the Italian theory of international law.

Remembering that Kant's formulation of the principles of 1789 in the realm of law—and his conceptions of justice and individual liberty—were articles of faith with speculative jurists; remembering, on the other hand, that passionate attachment of the Italian people to their essential national unity, nullified as it was by the feudal barriers of their petty principalities, it is obvious that when Mancini proclaimed in 1851 his theory of nationality as the basis of international law, the hour and the man had come.

As he tells us, he applied to nationality the canon of liberty which Kant postulated for the individual in the realm of law. Nationality, not the State, is the true basis of

international law; States being then in many cases mere artificial aggregations resting on brute force. Nationalities, on the contrary, are natural aggregations, resting as their ultimate basis of right on the recognition of the personality—of the liberty—of the individual, and of his freedom of association.^(a)

The victory of the principle of nationality in the politics of Italy enabled its exponent in the domain of law to embody his ideas in the Italian code.

It is plain that the theory is applicable to public international law—the relations of States to each other as regards States' interests—as well as to private international law—the relations of States to each other as regards the private interests of their subjects in foreign territory.

But the theory of the Italian school has produced less relative effect in the domain of public international law. The reason is that there was less work to be done in that department. It was unanimously admitted that the relations of States to each other as to their public interests were matters of strict law, of strict right and duty. On the contrary, the theory of international courtesy—of *Comitas Gentium*—dominated the other division of international law.

Here, then, in asserting international duty, there was more to be done by the newer writers, and more was done. For this reason I propose to confine this consideration of their theories to the department of private international law.

To Kant I have traced the proximate juristic source of their theory—the side, that is to say, that regards more particularly legal topics. The relation of the Italian school to Savigny, the greatest of German jurists, was close and immediate. Founding as he does his standard of justice and legal right in the conceptions formulated by Kant, that relation was inevitable. But it is much closer in two essential particulars—the supremacy of the law of public order and the postulating of a community of law among civilised States.

(a) Mancini, "Della Nazionalità." Turin, 1851; and *see* Dir. Int. 90.

To see that relation clearly it will be necessary to postpone further consideration of Savigny's position towards the school, until an outline of their theory has been given.

THEORY OF THE SCHOOL.

Law and Right—International Law in General.

It will enable us to better appreciate the import of the doctrines of these writers on international law if, without attempting to see their history, we first set out those scientific theories which they hold in common with all recent jurists—with one inconsiderable exception to which I shall refer again—and then to consider the special additions made by the school.

The general theory of law and right is that held by all the great writers on law. Rights arise not from law but from the facts of human existence internal and external, giving rise to jural relations. They spring, therefore, from the nature of things. It is the function of reason to delimit their exercise. This is done by ascertaining the corresponding social duties which are capable of being, and ought reasonably to be, enforced by external human power. These duties, therefore, are necessarily confined to external acts. Law, far from creating, is created solely to protect rights. If the written law of any community fails to do so, it fails in its duty. The application of reason to jural relations is the work of juristic science. Law is primarily a body of principles conversant with the social rights and duties of men, and existing in the common consciousness of men, whether one people or a community of many peoples. The conclusions of juristic science become gradually incorporated in that consciousness.

The theory of international law, as generally held by these writers, is similarly held by them in common with all the more eminent writers. International law consists of a body of principles conversant with the duties of States of

European civilisation, existing in the common consciousness of all the peoples.

The source of these principles is in part to be found in certain deductions drawn by juristic science from the necessary facts of State existence. This is the necessary law of nations resting on the nature of things. This source is supplemented by another branch of rules, purely customary law, the result of various historical causes.

It will be observed that there is no distinction between the law of one people and the law of nations as regards its essential common basis—the consciousness of the people. The difference consists in the rights that are in question, and the greater or less area over which the law extends.

Similarly there is no distinction in essential basis between international law public, which deals with the duties of States towards each other as regards States' rights, and international law private, treating of the duties of States towards each other as regards subjects in foreign jurisdiction.

Passing now from the ground where practical unanimity prevails, we come to those scientific definitions and postulates, the proximate source of which was Kant, formulating in juristic science the principles of 1789. Justice is the delimitation, by the aid of reason, of the sphere of liberty of each individual from the like spheres of liberty of other individuals, whose equality before the law and whose harmonious co-existence are postulated. The right of the individual to liberty springs from nature—the nature of man with all its facts, internal and external. The widespread acceptance of these conceptions is here only to be noted, not explained.

Bearing clearly in mind that, when dealing with the foregoing ideas, the Italian school are but accepting the current coin of modern juristic authorities—either unanimous or of preponderating number—let us now pass to the original conceptions round which they have grouped most of these ideas, and drawn conclusions from their mutual reaction.

The distinctly original conception is the foundation of nationality on the right of the individual to liberty.(a)

Connected therewith is the application to the relations of States of Kant's canon of liberty, as the foundation of international law, public and private.(b)

The basing of the right of the State on the nationality, of which it is the incorporation in international law, is also intimately connected therewith, being a deduction from the original premises rather than a new conception.

The conclusions drawn from this theory of international relations, as far as it affects public international law, need not be dwelt on here, for the reason already given, that, except perhaps as to the right of a nationality to constitute itself a State, or the right of a dismembered nationality to reunite, the effect is not so obvious as in private international law.

THEORY OF THE SCHOOL—PRIVATE INTERNATIONAL LAW.

International law affecting the mutual rights and duties of States as regards subjects in foreign territory may be divided into three branches. The first two define Foreigners' Rights and States' Rights. The third is concerned with Delimitation of the Spheres of State Law (Conflicts of Law).

I.—*Foreigner's Rights.*

The recognition of the foreigner's personality and nationality involve the extra-territorial recognition of his rights; and, in cases properly depending on his national law, the extra-territorial application of foreign law. That recognition of rights and application of foreign law are duties of inter-

(a) "La Nazionalità non è che la esplicazione collettiva della Libertà." Mancini, "Della Nazionalità," 41. Esperson, "Nazionalità," 5.

(b) Mancini. "Della Nazionalità," 64. "Laonde può applicarsi al principio di Nazionalità quello che Kant affermò della libertà." "Diritto Internazionale," 29.

national justice of strict obligation, binding on the State under the law of nations.

The foreigner's State is entitled to protect its citizen abroad in such manner as to secure the recognition of his rights.

The foreigner's rights are those of the individual and are limited only by those of the community in which he lives. The foreigner is therefore entitled to justice, as his absolute right, and the necessary recognition of his personality. The foreigner is entitled to the enjoyment of all rights, not directly affecting the liberty of the community. He is therefore entitled to all rights which are not public—that is, to all within the purview of private law. The moral equality of individuals demands as a consequence that he be entitled to the enjoyment of all civil rights, on the same footing as the citizen—the principle of fraternity. The imprescriptible liberty of the individual requires that his right of emigration be recognised by his own State and by the State to which he emigrates.

Incidentally to the recognition of his civil rights, the foreigner is entitled to the extra-territorial application of his foreign law to all jural relations properly depending, from the juristic standpoint of reason and justice, upon that law. As has been shown, these relations can only be of private law.

In all questions, the foreigner as an individual is entitled to the recognition of his personality. Merged in that of his State, his personality becomes his nationality. In questions affecting his personality, such as his status, capacity and family relations, that personality can only be respected by the application of his national law as his personal statute.

His liberty is further recognised in cases when the selection of the law of obligations is left to the will of the parties.

II.—*State's Right—Limit to Foreigner's Right.*

The canon of liberty is applicable to the right of the individual and the right of the State, as well as to the rights

of individuals between themselves; the State itself being an emanation from the liberty of its individual members.

The only limit to the foreigner's right is that of the State. The State's sphere of liberty is embodied in its public law, that portion of its law which deals with the interests of the community as a body. The foreigner is excluded from public rights, as justice to the State demands that exclusion; no reasonable probability existing in his case for their unbiassed exercise, as he is subject to a foreign allegiance. The State enforces its public law against foreigners as well as citizens. The foreigner is subject to the public law in regard to its formally public portion—constitutional law, criminal law, laws of police and public security, fiscal laws, and in regard to those provisions of private law which have public interests of the State (within which foreigners may justly and effectively be included) as their object.

The foreigner's duty is implicated in the statement of the State's right.

III.—*Delimitation of the Spheres of Municipal Law— (Conflicts of Law).*

Where in any case the right of a foreigner is in question, or any right of a citizen arising originally or subsequently falling within the scope of foreign law, it is necessary to decide what State law is properly applicable. This predicament is usually described as a conflict of law; more properly by Savigny and others, as a case calling for the delimitation of the proper spheres of State law.

The foregoing division of rights into those of the foreigner and the State, presents a canon for determining the respective spheres of State law and that of the foreign State. The personal statute of the foreigner *quod ossibus inhæret*, is supplied by the law of his nationality, which has extra-territorial operation, following him everywhere. The real statute is furnished by the public law of the State, which has only territorial operation, and stops at the frontier. In the voluntary division of private rights, in which the will of the

contractants is predominant, the liberty of the individual is respected by following his selection of the law.

Nationality based on the liberty of the individual is therefore the dominant idea. Viewed in one aspect, the right of the nationality to protect its citizens abroad, it gives the rules which may be styled the charter of foreigners' rights under international law.

Nationality, viewed as the right of the State to protect its own existence, gives the ground of the State's international right to enforce its public law against foreigners.

Finally, Nationality in both aspects gives a criterion for marking the sphere of the extra-territorial application of national law.

Justice, Nationality and Fraternity, based on the Liberty of the Individual, are therefore the cardinal ideas of the Italian school in private international law.

MEANS OF SECURING UNIFORM INTERNATIONAL RECOGNITION OF THESE PRINCIPLES.

As the State's duty in the matter of the extra-territorial recognition of rights and the extra-territorial application of foreign law is of strict obligation under the law of nations, it follows that the duty lies equally on all States. Absolute uniformity therefore is required. It can best be secured by international treaties, adopting the principles already explained. This last view forms an important, but of course not an essential part of the theory.

WRITERS OF THE SCHOOL.

In the year 1851, Mancini being appointed first professor of the newly created chair of international law in the University of Turin, published his famous lecture, "Della Nazionalità come Fondamento del Diritto delle Genti." In 1863 he was one of the sub-commission for drafting the Italian civil code, and presented conclusions subsequently

embodied in the code, and referred to in his report to the Institut de Droit International in 1874. In 1873 he published his "Diritto Internazionale."

Esperson, professor at the University of Pavia, in 1868 published "Il Principio di Nazionalità applicato alle relazioni Civili Internazionali," in which the doctrines of the school are systematically applied to the topics of private international law.

Fiore's work on private international law (2nd edition, Florence, 1874) is better known to English readers, having appeared in 1875 in the French of Pradier-Fodéré.

Lomonaco's "Diritto Civile Internazionale" appeared in Naples in 1874, and Pierantoni's "Diritto Internazionale" in Rome, in 1881; Fusinato's books (referred to extensively by Bar) appeared in 1884-85. Many commentators on the Italian civil code adopt the principles of the school.

Laurent's book, "Droit Civil International," appeared in 1880-82. The Belgian professor warmly adopts the Italian theory of nationality. The work is remarkable for its lucid summary of the history of private international law, and for its vigorous assault on the stolid phalanx of "Anglo-American realism."

Weiss's book, "Traité Elementaire du Droit International privé," Paris, 1885, is remarkable for its clear exposition of the doctrines of the school. The first instalment of a new edition, or rather of a new treatise on the same subject, appeared last year. Durand ("Droit International privé," Paris, 1882) has also written from the same point of view.

Brocher ("Droit International privé," Genève, 1876) must be considered an adherent in the main of the tenets of the school, which indeed he has done much to strengthen. Mancini counted him among its supporters; although Bar (1889) shows some divergence of opinion.

THE SCHOOL AND THE ITALIAN CIVIL CODE.

Mancini, as has been stated, being one of those entrusted with the preparation of a draft Civil Code for United Italy,

had the satisfaction of seeing his principles embodied in the completed work promulgated by Victor Emmanuel in 1865. The articles of the Code which follow are formulated on the principles of the school.

The principle that the foreigner and the citizen are equal before the law as to civil rights—the principle of Fraternity—is recognised, and the extra-territorial recognition of the foreigner's rights is provided for in Lib. I. Delle Persone. Tit. I. Della cittadinanza e del godimento dei diritti civili. Art. 3. “Lo straniero è ammesso a godere dei diritti civili attribuiti ai cittadini.”

Among civil rights is included, by the Italian school, a right of emigration—resting more immediately on the liberty of the individual than on his membership of a nationality. This right is recognised in Lib. I. Delle Persone. Tit. I. “Della Cittadinanza.” Art. 11. La cittadinanza si perde: 1st. Da colvi che vi rinunzia con dichiarazione davanti l'uffiziale dello stato civile del proprio domicilio, e trasferisce in paese estero la sua residenza. 2nd. Da colvi che abbia ottenuto la cittadinanza in paese estero.

Nationality is adopted as determining the personal statute of the foreigner. As regards his status, capacity, and family relations, this is effected in the preliminary provisions of the Code.

Disposizioni sulla . . . Pubblicazione, Interpretazione ed Applicazione delle Leggi in Generale. Art. 6. “Lo stato e la capacità delle persone ed i rapporti di famiglia sono regolati dalla legge della nazione a cui esse appartengono.”

As regards his moveable property this is effected by—

Art. 7. “I beni mobili sono soggetti alla legge della nazione del proprietario, salve le contrarie disposizioni della legge del paese nel quale si trovano.”

As regards succession to the foreigner, whether *ab intestato* or testamentary, this is effected by—

Art. 8. “Le successioni legittime e testamentarie però, sia quanto all'ordine di succedere, sia circa la misura dei diritti successorii, e la intrinseca validità delle disposizioni,

sono regolate dalla legge nazionale della persona, della cui eredità si tratta, di qualunque natura siano i beni, ed in qualunque paese si trovino.”

In the voluntary division of private law, the nationality of the individual, and at the same time his right to the exercise of his freedom of choice, is recognised.

As regards forms, this is provided by—

Art. 9. “Le forme extrinseche degli atti tra vivi e di ultima volontà sono determinate dalla legge del luogo in cui sono fatti. E però in facoltà de’ disponenti o contraenti di seguire le forme della loro legge nazionale, purchè questa sia comune a tutte le parti.”

As regards substance and effect of acts the same article provides—

“La sostanza e gli effetti delle donazioni e delle disposizioni di ultima volontà si reputano regolati dalla legge nazionale dei disponenti. La sostanza e gli effetti delle obbligazioni si reputano regolati dalla legge del luogo in cui gli atti furono fatti, e, se i contraenti stranieri appartengono ad una stessa nazione, dalla loro legge nazionale. E salva in ogni caso la dimostrazione di una diversa volontà.”

The foregoing dispositions refer to the personal statute in which the nationality of the foreigner is the criterion, and to the voluntary statute—if the term may be used instead of the ambiguous term “mixed”—in which the freedom of the individual is recognised.

There remains the real statute, the determinant of which according to the Italian school is territoriality—the contrary aspect of nationality. The Code provides for the supremacy of the public law and public order of the State.

Disposizioni. Art. 11. “Le leggi penali e di polizia e sicurezza pubblica obbligano tutti coloro che si trovano nel territorio del regno.”

Art. 12. “Non ostante le disposizioni degli articoli precedenti, in nessun caso le leggi, gli atti e le sentenze di un paese straniero, e le private disposizioni e convenzioni potranno derogare alle leggi proibitive del regno che con-

cernano le persone, i beni o gli atti, nè alle leggi riguardanti in qualsiasi modo l'ordine pubblico ed il buon costume."

THE SCHOOL AND THE INSTITUT DE DROIT
INTERNATIONAL.

At the first session of the Institut de Droit International held in Geneva in 1874, on the motion of Mancini, their president, the Institut adopted unanimously the following amongst other resolutions, embodying the principles of the Italian School:—

"Dans l'état actuel de la Science de Droit International ce serait pousser jusqu'à l'exagération le principe de l'indépendance et de la souveraineté territoriale des nations, que leur attribuer un droit rigoureux de refuser absolument aux étrangers la reconnaissance de leurs droits civils, et de méconnaître leur capacité juridique naturelle de les exercer partout. Cette capacité existe indépendamment de toute stipulation des traités et de toute condition de réciprocité. L'admission des étrangers à la jouissance de ces droits, et l'application des lois étrangères aux rapports de droit qui en dépendent ne pourraient être la conséquence d'une simple courtoisie et bienveillance (*Comitas Gentium*), mais la reconnaissance et le respect de ces droits de la part de tous les Etats doivent être considérés comme un devoir de justice internationale. Ce devoir ne cesse d'exister, que si les droits de l'étranger et l'application des lois étrangères sont incompatibles avec les institutions politiques du territoire régi par l'autre souveraineté ou avec l'ordre public tel qu'il y est reconnu."

Other portions of Mancini's report—the special conclusions—were postponed, through want of time for their consideration. They were further postponed at the successive sessions of La Haye, Zurich, Paris and Brussels, and were finally submitted to the vote of the Institute at its session held in Oxford in 1880, when the original propositions of Mancini, with some minor modifications, were adopt-

ed.(a) and the Institute resolved (Resolutions of Oxford, 1880):—

I. “L'étranger, quelleque soit sa nationalité ou sa religion, jouit des mêmes droits civils que le regnicole, sauf les exceptions formellement établies par la législation actuelle.”

VI. “L'état et la capacité d'une personne sont régis par les lois de l'Etat auquel elle appartient par sa nationalité.”

“Lorsqu'une personne n'a pas de nationalité connue, son état et sa capacité sont régis par la loi de son domicile. Dans le cas où différentes lois civiles coexistent dans un même état, les questions relatives à l'état et à la capacité de l'étranger seront décidées selon le droit intérieur de l'Etat auquel il appartient.”

VII. Les successions a l'universalité d'un patrimoine sont, quant à la détermination des personnes successibles, à l'étendue de leurs droits, à la mesure ou quotité de la portion disponible ou de la réserve, et la validité intrinsèque des dispositions de dernière volonté, régis par les lois de l'Etat auquel appartenait le defunt, quelleque soient la nature des biens et le lieu de leur situation.”

VIII. “En aucun cas les lois d'un Etat ne pourront obtenir reconnaissance et effet dans le territoire d'un autre Etat, si elles y sont en opposition avec le droit public ou avec l'ordre public.”

THE THEORY OF THE ITALIAN SCHOOL AND THE AUSTINIAN ANALYSIS.

It is impossible on this side of the Channel to form any adequate, or even approximately correct, estimate of the

(a) Among those taking part in the discussion were most of the leading writers on international law. Among the foreign members were MM. Rolin-Jaequemyns, Rivier, Clunet, Moynier, Pierantoni, Bluntschli, Arntz, Neumann, Martens, and Saripolos. Among those from the United Kingdom were Professors Westlake, Lorimer, Dicey, Holland, Mr. Bernard, Mr. Hall, and Sir Travers Twiss. The latter, with Mr. Hall and Professors Lorimer and Holland, opposed the inclusion of immoveables among successions determinable by the law of the nationality of the proprietor (Res. 7).

value of the Italian theory of private international law without taking first of all into account a fact which has done more than any other to retard the progress of juristic science in England. That fact is that the conceptions of law, right, and duty, current among many English writers on law, are in violent contrast with those of all foreign writers of all schools, and are at the same time inconsistent with the essential truth as to the phenomena with which they profess to deal. These conceptions are, for the most part, to be found only with writers of this century; indeed, almost exclusively with those who have written since the growth of what is called the Austinian school.

According to all Continental jurists, right is not the creation of law. On the contrary, law is created to protect rights. Rights spring from jural relations arising from the facts of human existence, internal and external.

It is the function of reason to trace the boundaries of these rights. That number of reasoning minds, which are applied to the study of jural relations, present their deductions to the world, and in time these become incorporated into the consciousness of the people. It is the duty of the legislative organs of the State to bring the outward expression of the law into harmony with the reality existing in the minds of the people. If the legislature fails to do so, it fails in its duty. Its law is not true law, though of course its judges and officials, unless they have legislative powers, must administer it.^(a)

The English writers on law before this century, reasoning, as they were accustomed, on the English common law—in its essence customary, and independent of positive legislation—were not in the main led to conclusions out of harmony with these conceptions of right and law.

But the Austinian school has spread what may be described as the legal practitioner's conception of law and right, and claimed for it not merely a title, but an exclusive title,

(a) See Bar, Intern. Priv. Recht., 1889, § 4. Savigny, Syst. i. 13.

to these terms. Law is nothing but an enactment of the legislature, direct or indirect. Right is nothing but a privilege conferred by a law as thus defined. Any other claimants to these titles, in legal discussion, are usurpers, whose claims are "vague" and "unscientific."

This view is obviously that of the legal practitioner, who is not in the least concerned to know what is the individual's right arrived at by reasoning on the jural relations actually existing in the community. He merely wants to find out what legal right is recognised, or as he would say, created by a statute or decision, and conferred on the individual. If the law is wrong (as he would say, morally) it is no affair of his; which, perhaps, is sufficiently true, in the sense that he is not responsible. Legal discussions based on any other conceptions of law and legal right than his own, he regards as ethical or political.

This narrow conception of law and right is, no doubt, defensible enough for the ordinary purposes of the practitioner, although when he desires to base a claim on a custom not yet judicially established, its inconvenience becomes palpable. But it is radically unfit for use by anyone else. It is eminently unfit for use by the English judge, who is a legislator in his decisions.

When, however, it is transferred by the Austinian "analyst" to the sphere of scientific discussion, it becomes a fantastic travesty of the true nature, not merely of law and right, but even of the positive statute or decision, which it professes to take as its sole standard.

To the scientific jurist the statute and the decision are seen to be mere adjuncts to the slowly-changing substructure of national ideas, sentiments, opinions, customs, which uphold, enforce, modify, or overwhelm them. True law resides in the minds of the people antecedently to its expression by the legislative or judicial organs of the State.

But what is important here is not the refutation of the Austinian analysis which, at its best, is not so much a theory of law as an attempt to photograph one of its exter-

nal aspects, and an effort to present it as nothing but the creation of physical force, directly applied or apprehended. What is desirable is rather to draw attention to the existence of the Austinian analysis and to remind the reader that those phenomena of the jural relations which the Austinian "analyst" describes as moral, all other jurists rightly regard as legal.(*a*)

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(To be continued.)

(*a*) The Austinian conceptions sometimes mislead, although usually sufficient for, the legal practitioner. In the Clitheroe Abduction Case—the "Jackson Case," 1891—the English Court of Appeal declared as law the altered ideas of the people as to marital rights. The written portions of the law were, for the most part, framed to suit a different state of popular ideas.