REVIEWS.

Das Internationale Civil und Handelsrecht auf Grund der Theorie, Gesetzebung und Praxis. By F. Meili, Zurich, 1902. *International Civil and Commercial Law,* etc., by F. Meili. Translated and Supplemented with additions of American and English Law. by Arthur K. Kuhn. The MacMillan Company, New York, 1905.

Das Internationale Civilprozessrecht auf Grund der Theorie, Gesetzebung und Praxis. By F. Meili. Parts I and II. Zurich, 1904.

Professor Meili, in these volumes, treats of whatever belongs to Private International Law, (or as he prefers to call it, International Private Law), considered with reference to civil relations, in two aspects. The first work deals with substantive rights; the last describes remedial procedure. Each shows wide reading and close thought.

Dr. Meili has been a prolific author of late years, and this may account for a certain incompleteness of statement which is sometimes noticeable. Thus in the volume devoted to substantive law he begins by observing that the problems to be solved are approached in any country in two directions, namely, that which views the obligations of foreigners and that which views the obligations of its own citizens in foreign lands. The third point of view—that concerning the rights growing out of foreign transactions, whether the parties to it be aliens or citizens—is left here unnoticed. It is nevertheless, as is fully recognized later in the work (Sec. 34 *et seq.*), the main and controlling point of view, according to the doctrines of modern political science, as formulated by Savigny and repeated or re-phrased by von Bar and Schaffner.

The author does not mince words in discussing opposing theories. The positions of Pütter and Pfeifer for instance as to the *lex fori* are contemptuously passed by with the remark that both treated in a careless manner a topic that neither understood nor sought to understand.

As to the question whether national law or that of the domicil should be adopted, as the ordinary test of personal rights, Dr. Meili, following lines indicated in his address before the St. Louis points to the policy and institutions of Congress of Jurists in 1904, his country as indicating a *via media.* As to some objects he would accept the one; as to others the other (Sec. 45). To apply it to every case would, he thinks, be to bring back the system of legal chaos obtaining in the dark ages, when five men might live in the same place, each subject to a different law and yet subject to the same sovereign (Sec. 17).

He has no patience with the sciolists who would aim at the general unification of the laws of different countries. On a few subjects they can be the same. On most it is enough to settle which of several differing laws shall be applied to a particular case. The work of the Hague Conferences of 1893, 1894 and 1900 in this direction is described at some lengths and contrasted with the comparatively abortive attempts of South American Congresses of a similar character—abortive because insisting too strongly on absolute uniformity. In saying, however, that the treaties framed by that held at Montevideo in 1889 were only ratified by Uruguay, he is in error. Before the close of 1894 they had also been ratified by Peru, Paraguay and the Argentine Republic. The text of the three Hague treaties on marriage, divorce and guardianship, which are now in force between ten European powers, is given in the appendix to Mr. Kuhn's translation.

The latter has done his work with care, and very creditably, in view of the difficulties to be encountered. Occasionally a harsh term creeps in which hardly carries the author's thought, as where (Sec. 15) the *jus gentium* is said to represent a complex of strange views of private law; "strange" being here an infelicitous substitution for "foreign." So an attempt to reduce to a word the description of a complicated subject sometimes tends to obscurity, as where (Sec. 66) reference is made to the great liberty accorded by England and America to foreign corporations as to entering "into legal relations in the internal state;" "internal" being here used to denote the country (being foreign to the corporation) which is the seat of the transaction, or possibly (cf. p. 546) the *lex fori.* A few errors in proof revision are to be regretted, as where (p. 228) "changeableness" is used where "unchangeableness" was intended.

Discriminating citations of American authorities added by Mr. Kuhn are incorporated in the text of his translation, and with their aid the work will be a useful manual to American students.

It avoids the diffuseness of many writers on this subject, and its propositions are generally both clear and compact. A valuable feature is the concise statements of the positions taken by leading authors, and by congresses and learned societies, down to the opening year of the present century. In revising Mr. Kuhn's work, Dr. Meili has taken the opportunity to refer in this manner to much that has been done and published in 1903 and 1904.

The latest of these books, that treating of *Civilprozessrecht,* proceeds on a less traveled path, and may be said to be a supplement to the other. It is a hand-book of practice in three parts, for the lawyer who has to prosecute a claim abroad or to present before the courts of his own country one arising out of a foreign transaction. Such remedies as might be open to him are described at length, with relation to mesne process, jurisdiction, pleadings, evidence, judgment and execution. The first part deals with general considerations; the second with particulars; and the third (not yet published) is to be confined to final judgment and process.

The author cites an important decision (p. 35) of the court of appeals at Rome, given in 1881, to effect that treaties become the law of each of the contracting powers and magistrates have full right to recognize their effect when they are invoked in the support of private rights. This, for Italy, puts a treaty by judicial construction where our own Constitution puts it in express terms. It is a reasonable deduction from the modern practice requiring parliamentary ratification of treaties, which now prevails generally in Europe.

Considerable space is given to methods of extra-territorial service of process by the aid of foreign judicial officers, a proceeding analogous to that upon a rogatory commission. The treaties between various European powers as to jurisdiction of suits affecting foreigners, whether natural or artificial persons, are described at length, as well as the provisions of their codes. International arbitration receives ample consideration (Sec. 44).

A part of the book which is of special practical importance to American lawyers is the discussion of the rules affecting written evidence produced from abroad (Sec. 561, *et seq.*). There is a certain trend of Continental European opinion towards giving it such weight as it would be entitled to within the jurisdiction from which it comes, but the Institute of International Law, in resolutions cited by the author and adopted in 1898, while accepting this rule as to matters of form, favored the *lex fori* as the standard of probative force.

No lawyer can ever safely assume the conduct of a cause in a foreign country. He must rely on local counsel for the ultimate direction of its course; but a book like that under review will help him greatly, both in giving advice to such an associate and in understanding advice given by him. It is a good guidepost, and it is good to have guideposts as well as guides.

S. E. B.

Roman Water Law. Translated from the Pandects of Justinian. By E. F. Ware, of the Topeka Bar. The West Publishing Co., St. Paul, Minn. Half morocco, pages, 160.

This is an interesting monograph on the subject of the Roman law concerning fresh water. It is composed of excerpta from the *Corpus Juris Civilis* (particularly the Digest), which bear in any way upon this subject. Primarily it is a translation of these excerpta, which have been literally translated with care. This material from the Roman law has been arranged by the author in the following topics: rivers, rain water, springs, drip, waterworks, sewers, reservoirs, irrigation, water-rights, right of way and the appropriate remedies and procedure of the civil laws as to the same. It is an advantageous contribution to the literature in English or Roman law.

It is supplemented by the Spanish law on the same subject as found in the *Siete Partidas,* which was their law when America was

discovered and which underlies the modern Mexican law on this subject. Students of legal history in Louisiana and certain of the southwestern states should welcome this addition of the author to the proper scope of his work.

The author's introduction of fifteen pages is an ambitious effort. It notices the point of contact between certain American states and the civil law, discusses the codification of the Roman law by the Emperor Justinian, and gives some interesting data as to the possible influence of Assyrian, Persian and Egyptian law, on Roman water lay. Furthermore, it contains what is found in the works of the French civilian Domat and in the French Civil Code, relative to the same subject, a feature which would have come more logically in the supplemental posterior portion of the book.

C. P. S.

Cases on Domestic Relations and the Law of Persons. Second edition. By Edwin H. Woodruff, Professor of Law at Cornell University. Baker, Voorhees & Co., New York. Art canvas, pages XV, 624.

The compilation of a satisfactory case-book upon the law of Domestic Relations is attended by peculiar and exceptional difficulties by reason of the changeable state of the law and the chaotic condition of the decisions by which the compiler is confronted. Professor Woodruff achieved an enviable degree of success by the first edition of his work and now, after an interval of eight years, we are favored with a new edition differing from the first chiefly in the recent decisions which are inserted to the extent of a hundred additional pages and numerous additional notes. These new cases add materially to the value of the entire work and the notes, while they are mostly brief, are very satisfactory. The author in his very brief preface calls special attention to the fact that a group of cases on conflict of jurisdiction in divorce cases has been added, but an examination of these cases indicates that, in this instance, Professor Woodruff has been less fortunate than usual in his selection of decisions. No mention whatever is made of that remarkable series of cases decided by the Supreme Court in 1901, beginning with *Atherton v. Atherton,* 181 U. S. 155. On the other hand, space is given to *People v. Baker,* 76 N. Y., 78, which is practically overruled by the Supreme Court in *Atherton v. Atherton.* No student should be allowed to complete his study of Domestic Relations without having had a brief opportunity to gain an accurate knowledge of the law as established in these cases by our court of last resort. Aside from this regrettable omission, Professor Woodruff's book commends itself to every student and will also prove of universal value to the practitioner.

B. E. C.

Wills on Circumstantial Evidence. Fifth Edition. By Sir Alfred Wills, Knt. American notes by Professors George E. Beers and Arthur L. Corbin of the Faculty of the Yale Law School. The Boston Book Company, Boston, Mass., 1905. Sheep, pages, 448. (American Notes, 239.)

Wills on Circumstantial Evidence is an exposition of the fascinating parts of the criminal law. Many of the cases digested and used for illustration remind one rather of the stories of Poe and Doyle than of a technical work—so much the more interesting because of their truth. Of course these cases are the pick of a century—the confession without guilt, or the case minutely perfect made out by the prosecution only to be controverted by an unimpeachable alibi are phenomena to be observed not more than once in the life of any man—but they make one forget the daily routine of pettiness, of sordidness, and of filth, which gains for the practice of criminal law so universal disfavor and which repels most of the greater lawyers. Without regard to its technical merits, but merely for the human interest of the cases, the book is well worth reading.

The American notes, though containing fewer pages, are in much finer print than the text and since the digests of cases are more brief, they actually cover rather more ground. Some of the American cases are given in detail and are of great interest, especially those like that of the Chicago Anarchists, Molineaux and Prof. Webster. No table of cases, however, is cited which is rather detrimental, we think, to the general utility. The present writer sought in vain for the case of Martin Thorne and H. H. Holmes in the American notes, though possibly some mention is made of them, which he overlooked. But both for analogy and reference the book, and especially the American notes, ought, to those who have the opportunity and inclination to undertake the great cases of the criminal law, where usually the circumstantial is the only evidence obtainable, to be of great value.

G. S. A.

Jurisprudence, Law, and Ethics. By Edgar B. Kinkead, M. A., Professor of Law, Ohio State University. The Banks Law Publishing Co., New York, 1905. Buckram, pages, 357.

This work consists of a collection of lectures prepared for the class room. It is an introduction of primary and fundamental principles. They are set out tersely, almost epigrammatically, leaving the reader plenty of opportunity for individual speculation. The author does not attempt to treat the subject of jurisprudence and ethics from any original standpoint, but is content in introducing us to what the great minds of continental Europe, England and America have thought, quoting freely from their works. The science of law, its fundamental basis and its relation to other sciences is displayed, and its objects set forth. In part II the professional relation of the lawyer to the bench, his fellow members of the bar and his client is discussed. Lawyers as well as students

should find this part of the work useful and interesting. Too much cannot be said on professional ethics. Such works as this, together with more stringent requirements for admission to the bar in several states should help raise the moral standards of the American lawyer.

M, S. W.

American Railroad Rates. By Walter C. Noyes. Little, Brown & Co., Boston. 1905. Cloth, pages 277.

This volume contains a clear, clean cut exposition of the present railroad problem,—federal regulation of rates. In the early chapters the author, treating the basal principles of rate making, classification, tariffs, discriminations, competition and combination, and movements of rates, sets forth the evils resulting from regulation of rates by railroad officials. The last two chapters consider the expediency of governmental regulation of rates and the inadequacy of existing federal legislation.

The Interstate Commerce Commission Act in its provision for the regulation of rates is merely declaratory of the common law rule that all rates shall be reasonable. Congress has not given the commission power to complete the remedy by prescribing a reasonable rate to supersede one found to be unreasonable. *Maximum Rate Case*, 167 U. S. 512. Thus the power of the commission ceases at the vital point. The present problem, therefore, is to provide a constitutional and effectual plan for declaring authoritatively that a rate is unreasonable and also what rate should be substituted therefor. In effect, the remedies generally proposed provide that the existing law should be amended to give the present commission this latter additional power, e. g., the Esch-Townsend Bill, which has passed the House of Representatives and awaits the action of the Senate.

The author strongly opposes these proposed remedies as unconstitutional in that they confer judicial and legislative powers upon the same body. He places much reliance on the following extract from the Maximum Rate Case, *supra:* "It is one thing to enquire whether the rates which have been collected are reasonable—that is a judicial act—but an entirely different thing to prescribe rates which shall be charged in the future, that is a legislative act." In passing it is well to note that this question is still *res integra*, since the above statement is clearly *dictum*, the question before the court in that case being merely whether Congress had as a matter of fact given the existing commission power to prescribe future rates, not whether such a grant by Congress would be unconstitutional. The court said: "Our conclusion, then, is that Congress has not conferred upon the commission the legislative power of prescribing rates." (p. 512).

To avoid this constitutional objection the author proposes the following plan:

"First: A special court should be created in accordance with the constitutional provision concerning the federal judiciary. Complaints made by persons aggrieved or in their behalf by a

public official or board, that specific railroad rates upon interstate traffic are unreasonable and unjust should be presented to this court. After speedy notice to the carrier the court should summarily inquire into the reasonableness of the rates complained of. If found reasonable, the complaint should be dismissed; if found unreasonable, the court should enjoin its further collection. This would end the function of the court.

Second: In case a rate was found unreasonable all the papers in the case, together with the evidence, should be certified to the Interstate Commerce Commission, which should be empowered, upon an inspection of the papers, then to make a maximum rate to take the place of that found unreasonable by the court. The rate prescribed should remain in force a prescribed time, but should be subject to modification by the commission." (p. 255).

This scheme is ingenious and its constitutionality is beyond question. Yet, however constitutional a scheme it may be it is of no avail if impracticable. The following reasons seem sufficient to show the difficulty of a practical application of the author's scheme and to establish the necessity of conferring upon one body authority to declare that a rate is unreasonable and also what rate should be substituted therefor.

I. The second body might not have sufficient evidence before it to enable it to determine the reasonable rate. By the author's plan this body is to consider only the evidence before the first tribunal. The only question before this body being the reasonableness of the rate complained of, evidence bearing on this point only would be admissible. In case the rate complained of is palpably unreasonable it would be unnecessary for the first tribunal, in determining that the charge is unreasonable, to go through the process of determining the exactly reasonable rate. Says the author, "The courts might enjoin the collection of one dollar as an unreasonable charge. There would be no necessity for determining whether eighty or ninety cents would be unreasable." (p 254). Evidence of the latter fact would not be essential to the former conclusion.

II. In case of a close question as to the unreasonableness of the charge it would undoubtedly be necessary for the first tribunal to adopt some standard of reasonableness for purposes of comparison. Of course a standard would have to be adopted by the second body in all cases. There is no certainty that both bodies would adopt the same standard.

Some conception of the difficulty of fixing a proper standard and of the broad field for honest differences of opinion may be had from the following language of the Supreme Court in the *Freight Association Case*, 166 U S. 331: "What is the proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford a shareholder a fair and reasonable profit? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and as the rate

itself differs in different localities, which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or, is still another standard to be created, and the reasonableness of the charges tried by the cost of a carriage of the article and a reasonable profit allowed on that? And in such case would contribution to a sinking fund to make repairs be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation."

In the opinion of the author "The only way is to base charges upon ability to pay. But in measuring ability and differences in ability there is no definite rule to go by. The method is so flexible and elastic that there is much room for honest differences of opinion as to the precise point where the rate should be fixed." (p. 236). In *Tift v. Southern Ry. Co.* 138 Fed. 753, the United States Circuit Court repudiates this rule of "charging what the tariff will bear."

Even if a proper standard were agreed upon there might arise a difference of opinion regarding its application. Thus a rate declared unreasonable by the first body might be found to be reasonable by the second body.

Nor do we think the author's objection to combining these powers in one tribunal well taken. That legislative, executive and judical functions should not be exercised by one body is a maxim of political science. It may be well to note that Montesquieu, if not the parent, the foster parent of this precept, in saying, "There can be no liberty if the power of judging be not separated from the executive and legislative powers," *Spirit of Laws*, Bk. XI C. 6, meant, as his own words indicate, especially when viewed in the light of the example before him, the English Constitution, considered by him "The Mirror of Political Liberty," that the same hands that possess the *whole* power of one department should not exercise the *whole* power of another department. Further on in this chapter he provides that the preferment of charges of impeachment and trial of the same should be in the hands of the legislature and that "the executive power should have a share in the legislature by the power of rejecting." It is unnecessary to call attention to the numerous exceptions to the maxim made by the federal and state constitutions. Besides these exceptions there are many others based on the solid ground of public convenience and practical necessity. The courts exercise legislative power in prescribing rules of procedure, evidence, etc.

Of necessity these great functions of government overlap each other and involve in their execution many incidental pow-

ers common to all, though in their intrinsic character more naturally within the scope of one department. Investigation of facts precedent to action is an essential attribute of both departments. The mere fact that the method of conducting the investigation adopted by the legislature is similar to that used by judicial tribunals does not constitute an unconstitutional encroachment upon the prerogative of the judiciary. The ultimate *purpose* for which, not the method by which, the investigation is conducted determines the character of the function exercised. The court investigates the facts to enable it to exercise its exclusive functions of applying existing rules of law and affording a remedy to the injured party or inflicting a punishment. The legislature investigates the past and present conditions to enable it to exercise its exclusive prerogative of determining the expediency of a change in the law and what particular change should be instituted. The power to determine the reasonableness of an existing rate is an incidental power necessarily common to both the legislative and judicial departments as such is merely investigation precedent to action. *W. U. Tel. Co. v. Myatt*, 97 Fed. 335, 345. As an illustration of this we may take the author's provision that, "the rate prescribed should be subject to modification." (p. 256). By whom is the fact to be determined that a modification of the rate prescribed by the commission has become necessary by reason of a change of circumstances? The author says "by the commission." This is so for the courts could not interfere unless the rate prescribed by the commission were confiscatory. When the rate "has been properly fixed, the legislature and not the courts must be appealed to for the change." *Peik v. Chicago Rd. Co.*, 94 U. S. 178. Would not the author's objection to combining the functions of the two departments apply here? It would be necessary for the commission to determine whether the rates which had been collected were unreasonable and to prescribe "rates which should be charged in the future."

C. H. H.