BOOK REVIEWS.

THE SUPREME COURT OF THE UNITED STATES: ITS HISTORY AND CENTENNIAL. By HAMPTON L. CARSON. Philadelphia; A. R. Keller Company. 1892.

Truly our Constitutional law has a dignity about it which pervades the thoughts and guides the pens of all who write concerning its vital principles. This is partly because of the "awful dignity" of the great Chief Justice who first expounded them—a dignity which still impresses us as we read his opinions—and partly because of the inherent importance of the subject. All Americans, nay, the whole world, look with feelings akin to reverence on the Supreme Court of the United States—that tribunal which deals out justice between sovereign States and stands between the individual citizen and his government unarmed except with the moral force of that love of justice which is lodged in the hearts of this Anglo-Saxon people. The history of this tribunal must necessarily be of peculiar interest to us all. The highest compliment which we can pay Mr. CARSON is to say that the work before us is worthy of its subject. It is worthy in the lavishness with which the technique is carried out. Even if the reading matter were valueless, the handsome collection of steel portraits of all the chief justices and associate justices would be of intense interest to the lawyer and historian. But the matter of the work is also equal to the subject. Before passing to this, however, we would like to call attention to the author's style, which, being distinctly oratorical, is rare in our day, when the pen rather than the tongue is the chief medium by which we influence our fellows. The descriptions are at all times full—that is, there is a free use of adjectives. If we would offer a criticism in this respect it would be that there is a tendency for the words of some of the sentences to rise above the subject-matter. Nevertheless, this slight defect is much more than compensated by the models of English which the reader finds in the many striking paragraphs of the work. Two examples will suffice. Speaking of Chief Justice MARSHALL'S accession to the bench he says: "The glory and strength of the nation were to come, and the decisions of the great Chief Justice, in which he explained, defended and enforced the Constitution, were to shed upon the ascending pathway of the Republic the combined lustre of learning, intelligence and integrity;" and, in speaking of the death of the same great Judge, and of the darkness of the Republic's future at that time, we read: "The clouds which gathered around his dying head burned with the unquenchable glories of his matchless day." Such impressive sentences as these are retained long in the memory, and serve, as nothing else can, to fix the salient points of character and facts of history.

Turning from the make-up of the book and the author's style to the work itself, we find that Mr. CARSON has not in any sense attempted a history of Constitutional law, or a critical analysis of the development of its principles. He has simply been the historian of the court, but he has performed his task *completely*—and of how few books which come into

the reviewer's hands can this be said! Here we have a history of the court's formation, of the forces which made it what it is to-day, of the men who have composed it, of the questions which have come before it for determination, and of the great lawyers who have pleaded before it. The whole has been accomplished by one who evidently combines with the abilities of the historian the instinct of the lawyer. As a result, the reader gains a vivid picture of the justices and of the cases, and through them unconsciously is brought into touch with the life of the past more closely in many points than could have been the case had he perused the work of a mere historian.

It was indeed a "fortunate accident" which enabled the Judiciary Centennial Committee of the New York Bar Association to print the record of the Centennial celebration proceedings in conjunction with a complete history of the formation and work of the Court during its first hundred years.

Part I is devoted to the "Sources of the Jurisdiction of the Supreme Court of the United States," and is occupied in showing that the framers of the Constitution had before them historical models in old Colonial Vice-Admiralty Courts, in the State Admiralty Courts, in the Standing Committees of Appeal of the Continental Congress, and the Continental Court of Appeals in Cases of Capture; while the inability of the Standing Committee of Congress to enforce its decrees, so conspicuously shown in the case of the sloop "Active," impressed upon the framers of the Constitution the necessity of strengthening the arm of the Federal Court.

To us this part of Mr. CARSON'S work, together with Part II, on the "Establishment of the Supreme Court," is of especial interest, as it is here that the historical powers of the author have their widest field. Indeed, though others have given a fuller treatment of the debates in the Convention of 1787 over the powers of the Supreme Court, none have written a clearer or more interesting description of them.

It is in this portion of his work that Mr. CARSON has the merit of being the first to ascribe credit where credit is due for the first judicial statement of the right of a Court to declare an act of the legislature void when in conflict with the Constitution. This doctrine, whose exposition by MARSHALL has made the case of Marbury *v.* Madison immortal, it is pointed out was first expressed by the judges of the courts of Virginia, who declared that they had the right to set aside an act of the legislature if repugnant to the Constitution in the case of Comm. *v.* Caton, as early as 1782. Heretofore the palm of priority in the enunciation of this fundamental doctrine of constitutional law has been given by different historians to Rhode Island, North Carolina and New Jersey.

Another evidence of historical accuracy is to be found on page 129, where he points out a mistake of Mr. FLANDERS, who in his "Lives and Times of the Chief Justices," attributes a share of the honor of preparing the original draft of the Judiciary Act of 1789 to WILLLIAM SAMUEL JOHNSON. Such instances as these, while perhaps trivial in themselves, illustrate the care with which the work is done, and give the reader a well-merited confidence in the accuracy of the statements of historical fact with which he is not familiar.

The concluding, or third, part of the book deals with the history of the Court itself, the members who have composed it, the cases which came before them, and the way in which those cases have been decided. The hundred years are divided into seven epochs. The first covers the time before MARSHALL'S accession to the bench. The second and third epochs treat respectively of the first and second half of the judicial career of the great Chief Justice. The last-mentioned epoch, covering the years from 1816–1835, and opening with the case of Martin *v.* Hunter's Lessee, and including the great cases of Cohens *v.* Virgiria, McCulloch *v.* Maryland, Dartmouth College *v.* Woodward, Brown *v.* Marvland, and many other fountains of our constitutional law, is truly called the Golden Age of the Court. The judicial career of Mr. Justice TANEY covers the next two epochs; the sixth period carries us through the Civil War and the reconstruction period down to the case of Gilman *v.* Philadelphia; while the last, or seventh, epoch, which completes the first century of the court's existence, covers the Legal Tender cases, the decisions which have interpreted the Fourteenth Amendment, and the Original Package Cases. Mr. CARSON completes his work by giving us short sketches of the reporters and clerks of the Court.

Each epoch combines a historical sketch of the new judges appointed during its continuance, with a description of the cases which came before the Court. These historical and character sketches aim not so much at showing the justices as they were, as at bringing to light the good points of each. As a censor of moral or intellectual failings the author's pen deals lightly with his characters, but he is lavish in the praise of that which is good. This is as it should be. He is dealing with a body of men almost uniformly great, good, wise and able. Let the historian of the development of our Constitutional jurisprudence point out the errors in their opinions, but let the historian of the Court itself alone preserve that in their characters and gifts which is worth preserving. Except concerning the intellectual characteristics of the present members of the Court, Mr. CARSON'S praise, while full, is discriminating. For instance, what could be more accurate than the following description of Chief Justice MARSHALL as a jurist: "With a mind mathematical and analytical, not richly stored with technical knowledge as compared with those of TANEY and STORY, but conscious of its own strength working out results with astonishing penetration, and resolving every argument into its general principles; moving among the intricacies of novel questions with calm but persevering circumspection; with a marvelous instinct as to what the law ought to be; . . . close and logical in the connection of his thoughts, clear as light itself in his demonstrations, he conquered by pure ratiocination the intellectual convictions and prejudices of his countrymen, and won by his unsullied character their absolute trust in the integrity of his tribunal." Such a discrimination in the choice of words could only be made by one who had often read and learned to love the opinions of America's—nay, of the world's—greatest jurist.

It is not only those with whose constitutional opinions he is in sympathy, whom the author can appreciate. An ardent lover of the national idea himself, as what student of the history of our constitutional

development is not, he can nevertheless appreciate such a man as Mr. Justice CAMPBELL, even though that judge resigned a seat upon the bench to help tear down that Constitution which he had taken an oath to support.

Mr. CARSON'S constitutional opinions, which breathe through his accounts of the cases decided by the Court, are always those of a consistent Federalist, of what we may call, for lack of a better name, the "old school." Never extreme, appreciating TANEY'S development of the powers of the States, as exemplified in the Charles River Bridge Case, as much as MARSHALL'S development of Federal power in McCulloch *v.* Maryland, he is more interested in the division of the powers of National and State governments than in the development of theories respecting the rights of individuals as such, which neither nation nor State can trample under foot—of what in apt words has been called "the liberty in the Constitution." Thus we find an almost unconscious confusion between local self-government and individual liberty. This leads him on page 461 to note, without disapproval, Mr. JOHN S. WISE'S absurd panegyric on the decision in the Slaughter-House Cases, that a State could trample on the rights of individuals by establishing a monopoly. The effusion to which we refer runs as follows: "I said that we owe more to the American lawyer than to the American soldier, and I repeat it; for not all the victories of Grant, or all the marches of Sherman, have by brute force done as much to bulwark this people with the inestimable blessings of constitutional liberty as that one decision of the Supreme Court in the Slaughter-House Cases, declaring what of their ancient liberties remained."

This confusion between local interest and self-government and individual liberty detracts but little from the review of constitutional cases. The development of individual liberty, as distinguished from State rights, will be the work of the second hundred years of the court's existence. And we must always keep in view the fact that Mr. CARSON is not writing a history of the development of constitutional law. That is a work of the future, and it will involve a departure from the strict chronological order which Mr. CARSON has adopted. But he has presented to us an interesting sketch of the history of the Court, and a clear statement of the principal points involved in every case of interest which has come before the tribunal. This is a great work for one man to undertake and to accomplish. The book should be possessed and read by all who care to understand the institutions of their country.

W. D. L.

SELECT CASES ON EVIDENCE AT THE COMMON LAW. With Notes. By JAMES BRADLEY THAYER, LL.D., Professor of Law at Harvard University. Cambridge: Charles W. Sever, 1892.

Professor THAYER, in the preface to this large volume of over twelve hundred pages, tells us that he has been driven to the preparation of such a work by the necessities of his classes at the Harvard Law School, where the recent growth of the number of students has been so great that

it is no longer possible to rely merely upon the library. "The book," he says, "is designed, primarily, for the use of these classes; but in preparing it I have kept in mind the fact that it might be used elsewhere. It furnishes a text-book for that careful preliminary study which should prepare all who are to take part in the regular conferences between an instructor and his pupils. My experience confirms that of others who have found, in dealing with our system of law, that the best preparation for these exercises is got from the study of well-selected cases."

The work is a mine of information on the Law of Evidence. It contains not only a very large number of cases, reported either in full or in part, but a series of elaborate head-notes to the various divisions of the work, in which the student will find an historical and critical exposition of the principles underlying the subject in question. Many of these head-notes are substantially reprints of articles contributed from time to time to the *Harvard Law Review*, and it is gratifying to observe that, among these, the author has given to the profession at large the greater part of his admirable paper on "Presumptions and the Law of Evidence."[1]

The work is divided into five chapters, each of which is elaborately subdivided. The five are: I "Preliminary Topics;" II, "Leading Principles and Rules of Exclusion;" III, "Real Evidence. Things Presented to the Senses of the Judge or Jury;" IV, "Writings," and V, "Witnesses."

"Admissions" are treated by Professor THAYER as one of the "Preliminary Topics," but he adds no comments of his own to the head-note of the section, which consists entirely of quotations on the subject from GREENLEAF. The latter author, it will be remembered, objects to the classification of admissions as exceptions to hearsay, and prefers to treat them "as a substitute for the ordinary and legal proof, either in virtue of the direct consent and waiver of the party, as in the case of explicit and solemn admissions, or on grounds of public policy and convenience, as in the case of those implied from assumed character, acquiescence or conduct." It is a matter of regret that Professor THAYER has not given the profession the benefit of an original discussion of admissions, for it may be doubted whether GREENLEAF has said the last word on the subject. It may be correct enough to say that admissions are "a substitute for the ordinary and legal proof;" but it seems to the writer that it should be pointed out that what is sought to be established by the party offering an admission in evidence is not so much the ultimate fact to which the admission relates as *the fact of the admission itself*—the fact, that is, that his adversary (or one identified in interest with him), has made a certain statement, or acted in a certain way. Whether the statement is true or not is, perhaps, quite immaterial, for the adversary cannot complain if, having made the statement, court and jury take him at his word; or if, having been silent when it was his duty to speak, the jury are permitted to draw inferences from his silence. It is, moreover, clear that in the case of many admissions the elements of an estoppel are wanting; for the statements are admissible against a party whether or

[1] 3 *Harv. Law Rev.*, 142 *et seq.* See Thayer on Evid., pp. 1–4 and 79–82.

not they have been acted upon by his adversary. And, again, no rule of admissibility can be said to be based on estoppel, for the question of bare admissibility is entirely distinct from the question of what weight is to be attached to the evidence, or whether or not it can be contradicted. It may be true, therefore, that the basis for receiving admissions in evidence is something quite independent of their probable truth, while the reason underlying the admission of all other exceptions to the hearsay rule is that in each case there is a sanction which is substantially equivalent to an oath and cross-examination. But why should this difference lead to the conclusion that admissions are not exceptions to hearsay, if that term is to have its customary signification of "statements made by a person not called as a witness?"

The other matters treated under Chapter I are "The Jury," "Judicial Notice," "Burden of Proof," "Presumptions," Law and Fact," Court and Jury," and "Demurrers upon Evidence." The note on p. 19, *et seq.*, discussing where abouts in the law the doctrine of judicial notice belongs, is of absorbing interest. There is much food for reflection in the following remark: "This function is, indeed, a delicate one; if it is too loosely or ignorantly exercised it may annul the principles of evidence, and even of substantive law. But the failure to exercise it tends daily to smother our trials with technicality, and monstrously lengthens them out." The attention of our readers is also called to the note on p. 44, *et seq.*, in which there is a masterly discussion of the double meaning of the term "Burden of Proof."

It would be a pleasant task to take up in order each of the topics treated by Professor THAYER, and set down in this review the impressions which are the result of an exhaustive examination of this work. But lack of space makes this impossible. We cannot forbear, however, from printing in full a short note on p. 554, which calls attention to a fruitful source of error and confusion:

"In England, declarations made by a deceased person in the usual course of duty or business hold the place of a clear exception to the rule against hearsay. The fact has not always been observed in this country. Greenleaf's treatment of them in a wholly different manner (1 Ev., § 123), as not related to hearsay, has perplexed the subject. It has taken long, moreover, to work clear of a tendency to confuse this topic with that of a party's use of his own entries in his account books, and with that of using entries as a mere auxiliary to testimony—to refresh recollection. It should be noticed that the English irregularity which allows evidence of oral declarations in this class of cases does not obtain in this country."

The cases have been selected with anxious care. By one who is particularly interested in the law of evidence the volume will be found to contain many old friends. The cases on "Declarations as to Pedigree" are especially interesting. Professor THAYER summarizes in a note the case of Blackburn *v.* Crawford,[1] but expresses no opinion as to the correctness of the decision. To the writer it has always seemed as if that case were wrongly decided, and as if Mr. Justice SWAYNE could almost be accused of so far misunderstanding the rule as to suppose that the

[1] 3 Wall., 175.

witness must be proved to be related to the declarant. In connection with this topic Professor THAYER might, perhaps, have cited with advantage the case of Sitler *v.* Gehr, in 105 Pennsylvania.

On the whole, nothing but praise can be accorded to this volume, and we welcome it as one of the most important contributions to legal literature which has appeared in many a day.

G. W. P.

BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND. Edited by WILLIAM HARDCASTLE BROWNE, A.M., of the Philadelphia Bar. New York: L. K. Strouse & Co., 1892.

In this single volume of about eight hundred clearly printed pages Mr. BROWNE offers to the public "all of BLACKSTONE'S great work which has any bearing whatever upon the present law, whether it be the law itself, as now operative, or the grand principles which underlie it; and also all matter of historic interest contained in the commentaries which may prove valuable or entertaining reading." The editor appends a glossary of legal terms employed, brief biographical notes of writers referred to, and a chart of descent of English sovereigns. All the notes of former editors are omitted, and none are substituted for them, with the exception of a very few brief foot-notes designed to qualify or explain condensed statements in the text. This is in response to a demand said to be made by leading educators for an edition of BLACKSTONE "exclusive of editor's notes."

The editor has not hesitated to condense the statements of his author, and he has divided the entire work into paragraphs, each of which begins with a side heading in heavy type so worded as to indicate the subject-matter of the paragraph.

Criticism of this work must be confined to the expression of a doubt whether such a book should ever have been written at all. If it once be admitted that BLACKSTONE can be abridged and "modernized" to advantage, it will be conceded that Mr. BROWNE has done his work reasonably well. It is true that the paragraph headings offend the eye, and that the use of the same type in them throughout the book destroys all sense of perspective by treating to that extent all statements as equally important, whether they be statements of some trivial illustration or of some weighty principle of law. It is also true that the process of condensation has resulted in marring the beauty of the author's style, and has thus deprived the work of a peculiar charm. But, on the whole, the omissions have been judiciously made, and the condensed statements are clear and reasonably complete.

As to the question whether or not such a work as BLACKSTONE'S is susceptible of abridgment we express an opinion with diffidence. Mr. BROWNE, in his preface, says that the general plan of the work has been approved by several eminent professors of the law. Such approval must carry great weight as coming from men who are in a position to gauge the needs of students. But it must not be forgotten that the commentaries of BLACKSTONE in themselves constitute only a bird's-eye view, as it were, of the field of law. Moreover, the mode of treatment

was itself characteristic of the age in which BLACKSTONE wrote. No jurist would think of writing a commentary upon the same lines to day. So that it is a serious question whether in abridging and modernizing BLACKSTONE we are not abridging an abridgment, and whether we are not taking from its frame a picture which, when the dust of ages is removed, is found to have in it many a defect and many a flaw.

G. W. P.

PRINCIPLES OF THE LAW OF WILLS, WITH SELECTED CASES. By STEWART CHAPLIN, Professor of Law in the Metropolis Law School, New York, and author of "Chaplin on Suspension of the Power of Alienation." New York: Baker, Voorhis & Co., 1892.

"This book," says the author in the opening lines of his preface, "is composed in part of text, devoted to stating and explaining the principles and the important features of the law of wills; and in part of selected cases, in which the facts illustrate, and the opinions expound and apply, that law."

The book differs from such works as "Richards on Insurance" in that the statement of principles is not confined to one portion of the book and the reported cases to another, but the cases are scattered through the text, somewhat in the manner in which the illustrations appear in Mr. Justice STEPHENS' "Digest of the Law of Evidence," except that in the book before us the illustrations are not merely condensations or syllabi of cases, but in a large number of instances are fully reported decisions with statement of facts, names of counsel and opinion of Court.

A careful examination of the work has convinced us of its value. The introduction gives in a few words the legal history of will-making, and proceeds to outline the author's plan of treatment. Starting with the general proposition that everyone has the right to make a will, Professor CHAPLIN considers the law under six main heads: (1) Testamentary Incapacity (or the question whether the testator fell short of the general statutory measure of persons competent to have and express their own will); (2) Undue Influence or Restraint (or the question whether the testator may have been driven to expressing the will of some one other than himself); (3) Execution, Revocation; (4) The Instrument itself, its make-up, nature, etc.; (5) Construction; (6) Probate.

Each of these topics is treated with remarkable conciseness and clearness. The illustrative cases are introduced with discrimination, and there can be no doubt that the student who studies this work from cover to cover will rise from his task with the principles of this branch of law firmly fixed in his mind, and that he will have at his command a valuable stock of precedents illustrating the application of those principles to the facts of actual cases.

Chapter VI contains a mine of information on construction, presumption, etc.; and the rules formulated by the author for arriving at the intent of the testator have the merit of clearness and precision.

It is scarcely necessary to remark that the reported cases are of value