SOUTHERN LAW REVIEW

(NEW SERIES)

Volume 1

1875-1876

Notes.

RUFUS CHOATE'S ADVICE TO A YOUNG LAWYER.—Twenty years ago Rufus Choate wrote to Col. J. D. Waddell of Georgia, an autograph letter of which the following is a copy:

BOSTON, January 26, 1855.

J. D. WADDELL, CEDARTOWN, GA.:

DEAR SIR:—I hope you will do me the justice to believe that I have intended long since to acknowledge your letter, but that a succession of cares, some ill-health, and some absences, have hindered me, until any reply will seem, I am afraid, ungraceful and unwelcome. If even now, however, I can convey a single useful suggestion, I shall the less regret the delay.

I take it for granted that in regard of strictly professional studies you do not mean to solicit any hint. In our profession we are nothing if we are not first and thoroughly lawyers—and to become such there is but one way. Such a course as Hoffman's—with some changes of *particular books*—extended and distributed over ten years of labor at the rate of at least three hours a day, over and above all that you read for your current business—will set you very high in this indispensable attainment—the knowledge of our science.

But I suppose you were thinking rather of subsidiary pursuits and accomplishments. I would unite, then, with the thorough mastery of the American law proper, which you are to practice, as much of the civil law as possible. This it was which gave Legare so much fullness and so much elegance of matter. The civilians are subtle, copious and exact. You of course know where all that learning is to be found—but I would look, too, into the *casuists*—for analysis; for ethical distinctions; for the direction of the head and heart. *Suarez de Legibus et de Legislatione* is a good book and represents a class. He is a Jesuit, you know.

But the great problem is, after all, how to give to your legal attainments their utmost power of impression on others; on the bench, the bar, the community, *the time*. And this conducts you at once into the circle of elegant, various, yet kindred acquisition and accomplishment. In my judgment the very first book to read and thoroughly digest is Quintilian. See there, how *the most splendid of legal rhetoricians*, the lights of the Roman bar—were trained in their marvelous perfection in the practice of forensic debate. I would translate him—a page or two a day—understand him perfectly—and apply all his weighty and mature counsels—apply by adapting them to the altered circumstances of our time. He who masters him knows how to become the most finished of the pro-

fession of the law. And Aristotle and Cicero—day and night. Add of the moderns, Bacon, Burke, and then all the English fine writers of prose and verse.

You get your idea of the fine legal orator, then, from Quintilian and Cicero and Aristotle. But to realize it in yourself, the indispensable studies are ethics, in which I include the Publicists, Grotius, Puffendorf, etc.—as well as the various moral treatises, and history. All knowledge will help, but these are nearest. History you must know, to understand the sources and the causes and spirit of laws; ethics to enrich and guide your reasonings on facts and your judgment of actions and of character. McIntosh, Smith, Jeremy Taylor—in cases of conscience—Cicero, Whewell, Rush—in this kind.

Nothing will set your fortunes earlier, and if your legal and general studies are faithful, nothing will mark you more conspicuously and brilliantly than a rich, select, and copious English style. This, with his emotional natural and eloquent feeling, placed Erskine at the head of the bar of England in an hour and forever. This, more than anything else, always excepting his prodigious learning and power of logic, made the spell of Pinckney's orations. *The tendencies* of the bar, are to a cheap, extemporaneous impoverished *gabble.* To counteract this, *resolve* to be master of our mother tongue. This will cost you a lifetime, and it is worth it. *Write every day;* if too exhausted for original composition, *translate*—say from Demosthenes, Cicero, Tacitus, Seneca, Pascal—selecting the choicest, most lively, and most energetic expression. Burke, Dryden, Johnson, Shakspeare, Jeremy Taylor, Spencer—have all the words. Never, under any circumstances, sleep without having read *for the language* one page in a great author. It will lift up your spirit, dilate your conceptions, insensibly warm and color your vocabulary. *Fluency* is not the thing. Rich and weighty speech is *power.*

But I have run through my letter, and wishing you the loftiest success, I am your servant and friend,

—*Atlanta Herald.* RUFUS CHOATE.

LORD ST. LEONARDS.—On the 29th day of January last, Edward Burtenshaw Sugden, Lord St. Leonards, died at his estate in Sussex, at the advanced age of ninety-four. As he was a great lawyer—perhaps the greatest equity lawyer of his generation—and is familiarly known through his writings on this side of the Atlantic, it may not be inappropriate to subjoin a brief sketch of his life, which we find in the Canada Law Journal:

On the 29th of January last died Edward Sugden, Lord St. Leonards, a name which ranks with Coke and Blackstone, as that of a writer upon the laws of England of no ephemeral fame. He had reached the great age of 94 years, and it has been said of him, what can be said of

no other lawyer living or dead, that he has been appealed to as a living oracle of the law for 70 years. In the roll of the Chief Justices and Chancellors of England will be found in about equal numbers, men of the highest and lowliest birth. Lord St. Leonards belonged to the latter class, and like Abbott, Lord Tenterden, was the son of a barber. He is said to have been born in his father's shop in London, on the 12th of February, 1781. It is related of Lord Chief Justice Tenterden, that on his last visit to Canterbury, his native place, he pointed out to his son a little booth or stall opposite the western front of the cathedral, saying "Charles, you see this little shop! I have brought you here on purpose to show it you. In that shop your grandfather used to shave for a penny. That is the proudest reflection of my life! While you live never forget that, my dear Charles." A story is told of Lord St. Leonards which exhibits him in an equally pleasing light. He was addressing a crowd of electors once from the hustings, when one of his hearers taunted him with his origin. "It is true, I am a barber's son," he retorted, "and I am proud to own it. If you had been a barber's son, you would have been a barber yourself."

The history of young Sugden's early life is not well authenticated, but it is clear that he was set to earn his bread in no very dignified capacity. He was employed as an errand boy in the office of Mr. Groom, a conveyancer in Cavendish Square, London. The story goes that Mr. Groom was in the habit of consulting Mr. Butler, the learned editor of "Fearne's Contingent Remainders" and "Coke upon Littleton." Butler happened one day to be in Mr. Groom's office, when he was bantered by Mr. Groom about a supposed error in one of his books, which the conveyancer said had been discovered by his office boy. Butler insisted on having the office boy into the room, and Sugden made his appearance. The error into which the great author had fallen is said to have been so clearly pointed out by the office boy that the author gave way, admitted he was wrong, and became his critic's firm friend. Butler went to Sugden's father and represented that the boy was meant for greater things than running errands and cleaning ink-bottles, and Sugden was eventually entered a student of Lincoln's Inn.

Owing to the curious and antiquated custom of unseating the Lord Chancellor with his defeated government, Lord St. Leonard's fame rests chiefly upon authorship, and not upon judicial decisions. He was hardly twenty-one years old when he made his first adventure in legal literature with a little work entitled, "A brief Conversation with a Gentleman of Landed Property about to buy or sell land." This unpretending work at once gave him a reputation, and met with so much encouragement that three years later, in 1805, he published his celebrated Treatise on the Laws of Vendors and Purchasers, which has gone through fourteen editions, and will always be the standard text book on the subject.

In 1807, Mr. Sugden was called to the bar, having been previously a conveyancer simply. He immediately stepped into an extensive practice, which increased rapidly. At one time his professional income is said to have reached, and perhaps exceeded £20,000 a year. His fame as a real property lawyer caused him to be retained in most important cases where questions of that description arose, and in the common law as well as in the equity courts. About 1822 he received his silk gown from Lord Eldon, who had the highest respect for his learning, and is said to have once consulted him privately on an abstruse question relating to "springing uses," and to have been guided by his view.

"His silk gown," says a writer in Blackwood's Magazine, to whom we are indebted for many of the facts in this notice—

"Was a splendid success, silencing all sneers and the whispers of disparagement in every quarter. His consummate knowledge of the principles and details alike of real property law and of conveyancing, and of equity, his rapidity of perception, his imperturbable coolness and self-possession, his conscientious devotion to the interests of his clients, the pith and brevity of his arguments, his lucid exposition of the most involved facts—these points all combined to invest his advocacy with such charms in the eyes of anxious solicitors and their clients, that retainers were soon showered down upon Mr. Sugden from every quarter, and it was almost a race between rival solicitors who should first retain him."

But the pressure of counsel business did not detract from Sugden's literary efforts. Before he had passed his 27th year, he had given to the public two new and enlarged editions of the "Vendors and Purchasers," and had written an entirely new work, the celebrated "Treatise on Powers," which is regarded "as one of the most remarkable performances on record in the literature of the law." This was followed in close succession by other works on legal subjects, some of an extensive and others of a minor character.

Mr. Sugden was, in politics, a Tory, and in 1828 was elected in the interest of that party, for the constituency of Weymouth and Melcombe Regis, and was soon after made Solicitor-General in the Duke of Wellington's administration. This, however, he did not long enjoy, for he was compelled to retire with his colleagues in 1830, when Earl Gray and the Reformers came into power. Sir Edward Sugden then resumed his practice at the bar, and had the pleasure of pleading before Brougham, the new chancellor, with whom, according to general belief, he was on anything but amiable terms. The caustic comment of Sugden upon the chancellor's capacity for his office, is well-known. "If the chancellor knew only a little of law, he would know a little of everything." A good deal has been said about the relations between Lord Brougham and Sugden. Lord Campbell, in those "Lives," which added a new terror to death, dwelt upon the matter with such spitefulness as to

call forth from Sugden the *brochure* known as "Lord St. Leonard's Defence." In a much canvassed book lately published, which probably embraces as much malice and scandal as any book of its size yet written, the "Greville Memoirs," the hostility between Brougham and Sugden is accounted for by reasons hitherto, we believe, unknown. We will let the accomplished gossiper tell his own story.

"Lamarchant told me that the cause of Sugden's inveterate animosity against Brougham, was this: that in a debate in the House of Commons, Sugden in his speech took occasion to refer to Mr. Fox, and said that he had no great respect for his authority, on which Brougham merely said, loud enough to be heard all over the house, and in that peculiar tone that strikes like a dagger, "Poor Fox." The word, the tone, were electrical; everybody burst into roars of laughter; Sugden was so overwhelmed that he said afterwards that it was with difficulty he could go on, and he vowed that he never could forgive this sarcasm."

At this time, Sir Edward Sugden, with professional and parliamentary duties combined, seems to have been in the habit of accomplishing an amount of work which was simply tremendous. On one occasion, the evening before a "motion day," he read and mastered the contents of 30 briefs between his dinner and 11 P. M., and then, instead of going to bed, called a hackney coach and drove to the House of Commons.

In 1834, on the return of the Tories to power, Sugden was made Lord Chancellor of Ireland, an office which he held for three months, just long enough to make his rare powers as a judge manifest, and to cause his return for another too brief period, in 1841, to be hailed with acclamation. In 1852 he was appointed by Lord Derby, Lord Chancellor of England, with the customary peerage.

"He speedily showed both the bar and the public that he justified the appointment, and something more than justified it. In the first appeal case which came before him in the House of Lords—that of Rhodes v. De Beauvoir—a most intricate case, depending on the construction of a singular and most obscurely worded will, when the counsel expected that he would ask for the papers and take time to consider, he delivered, off-hand and without notes, a most elaborate and luminous judgment, which occupies nearly 20 pages in the printed reports. And this he did repeatedly as by intuition, so familiar had he grown with every possible complication that had arisen, or could arise, in all questions as to the ownership or transfer of real property."

Since the close of 1852, he never again held the Great Seal of England, although the opportunity was again offered him in his 77th year. That offer was declined, but not through love of ease, for from that time till the very end of his long and laborious life, Lord St. Leonards kept himself busily employed in work of different descriptions. He read and noted every reported case in all the courts and recorded them in the margin of his works, so that, it is said, his executors could send a new

edition to the press to-morrow without revision. He wrote his "Handy Book of the Law of Real Property" since his retirement from office. His attendance in the House of Lords as a Law Lord was unremitting. He allowed no legal measure to pass the house uncriticised. For instance, when Lord Hatherley, in 1869, introduced his Judicature Bills, Lord St. Leonards, though close upon 90 years of age, put forth a clear and lucid criticism upon those measures.

TESTIMONY OF ATHEISTS.—The question of the competency of an atheist to give evidence was raised by the sitting magistrate last Monday at the Westminster Police Court. The question is doubtless one which has given rise to many opinions, judicial and otherwise, but which we considered had at length been determinately settled. The theory of the law as shown in the celebrated case of Omychund v. Barker (1 Atk. 21), and other subsequent decisions, has been based on the assumption that a witness is required to take a certain form of oath, importing a belief in the existence of a God, or Supreme Being, but that if a person have no such belief, an oath could not be administered unto him. In consequence of the religious belief of the Society of Friends and of the Moravians, statutes have been passed to abolish the necessity of an oath, and to substitute a formal affirmation or declaration for such people, who, from conscientious motives, are unwilling to take an oath. The Common Law Procedure Act 1854, s. 20, next applied the same alternative in civil cases to any person whomsoever who might object to an oath from matters of conscience, and the 24 & 25 Vict., c. 66, extended the same boon to criminal cases also. But it will be observed that these enactments alone apply to persons who, from a religious feeling, refuse to comply with a religious form, and not to those who are destitute of all religious belief. The first legislative step in favor of the admission of such latter persons to give evidence, was the 6 & 7 Vict., c. 22, which permits members of the tribes of barbarous and uncivilized people in British colonies and plantations, persons described by the act as "destitute of the knowledge of God and of any religious belief," to give evidence without being sworn. This enactment, we regret to say, was found necessary to be extended to our own country by the provisions of the 32 & 33 Vict., c. 68, which in sect. 4 enacts that if any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, "shall object to take an oath, or shall be objected to as incompetent to take an oath," such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration, viz.: "I solemnly promise and declare that the evidence given by me to the court, shall be the truth, the whole truth, and nothing but the truth." Such declaration has the same effect as an oath in subjecting the person, who

may make the declaration, to all the penalties attached to perjury, in case he should afterwards make any material statement untruly, or give any false evidence. Although to the Christian mind a natural antipathy may present itself as to what belief and credit should be accorded to atheists, it is certain that it is in the interests of justice, and for the benefit of the community, that such persons should be able to give evidence. It is no improbability to suppose the escape of a murderer from justice because the only person who can supply a necessary, but missing link, chances to be an atheist; and, although in the United States, where such evidence has long been receivable, the testimony of an atheist is, as a rule, subject to comments of discredit because he is an atheist, yet it is quite possible for an atheist to speak the truth, and, moreover, to be a person on whom implicit reliance may be placed, for, as Lord Bacon remarks, "atheism leaves man to sense, to philosophy, to natural piety, to laws, to reputation, all which may be guides to an outward and moral virtue, though religion were not." Essay on Superstition. And Bentham observes, on the same subject, that "the rebel to religion may still bear allegiance to the laws of honor, to those laws to which every thinking man, in proportion as he deserves that title, will ever pay obedience." Having regard to 32 & 33 Vict., c. 68, we have no hesitation in expressing our opinion that the magistrate, although actuated, we are sure, by the very best intentions, improperly excluded the evidence of the atheist in the case before him.—*The Law Times.*

A CURIOSITY.—The following remarkable judgment was delivered by the Supreme Court of Kansas, during the cholera season of 1866, in the case of Searle v. Adams, 3 Kansas, 515. It had been stated that this opinion was printed and distributed among the members of the Republican convention which met to nominate a successor to Chief Justice Crozier, and that it prevented his renomination. We do not vouch for this statement, however. At all events the learned judge seems, like the statute of limitations, to have been "irrepressible;" for he was appointed by Governor Osborne, United States senator, in place of Caldwell, and is still understood to be in the way of several aspirants for political preferment:

By the court, CROZIER, C. J.

In this case the irrepressible statute of limitations is again presented for consideration. For some years past, upon the disposition of each succeeding case involving a construction of this statute, it was considered by bench and bar that fiction itself could scarcely conceive of a new question to arise thereunder, but as term after term rolls around, there are presented new questions comparing favorably, in point of numbers, with Falstaff's men in Buckram, thus adding to the legions that have gone before, a new demonstration of the propriety and verity of the adage that "truth is stranger than fiction." With the heat of 98

degrees of fahrenheit, in the shade, and the newspapers teeming with reports of the ravages of our great common enemy, who, the more effectually to accomplish his double purpose of capturing the imprudent and frightening the timid, has assumed the form of the Asiatic monster, it might be supposed by the unthinking that the consideration of such questions would be entered upon rather reluctantly. But we beg to disabuse the public mind of any such heresy. Cases might be imagined where "smashes" would not stimulate, nor "cobblers" quicken, nor "julips" invigorate; but a new question under our statute of limitations, in coolness and restoring power, so far exceeds any and all of these, that when one is presented, the "fine, auld Irish gintleman's" resurrection, under the circumstances detailed in the song, becomes as palpable a realty as the "Topeka constitution or the territorial capital at Mineola." The powers of a galvanic battery upon the vital energies are wholly incomparable to it. So that the consideration of this case, upon this day of wilted collars and oily butter, should not entitle the court to many eulogies for extraordinary energy in the fulfillment of its duties.

In the case at bar, this court is asked to say, that upon the facts found by the judge of the district court, no judgment should have been rendered against Searle; and in making this request, counsel was understood to intimate that some mischievously disposed persons, with a diabolical intent, not clearly revealed, while organized as the legislature of the state, had made a violent and unwarrantable onslaught upon the constitution,—that constitution which this court, as a tri-pedal pier, is exerting its utmost endeavors to support,—that constitution which, not only from patriotic and moral, but from alimentary considerations as well, we are bound to maintain and defend. Judging from the argument of counsel, considered with reference to its length, earnestness and number of authorities cited, we did not know but that while we were sitting attentively listening to what was said in exposition of the attempt aforesaid, even then the constitutional fabric was toppling to its fall, and needed but an affirmance of the judgment of the court below to bring it down about our ears with a crash which should cause constitutional governments all over the world to quake upon their foundations, and inflict upon the body of constitutional liberty, contusions which must inevitably result in her speedy mortality.

Being in a somewhat "melting mood" to-day, we would be pleased to gratify counsel by adopting his fears, growing out of the supposed nefarious attempt of the legislature in the passage of the 19th section of the act, concerning the lost records of Douglas county, but supposing he will be somewhat gratified at a decision in his favor upon any ground, we proceed now to render such decision, asking to be excused from resolving ourselves into a state of excitement on account of the supposititious attack aforesaid, especially as we are not convinced that any such attack was contemplated or accomplished. The right of action accrued against

Searle on the 8th of July, 1858, and was barred July 8th, 1861, because no summons dated prior to that time was served upon him; the twenty-seventh section of the code, providing that an action shall be deemed commenced within the article on limitations, at the date of the summons which shall be served on each defendant. The summons issued March 23d, 1861, was not served upon Searle, and if an alias had been issued after July 8th, 1861, and before the destruction of the records in 1863, and served upon him, he might have successfully availed himself of the limitation provided. * * *

It is as transparent as the soup of which Oliver Twist implored an additional supply, that the case at bar is not one of those as to which the general limitation was sought to be suspended by the section quoted; wherefore the district court erred in rendering the judgment against Searle.

THE VACANT LOUISIANA JUDGESHIP.—Judge Durell resigned the office of United States District Judge for the District of Louisiana, and his resignation was accepted, in December last, while Congress was in session. The President thereupon nominated D. A. Pardee, Esq., to the vacancy. This nomination was laid over by the senate until its extra session which was held after the adjournment of the forty-third Congress. The senate neither confirmed nor rejected the nomination, but laid it on the table, and then adjourned. Louisiana is thus left without a federal district judge, and one of the most important commercial cities of the Union is left without a court of admiralty and bankruptcy. Much important public and private business is pending in that court, and a large amount of funds is held by assignees in bankruptcy which can not be distributed without an order of the court. Great injury to public and private interests is thus threatened by the failure to fill the vacancy; and a question of pressing urgency is, can any remedy be devised before the meeting of the next Congress? The constitution of the United States (art. 2, § 2), provides: "The President shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session." But this vacancy did not happen during a recess of the senate. It happened while the senate was in session; and that body with an apparent disregard of the public interests, failed to act upon the nomination of an incumbent to fill the vacancy which was sent to them. Under these circumstances the attorney-general is said to have advised the President that he had no power to make an *ad interim* appointment. It will be remembered that the question of the power of the President to make appointments in such cases, was brought before the country in a very forcible manner in 1866, by the appointment by President Johnson of Adjutant-General Thomas, as secretary of war *ad interim*, in the place of Secretary Stanton. This proceeding resulted in the passage of "The Tenure of Office

Act," 14 Stat. 439; Rev. Stat. U. S., p. 315, § 1769, by which it is provided as follows:

"The President is authorized to fill all vacancies which may happen during a recess of the senate, by reason of death or resignation or expiration of term of office, by granting commissions which shall expire at the end of their next session thereafter. And if no appointment, by and with the advice and consent of the senate, is made to an office so vacant, or temporarily filled during such next session of the senate, the office shall remain in obeyance, without any salary, fees, or emoluments attached thereto, until it is filled by appointment thereto, by and with the advice and consent of the senate; and during such time all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office."

There appears to be nothing in this provision which negatives the power of the President to fill the vacancies *existing* during a recess of the senate, if he possessed it before. Did the President, then, before the passage of this act, possess, under the constitution, the power to fill a vacancy in a case like the present? In Swartwout's case, it was ruled by the ablest of the attorneys-general, that he has. 1 Op. Attys. Gen. 631. In that case the commission of Swartwout as navy agent at New York expired during a session of the senate. The President nominated another person to fill the vacancy, but the nomination was not confirmed by the senate. This, then, was the case of a vacancy which arose during a session of the senate, but which, from the circumstance mentioned continued to exist during the recess. Mr. Attorney-General Wirt held that the President had power, under the constitution, to fill the vacancy by a commission to expire at the end of the next session of the senate. He reasoned that the words of the constitution "may happen during the recess," are equivalent in meaning to "may happen to exist during the recess;" and he adopted this as a construction not doing violence to the language of the constitution, and as the only one which would permit the spirit of the instrument to be carried out. He took the broad and apparently just view that "the President *alone* can not make a *permanent appointment* to those offices; that, to render the appointment permanent, it must receive the consent of the senate; but that, whensoever a vacancy shall exist which the public interests require immediately to be filled, and in filling which the advice and consent of the senate can not be immediately asked, because of their recess, the President shall have the power of filling it by appointment, to continue only until the senate shall have passed upon it; or, in the language of the constitution, 'until the next session.'"

The same doctrine was intimated by Mr. Attorney-General Taney, in Gwinn's case (2 Op. Attys. Gen. 525). Gwinn had been appointed by President Jackson, to the office of register of land titles in Mississippi,

during a recess of the senate, and the nomination having been afterwards made to the senate, was rejected by them. Afterwards, the President, receiving strong testimonials in his favor, re-nominated him. This nomination the senate laid on the table, as in the present case, and also laid on the table a resolution to inform the President, that the senate designed to take no further proceeding in the matter; and adjourned leaving the office unfilled. Mr. Taney, concurring in the opinion of Mr. Wirt, above cited, held that the President had power to fill the vacancy.

The same view was taken by Mr. Attorney-General Mason, in an opinion to the President in 1846, and it asserted that even though the vacancy occurred before the session of the senate, if that body, during its session, neglected to confirm a nomination to fill it; the President may fill it by temporary appointment. 4 Op. Attys. Gen. 523.

In an opinion of Mr. Attorney-General Legare to the secretary of war in 1841, this doctrine was pushed still further, and it was held that where a vacancy happened during a recess of the senate, and a session afterwards intervened without the vacancy being filled, the President had power, during the next recess of the senate, to fill the office by temporary commission. 3 Op. Attys. Gen. § 673. But the exercise of the power in these last two cases is now prohibited by section 3 of the Tenure of Office Act, *supra*.

It was, however, held by Mr. Legare in a previous case, that where vacancies are known to exist during a recess of the senate, *and nominations are not then made*, the President can not fill them during the subsequent recess. In other words, the President can not, by failing to make nominations while the senate is in session, acquire the power to fill the vacancies without the advice and consent of that body. 4 Opin. Attys. Gen. 361. But in the case of the collectorship of Alaska (12 Op. Attys. Gen. 455), Mr. Attorney-General Evarts overruled this doctrine, and advised the secretary of the treasury that where an office is created during a recess of the senate, and no nominations are made thereto, the office may be filled by executive appointment during the recess. This ruling was made in view of the third section of the Tenure of Office Act. It may be added that in each of the earlier cases above cited, the advice of the attorney-general appears to have been acted on by the President.

The power of the President to fill this vacancy being clear, according to the uniform holdings of the attorneys-general, and the uniform practice of the Presidents before the passage of the Tenure of Office Act, it remains to enquire, has this power been changed by that act? The answer is, first, it has not been changed; secondly, if it had been attempted to be changed by the act, the act would in so far be unconstitutional and void; since it must necessarily be beyond the competency of Congress to curtail a power lodged in a co-ordinate branch of the government by the constitution. It will be seen that the first clause of section 3 of the

Tenure of Office Act, simply follows the language of the constitution. In the case of The Collectorship of New Orleans (12 Op. Attys. Gen. 449), Mr. Attorney-General Evarts held, that in thus adopting the language of the constitution, Congress employed the words in the same sense in which they had been accepted and acted upon by the executive branch of the government; and he held that the language embraces "all vacancies that from any casualty happened to exist at a time when the senate can not be consulted as to filling them;" and that the predicament of "abeyance" under the second clause of the section, in its application to an office made vacant during a recess of the senate, and not filled at the expiration of that session by a full appointment, by and with the advice and consent of that body, can only arise at the expiration of its *next* session, without that body's having concurred in a full appointment to the office.

There would seem to be no doubt, then, of the President's power to fill the vacancy by temporary appointment in this case.

But should the President entertain a different view, the remaining enquiry is, can the circuit judge solve the difficulty by appointing one of the district judges of some other district to hold the court pending the vacancy? This enquiry is suggested by the fact that Mr. Circuit Judge Woods is understood to hold that he has such power. We find nothing in the revised statutes conferring it. Those statutes (§§ 591–596), contain provisions for the designation of a judge of another district, to perform the duties of a district judge in case of his *disability*, or in case of *an accumulation of business;* but the only provisions applicable to the case of a *vacancy* appear to be sections 602 and 603, which read as follows:

"§ 602. When the office of judge of any district court is vacant, all process, pleadings, and proceedings pending before such court, shall be continued of course until the next stated term after the appointment and qualification of his successor; except when such first-mentioned term is held as provided in the next section.

"§ 603. When the office of district judge is vacant in any district in a state containing two or more districts, the judge of the other, or of either of the other districts may hold the district court, or the circuit court, in case of the sickness or absence of the other judges thereof, in the district where the vacancy occurs, and discharge all the judicial duties of judge of such district, during such vacancy; and all the acts and proceedings in said courts, by or before such judge of an adjoining district, shall have the same effect and validity as if done by or before a judge appointed for such district."

It is seen that neither of these sections authorizes the designation of a district judge to hold a district court *in another state*, and that the last section can not apply to the case of Louisiana, which constitutes but one district.

Unless some serious mistake or oversight has been made in the examination of this question the view would seem unavoidable that relief can not come from any action within the competency of the circuit judge, but must come from the President through an *ad interim* appointment.

HORSE KICKING MARE THROUGH BOUNDARY FENCE.—The recent case of Ellis v. The Loftus Iron Company (31 L. T. Rep., N. S. 483), usefully illustrates the subject of remoteness of damages. It was an appel from the County Court Judge of Glamorganshire. The plaintiff occupies a farm, a portion of which was let to the defendants. This portion was fenced in by the defendants by means of a wire fencing. On the adjoining land the plaintiff kept a number of horses and cattle. On the 18th of August the defendants turned an entire horse, which belonged to them, on to this plot of ground. This horse and one of the plaintiff's mares being on either side of the fence, the former damaged the latter by biting and kicking, and an action was consequently brought. The evidence proved that the horse did not cross the fence; but that the plaintiff had warned the defendants to keep the horse away from his mares. The county court judge held that there was no trespass, and that the damage was too remote. The court of common pleas reversed this judgment. The learned judges were mainly influenced in deciding the question of remoteness of damages by the case of Lee v. Riley, 18 C. B., N. S. 722. In that case, through a defect in the fences, which it was the defendant's duty to repair, his mare strayed in the night-time from his close into an adjoining field, and thence into a field of the plaintiff's, in which was a horse. From some unexplained cause the defendant's mare kicked the plaintiff's horse and broke his leg. It was held that the defendant was responsible for his mare's trespass, and that the damage was not too remote. "The only question," says Mr. Justice Montague Smith, "is whether or not the injury so caused was too remote. It was contended that it was, because the plaintiff gave no proof that the defendant's mare was vicious, and that the defendant knew it. I do not think it was wrong to give any such evidence. * * * If even the plaintiff's horse committed the first assault, the plaintiff would, under the circumstances, I think, have been equally liable. It was through his negligence that the horse and the mare came together. The damage complained of was the result of that meeting, and I think it was not too remote." The decision of the court of common pleas seems at first sight to bear hard upon the Iron Company, but a moment's reflection will show that it is quite consistent with justice.—*The Law Times.*

[We may add to the above that one of the chief grounds on which the judges of Common Pleas rested their decision, was that the horse occu-

pied the position of a trespassing animal; that there are no degrees in trespass; and that *the horse having got his leg through the fence, and hence across the boundary line*, was trespassing on the plaintiff's close at the time the injury was committed.—Ed So. L. R.]

A REHEARING.—A justice of the peace in Chicago, who is a convert to spiritualism, is, according to the Chicago Tribune, in the habit of having protracted conversations with Sir Edward Coke, Blackstone, and other authorities, and bringing their experience to bear on the cases before him. The other day, during the forenoon session of the court, a case came up for trial. The attorney for the defence quoted a decision which he found in one of the early Illinois reports. It was apparently decisive. The lawyer looked triumphantly at the judge. The latter said: "Wait a minute, I feel the influence." Then the judge grabbed a lead pencil and a sheet of paper. His hand went convulsively, and at the end of five minutes he had scribbled over the entire page. When he had finished he said to the lawyer: "I have just received a message from Judge Lockwood, who was one of the judges of the supreme court at the time this decision was rendered. He authorizes me to say that the majority of the members of the then court, who are now in the spirit land, after mature consideration, decided to reverse their former judgment. Please inform the profession of that fact, that they may govern themselves accordingly." The judge then continued: "Under the circumstances, you will see that I can pay no attention to the decision you have quoted, and judgment must be rendered against you." The lawyer remonstrated; and the judge finally agreed to postpone the case for one week, in order to give Judge Lockwood and his colleagues an opportunity to examine the matter again, and see if they are determined to reverse their former opinion. In the meantime, the lawyers of Chicago are meditating whether it will not be necessary for them to burn all their reports if judges in the spirit land are to be allowed to carry on the business of making decisions and of reversing those which they have made in this world.—*Pall Mall Gazette.*

HEAVY FEES.—It has been publicly announced that the fee paid to Serjeant Ballantine, upon his retainer to defend the Guicowar of Baroda, was 5,000 guineas, and that a "further scale of fees" not likely to be less than 5,000 guineas, but "depending somewhat on the time the Serjeant will be absent from England," has been also "arranged." Speculation has already fixed the period of absence from England at about three months. If this be correct, the *honorarium* is probably among the largest ever paid to counsel, and it furnishes a curious commentary on the superstitition which, as Mr. Forsyth tells us (Hortensius, p. 410), has prevailed in every country where advocacy has been known, of

looking upon the exertions of the advocate as given gratuitously. It hardly needs, however, the example which he cites from Roman history, of the speedy relaxation of the decree of Augustus prohibiting advocates from taking fees, to show how rapidly the custom becomes more honored in the breach than in the observance. In our own country, except in the ecclesiastical courts (see Canon, 131), the rule has always been that a barrister has no legal right to a fee. "The reward," says Sir John Davys, "is a gift of such a nature, and given and taken upon such terms as albeit the able client may not neglect to give it without note of ingratitude, * * * yet the worthy counsellor may not demand it without doing wrong to his reputation." A curious comparison of the fee-books of Dunning and Kenyon may be found in the life of the latter recently published by his great-grandson. It appears that the utmost amount realized by Lord Kenyon in one year, when he was attorney-general, was £11,038 11s., of which more than 3,000 guineas were made by opinions. The fee-book of Lord Eldon, when attorney-general, is given by Lord Campbell in his "Lives of the Chancellors," and the highest total for one year is put down as £12,140 15s. 8d. Erskine appears to have received £1,000 for the defence of Admiral Keppel, but that was after the acquittal. In our own time, two fortunate attorney-generals and a late leader of the parliamentary bar, are stated to have respectively received thirty thousand pounds in one year. But as far as we remember, although refreshers have often been very liberal in proportion to the retainers, no retainer, since the fee of four thousand guineas, marked on the brief of Serjeant Wilde, in Small v. Atwood, has at all approached in amount that given to Serjeant Ballantine.—*Solicitor's Journal.*

[Serjeant Ballantine was but partially successful in the defence of his client—the commission before which he was tried having disagreed.—ED. So. L. R.]

THE LEGAL ASPECTS OF THE TRIAL AND CRUCIFIXION OF CHRIST.—The crucifixion of Christ is universally regarded among Christians as a cruel murder, perpetrated by the Jews under the pretence of a legal sentence, after a trial in which the law and its forms were grossly violated and disregarded. The Jews, however, to this day, maintain that, whatever were the merits of the case, the *trial* was regular according to law, and hence the sentence was legally just.

Within the last half-century this subject has been thoroughly discussed by eminent men learned in the law. Mr. Joseph Salvador, a learned Jew, in his great work entitled "History of the Institutions of Moses and the Hebrew People," gives a detailed account of the administration of justice among the Hebrews, and to that chapter he has subjoined an account of the "Trial and Condemnation of Jesus," and he expresses

his opinion that the trial, considered merely as a legal proceeding, was conformable to the Jewish laws then existing.

One of the most eminent lawyers at the French bar, M. Dupin, immediately called in question the correctness of Mr. Salvador's opinion, and entered upon an analysis of that portion of his work with a view to examine its soundness. The former had, many years before, in a little work published in 1815, taken the view that this great trial was illegal, and which, he observed, has been justly called "the *Passion* or *Suffering* of our Savior, for he did in truth *suffer* and had not a trial."

M. Dupin had great respect for the talents of Mr. Salvador, and with a friendly spirit he entered upon his critical examination, which was conducted with an ability, learning, animation and interest that apparently left nothing to be desired. As an argument, his work is unanswerable—he has demolished that of his adversary.

The questions between them involve several distinct points of enquiry, namely, first, whether Christ was guilty of blasphemy; and secondly, whether his arraignment and trial were conducted in the ordinary forms of law; and still again, whether, admitting that as a mere man he had violated the law against blasphemy, he could legally be put to death for that cause; and if not, then whether he was justly condemned upon the new and supplemental accusation of treason or sedition, which was vehemently urged against him.

Mr. Salvador's introductory analysis of his chapter on the Administration of Justice among the Hebrews is highly instructive and interesting; and those persons who have not been accustomed to read the bible, with particular reference to the *Law*, will find many new and striking views of that portion of the Scriptures. They can not fail to be struck with the extraordinary care taken to secure by law the personal liberty and rights of the citizen; and in his chapter on the "Public Orators and Prophets," it is clearly proved that in no nation was the liberty of speech so unlimited as among the Hebrews.

It remained, however, for a great American scholar, lawyer and author to do the crowning work relating to this interesting subject. We have reference to Prof. Simon Greenleaf's celebrated work entitled "The Testimony of the Evangelists examined by the Rules of Evidence administered in Courts of Justice," with an appendix containing a "Review of the Trial of Jesus." This was first published about thirty-five years ago, and has recently been republished in New York. No clergyman of any denomination should attempt to preach an Easterday sermon without having first read this latter work. We think M. Dupin and Prof. Greenleaf established, by the clearest record evidence, that the trial and sentence of Christ was illegal, when viewed simply as the ordinary course of law against any accused person.—*N. Y. Daily Register.*

ERSKINE AND CHOATE.—In the course of an eloquent address on The

Trial by Jury, delivered by Hon. Charles S. May, at the recent commencement of the Law Department of the University of Michigan, the following parallet is drawn between the two greatest masters of forsenic eloquence who have spoken in the English language—Erskine and Choate:

Into this arena of the trial by jury have stepped some of the brightest intellects of the world. In the brilliant constellation of advocates who, in the last hundred years, in England and America, have reflected the light and glory of their genius upon the forsenic stage, I would place Erskine and Choate at the head. I do not forget Brougham, and Denman and O'Connell and the marvellous Curran on the other side of the ocean, nor Pinkney and Hoffman and Prentiss and Paul Brown and Brady on this side. But all these, and many more able and gifted men are fairly distanced to these two great and incomparable advocates, who must stand in their respective countries as the bright particular stars of the jury forum.

But although Erskine and Choate were almost equally great as jury lawyers, their lives and careers present a series of sharp and striking contrasts. Erskine, the scion of a noble Scotch family, with imperfect early education, and after years wasted in a most opposite and dissimilar pursuit, took up the law when weary and disgusted with the life of an army officer in time of peace. Choate, a New England farmer's son, came early to the bar, after full preparation and worthily crowned with academic and collegiate honors. Erskine never became a scholar and was never distinguished for learning in the law or wide reading of literature. Choate, in all his subsequent career, was a laborious student and undoubtedly ranked higher in legal and general learning than any other advocate of his time. In the work which these men did at the bar the same contrast is presented. It happened to Erskine to be employed in a remarkable succession of great state trials in which he became the advocate of the rights and liberty of the citizen against public despotism, and in giving the death-blow to the doctrine of constructive treason, and vindicating the right of free speech and a free press, he performed the noblest service to the law and the free constitution of the empire, and won unfading and immortal forsenic honors. Choate, on the contrary, was never privileged to argue a single case of great public political importance, but was compelled to use his vast and varied powers in questions of mere private interest and dispute—a circumstance which in his last days he recalled with pathetic regret.

So in the splendid and unequalled gifts which each brought to the bar they were still dissimilar. Erskine, who commanded the higher power and the better art, spoke with singularly clear and felicitous language, in sentences short and rich with beauty and strong with logic, and not unworthy of the great models of English speech which he found and studied in Shakspeare, Milton and Burke. Choate, whose learning

was deeper and whose vocabulary was wider and ampler, spoke in sentences of remarkable length and resounding sweep and rythm, and astonished all by the amazing affluence and gorgeousness of his diction. Both were men of high imagination, but while Choate was more poetical and subtile in his fancy, Erskine was more vivid, intense and practical. Choate dazzled and overwhelmed a jury; Erskine swept and mastered them. Choate more resembled Cicero, who was a rhetorician as well as an orator, while Erskine was more like Demosthenes, who was the greater master of true eloquence.

In their personal appearance and outward manner, also, these great advocates were widely different. Erskine was fresh and bouyant, full of vivacity and of a fine and engaging presence; Choate was angular and almost ungainly of form, of pale and haggard countenance, and with only the divine genius looking out from his deep and burning eyes to distinguish him from an ordinary man. Possibly this may account for the fact that Erskine was full of personal vanity, while Choate was singularly modest and unenvious.

But in the midst of these many contrasts one great and striking parallel stands out in their public careers. Each left the bar for a brief season for service in a legislative assembly, the one in the British House of Parliament and the other in the senate of the American Congress. Each wearied and failed in the new and uncongenial place; and stranger coincidence still,—each met and quailed before a great parliamentary leader; Erskine before the imperious orator and statesman, William Pitt, son of the great commoner of England, and Choate before another proud and arrogant parliamentary chieftain, Henry Clay, the great commoner of America.

Returning now to the bar and the courts after their legislative failures, the old contrast stands out again in their lives, even to the very close. Erskine went upon the chancellor's woolsack, for a brief period, and then retired at fifty-seven from the bar and the courts. Choate returned from the senate to the bar while yet in his early prime, and gave thereafter his best powers and most brilliant efforts to his profession. Erskine died at seventy-three, after a long, sad evening to his life, in which he missed the old excitement of the courts and found no compensation in the love of books, that sweet solace of cultivated old age. Choate broke down suddenly at sixty, while yet in full practice, his nerves shattered by the long contentions of the forum; dying prematurely, and missing what he had so longed to enjoy—a peaceful and restful evening to his stormy and laborious life, when he could forget the fiery encounters of the bar in the sweet studies and unfailing delights of the books he loved so well. And so in death the great advocates present their last sad contrast, as each missed the closing felicity of his life—the one in the living too long, the other in dying too soon.

LIST OF LAW BOOKS PUBLISHED SINCE OUR OCTOBER NUMBER.

Abbott's National Digest. Vol 1.
American Railway Reports. Vol. 3.
Bankrupt Law with Amendment. Third Edition. Cloth and paper.
Bankrupt Register. Vol. 10 (1874).
Benjamin on Sales. Amer. Edition.
Blackwell on Tax Titles. Fourth Edition.
Bump on Bankruptcy. Seventh Edition.
Byles on Bills. Sixth Edition.
California Digest. Vol. 3.
Connecticut Statutes. Revision 1875.
Central Law Journal. Vol. 1. Bound.
De Colyar on Guaranty, Principal and Suretyship.
Flanders on Fire Insurance. Second Edition.
Freeman on Cotenancy and Partition.
" " Law of Judgments. Second Edition.
Green's Criminal Reports. Vol. 1.
High on Extraordinary Legal Remedies.
Hilliard on the Law of Injunctions. Third Edition.
" " " " Torts. Fourth Edition.
Lacey's Digest of Railway Reports.
McClellan's Probate Law and Practice. (N. Y.)
Oregon Statutes. Revision of the Laws of. 1843—1872.
Perry on Trusts and Trustees. Second Edition. 2 vols.
Redfield's American Cases on the Law of Wills.
Roe's U. S. Commissioners' Manual.
Roscoe's Criminal Evidence. Seventh Edition.
Sedgwick on Constitutional and Statutory Law. Second Edition.
Sedgwick on the Measure of Damages. Sixth Edition.
U. S. Digest. First Series. Vol. 4.
U. S. Digest. New Series. Vol. 4. (1873.)
U. S. Statutes at Large. Revision of 1875.
Wharton on the Law of Negligence.
Wisconsin Digest. (Simmons.) Vol. 2.

For a full list of the late volumes of the state and federal reports, see *The Library Docket*, for April.