The Madras Law Journal.

PART I.] JANUARY [VOL. XLVI.

SIR WALTER SALIS SCHWABE Kt., K. C.

The Madras Bar bade farewell the other day to Sir Walter Schwabe, the retiring Chief Justice. It has not been the policy of this Journal to discuss the merits and demerits of a Judge when he is in office as, in its view, such a discussion is likely to impair the confidence of the public in the highest Court in the land and lower the prestige and dignity of the Judges which it ought to be the duty of every citizen to maintain and foster in the larger interests of the administration of justice. Now that Sir Walter has laid down the reins of his high office, we think it is appropriate to attempt a fair and just estimate of his work and services as the Chief Justice of our Court during the brief period of two years that he has been with us, and place our views before our readers. The demonstration, the other day, in Court and at the Kushaldas Gardens and the warm, if a bit exaggerated, words of appreciation uttered by the spokesmen and accredited representatives of the Bar bear eloquent testimony to his widespread popularity and the esteeem in which he is held by the profession as a whole. It may be he may not take rank side by side with the great Judges that adorned this Court in the past " whose Judgments still illumine the pages of the law reports." But there can be no gainsaying that during his brief tenure he has striven to maintain the high traditions of his exalted office and the prestige and dignity of the Court over which he presided. In the discharge of his judicial duties, he exhibited an innate sense of justice, brought to bear upon his work a calm and serene temper and showed a keen grasp of the essential facts of a case and the points of law involved in it. In his treatment of the Bar, he was uniformly courteous and the youngest member of the Bar received the same consideration at his hands as the oldest or the most prominent member of it. He gave a patient hearing in all the

causes that were tried and argued before him and on the whole we may say without fear of contradiction that he was a safe and sound judge of fact and law. He was a ruthless fighter against barren technicalities and forms of procedure calculated to defeat the ends of justice. He seldom, if ever, upheld a plea of limitation either in a suit or in an appeal.

When we hold up these great qualities of his, it is not as if we are not alive to his faults or short comings. Thought he felt it was his duty to give a patient hearing and sedulously cultivated the art of being a good listener, one noticed a tendency in his Lordship to form conclusions and if we may say so, strong conclusions very early in the progress of a cause which he seldom changed afterwards ; and on many occasions, the further hearing of the cause reduced itself into a mere formality. It cannot be said of him as of some great Judges that he kept an open mind until the last moment. Not infrequently did a feeling of despair overtake Counsel arguing a case when His Lordship knit his brows and shook his head. With his Lordship, it looked as if the duty of an Advocate was merely to take him through the papers and present the case in a proper form and suggest particular aspects leaving it to his Lordship to form his own conclusions. A debate or keen intellectual combat seldom won a cause before him. He had a high if somewhat overweening sense of his own powers and the tactful advocate before him was one who made his Lordship feel that a point emanated from him even if it was in fact suggested to him by Counsel. In spite of his abounding affection and esteem for the bar, one felt doubtful whether His Lordship ever believed what once Mr. Upjohn K. C., felicitously called " the bound and rebound of ideas and arguments between the bench and the bar." His strong and masterful temperament would not easily brook a direct or a flat contradiction from the bar.

He came out to this country with the reputation of being a commercial lawyer and we had great hopes that our law reports would be enriched by his scholarship and legal erudition ; but we must confess to some feeling of disappointment in this respect. It is true that in the disposal of the causes that came up before him, he showed a firm grasp of the principles of the English Common law and the Commercial law and his actual decisions were generally sound. But one searches in vain for a judgment of His Lordship which is a masterly or scholarly exposition of the principles

of the English or Indian Law. He did not command a trenchant legal style and there is hardly a judgment of his, not even a judgment in a commercial cause, which can be said to be a lasting contribution to legal literature. His was not a mind to grapple with and harmonise apparently conflicting decisions or to take a genuine interest in the history and the development of law as a science. When a Counsel once attempted some such task, His Lordship in his characteristic manner, with a smile on his lips, humorously remarked that life was not worth living at that rate. Comparing him with his predecessors we cannot say that he had Sir John Wallis' passion for law, the indomitable energy or the massive intellect of Sir Charles Turner, or the legal erudition of Sir Colly Scotland. In his judgments we miss the profound scholarship and the charm of style of Sir T. Muthuswami Aiyar, the fertility of ideas and the vigour of expression of Sir Subramania Aiyar and the subtlety of reasoning and the close analysis of Sir Bhashyam Aiyangar.

It was somewhat regrettable that the Chief Justice seldom sat for the disposal of first appeals from the mofussil though by far the most complicated litigation in this Presidency is from the mofussil. It is particularly important that the Chief Justice of the Court should acquaint himself with every sphere of judicial work of the Court, especially as he is the authority that is consulted by the Government on all matters of patronage relating to higher judicial offices. It is impossible for a Chief Justice to properly advise the Government with regard to the calibre or efficiency of particular members of the subordinate judiciary if he has not had occasion to deal with their judicial work in particular causes. On the Criminal side, there was a feeling sometimes that owing to his lack of experience and want of acquaintance with the mechanism and details of Indian administration he attached too much credence to the police evidence.

His was the dominating voice in every bench over which he presided and there is a feeling in certain quarters that in various matters, he was a little too domineering over his colleagues. It is said that he was so wedded to his opinions that his constitution of benches was affected by the predelection for his own opinions.

In exercising the disciplinary jurisdiction of the Court over the members of the bar, His Lordship while he was anxious that nothing he did or decided should lower the standard of high

rectitude and honesty at the bar, fully realised as was pointed out by Mr. T. R. Ramachandra Aiyar that the proceedings against a practitioner were of a quasi-criminal nature and that you must adhere to the maxim that the practitioner must be presumed to be innocent until the guilt was brought home to him. He always acted on the view, to use his own language, that the exercise of this jurisdiction was not to be vindictive ; and his punishments in such cases were always tempered by mercy. At the same time, we cannot but remark that in the early stages of the cases which recently came up before the High Court in connection with proceedings against certain practitioners associated with the non-co-operation movement, he showed a lack of sympathetic imagination and His Lordship took even a stricter view than His Lordship Mr. Justice Coutts Trotter ; but in the end, the Chief Justice's innate sense of justice and fairplay came to his rescue.

In the Nehru entertainment episode, it cannot be said that either the Chief Justice or the High Court or the Vakils Association came out with flying colors.

As the administrative head of the High Court, he has rendered yeoman service by standing out for the independence, prestige and dignity of the High Court and resented any invasion of its powers by the executive. He lent a sympathetic ear to the grievances of the subordinate staff under him and was easily accessible to every one, high or low, which made him so immensely popular with the establishment. In matters of patronage to higher offices it is believed that he was not particularly pro-Indian in his sympathies.

In estimating one's public career, a minute analysis or dissection of the different spheres of one's work is likely to lead us astray and there is a danger of our losing the true perspective. We yield to none in our appreciation of his great qualities and our criticisms or remarks are not in any way intended to obscure them. Giving full weight to every aspect of his career, we can confidently say of him that he was an able and conscientious Judge of whom it may be truly said in the words of a former Chief Justice of this High Court that "he did his duty in fear of God and without fear of man."

SUMMARY OF ENGLISH CASES.

GAS LIGHTING IMPROVEMENT COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE (1923) A. C. 723.

Income Tax—Company—Foreign company managed and company—Shares—Deduction.

A company dealing in petroleum purchased some shares in a foreign company dealing in the same with the object of facilitating its own business. *Held*, the shares were investments, the income of which cannot be taken into account in estimating profits for the purpose of levying excess profits duty and the value of the shares must be deducted in estimating the capital of the business for ascertaining the percentage standard.

Distinction between "capital" and "investments" pointed out.

BRADBURY *v.* ENGLISH SEWING COTTON COMPANY, LTD., (1923) A. C. 744.

Income Tax—Company—Foreign company managed and taxed in England—Subsequent transfer of management abroad—Foreign possession—Mode of taxation.

A foreign company was for 3 years managed and controlled in England by an English Company which held all the stock and during that period it was taxed as resident in England on all its profits. Thereafter the management and control were removed to America, whereupon the Taxing authority sought to tax it for the fourth year on the basis of the average for the previous three years' profits. *Held* by the majority of the House of Lords (Lord Summer dissenting) the profits of the prior 3 years were not derived from "a foreign possession" and as such cannot be the basis of an average, since the same had been once assessed as income from a British source.

The locality of the shares or stock of a company is to be determined by its place of residence and trading.

ABRAM STEAMSHIP COMPANY, LTD. *v.* WESTVILLE SHIPPING COMPANY, LTD., (1923) A. C. 773.

Contract—Rescission—Mis-representation—Assignment and sub-assignment—Repudiation by latter—Effect—Affirmation.

A contract for purchasing a steamer in construction was assigned on the representation that it was then at a certain stage of completion and the same was passed on to a sub-assignee. The latter found out that the representation was not true, and thereafter agreeing to a minor alteration in the construction brought an action for rescission. During the pendency of the same, the original assignee brought an action against his assignor for rescission. The first was decreed without contest and in the latter the assignor set up the defence that agreeing to the minor alteration by the sub-assignee amounted to an affirmation of the contract and also that the assignee had no cause of action so long as his sub-assignment stood.

Held, election to affirm a contract must be gathered from unequivocal acts. The trivality of the act affirmed in the case could not amount to an affirmation of the contract.

Held also, though an action could not be brought so long as the sub-sale stood, the decree for rescission in the prior action put an end to it, even though the farmer was passed only after the action was filed.

Per Lord Atkinson.—When one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or material error inducing him to enter into a contract he has resolved to rescind it, the expression of his election terminates the contract. It is a mistake to suppose it is the verdict on an action brought for rescinding the contract that terminates it as the verdict is merely the judicial determination of the fact that the election to rescind was justified.

A. G. MOORE AND COMPANY *v.* BARKEY, (1293) A. C. 790.

Burden of proof—*Common employment*—*Death due to explosion*—*Breach of regulation.*

Where in a suit for compensation for death arising in the course of employment, the employer wants to show that the workman has incurred some added risk which does not arise out of his employment and which he is not bound by his contract of service to encounter, the employer must show that by satisfactory evidence. Where it is found death is due to explosion and it was found that contrary to the Regulations, an attempt was made to light a lamp inside the mine, but there

was no evidence to show who attempted to do it, the heirs of the deceased are entitled to compensation.

MEYER AND COMPANY v. FABER, (1923) 2 Ch. 421.

Partnership—Suit by firm against one partner for moneys in his hand—Maintainability—Controller—Position of.

During the War a controller was appointed in connection with a firm consisting of a British and three German partners. He brought a suit in the name of the firm for recovering moneys alleged to be in the hands of the British partner. *Held,* the action was not maintainable.

A partner cannot be a creditor or a debtor to his firm or sue his firm or be sued by it, the only relief obtainable *inter se* being an action for accounts. Neither moneys in the hands of a partner as the result of collection and distribution of the assets of a dissolved partnership nor moneys standing to his debit in the books of the firm are moneys due to or held by him for the firm or the proprietors thereof. They could not be recovered by an action in the name of the firm nor even by an action by the other partners except after an account has been taken of the dealings and transactions of the partners.

The mere fact that the controller's name also is added as a co-plaintiff does not affect the question as he only represents the partners. There is nothing in the Statute conferring on him powers which the Company itself has not.

STEINBERG v. SCALA (LEEDS), LTD., (1923) 2 Ch. 452.

Contract—Infant—Shares in Company—Right to repudiate—Recovery of money paid—Failure of consideration.

An infant applied for shares in a Company and on the same being allotted, paid a certain number of calls and then brought a suit repudiating the contract and for return of the money paid. *Held,* the infant was entitled to repudiate the contract in so far as future liability was concerned and to get his name taken away from the list of share-holders. But he was not entitled to return of money paid unless he shows consideration has wholly failed. The fact that the shares were falling in value is not ground for the return of the money. The test is not whether the infant had derived any real advantage out of the transaction.

ELLIS AND SONS, LTD. *v.* POGSON, (1923) 2 Ch. 496.

Patent—Threat by applicant—If can be restrained—Patents and Designs Act, S. 36.

If a person who has merely applied for a patent but has not obtained one, threatens another with legal proceedings for infringing his patent and thereby causes damage to him, the latter cannot maintain an action to restrain the threats or for damages. At Common Law, such an action could be maintained only if malice is proved; under the Patents and Designs Act, there must be a patent in existence for an action being brought.

In re EYRE-WILLIAMS WILLIAMS *v.* WILLIAMS, (1923) 2 Ch. 533.

Limitation—Marriage settlement—Settlor converting money to his own use—Liability—Constructive trustee—Acquiescence of wife—Effect.

Under a marriage settlement certain mortgage debts were constituted into a trust, the tesator having a life interest and his wife the same interest after his death. The trustee of the mortgage debt was not made aware of this settlement and the mortgage money came into the hands of the testator. After his death the trustees claimed the money on behalf of the other beneficiaries and the defence was one of limitation. *Held*, the testator was a constructive trustee who constituted himself such by receiving trust property with knowledge of the same and in an action brought by the equitable owners to recover it, he is not entitled to avail himself, by analogy, of the Statute of Limitations.

Even if the wife, the sole beneficiary alive knew of the husband's acts in the disposal of the fund, the trustees are not thereby debarred from recovering the money.

CROSS *v.* IMPERIAL CONTINENTAL GAS ASSOCIATION, (1923) 2 Ch. 553.

Company—Debenture stock—Distribution of surplus profit as dividend—Capital left intact—Right of stock-holder to object.

A debenture stock is a charge on the net profits and earnings of a trading corporation and so long as there is no interest on it in arrears, there is no debt due to the debenture-holders.

The latter have no right to interfere with the ownership, possession or dominion of the association ; where the paid-up capital is left intact, one shareholder cannot prevent the directors from distributing any profit realised as dividend.

RUSSIAN COMMERCIAL AND INDUSTRIAL BANK *v.* COMPTOIR D' ESCOMPTE DE MULHOUSE AND OTHERS, (1923) 2 K. B. 630.

Principal and agent—Russian Bank—English Branch—Effect of Soviet legislation—Right to represent.

A Russian Bank had a branch in England and the manager in the latter had a power of attorney to transact business on behalf of the former. As a result of various orders passed by the Soviet Republic all private banks were nationalised and became a part of the Government. Thereafter the English Manager brought an action against another person for return of documents deposited while the old Russian Bank was in existence on payment of money due. *Held* by the majority of the Court of Appeal (Atkin, L. J. dissenting) the effect of the Soviet orders was to extinguish the Bank and the power of attorney also became extinguished thereby.

BANQUE INTERNATIONALE DE COMMERCE DE PETROGRAD *v.* GONKASSOW, (1923) 2 K. B. 682.

Conflict of laws—Foreign contract—Status of plaintiff—Recognition by lex loci *but not in England—Right of suit.*

A Russian Bank with a branch in France entered into a contract in France and brought an action thereon in England where the defendant was residing. At the time of the action, the Soviet Government in Russia had abolished all private banks. The Soviet Government had not been officially recognised by the French Government but the English Government had. *Held,* though the *lex loci contractus* recognised the existence of the plaintiff Bank, the law in England where the action was brought did not and the action was therefore not maintainable.

NUMAN *v.* SOUTHERN RAILWAY COMPANY, (1923) 2 K. B. 703.

Railway—Liability Death of passenger through negligence—Contract with deceased limiting liability—Effect on gift by heir for compensation.

A person who was travelling in a train purchased a ticket which expressly limited the liability of the Company in cases of personal injury to £ 100. As the result of an accident the man died, and a suit was brought by his widow for compensation under the Fatal Accidents Act. *Held,* the damages which the Court could award were not limited to the sum mentioned in the contract between the deceased and the Company—Nature of widow's action under the Act and what amounts to notice of terms printed on a ticket considered with reference to case-law.

SCOTT *v.* PATTISON, (1923) 2 K. B. 723.

Contract—Service as labourer for a year—Absence due to sickness for some weeks—Action for wages—If maintainable.

A farm labourer entered into a parol agreement to serve on weekly wages for a year. He was absent for some weeks on account of sickness and after the period was over sued for wages due during the period of sickness. *Held,* the action based on the oral contract was unenforceable as it was against the Statute of Frauds ; but it is open to the plaintiff to sue in assumpsit on an implied promise to pay for services rendered and therein he could establish a custom to pay even during illness or a claim for fair and reasonable wages even apart from custom.

UNITED STATES SHIPPING BOARD *v.* DURREL AND CO., (1923) 2 K. B. 739.

Shipping —Demurrage —Claim for— Different terms in bills of lading—Discharge of ship.

In a ship carrying cargo goods were shipped under bills of lading which varied from consignee to consignee. Some contained the condition that goods should be discharged at such and such a rate, failing which demurrage at such and such a rate on the cargo should be paid. Others provided for discharge irrespective of whether a berth was available or not; while some consignments were transferred from another vessel without any bill of lading. In an action for demurrage, *held,* the fact that unequal obligations were cast on the consignees does not exonerate them from liability for the obligation stipulated for in the bill of lading, each being a separate contract by itself.

THE KING *v.* HAMMER, (1923) 2 K. B. 786.

Marriage—Foreign marriage—Jews—Proof of—Function of Judge.

Where a Jewish marriage is celebrated abroad, its validity is a question of fact and can be proved otherwise than by a written contract. In such cases where an action whether civil or criminal is being tried before Judge and jury and a question of foreign law has to be decided, the matter is one entirely for the Judge.

SALTER *v.* LASK, (1923) 2 K. B. 798.

Landlord and tenant—Ejectment—Portion of premises only—Maintainability.

There is nothing to prevent a landlord who has let out his premises to bring an action for ejectment in respect only of a portion of the same.

CHELLEW *v.* BROWN, (1923) 2 K. B. 844.

Costs—Security for—Practice—Mistake in describing residence—Effect.

Where a plaintiff who had no fixed abode in England gave in his writ the address of his sister as his own residence, the misdescription is not one with intent to deceive and as such there is no ground for ordering security for costs. There must be an intentional mis-statement to render him liable to give security for costs.

JOHNSON *v.* STEPENS AND CARTER LTD., (1923) 2 K. B. 857.

Costs—Security—Joint contractors—One refusing to Join as plaintiff—When can be made defendant.

In the absence of special circumstances if one of two joint contractors refuses to join as plaintiff in an action for a breach of a contract the party seeking to sue should offer the other an indemnity and then if he still refuses is entitled to join him as a defendant. But if the co-contractor refuses to join because he has procured the breach or has acted in some way in fraud of the other co-contractor, the latter is entitled to bring an action without offering an indemnity against costs.

THE KOURSK, (1923) P. 206.

Shipping —Collision —Joint tortfeasors —Judgment against one —If bars recovery against another.

As the result of negligence on the part of the masters of two ships a collision ensued and one of the ships continuing headway ran into and sank another vessel. A suit for damages against the vessel which caused the siking was decreed, but full satisfaction not being obtained, the owners proceeded against one alone does not bar a subsequent action against the collision. *Held,* the sinking being due to the first collision caused by the negligence of both the vessels an action would lie against both. The fact that judgment had been recovered against the vessel which caused the sinking was decreed, but other. To sue whether damages arising from negligent navigation constitutes a joint tort which would bar a fresh action after getting judgment against one of the tortfeasors only, the test to apply is whether there was only one act of negligence or separate acts. To constitute a joint tort, there must be one *damnum* and one *injuria.* Case law on the subject considered.

DEAN *v.* DEAN, (1923) P. 172.

Divorce— Judicial separation —Permanent alimony— Basis of calculation.

In cases of fixing a permanent alimony after judicial separation, courts have to fix a reasonable provision. Normally the Ecclesiastical Courts used to fix it at 1/3 of the husband's income, but Courts have power to alter the rate if a real cause arises to vary the same.

When the wife is innocent, the fact that when living together she acquiesced in a narrow scale of living is not a ground to cut down the alimony. The discretion is to be exercised by the Judge and not the Registrar.

PALMER *v.* PALMER, (1923) P. 180.

Restitution of conjugal rights —Separation deed —Effect of Bona fide application of wife.

A husband and his wife were living apart under a deed of separation by which she agreed on receipt of a weekly sum for maintenance not to molest him or claim restitution of conjugal rights. She later on endeavoured to induce her husband to

resume cohabitation, but on his refusing filed a petition for restitution of conjugal rights. *Held,* where her *bona fides* and good faith are not in dispute, she is entitled to the relief claimed ; the fact that if the decree is not obeyed, she might have recourse to proceedings for a divorce does not disentitle her to the decree sought for, as there is nothing inconsistant in her attitude.

In re Emery : EMERY *v.* EMERY, (1923) P. 184.

Costs —Security for —Caveat filed by undischarged bankrupt.

A caveator is not the actor in probate proceedings in the sense that he sets the law in motion entailing costs on others. It is true his conduct gives rise to the institution of the suit, but the same is carried on by the person who wants to prove the will. The mere fact he is an undischarged bankrupt is no ground for demanding security for costs.

UPTON *v.* GREAT CENTRAL RAILWAY COMPANY, (1923) 2 K. B. 879.

Workmen's Compensation Act—Injury arising out of employment—What is compensation.

A workman living in a certain railway town was employed at another railway station, but for purpose of calculating wages the time taken up in the railway journey back to his own town was taken into consideration. One evening when going to catch the train homeward he slipped on the platform and sustained injuries as the result of which he died. In a suit for compensation by his widow. *Held* by the majority of the Court of Appeal (Warrington, L. J., dissenting) the accident took place in the course of employment but did not arise " out of " it and as such no action lay, in the absence of any special peril on the platform. Case law considered.

H. M. S. GLATTON, (1923) P. 215.

Shipping —Collision —Wreck lying in harbour unlighted —Entry into harbour prohibited at night —Trespasser — Rights of.

Under an Order in Council private vessels were prohibited from entering into a harbour at night without the special authority of the Harbour Master. A private vessel in contraven-

tion of the order entered the harbour and struck on the wreck of a sunken vessel which the master alleged was unlighted at the time. *Held,* he was a trespasser and the harbour authorities did not owe a duty to him to make the harbour safe for use at night when he had no authority to enter at all.

THE SYLVAN ARROW, (1923) P. 220.

Shipping — Collision — Maritime lien — Ship under Government requisition — Effect.

A ship while under compulsory requisition by the Government and under its control collided with another vessel causing damages to the same. An action for damages was instituted after the vessel was released from the Government requisition. *Held* no maritime lien attached to the vessel and there was no liability.

Quaere whether the same principles would apply to the case of vessels not compulsorily requisitioned but placed voluntarily in the control of others ?

JOTTINGS AND CUTTINGS.

The Douglas Trial :—There can be no two opinions but that the defendant deserved the very moderate sentence passed upon him by Mr. Justice Avory last week at the Central Criminal Court for libel. From a professional standpoint, however, the more serious side of the case lies in the action of the counsel for the defence. When the Attorney-General is constrained to say—we quote from the *The Times* report.

"The Jury had heard Mr. Churchill give his evidence, and had heard the speech of Mr. Hayes in which he spoke of the hide of the rhinocerous, the reckless gambler with human lives, and all the other vile epithets hurled at him. Did they think it was a pleasant ordeal to have to prosecute a man like Lord Alfred Douglas for false and unfounded charges when there was no limit to the mud thrown at one by the scavengers of the gutter so long as one could find a counsel who would abuse the licence which was generally so faithfully observed by members of the Bar ? He could make any insinuation he pleased and make any attack he pleased on a man who had been in the public eye, who knew perfectly well that if he faced the ordeal of a prosecution he exposed himself to the risk of mud and vile abuse of any sort being flung at him, and his only refuge being that he could deny the truth of the statements."

and Mr. Justice Avory in his summing up said—

"I am bound to say that after a long experience at the Bar and on the Bench I do not believe that any learned counsel in any Court of justice has ever been allowed greater latitude than has been allowed to Mr. Cecil Hayes in this case. He addressed you the previous morning at considerable length, and un-

til the adjournment his observations were a mass of irrelevance to any issue you have to determine. Until he came to tell you what evidence he proposed to adduce in support of the plea of justification his speech was a diatribe on politicians and vituperative abuse of Mr. Winston Churchill."

it is clear that the matter ought not to be allowed to rest, and for the honour of the Profession the conduct of counsel should be seriously considered by the Benchers of his Inn. No one would suggest for a moment that freedom of speech at the Bar Bar should be curtailed in the slightest degree; but liberty must not be degraded to licence and the privilege of counsel must not be used to make unwarranted personal attacks even at the behest of a disgruntled client. *The Law Times* 457.

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Banker and Customer :—It has always been accepted as a general principle that a Banker may not disclose the state of a customer's account without justifiable cause. This duty is a legal one arising out of contract ; although that duty is not absolute, but qualified. The extent of those qualifications has never been authoritatively settled and it is for that reason that the judgments delivered this week in *Tourner* v. *National Provincial and Union Bank of England by the* Court of Appeal, consisting of Lords Justices Banks, Scrutton, and Atkin, are particularly important. • Lord Justice Bankes said :

"In my opinion it is necessary in a case like the present to direct the jury what are the limits and what are the qualifications of the contractual duty of secrecy implied in the relation of banker and customer. There appears to be no authority on the point. On principle, I think that the qualifications can be classified under four heads : (*a*) where a disclosure is under compulsion by law ; (*b*) where there is a duty to the public to disclose ; (*c*) where the interests of the bank require disclosure ; (*d*) where the disclosure is made by the express or implied consent of the customer."

And, further he pointed out that the duty does not cease when the account is closed ; that information gained during the currency of the account remains confidential unless brought within one of the qualifications ; and that the confidence is not confined to the state of the account, but extends to information derived from the account itself, and, in fact, may go further than this, and the duty of non-disclosure may extend to information not derived from the customer himself or from his account, *e. g.*, from the account of another customer of the bank. In the case under comment it was rightly insisted that the confidential relationship of banker and customer is very marked, and it is a matter for congratulation that the Court of Appeal has been

enabled to sustain this relationship, save in the four excepted classes. Heads (*a*) and (*d*) are comparatively simple, but under (*b*) and (*c*) the limits are perhaps more difficult to state ; but the examples given in the course of the judgments afford valuable guidance. —*Law Times, pp.* 457-458.

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The Public and the Courts.—An unusual application was made to the Divisional Court at the close of the past Sittings which resulted in a noteworthy exercise of jurisdiction by the Judges—Sankey and Swift, JJ—who heard it (*Ex parte Everett,* December 28). The applicant complained that he had been unable to gain admission to the public gallery at the Central Criminal Court during the trial of Lord Alfred Douglas, that the Police in charge of the entrance to the public gallery had allowed some persons to enter who had waited not nearly so long as other persons whom they kept out, and that this improper discrimination was due to 'tipping.' Mr. Justice Sankey, while stating that 'the Court could express no opinion on the facts of the case without hearing both sides,' showed that both he and Mr. Justice Swift regarded the application with some sympathy by adding that 'if the facts had been correctly stated by Mr. Everett, the Court thought that the police-officers concerned ought not to have exercised an improper discrimination, and ought not to have kept persons out of the public gallery when there was room for them in it, and when there was no legal objection to being admitted.' That goes to prove that the Judges are not unconscious of the undesirable practices by which, whenever a sensational trial is proceeding, certain members of the public are enabled to obtain admission in preference to others. They are practices, be it added, which are not confined to the Central Criminal Court. But what is even more noteworthy is that the Divisional Court, being asked by the applicant to make inquiries into the matter, decided to 'request' the Associate to send a copy of Mr. Everett's affidavit to the Lord Mayor and to ask his Lordship to inquire into the matter. The result of the action delicately taken by the Divisional Court will be awaited with much interest. The Central Criminal Court, which is a statute created tribunal, is peculiarly under the control of the Lord Mayor and the Corporation ; the police-officers whose conduct as janitors is impugned are also controlled and paid by them. It might, therefore, have been thought that Mr. Everett's application should

have been made to the City authorities. The interesting thing about the decision of the Divisional Court, informal as it appears to have been, is that it implies that the King's Bench Division has, by virtue of its general jurisdiction to remedy the grievance of the King's subjects, a right of control even over what may be regarded as the more domestic arrangements for the administration of justice at the Central Criminal Court.
—*Law Journal*, 605.

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Police Methods and the Standard of Justice.—Another case of doubtfully just methods in the practice of inferior tribunals has afforded the Lord Chief Justice a fresh opportunity for the assertion of the Court's determination to maintain the highest standard in the administration of justice. In a case before the Court of Criminal Appeal this week (*Rex v. Goss*, December 23), where the appellant had been convicted at Cheshire (Knutsford) Sessions of housebreaking, and had been sentenced to three years' penal servitude, it appeared that, before the two principal witnesses were taken to identify the accused person, the police took them into a room and showed them a number of photographs, and the witnesses picked out the photograph of the appellant. No doubt there are circumstances in which the police may legitimately use photographs, but they cannot do so without suspicion of 'coaching' when the question is the identification of the very person whom the witnesses are afterwards going to see. That is a course which the Courts will not countenance, and the fact that what had been done in this case made it possible that a suspicion of unfairness, however unfounded, might arise, was sufficient to invalidate the proceedings. The Court accordingly quashed the conviction, the Lord Chief Justice remarking, in his judgment, that 'It is not sufficient that what is done in these matters shall be fair; it must also be manifest that nothing is done which could be unfair.' Following on the warning to Justices in *The King* v. *Hurst and others*, where Lord Hewart was emphatic in declaring that 'the rule is that nothing is to be done which so much as creates even a suspicion that there has been an improper interference with the course of justice,' and the observations of Lord Justice Atkin in *Schrager's case* (adopting Lord Reading's *dictum*) that "It is of as much importance that justice should seem to be fairly administered as that it should in fact be so,' a clear indication is given to all concerned

in the administration of the law—whether it is the police or other functionaries —that the highest standard if fair play be observed in all proceedings, and that the 'Superior Courts will insist, in every case (civil or criminal) on its strict observance. —*Law Journal*, 580.

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The abuse of Advocacy.—The independence of the Bar, which has long been recognised as essential to the administration of justice in the Crouts, involves a sense of responsibility which, happily, is rarely wanting. Whenever a member of the Bar does violate the traditions of his calling by allowing his privilege to degenerate into licence, the profession, no less than the public, have good reason to make an earnest protest. One may hope, therefore, that the strong condemnation by the Attorney-General of the extraordinary speech which Mr. Cecil Hays made in defence of Lord Alfred Douglas at the Central Criminal Court—a speech which, in its malignity and baselessness, aggravated the gross offence, of his convicted client—will be followed by some inquiry by the Benchers of his Inn into conduct which was condemned by Mr. Justice Avory as well as by Sir Douglas Hogg, and which has been the subject of most vigorous comment in the Press in all parts of the country. The recognised rules of advocacy permit an advocate to do all that he honestly can for his client, but they certainly did not justify Mr. Cecil Hays in adding his own calumnious attack upon Mr. Winston Chuchill to that for which his client was sent to prison for six months. "An advocate," said Sir Alexander Cockburn, in his classic definition of the functions of the Bar, 'should be fearless in carrying out the interests of his client ; but I couple that with this qualification and this restriction—that the arms which he wields are to be the arms of the warrior, and not of the assassin. It is this duty to strive to accomplish the interests of his clients *per fas*, but not *per nefas*.' A member of a learned profession ought never to stoop to regard himself as a mere hireling—a point which is emphasised by Dr. Showell Rogers in his admirable brochure on 'The Ethics of Advocay :'

> "Counsel ought never to sink his own individuality so far as to become the *alter ego* for all purposes of every knave who can nd a guinea to employ him ; and he is not bound, indeed he is bound not to employ knavish artifices in a knave's defence. He must never forget that the stream of his forensic eloquence should flow from him as through a purifying filter ; and it behoves him to guard against opening the sluices of words regardless of evil consequences

to others: and he is not to regard himself, nor allow himself to be used, as a mere 'conduit pipe' for the transference of matter, be it never so foul or vile."

This is an excellent statement of the forensic obligation which Lord Alfred Douglas's counsel did not observe. He saw fit to justify the libellous statements of his client by repeating them as his own personal views. He is protected by the privilege of the Bar from the proceedings which might have been taken against him had he made his scurrilous speech in some place other than a Court of Justice; but he is not protected from the censure of those whose business it is to guard the honour of the Bar.—*Law Journal*, 595.

CONTEMPORARY LEGAL LITERATURE.

An aritcle on *Eugenics and Limitations of Marriage* which appears in *the Journal of Comparative Legislation and International Law for* November 1923 throws much light on the possible defects to be avoided in dealing with social ills with the aid of the legislative machinery of the State. After pointing out that the rule of prohibited degrees within which marriage was not permitted from ancient times was an illustration of intuitive eugenics and applied to secure public welfare, and that the law which avoided marriage brought out by a fraud going to the essence of the marital relationship was an instance of the view-point of the private individual being consulted the writer proceeds to discuss some of the recent enactments on the subject of marriage limitations in the American States.

Early legislation in America prohibiting marriage between coloured and white persons, and in western states with respect to Asiatic races, and the federal statute prohibiting polygamy, were upheld as being within the police power of the State and constitutional.

An Act passed in Connecticut in 1895 forbade the marriage of epileptics, imbeciles and the feeble minded. The minimum penalty was 3 years imprisonment, it being applicable also o unmarried persons, the object being to prevent undesirable child-births. The Act was attacked before the Supreme Court in 1905 as infringing the section in the constitution guaranteeing to the people "life, liberty and the pursuit of happiness;" but it was upheld (so far as epilepsy was concerned) as a reasonable limitation on the right of the individual to freely contract matrimony. But this Act which it rendered its violation

punishable did not make marriages in contravention of it void. In 1902 the Act was revised and 3 years was made the maximum penalty with no minimum prescribed. The Act of the Wisconsin State is in much the same terms. The Delaware State goes further. There it is unlawful " for an epileptic or a person of any degree of unsoundness of mind, or a person who is venereally diseased, or a person who is suffering from any other communicable disease the nature of which is unknown to the other party to the proposed marriage, to marry. The marriages are voidable at the instances of the innocent party. The penalty is a $ 100 fine, or in default 30 days' simple imprisonment. As the writer justly observes, the mild penalty of this 1921 Act compared with that imposed by the 1895 Act in Connecticut shows strikingly a decreased confidence in the power of the criminal law to prevent socially undesirable marriages.

Some of the States, Missouri, Montana Maine, latterly Wisconsin, have made such marriages " absolutely void," or " incestuous and void from the beginning " and so on.

To effectively prevent such marriages, and not merely punish those who contract them, some States make physical examination of parties an essential preliminary to the granting of a marriage license (Wisconsin, New York, etc.,) But an Oregon statute which was to go very far in this direction, making the decision of 3 physicians before the County Courty final with regard to " contagious or communicable venereal disease and mentality " of candidates to marriage, was beaten on referendum. The writer thinks that even if it had been passed it would have been unconstitutional, as the judgment of the physicians was substituted for that of the Court, and as the test, mentality, was so vague as to make the Act unenforceable for uncertainty, or as involving a delegation of legislative authority. The Indiana State took the line of providing for sterilization of certain criminals (held constitutional in some cases (Wash) and contra, as being " cruel and unusual " punishment, in others (Iowa)), and of the inmates of State ' Institutions (held unconstitutional as " unreasonable classification " (Mich)).

The writer concludes that a serious impediment in the enforcement of those statutes is the lack of an exact standard of deficiency. He expects with the advance of medical science better provision in the laws for the protection of future generations.