1933 *Present :* **Dalton A.C.J., Drieberg J., and Maartensz A.J.**

In re a PROCTOR.

IN THE MATTER OF A RULE ISSUED UNDER SECTION 19 OF THE COURTS ORDINANCE, NO. 1 OF 1889.

Proctor—Appropriation of client's money—Malpractice—Courts Ordinance, No. 1 of 1889, s. 19.

The appropriation of client's money by a proctor for his own use is an act of professional misconduct amounting to malpractice within the meaning of section 19 of the Courts Ordinance.

THE respondent proctor was called upon to show cause, under the provisions of section 19 of the Courts Ordinance, why he should not be suspended from practice or removed from the roll of proctors on the ground of misconduct.

Ilangakoon, Deputy S.-G. (with him *M. F. S. Pulle, C.C.*), appears as *amicus curiae* on notice from the Court.

Hayley, K.C. (with him *Soertsz, K.C., N. E. Weerasooria,* and *E. B. Wickramanayake*), for the respondent, instructed by S. R. Ameresekera.

Cur. adv. vult.

November 17, 1933. DALTON A.C.J.—

The respondent, a proctor of this Court, has been called upon to show cause, under the provisions of section 19 of the Courts Ordinance, why he should not be suspended from practice or removed from the roll of proctors on the ground of misconduct, in that he between September 18, 1931, and July 12, 1932, improperly retained or appropriated to his own use a sum of Rs. 701.95 belonging to Mrs. T. K. Doole, a client of his, and received by him on her behalf.

The admitted facts, very shortly put, are that Mrs. Doole, the present petitioner, and her husband in November, 1925, authorized the respondent to recover from one Agonona Bahaman the sum of Rs. 450 on a promissory note. As a result action No. 2,405 was instituted in the District Court, Tangalla, by the respondent on their behalf. On November 19, 1925, the defendant in that case consented to judgment, and on that day judgment was entered for the plaintiffs as prayed for with costs. Some years elapsed before any benefit was obtained by Mrs. Doole from the judgment she had obtained. There were certain matters, such as execution proceedings, a judicial sale, an application to set it aside and afterwards seizure of the proceeds by others, that intervened.

On September 3, 1931, the respondent obtained an order for the payment of the sum of Rs. 751.95 out of Court to him, on behalf of the petitioner. This order was made out in his name with the previous approval of the petitioner. The order for payment was then sent by him to the Imperial Bank of India, Colombo, the amount to be collected and paid in to his private account with the bank. This was done and the amount so credited on September 18, 1931, and it is clear, as his cheque book and pass book show and from his own statements, that as the money was credited to his private account he has been operating on it and has used this money for his own private purposes.

On June 20, 1932, the petitioner, having heard nothing from her proctor, so she says, visited him at Tangalla and asked him if he had not yet received the sum for her. The parties are not agreed as to what actually passed between them that day, but she did not receive any money from him. She thereupon the same day, having apparently returned to Hambantota, a distance of 27 miles, after seeing respondent, wrote a letter (exhibit P) to the District Judge, received by him on June 21, stating she had submitted a motion about a year earlier to withdraw money standing to her credit in the case in Court, but had got no money yet, and adding she could not understand the delay in the issue of the order of payment. She therefore asked that the payment order be issued to her and sent to Hambantota Kachcheri to enable her to draw it there. This letter was referred by the District Judge to the respondent for report. The latter had, however, on June 20, already commenced steps to collect from different sources a sum sufficient to pay the amount due to the petitioner and on July 12 he deposited the sum of Rs. 701.95 in Court, being the Rs. 751.95 received by him on behalf of his client less a sum of Rs. 50 which he claimed to be due to him by her for professional work done. Meanwhile the petitioner on July 4 sent in a petition (P 7) to the Attorney-General and thereafter petition (P 9) dated September 3, 1932, to this Court, on which this inquiry was based.

It is clear on the facts admitted by respondent that between the dates set out in the rule he appropriated to his own use the sum of Rs. 701.95 belonging to Mrs. Doole. He had no permission from her to do so. All he had to do was to receive the money on her behalf, and pay it over to her as soon as it could conveniently be done. A considerable amount of time was spent on the examination and cross-examination of the petitioner in respect of the circumstances leading up to the receipt of the money by respondents, her movements, different statements she made

from time to time, and her motive for making a complaint against the respondent. However contradictory and unreliable her statements may be on various matters, it does not alter the main fact in the case that her money was appropriated by respondent for his own use without her consent. The petitioner was almost as garrulous in the witness box as the respondent, and she was undoubtedly untruthful at times, her evidence on some points requiring corroboration before one could safely act on it, but some of the contradictions in her various statements were possibly due to her reluctance to admit she had forgotten anything and also to the length of time that had passed since some of the events happened or the earlier statements were made. There is no reason, however, to think she was actuated in making her complaint against the respondent by any reason or motive other than her desire to have her money, of which she was deprived for such a long period of time. It is clear she wrote to the District Judge immediately after her interview with the respondent on June 20, the fact that the latter took steps that very day to begin to collect the money to pay her showing that her demand must have been at least insistent, and possibly expressed in strong terms.

It is not denied by respondent that he operated on his Imperial Bank account between the dates mentioned in the rule for his own purposes, with the result that he was unable from that account to pay to his client the amount he had received on her behalf to which she was entitled. He had two other bank accounts, in the Ceylon Savings Bank and the Post Office Savings Bank, and it is not denied that at various dates between the dates mentioned in the rule and also on June 20 the total balance to his credit in all three accounts was very considerably less than the amount he had received on behalf of the petitioner. There is no suggestion on his behalf that he had kept that amount intact or had ever tried to do so. The position he takes up is that although he spent the money he had received on her behalf, he was always in a position to pay her, in other words that the money was always available in cash in his banks and in cash at home, on her request for payment, supplementing in other statements these two sources whence the money was available, *i.e.*, cash in the banks and cash in the house, with a further source, namely, uncashed vouchers in his possession for work done by him as Crown Proctor. This reply is no reply to the charge of appropriating her money to his own use, having regard to the relationship between the parties and the circumstances related, even if it were true. That respondent was in a position from his various assets to pay her if given time to raise the money there seems to be no doubt, but that he had cash available as he states it is impossible to accept.

With reference to cash available in the house, respondent in his first statement (exhibit P 6*a*) to the District Judge, dated July 12, stated that he had informed petitioner on June 20 that he required a few days' time to pay her the money " as I do not keep money in the house, and I would send her the money by post at the end of the month ". This he repeated in practically the same words in his reply to the Attorney-General (exhibit P 7*a*) of August 10. In his first statement to the District Judge, on September 19, he qualifies these statements slightly,

but made it clear that he did not keep much money in the house. In his subsequent statement of October 3, he does not mention this source. In his statement of January 26, 1932, he states he does not as a rule keep more than a couple of hundred rupees as cash, but he clearly says in that statement that he had sufficient money in the banks and in hand on June 20 to pay the petitioner in full without reference to unpaid vouchers. This, although from his subsequent statements clearly untrue, he repeats again on April 11, referring again only to cash in the banks and in the house and adding that the money was always available in this form to the petitioner since his receipt of the Rs. 751.95. Then in a long written statement of April 11, which he sent to the District Judge, to make, as he says, the position clear, in explanation of his practice and why he did not have the money available to pay over on June 20, 1932, to the petitioner (thus contradicting earlier statements), he says that his practice was to keep a limited quantity of cash in his almirah (cupboard), explaining why he preferred for his own safety to deposit his money in the banks and to keep vouchers uncashed until he wanted the money, mentioning a burglary at the house of his predecessor in the office of Crown Proctor. In his evidence in this Court the respondent stated he had, on June 20, cash in the house up to about Rs. 300, but in view of his earlier contradictory statements on this and other matters it is impossible to believe that that statement is true. If he had this large sum available in the house on that date, it is very difficult to understand the necessity of drawing to the limit of all his bank account; further, one would have expected him to have offered then and there to pay petitioner a large portion of her money. The difficulty of villagers cashing cheques has been referred to and no doubt exists, but petitioner was residing in Colombo, and there is nothing to suggest she could not cash a cheque in Colombo on her return there, if one had been given her. On the question of this sum of Rs. 300 being available in the house it is impossible to accept his statement. No doubt the witness arrived at that figure to make up the total of the available funds which he fixed at Rs. 1,100 in his affidavit marked R3, sworn on October 21, 1933, two days before the present inquiry commenced before us, other items, however which go to make up that sum as will appear below being also incorrect.

With regard to available funds in the Imperial Bank on June 20, respondent swore in the same affidavit (marked R3) to the effect that the sum of Rs. 319 was available at that date to pay the petitioner with the help of sums obtained from elsewhere. He confirmed the affidavit and repeated the statement to us in the witness box. One would have thought that, if his position was that his ability to pay the petitioner on June 20, 1932, in cash was an answer to the rule, at any rate by that time he would have made a detailed examination of his financial position on that date and that his statements on such a simple point would be reliable and true. An examination, however, by the Court of his pass book and cheque book, after the examination and cross-examination of the witness, showed that he had drawn two cheques on June 14 and 15 against his account, for Rs. 216.03 and Rs. 16.23, respectively, which were unpaid on June 20 and that he had included these two sums in the

balance Rs. 319 he gave as being still available on that date. It may be that he did not intend to make a false statement or to hide these two payments, but if so, it can only be part of the careless and casual attitude of the respondent adopted throughout the proceedings. The available balance in the Imperial Bank account should therefore on June 20 be Rs. 86.74 and not Rs. 319.

There is a further statement in the affidavit which is untrue. The respondent states that on June 20, 1932, at midday, when he returned from Court in the luncheon interval he looked into the various accounts and decided to cash an unpaid voucher for Rs. 158.87, which was to form part of the amount due to the petitioner which he was getting together to pay her. In cross-examination, however, he had to admit that he had receipted the voucher on June 14 and sent it to the Imperial Bank for collection, payment being made at the Hambantota Kachcheri on June 20, and the amount was credited to his bank account on June 24. His available balance of Rs. 86.74 at the Imperial Bank would be increased therefore by the amount of this voucher on June 24. The cashing of this voucher, however, clearly had nothing to do with the visit of petitioner and her request on June 20 to be paid what was due to her. His attempted explanation of this error and of statements in other instances which he had to admit were incorrect or untrue, and also regarding the destruction of his file in petitioner's case before it was concluded, was far from satisfactory or convincing. The untrue statements may not have been deliberate, but at any rate they clearly show the respondent has not been too particular in ascertaining whether or not his statements are reliable or based on fact, and it must necessarily result in the Court being reluctant, in view of such gross carelessness on his part, the truth or otherwise of these matters being particularly within his knowledge, to accept any statement by him without careful examination. He states he never took the complaint of petitioner seriously, and that attitude it seems one might conclude he has maintained almost to the end of this inquiry.

With regard to funds available from the proceeds of uncashed vouchers in his possession there seems to be no doubt that at the preliminary inquiry made into the complaint by the District Judge at the request of this Court, respondent sought to make out that he also had uncashed vouchers in his possession for work done as Crown Proctor, from which he was able to pay the petitioner. On September 19, 1932, when speaking of sources whence on June 20 he could obtain money to pay petitioner, he says, "I had some vouchers too". On October 3, 1932, speaking of what he did on June 20, he says, "I sent withdrawal forms to the Ceylon Savings Bank and Post Office Savings Bank and some vouchers or payment orders or both which I had". In his statement of April 11, 1933, sent on his own initiative to the District Judge for the purpose he says of making the position clear, he states that on June 20 to raise the money to pay to the petitioner, amongst other things, "I cashed some vouchers which I had". He then explains "These vouchers referred to were vouchers received by me from the Attorney-General and which I had kept with me without cashing, as it is not safe to keep much cash in the house, to be cashed when necessary". It has been

proved, and indeed respondent has to admit it, that that statement is quite untrue and he did not have a single uncashed voucher from the Attorney-General in his possession at that date.

A bank book was produced during the proceedings before us showing that respondent's wife had money in both Savings Banks, and an attempt was made to show that this money was the property of the defendant. It is not necessary to say any more than this, that respondent had no power to deal with those sums without the approval and consent of Mrs. Wikremanayake. It was not money at his disposal, and if he had in fact paid it in to her account, he had placed it beyond his reach. There is no reliable evidence to show it was his money, although it may represent gifts of money by him to her. The money had been deposited in small sums over a very long period of time without any withdrawals, and may well represent money that had been saved by her.

To respondent's affidavit (R3) he has attached a statement of his income from August 1, 1931, to June 30, 1932. This amounts to Rs. 11,007.22. It has admittedly been carelessly prepared, since in examination it was shown not to be accurate in every detail. Item 7 and part of item 8 were admitted to be included in item 1. The respondent then mentioned some other source of income that he had not included at all, to make up for this error. The third item is a sum of Rs. 1,250, being lease money received by him on September 1, 1931. This sum he says he kept in the house. An examination of his bank pass book, however, shows a cheque for Rs. 250 debited to his Imperial Bank account on September 19, very soon after the Rs. 751.95 had been paid in. This Rs. 250 was a cheque drawn on September 17 in payment to a jeweller at Matara. Respondent stated he had borrowed the money on a promissory note and was paying the sum in discharge of the note. He stated he could give no details of this transaction, but admitted the sum might have been borrowed by him some months before. It is difficult to understand why, if he had Rs. 1,250 cash in the house, respondent made no use of that to pay off the note but preferred to draw a cheque in favour of this jeweller at Matara and in effect paid him out of the proceeds of petitioner's money in his account at the Imperial Bank. It is difficult also to understand, if respondent's financial position was so sound as he stated, why he was borrowing money on promissory notes. This matter has to be considered by this Court because respondent has purported to answer the rule issued upon him by showing that he was always in a position to pay over the money to petitioner when asked.

With regard to the keeping of accounts in respect of his professional work respondent admits there was no record at all kept in his office of the receipt of this sum of money for petitioner. He rather vaguely referred one to the Court records which would show the transaction. How any business could be conducted on these lines it is difficult to understand. However, it is not necessary to say any more on that subject. With regard to the keeping of a separate banking account for clients' moneys, the advisability and, indeed, propriety of such a course never seem to have occurred to the respondent. That there was no difficulty in having such a separate account in his case is clear. He had three separate bank accounts. His counsel pointed out the keeping of a separate account

for clients' moneys would not prevent fraud, if the proctor was determined upon such a course. That is of course obvious, but it has repeatedly been pointed out in England, if not in Ceylon, that the payment of clients' moneys into the solicitor's private account is an irregular and indeed a most dangerous practice, since it renders it most difficult to keep the clients' money intact and affords a ready means for improper dealing with the money. Whether such moneys are paid into a bank or not, it is the proctor's duty to keep them intact if they are received by him to pay over to the client, and he had no right whatsoever to draw upon them or to use them for any purpose other than that for which he has received them. If any appreciable sums of clients' money are dealt with by proctors the advisability of using a bank for the custody of such sums is clear. If that is done the proper course is to open a separate account for that purpose. One would like to see this course made compulsory in Ceylon, as it has been done in England by the Solicitors Act, 1933. The effect of that Act has been concisely summed up in the following words :—" You must keep your clients' money in a separate account or accounts from your own office account ". It has been pointed out, however, that that Act cannot be more than a possible deterrent against wrong doing on the part of solicitors, although breach of the rules thereunder entails heavy penalties.

It is sufficient for the purpose of this case to consider the position of the respondent on June 20, 1932, when petitioner called on him, although it is clear that on various dates after the receipt of the money and prior to that date he was not in a position to pay petitioner the sum due to her from cash in his possession or at his disposal. On that date he had received her money, had made use of it for his own purposes, and was not in a position to pay it to her. Her money had been spent by him Even if his reply to the charge that he had cash elsewhere available on that day to pay her be regarded as an answer to the charge (which it is not) if proved to be true, he has failed to show it is true. This appropriation of his client's moneys is an act of professional misconduct on his part, a malpractice within the meaning of section 17 of the Courts Ordinance.

The charge of improperly appropriating the sum mentioned in the rule to the respondent's own use having been proved, it remains to be decided what order this Court should make thereon.

Reference has been made to the thirty years' practice of the respondent and to the fact that he has been Crown Proctor at Tangalla for the last fourteen years. He states he has had in the past a large practice for many years, but during the last few years owing to political work his practice has been much reduced. The evidence of respondent himself, however, shows great laxity in the control of his office and the work done there, for which he cannot disown responsibility, whilst his answer to this rule and the evidence he has given would almost lead one to think that he was really ignorant as to what was his duty in respect of clients' money entrusted to his care. That in such a person as respondent is very difficult to believe. The absence of desire to benefit himself and of bad intention can hardly, however, in the case of an experienced proctor be attributed to the want of knowledge and the want of prudence. A

proctor is in a position of great trust and confidence, and necessarily as a result has ample opportunity of taking advantage of such a position and of his clients if he be so minded. It must at once be said, however, that there is no evidence to support any finding that respondent had here any dishonest or criminal intention in appropriating this sum. His conduct in this case would seem to have been the result of great carelessness and negligence on his part of his client's interests and most lax ideas as to what was his duty in respect of trust funds received by him on her behalf.

While it is necessary that the order made in this matter should express the opinion of the Court of the respondent's conduct, there are circumstances which enable the Court to treat him with some degree of leniency. It is possible that some proctors have fallen into a belief that they are entitled to use a client's money for their own purposes so long as they are in a position to make payment within a reasonable time of demand being made of them, and the respondent's conduct suggests that he has acted on this belief. There can be no ground of any such belief hereafter. He says further that on no occasion before has a client complained of his not acting properly in the matter of money due to him, and the position he has attained in his practice as proctor can be accepted as proof of his enjoying the trust and confidence of his clients. While realizing what an order of suspension from practice will mean to the respondent, we feel that such an order is necessary in this case.

The order of the Court is that the respondent be suspended from practice in the office of proctor for a period of six months from this date, and that he further do pay into Court the costs of these proceedings in this Court which we fix in the sum of Rs. 300.

DRIEBERG J.—I agree.

MAARTENSZ A.J.—I agree.