Present: Garvin, Dalton, and Lyall Grant JJ. 1926.

ATTORNEY-GENERAL *v.* ELLAWALA.

In the Matter of an Application under Section 19 of the Courts Ordinance, No. 1 of 1889.

Proctor—Information filed by Attorney-General—Affidavit not admissible—Powers of Supreme Court—Member of Buddhist Temporalities Committee—Acceptance of bribe—Misconduct involving deceit—Courts Ordinance, No. 1 of 1889, s. 19.

Where, upon information filed by the Attorney-General, which was supported *inter alia* by an affidavit—which consisted of a verification on oath of the statements recorded by a Superintendent of Police under Chapter XII. of the Criminal Procedure Code—a rule was issued by the Supreme Court on a proctor under section 19 of the Courts Ordinance,—

Held, the Supreme Court had power to proceed with the investigation into the conduct of the proctor although the affidavit was not admissible in evidence.

The power of the Supreme Court to investigate charges against members of the legal profession is unfettered by rigid rules of procedure relating to the initiation of such procedings or by any strict definition of or limitation as to the nature of the material upon which such proceedings may be founded.

Where a proctor, who was a member of the District Committee appointed under the Buddhist Temporalities Ordinance, accepted a bribe for the purpose of procuring unfairly the lease of a temple land to an applicant for the same,—

Held, that he was guilty of gross misconduct involving deceit within the meaning of section 19 of the Courts Ordinance.

ON the application of the Attorney-General, who filed a petition setting out facts rendering Mr. Cyril Ellawala, the respondent, a proctor practising in Ratnapura, liable to be dealt with under section 19 of the Courts Ordinance, a rule was issued by the Supreme Court on the respondent to show cause why he should not be suspended or removed from the office of a proctor. To the petition was annexed among other documents an affidavit sworn to by Guy Melville Boustead. The charge which the respondent had to meet was that—being a proctor duly admitted and enrolled—he was guilty of a deceit, malpractice, crime, or other offence within the meaning of section 19 of the Courts Ordinance, in that he being a member of the District Committee of Ratnapura under the Buddhist Temporalities Ordinance did prior to the execution of a lease in favour of Guy Melville Boustead wrongfully, unlawfully,

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fraudulently, and deceitfully agree to accept, and thereafter did in fact accept, a sum of Rs. 12,500 as a bribe, inducement, and gratification for dishonestly securing and obtaining the acceptance of Boustead's tender and the execution in his favour of the said lease of 1,000 acres of temple land.

Allan Drieberg, K.C. (with him *R. L. Pereira* and *Canakeratne*), for the respondent.—The Attorney-General has launched the inquiry without investigation. It is based on an insufficient affidavit following on certain statements made to a police officer.

The objections to the affidavit are—

(1) Being evidentiary matter it must be a recital of facts in the first person.

[GARVIN J.—Is it your contention that these proceedings cannot be initiated without an affidavit?]

In the present case the machinery of the Court has been set in motion by affidavit. The production of the affidavit shows the intention to use it for the purpose of the proceedings (*vide* section 182 of the Civil Procedure Code). You cannot use for a civil matter a statement made for an extraneous purpose (*vide* section 438, Civil Procedure Code).

[GARVIN J.—Are you contending that if the affidavit is faulty the rule should be discharged?]

Yes! As Mr. Boustead, whose affidavit is relied upon, is not in the Island.

(2) It does not set out the address and decription of the person.

(3) It is a matter of express requirement that no person interested in the subject matter of the affidavit should have the affidavit sworn to before him.

1 Br. 170. See the dictum of Bonser C.J., ; also *Mohideen v. Cassim.*[1] *In re Bagley* [2] shows the English practice. According to the judgment of Bonser C.J. the English practice is applicable.

It is submitted that the affidavit cannot be looked at for the purpose of the proceedings.

If the Attorney-General supports the rule issued with an inadmissible affidavit, the rule should be discharged.

(4) By Chapter XII. of the Criminal Procedure Code, section 122 (3), statements made under it cannot be used for other purposes.

[1] *1 Br 280.* [2] *(1911) 1 K. B. 317.*

The affidavit is the production by the Attorney-General of a statement by Mr. Boustead in the course of proceedings made in the course of an inquiry. It is utilizing the statement made to the police to which an affidavit is attached. If the statement is produced *simpliciter* it is barred.

[The Court called upon the Solicitor-General to answer the preliminary objection.]

Obeyesekere, Acting S.-G.—The Supreme Court is not bound by the restrictions imposed by the Civil Procedure Code. See section 5 of the Code; in an inquiry such as this conducted under the Courts Ordinance.

The affidavit contains virtually the sworn testimony of Mr. Boustead. It may touch the evidentiary value of the affidavit. It is not a statement made under Chapter XII.

Your Lordship's Court can exercise jurisdiction upon a letter independently of section 120.

[DALTON J.—But a rule of evidence which is involved in the objection binds this Court.]

The statement is incorporated in an affidavit.

[GARVIN J. intimated to counsel that the Court was of opinion that the proceedings were initiated upon sufficient material, but that the affidavit was inadmissible as evidence.]

The evidence was then recorded.

Drieberg, K.C. (continuing).—Although the Supreme Court has general disciplinary powers, yet it must restrict itself to the specific charge under consideration. If the charge is entirely a different one, Your Lordships will direct the machinery of Court against the respondent in a different investigation, because otherwise the defence would be greatly embarrassed.

Disciplinary powers were exercised when the rule was issued to show cause. That stage has now passed, and the Court is sitting to investigate on a definite charge. The disciplinary powers must be confined to section 19 of the Courts Ordinance, and should not go further than that section. The section states how it can be exercised and when.

There is nothing wrong in proctors receiving commissions. (See the *Law Times* of March 13, 1926, where an advertisement appears that share brokers will share commissions with solicitors.)

Section 19 contemplates deceit, malpractice, crime, or other offence, and goes no further.

In Ceylon, unlike as in England, an agent receiving money, &c., is not guilty of a crime or other offence unless he is a public servant. "Malpractice" would suggest anything wrong done by a person

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in the exercise of his duties as an advocate or a proctor. It may extend to wrong acts done outside the profession only in cases where there is evidence to show that he was employed solely because he was an advocate or a proctor. *Archbold's Q. B. Practice, vol. I., p. 177.*

The Court will take notice where the conduct in question is one in his capacity as solicitor, and also outside it, if it is proved that he was employed owing to the fact that he was a solicitor.

In re Chandler[1] is a similar case. Trustee and solicitor. The solicitor was appointed a trustee merely because he was a solicitor.

Here there is no evidence to suggest that Ellawala was created a member of the committee because he was a solicitor.

The disciplinary powers of the Supreme Court must be confined to the four corners of the section. This is evident by comparing the present section with the corresponding section of the old Ordinance. Under the old section the Supreme Court can exercise disciplinary powers upon " reasonable grounds, " unlike as under section 19 of the Courts Ordinance.

Obeyesekere, Acting S.-G. (with him *Fonseka, Acting C.C.*).—The word " any " in the section is important. Any deceit, malpractice, &c., shows that the Courts must follow the English practice. It means deceit or malpractice, &c., either within the profession or out of it.

Counsel commented on section 90 of the Trust Ordinance.

Andrey on Solicitors, 2nd ed., p. 152—jurisdiction of the Court is not confined to acts done within the profession.

In re Weare.[2] *Re Hill*[3]—misconduct before admission is sufficient to entitle the Court to suspend or cancel the licence.

In re Beake [4] was cited. *Re A Solicitor*[5]—solicitor carrying on trade of a bookmaker was deemed to be guilty of misconduct.

Drieberg, K.C., in reply—The cases cited by the Crown can all be differentiated from this case. They are either (1) instances of solicitors guilty of misconduct outside their profession when employed in a capacity on the sole ground that they were solicitors; or (2) cases in which the Court interfered because they were convicted of an offence; or (3) case in which solicitors engaged themselves in occupations which the law specially prohibits.

Cur. adv. vult.

[1] *25 L. J. (Chan.) 39.*
[2] *(1893) Q. B. D. 2,439.*
[3] *(1868) L. T. 564.*
[4] *(1861) L. J. 13, 32.*
[5] *(1905) (93 Law Times) 838.*

The Court delivered the following order:—

May 20, 1926.

This is a proceeding for the suspension or removal from office of Cyril Ellawala, a proctor of the Supreme Court, on the ground that he has been guilty of conduct which renders him liable to be dealt with by this Court under the provisions of section 19 of the Courts Ordinance, No. 1 of 1889.

It was initiated by the Attorney-General, who on March 10 filed a petition in which was set out the facts which it was alleged rendered the respondent liable to be dealt with under the provisions of the Ordinance above referred to. To the petition were annexed the record of the District Court of Ratnapura bearing No. 4,373, an affidavit sworn to by Guy Melville Boustead, and copies of the documents marked A, B, C referred to in the petition.

In pursuance of a rule issued by this Court, Cyril Ellawala appeared to show cause against his suspension or removal from office.

A preliminary objection was raised by his counsel to the affidavit annexed to the Attorney-General's petition. It was urged that it was defective and inadmissible in evidence for the following reasons :—

(*a*) It did not give the address of the informant.
(*b*) It was not in the first person.
(*c*) It was not entitled as of the proceeding in which it was to be used.
(*d*) It was sworn to before the Assistant Superintendent of Police who made inquiry in the matter, and who for that reason was said to be an interested party.
(*e*) It was in effect a verification on oath of statements made in the course of an inquiry under Chapter XII. of the Criminal Procedure Code, which in themselves were not admissible in evidence except for the limited purposes specified in section 122 of that Code.

Upon these submissions was founded the further argument that the rule issued on material of which this affidavit formed a part should be discharged. It was conceded by counsel that a rule might have been issued on the information of the Attorney-General unsupported by any further material. This concession is fatal to the preliminary objection. The written information of the Attorney-General was before this Court when this rule was issued, and it is supported in Court by the Silicitor-General. The power of this Court to investigate charges against members of the legal profession is unfettered by rigid rules of procedure relating to the initiation of such proceedings or by any strict definition of or limitation as

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to the nature of the material upon which alone such proceedings may be founded. Whenever in the opinion of this Court an occasion has arisen to investigate a charge against an advocate or proctor which, if true, renders him liable to suspension or removal from office it has the power to initiate proceedings for the investigation of the charge. It is essential, not only in the interests of the profession, but of the public, individual members of which are constrained daily to commit their most vital interests to members of the legal profession, that cases of misconduct, and especially of dishonourable conduct, which come under or are brought to the notice of this Court should be fully investigated, and that their investigation should not be hampered or burked by mere technicalities. The rule issued in this case is well founded, and as we intimated to counsel at the hearing this preliminary objection must be rejected.

The next objection raised on behalf of the respondent was to the reception in evidence at the inquiry into the charge against him of the affidavit of Guy M. Boustead. It transpired that this gentleman had left the Island, and that there was no prospect of his returning to the Island for the next two and a half years. It is for the Court to decide whether it will order the proof of facts by affidavit. The serious nature of the charge made against the respondent, and the fact that such an order if made will deprive him of the right of cross-examination, are factors which will justify a refusal to make such an order. But the objection is pressed on another ground as well. The affidavit is not a statement of fact, but a mere verification on oath of the facts recorded in two statements annexed to the affidavit. The evidence of Mr. Peiris, Assistant Superintendent of Police, shows that these are the original statements recorded by him in the course of an inquiry held under Chapter XII. of the Criminal Procedure Code. Mr. Peiris obtained the sanction of the Police Court and vested himself with the right to exercise the powers conferred on an inquirer under Chapter XII., and these statements were recorded by him in pursuance of those powers.

The law prohibits the reception in evidence of such statements, except for the purposes specified in section 122 of the Criminal Procedure Code. It is not sought to use the statements for either of the specified purposes. The proposal is to give them as affirmative evidence of the facts stated therein. The statements are clearly not admissible for that purpose. It was contended by the Solicitor-General that they are admissible as part of the affidavit of which they must now be deemed to be part. The Solicitor-General is in no better position than if Mr. Boustead were present and stated in evidence " I swear that the statements made by me to Mr. Peiris and recorded by him are true. I produce the original record

made by Mr. Peiris." In that case counsel would surely be entitled to object to the production of the statements and to their reception in evidence. The fact that Mr. Boustead is absent but makes exactly the same statement in an affidavit cannot affect the respondent's right to have the statements excluded from consideration.

This objection was entitled to prevail and was upheld. It remains for us to consider whether the evidence led by the Solicitor-General establishes the charge laid against the respondent, and if so whether it is a charge which renders him to be dealt with under the provisions of section 19 of the Courts Ordinance.

The charge which the respondent was required to meet is as follows:—

> That he being a proctor duly admitted and enrolled has been guilty of a deceit, malpractice, crime, or offence within the meaning of section 19 of the Courts Ordinance, No. 1 of 1889, in that he being a duly elected member of the District Committee of Ratnapura constituted in accordance with the provisions of the Buddhist Temporalities Ordinance, No. 8 of 1905, did prior to the execution of a lease bearing No. 506 attested by W. E. Peiris, Notary Public, in favour of Guy Melville Boustead wrongfully, unlawfully, fraudulently, and deceitfully agree to accept, and thereafter in the month of October, 1925, did in fact accept, from the said Guy M. Boustead a sum of Rs. 12,500 as a bribe, inducement, and gratification for dishonestly securing and obtaining for the said Guy M. Boustead the acceptance of his tender and the execution in his favour of the said lease of 1,000 acres out of the temple land called and known as Galatura Nindagama.

The respondent is a proctor; he is also, and at all times material to this charge was, a member and secretary of the District Committee constituted under the Buddhist Temporalities Ordinance, No. 8 of 1905, for the District of Ratnapura. Potgul Vihare is a temple in the District of Ratnapura, and among the temporalities of that vihare is a large tract of land of about 5,000 acres known as the Galatura Viharagama, situated in the District of Ratnapura. Early in 1925 it was decided to lease the lands comprised in the Galatura Viharagama. Mr. Martin, a proctor practising in Kalutara and a gentleman of considerable wealth, heard of the proposal to lease these lands. He requested one Dissanaike to make inquiries for him, and himself paid two visits to Ratnapura. On his first visit he met Marambe Ratemahatmaya, who is also a member of the District Committee. On the second occasion he saw and spoke to Muttetugama Ratemahatmaya, the President of the District Committee. R. B. Dissanayake, who was acting for Mr. Martin, fixes

Mr. Martin's visit as having taken place in February. At that time Bennet Abeyesekere was negotiating a lease of these lands to a Dr. Philip of Kalutara. Dissanaike went to see the respondent, Mr. Cyril Ellawala, in the company of a Buddhist priest. Mr. Ellawala informed him that Bennet Abeyesekere had made an application on behalf of Dr. Philip, and that he would first see Dr. Philip and then see Mr. Martin. Dissanayake says that, on one of his visits with the priest, Mr. Ellawala said that the rent would be Re. 1 per acre for the first five years and thereafter Rs. 2 per acre, and added that Dr. Philip was prepared to pay Rs. 15,000 to the Committee for the trouble they were taking.

Dissanaike says that he travelled with Mr. Ellawala to Colombo. On their way they picked up Bennet Abeyesekere and visited Dr. Philip. He stayed outside in the car, while Mr. Ellawala and Abeyesekere went in. They returned after a while and said that everything was all right.

Mr. Martin tells us he decided not to pursue the matter further, and negotiations were broken off. The evidence of Mr. Martin was not challenged, and is unimpeachable. Dissanaike is now a poor man, having lost heavily in gemming, but nothing has been elicited in the cross-examination to which he was subjected which shakes his credit. He is a witness whose evidence can be accepted and acted upon without any hesitation. This evidence establishes that early in 1925 it was decided to lease the Galatura lands; that Mr. Ellawala was actively interesting himself in securing lessees for those lands; that Bennet Abeyesekere was in touch with him; that he (Mr. Ellawala) had decided that the rent for the lease should be Re. 1 per acre for five years and thereafter Rs. 2; and that in imparting this information to those who were acting for Mr. Martin he made the significant observation that Dr. Philip had promised to pay the members of the District Committee Rs. 15,000 for their trouble.

In June Mr. G. M. Boustead, who met Mr. J. L. B. Crozier in the course of business, intimated to him that he wished to buy or lease land, and requested him to inform him if it came to his knowledge that land was available.

Crozier met Abeyesekere, who told him of the proposal to lease 1,000 acres of land belonging to the Potgul Vihare; that he had got the information from Mr. Cyril Ellawala and was acting for him. He asked for particulars, and Abeyesekere wrote him the letter A 1 of July 22, 1925. That letter gives particulars of the title, extent, transport facilities, and then there appears the following:—

> Tender Rs. 20,000 as premium, thereafter Re. 1 per acre for the first five years, thereafter Rs. 2 per acre for the remaining period.

The rent of Re. 1 per acre for the first five years and thereafter at Rs. 2 is the same as the rent for which Cyril Ellawala stipulated in the conversation to which Dissanaike refers. Bennet Abeyesekere says he got the information from Mr. Ellawala, who asked him to secure a lessee, and on this point there is no reason to disbelieve him, nor is there reason to doubt that he was acting for Ellawala in trying to secure a lessee, as he is shown to have been doing in the case of Dr. Philip.

Crozier conveyed the information to Mr. Boustead, who was interested and desirous of pursuing the matter. Abeyesekere and Crozier then went together to see Mr. Boustead. There is a conflict of evidence as to what was told Mr. Boustead about this sum of Rs. 20,000.

Crozier's version is that Abeyesekere explained that Rs. 15,000 had to be paid to five persons—the incumbent of Potgul Vihare, his brother, and the three members of the District Committee; the balance sum of Rs. 5,000 was to be Abeyesekere's commission.

On the other hand, Abeyesekere maintains that the whole sum of Rs. 20,000 was to be his commission computed at the rate of Rs. 20 per acre. Whatever may have been said to Mr. Boustead, there is very little doubt that Abeyesekere did say to Crozier that the sum of Rs. 20,000 was to be applied as to Rs. 15,000 in payments to the five persons mentioned and as to the balance to himself as commission. The letter A1 commences with the statement "The particulars of the 1,200 acres are briefly as follows." Lower down in the same letter occurs the passage "Tender Rs. 20,000 as premium." These words, says Abeyesekere, were intended to convey the meaning that the sum of Rs. 20,000 was the commission payable to him. The explanation is absurdly untrue. In all probability the true explanation is that Abeyesekere was not prepared to commit to paper the real purpose towards which so large a part of the Rs. 20,000 was to be applied. One thing is clear on the face of the letter—the sum of Rs. 20,000 was not the result of a computation at Rs. 20 per acre because his letter refers to "the 1,200 acres."

Abeyesekere admits that he agreed to give Crozier half his commission, and says that amount was to be Rs. 10,000; Crozier says he was to receive half Abeyesekere's commission of Rs. 5,000 or, Rs. 2,500. After the transaction had been put through Abeyesekere gave Crozier the letter A2 addressed to Mr. E. L. F. de Soysa, with whom Abeyesekere had deposited the money he received, requesting him to pay Crozier Rs. 2,400. This, Crozier says, was his half share less a sum of Rs. 100 claimed by Abeyesekere as part of the expenses incurred. This letter strongly supports Crozier's statement. Abeyesekere admits he wrote this letter, but seeks to escape from the inference to which it gives rise by means

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of a very lame explanation. He says that he decided to pay only Rs. 2,400 to Crozier because he had not done as much as he should have done. It was Crozier who introduced him to Mr. Boustead, and it is evident that Crozier did all that he could be expected to do. When asked in what respect Crozier had failed to do his part Abeyesekere could give no explanation and sought another avenue of escape. He said Crozier had tricked him out of his dues in some other transaction. Abeyesekere was palpably lying. Whether the statement be true or false in fact, there can be no question he did tell Crozier that Rs. 15,000 was to be applied in payments to the temple authorities and the District Committee, and that the balance Rs. 5,000 was to be divided between them. There is no reason why Crozier should abandon three-quarters of his claim if indeed the agreement was that his share was to be Rs. 10,000, particularly when it is proved that Abeyesekere countermanded the order A2 and Crozier still remains unpaid. Moreover, there is the inherent improbability that so large a sum as Rs. 20,000 would be paid as legitimate commission or brokerage.

Crozier asserts that Mr. Boustead was told by Abeyesekere how the sum of Rs. 20,000 was to be applied. Abeyesekere says he stipulated for a payment of Rs. 20 per acre " for procuring the execution of the lease." Herbert Fonseka, a proctor, who came into the matter at an early stage, supports Crozier, in that he says a similar statement was made to Mr. Boustead in his presence, Crozier says that the statement was repeated at the office of Messrs. Julius and Creasy, a firm of solicitors, when the parties met there to take the opinion of Mr. Hughes, a member of the firm, as to title and that Mr. Hughes was present. Mr. Hughes, who was called for the defence, says he never heard such a statement being made. Either the statement was made and not heard by Mr. Hughes, or it was not made at all. It is urged that neither Crozier nor Abeyesekere would ever have made to Mr. Boustead a statement which was in effect an admission that the bulk of the sum of Rs. 20,000 was to be applied in bribery. Mr. Boustead is unfortunately not here. His version is not before us, and under all the circumstances we think the evidence as to the exact terms of the statement made to him should be treated as inconclusive.

The evidence in the case shows that the usual rate of commission is two and a half per cent. in the case of a sale computed on the purchase price, and in the case of the lease on the total amount payable by the lessee for the whole term of the lease. On this basis the commission ordinarily payable on this transaction would be Rs. 2,370. Mr. Boustead agreed to pay, and has in fact paid, about nine times the amount usually payable as commission. Why? Mr. Boustead knew that this land was the property of a Buddhist temple. He must have known what is common knowledge

in this Colony, that such land is vested by law in a trustee controlled by the District Committee. What need was there to promise to pay this exorbitant sum to any person for negotiating a lease when the trustee and District Committee were bound to consider each application honestly and on its merits?

Now, about the time when negotiations with Mr. Boustead and Abeyesekere commenced, upon an application made to the District Court to authorize a lease of 500 acres out of the Galatura Viharagama to Messrs. D. and R. Doulatram, two Indian gentlemen, the District Judge intimated that tenders should be called for. This was on July 30. The District Committee and the trustee took action accordingly, and advertisements were inserted in certain local papers calling for tenders for the lease of 1,000 acres of the Galatura Viharagama. So that early in the course of the negotiations to which Mr. Boustead was a party it was known that tenders were being called for which would be received up to September 12. Ultimately Mr. Boustead authorized Crozier to tender for him, and on September 11 Crozier went to Ratnapura and presented a tender on his behalf.

Why Mr. Boustead should have undertaken to pay Abeyesekere Rs. 20,000 if the tender he made through his agent Crozier should happen to be selected and a lease granted upon the terms proposed in his tender it is impossible to understand, except upon the assumption that there is significance in Abeyesekere's statement that it was to be paid to him for "procuring the execution of the lease."

When Abeyesekere acting with Crozier communicated to Mr. Boustead the information that the Galatura lands were to be leased, its extent, situation, nature of the title, and other like particulars and accompaned Mr. Boustead to the land for the purpose of inspecting it, he did all that he could honestly have done. It is idle to suggest that so large a sum as Rs. 20,000 was to be the remuneration for these services.

Whatever the actual terms of the statement to Mr. Boustead, the circumstances point strongly to the conclusion that he at least had reason to believe that a considerable part of the sum of Rs. 20,000 was not legitimate commission but was to be applied in influencing those in whose power it was to grant or refuse a lease.

Among those who submitted tenders was Mr. Proctor Martin. He sent in a tender asking for a lease in favour of himself and a Mr. Fernando, who Mr. Martin described as the richest man in Kalutara. Mr. Martin took the precaution of sending a copy of his tender to the District Judge. This copy shows that whereas Mr. Boustead was prepared to pay Rs. 1 per acre for the first five

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years and Rs. 2 per acre thereafter, Mr. Martin was prepared to pay Rs. 3 per acre for the first five years and thereafter Rs. 6 per acre of plantable land.

Mr. Boustead's tender was accepted.

In due course an application was made to the District Court for its authorization, and to this application was attached in a sealed envelope the tenders received in response to the notice. The District Judge has no recollection of having seen amongst them the tender of Mr. Martin. They remained in the sealed envelope till the envelope was opened again for the purposes of this inquiry. It was not amongst the tenders. The District Judge has no clear recollection whether the envelope tendered with the application was even opened by him. If it was, he says it was re-sealed. The seals now on the envelope are not the Judge's seal. His impression is that they still bear the seals with which they were sealed when they were submitted to Court. Mr. Martin did send a tender to the thustee, and the trustee tells us that in accordance with the instructions of the committee he took the envelopes unopened and handed them to Ellawala. He heard of Mr. Martin's tender for the first time in Court. It is said that if such a tender was received it would be idle to suppress it when it was known that the Judge had received a copy. But did Mr. Cyril Ellawala know that? It is true the trustee's proctor, Mr. Goonewardene, was aware of it, but there is evidence that he fell ill about that time and no evidence that he communicated his knowledge to Mr. Ellawala.

The District Judge tells us that when the trustee's application came before him the fact that Mr. Martin had sent in a tender was recalled to his mind and he had it brought up for consideration. Mr. Ellawala was present in Court instructing the trustee's proctor to press for the approval of the lease to Mr. Boustead. Mr. Martin's tender was objected to on the ground that he only wanted the " plantable " area, whereas Mr. Boustead was prepared to accept 1,000 acres, taking the good land with the bad. Mr. Martin's explanation is that he heard there was an area of solid rock which would grow nothing, and he only wanted that area excluded. It was urged before the District Judge that there was a challenge of the temple title, that Mr. Boustead had undertaken to pay the cost of any litigation he may have with persons asserting title against the temple out of his own pocket and take the risk of eviction. It was also urged that Mr. Boustead's standing was an assurance that the estate would be well developed and well maintained. The District Judge approved the lease to Mr. Boustead. As to the last of these points made by the trustee's proctor under Mr. Ellawala's instructions, Mr. Dharmaratne, a senior proctor of Ratnapura,

who often acts as the District Judge, and whose partner, Mr. Goonewardene, acted for the trustee in this very matter, says that he knew Mr. Martin and his standing and would himself have had no hesitation in accepting Mr. Martin as lessee. The lease to Mr. Boustead gave him the right to select and demarcate 1,000 acres out of the Viharegama. Such a concession is more than Mr. Martin ever asked for. It contains an express covenant by the lessor to warrant and defend title, and not a word to suggest that the cost of litigation was to be found by Mr. Boustead or that he had agreed to take the risk of eviction. The lease is in the usual form, and gives Mr. Boustead all the rights and remedies of a lessee. Mr. Cyril Ellawala is found instructing the trustee's proctor to inform the Judge that Mr. Boustead had taken upon himself liabilities and risks of an extraordinary character, whereas the written record of the agreement says no such thing. What it does say, legally construed, is the exact opposite of what the Judge was told.

Despite Mr. Martin's standing and the handsome rent he offered to pay, there was no pause to consider his tender or make any inquiry if further inquiry was thought to be necessary. It was immediately opposed by Mr. Ellawala, and Mr. Boustead's tender strongly pressed upon the Court for reasons which do not bear scrutiny.

Mr. Ellawala has elected not to give us an explanation of his scrutiny.

October 1 was appointed for the execution of the lease. Crozier was informed that Mr. Boustead would travel by train and wished to be met at Avissawella. He and Mr. Ellawala travelled from Ratnapura to Avissawella by motor. They met Mr. Boustead at the Avissawella Resthouse and journeyed back to Ratnapura in the car—Mr. Ellawala and Mr. Boustead occupied the back seat. This is the first time Mr. Ellawala is brought by the evidence into direct touch with Mr. Boustead. On arrival at the Ratnapura Resthouse, Crozier says he was told by Ellawala to wait downstairs as he wished to speak privately with Mr. Boustead, with whom he then went upstairs.

A short while later Mr. Peiris, a proctor and notary, arrived and the lease was executed. Mr. Boustead, who had omitted to bring his cheque book, wrote out three orders on his Bankers, the National Bank of India, on ordinary paper. One of these plain paper cheques for Rs. 2,000 he handed to the trustee, being payment in advance of rent for two years; another for Rs. 12,500 he handed to Mr. Cyril Ellawala; and the third for Rs. 7,500 to Bennet Abeyesekere. After the transaction was completed Mr. Boustead left for Avissawella by motor accompanied by Mr. Ellawala and Proctor Fonseka. They went to the resthouse. Mr. Fonseka says that as they were

about to leave he commenced to enter their names in the resthouse book. He entered his name and Mr. Boustead's name, and was about to enter Mr. Ellawala's name when he was seized by the arm by Ellawala, who asked him not to enter it. He says he had actually written the first two letters of the name Cyril. Visitors are requested to sign the resthouse book, and it is the usual thing to do so, though it is not invariably done. It is not a mere record of names of those who visited the resthouse, but is a book in which is entered against each name the amount of resthouse charges levied. The book shows that on October 1 Mr. Herbert Fonseka and Mr. Boustead were in the resthouse. In the next line appears a name, Piyadasa. It is not the name of anyone connected with this case. Then appears the name Crozier. He was not a member of the party, and if he came in it must have been later. It is quite clear that the name Crozier was written over what looks like a capital C and a small y in another handwriting. They do not appear in the line occupied by the name Piyadasa as one might have expected. Fonseka's explanation is that his sight is bad--he wears rather powerful lenses—and that he probably passed over a line. The lines are fairly close together, and this is probably a true explanation. The record speaks for itself. It supports Fonseka. The names of Mr. Fonseka and Mr. Boustead appear in the book. There is also the indication that a C and a y were written in the line now occupied by the name Crozier. Mr. Cyril Ellawala was there, but his name is not entered. Presumably because he did not wish it to appear.

Mr. Boustead travelled to Colombo by train. Mr. Fonseka and Mr. Ellawala travelled with him. The next morning Mr. Fonseka by arrangement went to Mr. Boustead's office at about 9.30. He met Mr. Ellawala and the trustee coming downstairs. Each of them had a cheque. He stopped them and asked Mr. Ellawala for the number of the cheque in favour of the trustee as he wanted the number for insertion in the attestation clause. He saw a cheque for Rs. 2,000 on the National Bank in favour of the trustee and in Mr. Ellawala's hand a cheque for Rs. 12,500. These cheques had obviously been given in exchange for the plain paper cheques.

Abeyesekere also came to the office and received a cheque for Rs. 7,500 in exchange for his plain paper cheque. The following cheques signed by Boustead Bros. have been produced:—

F 587084 cash or bearer Rs. 12,500.
F 587085 K. C. Dhamasekera Rs. 2,000.
F 587087 B. Abeyesekere Rs. 7,500.

They all bear the same date—October 2, 1925. They have all been cashed. K. C. Dhamasekera is the trustee.

It will be noticed that the first cheque is for Rs. 12,500 and the very next in the series is the cheque in favour of the trustee. There can be no doubt that this cheque F 587084 for Rs. 12,500 is the one Fonseka saw in Ellawala's hands. This cheque bears Mr. Boustead's endorsement. Counsel urged that if this cheque was cashed by Ellawala it would according to the practice of the bank have borne his signature as well. He suggests it could only have been cashed by Mr. Boustead. Whether Ellawala handed in the cheque and being known to the bank received payment himself, or whether he later met Mr. Boustead who obtained the cash for him we do not know. But there can be no real doubt that the cheque produced was cashed and the proceeds found its way into Ellawala's hands. That very day he is shown to have paid Rs. 3,000 in cash as part payment for a motor car. The absence of his name on the back of this cheque is in harmony with its absence from the resthouse book. This, it is said, is not conclusive. It is strong *prima facie* evidence. But what is conclusively proved is that at the execution of the lease Mr. Ellawala received a plain paper cheque for Rs. 12,500 out of the Rs. 20,000 promised by Mr. Boustead. Abeyesekere has received the balance Rs. 7,500, and there is not the slightest reason to doubt that Ellawala has had Rs. 12,500 cash. He has not denied it.

These are the principal points in the case presented against the proctor. The witnesses, Crozier and Fonseka, have been vigorously attacked in cross-examination, Crozier is an uncertificated bankrupt, and he has been committed to jail on civil warrants. He was at one time a broker, and he says his certificate was refused because he did not keep books. He claims to have settled with his principal creditors and that he has only a few minor debts outstanding. He has not been frank with Mr. Boustead; he concealed from him the fact that he was to get from Abeyesekere half this commission of Rs. 5,000, and arranged for Rs. 1,000 for himself, which he was paid. These circumstances and other blemishes in his evidence have been given the weight which they are entitled to receive. Having carefully considered and examined his evidence we are satisfied that this story in the main is true. Much of the story cannot but be true. On all points of importance his evidence has been explored and examined in relation to the whole case and may safely be acted upon to the extent indicated in that examination. Crozier has no motive for giving false evidence with intent to implicate Ellawala. Mr. Fonseka is a proctor whose name is on the rolls. His record is not a good one. But his contribution to the case against Ellawala is not considerable. On those points his evidence is so strongly supported by other facts and circumstances that there is no reason to reject it.

Bennet Abeyesekere was an obviously untruthful witness. At the time of this transaction he had been adjudicated an insolvent for the second time. He admits to having been fined Rs. 5 for bringing a false charge. He was called by the Solicitor-General with the knowledge that he had sworn an affidavit which was in the hands of the respondent. His evidence does not advance the case against Ellawala, except to the extent that he supports Mr. Fonseka's statement that a cheque for Rs. 12,500 written on a plain piece of paper was handed by Mr. Boustead to Mr. Ellawala. The leading feature of his evidence is his statement that Mr. Boustead did this at his request as a payment by him to Mr. Ellawala. Mr. Ellawala, he says, had from time to time lent him money and had otherwise shown him much kindness, so he decided to pay him Rs. 8,000 which he owed him and to give him an additional sum Rs. 4,500 to mark his gratitude. There is no record of any of the loans which go to make up this debt of Rs. 8,000. It is not shown in the statement of assets and liabilities filed by him in the insolvency proceedings. Mr. Ellawala did not prove for this amount, or at all in those proceedings. The debt, says Abeyesekere, was barred by limitation. His outstanding liabilities to creditors as shown by him in the insolvency proceedings is Rs. 12,500. He forgot his creditors, he forgot the arrangement he says he made with Crozier to pay him Rs. 10,000 out of this very sum of Rs. 20,000, and pays Mr. Ellawala Rs. 12,500, partly in settlement of moral obligations to the extent of Rs. 8,000 and as to Rs. 4,500 as a gift. Further comment is unnecessary. It is sufficient to say that such a story, particularly when it proceeds from the lips of a witness who has so strongly impressed us as utterly unworthy of credit, is one which we cannot accept.

Crozier and Abeyesekere were the intermediate links between Mr. Boustead and Mr. Ellawala, who did not come into direct touch until the day on which the lease was executed. Abeyesekere's connection with the matter of the lease of Galátura lands commenced early in the year. He was given the information by Mr. Ellawala and was requested by him to secure a lessee. It was Abeyesekere who was in negotiation with Dr. Philip, and Mr. Ellawala is proved to have actively interested himself in the mater to the extent of going down to Colombo to see Dr. Philip accompanied by Abeyesekere.

It is Mr. Ellawala who is approached by Dissanaike and the priest. He tells them what rent is expected, and makes the significant observation " Dr. Philip is prepared to pay the members of the Committee Rs. 15,000 for their trouble." Crozier and Abeyesekere get into touch, and Abeyesekere tells Crozier that Rs. 15,000 out of the sum he wanted from a lessee was to be paid to five persons, of whom three were the members of the District Committee. The

trustee was called as a witness and gave evidence. He was an ordinary Sinhalese villager, poorly clad, and obviously a person of poor standing. Yet he is the trustee of this temple and vested with the care of its valuable temporalities. Let him speak for himself as to his appreciation of his own position. The committee ordered him not to open the tenders. He did not open them. He was told to deliver the tenders to the committee. He handed them to Mr. Cyril Ellawala. His own estimate of his part in this affair is contained in his words "I did what the District Committee ordered me to do." The man is a cypher. The transaction was entirely in the control of the committee.

Abeyesekere is next brought into touch with Mr. Boustead, who agrees to pay Rs. 20,000 to him for procuring the execution of the lease. Is it conceivable that Abeyesekere did not proceed to ensure for himself the large share which he intended for himself by contriving the acceptance of Mr. Boustead's tender? A number of tenders were received. Mr. Boustead's tender was accepted despite the fact that Mr. Martin had made a tender at a far higher rental—a tender which at least merited some inquiry as to what he meant by "plantable" land. The District Judge is moved for sanction and the tenders are forwarded with the application. Mr. Martin's tender was not amongst them. It is the District Judge who is reminded of Mr. Martin's tender and brings it up for consideration. Mr. Ellawala instructs the trustee's proctor to oppose its acceptance and to press for the acceptance of Mr. Boustead's tender. He instructs him to urge reasons which are inconsistent with facts and obtains the District Judge's assent.

On the day appointed for the execution of the lease he is in close contact with Crozier and goes to Avissawella to meet Mr. Boustead and accompanies him to Ratnapura. He receives a plain paper cheque from Mr. Boustead for Rs. 12,500. He accompanies Mr. Boustead to Avissawella Resthouse. There he contrives that his name shall not appear in the visitors book. He travels to Colombo with Mr. Boustead and obtains a cash cheque for Rs. 12,500 and later cash.

These are the proved facts. What other conclusion do they lead to than that Mr. Ellawala had agreed with Abeyesekere, who was Mr. Boustead's agent, in consideration of a gratification to procure the acceptance of Mr. Boustead's tender and the execution of a lease to his favour. The tender was accepted, and Mr. Ellawala is shown to have successfully induced the Court to approve the tender by urging reasons which have already been fully stated and examined. He then gets into touch with Mr. Boustead, and possibly in consequence of a very natural distrust of Abeyesekere gets direct from Mr. Boustead a cheque for Rs. 12,500, the gratification which

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he had earned and in amount very little short of the sum of Rs. 15,000 which he said the Committee had been promised by Dr. Philip.

At the close of the case presented by the Solicitor-General, counsel for the respondent intimated that he did not propose to call his client. After consultation we decided in fairness to the respondent to invite him to consider again whether this was not a case in which the respondent should give us the benefit of his explanation. After a brief consultation between the respondent and his legal advisers we were informed that it was decided that the respondent should not enter the witness box and would take his stand upon his strict legal rights. It was contended that no case had been established. We cannot agree. The respondent has had every opportunity to place his explanation before us. He has elected not to do so. On the evidence before us we are of opinion that the charge against him has been established.

We should perhaps mention that at the commencement of these proceedings counsel submitted certain affidavits which he said he would move to read. Very shortly afterwards he desired to withdraw them, and did so with our leave in pursuance of his decision not to make any admission or concession and to ask that the charge be proved against his client.

It only remains to consider the submission that the charge, even if it be held to have been established, does not bring this case within the words "any deceit, malpractice, crime, or offence." It is contended that in the present state of the law the acts ascribed to the respondent in the charge do not amount to a crime or offence. His conduct, had he been a public servant, would have rendered him liable to prosecution and conviction under the Penal Code of the Colony. He is not a public servant, but the position he occupies is none the less one of great trust. Indeed, he is a member of a committee constituted by law and vested with large powers designed and directed to protect Buddhist Temporalities and ensure the due administration of such property by the trustee in whom it is vested.

A special provision prohibits any lease by the trustee except with the sanction of this committee. In this very matter, in respect of which the law vests in District Committees a special supervisory power over the trustee, the respondent, in gross breach of the trust reposed in him, accepts a bribe to advance the interests of one applicant when his plain duty was to secure the best possible terms for the temple; he is proved to have deceived the Court, and I have no doubt the trustee, and possibly the other members of the committee, and in the matter of his attitude towards Mr. Martin's tender to have acted in flagrant disregard of the very interests he

was there to protect. It is a question whether he placed it before the other members of the committee. He did all this to the end that he should ensure for himself the money he received at the completion of the transaction.

If he has not brought himself within the grip of the criminal law, he is proved to have been guilty of grossly dishonourable and reprehensible conduct. We leave it to the authorities to consider whether this case does not show that there is a real need for legislation on the lines of the Corrupt Practices Act.

It is said that he has not misconducted himself in the character of a proctor. We cannot admit that no matter how dishonourably a proctor may be proved to have acted he is not amenable as long as he was not acting in the character of a proctor. In the case of *Francis Blake*,[1] a solicitor, it was contended that the fraud which he was shown to have committed did not amount to a crime and was not committed in the course of a transaction in which he was acting as solicitor. The contention was rejected, and the following passage from *Lush's Practice, p. 218*, was quoted with approval:—

> "For any gross misconduct, whether in the course of his professional practice, or otherwise, the Court will expunge the name of the attorney from the roll."

In re Weare[2] is a case in which the same principles were applied. Lord Mansfield observes in *re Brownsall*[3]: "But the question is whether after the conduct of this man it is proper that he should continue a member of the profession which should stand free from all suspicion."

If this question be asked, whether the respondent after the conduct of which he has been guilty should continue a member of the honourable profession to which he belongs, there can be but one answer.

But it is said that he must be shown to have been guilty of a deceit or malpractice. Neither the research of counsel nor our own inquiries have discovered any cases in which these words have been construed in a similar context. In collusion with Abeyesekere he secretly engages in consideration of a bribe to procure the execution of a particular lease regardless of and to the detriment of the very interests he is appointed to protect. There can be little doubt he deceived the trustee, and so far as we know the fellow-members of his committee. He pretended to advise and consult with them frankly and honestly as a member of the committee whereas he was already pledged in advance and in Court he was guilty of misrepresentation of facts.

[1] *(1860) 30 L. J. N. S. Q. B. Com. Law 32.* [2] *(1893) L. R. 2 Q. B. D. 439.*
[3] *2 Cowp. 829*

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This conduct was inevitable if the object of his secret engagement was to be attained. It is gross misconduct which involves deceit.

We are of opinion that the respondent has made himself amenable to be dealt with under section 19 of Ordinance No. 1 of 1889.

In the circumstances of this case there is but one order which should in justice and in the interests of the profession and the public be made. It is that he be removed from the roll, and we order accordingly. This Court has the right and the power to restore him to the rolls if and when, to use the words of Lord Esher, "he continues a career of honourable life for so long as to convince the Court that there has been a complete repentance and a determination to persevere in honourable conduct."

GARVIN J.

DALTON J.

LYALL GRANT J.