1942 *Present :* **Howard C.J., Soertsz and de Kretser JJ.**

In re BRITO.

IN THE MATTER OF SECTION 17 OF THE COURTS ORDINANCE.

Proctor—Conviction for sending indecent post cards—Application to strike proctor off the roll—Unfit to remain member of profession—Powers of Supreme Court—Courts Ordinance, s. 17.

A Proctor may be struck off the roll for an offence which has no relation to his character as a Proctor. In such a case the question is whether the offence is such as makes a person guilty of it unfit to remain a member of the profession.

The Supreme Court has a discretion and will inquire into the nature of the offence and will not, as a matter of course, strike a Proctor off the roll merely because he has been convicted.

It is the duty of the Court to regard the fitness of the proctor to continue in the profession from the same angle as it should regard his fitness if he was a candidate for enrolment.

THIS was an application in which the respondent, a Proctor, was called upon to show cause why his name should not be removed from the Roll of Proctors.

C. S. Barr Kumarakulasinghe, for the respondent.—There is no absolute rule that a Proctor convicted of an offence should be struck off the roll. It is a matter of discretion. The offences committed by the respondent are punishable under the Post Office Ordinance (Cap. 146) and bear no relation to his character as a Proctor. There are many extenuating circumstances in the present case, and the respondent has been already sufficiently punished. Vide *In re Abeydeera* [1], *Re a Solicitor* [2] and *In re a Proctor* [3].

J. Mervyn Fonseka, S.-G. (with him *H. H. Basnayake, C.C.*), in support of the rule, was called upon to comment upon the decision in *In re a Proctor* (*supra*).—It is clear from the report of the argument in *In re a Proctor* that important decisions were not referred to. That case does not contain any definite statement of principle. For any gross misconduct, whether in the course of his professional practice, or otherwise, the name of a Proctor will be expunged from the roll—*Attorney-General v. Ellawala* [4]. The material question is whether the offence committed is such as makes the person guilty of it unfit to remain a member of the profession. The leading case on the subject is *In re Weare, a Solicitor* [5]. See also *In re Kandiah* [6] and *Jamshad Kanga v. Kaikhushru Bharucha* [7]. Attention may be invited to the fact that the respondent wrote not only the three post cards which are the subject-matter of the charge and conviction but also several other similar post cards.

[1] *(1932) 1 C. L. W. 359.*
[2] *(1889) 61 L. T. 842.*
[3] *(1938) 40 N. L. R. 367.*
[4] *(1926) 29 N. L. R. 13 at p 31.*
[5] *L. R. (1893) 2 Q. B. D. 439.*
[6] *S. C. Minutes of 2nd November, 1932.*
[7] *A. I. R. 1935 Bom. 1.*

Barr Kumarakulasinghe in reply.—In the case of *In re Weare, a Solicitor* (*supra*) the offence committed by the Solicitor was of a serious and offensive nature from the point of view of society. It is not so in the present case. The post cards in question were written by the respondent at a time when he was suffering under and obsessed with a deep sense of personal grievance and in circumstances which affected his balance of mind. The respondent is truly penitent now and has in his affidavit expressed his regret.

Cur. adv. vult.

September 16, 1942. HOWARD C.J.—

The respondent, a Proctor of this Court, has been called upon to show cause why his name should not be removed from the Roll of Proctors entitled to practice before this Court.

On November 6, 1941, the respondent was convicted in D. C. Colombo, No. N. 338/22,541 on three counts punishable under section 71 (1) of the Post Office Ordinance (Cap. 146), in that on September 2, 1940, October 11, 1940, and October 15, 1940, respectively, he did send by post a post card addressed to Mrs. Babsy Phyllis Ludowyk, having thereon words of an indecent or grossly offensive character. Upon these convictions the respondent was sentenced to six months' rigorous imprisonment on each count, the sentences running concurrently. On an application by way of revision to have the said convictions and sentences set aside, this Court on March 6, 1942, refused the said application and affirmed the said convictions and sentences.

In urging the Court to take a lenient view of the conduct of the respondent and not to proceed to the extreme step of removing the respondent's name from the Roll of Proctors, his Counsel has stressed the fact that the offences of which the respondent were convicted were not committed by him *qua* Proctor and have no connection with his conduct as such. And, therefore, so far as these offences are concerned, he must be treated like an ordinary individual. Mr. Barr Kumarakulasinghe, in contending, on behalf of the respondent, that this is a case in which, having regard to extenuating circumstances, the Court should exercise its discretion in his favour, has relied on the case of *In re a Solicitor; Ex parte the Incorporated Law Society*[1]. I agree with the dictum of Baron Pollock in this case when he states that "the mere conviction is not binding upon the Court in a case of this kind, and that the Court can, and may, and ought, to enter upon and weigh all the facts of the case, including any extenuating circumstances that exist in favour of the Solicitor, then I think our duty is to look and see upon what facts the judgment of the Court was based, &c." In the same case, Manisty J., stated that "it was not *qua* Solicitor that he committed the offence of which he had been convicted and that was pointed out (*In re Hill*[2]) as a very strong fact to be considered. So far as the offence was concerned he was like an ordinary individual." Mr. Barr Kumarakulasinghe also relied on the judgment of Hearne J., *In re a Proctor* (*supra*), in which case the Court thought that suspension from practising as a Proctor for twelve months was a sufficient penalty for a Proctor convicted of committing criminal breach of trust. In this case

[1] 61 L. T. 812. [2] 18 L. T. 564.

also the offence was not committed by the respondent *qua* Proctor. The Court in coming to a conclusion seems to have been guided solely by the two cases to which I have referred. Other cases in which reference was made to other matters which the Court should take into consideration when the offence was not committed *qua* Solicitor were not cited. We have had the advantage of considering these cases. In the case of *In re Weare, a Solicitor, In re The Solicitors Act, 1888* (*supra*), a Solicitor was convicted of allowing houses, of which he was the landlord, to be used by the tenants as brothels. In an application by the Incorporated Law Society to strike the name of the Solicitor off the roll, it was held that a Solicitor may be struck off the roll for an offence which has no relation to his character as a Solicitor, the question being whether it is such an offence as makes a person guilty of it unfit to remain a member of the profession. Conviction for a criminal offence prima facie makes a Solicitor unfit to continue on the roll: but the Court has a discretion and will inquire into the nature of the crime, and will not as a mere matter of course strike him off because he has been convicted. Both the other English cases I have cited were referred to in the judgment of Lord Esher in this case. In the course of his judgment, Lord Esher M.R., stated as follows:—

> "All these cases seem to me to show that it is not necessary that the offence, at all events, if it be a criminal offence, should be committed by the offending party in his character as an attorney; the question is whether it is such an offence as makes it unfit that he should remain a member of this strictly honourable profession. Where a man has been convicted of a criminal offence that prima facie at all events does make him a person unfit to be a member of the honourable profession. That must not be carried to the length of saying that wherever a Solicitor has been convicted of a criminal offence the Court is bound to strike him off the roll. That was argued on behalf of the Incorporated Law Society in the case of *In re a Solicitor, Ex parte the Incorporated Law Society* (*supra*). It was there contended that where a solicitor had been convicted of a crime it followed as a matter of course that he must be struck off; but Baron Pollock and Manistry J. held that, although his being convicted of a crime prima facie made him liable to be struck off the roll, the Court had a discretion and must inquire into what kind of a crime it is of which he has been convicted, and the Court may punish him to a less extent than if he had not been punished in the criminal proceeding. As to striking off the roll, I have no doubt that the Court might in some cases say, 'under these circumstances we shall do no more than admonish him'; or the Court might say, 'We shall do no more than admonish him and make him pay the costs of the application'; or the Court might suspend him, or the Court might strike him off the roll. The discretion of the Court in each particular case is absolute. I think the law as to the power of the Court is quite clear."

In his judgment in this case Lopes L.J. cited with approval the following passage from the judgment of Blackburn J., *In re Hill* (*supra*):—

> "We are to see that the officers of the Court are proper persons to be trusted by the Court with regard to the interests of suitors, and

we are to look to the character and position of the persons, and judge of the acts committed by them upon the same principle as if we were considering whether or not a person is fit to become an Attorney. If he has previously misconducted himself we should see whether the circumstances were such as to prevent his being admitted, or whether he had condoned his offence by his subsequent good conduct, the principle on which the Court acts being to see that the suitors are not exposed to improper officers of the Court."

The principles formulated *In re Weare* (*supra*) have been followed in various cases in Ceylon. In *Attorney-General v. Ellawala* (*supra*) the following passage from Lush's Practice, p. 218, was cited 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."

Again *In re Isaac Romey Abeydeera, a Proctor of the Supreme Court* (*supra*) Macdonell C.J. cited with approval the following passage from the judgment of Mukerjee J., in *Emperor v. Rajani Kanta Bose et al.*[1].

> "The practice of the law is not a business open to all who wish to engage in it; it is a personal right, or privilege limited to selected persons of good character with special qualifications duly ascertained and certified; it is in the nature of a franchise from the State conferred only for merit and may be revoked whenever misconduct renders the person holding the licence unfit to be entrusted with the powers and duties of his office. Generally speaking the test to be applied is whether the misconduct is of such a description as shows him to be an unfit and unsafe person to enjoy the privileges and to manage the business of others as a proctor, in other words, unfit to discharge the duties of his office and unsafe because unworthy of confidence."

The Chief Justice then applied this test and stated as follows:—

> "We are compelled by the facts proved and admitted in this matter to say that the respondent is not a person who should be allowed to manage the business of others as a Proctor because he has abused the confidence of those who entrusted their business and money to him as such Proctor."

We have applied the principles laid down in the various cases I have cited to the facts of the present case. The respondent was convicted of sending to Mrs. Ludowyk post cards of a particularly obscene, disgusting and abusive character. In doing so he has committed what can only be described as a personally disgraceful offence. It is said that he acted as he did because he was labouring under a deep sense of personal grievance. The fact that he could react in such a manner shows his unfitness for membership of an honourable profession. Ought any respectable Proctor be called upon to enter into that intimate intercourse with him which is necessary between two Proctors even though they are acting for opposite parties? In my opinion no other Proctor ought to be

[1] *49 Calc. p. 804.*

called upon to enter into such relations with a person who has so conducted himself.. The conviction is prima facie a reason why the Court should act. Section 16 of the Courts Ordinance is worded as follows:—

> "Subject to the rules hereinafter set out in the Second Schedule the Supreme Court is authorised and empowered to admit and enrol as advocates or proctors in the said Court, and as proctors in any of the District Courts of the Island, persons of good repute and of competent knowledge and ability."

How can it be said that the respondent is a "person of good repute"? Our duty is to regard the fitness of the respondent to continue in the profession from the same angle as we should regard it if he was a candidate for enrolment. In my opinion the disgracefulness of the offence leaves us with no option but to strike the respondent off the roll. If he continues a career of honourable life for so long a time as to convince the Court that there has been a complete repentance and a determination to persevere in honourable conduct, the Court will have the right and the power to reinstate him in his profession. For the time being the order is that he be struck off the roll.

SOERTSZ J.—I agree.

DE KRETSER J.—I agree.

Rule made absolute.