DHAMMIKA CHANDRATILEKE
v.
SUSANTHA MAHES MOONESINGHE

SUPREME COURT
BANDARANAYAKE, J.
AMERASINGHE, J. AND
DHEERARATNE, J.
4TH JUNE AND 12TH DECEMBER, 1992.

Attorney-at-Law – Disciplinary Rule – Deceit and criminal breach of trust – Judicature Act 42(2) read with the Supreme Court Rules 1978.

S. M. Moonesinghe an Attorney-at-Law carrying on business under the name and style of T. M. Associates received a deposit of Rs. 50,000/- from Mrs. Dhammika Chandratileke for which he issued a promissory note agreeing to pay interest at 24% per annum. He paid interest upto July 1988 and thereafter defaulted. After several requests and demands he issued Mrs. Chandratileke a cheque for Rs. 20,000/- on 1.2.89 encashable on 15.6.89. But the cheque bounced when it was presented as the account had been closed. Moonesinghe kept on putting off Mrs. Chandratileke and eventually on a complaint made by her, the Supreme Court issued a Rule under s.42(2) of the Judicature Act. The Rule alleged that Moonesinghe had committed deceit and criminal breach of trust in a sum of Rs. 50,000/-.

Held:

The respondent Moonesinghe should be removed of the office of attorney-at-law and his name struck off the roll.

Held: per Bandaranayake and Dheeraratne, JJ.

When formulating a Rule one has to bear in mind that s.42(2) of the Judicature Act recites a species of conduct to wit: deceit, malpractice, crime or offence which is viewed with disapproval by the Supreme Court. An Attorney-at-Law guilty of such conduct is liable to be disciplined by the Court in terms of s. 42(2) and Rules made in terms of Article 136(1)(g) of the Constitution.

The language of section 42(2) of the Judicature Act cannot be divided into parts, one variety of unconscionable conduct by an attorney-at-law permitting the courts to exercise its jurisdiction, to wit; deceit or malpractice, whereas some other variety of unconscionable conduct, to wit; crime or offence divesting the court of

its jurisdiction. It is essential the language of section 42(2) aforesaid be viewed as a whole and a Rule formulated in such a manner as to give a respondent sufficiently clear particulars as to the specific conduct that is being examined by the Supreme Court as disciplinary action is not confined to conduct or acts done in the course of an Attorney's professional practice. Thus in the course of giving particulars in the instant case, a reference has been made to the deception practised on the complainant by the respondent and a specific reference made to the transaction concerning the acceptance of money on trust on deposit to accrue interest and the breach of such trust described in the Rule as criminal breach of trust. This description in the Rule is legitimate and does in fact give the respondent a clear intimation of what is in the mind of the disciplining authority. It is nothing more than giving the respondent particulars of the matter to be examined by the Court.The Rule as formulated is therefore without exception correct upon the facts.

Per Bandaranayake, J.

"The Supreme Court admits a person of good repute and of competent knowledge and ability to the office of Attorney-at-Law, likewise the Supreme Court may admonish, reprimand, suspend or remove him from such office for guilty conduct of the species enumerated in s. 42(2) aforesaid as the case may be . . ."

"The use of the word 'charge' in s.42(3) of the Judicature Act must be understood in this way. The matters contained therein are descriptive of the course of conduct of an Attorney to be examined. The provisions of section 42(3) and (4) are consistent with this view of section 42(2). The Supreme Court here is exercising a disciplinary jurisdiction and not a penal jurisdiction. It is the exercise of a special jurisdiction conferred on the Supreme Court alone.

Per Amerasinghe, J.

(1) "Conviction for an offence is neither necessary, nor invariably sufficient, to make a person amenable to the disciplinary jurisdiction of this Court. It is not an irrelevant matter, for conviction for an offence is a *prima facie*, albeit only a *prima facie*, reason for this Court to act in disciplinary proceedings. The question in proceedings of this nature, is not whether an attorney-at-law has been, or may be convicted for or found guilty of an offence or not, and if guilty whether he should be punished, but whether, having regard to the misconduct established, he is a fit person to be continued on the roll, and if so, on what terms."

(2) "An attorney whose misconduct is criminal in character, **Whether it was done in pursuit of his profession or not** . . . may be struck off the roll, suspended

from practice, reprimanded, admonished or advised, even though he had not been brought by the appropriate legal process before a court of competent jurisdiction and convicted, and even though there is nothing to show that a prosecution is pending or contemplated".

(3) If there has been a charge and conviction in full force and effect "the attorney is debarred from traversing the conviction or from regarding the findings of fact on which the conviction is based, but it would be open to him to **confess and avoid,** that is to show by extra matter that, in spite of the conviction, he yet was not guilty of the crime or offence whereof he was convicted, **whereby he would be liable under section 42 of the Judicature Act."**

(4) "This Court is the sole arbiter of the question whether or not a person is fit to remain on the roll and, upon what conditions . . . **In the determination of that question,** its powers are unfettered and untramelled by the findings of fact, their interpretation, and the decisions of other judges and tribunals on the basis of those facts."

(5) "Even if there is no conviction, yet if the attorney's conduct is otherwise criminal in character, the Court would usually order the removal of his name from the roll, if it was of a particularly reprehensible nature."

(6) "Although criminal misconduct *prima facie* makes a person unfit to be an attorney-at-law, this, however, is not an inflexible rule."

(7) "A court acting in the exercise of its criminal jurisdiction is concerned with finding out whether the specifically, precisely and narrowly defined ingredients of an offence have been proved beyond reasonable doubt, strictly in accordance with the formal rules of evidence and procedure laid down for that purpose, if it finds a person guilty, it pronounces a sentence of punishment. The punishments it may impose are statutorily prescribed (see Chapter III of the Penal Code), and may, in certain instances, include death, rigorous or simple imprisonment, whipping, forfeiture of property or fine. Our task, in the exercise of the disciplinary jurisdiction vested in us in terms of section 42 of the Judicature Act, is the determination, based on an appropriate degree of proof, having regard to the nature of the charge, whether a person we formerly admitted should be struck off the roll, suspended, reprimanded, admonished, or advised for his unprofessional conduct. In the performance of that task, this court proceeds with its investigations under section 42 of the Judicature Act, unfettered by invariable and inflexible standards of proof or of rigid rules pertaining to procedure and the admissibility of evidence.

(8) "I am inclined to think that the word "offence" in section 42(2) of the Judicature Act has a wider meaning than that given to it in the Penal Code and Code of Criminal Procedure. I think it means, **disciplinary offence** and includes, conviction for an offence by a competent court, conduct that is criminal in character, malpractice – whether the professional misconduct involves moral turpitude or not – deceit, and all other forms of unprofessional conduct in the sense of misconduct the Court ought to have taken into account at the time of the admission of any attorney-at-law in deciding whether he was a person of good repute."

Cases referred to:

1. *Bhandari, v. Advocates Committee* (1956) 3 All ER 742, 744.
2. *Re Dematagodage Don Harry Wilbert* (1989) 2 Sri LR 18, 28, 29, 30, 32, 35.
3. *Re Two Solicitors, ex parte Incorporated Law Society* (1909) 53 Sol. Jo. 342.
4. *Hall v. Jordan* (1947) 1 All ER 826.
5. *Younghusband v. Luftig* (1949) 2 All ER 72.
6. *Wilson v. Inyang* (1951) 2 All ER 237.
7. *In re Weare* (1893) 2 QB 439, 442, 445, 446, 447, 449, 450.
8. *Re Solomon Victor Ranasinghe* (1931) 1 CLW 47.
9. *The Solicitor-General v. Chelvatamby* (1938) 13 CLW 80.
10. *Solicitor-General v. Cooke* (1939) 41 NLR 206.
11. *Re Aiyadurai* (1950) 52 NLR 510.
12. *Solicitor-General v. Abdul Cader* (1958) 60 NLR 49.
13. *Re Fernando* (1959) 63 NLR 233.
14. *Short v. Pratt* (1822) 1 Bing. 102 Vol. 130 (1912 Ed.) ER 42.
15. *In the Matter of Knight and Hall* (1823) 1 Bing. 142 Vol. 130 (1912 Ed.) ER 58.
16. *Re Hill* (1868) LR 3 QB 543, 545, 548.
17. *Re a Solicitor* (1907) 51 Sol. Jo 212.
18. *Re P. P. Wickremasinghe S.C.* Rule 2 of 1981, S.C. Mins. of 19.7.82.
19. *Re Edgar Edema* (1877) Ramanathan 380, 384.
20. *Stephens v. Hill* (1842) 10 M & W 28 Vol. 152 ER (1915 Ed.) 368.
21. *Re Isaac Romey Abeydeera* (1932) 1 CLW 358, 359.
22. *In re a Proctor* (1933) 36 NLR 9.
23. *In re C. E. de S. Senaratne* (1953) 55 NLR 97, 100.
24. *Re Donald Dissanayake* Rule 3 of 1979 S.C. Minutes of 31.10.1980.
25. *Re Rasanathan Nadesan* Rule 2 of 1987 S.C. Mins. of 20.5.1988.
26. *Re Vallance* (1889) Times 9 April & 29 October.
27. *Re Knight* (1823) 1 Bing 142.
28. *Re Thirugnanasothy* (1973) 77 NLR 236, 239.
29. *Re Garbett* (1856) 18 CB 403.
30. *R v. Southerton* (1805) 6 East 126.
31. *Re W. H. B.* (1842) 17 L. Jo. 165.

32. *Re Kandiah* (1932) 25 CLW 87, 88.
33. *In re A. P. Jayatilleke* (1933) 35 NLR 376, 377, 378, 445.
34. *Attorney-General v. Seneratne* (1958) 60 NLR 77.
35. *Re Brito* (1942) 43 NLR 529, 533.
36. *Undugodage v. Rasanathan* (1989) 2 Sri LR 165, 167.
37. *Re Arthenayake* (1987) 1 Sri LR 314, 341, 346.
38. *Re Abeydeera* (1932) 1 CLW 359, 362.
39. *Ex parte Brounsall* (1778) 2 Cowp. 829 Vol. 98 ER (1909 Ed.) 1385.
40. *Re an Advocate* (1951) 52 NLR 559, 560.
41. *Re Bradley* (1901) 36 L. Jo. 351.
42. *Re Page* (1823) 1 Bing. 160.
43. *Attorney-General v. Ellawala* (1926) 29 NLR 13, 17, 18, 31.
44. *Solicitor-General v. Ariyaratne* 1 CLW 400.
45. *Re Gaston K. de Vaz* Rule 2 of 1988 SC Minutes of 29 May 1989.
46. *Attorney-General v. Ariyaratne* (1932) 34 NLR 196.
47. *Re Cooper* (1898) 67 LJQB 276.
48. *Re Watts, Ex parte Incorporated Law Society* (1899) 43 Sol. Jo. 192.
49. *Re Jellicoe* (1899) 43 Sol. Jo. 192.
50. *Re A Solicitor* (1955) Times 22nd and 27 October.
51. Re A Solicitor (1891) 7 TLR 420.
52. *Re A Solicitor* (1896) 40 Sol. Jo. 389.
53. *In re A Proctor* (1938) 40 NLR 367.
54. *Re a Solicitor, Ex parte Incorporated Law Society* (1889) 37 WR 598, 61 LT 812.
55. *Re M. Shelton Perera* Rule 2 of 1987 S.C. Minutes of 28.9.1979.
56. *Re de Soysa* (1954) 56 NLR 287.
57. *Re Dharmalingam* (1968) 76 NLR 94.
58. *In re Simon Appu* (1900) 4 NLR 127.
59. *In the matter of K* (1900) 4 NLR 155.
60. *In re Dharmaratne* 1862 Ramanathan 134.
61. *Re the complaint of Dr. C. J. Kriskenbeck against A. J. a Proctor of the Supreme Court* (1878) 3 NLR 242.
62. *The Solicitor-General v. Jayawickrema* (1952) 53 NLR 320.
63. *In re Batuwantudawa* (1950) 51 NLR 513 and (1967) 72 NLR 198.
64. *Re Wijesinghe* (1939) 40 NLR 385, 387.
65. *Re D* (1888) 23 L Jo. 67.
66. *Emperor v. Rajani Kanta Bose et al* 49 Calcutta 804.
67. *In the matter of an application to be readmitted and re-enrolled as an Advocate of the Supreme Court* (1936) 39 NLR 476.
68. *Re King* (1845) 8 QB 129.
69. *Re Hall, Dollond v. Johnson* (1856) 27 LT (OS) 230.
70. *Re Blake* (1860) 3 & E 34, 37, 40; 30 LJ QB 32, 34, 35.
71. *Re Strong* (1884)) 53 LT (N S).

72. *Re Hopper* (1890) 34 Sol. Jo 568.
73. *Myers v. Elman* (1939) 4 All ER 484, 497.
74. *Sittingbourne and Sheerness Rail Co. v. Lawson* (1886) 2 TLR 605.
75. *Simes v. Gibbs* (1838) 6 Dow 310.
76. *Brendon v. Spiro* (1937) 2 All ER 496.
77. *Re A Solicitor, Ex parte Incorporated Law Society* (1906) 93 LT 838.
78. *Ex parte Champ* (1843) 2 LT (OS) 168.
79. *Bunny v. Judges of New Zealand* (1862) Moo. P.C.C. 164.
80. *Re A Solicitor, Ex parte Incorporated Law Society* (1898) 1 Q B 331.
81. *Re Iles* (1922) Sol. Jo. 297.
82. *Macauley v. Sierra Leone Supreme Court Judges* (1928) A C 344.
83. *Re Seneviratne* (1928) 30 NLR 294.
84. *Re Monerasinghe* (1913) 3 CWR 370.
85. *Re W. A., P. Jayatilleke* (1953) 56 NLR 49.
86. *Re Ranasinghe* (1951) 15 CLW 26.
87. *Re Senaratne* (1928) 30 NLR 299.
88. *In the matter of an application for the readmission as a Proctor* 39 NLR 517.
89. *Attorney-General v. Ellawela* (1931) 29 NLR 32.
90. *Re Wickremasinghe* (1945) 46 NLR 204.
91. *Re Salgadoe* (1936) 6 CLW 125.
92. *Re Arumugam* S.C. Application 7 of 1988 Spl. S.C. Mins. of 13.12.1988.

Proceedings on Rule Nisi to remove Attorney-at-Law from roll of attorneys.

N. R. M. Daluwatte, P.C. with *Rohan Sahabandu* for the Bar Association of Sri Lanka.

Hector Yapa, Deputy Solicitor-General with *Asoka de Silva, Deputy Solicitor-General for Attorney-General.*

Respondent absent and unrepresented.

Cur. adv. Vult.

5th June, 1991.

BANDARANAYAKE, J.

Upon the complaint of Mrs. Dhammika Chandratileke of a fraud perpetrated against her by Susantha Mahes Moonesinghe, Attorney-at-Law, the Court decided to notice the Respondent Attorney. Copies of the affidavit of Mrs. Chandratileke along with a notice calling for an explanation were despatched through the usual channels to the Fiscal

for service and to the Respondent's known residences in view of the provisions of s. 42(3) of the Judicature Act, These attempts failed.

Section 42(2) of the Judicature Act provides as follows:

> "Every person admitted and enrolled as an Attorney-at-Law who shall be guilty of any deceit, malpractice, crime or offence may be suspended from practice or removed from office by any three judges of the Supreme Court sitting together."

Numerous registered letters sent to the Respondent's known address were returned undelivered except for one sent to his address in Panadura (which was also the address of the Respondent according to a warrant of detention made against the Respondent by the Magistrate's Court of Mount Lavinia in cases 56280 and 60932) and which was not returned. This is significant. The Fiscal reported his inability to effect personal service as the Respondent could not be found. According to a letter written by the Respondent dated 16.2.1990 to A. L. M. Ameen, President's Counsel, who was a witness at the inquiry (the letter being produced) the Respondent had left the country. That letter bears no address of the sender. The court proceeded to frame a Rule against the Respondent which it did on 24.12.90.

The Rule referred to the following amongst other matters:–

> "And whereas the said complaint of the said Mrs. Dhammika Chandratileke and other information available to this court discloses that you have committed –

(a) deceit; and

(b) criminal breach of trust of the (said) sum of Rs. 50,000/- (falling within the ambit of section 42(2) of the Judicature Act No. 2 of 1978).

And whereas this Court has decided that proceedings for suspension or removal from the office of Attorney-at-Law should be taken against you under section 42(2) aforesaid read with the Supreme Court Rules 1978.

These are therefore to command you in terms of section 42(3) of the Judicature Act of 1978 to appear before this court and show cause . . . why you should not be suspended or removed from office of Attorney-at-Law . . .

The Respondent did not appear before the Court nor was he represented on the date fixed for inquiry. Fiscal reported that summons could not be served on the Respondent and the registered letters sent to the Respondent containing the summons were returned undelivered. The Court postponed the inquiry for 21.2.91.

On 21.2.91 also the Respondent was absent and unrepresented. Summons were returned undelivered. The case was postponed for 25.3.91. Mr. Daluwatte, President's Counsel representing the Bar Association of Sri Lanka undertook to provide the address given by the Respondent to the BASL. Registrar was directed to reissue summons to that address which was done. On 25.3.91 again the respondent was absent and unrepresented and summons returned undelivered. At this stage Court directed substituted service by publication in the newspapers. This was done. Inquiry was refixed for 4.6.91. Once again the respondent was absent and unrepresented. But the Court decided to proceed with the inquiry *ex parte* and the inquiry commenced. Whilst the inquiry was in progress Registrar, Supreme Court, received a letter at 11.45 a.m. dated 2.6.91 purporting to be from a Law Firm in the Seychelles stating that they were acting for the respondent and that they were instructed that the respondent had got to know about the pending Rule against him before the Supreme Court of Sri Lanka from the newspapers and prayed that the respondent be granted a further date so that arrangements could be made for the respondent to be represented at the inquiry. Despite the uncertainty of the genuineness of this communication the Court postponed the inquiry for 12.11.91 and the writer from Seychelles, to wit: Director, Francis Rachel Law Centre, Francis Rachel Street, Victoria, Seychelles was so informed. On 12.11.91 as the respondent was again absent and unrepresented inquiry proceedings of 4.6.91 were adopted by the Court with the consent of all Counsel present and further evidence of Hatton National Bank officers were taken and the inquiry concluded. No further communication has been received from the Seychelles Law Centre.

The evidence recorded on 4.6.91 was as follows: Mrs. Dhammika Chandratileke, Assistant Registrar, University of Colombo, who was the complainant, stated that on the recommendations of Mr. Mahathanthila, Registrar of the University at that time, the complainant invested Rs. 50,000/- with the respondent, S. M. Moonesinghe, carrying on business under the name and style of "T. M. Associates". That was on 27.7.87. In consideration of that she was issued Promissory Note P2 for the repayment of the capital and interest at 24% per annum but with a deduction of Rs. 2000/- being 1st month's interest, amounting to a sum of Rs. 72,000/-. She had earlier visited T. M. Associates on 19.1.87 and met the Respondent Mahes Moonesinghe and having spoken to him and on his promise to pay 24% interest on a deposit which worked out to Rs. 2000/- per month, she handed over the capital sum of Rs. 50,000/- to him. The respondent issued to her promissory note P2 which was signed by him in her presence. The document P2 contains an undertaking that – quote – "I, the undersigned Susantha Mahes Moonesinghe . . . promise to pay Mrs. Dhammika Chandratileke . . . the sum of Seventy Two Thousand currency for value received with interest thereon at the rate of 24% per centum per annum, from date hereof." It was Mrs. Chandratileke's evidence that the first month's interest amounting to Rs. 2000/- was deducted and the note given for Rs. 72,000/-. She also stated that she has received interest in October 1987, did not receive interest for November 1987 and received interest from December 1987 to July 1988 totalling Rs. 18000/-. She had to go to the respondent's office to collect these sums of monthly interest and sign a registrar maintained by him. A yellow card issued to her she had lost. The July 1988 interest was given later. Thereafter in August 1988 the Respondent informed her that he was financially bankrupt and that the auditor was checking his balance account. Thereafter Respondent sent letter P3 informing her that his office was shifting to Duplication Road. Witness identified the signature of the Respondent in P3. Thereafter witness visited the office at Duplication Road (R. A. de Mel Mawatha) more than 20 times. She met the respondent two or three times and asked for the return of the capital sum invested. Respondent replied that he did not have money to settle her and gave her a post-dated cheque P4. This cheque was issued on the Hatton National Bank and dated 15.6.89 the payee being Mrs. Chandratileke for the amount of Rs. 20,000/-. When issuing the

cheque the respondent made an endorsement on P2 to the effect that witness received Rs. 20,000/- as return of part capital by cheque No. 293718 dated 15.6.89 drawn on Hatton National Bank. Witness signed endorsement and identified same. The cheque had been signed, witness says, by M. Moonesinghe and the cheque Number was 293718. This cheque was issued to her by the respondent on 1.2.89. Witness said she kept the cheque with her until the first week of July 1989 because she did not have a current account in a Bank. She handed it to Mr. Mahatantila to be presented for claim through his bank account (the People's Bank, Union Place Branch, Colombo) which he had done on 13.7.89. She endorsed the cheque when she gave it to Mahatantila. Later Mahatantila returned the cheque to her as it had been returned to him with an endorsement "Account closed on 13.3.1989" in red ink.

Witness thereupon complained to the Police. Witness handed over the original cheque to OIC Kollupitiya on 12.8.89. She also complained to the CID Fraud Bureau. A certified copy of her complaint to the Police was produced P5. Witness said that to date she has not received Rs. 20,000/- or other part of the capital sum invested from the respondent. The witness was tendered for cross-examination by Mr. N. R. M. Daluwatte, President's Counsel representing the Bar Association of Sri Lanka. Her evidence was not challenged.

Witness Mahatantila confirmed that he advised Mrs. Chandratileke to invest money with T. M. Associates. He also confirmed that Mrs. Chandratileke gave his cheque P4 for encashment through his Bank account which he did after 15.6.89 and that it was returned by the Bank with a note reading "account closed" on 13.3.89 in red ink. Witness returned the cheque P4 to Mrs. Chandratileke.

Witness M. L. M. Ameen, President's Counsel produced a photocopy of a letter dated 16.6.90 written to him by Susantha Mahes Moonesinghe, Attorney-at-Law and Notary Public marked P1. The original of P1 had been produced in a case in Magistrate's Court, Mount Lavinia. In the letter P1 the writer has stated that he had considerable difficulty in appearing before the Magistrate's Court as the CID who were investigating into a complaint had been following

him on such occasions. Mr. Ameen also said that he received a telephone call from Mahes Moonesinghe from Singapore after he received P1 (16.2.90) and that he informed Moonesinghe that a Rule had been issued against him by the Supreme Court and that the matter was called before the Court and that as he was not present it was put off. Moonesinghe had replied that he had heard about the Rule. Moonesinghe did not indicate when he would come to Sri Lanka. Mr. Ameen had appeared for Moonesinghe in the Magistrate's Court but was not representing him in the matter of the Rule.

Witness J. A. D. R. Jayasinghe, Acting Registrar, Magistrate's Court, Mount Lavinia, produced the original of the letter P1 (marked also as P1). The letter is dated 16.2.90 and has been written to Mr. M. L. M. Ameen, Attorney-at-Law on the letter-head paper of Susantha Moonesinghe, Solicitor and Notary Public. No address is given of the sender. Mr. Ameen identified the signature of Susantha Mahes Moonesinghe. It states that the writer had to leave the Country and remain out until such time as matters are sorted out. The letter refers to two cases filed against the writer to wit: M.C. Mount Lavinia Cases Nos. 56280 and 60932 and requests Mr. Ameen to continue to appear in those cases on his behalf in his absence. This witness was submitted for cross-examination but no questions were asked of him.

Next, evidence regarding the Bank account of the respondent at the Hatton National Bank was led. S. M. Moonesinghe had opened Account No. 330788 with the Hatton National Bank, City Office on 31.1.89 with a cash deposit of Rs. 20,000/-. Thereafter the respondent had made deposits to the credit of this account and made withdrawals. Witness produced statement of account P6. Cheque P4 bearing No. 29378 refers to account No. 330788 aforesaid. The statement shows that the account had been opened on 31.1.89 and closed on 13.3.89. Sums of money had been frequently deposited and frequently withdrawn from this account in the short period of its existence. On 13.3.89 the credit balance was Rs. 24.25. One sees the unsatisfactory state of this account. For example, on 3.3.89 the credit balance was only Rs. 339.25. Then there has been a deposit of money amounting to Rs. 15000/- by 7th March and again a balance of only Rs. 24.50 by 13.3.89. This shows a pattern of deposits and quick withdrawals. When the respondent

issued P4 the post-dated cheque dated 15.2.89 for Rs. 20,000/- on 1.2.89 the respondent had opened this account only the previous day (31.1.89) with a cash deposit of Rs. 20,000/-. Then on 15.2.89 the respondent had deposited Rs. 30000/- by 5 cash deposits and on the same day withdrawn Rs. 25,000/- by cash cheque leaving a balance of only Rs. 5,694.25 to meet the cheque P4 for Rs. 20,000/-. Undated letter (a copy of which was produced as P7) was sent by the Senior Manager of the Bank, J. M. J. Perera informing the respondent of the closure of his account No. 330788 for unsatisfactory conduct. This letter states . . . "We regret to note that within the short period (since 31.1.89) we have returned 4 cheques drawn by you for lack of funds . . . We expect you to maintain a minimum balance of Rs. 20,000/- . . . we hereby give you notice to close your account by 3rd March 1989 . . . " Cross-examination by Mr. Daluwatte, President's Counsel, was directed at elucidating a few matters arising upon the evidence.

The evidence regarding the cheque P4 was as follows: Romali Abeysekera, Staff Officer, Hatton National Bank, City Office, stated that P4 came to her through the clearing department. P4 related to account No. 330788 of S. M. Moonesinghe. She made an endorsement on the cheque stating that the account had been closed on 13.3.89 and returned the cheque. This witness also stated that she had come across abut 20 cheques stated as drawn by S. M. Moonesinghe after the account was closed. That was both before and after discovering P4. Witness also identified letter P7 the letter sent by the Manager by registered post to S. M. Moonesinghe informing him that his account was closed for unsatisfactory conduct. P7A the registered postal article receipt dated 13.3.89 was produced. P7B a document maintained by the Bank showed letter 8002 had been sent to S. M. Moonesinghe to the address given in his application P8. I am satisfied that the respondent was duly informed in February that he should close his account by 3rd March. Witness Gunatillake, Staff Assistant of the Hatton National Bank produced a certified copy of the application made by S. M. Moonesinghe to open the account marked P8. In that application the applicant has styled himself as a businessman. Witness also produced as P9 the specimen signature of S. M. Moonesinghe retained by the Bank. This witness confirmed through entries made by the Bank Manager in

P10, a record card containing entries "CNR" which means covers not received (i.e.) insufficient funds, that several cheques issued by S. M. Moonesinghe were returned for lack of funds. This witness was familiar with the signature of the manager.

The above constituted the evidence led by the Deputy Solicitor-General against the respondent. This is the only evidence placed before this Court. The testimony of the complainant has been amply supported by the documentary evidence to wit: the Promissory Note P2, cheque P4 and supported by the evidence of witness Mahatantila. The Court unhesitatingly accepts their testimony as truthful and reliable. The fact that the respondent accepted the investment of Rs. 50,000/- from the witness Chandratileke on 27.10.87 is proved beyond reasonable doubt. The respondent agreed to pay interest of 24% per annum at that time in monthly instalments. The respondent has paid monthly instalments of interest up to and including July 1988. Thereafter he has paid nothing and in fact stated that he was bankrupt. Upon the complainant demanding some payment the respondent has given her a post-dated cheque for Rs. 20,000/- on 1.2.89 encashable on 15.6.89. But the Bank statement P6 shows that the respondent had only a balance of Rs. 24.25 on 13.3.89. When the Bank account was closed.

Respondent opened the account on 31.1.89 with a deposit of Rs. 20,000/-. He wrote P4 for Rs. 20,000/- the next day on 1.2.89. From 31.1.89 to 13.3.89 – a period of 6 weeks – the respondent has made transactions through this account either of deposits, purported deposits or withdrawals on 31.1.89, 2.2.89, 6.2.89, 7.2.89, 9.2.89, 10.2.89, 13.2.89, 14.2.89, 15.2.89, 21.2.89, (4 entries), 23.2.89 (6 entries), 24.2.89, 28.2.89, 3.3.89, 7.3.89 (6 entries) and 10.3.89. By P7 he had been informed by the Bank that he should close his account by 3rd March. I am satisfied that by 7.3.89 the respondent knew the parlous state of his account and that he had no funds in this account to meet P4. Thus, knowing that P4 will be dishonoured the respondent has taken no step to inform the complainant of the fact that he had no funds to meet P4 or to make other arrangements regarding payment of dues to the complainant.

The Rule specifies that the complaint and other information available to the court discloses that the Respondent has committed –

(a) deceit; and

(b) committed breach of trust of a sum of of Rs. 50,000/-;

which was money deposited with the Respondent by the complainant as savings to accrue interest. It requires the Respondent to show cause as to why he should not be suspended or removed from the office of Attorney-at-Law;

When formulating a Rule one has to bear in mind that s.42(2) of the Judicature Act recites a species of conduct, to wit: deceit, malpractice, crime or offence which is viewed with disapproval by the Supreme Court. An Attorney-at-Law guilty of such conduct is liable to be disciplined by the Court in terms of s.42(2) and Rules made in terms of Article 136(1) (g) of the Constitution.

The language of section 42(2) of the Judicature Act cannot be divided into parts, one variety of unconscionable conduct by an Attorney-at-Law permitting the court to exercise its jurisdiction, to wit:deceit or malpractice, whereas some other variety of unconscionable conduct, to wit: crime or offence divesting the court of its jurisdiction. It is essential that the language of section 42(2) aforesaid be viewed as a whole and a Rule formulated in such a manner as to give a Respondent sufficiently clear particulars as to the specific conduct that is being examined by the Supreme Court as disciplinary action is not confined to conduct or acts done in the course of an Attorney's professional practice. Thus in the course of giving particulars in the instant case, a reference has been made to the deception practised on the complainant by the Respondent and a specific reference made to the transaction concerning the acceptance of money on trust on deposit to accrue interest and the breach of such trust described in the Rule as criminal breach of trust. This description in the Rule is to my mind legitimate and does in fact give the Respondent a clear intimation of what is in the mind of the disciplinary authority. It is nothing more than giving the Respondent particulars of the matter to be examined by the Court. The Rule as formulated is therefore without exception correct upon the facts. I am therefore unable to agree with the view expressed by my brother Amerasinghe, J. in this regard.

The Supreme Court admits a person of good repute and of competent knowledge and ability to the office of Attorney-at-Law; likewise the Supreme Court may admonish, reprimand, suspend or remove him from such office for guilty conduct of the species enumerated in s.42(2) aforesaid as the case may be. In any event no matter of law arising from the Rule Nisi was raised or argued by any Counsel appearing at the inquiry.

The use of the word 'charge' in s.42(3) of the Judicature Act must be understood in this way. The matters contained therein are descriptive of the course of conduct of an Attorney to be examined. The provisions of section 42(3) and (4) are consistent with this view of section 42(2). The Supreme Court here is exercising a disciplinary jurisdiction and not a penal jurisdiction. It is the exercise of a special jurisdiction conferred on the Supreme Court alone.

Upon the facts it is abundantly clear that the Respondent deceived the complainant into the belief that P4 will be honoured and she will recover part of her monies due to her. Also the Respondent has been in breach of the trust reposed in him when the complainant deposited money with him in order that interest may accrue on the deposit. The Respondent has failed to pay interest or repay the capital sum invested. The Respondent has not denied the allegations or offered any explanation whatsoever in his defence. The Respondent is guilty of both charges laid in the Rule. The Respondent therefore is guilty of gross misconduct.

Upon the foregoing proved facts in my view the Respondent is unfit to function as an Attorney-at-Law of this court. I am of opinion that the Rule should be made absolute. I direct that the Respondent Susantha Mahes Moonesinghe be removed from the office of an Attorney-at-Law of this court and that his name be struck off the Roll of Attorneys'-at-Law.

Registrar to take steps accordingly.

DHEERARATNE, J. – *I agree.*

AMERASINGHE, J.

I have had the advantage of reading a draft of the judgment of Bandaranayake, J. I respectfully agree with His Lordship that Moonesinghe should be removed from office. Moonesinghe was charged in the Rule with (1) deceit and (2) criminal breach of trust. As for the charge of deceit, I agree that Moonesinghe is guilty of deceit. As for criminal breach of trust, I agree that Moonesinghe is guilty, but, perhaps we reach that conclusion somewhat differently.

In a technical sense, criminal breach of trust is a specifically defined offence in section 388 of the Penal Code. There was no evidence that Moonesinghe was convicted by a competent court. I do not hold him "not guilty" or "guilty" of the offence of criminal breach of trust *as defined in the Penal Code*; for that is matter to be determined by a competent court designated by the Code of Criminal Procedure for that purpose in other proceedings, if it is decided that he should be prosecuted.

Conviction for an offence is neither necessary, nor invariably sufficient, to make a person amenable to the disciplinary jurisdiction of this Court. It is not an irrelevant matter, for conviction for an offence is a *prima facie*, albeit only a *prima facie*, reason for this Court to act in disciplinary proceedings. The Court has a wide jurisdiction in deciding what is unprofessional conduct that makes a person amenable to disciplinary proceedings. The question in proceedings of this nature, is not whether an attorney-at-law has been, or may be convicted for or found guilty of an offence or not, and if guilty whether he should be punished, but whether, having regard to the misconduct established, he is a fit person to be continued on the roll, and if so, on what terms. It may well be that the facts establishing unprofessional conduct may *also* be the foundation of a criminal prosecution, past, present or to come. However, it is unnecessary to decide, and I wish to make it clear that I have not decided, that the facts proved satisfy the criteria set out in section 388 of the Penal Code, for the ascertainment of whether Moonesinghe is guilty of the penal offence of criminal breach of trust is not the object and intention of these proceedings. Having regard to the object and intention of these proceedings, I find that a non-technical, popular, meaning – *uti*

loquitur vulgus – rather than the technical meaning usually given to the phrase by lawyers, is more appropriate and agreeable in deciding what criminal breach of trust means in the Rule. I find Moonesinghe guilty of criminal breach of trust in that non-technical, popular sense. However, having regard to the ambiguous nature of the phrase, and the horrendous consequences of being, albeit mistakenly, supposed that he has been convicted of the penal offence criminal breach of trust, I want it to be clearly understood in what sense I find him guilty of criminal breach of trust. Criminal breach of trust is a phrase which should not be allowed to needlessly escalate into a sentence. For what he has done, he does not, more or less, owe the law his life. *(Timon).*

On 27 July 1987, Mrs. Dhammika Chandratileke, an Assistant Registrar at the University of Colombo, on the recommendations of Mr. Mahathanthila, the Registrar of the University of Colombo, invested a sum of Rs. 50,000/- with Susantha Mahes Moonesinghe who was carrying on the business of borrowing and lending money under the name and style of an organization known "T.M. Associates (Pvt) Ltd". In return, Moonesinghe, issued a Promissory Note (P2) dated 27 October 1987. In terms of the Promissory note Moonesinghe personally undertook to pay Mrs. Chandratileke on demand or order the sum of Rs. 72,000. In terms of a contract arrived at discussions held between Moonesinghe and Mrs. Chandratileke, she was to be repaid the capital and interest at the rate of 24 per centum per annum, less the first month's instalment, in monthly instalments of Rs. 2000. Nine monthly payments were made between October 1987 and July 1988. The instalment for November 1987 was not paid.

In his letter dated 28 August 1988, Moonesinghe informed Mrs. Chandratileke that "due to unforeseen commitments", the "Company", was "reluctantly compelled to suspend payments for the next three months commencing 01st September 1988." Payments were to be thereafter "revised and reviewed from time to time." The letter, he explained, "was an appeal for understanding, support and forbearing" and Mrs. Chandratileke was told "not to hesitate to write or meet" Moonesinghe if she wished to discuss "any personal matter or to know further details."

This was easier said than done: After over twenty visits to his office, and after meeting him on several occasions to obtain a return of her money, on 1 February 1989 Mrs. Chandratileke succeeded in obtaining a cheque (P4) for Rs. 20,000 from Moonesinghe. Moonesinghe wrote the following endorsement on the Promissory Note (P2): "Received Rs. 20,000/- as part capital by chq. No. 293718 (HNB) dated 15-6-89. Balance due to me on this Pro-note is 20,725/-". Mrs. Chandratileke signed it. The cheque given to Mrs. Chandratileke on 1 February, 1989 was dated 15 June 1989. It was signed by Moonesinghe, and drawn on the Hatton National Bank. When the cheque was presented, it was returned dishonoured, bearing the endorsement "Account closed on 13.3.1989". Mrs. Chandratileke then complained to the Police on 12 August 1991. (P5).

She also complained to the Chief Justice. In her letter dated 8 September 1989, Mrs. Chandratileke prayed that his Lordship "be pleased to direct an inquiry to be held to ascertain whether Mr. Mahes Moonesinghe is a fit and proper person to hold the office of an Attorney-at-Law". On 30 November 1989, Mrs. Chandratileke, set out her complaint in the form of an affidavit. A copy of the affidavit with a letter calling for his observations were sent to Moonesinghe by Registered post to three addresses: at Malabe, Rajagiriya and Panadura. The documents sent to Malabe and Rajagiriya were returned undelivered. When there was no response from Moonesinghe, a copy of the affidavit and Registrar's letter were sent to the Panadura address where the earlier documents had been delivered. This time they were returned undelivered.

A Rule *nisi* was issued by this Court on 24.12.1990 requiring Moonesinghe to appear before this Court on 21 January 1991 and show cause why in terms of section 42(2) of the Judicature Act, he should not be suspended or removed. Section 42(2) of the Judicature Act No. 2 of 1978 provides that before any attorney-at-law is suspended or removed, "a notice containing a copy of the charge or charges against him and calling upon him to show cause within a reasonable time why he should not be suspended or removed, as the case may be, shall be personally served on him. If, however, personal service cannot be effected, the Supreme Court shall order such substituted service as it may deem fit." The fiscal reported his

inability to serve summons personally on Moonesinghe. Notices sent by registered post were returned undelivered. By order of Court, substituted service was published in the newspapers. There was no response from Moonesinghe.

On 4 June 1991, the Court commenced its inquiry in the matter of the Rule. According to the evidence of Mr. M. L. M. Ameen, P.C., at that inquiry, he had been retained by Moonesinghe to appear for him in the Magistrate's Court of Mount Lavinia. He produced a copy of a letter (P1) dated 16 February 1990 from Moonesinghe. In that letter, Moonesinghe explained why he was an elusive Fugitive: He said that when he appeared in Court, his creditors attempted to "waylay" him; and once he had to leave the court-house "from the rear side". Since he did not think it was "safe any more... to appear in public", he "had to leave the country and remain out until such time these matters are sorted out." According to Mr. Ameen, P.C., Moonesinghe telephoned him from Singapore and told him that he was aware of the issue of the Rule. During the inquiry held by the Supreme Court on 4 June 1991, a letter, dated 2 June 1991 addressed to the Registrar of the Supreme Court purporting to be from the Director of the Francis Rachel Law Centre, Attorneys-at-Law and Notaries Public of the Seychelles, was placed before the Court. The Director stated that it had been gathered by their "client" Susantha M. Moonesinghe, after reading about it in the newspapers, that an inquiry was pending against him in the Supreme Court. The Centre, which was acting for and on behalf of Moonesinghe, prayed that an adjournment of the proceedings be granted to enable Moonesinghe to be represented at the inquiry. The Court adjourned the inquiry and fixed further hearing for 12 November 1991 and so informed the Director of the Francis Rachel Law Centre by Registered Post. In a letter dated 6 September 1991, the Director-General of the Postal Services Divisions of the Seychelles stated that that Law Firm no longer existed. When the matter came on for inquiry of 12 November 1991, Moonesinghe was absent and unrepresented. With the consent of the counsel for the Bar Association of Sri Lanka and the Deputy Solicitors-General who were present, the evidence already recorded was adopted and further evidence was recorded.

In *Bhandari v. Advocates Committee* [1] (followed with approval in *Re Dematagodage Don Harry Wilbert* [2]) it was said that "in every allegation of professional misconduct involving an element of deceit

or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn him on a mere balance of probabilities."

The Rule *nisi* charges Moonesinghe with (1) deceit and (2) criminal breach of trust. Both deceit and criminal breach of trust involve dishonesty. Section 22 of the Penal Code (Cap. 25) states that "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing "dishonestly". Where knowledge or intention is an ingredient of a disciplinary offence, it is the view in the United Kingdom that it seems appropriate that the criminal standard of proof should apply. (See *Cordery's Law Relating to Solicitors*, 1961, 5th Ed. at p.467.Cf. *Re Two Solicitors, ex parte Incorporated Law Society* [3]; *Hall v. Jordan* [4]; *Younghusband v. Luftig* [5]; *Wilson v. Inyang* [6]. Although in *Re Wilbert* (*supra*) at p.29 Fernando, J. states that "a degree of proof commensurate with the subject-matter is necessary", and although in deciding a matter involving dishonesty, his Lordship was satisfied "beyond all reasonable doubt" that the attorney was guilty (see at p. 28), however, at p.28 his Lordship states that "In proceedings of this nature, it is not necessary that the acts alleged be proved beyond reasonable doubt."

In this case I cannot have any real doubt as to the facts. They have been established beyond reasonable doubt. I think Moonesinghe intentionally deceived Mrs. Chandratileke into an erroneous belief that he meant to repay the sum of Rs. 50,000/- she had given him with interest and thereby induced her to give him the said sum of money when he had no intention of repaying the money in the manner agreed upon. What Moonesinghe really had in mind was wrongful personal gain, and he dishonestly induced Mrs. Chandratileke to give him the said sum of Rs. 50,000/-. He then dishonestly misappropriated or converted to his own use the sum of Rs. 50,000/- given to him by Mrs. Chandratileke in violation of his undertaking and his legal obligation to repay the money so entrusted to him. I have no doubt that when Moonesinghe issued the Cheque for Rs. 20,000 on 1 February, 1989 (P4), it was a sham. It was a piece of trickery. He

deceived Mrs. Chandratileke. He persuaded her to show him the "understanding, support, and forbearance" he had prayed for in his letter of 28 August 1989 and accept a post-dated cheque by misleading her to confidently believe that a sum of Rs. 20,000 would be paid to her on or after 15 June 1989 and that the balance sum of Rs. 20,725/- would be paid sometime thereafter. The cheque was drawn on an account Moonesinghe had opened a day before. He had made a cash deposit of Rs. 20,000 when he opened his account. This was not with the intention of having sufficient funds to honour his cheque, but to meet the requirement of the Bank that he should make a minimum deposit of Rs. 20,000/-. It was a minimum sum he never maintained to honour either his obligations to the Bank or to Mrs. Chandratileke. Deducting the cost of the cheque book issued to him, viz., Rs. 105, he had insufficient funds to meet the value of the cheque even when he issued it. In any event, had he Rs. 20,000 in his account on that date, it was of little use to Mrs. Chandratileke, since her cheque was dated 15 June 1989. By that date, the account had been closed. Moonesinghe, of course, could not have known that the cheque would not be honoured because his account would be closed by June 15. Indeed, he might have optimistically hoped that it would go on for as long as possible to enable him to carry out more of his sinister designs. He did not voluntarily close his account. The Bank ordered him, by a letter sent by Express Registered Post (P7), to close his account by 3 March 1989 and proceeded to close it on 13 March 1989, because Moonesinghe had with reckless disregard been issuing cheques without sufficient funds in his account to meet his obligations and failed to keep the minimum credit balance of Rs. 20,000/- required of him as an account holder. All of this is manifestly clear from Moonesinghe's Statement of Account (P6) and the evidence of the Bank's officers. Several cheques had been returned for lack of sufficient funds before the account was closed. Romali Abeysekera, a Staff Officer of the Bank stated in her evidence that about twenty cheques drawn by Moonesinghe were presented after the account had been closed. Having regard to the way in which he operated his account, I have no doubt in my mind that Moonesinghe knew that the cheque he gave Mrs. Chandratileke was a worthless piece of paper and that it would not be honoured at any time. If his intentions were honourable, why did he fail to inform Mrs. Chandratileke of the fact

that his account was closed and allow her to hopefully retain the cheque and present it for payment several months after his account was closed?

I am of the view that the charge of deceit has been amply proved. Moonesinghe is guilty of deceit that was grave and reprehensible. It would, as was said by Lord Justice Lindley *in re Weare* [7] be a "stretch of charity which would degenerate into absurd and ridiculous weakness" to allow myself to express any doubts on these matters. It would, as Lindley, LJ said, be "idle and childish to come to any other conclusion"

The Rule also charges Moonesinghe with "criminal breach of trust". Criminal breach of trust may be either a penal offence, conviction for which would be a *prima facie* reason why the Supreme Court should act in the exercise of its disciplinary powers in terms of Section 42 of the Judicature Act; or the phrase may be taken to be a convenient, shorthand way of describing, in a non-technical way, deceitful conduct involving a breach of confidence which is grave in character, making an attorney-at-Law who is guilty of such unprofessional conduct amenable to the disciplinary jurisdiction of the Supreme Court in terms of section 42 of the Judicature Act. I shall deal with these matters separately.

What "Criminal breach of trust" usually, in an everyday sense, means to us, *as lawyers*, and, therefore, technically, is an offence defined in the terms set out in section 388 of the Penal Code. Since this is primarily a matter for decision by lawyers about the alleged misconduct of a lawyer, I shall first deal with the question from a lawyer's point of view.

Section 389 of the Penal Code provides for the punishment of a person guilty of the offence of Criminal breach of trust as defined in the Penal Code.

Being a "thing made punishable by" the Penal Code, criminal breach of trust is, in terms of section 38 of the Penal Code and section 2 (*s.v.* "offence") of the Code of Criminal Procedure, an "offence".

In terms of Article 13 (3) of the Constitution, "Any person charged with an offence shall be entitled to be heard in person or by an attorney-at-Law, at a fair trial by a competent court." And Article 13(5) of the Constitution provides that "Every person shall be presumed innocent until he is proved guilty." A court having jurisdiction in terms of section 10 and the First Schedule of the Code of Criminal Procedure is a competent court to hear, try and determine whether the offence of criminal breach of trust had been committed.

No evidence was placed before this Court, as it was done, for instance, in *Re Ranasinghe*[8]; *The Solicitor-General v. Chelvatamby*[9]; *Solicitor-General v. Cooke*[10]; in *Re Aiyadurai*[11]; in *Solicitor-General v. Abdul Cader*[12] and in *Re Fernando*[13], showing that Moonesinghe had been convicted for the offence of criminal breach of trust by a competent court having jurisdiction in terms of the Code of Criminal Procedure.

What may the Court do when, as in this case, an attorney-at-law charged in a Rule with misconduct that appears to be a criminal offence, has not been convicted for that offence?

Where the amenability of an attorney-at-law to the disciplinary jurisdiction of this Court is supposed to depend (because the Rule is so framed in restricted terms) on the question whether he is guilty of an offence as defined in the Penal Code and Code of Criminal Procedure, and guilt is denied, the Court, *may, perhaps*, postpone the hearing of the disciplinary inquiry until the attorney concerned had been heard and tried by a court of competent jurisdiction as defined by the Code of Criminal Procedure. This, I think, is as far as *Shore v. Pratt*[14]; *In the matter of Knight and Hall*[15]; *Re Hill,*[16] per Cockburn, J and per Blackburn, J at pp. 545, 548; *Re a Solicitor*[17] should be permitted to take us.

There is no denial in the case before us. Nor is the Rule restrictively framed in this matter. There was no occasion for the Court to consider whether in the exercise of its discretion, these proceedings might be postponed.

Even where the amenability of an attorney to the disciplinary jurisdiction of this Court does not depend on conviction for an

offence, it *may* in the exercise of its discretion, where its findings on the same facts might prejudice the attorney, postpone the disciplinary proceedings. In *Re P. P. Wickremasinghe* [18] a Rule was issued on 18 June 1981 on an attorney-at-law, charging him with deceit and malpractice by appropriating the money of his client to his own use. On 16 October 1981, counsel, on behalf of the attorney, informed the Supreme Court that there was a criminal charge in respect of the same matter in the High Court of Colombo and requested that the inquiry pertaining to the Rule be postponed on account of possible prejudice. Samarakoon, CJ (Weereratne and Sharvananda, JJ agreeing) ordered (SC Minutes of 16 October 1981) that "the inquiry be postponed and fixed on a date subsequent to the final determination of the High Court case." The Court, not being subject to statutory constraints of time in these matters, may await the decision of the criminal court, if in its opinion, in the circumstances of a particular case, it considers that to be the desirable course of action. The attorney, in the meantime, in the exercise of the powers of the Court in terms of the proviso to section 42 (3) of the Judicature Act, may, as he was in *Wickremasinghe's case*, be suspended from practice. (For the later proceedings in the case see SC Minutes of 19 July 1982 per Wimalaratne, Victor Perera and Soza, JJ).

Alternatively, instead of postponing the proceedings, it may refrain from making a decision touching a matter pending before a criminal court, and proceed to deal with the attorney on the basis of the other matters alleged in the Rule. Thus in *Dematagodage Don Harry Wilbert* [2], where the attorney was charged in the Rule with having fraudulently used as genuine a certificate which he knew or had reason to believe to be a forged document, and of deceit, Fernando, J at p.29 (Atukorale and Bandaranayake, JJ agreeing) said as follows:

> It transpired that criminal proceedings are contemplated against the Respondent for forgery; although not obliged to do so, in view of our order in this matter, we refrain from making any finding in respect of the charge of fraudulently or dishonestly using as genuine a certificate known to be forged.

The attorney was found guilty of deceit and struck off. The phrase, "although not obliged to do so", does not, in my view, mean that there

was the recognition of a right to convict and punish the attorney of an offence under section 459 of the Penal Code for using as genuine a forged document, as if the Court had parallel jurisdiction with a Court empowered by the Code of Criminal Procedure to determine such a matter: Fernando, J. had earlier at p.28 made it manifestly clear that the proceedings before him were "not criminal or penal in nature". And at p.30 his Lordship stated that "The jurisdiction under section 42(2) does not involve considerations of punishment or penalty or stigma". I think his Lordship meant that this Court is not precluded, on the facts established, of finding an attorney guilty, not of a specific penal offence as if it had a parallel jurisdiction, but of unprofessional conduct that would make a person unfit to continue on the roll, although such a finding might be based on the same facts upon which an attorney had already been convicted; or upon which a pending or contemplated, or possible, prosecution might be founded. With such a view, I would respectfully agree.

The fact that there nas been no conviction, or that a prosecution is pending, or that no prosecution is contemplated, does not preclude this Court from holding an inquiry, in the exercise of its disciplinary jurisdiction, with a view to ascertaining whether an attorney was guilty of misconduct, criminal or otherwise, that makes him unfit to be a member of the legal profession. In fact, the several interests of the State, the Courts and the administration of justice, suitors, the public and the profession, require that the matters of this sort should be determined by this Court without delay, where it is feasible to do so on the available evidence. It was realized over a century ago that this Court should not unduly delay the disposal of these matters. In *Re Edgar Edema* [19], Phear, CJ. observed as follows:

> We took time to consider our judgment not so much on account of any doubt upon the facts in issue between the parties, as for the purpose of endeavouring to find some ground upon which we could offer the respondent a *locus poenitentiae* and a hope, however slight, of being allowed upon condition at some future time to apply for admission to his lost post. We regret, however, that reflexion does not enable us to do so, and therefore the rule will be made absolute unconditionally.

I think the purpose of section 4 of the Penal Code was to affirm the power of the Supreme Court to deal with acts of misconduct (albeit limited *in terms of that section,* to acts of malpractice), even though the misconduct was criminal in character and may also have constituted an offence under the Penal Code. I should like to refer to *Stephens v. Hill* [20] (on which I think section 4 of the Penal Code was based). Lord Abinger, CB, explained the matter in the following terms, where an attorney had attempted to win his case by persuading a witness to keep away from the trial:

> "I never understood that an attorney might not be struck off the roll for misconduct in a cause in which he was the attorney, merely because the offence imputed to him was of such a nature that he might have been indicted for it. So long as I have known Westminster Hall, I never heard of such a rule as that; but in the case of applications calling upon an attorney to answer the matters of an affidavit, I have known Lord Kenyon and also Lord Ellenborough frequently say, you cannot have a rule for that purpose, because the misconduct you impute to the man is indictable; but you may have one to strike him off the roll. Now an attorney who has been guilty of cheating his client, or the opposite party, in such a manner as to render himself indictable, is unfit to be allowed to remain on the roll, or to practise in any court; and I see no objection, on principle, to the Court's removing him at once from it. If indeed he were called on to answer the matters of an affidavit, he would not by complying, be guilty of a contempt for which he might be punished by attachment, and if the offence imputed to him were of an indictable nature, it would be most unjust to compel him to do so; for which reason a rule to answer the matters of an affidavit is never granted in such a case, but only a rule to strike him off the roll, which gives him a full opportunity of clearing himself from the imputation, if he can, while, on the other hand, it does not compel him to criminate himself . . . In all cases where an attorney abuses the process of the Court of which he is an officer, and his proceedings are of such a nature as tend to defeat justice in the very cause in which he is engaged professionally, I never heard that, because by possibility he may thereby have exposed himself to be indicted as a cheat or for

conspiracy, he is to be permitted to remain on the roll . . . Such a rule would be extremely injurious; for in no case could any remedy be had against the attorney, unless the client would first prosecute him to conviction, until which time he could not be struck off the roll or prevented from practising. Where, indeed, the attorney is indicted for some matter not connected with the practice of his profession as attorney, that also is a ground for striking him off the roll, although in that case it cannot be done until after conviction . . ."

Conviction for an offence is only a *prima facie* reason why this Court may act in matters of this kind. An attorney whose misconduct is criminal in character, *whether it was done in pursuit of his profession* or not, (this Court has wider powers than those affirmed by section 4 of the Penal Code), may be struck off the roll, suspended from practice, reprimanded, admonished or advised, even though he had not been brought by the appropriate legal process before a court of competent criminal jurisdiction and convicted; and even though there is nothing to show that a prosecution is pending or contemplated. (See *Re Edgar Edema* [19]; *Re Isaac Romey Abeydeera* [21]; *In re a Proctor* [22]; *In re C. E. de S. Senaratne* [23]; *Re Donald Dissanayake* [24]; *Re P. P. Wickremasinghe* [18]; *Re Rasanathan Nadesan* [25]; *Stephens v. Hill* (*supra*); *Anon.* (*supra*); *Re Hill* (*supra*); *Re Vallance* [26]; Anon (1894) 24 L. Jo 638. But cf. *Short v. Pratt* [14] and *Re Knight* [27]).

I might go further: If Moonesinghe had been charged with the commission of an offence in a competent court and acquitted, he could and ought, nevertheless, to have been dealt with by this Court, as the proctor was in *Re Thirugnanasothy* [28]. See also *Re Garbett* [29]; *R v. Southerton* [30]; *Re W.H.B.* [31]. In *Re Thirugnanasothy* a proctor had been acquitted of criminal misappropriation by a District Court. He was, nevertheless, struck off the roll, G. P. A. Silva, SPJ., explaining at p.239 that although the reasons for the acquittal were "sound", they were "technical in nature".

On the other hand, if an attorney answering a Rule has evidence, besides that produced at the trial and conviction, which shows conclusively that he was not guilty of the crime or offence whereof he was convicted, he is not debarred in proceedings of this nature from bringing forward that evidence *to avoid becoming amenable to the*

disciplinary jurisdiction of the Supreme Court. This does not mean that if a conviction if in full force and effect, that is, if it has been affirmed in appeal or has not been appealed against, within the time allowed for appealing, this Court will permit the matter to be reargued before it on the evidence upon which that conviction was based; it will not rehear a matter which has been heard and determined, or allow argument that evidence which was believed by the court should not have been believed or that evidence disbelieved by it should have been accepted. The attorney is debarred from traversing the conviction or from rearguing the findings of fact on which the conviction was based, but it would be open to him *to confess and avoid,* that is to show by extra matter that, in spite of the conviction, he yet was not guilty of the crime or offence whereof he was convicted, *whereby he would be liable under Section 42 of the Judicature Act.* (See per Macdonell, CJ in *Re Kandiah* [32]. See also *In re A. P. Jayatilleke* [33] per Dalton, ACJ. The question was raised but not decided in *Attorney-General v. Seneratne.* [34] CF. *Re Wilbert* (*supra*) at p. 32).

Conviction for an offence is a *prima facie* reason why the Supreme Court should act in the exercise of its disciplinary powers in terms of section 42 of the Judicature Act. (Cf. per Howard, CJ in *Re Brito* [35]). In the absence of contrary evidence, the Court may proceed to act on it in disciplinary proceedings. (E. see per Garvin, SPJ in *Re Solomon Victor Ranasinghe* [8]). However, it is only a *prima facie* reason that might move the Supreme Court to exercise its disciplinary jurisdiction. This Court is the sole arbiter of the question *whether or not a person is fit to remain on the roll and, upon what conditions.* (Cf. *Re Wilbers* (*supra*) at p.32). *In the determination of that question,* its powers are unfettered and untrammelled by the findings of fact, their interpretation, and the decisions of other judges and tribunals on the basis of those facts. (Cf. *Re Thirugnanasothy* [28]; *Undugodage v. Rasanathan* [36]). The reasons are not difficult to understand.

The objectives of this Court in exercising its disciplinary jurisdiction and the objectives of a court exercising its criminal jurisdiction are quite different. Although section 4 of the Penal Code refers to the power of the Court to punish attorneys-at-law, and despite the fact that many an eminent Judge, *pace,* undoubtedly through a mere *lapsus calami,* has sometimes referred to

"punishment" in the exercise of the disciplinary powers of the Court, (e.g. see per Rose. CJ. *In re Senaratne*[23]; per G. P. A. Silva, SPJ in *Re Thirugnanasothy*[28]; per Atukorale, J in *Re Arthenayake*[37] and per Ranasinghe, CJ in *R. Nadesan*[25]); and although the need for orders that have a deterrent effect was referred to by Macdonell, CJ. in *Re Abeydeera*[38], we ought not to be influenced by punitive considerations in making orders in matters of this kind. For the purposes of this Court, in matters of the kind before us, it is not the punishment of a guilty attorney-at-law, but the consideration of the question whether he is a proper person to be continued on the roll that concerns us. (See per Lord Mansfield in *Ex parte Brounsall*[39]; per Gratiaen, J in *Re an Advocate*[40]; per Basnayake, CJ in *Re Fernando*[13]; per Fernando, J in *Re Wilbert*[2]). It is because of that reason that a person may be struck off the roll for an offence committed even before admission (*Re Bradley*[41]; See also *Re Wilbert, supra*, at p.30), at any rate, if the application to remove him is made soon after admission. (Anon. (1831) 2 B & Ad 766; cf, *Re Page*[42]).

In *Ex parte Brounsall* (*supra*), an attorney had been convicted of stealing a guinea. He had been branded in the hand and confined in a house of correction for nine months. Five years later, although he had committed no other act of misconduct, the question was raised whether he was an unfit person to practise as an attorney. Lord Mansfield said: "This application is not in the nature of a second trial or a new punishment. *But the question is, whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion.*" Although his Lordship was of the view that the rule should be made absolute, "as it was for the dignity of the profession that a solemn opinion should be given", others were consulted and on June 27, 1778 Lord Mansfield said: "We have consulted all the Judges upon this case, and they are unanimously of opinion, that the defendant's having been burnt in the hand, is no objection to his being struck off the roll. *And it is on this principle; that he is an unfit person to practise as an attorney. It is not by way of punishment; but the Court on such cases exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not.* Having been convicted of felony, we think the defendant is not a fit person to be an attorney. Therefore let the rule be made absolute."

As Lord Esher, MR, in *Re Weare* (*supra*) at p.442 observed, Lord Mansfield did not lay down any new law, but the law was "very authoritatively laid down by him with his usual felicity of expression." Referring to Lord Mansfield's statement of the law, Lord Esher (at p.443) said: "There it seems, to me, is the whole law on the matter laid down as distinctly as can be, and in a way the propriety of which nobody, as it appears to me, can doubt."

The italics in the words quoted from the decision of Lord Mansfield are mine. The first group of words I have italicized in the observations of Lord Mansfield were quoted with approval by Garvin, J in *Attorney-General v. Ellawala* [(43)].

Fernando, J (Atukorale and Bandaranayake, JJ agreeing) in *Re Wilbert* [(2)] said:

> . . . these proceedings are not criminal or penal in character, but are intended to protect the public, litigants, and the legal profession itself. Over half a century ago it was observed in *Solicitor-General v. Ariyaratne* [(44)] that these proceedings involve not a question of punishing a man, but quite a different question, ought a person against whom such offences have been proved, remain on the roll of an honourable profession?

Since our purposes are different, our respective methods of ascertaining and evaluating the facts correspondingly vary: A court acting in the exercise of its criminal jurisdiction is concerned with finding out whether the specifically, precisely and narrowly defined ingredients of an offence have been proved beyond reasonable doubt, strictly in accordance with the formal rules of evidence and procedure laid down for that purpose. If it finds a person guilty, it pronounces a sentence of punishment. The punishments it may impose are statutorily prescribed (see Chapter III of the Penal Code), and may, in certain instances, include death, rigorous or simple imprisonment, whipping forfeiture of property or fine. Our task, in the exercise of the disciplinary jurisdiction vested in us in terms of section 42 of the Judicature Act, is the determination, based on an appropriate degree of proof, having regard to the nature of the charge, whether a person we formerly admitted should be struck off the roll, suspended, reprimanded, admonished, or advised for his

unprofessional conduct. In the performances of that task, this Court proceeds with its investigations under section 42 of the Judicature Act, unfettered by invariable and inflexible standards of proof (Cf. in *Re Wilbert* (*supra*) at p.29), or of rigid rules pertaining to procedure and the admissibility of evidence. (Cf. *Attorney-General v. Ellawala* [43]).

It has not been established that Moonesinghe has been convicted for the offence of criminal breach of trust. However, I have explained that conviction for an offence is neither necessary, nor indeed, invariably sufficient, to make a person amenable to the disciplinary jurisdiction of this Court.

We have also seen that the objects and intentions of a criminal prosecution, on the one hand, and the objects and intentions of proceedings of this nature, on the other, are altogether different. Although to us, as lawyers, the phrase "criminal breach of trust" in an everyday, usual and ordinary, sense means criminal breach of trust as defined in the Penal Code, I must in these proceedings, reject that meaning, since another meaning is more agreeable and appropriate to the object and intention of these, thank goodness, rare, unusual and extraordinary legal proceedings. (Cf. Maxwell, *Interpretation of Statutes* 11th Ed, 1962 at p. 53). The phrase "criminal breach of trust" in the Rule is not used, in a technical sense, but in its ordinary sense, as when it is used by members of the public generally, that is, in its popular sense. In the circumstances, it is unnecessary for me to determine whether the ingredients of "criminal breach of trust" set out in section 388 of the Penal Code have been established.

As to whether Moonesinghe was guilty of criminal breach of trust in the sense relevant to these proceedings, I have no doubt whatsoever in affirmatively answering that question. In my view, Moonesinghe acted in a way that was not straightforward. Rather, he acted in a way that was knavish and wanting in probity. He persuaded Mrs. Chandratileke, both by reason of his membership of an honourable profession and by communication, to employ him in a manner implying confidence. He then put to wrong use or uses a sum of money given to him by Mrs. Chandratileke in flagrant disregard of their understanding, agreement or contract. And further, on account

of such confidence, and on account of an insincere and false assurance to eventually repay her in full, Moonesinghe persuaded Mrs. Chandratileke to accept a post-dated cheque, by way of repayment in part of the sum of money she had given him, which Moonesinghe probably *believed* at the time he issued it, and certainly *knew* long before it was due for presentation, would be dishonoured.

Would my holding Moonesinghe guilty of criminal breach of trust in a non-technical sense cause him prejudice, so much so that I should refrain from making a finding in that regard? In *Undugodage v. Rasanathan* [36] an attorney-at-law had been charged with the misappropriation of certain sums of money. With regard to one charge, the Court found that there had been no misappropriation as alleged in the Rule. With regard to the other charge of misappropriation, Atukorale, J (H. A. G. de Silva and Jameel, J. agreeing) held that, although that act of misconduct "would, to say the least, constitute the clearest instance of a malpractice within the meaning of Section s.42 (2) of the Judicature Act" which was sufficient to warrant his removal from office, yet this had not been raised before the disciplinary committee, and since the attorney would be gravely prejudiced if it were raised at the stage of the disciplinary inquiry before the Supreme Court, the Court did not deem it "proper or possible" to "reach a finding adverse to the respondent" on that charge. Would Moonesinghe have been prejudiced by any ambiguity? I do not think so. Perhaps he believed that the Rule was not concerned with criminal breach of trust in a technical sense but rather in a non-technical sense? Why did he retain counsel to appear for him in certain criminal charges against him (although unrelated to this case) but not in the matter of the Rule? I think he knew the difference between the technical and non-technical sense of the phrase and understood perfectly well the sense in which the charge of criminal breach of trust was made in the Rule. I would certainly not have been prepared, if an objection had been raised, to smother or hush up these proceedings on the basis that "criminal breach of trust" has more than one meaning.

In *Attorney-General v. Ellawala* [43], the Court (Garvin, Dalton and Lyall Grant, JJ) said that:

> 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 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.

I would respectfully agree. However, I should like to add this: In the framing of Rules *nisi*, in arriving at conclusions on the facts, and in making orders, this Court has been cautious and restrained. I might mention a few examples. In *Re Donald Dissanayake* (*supra*) where an attorney dishonestly converted his client's money to his own use, and there was no conviction, the Rule issued was in respect of deceit and malpractice. In *Re Isaac Romey Abeydeera* (*supra*) in similar circumstances, the proctor was simply charged in the Rule with "misconduct" that was said to have made him amenable to the disciplinary jurisdiction of the Court in terms of the relevant statutory provisions at that time. In *Re Nadesan* (*supra*) there was no conviction, but the Rule charged the attorney with criminal breach of trust. *Even though he pleaded guilty,* the Court, in making its order, dealt with him on the basis that he was a "person who has been guilty of misappropriation, deceit and malpractice." H. N. G. Fernando, CJ and Samerawickrame and Weeramantry, JJ in *Re Dharmalingam* (*supra*) found a proctor who had misappropriated his client's survey fees guilty of malpractice and no more, although Seneviratne, J. in *Re Arthenayake* (at p.346) was of the view that the facts of *Dharmalingam* disclosed criminal misappropriation as defined by Section 386 of the Penal Code. Atukorale and De Alwis,

JJ in *Re Arthenayake* (*supra*) adopted the view that in *Re Dharmalingam* the proctor was guilty of malpractice. In *Re Wilbert* (*supra*) Fernando, J (Atukorale and Bandaranayake, JJ agreeing), although "not obliged to do so", (see at p.29) refrained from making a finding on the charge of dishonestly using as genuine a certificate known to be forged, since criminal proceedings in that regard were contemplated, the attorney being struck off on other grounds.

The question that remains is this: whether after the conduct of this man, what is the appropriate order that should be made in this case? As Chief Justice Sir Alan Rose observed in *Re Senaratne* [23], it is "always difficult in matters of this kind" to arrive at a decision on that question.

Although Section 42(2) of the Judicature Act only refers to the options of removal or suspension where an attorney has been guilty of deceit, malpractice, crime or offence, striking off the roll or suspension are not the inevitable and invariable orders this Court may make.

The appropriate order is a matter within the plenary and absolute discretion of the Court. Esher, Mr, in *Re Weare* (*supra*) – a case followed with approval by our courts (e.g. see *In re Jayatileke* said):

> 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."

The Supreme Court, in the exercise of its absolute and plenary discretion in this matter, having regard to the special circumstances of each case, including primarily, but not exclusively, the nature of the disciplinary offence in question, has made orders ranging from removal, through suspension, to merely stating in strong terms what was expected of the lawyer concerned. In searching for the right decision to make in these matters, a feel, a general sense, based on

what the Court has done in the past, (not merely in cases assumed to be "exactly in point" – if it were ever possible in matters of this kind to find such cases), is helpful. Not one case was cited in this, or in any other connection, by learned counsel in these proceedings; but this is what I have found. I hope it will be of some use to others.

In general, (but not invariably or inevitably – See e.g. *Solicitor-General v. Chelvatamby*[3]; *Re Aiyadurai*[11] and *Re Gaston K. de Vaz*[45] referred to below and see also the observations in *Re Jayatileke* (*supra*) at p. 377) conviction for a criminal offence, *whether connected with his character as an attorney or not*, and whether involving money matters or not, makes a person unfit to hold the office of an attorney-at-law, and the Court orders removal from the roll. (E.g. see *Re Solomon Victor Ranasinghe*[8] where an advocate convicted of criminal breach of trust was struck off; *Solicitor-General v. Cooke*[10], *Solicitor-General v. Abdul Cader*[12], and *Re Fernando*[13], where proctors convicted of criminal breach of trust were struck off; *Re Kandiah*[32], where an advocate convicted of an offence under Section 8 of the Opium Ordinance No. 5 of 1910 was struck off; *Re A. P. Jayatilleke*[33] a proctor convicted of unlawful assembly was struck off; *Attorney-General v. Ariyaratne*[46] a proctor convicted of culpable homicide was struck off; *Re Brito*[35] a proctor convicted under the Post Office Ordinance for sending a post card with words of an indecent and grossly offensive character was struck off. See also *Anon* (1815) 1 Chitty's Practice Reports, 1770-1822, 557 n; *Ex parte Brounsall*[39]; *Re Weare*[7]; *Re Cooper*[47], cf. *Re Watts, Ex parte Incorporated Law Society*[48]; *Re Jellicoe*[49] Ibid; *Re A Solicitor*[50]; *Re a Solicitor*[51]; *Re a Solicitor*[52].)

Even if there is no conviction, yet if the attorney's conduct is otherwise criminal in character, the Court would usually order the removal of his name from the roll, if it was of a particularly reprehensible nature. Thus in *Attorney-General v. Ellawala*[43] a proctor who had accepted a gratification in his capacity as a member of the district committee appointed under the Buddhist Temporalities Ordinance was struck off for being guilty of "gross misconduct involving deceit", although he had not been convicted of any penal offence. Similarly, the Court would strike off an attorney guilty of criminal misconduct, especially if it was done in the exercise of his

professional functions. (E.g. See *Re Edgar Edema* [19] where a proctor who misappropriated his client's money was removed from the roll; *Re Isaac Romey Abeydeera* [21] where a proctor who had dishonestly appropriated his client's money, although not convicted of criminal breach of trust, was struck off; *Re Donald Dissanayake* [24] where an attorney had misappropriated his client's money and was guilty of deceit and malpractice which he explained was due to his "helpless addiction to liquor", he was struck off, Samarakoon, CJ observing that "Those whose professional lives are ruled by Bacchus are a danger to the public and it is unsafe to allow them to hold themselves out to the public as licensed attorneys-at-law; *Re Rasanathan Nadesan* [25], where an attorney was guilty of misappropriation of his client's money, deceit, professional negligence and malpractice was struck off).

Although criminal misconduct *prima facie* makes a person unfit to be an attorney-at-law, this, however, is not an inflexible rule. (Cf. *In re A. P. Jayatilleke* [33] following In *Re Weare* (*supra*); *In re a Proctor* [53]; *Re a Solicitor, Ex parte incorporated Law Society* [54]. The Court, perhaps, ought not to pass over the matter without marking its sense of the misconduct, but it may certainly decide on some other order without going to the extent of striking him off the roll. (E.g. see *Re Hill* (*supra*) followed in *The Solicitor-General v. Chelvatamby* (*supra*) where a proctor guilty of criminal breach of trust was suspended and ordered to pay costs). The appropriate order is a matter for the Court in the exercise of its discretion having regard to the circumstances of the case. Lord Esher, MR, in *Re Weare, (supra)*, at p.445 explained the matter in the following terms:

> 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 whenever 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 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 Manisty, 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 he had been punished in the criminal proceeding.

In the same case, Lopes, LJ, at p.449 fin. – 450 said as follows:

> It is perfectly clear that the mere fact that the person has been convicted of a criminal offence does not make it imperative on the Court to strike him off the roll. There are criminal offences and criminal offences. For instance, one can imagine a solicitor guilty of an assault of such a disgraceful character that it would be incumbent on the Court to strike him off the roll. On the other hand, one can imagine an assault of a comparatively trifling description, where in all probability the Court would not think it its duty to interfere. The same observation would arise with regard to indictments for libel. There are libels and libels, some of which would compel the Court to act under the plenary power it possesses, others where the Court would hesitate before it so acted.

Moonesinghe is guilty of deceit. Deceitful conduct, which is not necessarily criminal in nature, has resulted in various orders: In *Re M. Shelton Perera*[55] a proctor who gained admission to the Law College by deceitfully leading the Principal to believe he was not employed was suspended for three years. *In Re a Proctor*[22] a proctor who had misappropriated money without a criminal or dishonest intention was suspended for three months and ordered to pay costs. In *Re Dharmalingam*[57] (*supra*) a proctor who had misappropriated the survey fees deposited with him and was merely guilty of malpractice was suspended for four months. Where deceitful conduct, as in the case before us, is criminal in character, the order has usually been for removal. Thus in *Re Dematagodage Don Harry Wilbert*[2] an attorney who provided forged documentation for admission to the Law College was struck off; In *Re Edgar Edema* (*supra*), *Re Donald Dissanayake* (*supra*), and in Re R. Nadesan, (*supra*) lawyers guilty of misappropriation and deceit of a criminal character were struck off even though they had not been convicted. In *Re Thiruganànasothy*

(*supra*) though acquitted, the Court struck off a lawyer guilty of deceit of a criminal character.

Acts of malpractice have also been variously dealt with. In *Re A. V. de Silva* (1934) an advocate who was guilty of touting was removed from the roll; In *Re de Soysa* [56] a proctor in his professional capacity signing false certificates to enable persons to obtain identity cards was suspended for three years; In *Re Arthenayake* [57] an attorney who had been guilty of gross negligence in the discharge of his professional duties and in correspondence with his client indulged in unbecoming language, was suspended for two years; *In Re a Proctor* [22] where a proctor without criminal intention had negligently misappropriated his client's money, was suspended for six months and ordered to pay costs; In *Re Dharmalingam* [57] a proctor who misappropriated the survey fees deposited with him with the result that his client's case was dismissed, was suspended for four months; *In re Edwin Bevan* (1897) a proctor who signed and issued blank letters of demand was suspended for three months; *In Re two Proctors* (1935) where two proctors were guilty of deceit and malpractice in drawing up the terms of settlement submitted to a court, one of them was suspended for six months and the other for three months; *In re Simon Appu* [58] a proctor signing a plaint drawn by a petition drawer was suspended for three months; *In the matter of K* [59] a proctor who appeared drunk in court was suspended for three months; *In re Dharmaratne* [60] a proctor who had prepared a petition of appeal in false and scandalous terms insulting the judge against whose order his client was appealing, was suspended for a month; In *Re the complaint of Dr. C. J. Kriskenbeck against A. J. a Proctor of the Supreme Court* [61] where an advocate who was found guilty of "the small tyranny of cross-examination and bullying a witness, was in strong terms told what the expected standards were and the matter was dropped; In *The Solicitor-General v. Jayawickreme* [62] where when an advocate was guilty of malpractice for dealing directly with a client and not through the intervention of a proctor, the case being the first of its kind in this country, the Court did no more than make the Rule absolute.

In exercising the Court's disciplinary powers, many a thing has been taken into consideration. *In re Batuwantudawa* [63], in refusing to

re-enroll an advocate who had been convicted of forgery and cheating and sentenced to imprisonment. Dias, SPJ said that there was a solemn duty cast upon the Court to make it clear, "particularly at a time when public morality is at a low ebb", that it is not an easy matter for a person convicted of offences of this kind to be restored to the ranks of an honourable profession, the good name of which he has degraded by his conduct." I have no evidence before me of the state of "public morality". And in any event one might with Terence (*Phormio* 454) say *Quot homines tot sententiae; suo quoique mos.* So many men, so many opinions; his a law to each.

Account has also been taken of the fact that the attorney was not aware of the wrongful nature of his act. (See *Re Simon Appu* (*supra*); *Re a proctor* 1933 36 NLR at 16). There is no suggestion here that Moonesinghe was ignorant of the reprehensible nature and quality of his acts. The fact that the attorney was acting under pressure (*Re a Proctor* [53]) or had domestic problems at the time (*Re Dhramalingam* [57]) on certain occasions moved the Court to take a lenient view. However, in *Re Nadesan* [25], the fact that the delinquent attorney was mentally depressed on account of the ill-health of his mother and mother-in-law did not prevent the Court from striking off the attorney for misappropriating his client's money. The age of the attorney, (see *Re Simon Appu* (*supra*); *Re Aiyadurai* (*supra*); *Re Chelvatamby* (*supra*),) and his years of standing at the Bar (e.g. see *Re Simon Appu; Re Aiyadurai* (*supra*); *Re a Proctor* (1933) 36 NLR 9; *Solicitor-General v. Chelvatamby* (*supra*); *Re de Soysa* [58]) have also been considered. In *Re Fernando* (*supra*) however, Basnayake, CJ regarded long standing at the Bar as being merely an "unfortunate" circumstance. I have no evidence in this case of the age or standing of Moonesinghe, nor of any stresses that unbalanced him. The long interval between the commission of the offence and the consideration by the Court has also been taken into account. In *Re Thirugananasothy* (*supra*) at p.239 it was held that delay in complaining, unless explained was a mitigatory factor. In *Re Gaston R de Vaz* (*supra*) the lapse of fourteen years led the Court to treat the matter as one of re-enrolment. There has been no such lapse of time in the matter before us. Mrs. Chandratileke acted with sufficient celerity to bring this matter before us.

Where there has been misappropriation, although Basnayake, CJ in *Re Fernando* (*supra*) at p.235 considered the fact of restitution to be irrelevant when the Court is exercising its disciplinary powers, repayment being regarded as a mere discharge of one's civil liabilities, restitution has been taken into account in other cases. In *Solicitor-General v. Chelvatamby* (*supra*) restitution was considered a mitigatory factor although belated and "not in consequence of contrition". In *Re Aiyadurai* (*supra*) at p.511 the fact that restitution was intended was held to warrant "some degree of leniency"; In *Re P. P. Wickremasinghe* [18], the fact that the money had been paid back with interest was regarded as a mitigatory circumstance. In *Re Wijesinghe* [64] restitution was considered in the matter of an application for re-enrolment. In *Solicitor-General v. Cooke* (*supra*) Soertsz, J at p. 207 said that although restitution cannot be ignored, the weight to be given to that fact depended on the circumstances. On the other hand the refusal to make good the loss (*Re Thirugnanasothy* (*supra*) at p.240) or the evasion of payment "under cover of a series of fictitious stories and fraudulent excuses" (*Re Edgar Edema* (*supra*); or an unfulfilled promise of repayment (*Re Abeydeera* (*supra*) have been held to aggravate the offence. In the matter before me, Moonesinghe's pretended partial restitution by issuing a post-dated cheque, which he always believed or knew was a worthless piece of paper, and which he was willing to permit Mrs. Chandratileke to present for payment when he knew that his account had been closed, is conduct that aggravates his offence.

Although a charge will not be dropped because the complainant has made a private arrangement with the attorney (see *Anon* (1863) 9 LT 299; *Anon* (1873) 19 Sol. Jo 635, yet the fact that the complainant Indicates an intention not to pursue the matter may be considered in mitigation. (E.g. *Re P. P. Wickremasinghe* [18]. Understandably, Mrs. Chandratilake has not shown any intention of pardoning Moonesinghe.

The amount involved is of little or no consequence if the offence is serious. (E.g. *Re Abeydeera* (*supra*). In the matter before us the offence is serious and the amount involved is considerable.

One of the most important considerations in matters of this sort is the professional relationship of the attorney to the complainant. An

act which is ordinarily reprehensible deserves to be more severely marked if it is done by an attorney-at-law in pursuit of his profession. In *Re Hill*[16], Blackburn, J. at p. 548 said that in considering the order the Court should make "It always should be considered whether the particular wrong done is connected with the character of an attorney. The offence morally may not be greater, but still, if done in the character of an attorney, is more dangerous to the suitors, and should be more severely marked." If the misconduct with which an attorney is charged and of which he has been found guilty was committed in his capacity as an attorney-at-law, it is an aggravating circumstance. (See *Re Ranasinghe (supra); Solicitor-General v. Abdul Cader (supra); Re Fernando; Re Edgar Edema (supra); Re Abeydeera (supra); Re Donald Dissanayake (supra); Re Nadesan (supra); Re Hill*[16]; *Re D*[65]; *Re Weare (supra)* at p. 444; See also in *re A. P. Jayatileke*[33]).

Was there something Moonesinghe did as an attorney-at-law in the course of his professional employment towards a client, or towards a court or to an opponent in litigation or, in a non-contentious matter, the "other side"? There was no litigation, no court, or "other side" in this matter. Nor was there a client-attorney relationship. It is evident from Mrs. Chandratileke's letter to the Chief Justice as well as from her affidavit that the organization known as T & M Associates (Pvt) Ltd. was not seen by her as a firm of attorneys-at-law, but rather, as she says, "a financial institution" which she claims ought to have been registered under the Control of Finance Companies Act (Cap. 329). In his application to open his bank account (P8), Moonesinghe left the column relating to his "Occupation, Profession or Employment" without any entry; and in the Signature Card pertaining to his bank account (P9) he described his "Designation/Occupation/Profession", not as an attorney but as a "businessman". There was no relationship of attorney and client between Moonesinghe and Chandratileke. The conduct in question, in my view, was not in pursuit of his profession as an attorney-at-law and does not constitute professional misconduct. This is a mitigatory circumstance. Thus in *Solicitor-General v. Chelvatamby*[9] reported *sub. nom. In re a Proctor*[53], a proctor convicted of criminal breach of trust but not of property entrusted *qua* a proctor was suspended for twelve months and ordered to pay costs. In *Re Aiyadurai*[11] a proctor

convicted for criminal breach of trust of property not entrusted to him in his professional capacity was suspended for six months.

On the other hand, the response of Moonesinghe to the Rule has been most unsatisfactory. There has been no apology, or expression of regret or any sign of repentance, and he has failed to explain his conduct or show cause why he should not be dealt with by this Court. These are matters we should not ignore. (See *Re Simon Appu (supra); Solicitor-General v. Jayawickrama (supra)* at p. 322; *Re Arthenayake at p. 334-335; Re Wilbert (supra)* at 34). In the matter before us Moonesinghe's disrespect for this court by failing to submit his observations when they were called for by the Court and by failing to respond to the Rule was exacerbated by his attempt to stall the proceedings by pretending to act through a firm of attorneys in the Seychelles.

How then should we deal with such a man in the circumstances of this matter? It has been said that the Supreme Court has inherent disciplinary powers over its officers. (Cf. *Re Arthenayake*[37] per Seneviratne, J; *Re Dematagodage Don Henry Wilbert*[2] per Fernando, J). It also does, and has always had, wide statutory powers to deal with its officers in matters of discipline. Article XXIV of the Royal Charter of Justice of 1801, which set up the Supreme Court of Judicature of this Island empowered the Court to "approve, admit and enrol" advocates and proctors, and gave the Court the adjunct power to remove "on reasonable cause" those who had been so admitted. The Supreme Court was empowered by Article 17 of the Charter of Justice of 1833 to admit as Proctors or as Advocates of the Supreme Court persons "of good repute" and competent knowledge and ability. No reference was made to the power of removal or suspension; but the Court did exercise those powers. For instance, in *Re Dharmaratne*[60] it suspended a proctor who was found guilty of gross and culpable misconduct. In *Re Edgar Edema*[19] the Court struck off the name of a proctor from the roll for misappropriating his client's money for his own use.

Section 16 of The Courts Ordinance No. 1 of 1889 gave the Court the power to admit "persons of good repute and competent knowledge and ability" as Advocates or as Proctors of the Court. Section 17 provided that "Every person so admitted and enrolled,

who shall be guilty of any deceit, malpractice, crime or offence, may be suspended from practice or removed from office by three Judges of the Supreme Court sitting together."

The Administration of Justice Law No. 44 of 1973, removed the distinction between the two branches of the profession, and through Section 33 empowered the Supreme Court to admit and enrol as attorneys-at-law "persons of good repute and of competent knowledge and ability." Section 35 of the Administration of Justice Law provided that "Every attorney-at-law who shall be guilty of any deceit, malpractice, offence or other conduct unworthy of an attorney-at-law may be suspended from practice or removed from office by any three Judges of the Supreme Court sitting together."

Section 62 of the Judicature Act No. 2 of 1978, *inter alia,* repealed the provisions of Chapter 1 (Section 5-54) of the Administration of Justice Law No. 44 of 1973. However, the Judicature Act of 1978 enacted in Section 40(1) that the Supreme Court may, "in accordance with the rules for the time being in force, admit and enrol as attorneys-at-law persons of good repute and of competent knowledge and ability." In Section 42(2) the Judicature Act provides that "Every person admitted and enrolled as an attorney-at-law who shall be guilty of any deceit, malpractice, crime or offence may be suspended from practice or removed from office by any three judges of the Supreme Court sitting together." Although it was in terms similar to Section 35 of the Administration of Justice Law, the words "or other conduct unworthy of an attorney-at-law" were removed.

In *Re Arthenayake (supra)* Seneviratne, J. at p. 349 said that in the interests of the Bar and that of the public Section 42(2) of the Judicature Act should be amended by the addition of the words "or other conduct unworthy of an attorney-at-law". Although the phrase certainly did usefully put the matter beyond any doubt, and might have been retained out of an abundance of caution, which, with great respect, is what I think Seneviratne, J. meant, I do not think the removal of the words "or other conduct unworthy of an attorney-at-law" has diminished the powers of the court, I am inclined to think that the word "offence" in Section 42(2) of the Judicature Act has a wider meaning than that given to it in the Penal Code and Code of

Criminal Procedure. I think it means *disciplinary offence* and includes, conviction for an offence by a competent court, conduct that is criminal in character, malpractice – whether the professional misconduct involves moral turpitude or not – , deceit, and all other forms of unprofessional conduct in the sense of misconduct the Court ought to have taken into account at the time of the admission of any attorney-at-law in deciding whether he was a person of good repute.

In terms of Section 42(1) of the Judicature Act, the Supreme Court is given the power to refuse to admit and enrol any person applying to be admitted as an attorney-at-law, declaring in open court its reasons for such refusal, if required to do so by the applicant. It is not without significance that the power to refuse admission is embodied in a sub-section of the same section containing the provisions regarding the power to suspend or remove admitted attorneys, rather than in the section relating to admissions. The two matters are inextricably linked. Disciplinary control over persons the Court has admitted as attorneys-at-law is a power that is accessory or adjunct to its power of admission. The power to admit and the power to exercise disciplinary control by removal, suspension, reprimand, admonition or otherwise are concomitant. I should venture to express the view that if Section 40 of the Judicature Act merely gave the Court the power of admission without, as it does in Section 42(2) Judicature Act, expressly conferring the powers of removal and suspension, yet, as a matter of necessary implication, it also gave the Court the power to remove, suspend or otherwise exercise disciplinary powers over the persons appointed by the Court to act as its officers. (Cf. Section 14(f) of the Interpretation Ordinance (Cap. 12)). As we have seen, when it had no express statutory powers to do so under the Charter of Justice of 1833, which in express terms only gave a power of admission, the Court had no hesitation in suspending *(Re Dharmaratne (supra))*, and removing (see *Re Edgar Edema (supra))* members of the Bar.

And so, in deciding what is to be done, I think I should ask myself this: What would I have done if Moonesinghe was an applicant for admission as an attorney-at-law? As Howard, CJ observed in *Re Brito*[35]: "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 re Hill*[16], where an attorney had admitted embezzlement of money he had received, but not in his capacity as an attorney, Cockburn, CJ said this:

> "I should add, there is one consideration I omitted, and which, I think is entitled to great weight. It is that put to us in the course of the discussion, namely, that if those facts had been brought to our knowledge upon the application for this gentleman's admission, we might have refused to admit him; and I think the fact of his having been admitted does not alter his position; having been admitted, we must deal with him as if he were now applying for admission; and as in the case of a person applying for admission as an attorney, we should have considered all the circumstances, and either have refused to admit, or have suspended the admission for a certain time, so where a person has once been admitted we are bound, although he was not acting in the precise character of an attorney, to take notice of his misconduct."

In terms of the Supreme Court Rules (1978) (made under Article 136 of the Constitution and published in *Gazette Extraordinary* No. 9/10 on November 8, 1978), every person who intends to apply for admission as an attorney-at-law is required, *inter alia,* to submit to the Supreme Court a "certificate from two or more Attorneys-at-law of at least seven years' standing that the applicant is a person of good repute and that there is no impediment or objection to his enrolment as an attorney-at-law." (Rule 68 (e)). When these certificates have been filed, the Supreme Court is required by Rule 69 to direct the Registrar "to inquire and report whether the applicant is of good repute and whether there exists any impediment or objection to his enrolment as an attorney-at-law, and upon such report the Supreme Court shall either direct the applicant to be sworn or affirmed, and admitted and enrolled, or make such other order as it may deem proper."

Persons have been admitted to the legal profession in this country always only if they are persons of good repute. In the common or general estimate, and in the relative estimation of the Court, and of admitted attorneys-at-law of prescribed standing, a person must be regarded as decent and respectable enough to be a member of an

honourable profession. The State, the court before whom he may appear, the litigants and members of the public who may seek his advice or to whom they may entrust their affairs, and the legal profession and its members, ought to be considered.

First, I should consider the matter from the duty we owe the State. Let me explain. Three salient features characterize the role of consulting professions like the legal profession: (a) the provision of services related to basic values; (b) self-regulation and (c) a monopoly or near monopoly of services. The legal monopoly, or near monopoly, over our professional services has this implication: We do not have a *right* to practice, but only a *privilege conferred by the State,* provided certain conditions are fulfilled. The Supreme Court has from the time of the Charter of Justice of 1801, been entrusted with the task of determining what those conditions are, and conferring or taking away the privilege of practising as a member of the legal profession. We, therefore, owe the State a duty to ensure that only those who are qualified by continuing to satisfy the conditions upon which they were admitted are permitted to hold the franchise given to them. Mokerjee, J in *Emperor Rajani Kanta Bose et al*[66] followed with approval by Howard, CJ in *Re Brito (supra)* at p. 532 said:

> 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 privilege and manage the business of others as (an attorney-at-law), in other words, unfit to discharge the duties of his office and unsafe because unworthy of confidence.

The fact that the right to practice is a revocable franchise was also referred to by Macdonell, CJ in *Attorney-General v. Ariyaratne (supra).* at p. 197.

One of the essential conditions for admission to the legal profession is that a person must be of good repute. In the circumstances of this case, Moonesinghe would certainly not have qualified. Therefore, in discharging the obligations we owe the State, the franchise granted by us to Moonesinghe to practise as a member of the legal profession must be revoked.

There is a duty on our part to the courts before whom he may practise to ensure that an attorney will maintain the highest standards of conduct so that he might be a person fit to be an officer of the court. He must be a person who can be trusted by the Court. He must be able to command the confidence and respect of the judges. See *Re Fernando (supra)* followed in *Re Nadesan (supra)*. Rule 51 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules of 1988 provides that "An Attorney-at-Law shall not mislead or deceive or permit his client to mislead or deceive in any way the Court or Tribunal before which he appears." Moonesinghe is guilty of deceit. Having regard to the nature and quality of Moonesinghe's dishonesty, which in my view is grave, I do not think he could have been depended upon to observe the cardinal principles enshrined in Rule 51. I would, therefore, not have admitted him, *In the matter of an application to be readmitted and re-enrolled as an Advocate of the Supreme Court*[67] Chief Justice Abrahams (Maartensz and Moseley JJ agreeing) said at, p. 477: "We should of course be very careful in admitting to the profession – members of which should observe the highest standard of honour and trustworthiness – a man who has been guilty of crime and dishonesty." And so, I do not think Moonesinghe is a fit person to continue as an officer of this Court.

There is duty we owe the public. In *re Hill*[16] Cockburn, CJ said: "When an attorney does that which involves dishonesty, it is for the interest of suitors that the Court should interpose and prevent a man guilty of such misconduct from acting as an attorney of the Court." Significantly, in the matter before us, Mrs. Chandratileke in her letter to the Chief Justice complained that she and other members of the public invested large sums of money with Moonesinghe "relying" on his "integrity as a professional man." There was no client-attorney relationship in this case, but Mrs. Chandratileke, was Justified, as a member of the public who had dealt with a member of the legal

profession in whom she was entitled to repose confidence, in requesting the Chief Justice to direct an inquiry to ascertain whether Moonesinghe was "a fit and proper person to hold the office of attorney-at-law." She was entitled to ask for an inquiry to ascertain whether the franchise given to this man should be withdrawn. In *Re C. D. de S. Senaratne*[23] a proctor who was guilty of deceit and negligence was suspended and ordered to pay costs. Rose, CJ (Nagalingam, SPJ, and K. D. de Silva, JJ agreeing) held at p. 100 that "the interests of the profession and the public demand a suitable recognition of the respondent's misconduct" even though the complainant had merely suffered "inconvenience, annoyance and anxiety." Similarly in *Solicitor-General v. Cooke (supra)* (followed per Ranasinghe, CJ. in *Re Nadesan (supra))*, Soertsz, J. ordered that a proctor convicted of criminal breach of trust be struck off because "the interests of the public and the prestige of the profession to which the respondent belongs" required it. (see also *Attorney-General v. Ellawala (supra)* at p.18).

In *Re Fernando*[13], a proctor had been convicted of criminal breach of trust and dishonest misappropriation of property. It was argued that the money was not entrusted to him in his capacity as a proctor. Basnayake, CJ. (Pulle and Fernando, JJ. agreeing) followed the decision in *The Solicitor-General v. Abdul Cader*[12] and said as follows:

> The evidence in the case which we have perused leave no room for doubt that the clients concerned came to him to obtain his services as a professional man and not in any other capacity. But even if the assumption of learned counsel is correct, it makes no difference. The jurisdiction this Court exercises under Section 17 of the Courts Ordinance has nothing to do with punishment. The power to remove or suspend a proctor from his office is one that is meant to be exercised for the protection of the profession and the public and for the purpose of maintaining a high code of conduct among those whom this Court holds out as its officers to whom the public may entrust their affairs with confidence. If a proctor is adequately to perform the functions of his office and serve the interests of his clients, he should be able to command the

> confidence and respect of Judges, of his fellow-practitioners and of his clients. When a proctor is convicted of a criminal offence, more especially of an offence involving his honesty and fidelity, it must inevitably mean the loss of that confidence and respect without which he can no longer adequately perform the functions of his office. Such a person this Court cannot hold out to suitors *and others* "(the emphasis is mine)" as a person in whom they may with safety place their confidence and who can be trusted to advise them, and to undertake their affairs ... It is unfortunate that the respondent should find himself in this situation after nearly 20 years in his profession. But the interests of the profession and the public which are paramount require that he should be removed from his office...

Although Cockburn, CJ in *Re Hill* (*supra*) referred to the interest of "suitors", it is clear that criminal misconduct and deceit, whether it be connected with his character as an attorney-at-law or not, may render him unfit to be an attorney-at-law. (See *R v. Southerton* (*supra*) at p.143; *Re King*[68]; *Re Hall, Dollond v. Johnson*[69]; *Re Blake*[70]; *Re Strong*[71]; *Re Hopper*[72]; *Re Weare*[7]. Indeed the disciplinary powers of the Court remain as long as a person's name is on the roll and does not depend on whether he has ceased to practise. (Cf. *Myers v. Elman*[73], *Sittingbourne and Sheerness Rail Co. v. Lawson*[74]; *Simes v. Gibbs*[75]; *Brendon v. Spiro*[76]; *Re a Solicitor, Ex parte Incorporated Law Society*[77]; *Ex parte Champ*[78]; I do not think that Cockburn, CJ intended his remarks to be confined to the misconduct of attorneys-at-law acting for litigants. The case before the Chief Justice related to the misconduct of an attorney by misappropriating funds entrusted to him as a clerk to a firm of attorneys. However, the Chief Justice did not hesitate to suspend the man for twelve months. That the Chief Justice was using the term to refer to any person who may deal with an attorney, whether a professional client or not, is clear from his earlier statement in *Re Blake*[70]. In that case, as in the matter before us, the matter arose out of a loan transaction where there was no attorney-client relationship. In that case, the Chief Justice said:

> I am of opinion that Blake is amenable to the summary jurisdiction of this Court, although the misconduct of which he has been guilty did not arise in a matter strictly between

> attorney and client, but out of a simple loan transaction. I proceed on the general ground that where an attorney is shown to have been guilty of gross fraud, although the fraud is neither such as renders him liable to an indictment, nor was committed by him while the relation of attorney and client was subsisting between him and the person defrauded, or in his character as an attorney, this Court will not allow suitors to be exposed to gross fraud and dishonesty at the hands of one of its officers.

Lord Esher, MR, *In re Weare* (*supra*) referred at p. 444 to the dictum of Cockburn, CJ., and added that the word "strictly" ought to be left out.

In *Black* (*supra*) Crompton, J (3 E & E at p. 40 and 30 LJ QB at p. 35) cites a passage from Chitty's Archbold's Practice, 11th Ed. P. 146: "The Court will, in general, interfere in this summary way, and strike an attorney off the roll, or otherwise punish him, for gross misconduct not only in cases where the misconduct has arisen in the course of a suit, or other regular and ordinary business of an attorney, but where it has arisen in any other matters so connected with his professional character as to afford a fair presumption that he was employed in or entrusted with it in consequence of that character." In that case blake had made fraudulent use of a deed entrusted to him because of his character of attorney; and Crompton, J went on to say: "In the present case I cannot say that Blake's fraud was not committed in a matter connected with his professional character. If he did not act in it as an attorney, he, at all events, took advantage of his professioal position to deceive."

That is not the position here. Moonesinghe neither acted in his professional capacity nor did he take advantage of his professional position to deceive. However, the fact that he was an attorney-at-law did influence Mrs. Chandratileke, and perhaps others, and lead them to trust him. Moonesinghe was confidently entrusted with a large sum of money in consequence of being a member of an honourable profession. There is a duty we owe the public generally to admit and keep enrolled only those who can be held out to members of the public as persons who may with safety be trusted to advise them and undertake their affairs. (See per Phear, CJ, in *Re Edgar Edema* (*supra*) at p. 384; *Attorney-General v. Ellawala* (*supra*) per Garvin,

Dalton and Lyall Grant, JJ at p. 18; per Soertsz, J in *Solicitor-General v. Cooke (supra)* at p. 207; per Basnayake, CJ in *Solicitor-General v. Abdul Cader (supra)* and in *Re Fernando (supra).*

Moonesinghe has betrayed the confidence reposed in him as a professional man in a most reprehensible manner. His misconduct has rendered him unfit to be held out to members of the public as a person qualified to advise them and to undertake their affairs and in whom they may safely place their confidence. I would not have admitted him if we were considering the matter of his admission. He must therefore be removed from the office of attorney-at-law.

In addition to considering the question of good repute from the point of view of the State, the Court and the administration of justice, and from the point of view of the public, the matter should also be looked at by us as trustees of the legal profession. In *Re an Advocate*[40] Gratiaen, J at p. 560 said:

> Our duty must be measured by the rights of litigants who may seek advice from a professional man admitted or readmitted to the Bar by the sanction of the Judges of the Supreme Court. It is also measured by the right of the profession, whose trustees we are, to claim that we should satisfy ourselves that re-enrolment will not involve some further risk of degradation to the reputation of the Bar.

Those observations of Gratiaen, J were quoted with approval by Fernando, J *sub. now re Ranasinghe* in *Re Wilbert (supra)* at p. 28.

We have seen that at the time of applying for admission, an applicant is required to submit certificates from two or more attorneys-at-law of at least seven years standing that the applicant is of good repute. (Rule 68 (e) of the Supreme Court Rules 1978). This is in addition to the Court's own inquiry on the question in terms of Rule 69, reflecting the Court's concern for the opinion of our professional brethren of good repute and competency. Rules 60 and 61 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules of 1988 (Gazette Extraordinary No. 535/7 of 7 December 1988) made by the Supreme Court under Article 136 of the Constitution provides as follows:

60. An Attorney-at-Law must not conduct himself in any manner which would be reasonably regarded as disgraceful or dishonourable by Attorney-at-Law of good repute and competency or which would render him unfit to remain an Attorney-at-Law or which is inexcusable and such as to be regarded as deplorable by his fellows in the profession.

61. An Attorney-at-Law shall not conduct himself in any manner unworthy of an attorney-at-law.

In this exercise of our powers conferred by Section 42(2) of the Judicature Act, there is, I think, a duty we own the profession, as Lord Mansfield said in *Ex Parte Brounsall*[39] to ensure that it "should stand free from suspicion". Perhaps the duty is one we owe the fraternity of lawyers on a wider basis?; although, undoubtedly, what *action* one country might take in relation to misconduct committed elsewhere would depend on the circumstances. (E.g. see *Bunny v. Judges of New Zealand*[79]; *Re A Solicitor, Ex parte Incorporated Law Society*[80]; *Re Iles*[81]; *Macauley v. Sierra Leone Supreme Court Judges*[82]. In *Re Batuwantudawe (supra)* it was held that it was the duty of the Registrar of the Court to forthwith inform the English Inn to which the delinquent lawyer belonged of the decision of this Court with regard to his removal. There is also, more obviously, a duty to ensure that the members of the profession he may regularly meet are not required to deal with an unworthy person. In *Re Weare*[7] Lord Esher, MR, at p. 446 said as follows:

The Divisional Court, having heard the case, has come to the conclusion that this solicitor has been convicted of a criminal offence of such a disgraceful kind that he ought to be struck off the rolls. The Court is not bound to strike him off the rolls unless it considers that the criminal offence of which he convicted is of such a personally disgraceful character that he ought not to remain a member of that strictly honourable profession. Now what is the offence? The offence is being a party to the use of a house belonging to him as a brothel. Is it or is it not personally disgraceful? Try it in this way. Ought any respectable solicitor to be called upon to enter into that intimate intercourse with him which is necessary between two solicitors, even though they are

acting for opposite parties? In my opinion, no other solicitor ought to be called upon to enter into such relations with a person who has so conducted himself. I think he has been convicted of a personally disgraceful offence.

In the same case (at p. 447) Lord Justice Lindley said:

> The question is, whether a man is a fit and proper person to remain on the roll of solicitors and practise as such. That is the question. Now, asking that question, how can we say that a person who acts as this man is proved to have acted is a fit and proper person to remain on the roll of solicitors? What respectable solicitor could without loss of self-respect, knowing the facts, meet him in business? And what right have we to impose upon respectable solicitors the duty of meeting him in business?

In relation to the charge of deceit, Moonesinghe has been guilty of such disgraceful conduct that I should have been quite unwilling to admit him to the legal profession and to impose upon respectable members of our profession the duty of meeting such a man in business. Having been admitted, he must now be removed from the honourable profession in which he now has a place.

All is not lost. If I might adopt the words of Schneider, ACJ in *Re Seneviratne*[(83)]; I can only hope that this decision will have "the salutary effect of awakening in" Moonesinghe "a higher sense of honour and duty." As Lord Esher observed in *Re Weare (supra)* and followed with approval in *Attorney-General v. Ellawala (supra)* at p. 32, "if 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", he may be considered for readmission. (See *Re Monerasinghe*[(84)]; *Re W. A. P. Jayetilleke*[(85)]; *Re Ranasinghe*[(86)]; *Re Batuwantudawa*[(63)]; *Re Senaratne*[(87)]; *In the matter of an application for the readmission as a Proctor*[(88)]; *Attorney-General v. Ellawela*[(89)]; *Re Wijesinghe*[(84)]; *In Re Britto (supra)* at p. 533; *Re Wickremasinghe*[(30)]; *Re Salgadoe*[(91)]; *Re Arumugam*[(92)]; *Re Gaston R. de Vaz*[(45)]. For the time being he must be struck off the roll. No sympathetic considerations must stay my hand. I cannot show a forbearance or practise a generosity of an

unacceptable kind. (See per Soertsz, J in Solicitor-General v. Cooke followed per Ranasinghe, CJ in Re Nadesan; see also per Gratiaen, J in Re an Advocate (*supra*)).

For the reasons set out in my judgment, I am of the opinion that the Rule must be made absolute. I make order that Susantha Mahes Moonesinghe, Attorney-at-Law, be removed forthwith from the office of attorney-at-law, and direct that his name be struck out of the Roll of Attorneys-at-Law of the Supreme Court of Sri Lanka.

Rule made absolute.