1938 *Present :* **Hearne, Keuneman, and Nihill JJ.**

In re A PROCTOR.

In the Matter of an Application under section 19 of the Courts Ordinance.

Proctor—Property entrusted to him in his private capacity—Breach of trust—Suspension from practice—Sufficient punishment—Application to strike name off the rolls.

Where the respondent (a proctor) was convicted of criminal breach of trust of an attiyal which had been entrusted to him for sale, not in his professional capacity, and where at the trial before the Supreme Court the complainant accepted the attiyal on the suggestion of the presiding Judge,—

***Held,* that suspension from practice for twelve months would be a sufficient punishment for the respondent's misconduct.**

There is no absolute rule that a proctor convicted of an offence should be struck off the rolls.

THIS was an application to remove the respondent's name from the roll of practising proctors.

E. F. N. Gratiaen (with him *N. Nadarajah* and *P. Navaratnarajah*), for respondent.—The respondent was convicted of criminal breach of trust of an attiyal entrusted to him for sale by Mrs. Rasiah. Before the Police Court prosecution the attiyal was offered to Mrs. Rasiah, but she denied that it was the same attiyal and refused to accept it. Later, at the conclusion of the Supreme Court trial, she accepted it on the advice of the Chief Justice, who was the presiding Judge. Restitution has been made, and this is a matter which should be taken into consideration in favour of the respondent. (*In re Hill*[1].) A still more weighty consideration is the fact that the alleged offence was not committed by the respondent in his official capacity. He was not employed by Mrs. Rasiah as her proctor in this matter. The attiyal was entrusted to him in his private capacity as a friend. In determining whether he should be struck off the roll, the question whether the misconduct was professional or not is material. It should be considered whether the particular wrong done is connected with his character of proctor. (*In re Hill (supra)*); *In re A Solicitor, ex parte The Incorporated Law Society*[2]; *Coderey on Solicitors (4th ed.) 230.* Respondent has been sufficiently punished. He received only a temporary benefit in a sum of Rs. 50. He has to support a wife and seven children, and if he is barred from practising as a proctor, that would mean utter ruin and disaster for himself and his wife and family. A proctor who appropriated his client's money for his own use was not removed from the roll of proctors, but suspended from practice for a period. (*In re A Proctor*[3].) Similarly in the case of two proctors found guilty of deceit and malpractice. (*In re Two Proctors*[4].) Respondent is not seeking to defend himself. He merely desires to point out the mitigating curcumstances and throw himself at the mercy of the Court.

[1] *18 L. T. 564.*
[2] *61 L. T. 842.*
[3] *36 N. L. R. 9.*
[4] *37 N. L. R. 352.*

M. T. de S. Ameresekere, C.-G. (with him *D. Jansze, C.C.*) in support.—The consequence of a conviction for an offence involving moral turpitude has invariably been removal from the roll. In the two cases cited, *In re A Proctor* and *In re Two Proctors* there were no convictions. However, there is nothing to prevent a departure form what may be regarded as *cursus curiae.* It is conceded that the offence was not committed by the respondent *qua* proctor. With regard to restitution, this is not admitted. On the evidence it is clear that the value of the attiyal had been demanded by Mrs. Rasiah, and the respondent had sent a cheque which was dishonoured. He had made use of the attiyal for his own purposes by pawning it. It is not admitted that the attiyal returned was the identical one entrusted to him. No restitution has in fact been made. There has been, at least, one case where a proctor had made restitution, yet his name has been removed. Even if this application is allowed, it will be open to the proctor in appropriate circumstances to have his name restored to the roll.

E. F. N. Gratiaen, in reply.—With regard to the *cursus curiae.* This is the only case where a sentence of imprisonment was not passed on a proctor convicted of misappropriation. In passing a sentence of fine only the presiding Judge referred to the extenuating circumstances. The attiyal was first tendered to Mrs. Rasiah long ago, before the Police Court inquiry.

Cur. adv. vult.

December 21, 1938. HEARNE J.—

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

On May 27, 1938, the respondent was convicted in S. C. case No. 31, P. C. Kandy, No. 57,320, of an offence punishable under section 389 of the Ceylon Penal Code, in that in or about July, 1930, " he did commit criminal breach of trust of an attiyal of the value of Rs. 1,250 entrusted to him at Kandy for sale by Mrs. E. R. Rasiah ".

The facts of the case which the Jury by their verdict accepted were that the attiyal which had been entrusted to the respondent for sale has been deposited by him as security for a loan which he obtained from one S. J. Fernando.

Mrs. Rasiah in D. C. Kandy, No. 41,900, sued the respondent for the recovery of Rs. 7,500 (with this we are not here concerned) and on a second cause of action for the recovery of the attiyal or its value. Judgment was entered of consent and was followed by execution proceedings in which, by the sale of respondent's property, a sum of Rs. 3,728.90 was recovered by the plaintiff.

Prior to the Police Court proceedings the respondent offered to Mrs. Rasiah an attiyal which he stated was the one entrusted to him, but she declined to accept it on the ground that it was not the original attiyal she had handed to the respondent. This attiyal was a production at the S. C. trial and at its conclusion, as Mr. Gratiaen who appeared for the respondent at the trial states, the Chief Justice who presided

advised her to accept it which she did. It would, we think, in these proceedings be fair to assume that though belated and not, as it would appear, in consequence of contrition, restitution has in fact been made.

In the case of *In re Hill*[1] in which an admitted attorney, being engaged in the employ of a firm of attorneys as managing clerk, embezzled two sums of money amounting to £93 which he had received from a client of the firm, the fact that he had repaid the sums of money was referred to as a relevant circumstance although repayment took place only upon the discovery of the fraud.

But the most important consideration to which in our opinion weight should be given is that the attiyal was not entrusted to the respondent in his capacity as proctor. This aspect of the matter was pressed on our notice by Mr. Gratiaen and was not disputed by the learned Solicitor-General.

In *In re A Solicitor, ex parte The Incorporated Law Society*[2], a Solicitor, while acting as a clerk to a firm of Solicitors, misappropriated various sums of money amounting to £175 belonging to his employers. For this offence he was sentenced to 18 months suspension. Later he was prosecuted in a criminal court and sentenced to six months imprisonment. The Incorporated Law Society then applied to strike the Solicitor off the rolls on the ground of such conviction for felony, although the facts were the same as on the former occasion when he was suspended. It was held that there was no absolute rule that a Solicitor convicted of felony should be struck off the rolls.

In his judgment Pollock B. said, " the mere conviction is not binding upon the Court in a case of this kind, and the Court can, and may, and ought, to enter upon and weigh all the facts of the case, including any extenuating circumstances . . . . "

Manisty J. said, " It is very important to bear in mind, that the facts of this case are exactly the same as in the case of *In re Hill* (*supra*). It was not *qua* Solicitor that he committed the offence of which he had been convicted and that was pointed out as a very strong fact to be considered. So far as the offence was concerned he was like an ordinary individual . . . . It is not the case of a Solicitor, but it is the case of a man committing a felony, he being a Solicitor at the time, and that is pointed out strongly in the judgment of Cockburn C.J. and Blackburn J. . . . . "

The respondent is a man of 49 years of age and has been in practice for 17 years. He appears to have acted under the influence of considerable pressure. I think that in all the circumstances we are not called upon to go to the extent of striking him off the rolls. It will be sufficient in my opinion if we mark our sense of his misconduct by ordering that he be suspended from practising as a proctor for twelve months from this date. He will bear the costs of this application which we fix at Rs. 52.50.

KEUNEMAN J.—I agree.

NIHILL J.—I agree.

[1] *18 L. T. 564.*