[HIGH COURT OF AUSTRALIA.]

IN RE DAVIS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1947.

SYDNEY, *Dec.* 5, 15.

Latham C.J., Starke, Dixon, McTiernan and Williams JJ.

Legal Practitioners—Barrister—Admission—Criminal offence prior thereto—Non-disclosure to Barristers Admission Board—Jurisdiction of Court over barristers—Disbarring—"Shall"—Legal Practitioners Act 1898-1936 (*N.S.W.*) (*No.* 22 *of* 1898—*No.* 10 *of* 1936), *ss.* 9, 10.*

The appellant, having been approved for admission as a barrister by the Barristers Admission Board was in 1946 admitted as a barrister by the Supreme Court of New South Wales. In 1947 that Court disbarred the appellant on the ground that in 1935 he had pleaded guilty to an indictment for breaking, entering and stealing and that he had failed to disclose this fact to the Court or to the Board or to the persons from whom he obtained certificates of good fame and character.

Held (i) by *Starke*, *Dixon*, *McTiernan* and *Williams* JJ. (*Latham* C.J. dissenting), that the Supreme Court is not bound by s. 10 of the *Legal Practitioners Act* 1898-1936 (N.S.W.) to admit to the Bar a candidate who is approved by the Board,

(ii) by the whole Court, that the power of the Supreme Court to disbar may be exercised upon a ground that is antecedent to the admission of a barrister or the determination of the Board to approve him as a fit and proper person,

(iii) that the Supreme Court rightly held that the appellant was not a fit and proper person to be a barrister.

Decision of the Supreme Court of New South Wales (Full Court): *In re Davis*, (1947) 48 S.R. (N.S.W.) 33; 64 W.N. (N.S.W.) 226, affirmed.

APPEAL from the Supreme Court of New South Wales.

The Prothonotary of the Supreme Court of New South Wales reported to that Court that in the year 1946 Sydney Samuel Wilton

* Section 10 of the *Legal Practitioners Act* 1898-1936 (N.S.W.) provides: "Every candidate whom the Board shall approve as a fit and proper person to be made a barrister shall be admitted as a barrister by the Court on any day appointed for that purpose."

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Davis, referred to in the report as "Mr. X," was admitted as a barrister of the Supreme Court of New South Wales and he, the Prothonotary, had been informed that at the sittings of the Court of Quarter Sessions held at Sydney on 5th March 1935, Davis had been arraigned upon an indictment presented and filed in that Court charging him that he did break and enter a dwelling house and steal articles of jewellery, clothing and other articles therein. Davis having pleaded guilty to the indictment was sentenced for his offence to be bound over self with one surety in £100 each, to be of good behaviour for a period of three years, and to appear for sentence if called upon during such period. A condition of the recognizance was that Davis was to keep away from the company of certain people mentioned. A certificate of the conviction was produced to the Court.

The Prothonotary further reported that on 4th January 1944, Davis was charged at the Central Court of Petty Sessions that on 31st December 1943, in Darlinghurst Road, Sydney, he did behave in an offensive manner. Davis did not appear to the charge whereupon his recognizance was forfeited. The relevant court document relating to this charge was also produced.

The Prothonotary said in his report that from a perusal of the papers submitted by Davis on his application to the Barristers Admission Board on 13th February 1946 for approval for admission to the Bar it would be seen that there was not any mention, either by Davis himself or in the certificates of character submitted in support of his application, of Davis' conviction. Nor was it brought to the notice of the Court on his admission to the Bar.

The Supreme Court granted a rule nisi calling upon Davis to show cause why he should not be disbarred and his name removed from the roll of barristers. The Court ordered that a copy of the rule nisi and of the Prothonotary's report be served upon Davis and also upon each of two named solicitors one of whom in February 1946 and the other in March 1946 had given certificates of character with respect to Davis.

Upon the return of the rule nisi affidavits by Davis, each of the two solicitors referred to above, the Attorney-General for New South Wales, a professor in the Faculty of Law of the University of Sydney, a minister of religion, and a detective constable of police, were read to the Court.

The affidavit by Davis contained facts the material portions of which are recited in the judgments hereunder.

In affidavits sworn and filed by each of them respectively the two solicitors referred to above said that they first became acquain-

ted with Davis in 1932 when they were students at the Law School of the University of Sydney. They lost touch with him for a period but from the date of his return to Sydney at the end of 1941 up to the date of their affidavits they had been well acquainted with Davis both as a personal friend and during the three years immediately preceding their affidavits, professionally. Until served, on 19th September 1947, with a copy of the rule nisi and the report of the Prothonotary they were unaware that Davis had ever been charged with or convicted of any offence against the law and they were not told of those matters by Davis or any other person, except that one of the solicitors, on 18th September 1947, received certain information as a result of a newspaper report. Each of the solicitors said that he gave his certificate of character from his own assessment and knowledge of Davis' character during the years the solicitor had known him and from the reputation Davis had borne among their mutual friends and acquaintances.

The Attorney-General for the State of New South Wales deposed that he first met Davis in 1932 and had met him on several occasions between that year and 1943. During 1946 and 1947 Davis had called upon the Attorney-General occasionally and he considered that he had sufficient knowledge of Davis during those two years to state that he had been of good character and displayed considerable ability and industry in his professional work.

A professor in the Faculty of Law of the University of Sydney also deposed that in his opinion Davis, whom he had known for several years, was a person of good conduct and character, and he adhered to this opinion despite the facts concerning the matters now alleged against Davis and which were made known to the professor for the first time on or about 22nd September 1947.

A minister of religion deposed that since 1942 his relationship with Davis had developed into a close personal friendship and that during that period of friendship Davis had always appeared to him as trustworthy, industrious and of good fame and character.

The Supreme Court made the rule absolute and ordered that Davis be disbarred and his name removed from the roll of barristers ; *In re Davis* (1).

From that decision Davis appealed to the High Court on the grounds, *inter alia* : (*a*) that there was not any evidence to support the making of the order appealed from ; (*b*) that there was not any evidence that he was not a fit and proper person to be on the roll of barristers at the time of his showing cause ; (*c*) that the Supreme Court was in error in holding that it had been established that he

(1) (1947) 48 S.R. (N.S.W.) 33 ; 64 W.N. 226.

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was guilty of fraud in procuring his approval by the Barristers Admission Board as a fit and proper person to be admitted to the Bar, or, alternatively, that the establishment of a concealment at the time of procuring such approval by Davis as facts which as a man of honour it was his duty to disclose and falling short of fraud was sufficient to empower the Full Court of the Supreme Court of New South Wales to make the order; (*d*) that Davis having been certified by the Barristers Admission Board as a fit and proper person to be admitted to the Bar of New South Wales and having been by order of the Full Court of the Supreme Court admitted to that Bar the said Full Court had no power on the evidence before it to disbar Davis and remove his name from the roll of barristers; (*e*) that the judgment and order of the said Full Court was against the evidence and the weight of evidence inasmuch as the fact of the crime of which Davis was admittedly guilty was not in itself sufficient to establish that he was not of good fame and character so as to be approved by the Barristers Admission Board as a fit and proper person to be admitted to the Bar at the time of his making application to be so approved or that the fact of such crime taken in conjunction with the failure of Davis to inform the persons certifying him to be of good fame and character or the Barristers Admission Board thereof was not sufficient in the circumstances appearing from the evidence.

The relevant statutory provisions, Barristers Admission Rules and the nature of the arguments are sufficiently set forth in the judgments hereunder.

Barwick K.C. (with him *Clapin*), for the appellant.

Fuller K.C. (with him *Sheppard*), for the Bar Association of New South Wales, to assist the Court.

Cur. adv. vult.

Dec. 15. The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a rule of the Supreme Court of New South Wales disbarring the appellant Sydney Samuel Wilton Davis and removing his name from the roll of barristers. The appeal is brought as of right, the appellant's income from his profession having been more than £300 in a limited period—*Judiciary Act* 1903-1946, s. 35 (1) *a* (1) (*Thomas* v. *Incorporated Law Institute of New South Wales* (1)).

The appellant was born in 1914; his father was a man of small means; he was successful at school, but had to earn money in order

(1) (1929) 3 A.L.J. 32.

to remain at school. In 1932 he enrolled as a student in the Faculty of Law in the University of Sydney. He passed his examinations, but in 1933 there were family misfortunes and he had to give up his work at the university and accept a position as an insurance canvasser. He broke down and was in a mental hospital until May 1934. In September 1934, in conjunction with two other persons, he broke and entered a house and stole about £140 worth of goods. He was apprehended and made a full confession. He was sent for trial to Quarter Sessions, where he pleaded guilty. He was released on a bond. He worked at Garden Island during the war and subsequently resumed his legal studies and was admitted as a barrister in 1946.

The appellant qualified for admission as a barrister by pursuing the course prescribed for students-at-law: see Barristers Admission Rules 1928 (*Betts, Louat & Hammond, Supreme Court Practice*, 3rd ed. (1939), p. 464), rule 10. Rule 12 as amended on 19th November 1941 requires persons applying to be admitted as students-at-law to produce certificates from two or more qualified persons stating whether in their opinion the applicant is a person of good fame and character. The appellant obtained such certificates from two solicitors in 1944 and presented them to the Barristers Admission Board. He did not disclose either to the solicitors or to the Board the fact that he had been convicted of breaking and entering.

The *Legal Practitioners Act* 1898-1936 (N.S.W.) s. 4, provides that the Judges (of the Supreme Court), the Attorney-General, and two barristers, shall form a Board for the approval of properly qualified persons to be barristers. Section 9 provides that: "No candidate, however qualified in other respects, shall be admitted as a barrister unless the Board is satisfied that he is a person of good fame and character. . . ." Section 10 is as follows:—"Every candidate whom the Board shall approve as a fit and proper person to be made a barrister shall be admitted as a barrister by the Court on any day appointed for that purpose." Rule 40 of the Barristers Admission Rules as amended on 19th November 1941 requires every student-at-law applying for admission as a barrister to lodge certificates as to character from two or more qualified persons as prescribed by rule 12. The appellant obtained certificates of character from the same two solicitors and produced them to the Board. On this occasion also he abstained from informing the solicitors or the Board of his conviction.

The Prothonotary of the Supreme Court reported to the Court the fact of the conviction and a rule nisi was made calling upon the appellant to show cause why he should not be disbarred and why

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his name should not be removed from the roll. The Full Court, holding that it had jurisdiction to remove a barrister's name from the roll, decided that the appellant was not a fit and proper person to remain on the roll because he was not a person of good character, in that he had committed the criminal offence mentioned, had failed to disclose that fact to the Board and the solicitors from whom he had obtained certificates of character, and had therefore deceived the Board and those solicitors.

It was not contended on behalf of the appellant that the Supreme Court did not have jurisdiction to disbar a barrister. It was conceded that the Supreme Court had such jurisdiction, provided that the ground upon which removal of the barrister's name from the roll was sought was a ground relating to matters or circumstances which occurred after the barrister's admission. It was contended, however, that the Supreme Court had no jurisdiction to disbar by reason of any facts or circumstances which had occurred before the Board gave its approval of a candidate as a fit and proper person under s. 10 of the *Legal Practitioners Act* 1898-1936.

Under the Charter of Justice, cl. X., (*Betts, Louat and Hammond, Supreme Court Practice*, 3rd ed. (1939), p. 3) the Supreme Court is given jurisdiction to admit "fit and proper Persons to appear and act as Barristers, Advocates, Proctors, Attorneys and Solicitors." It was held in *In re the Justices of the Court of Common Pleas at Antigua* (1) that a power to admit advocates in a colonial court carried with it, as an incidental power, a power of suspending from practice. In an unreported case of *In re White* (August 1930) the Supreme Court held on the authority of the *Antigua Case* (1) that the Court had a power of suspending barristers from practice and disbarring them in a proper case. The Supreme Court followed this decision in the present case.

The jurisdiction of the Court to disbar being admitted, the question which arises is whether the Court is entitled in the exercise of that jurisdiction to consider matters antecedent to the admission of a barrister.

The argument for the appellant emphasized the provision of s. 9, which has already been quoted, which requires the Board to be satisfied that the candidate is a person of good fame and character. Decision upon the question of the good fame and character of a candidate is expressly by this section entrusted to the Board. It is not given to the Court. Section 10 provides that every candidate approved by the Board as a fit and proper person "shall be admitted as a barrister by the Court on any day appointed for that purpose."

(1) (1830) 1 Knapp 267 [12 E.R. 321].

Accordingly, the Court is bound to admit a candidate who is approved by the Board. To hold the contrary appears to me to give no effect to the word "shall." All the judges are members of the Board, and there is no difficulty in understanding why it is provided that upon the approval of the Board the Court shall admit the candidate. The judges, as members of the Board, have considered whether or not to approve the candidate before he applies to the Court. Section 10 in my opinion gives a right to be admitted to a candidate who comes to the Court upon an appointed day with the approval of the Board. The provision that the candidate shall be admitted is much stronger than a provision that the Court may admit, or that it shall be lawful for the Court to admit, the candidate.

It has been argued that upon this interpretation the Court would be bound to admit a candidate notwithstanding the happening or the discovery of some disqualifying fact after the Board had approved the candidate but before he had been admitted by the Court. This is an argument from consequences, but the consequence which is feared need not arise. In the event supposed there would be nothing to prevent the Board withdrawing its approval and informing the Court accordingly before the candidate is admitted. After a candidate is admitted the Board has no power to act in any way with respect to his membership of the Bar, but, up to the moment of admission, the Board has full power of giving or withholding the approval which is an essential condition preliminary to admission. Neither a refusal of approval nor a giving of approval is irrevocable. The Board may refuse approval, and, upon reconsideration (with or without new material), give approval. So also the Board may first give approval and, upon reconsideration, refuse approval, withdrawing the approval previously given.

The next step in the argument for the appellant is that, as the statute vests in the Board, and not in the Court, the function of determining whether a candidate is of good fame and character, the Supreme Court, upon an application for removal of the name of a barrister from the roll, cannot properly consider any matter or circumstance affecting character which is antecedent to the date of the approval of the Board. The Board, it is contended, is to be the sole judge of such matters and circumstances. In my opinion this argument is well founded in relation to admission, but the provisions upon which it is based have no relation to removal. The sections cited relate only to admission of barristers. They have no bearing upon any matters relating to the disbarring of barristers, which is a function of the Court, not of the Board.

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Upon an application for removal of the name of a legal practitioner from the roll, the question which has to be determined by the Court is whether he is a fit and proper person to remain as a member of the profession. In *Southern Law Society* v. *Westbrook* (1) reference is made to the relevant authorities. In exercising this jurisdiction the Court may consider any conduct of the barrister which is relevant to the question of whether he is a fit and proper person to continue to be a barrister. In determining this question immediately recent and more distant behaviour may be taken into account. It is not possible to draw a line at some point of time and to prevent the Court from looking behind that line. When a question arises in 1947 as to whether a person is a fit and proper person to continue as a barrister it is not irrelevant to consider facts which happened in 1934, 1944, or 1946. Such facts may be most informative as to his character. When a considerable period of time has elapsed past facts should be considered in the light of the lapse of time, and weight should be given to the subsequent behaviour of the person concerned. In this case, however, the applicant was not only guilty of a grave criminal offence in 1934, but in 1944, and again as recently as 1946, he induced two solicitors to give him certificates of character without disclosing to them that he had been convicted of that criminal offence, and he presented to the Board certificates so obtained. It would not be reasonable to require a candidate to disclose to the Board, or even to persons whom he approached with a request for certificates, every wrongdoing of his life. But a conviction for housebreaking is so obviously a relevant matter when character is under consideration that there can be no room for doubt in the present case as to the duty to disclose it both to the Board and to the persons from whom he obtained certificates of character.

It was submitted that the appellant, by his good behaviour since 1934, had redeemed himself, and that it was not unreasonable for him to take the view in 1944 and 1946 that he was then a person of good fame and character. It may be that he had by that time become a person of good fame, i.e., of good reputation among those who then knew him. But intrinsic character is a different matter. A man may be guilty of grave wrongdoing and may subsequently become a man of good character. If the appellant had frankly disclosed to the Board and to the two solicitors the fact of his conviction, that disclosure would have greatly assisted him in an endeavour to show that he had retrieved his character. But his failure to make such disclosure in itself, apart from the conviction,

(1) (1910) 10 C.L.R. 609, at p. 612.

excludes any possibility of holding that he was in 1946, or had become in 1947, a man of good character.

It was further argued for the appellant that even if the Court had jurisdiction to consider matters which arose prior to the approval given by the Board, yet the Court ought not to have disbarred him, but should have been content to impose a limited suspension or to administer some form of reprimand or censure. It is impossible, in my opinion, to say that the Court was wrong in determining to disbar the candidate. He committed a very serious offence and concealed it in circumstances when it was his duty to disclose it. The order made will not prevent the appellant from applying at a later date to the Board to approve him as a fit and proper person to be admitted to the Bar (*Incorporated Law Institute of New South Wales* v. *Meagher* (1)).

I am of opinion, for the reasons stated, that the Court was entitled, in exercising its jurisdiction with respect to removal, to consider the whole conduct and character of the appellant for the purpose of answering the question whether he was a fit and proper person to continue to be a barrister, and that the Court rightly held that he was not a fit and proper person to continue to be a barrister.

In my opinion the appeal should be dismissed.

STARKE J. This is an appeal from an order of the Supreme Court of New South Wales disbarring the appellant and removing his name from the roll of barristers.

It is contended that the Supreme Court had no jurisdiction to make the order. The argument was founded upon Part II. of the *Legal Practitioners Act* 1898-1936 of New South Wales. A Board is set up by that Act for the approval of properly qualified persons as barristers but no candidate, however qualified in other respects, shall be admitted as a barrister unless the Board is satisfied that he is a person of good fame and character. And s. 10 provides that every candidate whom the Board shall approve as a fit and proper person to be made a barrister shall be admitted as a barrister by the Court on any day appointed for that purpose.

The appellant was approved by the Board and admitted in 1946 as a barrister by the Court. But it appears that he suppressed the fact both from the Board and the Court that he had some years before, in 1935 to be exact, pleaded guilty to and been convicted of breaking and entering a dwelling house and stealing articles of jewellery and clothing therein.

(1) (1909) 9 C.L.R. 655, at p. 681.

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The argument is that the Board's approval of the appellant as a fit and proper person to be a barrister was conclusive of his right to be admitted and of the duty of the Court to admit him as a barrister.

But the word " shall " does not always impose an absolute and imperative duty to do or omit the act prescribed. The word is facultative : it confers a faculty or power. And, as Earl *Cairns*, L.C. said in *Julius* v. *Lord Bishop of Oxford* (1) in relation to the expression, " it shall be lawful," " there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so." Apart from the word " shall " there is nothing in the *Legal Practitioners Act* which suggests an imperative and absolute duty upon the Court to exercise its authority to admit persons as barristers. Indeed the interposition of the Court would be merely ministerial if it were under an absolute duty to admit a person as a barrister upon approval of the Board. And the Court would be without jurisdiction to refuse admission to any person approved by the Board though information was before it that such person, though unknown to the Board, was a lunatic or a thief or otherwise disreputable or unfit to belong to the profession of a barrister.

In my opinion however, the faculty or power is reposed in the Court in the public interest. It must have the approval of the Board but upon the Court is placed, in the end, the duty and the responsibility of admitting persons as barristers. The Court has power in reserve, seldom required, having regard to the functions of the Board, but still necessary, as this case well illustrates.

The provision of s. 23 of the *Interpretation Act of* 1897 of New South Wales requires notice. It provides that wherever in an Act a power is conferred on any officer or person by the word " may," such a word shall mean that the power may be exercised, or not, at discretion ; but where the word " shall " confers the power, such word shall mean that the power must be exercised. The words " any officer or person " are not very appropriate as applied to courts of law though no doubt the Commonwealth Court of Conciliation and Arbitration and its judges have for the purposes of s. 75 (v.) of the Constitution been regarded as officers of the Commonwealth. The application, however, of the section depends on the

(1) (1880) 5 App. Cas. 214, at pp. 222-223.

content of the power, the nature and the purpose of the thing required to be done. The word "shall" cannot be construed without reference to its context. Here the power must be exercised. But it may be exercised by a refusal of the thing required or by a grant of that thing. And in the present case though a candidate for admission is approved by the Board still it is upon the Court that the duty and responsibility of admission is conferred. And that duty is not, as already indicated, imperative and absolute.

The Court in the present case might, therefore, if the facts of the appellant's conviction had not been suppressed, have rejected his application for admission. Both the Board and the Court were misled and this in itself is a sufficient ground for disbarring the appellant and removing his name from the roll of barristers.

No express power to remove barristers from the roll has been brought to our attention, other than the limited power contained in cl. X. of the Charter of Justice, but I would add that the power is inherent in the Court. Clearly, under various powers, the Court could make rules regulating the matter (Note 9 Geo. IV., c. 83, s. 3). And it is essential for the due administration of justice, as was said in *In re the Justices of the Court of Common Pleas at Antigua* (1) that the Court should have that authority. The power of removal or suspension is incidental to that of admitting to the roll of barristers.

Accordingly, the order made by the Supreme Court disbarring and removing the appellant from the roll was not beyond or without its jurisdiction.

Nothing is gained by an examination in detail of the facts of this case for there is no ground upon which this Court should interfere with the decision of the Supreme Court removing the appellant's name from its roll of barristers.

The appeal should be dismissed.

Dixon J. This appeal is brought as of right from an order of the Supreme Court of New South Wales. At the beginning of the year 1946 the appellant was admitted to the Bar of that State.

The order against which he appeals was made on 20th October 1947. It disbars him and removes his name from the roll of barristers. No objection is taken to the competence of the appeal, which is based upon the value in terms of money of the appellant's status as a barrister-at-law.

The ground upon which the Supreme Court disbarred him was that on 5th March 1935 he had pleaded guilty to an indictment for

(1) (1830) 1 Knapp 267 [12 E.R. 321].

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breaking and entering a dwelling house and stealing articles of jewellery and of clothing therein and, further, that he had failed to disclose this fact to the Court or to the Barristers Admission Board, to which he had produced certificates of good fame and character from persons who did not know that he had been so convicted.

The Bar is no ordinary profession or occupation. The duties and privileges of advocacy are such that, for their proper exercise and effective performance, counsel must command the personal confidence, not only of lay and professional clients, but of other members of the Bar and of judges. It would almost seem to go without saying that conviction of a crime of dishonesty of so grave a kind as housebreaking and stealing is incompatible with the existence in a candidate for admission to the Bar of the reputation and the more enduring moral qualities denoted by the expression, "good fame and character," which describe the test of his ethical fitness for the profession.

By the argument in support of the appeal, however, in the strange circumstances of his case, the appellant's crime was given a different interpretation; it was treated rather as an aberration in the course of a life of highly commendable and very unusual effort and achievement by which earlier disadvantages were overcome and misfortune surmounted.

The appellant's history is indeed strange and in some respects incongruous. He is now thirty-three years of age. His father was a working man and he was the eldest of four children. At school he showed promise and he took a high place at the State public school and high school which he attended. But at fourteen years of age he was compelled to leave school. He went to Brisbane where he lived first with some relatives and afterwards with his employer. He earned his living as a cook's assistant. After a year or more he returned home and attended high school again. When he was sixteen he sold newspapers in the evening while he continued his schooling by day. Next year he and his brother became fruit and vegetable vendors. He nevertheless obtained his school leaving certificate and he then secured employment as a clerk. He received a grant of assistance contributing to the payment of his University fees and at eighteen years of age he was enrolled as a student in the Faculty of Law.

His difficulties had been increased by his sister's becoming an invalid and now his youngest brother suffered disablement by a serious accident. He passed, however, his first year and entered

upon his second. At the same time the appellant undertook canvassing for industrial life insurance, work which yielded him no income. In the middle of the year, being then nineteen years of age, he suffered a complete nervous breakdown beginning with loss of memory and he was admitted to a mental hospital. There he remained as a patient for about eight months. At the end of that time he was given leave of absence. A little over four months after he had been released he committed the crime of which he was convicted. He was in his twenty-first year. Apparently he lived with his mother, but she had her hands full with the two younger children who were invalids. The appellant says that his recollection of the period is hazy and that he cannot remember many of the events. In wandering about, he met a young man and woman and in company with them he broke and entered a flat at Bondi, the occupant of which he knew and had visited. After the appellant had failed in an attempt to get through the fanlight, the young man gained entrance by manipulating the lock. They stole about £140 worth of goods, including a fur coat and other clothing, jewellery, a wireless set and an electric iron. The appellant and the girl sold and otherwise disposed of some of these articles. When questioned by the detectives the appellant at first denied his complicity in the crime, which he said had been committed by some other person whom he invented, but afterwards he made a full written confession. The housebreaking took place on 18th September 1934. The appellant was committed for trial on 10th October. On 29th October his mother returned him to the mental hospital. He was finally discharged from the hospital on 9th January 1935. He pleaded guilty before Quarter Sessions on 5th March 1935 and was released upon a bond to be of good behaviour for three years and to avoid the company of his two confederates. It is not clear what medical evidence there was before the magistrates and the Chairman of Quarter Sessions. But it does not seem to have supported the view that the appellant's crime was to be excused or explained by his mental condition. The learned Chairman, however, remarked that to his mind the appellant's demeanour was most peculiar and was possibly due to some other cause than criminality.

After his discharge from the mental hospital the appellant went to Queensland where he earned a living in various ways, as a coach, as a builder's labourer, a cane-cutter (an occupation in which he lost a finger and injured his hand) and as a boarding-house keeper. Then, in 1938, he began a course in Law and Arts at the Queensland University. He passed his year, but he married and that seems to have interrupted his course. For the ensuing three years he

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earned his living as a salesman of cash registers. Then he returned to Sydney. He was rejected for military service and he became a process worker in an aircraft factory and, later, a fitter in a naval establishment.

In 1943 he combined his work with a resumption of his Law course at the Sydney University. He decided to qualify for the Bar and, in May 1944, he applied for admission as a student-at-law. He obtained the requisite certificates that he was of good fame and character from two solicitors whom he had known since 1932. Neither of them knew that he had been convicted, though the appellant himself thought, as it appears, that one of them was aware of the fact.

The appellant says that since 1934 he has led a life of scrupulous honesty and there is no reason to believe otherwise. Indeed, except for an unseemly piece of behaviour at the end of 1943 on New Year's Eve, when in an altercation between the appellant and his wife in the street a policeman intervened and took him to the station, there is nothing known to the appellant's discredit after his conviction.

The appellant graduated with second class honours in 1945. For the purpose of his admission at the beginning of the next year, he obtained certificates of character from the same two solicitors. The Barristers Admission Board, with no further information before them, certified that the appellant had complied with the Rules for the Admission of Barristers and was eligible for admission.

In 1947 the fact that the appellant had been convicted was discovered and, upon the report of the Prothonotary, the Supreme Court made a rule nisi calling upon him to show cause why he should not be disbarred and, after hearing cause, made the rule absolute.

In support of this appeal against the rule absolute three contentions were advanced. First, it was said that the jurisdiction of the Supreme Court did not enable the Court to disbar the appellant upon the ground that, before his admission to the Bar he was not of good fame and character or that he had been convicted or that he had not disclosed the fact to the Board or the Court before admission.

Secondly, it was contended that upon the facts he was at the time of his admission of good fame and character and that the Supreme Court should have so found.

Thirdly, on the assumption that the circumstances did enable the Supreme Court to disbar the appellant, an attack was made on the exercise by the Supreme Court of the discretion to make an order disbarring him and removing his name from the roll of counsel.

The first contention rests substantially upon the view that it is for the Barristers Admission Board and not the Court to decide whether a candidate is a fit and proper person to be a barrister; the Board having granted its certificate, the Court cannot go behind the certificate and refuse to admit a candidate, or, having admitted him, afterwards disbar him on grounds which are antecedent to the certificate.

The authority of the Supreme Court to admit persons to practise as counsel comes from cl. X. of the Charter of Justice. Although so much of the clause as relates to the removal of barristers from their station on reasonable cause is expressed in reference to practitioners from Great Britain and Ireland only, there has never been any doubt that the Court has a general authority to suspend or remove barristers from the roll (cf. *In re the Justices of the Court of Common Pleas at Antigua* (1)). By 11 Vict. No. 57 a Board was established for the approval of properly qualified persons to be barristers. The Barristers Admission Board consists of the Judges, the Attorney-General and two barristers to be annually elected by the practising barristers. The powers and duties of the Board and the conditions to be fulfilled by candidates for admission are now governed by Part II. of the *Legal Practitioners Act* 1898-1936 and by the Rules for Admission of Barristers of 1928, as amended. (New South Wales *Law Almanac* 1938, p. 244, and 1947, p. 186).

Section 9 of the Act provides that no candidate, however qualified in other respects, shall be admitted as a barrister unless the Board is satisfied that he is a person of good fame and character. Section 10 provides that every candidate whom the Board shall approve as a fit and proper person to be made a barrister shall be admitted as a barrister by the Court on any day appointed for that purpose.

Among persons who by the Rules are to be eligible for admission as barristers are students-at-law who have been such students for the prescribed period and have complied with the requirements of the Rules (r. 4 (*c*)).

Every person intending to apply for admission as a student-at-law must give written notice of his application to the Secretary of the Board (r. 11). His notice must be accompanied by certificates from two persons who possess one of the requisite qualifications, which are set out. Each such person must identify himself, give the period for and the circumstances in which he has known the applicant and state in his own handwriting whether, in his opinion, the applicant is a person of good fame and character (r. 12).

(1) (1830) 1 Knapp. 267 [12 E.R. 321].

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The Board may then require such further or other evidence as to the good fame and character of any applicant as it thinks necessary (r. 13).

When the student-at-law has in other respects qualified and comes to apply for admission to the Bar he must give notice to the Secretary of the Board (r. 36). He must lodge with the Secretary, among other things, certificates as to character from two or more qualified persons as is prescribed in the case of admission as a student-at-law (r. 40).

It is then provided that, unless the Court otherwise orders, no student-at-law shall be entitled to be admitted as a barrister until the Board certifies that he has complied with the rules and is eligible for admission (r. 41).

A rule provides that a barrister is to be admitted only upon motion made in open Court and he must be present (r. 42).

Upon the foregoing provisions it is maintained that, the Board having been satisfied in 1946, as it must be taken to have been, that the appellant was of good fame and character, that is conclusive of his fitness as at that date. Section 10, it is said, thereupon conferred a right upon him to admission to the Bar to which it was the Court's duty to give effect.

This contention, in my opinion, gives too literal a construction of s. 10. It would be absurd to lay hold of the word "shall" and interpret the provision as intending to place upon the Court the imperative duty of admitting to the Bar, without regard to any other condition, a person who showed that the Board approved him as a fit and proper person. To take an imaginary instance, suppose that, after the Board had certified its approval of a candidate for admission, he was convicted of felony, found to be lunatic, ascertained to be an alien enemy, or ordered to be deported as a prohibited immigrant. Section 10 can scarcely be understood as meaning that these disqualifications, for such they would otherwise be considered, are to be disregarded. The provision is evidently based on the assumed condition that there is no disqualifying circumstance and nothing to invalidate the certification by the Board of its approval. The Board's approval is a judicial or quasi-judicial determination and like every other ex-parte judicial determination may be recalled if it has been obtained by misrepresentation, non-disclosure or other invalidating means or is based even on misapprehension or error.

If the original form of s. 10 is examined as it appeared in 11 Vict. No. 57, s. 3, it will be seen that in all probability it was directed only to insuring that a barrister was admitted by the judges in open

court on a day appointed for the purpose. In 1848 the fact that in England men were called at the Inns of Court and not in court would be present to the mind of the draftsman and it would also be seen to be possible that barristers might be enrolled by the Prothonotary without appearance before the Court at all. In 11 Vict. No. 57 the provision was as follows:—"And be it enacted That every candidate whom the said Board shall approve as a fit and proper person to be made a Barrister shall be admitted as a Barrister of the said Supreme Court by the Judges in open Court on such day as shall be appointed for that purpose any law or usage to the contrary notwithstanding."

Consolidation has given the provision an apparently different emphasis and some of the work it was intended to do has been taken over by the Rules: see r. 42.

But I am clearly of opinion that to treat s. 10 as it now stands as imposing an imperative duty upon the Court without regard to any other condition to admit a candidate to the Bar once he shows the Board's approval, produces such absurd and inconvenient consequences and is so improbable an intention that some other construction should be adopted, if one is possible. I think that another meaning is open and that the real effect of the section is to provide no more than that, if the candidate has obtained approval of the Board, then his admission shall be in open Court and upon some day appointed for the purpose. Its purpose is not to entitle him to admission independently of every other consideration. When the legislation wishes to give a right to admission it uses the word "entitles," as for example in ss. 11 and 12.

In my opinion, there is no reason why the Court's power of disbarring should not be exercised upon a ground that is antecedent to the admission of a barrister or the determination of the Board to approve him as a fit and proper person.

The argument that, in 1946 the Board had had before it all the facts as they are now known and upon full consideration had decided to approve the appellant as a candidate, the Court would have been required to accept the Board's decision, does not appear to me to affect the conclusion that the Court's jurisdiction continues to exist.

The Board is composed of the Judges, the Attorney-General and two barristers and it may be taken for granted that the Full Court would act on a certificate of the Board given after complete disclosure by the candidate and full consideration by the Board and would afterwards refuse to go behind it.

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The second contention depends in part on the facts of the case and in part upon an argument that whether a man is of good fame and character is a question of his general reputation and not of his moral standards or qualities. This latter argument is quite wrong and comes from a confusion between the rule of criminal evidence allowing an accused to prove his " good character " as part of his defence, and the question whether a man is fit to enter one of the four traditional professions.

As to the facts, I hope that I have stated them in a way which brings out many considerations undeniably favourable to the appellant. He has shown industry, perseverance and courage amidst the most adverse circumstances, and has overcome many disadvantages and obstacles encountered particularly in his early years. His mental breakdown and even his descent into criminality will evoke much human sympathy. It is always so upon moral questions, particularly when a man, whose conduct or actions have been in many respects praiseworthy, mars his life by a crime.

But, though concern for an individual who is overtaken by the consequences of past wrongdoing is a very proper human feeling, it is no reason whatever for impairing in his interests the standards of a profession which plays so indispensable a part in the administration of justice.

Housebreaking for the purpose of theft is not a crime the effect of which as a disclosure of character can be considered equivocal. It is not so easy to imagine explanation, extenuation or reformation sufficiently convincing or persuasive to satisfy a court that a person guilty of such a crime should take his place as counsel at the Bar.

But a prerequisite, in any case, would be a complete realization by the party concerned of his obligation of candour to the court in which he desired to serve as an agent of justice. The fulfilment of that obligation of candour with its attendant risks proved too painful for the appellant, and when he applied to the Board for his certificate he withheld the fact that he had been convicted.

In those circumstances the conclusion that he is not a fit and proper person to be made a member of the Bar is confirmed.

The third contention made in support of the appeal was that the Supreme Court did not soundly exercise its discretion to disbar the appellant. I can only say that I think that the order made was inevitable.

For these reasons I am of opinion that the appeal must be dismissed.

I do not think that we should order the appellant to pay the costs of the Bar Association.

McTiernan J. I agree that the appeal should be dismissed. It is a clear principle that the Supreme Court of New South Wales has jurisdiction to disbar upon reasonable grounds. This jurisdiction rests upon cl. X. of the Charter of Justice. It is a concomitant of the authority granted by the Charter of Justice to the Court to admit "fit and proper persons" to the Bar (*In re the Justices of Antigua* (1)). There is an express power given by cl. X. to disbar "upon reasonable cause" barristers admitted upon qualifications gained in Great Britain or Ireland. The Supreme Court has acted upon the view that this power applies, by necessary implication, in the case of barristers admitted upon local qualifications. I respectfully agree with that construction of cl. X. This jurisdiction is complete unless the *Legal Practitioners Act* 1898-1936 has affected it. It extends to any case in which a barrister is shown to be unfit to remain a member of the profession. The jurisdiction of a superior court can only be taken away by express words or necessary implication. In this Act, there is no express language touching the Court's jurisdiction to disbar. In order to hold that the Act curtailed or made any inroad into that jurisdiction, the legislative intention must be not merely implied, but necessarily implied.

The function of the Board, which is constituted by the Act, is "the approval of properly qualified persons to be barristers": s. 4. It is not within the Board's province to call to the Bar or to disbar. Except in the case of English and Irish barristers and Scotch advocates, there is a prohibition against the admission of any candidate to the Bar "unless the Board is satisfied that he is a person of good fame and character": s. 9. Candidates are admitted by the Court. Section 10 says: "Every candidate whom the Board shall approve as a fit and proper person to be made a barrister shall be admitted as a barrister by the Court on any day appointed for that purpose." The Act does not make the Board's approval of a candidate irrevocable, once it is given. If something to the discredit of the candidate was revealed after the approval was given, or if there was any other good reason, the Board would be entitled to withdraw or revoke its approval, and then the candidate would have no right to apply to the Court for admission or to have his application granted, if made. It may be that it is imperative upon the Court to exercise the authority given to it by s. 10, if its exercise is duly applied for by a candidate who has a formally valid and subsisting approval given by the Board (cf. *Macdougall* v. *Paterson* (2)). But it is an entirely different thing to say that the satis-

(1) (1830) 1 Knapp. 267 [12 E.R. 321].

(2) (1851) 11 C.B. 755, at p. 773 [138 E.R. 672, at p. 679].

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faction of the Board under s. 9 or its approval under s. 10 establishes finally and conclusively that the candidate was up to the time of his admission a person of good fame and character or a fit and proper person to be admitted as a barrister. It is not a necessary implication in these sections, that the jurisdiction of the Court to disbar or suspend from practice for conduct antecedent to admission is ousted. The appellant was found guilty of the crime of breaking and entering a dwelling house and stealing therein. The Board did not know this fact when the appellant was admitted as a student-at-law, or when it approved of him as a person of good fame and character and a fit and proper person to be admitted to the Bar. It was within the jurisdiction of the Court to determine whether having regard to the nature of the crime, the circumstances of the appellant when he committed it, the time that elapsed since he committed it and his failure to disclose the crime, he was a fit and proper person to be a barrister. The Court reached a conclusion adverse to the appellant.

I find it impossible to disagree with that conclusion.

WILLIAMS J. I have read the judgment of my brother *Dixon* and agree with the opinions therein expressed.

I only wish to add a few words with respect to the contention that the Supreme Court has no jurisdiction to disbar a barrister for misconduct which occurred prior to the date of his admission. I entirely disagree with this contention. It rests upon the presence in s. 10 of the *Legal Practitioners Act* of the word " shall " where it secondly occurs. Prima facie the word " shall " is used in an Act in a mandatory sense, but in many cases it has been held to be directory. The *Legal Practitioners Act* is intituled " An Act to consolidate the enactments relating to Legal Practitioners." Sections 9 and 10 of this Act replace ss. 2 and 3 of the Act 11 Vict. No. 57. Section 9 is in the same words as s. 2. But s. 3 was in the following terms :—" And be it enacted, That every candidate whom the said Board shall approve as a fit and proper person to be made a barrister, shall be admitted as a barrister of the said Supreme Court by the Judges in open court on such day as shall be appointed for that purpose, any law or usage to the contrary notwithstanding." The word " shall " occurs thrice in this section. It is clear that it was not intended to do more than direct the Board to approve of such candidates as it thought fit, or to direct the court to appoint days on which their admission could be moved. It is equally clear that it was only intended to direct the manner in which candidates should be admitted, that is by the judges sitting in open court.

In *Gilbert* v. *Gilbert* (1) Lord *Hanworth* M.R. referred to "The importance of treating a consolidating Act as what it says it is and not as one amending the law." On the same page (1) *Scrutton* L.J. said—"The presumption with which one starts is that a consolidating Act is not intended to alter the law." The word "shall" occurs twice in s. 10 of the *Legal Practitioners Act*. It is clearly used in a directory sense in reference to the Board, and the subsequent portion of the section does not appear to have been intended to alter the meaning of the corresponding portion of s. 3 of 11 Vict. No. 57. The words "in open court" would appear to have been omitted from the consolidation as surplusage when the word "judges" was altered to the word "court." The third "shall" would also appear to have been omitted for the same reason.

The approval of the Board of the candidate as a fit and proper person to be admitted as a barrister gives that person a prima facie right to be admitted. But s. 10 is throughout directory and is not intended to deprive the Court of any of the jurisdiction conferred upon it by the Charter of Justice to refuse to admit the candidate as a barrister for reasonable cause or to disbar him if it is subsequently shown that a reasonable cause existed for not acting upon the approval of the Board.

In my opinion the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Allen Allen & Hemsley*.

Solicitor for the Bar Association of New South Wales, *Kenneth V. Swain*.

J. B.

(1) (1928) P.1, at p. 8.