[HIGH COURT OF AUSTRALIA.]

Ex parte LENEHAN.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. of A. 1948.

Sydney, *Aug.* 6, 9; *Nov.* 23, 24; *Dec.* 16.

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

Legal Practitioners—Clerk—Managing clerk—Application for admission as solicitor—Misconduct—Application refused—Subsequent exemplary conduct—War service—Rehabilitation—Further application refused by State Court—Fit and proper person—Discretion of Court—Supreme Court Rules (*N.S.W.*), *rr.* 428 (*g*), 458, 459, 492A.

It is not a rule of law that an applicant for admission as a solicitor, who has been guilty of pecuniary dishonesty, cannot be allowed to proceed unless it is shown that there are some exceptional circumstances. The duty of the court, in the case of such an application, is to exercise its discretion having regard to the particular circumstances proved; a material circumstance for the court's consideration is that a completely satisfactory subsequent career on the part of the applicant, sustained over a lengthy period of time, may displace the adverse conclusions that might otherwise be drawn from an unsatisfactory beginning.

So *held* by *Latham* C.J., *Dixon* and *Williams* JJ., and *semble* by *Starke* J. *Ex parte Macaulay*, (1930) 30 S.R. (N.S.W.) 193, and *Ex parte Macaulay*, (1935) (unreported) explained.

An applicant for admission as a solicitor committed, between the ages of twenty-five years and twenty-eight years, dishonest or discreditable acts involving moneys belonging to the solicitors by whom he was employed as managing clerk, or their clients. Subsequently he was employed as managing clerk by other solicitors and also by a bank upon duties similar to those performed by a managing clerk, all of whom warmly commended him and testified that his character, conduct and attention to duties were completely satisfactory. Soon after the outbreak of war in 1939 he received a commission in the 2nd A.I.F. and served with distinction throughout the war. He returned to duty with the bank in 1946. During the course of his service with the army and his employment with the bank he had been entrusted with large sums of trust funds and all were properly accounted for. Two previous applications, made in 1936 and 1937 respectively, for admission as

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a solicitor having been rejected, he made a further application after his return to the service of the bank. In affidavits and statutory declarations made by him in support of his applications and during the course of cross-examination he had given conflicting accounts of the acts referred to above.

Held, by *Latham* C.J., *Dixon* and *Williams* JJ. (*Rich* and *Starke* JJ. dissenting), that the proper conclusion from all the material before the court was that the applicant was now a fit and proper person to be admitted as a solicitor.

Decision of the Supreme Court of New South Wales (Full Court) reversed.

APPEAL from the Supreme Court of New South Wales.

On 12th February 1936 Joseph Louis Lenehan, having passed all the examinations required by the Rules of the Supreme Court of New South Wales, applied to that Court for permission to present himself for admission as a solicitor, proctor and attorney of that Court under rules 428 (*g*) and 458 of the Rules of the Supreme Court. Rule 428 (*g*) makes eligible for admission persons who have attained the age of thirty years and have completed the term of ten years of clerkship in the office or offices of a solicitor or solicitors and have been for at least five of such years managing clerk in such office or offices. Rule 458 (1) requires the permission of the judges to be obtained before such person can present himself for admission and rule 458 (2) (*e*) requires the applicant to furnish a certificate from the Incorporated Law Institute of New South Wales as to the applicant's service and the facts relating thereto and that that the applicant has been and is a managing clerk. These requirements were additional upon the requirement that the applicant pass the necessary examinations. Rule 492A, as promulgated on 18th February 1944, confers upon the court in cases of persons who have been engaged in war service, a full discretion to relax any rule.

The certificate of the Incorporated Law Institute given in connection with the application showed that Lenehan attained the age of thirty years on 30th April 1933 and that he had had eleven years in all of clerkship in solicitors' offices. He was a general clerk from May 1922 until April 1928 and he was a managing clerk for five years and one month between April 1928 and February 1935. Since February 1935 he had been employed by the Rural Bank of New South Wales performing the duties usually performed by a managing clerk, but he was not employed by a practising solicitor.

The judges of the Supreme Court referred the application to a sub-committee consisting of *Stephen* and *Street* JJ. who considered, *inter alia*, various affidavits filed on the making of an application by one Leo Charles Elliott in 1934 to be restored to the roll of

solicitors. Lenehan was in Elliott's employ as a general clerk and as a managing clerk for a period in all of about six years. On his application to be restored to the roll of solicitors Elliott suggested that the misapplication of funds which was the cause of his being struck off was really due to defalcations in the office by Lenehan. The evidence before their Honours showed, amongst other things, that Lenehan was employed at a salary of about £275 per annum together with bonuses which he stated might amount to as much as £150 per annum.

In 1928 the sum of £1,238 was paid into Lenehan's account with the Primary Producers' Bank and in 1929 the sum of £1,645 was paid into that account. One of the amounts paid in in 1928 was the sum of £400 which apparently had been advanced to Elliott by Lenehan's aunt in 1927 on the security of a second mortgage given by Elliott over his home. This second mortgage was discharged in October 1928, by payment of the sum of £400 and interest and this amount was paid by Lenehan into his account with the Primary Producers' Bank. On 30th May 1929, the aunt complained to Elliott about his failure to repay the principal to her and asked for a cheque by return of post. Elliott then drew her attention to the fact that the mortgage had been discharged and that the cheque for the amount due had been handed to Lenehan and, Elliott said, that after some discussion the aunt asked him not to take any action in the matter. Lenehan's account of this transaction was that he had always managed his aunt's business, that the whole matter had been done with her consent and that she had forgotten about the fact that the money had been paid to him. He stated that she had previously guaranteed his account with the Primary Producers' Bank to the extent of £250 and that she was fully aware of all the circumstances of the transaction. The bank manager stated in an affidavit sworn by him on 27th July 1934, that the aunt never at any time guaranteed Lenehan's account with the Bank. With regard to other large amounts paid into his account he explained a number of them by saying that they were given to him by various people, such as his brother, his father-in-law, his aunt, his mother and his wife, but evidence was not given by any one of the persons named that he or she was aware that these moneys had been contributed by him or her respectively.

In an affidavit filed by one Henry Livingstone, who acted as managing clerk for Elliott during 1929, he stated that he discovered that Lenehan had been misappropriating moneys and Elliott called Lenehan into a room and, in Livingstone's presence, charged him with theft which Lenehan ultimately admitted to be true. After

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ceasing to be employed by Elliott, Lenehan was employed for a time as managing clerk by Vincent John Brady, a solicitor, who, in an affidavit filed by him on 24th December 1933, stated that on or about 1st February 1931 he dismissed Lenehan from his employ because he had discovered that he, Lenehan, between November 1929 and January 1931, had misappropriated funds in his, Brady's, office up to an amount of £130, and that having been taxed with these defalcations in the presence of Brady and his auditor Lenehan admitted the greater part of them and restitution was subsequently made.

Lenehan denied that he was ever guilty of any misappropriation and denied that he had ever made any such admissions as stated above.

From an affidavit sworn by Elliott on 5th November 1934 it appeared that on 2nd September 1930 Lenehan signed a notice of transfer of land describing himself as " Solicitor for the purchaser, Wingello House, Angel Place, Sydney."

Their Honours did not accept Lenehan's version of the matters referred to above, or the denials made by him, and, on 4th March 1936, reported that in view of all the matters contained in the affidavits and particularly the matters dealt with above, and quite apart from the question whether Lenehan could properly be described at that time as a managing clerk within rule 458 (2) (*e*) of the Rules of the Supreme Court, they were of opinion that he was not a fit and proper person to whom the permission of the judges should be given to present himself for admission as a solicitor.

In a statutory declaration made by him on 17th September 1937, Lenehan declared, *inter alia*, that, in a letter dated 18th December 1935 forwarded by the secretary of the Incorporated Law Institute of New South Wales to the secretary to the judges of the Supreme Court it was stated that among the certificates produced by Lenehan were (*a*) a certificate dated 30th October 1929 from Elliott, then a solicitor, which, so far as material read as follows :—" During the period of Mr. Lenehan's employment the writer has found him conscientious, honest and reliable and he has always carried out his duties in a most satisfactory and expeditious manner. Further, the writer has for some years been suffering from indifferent health and as a consequence Mr. Lenehan has been entrusted with the major portion of the office business. Mr. Lenehan now leaves us at his own request, a fact which we very much regret and wish him every luck for his future." ; and (*b*) a certificate dated 29th July 1932, from Vincent J. Brady, solicitor, which ended as follows : —" Mr. J. L. Lenehan was employed in my office as managing clerk

for a period of fifteen months and had absolute control of all conveyancing and common law matters therein. He has a thorough knowledge of office routine and legal procedure and during his period in my office carried out his duties with ability. Owing to a re-arrangement of my staff early in 1931, I was compelled to dispense with his services."

It was further stated in the letter that on 17th July 1935, Elliott, by letter, requested that the above-mentioned affidavits by himself, Brady, Livingstone, Jennings and Long, used on his application for re-admission to the roll of solicitors and referred to above, be placed before the court and the Solicitors' Admission Board on the occasion of the hearing of Lenehan's application, and that he, Elliott, said that at the time he " gave Lenehan a reference, excepting as to the money he stole from his aunt, S. Lenehan, I was unaware that he had stolen or embezzled large sums of moneys and that he had forged my signature. I revoke absolutely any certificate or reference given by me to the said J. L. Lenehan as a managing clerk or otherwise and say he is not a fit and proper person to be admitted as a solicitor." In his said statutory declaration Lenehan declared that what he meant to convey when he stated that his aunt had guaranteed his account with the Primary Producers' Bank was that she had furnished security to the Bank to guarantee his overdraft with it of £250. He annexed a list of the deposits made by him to the credit of his account between 1st January 1928 and 31st December 1929 and said that none of the names of the drawers of the cheques paid in was the name of any client of Elliott.

Lenehan made a further statutory declaration on 21st September 1937, in which he declared that the allegations made by Brady were not true, that the only disputes between Brady and himself were of a civil nature, and that he had never heard any suggestion made by Brady regarding his honesty until he received a copy of Brady's affidavit. He further declared that the allegations contained in Elliott's letter dated 17th July 1935 to the Incorporated Law Institute, that he, Lenehan, had embezzled the sum of about £15 trust money and that a refund thereof had been made by Lenehan's father-in-law, were without foundation; the facts were, said Lenehan, that he had not had the money and he was sure that Elliott had taken the money himself as he had previously, and that a summons having been issued, and in connection with which Lenehan had given instructions to a solicitor to defend, Lenehan's father-in-law, in order to avoid publicity, and unknown to Lenehan, had paid the money to Elliott.

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In response to a request made by him Lenehan appeared represented by counsel before a sub-committee of judges on 21st September 1937 and gave oral evidence not on oath.

By letter dated 2nd November 1937, the secretary to the judges informed Lenehan that the judges, after consideration of the report of the sub-committee which was appointed to hear his personal application for leave to present himself for admission as a solicitor under rules 428 (*g*) and 458, were of opinion that he was not a fit and proper person so to present himself and that his said application was refused accordingly.

In September 1946, Lenehan again applied for the permission of the judges to present himself for admission as a solicitor, proctor and attorney of the Supreme Court, and forwarded two certificates by the solicitor for the time being of the Rural Bank of New South Wales, covering the period from February 1935 to July 1946 to the effect that except whilst on military leave from the outbreak of the war until his return to duty on 3rd June 1946 Lenehan's duties had been entirely legal and were equivalent to the duties of a managing clerk in the office of a private practitioner, and that the opinion held was that his character, conduct and experience during his service with the Bank were such that he was a fit and proper person to be admitted as a solicitor. In an affidavit in support of his application Lenehan deposed, *inter alia*, that on 2nd September 1939, the date of the outbreak of war, he went into camp and was in and out of camp for varying periods until 17th August 1940 when he was granted a commission in the 2nd A.I.F., and was from that date wholly engaged on war service. He sailed for service overseas in 1940 and saw service in Palestine, Egypt, Libya and Syria and finally took part in the battle of El Alamein, attached to the 9th Division, whence he returned to Australia in 1943. His service was firstly as a regimental officer and, subsequently, after attending a Staff College in the Middle East, as a staff officer. As a staff officer he had held appointments in the Australian Imperial Forces as follows :—

Staff Captain—(*a*) A.I.F. Headquarters, Middle East and 9th Division ; (*b*) Headquarters, Royal Australian Artillery, 3rd Australian Corps ; and (*c*) Military Secretary, Branch Allied Land Forces, S.W.P.A. ;

Deputy Assistant Adjutant General—Australian Army Staff, London ; and

Assistant Adjutant and Quarter Master General—Australian Army Staff, London.

Early in 1944, Lenehan was selected to proceed overseas again for service in London. Whilst so serving his duties were of a responsible nature consisting of liaison with the British War Office and Allied and Dominion Forces and in this regard he saw service on the continent of Europe, firstly attached to the 21st Army Group commanded by Field Marshall Montgomery and, secondly, with Supreme Headquarters, Allied Expeditionary Force commanded by General Eisenhower. Whilst in London he was appointed Australian Representative on the Imperial Prisoners of War Committee, a body which was responsible for policy in respect of all British Commonwealth prisoners of war in the hands of Germany, Italy and Japan. He was also the Australian representative who attended various conferences including that of the British Adjutant General and Quarter Master General and the various committees held to evolve policy in respect of dealing with war crimes and war criminals. Lenehan, who attained the rank of major, submitted for the information of the court various references and testimonials received by him from military officers of high rank all of whom expressed themselves in very laudatory terms as to the efficiency, zeal and enthusiasm with which he carried out his duties, his integrity and high moral standard, his cheerful nature and disposition and the high respect in which he was held by his fellow officers and a large circle of friends and associates abroad.

Lenehan requested the court, in considering his application, to take into account his war service and also that the matters raised in respect of his previous applications happened when he was a young man and some two or three years before he had commenced to study for the Solicitors' Examinations in 1933, and submitted that his subsequent conduct established that he was a fit and proper person to be admitted as a solicitor.

The secretary of the Incorporated Law Institute, by letter dated 13th December 1946, informed the judges that the opinion of the Council of that body was " that while Mr. Lenehan is deserving of commendation for his distinguished war service, in view of his past conduct in the profession his war service does not appear to have been of such a nature as necessarily to afford any guide as to whether he is a fit and proper person to be admitted as a solicitor and to have the care and control of trust moneys."

In a further affidavit, sworn on 1st April 1947, Lenehan deposed (*a*) that whilst in the employ of Messrs. Marsden and Lightoller, solicitors, he conducted many conveyancing matters and this entailed the handling of considerable amounts of trust funds; (*b*) that during the period of employment with the Rural Bank he

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had handled almost daily many thousands of pounds of the Bank's funds, and in the conduct of conveyancing matters he had been entrusted with the payment away and the receipt on behalf of the Bank of its funds; and (*c*) that during his war service he had had the care and control of various army funds, which he specified, involving large sums, in respect of one of which funds he was responsible for the drawing in cash the fortnightly pay of the regiment, amounting to between £5,000 and £6,000, and the paying of and accounting for it. These statements were supported by Mr. Lightoller, another solicitor who was formerly employed by the Bank, and the adjutant of the regiment.

Lenehan's request that he be permitted to present himself for admission as a solicitor was granted upon the report of a sub-committee consisting of *Davidson* and *Street* JJ., and in July 1947 he gave notice of his intention to apply for admission as a solicitor. A few days later Elliott filed a notice of motion that his name be restored to the roll of solicitors.

During the course of cross-examination at the hearing of the application Lenehan said that although he thought differently at the time, he now, on reflection and with greater experience, said that he did not have the authority of his aunt to pay the said sum of £400 into his own account. He denied that he had committed the acts of misappropriation alleged by Livingstone and that he had admitted those acts in the presence of Livingstone or at all, but he did admit that there was some truth in the story told by Brady, the explanation being that it was a matter of accounting between them of moneys which went to him from clients whom he had introduced into the office, and he now said that he had no real authority or any real right to hold on to those moneys, they should have been paid over. Also, that he paid into his own account the sum of £20 out of £30 received from a Mr. Yorkney because some moneys were due to him by Elliott under an arrangement of general percentage, otherwise he was not entitled to any portion of those fees.

The Full Court of the Supreme Court (*Jordan* C.J., *Maxwell* and *Owen* JJ.) dismissed the application.

From that decision Lenehan appealed to the High Court.

In an affidavit filed in connection with this appeal Lenehan deposed, *inter alia*, that his remuneration in respect of his employment in the legal department of the Rural Bank was limited to £686 per annum by reason of the fact that he was not a qualified solicitor and that if he were a qualified solicitor he would immediately

be eligible to obtain a salary in that employment up to £550 per annum in excess of his present remuneration.

Further facts and relevant statutory provisions appear in the judgments hereunder.

Spender K.C. (with him *Ferguson* K.C., *Sturt* and *Osborne*), for the appellant. The decision of the court below was based on *Ex parte Macaulay* (1). That test is wrong in law. The correct test is as laid down in *Incorporated Law Institute of New South Wales* v. *Meagher* (2): see also *In re Davis* (3); *Re Hill* (4); *In re Moss*; (5) and *In re a Solicitor* (6). The principles enunciated in *Meagher's Case* (7) were followed in *Ex parte Meagher* (8); *In re Lundon* (9); and *In re a former Practitioner of the Supreme Court* (10). In any event the test applied by the court below was wrong as the court did not direct itself to the considerations which in *Meagher's Case* (7) and *Ex parte Meagher* (8) were accepted as the correct approach. The evidence establishes (*a*) that the appellant for many years has continued in a career of honourable life; (*b*) that there has been and is a determination on his part to continue in honourable conduct; (*c*) that there has been a complete repentance on his part; (*d*) that he has awakened to a higher sense of honour and principle; (*e*) that for very many years his conduct has been such as to ensure confidence in his character; and (*f*) that the appellant is a fit and proper person to be admitted as a solicitor. In particular the appellant has satisfied the test which if it had been satisfied in *Ex parte Meagher* (8) would have resulted in that applicant being re-admitted as a solicitor. The test laid down by the court below in determining whether the appellant should be admitted was inconsistent with the proper test because it virtually precludes him from ever being admitted. To comply with that test it would be necessary for him to establish: (*a*) that he was at all relevant times in financial difficulties; (*b*) that it was not difficult to pilfer in the situation in which he found himself; and (*c*) that he was subjected to temptation and resisted it. The court below found in the appellant's favour all the facts which would be sufficient to satisfy the tests laid down in *Meagher's Case* (7) and he could never prove any more than was proved in this case except a greater lapse of time. The facts so found in his favour

(1) (1930) 30 S.R. (N.S.W.) 193.
(2) (1909) 9 C.L.R. 655, at pp. 664, 680-682, 689-692.
(3) (1947) 75 C.L.R. 409, at p. 417.
(4) (1868) L.R. 3 Q.B. 543.
(5) (1901) 1 S.R. (N.S.W.) 295.
(6) (1910) 10 S.R. (N.S.W.) 373.
(7) (1909) 9 C.L.R. 655.
(8) (1920) 20 S.R. (N.S.W.) 245.
(9) (1926) N.Z.L.R. 656.
(10) (1933) S.A.S.R. 93, at p. 95.

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were: (*a*) that he had had a long and honourable career of war service; (*b*) that he was not inherently unscrupulous or likely to misappropriate money; (*c*) that the offences were all within a certain limited period when he was a very young man; (*d*) that he was held in high regard by his professional associates and senior military officers; (*e*) that since the incidents complained of, both during his service in the army and with the Bank, he has had the handling of large sums of money; (*f*) that he has proved himself to be a good citizen; and (*g*) that he is a good husband and family man. The appellant could not, if admitted, set up in practice subject to no checks or controls as stated in the judgment appealed from: see *Legal Practitioners' Act* 1898-1936 (N.S.W.), Part VII.

Teece K.C. (with him *Riley*), for the Incorporated Law Institute of New South Wales, to assist the court. The correct rule is as laid down in *Ex parte Macaulay* (1). The "exceptional circumstances" referred to in that case mean exceptional circumstances existing at the time of the committing of the offence and do not refer to later circumstances. If the original offences were inexcusable at the time no subsequent conduct will rehabilitate. The appellant's acts were inexcusable. The appellant's war service of itself is not a determining factor. When handling large sums of money during recent years, both in the army and in the Bank, he was subject to checks and controls so that fact is not a guide as to his honesty and reliability. If, as was submitted on behalf of the appellant, the only point involved was the question of his dishonesty the Incorporated Law Institute would not have opposed the application. But the appellant admitted, during the course of cross-examination, that since the defalcations, which admittedly had occurred a long time ago, he had, on oath, in a number of affidavits and declarations, given false information to the court. The giving of such false information disentitled him to be regarded as a fit and proper person to be admitted as a solicitor (*Incorporated Law Institute of New South Wales* v. *Meagher* (2)). The Institute is entitled to its costs in any event.

Cur. adv. vult.

Dec. 16.

The following written judgments were delivered:—

LATHAM C.J., DIXON AND WILLIAMS JJ. This is an appeal by an applicant for admission as a solicitor from an order of the Supreme Court of New South Wales dismissing his application. The appeal is brought without special leave in reliance upon the

(1) (1930) 30 S.R. (N.S.W.) 193. (2) (1909) 9 C.L.R. 655.

unreported decision of this Court in *Thomas* v. *The Incorporated Law Society of New South Wales*, 18th April 1929 (1), in which the court overruled an objection that a judgment or order involving the right to practise as a solicitor cannot fall within s. 35 (1) (*a*) (2) of the *Judiciary Act* 1903-1947.

No objection was taken to the competence of the present appeal.

The appellant's qualification for admission rests upon rule 428 (*g*) of the Rules of Court. Sub-paragraph (1) of that rule prescribes as conditions of such qualification that the person claiming to be eligible for admission shall have attained thirty years of age and shall have completed the term of ten years of clerkship in the office or offices of a solicitor or solicitors practising in New South Wales and shall have been for at least five of such years managing clerk in such office or offices and shall have passed the examination prescribed by the rules. The appellant has fulfilled or complied with all the foregoing conditions. But sub-par. (2) requires that such a person shall have been a managing clerk for the five years immediately preceding his application unless in any case the judges shall otherwise direct. The appellant's application, dismissed by the order under appeal, was made in 1947 and during the five years preceding he had been either serving in the army or employed by the Rural Bank in its legal branch, that is its solicitors' office, and he had not been managing clerk.

But under rule 458 it is necessary for a person claiming to be qualified under par. (*g*) of rule 428 to obtain the permission of the judges to present himself for admission and he must support his application with certificates not only bearing on his character and conduct, but also showing compliance with the conditions.

After a hearing by a sub-committee of the judges consisting of *Davidson* and *Street* JJ. the appellant's application for permission to present himself for admission, which was dated 13th September 1946, was, according to a notification from the secretary to the judges, considered at a meeting of their Honours on 30th April 1947, when the leave asked for was granted. This perhaps covered the difficulty that his period of managing clerkship did not extend up to the time of his application, but belonged to a much earlier time. For it is unlikely that the judges would have given him permission to present himself without exercising their discretion in his favour under rule 428 (*g*) (2).

The hearing before *Davidson* and *Street* JJ. was concerned with the question of his conduct and character, that is whether he was a fit and proper person to be admitted, and that question was fully

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

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inquired into. Their Honours were evidently sufficiently satisfied that he was a fit and proper person for admission as a solicitor to permit him to present himself. But the jurisdiction to admit a solicitor is vested, not in the judges, but in the Supreme Court. When the appellant's application for admission came before the Supreme Court it was heard in conjunction with an application by a former employer of the appellant named L.C. Elliott for re-admission as a solicitor. Elliott had been struck off the rolls for dishonesty.

In the result the Full Court, which consisted of *Jordan* C.J. and *Maxwell* and *Owen* JJ., arrived at the conclusion that the appellant was not a fit and proper person to be admitted, and on that ground dismissed his application. From that decision he now appeals.

The facts which the Supreme Court regarded as showing his unfitness for the profession of a solicitor occurred in the years 1928-1931. For a proper understanding of his appeal it is necessary to go back some distance of time and, indeed, to begin with his first entry into a solicitor's office.

The appellant was born on 30th April 1903 and is the son of a solicitor who seems to have died while the appellant was still a youth. At nineteen he went into a solicitor's office as a clerk and after eighteen months' experience in that and another office, in November 1923 he was employed by L. C. Elliott, who had taken over the appellant's dead father's practice. He remained in his employment until 1st November 1929, that is from the age of twenty to the age of twenty-six. For the last eighteen months or more he was Elliott's managing clerk. Elliott clearly conducted his office on very bad principles. He himself was given to drink. His books were kept carelessly or not at all. His handling of money left much to be desired, and when he was struck off the roll on 18th December 1929 it was for misappropriation. He paid a bonus to his clerks, or at all events to the appellant, for business introduced. But the salary and remuneration of the appellant was not by any means paid with punctuality. At that time and in the proceedings against Elliott no suggestion against the appellant was made. But four years later, namely at the end of 1933, Elliott began an application for re-admission as a solicitor. In the affidavits he filed in support of his application he sought to throw upon the appellant some of the blame for his inability to account to his clients for their money.

From Elliott's office the appellant had gone into the employment of a solicitor named V. J. Brady, with whom he remained for

fifteen months, that is until February 1931. Brady assisted Elliott with an affidavit charging dishonesty against the appellant.

The Law Institute acquainted the appellant with what had been said against him and he made affidavits in answer and assisted the Law Institute's solicitor in opposing Elliott's application, which failed. In the meantime the appellant had passed certain of the prescribed examinations. At the end of 1935 he proceeded to take the necessary steps to be admitted as a solicitor. Elliott intervened with the Law Institute and the appellant's application for permission to present himself for admission was refused on the papers by the judges on 6th March 1936. The appellant then sought a hearing and a sub-committee of judges was formed for the purpose. But permission was again refused. That was on 22nd October 1937. In the course of these and the present applications the charges against the appellant have been made the subject of various affidavits and declarations. The task of disentangling the detailed facts is not altogether easy, but a close consideration of all the material makes it possible to form a fairly clear view of what ought to be taken to be the facts. There are four matters that have an importance and several others which an examination of the material shows to have no importance. It is better to state these matters separately.

(*a*) In 1927 Elliott, being short of funds, desired to borrow £400. He owned his home at Cremorne, but it was subject to a mortgage. The appellant had for some years been managing the affairs of an elderly aunt named Sarah Lenehan, whose resources were equal to lending the amount. The loan was secured by second mortgage over Elliott's property at Cremorne, the title to which was under the *Real Property Act* 1900 (N.S.W.). The currency of the loan is not stated, but it seems to have expired on 6th January 1928. In August 1928 the appellant married. On the eve of his wedding he applied to his bank (the Primary Producers, whose records are no longer available) for an advance on overdraft of £250, stating that he was to be married on the following day and had not received money he had expected. He offered as security the second mortgage in his aunt's name given by Elliott over his home. The manager of the branch agreed to grant an overdraft up to £250 upon this security, and apparently fixed a period for the advance of one month, expiring 15th September 1928. The precise form the security took is not quite clear, but it is almost certain that Sarah Lenehan executed a transfer of the second mortgage, either naming the bank as transferee, or leaving the name of the transferee blank, and that the mortgage and the transfer were lodged with the bank. The

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transfer was not registered. On 17th September 1928 the manager of the bank wrote to the appellant reminding him that the period for which he had agreed to his overdrawing his account had expired on 15th September, and requesting him to expedite the arrangement of an outside loan and advise the bank what had been done. At some stage, probably at this stage, the appellant drew up a letter for his aunt Sarah Lenehan to send to Elliott asking for repayment of the loan she had made to him.

On 9th October 1928 Elliott paid off the loan. Sarah Lenehan attended at the bank and executed a discharge of the mortgage. She gave her nephew, the appellant, an authority to receive payment from Elliott. The appellant obtained a cheque from Elliott for principal and interest amounting to £410 19s. 8d. He paid it into his account, whereupon the bank handed him the mortgage and the discharge (probably endorsed upon it) and the transfer and he handed the mortgage and discharge to Elliott.

There is some suggestion that the appellant's bank account was at that date overdrawn to a greater extent than £250, but, whether that was so or not, he did not pay to his aunt any part of the amount of £410 19s. 8d. It is not shown that his account was in truth overdrawn more than £250, and on the assumption that it was not so overdrawn he must afterwards have drawn, presumably for his own purposes, the difference, i.e. £160 19s. 8d. for which he ought to have accounted to his aunt at the time when the mortgage was paid off. His aunt had, it seems, no banking account on which cheques could be drawn, and the appellant says that her moneys, or some of them, went through his account. It does not appear that he ever paid his aunt the £410 or any part of it, nor does it appear what were his subsequent relations with his aunt, who is now dead. What does appear is that some time afterwards, at a date which Elliott fixes as 13th May 1929, Sarah Lenehan had some communication or conversation with him from which it seemed that she thought he had not repaid the loan she had made to him. He produced afterwards a letter from her undated requesting payment which he ascribed to that date, but the appellant says that it is the letter he wrote for his aunt to sign before the loan was paid off. That is not improbable, and in any case Elliott's statements deserve little or no credit. The appellant said that his aunt's memory was poor and that in the presence of his brother and sister he reminded her of her visit to the bank. She recalled the facts and said she would tell Elliott. In an affidavit the appellant spoke of his aunt guaranteeing his account, an inaccuracy to which some exception has been taken. It is an inaccuracy to which

it seems hard to attach any significance, and one which has no point. For Sarah Lenehan had made her property, the second mortgage, which was worth £400, liable for the appellant's bank account up to £250 and for any purpose of explanation, mitigation or excuse on the part of the appellant, it is quite immaterial whether she had also incurred a personal liability to the bank.

The whole transaction with his aunt was plainly discreditable to the appellant, even if the most favourable account of it were accepted. When the matter was first raised, that is in 1934, and again in 1937, the appellant's attitude, as disclosed by his affidavits and declarations, was that he possessed his aunt's authority for the application he made of the money. But even so, since he had said that she was old and unfamiliar with business, the transaction would remain discreditable. In any case his explanations at that time are far from satisfactory and are open to the comment that they are more exculpatory than candid. But in his evidence before the Full Court upon the present application he adopted a different attitude. He was asked—"Do I understand from this that you admit now that you had no authority from your aunt to pay the money into your account?" He answered—"That is so. I considered that I did have the authority at the time, as I was dealing with her matters, but now, on reflection and with greater experience, I say I did not have that authority."

(*b*) The second matter that has been used to show that the appellant is not a fit and proper person to be admitted to practise is the appropriation to his own use of an amount of £20. The appellant in 1929 was authorized to endorse cheques payable to Elliott or Elliott & Co., the style under which his employer practised. An arrangement subsisted between Elliott and the appellant by which the latter received, in addition to his salary, by way of bonus, one-third of the costs from clients brought by him.

According to the appellant, in March and April 1929 Elliott owed him about £60 for arrears of bonus and salary. Elliott was in financial difficulties, his rent was in arrears, he had misapplied clients' money, and he was drinking. His trust account was exhausted, his private account was overdrawn and cheques of his had been dishonoured. There is no reason to doubt or even to discount this description of the state of Elliott's affairs. While it prevailed a client named Yockney paid over £30. He handed the appellant either two cheques, one for £10 and the other for £20, or possibly £10 in money and a cheque for £20. The latter was payable to Elliott & Co., perhaps both cheques were, if there were two. Apparently the cheque for £20 was payable to L. E. Elliott

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& Co. or bearer. The appellant paid over to Elliott or into his account the cheque or amount of £10. But the cheque for £20 he retained for himself and paid it into his account at the State Savings Bank. For this purpose he endorsed it "Pay J. L. Lenehan L. E. Elliott & Co. 6th March J. L. Lenehan." The appellant did this in order to pay himself, and in 1934 and 1937 took the stand that he was entitled to do so. During his evidence upon this application he was not asked specifically whether he still maintained that he was justified in applying the money towards paying himself. But in 1948 he seems to have tended to the other extreme and to have been almost eager in his confiteor. So perhaps we may take it that his ripened experience would have led him, had he been asked the question, to disclaim any legal justification.

(*c*) When the appellant left Elliott's employment and joined V. J. Brady the latter arranged to pay the appellant, in addition to salary, one-third of the costs from clients brought to Brady by the appellant. As to one client, an insurance company, the appellant was to receive a higher proportion after the costs reached a certain amount. The appellant received costs and made disbursements and as it seems handled moneys, at all events from the clients he brought, as if he were a principal. When in February 1931 the appellant left Brady's employment an account was made up and agreed between them which made the appellant Brady's debtor in the sum of £97 14s. 3d. The account is not easy to understand. One column consists of amounts received in respect of matters connected with the insurance company. They total £96 16s. 2d. From that the appellant's one-third, or £32 5s. 4d. is deducted, leaving £64 10s. 10d. The second column, headed "ordinary," consists of three items amounting to £31 14s. 8d. The third column is headed "disbursements" and consists of items, with the name of the client or matter, producing a total of £16 8s. 3d. These three totals are added together, the first being called "costs due," the second "ordinary" and the third "disbursements." The resulting total of £112 13s 9d. is called "joint statement commission owing" and from it salary and other items are deducted, leaving the amount of £97 14s. 3d. owing to Brady by the appellant. The appellant says that further costs were to come in his third of which would have resulted in the reduction of the liability but that his father-in-law, whose aid apparently was invoked, thought it better to settle the matter and to pay the above amount. Brady, in enclosing the account to the appellant's father-in-law, said that certain amounts were outstanding and, when he received them, due allowance would be made of any amounts due to the appellant.

It is difficult to understand why the disbursements should be added and not be deducted unless the appellant had received the amount of them from the client as reimbursement notwithstanding that he had disbursed them from his employer's moneys. This may be assumed to be the case, and it is a fact counting, and somewhat heavily, against the appellant. The appellant's version in 1934 and 1937 was that the whole matter was one of ordinary accounting at the end of his service for moneys coming into his hands and that it involved no charge of dishonesty or impropriety. He said that he left Brady's employment because, owing to the depression and the falling off of work, Brady found that he could no longer afford to employ him at the salary and on the terms arranged. Brady in an affidavit filed in 1934 in support of Elliott's application to be restored to the roll attacked the appellant and said that he dismissed him for misappropriation, which he admitted. This is entirely denied by the appellant. Brady had given the appellant a credential which said that owing to a re-arrangement of his staff in 1931, he was compelled to dispense with the appellant's services. It is apparent that caution must be exercised in using against the appellant what Brady said in reference to him and in support of Elliott; and counsel for the Law Institute did not suggest that great reliance should be placed upon his statements.

But the appellant himself in his evidence given in this application before the Full Court in February last made a complete retraction of his former claim of right and acknowledged his culpability. He was asked whether there was any truth in Brady's story that he had misappropriated some of his money, and he answered yes that he agreed with it. On its being pointed out that he had sworn in an affidavit that the charge was untrue, he said yes, he could only offer (as) some explanation that they had an arrangement between them and certain moneys came to him from clients which he had introduced to the office: he quite readily now said that he had no authority or real right to hold on to those moneys, they should have been paid over.

(*d*) In March 1932, nearly two and a half years after the appellant had left the employment of Elliott, the latter made a claim upon him in respect of £13 7s. 6d. which he alleged that the appellant had on 28th June 1929 received on behalf of a client named Lipscombe and had misappropriated. The appellant from beginning to end has denied this charge. He explained how Elliott came to make the charge. He said that on at least three occasions when he, the appellant, had placed money received in the safe overnight, Elliott had come in during a drinking bout and had taken the money.

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The appellant said that he placed the sum of £13 7s. 6d. in question in the safe and that he was sure Elliott himself took it in this way and he had so stated to Elliott. However, on 15th June 1932 Elliott laid an information against the appellant for larceny of the money as a clerk and issued a summons. The appellant instructed a solicitor to defend him against the charge. But, as is proved by independent evidence, the matter was settled behind the appellant's back by his father-in-law, who paid £15 and obtained a full receipt in respect of all money transactions between Elliott and the appellant. On the facts this charge should not be taken into consideration against the appellant.

These are the only four matters of any importance. Elliott, however, did put forward other charges or suggestions. One of them was that, having regard to his remuneration, the amounts paid into the appellant's bank account in 1928 and 1929 were excessive, and therefore excited suspicion. A list of the principal payments was made by the appellant and statements of their nature were made which seem quite satisfactory. Indeed, one large amount of £800 was proved to have been paid into the account in exchange for a bank cheque in order to effect a settlement of a conveyancing transaction of Elliott's and this was done by the appellant to safeguard the money from Elliott. As to the balance consisting of small items the appellant in 1937 expressed his readiness to explain them all, if it were desired that he should do so.

Again, a man named Livingstone, who for three or four weeks before 1st November 1929, when the appellant left Elliott, had been in the latter's employ with the appellant, made an entirely general allegation of dishonesty against the appellant, as did Elliott and Brady. This was done in support of Elliott's effort to shift the responsibility for the defalcations laid to his charge. The statements come from discredited sources; the circumstances would in any case throw doubt upon them: the *animus* against the appellant was evident. They are too general to be dealt with except by a denial and a most emphatic denial was given and has been maintained.

The foregoing statement represents the amount of wrongdoing that has been established against the appellant. It will be seen that he behaved, if not dishonestly, at all events very unfairly and wrongly towards his aunt Sarah Lenehan, and that in relation to his employer Elliott, though in what must be considered extenuating circumstances, he paid himself without authority part of what Elliott owed him out of Elliott's moneys without Elliott's knowledge. In relation to Brady what he did was no doubt worse. He

failed to account regularly for the moneys he received, and he retained a total sum much in excess of that to which he was entitled. It is impossible to say whether or not Brady knew that moneys were being collected by the appellant and paid into his own account. It seems probable that the monetary relations between them were conducted in a very irregular way. At all events the appellant does not now claim that what he did was justifiable or honest.

The narrative makes it very plain that the appellant as a young man in his twenties underwent a very bad preparation for the profession of a solicitor and was employed where bad and disreputable practices were pursued and pecuniary dishonesty was commonplace. There are two consequences of this with contrary tendencies. On the one hand the evil examples and questionable practices by which he was surrounded at so early an age explain his conduct and form some mitigation and extenuation. On the other hand a court asked to admit to practise as a solicitor a man who has received so bad an early training cannot but reflect upon the lasting effect produced by early impressions.

In the Supreme Court *Jordan* C.J., however, expressed a view of the appellant's conduct which the facts as they have been stated above seem hardly to support. His Honour said that he was forced to the definite conclusion that in the years 1928 and 1929, whenever the applicant was hard pressed, he showed himself unscrupulous in misappropriating money belonging to his aunt, to his employers and to his employers' clients as and when he got the opportunity, and equally unscrupulous in giving false explanations in endeavours to exculpate himself. No doubt the appellant's conduct deserves reprobation and it was not honest. But the three matters stated above under the headings (*a*), (*b*) and (*c*) are all that have been established against him, and they do not appear to warrant the conclusion to which his Honour felt himself forced, a conclusion which goes far to explain the dismissal of the appellant's application.

The Supreme Court applied to this case a proposition laid down in *Ex parte Macaulay* (1), to the effect that if a solicitor had been struck off the roll for fraudulent misappropriation of clients' money "he should not, unless in very exceptional circumstances, ever be allowed again to be held out to the public as a solicitor in whom confidence might be reposed." It was said that it was clear enough from the report of that case and from a subsequent unreported case of *Ex parte Macaulay* (2) that "what the court had in mind was exceptional circumstances connected with the commission of the

(1) (1930) 30 S.R. (N.SW.), at p. 194. (2) Unreported (6th March 1935).

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offence of dishonesty for which he was struck off. There may be other exceptional circumstances, but it is difficult to see what they could be in this type of case."

The decisions cited refer to cases where a solicitor who had been on the roll was struck off the roll. When such a person applies for reinstatement he is in a more disadvantageous position than an original applicant because he must displace the decision as to probable permanent unfitness which was the basis of his removal. A solicitor may be restored to the roll after he has been struck off, but the power to reinstate should be exercised with the greatest caution and only upon solid and substantial grounds (*Incorporated Law Institute of New South Wales* v. *Meagher* (1)).

The question to be decided is not one of law to be determined by reference to previous decisions. The duty of the court is to determine in what manner the court should exercise its discretion in the particular circumstances of each case. Generalizations relating to questions of character and moral fitness, such as the statement quoted from *Ex parte Macaulay* (2) should not be treated as if they were propositions of law. The two cases of *Ex parte Macaulay* (3) properly emphasize the great importance of financial integrity in a solicitor, but they should not be regarded as laying down a rule of law that a solicitor who has been struck off the roll for pecuniary dishonesty cannot be reinstated and that an applicant for admission who has been guilty of a similar act cannot be allowed to proceed unless it is shown that there were some exceptional circumstances in the original offence.

Once the appellant left the atmosphere of his early experience his story becomes entirely different. Thenceforward his record is one of respectable work and achievement in civil life warmly commended by his successive employers, and in military life of completely satisfactory war service and of promotion. Having left the employment of Brady in February 1931 he became a managing clerk to Messrs. Marsden and Lightoller in November 1932, with whom he remained for two and a half years, except for about six weeks when he acted as managing clerk to Messrs. Clapin and Fleming. Mr. Lightoller swore an affidavit in which he spoke most highly of the appellant and his work, which included the handling of trust and other moneys. He stated that having met him professionally and otherwise since, he had formed the opinion that the appellant's character and conduct are such as to entitle him to

(1) (1909) 9 C.L.R. 655.
(2) (1930) 30 S.R. (N.S.W.) 193.
(3) (1930) 30 S.R. (N.S.W.) 193, and one case unreported (6th March 1935).

perform the duties of a solicitor both from the point of view of ethics and the handling of trust funds, and that he regarded him as a fit and proper person to be admitted. In February 1935 he joined the legal branch of the Rural Bank, where he performed the duties ordinarily belonging to a managing clerk. Subject to military service in the war, he has remained ever since in the employment of the Bank. From his affidavit filed in this Court explaining why an appeal as of right lies from the order refusing his admission as a solicitor, it appears that his reason for seeking to become a solicitor is that his want of professional status bars his promotion in the Bank's legal department.

The heads of that department, which is a large one and involves the handling and disposal of trust funds and other moneys, have in succession expressed highly favourable opinions of his work and character. These opinions are confirmed by an affidavit of a solicitor, Mr. Young, of the firm of Primrose, Young & Primrose, who before he joined that firm was associated with him in the Bank. The appellant joined the Australian Military Forces in 1935 and on the outbreak of war in September 1939 he went into camp. In August 1940 he obtained a commission in the second A.I.F. and was engaged upon war service until 24th April 1946, when he rejoined the Bank. His rank is now that of major. He served in the Middle East from 1940 until his return to Australia in 1943 after the battle of El Alamein. He served as a regimental officer and afterwards as a staff captain. In March 1944 he was sent to London where he held various appointments on the staff of the Australian Headquarters. He was afterwards attached to 21st Army Group as a liaison officer and saw service in Europe. Later still he was attached to the Supreme Headquarters Allied Expeditionary Force. He produces highly commendatory certificates from a number of commanders under whom he served. When the appellant's application was referred to the Council of the Incorporated Law Institute with a view of obtaining their observations upon it, the council expressed the view that while he was deserving of commendation for his distinguished war service, yet in view of his past conduct in the profession his war service did not appear to have been of such a nature as necessarily to afford a guide as to whether he is a fit and proper person to be admitted as a solicitor and to have the care and custody of trust moneys. This led to the filing of an affidavit by the appellant that made it plain that during various parts of his war service the responsibility of handling, paying out and administering considerable funds had rested upon him, regimental funds, petty cash, unit fortnightly pay and much besides.

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The foregoing narrative will show that the present appeal imposes upon this Court a responsibility the discharge of which is both delicate and difficult. The appellant having made an unfortunate beginning under very bad example so acted between the ages of 25 and 28 as to raise a presumption against his fitness for the profession of a solicitor. From the age of 28 to 45 he has behaved in such a way as to raise a strong presumption that he has redeemed his early errors and that they did not reflect any permanent defect of character. The judges of the Supreme Court thirteen and eleven years ago were not prepared to permit him to present himself for admission. He has since given further proof of good character by his war service, and has undergone a discipline and a set of experiences which should contribute somewhat more to the strengthening of his moral nature and the raising of his standards and, indeed, of his outlook on life. Their Honours, the judges, after two of their number had made a re-examination of the appellant's case, have now been prepared to give him permission to present himself for admission. The Full Court, however, consisting of three judges sitting judicially, has decided against his fitness for the profession but upon grounds which include a view of his conduct which the facts do not appear to support.

This case is of a class in which this Court interferes in the decision of the State Court with reluctance, but it has been decided that an appeal lies as of right and that places upon us the duty of deciding the appeal by way of rehearing upon ordinary principles.

There must be a strong disinclination to admit to the profession of a solicitor any person who has been shown ever to have been guilty of improper conduct. It is a disinclination founded upon the unsafety of such a course and the need of strictness in maintaining the standards of the profession. But the false steps of youth and early manhood are not always final proof of defective character and unfitness. The presumption which, according to circumstances, they may appear to raise may surely be overcome by a subsequent blameless career.

The present case discloses the strongest contrast between two periods, one of early manhood under bad influences without proper guidance and dealing with difficult circumstances; the other of a fully adult life of seemingly correct and exemplary conduct and every outward manifestation of good character. A fine war record is something which ought to count in such a question.

In short this appears to be a case in which this Court ought to give effect to the view that the adverse conclusions that might otherwise be drawn from an unsatisfactory beginning may be

displaced by a completely satisfactory subsequent career sustained over a lengthy period of time. The true conclusion from all the material before the court is that the appellant now is a fit and proper person to be admitted as a solicitor.

Among the rules with which, apart from any special order or direction of the court or the judges, the appellant had to comply is rule 458 (2) (*d*), requiring a certificate from each solicitor with whom he had been a clerk. It is hard to imagine Elliott or Brady giving him a certificate. Rule 459 as amended gives a wide discretion to the judges and perhaps under it the difficulty has been overcome and, since permission to present himself for admission has been granted, it no longer exists. In any case, rule 492A as promulgated on 18th February 1944 gives to the court in cases of persons who have been engaged in war service a full discretion to relax any rule.

However, had the Supreme Court been of opinion that the appellant was a fit and proper person to be admitted, that Court would readily have satisfied itself with respect to these and any other formalities. In any case the actual admission of the appellant would take place in the Supreme Court. The appropriate form of order, therefore, for this Court to make in order to give effect to the view expressed in this judgment is to allow the appeal from the order of the Supreme Court made on 1st March 1948 whereby the appellant's application was dismissed and he was ordered to pay the costs of the Incorporated Law Institute of New South Wales, to discharge that order and in lieu thereof to order that it be declared by this Court that the appellant is a fit and proper person to be admitted as a solicitor, and with that declaration, to remit the matter to the Supreme Court to deal with according to law consistently with this order.

The Incorporated Law Institute of New South Wales has taken part in these proceedings for the purpose of assisting the courts in elucidating the facts and applying appropriate principles in the decision upon the appellant's application. The Institute is not a party to the proceedings, but it would not be right to require the Institute to bear the cost of performing this duty to the public as well as to the legal profession. It is proper to order that the appellant pay the costs of the Institute in this Court and in the application in the Supreme Court.

RICH J. The qualification of the applicant for admission as a solicitor was based on rules 428 (*g*) and 458 of the Rules of the Supreme Court which required him to apply to the judges for

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"permission to present himself for admission." Accordingly, he made such an application and two judges of the Supreme Court considered the matter and gave the requisite permission. Their report was not before the Full Court of the Supreme Court which alone had the jurisdiction to deal with the application for admission, nor was it before us. In any event the report was not binding on the court and could only have the effect of a statement that the applicant had fulfilled the necessary and preliminary qualification prescribed by the rules for an application for admission. Subsequently the matter came on for hearing before the Full Court, which dismissed it. Hence this appeal. Applications by persons seeking admission and those to strike solicitors off the roll impose on the court a painful and disagreeable task. But it is necessary and must be exercised with firmness in the interests of the public. Solicitors are officers of the court and the public expects that the court will, so far as it can, ensure upright and honourable conduct on the part of its officers. The interests of the court, the public, the profession and of the applicant must be considered (cf. *In re Kearney* (1)). The public must not be exposed to improper officers of the court (*Re Hill* (2)). The fact that a person is a solicitor of the court gives him the stamp of trustworthiness and marks him as a person in whom confidence may be reposed (*In re Chandler* (3)).

Applying these principles the question for the Supreme Court and for us is to determine whether the applicant is a fit person to be accredited as an officer of both Courts. And as regards the profession "It is obvious that the conduct of a solicitor in his profession must be judged by the rules of his profession and by the standard which its members set up not only for their brethren, but for themselves" (*In re a Solicitor*; *Ex parte Law Society* (4)). In the instant case the secretary of the Incorporated Law Institute of New South Wales in a report to the secretary of the judges of the Supreme Court stated :—"My Council has given consideration to the papers referred by you in your letter of the 1st November ultimo, and in response to your request I have been instructed to reply to you as follows: The Council's opinion is that while Mr. Lenehan is deserving of commendation for his distinguished war service, in view of his past conduct in the profession his war service does not appear to have been of such a nature as necessarily to afford any guide as to whether he is a fit and proper person to be admitted as a solicitor and to have the care and control of trust moneys."

(1) (1908) 8 S.R. (N.S.W.) 87, at p. 89.
(2) (1868) L.R. 3 Q.B., at p. 545.
(3) (1856) 22 Beav. 253, at p. 256 [52 E.R. 1105, at p. 1106].
(4) (1912) 1 K.B. 302, at p. 314.

I have considered with anxious care all the facts of the case. The material facts are set out in the judgments of *Jordan* C.J. and of my brothers the Chief Justice, *Dixon* and *Williams* and *Starke*, and need not be recapitulated. These facts present instances of serious misconduct while the applicant was a clerk in solicitors' offices—instances of larceny or embezzlement, misappropriation and forgery. On the other hand it was sought to purge him of these grave offences by evidence of his subsequent honourable conduct, especially his very meritorious war service. But with great regret I have come to the same conclusion as the judges of the Supreme Court, and I decline to interfere with their discretion. Theirs is the primary and most important responsibility of presenting the applicant to the public as a fit and proper person to deal with their legal and confidential matters and their money and investments. I am not satisfied that the circumstances are so exceptional as to warrant me in disturbing the decision of the Supreme Court. I would dismiss the application.

STARKE J. Appeal from the Supreme Court of New South Wales dismissing an application on the part of the appellant to be admitted as a solicitor of that Court. The competency of the appeal has not been challenged.

The Charter of Justice empowers the Supreme Court to admit fit and proper persons to appear as barristers, advocates, proctors, attorneys and solicitors as may be necessary according to such general rules and qualifications as the court shall for that purpose make and establish.

And the *Judiciary Act* 1903-1947 provides that any person entitled to practise as a barrister or solicitor or both in any State shall have the right to practise in any Federal Court or in any court of a Territory under the control of the Commonwealth.

Rule 458 of the Rules of the Supreme Court provides that no person in the position of the applicant should be admitted as a solicitor without having first obtained the permission of the judges to present himself for admission.

In May 1947 he obtained this permission but it had been refused on other occasions.

The critical question is whether the applicant established that he was a fit and proper person to be admitted as a solicitor of the Supreme Court.

This is not a case in which the applicant had been struck off the roll of solicitors for misconduct for he had never succeeded in being admitted as a solicitor.

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But looking at the power vested in the court of admitting persons to the responsible position of attorneys, solicitors and officers of the court the burden is upon the appellant of satisfying the court that he is a fit and proper person to be so admitted.

In the years 1928 and 1929 when he was 25 or 26 years of age he was guilty of very grave misconduct.

The Supreme Court has examined the facts at length but I do not propose to do more than summarize admitted acts of misconduct.

(1) The applicant managed his aunt's affairs. He had transferred to a bank or lodged with her consent as he asserts a mortgage belonging to her as security for his overdraft or debt to a bank. When this mortgage was paid off he received the principal sum and some interest, in all, about £410. He paid off his overdraft or debt to the bank, some £250, with his aunt's assent as he asserts, and misappropriated or, in plain words, embezzled the balance.

(2) The applicant had been in charge of the conveyancing practice of one Elliott, a solicitor, and after Elliott had been struck off the roll of solicitors for fraudulent conduct the applicant received a cheque for £20 payable to Elliott and had endorsed it in Elliott's name without any authority to do so and misappropriated the amount. The applicant was guilty both of forgery and embezzlement.

(3) The applicant was employed by Brady, a solicitor, from November 1929 to February 1931. During that period he apparently collected about £112 on Brady's account for which he did not account. Finally an account was drawn up which brought him in debt to Brady in a sum of about £97 which the applicant's father-in-law paid for him. A receipt for this sum was brought to the attention of the court which suggested, it was said, merely civil claims between the parties.

But the circumstances make it clear, I think, that the applicant misappropriated the funds of Brady and that the appellant's father-in-law stepped in to save the appellant from the consequences of his misconduct. He was guilty of embezzlement or larceny as a servant.

(4) The affidavits of the applicant in support of his application are wanting in candour as was pointed out by counsel who appeared for the Incorporated Law Institute of New South Wales, which opposed this appeal.

But I shall not pursue this summary nor the suggestion that the applicant's banking account showed deposits for the year 1928 of £1,238 and for the year 1929 of £1,645 although he was only a clerk in receipt of £4 to £5 per week partly because the suggestion comes

from a tainted source, Elliott the solicitor who was struck off the roll, and partly because of explanations offered by the appellant.

Standing alone I should think that this misconduct of the appellant made it plain that he was not a fit and proper person to be admitted as a solicitor.

But it is said that since 1929 the appellant has lived an honourable life and made it abundantly clear that he is now a fit and proper person to be admitted as a solicitor.

The facts are summarized in the judgment of the Supreme Court.

The applicant is now 45 years of age.

He had a long and honourable career of war service which deservedly won him the highest encomiums from those best qualified to give them. His war service extended from 1939 to the middle of 1946, and he rose from the rank of lieutenant to that of major. He acted as a regimental officer and also as a staff officer and had the control of large sums of money including regimental pay amounting to £5,000 or £6,000 a fortnight.

He was also employed by a solicitor as a managing conveyancing clerk from 1932-1935 and handled considerable sums of money both trust and otherwise and had been honest and reliable.

He has also been employed since February 1935, excluding the period of his war service (1939-1946), by the Rural Bank. His duties related to legal matters and were equivalent to the duties of a managing clerk in the office of a solicitor and he has been found honest, reliable, efficient and careful in his work, and in every way satisfactory, and in the course of his duties paid and received moneys on behalf of the bank and had the handling of considerable sums of trust moneys.

But despite these facts the Supreme Court declined to admit the appellant as a solicitor of the Supreme Court. The Chief Justice said that the court was being asked to do something that would put the applicant in an entirely different position from that which he had ever occupied before. If he were admitted as a solicitor he would at once become qualified and entitled to practise on his own account subject to no checks or controls. And in substance the Chief Justice said much the same thing as was said by *Willes* J. (with whom *Montague Smith* and *Brett* JJ. concurred) in *Re Poole* (1), that the appellant would thus have the sanction of the court for saying that prima facie at least he was worthy to stand in the ranks of an honourable profession to whose members people ignorant and otherwise might resort for assistance in the conduct and management of their affairs with unbounded confidence.

(1) (1869) 4 C.P. 350, at p. 353.

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The Supreme Court could not bring itself to the conclusion that the appellant was a fit and proper person to be admitted as a solicitor of that Court in view of his grave misconduct in 1928-1929, and, I may add, possibly also because of the want of candour in his affidavits.

Giving every weight to the appellant's subsequent history and conduct I am not prepared to dissent from the view of the Supreme Court: indeed I agree with it. In my opinion some manifest mistake or error on the part of the Supreme Court should be established before this Court should interfere with the decision of that Court and admit a person as a solicitor of that Court or declare him to be a fit and proper person to be admitted as a solicitor of that Court when it declares that he is not a fit and proper person to be so admitted.

No doubt this Court has jurisdiction so to act but it is a jurisdiction involving grave responsibility and one that should be exerted only in exceptional cases: see *Meagher's Case* (1).

But it was said that the Supreme Court applied a wrong principle of law in this case.

The Chief Justice of that Court said that when a solicitor had been struck off the roll it did not necessarily follow that he is forever debarred from again acting as a solicitor. But the position was very different, he added, when a solicitor had been struck off the roll for having fraudulently misappropriated money entrusted to him by or on behalf of a client. In that type of case it was laid down as a rule by the court in *Ex parte Macaulay* (2) that where a solicitor has been proved guilty of theft he should not, unless in very exceptional circumstances, ever be allowed again to be held out to the public as a solicitor in whom confidence might be reposed. Much the same opinion was expressed in the Court of Common Pleas in *Re Poole* (3) by *Willes* J., with whom *Montague Smith* and *Brett* JJ. concurred. An attorney who had been guilty of a fraudulent appropriation of the moneys of a client to a large amount was struck off the roll. He applied to be reinstated. But *Willes* J. said that looking to the fact that in restoring him to the roll the court would be sanctioning the conclusion that in its judgment he was a fit and proper person to be so trusted he thought the court ought not to do so except upon some solid and substantial grounds.

But I am unable to agree with the further view expressed by the Chief Justice that the exceptional circumstances must be connected with the commission of the offence of dishonesty for which he was struck off.

(1) (1909) 9 C.L.R. 655.
(2) (1930) 30 S.R. (N.S.W.) 193.
(3) (1869) 4 C.P., at p. 353.

The whole circumstances of the case and the subsequent conduct of the solicitor must be examined. "If," as was said by Lord *Esher* M.R. in *In re Weare* (1), "he continues a career of honourable life for so long a time as to convince the court that there has been a complete repentance, and a determination to persevere in honourable conduct, the court will have the right and the power to restore him to the profession."

Further it should be observed that the rule stated by the Supreme Court relates to solicitors who had been struck off the roll and to the solicitor Elliott mentioned in this case who had been struck off the roll for fraudulent conduct. Elliott, it will be remembered, was a former master of the present appellant. He had applied to be restored to the roll. His application was dealt with at the same time as the appellant's.

But the appellant was not a solicitor who had been struck off the roll. The rule was not applicable to and was not applied by the Supreme Court to this case. It examined the whole circumstances of the appellant's case and his subsequent conduct and came to the conclusion that it would be guilty of a dereliction of duty if it were to admit the appellant, tainted as he is, as a fit and proper person to be enrolled as a solicitor of the court and to stand in the ranks of an honourable profession to whom the public might resort for assistance in the conduct and management of their affairs with confidence and security.

In my opinion this appeal should be dismissed.

Appeal allowed. Order of the Supreme Court discharged and in lieu thereof declare the appellant is a fit and proper person to be admitted as a solicitor. Matter remitted to the Supreme Court to be dealt with consistently with this order. Appellant to pay the costs of the Incorporated Law Institute of New South Wales of this appeal and of the Supreme Court.

Solicitors for the appellant: *Cecil F. Hurley & Co.*

Solicitors for the Incorporated Law Institute of New South Wales: *Dettmann, Austin & Maclean.*

(1) (1893) 2 Q.B. 439, at p. 447.

J. B.