High Court of Australia

Clyne v NSW Bar Association [1960] HCA 40; (1960) 104 CLR 186 (1 July 1960)

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CLYNE v. N.S.W. BAR ASSOCIATION [1960] HCA 40; (1960) 104 CLR 186

Legal Practitioners - High Court

High Court of Australia
Dixon C.J.(1), McTiernan(1), Fullagar(1), Menzies(1) and Windeyer(1) JJ.

CATCHWORDS

Legal Practitioners - Barristers - Striking off roll - Grave professional misconduct - Instigation of baseless prosecution - Devised to intimidate solicitor - Extravagant attack in opening proceedings upon professional character and reputation of solicitor - No evidence to support allegations.

Legal Practitioners - Solicitor - Conduct of case for client without means - Maintenance - Whether maintenance now a crime.

High Court - Appeal as of right - Appeal from order striking name of barrister from rolls - Special leave necessary - Judiciary Act 1903-1959 (Cth), s. 35 (1) (a) (1) (2), (1) (b).

HEARING

Sydney, 1960, April 5-8, 11-13;
Brisbane, 1960, July 1. 1:7:1960
APPEAL from the Supreme Court of New South Wales.

DECISION

July 1.
THE COURT delivered the following written judgment:-
This is an appeal from an order of the Full Court of the Supreme Court of the roll of barristers of the State of New South Wales on the ground that he has been guilty of such grave professional misconduct as shows him not to be a fit and proper person to practise as a barrister. The charges made against him arose out of four prosecutions for indictable offences and the conduct of these by the appellant at the preliminary hearing before a magistrate. These prosecutions were, on the advice of the appellant, launched by a client of his against a solicitor, and were admittedly devised as a means of intimidating that solicitor into ceasing to act for a certain lady in certain civil proceedings pending between her and that client. In opening the proceedings before the magistrate the appellant deliberately used the occasion to make a savage public attack on the professional character of that solicitor. He made that attack in extravagant terms, alleging fraud, perjury and blackmail. He knew

that he had no evidence to substantiate such allegations. At the end of his opening he invited the man whom he was prosecuting for a crime to defend himself before any evidence had been given against him, and intimated that, if he were to cease to act for his client, the criminal proceedings would have achieved their object and could be discontinued. It is necessary, of course, that we should explain our view in some detail, but we may say at once that we are of opinion that the Supreme Court was entirely right in the conclusion which it reached. (at p188)

2. With regard to the jurisdiction of the Supreme Court, it is sufficient to refer to Ziems v. The Prothonotary of the Supreme Court of N.S.W. [1957] HCA 46; (1957) 97 CLR 279, at pp 290, 291 . The words "fit and proper person" are the words used in the Charter of Justice of 1823, which issued under the authority of the Imperial statute 4 Geo. IV, c. 96, and by which the present Supreme Court of New South Wales was constituted. Clause 10 of the Charter provided for the admission of persons to practise in the Court. It empowered the Court to approve, admit and enrol persons who had been admitted at Westminster, Dublin or Edinburgh "to act as well in the character of Barristers and Advocates as of Proctors, Attorneys and Solicitors in the said Court". Persons so admitted were authorized "to appear and plead and act for the suitors of the Court, subject always to be removed by the said Court from their Station therein, upon reasonable cause". It was further provided that if there should not be a sufficient number of such persons in the Colony competent and willing to appear for the suitors of the Court, then the Court might admit other "fit and proper persons" according to such general rules and qualifications as it might make. In Ziems's Case [1957] HCA 46; (1957) 97 CLR 279 Kitto J. said: "The issue is whether the appellant is shown not to be a fit and proper person to be a member of the Bar of New South Wales. It is not capable of more precise statement. The answer must depend upon one's conception of the minimum standards demanded by a due recognition of the peculiar position and functions of a barrister" (1957) 97 CLR, at pp 297, 298 . Since 1835 barristers in New South Wales have, by virtue of a rule made under s. 16 of 9 Geo. IV, c. 83, constituted, as in England, a separate and distinct branch of the legal profession. The respondent to this appeal, the Bar Association of New South Wales, is a voluntary association of barristers, which was incorporated in 1936. It exercises supervision over the conduct of members of the Bar, and lays down rules and decides questions of professional conduct and etiquette. It is recognized by the Supreme Court as the body which represents the Bar, and it is heard by counsel in matters coming before the Court in which the status or conduct of a member of the Bar is in question. (at p189)

3. In the proceedings with which we are immediately concerned, the appellant's client was a man named Jacombe, who with his wife (or reputed wife - the reason for this alternative will appear later) had come from a foreign country and settled in Australia in 1954. They had one child, a girl aged about twelve years. They appear to have brought with them money or property of very considerable value: whether the whole of this belonged to Mr. Jacombe or some of it to Mrs. Jacombe (as we will call her) has been a matter of violent controversy between them. The pair were not on good terms in 1956, and in that year Mrs. Jacombe left their home, but returned some three weeks later. Towards the end of August 1958 Mr. Jacombe was found with a woman in circumstances strongly suggesting adultery, and he does not appear to have denied at any time that he committed adultery. Mrs. Jacombe left the home for the second time on 2nd September, and on 17th September commenced proceedings for divorce. Then followed what can fairly be described as an orgy of litigation. The number of proceedings pending in December 1958 has been variously stated at figures lying between twenty and twenty-seven, but, apart from the four proceedings which are relevant in this case, most of these had been initiated by Mr. Jacombe. Of those four proceedings the first was a suit for divorce on the ground of adultery. The second was a suit in equity for an account in respect of certain moneys alleged to belong to Mrs. Jacombe. The third was a suit under s. 66G of the Conveyancing Act, 1919-1954 (N.S.W.), which contains provisions for the partition or sale of real property held in co-ownership. The subject matter of this suit was a property known as Lynton Manor, the legal title to which stood in the joint names of Mr. Jacombe and Mrs. Jacombe. The fourth was an application by Mrs. Jacombe for alimony pendente lite in her suit for divorce. This was, of course, not really an independent proceeding but an incident of the suit for divorce. In the

prosecutions about to be mentioned, however, it was treated as a separate substantive proceeding. In fact the application came on before the Registrar in Divorce on 27th November 1958, when it was adjourned to 17th February 1959, Mr. Jacombe being ordered to pay alimony and maintenance during the adjournment at the rate of 36 pounds per week. (at p190)

4. It was in December 1958 that the appellant was first consulted by Mr. Jacombe. In that month Mr. Jacombe changed the solicitors who had been acting for him, and who had been instructing counsel other than the appellant on his behalf, and thereafter new solicitors acted for him and instructed the appellant as counsel. Complaints were made to the Bar Association about the manner in which this change was effected, but, if any impropriety was involved, it does not enter into the present proceedings. (at p190)

5. In the four matters mentioned above the solicitor acting for Mrs. Jacombe was Mr. E. R. Mann of the firm of E. R. Mann & Co. There is nothing in the material before us to suggest that Mr. Mann had in any way acted otherwise than in the best interests of his client, but Mr. Jacombe had conceived the idea that, if Mr. Mann ceased to be employed by Mrs. Jacombe, the proceedings brought by her would be abandoned or could be readily compromised. He had early in September written to her a very remarkable letter (to which we shall have to refer later) relating mainly to the divorce suit. No reply to this letter had been received either from her or from Mr. Mann, and Mr. Mann had apparently shown himself unwilling to negotiate for a settlement of any of the proceedings in question. Mr. Jacombe's immediate purpose, then, when he consulted the appellant, was to get Mr. Mann to cease to act as Mrs. Jacombe's solicitor. The appellant says that he considered, on certain information supplied by his client, three possible lines of attack on Mr. Mann. It was finally decided that the best plan would be to institute a prosecution of Mr. Mann for the common law misdemeanour of maintenance. What was said later in court by the appellant suggests that it was hoped that Mr. Mann would, rather than face trial on a criminal charge, agree to cease to act as Mrs. Jacombe's solicitor. But it is not easy to believe that this hope was very seriously entertained. No self-respecting solicitor would react in such a way to such a threat, and, in the light of what happened, it is probably true to say that the general idea was to make a vigorous public attack on the professional character of Mr. Mann and hope for the best. At any rate, it is quite clear that the prosecutions were undertaken with no other object in view than the elimination of Mr. Mann from the proceedings between Mr. and Mrs. Jacombe, and the whole enterprise seems to have been irresponsible and mischievous. (at p191)

6. On 14th January 1959 four informations - one in respect of each of the four "proceedings" mentioned above - were laid by Mr. Jacombe against Mr. Mann. The informations are not in the appeal book, but the appellant said that they followed the form in Archbold. That form merely alleges that AB "unlawfully maintained" a specified proceeding between CD and EF. The offence - if it is today an offence - is, of course, an indictable offence, and the preliminary hearing took place on 21st, 22nd and 23rd January before a stipendiary magistrate in Sydney, the appellant appearing for the informant, Mr. Jacombe. At the end of the hearing Mr. Mann was committed for trial, but in March 1959 he was notified that the Attorney-General did not intend to proceed in the matter. (at p191)

7. We are bound to say at the outset that it is, in our opinion, to say the least, an extremely regrettable thing that Mr. Mann was committed for trial. The charge was one which reflected - or by the public generally would be regarded as reflecting - gravely on Mr. Mann in the way of his profession, and there was no evidence before the magistrate which could conceivably have been held to sustain the charge before a jury. It is a fact, of course, that the magistrate was called upon to deal with an obscure and dubious offence, of which we have found no reported instance, though there is a reference to one (which was not a case of a solicitor) in Metropolitan Bank v. Pooley (1885) 10 AC 210, at p 218 . But it may be said, on the other hand, that this very fact called for special caution. (at p192)

8. Mr. Jacombe had somehow discovered that certain cheques had been drawn by Mr. Mann and

paid into Mrs. Jacombe's bank account, and it was primarily on the strength of this great discovery that the appellant advised prosecutions, and prosecutions were launched. It was proved at the hearing, by production of cheques and accounts, that between 8th September 1958 and 9th January 1959 six cheques for amounts totalling 490 pounds had been drawn by Mr. Mann and paid into Mrs. Jacombe's account with the Australia and New Zealand Bank. In fact the cheques were drawn on Mr. Mann's trust account, and it would appear from the appellant's letter of 7th May 1959 to the Secretary of the Bar Association that the payments represented the proceeds of jewellery sold by Mrs. Jacombe. The appellant at the time of the hearing had no reason to suppose that this was the explanation of the payments, and he did not know until the cheques were put in evidence that they were drawn on Mr. Mann's trust account. But in truth it seems to us to matter little whether the cheques were drawn on Mr. Mann's office account or personal account or trust account. It is impossible to say that the making of a payment by a solicitor to a client for whom he is conducting litigation is proof that he is "unlawfully maintaining" that litigation. He may be paying money which he owes to the client. He may be making a loan to the client: there is no reason why he should not do so. (at p192)

9. It is worthy of note that, after he knew that the cheques were drawn on the trust account - so that Mr. Mann was presumably paying to Mrs. Jacombe her own money - the appellant persisted in relying on the payments as evidence of "unlawful maintenance". This, however, is of comparatively little moment. It was in the course of the opening of the case to the magistrate, and before the cheques were tendered in evidence, that the appellant was guilty of the conduct which has led to the making of the order under appeal. In this opening address he launched, as we have said, an unrestrained and vicious public attack on Mr. Mann, making allegations of the most serious and damaging nature, which, so far as any evidence which he had went, could not possibly be substantiated, and inviting inferences which could not possibly be drawn from any material which he had. Before referring to what he actually said, it is convenient to consider, against the background of the evidence adduced, the allegations which he made, and which were in substance five in number. (at p193)

10. First, he placed in the forefront of his case an allegation that Mr. Mann was in September 1958 "in financial difficulties" because he "undertook to pay large sums as a result of his partner's defalcations, which placed him in financial difficulties". This evidence, he said, would be given as evidence of "motive". To say of a solicitor that he is in financial difficulties is, of course, to make a highly damaging statement, and mention of the fact that he has had a defaulting partner is itself prejudicial. Assuming it to be relevant, the statement that Mr. Mann was in financial difficulties could only be justified if the prosecutor had clear evidence of the facts stated. The only evidence on the matter was given by a member of the police force, Sergeant Canacott, who had investigated an embezzlement by a partner of Mr. Mann, and who said said that he had had a conversation with Mr. Mann at some time prior to 3rd May 1957 - more than eighteen months before the relevant time. At that time, he said, Mr. Mann had told him that the outstanding deficiency was a little over 13,000 pounds, and had "said that, if they" (i.e. the outstanding amounts) "were at any stage shown to be a liability of the partnership, he would have no alternative but to meet them". It is obviously impossible to infer from this that Mr. Mann was in such financial difficulties as would induce him to commit a crime, and it was an outrage to suggest it. (at p193)

11. The excuse for opening this matter which is put forward by the appellant in his letter to the Bar Association has merely the effect of making matters worse. He says that he was entitled to open this matter, because he had served a subpoena on Mr. Mann to produce all his books of account, and he hoped, on examining them, to find evidence to show that the defendant was in financial difficulties. This, of course, is absurd. It may or may not have been improper to serve a subpoena to produce documents on Mr. Mann. But the only person in court who could have proved the documents was Mr. Mann himself, and he was, of course, not a compellable witness. The "excuse" really amounts to no more than a confession by the appellant that he was not in a position to prove the grave allegation which he was making. It is an aggravating fact that, when Mr. Mann's counsel said that the documents were not produced, the appellant suggested to the magistrate that the reason for their

non-production could only be either that Mr. Mann was contemptuous of the Court's process or that the documents would or might incriminate him. (at p193)

12. The second allegation of specific misconduct on the part of Mr. Mann was in relation to the application for alimony pendente lite in the divorce suit. For the purposes of this application an affidavit had been filed on behalf of Mrs. Jacombe, in the course of which she deposed : "I have no income, no money in the bank, and no means whatsoever". The appellant told the magistrate in his opening that the order for alimony "was procured by fraud upon an affidavit prepared by the defendant and with his knowledge sworn by Mrs. Jacombe, an affidavit which was false". Each of the three statements contained in it and quoted above "was", he said, "false and false to the knowledge of the defendant". These things having been said by the appellant, he adduced no evidence whatever to connect Mr. Mann personally in any way with the affidavit. It was as likely as not - one would think, more likely than not - that it was drafted by a clerk in Mr. Mann's office on Mrs. Jacombe's instructions. In any case, there was no evidence that Mrs. Jacombe had at the date of the affidavit any "income" or any "means". It was not literally true that she had "no money in the bank", because it was shown that at the material date she had a credit balance of 11 pounds 0s. 0d. at her bank. But to a woman accustomed, as Mrs. Jacombe was, to wealth, the difference between nothing and 11 pounds might well have seemed immaterial. Her possession of 11 pounds could not possibly have affected the amount of alimony to be awarded. Her omission to mention the four sums paid to her by Mr. Mann before the date of the application might have been made the subject of cross-examination on the application for alimony, but the mere fact of those payments did not falsify her affidavit. Having nothing more to go upon, the appellant apparently saw nothing wrong in saying that among the facts which he would establish was that Mr. Mann had been an accessory to perjury. (at p194)

13. The next allegation made against Mr. Mann was even more fantastic. He was accused of deliberately protracting litigation to serve his own ends, because he refused to give certain "particulars" in the divorce suit. The facts were these. The ground of Mrs. Jacombe's petition for divorce was, as has been said, adultery. The available evidence of adultery was strong, and Mr. Jacombe did not deny adultery. He had, however, discovered, or professed to have discovered, that there was some doubt about the validity of the marriage, and he denied the marriage. The suggestion was that a previous husband of Mrs. Jacombe's was living and still married to her when she went through the ceremony of marriage with Mr. Jacombe at Jerusalem. His solicitors asked for "particulars" as to whether the previous husband was alleged to have been dead or divorced at the time of the Jerusalem ceremony. It would seem clear that it was not a matter for "particulars" at all. If it was, a summons could have been taken out and dealt with within a few days. If the request was regarded as a mere request for information, why should it have been complied with? Mr. Jacombe had denied that Mrs. Jacombe was married, with the implication that her child and his was illegitimate. Mrs. Jacombe would have to prove a marriage in order to obtain a decree. Why should Mr. Jacombe not be left to destroy her prima facie case, if he could, by cross-examination or otherwise? It was a monstrous thing to assert that a solicitor who refused information was doing so for the purpose of protracting proceedings and making costs for himself. (at p195)

14. The fourth of the main allegations against Mr. Mann was that he had refused or neglected to negotiate with Mr. Jacombe or his solicitors for a settlement of the proceedings between Mr. and Mrs. Jacombe. This attitude also was attributed to Mr. Mann's determination to extract by way of costs as much money as possible out of Mr. Jacombe. The accusation was based mainly on the fact that no reply had been received either from Mrs. Jacombe or from Mr. Mann to a letter written by Mr. Jacombe to Mrs. Jacombe on 6th September 1958 - very shortly after the institution of the divorce suit. It is an extraordinary letter, but its substance is, we think, correctly summarized by the learned Chief Justice of the Supreme Court. The letter pointed out that the divorce suit might be dealt with in one of two ways - either as a defended suit with much unpleasant publicity, or as an undefended suit. Mr. Jacombe then told her that he had evidence available which he could adduce at the trial and which, if accepted, might result in her failing to obtain the dissolution which she was seeking, and which would be most material in rebutting her claim to any alimony or to the custody

of the child. He then suggested that if she would agree to his terms with regard to alimony and custody, the suit would go through without "scandal and publicity", and he suggested that they should agree upon "a dignified approach to the problem" and reach "an amicable settlement". It is to be observed that, if Mr. Jacombe wanted an undefended suit, all he had to do was to admit the marriage and the adultery. It is also to be observed that he was threatening to give evidence which would seriously affect the question of the custody of the child, although he also said in the letter : "I still believe that you are a wonderful mother". (at p195)

15. We do not think it necessary to consider whether an acceptance of the offer contained in this letter would have amounted in law to collusion. The learned Chief Justice thought that it would. Perhaps its worst feature is that the writer offers to refrain from raising matters vitally affecting the welfare of the child if Mrs. Jacombe will agree to his terms. For present purposes, it is only necessary to say two things. First, there is no evidence that Mr. Mann at any material time ever saw the letter. Secondly, any responsible solicitor, whose client brought him that letter in the circumstances of this case, would certainly advise his client to ignore it, and would himself either not answer it at all or, if he did answer it, would say little more than that his client was not to be intimidated. (at p196)

16. The fifth and last of the accusations made against Mr. Mann was that he was conducting on behalf of his client, and without expectation of receiving any payment directly from her, proceedings which he knew to be hopeless. It could not, of course, and was not, pretended that the divorce suit, or the application for alimony pendente lite, was frivolous or vexatious. Nor could it be legitimately pretended that the suit under s. 66G of the Conveyancing Act was of that character. Mrs. Jacombe was clearly prima facie entitled to an order under that section. The appellant said that this suit was vindictive. There is no real reason for saying that Mrs. Jacombe was inspired by vindictive motives in bringing that suit : the marriage had been broken up, and the best thing to do with the large matrimonial home would seem to be to sell it and divide the proceeds. In any case, it is obviously not misconduct for a solicitor to act for a client who has a perfectly good cause of action but is inspired by ill-will towards the defendant. The appellant also said that the suit under s. 66G could not end in any advantage to Mrs. Jacombe because, when Lynton Manor was purchased in their joint names, he had himself provided one half of the purchase money, and had lent the other half to Mrs. Jacombe. Lynton Manor was expressly excluded from the operation of the deed of release which will have to be mentioned in a moment, and which expressly refers to "her interest in the freehold property known as Lynton Manor", and to "her one-half interest as joint tenant in the freehold property known as Lynton Manor", but what Mr. Jacombe suggested was that, if Lynton Manor were sold, he would be entitled to one half of the net proceeds, and, although Mrs. Jacombe would be entitled to the other half, he had a claim against her for money lent which would leave her with nothing as a result of the sale. In relation to this matter, there are three things to be said. First, the appellant adduced no evidence that Mr. Mann knew anything of Mr. Jacombe's allegation that Mrs. Jacombe was indebted for money lent in connexion with Lynton Manor. Secondly, if Mr. Mann did know of this allegation, he might well have had instructions which led him to doubt whether the allegation was well founded. Thirdly, if Mr. Jacombe's allegation was well founded, Mrs. Jacombe might nevertheless, if Lynton Manor were sold, well derive a very substantial benefit from an increase in the price received over the price originally paid for the property. It was a thoroughly disgraceful thing for the appellant to assert publicly that, in and about the suit under s. 66G, Mr. Mann was conducting, merely in order to make costs for himself, litigation which he knew could not result in any benefit to his client. (at p197)

17. Nor had the appellant really any more foundation for making this allegation of professional misconduct in relation to the suit in equity for an account. It is true that in this case Mrs. Jacombe had an obstacle to overcome. For she had, when she left Mr. Jacombe in 1956, instituted a suit for what was, we gather, the same relief as that which she now claims. And she had, when she returned to Mr. Jacombe and they became for the time being reconciled, executed on 17th August 1956 a deed by which she (1) acknowledged that she had no interest in any property standing in her husband's name, (2) acknowledged that all property standing in her own name (apart from her

interest in Lynton Manor) was held in trust for Mr. Jacombe, and (3) released all claims made by her in the suit. It must be added that this deed was executed by her in the presence of a solicitor who was not acting either for her or for Mr. Jacombe in the suit, and who may be presumed to have explained to her the effect of the deed. She appears also to have signed, some three months after the execution of the deed, a statutory declaration, parts of which were put to her in cross-examination on the application for alimony. It would certainly seem that these documents afford a prima facie defence to the pending equity suit, but it is a far cry from saying this to saying that a solicitor, who acts for a wife in a suit which cannot succeed unless a deed between her and her husband is set aside, is acting purely in his own interests or is in any way guilty of misconduct. Again there was no evidence whatever to support the allegation made. The appellant knew nothing, of course, of the instructions given by Mrs. Jacombe to Mr. Mann. That the validity of the deed is challenged by Mrs. Jacombe was, though her English (unlike Mr. Jacombe's) is far from perfect, made clear by her on the application for alimony. And, as Mr. Reynolds observed, the statutory declaration is on its face a very curious document. (at p197)

18. The appellant was not content with building the baseless fabric which has been described. He adorned it by extravagant characterizations of the most offensive and damaging nature. A number of objectionable passages in his opening address are set out in full in the judgment of Ferguson J. We need refer only to a few short passages. Early in his opening he said : "The essence of the charge against the defendant is he is using his own client as an instrument of blackmail against a wealthy man in the hope of extracting money". After asserting that the defendant was in financial difficulties, and referring to the equity suit, he said : "This suit was brought utterly without any foundation or responsibility". He then said : "The alimony order which has already been made we will establish was procured by fraud upon an affidavit prepared by the defendant and with his knowledge sworn by Mrs. Jacombe, an affidavit which was false". The proposals made by Mr. Jacombe in his letter of 6th September 1958 were, he said, "offers which no responsible solicitor could have failed to advise his cleint to accept". Referring to the payments into Mrs. Jacombe's bank account, he said : "Those moneys were paid to Mrs. Jacombe in such a way that she became a tool in the hands of the defendant for the purpose of bringing proceedings against a wealthy man". This was an accusation of the grossest possible professional dishonesty, and it was deliberately made without the slightest foundation. "In conclusion" he said that "all the difficulties between the informant and his wife can be settled on a basis that is fair and equitable if Mrs. Jacombe had the advice of an independent and reputable solicitor". Mr. Mann is a solicitor of forty years' standing, and the suggestion that he was not an independent and reputable solicitor was entirely without foundation. Finally he said : "In conclusion, this is an informant who is regarded by the defendant as the goose most likely to lay a large number of golden eggs if it is squeezed". (at p198)

19. We have thought it desirable to state fully the facts and circumstances of the case. Having been stated, they speak for themselves. This Court would not interfere with the discretion of the Supreme Court in a matter so peculiarly the concern of that Court unless it seemed to it clear that the discretion had been wrongly exercised. A relationship of trust and confidence between that Court and the members of the Bar of New South Wales is essential for the due administration of justice in New South Wales, and that relationship would be in danger of being impaired if, on any but the most compelling grounds, the High Court were to restore to the roll of barristers a person who had been held by the Supreme Court not to be a fit and proper person to practise before it. Here the facts lead inevitably, in our opinion, to the affirmative conclusion that the Supreme Court was entirely right in holding that the appellant is not a fit and proper person to practise as a member of the Bar of New South Wales. (at p199)

20. The object which Mr. Jacombe had in view in launching the four prosecutions, and the object which the appellant set out to serve, has already been mentioned. The object was to intimidate Mr. Mann into refusing to act further for Mrs. Jacombe. The appellant made no secret of this. He apparently saw nothing disreputable in it. He said in open court that, if Mr. Mann would cease to act for Mrs. Jacombe, the prosecution would, so far as Mr. Jacombe was concerned, be dropped. He said in his opening address : "I say, if Mrs. Jacombe or Mr. Mann undertakes to allow her consult an

independent solicitor this matter could be settled within 48 hours. We have taken the course which may seem desperate and unusual because we can see no other way of avoiding litigation which is going to go on and on in a number of courts simply because a solicitor wants to make money". Again, at the very end of his opening, referring to Mr. McIntosh Q.C., who was counsel retained for Mrs. Jacombe in the proceedings to which the prosecutions related, and also counsel for Mr. Mann on the prosecutions, he said handsomely: "Have Mr. McIntosh instructed by an independent solicitor who acted in Mrs. Jacombe's interest he and I would probably have this case settled over lunch." Such was the object of the prosecutions. So far as the conduct of them is concerned, it is unnecessary to say more than that it is difficult to conceive a more glaring abuse by a barrister of his position as a barrister. (at p199)

21. The rules which govern the conduct of members of a body of professional men, such as the Bar of New South Wales, may (though there is, of course, no logical dichotomy) be divided roughly into two classes. In the one class stand those rules which are mainly conventional in character. To say this is not to deny their importance from the point of view of the client. But they are designed primarily to regulate the conduct of members of the profession in their relations with one another. Many of these rules are reduced to writing, and they are from time to time interpreted, and perhaps modified to fit specific cases, by resolutions of the governing body of the profession. Examples of this class in the case of the Bar are the rule which forbids advertising, the rules with regard to retainers, the rule that one of Her Majesty's counsel must not appear without a junior. A breach of any of these rules is treated seriously, but would not warrant disbarment - at least unless it were shown to be part of a deliberate and persisent system of conduct. (at p200)

22. Rules of the other class are not merely conventional in character. They are fundamental. They are, for the most part, not to be found in writing. It is not necessary that they should be reduced to writing, because they rest essentially on nothing more and nothing less than a generally accepted standard of common decency and common fairness. To the Bar in general it is more a matter of "does not" than of "must not". A barrister does not lie to a judge who relies on him for information. He does not deliberately misrepresent the law to an inferior court or to a lay tribunal : cf. Carr v. Wodonga Shire [1924] HCA 15; (1924) 34 CLR 234, at pp 239, 240 . He does not, in cross-examination to credit, ask a witness if he has not been guilty of some evil conduct unless he has reliable information to warrant the suggestion which the question conveys. (at p200)

23. As the learned judges of the Supreme Court have said, a member of the Bar enjoys great privileges both de jure and de facto. In particular his privilege in relation to defamatory statements made by him in court is not qualified but absolute. It is perhaps worth while to quote yet again the oft-quoted words of Lopes L.J. in Royal Aquarium and Summer and Winter Garden Society v. Parkinson (1892) 1 QB 431 . His Lordship said : "This 'absolute privilege' has been conceded on the grounds of public policy to ensure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that Courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them" (1892) 1 QB, at p 451 . The last thing we would wish to do would be to say anything which might be thought to curtail this freedom of speech, which public policy demands. Cases will constantly arise in which it is not merely the right but the duty of counsel to speak out fearlessly, to denounce some person or the conduct of some person, and to use such strong terms as seem to him in his discretion to be appropriate to the occasion. From the point of view of the common law, it is right that the person attacked should have no remedy in the courts. But, from the point of view of a profession which seeks to maintain standards of decency and fairness, it is essential that the privilege, and the power of doing harm which it confers, should not be abused. Otherwise grave and irreparable damage might be unjustly occasioned. The privilege may be abused if damaging irrelevant matter is introduced into a proceeding. It is grossly abused if counsel, in opening a case, makes statements which may have ruinous consequences to the person attacked, and which he cannot substantiate or justify by evidence. It is obviously unfair and improper in the highest degree for counsel, hoping that, where proof is impossible, prejudice may suffice, to make such statements unless he definitely knows that

he has, and definitely intends to adduce, evidence to support them. It cannot, of course, be enough that he thinks that he may be able to establish his statements out of the mouth of a witness for the other side. This was explained to the appellant, who should have known it before, by Manning J. in certain proceedings in April 1957, to which we shall refer in a moment. (at p201)

24. The conduct of the appellant in the proceedings of January 1959 was in breach of a rule which all responsible counsel obey, and the breach was accompanied by aggravating circumstances. He must have known that he was dealing with an obscure offence with which the magistrate could not be familiar and was not likely readily to understand, and it behoved him to be specially cautious and careful in dealing with the law and in stating the facts which he was in a position to prove. There were other aggravating circumstances. If any of the proceedings were frivolous and vexatious, a clear remedy was available : every court has an inherent jurisdiction to stay proceedings which are an abuse of its process. If the solicitor was guilty of misconduct, the proper course was to report him to the Law Institute. It is difficult to avoid the conclusion that the course adopted was chosen because of the opportunities which it offered for a public attack on Mr. Mann. Again, the assertion that Mr. Mann was in financial difficulties cannot be defended or excused. Even if that assertion had been capable of proof, which it was not, it is extremely difficult to justify it as relevant. Further, the requiring of Mr. Mann to produce a mass of documents, and the suggestion that their non-production was due to a fear that they might incriminate him was inexcusable. The appellant said that he derived some comfort from the fact that the magistrate had committed Mr. Mann for trial. We are disposed to regard that fact as rather damning than exculpatory. It shows that tactics which ignore elementary ethical standards may be successful up to a point, and so reinforces our view that only disbarment can meet such a case as the present. Although it is sometimes referred to as "the penalty of disbarment", it must be emphasized that a disbarring order is in no sense punitive in character. When such an order is made, it is made, from the public point of view, for the protection of those who require protection, and from the professional point of view, in order that abuse of privilege may not lead to loss of privilege. (at p202)

25. We must refer in conclusion to two earlier episodes which fortify us in the view, which we should have taken without them, that only disbarment can meet this case. In April 1957 the appellant appeared for the defendant in a case heard before Manning J. and a jury. It would appear that the appellant, in opening the defendant's case to the jury, made accusations of fraudulent conduct against the plaintiff, and adduced no evidence to support the allegations made. In commenting on and condemning this conduct, Manning J. made the following observations : "I feel most concerned about this matter. You addressed this jury in opening and you made a number of statements of a very, very serious nature indeed . . . I want to ask you why you have opened matters involving accusations of gross impropriety and now close your case without one single word of evidence to support it. . . . You opened your case to the jury, made a most serious allegation of impropriety, fraud, crookery, and you sit down and close your case without one word of evidence to support it. . . . You are never entitled to open to the jury a case other than the case you are setting out to establish, and to open this highly prejudicial matter merely because you think, if and when the other side goes into the witness box, you will be able to get some admissions to show it. I think it is quite improper." The appellant on this occasion thus received a direct and severe judicial warning against the very kind of conduct of which complaint is now made. (at p202)

26. In September of the same year he was brought before the Supreme Court on charges of unprofessional conduct. The conduct then complained of was much less serious than that which is now in question. In the words of the Chief Justice, "the real gravamen of the complaint was that he had embarked upon a course of conduct which amounted to advertising . . . in a way wholly inconsistent with the conduct of a professional man." The Court made it plain that it took a serious view of the matter, but the charges were withdrawn on his giving an undertaking "to abide by the recognized standards which should govern the conduct of members of the profession". He said that he had a clear conception of what his obligations were. (at p202)

27. This case, which depends entirely on the professional conduct of the appellant, does not raise

directly any question of the law relating to maintenance. But we think it undesirable to leave the case without some expression of opinion on the position of a solicitor in relation to that law. For the interesting history of the subject reference may be made to Holdsworth, A History of English Law vol. 8, pp. 397-402 and to an article by Winfield, The History of Maintenance and Champerty (1919) 35 LQR 50 At one time maintenance was a term with a very wide denotation, and was a crime at common law and by virtue of a number of statutes. It became in due course also a civil wrong. It was at one time a crime of great importance, but the reasons for its importance disappeared centuries ago. Though the conception of what is comprehended within the term has greatly narrowed, maintenance is still a civil wrong, and there are several modern instances of civil proceedings for maintenance, though it may be mentioned that Winfield (1919) 35 LQR, at p 233 refers to the action for maintenance as being today "rather a disreputable mode of paying off a score against another man than a symbol of the venality of officials or of the oppression of great nobles". (at p203)

28. It may be necessary some day to consider whether maintenance as a crime at common law ought not now to be regarded as obsolete. But, whether we regard it as a crime or as a civil wrong only, it is obvious that, in relation to maintenance, special considerations must apply to a solicitor, since it is, in a sense, the business of a solicitor to maintain litigation for his clients. It would appear indeed to be impossible for a solicitor to be held, in relation to legal proceedings conducted for a client, to be guilty of maintenance except perhaps in two cases, one of which might amount to champerty. For a solicitor could hardly be held guilty of a crime in respect of conduct which is recognized by the law as perfectly proper professional conduct. And it seems to be established that a solicitor may with perfect propriety act for a client who has no means, and expend his own money in payment of counsel's fees and other outgoings, although he has no prospect of being paid either fees or outgoings except by virtue of a judgment or order against the other party to the proceedings. This, however, is subject to two conditions. One is that he has considered the case and believes that his client has a reasonable cause of action or defence as the case may be. And the other is that he must not in any case bargain with his client for an interest in the subject-matter of litigation, or (what is in subtance the same thing) for remuneration proportionate to the amount which may be recovered by his client in a proceeding: see Fleming, The Law of Torts (1957) p. 638, where it is pointed out that the position in the United States is different. (at p203)

29. That the position of an attorney is as we have stated it above appears to have been recognized long ago. It is so stated in Bacon's Abridgement and in Hawkins, and these authorities are cited in Russell on Crimes, 10th ed. (1950) vol. 1, p. 381 for the proposition that "a solicitor, when retained, may lawfully prosecute or defend an action, and lay out his own money in the suit". In charging a jury in Ladd v. London Road Car Co. (1900) 110 LTJo 80 the Lord Chief Justice (Lord Russell of Killowen) said: "In reference to the subject of speculative actions generally, I think it right to say, on the part of the profession and the class of persons who were litigants in such cases, that it was perfectly consistent with the highest honour to take up a speculative action in this sense - viz., that if a solicitor heard of an injury to a client and honestly took pains to inform himself whether there was a bona fide cause of action, it was consistent with the honour of the profession that the solicitor should take up the action." After observing that if it were not so, the wrongs of the "humbler classes" might go unvindicated, he said: "Justice would very often not be done if there were no professional men to take up their cases and take the chance of ultimate payment; but this was on the supposition that the solicitor had honestly satisfied himself by careful inquiry that an honest case existed." This statement was approved by the Court of Appeal in Rich v. Cook (1900) 110 LTJo 94 . The whole position is admirably put by Ostler J. in Sievwright v. Ward (1935) NZLR 43 to which the appellant himself referred us. His Honour said: "If a solicitor (or a partner of a firm of solicitors) has honestly investigated a client's case, and honestly come to the conclusion that the client has a good cause of action or a good defence to an action, then, so long as he makes no bargain with his client to take a share of the proceeds, he does not, by advancing money for disbursements and by conducting the case without having received any payment on account of his costs, commit the wrong of either champerty or maintenance. I think further that, whether the solicitor does this

without any prior agreement with his client, or whether he makes a prior agreement either that in any case he shall be repaid such costs and disbursements, or that he should be paid only out of the proceeds of the suit, and that if there are no proceeds the solicitor will bear the loss, the result is the same: the solicitor would be guilty of no wrong. To hold otherwise would be against the public interest" (1935) NZLR, at p 47 . Then, after citing Ladd's Case (1900) 110 LTJo 80 and Rich v. Cook (1900) 110 LTJo 94 , his Honour said: "In the statement quoted it is said that solicitors may lawfully take the chance of ultimate payment. In many cases the solicitor must know the client to be so poor that unless the action succeeds he will never be able to pay the costs, and the only chance he has of recovering them is out of the proceeds of the judgment. It is the taking of that chance which, in my opinion, the Court of Appeal has said is not only lawful, but consistent with the highest professional honour" (1935) NZLR, at p 48 . (at p205)

30. The appeal purports to be brought as of right, and there is on the file an affidavit of the appellant in which he states that his net income from his practice as a barrister has for some years been, and, if he continues to practise, is likely to be in the future, in excess of 1500 pounds per annum. The view that an appeal as of right to this Court lies in such a case is supported by the decision of Knox C.J., Gavan Duffy and Rich JJ. (not, as stated in the report, Knox C.J., Gavan Duffy and Starke JJ.) in Thomas v. The Incorporated Law Institute of New South Wales (1929) 3 ALJ 32 and in Ziems v. The Prothonotary of the Supreme Court of N.S.W. [1957] HCA 46; (1957) 97 CLR 279 the appeal was brought as of right without challenge either by counsel or from the Bench. In the present case counsel for the Bar Association expressly declined to challenge the right of appeal, but the point was raised by the Court at an early stage, and it has seemed to us that the question ought now to be considered and decided. We are of opinion that Thomas's Case (1929) 3 ALJ 32 was not correctly decided and ought not to be followed. It seems clear that the order of the Supreme Court was not given or pronounced for or in respect of a sum or matter at issue amounting to or of the value of 1500 pounds, so that the case does not fall within s. 35 (1) (a) (1) of the Judiciary Act 1903- 1959. Nor do we think that it can be brought within s. 35 (1) (a) (2). There is no "property" that can be said to be involved, and no civil right capable of being valued. The appellant, however, asked that, if we should be of opinion that an appeal did not lie as of right, we should grant special leave to appeal. We think that this is a case for special leave. It is of obvious importance to the appellant himself, and it has seemed to us to raise matters of great importance to the legal profession and to the public. We have accordingly considered the case on the footing that the appeal is brought in pursuance of special leave under s. 35 (1) (b). (at p205)

31. The appeal should, in our opinion, be dismissed. (at p205)

ORDER

Appeal dismissed.
