IN RE ROGERS-WRIGHT (A LEGAL PRACTITIONER) and IN RE LEGAL PRACTITIONERS (DISCIPLINARY COMMITTEE) ORDINANCE (CAP. 118)

WEST AFRICAN COURT OF APPEAL (Blackall, P., Hallinan, J. (Nig.) and Hyne, J. (G.C.)): November 29th, 1950
(W.A.C.A. Civil App. No. 1/50)

[1] **Legal profession—disciplinary proceedings—conduct tending to bring profession into disrepute—solicitor's negligence as to conduct of clerk may amount to professional misconduct—court will suspend or strike solicitor off Roll only for personal misconduct:** A solicitor who is negligent with regard to the conduct of his clerk may be guilty of professional misconduct, though a court will only strike him off the Roll or suspend him in cases where he is found to have been personally guilty of professional misconduct (page 79, lines 13–25).

[2] **Legal Profession—disciplinary proceedings—conduct tending to bring profession into disrepute—solicitor who acts for clients with conflicting interests guilty of professional misconduct—not sufficient to tell client to look for another solicitor:** A solicitor will be guilty of professional misconduct if he acts for clients with conflicting interests and fails to insist on each of such clients obtaining independent advice; it is not sufficient for him in these circumstances merely to tell a client to look for another solicitor (page 78, line 38—page 79, line 10; page 83, lines 28–31).

[3] **Legal Profession—disciplinary proceedings—conduct tending to bring profession into disrepute—solicitor who knowingly files false affidavits guilty of professional misconduct:** A solicitor who files an affidavit knowing that its contents are false is guilty of professional misconduct (page 79, lines 11–13; page 82, lines 34–39).

[4] **Legal profession—disciplinary proceedings—conduct tending to bring profession into disrepute—West African Court of Appeal capable of establishing standard of care required of practitioners—will interfere only reluctantly with decision of Chief Justice in disciplinary proceedings:** The standard of care required of practitioners in Sierra Leone is pre-eminently a matter for the judges of the courts of that country; and while the West African Court of Appeal is such a court, it will be reluctant to interfere with a decision of the Chief Justice in disciplinary matters, since he is primarily responsible for ensuring a proper standard of integrity among local practitioners, and it will only do so in proper cases (*per* Blackall, P., page 84, lines 10–23).

[5] **Legal Profession—obligations towards client—professional negligence—solicitor's negligence as to conduct of clerk may amount to professional misconduct:** See [1] above.

[6] **Legal Profession—professional etiquette—conflict of interests—solicitor**

who acts for clients with conflicting interests guilty of professional misconduct—not sufficient to tell client to look for another solicitor: See [2] above.

The appellant, a legal practitioner, was charged in the Supreme Court with professional misconduct.

A grant of administration with will annexed in respect of an estate was made to the Official Administrator. Fourteen relatives of the deceased hired the appellant to contest the grant. The appellant instituted three separate suits on behalf of different groups of these relatives and signed the writs in respect of these suits. Affidavits which were later shown to contain false statements were also prepared in the appellant's office. The Attorney-General instituted the present proceedings against the appellant for professional misconduct in accepting three different sets of clients with conflicting interests and in allowing two false affidavits to be filed. The Supreme Court (Lucie-Smith, C.J.) held that the appellant was personally guilty of professional misconduct and ordered him to be struck off the Roll. The proceedings before the Supreme Court are reported in 1950–56 A.L.R. S.L. 16.

On appeal to the West African Court of Appeal, it was contended that (a) the trial judge had not made it clear whether he found the appellant personally guilty of professional misconduct or whether the basis of the appellant's liability was merely the misconduct of his managing clerk in preparing the affidavits; (b) in any event there was insufficient evidence to support a finding that the appellant was personally guilty of professional misconduct; and (c) the order of the court was too severe in the circumstances of the case.

Cases referred to:

(1) *In re Four Solicitors, ex p. Incorporated Law Socy.*, [1901] 1 K.B. 187; (1900), 83 L.T. 484, applied.

(2) *In re Gray, ex p. Incorporated Law Socy.* (1869), 20 L.T. 730, followed.

(3) *Myers* v. *Elman,* [1940] A.C. 282; [1939] 4 All E.R. 484, followed.

(4) *In re Zizer,* Supreme Court of Nigeria, unreported; on appeal, *sub nom. Zizer* v. *Supreme Court of Nigeria JJ.*, Judicial Committee of the Privy Council, P.C. App. No. 56 of 1928, unreported, applied.

Miss Wright, Hotobah-During and *O.I.E. During* for the appellant.
The respondent appeared in person with *Benka-Coker, Ag. Sol-Gen.*

HALLINAN, J. (Nig.):
This is an appeal against the decision of Lucie-Smith, C.J.,

wherein he held that the appellant had been personally guilty of professional misconduct—(a) in accepting three different sets of clients with what he knew or should have known were conflicting interests and in issuing the three writs in Suits Nos. 220, 221 and 222 of 1948; and (b) in allowing two affidavits, one of which he must have known or should have known to be false, to be filed. Because of this finding, the Chief Justice ordered that the appellant be struck off the Roll of the court.

The acts of misconduct alleged against the appellant arose out of proceedings in the estate of one Mormodu Allie, who died on January 22nd, 1948. It is evident from the bequests in his will that the estate in this case was of considerable value.

On March 10th, 1948, a grant of administration of this estate was made to the Official Administrator (Mr. Ahmed Alhadi), and annexed to the grant was the will of the deceased dated August 30th, 1946 and a codicil dated July 19th, 1947. This caused dissatisfaction among certain relatives of the deceased, and some 14 of them went to the appellant's office with the object of contesting the grant. As a result, three separate suits were instituted: Suit No. 220/1948 with five plaintiffs for the revocation of the grant and a declaration of intestacy; Suit No. 221/1948 with six other plaintiffs for the execution of the trusts of the will of 1946; and Suit No. 222/1948 with three other plaintiffs who claimed to be executors of a will of the deceased made in the year 1939. These executors also claimed revocation of the grant to the Official Administrator.

In the course of these proceedings, certain documents were prepared in the appellant's office and these form the subject-matter of the charges against him. The writ in each of the three actions was dated July 16th, 1948, and each was signed by the appellant. On July 14th, the plaintiffs in Suit No. 220/1948 swore an affidavit to lead a citation to bring in the grant in which they alleged that the deceased died intestate; and on September 7th, 1948, the same plaintiffs swore an affidavit of scripts in which they made the same allegation. On July 16th, 1948, the plaintiffs in Suit No. 222/1948 swore an affidavit to lead a citation to bring in the grant which contains a paragraph alleging that the deceased had duly executed a will in 1939.

The first point to consider is whether it is professional misconduct on the part of a solicitor if (a) he acts for clients with conflicting interests, and (b) if he files affidavits knowing that the contents of one of these affidavits is false. I think there can be no doubt that

a solicitor who acts in either of these ways is guilty of professional misconduct. The rule as to clients with conflicting interests is stated in 31 *Halsbury's Laws of England*, 2nd ed., at 94, in the following passage: "As soon as any conflict arises, it is the solicitor's duty to cease to represent any party whose interest conflicts with those of his other clients."

In the case of *In re Four Solicitors ex p. Incorporated Law Socy.*, (1), a solicitor sent clients with conflicting interests to other solicitors, but made an agreement with them as to sharing costs; even there, this court held all four solicitors guilty of professional misconduct. An authority for the proposition that a solicitor who files affidavits knowing the contents of one is false is in *In re Gray, ex p. Incorporated Law Socy.* (2). There is one other question of law which it is convenient to mention before considering the grounds of this appeal: that is, the bearing of the decision in *Myers* v. *Elman* (3) on the present appeal. In that case the question was argued whether a solicitor was guilty of professional misconduct if the misconduct was on the part of his clerk and only negligence was alleged against the solicitor. The House of Lords, restoring the decision of the trial court, held that the solicitor in such circumstances was guilty of misconduct and was rightly made to pay a portion of the costs which such misconduct had involved. However, it is clear from the judgments in the House of Lords that before the court will discipline a solicitor by striking him off the Roll or by suspending him, it will require proof that he was personally guilty of professional misconduct.

Miss Wright, in arguing the appeal, very properly abandoned many of the grounds set out in the grounds of appeal, and in my view greatly strengthened the cogency of her argument by confining herself to three principal grounds: first, that the learned Chief Justice had not made it clear whether he had found the appellant personally guilty of professional misconduct or whether the ground of his liability was merely the misconduct of his managing clerk, Mrs. Cole; secondly, assuming that the Chief Justice had found the appellant personally guilty of misconduct, there was insufficient evidence to support his finding; and thirdly, that the order of the court was too severe and was based on considerations which ought not to weigh in this particular case. Miss Wright drew attention to the phrase in the Chief Justice's finding "what he knew or should have known," and she submitted that the words "should have known" suggest that the Chief Justice did not hold that the appellant himself committed the act of misconduct. I consider that the

findings of the Chief Justice can only be ascertained by looking at his judgment as a whole. He undoubtedly disbelieved the evidence of Mrs. Cole, and he also considered the decision in *Myers* v. *Elman*, where so much turned on the question whether the misconduct was personal or vicarious. Immediately following his reference to *Myers* v. *Elman* comes his finding "in the result I find that the respondent herein was personally guilty of professional misconduct." Taken in that setting, I do not think the expression "must have known or should have known" means more than that the appellant either acted intentionally or showed such a reckless indifference to the truth of the facts stated in the affidavits and to the conflicting interests of his clients that his indifference amounted to deliberately blinding himself to the nature of his acts.

For these reasons I think that the learned Chief Justice did, in fact, find the appellant personally guilty of professional misconduct.

This brings us to the question of whether the evidence on which the Chief Justice based his findings was sufficient. The Attorney-General, in an able argument, summed up the evidence against the appellant. I may say at once that I think the evidence in support of the charge of acting for clients with conflicting interests was very much stronger than the evidence in support of the other charge. As regards the first charge, there is the fact that each of the three writs was signed by the appellant. It is difficult to believe that a solicitor could act for as many as 14 clients in what was obviously a large and important estate without making some enquiry or taking some instructions from his clients. Nor is it likely that he should sign the endorsement to the writs wherein the Official Administrator was, in each case, the defendant without looking at the claims to see why three claims should be necessary, especially when it is remembered that these writs were all signed on the same day.

There is the further fact that the claim on the writ in Suit No. 220/1948 was amended by the insertion of the word "Allie" and this insertion was initialled in the margin. This, as she admitted in cross-examination, was not done by Mrs. Cole; the handwriting is similar to that of the appellant, and it is unlikely that he would amend the claim without having read it. In a letter to the Attorney-General dated October 18th, 1949, the appellant stated that the writs were prepared by Mrs. Cole but when the appellant came to depose to these facts on oath in his affidavit of December 6th, 1949, he confined himself to stating in para. 2—"the writs of summons . . .

were not prepared in my chambers"—a fact which he would contest but which evades the point at issue. There is no averment by him on oath that the writs were prepared by Mrs. Cole; in fact, the only such averment is made by Mrs. Cole, whose evidence was, in my opinion, rightly rejected by the Chief Justice. While I do not regard her cross-examination about the precedents from which she alleges she prepared the documents as of much importance, her answers in cross-examination on the amending and initialling of the claim in the writ was most discreditable to herself. I think the Chief Justice, after this examination and having seen her demeanour, had ample reason for disregarding her evidence. It was contended for the appellant that he should have been cross-examined by the Attorney-General. The Attorney-General in reply submitted that once Mrs. Cole's evidence was rejected, and there was no averment in the appellant's affidavit that Mrs. Cole prepared the writs, the onus remained on him to prove that he had not personally acted for his clients when he issued the writs. He further submitted that the proceedings were upon affidavit, and although the Attorney-General had procured the attendance of the appellant for cross-examination, there was, in the event, no necessity for such cross-examination when the charge was proved without having to elicit any further admissions from the appellant. Lastly, he submitted that it must be assumed that the Chief Justice directed himself on the omission to cross-examine the appellant. So far as concerns the first charge, I think the learned Attorney-General's submissions are well founded.

Taking the evidence on the first charge as a whole, I am of opinion that the learned Chief Justice had ample evidence to support his findings.

The evidence in support of the charge concerning the affidavits in my view is much weaker. The appellant in his affidavit of January 6th, 1949 avers that Mrs. Cole prepared these affidavits, and it is a relevant consideration that he was not cross-examined about this. The Attorney-General directed attention to the letter of September 1st, 1948 from the appellant to Mr. Kempson, solicitor for the Official Administrator, and he submits that this letter, taken in conjunction with Mrs. Cole's cross-examination, shows that the appellant must have had instructions from his clients shortly before the preparation of the affidavit of scripts in Suit No. 220/1948 on September 7th, 1948. But it seems to me that the action contemplated in the letter of September 1st was to move the court for an injunction

to restrain the Official Administrator; it does not appear to have had much to do with the filing of an affidavit of scripts.

The false statement, the subject of the second charge, is presumably that contained in the affidavit of July 14th, to lead a citation, and the affidavit of scripts of September 7th in Suit No. 220/1948, wherein it is stated that neither the deponents nor their solicitor knew of any testamentary paper. The statement that there were no testamentary papers is false if the statement contained in para. 3 of the affidavit of July 16th to lead the citation in Suit No. 222/1948 is true, for this para. 3 states that the deceased had executed a will in 1939. It was incumbent on the Attorney-General to show that the solicitor knew positively that the contents of this para. 3 were true. It is, however, difficult to discover in the record evidence to support the finding that when certain of the appellant's clients swore that there were no testamentary papers, the appellant knew personally that, in fact, the will of 1939 was in existence. The only evidence on the record as to who had possession of the will of 1939 is contained in the citation to bring in the grant which is exhibited in the affidavit of the Official Administrator dated January 10th, 1950. There it is stated that the will was in the possession of Alhadi, but there is no sufficient evidence to show that the appellant had ever seen it. It is noteworthy that in the documents which the appellant is alleged to have prepared, the date of the 1939 will is not mentioned, and when the plaintiffs in Suit No. 222/1948 came to file an affidavit of scripts the deponents stated that neither they nor their solicitor knew of any testamentary paper.

We have been referred by the Attorney-General to a case in Nigeria, *In re Zizer* (4), where proceedings were brought against a solicitor who permitted his client to swear in an affidavit that a warrant for his arrest had been issued without a sworn information, when an inquiry on the part of the solicitor would have revealed the fact that such sworn information was made. In the course of the judgment of the Full Court, Coombs, C.J. said:

> "The court expects that a solicitor shall not insert in an affidavit a statement of fact which is untrue to his knowledge; or a statement of fact which he must know or which, if he gave the question any consideration, should know that the person who was swearing the affidavit was not in a position to depose to it."

In that case the solicitor was found guilty of professional misconduct. On appeal to the Privy Council, this decision was

upheld, although perhaps it might be inferred from their Lordships' judgment that if they were in the same position as the Supreme Court of the Colony they might have reached a different conclusion.

The facts in the present case are, I think, very different from those in the Nigerian one, for it was at least in doubt as to where the appellant might have inspected the 1939 will; it was clear that both he and his clerk were much in the dark about the testamentary dispositions of Mormodu Allie, while in the Nigerian case nothing could have been easier than for the solicitor to have verified the existence or non-existence of the sworn information.

For these reasons I am of opinion that the Chief Justice had not sufficient evidence on which to base his finding that the appellant had allowed two affidavits to be filed, one of which he knew, or should have known, to be false.

Miss Wright urged on behalf of the appellant that in all the circumstances the order of the court was too severe. Counsel submitted that no one had suffered by the appellant's action and that he had not persisted in his wrongdoing for he had called his clients together in December 1948 and explained the whole position to them. He had advised them either to abandon Suits Nos. 220 and 221/1948 or to get another solicitor to represent them. It is true to say that the Attorney-General has not shown that the appellant's clients suffered loss, except in the matter of costs, which the appellant at an early stage of the proceedings undertook to pay. However, I do not consider that the action he took in and after December 1948 was sufficient. I have already referred to the passage in 31 *Halsbury's Laws of England*, 2nd ed., at 94, where the duty of a solicitor in such circumstances is set out. It is not sufficient to say to a client whose interest conflicts with another client "you may find another solicitor," but the solicitor must insist on the client, in his own interests, getting independent advice. Moreover, it is evident from the affidavit of the appellant's clients, dated December 6th, 1949, at para. 14, that the parties to Suits Nos. 220 and 221/1948 in fact continued to regard the appellant as their solicitor.

There are, however, two other matters which should be taken into account in considering whether the order was too severe. In the appellant's favour it might be remembered that, in my opinion, the evidence is only sufficient to support the first charge. But, as against the appellant, there is the fact that he has been found guilty of professional misconduct on two previous occasions.

In all the circumstances of the case, I consider that the order

of the learned Chief Justice should be varied by substituting an order that the appellant be suspended for a period of 18 months with effect from the date on which he was struck off the Roll. I think also there should be a further order that he pay the taxes and costs of his clients in Suits Nos. 220 and 221 which he has already offered to pay. Each party to pay his own costs here and in the court below.

BLACKALL, P.:

I concur, and have only a few words to add. In the Privy Council judgment in *Zizer's* case (4), their Lordships said that while they would be slow to impute in all the circumstances moral blame to the appellant for the omission, they think that the standard of care to be exacted from practitioners in the Colony is pre-eminently a matter for the judges of the local court, and accordingly they were not prepared to interfere. This court is not in quite the same position as the Judicial Committee as we may, I think, regard ourselves as a local court in West Africa. At the same time, we are reluctant to interfere with a decision of the Chief Justice in disciplinary matters, for we realise that he is primarily responsible for ensuring a proper standard of integrity among local practitioners in the Colony. But although we are slow to interfere, we should do so in proper cases.

Now, in this case, the order which the learned Chief Justice made was to strike the appellant off the Roll. That, for a professional man, is a sentence of death, and in my view it should only be imposed as a last resort. Now, my brother Hallinan, J. has indicated certain grounds in the appellant's favour which were very ably put forward by his counsel, Miss Wright. I agree that we must acquit the appellant of any active intention of damaging his clients. His fault is that he was too greedy. Such large estates as this do not grow on gooseberry bushes in Freetown, and I am afraid the appellant made up his mind that nobody else would have a finger in the pie and that he did not take care to make sure that his clients or some of them would not suffer through this. But on the whole it is not in my view a case for striking off the Roll. The appellant has, however, been suspended twice before, so I hope that he will take this suspension as a final warning.

HYNE, J. (G.C.):

I concur both with the judgment and variation of the order.

Order accordingly.