[HIGH COURT OF AUSTRALIA.]

NORTON . . . . . COMPLAINANT;

AND

TAYLOR . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1905.

SYDNEY, *March* 31.

Griffith C.J. Barton and O'Connor JJ.

Practice—Special leave to appeal—Sydney Corporation Act (*N.S.W.*), (*No.* 35 *of* 1902), *sec.* 24—*Disqualification of councillor—"Interested in any contract . . . with or on behalf of the council"—Sale of materials to contractor.*

A firm of timber merchants of which the defendant was a member, gave to a firm of manufacturers, who contemplated tendering for a contract with the City of Sydney Council, a quotation of the prices at which they were prepared to supply them with timber for the purposes of the contract. The tender was sent in, and was accepted by the Council, of which the defendant had in the meantime been elected a member. Subsequently, while the defendant continued in the Council, his firm supplied timber at the prices quoted to the contractors, who used it in carrying out their contract. The Supreme Court having decided, on an appeal from a magistrate, that the defendant was not "interested" in the contract within the meaning of sec. 24 of the *Sydney Corporation Act*, 1902, the High Court, seeing no reason to doubt the correctness of that decision, refused to grant special leave to appeal.

Rule laid down by Lord *Watson* in *La Cite de Montréal* v. *Les Ecclésiastiques du Seminaire de St. Sulpice de Montréal*, 14 App. Cas., 660, at p. 662, as to granting special leave to appeal, applied.

Le Feuvre v. *Lankester*, 3 El. & Bl., 530; 23 L.J.Q.B., 254, followed.

Special leave to appeal to the High Court from the decision of *Pring* J. (22 N.S.W. W.N., 36), refused.

Sec. 24 of the Act No. 35 of 1902 is as follows:—

24. Any person who, while holding any civic office under this Act, continues to be or becomes directly or indirectly, by means of partnership with any other person, or otherwise howsoever knowingly engaged or interested in any contract, agreement, or employment, with or on behalf of the Council, except as a shareholder, but not being a director in any joint stock company, shall be liable to a penalty not exceeding one hundred pounds, nor less than fifty pounds, and shall be for three years thereafter disqualified from holding any civic office.

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MOTION for special leave to appeal.

The defendant was proceeded against under sec. 24 of the *Sydney Corporation Act*, 1902, before a magistrate, on an information laid by the complainant, for holding a civic office under that Act, and continuing to be or becoming directly or indirectly interested in a contract with the City Council.

From the evidence given at the hearing it appeared that in 1902 the Council called for tenders for certain work in connection with an electric lighting plant for the city of Sydney. Henley's Co. Ltd., manufacturers of electrical apparatus and plant, who contemplated tendering for the contract, obtained from a firm of timber merchants, of which the defendant was a member, quotations of the prices at which they were prepared to supply timber to them to be used in carrying out the contract, and subsequently sent in a tender. This was accepted by the Council, of which the defendant had in the meantime been elected a member. The contract was then carried out by Henley's Co. Ltd., and for that purpose a very large amount of timber was supplied by the defendant's firm to the contractors, and used in the work. The defendant continued in the Council during the course of the work, and was elected mayor. He also became chairman of the works committee of the Council, whose duty it was to approve the timber and other material put into the works under the contract. There was no evidence of any contract between the defendant's firm and Henley's Co. Ltd., nor of any stipulation that the payment for the timber by the latter should depend upon its being approved by the Council.

The magistrate held that the defendant was not interested in the contract within the meaning of sec. 24, and dismissed the information. The complainant appealed from this decision to the Supreme Court, by way of special case stated under the *Justices Act*, 1902, and *Pring* J., who heard the appeal, held that the decision of the magistrate was right (1). Both the magistrate and *Pring* J. held that the case was covered by *Le Feuvre* v. *Lankester* (2).

The complainant now moved for special leave to appeal.

Lamb, for the applicant. The defendant had an interest in the

(1) 22 N.S.W. W.N., 36.

(2) 3 El. & Bl., 530; 23 L.J.Q.B., 254.

contract, within the meaning of sec. 24. The more timber Henley's Co. Ltd. required for the purposes of the contract, the more they would be likely to order from the defendant's firm. The defendant would therefore profit by the contract. Moreover, the position of the defendant as chairman of the works committee placed him in a position in which his interest might conflict with his duty. That is the mischief which such provisions as this are designed to prevent: *Nutton* v. *Wilson* (1); *Barnacle* v. *Clark* (2). Although there is no evidence of a contract between Henley & Co., and the defendant's firm, there was a continuous course of dealing, which would have justified the defendant in expecting a continuance of orders for timber. [He referred also to *Tompkins* v. *Jolliffe* (3); *West* v. *Andrews* (4); *Towsey* v. *White* (5); *Hunnings* v. *Williamson* (6); *Burgess* v. *Clark* (7); *Whiteley* v. *Barley* (8); *Le Feuvre* v. *Lankester* (9); *Ex parte Anderson* (10); *In re Watson* (11); *Ex parte Bowring* (12); *Ex parte Lansdown* (13).]

March 3.

GRIFFITH C.J. Special leave to appeal in cases involving less than the appealable amount will not be granted by this Court as a matter of course. It is not necessary now to mention all the conditions under which such leave will be granted. It is sufficient to refer to what was said by the Judicial Committee of the Privy Council on an application for special leave to appeal to His Majesty in Council from the decision of this Court in the case of *Daily Telegraph Newspaper Co Ltd.* v. *McLaughlin* (14). In that case Lord *MacNaghten*, in delivering the judgment of their Lordships of the Judicial Committee, quoted a passage from a judgment of the same Board, delivered by Lord *Watson*, in *La Cite de Montréal* v. *Les Ecclésiastiques du Seminaire de St. Sulpice de Montréal* (15). "A case may be of a substantial character, may involve matter of great public interest, and may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right,

(1) 22 Q.B.D., 744.
(2) (1900) 1 Q.B., 279.
(3) 51 J.P., 247.
(4) 5 B. & Ald., 328.
(5) 5 B. & C., 125.
(6) 11 Q.B.D., 533.
(7) 14 Q.B.D., 735.
(8) 20 Q.B.D., 196.
(9) 3 El. & Bl., 530; 23 L.J.Q.B., 254.
(10) 1 N.S.W. L.R. (L.), 338.
(11) 1 N.S.W. L.R. (L.), 13.
(12) 7 N.S.W. L.R (L.), 439.
(13) 7 N.S.W. L.R. (L.), 434.
(14) (1904) A.C., 776; 1 C.L.R., 479, 481.
(15) 14 App. Cas., 660.

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or at least to be unattended with sufficient doubt to justify their lordships in advising Her Majesty to grant leave to appeal."

Assuming then, but not deciding, that this is a case of a substantial character, that it involves matter of great public interest, and raises an important question of law, we must yet inquire whether the judgment from which leave to appeal is sought is attended with sufficient doubt to justify us in granting leave to appeal. The learned Judge whose decision is now in question followed, or thought that he was following, the judgment of the Court of Queen's Bench, delivered in 1854, in *Le Feuvre* v. *Lankester* (1), and a judgment of the Supreme Court of New South Wales, delivered in 1880, in the case of *Ex parte Anderson* (2), which dealt with practically the same point, that is to say, whether an alderman who supplies goods to a contractor for the purpose of carrying out a contract with the corporation comes within the provisions of the Statute. The provision in this case is in the following words:—[His Honour then read the section and proceeded]:—The words under consideration in *Le Feuvre* v. *Lankester* (1), were substantially the same. They were "nor shall any person . . . . be qualified to be elected or to be a councillor of any such borough, during such time as he shall have directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the Council," &c.; and any person who offended against the section was made liable to a penalty. In that case Lord *Coleridge*, in delivering the judgment of the Court, which consisted of himself, *Wightman* J., *Erle* J., and *Crompton* J., a very strong Court indeed, said (3): "It is quite obvious that this relation alone, no fraud being found, and no previous contract or agreement, or any concert with the contractor being proved, and there being nothing more than the simple fact of the sale itself, does not give him any share or pecuniary interest in the contract; it does not affect the price of the articles which he sells, nor does it affect his interest or right to receive that price in any way at all. It was, however, said, that it was within the mischief of the clause, because, supposing there had been a question afterwards as to the

(1) 3 El. & Bl., 530; 23 L.J.Q.B., 254. (2) 1 N.S.W. L.R. (L.), 338.
(3) 23 L.J.Q.B., 254, at p. 258.

quality of the goods, the defendant himself, in the capacity of one of the town Council, might have to determine on the matter, and that he might thus have an indirect interest. Now, whether that might fairly bring the case within the mischief it is not necessary to determine, unless it is also fairly brought within the meaning of the words. All that can be said is, that the legislature has not provided for such a case, and we must not strain a penal clause from any consideration of consequences. Abundance of cases might be supposed in which a party might in that sense have an interest in a contract. Suppose the contract to be with a man's relation, such as his brother or his son, he might have a bias on his mind to decide the question improperly, but no one could say, that this would bring the case within the fair meaning of the words of the section; and I think the present facts do not carry the case at all further."

The facts in the present case are not distinguishable from those in *Le Feuvre* v. *Lankester* (1). It appears that the defendant is a member of a firm of timber merchants, and, before the contract in question was entered into another member of the defendant's firm gave Henley's Co. Ltd., the contractors, a quotation of the prices at which they were prepared to supply timber. There is no evidence that there was any contract that the defendant's firm should supply any timber at all at those or any other prices; there was merely a statement of the prices at which they actually supplied it. The defendant's firm was not bound by those quotations; it was open to them at any moment to alter their prices, or to say, when the contractor came to ask for timber at the prices quoted, that they would not supply it at those prices or at all. There is no further evidence as to any contract except that the defendant's firm from time to time supplied timber to Henley's Co. Ltd., which was used in carrying out the contract with the Council. If there were any other facts we do not know them; these were the only facts before the magistrate and before us. All, therefore, that can be said is that the defendant's firm from time to time sold timber to contractors for the purpose of carrying out a contract with the corporation. These facts seem to me to bring the case exactly within the decision

(1) 3 El. & Bl., 530; 23 L.J.Q.B., 254.

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of *Le Feuvre* v. *Lankester* (1). That case was followed in *Ex parte Anderson* (2), decided by the Supreme Court of New South Wales in 1880. If there were no more in the case, the fact that a certain interpretation had been put upon these words by the Supreme Court, and that after that decision the legislature had repealed and re-enacted the provision in the same terms, would, in my opinion, compel us to hold that the interpretation already placed upon those words was the one now to be attributed to them, even if we entertained a different opinion ourselves.

Reliance was placed by the applicant on the case of *Nutton* v. *Wilson* (3), in which the words of the Statute under consideration were: "Any member who . . . . in any manner is concerned in any bargain or contract entered into by such board, or participates in the profits thereof, or of any work done under the authority of this Act in or for the district, shall . . . cease to be such member, and his office as such shall thereupon become vacant;" and another section imposed a penalty upon any person who acted as such member when disabled from acting by any provision of the Act. It appeared that the alderman in question in that case was "concerned" in a contract to this extent, that he, by his servant actually performed the work under the contract, as the agent of the contractor or sub-contractor. The Court of Appeal thought that, as the performance of the contract by the servant was a performance by the master himself, that amounted to "being concerned" in the contract with the Council. But that was a very different thing from supplying a contractor with materials to be used by him in carrying out his contract. It is suggested that the language of *Lindley* L.J. in that case is inconsistent with the decision in the case of *Le Feuvre* v. *Lankester* (1). I do not think so. The case was not referred to, and up to that time had never been questioned in any way. Reference was also made by Mr. Lamb to a later case in 1900, *Barnacle* v. *Clark* (4), which was a decision upon a Statute of the same kind, in which it was held that a person who supplied materials to a contractor was "concerned in the profits or work done" under a contract made with a school board. It is sufficient to say that the words of the

(1) 3 El. & Bl., 530; 23 L.J.Q.B., 254.
(2) 1 N.S.W.L.R. (L.), 338.
(3) 22 Q.B.D., 744.
(4) (1900) 1 Q.B., 279.

Statute then under consideration are not the same as those in the present case. But, even if they were, that case can hardly be set up as an authority of equal weight with *Le Feuvre* v. *Lankester* (1). This case was followed by Mr. Justice *Pring*. His decision is, in my opinion, unattended with sufficient doubt to justify us in granting special leave to appeal from it.

BARTON J. I am of the same opinion. I cannot distinguish the broad facts of the present case from those of *Le Feuvre* v. *Lankester* (1), and consequently I think that the same principle should be applied.

O'CONNOR J. I am of the same opinion. I can see no evidence whatever in the case put before us, to show that the defendant was "interested" in the contract with the Council, within the meaning of the Statute. The word "interest" as there used must in my opinion mean pecuniary interest. I can well understand that evidence might in such a case as this be given which would establish that the defendant had some such interest in the contract, for instance, that he was not to be paid for the timber unless it should be accepted by the Council, and that the acceptance of the materials supplied to the Council by the contractor depended upon the certificate of the engineer of the Council. Under such circumstances as those there might be some grounds for holding that the defendant was "interested" in the contract. But there was no evidence of that kind. The only evidence given to connect the defendant with the contract was that his firm had given a quotation of prices to the contractors, that the latter had ordered timber from them for the purposes of the contract at those prices from time to time, and that the defendant's firm had supplied the timber in the ordinary way of business. It appears clear to me therefore that the defendant has not been shown to have an interest in the contract with the Council, within the meaning of sec. 24, and that leave to appeal should be refused.

Leave refused.

Solicitors for the applicant, *Westgarth & Nathan.*

C. A. W.

(1) 3 El. & Bl., 530; 23 L.J.Q.B., 254.