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BARTON J. I am quite of the same opinion.

RICH J. I agree.

Appeal dismissed with costs.

Solicitor for the appellant, *E. W. Warren.*
Solicitors for the respondents, *Pigott & Stinson.*

B. L.

[HIGH COURT OF AUSTRALIA.]

FORD . . . . . APPELLANT;

AND

ANDREWS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 27; *May* 5.

Griffith C.J., Barton, Isaacs and Gavan Duffy JJ.

Local Government—Alderman—Ouster—Disqualification—Person engaged or interested in contract with council—Director of company which has contract with council—Knowledge of director—Possibility of future benefit—Local Government Act 1906 (*N.S.W.*) (*No.* 56 *of* 1906), *sec.* 70.

Sec. 70 of the *Local Government Act* 1906 (N.S.W.) provides that a person is disqualified for the office of alderman if "(*j*) he is directly or indirectly by himself, or any partner, engaged or interested (other than as a shareholder in an incorporated company, association, or partnership consisting of more than twenty members) in any contract, agreement, or employment with, by, or on behalf of the council," with an exception of certain specified contracts or agreements.

By the articles of a company the directors had power "to give any director or other officer or other person employed by the company a commission on the profits of any particular business transaction or share in the general profits of the company, and such commission or share of profits shall be treated

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as part of the working expenses of the company." A subordinate officer of the company agreed on behalf of the company to sell to the council of a municipality a quantity of bricks.

Held, by *Griffith* C.J. and *Barton* and *Gavan Duffy* JJ. (*Isaacs* J. dissenting), that an alderman of a municipality who was also a director of the company, but who did not know of the making of the contract, was not, by reason either of his being a director or of his being a creditor of the company in respect of unpaid director's fees, or of the possibility of his receiving a future benefit under the article above referred to, engaged or interested in the contract within the meaning of sec. 70 of the *Local Government Act* 1906, and was therefore not disqualified from the office of alderman.

By *Griffith* C.J. and *Barton* J.—A director of a company owes a duty towards the company which may give rise to an interest in a contract between that company and the council of a municipality which will under the section disqualify him from the office of alderman of the municipality, but an interest of that nature cannot arise unless the director has knowledge of the facts which in the particular case impose the duty upon him.

By *Gavan Duffy* J.—A person cannot be engaged or interested in a contract within the meaning of the section unless, otherwise than in his capacity of alderman, he personally or by his partner actively intervenes or, if there is no active intervention, has an existing pecuniary or proprietary interest in the contract which would be recognized, though not necessarily enforced, by the Courts.

Decision of the Supreme Court of New South Wales (*Ferguson* J.) reversed.

APPEAL from the Supreme Court of New South Wales.

An order *nisi* was obtained by Henry Richard Andrews calling upon Ebenezer Ford to show cause why he should not be ousted of his office of alderman of the Council of the Municipality of Enfield, on the ground that while holding and acting in such office he had become disqualified for it by reason of his being interested in a contract made with the Council by the Enfield Park Brick Co. Ltd. of which he was a director and managing director. The order *nisi* was heard by *Ferguson* J., who made it absolute.

From that decision Ford now, by special leave, appealed to the High Court.

The material facts are stated in the judgments hereunder.

Knox K.C. and *Windeyer*, for the appellant. The appellant was neither "engaged" nor "interested" in the contract within the

meaning of sec. 70 (*j*) of the *Local Government Act* 1906. "Engaged" means personally and actively taking part either as principal or agent in making or performing the contract, and on the evidence the appellant was not so engaged in the contract. The word "engaged" implies some act of volition in respect of the contract, and does not include a constructive engagement; so that the mere fact that the appellant was a director of the Company does not make him "engaged" in the contract in the absence of knowledge on his part of its making or carrying out. [Counsel referred to *Ex parte Anderson* (1).]

[GRIFFITH C.J. referred to *Miles* v. *McIlwraith* (2).]

The word "interested" in the section means pecuniarily interested: *Per O'Connor* J. in *Norton* v. *Taylor* (3). The possibility that in the future the appellant might receive a benefit under art. 92 (*p*) of the Articles of Association of the Company does not constitute a pecuniary interest.

Loxton K.C. (with him *Davidson*), for the respondent. The object of sec. 70 (*j*) is to prevent a man from holding a position in which his interest conflicts with his duty, or in which he has two conflicting duties. The words "engaged" and "interested" convey different ideas, and apply to different cases in which that conflict can arise. A person is "engaged" in a contract if he intervenes in its making or carrying out, and that intervention may be constructive. A director of a company is constructively engaged in contracts made by the company. The evidence also shows that before the contract was completed the appellant knew of its existence and intervened in it. The appellant was "interested" in the contract by reason of his being a director in the same way as a shareholder is interested in it, as is recognized by the exception to the section. A director is interested in a contract made by a company by reason of the fiduciary duty he owes to the company. See *Todd* v. *Robinson* (4); *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co.* (5).

(1) 1 N.S.W.L.R., 338.
(2) 8 App. Cas., 120.
(3) 2 C.L.R., 291, at p. 297.
(4) 14 Q.B.D., 739.
(5) (1914) 2 Ch., 488, at p. 503.

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[ISAACS J. referred to *Dimes* v. *Proprietors of Grand Junction Canal Co.* (1); *Le Feuvre* v. *Lankester* (2).]

The appellant has under art. 92 (*p*) a pecuniary interest in the contract.

Knox K.C., in reply.

Cur. adv. vult.

May 5.

The following judgments were read :—

GRIFFITH C.J. The appellant, an alderman and mayor of the Municipality of the Borough of Enfield, was the director (called managing director) of the Enfield Park Brick Co. Ltd., one of whose subordinate officers agreed to sell 12,000 bricks to the corporation. An order *nisi* for ouster was granted on the ground that he was interested in that contract otherwise than as a shareholder of the Company. One form in which the interest was alleged to arise was that he was a creditor of the Company in respect of arrears of director's fees. The learned Judge who heard the matter very properly overruled that point. Another form of interest was alleged to arise by virtue of art. 92 (*p*) of the Articles of Association of the Company, which authorizes the directors to give to any director, officer, or other person employed by the Company a commission on the profits of a particular business transaction, or a share in the general profits of the Company, which commission or share of profits is to be treated as part of the working expenses of the Company. The learned Judge thought that this objection was well founded, and made the order *nisi* absolute.

The article extends to officers of the Company as well as to directors.

After some fluctuation of opinion I have come to the conclusion that the so-called interest under this article is not a present pecuniary interest at all, but a mere possibility of a future interest, analogous to the interest of a next of kin of a living person in his property, and is not such an interest as is contemplated by the Statute. It cannot, in any case, be a greater interest than the interest of a director in director's fees to be earned, which under the Articles of the

(1) 3 H.L.C., 759.

(2) 3 El. & Bl., 530.

Company are to be determined by the Company in general meeting, and would not, I think, be an interest within the meaning of the Act, any more than the right of an officer of the Company to receive his salary from it.

But there still remains an objection, not dealt with by the learned Judge, that the appellant, being a director, was, as such, interested in every contract made by the Company. The point is a very important one, and I feel bound to deal with it, since the principles applicable to it are not limited to directors of companies but apply to all persons who are placed in a fiduciary relation to others.

In my opinion, a person who, with or without pecuniary remuneration, becomes charged with the duty of supervising or protecting the interests of another person in respect of a contract is himself interested in that contract within the meaning of the Act, whether he actually intervenes in its execution or not. No one disputes that a pecuniary obligation incurred by a man in respect of the performance of a contract made by another creates such an interest. An obligation arising from duty (by which I mean a duty cognizable by the Court, not necessarily contractual) is in my opinion equally efficacious to create an interest. It is to be noted that the words of the Act are "is interested in," not "has an interest in," which might, perhaps, be limited to pecuniary or proprietary interest. It would be lamentable if it were to be laid down by the Court that a person bound by the obligation of duty, however arising, is not interested in the matter with respect to which the duty is to be performed.

As applied to directors of companies this position is supported by high authority.

In *North-West Transportation Co.* v. *Beatty* (1) Sir *Richard Baggallay*, delivering the opinion of the Judicial Committee, said:— "A director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director."

(1) 12 App. Cas., 589, at p. 593.

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In the *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co.* (1) *Swinfen Eady* L.J. delivering the judgment of the Court of Appeal (Lord *Cozens-Hardy* M.R., *Pickford* L.J. and himself), after quoting the rule formulated by Lord *Cranworth* in *Aberdeen Railway Co.* v. *Blaikie* (2), said (3):—"Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards and owes a duty to another company which is proposing to enter into engagements with the company of which he is a director, he is in our opinion within this rule. He has a personal interest within this rule or owes a duty which conflicts with his duty to the company of which he is a director. It is immaterial whether this conflicting interest belongs to him beneficially or as trustee for others. He is bound to do as well for his cestuis que trust as he would do for himself. Again, the validity or invalidity of a transaction cannot depend upon the extent of the adverse interest of the fiduciary agent any more than upon how far in any particular case the terms of a contract have been the best obtainable for the interests of the cestui que trust, upon which subject no inquiry is permitted."

To abbreviate—"Where a director of a company . . . owes a duty to another company which is proposing to enter into engagements with the company of which he is a director . . . he has a personal interest within this rule or owes a duty which conflicts with his duty to the company of which he is a director."

There cannot, in principle, be any difference between this case and that of a director of a company who is an alderman of a municipality which is proposing to enter into engagements with the company of which he is a director.

But there is an important difference between being so interested and having a pecuniary interest. In the latter case knowledge or recollection of the party interested is irrelevant. The mere fact that he is the legal or beneficial owner of the interest is sufficient. When, however, the interest only arises from an obligation to perform a duty it is, in my opinion, essential that the person concerned should be aware of the facts which give rise to the duty.

(1) (1914) 2 Ch., 488.
(2) 1 Macq., 461.
(3) (1914) 2 Ch., at p. 503.

It is necessary, therefore, to inquire in such a case what is the nature of the duty and under what circumstances it arises. In the case of a director of a company the answer to this question must depend in the first place upon the character of the duties which are imposed upon him by the constitution of the company with respect to the contract in question, or, if no duties are so imposed with respect to that contract, upon any duties which he may have in fact assumed with respect to it. I do not think that it can be predicated of every director of a company, as such, that he has a personal duty with respect to every transaction entered into by a subordinate agent of the company without his knowledge. Whether he has such a duty or not depends upon other circumstances. In the present case the relevant circumstances were not considered in the Supreme Court, nor was the point distinctly made before *Ferguson* J., and I am not disposed to deal with the evidence as a Judge of first instance, even if this Court could properly do so.

Applying these principles to this present case, I am not satisfied that it was clearly established by the evidence that the appellant was shown to have any such duty in respect of the supply of the 12,000 bricks as created an interest in the contract.

I think, therefore, that the appeal should be allowed.

BARTON J. The judgment appealed from deals only with the question of interest, and so far as we can learn that was the only question argued below, but in this Court there has been much discussion of the meaning of the word " engaged " in the section of the *Local Government Act* 1906 relied on, namely, 70 (*j*), the words of which I need not repeat.

It seems to me that if the appellant was " interested " in the contract it matters little whether he was " engaged " in it or not. The word " engaged " seems to import a closer concern with the contract than the word " interested." I mean that a person can scarcely be engaged in a contract without being interested in it, although he may have some interest in one without being actually engaged in it. The latter word was probably used to meet the cases of actual participants, the term " interested " being employed

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to cover a wider class of cases which do not involve any active participation.

The real question is, to my mind, whether the appellant was "interested" in the contract otherwise than as a shareholder in the Company. In other words, conceding that his possession of shares formed no disqualification by way of interest, did his directorship either of itself or by reason of any of the facts establish a disqualifying interest? There is no evidence of personal effort to obtain the contract. Indeed, at the time that the overseer of works obtained quotations from three brickyards and found that the Enfield Park Company's price was the lowest, the appellant was unaware that a quotation had been obtained from his company, and he was equally unaware of that fact when the Council resolved to accept the overseer's estimate and to do the work. He did not know that the work was being carried out with the Company's bricks until the contract had been partly performed. See his affidavit, which there is no reason to doubt.

I fully agree with the Chief Justice that an obligation arising from a fiduciary duty such as that of a company director may create such an interest as to disqualify from the office of alderman a person who is under that duty. The passages quoted from the opinion of the Judicial Committee delivered by Sir *Richard Baggallay* in *North-West Transportation Co.* v. *Beatty* (1), and from the judgment of the Court of Appeal delivered by *Swinfen Eady* L.J. in *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co.* (2), apply expressly only to cases of directors under conflicting duties to two companies, but they clearly apply equally to cases where the same person is on the one hand a director of a company and on the other an alderman of a municipality between which and the company a contract exists or is in negotiation. Where the interest is pecuniary there is an end of the matter, even if the person holding it is quite unaware of the contract. In the present case, however, the alderman, who happened to be a director of the contracting company, had no pecuniary interest, if my view of art. 92 (*p*) is correct, beyond that

(1) 12 App. Cas., 589.

(2) (1914) 2 Ch., 488.

of a shareholder, which is expressly excepted from the disqualification. His disqualification, if any, arises from his duty apart from pecuniary interest. But this duty is not called into exercise unless the facts which demand its exercise come to his knowledge. How otherwise can it be exercised ? Here there was no such knowledge, for he was quite unaware that the contract related to the bricks of his company. There is no evidence either that his want of knowledge resulted from his shutting his eyes to what was going on.

I do not think it is shown that the appellant was at the time under such a duty as made him interested in this contract.

As to pecuniary interest there is a further point.

The judgment of *Ferguson* J. in favour of the respondent was rested solely upon the learned Judge's construction of No. 92 (*p*) of the Articles of Association, but for which his Honor would have discharged the rule. That article empowers the directors to give a fellow-director or an employee of the Company a commission on the profits of a business transaction or a share in the general profits of the Company. I am unable to concur with his Honor that this gives the appellant a direct or any interest, within the meaning of the section, in the contract in question apart from his interest as a shareholder. In my view the disqualifying interest must be one in existence at the critical time, and not merely a possibility of acquiring an interest. Had the appellant exerted himself to obtain this contract in any way (which does not appear in the evidence) his co-directors might or might not have voted him a commission or a share in the general profits. (I speak here, not of a legal power in the directors, but of the assumption of power in the article.) Such a possibility does not in my opinion amount to an interest, especially in a case devoid of any service on his part on which the award of any such remuneration could be founded. The article cannot be read as authorizing a mere gift of the Company's funds amounting to spoliation.

For these reasons I think the appeal should be allowed.

ISAACS J. I take an entirely different view of this case. In my opinion the judgment given by *Ferguson* J. was perfectly right, and

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is necessary to maintain the safeguards introduced by the Legislature for the prevention of corruption in public affairs.

The *Local Government Act* 1906, sec. 70, provides that a person is disqualified for the office of alderman or councillor if (among other things) "he is directly or indirectly by himself, or any partner, engaged or interested (other than as a shareholder in an incorporated company, association, or partnership consisting of more than twenty members) in any contract, agreement, or employment with, by, or on behalf of the council," except in certain contracts or agreements specified and immaterial here. The Legislature thinks the matter so important that it subjects any person acting in office while so disqualified, not merely to a penalty, as in other cases of disqualification, but also in that and a similar case to a further liability of a minimum penalty of £50, and disqualification from office for seven years, and to incompetency to recover any money due and the obligation to return whatever he has received under the contract or agreement.

With reference to a similar section in England *Field* J., in *The Queen* v. *Mayor of Ramsgate* (1), said:—"The policy of the Statute is wide-spreading, as every day more and more of our affairs are being entrusted to the management of local bodies. It is a matter of the highest importance to keep that policy well upheld." I concur unreservedly in those observations, and cannot help entertaining the fear that, if what has occurred with respect to the appellant Ford in this case is to be regarded as untouched by the enactment I have quoted, a convenient door has been left open by the Legislature for the personal and private enrichment of municipal representatives at the expense of their constituents. The material facts are undisputed, and, as I read the Act, nothing was further from the intention of the Legislature than to permit what has happened in this case.

It will be observed that Parliament disqualifies the alderman or councillor "if he is directly or indirectly engaged or interested in the contract." It is not enough for him to say that he is not a party to the contract with the council, or that he is a sub-contractor, or that his interest is merely collateral or in any other way not direct.

(1) 23 Q.B.D., 66, at p. 71.

If only he is " interested " in the contract it matters not how indirect that interest may be.

I may first dispose of the word " engaged," so as to get to the heart of the case. The phrase " is engaged " means that the person referred to by himself or someone authorized by him, and otherwise than in his capacity of alderman or councillor, does some act in performance or furtherance of the contract. The shareholder exception within parenthesis does not apply to " engaged," but only to " interested." (See *Companies Act* 1899, No. 40, sec. 4.) The two prohibitions as to being " engaged " and being " interested " are distinct and independent. In other words a person may be " engaged " without being " interested." If he is " engaged " in the contract, that is enough to disqualify him, even though he has neither personal interest in it nor personal duty to another in relation to it—such considerations being immaterial to the word " engaged." The Legislature forbids the civic officer engaging in the contract, not because he has in fact an interest, but because he might have and in the ordinary course of things would have. The inquiry whether he has not in the particular instance is precluded.

On the evidence before us, however, Ford cannot judicially be regarded as having been " engaged " in the contract.

Then as to the word " interested." Here it is unnecessary that the officer should be directly or indirectly engaged in the contract; it is sufficient if he is " directly or indirectly interested " in it. What is meant by this prohibition of an alderman being directly or indirectly interested in a contract with the corporation of which he is an officer? It is a fundamental principle of law, which Courts are daily called upon to vindicate, and perhaps more stringently as business affairs become more complex, that an agent or a trustee in the strict sense, shall not make a profit out of his principal or cestui que trust either directly or indirectly. If he does he must account for it and hand it over, or in some cases the transaction can be avoided altogether by the person towards whom the agent or trustee owes fidelity. The agent or trustee must not (I leave out for the moment the question of disclosure) act for his principal so as to serve an adverse interest in himself.

Story on Agency (sec. 210) says :—" It is a confidence necessarily

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reposed in the agent, that he will act with a sole regard to the interests of his principal, so far as he lawfully may; and, even if impartiality could possibly be presumed on the part of an agent, where his own interests were concerned, that is not what the principal bargains for; and, in many cases, it is the very last thing which would advance his interests." Speaking of a man selling an estate as the agent of the owner, he says:—"If, then, the seller were permitted, as the agent of another, to become the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other; and thus a temptation, perhaps, in many cases, too strong for resistance by men of flexible morals, or hackneyed in the common devices of worldly business, would be held out, which would betray them into gross misconduct, and even into crime."

It is, of course, manifest that an agent to let a contract for bricks is in no different position from an agent to sell a house. If an agent or trustee acts contrary to the inflexible rule of law to which I have adverted, the Courts afford an ample remedy for the private wrong done. But the common law does not extend so far as for that reason to disqualify an official in a statutory position of trust such as Ford occupies as alderman and mayor of Enfield. The position which the law regards him as holding in relation to the municipality is left in no doubt in view of two cases of the highest authority.

The first relates to a railway company, and is the case of *Aberdeen Railway Co.* v. *Blaikie* (1). At p. 471 Lord *Cranworth* L.C. said:—"The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a *personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.* So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into."

(1) 1 Macq., 461.

That case still left it open to be argued by very eminent counsel that the council of a municipal corporation stood in a different position. But that was disposed of in *Bowes* v. *City of Toronto* (1). There the mayor was sued for having acquired by contract from a contractor with the Council an interest in bonds issued by the Council, and was sued as agent or trustee. The Privy Council held that he, being mayor, was agent or trustee for all practical purposes. They said :—" The relation, however, was disputed; but, as their Lordships think, unsuccessfully. He may not have been agent or trustee within the common meaning or popular acceptation of either term, but he was so substantially; he was so within the reach of every principle of civil jurisprudence, adopted for the purpose of securing, so far as possible, the fidelity of those who are entrusted with the power of acting in the affairs of others." Again, their Lordships observe :—" It was incumbent on the appellant, while the affair of the debentures was pending and unsettled, not to place himself voluntarily in a position in which, while retaining the office of mayor, he would have a private interest that might be opposed to the unbiassed performance of his official duty." And again :—" The Council was in effect and substance a body of trustees for the inhabitants of Toronto."

Now, when Parliament passed the enactment referred to, it was adopting legislation that had become very common in England. Its object is stated in *Nutton* v. *Wilson* (2), where a provision of the same class was under consideration by the Court of Appeal. The subject matter of the enactment and the object of the two Legislatures were manifestly the same, and so far the case is useful ; though the extent of the remedy in each case depends on the particular words employed. Lord *Esher* M.R. said (3) :—" I adhere to what I have before said with regard to provisions of this kind. They are intended to prevent the members of local boards, which may have occasion to enter into contracts, from being exposed to temptation, or even to the semblance of temptation." *Lindley* L.J. said (4) :—" To interpret words of this kind, which have no very definite meaning, and which perhaps were

(1) 11 Moo. P.C.C., 463, at pp. 518, 519, 523, 524.
(2) 22 Q.B.D., 744.
(3) 22 Q.B.D., at p. 747.
(4) 22 Q.B.D., at p. 748.

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purposely employed for that very reason, we must look at the object to be attained. The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise." *Lopes* L.J. also puts it on the ground of temptation to the members of local boards. It is plain, therefore, that when the Legislature disqualifies a man if he is directly or indirectly interested in a municipal contract, it is speaking of the same interest that would disqualify an agent or trustee in private transactions. On general principles, apart from any Act of Parliament, it was held by the Exchequer Chamber in *Salomons* v. *Pender* (1) that where an agent, employed to sell land, sold it to a limited company in which he was interested as a shareholder and director, he did wrong, and was entitled to no commission. The Court held that he was in effect a principal in the purchase. In *City of London Electric Lighting Co.* v. *London Corporation* (2) the House of Lords so held under an enactment similar to the one we are considering. And the interest referred to must, of course, be one of a pecuniary or proprietary nature. (See *Smith* v. *Hancock* (3).) The considerations to which I have adverted indicate the limit where the person ceases to be indirectly interested in a contract within the meaning of the Act. No matter how indirect the interest in the contract is, it is sufficient to disqualify if it is such as might affect the judgment and action of the alderman or councillor in conducting the affairs of the corporation. If the private advantage which he does or may obtain would weigh in any degree, however small, in the mind of the officer, if it would diminish to any extent the impartial and disinterested consideration that the law expects him to bring to the determination of the corporation business, then he is sufficiently "interested" in the subject matter to disqualify him. *In a word, he is "interested" if he is not "disinterested" in a pecuniary or proprietary sense.* It may be hard upon him in some exceptional cases; but the public safety is the highest consideration, and so the Legislature has, in my opinion, said.

Now, let us see in what position Mr. Ford was, a position which my learned brothers consider he was free to occupy in the past, and,

(1) 3 H. & C., 639. (2) (1903) A.C., 434.
(3) (1894) 2 Ch., 377.

of course, is in like manner free to occupy in the future. What he has done, he may do again, and on a larger scale ; and, what he may do, others in a similar position may do, with possibly interesting results upon the community, unless the Legislature intervenes. Such a clause as the present will, no doubt, be soon found as a safe and effectual provision in the Articles of all companies whose directors aspire to a public position of trust. Now, Ford is what is called "managing director" of the Enfield Park Brick Co. Ltd. The Articles provide (No. 85) that the directors may determine the quorum necessary for the transaction of business, and unless otherwise determined two directors shall form a quorum. It has not been otherwise determined, so far as the evidence goes. Art. 86 gives to the chairman of the meeting a second or casting vote in case of an equality of votes. If Ford and another director were the only directors present, and he were in the chair, the result is obvious, because by art. 88 the meeting so constituted is enabled to exercise all the powers vested in the directors generally. One of the powers so vested in the directors is contained in art. 92 (*p*), and is a power "to give any director or other officer or other person employed by the Company a commission on the profits of any particular business transaction or share in the general profits of the Company, and such commission or share of profits shall be treated as part of the working expenses of the Company." Dividends to shareholders as such are thus clearly dependent on the reduction of gross profits by any payments thereout to directors or other agents of the Company, as "working expenses," and they are themselves left absolute discretion to take what they think fit as a just compensation in their opinion for their efforts as directors over and above their ordinary fees.

Two distinct possible rewards are provided for by the clause. First, there is a "commission," as it is called, in return apparently for some specific effort, and limited to that, but quite independent of whether the year's transactions end in a profit or a loss ; and, next, a share in whatever profits exist at the end of the year, arising from the total business done, and this is a return, on the surface for general services of a director or employee in his office, but not controlled by any requirement. The power is general. Such a

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clause is called the "percentage clause," and is found in *Palmer's Company Precedents*, 10th ed. (1910), at p. 682, but does not include directors. This company was formed in 1912, and directors have been added to the form. Sir *Francis Palmer* makes this note to the form :—"An *interest* in profits is often found to render the services of an agent more beneficial to an employer. Apart from a special power, a person standing in a fiduciary relation to the company could not be given *such an interest* by the board." (The italics are mine.) That is to say the interest could only be given by the Company, and it is accordingly so given by this article. It is, on the face of it, an interest that comes in conflict with the fiduciary duty of the person to the opposite party. In practical terms, the clause means that at the end of the year the directors have in their mind's eye so many sovereigns before them being the year's profits—some of them arising from municipal contracts. They have the power of taking as many of those sovereigns for themselves as they please ; no one can challenge them, or question them ; no one can say there was no special effort by the directors. A director who, as mayor or alderman, sat quietly by at the municipal council table, or even purposely absented himself, might find his reward in the heap of sovereigns. Knowledge of the contract is not necessary to constitute the interest referred to by the Statute, though Ford admits knowledge that the contract was being proceeded with. If actual knowledge were necessary, evasion would be easy. If the object of the clause in the Act is, as Lord *Esher* and other Judges say, to avoid temptation or the semblance of temptation, so as to get the very best terms and the very best work for the Council, then, surely the temptation of increasing the Company's profits fund as an available source of personal advantage is a real one.

It has been argued that there is no pecuniary interest in the contract, because the directors have not yet voted themselves the profits. Of course not : there may be no profits from the contract ; the other directors may refuse to vote any special grant, and, if they do, there is perhaps no contract in existence, it is ended ; but, in the meantime, the first indispensable step is taken, namely, the existence of the contract, and all the evils which the Legislature is guarding against exist just as much whether the article itself divides

the profits or leaves the directors to do it themselves. Suppose Ford were the agent or trustee of a private person owning land, and were engaged in selling that land for him. Clearly, he would not be justified in selling it to a company in which he was a shareholder without disclosing the fact, because he would share in any profits arising from the transaction. But suppose he disclosed the fact of his shareholder's position, and got the consent of the owner—*sui juris*—to sell to the company, but did not disclose the special interest in the profit given by the article. Would he still have been justified? Clearly not, in my opinion: *Imperial Mercantile Credit Association* v. *Coleman* (1). If he would be justified, then I have quite misapprehended the uniform refusal of Courts of equity to allow an agent or trustee to profit, however indirectly, at the expense of his principal or cestui que trust. But if I am right, how can it be said that Ford is clear in the present instance? I think the observations of the Lord Chancellor in *Norton* v. *Taylor* (2) are much in point. His Lordship said:—"Courts of Justice in such cases would be vigilant to observe evidence of any concert to enable a civic officer to derive benefit from a contract." The arrangement here is quite sufficient to lead the civic officer to prefer the line of personal advantage to that of public duty, and, by operating upon his sense of self-interest, to impair the fidelity with which he is expected to maintain the welfare of the corporation. The contrary opinion not only would permit persons in Ford's position to sit in the civic chair, and on behalf of the municipality assent to transactions and afterwards divide the profits; but would permit even a Minister of the Crown, who occupied the same position in the Company and assented officially to bargain with the Company, to plead the opinion of this Court that, notwithstanding the very distinct provisions of such an article, he was "not directly or indirectly interested in the contract."

I am consequently utterly unable to see why Ford was not "directly or indirectly interested" in this contract, quite beyond his rights as a mere shareholder. Therefore, though I have dwelt much on the power of the directors themselves to distribute profits, because it is an *à fortiori* case, I by no means exclude the case of

(1) L.R. 6 H.L., 189.

(2) (1906) A.C., 378, at p. 380.

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an employee under par. (*p*) of art. 92. On the contrary, I consider he would be equally disqualified.

My opinion is that the judgment of *Ferguson* J. was absolutely correct, and should be affirmed.

GAVAN DUFFY J. Sec. 70 (*j*) of the *Local Government Act* 1906 provides that a person is disqualified for the office of alderman, if "he is directly or indirectly by himself, or any partner, engaged or interested (other than as a shareholder in an incorporated company, association, or partnership consisting of more than twenty members) in any contract, agreement, or employment with, by, or on behalf of the council, except &c." The question for our determination is whether the appellant comes within this provision. It is unnecessary to enumerate the cases to which it applies, it is enough to say that in my opinion a person cannot be engaged or interested in any contract, agreement, or employment, within the meaning of the sub-section unless, otherwise than in his capacity of alderman, he personally or by his partner actively intervenes, or, if there is no active intervention, has an existing pecuniary or proprietary interest in such contract, agreement or business, which would be recognized, though not necessarily enforced, by the Courts. In this case it is not shown that the appellant did intervene in the contract otherwise than as alderman, and I do not think that the mere possibility of obtaining from the directors, of whom he was one, a gift of a share in the profits of the Enfield Brick Company under its Articles of Association, clause No. 92 (*p*), is such a pecuniary or proprietary interest. It is not suggested that there was in fact any agreement or understanding that he should get such a share, but it is said that the mere existence of the power to give it is enough. The relevant portion of the clause is as follows :—"(92) Without prejudice to the general powers conferred by the last preceding clause and of the other powers conferred by these presents it is hereby expressly declared that the directors shall have the following powers that is to say, . . . (*p*) To give to any director or other officer or other person employed by the Company a commission on the profit of any particular business transaction or share in the general profits of the Company and such commission

or share of profits shall be treated as part of the working expenses of the Company." Of course this provision would not make it legal for the directors to give the appellant a commission on the profits of the contract in which he is said to be interested, but it is contended that it would enable them to give him a share in the general profits of the Company, and that the profits of the contract, if any, would in the ordinary course of business go to swell the general profits of the Company and so increase the fund of which the appellant might get a share. Assuming this to be so, the appellant would not in my opinion be interested in the contract within the meaning of the section. Could it be suggested that his right under the Articles to receive in each year such remuneration for his services as shall be determined at a general meeting makes him so interested, though payment would be made out of the general profits of the Company and the amount in all probability fixed by relation and in proportion to such profits, or that all the employees of the Company whose salaries and emoluments are fixed by the directors and paid out of the same fund are necessarily interested in the contract. A man is directly interested in a contract if he is a party to it, he is indirectly interested if he has the expectation of a benefit dependent on the performance of the contract; but in either case the interest must be in the contract, that is to say, the relation between the interest and the contract must be immediate and not merely connected by a mediate chain of possibilities. Here there is no such immediate connection, and so the appellant is not obnoxious to the provision of sec. 70 (*j*).

In my opinion the appeal should be allowed.

Appeal allowed. Order appealed from discharged. Order nisi discharged with costs. Respondent to pay costs of appeal.

Solicitors for the appellant, *Geo. W. Phillips & Dean.*
Solicitor for the respondent, *W. C. Clegg.*

B. L.