[HIGH COURT OF AUSTRALIA.]

ALLEN . . . . . APPELLANT;
DEFENDANT,

AND

TOBIAS AND ANOTHER . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1957-1958.

1957, MELBOURNE, *Oct.* 24, 25, 28, 29;

1958, SYDNEY, *April* 4.

Dixon C.J., McTiernan and Williams JJ.

Local Government—Councillor—Disqualification—Of person "concerned . . . in any contract or in any work to be done under the authority of any such Council"—Meaning—Action for penalties against disqualified councillor—Onus of proof—Provision for recovery of penalty "with full costs of suit"—Meaning—Presumptions—Omnia praesumuntur contra spoliatorem—Destruction of document by party to suit—Local Government Act 1946 (*No.* 5203) (*Vict.*) *ss.* 53 (1), 56 (1), (2).

Section 53 (1) of the *Local Government Act* 1946 (Vict.) provides:—"No person holding any office or place of profit under or in the gift of the council of any municipality or concerned or participating in any manner whether directly or indirectly in any contract with any municipality or in any work to be done under the authority of any such council or in the profit of such contract or work shall be capable of being or continuing a councillor of the municipality."

Held, that the words "work to be done under the authority of any such council" include work to be done for and on behalf of the council if it is within the scope of the authority conferred by the council on the persons who do it.

Held, further, that the effect of the words "to be done" is to make "concern" a cause of incapacity if it is concern in work about to be undertaken or in the course of execution if not yet completed.

The meaning of "concerned" in its context discussed with reference to the authorities.

Section 56 of such Act provides:—"(1) Every person who acts as a councillor, being incapacitated under the provisions hereof to be or continue such or

H. C. OF A. 1957-1958.

ALLEN v. TOBIAS.

before he has made and subscribed such declaration as aforesaid, shall, save in case of incapacity proceeding from unsoundness of mind, be liable for every such offence to a penalty of not more than fifty pounds, and such penalty may be recovered by any person with full costs of suit in the Supreme Court or any county court, and such penalty when recovered shall be paid into and form part of the municipal fund. (2) In every such action the person sued shall prove that at the time of so acting he was qualified under the provisions of this Act to be a councillor, and had made and subscribed the declaration aforesaid, or he shall be adjudged to pay the said penalty and costs without any other evidence being required from the plaintiff than that such person had acted as a councillor in the execution of this Act."

Held, that the burden of disproving incapacity or disqualifying facts is on the councillor not only where his initial qualification is in issue but also where the question is whether he has incurred a disqualification through interest.

Held, further, that the words " full costs of suit " mean party and party costs of the action considered as an action confined to the penalty or penalties actually recovered.

In an action against a councillor for penalties the question arose whether the defendant had executed an agreement the three copies of which had admittedly later been destroyed by him.

Held, that it was proper to presume against the defendant that he had executed the agreement upon the principle *omnia praesumuntur contra spoliatorem*.

The Ophelia (1916) 2 A.C. 206, at pp. 229, 230, applied.

Decision of the Supreme Court of Victoria (*Sholl* J.), varied.

APPEAL from the Supreme Court of Victoria.

On 8th February 1956 Charles Eric Tobias and Douglas John Stanley commenced an action in the Supreme Court of Victoria against Leslie William Allen. The plaintiffs alleged that the defendant, while incapacitated from being a councillor of the Shire of Mulgrave, had acted as such a councillor on fifteen occasions in 1953, on eighteen occasions in 1954, on sixteen occasions in 1955 and on two occasions in 1956 and claimed the sum of £50 penalty in respect of each of such offences.

The action was heard before *Sholl* J. who, in a written judgment delivered on 11th April 1957, held, *inter alia*, that the defendant had acted while incapacitated as alleged on the sixteen occasions alleged in 1955 and on 2nd February 1956 and imposed a penalty in respect of each offence of £2.

From this decision the defendant appealed by special leave to the High Court.

The facts and the arguments of counsel are set out in the judgment hereunder.

Dr. *E. G. Coppel* Q.C. and *J. A. Lewis*, for the appellant.

M. J. Ashkanasy Q.C., *D. I. Menzies* Q.C. and *H. Ball*, for the respondents.

Cur. adv. vult.

1958, April 2.

THE COURT delivered the following written judgments :—

By the judgment of the Supreme Court of Victoria from which this appeal comes, the plaintiffs, who sued under s. 56 of the *Local Government Act* 1946 (No. 5203) (Vict.), recovered from the defendant certain penalties " to be paid into and form part of the municipal fund of the Shire of Mulgrave " and one-half of their taxed costs of the action including costs of pleadings and transcript of evidence and any reserved costs. The penalties amount to £34. Presumably an action for penalties is to be regarded as an action neither of contract nor of tort within the meaning of O. LXV r. 12 of the *Rules of the Supreme Court*, and accordingly the order for costs carries half the full costs of suit taxed in the ordinary manner. The trial occupied seventeen days. The questions which arose, both of fact and law, were dealt with in a very full and careful judgment by the learned judge who heard the suit, *Sholl* J. Nevertheless the defeated party, the defendant, sought and obtained from this Court special leave to appeal from the judgment, and the successful parties, the plaintiffs, took advantage of the appeal to give a notice of cross-appeal on the ground that the judgment did not go far enough in their favour. When the appeal came on to be argued, it occupied three days. The question for the determination of which all this has proved necessary is whether the circumstances in which land has been used as part of a rubbish tip by a shire council have disqualified one of three tenants in common of the land from sitting as a councillor within the period of time allowed for bringing such a penal action. About the period of time there is no doubt. The writ was issued on 8th February 1956, and, as a result of the operation of s. 5 (5) (*a*) and s. 35 of Act No. 5914 upon s. 81 of the *Supreme Court Act* 1928, penalties could only be recovered in respect of instances which occurred not earlier than 1st January 1955, of the defendant's acting as a shire councillor though disqualified : see *Paine* v. *Loft* (1). Nor is there any doubt about his so acting within the period. He acted in that capacity on seventeen occasions and

(1) (1953) V.L.R. 601.

H. C. OF A. 1957-1958.

ALLEN v. TOBIAS.

Dixon C.J. McTiernan J. Williams J.

in respect of each occasion a penalty of £2 has been fixed. What is in question is the disqualification. That depends upon a provision which stands as sub-s. (1) of s. 53 of the *Local Government Act* 1946. Under that provision no person concerned or participating in any manner whether directly or indirectly in any contract with any municipality or in any work to be done under the authority of any such council or in the profit of such contract or work shall be capable of being or continuing a councillor of the municipality.

The precise ground upon which judgment was given against the defendant is that during the period for which penalties might be recovered under the present writ he was disqualified because he was concerned in a contract made by his neighbour with the municipality with reference to the rubbish tip. The defendant's neighbour is named Cornell. The defendant and his two brothers own in common a piece of land of about eighty-five acres, bounded on the west by Springvale Road and on the south by Washington Road in the Shire of Mulgrave. On the northern boundary is Cornell's land. The two pieces of land are contiguous and stretch back to an eastern boundary in the same line. Near this eastern boundary both pieces of land had been eroded by the flow of a natural watercourse. The erosion lay so to speak across the common boundary but there was, too, a depression or basin (or perhaps two basins) much of which lay in Cornell's land. The greater part of both pieces of land was used for growing vegetables. The defendant became a councillor of the Shire of Mulgrave in 1945 and was re-elected in August of 1948, 1951, 1954 and 1955. A re-subdivision of the shire caused an election to be held in 1955 of the whole council. The shire council being in need of a site for a rubbish tip, a proposal was made in 1952 that the eroded or scoured water channel and the basin should be used. The suggestion may have come from the defendant, but, if so, that does not bear very much on the question to be decided. The works committee and the defendant inspected the site and later the engineer conferred with Cornell and the defendant there. The result was that all three concurred in a proposal that the shire should be at liberty to tip rubbish upon the site for ten years, proceeding with the filling of the erosion of the watercourse from north to south. Cornell gave his assent to the shire's building a road on his land to run along the boundary of the defendant's land from Springvale Road to the tip for the trucks to pass over. This would mean a formal agreement between the shire and Cornell. The defendant too said that he would sign whatever agreement might be required of him. The engineer made a written report of all this to the council which, on 11th December, 1952,

resolved that approval be given to " the proposal to enter into an agreement with Messrs. Cornell and Allen Bros. for the establishment of a tip at the south-eastern corner of land in Springvale Road owned by Cornell and the north-eastern corner of the adjoining property of Allen Bros ". Strangely enough the defendant moved this resolution in spite of the possibility of his being regarded as having an interest. But whatever interest might have been imputed to the defendant it is clear that it could not be said that the interest was pecuniary. Accordingly s. 181 was not infringed. Some time later the shire secretary instructed the solicitors for the shire to prepare the necessary documents. " Both the owners concerned ", so said the instructions, " have agreed to make the land available for the purpose required for a term of ten years with the option of a further renewal at the end of that time and are agreeable to enter into appropriate leases or agreements to meet the requirements of the council." On 30th April 1953, the solicitors sent in triplicate a document to be executed by the defendant and his brothers, by Cornell and by the council. It was a deed in which the defendant and his brothers were parties of the first part, Cornell was party of the second part and the shire was party of the third part. The parties of the first and second parts leased to the shire without fee the pieces of land described by a plan " as a depot for the reception and storage of garbage of all kinds thereon ". Cornell (the party of the second part) agreed to permit the council to use the proposed road for the passage of vehicles depositing garbage, and in consideration of the lease by him and the parties of the first part the shire undertook to fence the lands in question and maintain the fences and " to supervise the disposition of garbage and other rubbish on the said lands so that the levels thereof will be improved for its general benefit ". All three copies of this document were executed by Cornell and they then went into the defendant's possession. Of that *Sholl* J. was satisfied. The defendant denied that he or his brothers executed the documents but his Honour was " not satisfied in all the circumstances, to accept the defendant's denial of such execution ". However, the learned judge was unable to say whether they were actually so executed or not. Ultimately the copies were destroyed by the defendant. His Honour said that this raised a suspicion that they were destroyed lest the fact of execution by one or more of the brothers might prove difficult for the defendant in anticipated litigation ; he was not satisfied that he had heard the full truth about the documents. However, the learned judge did not think they had been executed on behalf of the shire council.

H. C. OF A. 1957-1958.

ALLEN v. TOBIAS.

Dixon C.J. McTiernan J. Williams J.

The road was made on Cornell's land in the early part of 1953 and vehicles began to cart rubbish over it to the tip. The shire however was not free to dispose of rubbish without reference to the Commission of Public Health : cf. *General Sanitary Regulations* 1950, Pt. III, particularly regs. 34, 35 (a), 36 and 38 and Schedules III and IV (*Vict. Govt. Gazette* No. 530 of 1950, vol. 2, p. 3505 ; *Victorian Rules, Regns. etc. of Utility*, 1949-1950, p. 495) ; and s. 90 of the *Health Act*, substituted by Act No. 4867, within which the operation was taken to fall. An application was made to the commission on 13th March 1953. Inspections followed and some discussion of features of the site which might be held objectionable, particularly an objection that there might be water flowing through the rubbish. In the result the shire council informed the commission that surface drainage would be diverted, that there would be a supply of water, i.e. in case of fire, that the channel of the watercourse would be diverted to prevent pollution and that a certain quantity of filling would be placed on the site. On 30th October 1953, the shire council was notified that the commission had approved of the establishment of the garbage tip. Some work was done at the site almost at once with a bulldozer, but how far it went is uncertain, and it would seem that it was not until February 1954, that there was any real attempt to fulfil the conditions subject to which the approval of the commission had been obtained. Under a resolution of the council work was done in February and March 1954, consisting of the cutting of a drain round the head of the erosion to the north and then east and south so as to divert the watercourse round the site. This ran some distance through the land of the defendant and his brothers. Surface water flowing from the north-west towards the site was intercepted by the digging of a drain on the land of the defendant and his brothers so as to prevent it flowing into the site and to channel it south into the watercourse further down. The rubbish trucks of the shire collected the garbage and deposited it at the tip site; it is true, however, at all events after July 1954, that until the area within Cornell's boundary was filled it was all deposited on his land. During the winter there was some scouring in the new diversionary channels. Eventually it was found necessary to improve the table drain along the road to the tip and to make a concrete drainage pit to take the water therefrom, so that it might discharge into the channel to the west of the tip constructed for the diversion of surface water. That work was carried out on the land of the defendant and his brothers during April 1955. Two small roads to the tip from the east-west road were also made.

In the meantime two things had occurred. Grounds arose for apprehending an attack on the defendant's position as councillor based on what had been done over the rubbish tip. Instructions were given to solicitors to prepare a new agreement with Cornell. This was done and a deed was prepared very much on the lines of the former document except that the defendant was not a party and there was a licence and not a lease of so much of Cornell's land as formed part of the site. The document was executed by Cornell and the council, bearing the date 15th July 1954. On that date the council met and resolved to adopt the report of a committee deciding among other things " That the council agree to the cancellation of agreement between Cornell and others and that a new agreement be made between J. Cornell and the council ". It was at this time that the defendant destroyed the copies of the earlier agreement.

The second thing that occurred was the holding of the municipal elections late in August 1954. At these the defendant was re-elected to office and he made the declaration under s. 54 of the *Local Government Act* 1946, on 3rd September 1954. Section 62 of that Act says " Nothing herein contained shall prevent any person from being immediately or at any time re-elected to the office of councillor if he for the time being is capable under the provisions hereof of being and continuing a councillor." It seems to follow from this provision that unless at the time of re-election there presently existed a cause of disqualification, he would not thereafter be " incapacitated " for the purposes of s. 56 (1) until, by reason of the occurrence of new or further facts, a state of things was found then to exist which satisfied the tests of disqualification or incapacity. *Sholl* J. adopted the view that Cornell's new contract could not be put into effect, were it not for the fact that the defendant allowed the continued use of the drains and diversionary channels over the land owned by himself and his brothers for the purpose of taking the flow of the watercourse and of the surface waters, and that therefore the defendant was concerned in the contract. If this be correct, the defendant was under a continuing disqualification at the time of the election in August 1954, and afterwards. His Honour regarded the defendant as having been " concerned " in the " work " done in February and March 1954, of making the diversionary drains and so on and inasmuch as that work was done under a resolution of the council there could be no doubt that he had been " concerned . . . in . . . work to be done under the authority of (the) council " within the meaning of s. 53 (1). Having thus become disqualified, as the learned judge held, the defendant remained

H. C. of A. 1957-1958.

Allen v. Tobias.

Dixon C.J. McTiernan J. Williams J.

disqualified until his re-election in late August 1954, but his " concern " in that " work ", now that it was complete, would not continue his disqualification beyond his re-election. For that reason the judgment of *Sholl* J. against the defendant rests on the finding that the defendant was concerned in Cornell's contract with the council.

It was in April 1955 that the road to the rubbish tip from Springvale Road, passing through Cornell's land at the edge of the land of the defendant and his brother, was given a better table drain and the concrete drainage pit was made. Both these pieces of work involved an encroachment on the land of the defendant and his brothers. By October 1955 so much refuse had been tipped into the eroded bed of the old watercourse within the confines of Cornell's land and had been covered that it became inevitable that the rubbish trucks should tip their loads on the defendant's side of the boundary. The overseer for the shire graded and metalled a track from the road running east, which had been extended. The extension had been kept within Cornell's land but the metalled track made by the overseer went south from it into the land of the defendant and his brothers, so that the rubbish could be tipped into their part of the scoured watercourse. It appears that the overseer in making the track did not consult the engineer but acted on his own responsibility and without the latter's knowledge. Tipping went on there, a number of truck loads a day being emptied into the eroded part of the land of the defendant and his brothers. It has been found that the defendant must have known that this was being done. It went on until February 1956. In May 1955 a step had been taken with a view to place the council's use of the land of the defendant and his brothers on what no doubt was considered a sounder basis. The municipal atmosphere seems to have been somewhat clouded and the defendant remarked to the shire engineer about this time that perhaps it might be safer or wiser not to tip on his land. A recommendation was made by the engineer on the advice of the solicitor of the shire that the council should compulsorily acquire " a right over the land in order to tip rubbish in the scour ". The council approved the engineer's recommendation on 19th May 1955, but no formal steps towards an acquisition were taken before the issue of the writ on 8th February 1956. Some days before its issue the solicitors for the defendant and his brothers had written to the shire secretary a letter which one may assume was " for the record ". They complained that in using as a tip land adjoining their clients' property the council had lately commenced to encroach on the land owned by their clients, pointed

out that no permission had been given by their clients to the encroachment and that they objected to it and finally sought an assurance that no further refuse would be deposited on any portion of the land owned by their clients.

It is perhaps desirable to refer again to one question of fact which *Sholl* J. left unsettled. Did the defendant and his brothers execute the agreement with the council drawn up in April 1953, the three copies of which were destroyed by the defendant ? Notwithstanding the difficulty which his Honour felt in arriving at a conclusion, there are two grounds why the Court should proceed upon the assumption that the document was so executed. In the first place to presume the fact against the defendant seems but a proper application to the circumstances of the principle *omnia praesumuntur contra spoliatorem*. It is a far cry from the municipal warfare of the present case to a case in Prize but no statement of the principle could be more apposite than that of Sir *Arthur Channell* delivering the opinion of the Privy Council in *The Ophelia* (1): " If any one by a deliberate act destroys a document which, according to what its contents may have been, would have told strongly either for him or against him, the strongest possible presumption arises that if it had been produced it would have told against him ; and even if the document is destroyed by his own act, but under circumstances in which the intention to destroy evidence may fairly be considered rebutted, still he has to suffer. He is in the position that he is without the corroboration which might have been expected in his case " (2).

A second reason for acting on the assumption that the agreement was executed by the defendant and his brothers is that the burden of proof is cast upon the defendant. To justify this statement means unfortunately a digression but it is perhaps better to pursue the by-path briefly and return to the central question. The action is brought under sub-s. (1) of s. 56 of the *Local Government Act* 1946 which imposes a liability to a penalty on every person who acts as a councillor, being incapacitated under the provisions of the Act to be or continue such ; he is to be liable for a penalty of not more than £50 for every such offence and the penalty may be recovered by any person with full costs of suit in the Supreme Court or county court and such penalty when recovered is to be paid into and to form part of the municipal fund. Sub-section (2) of s. 56 is expressed to place upon the defendant " in every such action " the burden of proof that at the time of acting as a councillor " he was qualified

(1) (1916) 2 A.C. 206.

(2) (1916) 2 A.C., at pp. 229, 230.

H. C. OF A. 1957-1958.

ALLEN v. TOBIAS.

Dixon C.J. McTiernan J. Williams J.

under the provisions of this Act to be a councillor, and had made and subscribed the declaration". It doubtless seems somewhat harsh, not to say unjust, to cast upon a councillor the burden of proving positively that he has not incurred any of the disabilities mentioned in s. 53 (1). It would be satisfactory enough if it were possible to construe s. 56 (2) as confined to what may be called the primary and initial qualifications required by s. 51 and the definite disqualifications mentioned in s. 52. There is, however, little in the form of the provisions to support such a construction except possibly the use in s. 53 (1) of the word " capable " and in s. 56 (2) of the word " qualified ". But no contrast or distinction is intended by these words, and a study of the history of the provision shows that the construction lacks real justification. The history may be seen by referring to Victorian Acts over the last hundred years.

Two Acts of 1863, 27 Vict. No. 176 and 27 Vict. No. 184 appear to have been the first public Acts in the State containing provisions which correspond more or less with those relating to qualifications of councillors in Div. 1 of Pt. III of the *Local Government Act* of 1946, ss. 51 to 56. Both Act No. 176 and Act No. 184 had local government as their subject matter: cf. 6 Vict. No. 7, an Act to incorporate the inhabitants of the Town of Melbourne. No. 176 set up a board composed of members for the administration of Road Districts and Shires: No. 184 was a consolidating and amending Act providing for the administration of boroughs by a council. The two Acts contained almost identical qualifications for, respectively, a member of the board and a councillor. But s. 37 of No. 176 placed the burden of proving qualification to act as a member of a board on the person sued for penalties whereas s. 37 of No. 184 placed the burden of proving disqualification of a person to act as a councillor on the person suing. This difference which in view of the connexion between the two Acts (cf. s. 17 of No. 176) may be called anomalous was shortly removed. In 1869 both these Acts respectively were amended and consolidated by 33 Vict. No. 358 and 33 Vict. No. 359, and in the latter Act as well as in the former the person sued now bore the burden of proving that he was qualified to act as a councillor. In these statutory provisions it seems clear enough that the burden of disproving incapacity or disqualifying facts is intended to lie on the councillor not only where his initial qualification is in contest but where the question is whether he has incurred a disqualification through interest or the like. This is plainly enough the meaning of s. 58 in its relation to s. 49 of 6 Vict. No. 7 by which the Town of Melbourne was incorporated,

in 1842, provisions which are *in pari materia* (see *Victorian Statutes* 1890, vol. 6, pp. 88, 89 and 85).

In 1874 Act No. 506 repealed both Act No. 358 and Act No. 359 and incorporated their substance in the first *Local Government Act* of Victoria. Section 56 of that Act placed the burden of proving qualification to act as councillor on the person sued and that provision has been substantially repeated in the *Local Government Act* 1890 (54 Vict. No. 1112), s. 53; (see *Local Government Act* 1891 (No. 1243), s. 16 replacing s. 51 of No. 1112); *Local Government Act* 1903 (3 Edw. VII No. 1893), s. 55; *Local Government Act* 1915 (6 Geo. 5, No. 2686), s. 55; *Local Government Act* 1925 (19 Geo. V, No. 3720), s. 55. See too ss. 9 and 15 of the *Commissioners' Clauses Act* 1847 (10 and 11 Vict. c. 16) of the United Kindgom and see *Nicholson* v. *Fields* (1) where s. 15 is held to apply though its effect on the burden of proof was not mentioned.

It is now proper to return to the question on which the defendant's liability ultimately turns. That question is whether the facts which have been stated in this judgment (including the assumed fact that the agreement of April 1953, was executed by the defendant and his brothers or on behalf of them) involve a disqualification of the defendant operating after his re-election in August 1954, and during the period between 1st January 1955 and 8th February 1956 or any part of it.

There can be little doubt that at an earlier time the defendant incurred a disqualification under s. 53. He was party to an arrangement by which the shire council should establish a rubbish tip on an area of land in portion of which he held an interest, doing whatever was required for the purpose. The full use of the tip would result in the levelling of the land in which he was interested and, although the advantage from that might be remote and contingent still it was a prospective advantage. It was the subject of an intended contract to which the neighbouring landowner committed himself and to which, in the view expressed in this judgment the defendant and his brothers must be taken to have committed themselves. Although the formal document was never executed by the shire council it had been authorised by that body, which, moreover, had acted on its terms. The road had been made pursuant to the terms of the document by the shire council and as an incident of the establishment of the tip the conditions imposed by the Health Commission had been carried out by the making of the diversionary channels and drain. None of these things may have brought any immediate benefit to the defendant. The prospective or possible benefit of

(1) (1862) 7 H. & N. 810 [158 E.R. 695].

H. C. OF A. 1957-1958.

ALLEN v. TOBIAS.

Dixon C.J. McTiernan J. Williams J.

a filling and levelling of the land in which he was interested could accrue only by the final completion of the use of the land as a tip, but these were steps towards that end. The ultimate benefit might not be important, it might prove of little significance. But it is a material benefit which might be expected to accrue and, so far as the law looks for benefit at all in a case under s. 53, it is enough that it is material and appreciable. Section 53 is a provision expressed in wide terms and in kindred provisions such terms have not been narrowly interpreted notwithstanding their privative and penal effect. The general or central purpose of s. 53 (1) is no doubt to disqualify a councillor if, when a contract is let by a council he stands with or behind the contractor so that he may have an interest on the other side. To this is added the case where work is to be done for the council though without a contract, no doubt because it is one possessing a complete analogy; the councillor must not stand on the other side in such a case any more than he may if there be a formal contract. But contracts with municipalities cover many subjects and take many forms and the operation of s. 53 (1) is not confined to the simple cases of an undisclosed principal or partner, an assignee of a share of the profits and a person entitled to some beneficial interest in the profits or proceeds of the contract. A person supplying for reward the materials to the contractor to enable him to perform the contract may be "concerned in" the contract: per *Hodges* J., *Middleton* v. *Marks* (1). In *Nutton* v. *Wilson* (2) a member of a local board was held disqualified because being a joiner he did some joinery work on the board's premises for a plumber who had contracted with the board to install a warming apparatus and because he put in two frames for another contractor who was installing a water tank for the board. "With regard to the words in question", said *Lopes* J. in the Court of Appeal, "in my opinion, a person employed to do . . . work, which another has entered into a contract with the board to do, is a person concerned in the contract" (3). To *Mann* J. in *Sloane* v. *Sambell* (4) this case seemed "to mark the lowest degree of pecuniary interest which will bring a defendant within a prohibition of being 'in any manner concerned in' a contract with the public body of which he is a member" (5). But the "interest" which the defendant in *England* v. *Inglis* (6) possessed was less definite. See too *Towsey* v. *White* (7) and *Barnacle* v. *Clark* (8)

(1) (1904) 29 V.L.R. 631, at pp. 634, 635.
(2) (1889) 22 Q.B.D. 744.
(3) (1889) 22 Q.B.D., at p. 748.
(4) (1931) V.L.R. 393.
(5) (1931) V.L.R., at p. 404.
(6) (1920) 2 K.B. 636.
(7) (1826) 5 B. & C. 125 [108 E.R. 46].
(8) (1900) 1 Q.B. 279.

and *Todd* v. *Robinson* (1). These decisions do no more than illustrate the variety of situation in which the " concern " of a councillor in a contract or in work to be done under the authority of a council may appear. The words are general and must be applied to varying facts reasonably but with a proper conception of their purpose. Cf. *Holden* v. *Southwark Corporation* (2); *Everett* v. *Griffiths* (3); *Lapish* v. *Braithwaite* (4); *Lane* v. *Atkin* (5); and *Paine* v. *Loft* (6) per *Barry* J.

In the present case, during the period before the shire council decided to make a contract with Cornell alone, that dated 15th July 1954, the proper inference seems to be that a relation of contract subsisted between the defendant and the shire council notwithstanding the failure of the council to seal the documents. But even if that were not so the defendant must be taken to have been concerned in the " work " done. The expression " in any work to be done under the authority of any such council " is not free from difficulty. But, with all respect to the manner in which these words were applied by *Sholl* J., it seems too limited a meaning of the words " under the authority of the council " to read them as requiring a resolution of the council which is either directed to, or is wide enough to embrace, the particular work. The better interpretation appears to be to include work to be done for and on behalf of the council if it is within the scope of the authority conferred by the council upon the persons who do it. The words " to be done ", however, involve a difficulty of their own in the context. They rather suggest that the " concern " must exist in the work before it is done and this perhaps may be thought to carry an implication that once the work is put in execution its disqualifying effect is spent. Perhaps that would not matter in the present case up to August 1954, and indeed, it might be, even thereafter. But it does not appear to be the correct interpretation of the words. Their true effect seems rather to be to make " concern " a cause of incapacity if it is concern in work about to be undertaken, or in the course of execution if not yet completed or ended. Once the work is completed or brought to a conclusion its incapacitating character ends too. Of course an incapacity which has already arisen from it in a councillor continues notwithstanding the termination of the cause, until he is re-elected.

The critical question in this case is not whether the defendant was disqualified, let us say, up to 15th July 1954, but whether there

(1) (1884) 14 Q.B.D. 739.
(2) (1921) 1 Ch. 550.
(3) (1924) 1 K.B. 941, at p. 947.
(4) (1925) 1 K.B. 474; (1926) A.C. 275.
(5) (1922) 30 C.L.R. 437.
(6) (1953) V.L.R. 601, at p. 604.

H. C. OF A. 1957-1958.

ALLEN v. TOBIAS.

Dixon C.J. McTiernan J. Williams J.

was a disqualifying "concern" after that date or more specifically at or after his re-election at the end of August 1954. The considerations which govern this question are within a small compass. The view already expressed as to the meaning and application of the words "work to be done" and of the words "under the authority of the council" must be held in mind. That view means that the work done in deepening the table drains of the easterly road from Springvale Road through Cornell's land encroaching, as the work did, on the defendant's land, and the work of making the concrete drainage pit amounted to work done "under the authority of the council". It means too that the road or track made by the overseer to the defendant's part of the tip was done under the like authority. For it is enough to read the engineer's evidence to see that it was within the scope of the overseer's authority to do it and clearly it was an incident of what the council had originally authorised.

In the next place the passage of trucks over that track and the deposit of the rubbish in the eroded parts of the land belonging to the defendant and his brothers were things done in pursuance of the original plan. The defendant had not withdrawn his consent to the use of that part of the site in spite of his cautionary conversation with the engineer. On the contrary he knew it was going on. In short the work as originally arranged proceeded. It may well be that the destruction of the three copies of the old contract, the adoption of the resolution of 15th July 1954, and the execution of the contract with Cornell of that date meant an implied termination of whatever contractual relations subsisted then between the shire council and the defendant. But that is all: it still left the work to proceed as arranged and for this the defendant's consent or licence necessarily continued.

The consequence is that he remained concerned with the work then continuing; work in course of execution under the authority of the council. It follows that the defendant should be held to be concerned in and after August 1954, in work to be done under the authority of the council. This view makes it unnecessary to consider how far the ground of the decision of *Sholl* J. may be supported, namely that the defendant was concerned in the contract with Cornell of 15th July 1954.

There remains a question raised by the cross-appeal. It is whether the order for costs made by *Sholl* J. is consistent with s. 56 (1). That sub-section among other things declares that the penalty may be recovered by any person with full costs of suit in the Supreme Court or any county court. In giving his reasons for ordering that the plaintiffs should recover one-half only of their

taxed costs of the action *Sholl* J. did not expressly refer to the provision contained in s. 56 (1) as to costs but his Honour gave reasons which doubtless related to the direction the sub-section gives. They depended *inter alia* upon the extent of the plaintiffs' success and upon the fact that their success was made possible by his Honour's preparedness to allow an amendment in the plaintiff's particulars even at that late stage. The amendment was not in fact made and it is one of the defendant's complaints in this appeal that no amendment ought to have been allowed and none was in fact made covering the ground of the decision pronounced by *Sholl* J. But having regard to the grounds upon which this judgment proceeds that question need not be discussed.

The difficulty of supporting the order as to costs arises wholly from the harsh but rigid provision made by s. 56 (1) on the subject of costs. The term " full costs " means only ordinary costs taxed as between party and party, not as between solicitor and client: see *Jamieson* v. *Trevelyan* (1); *Avery* v. *Wood* (2). But whatever are costs of the action must be awarded to the plaintiff who recovers a penalty under s. 56. It is no doubt proper to construe the provision as relating to the costs of the action considered as an action for the penalty or penalties in fact recovered. Costs which relate to other causes of action are not necessarily to be treated as part of the " full costs of suit " specified by s. 56. Whether it might have been possible for *Sholl* J. to impose upon the plaintiffs as a term of allowing the amendment a condition that they should forgo half the costs of suit need not be considered. For his Honour did not do that and, in the view which this judgment takes of the case, an amendment was unnecessary. But consistently with s. 56 (1) it seems difficult to support any order which is the result of an exercise of discretion. It is quite legitimate to exclude what may be called costs *ultra*, that is to say costs not belonging to the suit if it were confined to the penalties actually recovered. In the present case that would mean all costs which were not costs of and incidental to the recovery of penalties confined to the period from 1st January, 1955, to the issue of the writ. But nothing further is reconcilable with the strictness of s. 56 (2). The foregoing reasons mean that the appeal should be dismissed with costs: the cross-appeal should be allowed with costs and for the order relating to the costs of the action there should be substituted an order that the plaintiffs should recover their costs of the action excluding all costs which would not have been allowable had the action been confined to the recovery from the defendant of penalties

(1) (1855) 10 Ex. 748 [156 E.R. 642]. (2) (1891) 3 Ch. 115.

H. C. OF A. 1957-1958.

ALLEN v. TOBIAS.

for acting as a councillor during the period from 1st January, 1955, to the issue of the writ on the ground that the defendant was incapacitated at that time to be or continue such within the meaning of s. 56 (1) of the *Local Government Act* 1946 and that such costs be taxed in the Supreme Court.

Dismiss the appeal with costs.

Allow the cross-appeal with costs.

Discharge the judgment of the Supreme Court in so far as it deals with the costs of the action. Order that in lieu of that part of the judgment it be considered and adjudged that the plaintiffs recover from the defendant their costs of the action (including their costs of pleadings and of the transcript of evidence and any costs reserved in the Supreme Court) but excluding all costs which would not have been allowable had the action been confined to the recovery from the defendant of penalties for acting as a councillor of the Shire of Mulgrave during the period from 1st January 1955 to the issue of the writ of summons on the ground that the defendant was incapacitated at that time to be or continue such within the meaning of s. 56 (1) of the Local Government Act 1946 (Vict.). Order that such costs of the action be taxed in the Supreme Court of Victoria.

Solicitors for the appellant, *Corr & Corr.*
Solicitors for the respondents, *Russell Kennedy & Cook.*

R. D. B.