

prejudice to plaintiff bringing a further action if so advised :
3 O. W. R. 786.

Plaintiff appealed to a Divisional Court.

W. M. Boulton, for plaintiff.

D. C. Ross, for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), was delivered by

STREET, J.—Defendants at the argument before us sought to sustain the judgment in their favour upon the facts of the case, and to shew that there was not sufficient evidence upon which to base the findings of the jury, but we are all of opinion and so determined at the conclusion of the argument, that the findings were fully justified by the evidence, and we reserved only the legal question as to the right of plaintiff to maintain the action, under the following circumstances:—

Some time before 23rd January, 1903, plaintiff applied to the proper Surrogate Court for the grant to him of letters of administration, in the ordinary form, to the estate of the deceased, and, having completed his papers, an order was made by the Judge on 23rd January, 1903, for letters of administration to issue to him. On the same day he began the present action, and letters of administration were actually issued to him on 26th January, 1903. My brother Idington, before whom the action was tried, dismissed the action, upon the ground that plaintiff at the time the writ was issued was not the administrator of the deceased, and that the subsequent grant of letters of administration three days after action was not sufficient and did not relate back so as to enable him to maintain it, because he was not personally interested in the subject matter of the action and was not one of the next of kin of the deceased entitled to take out letters of administration. He followed in this respect a judgment of his own in *Doyle v. Diamond Flint Glass Co.*, 3 O. W. R. 510, 7 O. L. R. 747, in which he had adopted dicta to the same effect in *Chard v. Rae*, 18 O. R. 376. *Doyle v. Diamond Flint Glass Co.* was reversed, 3 O. W. R. 921, but upon grounds not affecting the present question.

I have gone through all the cases cited upon the argument and many more, and have been unable to find any actual decision supporting the distinction relied on by defendants in the present case between the effect of letters of