

defendants or any person for whose conduct and representations they were responsible, the plaintiffs would not have entered into, their remedy would be an action for damages, as in the case of *S. Pearson and Sons v. Dublin*, [1908] A.C. 351. But personal fraud or deceit is expressly disclaimed by the plaintiffs. Here the plaintiffs, if damnified at all, have been so as the result of the work being taken out of their hands by Whalen. But this furnishes no reason for their being allowed any greater price than the contract-price for what they had done under it—whatever other rights it may confer. . . . When the work was taken out of their hands on the 16th January, they had taken out not more than about 42 per cent. of the quantity to be excavated. . . . There can be no question that the plaintiffs had fallen far behind in performance of their contract. There appears to have been a lack of organisation and of the best kind of appliances and implements proper to be employed in the kind of work that this was. . . . Apart altogether from the provision in the contract, the defendants were but adopting a reasonable measure of self-protection in taking steps to secure the completion of the work within a reasonable time. . . . And, unless Whalen had become disqualified to act as referee and to exercise the powers vested in him by the contract, by reason of what had occurred between him and the defendants subsequent to his appointment, it cannot be said that he acted unreasonably in taking the work off the plaintiffs' hands, in the circumstances. . . . Whalen became interested in a way that placed him in a position in which his interests might prevent him from acting in an independent and unbiassed manner, and this was not disclosed to the plaintiffs. He held what in law may be said to be conflicting interests, and without the plaintiffs' assent was not qualified to perform the duties of referee.

The defendants are not entitled to rely upon his decision and action as conclusive against the plaintiffs and as entitling the defendants to claim all the benefits and advantages that an exercise of these powers by an independent referee would confer. The taking of the work out of the plaintiffs' hands must be treated as the defendants' act, necessary to be justified by them as reasonable and proper in view of all the circumstances. Two courses were open to them: one to permit the plaintiffs to proceed with the work under their contract; the other to take it from them and complete it themselves. In the latter case the plaintiffs would be entitled to recover damages, if they could shew them, for loss which they properly suffered by reason of being improperly deprived of the contract. But