for a very long period their jurisdiction with regard to criminal and *quasi*-criminal matters has been limited to what has been conferred by statute. Then on another view of the case, the argument in favour of the sole jurisdiction of the Sheriff is very much strengthened by the provision as to appeal. The Sheriff is not a judge of appeal in criminal cases. Certainly he is not at common law, and I do not know of any statute under which a Sheriff is made a judge of criminal appeal. On the other hand it is an attribute of the jurisdiction of county and burgh magistrates that their judgments are only liable to be reviewed by this Court, and I should be slow to infer that this state of the constitutional law of the country regulating the co-ordination of the courts was intended to be taken away by Parliament by mere implication from a section dealing with other matters. But while it is necessary to find something that will satisfy the words of the statute, it is much more easy to suppose that this appeal was meant to be given within the Sheriff Court than to give the Sheriff authority to review the decisions of other courts. We have an analogy in the right of appeal within the Court which exists in civil cases, and as the so-called offences under the Motor Car Act are rather of the nature of *quasi*-criminal charges, and may be assimilated in many respects to the mere recovery of fines, it is not unnatural that in order to provide a summary and inexpensive review that power of review should be given to the Sheriff. I do not think that the magistrates of burghs would have jurisdiction in cases with a penalty of £10, £20, or £50 unless that were conferred upon them in express terms. It is no answer to say that the prosecutor may restrict his crave. In the first place, I should not like to assume that the prosecutor has any such power in suing for the recovery of a penalty. But supposing that he had, the jurisdiction is not to be ascertained by a consideration of what the prosecutor may possibly do in a special case, but by the penalties prescribed in the statute itself, and these appear to me to be such as cannot be recovered in the magistrates' courts or in the courts of the justices of the peace. I therefore concur in the view that this conviction should be suspended.

LORD KINNEAR—I agree for the reasons already given.

LORD STORMONTH DARLING—I agree with your Lordships.

LORD LOW—I also agree.

LORD PEARSON—I agree on both grounds.

The Court suspended the conviction.

Counsel for the Complainer—Solicitor-General (Ure, K.C.)—D. Anderson. Agents—A. C. D. Vert, S.S.C.

Counsel for the Respondent—Constable—Dunbar. Agent—James Ayton, S.S.C.

COURT OF SESSION.

Saturday, January 26.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

ASPHALTIC LIMESTONE CONCRETE COMPANY, LIMITED, AND ANOTHER *v.* CORPORATION OF GLASGOW—*et e contra.*

Company — Winding-up — Liquidation — Two Existing Contracts with Same Party —Power of Liquidator to Adopt One and Reject Other.

A company at the date of liquidation was bound under two separate contracts with the same corporation.

Held that the liquidator was entitled to adopt one contract and disaffirm the other, so far as unexecuted.

Company — Winding-up — Liquidation — Company under Two Contracts with Same Corporation, One of which only Adopted by Liquidator—Right of Corporation to Retain Price of Work Done by Liquidator in Security of Claim of Damages under First, and Due Performance of Second Contract.

A company entered into two separate contracts with a corporation, in 1902 and 1903 respectively, to pave certain streets and thereafter maintain them for a period of years. The larger part of the price was in each case payable on the completion of the work, and the remainder at intervals during the period of maintenance. In 1903 the company went into voluntary liquidation, and the liquidator refused to take up the first contract (under which the company's obligation to maintain had not yet expired), but adopted the second contract and completed the work, and was prepared and apparently able to carry out the obligation of maintenance.

Held that the corporation was not entitled, on the completion of the work under the second contract, to retain the sum which then became payable, either (*a*) in security of a claim of damages for the non-fulfilment of the obligation to maintain under the first contract, or (*b*) in security of the due performance in the future of the similar obligation under the second contract.

Contract—Delectus Personæ—Contract to Pave and Maintain Streets.

There is no *delectus personæ* in a contract to pave and maintain streets, the execution of which consists chiefly in manual labour.

On 26th January 1905 the Asphaltic Limestone Concrete Company, Limited, then in liquidation, and E. M. Sharp as liquidator thereof, raised an action against the

Corporation of Glasgow, in which they sued for £1172, 19s., in respect of certain paving work done by them in King's Drive and other streets in Glasgow, under a contract entered into between the Corporation and the company in May 1903. A counter action at the instance of the Corporation against the company and Mr Sharp was raised on 22nd February 1905, in which the Corporation sought decree for £2967, 6s., in respect of the company's alleged failure to fulfil (1) a term of the contract above mentioned; and (2) a previous contract between the same parties entered into in June 1902, under which the company were bound to pave and maintain for a specified period certain other streets in the city. Both actions were heard and decided together.

The facts as brought out at the proof and the effect of the correspondence are fully stated in the following portion of the opinion of the Lord Ordinary (ARDWALL):—"There are two actions to be considered, the one at the instance of the Asphaltic Limestone Concrete Company, Limited, whom I shall call the company, and its liquidator Mr Sharp, against the Corporation of the City of Glasgow, whom I shall call the Corporation, and the other action at the instance of the Corporation against the company and its liquidator. The actions have not been conjoined, but the parties agreed that they should be tried together, and that the evidence in the one action should be held to be the evidence in the other.

"The company, which is one of over thirty years' standing, having got into difficulties, Mr Sharp was, on the petition of debenture-holders, appointed receiver for the debenture-holders and manager of the company by the High Court of Justice, Chancery Division, on 26th August 1903. By special resolution of the shareholders, dated 1st September 1903, it was resolved that the company should be wound-up voluntarily, and Mr Sharp was appointed liquidator. His work as receiver and manager practically terminated on 25th June 1904, but he did not obtain his discharge from the Court till 25th October 1904. After 25th June 1904 he commenced to act as liquidator, and took over the assets and management of the company at that date. It was a creditor's liquidation throughout, there being no surplus for the shareholders. Mr Sharp sent a formal notice of his appointment as receiver and manager to the Corporation and received an acknowledgment thereof. The liquidation of the company was published as usual in the *Gazette*. Therefore neither the Corporation nor their officials are entitled to plead, as they endeavour to do, that they did not know about the position of Mr Sharp and the company. At 1st September 1903 there were two subsisting contracts between the company and the Corporation.

"The first contract had been entered into in June 1902, and by it the company became bound to pave with asphalt certain portions of the following streets, and the work of paving the streets was completed on the dates respectively put opposite their names:—Ingram Street, East, August 1902; Brunswick Street, September 1902; Hutcheson Street, October 1902; Queen Street, November 1902.

"It was provided by the specification, which is quoted in article 3 of the condescendence for the pursuers in the Corporation's action that the company should maintain the surface of the asphalt in a thoroughly good condition, to the satisfaction of the Master of Works of the Corporation, for a period of ten years from the completion of the work. It was also provided that 80 per cent. of the contract sum, as ascertained by measurement, should be paid on completion of the work to the satisfaction of the Master of Works, 10 per cent. on the expiry of five years from the completion of the work, and the balance on the expiry of the period of upkeep. Accordingly the period within which the company were bound to maintain the said streets does not expire till 1912.

"The second contract was entered into in May 1903, and by it the company agreed to pave with asphalt certain portions of the streets known as King's Drive (Glasgow Green), and King's Bridge, along which tramway lines were to be laid. The company's offer, with a statement of the prices, contains the following clause:—'These prices include a free maintenance for five years; all the other conditions in your specification are hereby agreed to. For the maintenance and surface repairs during the succeeding five years our price will be sixpence per yard super. per annum upon the total surface.'

"The contract further provides, *inter alia*, that 80 per cent. of the contract sum, as ascertained by measurement, should be paid on completion of the work, 10 per cent. on the expiry of three years, and the balance on the expiry of the five years, on the certificate of the Master of Works when the work had been completed and maintained in a satisfactory manner.

Mr Sharp, after looking into matters, made up his mind that it would be for the advantage of the creditors to adopt the latter contract and to let the Corporation rank in the liquidation for any claims they might have on the former. The two contracts were quite distinct from each other. Mr Sharp accordingly proceeded with the work under the second contract, and expended monies in his hand in completing it to the extent of £1191, 15s. 7d. He had given instructions that the best material should be used and the greatest care taken in laying it. I may note at this stage that, notwithstanding certain allegations on record, there is no question at present raised as to the quality of the work by the Corporation, nor do the company at present raise any question as to the sufficiency of the concrete foundation for the asphalt laid by the Corporation. On 10th October 1903 Mr Reid, the company's representative in Glasgow, wrote as follows to Mr Nisbet, the Corporation's Master of Works:—

'*King's Drive.*

'Dear Sir,—Referring to yours of 5th, I beg to state that I forwarded same to my principals, and now send you herewith their reply.

'"*Copy Letter above referred to.*

'"James Reid, Esq. *London, Oct.* 9, 1903.

'"1 Robertson Street, Glasgow.

'"Dear Sir,—We return you herewith the letter that you received from Mr Nisbet the other day, after having written to the liquidator of the Asphalt Company regarding same, and the following is his reply:—

'"'I am receiver and liquidator of this company, and the Court enables me to carry out any contracts entered into by the company.

'"'The Glasgow Corporation contract will be finished by me, and to the officials' satisfaction.'

'"Please advise Mr Nisbet to this effect. —Yours faithfully,

'"'ROWLAND, CARR, & CO."'

"In reply to this letter, which it is clear dealt only with the second contract, which was then in course of being carried out, the Master of Works merely stated that he would submit the matter to his committee at its first meeting. It may be explained that James Reid was the company's representative in Glasgow, and Rowland, Carr, & Company were the company's agents in London, who up to the appointment of a receiver had all along acted for them in connection with these contracts.

"On these letters there followed what I cannot describe otherwise than as a most unsatisfactory correspondence, which finally landed the parties in the present actions. The strange character of the correspondence is, however, so far explained by the positions which each of the parties took up. Mr Sharp, on the one hand, having as receiver and liquidator adopted and completed the work under the second contract, considered that he was personally liable, as he says in the evidence, to complete it both as regarded work and maintenance, and he says that he would either have retained sufficient money belonging to the company to enable him to implement the maintenance obligation, or paid some other contractor money down to undertake the obligation for him. The latter course would have required the consent of the Corporation. He says further that he did not distinctly say all this in so many words in his later letter, because it was apparent on the face of the letter above quoted, and of what he had done, (and he assumed the Corporation knew) that they had him bound as liquidator for the fulfilment of the second contract. Mr Sharp, however, was anxious throughout to get some other company to take over both contracts with the consent of the Corporation, so as to free himself from all future liability, and enable him to get the liquidation closed. This view led in the correspondence to some confusion, for it tended to mix up the two contracts, whereas Mr Sharp considered that his legal position under the one was totally different from his legal position under the other. On the other hand Mr Nisbet, the Corporation's Master of Works, in whose hands the management of the whole business seems to have been left, says this in his evidence, that on 2nd September 1903 Mr Sharp for the first time intimated to him that he had himself done any part of the contract work. He further says—'I never gave any consent to Mr Sharp doing the work. I knew nothing at all about Mr Sharp till the work was completed.' He further says —'When we found that the company had gone into liquidation the Corporation at once took up the position that they were not bound to pay the balance of the 80 per cent. (that is, on the second contract) or anything else, till the Asphaltic Company had made provision for the due carrying out of all their contracts.' This I think defines accurately the position of the Corporation. In my opinion it was not a position which they were entitled to take up. The two contracts were wholly distinct and separate. Mr Sharp might if he pleased have taken up neither of the contracts, but allowed the Corporation to rank for damages for breach of contract in the liquidation of the company. Instead of that Mr Sharp, who all along held the character of liquidator of the company, although he was acting as receiver and manager for some time under an order of Court, after due notice to the Corporation that he had been appointed receiver and manager, proceeded to complete the work under the second contract. He did this, it must be held, with the full knowledge and consent of the Corporation, and the Corporation ought to have known perfectly well that, having taken up the contract Mr Sharp was personally liable for the whole fulfilment thereof, and would have been personally responsible if he had parted with any of the funds of the liquidation to creditors or shareholders before making provision for its completion.

"Parties having taken up these respective positions, it appears that on October 20th Mr Sharp wrote Mr Nisbet, the Corporation's Master of Works, a letter offering to make an appointment for the measurement of the work. This letter was written by Mr Sharp in the first person, and as receiver and manager on the company's estate. Some more letters passed on the subject, with the result that the work was measured by a certified measurer appointed by the Corporation in the presence of Mr Morris, the company's manager, on behalf of Mr Sharp, and as is shown by the measurement which is produced, the total sum due in respect of the work done came to £2466, 3s. 9d., which, after deducting a payment of £800 which had already been made to account, and the 20 per cent. which was to be retained by the Corporation in security of the obligation of maintenance, left a sum of £1172, 19s. immediately payable to Mr Sharp under the contract, and this is the sum sued for in the action at the company's instance. Mr Sharp applied again and again for payment of this sum, but payment was always refused on the ground, as we now learn

from Mr Nisbet, that the Corporation would pay nothing till security over and above the retention of the 20 per cent. was provided for the fulfilment of the maintenance obligation in both contracts. In the meantime, owing as it would appear to the severe effects of the traffic as concentrated by the tramway lines, the asphalted roadway in King's Drive and King's Bridge required repairs, and in reply to a letter from Mr Nisbet requesting that immediate steps should be taken by Mr Sharp to repair the roadway, Mr Sharp wrote that he was sending the foreman to inspect the roadway, and that if Mr Nisbet would let him have the money due to him as provided by the contract, and which he admitted had been passed, he would do the repairs, and he adds—'It is unreasonable to ask for the repairs to be done before I have been paid the money now due to me.' Mr Sharp maintained this attitude throughout, and offered again and again to do the repairs necessary to the streets embraced by the second contract provided the Corporation would pay him the money which admittedly was due under it. This the Corporation consistently refused to do, and the result was that after patching the streets themselves for some time they proceeded to take in tenders for the maintenance of all the streets embraced in both contracts for the contract period, and finally accepted the tender of the Alcatraz Agency to undertake the obligations for the sum of £2904, and it is this sum, with the addition of £33, 6s. of temporary repairs, which is sued for in the action at the instance of the Corporation."

With reference to their claim under the 1903 contract, the company and the liquidator (pursuers) pleaded—"(2) The sum sued for being due in respect of work done by the liquidator of the said company subsequent to the liquidation thereof, the defenders are not entitled to set off against the same any debts contingently due by the said company to the defenders as at the date of the liquidation."

The Corporation (defenders) pleaded—"(3) The pursuers are barred from recovering the balance due in respect (*a*) they have not implemented the contracts between the said Asphaltic Company and the defenders, and (*b*) the liquidation of the company, and *separatim* their refusal to make provision for the due fulfilment of their obligation to repair and maintain the said streets in terms of the contracts, operated as a breach of the contracts libelled."

In their counter action the Corporation (pursuers) pleaded—"(1) The defenders having broken the contracts libelled for the maintenance and repair of the streets therein specified, are liable in reparation to the pursuers. (2) The sum of £2967, 6s., being the amount of the loss and expense sustained by the pursuers through the breach of contract libelled, they are entitled to decree in terms of the conclusions of the summons with expenses."

The defenders pleaded—"(2) The pursuers being in breach of their contract are barred from suing the present action. (3) *Separatim*, the defenders not having broken said contract are not liable as for breach to the pursuers."

On 20th July 1905 the Lord Ordinary (ARDWALL) pronounced the following interlocutor:—(1) *In the action at the instance of the company and the liquidator*—"Decerns and ordains the defenders to make payment to the pursuers the Asphaltic Limestone Concrete Company, Limited, and Elkanah Mackintosh Sharp as liquidator of the said company, of the sum of £1172, 19s., with interest thereon at the rate of 5 per cent. per annum from 17th May 1903 until payment," &c.

In the action at the instance of the Corporation—"Finds that the defenders the Asphaltic Limestone Concrete Company, Limited, are liable to the pursuers in the sum of £96, 2s. in name of damages for non-fulfilment of a contract entered into in June 1902 for the paving with asphalt of Queen Street, . . . all within the city of Glasgow: And decerns and ordains the defender E. M. Sharp, as liquidator of the said company, to rank the pursuers for the said sum in the liquidation of the said company, and to pay them any dividend that may be due in repect of said ranking: *Quoad ultra* dismisses the action," &c.

Note.—"For the grounds of the above judgment I refer to the opinion delivered in this action and in the action at the instance of the present defenders against the present pursuers. The sum now found due is brought out as follows:—

"Sum claimed in respect of the maintenance—

(*a*) Removing defective asphalt, &c.	£50 0 0	
(*b*) Maintaining .	600 0 0	
		£650 0 0
These figures are contained in the offer by the Alcatraz Agency.		
From this falls to be deducted the retention money, which, according to the report by the Corporation's Master of Works, is		553 18 0
Leaving a balance, for which the Corporation are entitled to a ranking, of		£96 2 0

. . . . . ."

Opinion.—[*After narrating the facts above quoted*]—"Several points of law were argued upon this state of the facts. The first question is whether Mr Sharp, as liquidator of the company, and for a time manager thereof, was entitled after the liquidation to take up and carry on the second contract. I have no doubt that he was. By section 95 of the Companies Act 1862 the liquidator has power to carry on the business of the company so far as it may be necessary for the beneficial winding-up of the same. Mr Sharp thought that to take up this contract was beneficial for the company, because the company had material and men on the spot, and he considered the price a fair one. In this respect a liquidator under the Companies Acts is in much the same position as a trustee

under the Bankruptcy Acts in Scotland. I am further of opinion that this was not a contract in which there was such *delectus personæ* in favour of the company as to disentitle the liquidator from carrying it out —See *British Waggon Co.* v. *Lea & Co.*, 1880, 5 Q.B.D. 149—and liquidation does not of itself constitute a breach of contract—See *Agra Bank, ex parte Tondeur*, 1867, L.R., 5 Eq. 165. I am accordingly of opinion that Mr Sharp as liquidator of the company was entitled to take up and carry out the second contract. This he did, and having completed the work to the satisfaction of the Corporation, and the same having been measured in terms of the contract by measurers appointed by the Corporation, the Corporation thereupon became bound to pay him forthwith 80 per cent. of the contract price of the work as so measured. This they refused to do, and the grounds of their refusal must now be examined. In the first place, they say that Mr Sharp never undertook to carry out the obligation of maintenance in the second contract. To this it seems sufficient answer to say (first) that apart from the demand for security for performance of the maintenance obligation under both contracts, which demand I shall hereafter deal with, Mr Sharp was never asked specifically to give any undertaking to carry out the maintenance clause of the second contract. This, however, seems of little importance, because he was certainly bound as a liquidator, and as having taken up the second contract, to see it carried out in its entirety, and he would have been personally liable if he had failed to do so. But further, the only way to carry out the maintenance obligation was by making repairs on the streets whenever required, and Mr Sharp again and again expressed his willingness to do this if the Corporation would pay him for the work he had already done, but, very properly as it seems to me, he refused to spend more of the creditors' money in the liquidation until the Corporation had paid him what was already long overdue under the contract, and in these circumstances it cannot be held that he either refused or failed to carry out the obligation of maintenance under the second contract. But the position taken up by the Corporation on the other hand, as appears from the correspondence and from Mr Nisbet's evidence, was that they refused to make the payment they were bound to make under the second contract till the Asphaltic Company had given security for the due carrying out of both their contracts. This position seems to involve some propositions which appear to me to be untenable in law. In the first place it involves the proposition that the liquidator was not entitled to take up one contract and leave the other. In my opinion he was so entitled, and I may refer to the case of *Gray's Trustees* v. *The Benhar Coal Company*, 1881, 9 R. 225, as an authority for this. In the next place, their claim to retain money due to the liquidator under the second contract in security for the obligation under the first contract, involves the proposition that they are entitled to set off against a debt due at, and prior to the date of the liquidation, a sum that became due by them to the liquidator for work done by them during the liquidation, thus obtaining for themselves a preference in the liquidation. This, I think, is against the law—see *The Ince Hall Rolling Mills Company, Limited*, 1882, 10 Q.B.D. 179; *Alloway* v. *Steer*, 1882, 10 Q.B.D. 22; Bell's Commentaries, ii, 122-123. The object of a liquidation is to make an equal distribution of the assets of the company among its creditors, and this would be defeated could debts contracted after the liquidation, such as the present claim for work done under the second contract, be set off against debts which became due at or before the liquidation—as in this case the sum necessary to cover the obligation for maintenance under the first contract. Counsel for the Corporation quoted the case of *Mitchell's Trustees* v. *Galloway's Trustees*, 5 F. 612, as an authority in his favour, but that case was decided on the ground that a letter by a superior to the vassal, modifying a term in the feu-charter could not be viewed as a separate contract, but must be taken as part of the contract constituted by the feu-charter, and that the trustee in bankruptcy was not entitled to take benefit from the letter without fulfilling all the obligations in the feu-charter, which he was not prepared to do, and that case proceeded on the assumption that, if the feu-charter and the letter could have been viewed as containing two separate contracts, the trustee would have been entitled to adopt the one and reject the other; to that extent it is an authority in the company's favour. I have accordingly come to be of opinion that the Corporation were not entitled to take up the position they did, and that their entering into the contract with the Alcatraz Agency to become liable for maintenance under the second contract was, so far as the Asphaltic Company were concerned, an entirely unnecessary act on the part of the Corporation, and one in respect of which they have no claim whatever against the company. So far, however, as the first contract is concerned, I am of opinion that the Corporation were entitled to enter on a contract for fulfilment of the obligation of maintenance under it, and that they are entitled to a ranking for the amount of that contract under deduction of the 20 per cent. retained in security of the obligation of maintenance. The result of the foregoing judgment is, that I shall pronounce decree in the action at the instance of the company for the whole sum therein claimed, and in the other action I shall grant decree against the company only for the amount above referred to due under the first contract, in order that they may rank for that sum in the liquidation."

The Corporation reclaimed in both actions. Lord M'Laren in his opinion indicates the chief points taken in the argument in the Inner House.

The following authorities were cited by the reclaimers—Bell's Com. ii, 122; *Smith* v. *Harrison & Co.'s Trustee*, December 22, 1893, 21 R. 330, 31 S.L.R. 245; *in re*

Asphaltic Wood Pavement Co. (*Lee & Chapman's* case), 1884, 26 Ch. D. 624, 1885, 30 Ch. D. 216; *Ogdens, Limited* v. *Nelson*, [1904] 2 K.B. 410, *aff.* [1905] A.C. 109; *Lord Elphinstone* v. *Monkland Iron and Coal Company, Limited*, June 29, 1886, 13 R. (H.L.) 98, 23 S.L.R. 870: *Ross* v. *M'Farlane*, January 19, 1894, 21 R. 396, 31 S.L.R. 305, *per* Lord Rutherfurd Clark; *Mersey Steel and Iron Company* v. *Naylor*, L.R., 9 Q.B.D. 648, *aff.* L.R., 9 A.C. 434; *Asphaltic Wood Pavement Company* (*cit. supra*); *in re Marriage, Neave, & Company*, [1896] 2 Ch. 663.

The following authorities were cited by the respondents:—*Agra Bank*, L.R., 5 Eq. 160; Palmer's Company Precedents, 9th ed. vol. iii, 428; *Gardner* v. *London, Chatham, and Dover Railway Company*, 1866, L.R., 2 Ch. App. 201; *Boyle* v. *Bettws Llantwit Colliery Company*, 1876, L.R., 2 Ch. D. 726; Bell's Com. ii, 122; Buckley on the Companies Acts, 8th ed., pp. 198, 408; Addison on Contracts, 10th ed., p. 246; *Thorneloe* v. *M'Donald & Company*, February 17, 1892, 29 S.L.R. 409.

At advising—

LORD M'LAREN — The two reclaiming notes which we are now to dispose of bring under review the judgments of the Lord Ordinary in two cases which were heard together on the same evidence.

The first action, which is at the instance of the Corporation of Glasgow, is a claim of damages for breach of contract. There are two contracts, 1902 and 1903, and it will be convenient to consider these separately. The first head of the claim is for non-fulfilment of a term of a contract entered into in June 1902 under which the defenders, the Asphaltic Limestone Concrete Company became bound to maintain for the period of ten years (reckoned from the completion of the work in 1902) the surface of certain streets in Glasgow. I understand that the company (now in liquidation) received payment of 80 per cent. of the contract price for paving the street, but under a term of the contract the Corporation was entitled to retain 20 per cent. of the contract price in security of the company's obligation to maintain the surface of the road for the period of ten years. Ten per cent. was to be paid to the company on the expiration of five years from the completion of the work to the satisfaction of their employers, and the balance was to be paid at the end of the tenth year.

The liquidator did not adopt the contract, and the Corporation have contracted with another company (the Alcatraz Agency) for the maintenance of the streets in question at the price of £650. The retention money under the first contract is £553, 18s. The larger sum (£650) represents the damage which the Corporation has suffered through the breach of the contract to keep the streets in repair for ten years. Under their conventional right of retention the Corporation is entitled to apply the retention money in part payment of this claim of damage, and for the balance, which is £96, 2s., the Corporation is entitled to rank in the liquidation. This is in substance the decision of the Lord Ordinary on the first claim; in which I am prepared to concur.

The Lord Ordinary has dismissed the claim founded on the second contract, which I proceed to consider in relation to this action and also in relation to the cross-action at the instance of the Asphaltic Company and its liquidator for payment of the contract price.

By the second contract, which was entered into in May 1903, the Asphaltic Company undertook to pave part of two streets called King's Drive and King's Bridge. The company's offer, which was accepted, contains a clause in the following terms:—"These prices include a free maintenance for five years; all the other conditions in your specification are agreed to. For the maintenance and surface repairs during the succeeding five years our price will be sixpence per yard superficial per annum on the total surface." The contract further provides that 80 per cent. of the price as ascertained by measurement should be paid on the completion of the work, ten per cent. on the expiration of three years, and the balance on the expiration of the term of five years, on the certificate of the Master of Works when the work had been completed and maintained in a satisfactory manner.

On 26th August 1903 Mr Sharp (now the liquidator) was appointed by the High Court of Justice receiver for the debenture-holders and manager of the company. On 1st September of that year the company went into voluntary liquidation, and Mr Sharp was then appointed liquidator. His duties as receiver and manager terminated on 25th June 1904, and from that date he acted as liquidator and took over the assets and the management of the company. Soon after his appointment by the company as its liquidator, Mr Sharp, in the interest of the creditors, resolved to take over the second contract; he proceeded with the work and expended money on it to the extent of £1191, 15s. 7d. No question is raised as to the quality or sufficiency of the work. Mr Sharp's resolution to take up and complete the work of the second contract was intimated to the Master of Works, who was the representative of the Corporation of Glasgow in these transactions. I refer to the Lord Ordinary's opinion as to the correspondence which ensued, and on this subject I may say that I agree with his Lordship that Mr Sharp considered himself personally liable for the fulfilment of the second contract; and further that it is of no materiality whether this was understood by the Master of Works or not, because the contract work was in fact completed (at the expense of the company in liquidation) long before the questions had arisen which we have to consider. As the Corporation have got the benefit of the contract work, it is, I think, perfectly clear that they must pay the contract price, unless they have some better answer than is suggested by their

criticisms on the position of Mr Sharp and his authority to take over the contract.

The points taken by the Corporation in the argument addressed to us are not altogether the same as those that were argued before the Lord Ordinary.

The points that were ultimately pressed are these—(1) That the company in liquidation could not take over the second contract unless it also took over the first contract; (2) that as a matter of fact Mr Sharp only took over the second contract in so far as regards the paving of King's Drive and Bridge, and did not undertake to carry out the obligation of maintenance; (3) that the Corporation is entitled to withhold payment of the ascertained sum of £1172, 19s. due to Mr Sharp for the completion of the work of paving these roads, and to retain this fund (*a*) in security of their claim of damages for non-fulfilment of the obligation to maintain the roads which are the subject of the first contract, and (*b*) in security for the performance of the obligation to maintain the roads paved under the second contract; (4) founding on a circumstance which I have not as yet noticed—I refer to the "reconstruction" of the Asphaltic Company (27th January 1904)—the Corporation suggests that the original Asphaltic Company had not the power to delegate the work of maintaining the roads to a new company formed for the purpose of taking over its business and carrying it on under the same name. I shall consider these points in their order. (1) No authority was cited in support of the proposition that the administrator of the affairs of an insolvent company or firm is not entitled to take over the performance of a remunerative contract unless he agrees also to take over and execute another contract the execution of which would involve the estate in loss. In this case the contracts of 1902 and 1903 are separate and independent and might have gone to different contractors. They are different in their subject-matter and in their terms and conditions, nor is there any reference made in the later to the earlier contract. Although Mr Sharp became the administrator of the company's affairs, first in the character of receiver and afterwards as liquidator, it is still the company in liquidation that is responsible for the performance of its obligations to creditors. What happened was really this. The company by reason of insolvency was unable to perform its obligation under the first contract to maintain the roads for ten years. It thereby disaffirmed the contract so far as unexecuted and became liable in damages for non-fulfilment; but through the intervention of the liquidator the company was able to perform and did perform the second contract to the extent of paving the roads, and undertook to maintain these roads for the stipulated term of five years. Now I do not know of any rule of law which requires that a party who has in fact performed one of its contracts should be treated as if it had failed in performance merely because he has refused or failed to perform a different and unconnected contract obligation.

(2) I think that the Corporation of Glasgow are not well founded in fact when they say with reference to the second contract that Mr Sharp only undertook to pave King's Drive and Bridge and did not undertake to keep these roads in repair for five years. Mr Sharp certainly insisted, as he had a perfect right to do, that he should be paid 80 per cent. of the price of paving the roads before he could be called on to lay out a further sum on their maintenance. But I agree with the Lord Ordinary that on the face of the correspondence Mr Sharp fully recognised his obligation to maintain the roads for five years as a term of the contract which he had taken over and was in the course of carrying into effect.

(3) The chief part of the argument for the Corporation of Glasgow was directed to support their contention that they are entitled to retain the price of paving the streets, which are the subject of the second contract, in security of the unfulfilled obligation under the first and second contracts to maintain the roads there referred to. Their argument appears to me to be founded on a complete misapprehension of the principle of retention in cases of bankruptcy or insolvency. In such cases, if the insolvent estate has a liquid claim against a solvent debtor, who again has a liquid claim against the insolvent estate, the principle of compensation is applied exactly as it would be if both parties were solvent. But if the claim of the solvent party is not liquid, *e.g.*, if the work has been done but the time of payment has not arrived, then by an equitable extension of the principle of compensation he is allowed to retain the money which he owes against his claim on the insolvent estate, so that he may not suffer the injustice of having to pay his debt in full while only receiving a dividend on his own claim. But this principle of bankruptcy law presupposes reciprocal obligations which are both existing at the time of the declaration of insolvency, although only one of them is, it may be, immediately exigible. It has no application to the case of a new obligation arising after bankruptcy or declaration of insolvency, when the rights of parties are irrevocably fixed. In the present case, in dealing with the claim under the first contract the Lord Ordinary has given effect to these principles of bankruptcy law, because although the obligation to maintain the roads is a continuing obligation spread over a period of ten years, his Lordship has treated the failure to maintain the roads as if it were failure to perform an obligation immediately prestable, and has given decree for the estimated cost of maintaining the roads during the stipulated period. But the case of the second contract is wholly different. When the Asphaltic Company became insolvent the company was proceeding with the paving of the roads, and the work was continued and completed upon the undertaking of the liquidator to make and maintain. There never has been a breach of the second contract on the part of the company in liquidation, and it follows that there

is no claim of damages to be enforced either by compensation or retention. It is of course possible that the obligation to maintain may not be completely performed, but as much may be said of any current obligation by a solvent debtor, and it was to protect itself against this risk that the Corporation stipulated for the retention of 20 per cent. of the price to cover the maintenance of the roadway for five years. As to the second period for five years, the Corporation incurs no risk, because for the repairs to be done in the second quinquennial period the contractor is to be paid. At the time of the insolvency, and down to the present time, the Corporation has no claim, liquid or illiquid, against their contractors, but only the possibility of a claim against which they are fully secured by the conventional right of retention of 20 per cent. of the price. As regards the claim of the Corporation to retain the sum due to Mr Sharp on behalf of the company against their claim of damages under the first contract, I need only point out that, when the first contract was broken by the insolvency of the Asphaltic Company, Mr Sharp's claim under the second contract did not exist, because the claim is for work done since he took over the contract. I think it is perfectly clear that the rights of the Corporation as fixed at the date of the insolvency cannot be extended to the effect of allowing them to withhold payment of a claim arising after the company went into liquidation, and for which value has been given in labour and material.

(4) The fourth and only remaining point is that 'the Corporation suggest that the original Asphaltic Company had not the power to delegate the execution of the contract for maintaining the roads to the new Asphaltic Company which took over the business. It is not said that the new company has disaffirmed the contract, or that it was unable to execute it. I agree with the Lord Ordinary that there is no *delectus personæ* in such a contract, the execution of which consists chiefly in manual labour. The judgment of Lord Chief-Justice Cockburn referred to by the Lord Ordinary is I think conclusive on this point. That was a case of contract for the repair of waggons, and the Lord Chief-Justice, delivering the judgment of the Court, says—"We cannot suppose that in stipulating for the repair of these waggons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendants attached any importance to whether the repairs were done by the company or by anyone with whom the company might enter into a subsidiary contract to do the work." (*British Waggon Co.*, 5 Q.B.D. 149). His Lordship then points out that it is quite customary for a manufacturing concern to perform part of its undertaking by handing it over to other traders. As in my opinion all the points maintained as against the Lord Ordinary's judgment have failed, it follows that his Lordship has rightly dismissed the action at the instance of the Corporation of Glasgow except to the extent of the sum of £96, 2s., for which he has given decree, and has rightly decerned in terms of the conclusions of the summons in the other action, and that both interlocutors should be affirmed.

LORD KINNEAR—I agree with your Lordship.

LORD PEARSON—I am of the same opinion.

The LORD PESIDENT was absent.

The Court adhered.

Counsel for the Reclaimers — Cooper, K.C.—Morison, K.C.—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondent—Scott Dickson, K.C.—C. H. Brown. Agent—F. J. Martin, W.S.

Saturday, February 2.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

M'MILLAN *v.* THE ACCIDENT INSURANCE COMPANY, LIMITED.

Insurance—Policy — Form of Proposal — Agent and Principal — Answers Signed by Insured but Filled in by Agent of Insurers not in Accordance with Information Supplied—Liability.

A person who signs a proposal for insurance, particularly a proposal by which he warrants that the statements contained in it are true, and that the proposal itself shall be taken as the basis of the contract, cannot be excused by either hurry or carelessness from reading over the paper which he signs, and if he chooses to take the risk of trusting that another has drawn up the document as he desired it, he must take the consequences if there be statements above his signature which are false.

A party signed a proposal form which contained an untrue answer to a question, but averred that he had communicated the truth to an agent of the company, who filled up the answers, and that he had not read them over before signing, as he relied upon the integrity of the agent. The proposal form bore on its face a statement that the company would not be responsible in respect of knowledge of, or notice to, their agent not communicated to the company in writing.

Held that the mis-statement in the proposal absolved the company from liability under the policy.

William M'Millan, builder and contractor, 73 Smith Street, Govanhill, Glasgow, brought an action against the Accident Insurance Company, Limited, for the sum of £218, 3s. 7½d.

The following narrative is taken from the opinion of the Lord Ordinary (SALVESEN):