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HODGINS, MASTER IN ORDINARY. MARCH 21ST, 1892.

MASTER'S OFFICE.

RE SUN LITHOGRAPHING CO.

Company—Winding-up—Meeting of Creditors—Winding-up Act, R. S. C. ch. 129, sec. 19—Necessity for Submission of Specific Questions.

In the course of a reference for the winding-up of the company, a question arose as to the terms of an order authorizing a meeting of creditors.

THE MASTER:—On the 14th instant I made an order for the submission to a meeting of creditors of two specific questions, and the draft minutes ask a general reference of undefined questions to the proposed meeting.

The English Rule, (45) provides that the liquidator shall give notice of the matter upon which the Judge desires to ascertain the wishes of creditors and contributories. And in this case the liquidator objects to any other matters than those asked for in the notice of motion.

It would seem from the reference to cases that specific questions, and not general and undefined questions, are, according to the English practice, the only ones authorized. And this seems reasonable from the fact that the creditors who have the right to attend may delegate that right to a proxy or agent, and they ought, therefore, to know the specific matters affecting their interests in the winding-up upon which the Court desires to ascertain their wishes. To do otherwise would be to leave creditors residing in foreign countries or at a distance from the place of meeting to the discretion of their proxy, who would not be bound by specific instructions

cn general or undefined questions or matters, as he would be on the specific questions stated in the notice to creditors calling the meeting.

These specific questions may be held to make the proposed meeting a special meeting, and the usual rule applicable to special meetings is that the business of such special meeting should be distinctly specified in the notice calling it.

Besides, it has come out in evidence that money considerations to procure proxies for votes at the informal meeting have been offered, and in view of such offers, I do not consider it in the interest of creditors or of justice that the voting power of proxies or agents of absent creditors should be enlarged so as to enable them to act without specific instructions on general and undefined matters at this meeting.

So that the creditors may be fully informed of the action of the Court, it will be proper to direct that a copy of Mr. Justice Ferguson's order and of my own shall be enclosed to the creditors.

HODGINS, MASTER IN ORDINARY. JUNE 11TH, 1892.

MASTER'S OFFICE.

RE SUN LITHOGRAPHING CO.

Company—Winding-up—Meeting of Creditors—Winding-up Act, R. S. C. ch. 129, sec. 19—Notices—Form of—Time for Issuing—Objections—Waiver—Stay of Proceedings—Costs.

In the course of a reference for the winding-up of the company a meeting of creditors was held, as to which objections were taken by certain of the creditors.

THE MASTER.—In this case certain creditors of the above company, Walter Raine, George Farquhar, and Charles Farquhar, obtained an order on the 14th March last directing that a meeting of the creditors of the company should be summoned pursuant to the statute, to be held on the 28th April, for the purpose of ascertaining their wishes: 1st, whether further proceedings should be taken to establish the alleged liability of the contributories; and 2nd, whether the claim of Charles Farquhar as a creditor (one of these applicants) should be further contested.

The application was partly founded upon the proceedings of an informal meeting which had been called by the liquidator on his own authority on the 23rd and 27th February last, and on the evidence adduced in support of the motion.

The meeting of creditors under the order was held on the day appointed, at which it appears 36 creditors were represented in person or by proxy.

Objections have been taken by the creditors who obtained the order for the meeting, that no proper notices were issued by the liquidator calling it, and that in any event the notices, such as they were, were not issued within the time limited by the order of the 14th March.

By that order it was directed that the notice summoning the said meeting should notify the creditors of the purpose for which it was summoned, as thereinbefore stated, and that copies of the order and of the order of Mr. Justice Ferguson made on the same date should be enclosed with such notice; and that the same should be sent by the said liquidator to each creditor by registered letter post-paid, or on or before the 24th instant.

The liquidator appears to have prepared no separate notice of his own, but to have sent by registered letter to the creditors named in exhibit A. to his affidavit, printed copies of the two orders directed by the order calling the meeting, and in which were specified its objects and the time and place at which it was to be held.

There are as a general rule three essential matters concerning such meetings in respect of which the creditors are entitled to notice: the time, the place, and the business proposed to be transacted. The order calling the meeting provided for all these, and I think the want of a special notice from the liquidator giving precisely the same information should not invalidate the meeting. See further In re London and Mediterranean Bank, 37 L. J. Ch. at p. 537, per Selwyn, L.J.

But it appears that the creditors who now take this objection were present at the meeting together with their respective solicitors, and made no objections to the regularity of the meeting, but took an active part in its proceedings and voted on the various resolutions submitted to the meeting.

In In re British Sugar Refining Co., 3 K & J. at p. 417, Sir W. Page Wood, V.-C., thus answered a similar objector: "You have come here after having accepted notice of the

meeting; you have no pretence for saying you knew nothing of it; you were present; you raised no question as to the regularity of the meeting, . . . and now you come . . to ask the Court summarily to relieve you by striking you off the register." And he intimated that such an application must be negatived. He further intimated that where parties had notice in effect and substance of the calling of a meeting, non-compliance with the provisions in the deed of arrangements as to advertising meetings, would not invalidate the meeting nor make its proceedings irregular.

And in the United States Courts a similar rule prevails. Thus in Kinton v. McAlpine, 5 Fed. Rep. 737, it was held that if parties complaining of want of proper notice attend and take part in the deliberations and actions of a meeting they are estopped from denying its legality. for want of such notice. See also Jones v. Milton, 7 Ind. 547, and Schenectady v. Thatcher, 11 N. Y. 102.

The rule also applies to corporation and other elections. In Rex v. Slythe, 6 B. & C. 240, Lord Tenterden, C.J., said: "It has been generally considered a rule of corporation law, that a person is not to be permitted to impeach a title conferred by an election in which he has concurred." And Macaulay, C.J., in Regina v. Parker, 2 C. P. 15, expressed the same opinion, adding that such a rule was applicable where all the facts were known to, or susceptible of being readily ascertained by, the parties, and no new information had been acquired by them that might not have been readily had before as well as after the election. See also Rex v. Chetwynd, 7 B. & C. 695.

The purpose of the notice referred to is to give those who are interested in the subject matter an opportunity of having a voice in what is to be done at the meeting, of making themselves members of it, and of taking part in its deliberations and actions.

A further objection made by these parties is that the two orders were not mailed to the creditors within the time directed by the order of the 14th March. The answer in part to this is, that one of the parties who obtained the order for the meeting did not furnish the liquidator with a copy of Mr. Justice Ferguson's order (as he was the party who had obtained that order) until the 26th March—two days after the time limited for mailing the notice to creditors. So, apart from the question of waiver of this objection by all of these parties attending the meeting, it does not lie in the

mouth of one of them to complain of a delay which he was instrumental in causing.

The liquidator has been cross-examined on his affidavit as to the notice to creditors, and he has stated that in his opinion the notices were issued in sufficient time for creditors, even those in England, to be notified; and he adds that in his opinion 90 per cent. of the creditors were present at the meeting. I must therefore hold that the meeting was duly called and held.

The result of the vote of the meeting is that 24 creditors were in favour of proceeding with the winding-up and 11 against it. But I am asked to consider "the amount of the debt due to each creditor." Neither the liquidator nor the parties who obtained the order for the meeting agree on the respective claims of creditors, and as a matter of fact it has not yet been definitely ascertained how much is due to each of the creditors. Neither of the parties have furnished me with any data or schedule by which I can arrive at the amounts due to each creditor so as to get the full aggregate liability of this company to its creditors. Nor is there any provision in the order as to how the amount of the debt due to each creditor is to be ascertained. And if the ascertainment of the debts due creditors is material in this proceeding, the observations of Sir W. M. James, L.J., in In re Albert Life Assurance Co., L. R. 6 Ch. at p. 386, are appropriate: "In order to enable the majority to bind the minority, the Court must be satisfied that there is a meeting of creditors the amounts of whose debts can be estimated . . . before it will interfere to enforce that which the large majority think the most beneficial way for them to get their claims satisfied. . . . But here the Court really has no data by which it can be at all ascertained what the claims of the creditors are." And it is further essential for the Court to know not only the number of the creditors voting, and the amount of their debts, but also the reasons they assign for the conclusions arrived at, and here the creditors desiring to stay these proceedings give no reasons for their policy in so seeking to bar the wishes of the majority of the creditors: See In re Great Western (Forest of Dean) Coal Consumers' Co., 21 Ch. D. 769.

The case in L. R. 6 Ch. 386 to which I have referred, and the case of Ex p. Totty, 29 L. J. Ch. 702, may also be referred to as to the effect of the vote of meetings of creditors in certain matters in winding-up proceedings. Practically the effort of these parties to induce creditors to allow a disputed

claim at the amount fixed by the creditor may be said to partake of some of the qualities of a compromise, and ought to come within the rules governing compromises; while the effort to relieve the alleged contributories of their liability for the amounts claimed by the liquidator against them would seem to be subject to the objections of Kindersley, V.-C., as an attempt to compel a section of the creditors of the company to take less than what perhaps they would be entitled to in the ordinary course of a winding-up proceeding, and that too without the reasons for such a policy being fully disclosed to the creditors and Court.

I think, therefore, that the liquidator is entitled to an order removing the stay of proceedings under the winding-up order made in the order of the 14th March.

I cannot charge the estate with the costs of these proceedings; and I think the liquidator is entitled to his costs of the order of the 14th March and the proceedings thereunder, and of this application, against the parties named in that order.

SCOTT, LOC. MASTER AT OTTAWA. MARCH 24TH, 1905.

MASTER'S OFFICE.

RE HARRIS, CAMPBELL, AND BOYDEN FURNITURE CO. OF OTTAWA.

DOUGLAS'S CASE.

Company—Winding-up—Contributory — Payment for Shares —Book-keeping Entries — Credit of Company's own Moneys—Audit—Estoppel.

Application by the liquidator to settle C. A. Douglas on the list of contributories, for the sum of $2,000 on account of 30 shares of capital stock of the par value of $100 a share.

J. E. O'Meara, Ottawa, for the liquidator.

G. F. Henderson, Ottawa, for Douglas.

THE MASTER.—The proposed contributory was one of the original corporators, and was president of the company from its inception. He asserts that he paid $3,000 in cash for the stock, and holds scrip certificates representing the shares as

fully paid up. The facts are not in dispute and are as follows:—

The business for the taking over of which the company was organized was formerly carried on by R. P. Harris junior and W. J. Campbell, under the firm name of Harris & Campbell. By an agreement embodied in two letters, both dated 6th October, 1900, in consideration of Douglas's aiding in the formation of the proposed company and subscribing for 30 shares of stock, R. P. Harris junior, W. J. Campbell, and one Joseph Boyden undertook to pay the several calls on the shares so subscribed to the extent of $2,000, or at their option to pay Douglas $2,000 in cash. It is not contended that this agreement was ever adopted by the company. It was never the intention that it should bind any one but the parties to it. The debt to Douglas arising out of it remained always the debt of Boyden, Harris, and Campbell.

The company were incorporated on 12th October, 1900, under the Ontario Joint Stock Companies Act, and on 6th November entered into an agreement, varied by a supplementary one, dated 25th February, 1901, for the taking over of the business on the following terms: the company purchased all the assets of the firm of Harris & Campbell, including real estate, plant, stock in trade, and book debts, and covenanted to assume all its liabilities, as set forth in a schedule, and to allot to the two members of the firm, and to R. P. Harris senior and Thomas Campbell, who, though not members of the firm, joined in the agreement, $12,000 of stock, provided the book debts should realize $15,500. If the book debts, however, realized less than $15,500, then the vendors were to be liable on their stock for the shortage. If, on the other hand, the book debts realized more than the sum named, the vendors were to be entitled to the excess, either in stock or cash. The book debts are described as "all the book debts and bills receivable set forth in the column headed 'good' in the first schedule, but excluding such book debts or commercial paper as entered in the column marked 'doubtful' in the said first schedule." No schedule of book debts appears ever to have been attached to the agreement, but by a separate document of even date certain specific book debts totalling over $16,000 are assigned. None of these are marked either "good" or "doubtful."

An account was opened in the company's ledger in the name of Harris & Campbell, to which was credited various amounts respectively representing the value of the real estate, stock, and plant, and the sums from time to time collected on account of book debts. The total of the latter was $14,678.68. The account is charged on the debit side

with the liabilities assumed by the company, a sum of $911.87 paid on account of liabilities of the firm not included in those the company were to assume, amounts carried from time to time to the credit of the stock accounts of the Harrises and Campbells, two sums of $60 each paid in cash to R. P. Harris junior and W. J. Campbell, two amounts of $500 each entered as "cash," and an amount of $1,000 entered as "C. A. Douglas." R. P. Harris junior was secretary-treasurer of the company, and the books were kept under his supervision.

The company, when paying the liabilities, succeeded in obtaining a considerable reduction, and the amount so saved was, pursuant to a resolution of the directors, divided among the shareholders. The collective amount coming to the Harrises and Campbells was $600, a cheque for which was issued but indorsed back to the company and credited on stock. The stock of the Harrises and Campbells was, however, never paid up in full, and all four will appear on the list of contributories for substantial amounts.

The first of the $500 "cash" debits is the amount of a cheque issued 6th February, 1901, payable to "Harris & Campbell," indorsed by them, and handed to C. A. Douglas, who deposited the amount to the credit of his private bank account. The deposit was made on 6th February, and on the same day Mr. Douglas issued his cheque to the company for $1,000, which amount was placed to the credit of his stock. For some reason, not explained, this credit appears as of 31st January, but the cheque is dated 6th February.

The second $500 "cash" debit is the amount of a cheque issued 1st April, 1901, payable directly to Mr. Douglas, and deposited by him as before, on 4th April. Mr. Douglas, as on the former occasion, concurrently issued his cheque to the company for $1,000, which amount was placed to the credit of his stock. This cheque, though dated 1st April, was not deposited until 4th April, nor paid until 6th April.

The $1,000 debit is a book-keeping entry, the amount being carried from the Harris & Campbell account to the credit of Mr. Douglas in his stock account.

The two cheques for $500 are signed for the company by C. A. Douglas, as president, and R. P. Harris junior, as secretary-treasurer, and countersigned by Joseph Boyden, as managing director. The scrip is dated 22nd February, 1902, and is signed by Douglas and Harris as president and secretary-treasurer respectively.

Such being the facts, I have no hesitation in finding that Mr. Douglas still owes $2,000 on account of his stock, and

that he must be placed on the list of contributories for that amount. The money standing to the credit of Harris & Campbell in the company's books was the company's money. It was collected by the company from book debts which, under the assignment, belonged absolutely to the company, although under the terms of the agreement collections were to be credited on the Harris & Campbell stock. It was suggested that a portion of the amount might have been collected from "doubtful" debts, which remained the property of Harris & Campbell. Mr. R. P. Harris junior in his evidence says that there may have been some of these collected, but that, if so, the amount was very trifling. If this affects the question at all, the onus is entirely on the proposed contributory. The company had nothing to do with any debts other than those specifically assigned to them, and I cannot assume that they collected any that were not their own.

It was also pointed out that a portion of the $600 bonus was the property of Harris & Campbell, the balance, of course, belonging to R. P. Harris senior and Thomas Campbell. I do not see how this circumstance affects the matter. The amount does not appear to have been credited in the "Harris & Campbell" account at all, and, whether it was or not, it was never mixed with the proceeds of collections, but was specifically credited to stock.

As the money standing to the credit of the "Harris & Campbell" account did not belong to R. P. Harris junior or W. J. Campbell, they had no right whatever to draw any of it or have it appropriated to purposes other than that contemplated by the agreement. That certain portions of it were, improperly as I must hold, paid out to them or to their creditors, cannot alter the matter. It follows that the payments by Douglas were, to the extent of $2,000, made out of the company's own money, and were therefore not payments at all. This is abundantly clear as to the $1,000 credited on the stock on 31st August. It is not pretended that any money passed. It was a mere book-keeping entry. I think it is also true as to $500 out of each of the $1,000 payments of 6th February and 1st April. On both occasions the company's cheque was in Mr. Douglas's bank before the $1,000 was paid, so that the money, if indeed any money can be said to have passed, was clearly ear-marked. The transaction was in effect the same as in the case of the August payment, and the parties could not, by going through the form of exchanging cheques, alter its nature. It must be remembered that all of the signatories to the company's cheques, as well as to the scrip eventually issued, were, in-

dividually, parties to the agreement out of which the debt to Douglas arose.

The company's financial statements for 1901, 1902, and 1903 are put in, shewing balances due by Harris & Campbell at the end of the respective years arrived at, after debiting the account with the amounts now in question. Each of these statements was duly audited, and was adopted at the annual meeting at the beginning of the following year. The liquidator was then the company's auditor. As the results only and not the details were submitted to the meetings, the adoption of the statements does not bind the company; and the liquidator, as he is now acting in a totally different capacity, is in no way estopped by his conduct when auditor, from taking the position he now assumes.

It is said that the parties acted openly and bona fide in what they did, and that most of the shareholders either knew or ought to have known what was being done. Assuming it to be important, actual notice is not brought home to any one outside the parties directly interested; and the question of bona fides cannot affect the result.

I have examined the cases cited by Mr. Henderson, but they do not assist him. They all turn on the question of what is a cash payment for stock. There was no necessity for Mr. Douglas's paying cash for his stock. Any valuable consideration accepted knowingly by the company would have sufficed. But to the extent of the $2,000 in question, no consideration whatever passed from him to the company. He must therefore be settled on the list of contributories for that amount, as asked by the liquidator.

CARTWRIGHT, MASTER. MARCH 27TH, 1905.

CHAMBERS.

SMITH v. SMITH.

Trial—Order Directing Preliminary Trial of Certain Questions of Law—Separate Issues Disposing of Whole Action—Reasonable Probability of Establishing Propositions of Law — Rule 259 — Jurisdiction of Master in Chambers.

Motion by defendants Robert Jaffray and W. J. Smith, two of the executors of the will of John B. Smith, for an

order under Rule 259 directing a preliminary trial of certain issues arising in the action.

G. L. Smith, for applicants.

J. E. Jones, for defendant company.

T. P. Galt, for plaintiffs.

THE MASTER:—This is an action brought by the widow and her children (all but one) against two of the executors of the late John B. Smith, and others.

The testator died on 7th March, 1894. His will was dated 25th August, 1893. Probate issued on 4th December, 1894, to Robert Jaffray, William Jaffray Smith, and Francis A. Smith. . . . .

The testator was married 3 times. The issue of the first marriage was an only son. The second wife . . . had 3 sons and 3 daughters, who with the eldest son and the executors and one of the children of the widow, are the (individual) defendants in the action.

By his will the testator devised all his estate to his 3 executors. His 3 elder sons had been taken into the business some years before his death, and by his will he directed (clause 8) that, "as my son James has been long connected with the business . . . Robert Jaffray shall be satisfied what is one-ninth of my estate, and such one-ninth shall be placed to his credit in the business, and I desire that he be admitted as a partner in it." Afterwards he deals with "the rest of my estate," and directs that one-half of the income is to be divided among his children (other than the 4 sons in the business), and the remaining half is to go to his widow. After her death the principal is to be divided among his children except the 4 sons already named.

By the 12th clause the testator provided as follows: "In all cases where any question may arise as to the intention or construction of this will, or under the carrying out of the trust, such question shall be decided by Robert Jaffray, whose decision shall be absolute, uncontrolled, and final."

In September, 1903, it was decided that the interest of the estate in the business could be safely withdrawn; and an agreement to that effect was drawn up, fixing the share of the estate at $40,000. This plaintiffs would not accept without further information, which was not given to such an extent as to satisfy plaintiffs, who thereupon requested inspection of the partnership books. This defendants refused to permit.

Before this, and some time in 1902, Mr. Jaffray, assuming to act under the power given in the 12th clause of the will, had agreed to transfer the interest of the estate to the partnership for a sum of $40,000. This was after the passing of the executors' accounts before the Surrogate Judge on 3rd November, 1902, when he found the capital of the estate in the business to be $26,000. And it is alleged that plaintiffs admitted the accounts to be correct, and are bound by such acknowledgment.

Both these propositions are denied by plaintiffs, and this action is brought to have the interest of the estate in the business ascertained, and the alleged transfer for $40,000 set aside, and that plaintiffs be declared entitled to follow the assets of the business into the hands of the company into which the business was changed after such alleged transfer.

A motion has now been made on behalf of the executors Jaffray and W. J. Smith for a preliminary trial to determine (1) the authority of Robert Jaffray to settle the accounts between the estate and the partnership, and to the effect of the passing of the accounts in November, 1902. . . .

No objection was taken to my jurisdiction to hear the motion. But I am not to be considered as deciding that I have power to deal with it. I remain of the opinion expressed by me in the similar case of Bank of Montreal v. Morrison, 3 O. W. R. 303.

Unless the separate issues, if found against plaintiffs, would admittedly end the action, I am clear that the rule invoked cannot be applied.

I think I am bound to consider further, before directing a preliminary trial, whether there is any reasonable probability that defendants' two propositions, or either of them, can be sustained. I cannot say that any such reasonable probability exists.

If the language of the 12th clause of the will can bear the interpretation now sought to be given to it, the will would read as if the testator had said that Mr. Jaffray was to be allowed to apportion the estate as he might see fit. And this in spite of the positive devise to his children other than the four sons, and his express direction that they should consider their interests in the partnership as full provision for them. That this would be the effect of the success of defendants' submission is plain. Here he has assumed to transfer to the sons for $40,000 the interest of the other children in the business. And this in opposition to their wishes, as they allege it to have been worth at least twice that sum. It also seems questionable if the share of the testator could be conveyed or

any binding agreement made to convey without the concurrence of Francis A. Smith. There is no allegation that he has conveyed his interest as executor to his co-executors, or that the heirs are all sui juris and have consented to such transfer.

If it is seriously argued that Mr. Jaffray has any such absolute power as is suggested, it would seem to have been the simpler course to have moved for the opinion of the Court before entering into the agreement of September, 1903.

But I cannot see why, if he is right, the testator did not leave him power to divide his estate among the children as he might see fit, indicating merely his ideas of what would be fair and reasonable. I am so sure that this contention will probably fail, that I do not think any preliminary trial should be ordered.

That such an order would inevitably cause serious delay in the winding-up of the estate (if unsuccessful) is shewn by Graham v. Temperance and General Life Assurance Co., 16 P. R. 536, 17 P. R. 271. In that case the preliminary issue was never decided in fact. The case went to the Court of Appeal, and was settled before judgment in December, 1897, having been three years in its abortive journey to the Court of Appeal by way of the Divisional Court.

As to the other point, it seems to me more unlikely to succeed even than the first. At what figure the share of the estate in the business was put, was not a matter of any consequence to the parties at the time, No disposition was affected by it, and so there could not be any estoppel.

If there had been any disagreement on the amount so given, the Surrogate Judge could not have decided the question. . . .

The whole matter can best be dealt with at one trial. . . .

The costs of the motion may be to plaintiffs in the cause.

MEREDITH, J. MARCH 27TH, 1905.

WEEKLY COURT.

GRAHAM v. McVEITY.

Chose in Action—Assignment of—Salary of City Solicitor—Agreement—Repudiation—Action—Notice to City Corporation—Service on Treasurer — Public Policy — Public Officer—Equitable Assignment—Parties.

Appeal by defendants from report of local Master at Ottawa, the reasons for which are reported ante 395.

W. N. Ferguson, for defendants.

G. F. Henderson, Ottawa, for plaintiff.

MEREDITH, J., dismissed the appeal with costs.

TEETZEL, J. MARCH 27TH, 1905.

TRIAL.

BULLION MINING CO. v. CARTWRIGHT.

Bill of Exchange—Failure of Consideration—Purchase of Shares in Mining Company — Failure to Allot Shares —Abandonment of Enterprise—Recovery back of Moneys Paid for Shares—Promissory Notes—Effect of Renewals.

Action on a bill of exchange for $3,046.85 drawn by plaintiffs and accepted by defendant.

Defendant pleaded an entire failure of consideration, and counterclaimed for $3,000 paid by him to plaintiffs on 17th September, 1899, to take up a promissory note which had been made by him to plaintiffs, upon the ground that the consideration for the payment had entirely failed.

E. Bristol and Eric N. Armour, for plaintiffs.

George Bell, for defendant.

TEETZEL, J.:—Plaintiffs are a mining company incorporated by Ontario letters patent dated 18th February, 1893, one of their purposes and objects being "to buy and sell and to deal in mineral properties and mines," and upon the evidence that appeared to be the chief business carried on by the company.

Among other properties, they owned two mining locations in the vicinity of Rat Portage, known as locations D. 233 and D. 389 . . . and early in 1899 plaintiffs began development work on these two locations, and about the same time suggestions were made to form a subsidiary company for the purpose of acquiring these two locations from plaintiffs. . . One Macdonald, on 15th July, 1899, made a written offer to plaintiffs wherein he proposed that he and one Sproule should undertake the flotation of a company to operate the two locations, to be called "Bullion No. 2 Gold Mining Company of Ontario, Limited." The acceptance of the offer . . . appears in resolutions passed by plaintiffs on 3rd August, 1899 . . .

Defendant had, through Macdonald, acquired a considerable interest in plaintiff company long before the suggestion was made to float the new company, and the correspondence shews that as a shareholder in plaintiff company defendant at first opposed the idea of the new company being formed to acquire the two locations, but . . . that Macdonald succeeded in convincing him not only that the new company

would be an excellent investment in itself, but that from the purchase money which plaintiff company would receive very substantial dividends would be paid on the stock he held in plaintiff company.

Macdonald had recommended him to take a one-fifth portion, being 60,000 shares, in the 300,000 that were proposed to be issued to and paid for by the promoters of "Bullion No. 2;" and, after a good deal of correspondence, defendant on 1st August writes Macdonald that he is ready to take one-fifth of the amount.

It was afterwards arranged that for these shares he should give his two promissory notes, one for $3,000 dated 14th August, 1899, at two months, and the other for $3,000 dated 16th October, payable in 4 months, both to plaintiffs' order.

The first of these notes was paid at maturity, and the other was twice renewed, and the last renewal of it is the acceptance sued upon herein; and it is the amount of the first note paid at maturity that defendant is counterclaiming to recover. . . .

It appears that as late as 24th March, 1900, there still remained unsold about 50,000 of the 300,000 shares, the proceeds of which at ten cents per share were to be paid to plaintiffs as the cash payment for the two locations; also that plaintiffs had expended about $13,000 in development work, which under the agreement was to be a charge on the treasury stock, none of which had been sold.

It also appears from the correspondence that the South African war and the collapse of "War Eagle" had, among other incidents, made it difficult to sell the stock. Excuses were also made from time to time that, owing to delay in getting reports from plaintiffs and other material for prospectus, sales had been delayed.

No further sales of the stock having been effected, plaintiffs shut down development work on 1st May, 1900, and this event was followed by a considerable amount of correspondence, and it is evident that before the end of May, 1900, the parties had little hope that the original scheme would be carried out, and it seems to have been practically abandoned; and during the remainder of 1900 different efforts were made to sell the stock at a lower price than that proposed in the original scheme, but, the market for gold mining stock having become demoralized, nothing was accomplished.

There never was any allotment or issue of any of the stock of "Bullion No. 2."

I find, upon the whole evidence, that the original purposes and objects of the formation of "Bullion No. 2" have

through no fault of defendant, become in a business sense utterly impracticable, and that all expectation of realizing the successful carrying out of the agreement, as originally entered into between plaintiff and Macdonald, and which was the basis of defendant's agreement, has been abandoned.

Plaintiffs did not, in fact, as required by the agreement, convey the said locations to "Bullion No. 2." In January, 1901, a transfer appears to have been executed, but not registered, so that, under sec. 41 of R. S. O. 1897 ch. 138, plaintiffs are still the owners.

I also find that Macdonald was the agent of plaintiffs to sell the 60,000 shares to defendant, and was the agent of defendant only to pay over the purchase money and receive the shares. Plaintiffs have never been in a position to carry out the agreement made by their agent with defendant, and, in my opinion, therefore, are not in a position to enforce the agreement against defendant. See Fry on Specific Performance, 4th ed., p. 404 et seq., and cases there cited.

In other words, I think the consideration for the draft sued on has entirely failed.

It was argued on behalf of plaintiffs that, even if this view prevailed as to the original note given, the effect of the two renewals was to estop defendant from the defence of want of consideration in the original note. I do not find that there was any circumstances in connection with either of the renewals which furnished further consideration to support the renewal. I take it to be well settled that, if an original note is voidable for failure of consideration, no amount of renewing will cure the defect, unless some new consideration is introduced, and that a mere compliance with defendant's request to renew does not constitute such consideration.

[Reference to Edwards v. Chancellor, 8 J. P. 454; Hooker v. Hubbard, 102 Mass. 239; Daniel on Negotiable Instruments, 5th ed., p. 232.]

The action will, therefore, be dismissed with costs. As to the counterclaim: having already found that the company the stock of which plaintiffs agreed to sell to defendant was in effect an abortive enterprise, through no fault of defendant, and that the stock never has been and cannot be delivered,, I think, under the authorities, defendant is entitled to recover from plaintiffs the purchase money paid by him on account of such stock, such money having been paid by defendant for a consideration which has failed, and therefore recoverable. See cases cited in Bullen & Leake, 5th ed., p. 298; also Asphitel v. Circombe, 5 Ex. 147; Johnson v. Goslett, 27 L. J. 122; Confederation Life Association v. Township of Howard, 25

O. R. 187; Lindley on Companies, 6th ed., pp. 33-39, and cases there cited.

The amount paid by defendant to plaintiffs was $3,000, but I do not think it is a case for interest, under the provisions of the statute, before the filing of the counterclaim on 10th December, 1901.

There will, therefore, be judgment in favour of defendant against plaintiffs for $3,000, and interest from the above mentioned date, together with the costs of the counterclaim.

CARTWRIGHT, MASTER. MARCH 28TH, 1905.

CHAMBERS.

LOVELL v. TAYLOR.

Writ of Summons—Service out of Jurisdiction—Statement of Claim—Default Judgment — Irregularity — Setting aside.

Motion by defendant to set aside order permitting service on defendant abroad of the writ of summons in this action, the service on defendant, and judgment entered for default.

C. A. Moss, for defendant.

H. O'Leary, K.C., for plaintiff.

THE MASTER:—On 24th February an order was issued for service of the writ of summons on defendant, a citizen of the United States and resident of West Virginia. The order would seem to have been hurriedly drawn, as the important paragraph allowing service by notice is defective. The order only provided for service of writ, and limited the time for appearance to 12 days. Plaintiff assumed under this order to serve a statement of claim as well as the writ. This service was apparently made on 3rd March. If the copy of the order served on defendant was correct, as it should be, it would seem that the order was irregular in two important respects: (1) It purported to be signed by the local registrar, whereas under Rule 634 (3) it should have been signed by the local Judge, as he was then sitting in Chambers. (2) The order does not shew on its face any memorandum of entry, as required by Rules 636 and 637.

On these two grounds, amongst others, the defendant has moved to set aside the service and also the order.

The order was within the discretion of the local Judge, and I do not think I can interfere with that. It was argued that to allow only 12 days for appearance was "wholly unreasonable."

No doubt, it has been the practice here in such cases to allow 3 weeks for appearance and defence, especially where the action is against a foreigner. But that is not such a ground as would justify me in setting aside the order. . . .

The service, however, must be set aside for the two defects already noted, and also because there was no authority for service of any statement of claim. If this was necessary or desirable, leave should have been given in the order.

There was a further branch of the motion, viz., to set aside a judgment assumed to be signed in default of appearance after service of notice of writ and of statement of claim under the above order.

The relevant facts, which are not in dispute, are as follows:

Assuming that the defendant was served on 3rd March, the 15th would have been the last of the 12 days given for appearance under the order of 24th Februarv.

On 16th March judgment was signed for $1,122.65, "the defendant not having appeared and not having delivered any statement of defence." The indorsement on the writ claimed $1,207.86 as due on 23rd February on the two notes sued on.

When the judgment was signed the originals sent for service had not been received by plaintiff's solicitor. There was therefore nothing to shew default nor upon which to make the necessary computation in the usual way.

It might have been thought that these difficulties were insuperable. They were, however, attempted to be met by affidavits of plaintiff and of his solicitor, and by the fact that defendant, who was opposing a motion for judgment, had made an affidavit in which he stated that he had been served on or about 3rd March. It would seem that plaintiff was very urgent about the matter, as the defendant, who had come to the county town to arrange matters, was in some way arrested at the plaintiff's instance, and a motion for judgment forthwith was also pending.

No doubt, the irregularities were pointed out by the solicitor or the local registrar or both; but plaintiff must have insisted on judgment being signed and been willing to give ample indemnity for anything done under it if required.

It is difficult otherwise to see how any such judgment could have been signed under the undisputed facts of what we must hope is a very unusual case.

To say that Rule 574 was complied with by the affidavit of plaintiff's solicitor as to their existence and contents, in the absence of the necessary papers, and by his statement of what defendant had stated in his affidavit, is surely an "argument of despair."

The words of the Rule are plain: "The plaintiff shall file an affidavit of service of the writ or the notice in lieu thereof."

If it be said that by what was done here "Rule 574 had been substantially complied with," such a view was expressly reprobated in a similar case by Osler, J.A., in Appleby v. Turner, 19 P. R. 175, and by Street, J., S. C., at p. 148. But, however that may be, there is another objection equally fatal.

The judgment professes to be signed, "the defendant not having appeared and not having delivered any statement of defence."

Plaintiff seems to have overlooked the effect of his service of a statement of claim with the notice of the writ. By so doing he brought himself under Rule 246, so that 8 days were added to the 12 days allowed for appearance, and no default occurred before the end of 21st March. This is the construction given to Rule 246 by Holmested & Langton, at p. 422. I am also informed by the clerk of records and writs, and by his predecessor, that this has been the invariable interpretation in the central office.

The case of Appleby v. Turner, 19 P. R. 145 and 175, shews that where a plaintiff is taking judgment by default he must at his peril be strictly regular.

The order will be to set aside the judgment and service of notice and statement of claim with costs to be taxed and set off against plaintiff's claim, which is admitted to a certain extent.

MARCH 29TH, 1905.

DIVISIONAL COURT.

SANDWICH EAST (No. 1) ROMAN CATHOLIC SEPARATE SCHOOL TRUSTEES v. TOWN OF WALKERVILLE.

Schools — Separate Schools — Adjoining Municipalities—Three Mile Limit—Separate School Supporters—Notice —Recovery of Taxes.

Appeal by defendants from judgment of BOYD, C., ante 211, in so far as it declared that the supporters of separate schools resident in Walkerville, where there was no separate school, might by proper notice become supporters of the nearest separate school in Sandwich East within the limit of 3 miles from that school; and appeal by plaintiffs from the same judgment in so far as it refused to make or direct changes in the assessment rolls of the town for 1903 so as to change the body of ratepayers named, by withdrawing those who were supporters of separate schools.

J. H. Coburn, Walkerville, for defendants.

A. B. Aylesworth, K.C., for plaintiffs.

THE COURT (FALCONBRIDGE, C.J., MACMAHON, J., CLUTE, J.) dismissed defendants' appeal with costs; and allowed plaintiffs' appeal, holding that moneys collected by defendants for 1903 from separate school supporters who gave notice should be paid over to plaintiffs.

CARTWRIGHT, MASTER. MARCH 31ST, 1905.

CHAMBERS.

HONSINGER v. MUTUAL RESERVE LIFE INS. CO.

Parties — Several Plaintiffs — Distinct Causes of Action— Joinder—Election—Life Insurance Policies.

Motion by defendants for order requiring plaintiffs to elect which of them will proceed with this action, and dismissing it as to the other plaintiffs, on the ground of the improper joinder of several and distinct causes of action.

Shirley Denison, for defendants.

W. J. Tremeear, for plaintiffs.

THE MASTER.—In this action 6 plaintiffs ask relief against defendants in respect of 8 different insurance policies. Of these the earliest was made on 9th February, 1886, and the latest on 11th November, 1893. No two of them were made at the same time. . . .

After examination of the statement of claim, I think the case is governed by Mason v. Grand Trunk R. W. Co., 3 O. W. R. 621, affirmed ib. 810, 8 O. L. R. 28.

I cannot see how 8 different contracts made with 6 different persons, during a period of nearly 8 years, can be considered to be a series of transactions within the meaning of Rule 185.

It might as well be argued that if a land agent induced a dozen persons to buy lots at different times in the course of 2 or 3 years, this would be a series of transactions. The transactions impeached in one action must be connected by relation as in Universities v. Gile, [1899] 1 Ch. 55. Here I see nothing of the sort.

Nor does there seem to be any common question of law or fact. It is not even said that the literature used by the agents, which, it is alleged, contained statements untrue and misleading, was the same during the whole of the 8 years; nor are the policies identical in their terms.

If these 6 plaintiffs can unite in one action, then I do not see why 60 or 100 or any number of dissatisfied policy-holders might not unite in one omnibus action.

It would seem reasonably clear that the evidence as to each of the 8 contracts must be separate and distinct. There may, perhaps, be some evidence common to each. But every good purpose will be attained by seeing that the cases are tried at the same time. It might prove a serious disadvantage to plaintiffs if, with so many on the record, there should be delay to all from transmission of interest through death or otherwise at different stages of the action.

An order will go as asked; costs to defendants in any event.

MEREDITH, J. MARCH 31ST, 1905.

WEEKLY COURT.

GORING v. HAWKINS.

Building Contract—Findings of Referee—Appeal—Amendment—Reformation of Contract—Costs.

Appeal by defendants from report of local Judge at Welland upon a reference to him for trial of an action upon a building contract.

A. B. Aylesworth, K.C., for defendants.

D. L. McCarthy, for plaintiff.

MEREDITH, J.:—The question of liability in respect of the one item now in contest between the parties depends upon a true answer to the question, did plaintiff really agree to do the painting and glazing provided for in the specifications? If he did, there is no good ground for relieving him from the obligation; if he did not, there is no contention that he is liable, nor any evidence upon which a liability could be supported. If he did, then the evidence of defendant and his wife is so likely to be true that effect should be given to it, and indeed without it there might be enough to determine this question against plaintiff. The learned referee found that plaintiff did so agree, and yet is not liable. That cannot be. His finding as to the agreement was based solely upon a construction of the writing, and so dealing with it that finding is right. The question whether the writing truly evidenced the actual agreement between the parties was not fully gone into. Had plaintiff desired it and sought to have

had proper amendments made, his desire should have been acceded to. All that can now be done only as an indulgence upon proper terms. The learned referee, I have no doubt, struggled to do substantial justice between the parties, notwithstanding the difficulties which he seems, during the trial, to have thought prevented him from going into any question of a rectification of the writing. Without saying that he failed in that struggle, I am obliged to say that in point of law his method cannot be supported. My endeavour shall be to reach the like end—substantial justice—in a manner unobjectionable to the law.

If plaintiff within 5 days elect to have the reference reopened and if he pay to defendants their costs of this appeal within 5 days after taxation, and amend—as he may—the pleadings, seeking reformation of his agreement so as to release him from any obligation to do the painting and glazing, the report will be set aside and the matter referred back for trial; otherwise the appeal will be allowed with costs and the action dismissed without costs, and the money in Court will be paid out to plaintiff; and in future plaintiff will, doubtless, be more careful in preparing and signing contracts remembering that that which he actually agrees to do, not that which he intended to agree to do, if they differ, is, generally speaking, binding.

If a new trial is taken, all costs will then be as under order of reference originally, that is, in discretion of referee, except costs of this appeal, to be paid as above.

MEREDITH, C.J. MARCH 31ST, 1905.

WEEKLY COURT.

RE FARLEY.

Life Insurance — Designation of Beneficiaries — "Legal Heirs"—Trust—Reservation of Power of Revocation—Declaration—R. S. O. 1897 ch. 203, sec. 159, sub-sec. 1—Construction of—Preferred Beneficiaries—Next of Kin.

Motion by Harold E. Peagam and R. S. Dinnick for a summary order determining whether the claimant John Arthur Farley was entitled to $2,000 paid into Court by the Royal Templars of Temperance, being the moneys payable under an insurance certificate upon the life of Arthur Farley, who died on 15th May, 1904.

The certificate was made payable to the beneficiary or beneficiaries designated on the certificate, "the said member reserving the power of revocation and substitution of other beneficiaries in accordance with the provisions of the constitution and laws of the Order."

The assured left but one lineal descendant, the claimant John Arthur Farley, who was his grandson; several brothers and sisters of the deceased also survived him, as did the claimant Mary Lawson Farley, who was the widow of his deceased son William W. Farley.

By an indorsement on the certificate, made in September, 1901, the assured declared that the "mortuary benefit" should be paid to "Harold E. Peagam, R. S. Dinnick, and William W. Farley, executors in trust for legal heirs," reserving to himself "power of revocation and substitution of other beneficiaries in accordance with the provisions of the constitution and laws of the Order."

The assured subsequently executed an instrument, dated November, 1903, by which he declared that the moneys should be paid to his daughter-in-law Mary Lawson Farley for her own use and benefit.

The assured made his last will and testament, bearing date 5th October, 1903, whereof he appointed his daughter-in-law Mary Lawson Farley executrix, and by it he assumed to dispose of the moneys payable under the certificate, or the greater part of it, for her benefit.

H. E. Rose, for applicants.

W. R. Riddell, K.C., for John Arthur Farley.

A. Hoskin, K.C., for Mary Lawson Farley.

MEREDITH, C.J.:—. . . John Arthur Farley claims the whole fund, his contention being that the declaration indosed upon the certificate had the effect of making him, in the events that have happened, the sole beneficiary under it, and that being, as it is said he is, of the "preferred class," and of one of the classes of persons mentioned in sub-sec. 1 of sec. 159 of the Ontario Insurance Act, R. S. O. 1897 ch. 203, the declaration in his favour was an irrevocable one, and the subsequent declarations which the assured assumed to make were of no effect.

But for the decided cases to the contrary, I should have thought that there is nothing in sub-sec. 1 of sec. 159 to prevent the assured from reserving to himself the right to revoke a declaration which he makes in favour of a bene-

ficiary coming within any of the classes mentioned in the sub-section.

The provision of the sub-section is that the declaration shall create a trust "in favour of the said beneficiary or beneficiaries according to the intent so expressed or declared, and so long as any object of the trust remains. . . ."

If the condition which the assured has imposed or the power of revocation which he has reserved is disregarded, I do not see how it can be said that the trust is treated as one in favour of the beneficiary or beneficiaries according to the intent expressed or declared in the declaration, for where the assured has made a declaration in favour of a member of any of the classes mentioned in the sub-section, reserving to himself the right to revoke the trust thereby created, to hold that he may not exercise the power of revocation, as it appears to me, is not to give effect to the trust according to the intent expressed or declared, but the contrary. The decided cases, however, make it impossible for me to give effect to my own view: Mingeaud v. Packer, 21 O. R. 267, 19 A. R. 290; Re Harrison, 31 O. R. 314; Fisher v. Fisher, 25 A. R. 108; Lints v. Lints, 6 O. L. R. 100, 2 O. W. R. 550.

If then the declaration in favour of Peagam, Dinnick, and Farley, "executors in trust for legal heirs," because, in the events that have happened, the grandson, John Arthur Farley, is the person who answers the description "legal heirs," operates as a declaration in favour of the grandson within the meaning of sub-sec. 1, I am bound to hold that it was not revoked or affected by the subsequent declaration of the assured, assuming to declare other and different trusts of the moneys payable under the contract of insurance.

I have, with some hesitation, reached the conclusion that the declaration is one not operating under sub-sec. 1. . . .

[Reference to Mearns v. Ancient Order of United Workmen, 22 O. R. 34.]

After that decision, and in all probability in consequence of it, the Ontario Insurance Act was amended by the addition of what is now sub-sec. 36 of sec. 2 of R. S. O. ch. 203, which provides as follows: "In insurance of the person the phrase 'legal heirs' or 'lawful heirs' shall mean and include all the lawful surviving children of the assured, and also the wife or husband if surviving the assured, or where the assured died without lawful surviving children and unmarried, it shall mean those persons entitled to take according to the Statute of Distributions."

This provision is, I think, applicable to a declaration by the assured, though not embodied in the contract of insurance itself, and, if there has been no valid revocation of the declaration in favour of the "legal heirs" of the assured, the grandson, John Arthur Farley, is therefore the beneficiary entitled under the certificate to the whole fund.

The declaration, read with the interpretation section, is one in favour of Peagam, Dinnick, and Farley, executors, in trust for the lawful surviving children of the assured, and also for his wife, if she should survive him, and for the persons entitled to take according to the Statute of Distributions, if the assured should die without lawful surviving children and unmarried.

Although, in the events that have happened, John Arthur Farley is the person entitled to take, I do not think that the declaration is one in favour of a grandson of the assured, within the meaning of sub-sec. 1.

What I understand is meant by sub-sec. 1 is that where the assured has selected husband, wife, children, grandchildren, or mother, or any or all of them, to be the beneficiary or beneficiaries, and has so declared in the manner provided by the sub-section, a trust is thereby created in their favour, irrevocable as long as any object of the trust remains; but I see no reason for holding that where, as in this case, the assured has named as beneficiaries members of certain of these classes, and has provided that, if none of them survives him, the persons entitled to take according to the Statute of Distributions are to be the beneficiaries, the persons who take under this latter description, although they may be of the class or classes mentioned in sub-sec. 1, are to be treated as if they had been designated by reference to them as members of the class to which they happen to belong. The assured in such a case, as it appears to me, has in view all the beneficiaries whom he desires to prefer, his wife and children, and, failing these, is content that the persons who, according to law, become entitled to his personal estate, shall take, whoever they may happen to be.

This view is, I think, strengthened by the classification in the Act of beneficiaries as "preferred beneficiaries" and "ordinary beneficiaries" (sec. 2 (35), sec. 159 (1)), the husband, wife, children, grandchildren, and mother of the assured constituting the former, and all other beneficiaries the latter class; and, as I have said, a declaration in favour of such persons as may be entitled to take according to the

Statute of Distribution, as it appears to me, is not a designation as a preferred beneficiary of the person who is entitled to take, though he may happen to be a member of one of the classes who are called "preferred beneficiaries."

As I understand what was decided by my late brother Lount in In re Duncombe, 3 O. L. R. 510, 1 O. W. R. 153, he was of the same opinion as that which I have just expressed. See pp. 511, 512, of 3 O. L. R.

I come, therefore, to the conclusion that the declaration of September, 1901, was revocable and was revoked, and that John Arthur Farley is not entitled to the fund.

The costs of all parties should, I think, be paid out of the fund.

ANGLIN, J. MARCH 31ST, 1905.

TRIAL.

LABOMBARDE v. CHATHAM GAS CO.

Negligence — Electric Wire Left on Ground — Injury to Passers-by—Liability of Gas Company—City Corporation —Immediate Cause of Injury—Damages—Costs.

Action for damages sustained by plaintiffs caused by contact with a guy wire of defendants the corporation of the city of Chatham, which had become "live" by being thrown across or laid over one or two power wires of defendants the Chatham Gas Co.

G. A. Sayer, Chatham, for plaintiffs.

M. Houston, Chatham, and F. Stone, Chatham, for defendant Gas Company.

W. E. Gundy, Chatham, and J. M. Pike, Chatham, for defendant city corporation.

ANGLIN, J.:—Plaintiffs offered no direct evidence to shew how the wire became loose, no evidence to shew how it came to be across the wires of defendant gas company. The evidence adduced by plaintiffs was that on the evening preceding the accident this guy wire was lying loose upon the ground. One employee of defendant gas company, who was stringing wires on their poles on Van Allen street, saw this wire loose, and he says that there were 3 or 4 feet of it upon the ground. He did not notice that it was over the wires of the gas company.

but would not swear it was not then hanging over and from these wires, which are some 30 feet above the ground. The suggestion made by plaintiffs was that the workmen of the gas company cut this guy wire loose for the purpose of straightening a pole of the gas company to which it was attached, and which had certainly been straightened by these workmen. While this is not improbable, I could not find, upon the evidence adduced by plaintiffs, that it was established as a fact that this guy wire was cut loose by the workmen of defendant gas company. But the evidence adduced by defendant city corporation, upon their defence, made it perfectly clear that the guy wire was in fact cut loose by the workmen of their co-defendants.

Plaintiffs are, I think, entitled to ask that this evidence should be taken as part of their case. It was made clear that the witness who gave it was subpœnaed for plaintiffs, and that but for his refusal to make any statement to plaintiffs' solicitor, he would have been called as a witness for plaintiffs. If necessary, I would permit plaintiffs' case to be re-opened and this evidence made part of it.

I, therefore, find the fact established that the guy wire in question was cut and left loose by the workmen of defendant gas company engaged in straightening the company's pole to which it was attached.

But it has not been shewn that the company's workmen placed or drew this wire across or put it in contact with the power wires which they had been stringing. . . . The circumstances would, I think, justify an inference that the workmen of defendant company did heedlessly—perhaps unintentionally—put the guy wire in the position which, when the electric current was turned into the company's wires, made it dangerous. But, if the actual throwing of the loose guy wire over the other wires were the act of some passer-by, who thought thus to put it out of the way, or even of some mischievous urchin, it seems to me such a likely and probable thing to happen that it is not too remotely connected with the act of cutting the guy wire from its fastenings and leaving it loose on the ground to render those guilty of the latter negligence liable for the consequences which ensued, though an independent agency had intervened as their immediate cause. The original negligence of the workmen of defendant company was an effective cause of the injury to plaintiffs: McDowell v. Great Western R. W. Co., [1902] 1 K. B. 618.

I therefore find that defendant gas company are responsible for the dangerous position of the live wire in question on 10th August, 1904, and for the injuries which it occasioned to plaintiffs. The other defendants are in no wise responsible, and the action against them fails.

That plaintiffs came in contact with the "live" guy wire there can be no doubt. They certainly sustained some shock. But, although examined by 3 different physicians, . . . they called no medical man to testify to the extent of their injuries. Plaintiffs themselves depose to a number of symptoms not uncommon in women at their respective ages—14 and 44. A couple of other witnesses speak of the appearance of some superficial injuries immediately after the accident. But, after hearing the evidence of Dr. McKeough, Mr. Miller, and Dr. Tye, called by defendants, which I fully accept, it is impossible to reach any conclusion other than that their injuries were of a most temporary and trifling character. . . .

Judgment will be entered for plaintiffs for $35 for Lucy Labombarde and $15 for Mary Labombarde for damages, with costs against defendant gas company; for defendant city corporation dismissing this action with costs; and for defendant gas company dismissing without costs the indemnity claim of their co-defendants—to which no appearance was entered by the gas company.