

Otto E. Klein, Walkerton, for plaintiff.

G. Lynch-Staunton, K.C., and E. H. Ambrose, Hamilton,
for defendants.

TEETZEL, J.:—At the close of plaintiff's case and of the trial the defendants moved for a nonsuit.

The only question of negligence upon which there was, in my opinion, any evidence to be submitted to the jury were: (1) whether, in the circumstances, the defendants' foreman should have warned the plaintiff of danger from the adjacent electric power line; and (2) whether the foreman told the plaintiff that the power current was not in fact on the line. I instructed the jury that these were the only matters of negligence which were open for their consideration, and the charge was not objected to.

In answer to the first question submitted, the jury found negligence, and in answer to the second question, requiring them to "state fully in what such negligence consisted," they state that "the foreman should insist that the operator should wear gloves in such dangerous places."

By giving this specific answer I think it must be held that they refused to find in favour of the plaintiff, and did find in favour of the defendants, in respect of the other two matters mentioned.

The negligence found by the jury was not set up in the statement of claim or particulars, and there was no evidence directed to any such issue.

I must, therefore, give effect to defendants' motion for a nonsuit, and direct the action to be dismissed with costs.

NOVEMBER 22ND, 1907.

DIVISIONAL COURT.

TRETHEWEY v. TRETHEWEY.

Evidence—Motion to Divisional Court for New Trial—Discovery of Fresh Evidence—Examination of Witnesses on Pending Motion—Appointment for—Motion to Set aside—Rules 491, 498.

Appeal by defendant from order of ANGLIN, J., ante 684, reversing order of Master in Chambers, ib., and setting