1904

*March 25.

*May 4.

THOMAS E. RANDALL AND ANOTHER (PLAINTIFFS)..... } APPELLANTS;

AND

AHEARN & SOPER, LIMITED, (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Electric wire—Trespasser—Evidence—Contributory negligence—New trial.

Ahearn & Soper had a contract to illuminate certain buildings for the visit of the Duke of York to Ottawa and obtained power from the Ottawa Electric Co. For the purposes of the contract wires were strung on a telegraph pole and fastened with tie wires the ends of which were uninsulated. R., an employee of the Ottawa Electric Co., was sent by the latter to place a transformer on the same pole and, in doing so, his hands touched the ends of the tie-wire by which he received a shock and fell to the ground being seriously injured. To an action for damages for such injury Ahearn & Soper pleaded that R. had no right to be on the pole and was a trespasser, and on the trial, their counsel urged that the work he was doing was connected with the lighting of a building in the city. The Court of Appeal held that this defence was established and dismissed the action.

Held, reversing the judgment appealed from, (6 Ont. L. R. 619) that the counsel's address did not indicate that the building referred to was not one of those to be illuminated under the contract and the evidence did not shew that R. was not engaged in the ordinary business of his employers and the case should be re-tried, the jury having failed to agree at the trial.

A rule of the Ottawa Electric Co. directed every employee whose work was near apparatus carrying dangerous currents to wear rubber gloves which would be furnished on application. R. was not wearing such gloves when he was hurt.

Held, that the mere fact of the absence of gloves was not such negligence on R.'s part as would warrant the case being withdrawn from the jury; that as to Ahearn & Soper, R. was not bound by said rules;

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard Davies, and Killam JJ.

1904

RANDALL v. AHEARN & SOPER.

and that though his failure to take such precaution was evidence of negligence he had a right to have it left to the jury and considered in connection with other facts in the case.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court which refused to enter judgment for either party on findings of the jury who did not agree on a verdict.

The facts are stated as follows by Mr. Justice Osler in the Court of Appeal.

"The facts lie in small compass. The defendants, electrical contractors and engineers, contracted with the Government to light the Government Buildings on the occason of the visit of the Duke of York to Ottawa in September, 1901, and they arranged with the Ottawa Electric Company to supply them with the necessary power. For the purposes of their contract the defendants carried two wires along Wellington Street and connected them with the equipment in the Departmental Block. At the south west corner of Wellington and O'Connor Streets there are two poles between 6 and 7 feet apart, one belonging to the Great North Western Telegraph Company, the other to the Ottawa Electric Light Company. The former carried telegraph and telephone wires only, and on it at a considerable distance below the wires, and about 29 or 30 feet from the ground, the defendants placed their wires which were about sixteen inches apart, and were attached to the usual glass insulators on the ends of small side blocks or wooden projections nailed diagonally to the pole. The wires were tied or fastened to these insulators by common wire which was not itself protected by any insulating covering. The projecting ends of the tie wire were two or three inches long. The defendant Soper said that their wires

(1) 6 Ont. L. R. 619. *sub. nom. Randall* v. *Ottawa Elec. Co.*

1904

RANDALL v. AHEARN & SOPER.

were put up with the knowledge of the telegraph company, but could not be sure of their permission had first been asked or not. These two wires were the only ones on that pole carrying the electric current, the only live or danger wires, and they were intended to be and were taken down as soon as the defendants' contract had been carried out. About 24 feet from the ground there was fastened to the pole a cross arm, whether put there by the defendants' men, or the telegraph company does not appear. Shortly after the defendants' wires had been put up, the Ottawa Electric Company, in the course of their own business, sent three of their men, one of whom was the plaintiff, to put up a transformer for the purpose of carrying a current for electric lighting into Victoria Chambers or some adjacent building on Wellington Street. The evidence leaves it to be inferred that this was put up in some way on the G. N. W. Telegraph Company's pole, but there is no detail of the manner in which it was accomplished or how the connection with Victoria Chambers was made, except that the transformer was hoisted by means of a block and tackle tied to the G. N. W. pole, about five feet above the cross arm. Having served the purpose the tackle was being taken down, and the plaintiff was standing on the cross arm engaged in untying the rope when in some way he received a shock which threw him to the ground and caused the injuries he complains of.

A. E. Fripp and *D'Arcy McGee* for the appellants.

Riddell K. C. and *Harold Fisher* for the respondents.

THE CHIEF JUSTICE and SEDGEWICK and GIROUARD JJ. concurred in the judgment allowing the appeal and ordering a new trial.

1904

RANDALL v. AHEARN & SOPER.

Davies J.

DAVIES J.—This action for damages sustained by plaintiff was one brought against the respondents for negligence in the manner in which they affixed certain electric wires to a pole of the North-West Telegraph Company, in Ottawa, along which wires they had contracted with their co-defendants, the Ottawa Electric Co., to transmit the electric current to enable them (Ahearn & Soper) to illuminate the outside of the Parliament Buildings during the visit of H. R. H. The Prince of Wales. The trial judge left three questions to the jury, two of which they answered in favour of the plaintiff, leaving the one as to his contributory negligence unanswered. The trial judge treated the neglect of the jury to answer this question as a disagreement and discharged them. Both parties appealed to the Divisional Court asking for judgment, the plaintiff on the two findings and the defendant for dismissal of the action.

The Divisional Court held that the trial judge was right, that judgment could not be entered on the findings for the plaintiff nor could the action be dismissed. Thereupon the defendants applied for and obtained leave to appeal to the Court of Appeal, conditional on their admitting the finding on the question of contributory negligence to have been for the plaintiff.

The Court of Appeal gave judgment for the defendants and dismissed the action on what, I think, was clearly shown to us on the argument to have been a misapprehension of the facts. That court proceeded upon the ground that it had been proved that the plaintiff was a mere trespasser in going up the North West Telegraph pole to affix a transformer to that pole, and that being such a trespasser the defendants owed no duty to him to take care that their wires strung on this post were so strung in a careful and safe manner. The learned judge who delivered the judgment of the

1904

RANDALL v. AHEARN & SOPER.

Davies J.

court appealed from stated that there was a misapprehension of the facts on this point by the Divisional Court and goes on to say:

> The putting up of the transformer had nothing to do with the defendant's business. It was put up by the Ottawa Electric Co., solely in connection with their own business arrangements for supplying light to Victoria Chambers. This indeed was stated by counsel for the plaintiff in opening the case to the jury and there is in fact nothing to connect the work which the plaintiff was doing with the defendants.

Mr. Fripp in argument before this court strenuously contended that these assumed facts upon which the Court of Appeal based its judgment were inaccurate and not justified by the evidence.

A careful examination of the evidence has satisfied me that he is correct, and that it would not be a legitimate inference from it to assume that Randall in placing the transformer on the poll was there as a mere trespasser and not, as contended by the plaintiff, in order to transform or supply the power of the Ottawa Electric Co. to the wires of the defendant. If the latter was the purpose for which plaintiff placed the transformer on the pole, or if it was necessary to be put there for the purposes of Ahearn & Soper, then plaintiff was legally there as one of the workmen of the Ottawa Electric Co, in connection with their contract with defendants, and so being was entitled to have from defendants the exercise of proper skill and care in relation to the manner in which they strung their wires on the post, and to hold them responsible for damages caused by want of such care and skill, to which he had not, by his own negligence, contributed. My understanding of the facts which are not at all clear in the evidence on this crucial point of plaintiff's presence on the pole, accords with that reached by the Divisional Court, and I assume also by the trial judge; and as I also concur with that court

in its statement of the law that the bald fact of the absence of gloves on the plaintiff's hands at the time of the accident was not of itself sufficient to withdraw the case from the jury, however cogent it might be as evidence of contributory negligence, I think a new trial should be had. That single fact of the absence of gloves must be taken and weighed in connection with all the other facts of the case, which might or might not according to circumstances as between plaintiff and defendants betweeen whom there was no contractual relation with respect to gloves, convince or fail to convince a jury of such negligence. Standing baldly by itself it is not conclusive.

The appeal should be allowed with costs in this court and the Court of Appeal and a new trial had, the costs of the first trial and of the appeal to the Divisional Court to be costs in the cause.

KILLAM J.—This is an action brought in the High Court of Justice for Ontario by an employee of the Ottawa Electric Co. against that company and the present respondents, Ahearn & Soper, Ltd., to recover damages for an injury received by the plaintiff. At the time the accident occurred the plaintiff was engaged in untying from a pole a rope which had been used to hoist up a transformer of the Ottawa Electric Co. to a place on the pole. The injury was caused by the plaintiff's falling to the ground from the pole, a distance of some thirty feet or more. Ahearn & Soper, Ltd. is an incorporated company carrying on business as electrical contractors and engineers. This company had a contract with the Dominion Government to light Government Buildings in Ottawa in September, 1901, and they arranged with the Ottawa Electric Co. to supply them with the necessary power. For the purposes of their contract Ahearn & Soper,

1904

RANDALL v. AHEARN & SOPER.

Killam J.

Ltd., carried two wires along Wellington Street. At the corner of Wellington and O'Connor Streets, these two wires were fastened upon a pole belonging to the Great North Western Telegraph Co. at a short distance from which was another pole belonging to the Ottawa Electric Co. The former pole was used to carry telegraph and telephone wires only. Ahearn & Soper, Ltd., fastened their wires to the Telegraph Co's pole by a common iron wire tied round insulators. The tie wires were not insulated, and had ends projecting two or three inches from the insulators. For some reason which is unexplained the plaintiff and other employees of the defendant company placed the transformer upon the pole of the Telegraph Co., and plaintiff, in untying the rope mentioned, appears to have put his hand upon one of the wires of Ahearn & Soper, Ltd., where it was fastened to the pole, and thus touched the uninsulated tie wire. The result was that he received a shock which caused him to unloosen his hold and fall to the ground.

By the rules of the Ottawa Electric Co., shewn to have been known to the plaintiff, it was provided:

1. Employees must always bear in mind that their occupation is a dangerous one, but no employee will take any risk of injury other than that which is necessarily incident to his particular work.

2. Every employee whose work is near the live wires or with apparatus carrying dangerous currents shall, whenever there is any possibility of receiving a shock, wear rubber gloves; such gloves will be furnished on application, and no excuse will be accepted for neglect to wear them.

The evidence also showed that it was the rule to treat all wires as "live wires," that is, as carrying currents strong enough to injure. Randall was wearing no gloves when he received the shock.

The action was tried before Mr. Justice Meredith, with a jury. The case was submitted to the jury only as against Ahearn & Soper, Ltd. Three questions

were submitted by the learned judge to the jury. These questions and the answers of the jury were as follows:

1. Was any negligence of the defendants Ahearn & Soper, Ltd. the approximate cause of the plaintiff's injury?—A. Yes.

2. If so, what was such negligence? State fully and plainly.—A. By using uncovered tie wires, and careless construction of tie wires.

3. Might the plaintiff, by the exercise of ordinary care, have avoided his injury?—No answer was given to the third question.

The learned judge treated the case as one of disagreement on the part of the jury, and discharged them. Both parties then moved before a divisional court for judgment, when the court dismissed both motions. Application was then made by Ahearn & Soper, Ltd. for special leave to appeal to the Court of Appeal, and the leave was given upon the condition that the case should be treated as if the jury had answered in favour of the plaintiff the question as to contributory negligence submitted to them, and as if judgment had been entered in favour of the plaintiff upon this and the other findings and Ahearn & Soper, Ltd. were appealing from that judgment. The Court of Appeal decided that Ahearn & Soper, Ltd., were entitled to judgment, and dismissed the action. They considered that the plaintiff had failed to prove any negligence on the part of Ahearn & Soper, Ltd., towards the employees of the Ottawa Electric Co., as in their opinion the plaintiff was a mere volunteer, a person on the pole without any license or authority, and also that the evidence showed that the plaintiff was the author of his own wrong, and to have brought his injury on his own head by the omission to employ the usual means of protection against danger from electric shock. The evidence did not disclose distinctly what authority Ahearn & Soper, Ltd., had for using the pole of the Great North Western Telegraph

1904

RANDALL v. AHEARN & SOPER.

Killam J.

Co. Mr. Soper, an officer of Ahearn & Soper, Ltd., being asked :—

Did you have to get permission from the Great North Western Co. to string your wires on their poles? It was done with their knowledge, I suppose?

said :

Yes, but I am hazy as to whether I asked their permission or not.

No other evidence was given of any authority on their part to so use the pole.

In delivering the judgment of the Divisional Court, Sir Wm. Meredith C.J. said :

The transformer which the plaintiff had been engaged in putting up, the appliances for raising which he was taking down when he was injured, as I understand the testimony, was put up by the Ottawa Electric Co. under their contract with the Ahearn Co. to supply the electric current for the line which the latter Company had put up, and whatever may have been the position of the plaintiff as between him and the owner of the pole, as between him and the Ahearn Co. it must, I think, be taken that he was using the pole under circumstances that made the duty of the Ahearn Co. towards him as great at least as it would have been had the plaintiff been an employee of the owner of the pole and had been engaged in doing the work upon which he was engaged for that owner.

In delivering the judgment of the Court of Appeal, Mr. Justice Osler said :

If the transformer had been put up by the Ottawa Electric Co. under their contract with the defendants in order to supply the power to their wires, as the judgment below assumes, there would be no difficulty in affirming the existence of a duty towards the workmen of the Electric Co. to take care that their wires were put up in a safe and careful manner * * It is, however, stated in the reasons of appeal and was again stated before us and not denied, that there is a misapprehension in the judgment on this point, and that the putting up of the transformer had nothing to do with the defendants' business. It was put up by the Ottawa Electric Co. solely in connection with their own business arrangements for supplying light to Victoria Chambers. This, indeed, was stated by counsel for the plaintiff in opening the case to the jury, and there is in fact nothing to connect the work which the plaintiff was doing with the defendants.

1904

RANDALL v. AHEARN & SOPER.

Killam J.

With all respect for both the courts below, it appears to me that both were alike under misapprehension in respect of this matter. There appears to be nothing in the evidence to suggest that the transformer was put up for any purpose of Ahearn & Soper, Ltd., or in any way connected with the supply to that company of electric current. On the other hand, there seems to be an equal lack of evidence as to the purposes for which the transformer was to be used by the Ottawa Electric Co., although, I admit, the *primâ facie* presumption is that it was for the purpose of the Ottawa Electric Co. alone. The remarks of the plaintiff's counsel in opening the case to the jury are set out in the appeal book. After stating that Ahearn & Soper, Ltd., had a contract with the Dominion Government to light the Parliament Buildings upon the occasion referred to, and that they had contracts to light other buildings in close proximity thereto, the learned counsel said (referring to Randall):

> He was sent to put up a transformer, that is a box, the effect of which is to reduce the current from one wire so as to carry a similar quantity of current into a building near the Victoria Chambers.

But there seems to have been nothing in the address of the learned counsel to indicate that the transformer was to be used in connection with the lighting of Victoria Chambers, or whether the building referred to was or was not one of those which he stated Ahearn & Soper, Ltd., were lighting under their contract. By their statement of defence Ahearn & Soper, Ltd., alleged that Randall at the time of the accident was a trespasser who had climbed upon the pole from which he fell without authority or right to do so. Mr. Soper was asked: "You say in your statement of defence that the plaintiff Randall was a trespasser on this pole. What do you mean by that?", and he replied: "I mean he was not our employee."

1904

RANDALL v. AHEARN & SOPER.

Killam J.

The printed case gives no indication that the defendants, Ahearn & Soper, Ltd., raised any objection at the trial to Randall's right to recover on the ground of his being in the position of a trespasser only. The learned judge in charging the jury pointed out the difference between the duty which Ahearn & Soper, Ltd., would have owed to the public generally if they had left the wires on or near the ground, and the duty which they owed to any person likely to be upon the pole at a distance sufficiently near to the point of attachment to receive a shock. In this connection he said:

> But when placed high up on these poles it is entirely different. There they knew it would be a man of experience, a man who knew the danger of these wires, and a man who ought to take care and avoid apparent dangers, and a man who, in his own interests, ought to take care, would be working there. * * And you are to say whether they did anything which was a want of ordinary care to a person of experience going there.

No objection appears to have been made to the charge of the learned judge or to his leaving to the jury the question of negligence on the part of Ahearn & Soper, Ltd. While it appears to me that, in the absence of evidence to the contrary, it should be assumed that Ahearn & Soper, Ltd., had their wires rightfully upon the pole in question, yet I think that under the circumstances the action should not be dismissed upon an assumption that the plaintiff was upon the pole without authority.

Then, upon the question of contributory negligence, I am of opinion that it cannot be said that the evidence is so clear against the plaintiff that the question should not have been left to the jury. As between himself and Ahearn & Soper, Ltd., the plaintiff was not bound by the rules of the Ottawa Electric Co., although his neglect to employ an ordinary precaution was strong evidence of negligence on his part.

Alfred Dion, Superintendent of the Ottawa Electric Co., gave the following evidence:

Q. Was it his duty to wear gloves at any such work like this?—A. Yes.

Q. At any rate it was his duty to wear gloves?—A. Yes.

Q. Could the accident have happened had he worn gloves?—A. Very unlikely.

No stronger evidence was given of the efficiency of the protection afforded by the use of gloves. Of course the plaintiff would see that these wires of Ahearn & Soper, Ltd., were used for the purpose of carrying a strong electric current, and he would also be aware of the danger of finding a strong current on any of the wires of the Telegraph Co. or Telephone Co. through contact with wires carrying high current. But it appears to me that there was still a question for the jury such as the third question left to them by the learned judge at the trial.

In my opinion, then, the court of Appeal was not warranted in disturbing the order of the Divisional Court dismissing the applications of both parties for judgment.

I would allow the appeal with costs, and discharge the order of the Court of Appeal, with costs in that court.

Appeal allowed with costs.

Solicitors for the appellant: *Fripp, Henderson & McGee.*

Solicitors for the respondents: *Murphy & Fisher.*