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PLAINTIFF'S WITNESSES:

Notice of Appeal.

(Filed August 9, 1919.)

Hudson County Circuit Court.

ALFRED STIEDLER,
Plaintiff-Respondent,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellant.

Action at Law
On Appeal.

To: ALEXANDER SIMPSON, Esq.,
Attorney for Plaintiff-Resondent:

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause.

Dated August 8, 1919.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant-Appellant.

Service of within notice of appeal acknowledged August 8th, 1919.

ALEX. SIMPSON,
Attorney for Plaintiff.

Grounds of Appeal.

(Filed August 22, 1919.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

ALFRED STIEDLER, *Plaintiff-Respondent,* *vs.* THE PENNSYLVANIA RAILROAD COMPANY, *Defendant-Appellant.*	Action at Law On Appeal.

And now comes the above-named Defendant-Appellant, The Pennsylvania Railroad Company, by Vredenburgh, Wall & Carey, its attorneys, and sets down the following grounds of appeal from the judgment of the Hudson County Circuit Court, in the above-stated cause:

1. The Court refused to grant a non-suit against plaintiff, when thereunto moved by defendant.

2. The Court refused to direct a verdict in favor of defendant and against plaintiff, when thereunto moved by defendant.

3. The Court refused to dismiss the action for want of jurisdiction, when thereunto moved by defendant.

4. The Court refused to charge the jury as follows:

"The mere painting of the pole, in which occupation plaintiff was engaged at the time

of the occurrence of the injury complained of, was not an act which, under the circumstances of this case, constituted an engaging in interstate commerce by plaintiff within the provisions of the statute upon which this action is based."

"The pole on which plaintiff was engaged in painting at the time of the occurrence of the injury complained of, was not, under the circumstances of this case an instrumentality of interstate commerce in the sense contemplated by and comprehended within the terms and provisions of the Federal Employers' Liability Act, under which this action is brought by plaintiff."

5. The Court refused to request the jury to return answers to the following written questions:

"If you find a verdict in favor of plaintiff and against defendant, state the fact or facts upon which you base and find such a verdict."

"If you find a verdict in favor of plaintiff and against defendant, state to what extent or proportion you find, if at all, plaintiff's own negligence contributed to the injury complained of, and to what extent or proportion you have reduced the amount of your verdict because of plaintiff's contributory negligence."

6. The Court charged the jury as follows:

"The burden is upon the plaintiff as to that issue, gentlemen, in this manner; that he must satisfy you by a fair preponderance of the evidence, first, of course, that this fellow servant did actually paint this pole on the side on which this plaintiff was, and beneath him; and, furthermore, that that servant in

so doing, was negligent in that he did not under all the circumstances of the case as they are before you use that care which a reasonably prudent person would or should use."

"The plaintiff says that what happened was that this co-employee or this fellow servant of his negligently painted beneath him, the plaintiff, and that as the plaintiff was coming down the pole, progressing with his work, he slipped upon this wet paint that the co-employee or fellow servant had, as he said, negligently placed there. As I say, gentlemen, it is not only necessary for him to establish that this co-servant or fellow servant was negligent, but that that negligence, if any he has shown, of that fellow servant, was the proximate cause of this happening, and the burden is upon him to show it by a fair preponderance of the evidence. If he has, then again I say to you, gentlemen, he is entitled to have a verdict except for what I shall have to say to you upon the question of assumption of risk, and whatever I have to say to you upon the question of contributory negligence."

"All of those things again, gentlemen, being dependent upon the showing that these pains and these sufferings, these disabilities, these inabilities to earn, or decreased ability to earn, the cost of effecting a cure, are the proximate result of this happening; because, you see, one may have disabilities and they may not have come through the negligence of the party against whom he is seeking to have a recovery. Of course, if that were so, it would be most unjust and unfair that the party as against whom he is complaining of negligence should pay for something that he

did not cause. So, therefore, I say the further burden of the plaintiff is to show that these disabilities which he is claiming as the cause of his loss are the proximate result of the happening in question."

"Finally, gentlemen, and to sum up entirely the question as to what a verdict may be for, let me say that what the plaintiff is entitled to have, if he is entitled to have a verdict, is only just what sum of money which will compensate him or put him back as nearly as may be in the position he would have been but for the alleged act of negligence which he complains was the cause of his condition."

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Service of within Grounds of Appeal acknowledged August 20th, 1919.

ALEX. SIMPSON,
Atty. for Pltff.

Amended Complaint.

(Filed January 27, 1919.)

HUDSON COUNTY CIRCUIT COURT.

ALFRED STIEDLER,
Plaintiff,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

} Action at Law

The plaintiff, who resides at No. 320-A Summit Avenue, at West Hoboken, in the County of Hudson, for an amended complaint, says that:

1. The defendant is now and was at all times hereinafter mentioned, a corporation of the State of Pennsylvania.

2. The defendant at the times hereinafter mentioned was a common carrier by railroad engaged in interstate commerce between the States of Pennsylvania and New Jersey.

3. The defendant, as such common carrier by railroad, engaged in interstate commerce, maintained certain metal poles on which were strung wire carrying electricity, which electricity was used by the defendant in propelling trains used in interstate commerce.

4. That the plaintiff on the 21st day of August, 1917, at Homestead, New Jersey, was upon a pole maintained by the defendant, as before described, upon the wires strung upon said pole was a certain current of electricity dangerous to human life.

5. The plaintiff was so upon the said pole as an employee of the defendant painting the said pole and while painting said pole was hurt by reason of the negligence of the defendant.

6. The negligence of the defendant consisted in this: That it did not warn or instruct the plaintiff that the said wires carried dangerous currents of electricity; but on the contrary left him, the plaintiff, without any information upon the subject; it did not use reasonable care to supply him with proper instrumentalities for his said work, knowing that the plaintiff was working in proximity to currents of electricity dangerous to human life and safety; it did not use reasonable care to so equip the said poles that persons working thereon would not come in contact with the wires thereon carrying currents of electricity dangerous to human life and bodily harm; and the injury to the plaintiff was caused through the negligence and carelessness of fellow servants, who were at the time and place mentioned, in the employ of the defendant herein and working within the scope of their employment.

7. By reason of the matters stated in the foregoing paragraph, the plaintiff, while using due care for his safety came in contact with one of the electric wires, or electricity therein, and was burned so that his right arm was injured, and it was necessary to amputate same, and his feet were injured permanently, and his spine and nervous system and head were injuriously affected.

8. The plaintiff lost gains which he otherwise would have made and expended money for medical expenses.

9. Plaintiff at the time suffered great pain and will continue permanently to suffer pain by reason of the injuries.

Plaintiff demands $100,000 damages.

ALEX. SIMPSON,
Attorney for Plaintiff.

Defendant consents to the filing of within Amended Complaint, but upon the condition that the Answer heretofore filed stand as the answer to the Amended Complaint. Jan. 24, 1919.

VREDENBURGH, WALL & CAREY
Attorneys for Defendant.

Answer.

(Filed October 28, 1918.)

HUDSON COUNTY CIRCUIT COURT.

ALFRED STIEDLER, *Plaintiff,* *vs.* PENNSYLVANIA RAILROAD COMPANY, *Defendant.*	Action at Law

Defendant, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, says that,—

1. It denies Paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the Complaint.

SECOND DEFENCE.

Both plaintiff and defendant were not engaged in inter-state commerce at the time of the alleged injury to plaintiff set forth in the Complaint.

THIRD DEFENCE.

The alleged injury to plaintiff set forth in the Complaint resulted from the contributory negligence of plaintiff, in that he did not use reasonable care to guard and protect himself from contract with the wires charged with electricity while in close proximity to them, or to inform himself of the nature thereof.

FOURTH DEFENCE.

The alleged injury to plaintiff set forth in the Complaint resulted from an ordinary risk of plaintiff's employment, the existence and danger of which were obvious and known to and appreciated by plaintiff, and which was assumed by him.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Reply.

(Filed November 14, 1918.)

HUDSON COUNTY CIRCUIT COURT.

ALFRED STIEDLER, *Plaintiff,* *vs.* PENNSYLVANIA RAILROAD COMPANY, *Defendant.*	Action at Law

The plaintiff denies the matters set up in the answer of the defendant under titles "Second Defense", "Third Defense" and "Fourth Defense."

ALEX. SIMPSON,
Attorney for Plaintiff.

Rule for Judgment.

(Entered February 26, 1919.)

HUDSON COUNTY CIRCUIT COURT.

ALFRED STIEDLER,
Plaintiff,

against

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

} Action at Law

The issues in the above entitled action having come on regularly to be tried before Honorable Luther A. Campbell and a jury, on the 25th day of February 1919, and both sides having appeared by Counsel, and the evidence of the respective parties having been adduced and submitted to the jury, and the jury having duly deliberated thereon, and having returned its verdict in favor of the plaintiff and against the defendant in the sum of Thirty-five thousand ($35,000) Dollars damages,

Now on motion of Alexander Simpson, Attorney for the Plaintiff,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff, Alfred Steidler, have and receive from the defendant the sum of Thirty-five thousand ($35,000) dollars, as awarded, together with costs to be taxed.

Let judgment be entered accordingly this 26th day of February, 1919.

LUTHER A. CAMPBELL,
Judge Circuit Court.

ALEXANDER SIMPSON,
Plaintiff's Attorney.

Rule to Show Cause.

(Entered March 6, 1919.)

HUDSON COUNTY CIRCUIT COURT.

ALFRED STIEDLER, *Plaintiff*, *vs.* THE PENNSYLVANIA RAILROAD COMPANY, *Defendant.*	Action at Law

Application for this rule having been made to me, the Judge before whom the above-stated cause was tried, within six days after the rendering of the verdict therein,—

IT IS ORDERED that the above-named plaintiff show cause before this Court, at the Court House, in Jersey City, New Jersey, on Friday, March 21st, 1919, at 10 o'clock in the forenoon, or as soon thereafter as the Court may hear the same, why the said verdict rendered in said cause should not be set aside and a new trial granted on the grounds that said verdict is—

(1) Excessive;
(2) Contrary to the weight of evidence;
(3) Contrary to the charge of the Court;
(4) The result of the bias, prejudice and passion of the jury.

Reserving unto the defendant its exceptions or objections noted to—

(1) The Court's refusal to grant a non-suit;
(2) The Court's refusal to direct a verdict in favor of defendant;
(3) The Court's refusal to dismiss the action for want of jurisdiction;

(4) The Court's refusal to charge as requested of defendant;
(5) The Court's refusal to request the jury to return answers to questions in writing;
(6) The Court's charge to the jury.

And that meantime execution be stayed.

Dated March 3, 1919.

LUTHER A. CAMPBELL,
Judge Hudson County Circuit Court.

Entered March 6, 1919, on motion of

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Filed March 6, 1919.

Reasons.

(Filed April 1, 1919.)

HUDSON COUNTY CIRCUIT COURT.

ALFRED STIEDLER, *Plaintiff,* *vs.* THE PENNSYLVANIA RAILROAD COMPANY, *Defendant.*	Action at Law On Rule to Show Cause.

The defendant sets down the following Reasons why the verdict in above cause should be set aside and a new trial granted:

1. The verdict is excessive.
2. The verdict is contrary to the weight of evidence.
3. The verdict is contrary to the charge of the Court.
4. The verdict is the result of the bias, prejudice and passion of the jury.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Service of within Reasons acknowledged; time to serve State of Case extended ten days.
March 28, 1919.

ALEXANDER SIMPSON,
Attorney for Plaintiff.

Conclusions.

(Filed July 31, 1919.)

HUDSON CIRCUIT COURT.

ALFRED STIEDLER, *vs.* PENNSYLVANIA RAILROAD COMPANY,	On Rule for new trial.

ALEXANDER SIMPSON, Esq., Attorney for plaintiff.

MESSRS. VREDENBURGH, WALL AND CAREY, Attorneys for defendant.

CAMPBELL, *Judge.*

I have concluded that plaintiff's verdict of Thirty-five (35000) Thousand Dollars is not sustainable under the evidence and that it should be reduced or set aside and a new trial had as to damages only.

To my mind a recovery for Twenty Thousand (20000) Dollars would be liberal and the verdict may be reduced to and stand at Twenty Thousand (20000) Dollars provided plaintiff files his proper consent and waiver within fifteen (15) days from the date hereof, otherwise the verdict may be set aside and a *venire de novo* had on the question of damages only.

Dated July 26, 1919.

LUTHER A. CAMPBELL,
Judge.

Consent to Accept Reduction of Verdict.

(Entered August 1, 1919.)

HUDSON CIRCUIT COURT.

ALFRED STIEDLER,
Pltf.

vs.

PENNSYLVANIA RAILROAD COMPANY,
Deft.

The Plaintiff hereby files his proper consent and waiver to the reduction of the verdict heretofore received in this cause to the sum of twenty thousand ($20,000) dollars pursuant to the opinion of the court dated July 26, 1919.
Dated August 1, 1919.

ALEX. SIMPSON,
Atty. for Pltff.

Rule Discharging Rule to Show Cause.

(Entered August 1, 1919.)

HUDSON CIRCUIT COURT.

ALFRED STIEDLER, *Pltf.*

vs.

PENNSYLVANIA RAILROAD COMPANY, *Deft.*

The rule to show cause heretofore allowed to the defendant as to new trial is discharged upon plaintiff reducing his verdict by consent to the sum of twenty thousand ($20,000) dollars.

LUTHER CAMPBELL,
Judge.

On motion
ALEX. SIMPSON,
Atty for Pltf.
Rule hereby entered
Aug. 1, 1919, at

Reduction of Amount of Judgment.

(Entered August 1, 1919.)

HUDSON CIRCUIT COURT.

ALFRED STIEDLER,
Pltf.

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Deft.

The plaintiff heretofore received a verdict of $35,000 against the defendant. The court allowed a rule to show cause for a new trial. The court decided that the rule be made absolute unless within 15 days from July 26, 1919, consent to reduce his verdict to $20,000. The plaintiff so consented August 1, 1919.

It is thereupon on August 1, 1919, ordered that the plaintiff's judgment heretofore entered now stand for the sum of $20,000, twenty thousand dollars, with costs to be taxed.

On motion,
ALEX. SIMPSON,
Atty. for Pltf.

Rule hereby entered,
Aug. 1, 1919, at 3.50 P. M.

Consent and Waiver.

(Filed Aug. 8, 1919.)

HUDSON CIRCUIT COURT.

ALFRED STIEDLER,
Plaintiff,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant.

The plaintiff pursuant to the opinion of the Court on the Rule to Show Cause for a new trial, hereby consents to reduction of the verdict in the above cause to the sum of Twenty Thousand Dollars, and waives any amount in excess thereof, and has entered judgment for the sum of Twenty Thousand Dollars.

ALEX. SIMPSIN,
Attorney for Plaintiff.

Formal Judgment Form.

This action was tried before Judge Luther A. Campbell with a Jury at the Hudson Circuit Court February 20-24-25, 1919.

The cause having been heard and submitted to the Jury they return their verdict as follows:

They say they find for the Plaintiff and against the Defendant and they assess the damages of the Plaintiff on the occasion of the premises at the sum of Thirty-five Thousand Dollars ($35,000.00) over and above the costs and charges by the said Plaintiff about his suit in this behalf expended.

And the matter coming on to be heard on rule to show cause why the verdict so as aforesaid should not be set aside and a new trial granted.

The Court orders unless the plaintiff shall remit all of the said verdict in excess of the sum of Twenty Thousand ($20,000.00) Dollars as and for his damages on occasion of the premises and the Plaintiff here remits the excess aforesaid.

Whereupon it is here adjudged that the plaintiff recover of the Defendant the sum of Twenty Thousand Dollars ($20,000.00) damages and his costs which are taxed at Seventy-seven Dollars and eight Cents ($77.08) making in the while the sum of Twenty Thousand, Seventy-seven Dollars and eight Cents ($20,077.08).

Judgment entered this 31st day of July, 1919.

LUTHER A. CAMPBELL,
Judge.

County Clerk's Transcript.

The answer of Luther A. Campbell, Esquire, Judge of the Circuit Court, holden in and for the County of Hudson, and within named the record and proceedings of the Plaint whereof mention is within made with all things touching the same I send to the Judges of our Court of Errors and Appeals of the last resort of all causes at Trenton, N. J. at the day and year within contained in a certain schedule to this Writ annexed as within I am commanded.

LUTHER A. CAMPBELL,
Judge.

Statement of the Case.

(Filed August 15, 1919)

HUDSON COUNTY CIRCUIT COURT.

ALFRED STIEDLER,
Plaintiff,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant.

Action at Law

Upon the trial of the issues joined in the above stated cause, the defendant moved the Court to request the jury, upon all the facts in this case, to return answers to the following written questions, pursuant to Rule 110 of the Supreme Court of the State of New Jersey:

1.—If you find a verdict in favor of plaintiff and against defendant, state the fact or facts upon which you base and find such verdict?

2.—If you find a verdict in favor of plaintiff and against defendant, state to what extent or proportion you find, if at all, plaintiff's own negligence contributed to the injury complained of, and to what extent or proportion you have reduced the amount of your verdict because of plaintiff's contributory negligence?

The Court: The defendant's attorney has requested the court under rule 110 of the Supreme Court to propound to the jury three certain questions——

Mr. Hartpence: Two questions. I will withdraw one.

The Court: Well, two certain questions. The court in the exercise of its discretion has declined to present them or require them to be answered, to which you wish to take an exception?

Mr. Hartpence: To which I wish to take an exception.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Service acknowledged, August 15, 1919.

ALEX. SIMPSON,
Attorney for Plaintiff.

Testimony.

HUDSON COUNTY CIRCUIT COURT.

ALFRED STEIDLER,

vs.

PENNSYLVANIA RAILROAD COMPANY.

ALEXANDER SIMPSON, Esq., for plaintiff.
VREDENBURGH, WALL & CAREY, Esqs., for defendant.

This case was tried at the Hudson Circuit, Thursday, February 20th, 1919, before Hon. Luther A. Campbell, Judge, and a jury.

(Counsel for the respective parties open to the jury.)

Mr. Simpson: I subpœnaed the division superintendent. Mr. Hartpence will agree to stipulate that the defendant was a common carrier by railroad, engaged in interstate commerce between New York and New Jersey, and as such operated the railroad by electricity from New Jersey to New York upon which they carried passengers.

Mr. Hartpence: That is all right. I will agree to that stipulation.

GEORGE HARRIGAN, sworn.

Direct Examination by Mr. Simpson:

Q. I won't call this witness—I thought he knew something about it. I will withdraw him. You did not see the accident, did you? A. No, sir.

Q. You worked at this kind of work, painting poles on the Pennsylvania Railroad, didn't you? A. Yes.

Q. When did you go to work? A. Same day with Alfred Steidler.

Q. And how long did you work there? A. About four months.

Q. What did you work steady at? A. Painting the poles.

Q. Where were those poles? A. Out on the Homestead road here.

Q. How many men would work on the pole painting? A. Two men on each pole.

Q. What was the way of doing the work; how would they work? Both on the same side? A. One on each side.

Q. They would come down evenly? A. Come down even, yes, sir, always together.

Q. Do you know pole number 14? A. Yes, sir.

Q. Did you work on 14? A. No, sir.

Q. You did not see this, did you? A. No, sir.

Q. Did you work there after Steidler was hurt? A. Yes.

Q. You don't know whether there was any change in the protection after he was hurt—

Mr. Hartpence: I object to it as immaterial.

Mr. Simpson: I will withdraw it. That is all.

Cross examination by Mr. Hartpence:

Q. When did you say you started to work, Mr. Harrigan? A. I couldn't say what day I started, but it was the same day with Alfred Steidler.

Q. You started the same time Mr. Steidler did? A. Yes, sir.

Q. How long was that before Mr. Steidler was injured, do you recall? A. It must have been about two months, I guess.

Q. And Mr. Steidler worked right along with you in the group of painters during that period? A. Well, we were not partners.

Q. I mean he worked right along in that same group painting those poles? A. Yes, sir.

Q. During that whole two months? A. Yes, sir.

Q. Who was your partner? A. Well, we don't have the same partner every day. Every day we used to have different partners.

Q. Were there always two men working on the pole? A. Yes, sir.

Q. And some times one man? A. If there wouldn't be a partner then one man would work alone.

Q. How is that? A. If there weren't enough there to be partners then one man worked alone.

Q. Sometimes a single man did work on a pole? A. Worked on a pole, yes.

Q. Had you ever done any painting work of this same kind before this? A. No, not on construction work like that.

Q. Never worked on poles of that kind? A. No, sir.

Q. With electric wires, did you, anywhere else? A. No, sir.

Q. When you speak of two men working on poles, one on each side, what do you mean, one on each side? A. Well, a pole will come up and one man will get on each side of the pole.

Q. I know, but which side do you refer to? There were cross arms on these poles? A. Yes, there is cross arms on the poles. We would come down—the arms would come across this way and we would come down this way on the pole so we would not paint underneath each man.

Q. How did you happen—these poles were square, weren't they? A. Square poles, yes.

Q. How did you paint the side of the pole where

the cross arms were? A. Well, we would have to lean over.

Q. When you got down below the cross arms then how did you do it? A. Then we would paint inside first and then paint on the outside—both of us get the inside painted first and then paint outside and work down together.

Q. You would not paint all four sides as you came down, would you? A. When we got below the wires we would.

Q. How is that? A. When we got below the wires we would paint the whole four sides.

Q. When you were up where the cross arms and the wires were you did not paint the whole four sides? A. No, sir.

Q. How many sides did you paint? A. Three sides.

Q. That would be the side on which you were, the opposite side on which your partner was, and then the third side, a cross arm side? A. Yes, sir.

Q. On the side the wires were deadened? A. Yes, were dead. The only side we paint would be dead.

Q. You went up to paint the fourth side after you painted the third side? A. We were not allowed to touch that side at all. The linemen painted that side.

Q. When you say you were not allowed to, what do you mean? A. That side was always live.

Q. You were forbidden to touch that side? A. We were forbidden to totuch that pile.

Q. By whom? A. By the foreman.

Q. By the foreman in charge of the painters? A. Yes.

Q. They were your instructions. A. They were instructions.

Q. Those instructions were given to all painters? A. Yes, sir.

Q. As a matter of fact they told you about that quite frequently, didn't they? A. Well, they used to tell us about three or four times a week.

Re-direct examination by Mr. Simpson:

Q. You spoke of live wires. What protection was there during the time you worked against these live wires to the man on the pole?

Mr. Hartpence: I object to it as immaterial and irrelevant. I think, your Honor, that the question now should be limited to the pole on which Mr. Steidler was working at the time he was injured.

Mr. Simpson: It is the system I am trying to get. Mr. Hartpence has asked him what his instructions were, nothing that I asked him about. I am entitled to ask him now what he knows about these instructions and what the protection was. I asked him nothing about instructions. I asked him simply certain things. Now Mr. Hartpence on cross examination asked him what were your instructions and what were all the men's instructions about live wires, and he asked him how they acted against the live wires, and certainly it is proper for me to ask on that new matter brought by Mr. Hartpence, what was the protection against the live wires. Why should the door be shut in my face when Mr. Hartpence has opened it.

Mr. Hartpence: I do not see how that opens the door to a general system of protection. Of course if this witness is shown to be competent to testify to the general system of protection, then I perhaps would not have interposed an objection.

Mr. Simpson: You just asked him what he saw.

Q. What did you see done? You have described to Mr. Hartpence about live wires and dead wires; you have described about working on the side of the dead wires and that you were not supposed to touch the live wires; you have described to Mr. Hartpence that you received certain instructions about the live wires. What did you see, if anything, on the poles that you worked on at the time you described before the accident as to means used to protect people working on the poles against the live wire? A. Well, there was a slab there, a screen, they call it, about four feet long and about fifteen inches wide, and that was placed up on the side of the pole to protect us from the live wires.

Q. That is, between the man and the live wires? A. Man and the live wires.

Q. How much of the fifteen inches was used, if any, in fastening that stuff against the pole?

Mr. Hartpence: I object to it as leading.

Mr. Simpson: Well, "if any". I will withdraw it.

Q. Describe the way in which it was fastened to the pole, and how much was used in the fastening, if any? How was it fastened? A. It was fastened up on a pole with strings, pieces of cord; it was about eight or seven inches sticking in the pole and about eight inches sticking out.

Q. That is the projection was only eight inches? A. Yes.

Q. And the height was about how much? A. It was about four feet, four or five feet.

Q. Was that all that you saw used as protection there during the time that you worked before the accident? A. That is all.

Mr. Hartpence: I object to it as leading and calling for a conclusion.

Q. Was or was not that all that you saw?

Mr. Hartpence: I object.

A. That is all.

Mr. Hartpence: I object to it as leading.

Q. Was or was not that all that you saw?

Mr. Hartpence: I object to it as merely a method of excluding everything else by having this witness answer yes or no. I am not objecting to what he saw.

Q. Will you describe whether you saw anything else for a man's protection besides that? A. That is all I saw, just that screen, only that life-belt, the belt we have.

Q. What is the belt? A. Comes around to hold us on.

Q. That is to protect you from falling off the pole? A. Yes.

Q. That is all.

Re-cross examination by Mr. Hartpence:

Q. Where did you ever see those screens on a pole, Mr. Harrigan? A. They were on a side of the poles that we were not allowed to touch—on the live side of the pole.

Q. So that they were between the painter— A. Yes, sir.

Q. —and the live wire? A. The live wire.

Q. And as you moved your hands and arm up and down with your paint brush the screen prevented you from coming in contact with live wires; is that right? A. Yes, sir.

Q. And extended out beyond the edge of the pole far enough to prevent you from—

Mr. Simpson: I object to it as calling for a conclusion. He has described the mechan-

ism and it is for the jury to say whether or not—that is a bare conclusion.

The Court: I think it does amount to a conclusion on his part.

Mr. Hartpence: If your Honor please, the jury might not know what the business of a painter is, and how he paints.

Mr. Simpson: I have no objection to that being described.

The Court: He can describe how it was done and the process of painting. I will sustain the objection.

Q. What sort of a brush did you use in painting those poles? A. It was a flat brush with a handle of about four inches on it. Sometimes we had a handle about a foot.

Q. Long? A. Yes, long and round. A round brush, so that we could get in the corners.

Q. And the pole itself was not solid, was it? A. No. sir.

Q. It was a metal pole? A. Metal pole, iron pole with angle irons.

Q. Cross pieces on each side? A. Yes, sir.

Q. It was a little thicker at the bottom than it was at the top? A. Yes.

Q. Tapered off toward the top? A. Yes.

Q. And the wires that you refer to, where were they located, near the bottom or top of the pole? A. Near the top.

Q. Carry a paint pot along with you? A. Yes.

Q. How long was your life belt? A. Oh, that I couldn't say.

Q. Where did you fasten your life belt? A. Came around our breast and we would fasten it on one of the angles.

Q. On one of the angles, and then you started at the top of the pole and came down? A. Yes, sir.

Q. And as you came down you moved the position of the life belt? A. As we came down we fastened on to another.

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Q. That permitted you to get far enough away from the pole to operate the brush, did it not? A. Yes, sir.

Q. Painting it in the usual way, moving your brush up and down on it? A. Yes, sir.

Q. Did you ever measure one of those screens—actually measure it? A. No, I never did.

Q. The measurements that you have given then are simply your best judgment? A. Best judgment on it.

Q. As to what the size of the screen was? A. Yes.

Q. That is all.

WILLIAM HOLMES, sworn:

Direct examination by Mr. Simpson:

Q. What is your business, Mr. Holmes? A. Switchboard operator, Pennsylvania Railroad.

Q. Are you in the power house there? A. No; in the substation 3.

Q. What does that do? A. That supplies the power for substation 4.

Q. That is the electricity? A. Electricity, yes.

Q. Where does the power that you supply go? A. Where does that go?

Q. Yes?

Mr. Hartpence: I object, unless the witness is shown to be competent in some way.

Mr. Simpson: He worked in the power house.

Mr. Hartpence: He is a switchboard operator at the power house.

Q. You know that the electricity is made in the house? A. Not made in my place, no, sir—Long Island City.

Q. It comes into your house? A. Comes into our house.

Q. You know electricity comes into your house; you use it there? A. Yes.

Q. Where do you send it from there?

Mr. Hartpence: I object to it as incompetent. This witness has not been shown to have any knowledge of the source.

Mr. Simpson: I will withdraw it.

Q. What do you do as a switchboard operator? A. Operate the machines for the third rail power.

Q. Is it necessary for you to know anything about electricity? A. Well, it is for the station, yes.

Q. Have you had experience in operating—using electricity how long? A. Six years.

Q. What do you actually physically do in this power house? What is it you do? A. Well, I operate the machines.

Q. How do you do it? A. Well, start machines up for the power for the third rail.

Q. You start the machines up? A. Yes, sir.

Q. How do you start it up? A. I start it with power from the power plant.

Q. What do you do, turn a wheel or pull a switch? A. No, turn a switch.

Q. And when you turn a switch what does that do? A. It starts the machine up slow.

Q. What does that machine do, transmit the power? A. Transmit the power, yes.

Q. Where does it go from you then? A. To the third rail.

Q. Are there poles along there? A. Underground feeders.

Q. What are those poles used for that are along there? A. That is for the power for sub-station 4 from 3.

Q. Where is that sub-station? A. About four miles away.

Q. Near the Manhattan Transfer? A. Yes.

Q. Do you send them the power from your sub-station? A. Yes, right there.

Q. From three to four? A. From three to four.

Q. Then when it gets to 4 it goes along those poles? A. No; it goes from 3 to 4 along the poles.

Q. Yes. These poles are used to send the power from 3 to 4? A. Yes.

Q. Then where does it go from 4? A. That is the last stop.

Q. That is the last stop; what does 4 do? A. They use the power for the third rail too through a converter.

Q. But they get it through you; if you didn't start up the machinery they couldn't get any power? A. That is a different line altogether.

Q. How do they get the power? A. They get the power from the feeders from my station, from the power house.

Q. Those feeders go from where? A. From Highland Avenue on Seventh.

Q. Are those poles numbered? A. Yes.

Q. What number? A. I don't know just the—

Q. You know pole 14? A. I never looked at the numbers.

Q. You know the poles along there? A. Yes.

Q. And those poles extend from your station to where? A. Sub 4.

Q. Where is 4, at Manhattan Transfer? A. Yes, near Manhattan Transfer.

Q. Don't you know how many of them there are? A. No, sir.

Q. What voltage do you send from there?

Mr. Hartpence: I object unless this witness is shown to know.

Q. Do you know anything about voltage? You say you have used electricity for six years? You know what a volt is, don't you? A. Yes.

Q. You have meters to measure it? A. Yes.

Q. You have got to use your judgment that you don't send too much or too little? A. No,sir; that is directed by the power house.

Q. In Long Island City? A. Yes.

Q. All right. Do you know what voltage is? A. Yes, sir.

Q. How much voltage would you send there or have you sent there?

Mr. Hartpence: I object. He hasn't shown he knows what voltage is.

Mr. Simpson: I assume he did not invent electricity, but my contention is that he was using it, that he transmits the power, that he has familiarity with it for six years, and I think I have qualified him to show what voltage goes out of his station.

The Court: I don't know. He has said that the voltage is regulated by the station in Long Island City.

Q. You know what voltage you send out? A. We go by the meters themselves.

Q. What voltage do you send out? A. Eleven thousand volts.

By the Court:

Q. That is what you are testifying to, from what your meters indicate? A. Yes, from what the meters indicate.

Cross examination by Mr. Hartpence:

Q. You don't know anything else about it? A. That's all.

Q. Except what your meters indicate? A. Yes, sir.

Q. You are not an electrical engineer, are you? A. No, sir.

Q. As a matter of fact you say electricity is transmitted from your substation 3 to substation 4; you only know what somebody else has told you? A. Yes, sir.

Q. You have not tested it out yourself? A. No, sir; we have men for that.

Q. You have men to do that? A. Yes.

Q. And as to just whether it goes from the wires into the third rail by means of the converter, you only know that from what somebody else told you about that? A. About what?

Q. About the transfer of the current from the feeders into the third rail? A. From the feeders to the machine to the third rail.

Q. Through the converter? A. Yes.

Q. You have never done that yourself? A. No, sir.

Q. You only know that because somebody else has informed you of that fact? A. Informed me, yes.

Q. You have other men? A. Other men to look after the outside work, yes.

Q. Your position as a switchboard operator is simply to follow somebody else's instructions? A. Yes, the power directors, Long Island City, they give us all instructions as to what you should do.

Q. He communicates to you by telephone? A. Yes.

Q. And tells you to do certain things with your switchboard? A. Yes.

Q. And your mechanism? A. Yes.

Q. And you do that. As to the result of it you have no personal knowledge? A. I don't know anything about that at all.

Re-direct examination by Mr. Simpson:

Q. Well, what did he tell you to do?

Mr. Hartpence: I object.

Mr. Simpson: He has brought it out.

Mr. Hartpence: When, where, and by whom?

Mr. Simpson: I won't press it.

Q. You were subpoenaed by me, weren't you? A. Yes.

Q. After you were, have you had any talk with Mr. Hartpence of the claim department of the Pennsylvania Railroad? A. No, sir.

Q. Notify them that you were subpoenaed? A. Only my boss, my foreman.

Q. Who is that? A. Mr. Proul.

Q. He is your boss? A. Yes.

Q. And is he in charge of that power house there? A. He is in charge of the power house, foreman of sub-stations.

Q. Where can he be subpoenaed?

Mr. Hartpence: I object.

Mr. Simpson: That is all. It is rather difficult to get these gentlemen, but I can find them.

By Mr. Hartpence:

Q. As a matter of fact, did you ever see me before to-day? A. No, sir, I never seen you.

By Mr. Simpson:

Q. You say you never saw Mr. Hartpence before to-day? A. Yes, sir.

Q. Weren't you in court yesterday and see him yesterday? A. I didn't take notice.

Q. You did not look at his countenance, you didn't know him? A. No, sir.

By Mr. Hartpence:

Q. Did you ever talk with me at all? A. No, sir.

ALBERT W. REYNOLDS, sworn.

Direct examination by Mr. Simpson:

Q. Mr. Reynolds, what is your occupation? A. Master carpenter for the Pennsylvania Railroad.

Q. What is your occupation? A. Master carpenter was my business of the Pennsylvania Railroad.

Q. You are the man that sent the plaintiff over to your brother L. R. Reynolds, to get the job of painting? A. I don't know whether I did.

Q. Do you send men over to get employment? A. When they apply for a position, size them up.

Q. Do you have any personal knowledge of the work they done on the pole? A. Only what I followed up with inspection maybe one day a week or one day a month.

Q. What is your duty in reference to those poles which have been described as carrying wires from sub-station 3 to 4? A. To look out and see they are properly taken care of.

Q. Do you know pole 14? A. I know about where it is stationed.

Q. Are they all one series of poles? A. All one series, what they are.

Q. Are they all the same dimension, are they all used for the same purpose? A. They are not all the same dimensions, they are all used for the same purpose.

Q. On the 21st of August, 1917, what wires were on this pole? A. I haven't looked—be more than

I can tell you. There were wires on the top—I don't know what voltage they were on.

Q. What are they used for? What do they carry? Where does the current go that they are carrying?

Mr. Hartpence: I object. He has said he is the master carpenter, so it has not been shown that he knows anything about electricity.

Mr. Simpson: He inspects the poles.

The Court: As to some particular thing he spoke of.

Q. Do you know anything about the poles at all? A. Paint them when it is necessary to be painted.

Q. What are they used for? What are the poles used for? What is on them? A. Wires on them.

Q. Where do the wires run from? A. They run from sub-station 3 on the tower to sub-station 4 on the tower.

Q. How many wires run from sub-station 3 to 4? A. That I couldn't answer offhand.

Q. Well, approximately? A. Fourteen.

Q. Are they on both sides of the cross arm? A. Right.

Q. You were so employed on the 21st of August, 1917, weren't you? A. Yes.

Q. And these poles were then in, existence weren't they? A. They were.

Q. Used for carrying wires from sub-station 3 to sub-station 4? A. Yes.

Q. Were you at the place of the accident at the time of the accident? A. I was not.

Q. Were you there shortly after the accident? A. I didn't get there for probably a week afterwards; I don't know just what date.

Q. You were not there on that day? A. I was not.

Q. What were your general duties you say in reference to these poles? A. To look after it and see that they are properly kept up.

Q. And what does that mean, properly kept up? A. A master carpenter's position will have to be settled in order to tell you what my duties are. I take in all mechanical trades in the construction of bridges and buildings, painting, and it refers to concrete, iron work, and all such material, the fixing of necessary repairs on those poles.

Q. Did you have to do with the painting of these poles? A. I would, yes, sir.

Q. What were they painted for? A. Well, various reasons we paint them for.

The Court: Well, some of them are what? A. To protect them—where the paint scales to make it look respectable along the line.

Q. Keep them from deteriorating? A. One reason, yes, sir.

Q. That is, the paint would preserve them? A. Paint would preserve them.

Q. Can you describe these poles generally, what they were made of, what size they were and how high they were? A. Well, vary in height anywheres from forty or thirty-four, I should judge, to one hundred and eighty-seven feet.

Q. About how wide are they? A. They run anywhere from fifteen inches to three feet six, while one hundred and eighty-seven feet, about eight feet square about the base, eight to ten.

Q. How many cross arms do they have, approximately? A. The upper or lower cross arms?

Q. Upper cross arms? A. Three.

Q. How many men did you have painting them? A. That I couldn't answer.

Q. Did you hire the men for painting? A. They

were hired from the office, I did not individually hire them.

Q. It was through your office? A. Through the office.

Q. Did you have to do with the putting up or getting together the materials and tools and all that sort of thing? A. They were sent out of the store room—no, I did not, directly.

Q. Well who would have? A. They would come under the foreman in charge of the gang, or the general foreman.

Q. Do you know who was the foreman in charge of the gang? A. I think this man Steidler worked on the——

Q. On the 21st of August, 1917? A. The foreman was O. R. Reynolds, foreman of carpenters, but he was in charge of the painters indirectly.

Q. Mr. Reynolds is in New York? A. He is in New York, yes.

Q. He is not in court to-day? A. No, he is not.

Q. Do you know anything from personal contact with these poles whether or not these wires that were on the poles were dangerous to human life when they were live? Whether the wires that were on these poles at the time that you describe them were dangeous to human life when they were carrying a current? Do you know anything about it? A. Yes, I have got a shock of six hundred and fifty, I know what that is, but I never had a shock of anything greater.

Q. Did you get it from these wires? A. I never did, no, sir.

Q. Don't you regard them as dangerous? A. Positively, yes.

Q. To men working on them? A. Yes.

Q. Did you have anything to do with protecting the wires, that is protecting the men who were working on the poles from contact with the wires?

A. I issued orders to see that protections were put up.

Q. Did you have a rubber pig on the day of the accident?

Mr. Hartpence. I object to it as immaterial.

Mr. Simpson: I want to show what they had.

Mr. Hartpence: I object.

Mr. Simpson: I will reframe the question to meet that technical objection.

Q. Did you or did you not have to have a rubber pig? A. I don't have them——

Mr. Hartpence: I object on the same ground.

The Court: I suppose he wants you to ask what did you have.

Mr. Simpson: This is a hostile witness.

Mr. Hartpence: Mr. Reynolds has not been shown to know what a rubber pig is.

Mr. Simpson: You can see what the attitude of this case is if they are going to make us—

Mr. Hartpence. I object to any statement of that kind.

The Court: Listen to me. If we are going to have any such trouble as this from the start I am going to stop this case right now. There is a way in which it is properly conducted and that is the way we are going to conduct it.

Mr. Simpson: I stated that as a reason for even a leading question, that this witness is manifestly a hostile witness.

The Court: I say he is not, and I say he has not shown himself to be so; he has answered every question you have put to him freely, as far as I can see.

Mr. Simpson: I did not so take it. There is

no use of wasting time about that, and I will reframe the question and say to him——

Q. State whether or not there was a rubber pig at the scene of this work on the day of the accident?

Mr. Hartpence: I object to it.

The Court: I will sustain the objection for the reasons given before. Take your objection if you want it.

Q. Will you state what there was in the way of protection at the time of the accident at this work? A. I could not state because I was not at the pole.

Q. What had you issued—what had your office issued? A. Place a wooden screen up to protect the men against the iron.

Q. A wooden screen, is that all? A. That is all —you say that is all.

Q. What orders did you give? You were in charge of this work. What orders did you give to protect him? A. Place a wooden screen on the pole to protect a man and allow no man to work on the pole without a life belt.

Q. Life belt and a wooden screen? A. Yes, sir.

Q. That is all that you issued orders for that you know? A. In regard to what?

Q. This protection which we are talking about? A. That I could'nt say now whether that was all the orders that we issued or not.

Q. Your memory is faulty on that, is it?

Mr. Hartpence: I object to that, if your Honor please.

Mr. Simpson. I am asking him.

Mr. Hartpence: I object to that as calling for a conclusion of this witness.

Mr. Simpson: Withdraw it.

Q. Do you remember or not whether that was all? A. I couldn't say I do, whether it is or not.

Q. Do you know who the man was that was in charge of the electrical work or the passage of electricity over these wires from three to four on or about the time of this accident? A. I don't know who was in charge of them; I know C. B. Kaiser, the master mechanic, should know some of these men; I don't know who was in charge of the work at that time.

Q. His office is in New York? A. His office is in New York, yes.

Q. C. B. Kaiser. Did you know Mr. Proul? A. Yes—Prow.

Q. You did not know Mr. Prow? A. Yes.

Q. Do you know who the man was—by the way, where is your office? A. Bay and Green Street at the present time, Jersey City.

Q. Who is there in Bay and Greene Street, if you know now, who had anything to do with the electrical work or the passage of electricity from 3 to 4 and the maintenance of way from 3 to 4 on the day of this accident? A. As I said before, that is my office, and I haven't anything to do whatever with electricity.

Q. Is there anybody down there? A. None whatever, that is my office, and the electrical departments do not report there.

Q. Is there an electrician's office in Jersey City? A. Yes.

Q. Where? A. Bay and Washington Street.

Q. Bay and Washington Street? A. Washington Street power house.

Q. Washington Street power house in Jersey City; is that power house connected in any way with this sub-station 3? A. Positively not, as far as I know.

Q. Do you know the name of the man in the

Washington Street power house? A. General foreman and manager David Miller.

Q. That is all.

The Court: Better recess at this time.

Recess.

After Recess.

ALBERT W. REYNOLDS resumed.

Further direct examination by Mr. Simpson:

Q. These poles that you have said that your work consisted in overseeing the painting of, where do they begin on the Jersey side in reference to the Pennsylvania Railroad? A. Where do they begin on the Jersey side?

Q. Where is the first pole? A. Which end?

Q. At the Jersey end, coming from the Hudson River? A. Coming from the Hudson River, just outside the sub-station 3.

Q. And how far from sub-station 3? A. The poles and wires is on sub-station 3 roof.

Q. That is the first pole? A. Adjacent to it.

Q. The wires coming out of the roof of sub-station 3? A. Yes, sir.

Q. Then they will be on this pole 1, and then where do they go? A. Travel on the poles to sub-station 4.

Q. What distance is that from sub-station 3? A. About four miles and a half.

Q. And for sub-station 4, I meant to say. Where is sub-station 4? A. It is located at Kearny junction.

Q. Is that the last sub-station? A. That is the last sub-station, yes, sir.

Q. That is the last place that these wires go to;

is that it? A. Well, I dont know what—I wouldn't know how to answer that question.

Q. Do they go into sub-station 4? A. They go into sub-station 4 and continues—I don't know whether it is the same line that continues on to Manhattan Transfer or not.

Q. These wires having gone into sub-station 4, are there wires that come out of sub-station 4 and continue to Manhattan Transfer? A. I couldn't say whether they go into sub-station 4 or whether they are tied to the line at the sub-station.

Q. Well, these wires that come out of 3 and go along these poles either go into or are connected with or have something to do, according to what you can see, with 4? A. Yes.

Q. What did you see when you examined them? Describe what you saw in reference to these wires that come out of 3 with reference to 4; what did you see as they reached 4?

Mr. Hartpence: I object unless some time is fixed.

Q. Well, covering the time of this accident? A. What did I see in regard to them going into sub-station 4?

Q. Yes, what did you see when you went there to inspect around this time, what did you see the physical condition to be? What did you see? A. In regard to poles or wires, or what?

Q. Poles, wires, and 4. Were not the wires carried from 3 to 4 over these poles? A. Yes, they were carried from 3 to 4.

Q. Well, then, what came out of 4, wires, or what? A. Well, that I don't know—I never—I couldn't answer that question. I know that the wires come on the tower to that 4, and they are supposed to go in and out of that—as far as the electrical line goes I don't know.

Q. Do any wires come out of 4? Have you ever seen any wires about the time of this accident coming out of 4? A. I don't know as I get your—I don't know as I can answer you correct.

By the Court:

Q. He means, as I take it, these wires that come from sub-station 3 and which you say go toward or in the direction of sub-station 4, do they continue beyond sub-station 4, and do they go in and out or do they continue beyond sub-station 4? A. I couldn't answer that question the way he asked it, because I don't know. I didn't connect the wire. I don't know whether——

By Mr. Simpson:

Q. What you saw with your eyes? A. They are located on the tower at sub-station 4; whether they go through a conduit or pipe at sub-station 4 I can't swear.

Q. Did you see wires coming out of sub-station 4 and going some place other than sub-station 3? A. No.

Q. That is where they end, then. No wires come out of 4 at all? A. Not that I could say.

Q. Well, what you have seen, that is what I am asking you. Have you seen any wires on the roof going in to 4? A. There are two wires on the roof.

Q. Well, on the poles or out of the windows or door of cellar have you seen any wires coming out of 4 at any time? A. I don't recall them. I have never seen them, no.

Q. You have never seen any wires coming out of 4? A. No.

Q. As far as you know all the wires ended at 4? A. Yes.

Q. How far are these sub-stations from the third rail? A. Well, 3 is about three hundred feet; 4 is approximately the same distance.

Q. Where does this third rail run, from 3 to 4? A. Along the track on the end of the ties.

Q. From there, from 3 to Manhattan Transfer? A. Yes.

Q. But does it go right into the tunnel and over to New York? A. Goes into the tunnel and over to New York.

Q. Have you seen trains moving on that track? A. Yes, sir.

Q. Have you seen brushes against the third rail? A. No brushes, no.

Q. What have you seen against the third rail? What part of the locomotive have you seen against the third rail? A. The contact shoe.

Q. Have you seen any blue flames or sparks or any indication of any kind at the point of contact? A. Yes, sir; where the rail was rusted, or wet weather or icy weather.

Q. What would you see? A. I see sparks.

Q. Of electricity? A. Yes, sir.

Q. How long were you in this position that you have described, from what time to what time? A. I couldn't give the exact date.

Q. Did it cover the period of August 21, 1917? A. Yes; as far back as '15.

Q. Were you the person whose duty it was to instruct the plaintiff as to the work he was to do? A. No, sir.

Q. Whose duty was it? A. That was the man in charge of the work.

Q. Who was that? A. The man in charge of the gang was O. R. Reynolds, foreman of carpenters, and a man named Knudson, sub-foreman of painters.

Q. He was under him? A. Yes.

Q. How would it become your duty to give him instructions? A. Because he was directing the painters in charge of the work.

Q. You would tell him to give intructions A. I would tell the foreman and he would impart the information to Knudson.

Q. Knudson was the man? A. Knudson was the man directly in charge.

Q. Is he in court here? A. Yes, sir.

Q. Will you point him out to me?

Mr. Hartpence: Stand up.

A. Third man on the end.

Q. He was a foreman? A. Sub-foreman.

Mr. Simpson: That is all.

Cross examine.

Mr. Hartpence: No cross examination.

ANGELO GILBERTO, sworn.

Direct examination by Mr. Simpson:

Q. Where do you live? A. 329 Paterson Plank-road.

Q. On the 21st of August, 1917, were you working for the Pennsylvania Railroad Company? A. Yes, sir.

Q. How long had you been working for them? A. About a month, as far as I remember.

Q. What was your work? A. I was painting the poles.

Q. Which poles were you painting? A. Thirteen.

Q. I mean where were those poles located with reference to sub-stations 3 and 4? Where were they located? You know where Manhattan Transfer is? A. Yes, sir; along the Pennsylvania track about a half a mile from sub 3.

Q. Were they poles west or east of the Manhattan Transfer station? A. East.

Q. Towards New York or towards Newark? A. East, towards New York from Manhattan.

Q. How long had you been working upon the bridges? A. I guess about a month, I couldn't tell you.

Q. How did you do the work? A. Well, with a brush.

Q. I mean as to whether one man or two men? A. Two men on a pole.

Q. How would those two men work? A. On either side of the pole, one on one side and one on the other.

Q. Why was that? A. So a fellow wouldn't paint under him and he wouldn't slip on the wet paint when he was coming down.

Q. How would you get down? A. Let yourself down and grab the pole and loosen the belt and put the belt on again.

Q. Was it a lattice work; did you step down or did you slide down? A. Yes, by angles like, going up on a slant.

Q. It was sort of open spaces? A. Yes, sir.

Q. Like metal lattice work? A. Yes, with slanting.

Q. You would come down by putting your foot in? A. Yes.

Q. Loosen your belt and then come down? A. Yes.

Q. How long had you been working on the day of the accident? A. How long?

Q. Huh! A. Until it happened.

Q. Well, I mean what time, from what time to what time? What time did you go to work? A. Nine o'clock I guess we started in.

Q. About what time did it happen? A. About half past ten.

Q. What pole were you working on? A. Thirteen.

Q. What pole was this man Steidler working on? A. He was on fourteen.

Q. Who was working with him—Boyson? A. Bottom, something like that.

Q. Bouton, wasn't it? A. Yes.

Q. What did you see of the accident? A. I see —I was sitting on the top part of the pole, painting the top of the pole.

Q. What number, 14? A. 13.

Q. What did you see? A. I seen this fellow step down.

Q. Who do you mean by this fellow? A. Al Steidler. I seen him step down a bar and then he reached for his paint pot and he sagged in—like a slip on the pole, and he threw his arm out.

Q. You saw him reach for his paint pot and slip on the pole? A. Yes.

Q. What did he do? A. He went backwards; if there was no belt on him he would fall.

Q. He had a belt on him and the belt held him. How did his hands go? A. They went out.

Q. Did either hand rest against a wire? A. No, only one.

Q. Which one? A. The right hand, that is the side the pole was alive.

Q. The right hand went against a wire and then what did you see? A. I seen he was on fire.

Q. What kind of flames did you see? A. Blue—like something like blue flames coming out of him.

Q. Like you have seen on the trolley? A. Yes.

Mr. Hartpence: I object to it as immaterial, incompetent and leading.

Q. State whether or not you have ever seen flames coming out of the trolley wire when the trolley wheel goes off? A. Yes.

Mr. Hartpence: I object to it as immaterial and irrelevant.

Mr. Simpson: I expect to prove the trolleys are run by electricity and this blue flame indicates the presence of electricity so as to have this witness say whether or not the flame that he saw resembled it, so it can be said whether or not it was electricity.

Mr. Hartpence: Then I will object to any comparison. I cannot object to this witness stating what kind of flame he saw.

Q. Will you say whether or not you have seen flames coming out of the— A. I did see flames.

Q. On the trolley wire——

The Court: Wait! I don't hink he understood, because he answered before it was finished.

Q. Have you seen flames come out of a trolley wire when the trolley came off?

Mr. Hartpense: I object to it as mmaterial.

A. Sure I seen that.

The Court: Why is it immaterial?

Mr. Hartpence: There is nothing to show that flames coming out of a trolley wire have any connection whatever with this gentleman at the time this accident happened. You might as well ask him if he ever saw water coming out of a water pipe.

The Court: Take your exception.

Mr. Hartpence: I ask that my objection be noted.

The Court: You may have it.

Q. You said yes, you have seen such flames coming out of trolley wires? A. Yes.

Q. State whether or not the flames you saw when his hand came in contact with the wire seemed to you the same as the flames that you have seen coming out of trolley wires?

Mr. Hartpence: I object to it as leading and as incompetent as well as immaterial, and irrelevant. I think he is simply stating conclusions to the witness to be ssented to, and I object to that on those grounds.

The Court: All right. Take your exception.

Mr. Hartpence: I ask that it be entered.

Q. What did you say about it—same or not? A. The same.

Q. Did you hear any noise at all? A. Yes.

Q. What kind of a noise? A. Like frying eggs, sizzing noise.

Q. Sizzling noise, as if somebody frying eggs? A. Yes.

Q. Was there any smell of burning flesh? A. That I couldn't——

Q. You couldn't notice that; you were too far away? What happened after you saw that—oh, one minute. Will you describe how this plaintiff's hand touched the wire with reference to this shutter that was on the pole, that screen, as it has been described? You saw a screen on the pole? A. Yes; every one of us has a screen.

Q. How did his hand touch the wire with reference to the screen? A. Well, the screen was not wide enough.

Q. Well, just——

Mr. Hartpence: I object, and ask that it be stricken out.

Mr. Simpson: I consent that it be stricken out. That is for the jury to say.

Q. What I want you to tell is what you saw, and

how did his hand project; was it beyond the screen or how was it? A. Well, it was beyond the screen.

Q. Well, that is what I want to know. How did he lie when his body laid back with his hand beyond the screen against the wire; how was he held up, by the life belt or what? A. By the life belt.

Q. What happened? A. I went down the pole and the two linemen, one from below from the paint gang, got a rope from a store over there or some place, and two linemen went up and one fellow went up on the side where he—this fellow—got a clip—and Steidler got hurted and he had to come down, and he clipped himself, because it was all wet.

Mr. Hartpence: I object and move to strike it out.

The Court: What is that?

(Answer repeated by stenographer.)

The Court: That question undoubtedly is directed to what happened to his men.

Mr. Simpson: I don't care about that.

Q. Just describe what it was happened to the man after you saw the blue flame and heard the burning flesh, what happened with reference to him? A. We took him down.

Q. How did you take him down? A. Put a rope.

Q. Did you go up to do it? A. Yes.

Q. How did you save yourself from being shocked? A. Who, me? He wasn't on the wire when——

Q. What? A. He was not on the wire.

Q. He had got off the wire by that time? A. Well, his hand bent—his arm.

Q. His hand bent away? A. His arm.

Q. How was his hand on the wire, the back of his hand or the front of his hand? A. The back of his hand.

Q. When you got up was it bent backward? A. Oh, I didn't see it, if it bent or not, but I seen him fall.

Q. You saw him fall. When you got up there what did you do? How did you get him down? A. The two linemen tied a rope around him.

Q. You did not get him down? A. No; I took him down on my shoulder while they were holding the rope.

Q. Were you up there with his body? A. Yes.

Q. Then describe what you saw. Was the body burned? A. I was doing it before they stopped me.

The Court: No; the question is was his body burned.

Q. Describe his condition? A. I went up on the side where he was hurted.

Q. What did you see? A. The blood was trickling down my neck.

Q. The blood was going down your neck? A. Yes.

Q. Go on and tell us? A. The linemen were up ahead of me.

Q. I don't care anything about that, I want you to tell the jury what you saw of his condition. Was he burned or what? A. He was dead—almost dead, anyway.

Q. Was he burned? A. Yes.

Q. Where? A. I know I tried to get—he had a pair of gloves or something on and I tried to get the gloves and there was all his meat burned, and there was no gloves at all.

Q. His meat? A. Yes; and I took the meat off his hands.

Q. All burned away? A. Yes.

Q. How was he, conscious or unconscious? A. He was groaning.

Q. Ruined? A. Groaning.

Q. How about his clothes, were they on fire or not? A. His clothes? No—only his socks was.

Q. Well, were his socks on fire? A. It was all burned, sure.

Q. His socks were burned; how about his shoes?

A. His shoes—one had eat a hole in the sole.

Q. What kind of hole, burned hole? A. I didn't take notice whether it burned.

Q. You didn't take notice. Then did they get him down? A. Yes, they got him down.

Q. Then what happened? A. Then we brought him up to the bank; we laid him in the little watchman's shanty there and stopped the train and took him to the city.

Q. What condition was he in when he lay in the watchman's shanty? A. I don't know; he was groaning something there, I don't know what he was saying.

Q. Was he conscious or unconscious? A. If he is groaning he is not unconscious.

Q. If he is groaning he is not unconsicous; all right. What happened? Flag the train, did you? A. Yes, sir.

Q. Train going which direction? A. New York.

Q. What did they do with him? A. They put him on the train and then I didn't go to the city, I stood there.

Q. How was that train going, was it a steam locomotive or an electric locomotive? A. There is no steam there, it is all electricity.

Q. Take him to New York?

Mr. Hartpence: I object. He said he didn't go.

Q. Didn't you go with him? A. No, sir.

Q. I thought you said you went with him? A. No, sir.

Q. When was it you last saw him? A. That is the only time. The last time I seen him for a long while—that day he was out to the hospital.

Q. This shutter that you say was on the pole the side he was on, would you describe what kind of shutter it was, that his hand went beyond? A. Four and a half feet by about fifteen or sixteen inches wide across.

Q. Four feet high and about fifteen or sixteen wide; how was it fastened to the pole? A. With pieces of string.

Q. Was it between the man and the live wires? A. Yes.

Q. The pole that you were working on that day was what pole? A. Thirteen.

Q. Were the wires live on one side?

Mr. Hartpence: I object, unless this witness knows whether they were alive or not.

Mr. Simpson: That will appear by cross-examination.

Mr. Hartpence: He has not qualified yet to state whether he knows what a live wire is. All wires look alike, I think the court will take judicial notice of that.

Mr. Simpson: All wires look alike, but they don't feel alike.

The Court: If he says he felt it I would say he knows. I would say the same thing. I don't know.

Q. Didn't you get instructions when you went up the pole as to the live and dead wires? A. Yes.

Q. What instructions did you get when you went up? A. Well, we were told which was the live side and the dead side.

Q. Which was the live side? A. Always was where the shutter was on.

Q. Which was that, the right or left? A. Right side.

Q. The north side? A. Like towards Manhattan Transfer, it was the right side.

Q. That was the live wire side? A. Yes.

Q. How many wires were there, do you know? A. About twenty, I guess, between small and big ones.

Q. Did these wires have any covering on or were they bare? A. They were bare.

Q. They were all on one cross arm, or more than one cross arm? A. There are about three crosses there, three bars.

Q. Do you know how many were on the right hand side and how many were on the left hand side? A. Same amount, I guess, on the two sides.

Q. That is very illuminating. How many were there—six, eight, or ten, or what? A. About twenty.

Q. What? A. About twenty, I said.

Q. Twenty on each side? A. Yes.

Q. What was the purpose—I think you have testified to it, as to the purpose of one man painting on one side and one on the other—but did you see while you were painting, whether his partner was on the same side of the pole under him?

Mr. Hartpence: I object to it as leading.

The Court: It is leading.

Q. State whether or not you saw at any time before the accident whether the man painting with the plaintiff was painting under him?

Mr. Hartpence: I object to it as leading, I cannot object to his stating what he saw, your Honor, but I do object to leading questions.

Mr. Simpson: I insist it is not leading. A leading question is one that puts the answer in the mouth of the witness. I say, "State whether or not."

The Court: He can say he was or he was not. He can say yes or no to it.

Mr. Simpson: That is not the test of a leading question.

The Court: All right, take your exception and go on.

Q. State whether or not he was painting under him? A. Yes, he was.

Q. How long before you heard this noise or your attention was attracted, and you saw this man burning in mid air? A. About a quarter of an hour I seen it.

The Court: Did you want your exception to that ruling, Mr. Hartpence?

Mr. Hartpence: No, sir. I do not think it does any good to take an exception to the admission of a leading question, and it is hardly necessary to encumber the record with it.

Cross examination by Mr. Hartpence:

Q. How long did Mr. Steidler work with the group of painters? A. How long did he work there?

Q. Yes. A. I don't know, he was there before I got there.

Q. He was there working then when you got there? A. Yes.

Q. You were working there about how long before the accident? A. I worked there about a month.

Q. How far away from 14 pole was 13 pole, about? A. I don't kow how far away.

Q. How much of a distance between the poles? A. About how much?

Q. Yes. A. About a hundred—a hundred and fifty yards, I guess.

Q. You were on 13 pole? A. Yes, sir.

Q. Now I understood you to say that all those poles where you were working had these shutters on the poles? A. Yes, sir.

Q. Did you ever measure those shutters with a measuring stick or yard stick or foot rule? A. I can measure myself; I am five feet and a half, and it goes up to my shoulders.

Q. Did you ever measure that with a measuring stick? A. No, sir.

Q. And the dimensions that you have given are simply your best judgment then? A. Yes, sir.

Q. As to the measurement, is that right? A. Yes, sir; that is what I think.

Q. Who was working with you on 13 pole that morning? A. Fellow by the name of Ernest Govern.

Q. What was the last name? A. Calven, I guess.

Q. Calven. You were working on top of 13 pole when this accident happened? A. Yes, way on top.

Q. Up among the cross pieces, wires? A. Yes; I was sitting on a cross piece on the dead side of the pole.

Q. You were sitting on the cross piece? A. Yes, on the dead side of the pole.

Q. Where was your side partner then? A. He was on the side towards Manhattan Transfer.

Q. Toward Manhattan Transfer, that would be the west side of the pole? A. Yes, sir, on the west side.

Q. You were painting your side of the pole from the cross pieces? A. Yes, because I had to paint the top of the pole. You see it is made up of—goes up on a corner like.

Q. So it was perfectly possible to paint the pole from a position on the cross pieces there, wasn't it? A. Yes, sir; the top of it. That is the only

side you can paint is the top from the bar.

Q. You could see Steidler working on his pole 14, from where you were? A. Yes, sir.

Q. Kept pretty close watch on the wires while you were there yourself, didn't you? A. I surely did.

Q. What did you do then? A. Well, we was warned by the foreman to look around all the time.

Q. Keep away from those live wires; isn't that right? A. Yes.

Q. The foreman warned you about that quite frequently, didn't he? A. Oh, sure; he surely did.

Q. Where was Bouton at the time you saw Steidler— A. When he was hurted?

Q. —reach for his paint pot? A. Oh, he was on the other side of the pole then.

Q. He was on the side towards New York? A. The west side of the pole,

Q. Who was? A. Bouton.

Q. And Steidler was on which side of the pole? A. Steidler was on the east side.

Q. That would be on the side towards New York? A. New York. ,

Q. Now when he stepped down did he drop his life belt, the hook, at that time? A. When he stepped down?

Q. Yes. A. He stepped down and fixed his life belt and he reached for the pot, in doing that he slipped.

Q. Yes, now how was the life belt fastened to the pole? A. It has got two rings—you have a belt around your waist there, and you have two rings on the side, one on either side of you, and the belt with two clamps, clamp it up on the side.

Q. Then you put the belt through— A. Through one of them cross pieces.

Q. Through one of the cross pieces? A. Yes, sir.

Q. How long did you continue to work painting those poles after the accident? A. I quit about two days after.

Q. You were there then a little over a month, were you? A. Yes, about a month, I guess.

Q. Did you see anybody else come in contact with those wires except Steidler during that period and be burned? A. No, sir.

Q. He was the only one? A. The only one while I was working there.

Q. What is your first name? A. Angelo.

Q. Do you know Henry Gilberti? A. That is my brother.

Q. He was also working there, wasn't he? A. Yes, sir, but he was about two or three poles on the west side of this pole.

Q. How many cross pieces were there on the top of the pole? A. Three of them.

Q. Three. That is three on each side; is that right? A. Yes, sir; there is three. They run across, you see, make three on each side.

Q. Run clear across the pole? A. Yes.

Q. Do you know how near to those or any one of those three cross pieces Mr. Steidler was when you saw him— A. How near to them?

Q. —fall back and hit the wire with his hand? How near to the cross piece was he at that time? A. How near? Well, he wasn't even hitting a cross piece.

Q. He was what? A. He didn't hit no cross piece, he hit the wire coming from the cross piece. The cross piece goes right in front of you, and he was on that side, you see, and the wires run——

Q. At that time was he above the cross pieces or below the cross pieces? A. He was between the three of them.

Q. He was right between the three cross pieces? A. Yes, sir.

Q. Do you know how far apart those cross pieces are running down the pole? A. About a foot and something.

Q. And he had painted a little higher up just before he fell? A. He finished painting up on top of the pole and he was coming down.

Q. Do you know how much of the pole extends above the cross pieces, how high above? A. How much? About two feet, two feet and a half.

Q. That is all? How long had Steidler been working on that pole that morning before he was hurt, to your knowledge? A. Since about nine o'clock, I guess—that is the time we started in.

Q. The accident happened about 11:30, did you say? A. Somewheres around there. I know we were waiting for the pay car and that is about that time.

Q. This was before noon? A. Yes, in the morning.

Q. Ordinarily how long did it take to paint that part of a pole that extended above the cross pieces? A. Well, it is because you have to go so many corners with your brush on the inside it takes you long.

Q. Ordinarily how long would it take? A. Paint the piece he was painting?

Q. Yes. A. Take about two hours or two hours and a half, I guess.

Q. You say you had seen Bouton painting lower down underneath him that same morning? A. Yes, sir.

Q. Then Steidler was right above him when he was doing that? A. Yes, sir, Steidler was on top and he was right under him.

Q. Bouton must have been right close to him when he was doing that? A. He was.

Q. So Steidler was in a position during all that hour and a half or two hours before he fell to see just what Bouton was doing underneath him?

Mr. Simpson: I object to it as calling for a conclusion. That is for the jury to say from the description of this witness, not for the witness.

The Court: I think that is so, Mr. Hartpence.

Mr. Hartpence: I think it amounts to that, but it is merely his stating that Bouton was in a position where Steidler could have seen him.

The Court: If that is so that is all you need.

Mr. Hartpence: That is what I asked him, if he is not in that position, but there might have been something intervening. I will withdraw it.

Q. Was there anything intervening between Steidler and Bouton as Bouton worked beneath Steidler to hide Bouton from Steidler's view? A. No. nothing to stop him, but fifteen minutes before this happened, you know, he must have told him to go around the pole or something, because I seen him move out of there.

Q. You didn't hear him saying anything, did you? A. Too far away to hear him.

Q. From where you were you couldn't hear him? A. If he hollered I hear, sure.

Q. During the time that Bouton was painting underneath Steidler there was nothing intervening between them, was there? A. No, sir.

Q. And these screens that you have referred to you say were always between the painter and what you have been told were the live wires? A. Yes, between the live side and the poles.

Q. Painter. How far up the pole did you go

after the accident, pole 14? A. Right up between his legs, with my shoulder.

Q. Right up where? A. Between his legs, with my shoulder.

The Court: Right up between his legs, meaning the plaintiff's legs, with his shoulder.

Q. How did you climb up there? A. Oh, I am pretty good at climbing, and I done that every morning.

Q. How did you do it? A. How did I do it? My legs.

Q. Use your hands also? A. Oh, sure.

Q. What did you take hold of with your hand? A. Took hold of the pole, of course, them cross pieces.

Q. The cross pieces? A. Yes, sir.

Q. And you put your feet on those cross pieces also, didn't you? A. Yes.

Q. Down in the angle formed by the cross pieces with the upper—isn't that right? A. Yes.

Q. That is the way all the painters did it? A. Sure, they have to go on there somewheres.

Q. The linemen climbed up and down the same way, didn't they? A. Yes; the linemen done the same way. There is no other way to get up there.

Q. You went up on this pole 14 after Steidler was injured in the same way you usually climb up and down the poles when you were painting; isn't that right? A. Yes.

Q. Did you take your life belt up when you went up? A. No, sir; I went up faster than I ever did before.

Q. Now there were some cross pieces lower down there, weren't there, than these three at the top of the pole? A. Cross pieces down—there is three on the top and one about ten feet below that.

Q. There is a screen there also at the lower bar,

was there not? A. I don't know—I guess—I don't remember if there was any there.

Q. You don't remember that? A. No, sir.

Q. Ordinarily there was, wasn't there? A. I know when I got there, up to the cross pieces, they was painting it already, so I started painting and I painted between the wires with the shutters on between the wires. You see I have not painted the bottom of the pole at all, I got there too late, the other fellows had done that.

Q. When did you— A. I got there after the job was done.

By the Court:

Q. Some time after this happened, you mean—you mean pole 14? A. Yes, but that was painted before up to the wires, you see. They had waited a chance to shut the pole off to get up between the wires.

By Mr. Hartpence:

Q. What you mean is when you went on the top first a certain portion of the poles had been painted; is that right? A. Yes, that was finished.

Q. You saw Steidler reach for his paint pot? A. Yes.

Q. Then you saw him go backwards, is that right? A. Yes.

Q. See his hand go out and hit the wire? A. Yes.

Q. See the flames, and then after that you went down the pole you were on, did you? A. Yes.

Q. And climbed up the other one? A. Yes, sir.

Q. Now when you got up there no part of his body was in contact with any wire, was it? A. No, sir; I wasn't going to touch him then if he was.

Q. Well, anybody tell you not to touch him? A. What?

Q. Anybody tell you not to touch him? A. No, nobody said anything because he was off the wire.

Q. Who finally told you to touch him? A. Well, I could see myself.

Q. That he was not in contact with any wire? A. Yes, sir.

Q. Then you were not afraid after that— A. No, sir.

Q. —to put him on your shoulder? A. No, sir.

Q. All the painters there were watching those wires pretty carefully, weren't they, to see——

Mr. Simpson: I object to it as not proper cross examination.

Mr. Hartpence: I will withdraw it.

Q. Did you know Mr. Steidler before you went to work there? A. No, sir.

Q. That is all.

Re-direct examination by Mr. Simpson:

Q. Mr. Gilberti, you have been asked if anybody else was ever—did you ever see anybody else burned. Did you ever see anybody else paint under anybody else before this day?

Mr. Hartpence: I object to it as immaterial and irrelevant.

Mr. Simpson: The purpose of that question is to show it was the fault of the man. I have a right to show that never before had this man ever seen another man paint under a man who was working on the pole.

Mr. Hartpence: My objection is that it is immaterial.

The Court: I think the other question was improper. That being left——

Mr. Simpson: Withdraw it. May I ask if David Miller is here, or C. B. King, or A. E. Prow?

Mr. Hartpence: Not that I know of.

Mr. Simpson: Will you produce them? They are all employees of the defendant. I have endeavored to subpoena them, but they are all in New York and Long Island City. If the case lasts over to-day will you produce them on Monday?

Mr. Hartpence: I wouldn't like to say that. I don't know that I can. Miller, Keyser, Proud.

WILLIAM HOLMES, recalled.

Direct examination by Mr. Simpson:

Q. I want to recall you with the permission of the court, to find out what you actually did in sub-station 3? What was your work in sub-station 3? A. Operating the switchboard.

Q. What does that mean? A. It is to operate the feeders to run the sub 4 and signal feeders.

Q. Well, I don't yet understand; what effect does what you do have on the road? What do you do? What is your work? A. Well, I operate the machinery for a third rail power.

Q. Where do you get power from to operate the machinery?

Mr. Hartpence: I object.

A. Long Island City.

Mr. Hartpence: I object to it as incompetent and immaterial, unless the witness is shown to know something about the source of the power. It goes back to the old question.

Q. Just tell us what you do. Tell us what you do and what you saw happen when you do it? A. I take on some power from Long Island City to cut in feeders and cut out feeders.

Q. How do you do that; you don't kiss it? A. With a control.

Q. Describe this controller? Tell us what it does? What does it look like? A. It is a handle, a pull handle; it is a switch worked by control.

Q. You will have to describe it for us, because you know we cannot make any conclusions. Is it a long metal thing from the ground? Does it come out of the ceiling or out of the wall? A. No; the wires, they come from the power house and then there is three switches.

Q. What do those switches look like? A. Knife switches—copper switches—long switches.

Q. Do they have black handles on and two pieces of copper? A. No handle at all.

Q. What do they look like? You say switches; I don't know what a switch is. A. Copper switch, high tension switch.

Q. Where are they located in sub-station 3? A. They are—the feeders come from the power house and then they have what we call a buzz, like three cables, and from the cables there is three more switches, long copper switches; from there they go to that one, an oil switch.

Q. What do you do in the power house? A. I operate the oil switches.

Q. What do you do; do you get hold of them with your hands or feet or what? A. No; control them from the switchboard.

Q. What is it you get hold of it? Describe it. A. There is a handle, near the switches.

Q. What kind of a handle? A. It is a wooden handle.

Q. Then how large is it? A. I couldn't just say how large.

Q. What do you do, pull it towards yourself or push it away from you? A. Automatic contact

makes contact and makes the switch go up and down.

Q. Do you do anything to make the automatic contact? A. I have got to work it by hand.

Q. What did you do? A. Turn it that way.

Q. When you turn it indicating your right what is the effect? A. The switch is in and it shows a green light on the switchboard.

Q. Then what does the green light mean? A. That is the line is live.

Q. There is electricity in it? A. Yes.

Q. Where does that go? When the green light comes up where does your electricity go, out of your power house?

Mr. Hartpence: I object to it as immaterial and incompetent.

Mr. Simpson: This man is the operator in charge of this station.

The Court: If he knows of course, why isn't it competent?

Mr. Hartpence: He hasn't yet shown he knows anything about electricity or operation. He only knows he follows certain orders.

Mr. Simpson: It can hardly be that the Pennsylvania Railroad would have a man in sub-station 3——

By the Court:

Q. Do you know where the current goes after you have done these things? A. It all depends on the feeders.

Q. You have to answer that yes or no. After you have operated the switch the way you say and the green light shows, do you know where the current goes? A. Yes.

By Mr. Simpson:

Q. How do you know where it goes? A. Well,

I can depend—see what the feeders does, whatever number of feeder I put in.

Q. How is that shown to you? A. Different feeders run to sub 4 and different comes from different sub-stations, from the power house.

Mr. Hartpence: I object until he is shown to know. I have never yet seen a man who has seen electricity. When it comes to asking him a question as to what takes place with electricity——

Mr. Simpson: I will withdraw it.

Q. If you do not move the switch into the feeder or the third rail can the locomotive move?

Mr. Hartpence: I object to it as incompetent.

Mr. Simpson: He has been there and he has seen what it is necessary to do.

Mr. Hartpence: At the present time he has only said he is a mere switchboard operator.

Mr. Simpson: I will withdraw that question.

Q. Go ahead and tell us everything that you do. What time do you get there? A. Eight o'clock.

Q. Go ahead and tell us everything that you did from the time that you get there. You were working there—I will withdraw that—just tell us what you do to find out what you know?

Mr. Hartpence: I object to it as immaterial and irrelevant.

The Court: Why is it irrelevant?

Mr. Hartpence: He might do a thousand things.

The Court: I suppose so. I do not want to spend the time to have him go over the whole category of everythng he does.

Q. There is nothing done in your sub-station

except deal with electricity? A. Get orders from the power director and we go according to his instructions.

Q. The power director is the chief station? A. Yes, Long Island City.

Q. What is his name? A. Heafy.

Q. And whatever he tells you to do you do? A. Yes.

Q. What is it in connection with? What do you do it in connection with? In connection with what work are you doing it? Switches or what? A. No, switches—operating the switches, automatic switches.

Q. What are these automatic switches? A. From the high tension power.

Q. What is the high tension power? A. That is the power from sub 3 to sub 4, and the third rail power.

Q. What is it used for? A. Which power?

Q. Well, switches for what? A. There is power for the third rail and power for the sub-station.

Q. What does the power for the third rail do? A. Drive the trains from New York.

Q. To where? A. Manhattan Transfer.

Q. What does the power for the other one do? A. The power that supplies sub-station 4 from sub-station 3.

Q. What does that do? A. That drives the machines out of the sub 4 too—generates power for the third rail.

Q. Where do the wires go that leave your sub-station 3—on these poles to 4? A. Yes, sir.

Q. Are they connected with this switch that you operate, automatic switches? A. Yes, all automatic switches, the high tension switches here.

Q. Located in your place? A. Yes.

Q. And when the contact is made what is the signal color? A. Green.

Q. What does that indicate? A. That switch is alive.

Cross examination by Mr. Hartpence:

Q. You only know that because somebody instructed you or told you that; isn't that true? You have been told that when the green light comes the wire is live? A. That is alive, yes, supposed— that is what we get told. We are supposed to know that is live, but we don't exactly know; there might be some trouble on the high line, maybe the wire might be broken and it might not reach the other end. We have to go by the power director.

Q. Your duties do not require you to know what becomes of the electric current, do they? A. I don't require, no, sir, only when we know the switches are live.

Q. You simply look for the green light; isn't that so? A. Yes, sir.

Q. You are not n electrical engineer, are you, Mr. Holmes? A. No, sir.

Q. What you know about the operation of these high tension wires is what somebody else has told you, isn't it? A. Yes, sir. We get orders from the power director, that is all we know.

Q. And the only way that you know certain of the wires are high tension wires and certain of the wires feed the rails is because somebody has told you that; you have never made the connections by yourself? A. No, sir; we have other men doing that.

Q. That is not part of your work? A. No, sir; I don't know what happens on the outside, only inside I have to take care of.

Q. All you know about what happens on the outside is what you learn from what somebody else tells you? A. Yes, sir.

The Court: I must confess I do not see why

we are spending so much time about this.

Mr. Simpson: I want to be sure I have electricity on these poles. These poles are supporting wires to furnish electricity.

Q. All you know is that when you make certain movements on your apparatus you see a light and you don't see a light; is that right? A. Yes.

Re-direct examination by Mr. Simpson:

Q. Where are you trained on the switches? A. Start from the power house and work ourselves up.

Q. Where did you start? A. Power House, Long Island City.

Q. For how long did you work in Long Island City? A. For a few years and then I worked out in sub 3.

Q. Didn't you come in practical contact with the electrical machinery and the machinery operated by electricity in that time? A. During all the time.

Q. When you learned to be a switchman? A. Yes, before we moved.

Q. You have to know what moves them? A. Yes.

Q. Don't you know what moves your switches in sub-station 3? A. We have automatic controls.

Q. Is it electricity or gas or candy, or what? A. Controlled by electricity.

Q. How long did you study before they allowed you to go in sub-station 3? A. Oh, we learned that—we was learning it all the time while we was around the switchboard.

Q. Do you see anybody in court that has anything to do with electrical work? You say there were men outside that had to do with electrical connections, do you see any men that have to do

with electrical work? A. What kind of electrical work?

Q. Any kind of electrical work. You don't know any of these men in the court room? A. No, sir; I don't know any of them.

Q. You have never seen any of them around doing electrical work? A. No; I don't see any of them on the outside; I am always on the inside.

Q. Who did you say is your superior? A. Mr. Heafy.

Q. Where is he? A. He is supposed to be in Long Island City.

Q. He is in charge of the power house at Long Island City? A. Yes.

Q. Do you have anything to do with sending currents from your station over to sub-station 4? A. It runs from my station.

Q. Do you have anything to do with it? A. Only —yes, sir; runs from my station.

Q. Do you send it over? How do you shut it off? A. Two feeders—cut the switches out.

Q. If you cut it out it does not run? A. It does run. I can't cut it all out together.

Q. How do you increase or decrease it? A. Get orders to cut out a certain feeder—what they call feeders.

Q. How do you do that? A. Well, by permission of the power director, Long Island City.

Q. What did you do physically to do it, cut out a switch? A. Cut out a switch.

Q. What does that do? A. That cuts the switch or cuts off the power for a certain section that runs out to the burg.

Q. You say your only superior is in Long Island City; is that right? A. Yes, sir—well, there is different men at different time during the week which has got to do certain things.

William Holmes, (recalled) for Pltff.—Redirect
William Holmes, (recalled) for Plaintiff—Recross

Q. I mean here. You have no superior here. You have nobody above you here? A. No, sir.

Re-cross examination by Mr. Hartpence:

Q. Did you ever see the electricity go from sub-station 3 to sub-station 4? A. No, sir.

The Court: Nobody ever saw that.

Mr. Simpson: I will admit he never saw it, and I will admit he never embraced it.

Q. All you know is when you turn a certain switch, according to the instructions of the power house director you see a light there? A. I see a light on the board.

Q. You assume from something that somebody has told you some time, that the current is on? A. Yes, sir.

Q. Isn't that correct? A. Yes, sir.

Re-direct examination by Mr. Simpson:

Q. How have you learned that? Haven't you learned it by devoting yourself to learning this for six years, working around where electricity is, seeing how it is? A. We got broke in in Long Island.

Q. You are trained? A. Yes, sir.

Q. By the Pennsylvania Railroad? A. Yes, by men in the sub-station.

Q. That are experts in it? A. Well, not experts, no, sir.

Q. How do they train you? A. Well, they know all about this, the head men, in the day time.

Q. And you have used the electricity? A. Yes, sir.

Q. And you are taught that? A. Yes.

Q. You have never claimed that you saw electricity at all, did you? A. Cannot see it.

Q. But you know it is there, don't you? A. I know it is there, yes, sir.

By Mr. Hartpence:

Q. How do you know it is there? A. Supposed to know it.

Q. That is all, as far as you know? A. Yes, that is all.

THOMAS KNUDSON, sworn.

Direct examination by Mr. Simpson:

Q. Were you the foreman of this plaintiff on the 21st of August, 1917, when he was hurt? A. Yes, sub-foreman.

Q. Were you the man that supplied the screens? A. Why, no, I didn't supply them.

Q. Who supplied them? A. Why, my foreman.

Q. What is his name? A. Oliver Reynolds, O. R. Reynolds.

Q. Is he here? A. Yes, sir—I guess so.

Q. What! You guess so. Don't you know him? A. He is here.

Q. What were you guessing about? A. Well, I hadn't looked around. I had to look around.

Q. You are still working for the Pennsylvania, are you? A. Yes, sir.

Q. Now you say that you got these screens from Reynolds, did he give them to you? A. Why, he gave to the linemen.

Q. Who did he give them to, what lineman? A. To Dorlans, lineman foreman.

Q. Spell it? A. I don't know exactly how to spell it.

Q. Is he here? A. Yes.

Q. Would you know him if you saw him? A. Yes.

Q. Point him out to me. That gentleman here? A. Yes.

Q. He is the man that had the screens there and had them put up? A. He is the man that had them put up.

Q. You had nothing to do with putting them up? A. Nothing to do with putting them up, no, sir.

Q. You were simply, as I understand you, foreman of painters? A. Sub foreman of painters, yes.

Q. Did you supply this man with his tools, see that he got them? A. Yes.

Q. Give him any rubber gloves?

Mr. Hartpence: I object to it as immaterial and irrelevant.

A. Why, yes.

Mr. Hartpence: All right.

Q. You say you gave him on that day rubber gloves, the day he was hurt? A. I don't remember that.

Q. Oh, you don't remember that; but you had them there? A. I know he had gloves.

Q. You had them there? A. Why, yes.

The Court: He said he knew he had gloves.

Mr. Simpson: He said he didn't remember whether he gave them to him that day.

Q. Were there any rubber pigs that day, sheets of rubber over the wires to protect the men? A. We had them screens for protection.

Q. That is the only protection you had, the screens? A. The only protection.

Cross examination by Mr. Hartpence:

Q. Had life belts? A. Well, life belts, yes.

Q. They also had rubber gloves, or you did? A.

He had rubber gloves, but I don't know whether he had them that day.

Q. They were there if they wanted to use them? A. They were there if they wanted to use them, yes.

Q. You don't know whether he used them that day or not? A. I don't know. I don't remember.

WILLIAM DOLAN, sworn.

Direct examination by Mr. Simpson:

Q. Mr. Dolan, what was your occupation on the 21st of August, 1917? A. Foreman. Third rail and transmission.

Q. Do you know this pole 14? A. Yes.

Q. On the day of this accident do you know what voltage it was carrying on the right side? A. Supposed to be eleven thousand volts.

Q. What was that electricity used for, do you know? A. To convey current out to sub-station 4, and to transform all rotary convertors to third rail current.

Q. And that third rail was what was used to propel the trains to New York, wasn't it? A. Yes.

Q. Were you in charge of the installation of these—I will withdraw that. Was it your men that put up the screens on pole 14 the day of the accident? A. Yes, sir.

Q. Will you describe those screens? A. It is a wooden screen built of lattice—of laths, an upright on each side with laths tacked across probably quarter of an inch apart, probably five and a half to six feet long, and eighteen to twenty-three inches wide.

Q. How was it fastened to the pole on this day? A. Secured to the pole by marlin.

Q. That is rope? A. Yes.

Q. Well, is any of that eighteen to twenty-three inches used in fastening it? A. Yes, sir.

Q. About how much? A. Probably about three or four inches.

Q. And how much would that leave clear projecting beyond the pole between the man and the wires? A. Probably eighteen inches.

Q. The purpose of it was to prevent the man from coming in contact with the wire? A. Yes.

Q. That is the purpose of it. I think that is all. One question. You know what a pig is, a rubber pig? A. Yes.

Q. None of those there were there? A. No.

Q. There was nothing there. The Marshall shield, do you know what that is? A. Yes, sir.

Q. Made for the protection of linemen. Will you describe it? A. The Marshall shield is the same as the pig.

Q. The same as the pig? A. Some thing, only a nickname for it is the pig. That is what we linemen call it.

Q. Pig is really Marshall's shield? A. Yes, sir.

Q. You were not there at the time of the accident? A. No, sir.

Cross examination by Mr. Hartpence:

Q. What is the rubber pig, Mr. Dolan? A. Its build.

Q. Yes, what does it look like? A. Hard thing to describe. Its length for about twenty-four inches is about six inches in diameter; the outside ends of it run about eight inches over the six inch diameter size; it is slitted from one end to the other, that you could open it out and place it over the entire insulator and wire, and it comes together with its own spring; it is used on a cross arm to let a lineman lay over it to work the outside wire.

Q. What does it do when they apply it to the cross-arm? A. Well, he can lay right on it on a live feeder and work on the wire outside.

Q. Protection to him from coming in contact with the wire? A. Yes, sir.

Q. You are familiar with the poles 13 and 14 referred to in the case this afternoon? A. Yes, sir.

Q. How were those poles constructed; what were they made of? A. Steel.

Q. At the top or near the top were cross pieces, were they not? A. Cross-arms.

Q. Where those cross-arms were what was the thickness or diameter of the pole, about? A. Fourteen inches.

Q. And do you know how far away from the outside edge of that pole on the cross-arm on the north side of the pole 14, the nearest wire was? A. The nearest wire to the north face of the pole?

Q. Yes, north face of the pole? A. About sixteen inches, just about.

Q. Now in what way could the rubber pig, if at all, have been used with any protective effect on that wire, with regard to a man who was working on the opposite side of that pole? A. Well, we do not use it on that wire. That voltage is too high. Those feeders are all worked dead. When we use the pig is on twenty-two hundred volts.

Q. My queston is, what way could it have been used effectively to protect the men working on the dead side of the pole from coming in contact with the wire which was about sixteen inches away from the north face of the pole? A. To short—too shortly to be any good. It is too short in that location to be any good.

Q. It is only used then when they have to lay over the wire; is that the idea, on the cross line? A. Yes.

Q. But is it used at all to keep him from coming

in contact with the wire that might be alongside of him at a distance of from sixteen to twenty-four inches? A. Well, on a pole where there are a great many wires it would be used for that purpose.

Q. How would it be used then? A. Well, if you had probably six or nine wires on a pole and then had to get in to work between them, they can safely work in there and attach both of these pigs and it would be protecting them.

Q. But my question is if the man were working on the opposite side of that pole where the wives were dead and not working on the side of the live wire at all, would there be any object or purpose in putting that pig on the live wire to protect him on the opposite side of the pole? A. No.

Q. Why not? A. Why, the screen was there.

Q. Would there be any occasion for him coming in contact with the live wire on the other side? A. No.

Q. As he worked? A. No.

Q. Is that rubber pig ever fastened to a wire shelf running lengthwise through the wire? A. That is the way you set it on, on the wire, lengthwise of the wire.

Q. Does that in any way break the current on the wire? A. No.

Q. The current continues right through the wire? A. Yes, sir.

Q. Is there any way of breaking the current through the wire by grounding it at a pole or near a pole so that a person working there—or testing whether or not the current is broken or continues through the wire—in common use among linemen? The question is limited to testing. Is there any way of testing whether or not current is coming through the wire, in common use among linemen? A. Well, the linemen have a ground-stick.

Q. What? A. A ground-stick, what is known as a ground-stick.

Q. What is that? A. It is copper wire about three-eighths of an inch in diameter with a hook on the end of it, and it is passed through a bamboo rod, and on the bottom end of the bamboo rod a wire coming through there is soldered into a clamp, and the clamp is made fast on the steel pole, and if he was to take—wanted to test that feeder for current, he would just touch it on the wire and you would get a flash if the field was live.

Q. If it was dead, then what? A. Wouldn't get anything.

Q. How is the person who uses or operates that stick protected? A. Through the bamboo.

Q. Bamboo is a non-conductor? A. And the feeder that the wire is made fast to the dead ground in the pole carries it—discharge to the ground.

Q. They also use a chain sometimes? A. Chain or three wires.

Q. What is the chain—what does that consist of? A. It is a regular iron chain.

Q. How do they fix it, what do they do with it? A. When the linemen get a feeder out they test, after the power director tells them they can have the feeder, it is dead and grounded as far as the feeder is concerned, and——

Q. Speak a little louder? A. After the linemen request a feeder out to change the insulator or anything he gets word back from the power director that the feeder is out and grounded for it, and then does his work, but for his protection he carries his ground stick, and he screws one end of it to the field pole and tests each lag of the feeder—there is three lags of the feeder. If he doesn't get any flash on that hook on the wire he knows the feeder is dead and then carries a chain with him

that he takes three or four turns around each wire with a chain, tying them all in solid together, and that is his protection while he is working on the line.

Q. That is the lineman's test, is it, of whether or not the wire is dead before he goes to work on the line? A. Yes, sir.

Q. That is a precautionary measure in addition——

Mr. Simpson: I object. This is not an action by a lieman. I do not think we have got to do with linemen's tests.

Mr. Hartpence: Well, I thought you might be interested in knowing how it is done. I will withdraw it.

Re-direct examination by Mr. Simpson:

Q. What do you say is the reason this rubber pig is impractical as a protection? A. It is not practical?

Q. Why do you say it is not practical on such work as this that this man was doing as a protection? A. Because it is too short to do any good with these two screens that are on the pole.

Q. Well, with what two screens? A. That was on the pole.

Q. You didn't have to have screens if you used the pig. Couldn't you throw the pig right over the wires without bothering with the screens at all? Couldn't you take this rubber blanket, which I understand it is, and throw it right over these live wires? A. No.

Q. Why not? A. Current could get out there very easy.

Q. No, but take this man, a painter, who was working near live wires; now then if he had thrown that rubber pig over those live wires wouldn't that have protected him absolutely? A. No.

Q. Why not? A. Too short.

Q. You mean the pig was too short? A. Yes.

Q. Aren't they made in different sizes? A. Not that I know.

Q. Aren't made large enough to cover such wires as you have? A. No.

Q. How many wires did you have? A. On the pole?

Q. No, where this man was working? A. Three.

Q. Would not the pig cover the three wires? A. No.

Q. Couldn't they put one pig over each wire? A. Yes, but the only place you put the pig would be on that nearest wire, and doing so they do not come in sufficient lengths to give you any safety there.

Q. Couldn't you put a pig over the wire nearest him? A. Yes.

Q. Wouldn't that protect him from that wire? A. No.

Q. Why not? A. It would be too close to it.

Q. Too close to what? A. The wire.

Q. The pig was too close to the wire? A. No, the man would be too close to the wire.

Q. If he touched the pig wouldn't that insulate him? A. Yes, but you spot your pig with the half its length over the insulator, splitting the distance of the pig up, the length of the pig, and they are not long enough passing the center of the insulator to do any good.

Q. How far would the current jump then? A. Eleven thousand volts?

Q. Yes. A. According to the book about five-eighths of an inch.

Q. Then the purpose—I want to get this in my mind—the only protection you had was the wood screen? A. Yes.

Q. The wooden screen's purpose was to sepa-

rate the man's body from the live wire, wasn't it? A. Yes.

Q. Well now, then if the screen was so narrow that it didn't do it, that his hand went out beyond the screen and touched the wire, what protection would the screen be? A. The only protection that was put up there for was to keep him from getting out of the wire.

Q. I asked you what protection that would be if it was put up there to separate the man's body from the wire and his hands went beyond the screen and touched the wire—what protection was the screen to him? A. Well, no protection if the man wants to go outside the wire.

Q. All right. If the screen had been wide enough so that his hand when falling could not get beyond it it would have been an absolute protestion, wouldn't it, if it kept his hand away from the wire? A. Yes, if it was wide enough. It was not practical to put up them that way.

Q. I don't care about that, and I ask to have that stricken out as not responsive. You can answer the question. And those screens were made by your company, or did you buy them? A. Made by the company, the carpenters.

Q. They were simply wooden work and made in a lattice way? A. Yes.

Q. Were they ever tested? A. No.

Q. Never tested? A. No.

The Court: I don't know whether I know what you mean by tested.

Q. Were they tested electrically to see whether they would insulate the current if it jumped from the wire in the direction of the man? A. No.

Q. They were not? A. No.

Q. These wires were bare, weren't they? A. Yes, sir.

Q. On this side of the pole? A. Yes.

Q. They were not insulated? What was the purpose of leaving them uninsulated? A. Leaving them uninsulated?

Q. Because they were high tension wires. They could not be insulated, could they, if they were high tension wires? A. Oh, yes, they can insulate.

Q. They could have been insulated? Why do you leave them that way, for economy, don't you? A. Yes, sir.

Mr. Hartpence: I object to it as immaterial and irrelevant. There is no allegation in this case that because of the non-insulation of the wires——

Mr. Simpson: Yes, there is; "That it did not warn and protect the plaintiff, did not use reasonable care to provide him with instruments," etc. (Reads complaint.)

Mr. Hartpence: If this question is to show that non-insulation is negligence, then I ask that all that evidence be stricken out.

Mr. Simpson: No, that simply is a circumstance, I am relying on the fact that the screens—that is what I am relying on.

Q. The wires were left uninsulated and these wooden screens used? A. Yes, sir.

Q. Then the wooden screens would have been safer if the wires had been insulated, wouldn't they?

Mr. Hartpence: I object to it as immaterial and irrelevant.

Mr. Simpson: I will withdraw it.

By the Court:

Q. As these screens were put up and as it was on pole 14, how far was it from the nearest of the live

wires? A. About fifteen and three-quarters inches.

Q. In other words there was a space of fifteen and three-quarters inches or thereabouts between the screen and the nearest live wire to it? A. Yes, sir.

By Mr. Simpson:

Q. Isn't it a fact that it was only six inches from the nearest live wire when the screen was put up? Did you see this screen put up? A. I didn't see it put up.

Q. Did you see it in position at the time of the accident? A. The next day.

Q. Next day. I mean at the time of the accident? A. No.

Q. Then you don't know how near it was to the nearest live wire at the time of the accident, do you, if you did not see it? A. No.

Q. That is all.

Re-cross examination by Mr. Hartpence:

Q. How far was it from the nearest live wire to the face of the pole on which the screen was fixed? A. About fifteen or sixteen inches.

Q. Then this screen extended out how far from the pole? A. About a half an inch thick, and it is secured to the side.

Q. How far did it extend out from the pole itself? A. I would say about eighteen inches.

Q. So that a person working on that pole with a screen between him and the live wire, in order to have his hands come in contact with that nearest live wire, would have to reach back eighteen inches and then across fifteen inches before the hand could come in contact with the wire?

Mr. Simpson: I object to it as calling for a conclusion of the witness. That is for the

jury to say. He has not been qualified as an expert.

The Court: I think so. We have the actual situation, the size of the screen, the way it was located on the pole, the distance from the screen to the nearest wire.

Mr. Hartpence: The point is that Mr. Simpson has now gone into the question of how far the nearest wire was from the screen. Of course on the face it appears to have been about fifteen or sixteen inches in addition to that, and it seems I have a right to show as a practical situation—as bearing upon precautions that were taken—that it amounted to about double that amount or that distance, because of the physical situation of the screen.

(Question repeated by stenographer.)

The Court: I will leave it be answered. Take your exception, Mr. Simpson, if you want it.

Mr. Simpson: All right; I do not want an exception.

A. Yes.

Q. And how were those screens fastened to the pole, at what part of the pole? A. With marlin, to the corner angle of the pole.

Q. Right up against the face of the pole? A. Side of it.

Q. Side of the pole? A. Yes.

Q. If those screens had been made any larger in width than they were what would have been the effect as to their efficiency as a protection? A. During the wind they would have been blown up against the nearest wire, and that is all we were afraid of there.

Q. I can't hear you? A. During the wind, the wind would blow at all very hard it would blow

the outer edge of that screen up against the nearest wire.

Q. And in what way would that have affected the screen as a practical protection; benefitted it or harmed it or what? A. Well, it would harm it. We had no way to make it fast.

Q. I understand you to state in response to one of Mr. Simpson's questions something to the effect that it would not have been practicable to have made it larger. What did you mean by that? A. They have been made larger and we had to cut them down so that we could guy them into the pole to keep them in place so that they would not go back against the nearest wire.

Q. So that they operate to the best advantage with the invention as you then had it? A. Yes, sir.

Q. As a protection? A. Yes.

Q. Do you know whether similar screens have been used on other occasions in like situations as existed there during the painting of these poles? A. No, sir.

Q. You don't know? A. No, sir.

Q. Are you familiar with the use of rubber gloves by people who come in contact with the wires charged with electric current? A. Yes, sir.

Q. Now what kind of gloves could be used that could be an effective protection against eleven thousand volt wire? A. I don't know, because we never had them.

Q. What say? A. We have never had them for our eleven thousand volts.

Q. Why not? A. Well, the highest voltages we worked alive is twenty-two hundred.

Q. What kind of a glove would it take to be a protection, do you know, against eleven thousand volts current? A. I don't know of any.

Q. What do you mean by that; you don't know

of any glove that would be a sufficient protection against it? A. I don't know of any glove that they get out, that is manufactured, because we have never had any occasion to work anything higher than one voltage.

Q. And in your judgment in order to obtain a proper glove that would be sufficient to protect against such a high voltage as eleven thousand, it would be a glove that could be easily used or handled by a painter, or would it prevent the very work that he was there to do? A. Well, rubber gloves, with a paint brush, would be very awkward, as it is very slippery to hold this paint brush.

Q. Do you know what kind of rubber gloves were supplied to those painters that were working on this job? A. No, sir.

Q. You don't know? A. No, sir.

Re-direct examination by Mr. Simpson:

Q. These screens were made by you. They were not insulated, were they, at all? A. No, sir.

Q. Just board screens? A. Yes, sir.

Q. You say they were impractical because if they were bigger they would hit the live wire. If they had been insulated the hitting of the live wire wouldn't have made any difference, would it? A. Oh, yes.

Q. If it was dipped in a compound and made insulated, touching the live would not have conveyed the current, would it? A. Well, to me; I would not touch it.

Q. Well, I am asking you why it is impractical. Now I think that is all.

Mr. Hartpence: That is all.

HARRIS JASPER sworn.

Direct examination by Mr. Simpson:

Q. Where do you live, Mr. Jasper? A. 54 Mag-

nolia Avenue, Jersey City.

Q. What is your occupation? A. Electrical engineer.

Q. How long have you been an electrical engineer? A. Fifteen years.

Q. What experience have you had? A. Why, we do general contracting work, sub-station work and line work for industrial concerns through the state.

Q. Has your work carried you into familiarity with the use of currents of eleven thousand volts? A. It has.

Q. Are you familiar with the custom of employers in this vicinity who deal with labor working about wires carrying eleven thousand volts? A. I am.

Q. How they protect their labor? A. Yes.

Q. How did you gain that experience? A. By practical experience and we have men who they employed on that work, on that kind of work.

Q. Do you know what other employers do? A. Well, one other employer, the Public Service.

Q. In your judgment, suppose a workman is working in proximity to a live wire carrying eleven thousand volts, which is not insulated, and his only protection is a wooden screen attached to a pole between him and the live wire in such a way that in falling backward his hand extends beyond the screen and touches the live wire—in your judgment would that be an ordinary protection in use among people who were dealing with electricity of eleven thousand volts?

Mr. Hartpence: I object to it as immaterial, irrelevant and incompetent. This witness is not qualified, I do not think, to express an opinion on that question. That practically submits the case to him for his opinion.

Mr. Simpson: I will withdraw that, and say——

Q. In your opinion is a wooden screen between a workman and a wire carrying eleven thousand volts, which screen is of such a size that the workman in falling back has his hand come in contact against a live wire, any protection against the workman?

Mr. Hartpence: I object on the same ground. This witness might state what the effect would be, but to simply say that a screen is or is not sufficient protection is again a question that is an inference perhaps for the jury and not for this witness.

The Court: I am inclined to think that is so. You are practically submitting the case to this witness.

Mr. Simpson: I will ask for an exception.

Q. What are the ordinary ways in use of protecting workmen working around currents of eleven thousand volts on live wires? A. Why, the ordinary use is a rubber pig is fastened over the conductor, a vamp of rubber to keep the man from the wire, and if he did come in contact with the pig the pig is of sufficiient thickness to withhold the high tension current from jumping through the man's body to the ground.

Q. Where are these pigs made? A. Why, the Electrical Engineering and Equipment Company and the Benjamin Electrical Company—there are twenty different concerns.

Q. Are they tested by the underwriters? A. They are tested by the New York Underwriters Laboratory and the Chicago Underwriters Laboratory, and they are tested for different voltages, it depends what voltage you are going to work on, whereby you order that pig to do that particular work.

Q. Take a wood screen which is not insulated, is

that any protection; will that prevent electricity from coming in contact with the body of a man on the other side of it? A. Why, in a circuit carrying eleven thousand volts or around that there might be a little pore through the wood that the current would arc through and then that would make the screen a non-insulator. The wood itself might be damp from lying around in the shanty or on the ground, and that would make the screen just as live as a conductor if the screen should touch against or near the conductor.

Q. Is there any way of insulating these screens? A. These screens could be saturated in a paraffine compound of——

Mr. Hartpence: I object to it as immaterial, irrelevant and incompetent, because there is no evidence in this case now that the screen was ineffective as a protection to this man under ordinary circumstances. The testimony does show through having lost his footing and falling backwards, throwing his hand and coming in contact with the wire—so it seems to me——

The Court: Yes; it doesn't seem to me, Mr. Simpson, that that is the question, as to whether or not this screen was insulated.

Mr. Simpson: Why not?

The Court: In other words, what you complain of did not happen from this screen touching this live conductor or live wire, and conveying the electrical current from it to the body of this man. The complaint is more to the contrary, to the other way, that the screen was not effective because of its size or lack of size, for one thing.

Mr. Simpson: What I am complaining about is alleged in my complaint.

The Court: Yes; you say that he did not—

Mr. Simpson: That he did not properly equip the poles with devices to protect this man, and if an insulated wooden screen I have a right to show, I think, what would be the effect of the insulation.

The Court: You misunderstand what I am saying and undoubtedly misunderstand the objection. It is that there is nothing in this case to show that this thing happened because of the screen being the means of conducting the current from the live wire to the body of this man. What it does show, if anything, is —if it shows that—that the screen because of its size under the circumstances was not sufficient to screen this man's body from this live wire; not if there was any induction nor any passing of the current of the wire through the screen and through the screen into his body—that is not the point. I will sustain the objection.

Mr. Simpson: The complaint shows they did not use reasonable care to equip the poles —dangerous to human life and bodily harm. What your Honor is trying to do is to limit me to one conception of the facts, because the evidence so far shows that the man's hand went beyond the screen.

The Court: It is the only thing.

Mr. Simpson: Therefore I am limited to show it was improper in size. I do not think I am limited at all by the pleadings to that, and that if I can show that screen if insulated would have protected this man I should be permitted to do so.

The Court: I have sustained the objection.

Mr. Simpson: Take an excepton.

The Court: You may have it.

Q. Is there any other method customary in this vicinity among persons dealing with currents of eleven thousand volts, of protecting their men other than this pig, in general use, as you have described?

Mr. Hartpence: I object to it as immaterial, irrelevant and incompetent.

The Court: I do not see its relevancy. That is upon the question of furnishing a reasonably safe place.

Mr. Hartpence: Simply going into the general custom. It seems to me it should be custom in the like situation that existed here.

Mr. Simpson: That is what I say. Working in the vicinity of live wires, carrying currents of eleven thousand volts.

The Court: There is this difficulty—I can only just imagine it—it may be that a workman stand—upon a floor such as this and working in proximity to such wires, it would be a means of protecting him properly, while if he was working upon a pole such as this was there might not be the same method of protecting him—might not be practically, structurally might be impractical, because of the pole and the manner in which he had to support himself on the pole, and all that.

Q. (Repeated by stenographer.)

Mr. Simpson: I will withdraw that question.

Q. You have stated that you are familiar with the use of electricity in this vicinity. Will you state what the methods are in general use among persons using a current of eleven thousand volts in reference to protecting men working on poles in the vicinity of live wires carrying a current of eleven thousand volts?

Mr. Hartpence: I object to it as being immaterial and irrelevant. Pole—different kinds of pole might make a difference. Different kinds of work he was engaged in might make a difference.

Mr. Simpson: Might be a different color. The pole might be a different color. I want to look at 316—evidence of custom here is always—I can't put my hand on the case. There is a case in New Jersey, if I can put my hand on it, that defines this whole thing as to the evidence of custom of people doing the same kind of work under the same circumstances.

The Court: I do not think there is any objection to that, Mr. Simpson.

Mr. Simpson: That is what I asked.

The Court: No. The contention is, and I think rightly, that we are dealing with this situation that we have before us. You have a certain class of pole; it is a steel pole, for instance, it is not a circular pole, as I understand it, but it is a four-sided pole, I suppose, flat surface, it is larger at the bottom than at the top, it is separated or has a lattice work construction. That is the nearest I can come to it as I picture it in my mind. I suppose it has cross-arms on it upon which are strung wires; some of them are dead, some of them are carrying a current, as it is said, of eleven thousand volts. The position of this man is that he is painting the pole, using a life belt. Then the question which would go to what the recognized common custom and practice is, if there be any, with respect to a situation and a position of that sort, would undoubtedly, I think, be relevant.

Mr. Simpson: Well, I don't know the height

of this pole, so I could frame the question. I don't know how high the pole was. If I knew how high the pole was and how broad, and how much lattice work, of course I could frame it. The only thing I can say is the man was working on a metal pole, the sides of which were of lattice work, which was square, which had three cross arms on it, and that he was working in the vicinity of a live wire carrying eleven thousand volts, and ask him then under those circumstances what was the general custom in the vicinity of the court here of protecting him under those circumstances from contact with wires, if there was any.

Mr. Hartpence: It seems to me then the objection would be that it is a hypothetical question in form, and if so, should embrace all the facts in this case—deadening of the wires, and the fact of the distance of the wire from the place where the man ordinarly worked; the fact that there was an extraordinary circumstance that took place, and all those different things that should be incorporated in a hypothetical question.

The Court: Well, the best I can say, Mr. Simpson, is to frame your question and let me pass on it if there is objection.

Mr. Simpson: I will withdraw the question.

Q. What is the way of protecting a man who is working near eleven thousand volts? How can he be protected from contact?

Mr. Hartpence: I object to it as immaterial and irrelevant.

The Court: I will sustain the objection.

Mr. Simpson: How it can be protected? I certainly have a right to prove what are the

means of protecting a workman. I am not asking what a custom is now; I am asking how the physical thing is done.

The Court: Mr. Simpson, don't you see the situation? As I said to you before, it seems to me that a man working on this floor in this court room about wires containing or carrying a current of eleven thousand volts might be protected practically in one way. A man up on a pole such as this pole we are speaking of, working in proximity to wires carrying the same voltage, might not be able to be practically protected the same as the man on this floor. There is where the difficulty is as I see it.

Mr. Simpson: How can a man working upon a metal pole composed of lattice work, which is square in dimensions and high, carrying three cross arms, on which one side is dead and the other is live, be protected from a live wire, which is within eight inches of his body?

Mr. Hartpence: Objected to as incorporating a fact which is not in evidence.

Mr. Simpson: I am going to prove that later on.

Mr. Hartpence: I think your hypothetical question is untimely.

Mr. Simpson: I know, but this expert is coming here and maybe I would not be able to get him again. It can be stricken out if I do not prove the wire was eight inches away.

The Court: The trouble is the injury has taken place even though we strike it out and probably direct the jury.

Mr. Simpson: Then your Honor rules I cannot prove the manner of protecting a man in the vicinity of wire carrying a dangerous current of electricity?

The Court: Yes, generally—a general ques-

tion I would say no.

Q. Can you tell me if there is any way of protecting a man who is working on an iron pole upon which a wire is carrying a current of eleven thousand volts from the effect of the current if he is working in the vicinity thereof? A. I can.

Q. What are the ways? A. There are shields made that come around a man's body on the side of the body nearest the iron pole and then shields extend down to—around the side of the leg, so if the man should accidentally come in contact with the live wire the current will not ground through his body, due to the—because he is insulated from the pole.

Q. Those means used to protect men working around metal poles in the vicinity of live wires carrying a current of eleven thousand volts?

Mr. Hartpence: I object to it as immaterial and irrelevant, and on the same ground as the previous phases.

The Court: For the reason that the question does not state all the facts and all the situation?

Mr. Simpson: There is no situation yet. The plaintiff has not been on the stand.

Mr. Hartpence: Then I think the hypothetical question submitted to the expert should be deferred until the facts are in.

The Court: I will sustain the objection.

Q. What is the effect of a current of eleven thousand volts, in your opinion, upon a person?

Mr. Hartpence: I object to it as incompetent. The witness has not yet shown that he knows what the effect is.

Mr. Simpson: He is an electrical engineer.

The Court: He is not a physician.

Q. Have you seen persons who have come in contact with currents of this size?

The Court: Voltage eleven thousand volts?

A. I have.

Q. What has been the effect upon their bodies from your observation. What could you see?

Mr. Hartpence: I object to it as immaterial and irrelevant.

Q. What could you see?

Mr. Hartpence: I object to it as immaterial and irrelevant, as going into the general situation of what he may have seen with regard to some person or some persons in contact with wires with a voltage of eleven thousand volts in them. Now as to what might have been the effect upon Mr. Steidler is the question that is involved here.

Mr. Simpson: Mr. Steidler is a human being as much as Mr. Hartpence, and I don't think if he saw the effect on one human being the jury would have a right to say as to whether or not——

Mr. Hartpence: He is not competent.

The Court: Mr. Simpson, do you insist upon it or are you going to use your physician?

Mr. Simpson: I am going to use the physician.

The Court: In view of that do you want to take chances on that question?

Mr. Simpson: I have not asked him for his opinion. I asked him what he saw.

The Court: It is objected to as irrelevant.

Mr. Simpson: All right, then I won't press it.

Q. Are you familiar with the operation of the

Pennsylvania Railroad here from Manhattan Transfer through the tunnel? A. No more than I rode on the train through.

Q. Have you observed the system? A. I always observe outside electrical work that is interesting.

Q. Can you tell from your observation how the trains are propelled from New Jersey to New York? A. Why, I rode on that new line a few times and saw the construction of the line and the high tension circuit paralleling the line.

Q. What is a high tension circuit? A. Why, it is a circuit of wires running from a main power-house to a sub-station——

Mr. Hartpence: I object. Well, that is all right, if that is simply a general statement as to what a circuit is.

Q. Go on and state what a high tension system is? A. The high tension system is the system of conductors carried in an aerial manner on poles or lead covered cables under ground, and carrying a high voltage of elecetricity, anywhere from six thousand volts to one hundred and fifty thousand from the main generating station to a sub-station for any public utility company or a railroad company.

Q. What are the sub-stations? A. Sub-stations transforming the current or steppng the current down from a high voltage to a lower voltage, so that it can be distributed to the feeders.

Q. That is, they reduce it? A. They reduce the dangerous current.

Q. When it comes from one sub-station to another, then what happens? A. It goes at a lower voltage than the high voltage line, then it is transferred to the third rail or to the overhead trolley wire.

Mr. Simpson: Now I want to frame one question and get a ruling on it to be sure.

Q. Will you state what your experience has been in this vicinity in the custom of people who are in the use—that is employers who are in the use of currents of electricity of eleven thousand volts? Just state what your experience is, that is, what have you seen?

Mr. Hartpence: I object to it as immaterial and irrelevant.

The Court: Practically goes right back to the same question.

Mr. Simpson: No; I am qualifying it now. I may not have qualified it before, but I want to be sure of my ground. I want to qualify this man as to what his experience is. I have not asked him anything about this case yet. Put him on as an electrical expert.

The Court: I want to hear the question.

(Question repeated by stenographer.)

Mr. Hartpence: I object. You see what he does, bring right into the case the opinion of this gentleman on the subject through the guise of qualifying him.

Mr. Simpson: That is not the purpose of it at all. I think I have a right to qualify this man as an expert, because I want to show, at least I want to ask the question to show that it is the general custom of people, employers, masters in this vicinity of this accident, to do certain things which the defendant did not do, so that the jury will have a right under the case I want to lay my finger on to say that if they did not do that that is evidence of negligence.

The Court: I think you better find me that case first, Mr. Simpson, but I will sustain the objection at the present time, and until you show me that case, because I think this answer cannot bring anything else but such an

answer as would be directly opposed to my ruling on the previous questions.

Q. Will you kindly state your experience in the use of electricity—in the use by others of electricity? A. That seems to be a general question.

Q. What is your——

Mr. Hartpence: That is my objection to it.

A. Along what lines?

Mr. Hartpence: Objected to on the same ground.

The Court: You are coming right back to my idea of it, Mr. Witness.

Mr. Simpson: Is that ruled out?

The Court: The witness rules it out and says it is a general question.

Q. Then go ahead and give me a general answer. I want a general answer, what your experience has been.

Mr. Hartpence: I object.

A. Is it indoor construction——

The Court: All right. I overrule it. Take your exception, Mr. Hartpence.

A. Is it indoor construction or outdoor construction?

Q. Outdoor? A. Outdoor construction, why, outdoor lines carrying a voltage of that sort, when we build a line like that the wires are dead and we let them go up on——

Mr. Hartpence: I object to it, even after your Honors ruling. I do not think he is giving his experience at all; he is showing what certain people do. May bring it all into the case.

A. That is my experience, what I do.

The Court: Do you still insist upon it?

Mr. Simpson: No. What is the use of wasting time about it, if your Honor—unless your Honor thinks I haven't any right to prove this custom of manufacturers. Your Honor may be right. There is no good insisting upon it.

The Court: If you can show me between now and Monday morning that you have that right, you can have it on Monday morning assuredly.

Mr. Simpson: I can if I can get my witness back, that is the trouble.

The Court: You have only four minutes now.

Mr. Simpson: All right. That is all.

The Court: I haven't any doubt in that direction.

Mr. Simpson: I am quite sure of my ground. That is all.

The Court: You may start to cross-examine if you want to, but do not go into any subject that is going to take any length of time.

Mr. Hartpence: I do not see how I can do anything in the way of cross-examination in the very few minutes that remain, except to ask a few ordinary questions, and I would just as leave defer it.

The Court: All right. We will have to defer it until Monday morning.

Adjourned.

Monday, February 24, 1919, 10 A. M., trial resumed pursuant to adjournment.

JOSEPH M. RECTOR, sworn.

Direct examination by Mr. Simpson:

Q. Doctor, you are a practising physician? A. Yes, sir.

Q. And where do practice? A. Wherever I am called.

Q. Well, I mean the Jersey City office—your office is—A. In Jersey City.

Q. How long have you been a surgeon? A. The last twenty-six years.

Q. Have you had any experience on the other side in the war in surgery? A. Yes, sir.

Q. How much? A. Seven months at the front.

Q. At the front? A. The active front, yes, sir.

Q. Operating over there? A. Operating all the time.

Q. Now, Doctor, did you examine this Alfred Steidler at my request on the 22nd of February—was it? Yes, the 22nd of February. A. Yes, sir.

Q. Where did you examine him? A. At my office.

Q. Will you tell what condition you found him in? A. Found there had been an amputation of the right fore-arm at the junction of the middle and the upper third; there was a series of scars upon the right arm and forearm, one scar on the inner side of the stump was about two to three inches long; the skin and the soft tissues beneath were involved. The second scar on the outer side of the arm about three inches long with the skin and soft structures underneath involved. On the center part of the arm at the junction of the lower and middle third was a scar about three or four inches long. The lower part of this scar there was a portion in which the soft structures had been destroyed down to and on the surface of the bone. The skin which covered the amputation, of the stump, was adherent to one of the bones in the forearm while it was loose in the other. Upon the right leg, the lower third, on the front and the inner surface, there was a large scar which passed down from the junction of the lower and the mid-

dle third, the upper portion of which ended in an ulcer which is ungurated, which it requires reconstruction work to heal. The lower part of the scar divided into two portions extends downward over the arch of the foot. On the outside of the right foot there is a scar which involves the fourth and fifth and third toes. It is on the under surface, with the resultant formation of skin bands which have contracted and bound down the three toes so as to interfere with their motion. On the inner side of the left foot there is a long lineal scar extending from the first joint of the great toe backward to about three inches. That also has cicatricial bands which bind down and confine the motion of the first two joints. There is about one-half or two-thirds ankylosis or interference with motion of the right ankle joint or right elbow joint. There is one scar which though placed at the upper third of the arm extends down from the chest, which is healed, with contracting bands of scar tissue which cause pain and limitation of motion at the upward and outward motion of the shoulder joint.

Q. What in your opinion do those scars indicate and what kind of scars are they? A. They indicate burns, scars, anything which has destroyed tissue.

Q. And this running sore, this ulcer, what is that? A. That is the resultant—the original destruction of tissue extended down to the bone. At that part of the limb there is not sufficient vitality to heal an ulcer or a burn which passes down and destroys the covering—that is, the tissue covering of the bone itself. That requires reconstruction work and the formation of flappings which will cover the ulcer and take the place of the destroyed tissue. That has been running now since the accident, which was in August of 1917.

Q. And that is not healed yet, this running sore? A. It is still running; it is an ulcer.

Q. In your opinion how long will it be before it is healed? A. The healing will not take place until it is acted upon by reconstruction work, until we can flap skin over it to take the place of the destroyed tissue.

Q. What loss is there of use in that leg on which the scar is over the ankle A. He has one-half to two-thirds ankylosis of the ankle joint. He has pain on motion by reason of the contraction in the action of the third, fourth and fifth toes, by interference with the motion at these toes and at the ankle joint.

Q. Is this scar on the ankle joint? A. It is on the inner side of the leg at the junction of the upper and middle third just at the prominence of the ankle bone on the inside.

Q. And is that what causes the ankylosis, that running sore? A. No; that has been caused possibly by inactivity in the use of the ankle during the process of healing.

Q. What do you say about this condition even if operated on, in his leg? Will that operation give him the full use of the leg that he had before, in your opinion? A. We can relieve the bands which bind down the third, fourth and fifth toes. Neither palliative nor operative treatment on the ankle joint would probable relieve most of this anklosis. The same with the elbow. He can put an arm on there and have the use of that elbow.

Q. Was the arm— A. Just the junction of the upper and middle third of the forearm, which means about one-third of the length of the forearm below the elbow joint.

Q. Well, did you find anything else beside what you have designated? I mean about his general health. Did you find any other condition? A. Nothing else.

Cross examination by Mr. Hartpence:

Q. Did, the scars that you found there, the tissue is entirely healed? A. With the exception of one instance.

Q. And what is that? A. The ulcer on the lower third of the right limb.

Q. And what is the effect of the scars? It is the effect of the scars, as I understand it, on the toes, that interferes with the use of the toes? A. In the instance of the first great toe on the left foot and the first, fourth and fifth toes on the right foot. They bind down joints; they are over joints.

Q. Yes. It is the binding down that is affected by the scars? A. Yes; there is a contracting tissue of bands, and one at the axilla or arm pit; three scars with contracting bands.

Q. Those are the only injuries you found? A. Those are the only injuries, cicatricial bands which interfere with the movement of the joints.

Q. And that can be very readily remedied, you say, by operative processes? A. Yes, by operative process.

Q. That means removal? A. That means removal and replacement by new tissue.

Q. It does not interfere with Mr. Steidler's ability to walk, does it? A. Yes, sir; it limits the motion at the ankle by reason of pain and stiffness.

Q. About how much? A. I should say about one-third.

Q. Inactivity had something to do with that condition, I understood you to say, also? A. With the movement of the ankle joint?

Q. Yes? A. Yes.

Q. That would respond then, to manipulation, would it not, and use? A. Re-constructive work, yes, sir.

Q. That might have been done some time ago, might it not? A. Yes, sir.

Q. And if it had been done the chances are that it would be healed up at this time? A. The pain resulting from that ulcer is the only thing that would interfere with the passive and active motion of that right ankle joint.

Q. The ulcer itself you think would not respond to treatment? A. It has not for a year and a half. The edges are hard and ingurated and bound down to the surface of the bone, with no chance of the skin pushing out from the surface and sides by which the regeneration of tissue takes place.

Q. Of course, you don't know whether any treatment has been given or not? A. Except what I have been told.

Q. That also in your opinion would respond readily, would it not, to treatment which you— A. Operative treatment, yes.

Q. And the probability is that the result would be good; isn't that so? A. It should be.

Q. The loss of the right arm, or so much of it as has been lost, can be supplied to a great degree by an artificial arm and hand, can it not? A. An artificial arm or forearm can be placed upon the stump.

Q. And modern surgical appliances in that respect are very satisfactory, are they not, as a rule.

Mr. Simpson: I object to that. Satisfactory to whom? The man who lost his arm? I object to that.

Q. Well, they are very satisfactory in practical results, in taking the place of the natural member? A. That is hard to state. It depends on your own opinion as regards the usefulness of a false arm.

Q. Well, in your opinion what is the usual result in that respect in modern surgical—A. I find it good for cosmetical appearances. I would

not have much use; I would not find it of much use.

Q. How much use? A. I say I would not find it of much use, referring to the use that it might be if it were on the lower extremity, by which he could be aided in walking. It has no pressure on the arm. The arm is only used for motions of grasping, raising objects. Of course, with a lower arm that would not be of much use.

Q. Still it would be of some use? A. Well, you can look at that in that light, that there might be a minute particle of use in it, from not having any.

Mr. Hartpence: That is all.

Mr. Simpson. That is all, Doctor.

HARRY JASPER, re-called.

Cross examination by Mr. Hartpence:

Q. From what institution did you get your degree? A. Stevens Institute.

Q. Stevens Institute, what year? A. 1909.

Q. 1909? A. 1909.

Q. How old are you, Mr. Jasper? A. Twenty-nine years and six months.

Q. Your work has been chiefly contracting work, as I understood? A. Well, practically; electrical engineers; every kind of work, inside and outside work.

Q. When you say "we" whom do you mean by that? A. "We," my men.

Q. Are you in the electrical business for yourself? A. For myself, yes, sir.

Q. That is chiefly construction work? A. Construction work, substation work, interior and exterior work.

Q. You are not engaged in operative work, are you? A. No, no; we are not a public utility; we are just contractors; that is all, for public utilities companies.

Q. Have you had any experience at all in operative work? A. Why, when we build plants of substations or power houses we always leave an operator in charge for a month or so, so everything works in in good shape, and then turn the equipment over to the consumer.

Q. But during that time you don't operate the plant? A. Why, I make regular inspections if the work is near Jersey City—daily inspections.

Q. Have you ever done that for a railroad company? A. Not for a railroad company, no.

Q. So that you never actually engaged in the practical operation of the railroad company through the medium of electricity, have you? A. Why, in what manner?

Q. Well, have you run the road? A. Not run the road, no. Never run the railroad.

Q. Your knowledge of the operation of the trains between Manhattan Transfer and along that line and the tunnel is simply a matter of observation on your part? A. That is all; just interested in these things electrical, and as I go through different cities and towns I just naturally follow those different lines; that is all.

Q. Your own observation—you have observed these metal poles? A. Yes, along the line; I watched them constructing it.

Q. Did you ever climb one of those poles yourself? A. Why, I climb poles——

The Court: One of those poles?

The Witness: No, not one of those.

Q. Didn't climb one of those? A. No.

Q. Never painted one, did you? A. Not those poles, no.

Q. A rubber substance, Mr. Jaseper, in order to act as an insulator, must be entirely sound, must it not? A. It must.

Q. The slighest opening, the slighest pinhole— A. The smallest pinhole will cause perforation or rottenness.

Q. That is one of the drawbacks of insulation, is it not, that the main object wears off and in time it fails to give you— A. The rubber deteriorates and becomes perforated.

Q. And if you continue to rely on the insulation you are pretty apt to be burned because of that, are you not, rather than keeping away from it when you know it is not so? A. Why, if it had the slighest imperfection the current would leak through the hole, and it would naturally be grave, unless the apparatus was tested before it was used.

Q. That would mean continuously, would it? A. Well, every morning before it is taken out on the job.

Q. The rubber shield which you referred to in your examination on Thursday, of course, never would be any protection to a man if while working on a pole on which a high tension wire was strung he should throw his arm over and strike the wire itself and come in contact with the wire, would it? A. It would. The ruber shield is placed between the body and the pole, thereby the current cannot ground through the person's body through the iron work on the pole.

Q. But the question is, if while he was working on the pole he should throw his hand over and his hand came in contact with the wire, then the shield, of course, would be of no protection? A. The shield would be of protection, because the current could not ground if the hand did touch the wire, if his body didn't ground to the iron

and conduct a current to the ground. The potential is between the wire and the ground.

Q. Well, if he was standing on the metal pole and in throwing his hand, his hand actually came in contact with the live wire, then this rubber shield between him and the wire, of course, would not be of any effect, would it? A. It would. The ruber shield would totally insulate the man's body from any metallic substance on the pole, because in its construction it lays in on the lattice work that the man stands on; in other words, he stands on this shield and the shield protects the side of his body against any part of the metal work on the pole.

The Court: Pardon me, gentlemen. Possibly you are not understanding each other; are you referring to this so-called pig?

The Witness: Not the pig, the shield.

Mr. Hartpence: I am afraid I do not make myself clear, Mr. Jasper. I move to strike out the answer to the question as not being responsive to the question.

The Court: Pardon me one mnue. If I remember correctly this witness spoke of two different classes of shield, it may be said: one known as the pg, and then he spoke of some other class of shield. Now, it may be that he has the second class of shield in mind as he is talking, rather than this pig, so-called.

Mr. Hartpence. That is the one I have in mind.

The Court: Pardon me one minute. If I said: one known as the pig, and then he spoke

Mr. Hartpence: That is the one I have in

The Court: You are referring to the other?

The Witness: Yes, the rubber shield.

The Court: I think you referred to it as a coat or something of that sort?

The Witness: A shield; that is the one I answered on—a shield.

Mr. Hartpence: My recollection is you said it would hang down covering a portion of the body, covering the body of the workman?

The Witness: No, it is attached to the body of the workman, and the pig is attached to the wire. Now, if you referred to the shield, that is attached to the workman's body, the same as ahalf of an overcoat like; they would slip on the side of the body nearest the pole, and also there is another part of it that fits on the lattice work of the pole, a separate insulator.

Q. The pig itself is what sort of a looking instrument? A. Why, it is a sort of rubber blanket; that is the best way I can describe it to the layman. A rubber blanket that is laid over the high tension wire and projects fifteen inches each side. It is about thirty inches in length.

Q. And when you refer to it as a blanket you don't mean a large sheet? A. Not a large sheet; just enough to cover the wire and around the insulator.

Q. As a matter of fact it is sort of round in shape, is it not? A. That is it.

Q. And it clutches? A. It clutches right around the wire.

Q. Right around the wire? A. That is it.

Q. It is not in the nature of a large sheet or blanket such as we understand a blanket to be, but just goes around the wire? A. No, it would not be that clumsy.

Q. And that pig is so constructed as to be fastened over the insulator, is it not? A. Yes, sir.

Q. On the cross line? A. On the cross line.

Q. And then extends for a certain distance to— A. Each side.

Q. Each way from the cross arm? A. That is it.

Q. It is not a thing which you could take right out from the wire, in the middle between the poles, just clasped around the wire at any spot? A. Why, you could slip it on but it would not be a permanent attachment to the wire.

Q. Yes. And it would be very apt to become loose and cause more trouble than it prevented? A. Why, if the wind blew it would shift with the wire, and if one pole was higher than the other it might slip along the wire.

Q. And if it was not completely clasped together it would not prevent contact with the wire, just the same as a hole, so that its utility really depends on the method in which it is fixed over the insulator? A. On the application, on the knowledge of the operator that is attaching it to the orifice.

Q. And if the insulator itself were in between two cross pieces and not flat on top of the cross piece, then you could not fasten that insulator effectually, anyway, could you? A. Why, you could put two pigs on there then and clamp them together, on each side of the wire.

Q. Now, all these are precautions which you say might be taken in your judgment. Now, in looking back on what happened to Mr. Steidler, isn't that right? A. No; I am talking from practical experience, the methods employed by different companies and my own firm, in taking precautions to protect men working on high tension wires, carried on steel and wooden poles.

Q. And what experience of that kind have you had? A. Why, we built a substation down at the Remington Arms and Ammunition Company down in Hoboken carrying thirteen thousand two hundred volts.

Mr. Hartpence: I move to strike that out.

Q. My question is as to what experience you have had in the respect that you just referred to? A. Why, I don't understand the question.

Q. I understood you to say that it was based upon what you knew of other concerns, what they did in protecting men who were at work on high tension wires. Now I ask you what experience you have had in that respect? A. Why, when I have some work to do on a live circuit of that kind I use these shields, use pigs; in some cases where the holes are extensive we don't send the men on the poles at all, unless the circuit is killed and grounded.

Q. That is where you work right in among the wires, is it not? A. Why, where you would have to send a man on a pole for any cause—trouble-hunter.

Q. And this use of the shield and the use of the pig are usually where he goes on the pole while the current is in the wire, while the current is on the circuit? A. While the current is on the circuit.

Q. Now, if the current is cut off then you would not regard those shields and pigs and other precautions as being so necessary, would you? A. They would be necessary because of the fact that those poles carry different circuits, and the current may be cut off in one circuit, but be induced in one of the dead circuits, and for that condition we have a chain outfit that is passed around each wire and permanently grounded to the pole, so that in the event that the current should be crossed on another circuit that would not endanger human life; and they also order that circuit out and have it on the off side of the pole that the man is working on, so there would be

no possibility of the man getting in contact with the dead circuit.

Q. Yes, and that generally would be the protection—A. And at the same time we send the shields and pigs out on the dead circuits, too; so that if the other precautions should break down there will be some safety there for the man.

Q. That would be extraordinary precaution? A. That would be the right way to do it.

Q. That would be very extraordinary precaution which in your judgment you would think of and take, is that right? A. Yes.

Q. But if the circuit were off entirely in the wires, along which the workmen are working, then that itself would be sufficient protection, would it not? A. Not on a high tension—not on a pole line carrying other wires. If that was the only—

Q. In conjunction with the chains that you have referred to? A. It would not, not on the pole line that carries other circuits besides the dead circuit. If there were only three wires on the line and no other electrical connection between the substations that would be ample protection. Just pulling the oil switch at the particular station you would know the line would be dead and could not become alive through any accident; but where you had other circuits on the pole I would take all other precautions before I would let a man go up on the pole.

Q. That would be your method of proceeding? A. That is my method of doing that kind of work.

Q. And if there were a barrier between the man and the live wire which was sufficient ordinarily to protect him from contact with the live wire, and the wires on the side of the pole that he was working on were dead, then there

would be no occasion for him coming in contact with the live wire and nothing to protect him from, would there? A. Why, a barrier is not a fixed object on a pole, and it is not sufficient protection between a man and the live or the dead wire; because atmospheric conditions might affect the barrier, dampness and wind might blow it just the one side, and it might shift on the cross-over line.

Q. And that, of course, is based on the possibility of what might happen; isnt that true? A. Well, that is what all the safeguards are placed on for—what might happen.

Mr. Hartpence: That is all.

Mr. Simpson. That is all, sir.

Witness excused.

ANGELO GILBERTI, re-called

Direct-examination by Mr. Simpson:

Q. Mr. Gilberti, you testified on Thursday about going up the pole and finding this man's body there. Do you remember that? A. Yes, sir.

Q. Now will you state what was the condition of that pole as to fresh paint at the place where his body was? A. My brother was there before I got there, half-way up the pole—half-way between the ground and the Steidler. And he had to come down because he slipped himself.

The Court: No, that is not what you are asked. You are asked to say what you saw was the condition with respect to wet paint if there was any such thing.

Mr. Simpson: I move to strike out that portion of his answer.

A. I went up there and when I came down I was full of wet paint.

Q. You don't understand me. You went up the pole and you saw his body, didn't you? A. Yes, sir.

Q. Well, all right, now, get that fact in your mind. Now, at the place where you saw the body—that is, where the place was and under the body, did you see anything as to fresh paint? A. Yes, sir.

Q. What did you see? A. I seen it on my hands.

Q. Well, where the body was was there fresh paint on the pole? A. Why, sure there was.

Q. And state whether or not there was any fresh paint on the pole near the feet of this body?

Mr. Hartpence: Objected to as immaterial and irrelevant.

The Court: Why do you say it is immaterial?

Mr. Hartpence: I suppose the painters were there to paint the pole. We might naturally expect to find paint there.

The Court: That is one of the allegations of negligence, as I understand it.

Mr. Hartpence: There is no such allegaton in the complaint, sir.

Mr. Simpson. Well, the negligence of a fellow servant, we allege.

Mr. Hartpence: That does not tell us anything. It might be negligence of a fellow servant in not causing the sun to shine.

Mr. Simpson: Well, we are only obliged to plead ultimate facts. We are not obliged to plead evidence.

The Court: Was there a second amendment of the complaint??

Mr. Hartpence: Second amendment.

Mr. Simpson: I don't remember that.

Angelo Gilberti, (recalled) for Plaintiff—Cross

There is only one to my recollection. Mr. Hartpence may be right.

Mr. Hartpence: It was afterwards amended.

The Court: It would be the last part of paragraph 6, I take it, Mr. Hartpence. (Reads the part referred to.)

Q. (Repeated by the stenographer.) And state whether or not there was any fresh paint on the pole near the feet of this body?

The Court: To that you object because of its irrelevancy and incompetency?

Mr. Hartpence: And immateriality.

The Court: And immateriality. Well, will you state wherein, Mr. Hartpence, you claim it is that?

Mr. Hartpence: Well, just as I have already said, it seems to me they were there to paint the pole. The mere fact that there was wet paint on the pole does not predicate anything. That is the ground of my objection.

The Court: All right. I will overrule it.

Mr. Hartpence: Please let my objection be noted.

Q. What was there about wet paint near the feet? A. It was right on top of the wet paint.

Q. His feet were? A. Yes, sir.

Mr. Simpson: That is all.

Cross Examination by Mr. Hartpence:

Q. Both feet, Mr. Gilberti? A. Yes, sir; two feet.

Q. And what portion of the pole was that on?

Mr. Simpson: I have a picture. Will you look at it and see if you can probably get this thing clear? This is a picture of 14.

Mr. Hartpence: Taken when?

Mr. Simpson: Saturday. You can show it to some of your men and see if it is correct. You can use your own if you want. I have no objection to that. They are better than mine, I guess. I will put mine in. I will offer them.

Mr. Hartpence: I will offer mine to be marked for identification at this time.

The Court: Have you any objection to the offer of Mr. Simpson?

Mr. Hartpence: No.

The Court: All right; I will let them be marked in evidence.

Mr. Hartpence: Photograph of pole 14, as I understand it.

Mr. Simpson: Yes.

(Photographs marked "Plaintiff's exhibits 1 and 2 in evidence; photographs marked Defendant's exhibits 1 and 2 for identification".)

Q. Now, what part of the pole was it, Mr. Gilberti, that his feet were resting on?? A. What part of the pole? On the eastern part of the pole.

Q. I know, but was it any particular part of the pole that it was on? A. It was right about between the cross arms.

Q. Right between the cross arms? A. A little further down; about a foot from the top cross arm; that is, three cross arms on a pole, at the top, and he was painting between them three.

Q. Was his foot on the cross arms itself? A. No, sir; he was in one of those angles.

Q. One of the angles. That is the part I am trying to get at. He was in the angles? A. Yes, sir.

Q. You were on pole 13, I understood you to say? A. Pole 13, yes, sir.

Angelo Gilberti, (recalled) for Plaintiff—Redirect

Q. At the time the accident happened? A. Oh, about half past ten or quarter to eleven o'clock.

Q. You were on pole 13, as I understand it, at the time the accident happened? A. Yes, sir.

Mr. Hartpence: There are one or two questions, if your Honor please, I would like to ask Mr. Gilberti on cross examination, which I overlooked on his examination Thursday.

Mr. Simpson: Before you do that will you let me ask a question, because you might want to cross examine on it, and you can continue your whole cross examination and then I would not interrupt you.

By Mr. Simpson:

Q. You said on Thursday that you saw Mr. Steidler's companion on the pole paint under him. Can you mark out on this pole where you saw his companion painting? This is on plaintiff's exhibit P-1. Now, mark where you saw the man painting. I don't mean Steidler. I mean the other man. A. Right around here.

Q. Mark that heavily. A. Right here (indicating.)

Q. Right at the lower cross arm? A. Yes, right about there.

Mr. Hartpence: That is the lower of the four.

Mr. Simpson: Lower of the four.

The Witness: And Steidler was right between here.

Q. He was up in under the cross arms? A. Yes, sir; that is what I said.

Q. Well, I mean at the time the other man was painting? A. Well, I seen him about twenty minutes he got clipped, see? I seen him about an hour.

Q. Seen who? A. The fellow he was painting with, Bouton.

Q. You saw Bouton about twenty minutes before he got clipped painting down here at this arm? A. Yes, sir.

Q. Mark that B. Is that right where you made that mark? A. Yes, sir.

Q. Well, now, I will mark it with a C over the place you say Bouton was painting? A. Yes. His head was under here.

Q. His head was under the last cross arm, is that right? A. His head was here. That is where he was standing. The other fellow was up here.

Q. The other fellow was up on top between the first and second? A. Yes, sir.

Mr. Simpson: "S." Now, I would like to show that to the jury.

Recross Examination by Mr. Hartpence:

Q. I show you a paper, Mr. Gilberti, and ask you if that is your signature to it, Angelo Gilberti? A. (After examining paper) Gee! It looks like it.

Q. You remember, do you, making a statement to Mr. O. R. Reynolds, the foreman of the carpenters after this accident? A. He only asked me if I seen it, I said yes. "What did you do?" "I took him down." That is all I told him, because we were busy taking this fellow away on the train. See? And we were busy getting our pay.

Q. Didn't you tell Mr. O. R. Reynolds that you didn't see Steidler up to the time the accident happened? A. No, sir. I seen him all the time.

Q. Didn't you tell Mr. Reynolds that you did not see him? A. No, not that I remember. He only asked me about two questions in all.

Q. And then you signed your name to the paper, did you not? A. Yes, sir; I signed it, and he must

have wrote it down himself because I didn't write it down.

Mr. Hartpence: Mark that for identification.

(Marked defendant's exhibit 3 for identification.)

Q. Well, you did see it written on the paper before you signed it, didnt you? A. No. He only asked me two questions on a little piece of pad, right on the bridge. There is a bridge where this fellow got clipped.

Mr. Hartpence: That is all.

Mr. Simpson: That is all.

(Witness excused.)

SIGMAR C. HILFER, sworn.

Direct Examination by Mr. Simpson:

Q. You are a practising physician, Doctor? A. Yes, sir.

Q. Where do you practice A. West New York, New Jersey.

Q. Have you treated the plaintiff, Alfred C. Steidler, for the result of injuries received by him?

The Court: Mr. Simpson, you had better wait till the jury has finished examining these pictures.

Q. When did you begin to treat him? A. I just seen him while he was in the hospital on August 27th.

Q. What hospital? A. Bellevue Hospital.

Q. What was his condition there? A. I was called in to decide whether it was necessary to amputate the arm or not.

Q. Yes, sir. A. By the family.

Q. Yes. A. They were informed that an amputation will be necessary and I was called in as the family physician.

Q. Well, go on and tell us what you found when you got in the hospital. A. I found that the right was white and black in parts, and in claw position.

Q. In what kind of a position? A. In a claw position.

Q. Claw position? A. Claw. That shows absolute mortification. There was a demarkation line one third below the elbow joint.

Q. And what was that caused by in your opinion? A. By burn.

Q. Go on and tell the jury now everything that you saw when you looked at this man. What his condition was. A. He was feverish and in great agony, great pain. They gave him morphine to quiet his nerves and to quiet him. His leg also showed bad burns—both legs, and there was even a question arising if the right foot should not be amputated; but I told them that they should try treatment and see what treatment will do, and so that right foot was preserved this way, but it didn't heal up completely. There is a sore left above the ankle joint probably one inch above that has got the size of a silver. It looks to me as if it will never heal up.

Mr. Hartpence: I move that that be stricken out.

Mr. Simpson: I object to that.

Mr. Hartpence: Uuless he expresses it in different terms.

Mr. Simpson: He is a physician giving expert testimony—well, let that go out. I will let that go out.

Q. Now, what else did you see in your examination of him? You saw this arm in the claw posi-

tion; you saw the burns on both legs and the sore. What else did you see? Any other burns? A. None on his body.

Q. And that was on the 27th of August? A. On the 27th of August.

Q. And he was in bed in Bellevue Hospital? A. He was in bed in Bellevue Hospital.

Q. Well, as a result of your examination was an amputation consented to? A. Absolutely necessary.

Q. Was it done? A. It was done the next day.

Q. It was amputated—what was amputated? A. The right arm, forearm, lower arm.

Q. Below—— A. One third below the elbow.

Q. Well, did you meet him after that at the hospital? A. No, not at the hospital, but as soon as he got home.

Q. And do you remember when that was? A. On August 6th—on December 6th.

Q. December 6th he came home. That is, he was in the hospital from the date of the accident, August 21st until December 6th? A. Yes.

Q. Well, what did you do for him on December 6th, anything? A. I re-dressed his wounds.

Q. And at the hospital? A. At the hospital I just made the examination.,

Q. Well, I mean on the 6th of December what did you do? A. Well, on the 6th of December I re-dressed his wounds.

Q. What wounds did you dress? A. The leg, the foot——

Q. Now, these injuries you found him suffering with on the 28th of August, and which you dressed on the 6th of December, would they normally be accompanied by pain? A. Yes.

Q. To what extent? How much pain? A. Well, to render him sleepless and to affect his appetite, and to make him very miserable.

Q. And after the 6th of December, 1917, you

continued to treat him, didn't you? A. Until today.

Q. You are still treating him? A. I am still treating him.

Q. Now, what have you treated him for from the 6th of December, 1917, until today? A. His leg was still in a very swollen condition and while I treated him in the first two weeks, three weeks, a sequester—a part of bone—got loose, and I got it out, above the ankle joint, and a part of dead bone came out.

Q. Yes. A. Below the ankle joint there was extended phlegmone; that means infiltration, very much inflamed in the ligaments, along the inner margin of the foot.

Q. Is that accompanied by any pain? A. Yes, it was painful; he had to limp, he couldn't walk.

Q. And in your opinion has it been accompanied by pain since the condition existed until today? A. No, not now any more.

Q. Not now. How long is it since it has been painful? A. It was painful for one month.

Q. After the 6th of December, 1917? A. Yes.

Q. Well, now, what is his present condition? A. He has the right arm amputated.

Q. He has the right arm amputated below the elbow is that right? A. Yes.

Q. And what is the condition of his leg? This running sore, does that interfere with the use of the leg? A. It does not, but the ankle is slightly fixed; it is not——

Q. Rigid? A. Rigid.

Q. Well, what is the effect of this running sore? A. It will discharge and it will produce an offensive odor, so that it has to be dressed; he is forced to have it dressed.

Q. Is that sore in your opinion permanent or not? A. It looks to be permanent.

Mr. Hartpence: I move to stroke that out. I think it can be couched in the usual terms.

Mr. Simpson: What are the usual terms?

Mr. Hartpence: I don't think I should suggest those, but it seems to me we are looking to the Doctor——

Q. Well, what is your opinion, Doctor, as to whether this sore is a permanent condition or not? A. I have treated it for the last year, once a week in the last two months, and before twice a week; and it has never changed in size; it is always the same.

Q. Then in your opinion what is the chance of his recovery from that sore? Is it good or bad? A. They are bad.

Mr. Hartpence: Objected to as immaterial, as to the chances.

The Court: You mean that goes to the question of possibility, and the question we are dealing with is probability?

Mr. Hartpence: Yes.

Q. Well, in your opinion what is the probability of his recovery from this sore? A. The probability—there might be a surgical operation.

Q. But what is the probability even of a surgical operation? Is it probable that that would cure it or improbable? A. It is very doubtful.

Q. Very doubtful. Now have you rendered a bill to date for your services? A. Yes, I did.

Q. What is it? A. Up until to-day two hundred and fifty-three dollars.

Q. Is that in your opinion a reasonable bill? A. Absolutely.

Mr. Simpson: Cross examine.

Cross examination by Mr. Hartpence:

Q. Doctor, Mr. Steidler is in quite a different

condition to-day than he was when you saw him first in the hospital in New York, isn't he? A. Yes.

Q. You say that was on August 27th? A. August 27th.

Q. 22nd? A. 27th.

Q. Was that right after he had been injured? A. No, a week later.

Q. A week later. And under your treatment he has continued to improve regularly, has he not? A. He has.

Q. And he is still improving, isn't he? A. As far as improvement goes.

Q. There is no reason why he should not continue to improve, is there, as he uses his leg and moves around and does things from time to time? A. Why, he has put on flesh; that is some improvement.

Q. Yes; that indicates an improvement in general? A. In general health.

Q. In physical condition, doesn't it? A. Yes.

Q. And he goes out and walks around, doesn't he? A. He does, yes.

Q. And he has been doing that for some time, hasn't he? A. Yes.

Q. Does that without the aid of a cane or crutches? A. First off he had to use a cane.

Q. And he has since discarded the cane, hasn't he? A. He did.

Q. No reason why he should not go to work again in the course of the usual events of life, is there, as far as his general health is concerned? A. Yes.

Q. What do you mean by "Yes"? There is no reason why he should not go to work? A. It would not stop him from going to work.

Q. Yes. That is what I mean. Of course, he has suffered from the disadvantage which comes

from the loss of the arm, has he not? A. Yes, surely.

Q. Aside from that there is no reason why his condition should not improve and in a reasonable time he should resume some form of employment? A. Yes.

Q. Well, do you mean that there is some reason or that there is no reason? A. There is no reason why he should not be employed.

Q. I only wanted to be sure that you understood, Doctor. That is all.

By Mr. Simpson:

Q. You think a one-armed painter could easily get work, do you? A. No, not as a painter.

Mr. Hartpence: That is objected to as immaterial and irrelevant.

The Court: That was eliminated from the question, anyway, Mr. Simpson.

Mr. Simpson: Yes. That is all.

(Witness excused.)

ALFRED STEIDLER, sworn.

Direct Examination by Mr. Simpson:

Q. Where do you live, Mr. Steidler? A. 328 Summit Avenue, West Hoboken.

Q. How old are you? A. Twenty-four years old.

Q. And you are married or single? A. Single.

Q. Were you working for the Pennsylvania Railroad on the 21st of August, 1917? A. Yes, sir, I was.

Q. What were you working as? A. Painter.

Q. How long had you been working for them? A. About two months.

Q. And what were you doing on the 21st of August, as painter? A. Painting pole 14 on Secaucus Road.

Q. And showing you plaintiff's exhibits 1 and 2, is that the picture of the pole upon which you were working? A. Yes, sir.

Q. And was it practically in that condition when you were working on it? A. Yes, sir.

Q. As far as you can observe by the pictures? A. Yes, sir.

Q. And what time did you go to work that day? A. About nine o'clock.

Q. And how many men were in your gang A. Well, there was about eight of us.

Q. Can you name them? A. Well, there was Thomas Kelly, Henry Gilberti, Angelo Gilberti, George Harrington, John Bouton, myself, Tom Dawson, foreman, and a man by the name of Jack. I don't know his last name; Mr. Pierson, and there are two others I cant mention their names; I don't know their names.

Q. What tools were you supplied with when you went to work that day? A. A life belt, paint brush and paint pot.

Q. And who was it that was your foreman? A. No, sir.

Q. Who was your foreman? A. Tom Dawson.

Q. He was the person instructed you as to the work you were to do? A. Mr. Dawson.

Mr. Hartpence: Mr. who——

Mr. Simpson: Norton.

Q. Did you have a partner on the pole? A. Yes, sir.

Q. How many men worked on each pole? A. Two men on a pole.

Q. And what was the method of working? A. One man on one side and the other man on the other side.

Q. You came down the pole together, did you? A. Yes, sir.

Q. You came down together? A. Yes, sir.

Q. Now, what was the condition of this pole that you were on with reference to any barrier between you and the wires? A. A little shutter about fifteen inches wide.

Q. And how high was it? A. About four and a half foot high.

Q. And how was it fastened on the side of the pole? A. Fastened on the side of the pole to the arm.

Q. To the arm of the pole? A. Yes, sir.

Q. Will you show here, make a mark on what you call the arm? The arm of the pole, will you make a mark there on what you say is the arm of the pole? A. Yes, this here part, right under here, fastened on close to that.

Q. That is the lower cross arm? A. Yes, sir, from the top down.

Q. And covering all the cross arm? A. Yes, sir.

Q. I see. How was it fastened on the——

Mr. Simpson: Well, then, I will mark that. (Marks it.)

Q. That way? A. Yes, sir.

Q. The shutter? A. Yes, sir.

Q. And you were on what side of the shutter? A. I was on the inside of the shutter.

Q. You mean the left? A. Left side.

Q. How was that shutter fastened to the body of the pole? Was any of the fifteen inches used in fastening it? A. Yes, sir.

Q. About how much? A. I should judge about five inches, not more.

Q. And the balance was left projecting, then? A. Yes, sir.

Q. Well, now, on one side there was one set of wires, wasn't there? A. Yes, sir.

Q. And on the other side was another set of wires? A. Yes, sir.

Q. And which side——

Mr. Simpson: Withdraw that.

Q. Now, what did you do from the time you started at nine o'clock? A. I started, and I started to paint the top of pole 14 on the east side of the pole, right in the center, and I was painting on top and coming down; I took my life belt off; I moved myself down, put my life belt around the pole and strapped myself on, and in reaching my paint pot something caused me to slip and my hand flew out like that.

Q. Well, now, what was the feeling when your foot slipped? A. Why, slippery paint.

Q. And what did you do when you slipped? Just show the jury which way you threw your arm?? A. I fell like that (indicating).

Q. Yes, and what held you up? A. The life belt.

Q. And did any of your hands come in contact with the wires? A. Yes, sir, the right hand.

Q. Then what happened, can you remember? A. I couldn't tell you what happened.

Q. Well, what was your sensation when your hand came in contact? What sensation did you have? A. Like somebody hit me on the head with a hammer or something.

Q. And the next you remember was when? A. When they had me in Bellevue Hospital.

Q. What was your condition when you woke up in Bellevue Hospital? A. Well, the right hand was all bandaged up and I had considerable pain.

Q. Yes. A. And I was in pretty—pretty fierce agony.

Q. Well, how long were you in agony? A. For almost three weeks after.

Q. And what was the feeling? What do you mean by agony? What was the sensation? A. It was pain.

Q. Where? A. In the arm and in the leg.

Q. Did you have any burns on your body? A. No, sir.

Q. Burns—didn't you have any burns? A. Yes, in the arms and legs.

Q. Well, where? Where were the burns? A. On the left leg and on the right leg.

Q. And the Doctor says that when he was called in your hand was in a position of a claw? A. Yes, sir; like that (indicating).

Q. Well, now, how was it, your right hand? A. It was bent over like that (indicating).

Q. And did you have to keep it in that position? A. Yes, sir; I couldn't budge it back.

Q. What color was it? A. Black.

Q. How long did you stay in the hospital? A. Till December the 4th.

Q. Then where were you taken? A. Taken home.

Q. Were you in bed at home? A. No. sir.

Q. How long were you home? A. I am home since December 4th.

Q. And you have not worked since, have you? A. No, sir.

Q. Why not? A. Because I was not able to get around to do any work.

Q. Now what is your trouble besides the loss of your right arm? What other trouble have you? A. Well, my right leg.

Q. What trouble have you with that? A. An open sore on the right ankle.

Q. Does it affect the use of the ankle joint? A. Yes, sir.

Q. How? A. By walking; I cant use the ankle the same as I used to.

Q. In what way? Is it stiff or what? A. Yes, sir, stiff.

Q. Now, will you take your coat off and show the jury that right arm? A. (Does so.)

Q. Now, can you show them your—what leg is it—the right leg? A. The right leg is bandaged up.

Q. It is all dressed up? A. Yes, sir.

Q. It would not show anything if you showed it? A. No.

Q. Well, where is the sore? Point it out to them where it is? A. Right here (indicating).

Q. It is an open sore, is it? A. Yes.

Mr. Hartpence: Let me see. Point it out.

The Witness: Right there.

Mr. Hartpence: Just above the ankle.

Q. How big is it? A. About as big as that (indicating).

Q. Well, about as big as a quarter or half a dollar? A. Yes, sir; about as big as a half a dollar.

Q. How much did you earn when you worked as a painter? A. Three dollars and nine cents a day.

Q. Three dollars and nine cents? A. Yes, sir.

Q. When you fell backwards, as you say, do you know whether any part of your body came in contact with the shutter or not? A. No. sir; I don't know.

Q. You don't know that? And your right hand—when you fell you fell with your right hand towards the right, did you? A. Yes, sir, right.

Q. Did you see the shoes that you were wearing after you got to Bellevue? A. No, sir, I did not.

Q. You don't know what condition they were in? A. No, sir.

Q. Do you know how near to the screen the nearest wire on the right hand side was? A. Well, I should judge it was about— —

Mr. Hartpence: I object, if your Honor please, unless he first states he knows and makes himself competent in some way.

Q. Well, did you or did you not see the wire

nearest the screen on the right hand side? A. Yes, sir, I did.

Q. And can you tell from your observation about how far it was from the shutter? A. Well, there was about——

Mr. Hartpence: Now, I object unless he answers the question. He is going to tell how far it was.

The Court: Say yes or no. Can you tell without telling us what the distance was—can you tell?

The Witness: No, sir, I cannot.

Q. Can't you make a judgment of how near it was? A. I can make a judgment, yes, sir.

Q. That is, you didn't measure it, did you? A. No, sir.

Q. But you saw it? A. Yes, sir.

Q. Well, then, from your observation aren't you able to estimate how far it was from the shutter? A. About four inches.

Mr. Hartpence: I move to strike that out.

The Court: If he can say yes.

Q. Say whether you can or whether you can't, as his Honor says. I am not asking you for the distance, but can you estimate how far it was from the shutter or not? A. Yes, sir, I can.

Q. Well, from your observation at the time, the morning that you were hurt before the accident, will you state how far this nearest wire was on the right hand from the shutter?

Mr. Hartpence: That is objected to as immaterial, irrelevant and incompetent.

The Court: Why?

Mr. Hartpence: Well, there is no evidence that that is the wire that came in contact with him. There is no evidence he knows the wire was charged, and it might have been the dead wire.

Mr. Simpson: The testimony is by the lineman that all the wires on the right were alive, and I am directing his attention now to the nearest wire of these, which the foreman says were all alive. That would be, of course, problematical as to whether he hits that or not, but that would be for the jury.

The Court: I will overrule the objection.

Mr. Hartpence: I ask an exception.

The Court: You may have it.

Q. How far do you say it was from the shutter? A. About four inches.

Q. Now, this wound you have has been dressed by Dr. Hilfer? A. By Dr. Hilfer.

Q. And how often has he dressed it? A. First I went three times a week for about three months; then I went twice a week. Up till now I am going once a week.

Q. And does the wound look any different than it did when he began—— A. No, sir, it does not.

Q. Does it give you any pain? A. Yes, sir.

Q. Where were these burns on your leg with reference to this wound? A. On the left toe—left leg, on the big toe, and on the right leg on the three toes, the fifth, the fourth and the third.

Q. Well, is that the leg that the sore is on, the right leg? A. Yes, sir.

Q. Well, as to the left leg, have you any trouble with that now, where the burns are?? A. Not very much now, only on a rainy day I have a little pain.

Q. But there is comparatively nothing the matter with your left leg? A. No, sir.

Q. It is the right leg you complain of? A. Yes, sir.

Q. Well, now, what is the sensation in that right leg? A. Well, on a rainy day it pains me more than it does on any other day, and I cannot move it the same as I used to be able to move it.

Q. Did you see the Doctor take out this piece of bone that he said he took out? A. Yes, sir, I did.

Q. When was that? A. That was on December the 11th.

Q. And how large a piece of bone—December 11th when? A. 1917.

Q. Same year you were hurt? A. 1917.

Q. And how large a piece of bone did he take out of it? A. Large as a silver dollar.

Q. Was it rotten or not? A. Yes, sir.

Q. Now you say you have not worked, as I understand, since you were hurt? A. No; I have not.

Q. Who was the man that hired you? A. Mr. Oliver Reynolds.

Q. Where were you hired? A. Why, we went to New York and he sent us to A. W. Reynolds.

Q. In Jersey City? A. In Jersey City.

Q. And what did A. W. Reynolds do to you? A. He sent us to a doctor and we came back and he gave us a letter to take to Mr. Oliver Reynolds.

Q. What did Mr. Oliver Reynolds do? A. He told us to come in and go to work the next day.

Q. What was the date you were hired, do you know? A. No sir, I don't.

Mr. Simpson: Cross examine.

Cross Examination by Mr. Hartpence:

Q. But you had worked on this job painting those poles for about two months before you were hurt, had you not? A. Yes, sir.

Q. Practically every working day? A. Yes, sir.

Q. You were just hired by Mr. Reynolds for the purpose of painting those poles, weren't you? A. Yes, sir.

Q. You had not worked for the Pennsylvania Railroad Company prior to that time, had you? A. No, sir.

Q. And you were not a regular employee of the

Pennsylvania Railroad in the operation of its railroad work? A. No, sir.

Q. But you were simply at work engaged in the painting of these poles? A. Painting poles.

Q. And, of course, you have never worked for them since the time you were hurt, have you? A. No, sir.

Q. You were paid by the day? A. Yes, sir.

Q. Three dollars and nine cents, I understood you to say? A. Yes, sir.

Q. On how many poles had you worked besides pole 14, prior to the accident? A. Well, we worked on mostly all the poles along the road, painting underneath the wires, not above the wires, for a long time.

Q. The method of getting up and down the pole was what? A. Was to climb these cross bars up in the center between the two wires.

Q. Did you carry your paint pot and brush with you? A. Yes, sir.

Q. And your life belt? A. Yes, sir.

Q. And had your hands about filled with these things, hadn't you? A. No, sir.

Q. How did you fasten—— A. Fastened them onto the life belt, onto the side of the belt.

Q. That left your hands and your feet free to climb the pole? A. Yes, sir.

Q. These shutters that you have referred to that were on the pole, showing you D-1 for identification, do those lattice work pieces running along the length of the upper cross arms, look like these shutters? A. Yes, sir.

Q. That is the kind of shutter that you referred to that was up there, wasn't it? A. Yes, sir.

Q. And you saw the same kind of shutter on exhibit D-2 for identification, didn't you, along the upper wires? A. Yes, sir.

Q. Now that is the kind of shutter that was up

there at the time between you and the live wires while you were working on the pole? Is that right? A. Yes, sir.

Q. That is a very good representation, isn't it, on those pictures? A. Yes, sir.

Q. And lower down, above a spacing between the wires, I show you what appears to be similar shutters on the lower wires? A. Yes, sir.

Q. They were on the lower wires, were they not? A. They were.

Q. So you worked along those poles from the time you first started in up to the time that you were hurt, and as you worked those shutters were on the various poles, weren't they, as you worked? A. They were put up by the linemen before we went up there.

Q. The painter had nothing to do with putting them up? A. No, sir.

Q. And you say they were put up there before you went up on the pole? A. Yes, sir.

Q. You didn't take them down either, did you? A. No, sir.

Q. The linemen did that, too, didn't they? A. Yes, sir.

Q. You were simply up there for the purpose of painting the poles, is that right? A. Yes, sir.

Q. And for no other purpose whatsoever? A. For no other purpose.

Q. That is the only thing you were hired for by the Pennsylvania Railroad Company, isn't it? A. Yes, sir.

Q. Now as you worked on those poles for the two months prior to the time you were hurt you had never come in contact with the live wires before this occasion when you were burned, did you? A. No, sir.

Q. That was the first time, wasn't it? A. Yes, sir.

Q. So that as you worked upon the poles up among the cross arms and painted, I suppose, in this usual fashion? A. Yes, sir.

Q. Moving your brush up and down— A. Yes, sir.

Q. —those shutters kept you from coming in contact with the live wires, didn't they? A. Yes, sir.

Q. And if you had not fallen on the day when you did fall or threw your arm back, as you say you did, they were sufficient to have kept you from contact with the live wire were they not?

Mr. Simpson: I object to that as calling for a conclusion. That is for the jury to say.

A. Well according to what Mr. Reynolds told us, we were told we were fully protected from all danger.

Q. It was because of the fact that you threw your arm back as you fell— A. When I slipped.

Q. Yes; and as you threw your arm back it caused your arm to project from the end of the shutter—— A. Yes. sir.

Q. That was what caused you to come in contact with the live wire, wasn't it? A. Yes, sir.

Q. And if you had not fallen and thrown your hand back that way there was no occasion for your hand to have gotten beyond the edge of the screen, was there? A. No, sir.

Q. And in that event you would be completely protected by the shutter, wouldn't you, from contact with the live wire? A. Yes, sir.

Q. Now, you were not afraid to go up there and paint on the top of those poles, were you? A. No, sir.

Q. And Mr. Dawson was your foreman, wasn't he? A. Yes, sir.

Q. And Mr. Oliver Reynolds both asked you if

you were afraid to go before you started to go to work, didn't they? A. Yes, sir.

Q. You told them you were not? A. Yes, sir.

Q. And they also told you if you were afraid they would not send you up, didn't they? A. No, sir; they did not.

Q. Didn't they say that to you? A. No, sir.

Q. Did you ever hear any of the other painters say they were afraid to go up? A. No, sir.

Q. None of the other painters were burned by contact with these live wires any time they were painting on that job up to the time you were, were they? A. No, sir.

Q. You went up then, among the wires, to paint the poles of your own free will and accord, didn't you? A. We went—we all went up there and we were told——

Q. No, sir, answer my question. When you went up to paint among the wires at the top of the pole you went up because you were willing to go, didn't you? A. Yes, sir.

Q. And you never made any objection to Mr. Knudson and Mr. Reynolds about going up there and painting? A. No, sir.

Q. At any time during the whole time that you were painting there you did not, did you? A. No, sir.

Q. You were told by these gentlemen also or by some one in charge of the painters there from time to time that the wires on the right hand side as you looked toward Manhattan Transfer were live wires, weren't you? A. Yes, sir.

Q. And you were told to keep away from them, weren't you? A. Yes, sir.

Q. And you knew that they contained a high voltage of electricity, didn't you? A. No, sir; I didn't know what they contained.

Q. Well, you knew that they contained an electric current, didn't you? A. Yes, sir.

Q. You were told that; and that it would be dangerous to come in contact with them, weren't you? A. Yes, sir.

Q. And for that reason you always tried to keep away from those live wires, didn't you? A. Yes, sir.

Q. The wires on the left hand side of the pole, on the cross arms were deadened before you went up, weren't they? A. Yes, sir.

Q. Did you always have the same man working with you on the pole? A. Yes, sir.

Q. Bouton was your partner, was he? A. Yes, sir.

Q. Is he here to-day? A. No, sir.

Q. And it was your custom, was it not, to start at the top of the pole? A. Yes, sir.

Q. And as you painted you worked down toward the ground? A. Yes, sir.

Q. That is the way all the other painters did it, too, was it? A. Yes, sir.

Q. Now, while you were painting, just before you were hurt, what was your position on the pole? A. I was in the center of the pole.

Q. And facing the pole? A. Facing the pole, yes, sir.

Q. And you were toward what? A. Toward the west.

Q. Facing Manhattan Transfer? A. Yes, sir.

Q. And your back was toward— A. The east.

Q. The Hudson River? A. Yes, sir.

Q. Well, you could have stood on those cross pieces, could you not? A. No, sir; you could not.

Q. Why not? A. Because they were too close together.

Q. How many were there? A. There were three on—three double cross arms on top.

Q. The insulators were in between the double cross bars, weren't they? The glass pieces? A. What is that?

Q. Do you know what an insulator is? A. No, sir, I do not.

Mr. Hartpence: All right, I will withdraw the previous question.

Q. You say that the painter couldn't stand on the cross pieces and paint while up there? A. No, sir, he could not.

Q. And why was that? A. Because they were too close together.

Q. Would they have prevented you from putting your feet in on the cross bars? A. Why, no sir; you could sit on them if you wanted to hang over this way and fall down.

Q. Well, your life belt would have saved you? A. No sir, it would not help you.

Q. It would not help you? A. No sir, because you couldn't work that way.

Q. What did you say? A. You couldn't work that way.

Q. Well, the part of the pole that you painted that way was some portion that was above the level of your shoulder, is that right, and head? A. Yes sir.

Q. And you were always painting—about how far down would you paint before you shifted your life belt? A. Well, I come to about even with my body then I would shift myself down.

Q. No, but to within what part of your body? A. Right here.

Q. Across the breast? A. Yes sir.

Q. Then you would shift down and paint again? A. Yes sir.

Q. And that was the customary way that the painters did it, wasn't it? A. Yes sir.

Q. Well now, while you were up there painting you could see the pole on all sides of it, couldn't you? A. No, you couldn't, only on top of you.

Q. What is that? A. The top of you you could see all around.

Q. That is what I mean. You could see all sides of the pole? A. Yes sir.

Q. It was an open lattice work pole? A. Yes sir.

Q. Not a solid pole? A. No.

Q. And by looking down, casting your eyes down and looking down you could see down on the ground; you could see down inside of the pole on the opposite side of you; you can see down on the ground? A. On the opposite side.

Q. On the opposite side? A. Yes sir.

Q. And if you moved yourself back a little from the pole you could look down it? A. Yes, but you are liable to slip and come in contact with the wire anyhow if you move yourself back.

Q. You had to move yourself back to paint, didn't you? A. No sir; you just kept yourself steady, right there.

Q. Right there? A. Yes sir.

Q. When you paint? A. Yes sir.

Q. And you had been painting how long that morning before you were burned? A. Well, I had been painting I should judge about two hours.

Q. And where was Bouton? A. I couldn't tell you where he was.

Q. Well, wasn't he painting with you that morning? A. Well, when I went up the pole he was on the ground. I went up and paid attention to my work; I didn't pay attention to Mr. Bouton.

Q. Well now, Bouton usually worked right in with you, didn't he? A. On the opposite side, yes sir.

Q. Didn't you miss him that morning from his usual place? A. I didn't pay no attention to him, I just paid attention to my work.

Q. Well, didn't you—didn't it occur to you to

ascertain why your partner wasn't there with you that morning? A. No sir, it did not.

Q. You just went right on painting? A. Yes sir.

Q. Well, when did you first see him that morning after you left him on the ground when you went up the pole? A. I seen him in the shanty when we came out.

Q. Well, I mean after you left him on the ground and you went up the pole, then when did you next see him that morning? A. I didn't see him after that.

Q. You didn't see him after that at all? A. No sir.

Q. Did you see him working opposite you? A. No sir.

Q. Just before you fell? A. No sir.

Q. Didn't you see him working underneath you a little while before you fell? A. No sir.

Q. You didn't? A. No sir I did not.

Q. Did you move your life belt from one position to a lower position, and step down, didn't you—— A. Yes sir.

Q. ——into the angle formed by the cleats? A. Yes sir.

Q. Would you look down to see where you were stepping when you did that? A. Yes sir.

Q. Customarily? A. Yes sir; you would look down you would hold——

Q. And you could see where you put your foot? A. No sir; you couldn't see. You just held on. You were watching yourself that you wouldn't slip off.

Q. You mean you stepped down from a higher position on the pole to a lower position on the pole and never looked where you were putting your foot? A. What is that? I didn't get you.

Q. Do you mean to say you stepped down from

a higher position on the pole to a lower position on the pole and didn't look down to see where you were putting your foot? A. You could feel that when you moved yourself down, where you put your foot, whether you were on the cross bar or not.

Q. My question was, you did that without looking where you put your foot? A. Why, certainly I was watching myself. I had my hands—I had to watch my hands and leave go of the grip to come down.

Q. And you just simply felt down with your foot? A. Yes.

Q. And when you found you were in an angle you rested your weight on it? A. Yes sir, and fixed my life belt.

Q. And fixed your life belt after that? A. Yes sir.

Q. And it was after you moved down and got your foot on the angle—— A. On the angle.

Q. And then you put your life belt on and fastened yourself? A. Yes sir.

Q. As I understand you, you had done that and reached up for your paint pot when you felt yourself slip and fall? A. Yes sir.

Q. How did you fasten your paint pot up there? A. On the angle iron with a hook.

Q. With a hook? A. Yes sir.

Q. When you last saw Bouton on the ground before you went up the pole he was prepared in the usual way himself for his work, was he not? A. Yes sir; he was sitting on the bank, on the road, on the bank.

Q. He had his—— A. Paint pot standing on the side of him.

Q. And you anticipated his going to work as your partner as usual that morning, did you got? A. What is that.

Q. You anticipated his going to work as your partner that morning as usual? A. Yes sir.

Q. And yet you say you painted up there for nearly two hours without him? A. Yes sir.

Q. And it never occurred to you—— A. No sir.

Q. ——to ascertain where he was or what he was doing? A. No sir; when I left him on the ground if I thought he wanted to sit there I left him sit there until the foreman caught him sitting there.

Q. Where was Knudson? A. I couldn't tell you where Knudson was.

Q. Hadn't you seen him that morning? A. Yes sir, I seen him at the shanty.

Q. That was when you started to work? A. When we started to work.

Q. What time did you start to work that morning, Mr. Steidler? A. Well, we started out about nine o'clock.

Q. And how long was it after you had seen Knudson at the shanty? A. What is that?

Q. How long was it after you had seen Knudson at the shanty? A. Knudson, I seen him when we started out at nine o'clock; that was the last I seen him.

Q. You saw him then at the shanty just before you went to work? A. Yes sir.

Mr. Hartpence: That is all.

Re-direct Examination by Mr. Simpson:

Q. You said to Mr. Hartpence that Mr. Reynolds had told you something. What was it he had told you? You gave part of the conversation? A. Mr. Reynolds told us that we were fully protected against all danger.

Q. And you relied on that, did you? A. Yes sir.

Q. You were a painter? A. Yes sir.

Q. You were not an electrician, as I understand it? A. No sir.

Q. You had no knowledge about devices to protect people working in or near electric wires, had you? A. No, I had not.

Q. You also said to Mr. Hartpence, I think, that you never made any objection to going up the pole. Was that because of what Mr. Reynolds told you? A. Yes.

Mr. Hartpence: I object to that as leading.

Mr. Simpson: Well, I withdraw that.

Q. You told Mr. Hartpence that you never made any objection to going up the pole. Why was that? A. Because Mr. Reynolds had told us we were fully protected against all danger.

Mr. Simpson: I think that is all.

The Court: Is there anything further, Mr. Hartpence?

Mr. Hartpence: I think that is all.

(Witness excused.)

THOMAS KELLY, sworn.

Direct Examination by Mr. Simpson:

Q. Where do you live, Mr. Kelly? A. 4083—let's see; I don't remember the name of the——

Q. Been in France so long that you don't know the number? A. Boulevard.

Q. Well, that is not important. You were working on this day for the Pennsylvania Railroad, weren't you? A. Yes sir.

Q. And were you in this gang of painters? A. Yes sir.

Q. What pole were you working on? A. I was not on any of the poles at all.

Q. This morning you were working on some pole before you went away to get your money? A. Yes sir.

Q. What were you doing that morning? A. I was supposed to be helping those other fellows there, the couple of linemen there.

Q. Where were you at the time of the accident? A. I was at that—there was a bridge there.

Q. Where were you going? A. We were going to go into the shanty for our money.

Q. Well, what first attracted your attention? A. Well, I was crossing this bridge——

Mr. Hartpence: You mean this man Cameron and Doris?

Q. You, Cameron and Doris were crossing the bridge? A. Yes sir.

Q. Now, we have got as far as that. Now what happened after that? What attracted your attention? A. I heard—and I heard a sizzling noise.

Q. Yes, what kind of sizzling noise? A. As if some bushes were burning; something like that.

Q. And what did you do? A. Why, I looked all around to see if I could see anything and then I happened to glance up at this pole and this man Steidler was up on the pole.

Q. What did you see? What did you see when you looked? A. His arm was up on the wire.

Q. Yes, could you see which wire it was on? Was it the one nearest to the shutter or what wire was it? A. Why, if I could see the picture maybe I could tell you; I don't remember it just very well. (Referring to photograph.) The wires are not very clear. This here (indicating.)

Q. That is, pointing to the wire nearest the pole on the right hand side? A. Yes sir.

Q. Which wire is it, the first, second, third or fourth, counting from the bottom? A. I think it was about the fourth cross arm, something about here.

Q. Right about here (pointing to bottom cross arm)? A. Yes sir.

Q. What position was he in? A. Why he was —he was up on the pole, and he was something like this (indicating).

Q. Yes. A. On the wires.

Q. What did you do? A. I only just—I had stopped; I had called this other men, Mr. Cameron and Mr. Doris, and then these fellows came around and they told me, they said, "Now, you keep cool and don't go near the pole." And I said "No", and in the meantime he had stepped off the wire.

Q. Stepped off the wire? A. Yes sir.

Q. What did you see when you first saw his hand against the wire? A. Yes sir.

Q. See any flame? A. Yes sir, I seen flame.

Q. Did you go to the pole? A. No sir, I didn't go near the pole.

Q. Didn't go near it? A. No sir.

Q. What was the next you knew about it? A. Why, when they had him down.

Q. Yes—— A. On the ground I was up to see him and looked at him. I seen him moaning, with pain, I suppose, and his hand, his whole hand here, from here on was just like a glove; the skin was all off.

Q. Burned? A. Yes sir; it was burned in here.

Q. And was he conscious or unconscious? A. Well, he was moaning; I don't know whether he was unconscious.

Q. Did he seem to be bleeding anywhere? A. Well, it was in his foot.

Q. Now before this time you saw him burned had you ever seen his partner on the pole at all? A. Well, I had seen him in the morning before; it was about half past nine, I believe.

Q. Well, was he working when you saw him; was he working on the opposite side of Steidler or under side? A. He was working right under this man Steidler.

Q. And was he painting under him? A. Yes sir; he was painting there.

Q. Then did you see Steidler taken away? A. Yes sir, I seen him go away in the train.

Q. How was he taken away? A. Well, only had his—what do you call—clothes on; they put him on the train and he went away.

Q. And do you know who it was that took him down from the pole? A. Yes sir.

Q. Who were the people that took him down? A. That Mr. Cameron and Mr.——

Q. Cameron took him down? A. Yes sir, and Mr.—I can't catch this other man's name over there——

Q. Point him out? A. Doris.

Q. Doris? A. Yes sir.

Q. And they both took him down? A. Yes sir, and this other fellow here.

Q. Mr. Gilberti? A. Yes sir.

Q. How far away were you from him when you heard this sizzling noise like burning bushes, you say? A. Why, I was about—say here was the pole, and I was up on the bank, I was just opposite the pole.

Q. How far away were you away? How many feet? A. I don't really know; I couldn't tell.

Mr. Simpson. Cross examine.

Cross Examination by Mr. Hartpence:

Q. Weren't you working that day, Mr. Kelly? A. Yes sir; I was helping these other men here, sir.

Q. But you were not up on the pole? A. No sir, I was not up on the pole.

Q. Where were you when you saw Bouton painting under Steidler? A. I was at the bottom of the bridge there.

Q. Right where you were when you first saw Steidler hanging on the pole? A. Yes sir.

Q. How long was that before you saw Steidler hanging, in that hanging position? A. About an hour and a half after that.

Q. An hour and a half after what? A. After I seen—Mr. Bouton painting under Mr. Steidler.

Q. Yes; it was about an hour and a half after that before the accident occurred? A. Yes sir.

Q. Now, where did you next see Bouton after you saw him there? A. As I was coming in then, and I was coming in like from this other—I think it was out there at the—I don't remember; what do you call it? Some other bridge there—and we were supposed to pass in this way and I seen Bouton, he was on the other side of the pole; he was on the west side of the pole.

Q. And when was that? A. It was about a quarter to eleven.

Q. About a quarter to eleven you saw him on the west side of the pole? A. Yes sir.

Q. Opposite Steidler, higher up than Steidler? A. Well, he was not just opposite, but he was half way down this pole.

Q. Now what do you mean by half way down the pole? A. Half way down from the top to the bottom, half way down the pole.

Q. That is when you saw him on the west side? A. Yes sir.

Q. What was he doing there? A. He was painting.

Q. And that was about a quarter to eleven? A. Yes sir.

Q. Had you seen him anywhere else except on the west side of the pole? A. Who?

Q. After you saw him on the side under Steidler? A. I seen him at half past nine working under Steidler, and at a quarter to eleven when I came back he was working on the west side of the pole.

Q. You had not seen him in that intervening period of time? A. No sir.

Q. You had been away from the pole entirely during that time, had you? A. Yes sir.

Q. Well, how soon was it after you got back that you saw Bouton on the west side of the pole? How soon after that was it that you saw Steidler in his predicament on the top of the pole? A. It was just a quarter to eleven.

Q. So it was when you saw Steidler with his hand on the wire—— A. It was a quarter to eleven.

Q. That was at the same time that you saw Bouton on the opposite side of the pole? A. On the opposite side of the pole.

Q. What did Bouton do after Steidler was hurt? A. He didn't know it until I had called him, see? And he come down from this pole.

Q. He came down from the pole? A. Yes sir, he came down from the pole.

Q. How long had you been working there as a painter prior to this accident? A. Well, I don't know; about three months and a half, I believe it was; I ain't sure of it.

Q. This steel lattice work pole that you see on P-1 and P-2, these photographs, as you stood on the ground and looked up toward the top of the pole you could see the whole length of the pole, couldn't you? A. Yes sir.

Q. Did you work at any time painting those poles? A. Yes sir.

Q. That is the work you were doing too? A. Yes sir; I was supposed to be doing just the same as the other men.

Q. And from your position when you got up to the top of the pole you could look down and see the pole, down toward the ground, couldn't you? It is in full plain sight there, isn't it? A. But you can't see the bottom of the pole.

Q. Why not? A. Well, it is in angle out—let's see, I don't know what you would——

Q. Well, what is in your way? If you were to stand on that pole near the top and bend your head over and look down toward your feet, looking down toward the bottom of the pole, what is there between you and the bottom of the pole to prevent your seeing? A. Why, it is larger at the bottom.

Q. And for that reason you can't see it? A. No sir, you can't see the bottom of the pole.

Q. Because it is larger at the bottom than it is at the top? A. Larger at the bottom than it is at the top.

Q. Well, is that the reason you can't from the top of the pole, because the top is smaller than the bottom? A. No sir.

Q. Well, what is the reason that you can see the top from the bottom but you can't see from the top to the bottom? A. Just as I told you; it was wider at the bottom than it is at the top. You can give a glance down and you just see about here.

Q. About here (indicating)? A. Yes. You can just give a glance and you can see just about there.

Mr. Simpson: Marked X on P-2.

Q. It is the position of the pole then that prevents you from seeing there? A. Yes.

Q. It is not because there is any obstruction in your way? A. No, it is that it is—it is a little larger at the bottom of the pole than it is at the top.

Mr. Hartpence: That is all.

Mr. Simpson: That is all.

(Witness excused.)

ERNEST CALBERN, sworn.

Direct Examination by Mr. Simpson:

Q. Where do you live? A. 117 Prospect Avenue.

Q. Did you work in this gang of painters on the day Steidler was hurt? A. Yes sir.

Q. What were you doing? A. Painting 13 pole.

Q. And he was on 14? A. Yes sir.

Q. Was there more than one person painting on his pole? A. Him and partner by the name of Bouton.

Q. Did you see whether Bouton painted under him on that day? A. Yes sir.

Q. Well now, when did you see Bouton painting under Steidler? How long before the accdent? A. Well, about—close on to an hour before the accident.

Q. Before? A. Yes sir.

Q. Now in that hour did you see Bouton there around on the other side of the pole? A. No sir.

Q. And what was the first you saw of the accident? A. Well, the first I saw of the accident there was Harry—my partner Harry Gilberti started to go down the pole first, and I called him and asked him what was the matter. I thought the pay train was in and he would not give me any answer, and two men come running along the railroad and says "Get off your pole. There is a man been in contact with the wire." So then I looked in front and I saw Steidler hanging by his life belt, and I ran over to a blacksmith and got a rope and goes up and takes the rope up and gets quite a way up and hands it to one of the men that was up the pole.

Q. Who was up the pole? A. One of the linemen; I don't know their names.

Q. Do you see him here? A. Yes, there he is (indicating).

Q. That big man? A. Yes sir.

Q. He was up the pole already? A. Yes sir, he was up the pole.

Q. Now, how far up the pole did you get, about how far up, did you go? A. Well, just about—a little past the first arm.

Q. And how near to the body that was hanging there? A. How near?

Q. How near to his body? A. Well, I don't know; up to his feet.

Q. Well now, at that place did you notice whether there was any fresh paint or not? A. There was fresh paint—he was standing on fresh paint and there was paint about three arms under him besides that.

Q. How was he hanging? A. He was hanging back.

Q. And were his feet still in the angles or were his feet turned around? I mean were they still in these spaces or were they out or how were they? Did you notice that? A. No; I couldn't say.

Q. Did you notice that? A. No; I couldn't say.

Q. What position was he in with reference to the shutter? Was any portion of his body against the shutter? A. No, he was away from the shutter altogether.

Q. And his body was hanging away from the shutter? A. Yes sir.

Q. And when you got up there were or were not his arms in contact with the wire or had they come away? A. They were away from the wire.

Q. Did you see him at any time when his hand or either hand was in contact with the wire? A. No sir.

Q. Didn't see that? A. No sir.

Q. Now when you got up there and saw the position of his body and handed the rope to this

man what was the next thing you did? A. Went down the pole.

Q. Did you see them getting down? A. Yes sir.

Q. Describe that? A. Well, we was—they had the rope tied under his arms, and Harry had him on his shoulders, and the rope was to take some of the weight from Harry in bringing him down. We was at the bottom leaving the rope loose.

Q. Who was at the bottom? A. Well, I was—a few of us.

Q. Well, what happened? A. We got him down to the ground and that young fellow sitting there he flagged one of the trains——

Q. Who did? Which one? A. Fellow sitting over there.

Q. This man (indicating)? A. Yes sir.

Q. He flagged one of the trains? A. Yes sir.

Q. Then what happened? A. We had him in the shanty then. We were trying to get whatever we could off his shoes. He was all burned up. You would think he had been in a fire or something; they were all scrowed up.

Q. His shoes were? A. Yes sir. So they were getting him in the train and that is the last I saw of him.

Q. Then he was taken away? A. Yes sir.

Mr. Simpson: Cross examine.

Cross Examination by Mr. Hartpence:

Q. How many men were there up the pole at the time you were taking Steidler down? A. How many men were up on the pole? There was Harry and one of the linemen, that big Tom, I think he is, I think his name is.

Q. Mr. Cameron? A. Yes sir.

Q. And who was the other man? A. Harry Gilberti.

Q. Harry Gilberti? A. Yes sir.

Q. And you? A. You asked me who was on when I went there.

Q. That is what I said. A. Then I was going up and I goes up as far as that other lineman and I hands him the rope so then I went down again.

Q. And Steidler was also hanging there by his life belt? A. Yes sir.

Q. All four of you were on the pole at the one time? A. Yes sir, at the one time, and Steidler—

Q. Right under the cross pieces, cross arms? A. I wasn't under the cross arms, but Harry was up as far—up against Steidler, and the lineman put the rope around; there is a pipe on the top of the pole; he had the rope around the pipe.

Q. And where was Steidler with relation to the cross arms? A. Well, there is three cross arms on top, I think, and there is one on the bottom; he was in between the three and the one.

Q. The three and the one? A. Yes sir.

Q. And did you notice where his life belt was fastened? A. Yes sir.

Q. Where was that fastened? A. That was fastened—I guess it was one link down from the last of the three cross arms.

Q. Of the three cross arms? A. Yes, sir.

Q. And from the point where that was fastened that ran through this iron angle, didn't it, the cross arm—cross iron—that ran through one of these cross irons, did it not, of which the pole was made? A. Yes, sir.

Q. Now, how far from the top of the pole was that cross iron that this life belt was around? A. Oh, I couldn't say that.

Q. Can you point it out on the photograph A. Yes, sir.

Q. If I show you P-1? A. He had his life belt about in here. See? (Indicating.)

Q. That is about in between—— A. No, not

as high as that; right down a little more, right there (indicating).

Q. Just about at the top? A. Well, I couldn't say on the top; it was in between here.

Q. In between those two lower cross bars? A. Right in here, see? Where my finger is.

Q. Now, will you just mark there where you say his life belt was fastened? A. This is the wire. We got it under. It was about here.

Q. I will put a ring around it. That little dot in the ring? A. Yes, about there.

Q. And they put a rope around Mr. Steidler, did you say? A. Yes, under his shoulders.

Q. Who did that? A. Well, I couldn't say whether the lineman done it or Harry, I couldn't say.

Q. Did he go up above Steidler in order to go up and put the rope under his shoulders? A. I don't know who did it.

Q. Well, I say whoever did it. Oh, you didn't see who did it? A. No.

Q. You didn't see the rope put around him? A. I didn't see them put the rope around him, but I seen it was around him.

Q. And then did somebody unloosen the life belt when he put him on his shoulder.

Q. On his shoulder? A. Yes, and the rope was to take some of the weight from Harry to get down that angle.

Q. Who held fast to the rope? A. Well, I was one of them—I don't know none of their names, to tell you the t ruth; I couldn't say who was there.

Q. How soon was it that that was done after you first saw that Mr. Steidler was hurt? A. How soon after?

Q. Yes. A. Well, when I seen that he was—when I heard that he was there I ran over to the blacksmith's and when I came back they was going up the pole already.

Q. That was all done in a very few minutes, wasn't it? A. Yes, sir.

Q. After Mr. Steidler was hurt? A. Yes, sir; it was done quick.

Q. Done quickly, wasn't it? A. Yes, sir.

Q. Did you notice where those wooden blinds or shutters were up there among the wires when you went up to see Steidler? A. Well, they were where they were put.

Q. What? A. They were where they were put.

Q. Yes, they were there, weren't they? A. Sure they were there.

Q. About what time in the morning did you first see Bouton working on pole 14? A. Well, it was about—a quarter to ten.

Q. And where was he, then? A. On Alfred's side. I remember that because I said to my partner——

Q. Never mind what you said. You remember that he was on Alfred's side? A. Yes, sir.

Q. You mean by that Alfred Steidler? A. Yes, sir, under Alfred.

Q. Under Alfred? A. Yes, sir.

Q. And were you working that morning yourself there, painting? A. Yes, sir—no, I was working with another man.

Q. On what pole? A. Thirteen pole.

Q. Now, was 13 pole—that was nearer New York than 14 pole, wasn't it? A. Yes, sir.

Q. And which side of 13 pole were you working on? A. East side, New York City.

Q. New York City? A. Yes, sir.

Q. So that as you looked you looked down towards 14 pole? A. I was facing Steidler.

Q. And who was your partner? A. Angelo—Harry Gilberti.

Q. Harry Gilberti? A. No, Angelo. We call him Harry.

Q. Were you in court here during the trial Thursday? A. Yes, sir.

Q. You heard Angelo testify? A. Yes.

Q. As being on pole 13? A. Yes, sir.

Q. He was the one who was on pole 13 with you, wasn't he? A. Yes, sir.

Q. And he spoke about a brother Harry Gilberti? A. That was my partner, Harry. His name is Angelo but we call him Harry.

Q. You call him Harry? A. Yes, sir.

Q. This man Gilberti who was here on Thursday with an Army uniform on and testified, he was the man who was your partner? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. On pole 13? A. Yes, sir.

Q. Which side of pole 13 was he working on that morning? A. He was working on the opposite side that I was on.

Q. And looking toward New York? A. Yes.

Q. As he worked? A. Sitting smoking, he was.

Q. Is that right? A. No, he was looking towards the others, watching to see if they were going to leave for the pay train or not.

Q. When was that? A. Well, about half past ten.

Q. About half past ten? A. Yes, sir.

Q. But he had been working prior to that time painting, hadn't he? A. What is that?

Q. He had been working painting prior to that time? A. Oh, sure.

Q. And was he—and as he worked painting with you he had his back toward pole 14, hadn't he? A. When he was painting, yes—when he was.

Q. Yes, well, what do you mean by when he was? A. Well, when I was painting he was sitting looking around smoking cigarettes.

Q. Smoking cigarettes? A. Yes, sir.

Q. He spent most of the morning smoking cigarettes—— A. That is just what he did.

Q. Did he, instead of painting? A. Yes, sir.

Q. What first called your attention to Steidler? A. Well, my partner starts in going hasty down the pole and I call to him, asked him what was the matter. I thought maybe the pay train was in. He give me no answer, so I seen everybody running toward the bank, and there was two men—it was Tom, the foreman, and one of the lineman—they come running down and told me to get off the pole; there has been a man in contact with the wire.

Q. That is the first you knew about it? A. That was the first I knew about it.

Q. And it was your partner—what was your partner, Gilberti, doing just before you saw him start down the pole? A. Talking.

Q. Where was he sitting, do you know? A. On his arm.

Q. What? A. On this here arm (indicating). Sitting on this arm.

Q. Sitting on this arm, this extreme lower arm? A. Well, that is 14 pole, isn't it?

Q. That is 14 pole. Did 13 pole have the same number of cross arms on as 14, do you know? A. That I couldn't state.

Q. Well, he was sitting on a cross arm was he? A. Yes.

Q. Below you or above you? A. Right alongside.

Q. Right alongside of you? A. Yes, sir.

Q. Perfectly safe to sit up there and smoke cigarettes, wasn't it?

Mr. Simpson: I object to that. This is not proper cross examination. We are not suing them for providing cigarettes. What has that got to do with this case? Safe for him to smoke cigarettes—Gilberti is not suing. Still I will withdraw it if Mr. Hartpence thinks it is important.

Mr. Hartpence: Well, I don't think it is important; I only want to get Gilberti's position on pole 13.

Q. How far down the pole had you and Gilberti gotten that you were painting that morning when this accident happened? A. Well, in between both arms I should judge we were painting then. Q. When you say both arms that doesn't tell us anything. A. Well, the space in between.

Th Court: You mean the space in between the lowest arm and the four upper arms?

The Witness: Yes.

Q. And the four upper arms. Now after you had seen Bouton working underneath Steidler some time before this accident happened—— A. Yes, sir.

Q. —did you see what became of Bouton? Where did he go after that? A. He come down then—eh would paint anywheres so he could pass the morning, so he could notice when the pay train came. He didn't want to be on the top of the pole when the pay train was there. He would like to be near the bottom and he would be the first to get paid.

Mr. Hartpence: I object to that.

The Court: What was the question?

Q. (Repeated by the stenographer.) Now after you had seen Bouton working underneath Steidler some time before this accident did you see what become of Bouton?? Where did he go after that?

The Court: Now, after you saw him in that position which you told us of, then—now listen to the question.

Q. (Repeated by the stenographer.) Now after you had seen Bouton working underneath Steid-

ler some time before this accident did you see what became of Bouton? Where did he go after that? A. Well, I cannot say I was noticing Bouton all the time. I was talking——

Q. You did see him, however, painting on Steidler's side? A. On Steidler's side, yes, sir.

Q. And that was about an hour before the accident happened? A. When I saw him a quarter to ten or ten o'clock; something like that.

Q. And you didn't see what became of him after that? A. No, sir, I did not.

Q. You don't know where he was painting after that? A. No, sir.

Q. And where was Bouton when you had your attention called to the accident to Steidler? Did you see him then? A. He was down the pole then.

Q. Down the pole then? A. Yes, when I got down he was down.

Q. He was down? A. Yes, sir.

Q. Now, when you first saw Bouton painting on Steidler's side of the pole where was he on the pole? A. When I first saw him?

Q. Yes. A. When I first saw him——

Q. I will show you P-2 and ask you if you can show me where he was when you first saw him painting on Steidler's side? A. When I first saw him that was early, around in the morning; Steidler was up above.

Q. Where was Bouton, is my question, Mr. Calbern, when you saw him painting on Steidler's side? A. Steidler was painting on the upper part of this arm——

Q. Which arm do you mean, starting at the top and counting down. A. Starting at the seventh arm and he was painting down.

Q. Painting down when you saw him? A. Yes.

Q. When you saw him first ? A. Yes.

Q. And for how long a time did you see him painting there? A. Well, he was painting for quite some time when I noticed.

Q. Well, what do you mean by quite some time? How long would you say approximately? A. Well, about half an hour.

Q. About a half hour? A. Yes.

Q. Then you didn't see what became of him after that? A. No.

Q. Now, I understood you to say on your direct examination, Mr. Calbern, that you saw fresh paint on Steidler's side of the pole at a point where he was standing and for three arms below. Is that correct? Did I understand you correctly, or did you say three irons below? A. I don't understand what you mean at all.

Mr. Hartpence: I will withdraw that.

Q. I understood you to say on your direct examination that Steidler was standing in fresh paint when you got up at the pole? A. Standing on fresh paint, yes, sir.

Q. On the pole, and the pole on that side had been painted for some distance below that? A. Yes, sir.

Q. Now, how far below do you say it was painted fresh?

The Court: Starting with that place where you saw Mr. Steidler standing, the question is how far down the pole below that did you notice fresh paint?

The Witness: Well, it was about six angle irons painted.

Q. Six angle irons? A. And he was about on the third one, that was about in the middle of the wet paint.

Q. I understood you to say three arms below.

But what you said three irons below, is that correct? A. Yes, three irons.

The Court: I may have modified your question a little bit. You said "painted"; I said, "fresh paint". I did not mean to change it at all.

Mr. Hartpence: Well, he said it was fresh paint.

Q. What kind of looking man is Bouton, Mr. Calbern? A. Well, he is short, thin, young fellow.

Q. Short, thin, young fellow? A. Yes, sir.

Q. Light or dark complexion? A. Well, light in complexion.

Q. Smooth shave or beard or moustache? A. Oh, clean shaved.

Q. Clean shaved? A. Yes.

Q. How long had you known Mr. Bouton prior to this accident? A. Well, the length of time I was there. I got acquainted with him when I got there.

Q. About how long had you been there before this accident took place? A. Well, close on to five weeks.

Q. Would you know Mr. Bouton if you saw him again? A. Yes, sir.

Q. Do you see him in court this morning? A. He is not here.

Mr. Hartpence: That is all.

By Mr. Simpson:

Q. Bouton was here last Thursday, wasn't he? A. Yes, sir.

Q. Now, you, as I understand you, saw Bouton painting under Steidler, but you didn't see him when he shifted around on the other side? A. No, sir.

Q. But you did see him on the other side some

part of the morning, didn't you? On the side opposite to Steidler; you saw him painting under Steidler. Did you or did you not see him on the other side? A. Yes, I did see him on the other side.

(Witness excused.)

THOMAS KNUDSON, recalled.

Direct Examination by Mr. Simpson:

Q. Are you the foreman of the painters—were you the foreman of the painters on the day of this accident? A. Yes, sir; sub-foreman of painters.

Q. You were the man who gave the instructions as Mr. Reynolds testified the other day? He told you to give the instructions; you gave the instructions? A. Gave the instructions, yes, sir.

Q. Now, what instruction did you give about painting on the other side, the opposite side of the pole? A. Well, I told him to keep off there; every ten or fifteen or half an hour, keep off and be careful.

Q. Now, when you put two men to work on the poles, did you let one paint fresh under the feet of the other? A. No, sir.

Q. Put them on opposite sides? A. Opposite sides.

Q. That was your instruction, was it? A. That was my instruction.

Q. And what was the purpose of that instruction? Was it dangerous to put wet paint under the feet of the other man?

Mr. Hartpence: I object to it as leading—the last part.

The Court: It is.

Q. What was your purpose in telling them to

paint on opposite sides of the pole? A. Why, they were safe if they done the two of them.

Q. What do you mean by that? A. It would be more common sense.

Q. That is what I want to know—why you didn't allow them to paint one under another? A. Why, they will be one thing about it—they will be all full of paint going down the pole; there would be no sense in doing that.

Q. Well, was your only purpose to save their clothes? A. Oh, no.

Q. Well, now, tell us? What was the reason you didn't let one man paint under another? You know why it was? A. Why, it would not be the right thing.

The Court: Why, wouldn't it be the right thing?

The Witness: Why, if he was going down, of course, he would be full of paint, and slippery, and things like that. It stands to reason.

The Court: Well, you see, we can't get your thought unless you tell us.

Mr. Simpson: Cross examine.

Mr. Hartpence: No questions.

(Witness excused.)

THOMAS KNUDSON, recalled.

By Mr. Hartpence:

Q. One painter painted underneath the other, and as the top painter came down what would happen to the paint they had already put on, that had already been put on by the lower one? A. Why, it would all scratch up; they would have to go over it again. There would be no sense in doing that.

Mr. Hartpence: That is all.

Mr. Simpson: That is the case.

DEFENDANT'S MOTION FOR NONSUIT.

Mr. Hartpence: If your Honor please, the defendant moves for a nonsuit in this case, on the ground, first, that there is no negligence shown as to the proximate cause of the injury to the plaintiff on the part of the defendant; secondly, that the injuries complained of resulted solely from the act of negligence of the plaintiff himself; and, third, that it resulted from an assumed risk, an ordinary risk of the employment assumed by the plaintiff; and, fourth, upon the ground that it has not been affirmatively shown that both plaintiff and defendant were engaged in interstate commerce at the time of the accident to the plaintiff.

The Court: Well, I will hear you on that, Mr. Hartpence. If you do not mind I would just as leave have you argue the fourth first, and then argue your others; because if the fourth is established, if your argument is established in that direction, of course, that puts an end to all the consideration of the other points raised. I take it that that is the situation. If both parties were not engaged at the time in interstate commerce there could not be any recovery under any circumstances in this class of action. Now let me ask you this: It is not denied, is it, but what the defendant was engaged in interstate commerce?

Mr. Hartpence: I think that we admitted that in the opening of the case; that is, of course, an admission in general that we were operating trains between New York and Manhattan Transfer.

The Court: Between New York and Manhattan Transfer by electrical power?

Mr. Hartpence: Yes.

The Court: So it comes down more narrowly to whether or not this thing in and about which the plaintiff was engaged was a thing so connected with interstate commerce as to put him in the position of being engaged at the time of the happening in interstate commerce.

Mr. Hartpence. Yes, at the time of the happening of the accident. That is not disputed, and Mr. Doris himself I think, afterwards did testify that he was running from Manhattan Transfer to New York. The defendant, therefore, generally was engaged in interstate commerce.

The facts on that phase of the case, as I recall them, are simply these: That Mr. Steidler, the plaintiff, not being a regular employee of the railroad company, never having worked for them before, and, of course, never having worked since, was engaged simply for the purpose of assisting in the painting of these poles; and for no other purpose; that he was on pole 14 at the time that he was injured for the purpose of painting that pole, and for no other purpose; that was his own testimony.

The Court: Well, not disturbing your argument, may I ask you this question, Mr. Hartpence, Is it one of the points you are raising under that reason, for the nonsuit, that the painting of poles of this class is not so connected with interstate commerce as to be a necessary component part of carrying on that class of commerce; and therefore, that he was not engaged in interstate commerce? Is that the point?

Mr. Hartpence: Yes, sir, that is the chief point. I don't think it has been definitely—

The Court: What I want to get at is this: You were speaking of the casual employment—

Mr. Hartpence: Yes sir.

The Court: Do you believe that that makes any difference if he had only been engaged that morning, for instance, and yet it affirmatively appeared that this class of work he was then engaged in was that class or that thing which came within interstate commerce?

Mr. Hartpence: Yes, sir. I am prepared to argue on that particular principle. I do not think that it has been argued before in a case, but I am prepared to take the position in this case, and I do take it, in addition to the specific grounds stated, that such employment as that which your Honor has now referred to would not come within the spirit of the Federal Employers' Liability Act; that the object and purpose of that act was to bring within the Federal control the operatives of a railroad engaged in interstate commerce, not the mere casual employees who might from time to time be brought in by a situation that was only remotely connected with it, at most, as in this case. That was never the purpose or intent of the statute. The statute has in mind—I think its broad, general scope is to regard the more permanent employees, those who are engaged as railroad operatives—put it in that manner—as within the protection and under the supervision of the Federal Congress and Federal authorities.

The Court: Would you say, Mr. Hartpence, that an engine driver who was engaged by the morning of the day of meeting

his injury, and engaged only for that day, if that were possible, although he was actually engaged for that day, if that were possible although he was actually engaged in driving the train and the train was engaged unquestionably in interstate commerce, that that was casually an engagement as not to bring him within the protection of this act?

Mr. Hartpence: No, I would not say that specifically, your Honor, except for the purpose of argument. I would meet that, if it were in this case, by saying that that is so directly connected with the interstate transportation itself—it is an operation of interstate transportation.

The Court: That is the reason I put it to you.

Mr. Hartpence: That would put it in a different category. I am willing to admit now for the sake of argument it would put him in the position of an employee who might be engaged for casual employment.

The Court: Take the Peterson case. Suppose it had been shown that Peterson had been employed only recently, and in a casual way to carry the bundles to the railroad, engine, for instance, and the next day it was to put under repair; would you say that that would not leave the plaintiff Peterson in the position that you are questioning now, and not entitled to the benefit of this act?

Mr. Hartpence: No, I would not have said that; that is, I am willing to concede in this argument that it might not. Some day I am going to argue the broad general proposition, perhaps even to that extent, but I do not want to be taken out of the scope of this present case in an academic discussion of

that character, except that I would say for the purpose of this argument that that case and the decision of the Supreme Court of the United States—and we cannot, of course, gainsay it—that he was directly engaged upon an instrumentality of specific interstate transportation or the facilitation of it, without which interstate transportation could not have been carried on. You see, it is an essential—absolutely an essential situation. The interstate transportation—that is the test, as I understand the more recent cases of the United States Supreme Court, to express it, specifically in the Shanks case against the D. L. & W. The real test is a practical test—was the plaintiff engaged in some work which was so directly and specifically connected with interstate transportation as to form a practical——

The Court: In the Peterson case the plaintiff there was engaged in the repairing or constructing of a piece of shafting or machinery in a shop, which shop in turn and which machinery eventually either had been or would eventually be used in the reparation of engines and such like instrumentalities that would in turn be used in interstate commerce.

Mr. Hartpence: Yes sir. It seems to me to relate back to the "House that Jack built".

The Court: Of course. Now, the Harrington case, how recently is that? I don't think that I have seen it. Possibly I have. Harrington against whom?

Mr. Hartpence: I would give your Honor the citation in a moment. Shanks against the D. L. & W., was 39 U. S. 536; and the Har-

rington against the Chicago, Burlington & Quincy, is in 241 U. S., 177.

The Court: That is Harrington against Chicago & Burlington. Is that here?

Mr. Hartpence: It is in 60 Lawyers' Edition, on page 941. Then it is in 241 U. S., 177, Mr. Justice Hughes writing the opinion in the Harrington case, and it harks back to the Shank case and accepts the tests laid down in that case. In the Harrington case what they were doing was this: They were switching loaded coal cars belonging to the railroad company from a storage track to a coal shed or chutes from which this coal would be taken by interstate engines and used. In other words, it was being put there for the specific use of interstate engines as they needed it, as part of their preparation for an interstate journey, and it seems to me that the Harrington case is pretty directly connected up with interstate commerce if anything could be; yet the court held in that case that that was not within the tests adopted in the Shanks case, and Mr. Justice Hughes quoting the Shanks case, said, "The two tests of employment in such commerce in the sense intended, is, was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?" That was the language in the Shanks case, and that is followed in the Harrington case; and there are even more recent expressions of the situation than that.

In the case of Minneapolis, etc., against Winter, one of the very recent cases, 242 U. S., 353, decided December 5, 1916—I don't know whether your Honor has that or not?

The Court: Yes, I have it.

Mr. Hartpence: The real consequence or significance of the Winters case is that they apply the test at the moment of the injury, absoutely at the moment of the injury—absolutely at the moment of the injury. While I am on that particular point, I may call your Honor's attention to the case of Hudson and Manhattan against Iorio, in the Circuit Court of Appeals in the second circuit, New York, 239 Federal Reports, 855. I don't know whether your Honor has that on your notes or not.

The Court: The Hudson and Manhattan, is that?

Mr. Hartpence: Against Iorio. I think that is a very valuable case in this line of cases, because it is a recent expression by the Circuit Court of Appeals of the second circuit, (February 6, 1917) by Judge Hough, on the question as to how minutely the matter of time was considered in determining whether or not at the moment of injury the parties were engaged in interstate commerce. In that case the plaintiff, Iorio, was engaged in moving and piling rails alongside of the subway, for use in repairing tracks, and admittedly ninety per cent of the business of that railroad is interstate commerce; they hardly run a train, I think it appears in this report, which is not an interstate train, on the route from New York to New Jersey, and vice versa—well, the business they were engaged in is shown in the report; every train was an interstate train.

The Court: Every train was an interstate train.

Mr. Hartpence: Yes, except for such trifling business as may exist between the sev-

eral stations of this subway on one side or the other of the Hudson River, it is wholly engaged in interstate transportation. So that there, you see, there was a very narrow loophole for any employee who was engaged in anything other than interstate transportation.

The Court: Does that loophole appear in this case? I mean so far now as being anything but interstate traffic on this line that the defendant company ran?

Mr. Hartpence: Well, I don't think that there is anything in the case at the present time that shows anything to the contrary, than that we were engaged in interstate commerce.

The Court: On your line from your terminal in New York City to at least Manhattan Transfer.

Mr. Hartpence: So far as the present state of the record is concerned. But here Judge Hough in drawing the line between interstate and intrastate situations is careful to point out that it cannot be said that the rails which Iorio was engaged in storing against a use of a certain imminence which might never occur, were at the moment engaged in or part of interstate commerce; for that commerce was going on without any present assistance, without any present assistance either from Iorio or from the rails on which he was working.

The Court: Doesn't that go back practically to wiping out the Peterson case entirely?

Mr. Hartpence: Well, the Winters case comes pretty near wiping out the Peterson case. I think perhaps, with all due respect

to the Supreme Court of the United States, as a student of their decisions, and in no wise desiring to criticise the action of the court,— I think that perhaps the Peterson case marked the limit to which that court went in drawing almost everything into the domain of interstate commerce; and since that time perhaps a light has gradually broken in upon them and they have gradually been coming back the other way until in the Winters case they bring it down to the moment, and say there in that case that unless the instrumentality with which the plaintiff was working at the moment was engaged in interstate commerce it does not come within the terms of the act; and I think the Iorio case is another case of the backward tendency of the court toward a more liberal construction of intrastate commerce, rather than a strict interpretation of interstate commerce, following the Peterson case. But the Peterson case went the limit and there has been a movement backward from it since, and away from it, and the Winters case comes pretty near demolishing the Peterson case or the opinion by the Supreme Court that rendered the Peterson decision. But aside from that I only wish to call your Honor's attention to Judge Hough's language. That in conjunction with the Shanks and Harrington cases seems to make the test, was he engaged in interstate transportation? Or in words so closely related to it as to be practically a part of it? Something that would be essential, that would assist it, something without which the transportation would not go on; something which if it were not done might prevent the interstate transpor-

tation, something which if it is done facilitates and helps the interstate transportation. That is the reason why when your Honor asked me a question about the casual employment of the engine man and the casual employment of Peterson, if he were so employed, I said I would make a distinction there; because it might be argued and I might have difficulty even in convincing my own mind to the contrary that they were engaged, even though casually, in something which had specifically and directly to do with the movement of interstate commerce, and without their acts perhaps the commerce or transportation would be either impeded or interfered with, and by reason of their acts it is helped. So that the question of casual employment—I do not think the intent and purpose of the Second Federal Employer's Liability Act was to bring everything that happened to be done with regard to the work of a railroad company which generally is engaged in interstate commerce within the terms of that statute; that they should by a nicety of reasoning or refinement of reasoning be brought within the terms of that statute. Its object and purpose are indicated in the title—"an act relating to the liability of common carriers by railroad to their employees in certain cases." It is not broad, taking in all cases. It seems to me while a bridge might go down and it might be replaced in a day by men who were only hired by the day and for that day, that it might be said they were engaged in interstate commerce within the meaning of the act; because unless the bridge were restored the interstate transportation could not go on, and that

might end my argument to the contrary, although, as I said to your Honor, I would still be prepared to argue that the statute was not perhaps even broad enough to cover that. But it does seem to me that unless the plaintiff has shown that this act, the act that he was engaged in at the moment of his injury, was such an act as assisted in and helped interstate transportation, and without which it would not go on, or that his act was intended to help that interstate transportation, he has not brought himself within the terms of the act; and my point is that the trains would run just the same whether the pole was painted or whether it was not.

The Court: I presume they would, for a given length of time, and for how long I would not try to venture a guess, but if they were not painted after some length of time, whatever it might be, they would fall into disrepair, and so forth; and it might be just the same as you say with regard to the culvert, or the bridge getting into such a state of disrepair, that, like the one horse shay, it would fall to pieces all at once, and then you could not say that you could conduct your transportation interstate with that class of instrumentality in that shape. Would you?

Mr. Hartpence: Why, yes, if it were deemed wise—of course there is no proof on that point, that is the point here, if it were deemed wise to let the steel resist the action of the atmosphere until it was necessary to put in another steel post, it would not make any difference whether the pole was painted or not.

The Court: You are mistaken about that,

because your own man said they were painted to keep them in repair. That is the testimony in the case.

Mr. Hartpence: No, he said it was done to make them look respectable; and then in answer to your question he said to preserve them.

The Court: To keep them in repair.

Mr. Hartpence: But that does not make them an essential instrumentality of interstate transportation. So also it helps a station to keep it painted. But there are a whole line of cases showing that that is not interstate commerce—even though a round house is used for interstate purposes.

(Recess to 2 o'clock, P. M.)

After Recess:

Mr. Hartpence: I was about to call your Honor's attention to this decision by the Court of Appeals of the State of New York,—Palmer against the New York State Industrial Commission, in 223 New York, 8571. In that case the injured man was employed by the railroad as a foreman in the inspection and repair of the passenger station at Hillsdale, then in use by the railroad as an instrumentality of interstate commerce. There had been an award by the State Industrial Commission of the State of New York, which administers the Workmen's Compensation Act in that State. The Appellate Division had reversed, because they held that the employee was engaged in interstate commerce at the time of his injury. The Court of Appeals reversed the Appellate Division and affirmed the original award on the authority

of Shanks against the D. L. & W., but without opinion. Now, there, of course, apparently the employee was engaged in repairing an instrumentality.

The Court: Wouldn't there be a distinction made in the use of the word, "Instrumentality", Mr. Hartpence? It might well be that in the repair of a station house, making of a station house or doing other works upon the station or depot, it might not be said, although it may be proper terminology, that it is an instrumentality. It is one of the things—one of the instrumentalities uses, yes; but not so directly necessary as tracks, switches, bridges, locomotives, cars, and the like, all of which are instrumentalities, are they not?

Mr. Hartpence: Yes.

The Court: It seems to me, that cars, bridges, switches, signal posts and things of that character must be given a more distinctive meaning when you use the word "instrumentality" than when you use it with reference to a station, for instance.

Mr. Hartpence. Well, would your Honor think they should be given a more distinctive meaning than should be given to coal, without which the locomotive themselves cannot run, or something similar.

The Court: Well, I suppose you are referring to the Harrington case now, aren't you?

Mr. Hartpence: Exactly.

The Court: Yes; but there, you see, was this situation: All that Harrington was to do, and all he was doing was as a switchman to move coal cars that had come, from a storage belonging to the defendant company,

upon storage tracks on which they were, to these sheds, where the coal was placed in bins and chutes, from which in turn it was used to load the tenders of both classes of locomotives, used for both purposes, and the court said in that case, as I remember the case, as to the coal in the cars, as to the cars that were on the storage tracks, that coal had ended its original initial journey, and as to its original class, as to whether it came from within the state where he was working or originally came from without the state, that movement was at an end—the original, initial movement, was at an end, and all that Harrington did was to move it intrastate, or, in fact, intra-yard to these sheds, and then his services ended. He had nothing to do with putting it into a locomotive or anything of that kind.

Mr. Hartpence: But he was engaged on an interstate commodity at that time.

The Court: Which might or might not be used for those purposes. The same as the Winters case, if I remember it correctly—I remember it now when I read it again, in the last few minutes. Winters was engaged in the repairing of a locomotive, I believe, which had been interrupted in an intrastate or interstate journey; that whatever it had been doing before or whatever it had been engaged in before, that engagement had come to an end and it was an unclassified instrument and subject to be sent into one place or the other. At the time he was working upon it it had no classification in either one of those means of transportation.

Mr. Hartpence: It might go out next day on interstate.

The Court: Yes. And, of course, the court said there. "Its character as an instrumentality of commerce depended upon its employment at the time, not upon remote possibilities or upon accidental later events." But if these poles, Mr. Hartpence—if these poles were instruments at all in commerce, in the case before us and so far as the evidence goes, they could not be instrumentalities of anything else but interstate transportation, could they?

Mr. Hartpence: I am not willing to concede that at the present moment. We will concede for the sake of argument that they could not be.

The Court: If you can show anything which is to the contrary I will be glad to have you do it. All I remember in the case is that the company was engaged in interstate transportation between the State of New York and Manhattan Transfer in this state, moving its trains by electric power.

Mr. Hartpence: Of course, I would argue that the poles themselves are not strictly instrumentalities of interstate commerce in any event. Like a roundhouse—in what respect does a roundhouse differ from a pole?

The Court: Of course, the roundhouse has two purposes generally: One for housing of locomotives; and, secondly, as a general repair or machine shop.

Mr. Hartpence: A place for preparation.

The Court: Place for preparation, and so forth, of your locomotives. But, as I understand the testimony, these poles were used for conveying electric current which again in some manner reached the third rail, which was the instrumentality directly through

which, by means of a shoe attached to your locomotive, the power was obtained to run engines and trains.

Mr. Hartpence: Would your Honor think then that the berth in which the pole rests or is fastened becomes a specific instrumentality of interstate commerce also?

The Court. I would not want to go as far as that. But assuredly I would not say that you could not carry your wires on these poles because you might have carried them by means of conduits buried in the soil. But that is not the way in which you were doing it. You were carrying your wires which in turn were designed to carry the electric current, which in turn was designed to furnish the power—the wires were carried by means of these poles, and that is the reason why I think the pole in this case was an instrumentality used by the company in its interstate transportation. As assuredly you had to have rails upon which your cars may run, just as assuredly in turn you must have ties under your rails as far as present day construction goes, upon which your rails can be properly placed.

Mr. Hartpence: And just as assuredly, your Honor, as that you must have coal or some other fuel producing element to produce the motive power.

The Court: True. I take it that in the Harrington case there would not have been any question to arise if at the time of the happening to Harrington he was actually engaged in and about that which was necessary to place the coal in a tender of a locomotive already assigned to interstate transportation. But you see that was not the sit-

uation there. The coal that went in bins was in a shanty, and it could go to one class or the other of locomotives; and, as I understand it, he placed the cars in the shed, or possibly even dumped the coal from the cars into the different bins or sheds. Then his work was ended. I imagine that the situation would not have been the same and could not have been the same if instead of being employed in that class of work he had been employed to operate the chute to permit the coal to go into the tenders of the locomotive. I do not think you and I would disagree if he were in that position, and the work in which he was presently busy at the time of his injury was the chuting of coal into the tender of an intrastate locomotive; that he could not have any recovery under the Federal Act; because assuredly he was not then engaged, nor could it be said that the company either was engaged at that time and in the particular circumstances in interstate commerce. But there would have been a very different situation, I think, had his work been the operation of chuting coal into the tender of an engine that was then engaged in interstate commerce, or perhaps even then assigned to an interstate line; because it seems to me that then both parties—both the railroad company and Harrington—would have been engaged in interstate commerce.

Of course, you have, too, Mr. Hartpence—speaking of coal you have the Youkonous case, Youkonous against the D. L. & W., where the plaintiff was a man mining coal in the mine of the defendant company or the defendant carrier, which coal was designed to be used, I think, for interstate commerce—

Mr. Hartpence: Interstate commerce.

The Court: —interstate commerce. But the court said the connection was not close enough; it was too remote; it was practically the same as the Shanks case; and the court in the Shanks case finally concluded in this manner, after referring to this Youkonous case, and Swift & Co. against the U. S., and a number of others—I think the Peterson case: coming to apply the test to the case in hand it is plain that Shanks was not employed in interstate transportation or in repairing or keeping in suitable condition a roadbed, bridge, engine, car, or other instrumentality then in use in such transportation.

Of course, what Shanks was doing, as I said before, was changing in the machine shop of the railroad company an overhead shaft, which when in proper position would have power applied to it and in turn it would assist in the preparing of parts and appliances in turn to be used in repairing engines of the defendant company used in both classes of transportation. The court said there, as I have just recently said here, that it could not be said that it was such an engagement in interstate transportation.

Mr. Hartpence: Here is another decision that is directly applicable to the situation, of the Supreme Court of the State of California, Southern Pacific Railroad against the Industrial Commission, in 171 Pacific, at 1071. That is another very recent case, decided in April, 1918, in which the Supreme Court of California takes this view: That a servant injured while working on the main power line (apparently a lineman working on the line carrying alternating current to a sub-

station which converted it to a direct current for operating cars in interstate commerce,) was not injured in interstate commerce, his employment being too remote.

Now, if you want to consider it from the point of view of personal acts, as a lineman engaged in working on the line and doing something through which you can trace a direct connection, perhaps, to the movement of the train, you find that the reason of the court in this case leads you to this conclusion —they follow the Shanks case and the Harrington case, and they say that in the Harrington case the coal, or in the Youkonous case the same thing—the coal was the basis supply of the power. It had to have a little different treatment, of course, in order to become efficient as power in the electric current; but there is no difference between the two, the electric current is simply basic power the same as the coal is basic power; and the court argues that if the handling of the coal by Harrington was not an act of interstate commerce then how could the act of the lineman, working on the line which ultimately or eventually conducted an electric current that reached the instrumentalities of interstate commerce or moved instrumentalities— how could that be said to be anything except an act of workmanship of latent power, just the same as the coal is latent power.

The Court: Will you let me see that case?

Mr. Hartpence. 171 Pacific, at 1071.

The Court: Do you mind if I look at it?

Mr. Hartpence: No sir. I will be very glad to let you see it. I thought that it was very much in point in this case, even going beyond the question of painting the pole. It

would seem as though a lineman himself, concerning which we might not have so great an arguable ground, or so strong an arguable ground—even a lineman has been held to be not engaged in interstate commerce.

The Court: You think by this case, then—take on this very pole number 14, instead of this plaintiff being a painter painting the pole if he was there as a lineman repairing the wire which carried the current, that he would not be engaged in interstate commerce?

Mr. Hartpence: Yes, according to this.

The Court: Of course, if that is so, it makes for a very strong case, Mr. Hartpence; it would be much stronger it seems then in favor of the defendant because it removes the plaintiff to a very considerable degree, I think, beyond the electric lineman. (The court refers himself to the case in question.)

All right, Mr. Hartpence, I have read it.

Mr. Hartpence: Now, another case I want to call your Honor's attention to is Jackson against The Industrial Board, 117 Northeastern—an Illinois case—705, where it was held by the Illinois Supreme Court that a painter who was engaged to paint railroad bridges while on his way to get a new supply of paint for the purpose of painting a railroad board was not engaged in interstate commerce. Now, the bridge situation as I said this morning to your Honor, I would have more difficulty perhaps in convincing my own mind that a bridge was not a necessary instrumentality of transportation than I would in the case of a railroad station or roundhouse or even a pole on which wires were suspended for the purpose of carrying

current. There is a case where the Supreme Court of Illinois said that was not an act of interstate commerce.

The Court: Then there is still another case that has to do with painters that is helpful in reaching a conclusion, I think, upon this point, and that is the case of Collins against the Great Northern Railroad Company, in 161 Pacific, 69, by the Washington Supreme Court, in the State of Washington. The Jackson case was 117 Northeastern, 705. In that case the injured man, with others, was to paint the ceiling of a shed. The court found that the shed was an instrumentality of interstate commerce, so that as it stands it was an instrumentality of interstate commerce; it was used for handling interstate commerce. The rope broke on the scaffold and he fell and was injured, and that court held that he was not engaged in interstate commerce at the time he was injured. In that case the court went back to the Shanks case also.

Mr. Hartpence: Then there is another case that would go a long way to meet your Honor's suggestion with regard to locomotives, for instance, as being a direct instrumentality in interstate commerce, as well as the bridge which was affected in the Jackson case, of the B. & O. against Branson—Baltimore & Ohio Railroad against Branson, 128 Maryland, 678; 98 Atlantic, 225 of your sheet, the Atlantic Reporter report; and 242 U. S., 623. The reason I refer your Honor to the Branson case particularly is that there the Supreme Court of Maryland held that the employee, who was painting engines and cars used in

interstate commerce, was engaged in interstate commerce; that the Supreme Court of the United States reversed and held that he was not on the authority of all these cases that we have been discussing; Minneapolis & St. Louis against Winters; the Harrington case, the Shanks case and the Youkonous case.

The Court: Just let me see that case.

Mr. Hartpence: I haven't the report, unfortunately. I just have the reference to it. In my preliminary investigation of it I only had the Maryland report.

The Court: Then the memo that you have, as it purports to be, is certainly a very direct and broad case; in my mind maybe it would not be, because I have in my mind two things as this case has gone along. Naturally the Judge must try and see in advance of what is coming what is likely to come, and I will be frank in saying I was comparing these poles and the painting of them with the painting of a bridge, and any finding in that direction by our courts; and then I went from that to what seemed to me the more important instrumentality, if there can be degrees, and tried to compare it to engines and cars in interstate commerce. Now, if this case you speak of goes to that point and the U. S. Court has held that the painting of such an instrumentality does not bring one within the act it seems to come pretty close to our case.

Mr. Hartpence: Well, perhaps my investigation led my mind along somewhat the same lines that your Honor's ran, and that is the reason I thought this case was important along those lines.

The Court: It seems to me that this case of Southern Pacific against the Industrial Commission, as I read it very casually, seems to be attempting to draw some distinction as between in this line upon which this plaintiff was working, and the current which was actually used—electric current actually used for propelling the cars. It seems that he was working somewhere between the main power house where the current was originally generated, and a substation, and they seemed to treat of it as if it were—well, much the same as this coal that was put in the bin in the Harrington case; it was the energy that would eventually be used for propelling the cars, but it had not reached that point where it was at the time actually being used for propelling the cars; and therefore applied it to the Shanks case and the Harrington case. (The court refers himself to 98 Atlantic, 225.) You stated, Mr. Hartpence, that this was taken to the U. S. Supreme Court?

Mr. Hartpence: Reversed in 242 U. S., 623, on the authority of Shanks and Harrington cases. The significant part of that, to my mind, your Honor, is that having affirmed it upon the authority of Shanks, Winters, Youkonous, it would seem to place the painting of a locomotive in the same class with those other acts concerned in the other cases, putting them all in the same general class, same general category.

I have the Lawyers' edition at the office; that is all.

The Court: The particular reason why I asked you if you had the U. S. Supreme Court Opinion——

Mr. Hartpence: They wrote no opinion.

The Court: Was as to whether there could be any question as to whether these locomotives and cars upon which this plaintiff in this action was engaged in painting—whether there could be any question that they were interstate instrumentalities. This is a very long opinion, the opinion of the state court.

Mr. Hartpence: The State opinion seems to regard it as——

Mr. Simpson. The Supreme Court reversed it on the facts, not on the opinion.

Mr. Hartpence: The Supreme Court hands down many memorandum opinions just in that form: "Reversed on the authority" of such and such a case. Of course, they don't go into the facts beyond that.

The Court: Here is what brought it to my mind: "The plaintiff was in the employ of the defendant company at various times from the year 1909 and in the fall of 1912 was employed in the roundhouse at Cumberland, as a painter. At that time he was furnished for use in his work a spraying appliance called by the witness a paint cone. Now, a thing that was brought to my mind is that these locomotives and cars at the time were, of course, in this roundhouse or in this paint house; but it does go on to say—the state court did find that they were interstate instrumentalities.

Mr. Hartpence: Instrumentalities, in the same category with this Collins case I referred to, where the state court found that the shed they were painting, the ceiling of it, was an instrumentality in interstate commerce. The Supreme Court seems to have passed upon it from that point of view.

The Court: Well, the conclusion you are

drawing from it, as I take it, Mr. Hartpence, is even assuming in this particular case we are now arguing to—assuming that these poles were instrumentalities of interstate transportation of the defendant company——

Mr. Hartpence: And admittedly so——

The Court: ——and admittedly the work being done upon them was that of painting them, and that the plaintiff was engaged at that time in that work and upon such instrumentalities—admitting all of that to be true, yet, by force of this case and the others you have cited that is not such a work, or that work is too remote from the actual conducting of interstate transportation as to bring one who is actually doing it within the provisions of this act.

Mr. Hartpence. Yes sir, on that branch of my argument admitting all that to be the case.

The Court: Now, will you let me see that railroad bridge case?

Mr. Hartpence: Jackson against the Industrial Board of Illinois.

(The court refers himself to it.)

The Court: This has not been passed by the Federal Court?

Mr. Hartpence: Neither this case nor the California case, so far as I can find has been passed upon by the Federal Court.

The Court: Is this Jackson against the Industrial Board the case you referred to as the bridge case?

Mr. Hartpence: Yes sir.

The Court: It seems he was not engaged in the painting of the bridge at that time.

Mr. Hartpence: Well, the point is he was on his way——

The Court. (After referring to the opinion in the case in question.) Then it is true that this particular party who was the party who was injured, had gone to a given point to get more paint and was on his way back.

Mr. Hartpence: What I had in mind in that connection, your Honor, was that under the Zachary case where they held that the mere——

The Court: The fact is that he was engaged either directly or indirectly in the painting of a bridge.

Have you anything further to submit to me on this particular point, which is your fourth reason?

Mr. Hartpence: Of course, there are a number of other cases, like the Perrins case; the Welsh case, and one or two others along the same general lines, but they do not have to do specifically with paint propositions. I think perhaps your Honor has those.

The Court: I know those cases, yes. As I recall them, Mr. Hartpence, all of them have, as it were, somewhat of a twang to them that takes us away from the particular thing we have before us; that is, it takes us away from the question of the essentiality of the work, or takes us away from the question as to whether it is too remote to bring it within the provisions of this act.

Mr. Hartpence: No, I think they take us right to that question. That is the real test these cases lay down. It is the direct connection or remoteness of the act that seems to decide whether or not they are engaged in interstate commerce. If you get the "House that Jack Built" too far away, then they say it is going too far.

The Court: In the Perrins case if he was doing a thing in interstate commerce then he was doing a thing which was essential.

If you have nothing further to offer me on this point I will ask Mr. Simpson to let me hear from him before you take up any other points, because, as I said before, gentlemen; if this point is well taken, why, it would make unnecessary the consideration of any further points that you have raised, Mr. Hartpence.

Mr. Simpson: Now, in the Shanks case which he so much relies upon, the Supreme Court has said there, as your Honor has read, that it is plain that Shanks was not employed in interstate transportation or in repairing or keeping in usable condition the roadbed, engines, bridge, cars, or other instrumentalities then in use in such transportation. Now, this plaintiff, the jury may find, was keeping in usable condition the pole which was indispensable to the motive power of the railroad.

Now, in the case of Coal & Coke Company, against Bell, 231 Federal, the U. S. Circuit Court of appeals for the Fourth Circuit, said —and that is a case where a man was injured while putting up a pole to establish an electric system—the Circuit Court of Appeals said, "We are met at the threshold of this case with the question, was plaintiff at the time he was injured employed in interstate commerce? It is a matter of common knowledge that in order to successfully operate a railroad it is essential that a carrier should have a well equipped telegraph and telephone line constructed and maintained near to and parallel with its tracks, so as to enable

its train dispatchers to transmit train orders and thereby keep the engineers and conductors properly advised as to the relative positions of their respective trains. Under those circumstances a telephone or telegraph line is just as essential to the practical operation of the road as the track or any other particular part of the road's equipment. Owing to the recent enactment of the statute under which this suit was brought there has been more or less uncertainty as to the scope of the same. The roadbed and track constitute an essential element in the operation of trains, and acting upon this theory the Supreme Court of the United States in the case of Peterson against the D. L. & W. Railroad Company, 229 U. S. 151, in discussing this phase of the question, said: "Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that these instrumentalities be kept in repair. The security and efficiency of the commerce depend in large measure upon this being done. We are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it."

Now, this is what I think is the important situation. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole; but this is an erroneous assumption. The true test al-

ways is, is the work in question a part of the interstate commerce in which the carrier is engaged? The Supreme Court having declared one who is injured while carrying spikes to be used in repairing a bridge over which interstate commerce is transported is deemed to be engaged in interstate commerce within the meaning of the act, it necessarily follows that, as in this instance where one is injured while attempting to erect a telegraph pole to be used for the purpose of supporting wires over which messages are to be sent in directing the operation of trains in order that a company engaged in interstate commerce may safely operate its trains, such a person is engaged in interstate commerce within the meaning of the act.

Now, what distinction can your Honor draw between a man who is putting up a telegraph pole over which they have not strung wires yet, which they are going to use, and a man who is actually working on a pole which is transmitting the thing without which they cannot operate their trains—electricity?

The Court: What is that opinion?

Mr. Simpson. Coal and Coke Company against Bell 231——

The Court: I know, but when was it?

Mr. Simpson: February 2nd, 1916. Now, that went to the United States Supreme Court and th writ of error was dismissed by the United States Supreme Court in a short memorandum. The reference is in 234 Federal. The United States Supreme Court said: "This writ of error is dismissed under rule 28; so that they had that case in the United States Supreme Court.

Now then, turn to the Iorio case. There the distinction is plain; they keep saying that the United States Supreme Court has departed from the Peterson case. It has not done anything of the kind. It does not seem to me that you can reasonably say that they have. The U. S. Supreme Court, in the Shanks case, which was a case where a man was fixing a thing which was used in fixing machinery of interstate and intrastate commerce, said it was too far away. In the Winters case the man got off the train and finished his work. They said he was not engaged in interstate commerce. In the Harrington case the man was moving coal which might or might not be used in interstate commerce. So it seems to me the Supreme Court has not departed from its rule at all in the Peterson case. In the Peterson case they simply make that test which I read to you; they say that you cannot divide interstate commerce into its component parts, if the thing is essential (Cites the Iorio decision.)

What clearer distinction can there be? In the Iorio case Iorio was working on rails which were then engaged in nothing. In the case at bar the man is acting in repairing a pole over which electricity is passing, hurts him,—the very thing the pole is supposed to carry, is the instrumentality that hurts him, and that is the electricity that moves the train.

Now, in that connection this West's Lawyers' Docket collected a lot of cases on that subject some months ago, and after citing the Shanks case, which I read to your Honor, the editor says: "As indicated in these cases

a distinction is to be drawn between repair to an engine, cars or other instruments sometimes used in intrastate commerce, and repairs to such instruments while engaged in such commerce or merely stopped for repairs, as well as to a bridge, roadbed or other facilities permanently devoted to interstate transportation.

Now, you find in all these cases the man was working on something which was either intrastate, or he wasn't doing anything; he was waiting for orders.

You take this case they cited in Baltimore. In that case the man used a paint sprayer upon machinery some of which was intrastate and some interstate. The United States Supreme Court in reversing it said, as Mr. Hartpence says, "Reversed on the authority of the Shanks case." At the time he was injured he was not then engaged in repairing an instrumentality then used in interstate commerce, or at least, the plaintiff did not prove that he was. That is all that case proved.

The Perrins case, of course, your Honor understands. That was digging a tunnel. The instrumentality had not yet been put into use.

Now, I think the distinction between these cases is pointed out by the Supreme Court in that opinion I read in the Peterson case, where the court says the contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into several elements and the nature of each determined regardless of its relation to others, or to the business as a whole; but this is an erroneous assumption. The true

test always is, is the work in question a part of interstate commerce in which the carrier is engaged? In other words, was the keeping of this pole a matter of indifference? I say no, because if it were it would have got out of order; you could not run your trains; the electricity would have gone out of it. That is the difference. So all the later cases that are decided clearly preserve the distinction between the Peterson case and the Shanks case, and I say there is no escape if this case of Coal & Coke Company against Bell is law —and it was upheld by the United States Supreme Court.

Here is a man who is engaged in repairing an instrumentality that is conveying electricity absolutely used in interstate commerce. Suppose he had been a fireman on the train shovelling coal into the fire box, there could not be any doubt about it. Now, he is preserving an instrumentality by which the power goes to the locomotive. I submit under the principle in the Peterson case and the Iorio case and the Shanks case that he was actually using an instrumentality then in use in interstate commerce.

Mr. Hartpence: The burden of proving the interstate commerce is upon the plaintiff, and there is no proof in this case that the pole would not have performed its function if it had not been painted; nor is there any proof that the current would not have gone to the third rail and performed its function just the same whether the poles were painted, or whether they were not painted; nor is there any proof in the case that the mere painting of the posts in any way helped that result.

As far as the fireman on the railroad train is concerned, admittedly he was shovelling the coal into the furnace in which the steam was generated; I suppose there would be no question of his being engaged in interstate commerce. But suppose he had been merely painting the handle of the shovel which was used to shovel the coal, would your Honor say that was an act of interstate commerce? The paint might make it look a little more respectable, might preserve it to some extent, but there is nothing to show that the act of shovelling coal to generate the steam to move the train would not have resulted just the same whether the handle had been painted or had not been painted.

I think also your Honor ought to have this in mind, that the Coal & Coke Company against Bell, dismissed under Rule 28, does not mean anything at all so far as it having been considered by the Supreme Court of the United States is concerned. It may simply have been dismissed on a question of practice. They may not have filed a brief in time or something, and I don't think that case is an authority because of that fact, at all.

The Court: I will hear you on your other points, now, Mr. Hartpence.

Mr. Hartpence: Well, on the other points, your Honor, all I have to say is this, that the evidence as it now stands, it seems to me, shows this situation, that the wires on the one side of the pole were deadened, intervening between the plaintiff and the wires which are said to have been alive was a screen or protection, which, aside from the direct evidence by the plaintiff himself would be sufficient to protect him in his usual work for

nearly two months; the fact that nobody was injured or harmed while they were engaged in the usual course of their work, would go to indicate in my opinion that it was a sufficient protection from the point of view of the exercise of reasonable care on the part of the defendant; and that, of course, is the extent to which the defendant is obliged to go; that is its legal duty only—to exercise reasonable care for the prevention of injuries to its employees.

Now, I think the case can be brought down in its present aspect to this narrow situation; that Steidler had been working on the pole for about two hours that morning; there was nothing to interfere with his view of that part of the pole where he was working, at any rate; and on the direct examination of Kelly he could see, as indicated on the exhibit, more than half way down without any trouble at all; and certainly as you look at the pole it is inconceivable that he could not see everything that was going on around there, and beneath him and above him, if he had taken the trouble to look; and that he came down the pole to a point near one of the lower cross arms and then having stepped down, put his foot in the angle of the iron and fastened his life belt, nothing happened; and then he reached up for his paint pot and felt himself slipping and threw his arm back and came in contact with one of the large wires. If he had not slipped —in the direct line of causation—if he had not slipped he would not have come in contact with the wire; if he had not lost his footing he would not have come in contact with the wire. He painted for two months

with safety. Where in the exercise of reasonable care could the defendant have foreseen that that situation would have arisen at that moment so that it could have specially guarded him from injury or harm which might or might not have resulted? I suppose that is the test.

The Court: Suppose we leave out of the case entirely the question whether or not the defendant was negligent in the manner in which or as to the place which it provided for him to work. I understand the plaintiff is alleging, and there is that in the evidence from which probably a deduction may be made at this time—that it might be probable that this thing, this happening, or the slipping took place because of the negligence of a co-employee. Suppose there was no charge of negligence at all, going to an improper place furnished by the employer for the plaintiff to work, and the negligence charged was only that of a co- or fellow-employee and that was established. Wouldn't the defendant be responsible for the injuries that were the natural proximate result of that happening?

Mr. Hartpence. Oh, if it were negligence, yes, as a legal proposition.

The Court: If the act of the employee was negligence and that was the proximate cause of the happening, or the setting in motion of his fall, the defendant company would be responsible for whatever injuries resulted as a natural proximate result of that happening, wouldn't it?

Mr. Hartpence: Well, it is a legal proposition, of course——

The Court: Or even if the man had fallen

from his position to the ground and hurt himself, they would be held liable, would they not?

Mr. Hartpence: Well, they could not escape liability by alleging as a defense that it was the act of a fellow servant of the employee. Of course, that is the rule of law under the statute.

The Court: I mean the mere fact that he fell in that manner, as you said; that his body touched the live wires outside of this screen that was set—the thing that started in motion the happening was negligence of a co-employee or fellow-employee, then under this act the defendant company would be responsible for whatever the natural, proximate results were coming from that; wouldn't it?

Mr. Hartpence: I presume so, yes.

The Court: Even had he fallen in front of a train which had just been passing.

Mr. Hartpence: I suppose so. But where is the act of negligence? That is the point I am trying to find. Of course, we were not apprised by this complaint that they were going to rely on the specific situation as brought out in the evidence, but I suppose under that allegation almost anything can be shown as an act of a fellow employee.

The Court: As I understand it—I should not properly be called upon to answer it, though I am perfectly willing to give my version of it as I get it; maybe I am wrong about it—as to the negligence of the fellow-servant I understand their allegation to be this: That the order and the direction to the partners painting the pole was that they should paint on one side; that they should

not paint one under the other; that this employee whose name I have forgotten, who was the partner——

Mr. Hartpence: Bouton.

The Court: ——disregarding that order and that direction did paint, as is said, if the testimony is true,—did paint not on the opposite side of the pole where the plaintiff was, but on the same side where the plaintiff was and beneath him; and, if the testimony is believed, had painted within an hour or thereabouts, or a space of time prior to the happening at the point where the body of the plaintiff was found immediately after the accident; and, as it is said, if it is true, with his feet on the cross bar on which there was fresh paint. That is what I understand to be their allegation, and their alleged proof of negligence of this fellow-servant; and that, I take it, they say was the proximate cause of this happening; that that was the thing which set in motion this whole series of events.

Mr. Hartpence: Well, is that per se a negligent act if he painted on the other side of the pole?

The Court: I do not say per se, no; but have it in this evidence. Whether it is true or not of course is not for me to say now. I must assume it to be true because it is in evidence and not so far contradicted —that this fresh paint was there; that this man came down the pole and stepped into it? He says he slipped on it. You have what has been testified to as having been the order or the rule as promulgated amongst these employees, if that is correct, that they were not to paint on the same side of the pole

with each other, but on opposite sides of the pole. The reason is given for that by the sub-foreman of the plaintiff.

Mr. Hartpence: That a man coming down afterwards would come in contact with the paint; it would naturally smear him with paint; that they would have to do the work over again.

The Court: That is true. He said something further regarding the slipping on it.

Mr. Hartpence: But does that of itself constitute an act of negligence, your Honor? Suppose the orders were there. That does not necessarily mean that the breaking of those orders is negligence.

The Court. The mere breaking of it is not. I presume we go back to the rule of reasonable care as amongst and between the co-employees. Now, was it a reasonable act in view of the rule that is said to have been in existence—was it an act of reasonable care on the part of the co-employee to have done that thing in the face of that rule, if one existed? Of course, as to the conduct of the plaintiff himself, as to the manner in which he came down the pole, as to whether he looked, and could look, and did not look—all of those are outgrowths of this thing we are talking about.

Mr. Hartpence: It seems to me that the act of the plaintiff himself was the proximate cause of the injury. He came down the pole, he said, without looking, simply put his foot down in the angle, and the significant thing is that he did not slip at that time; he didn't even have his life belt fastened at that time. He fastened his life belt afterwards, and then he reached for the pot of paint and then he lost his footing.

The Court: I had it in mind and I was going to say that maybe that would have created a very much more serious position than the one he relates. I remember that his life belt, according to his discription was not then attached; it was, in fact, detached, because he says that he put his foot into the angle and then attached his life belt, and then it was that his foot slipped—or then in reaching for his paint pot his foot slipped.

Mr. Hartpence: It seems to me he must be taken to assume the risk of that situation; that he went there with full knowledge of the condition, full knowledge of the possibilities. He had his eyes before him, and he had his ears about him. He knew that the workman he did the work with was not where he should have been. There is no testimony that he took any means to ascertain his position; and it seems to me only a glance down would have shown him where his partner was.

The Court: The Court's difficulty, I say, Mr. Hartpence, is whether all we are talking about is not a question of fact; because I have in mind on this last point we are speaking to, while the testimony may not have been very clear on the part of the plaintiff as to where he could see or what he could have seen had he looked, yet there was something about his testimony in respect to his inability to see. It is true that some other workers did say that in a certain position on the pole certain things could be seen. It seems to resolve itself to my mind to a question of fact entirely.

Mr. Hartpence: Well, of course, our fourth ground is the particular thing upon which

we rest our present motion, or the strongest point on which we rest it; and it does seem to us your Honor, that even though your Honor should feel it is a question of fact as to the negligence or contributory negligence of the parties in the assumption of risk, that the plaintiff has not sustained the burden, and there is not sufficient evidence in the case to warrant the submission of the case to the jury or to have the defendant put to its defense on that point.

The Court: You are speaking now on the fourth point?

Mr. Hartpence: Of the fourth point. That your Honor should nonsuit or dismiss, whatever the appropriate action would be under the Federal Statute, on the plaintiff's failure to bring himself within the terms of the act.

The Court: I am not willing at this time, gentlemen, to nonsuit. I am not so much concerned about the other three points, gentlemen; that is, the first three, as I have as to the fourth one; because, as I have just stated, the first three are questions of fact; the fourth is not a question of fact by any means. But my mind is not so clear upon it, gentlemen, that I feel I am warranted in nonsuiting upon that ground at this time. I may change my mind between now and the termination of the case, and, of course, I shall immediately indicate the determination. I will decline, therefore, so that you may have your record in proper shape, to nonsuit on any and all of the points raised.

Mr. Hartpence: And I will ask that my objection be noted to your Honor's ruling as to all of the points raised on the motion.

The Court: I put my language in the

shape I did intentionally, gentlemen—that I refuse on any and all. That is the better way to put it, I suppose; so that it goes to each individually as well as to all of them.

Mr. Hartpence: I will ask that my objection be noted to each and all.

The Court: Each and all you want, yes. Let me ask you this question, gentlemen; it escaped my mind during the argument—whether the question as to whether or not the plaintiff was engaged in interstate commerce was a thing that was submitted to the jury. I think in the holding in this state that question has been passed on, too,—has been as to whether it is a question to be submitted to the jury?

Mr. Simpson: I do not know; I am not familiar——

The Court: In the case before me it was, and the court of errors said it might be. I imagine the only reason for it was that there might have been facts in dispute. I think that was the situation, and it probably was such a situation in this case of the Hudson and Manhattan. I do not see otherwise how it could go to the jury.

Mr. Hartpence: The rule is that where there is not a question of law, but a question of fact it resolves itself into a question of fact for the jury.

JOHN J. MOONEY, sworn.

Direct Examination by Mr. Hartpence:

Q. Doctor Mooney, you are a practising physician and surgeon of the State of New Jersey? A. I am.

Q. How long have you practiced, Doctor?

Mr. Simpson: I will admit his qualifications.

A. About twenty-four years.

Mr. Hartpence: The Doctor's qualifications are admitted?

Mr. Simpson: I will admit his qualifications.

Q. Doctor, you have examined Mr. Steidler, the plaintiff in this action? A. I have.

Q. For the purpose of testifying here? A. I have.

Q. And how recently did you examine him? A. About February 15, 1919.

Q. And where did you examine him? A. At my office, 477 Jersey Avenue, Jersey City.

Q. What did you find as the result of your examination? A. Why, the man had his right arm amputated at about just below his elbow, about the upper third of his forearm, the right arm; and he had a cicatrix or scar, and wound, an incised wound, that had healed, on the upper portion of the arm itself; he had a large cicatrix of a burn, scar of a burn on the inner side of his right leg, the lower third, with a portion of it which had not as yet healed; and on his left leg he had the scar of a burn on the inner aspect of the right leg which was entirely healed, and on the under surface of three of his toes—small toes on the left foot—he had a cicatrix of a burn.

Q. By cicatrix you mean—— A. Scar.

Q. —a scar? A. A scar.

Q. Did the scar on his left foot or left leg in any way interfere with the function or use of the leg or foot in your opinion? A. The scar on his left leg had entirely healed in my opinion—in my

opinion it wouldn't interfere with the function of the foot at all; it was on the inner aspect of the foot, this side here (indicating.)

Q. How about the condition of the right leg? Where, in your opinion does that interfere with the use or function of the right leg or foot, if at all? A. Why, he has a good sized scar on the lower third of the right leg, and the majority of it is healed, although there is quite a considerable spot of it yet that is not healed; but that will heal in time of itself, and could be healed in a quicker time by a probably minor operation, the transplanting of skin.

Q. How extensive an operation would that be? A. Why, it is considered a minor operation; it is the removal of a small portion of skin, that is, small portions of skin from another portion of his body, and placing them on his ulcer where it refuses to heal, refuses to skin over; and in that way, why, the skin will take hold and gradually grow over that whole raw surface which has refused to heal.

Q. Would that cause him any inconvenience at the time of the process, any appreciable inconvenience? A. Why, the removal of a portion of a skin is a very minor affair; it does not hurt very much.

Q. About how long a time would it take to heal over for that to be entirely healed? A. Why, that is problematic just now; I would say offhand probably a month it would take.

Q. Can you state then in your opinion the reasonable probability of it being entirely healed, not extending beyond the period of a month, if that were done? A. That is my opinion; about a month's time it would take to heal that ulcer up.

Q. Were there any other scars or feet that you found, other than those you described? A. None,

other than those I have already described.

Q. The arm has entirely healed, has it not? A. It has.

Q. What is your opinion, Doctor, as to his present general condition, then, and his present ability to work, except for the disability which he naturally suffers from the loss of his right hand and arm? A. Why, it is my opinion that the man is physically fitted to do the work that is required of a man that has lost his right arm at the present time.

Q. And that his present disability then is limited to the lack of the right arm only; is that right? A. To the lack of the right arm only, and the inconvenience of dressing an open sore on his right leg.

Q. How did you find his general condition of health? A. Why, he appeared to be in fair physical condition as far as his general health was concerned.

Q. To what extent, Doctor, could artificial hand and arm be applied to Mr. Steidler's case as a means of overcoming to some extent the disability which he suffers from the loss of the arm? A. Why, he could have an artificial appliance put to his arm and get some use out of the artificial appliance. Of course, it would not be anything like his own arm, but he would get some use.

Mr. Hartpence: That is all. Cross examine.

Mr. Simpson: No questions.

THOMAS KNUDSON, recalled.

Direct Examination by Mr. Hartpence:

Q. Mr. Knudson, I think you have already testified that you were the sub-foreman in charge of

the painters at the time Mr. Steidler was injured? A. Yes, sir.

Q. That is correct, isn't it? A. That is correct.

Q. And were you there in the vicinity of that pole 14 at the time of the injury to Mr. Steidler? A. No, sir.

Q. Where were you at that time? A. At pole 13 —between 13 and 12, about.

Q. Between 13 and 12? A. Yes.

Q. You didn't see him injured, then? (No answer.)

Q. You didn't see him sustain the injury? A. No, sir; I didn't see him when he got hurt.

Q. When did you first become acquainted with Mr. Steidler? A. Why, when he started to work.

Q. And about how long was that before this accident took place? A. That was about five weeks.

Q. When he started to work there did you say anything to him about his work? What he was to do, how he was to do it, and anything of that sort? A. Yes, I told him all about it.

Q. What did you tell him about it? A. I told him one side would be dead and the other side would be alive; to keep away from that side where the screens is on, to keep away.

Q. Which side? A. Where the screens was put on.

Q. Yes. What else did you tell him? A. I told him to be careful—that he was told every half hour every quarter of an hour, as I passed along the line.

Q. How often did you tell Steidler specifically about that? A. Oh, every morning.

Q. Every morning? A. They were all in front of me; after the linemen then they were all in front of me and they know what they were up against because I told them to look out.

Q. These screens that you have referred to, who

put them up on the poles? A. Why, the linemen.

Q. The linemen? A. Yes, sir.

Q. The painters had nothing to do with putting those up? A. The painters have nothing to do with those at all.

Q. When you started your painters on their work that morning what were they supplied with to perform their work with? A. With a paint pot, brush, and life belt, and ru——

Q. And—and what? A. And rubber gloves, if they wanted them.

Q. Rubber gloves if they wanted them? A. If they wanted them. They were very unhandy for them; they couldn't hold the brush with them, and the majority didn't want them.

Q. What do they interfere with? A. Why, you couldn't hold the brush; you couldn't—couldn't very well get along, especially open the lift belt and things like that; they would not be very handy.

Q. Speak a little louder. A. I say they would not be very handy climbing the pole and shifting the life belt; they were pretty hard, clumsy thing on the hand, and all full of paint, maybe running from the brush and be slippery. I, for my part, would sooner have it without them.

Q. Well, now, what did Steidler say about that? A. Why, he didn't want them.

Q. They were offered him, were they? A. Why, yes, every man was offered them.

Q. How did they get up and down these poles to paint them? A. Why, through the lattice work.

Q. Just climber up and down the lattice work on the pole? A. Yes.

Q. I show you a pair of rubber gloves, Mr. Knudson, and ask you if they in any way resemble the rubber gloves that you say you had there for the use of the painters who wanted them? A.

They are the kind of gloves.

Q. They are the gloves? A. Yes, sir.

Mr. Hartpence: I will offer them in evidence.

The Court: Any objection?

Mr. Simpson: No.

(Marked D-4 in evidence.)

Q. Did Mr. Steidler at any time that he was working there with you, particularly on the morning he was hurt, ever object to going up and painting those poles? A. No, sir.

Q. Did he ever say anything to you about being afraid to go up? A. No, sir. If he said that——

Q. Did he say anything to you about the precautions or safeguards that were taken for them? A. No, sir.

Q. Did you ever say anything to him about not going up if he was afraid? A. No, sir, I did not.

Q. You never said anything to him about that? A. No. Of course, if he had mentioned that he was afraid, why, I would not have sent him up any way.

Q. Why not? A. If any of the painters had mentioned that they were afraid to go up, why, they would not have gone up anyway; I would have kept them down even if they had said half an hour afterwards—I would have kept them away.

Q. What first called your attention to the accident to Mr. Steidler? A. Why, Tom Kelly came running along and told me there was a man on the wire.

Q. Is he the man who testified here this morning? A. Yes.

Q. What did you do when he called your attention to it? A. Ran over, called up Hazerer to send a light engine. He said he didn't have no light engine, but told me to flag the first train that comes along.

Q. Did you go up pole 14 then? A. Why, no; crossed pole 13 then.

Q. Did you go up pole 14? A. I did, yes, after that.

Q. After that? A. Yes; I went up and helped to lower Steidler down.

Q. Oh, you were on the pole then helping to lower Steidler down, were you? A. Yes, sir.

Q. How far away from pole 14 was pole 13, about? A. About three hundred feet.

Q. Had you ever seen or observed Steidler working on pole 14, that morning before he was hurt? A. Yes, sir; about fifteen minutes before he was hurt I come from the west and went east.

Q. Who was working with him on the pole, do you know? A. Why, Bouton.

Q. Where was Bouton working on that pole? A. Right up beside him.

Q. What did you say? A. On the west side of the pole.

Q. What position with regard to Steidler himself? How near was he to Steidler? A. Why, the pole is about fourteen inches thick; he was right up sideboard.

Q. You mean he was right opposite Steidler? A. Yes, right opposite him.

Q. When did you see him there? A. Why, about half past ten.

Q. That was when you were going from the west toward the—— A. East.

Q. —east? A. Yes. I had men working among the poles there, ten or twelve.

Q. They were both working there together, were they, at that time? A. At that time.

Q. But on opposite sides of the pole? A. Yes.

Q. Had you observed either Steidler or Bouton, or both of them working on pole 14 before, that morning, before half past ten? A. Yes, sir.

Q. When? A. About half past nine or quarter to ten.

Q. Did you see them when they started to work at the pole itself? A. Yes.

Q. What time did they start to work that morning? A. Well, it must have been, I guess, about a quarter after nine before they got up.

Q. Where was Bouton working on that pole whenever you saw him there that morning? A. On the west side.

Q. On the west side? A. Up side Steidler.

Q. Did you see him at any time that morning painting on the east side underneath Steidler? A. No, sir.

Q. Do you recall who was up on the pole with you when you brought Steidler down? A. Why, yes; Cameron and Tom Doris, and that painter there. What is his name?

Q. Gilberti? A. Not Gilberti, no—Gilberti.

Q. Gilberti? A. That is right.

Q. Well, how far up the pole did you go after Steidler was injured? A. All the way up.

Q. Up to where he was? A. All the way up to where he was.

Q. And on the same side of the pole or on the different side of the pole? A. On the same side of the pole.

Q. What di dyou find up there on your way up, or up there near him, right where he was, with regard to the condition of paint on the pole on his side? A. Why, I found pretty fair conditions.

Q. What? A. There might have been a few drops of paint from his brush or from his pot; when he grabbed the pot he probably capsized over; a little paint dropped down; I couldn't say any one has been doing any painting there.

Q. Did you find any fresh paint on the lattice work just below where Steidler was? A. No.

Q. What was Steidler's position? A. Why——

Q. Just where was he when you got up there on the cross arms? A. Why, he was up on the second cross arm.

Q. You mean the second from the bottom or the top? A. The second from the top.

Q. The second from the top. And what held him in place? A. Why, the life belt, and of course, he was hanging on to—to the pole himself, too, you know.

Q. When you got up there? A. Yes.

Q. How did you get him down? A. With a rope; rope around under his arms.

Q. Do you know who put the rope around him? A. I don't know for sure; I think it was one of the linemen.

Q. One of the linemen? A. Cameron or Doris; I believe it was Cameron.

Q. And you four men all worked up on that pole? A. Why, when he got that line around I went down and see that he had a good fastening down below, so we lower him; so as to see that the men didn't drop him. You see, that depends on the men that have hold of the line.

Q. And you all worked up around him among those wires in taking care of Steidler and putting the rope around him and letting him down in that way? A. Yes, sir.

Q. What was there between you and the live wires while you did that? A. The screens.

Q. The screen? A. Twenty-one inch screen, I think it was they had up there.

Q. What do you mean by a twenty-one inch screen? A. Well, between the live wire and the man, the workman.

Q. Well, what do you mean by twenty-one inches? High, or what? A. Twenty-one inches. Ten feet—twenty-one inches wide and ten feet long.

Q. Ten feet long. Did you ever measure the screen? A. Yes.

Q. Do you give those measurements from actual measurement of the screen? Do you? A. Why, yes.

Q. What were Steidler's duties? What was he there for? A. Painting.

Q. He was to paint? A. Yes, sir.

Q. Nothing else? A. Nothing else.

Mr. Hartpence: That is all. Cross examine.

Cross Examination by Mr. Simpson:

Q. When did you measure these screens? A. Why, before they were put up.

Q. How do you know it was the same kind that was up on that day? A. Why, we only used fifteen and eighteen inch screen the first couple of days, and it was—and we had to make some more on account some men got on about that time there; that was the——

Q. Well, what did they have? What kind did they have, fifteen and eighteen—what kind did they have? Twenty-one? A. That was for the lower arms.

Q. Did they have twenty-one? A. Yes.

Q. Why did they make them bigger than the fifteen and eighteen? A. Why, that was for the high tension higher up.

Q. This was a high tension wire he was on, wasn't it? A. Yes, sir.

Q. You say they had fifteen and eighteen inch screens and twenty-one inch; is that right? A. That is right.

Q. Were you there this day when this screen were put up? A. Yes, sir.

Q. Who put it up? A. The lineman.

Q. What is his name? A. Why Doris and Cameron, I believe it was.

Q. And did you ever measure this particular screen? A. Not this particular, no, sir.

Q. Oh, you are talking about some other screen that you measured, is that right? A. Yes; that is the same distance; same weight.

Q. Same general construction? A. Same construction.

Q. But you never had measured this screen? A. No, sir; not special this screen.

Q. You had never measured this screen, is that a fact? Or seen it? A. I didn't measure that screen that was on pole 14, no.

Q. Now, these gloves you say the men can't do their work with them—the painters; is that right? A. Why, they would not be very good, no.

Q. And they get, you said, slippery and full of paint so the men can't work with them; is that right? A. Yes; I don't think they will be safe.

Q. I didn't ask you whether you thought they were safe or not, I am asking you about your testimony, that a man couldn't work with these gloves; is that right? A. They didn't want them.

Q. Your men couldn't work with them; you swore. Is that a fact or isn't it? Did you mean that when you swore to it?

Mr. Hartpence: I object to that on the ground he didn't swear to it.

Q. Didn't you say these gloves were unhandy and they got slippery and the men couldn't work with them? A. I didn't say that. I said the men didn't want them, they were not very handy for them.

Q. Well, didn't you say and don't you say that the men could not work with these gloves as well as they could without them? A. Yes.

Q. Couldn't work so fast? A. Not only that; they would not be as safe.

Q. Couldn't do as much work? A. Not that, but it wouldn't be safe; it would be slippery; probably when he was shifting his life belt he would slip; it would be all full of paint——

Q. So that your company furnished them gloves to wear that would be very dangerous because they would be slippery: is that a fact? Is that what you say? A. Well——

Q. Did your company furnish gloves that would be so slippery they would be dangerous? Is that what you testify?

Mr. Hartpence: I object to it as immaterial and calling for a conclusion.

The Court: The witness said they could not work well with them, Mr. Simpson.

Q. What did you say about these gloves?

Mr. Hartpence: Objected to as immaterial anl irrelevant.

Q. Didn't you testify to Mr. Hartpence that the gloves were impracticable——

Mr. Hartpence: I object.

Mr. Simpson: Oh, I will withdraw it.

Q. They were supplied to these men? A. Yes.

Q. And you delivered a pair to Steidler? A. Yes.

Q. When? A. Why, the first few days he was there.

Q. What date did you offer them to him? What date? A. That I don't remember exactly what date.

Q. Where was he when you offered them to him? A. Why, at home—in the shanty.

Q. And was anybody present but you and him? A. I guess so; I don't remember exactly.

Q. You don't remember? Don't you know as

a matter of fact you never offered him a pair of these gloves and never offered him a pair of gloves? A. I didn't.

Q. Yes, don't you know that as a fact? Don't you know? A. Yes, that is a fact.

Q. Yes? A. No; there is no such thing. Every man that was there was offered a pair of gloves.

Q. When did you offer Steidler a pair of gloves? A. I don't remember exactly.

Q. You say you furnished Gilberti and all these men a pair of gloves, furnished or offered? A. When they were there in the shanty they were all offered if they want gloves, and none of them wanted it.

Q. When was that? A. The first few days they started.

Q. What good were the gloves? What did you offer them the gloves for? A. What did I offer them the gloves for?

Q. Yes. A. Why, I thought they would be better to handle around there; they wouldn't——

Q. You think they should have had gloves on; is that right?

Mr. Hartpence: I object to that. That is calling for a conclusion.

Q. Why did you offer them the gloves? That is all I want to know. Why did you offer them these gloves.

Mr. Hartpence: That is objected to as immaterial and irrelevant. He might have offered them for various reasons. The fact that he offered them, it seems to me, is the only material fact.

Mr. Simpson: I am testing the credibility of the witness. If he offered them gloves that would manifestly be dangerous it seems to me the jury can take that into consideration

and say whether this man is telling the truth or not.

The Court: What is the question?

Q. (Repeated by the stenographer.) Why did you offer them the gloves? That is all I want to know. Why did you offer them these gloves?

The Court: Objected to?

Mr. Hartpence: Objected to as immaterial.

Mr. Simpson: I withdraw that question.

Q. What do you say these gloves were for? What would they do? What were they for, these gloves? A. Why, so the men wouldn't get full of paint.

Q. So the men wouldn't be full of paint? A. Yes.

Q. They were not to be protected at all? A. They would not be any protection on that high tension stuff, no.

Q. These gloves? A. No, nor any other glove, I don't think.

Q. What would protect him on the high tension?

Mr. Hartpence: I object to that as immaterial and irrelevant. He is not qualified to express an opinion of that kind.

Q. You were away from this job some part of this day, weren't you? A. No—why, I was away from that man.

Q. Yes. A. I had about—I had about—three, six—fifteen—or two thousand feet to walk back and forth.

Q. How long were you away from this pole on that day? A. Oh, about half an hour.

Q. How long was this man under your observation this day—Steidler? How long was he under your observation this day? A. Why, from the day he started.

Q. Oh, this day, from the time he started to work how long was he under your observation? A. Five weeks.

Q. This day, not five weeks; in one day? A. That day? Oh, from when he started about nine o'clock up to eleven.

Q. And you were only away fifteen minutes from him, were you? A. That is about all.

Q. And yet you never saw the other man painting under him at all, did you? A. Never did.

Q. You didn't see that? A. If I had seen that he wouldn't have stood there a second—that man painting underneath him.

(Recess to 10 A. M., February 25, 1919.)

February 25, 1919, 10 A. M., trial resumed.

THOMAS F. DORIS, sworn.

Direct Examination by Mr. Hartpence:

Q. Mr. Doris, what is your occupation? A. Lineman.

Q. Lineman? A. Yes.

Q. And employed by whom? A. Pennsylvania Railroad.

Q. And were you employed in that same work in August of 1917? A. Yes, sir.

Q. How long have you been doing that kind of work? A. About sixteen years.

Q. And where were you working August 21st, 1917, at the time of the accident to Mr. Steidler? A. Well, we were working about six poles ahead of where he got injured, and we were coming on our way back toward the portals of the pay car to see about pay.

Q. And has your work as a lineman during these years you have been a lineman been in any way connected with work on wires—electricity? A. Yes, sir.

Q. During how long a period? A. Well, during about thirteen years.

Q. Thirteen years? What first attracted your attention to the injury to Mr. Steidler, Mr. Doris? A. I heard a kind of spluttering back behind me; that would be about fifty foot east of the pole. I turned around and I saw the flame or fire flying out of Steidler's hand.

Q. What pole was he on, do you know? A. Pole 14.

Q. And what did you do when you saw that? A. I turned around and I told one of the men to get a rope. I turned around, told one of the painters to get a rope. Next I hollered up to the man who was helping Steidler on the pole not to touch him and to come right down. Then I went up on the pole and told him to keep away from the wires until we could get him down.

Q. Told whom? A. Steidler. By the time we were up there and pacified him, why, one of the painters came behind me with a rope, and I helped Mr. Cameron to tie it under his arms and lower him down.

Q. When you spoke to this man who was working with Steidler on the pole and told him not to touch Steidler, where was he then—the man? A. He was on the opposite side of the pole standing on the cross arms.

Q. And when you say the opposite side of the pole you mean the opposite side of the pole from what? A. From Steidler.

Q. From Steidler? A. Steidler was on the east side of the pole, and this other man was on the west side, standing on the cross arm.

Q. And was he as high up on the pole as Steidler or lower down, where? A. He was higher up than Steidler was, because he was on the cross arm, standing on the cross arm when I saw him, of course.

Q. Now, when you told Steidler to keep away

from the wires after you had seen that he was injured, did he say anything to you? A. No, not to me; not at that time.

Q. Did he say anything to you afterwards? A. Well, he asked me if he was going to die.

Q. Where was he when he did that? A. On the pole.

Q. Before he had been lowered down? A. Yes, sir.

Q. Well, did he say anything else to you? A. Well, that is about all he said to me. He asked me if he was going to die and he was asking for his mother.

Q. And what became of him after you got him down from the pole? A. Some of the painters got him down and laid him on the track and kept him until the first train came along, which was flagged, and he was put on the train.

Q. Did you go with him on the train? A. No, sir.

Q. Did you hear him talk to anybody before he was put on the train? A. No sir.

Q. After you talked with him? A. No sir.

Q. Had you been up on that pole 14 before that time that morning? A. Not that morning.

Q. When was the last time that you were up there before that? A. Either two or three days before that. We had to go up to put those shutters on.

Q. Did you put the shutters upon pole 14? A. I helped to.

Q. Who helped you? A. Mr. Cameron.

Q. What is Mr. Cameron's work? A. Beg pardon?

Q. What is Mr. Cameron's work? A. He is a lineman.

Q. He is a lineman also the same as you? A. Yes sir.

Q. Now, you put the shutters up then in advance of the painters going on the pole, did you? A. Yes sir.

Q. Up among the other upper cross-arms what kind of shutters were there, did you put there prior to the 14? A. Wooden shutters.

Q. Do you know their size, their dimensions? A. I couldn't say; I never measured them.

Q. Well, were there any shutters placed anywhere else on the pole except at the upper cross-arm? A. Yes; there was a shorter shutter placed about fifteen foot down the pole where the twenty-two hundred volts are placed.

Q. Where the twenty-two hundred volt wires—A. Runs.

Q. ——are located? A. Yes.

Q. The shutters then at the upper part of the pole were larger than those at the lower part, were they? A. Yes sir.

Q. Now, what can you say as to the kind of shutters that were on top of pole 14, up in the upper cross arm, on that day, August 21st, 1917, when Mr. Steidler was injured? Were they larger ones or smaller ones up there? A. Larger ones.

Q. Now, when you went up the pole after Steidler was injured which side of the pole did you go up? A. On the west side.

Q. On the west side. And did you have anything to do with putting the rope around Mr. Steidler, to lower him down? A. Yes sir, helped to put it around.

Q. How did you do that? A. Well, Mr. Cameron held up his arms and I passed the rope around underneath his arms and made it fast.

Q. In doing that were you working right up there among those cross-arms? A. Yes sir.

Q. When you were there at that time did you observe the condition of the face—the east face

of the pole that Steidler was on, below him, as to whether it was freshly painted or not? A. I couldn't say; I didn't see any paint down there.

Q. Had you observed a man working with Steidler that morning, before the time of the accident? A. No.

Q. When you put the shutters up, you and Mr. Cameron, how did you fasten them? A. With marlin, string.

Q. String? A. Yes.

Q. And where was that place? A. There was one at the top of the batting, one in the middle and one at the bottom, and they were fastened around the pole.

Q. What part of the pole? A. Well, there was —half of them was fastened on the east side and half on the west.

Q. I know, but when you put the marlin or string around the pole what part of the pole did you put it around? A. Around the corners.

Q. That is where the upright pieces—pieces that run up and down? A. Yes sir.

Q. Then you tied them, did you? A. Yes sir.

Q. Well, do you recall how close the screens were then to the face of the pole after you had fastened them in; were they fastened right up against the pole or some distance away? A. They were fastened up alongside of the pole on the west side of the pole.

Q. And how much of the screen, if any, overlapped the face of the pole, the face under that fastening process? A. I should judge about three inches.

Q. And the rest of the screen then extended out and away from the pole, did it? A. Yes.

Q. How long had you worked on those poles doing that sort of thing prior to the accident to Mr. Steidler? A. On the 16th, I think, I went doing that.

Q. When? A. On the 16th of August.

Q. Of August? A. Yes, sir.

Q. And had you put those shutters up on other poles? A. Yes sir.

Q. For how long a time had you been doing that? A. From the 16th; I was working nights before that.

Q. Working nights before that? A. Yes, sir.

Q. How far away from the shutters was the nearest wire on the north side or west side, whichever you would call it—the north side, the live wire side, after you got your shutters up, got them fastened? A. About fifteen inches. I couldn't say for sure.

Q. In addition to the marlin that you put around the corner of the pole to fasten the shutters were the shutters tied or secured in any other way? A. No.

Q. I show you D-2 for identification and ask you if you recognize that photograph? A. Yes; it is just like the poles are now or the lines.

Q. Is that a pole similar to the pole Steidler was working on that day? A. Yes, sir.

Q. Now, up among the top wires I call your attention to two objects that look like lattice work or slats—— A. Yes.

Q. —and ask you what they are? A. That is what I call the batting or battings.

Q. And were they the screens or shutters that you referred to? A. Yes, sir.

Q. That you and Mr. Cameron had placed up there? A. Yes, sir.

Q. Is that a fair representation of the way they were placed there and how they appeared when they were there? A. That is just like it.

Q. And these lower down? A. Yes, sir.

Q. What are they, the smaller ones? A. Those are to screen off the twenty-two hundred volts.

Q. They are the ones you have referred to as the smaller screens? A. Yes.

Q. And is that also true with regard to the same apparatus that appears on pole on D-1 for identification? A. Yes; it looks the same.

Q. Looks the same. Which type of the screen, of these two, the upper or lower, as you see them on P-2, were up under the top wires on the day that Steidler was injured? A. Why, those long ones that are already there, that shows there.

Q. That is the kind that were up there, is it? A. Yes, sir.

Mr. Hartpence: That is all. Cross examine.

Cross Examination by Mr. Simpson:

Q. What time did you go to work on the pole that you were on when you saw the accident? A. I was not on the pole when I saw the accident.

Q. Where were you when you saw the accident? A. I was walking along the bank of the railroad.

Q. How near to pole 14? A. Oh, about fifty feet east of the pole.

Q. And where were you going? A. Into the portals.

Q. Into where? A. Into the portals, or into Homestead portals, as they call them.

Q. Portals? A. Yes, sir.

Q. What is the portals? A. Well, the tube, where the tubes start in.

The Court: The tunnels, you mean?

The Witness: Yes, sir.

Q. And what had you been doing before you saw the accident? You say you were working on the pole and saw these men on pole 14? What were you doing on the pole you were on? A. I was placing those short shutters alongside of the twenty-two hundred volt circuit.

Q. And what were the wires up on the cross-arm where you saw Steidler? What kind of wires were they? A. They were 4-O wires.

Q. I mean what did they carry? A. They are supposed to carry eleven thousand.

Q. Volts? A. Yes, sir.

Q. And you worked around those wires, did you? A. Yes, sir.

Q. That is your work as a lineman? A. Yes, sir.

Q. You were familiar with them? A. Yes, sir.

Q. And you know how to protect yourself from them? A. Yes, sir.

Q. I asked you that because you told Mr. Hartpence that you were working up among these wires when you took Steidler down. Now, what were these wires used for, do you know, that you were working among when you took Steidler down? A. Well, that voltage is run along there to be reduced down from eleven thousand to six hundred and fifty, which goes to make the power to run the electric engine.

Q. And what was it that first attracted your attention? A. I heard a sputtering sound like.

Q. Well, what kind of a sound was it? A. Like electricity makes when it is escaping; well, same as something was burning or frying.

Q. And what did you do then? A. I turned around and I told the man who was up on the pole with him not to touch him.

Q. Well, what did you see when you turned around? A. Well, I saw fire flying out of this man Steidler's hand.

Q. Where was his hand? A. Laying on the wire.

Q. Which position? Was it lying flat or was the back of his hand against the wire? A. The back of his hand was lying on the wire.

Q. And that was the wire nearest to the shutter, was it? A. Yes, sir.

Q. And on what cross arm was it? A. Second cross arm down.

Q. And what position was his body in when his hand was against the wire? A. Well, he was in an upright position, lying back on his safety belt.

Q. And was he against the shutter? A. No, sir.

Q. Was a portion of his body against the shutter? A. No, sir.

Q. Well, how was it his hand could go against the wire if no portion of his body was against the shutter? What position was his body in with reference to the shutter, that would bring his hand against the wire? A. Well, his hand was outstretched like that (indicating).

Q. Beyond the shutter, you mean? A. Yes, sir.

Q. Lying against the shutter, beyond the shutter? A. Yes, sir.

Q. And these shutters were simply wooden affairs which you had tied against the string or cord, weren't they, to the pole? A. Yes.

Q. And how many pieces of string had you used to tie this shutter that was up in the vicinity where his body was? A. Six.

Q. And did that give the shutter any play at all? A. No.

Q. Why not? If it was string? Could you tie string so tight that the weight of a big wooden shutter wouldn't give the shutter play? A. I don't say the weight of a man's body going against it wouldn't push it over.

Q. Well, that is what I mean. A. You asked me if it had any sway.

Q. No, any play when the body fell against it?

Mr. Hartpence: That is objected to.

Mr. Simpson: I will withdraw it.

Q. Will you tell me what was the effect of your fastening the shutter the way you did of the body lying against it.

Mr. Hartpence: That is objected to as immaterial and incompetent.

Q. Please describe the position of this shutter.

Mr. Hartpence: That is different from asking what the effect of a body going against the shutter is.

The Court: I haven't understood that the body was against the shutter.

Mr. Simpson: Well, he says his body was lying beyond the shutter.

Q. When you saw him was his body lying against the shutter or beyond the shutter? A. His body was not against the shutter.

Q. Any part of it against the shutter? A. No.

Q. Did it have any effect on the shutter? A. No.

Q. It simply extended beyond the shutter, then? A. His arm was out beyond the shutter.

Q. And you say that you don't know how far the nearest wire was to the shutter, but you think it is fifteen inches. You never measured it, did you? A. No, I never measured it.

Q. That is simply your judgment A. Yes, sir.

Q. Now, when you got up there what position was his body in up on the pole? A. In an upright position.

Q. Was he hanging by his life belt? A. Yes, sir; he was leaning back on the life belt.

Q. Leaning away from the shutter or towards the shutter? A. He was sideways towards the shutter; he was not leaning against it or towards it.

Q. His side was towards it? Which side? A. His right hand side .

Q. And was his hand still in contact with the wire when you got up there? A. No, sir.

Q. What position was his hand in then? A. I couldn't just remember the position he was in with his hand.

Q. And was he bleeding from any portion of his body? A. Yes, there was blood running from his feet.

Q. And were his shoes burned? A. I didn't see his shoes; I didn't take no notice.

Q. You didn't pay any attention to the shoes? A. No.

Q. What you were concerned with was getting him down; you were paying attention to him? A. Yes.

Q. And you didn't look at the pole at his feet to see whether it had been freshly painted or not, did you? A. No.

Q. You were just looking at the man, trying to get the man down. And did he seem to be in any pain? A. Yes.

Q. And he asked you if he was going to die? A. Yes.

Q. Was his hand burned? A. Yes.

Mr. Simpson: I think that is all.

Redirect Examination by Mr. Hartpence:

Q. In your years of experience as a lineman, Mr. Doris, have you ever used a rubber shield or blanket, which you put on like a half of an overcoat to wear as a protection against electric wires? A. No, sir.

Q. Have you ever seen anybody else among the lineman do that sort of thing? A. Never.

Mr. Hartpence: That is all.

Recross Examination by Mr. Simpson:

Q. Was there any other protection up there when you went up to get his body than the shutter? A. No.

Q. And you say you never used an electric pig—a rubber pig at all?

The Court. There is a distinction, as I take it, between the rubber pig——

Q. Is there a distinction between the pig and the shield that Mr. Hartpence has asked about? A. Yes, sir.

Q. What is the distinction? A. One is a rubber shield without any shape to it. Another is formed into a pig with a solid piece of rubber to fit over.

Q. And you never used anything of that kind? A. I have used what we call the pig, but not on eleven thousand volts, only on twenty-two hundred volts. All we ever use them on.

Q. Twenty-two hundred volts? A. Yes, sir.

Q. And the shield I understand you have never used; you never used the shield that Mr. Hartpence has referred to? A. No.

The Court: This rubber shield that he describes as half an overcoat.

The Witness: It is a piece of plain rubber.

The Court: You are asked did you ever use such a shield as that?

The Witness: Wrap them around the cross arms sometimes when we lay a wire on them, when we are working to change an insulator, and so forth, so it would not make any contact on to the arm.

Q. You would wrap them around? A. Wrap them around, yes.

Q. But this shield I am trying to find about. Mr. Hartpence speaks about a shield. You know

what he is talking about, don't you? A. Well, what I understand, the difference I think he means —there was a gentleman on the stand the other day referred to one of those side shields. Is that so, Mr. Hartpence?

Mr. Hartpence: That is what I am referring to. He said it was put on like half an overcoat.

The Witness: Went down one side. I never used one before, and I never saw one.

Q. But you have used the rubber pig which consists of a sheet of rubber. Have you ever used anything else besides the rubber pig and the shutter, any other protection when you are doing your work? A. Rubber gloves.

Q. Rubber gloves? A. Yes.

Q. Anything else? A. That is about all—well —that is about all.

Mr. Simpson: That is all.

By Mr. Hartpence:

Q. Why have you never used a pig on eleven thousand volt wire? A. Don't consider it safe; don't consider it safe, working on eleven thousand. In the first place a man wouldn't go so close to eleven thousand volts working on it as to put on a pig.

Q. I show you an instrument or a apparatus, what ever it might be called, Mr. Doris, and ask you what that is? A. Well, we call them a pig.

Q. Now, this is the instrument that you referred to, as a pig, is it? A. Yes, sir.

Q. And why is it that in fastening that down on an eleven thousand volt wire you would not regard it as safe? How do you fasten it on? A. You have to slip this off, and you have got to open those so that it will swing right over the wire in that way (indicating).

Q. Yes. Then how do you do? A. Just lay it right down over the wire like that (indicating).

Q. Then do these two end pieces clasp around the wire? A. You take and slip those over the wire first off, then you get these on and shove those back over this so that it don't fall off the wire.

Q. And in doing that you would have to come right in direct contact with that eleven thousand volt wire A. Your hand has got to come up against it to open that and press it on.

Q. Where does this wider part in the middle go? A. That is supposed to go over the insulator on the pole.

Q. And the insulator is located on what part of the pole? A. On the cross arm, projects out both sides.

Q. Running lengthwise with the wire? A. Yes. It is generally known—if you are working on an outside wire you put this on top of the insulator so that you can lean over it and work on the other wires and don't charge yourself.

Q. And you say they are usually used for twenty-two hundred volt wires? A. Twenty-two hundred volt wires.

Mr. Hartpence: I will offer this in evidence.

Mr. Simpson: No objection.

(Marked D-5 in evidence.)

Q. I show you this pair of gloves marked D-4 and ask you if that is the glove you refer to that you sometimes use in working around the live wires, a glove of that type? A. That type, long sleeve; about like that.

Q. Are they heavy enough for your protection on eleven thousand volt wire? A. No, sir.

Q. What tension wire would you use gloves of that kind on? A. Twenty-two hundred.

Q. Twenty-two hundred. What kind of glove would use use on eleven thousand volt wire? A. Well, I don't think the gloves are manufactured to handle eleven thousand volt wires, not in my belief.

Q. That you would be safe in working on eleven thousand volt wires; if they were they would be so thick and heavy that they would be cumbersome, isn't that so? A. I think so. You would have to have such a thickness of rubber that you couldn't work—handle it.

By Mr. Simpson:

Q. Well, what would you use to protect yourself on eleven thousand volt wire? A. I don't think they work it alive; they always have the circuit killed when they are working on it.

Q. Oh, they kill the circuit when they are working there? That is the only way to protect yourself? Now, this pig, is that the standard pig? I mean is it tested? A. Well I couldn't say——

Q. I don't mean this particular one. I mean the one in use would that be a tested pig? A. I don't know; I suppose so.

Q. Well, now, if it was in good condition, would it prevent the discharge of electric current of eleven, twelve or thirteen thousand volts? A. I couldn't say.

Q. You don't know that? A. No.

Q. But you do know this is only used, you say, on twenty-two hundred volts, and the way you are protected on eleven thousand or twelve or thirteen is to have the wires dead? That is to cut the current off altogether? A. Yes.

Mr. Simpson: That is all.

Mr. Hartpence: That is all.

(Witness excused.)

THOMAS KNUDSON, recalled.

Cross Examination by Mr. Simpson, continued:

Q. (Repeated by the stenographer from his previous testimony.) You didn't see that? A. If I had seen that he wouldn't have stood there a second—that man painting underneath him.

Q. What did you mean by that answer? You were referring to the question whether you had seen the man painting under the other man? A. I mean if I had seen the man painting under him.

Q. You said you wouldn't let him stay there a second? A. I would call him right down.

Q. Why? A. Because I would not think it would be the right way painting underneath another man who would be all full of paint himself probably.

Q. Well, he would make it slippery under the other man and the other man might slip; isn't that a fact? A. That would be a fact, too.

Q. That is one of the reasons you would call him down? A. Yes; another thing it would not be the right thing.

Q. Now you say you offered this plaintiff a pair of rubber gloves; isn't it a fact that you never had more than two pairs of rubber gloves for eighteen men at any time the plaintiff was working for you? A. No, sir; I had more than that.

Q. How many did you have? A. I had seven or eight pair.

Q. Between eighteen men? A. Why, they all say when there were eight or seven men out there working, we had a pair for each man—found out they didn't want them, couldn't use them.

Q. How many men did you have working on this day in this gang? A. Why, there was twelve—eleven or twelve.

Q. What was this work they were doing? They were painting poles weren't they? A. Yes, sir.

Q. How often was that done?

Mr. Hartpence: That is objected to as irrelevant and incompetent, unless this man is first shown.

Q. Well, how long have you been working there? A. About six weeks or two months, something like that.

Q. Now you mean? A. Working where?

Q. You.

The Court: At the time of this happening how long had you been sub-foreman? That is in August of 1917, August 21st; how long at that time had you been sub-foreman?

The Witness: Between six and seven years.

Q. Then your work consisted in overseeing the men that were painting the poles on this day, didn't it; you were the sub-foreman of the men that were painting the poles? A. Yes.

Q. All right: How often was it the custom to paint those poles?

Mr. Hartpence: That is objected to as immaterial anl irrelevant.

Mr. Simpson: I will make him my witness on that.

Mr. Hartpence: I object on the same ground.

Mr. Simpson: It is certainly material and relevant how often it was necessary to paint these poles, to keep these instrumentalities in suitable condition; because that is the very basis of the action. The test in the Peterson case is, was the thing he was doing a matter of indifference to interstate transportation? Now, if it was necessary to paint these poles every week to keep them in condition, or every year, whatever it was, why, that seems to me

is most relevant and material to show what kind of work he was doing.

Mr. Hartpence. That is the very basis of my objection. This witness has not been shown competent to testify to anything of that kind. He was sub-foreman in charge of these painters. There is nothing to show how often they were painted or how often they needed it. The painter goes out and does what he is told to do. He has already testified he went up and acted under the orders and directions——

Mr. Simpson: I will withdraw that question.

Q. Did you direct these poles to be painted or who did direct the painting of the poles? A. My foreman.

Q. Who? Who directed it? A. Mr. Oliver Reynolds.

Q. Mr. Oliver Reynolds? A. Yes.

Q. And you carried out his instructions? A. Yes.

Q. How often did you carry out his instructions to paint the poles? A. Well, that was the only one, as I remember.

Q. The only time? A. The only time.

Q. That is in six or seven years—that is the only time the poles were painted—is that right? A. Yes, sir.

Q. You don't know why they were painted; he simply instructed you to paint them; is that it? A. That is all.

Mr. Simpson: That is all.

(Witness excused.)

JAMES CAMERON, sworn.

Direct Examination by Mr. Hartpence:

Q. Mr. Cameron, what is your occupation? A. Lineman.

Q. For whom are you employed? A. For the Pennsylvania Railroad.

Q. How long have you been a lineman? A. About twenty years.

Q. Working for whom during that period? A. I worked for the New England Telephone, Stone & Webster, Pennsylvania Railroad, Public Service.

Q. Working among electric—— A. Yes, sir.

Q. —charged wires? A. Yes, sir.

Q. During all that period? Where were you working in August, 1917? A. Pole 14.

Q. Were you there the day that Mr. Steidler met with his injury? A. Yes, sir.

Q. Where were you at the time he was injured? A. I was walking in—I was fifty feet east of pole 14.

Q. And who was with you at that time? A. Mr. Doris and Mr. Kelly.

Q. Mr. Kelly, the gentleman who testified here yesterday, you mean? A. Yes, sir.

Q. And Mr. Doris who just preceded you? A. Yes, sir.

Q. What were you doing at the time this accident was brought to your attention? A. We were walking down to receive our pay.

Q. The pay car was there, was it? A. No, down to the—tunnel.

Q. Down to the tunnels? A. Yes.

Q. That is where you were paid? A. Yes.

Q. And the paymaster was there, was he, waiting to pay you men? A. No; but it takes about twenty minutes to walk from there; the pay car got out about twenty five past eleven.

Q. And were the painters paid by that pay car also? A. No; they were fourteen poles west of that.

The Court: No, were they paid by the same pay car, the painters? Did the painters get their pay from the same pay car?

The Witness: No; they went to New York on the train with Mr. Steidler.

Q. Well, ordinarily would the painters have been paid from the same pay car that you were paid from? A. Yes, sir.

Q. Well, what was it that directed your attention to the injury to Steidler, Mr. Cameron? A. I heard a kind of a sizzling noise, just the same as a trolley line when there is ice on the trolley.

Q. Did you hear anybody say anything? A. Why I believe Mr. Kelly was the first that seen it.

Q. Well, did you hear anybody say anything at the time you heard that splutter to call your attention to it? A. No, I don't remember.

Q. You don't remember that you did? A. No.

Q. Well, what did you do when you heard the spluttering? A. Me and Mr. Doris went up the pole and the painters got a rope and we lowered him down as soon as we could.

Q. Had you been up the pole before that any time? A. When we were putting up the screens.

Q. You put up the screens, did you? A. Yes, sir.

Q. With whom? A. Mr. Doris.

Q. When did you do that, do you remember? A. Oh, that was two or three days before that.

Q. You always put the screens up ahead of the painters going on the poles, didn't you? A. Yes, sir.

Q. How were the screens fastened up there? A. With marlin. Strings.

Q. Which side of the pole were the screens on? A. On the south side—on the west side, I should say.

Q. West side? A. Yes, sir.

Q. That would be the side toward—— A. On the live side.

Q. What did you say? A. On the live side.

Q. On the live side? A. Yes, sir.

Q. Toward the live wires? A. Yes, sir.

Q. Where did the painters work, do you know? Which side of the pole? A. There was one on each side from the top, started at the top and worked their way down.

Q. What do you mean, on the live side, side of the live wires? A. No, on the dead side.

Q. On the dead side. So that these blinds or shutters that you referred to were between them and the live wires, were they? A. Yes, sir.

Q. Does this lattice work which is at the top of this photograph, D-2, look anything like the blinds or shutters that you put up there? A. Yes, sir.

Q. Well, what are they? A. They are wooden screens, or something like that, you might call them.

Q. Wooden screens or shutters? A. Yes, sir.

Q. Is that the kind of screen or shutter that was up on top of pole 14 that Steidler was working on? A. Yes, sir.

Q. You say you and Doris had put them up there two or three days before? A. Yes, sir.

Q. What are these down below at the wires? A. Shorter ones, twenty-two hundred.

Q. These are the twenty-two hundred down there? A. There are two wires there; they don't need to be so long.

Q. Now, on the day that Steidler was hurt what kind of shutters were they up in the upper wires, the smaller ones or the larger ones? A. The larger ones.

Q. When did you see Steidler last before this spluttering called your attention to him? A. I don't remember.

Q. What had you been doing in the morning? A. I was putting up them shutters on the same side they were painting on, ahead of them.

Q. On another pole ahead of them? A. Yes sir.

Q. Well, when you went up the pole after the accident to Steidler how far up did you go? A. I went up as far as he was.

Q. What did you notice with regard to the condition of the side of the pole that he was on below him? A. I didn't notice anything.

Q. Did you notice any wet paint or fresh paint there? A. No sir.

Q. How did you get him down? A. We put a rope over the cross piece and put it under his arms and lowered him down.

Q. Worked up among the wires on the pole in order to do that, did you? A. Yes sir.

Q. Who else was up there with you? A. Mr. Doris.

Q. Anybody else? A. Mr. Knudson.

Q. Anybody else? A. What do you call him? Gilberti.

Q. One of the painters? A. Yes.

Q. And so among you you got Mr. Steidler down, did you? A. Yes sir.

Q. Did you say anything to Mr. Steidler or did he say anything to you while he was up there? A. He was asking for his mother.

Q. You heard him smoking, did you? A. Yes sir.

Q. Did he talk to you? A. Why he wanted to—

Q. Whom did he talk to about it that you heard? A. He wasn't talking to anybody in particular; he just uttered them words.

Q. Did you talk to him yourself personally at

any time after he got down from the pole and before he was taken away on the train? A. No, sir.

Q. Have you ever used this rubber sheet or similar apparatus, Mr. Cameron, in your experience as a lineman? A. Yes sir.

Q. Where did you use it? A. Twenty-two hundred volts.

Q. Ever use it on eleven thousand volt wire? A. No sir.

Q. Why not? A. Because it ain't no good there.

Q. Why isn't it any good there? A. The voltage is too high.

Q. You heard Mr. Jasper testify with regard to the rubber shield that you sort of put on like a half an overcoat; did you not? A. Yes sir.

Q. Did you ever use one of those in your work? A. No sir.

Q. Did you ever see any one else use it? A. No sir.

Q. In your experience? A. No sir.

Q. Did you ever see one? A. I did not.

Mr. Hartpence: That is all. Cross examine.

Cross Examination by Mr. Simpson:

Q. When you heard this spluttering noise that seemed like a car when there is ice on the wire what was the first thing you saw when you looked around? A. I seen kind of like smoke.

Q. Then what did you see? A. That Mr. Steidler was hanging with his head hanging down, in an upright position.

Q. His head down like that (indicating)? A. Like that, (indicating.)

Q. Oh, that way, back? A. Yes.

Q. And where was his arm? A. His arm was

clear of the wire when I noticed him.

Q. Oh, he didn't have his hand on the wire when you saw him? A. No.

Q. Where did the smoke come from? A. From his hand in connection with the wire.

Q. But his hand wasn't touching the wire when you first saw him? A. No sir.

Q. But his hand when it was still free was still smoking? A. Well, not exactly, no.

Q. Well, what is the smoke that you describe? A. From the charge that he made.

Q. Short circuit? A. Yes sir.

Q. What did he do when he touched the wire? What did the short circuiting? Did this thirteen thousand volts go through his body? A. Yes sir.

Q. Then where would that go? A. Down through the pole into the ground?

Q. Down from the pole—down through the pole into the ground? A. Yes sir.

Q. Well, when he called for his mother was it in the manner of a man who was in great pain and didn't know what his surroundings were, just calling out for his mother; was that it? A. Yes sir.

Q. And you don't mean to give the jury the impression that he was rational and all right at all; he was in considerable pain and agony, wasn't he? A. Yes sir.

Q. And his feet were bleeding, weren't they? A. Yes sir.

Q. Blood running out of his shoes. Now, when you say you didn't notice any fresh paint you didn't look for any fresh paint, did you? You went up there to take the man down; that is what you went up there for, wasn't it? A. I didn't see no fresh paint.

Q. You didn't look for it, did you? A. No sir.

Q. You went up to get the man and take him

down. How many wires were up there on these cross arms that you went up to? A. Twelve.

Q. Well, I mean on the whole four arms? A. Twenty.

Q. Twenty. And on the right side how many were there; that is, the right side of the shutter? A. Six—seven.

Q. On the whole four arms, you mean? More than that in the picture. I mean the whole four arms. There seem to be a lot more than that in the picture? A. Fifteen.

Q. Were they all alive, those fifteen? A. No, not fifteen; I take that back; there is nine wires.

Q. Well, were they all alive? A. On the right, yes sir.

Q. And those wires—you were working among those wires to get him down? A. We kept away from the wires.

Q. You kept carefully away from them; you knew what they were? A. Yes sir.

Q. How long have you been a lineman? A. Twenty years.

Q. Now, these rubber gloves would be no good on these high voltage wires, would they? A. No sir.

Q. How many volts do these right wires carry? A. Eleven thousand.

Q. The wires on the right that you say you kept away from, how many volts did they carry? A. Eleven thousand.

Q. These gloves wouldn't be any good? A. No sir.

Q. And this sheet wouldn't be any good; the only way to work safely among them would be to have the current cut off, is that right? A. Yes sir.

Q. Was that the custom when you worked on them to have the current cut off? A. Yes sir.

Q. Now, when this man was taken down, how did they get his body down? A. By putting a rope over the cross piece and putting it under his arms and lowered him down.

Q. Well, where were you when he was lowered down, up, or down on the ground? A. I was up.

Q. And did you see him when he was taken away? A. No sir.

Mr. Simpson: I think that is all.

By Mr. Hartpence:

Q. Mr. Cameron, the wires on the left hand side, or the south side, on which Steidler was working, they were all dead, weren't they? A. Yes sir.

Q. When you put the shutters up, you and the other men, was one side of the pole dead? A. Yes sir.

Q. And the other side alive? A. Yes sir.

Q. Your chief means of safety when you are working here or among live wires is to keep away from them; isn't that right, Mr. Cameron? A. Yes sir.

Q. These rubber appliances, insulators after all, are only safeguards that you might take, but not absolute safeguards, are they, against electric shock? A. No sir.

Q. If you don't come in contact with the live wire you can't be burned, can you? A. No sir.

Q. And if there is anything intervenes between you and the live wire to keep you from coming into contact with it you feel reasonably safe in working under such circumstances, do you not? A. Yes sir.

Mr. Hartpence: That is all.

By Mr. Simpson:

Q. You say you cannot be burned unless you

actually come in contact with the wire? Isn't it a fact that the current sometimes jumps from the wire? Doesn't the current sometimes jump from the wire? A. I never seen it.

Mr. Simpson: That is all.

(Witness excused.)

JOHN BOUTON, sworn.

Direct Examination by Mr. Hartpence:

Q. Mr. Bouton, you were working as a painter the day Mr. Steidler was burned, were you not? A. I was.

Q. And how long had you been working there prior to that time? A. Around a month, little over a month.

Q. Not working for the Pennsylvania Railroad Company now are you? A. No sir.

Q. Where were you working the morning that Mr. Steidler was burned? A. On the same pole.

Q. On the same pole with him? A. Yes sir.

Q. Well, what called your attention first to the fact that Mr. Steidler had met with an injury? A. Well, I heard the flash of the electricity going in the pole.

Q. And where were you at that time? A. Right across from him.

Q. And which face of the pole was he working on? Toward New York, toward Manhattan Transfer—toward New York? A. Toward New York.

Q. New York. And you were on the opposite face of the pole? A. Yes sir.

Q. With your back toward Manhattan Transfer? A. Yes sir.

Q. What part of the pole did you paint up to that time, that morning? A. Started at the top and came down.

Q. Started at the top and came down, on that same side of the pole you were when Mr.—— A. Same side, yes sir.

Q. And had you worked on that opposite side of the pole Steidler was working on at any time that morning? A. No sir.

Q. Had you put any fresh paint over there on his side of the pole at any time that morning? A. No sir.

Q. And did you start to work at the same time he did on the pole? A. We went up about the same time.

Q. And you both had been there at the top of the cross arms and wires together all the time you had been working there that morning? A. Yes sir.

Q. What did you do when you noticed that he had met with any injury? Didn't know anything. I stayed there until the lineman told me to come down off the pole.

Q. You did what? A. I stayed there until the lineman told me to come down off the pole.

Q. Did you say anything to Steidler after he was burned? A. No sir.

Q. Did you hear him say anything to anybody just before you noticed this shock that you refer to, or whatever it was that called your attention to the burning? A. No sir.

Q. Well, after the lineman told you to come down where did you go then? A. Down the pole and stood on the ground beneath the pole.

Mr. Hartpence: That is all. Cross examine.

Cross Examination by Mr. Simpson:

Q. You were in court Thursday to testify for Steidler, weren't you?

Mr. Hartpence: That is objected to as incompetent, immaterial and irrelevant.

Mr. Simpson: Well, I want to lay a foundation for contradiction of this man. I want to show his interest in this case,—I will withdraw that.

Q. You came to my office on last Thursday and asked me for money if you would testify and I refused to give it to you, did you not?

Mr. Hartpence: That is objected to.

A. I didn't—

Mr. Hartpence: He has answered it apparently.

Mr. Simpson: He has answered it.

Q. Weren't you in my office asking me for money on Thursday?

Mr. Hartpence: Objected to as incompetent, immaterial and irrelevant.

The Court: What is the purpose of it?

Mr. Simpson: To discredit him. To show he wanted money to testify; that he got it from the Pennsylvania Railroad Company.

The Court: That is not proper, Mr. Simpson; there is no proof.

Mr. Simpson: Well, I am going to prove it.

Mr. Hartpence: If he does not prove it I will ask for a withdrawal of a juror. I make the motion now on Mr. Simpson's statement.

The Court: I will give it serious consideration, Mr. Hartpence.

Q. You were in my office last Thursday and asked for money?

Mr. Hartpence: Objected to as incompetent, immaterial and irrelevant.

Q. For testimony in this case?

The Court: I will overrule that objection. It is going to show the interest and bias of this witness.

Q. Isn't that a fact? A. Didn't ask you for money. I came over for my expenses.

Q. And I would not give them to you, would I? A. You told me to go to Steidler for them.

Q. And you went away; didn't come back? A. You said you didn't want me any more.

Q. You went away and didn't come back? A. I was here until the case was over.

Q. What time did you go away Thursday? A. After the case was through.

Q. What time? A. I don't know what time.

Q. Did you come back in the court room here? A. I was out in the hall.

Q. What time did you go out in the hall? A. When I came back from dinner I stayed out there.

Q. Well, you didn't get any money from me or from Steidler, did you? A. No.

Q. You got your expenses from the Pennsylvania Railroad? A. I didn't get anything.

Q. You haven't got any promise of your expenses; do you swear that under oath? A. I got promise of my day's pay, yes.

Q. On, on Thursday, or before Thursday, on the 13th of February, 1918, you made a statement to a man named Houghteling, who was investigating this case, didn't you?

Mr. Hartpence: Objected to as incompetent, immaterial and irrelevant.

Mr. Simpson: I want to show he made a statement contradicting his present testimony. I am now laying a foundation for it.

Mr. Hartpence: I think anything he may have said on the prior occasion is immaterial and irrelevant in this case.

The Court: Well, it would go, would it not, either to what he is saying now——

Mr. Simpson: I will withdraw that.

Q. Didn't you say last Thursday in this room, in the presence of Butler, that you had painted under him but you only painted about five minutes? A. I didn't say it, no.

Q. You didn't say anything like that? A. No, I did not.

Q. You never have said that you painted under him? A. No, I did not.

Q. To anybody? A. No.

Q. You didn't say it to Mr. Houghteling on the 13th of February, 1918? A. Is that the man come over to my house?

Q. Yes. A. I did not.

Q. And you didn't say it in my presence and Mr. Steidler's presence, either? A. I did not.

Mr. Simpson: That is all.

Mr. Hartpence: That is all, Mr. Bouton—

By Mr. Simpson:

Q. And didn't you say it in front of this man, too, that you painted under him? A. I did not.

Mr. Hartpence: Who is that man?

Mr. Simpson: Mr. McComb.

(Witness excused.)

Oliver R. Reynolds, sworn.

Direct Examination by Mr. Hartpence:

Mr. Hartpence: There is one question I would like to ask Mr. Bouton on re-direct examination.

(Witness withdrawn for the present.)

John Bouton (recalled), for Defendant—Redirect

JOHN BOUTON, recalled:

Re-direct Examination by Mr. Hartpence:

Q. Mr. Bouton, when was the arrangement made with you to attend court here this morning?

Mr. Simpson: I object to that unless he says by whom.

Q. By the defendant in this case the Pennsylvania Railroad Company? A. Last night.

Q. What time last night? A. Little after seven.

Q. What time? A. Around seven o'clock.

Q. Around seven o'clock; and who made the arrangement with you? A. Mr. Brown, I believe his name is.

Q. Mr. Brown here?

Mr. Hartpence: Stand up.

Q. This gentleman? A. Yes, sir.

Q. And that was the first time you had been approached, was it, by anybody connected with the Pennsylvania Railroad? A. Yes, sir.

Cross Examination by Mr. Simpson:

Q. Why, you made a statement to the Pennsylvania Railroad long ago, didn't you? A. The day of the accident, yes.

Q. You were then working for the railroad, weren't you? A. I was then working for them, yes, sir.

Mr. Simpson: That is all.

(Witness excused.)

OLIVER R. REYNOLDS, recalled.

Direct Examination by Mr. Hartpence:

Q. Mr. Reynolds, what is your business? A. General foreman of carpenters and painters at the present time.

Q. Pennsylvania Railroad? A. Yes, sir.

Q. How long have you been such? A. As general foreman I have been about four months.

Q. What was your position with them in August of 1917? A. Foreman of carpenters and painters.

Q. How long have you been such? A. 1910—six years.

Q. Six years prior to that time? A. Yes, sir.

Q. Did you have anything to do with the painting of the steel poles, similar to the pole that Mr. Steidler was working on at the time he was injured, running along the line at Homestead, New Jersey? A. Did I have anything to do with that work?

Q. Yes. A. Yes, sir; it was under my jurisdiction.

Q. What had you directed to be done there? A. I had directed—I had screens made which were erected and I had directed each and every man that worked on that job in person to work inside of those screens and not to go on the opposite side, for on the opposite side those wires were alive.

Q. And did you direct Steidler that way? A. Yes, sir.

Q. Personally? A. Yes, sir.

Q. When was that, do you know? A. That was on the morning he started to work, on July the 19th.

Q. Did you have dimensions of those screens that you speak of? A. Those screens on top that were used are 21½ inches in width by 10 feet in length.

Q. You know the actual measurements on them? A. Yes, sir.

Q. And they were placed under your direction? A. Yes, sir.

Q. According to your measurements? A. Yes.

sir; and on the bottom arm they were 15 inches wide.

Q. And how high? A. We first started and we got them ten feet, and we got them down to approximately six feet in height.

Q. And the screens that were used in about the top wires were how long? A. Ten feet.

Q. And all those longer, larger screens, were how wide? A. Twenty-one inches and a half.

Q. Do you know how they were fastened on the poles when the painters were working there? A. Yes; they were fastened with marlin.

Q. In what manner? Will you describe how they were fastened? A. Yes. They were fastened to the corner angle of the pole, in the center top and bottom.

Q. And about how much of the screen was used up on the face of the pole in that fastening process? A. About three and a half inches.

Q. And the rest of the screen projected how? A. Out from the face of the pole.

A. Out from the face of the pole, and between the live wires and the painter? A. Yes, sir.

Q. One on each side of the pole? A. Yes, sir.

Q. How wide was the pole itself at that point where the screen was used? A. Why, the pole itself, I should say approximately sixteen inches.

Q. Sixteen inches? A. Yes.

Q. So that there was a solid screen then between the painter and the live wires of what width? A. Well, I should say between the painter and the live wires there was eighteen inches of screen, approximately.

Q. Do you know how far the nearest live wire was away from the face of the pole? A. Why, not exactly; but I would say that the nearest live wire from the face of the pole was approximately 15 inches.

Q. That would be on the side back of the screen? A. Yes, sir.

Q. Any other instructions given to Steidler and the other painters?

Mr. Simpson: I object to any instructions given to the other painters.

The Witness: There were instructions given to them all.

Mr. Simpson: Unless they were given in the presence of Steidler.

Q. Well, were there any other instructions given to Steidler or in the presence of Steidler? A. Yes; they were given them all.

Q. What instructions? A. They were instructed, as I said before, to keep within the screens, and that side of the pole on which they were working the wires were dead; every wire on that side of the pole was dead wires; but on the opposite side they were all alive, and upon no consideration to go outside of those screens.

Q. Did you give them any equipment to work with? A. Yes, sir.

Q. What? A. Gave them a pot, brush, and rubber gloves.

Q. Anything else to make them secure on the pole? A. Yes; a body belt, and a safety.

Q. What kind of gloves were they supplied with? Similar to these gloves, D-4? A. Yes, sir.

Q. Are they the gloves that they were supplied with? A. They are a pair of the gloves that they were supplied with.

Q. Do you know how many pair of gloves were supplied to work? A. Drawn for that job?

Q. Yes. A. Yes, sir; there were twenty pair of gloves drawn for that job.

Q. Where were they kept, do you know? A. They were kept in the linemen's shanty, right at

the Homestead tunnel, where we mixed our paint and where the men started to work.

Q. Is that where the paint was kept also? A. Yes, sir.

Q. Were you there the day Steidler was injured? A. No, sir, I was not.

Q. At the time you gave these instructions to Steidler did you receive any objections from him as to going up on the pole under those circumstances? A. No, sir.

Q. What did he say to you about it, if anything? A. He didn't pass any remark.

Q. Didn't make any complaint to you about the situation not being safe? A. No sir.

Q. Or express to you any fear to go up among the wires and paint? A. No, no.

Q. Had he ever worked for you before that time? A. No; he had not.

Q. He was not a regular employee of the Pennsylvania Railroad Company except as painter in this particular job, was he? A. That is it.

Q. Did you give him any written instructions? A. Any written instructions?

Q. Yes. A. Why, the only—I could not say we gave him any written instructions.

Q. Who was your sub-foreman on the—— A. Thomas Knudson.

Q. He was there in direct charge of the painters wasn't he? A. Yes, sir.

Q. I show you exhibit D-3 for identification, and ask you if you have ever seen that before? A. Yes, sir.

Q. And where? A. I took it myself in the office, 242 West 34th Street, New York.

Q. Took it from whom? A. Alfred Gilberti.

Q. What do you mean when you say you took it from him? A. Well, I mean that I took a statement.

Q. From him? A. Yes, sir.

Q. And was that statement in any way reduced to writing in this paper that you have before you? A. Yes, sir.

Q. Well, how was that done? A. Why, it was taken down de—the clerk I have. I asked him the questions and the clerk wrote off the answers. that is, putting it in as you see it here, the Q and the A; then he turned around and typewrited that off. After it had been typewritten he was called in and given to him to read, and I asked him if that was correct.

Q. Given to whom? A. Gilberti.

Q. Yes. A. And he said it was, and I asked him to attach his signature, which he did.

Q. Is that his signature? A. That is his signature right there.

Mr. Hartpence: I will offer it in evidence.

Mr. Simpson: No objection.

(Marked D-3 for identification, and received in evidence.

Cross Examination by Mr. Simpson:

Q. What was your position on the day of the accident? A. On the day of the accident foreman of carpenters and painters.

Q. Were you in charge of the general supervision of this painting work? A. I was.

Q. Did you order it? A. Did I order it?

Q. Yes. A. I ordered it through my master carpenter, and he ordered it and I ordered the work done.

Q. What kind of work was it?

Mr. Hartpence: I object to that as immaterial and incompetent unless this witness is first shown to know.

Mr. Simpson: I withdraw it.

Q. Do you know as the general foreman who ordered this work, why it was done? A. Pardon me. I was not general foreman at the time. I was foreman at the time.

Q. Do you know why it was done? A. Done because we were ordered by the master carpenter to paint it.

Q. Who is he? A. A. W. Reynolds.

Q. Is he here? A. Yes.

Q. And you don't know except you got the order from him; is that all you know, A. That is the idea.

Q. Now, then, these rubber gloves, you don't know anything about electricity, how dangerous thirteen thousand volts are, do you?

Mr. Hartpence: That is objected to as immaterial.

Mr. Simpson: I asked whether he knows.

Mr. Hartpence: I don't think there is any evidence in the case touching thirteen thousand.

Mr. Simpson: Well, eleven or twelve or thirteen thousand.

The Witness: I don't quite understand your question.

Q. Do you know anything about the danger or lack of danger of eleven or twelve or thirteen thousand volts? A. Why, I know it is a very dangerous wire.

Q. Do you know whether rubber gloves are any protection to a man working on such a wire? A. I would not want to take hold of it with a rubber glove.

Q. You don't think they are any protection, do you?

Mr. Hartpence: That is objected to as incompetent, immaterial and irrelevant and calling for a conclusion.

Mr. Simpson: Withdraw it.

Q. Where did they keep the rubber gloves? A. Where did they keep the rubber gloves?

Q. Yes. You said something about it? A. Why, they kept them at the Homestead portals.

Q. How many did you send out there? A. Twenty.

Q. How long before the accident? A. At the starting of the job.

Q. When was that? A. On July 19th.

Q. Whom did you send them to? A. Whom did I send them to?

Q. Yes. A. Why, I send them out to the subforeman.

Q. What is his name? A. Thomas Knudson.

Q. You don't know whether they arrived there? A. What do you mean?

Q. Did you see them there afterwards? A. Yes, I seen them there afterwards.

Q. Did you count them? A. Did I count them?

Q. Yes. A. No, I didn't.

Q. And they were all new, were they? A. Yes, sir.

Q. How long after you had seen them did you see them out there? A. Oh, several days.

Q. They were still new, were they? A. What is that?

Q. They still looked new? A. Some of them, and some of them had a little paint on.

Q. Now, you say you instructed this man Steidler when he took the job; isn't it a fact that all you told him was that every precaution would be taken to protect him? A. No, it is not a fact.

Q. You didn't say anything like that? A. No, I did not.

Q. Well, then, you say you told him what when you instructed him? A. I told him that on the

side of the pole, on the opposite side from where the screens were they were to work inside of the screens; that that was the dead side of the pole; on the opposite side of the pole that lines were alive, and not to go on that side of the pole upon any consideration.

Q. That is all you told him? Is that all you told him? A. Yes, sir.

Q. You didn't tell him anything about the danger of slipping on wet paint, did you? A. No occasion to tell him that.

Q. Did you—— A. No, I did not.

Q. I don't care anything about your occasion. That is all.

Mr. Hartpence: That is all.

(Witness excused.)

WILLIAM DOLAN, recalled:

Direct Examination by Mr. Hartpence:

Q. Mr. Dolan, how long have you worked among electrically charged wires? Fifteen years.

Q. How long? A. Fifteen years.

Q. Are you familiar with the use of this exhibit P-5, which they call the pig? A. Yes, sir.

Q. Will you state how it is operated and used, if you are familiar with it? Are you? A. Yes.

Q. Speak loud enough, please, for the jury and the court to hear you? A. The center part of the pig here is placed down over an insulator, with the center of the pig on the insulator with the same protection on the other side of the arm; it is then pulled together and the arrangement put on to keep it in place, to keep it from falling off the wire.

Q. Is an insulator and cross arm necessary to

the use of the pig? A. Well, the insulator could be off at the cross arm and the pig placed on it.

Q. The pig placed on it? What is the object of putting it over the insulator? A. So that the linemen can lay on it to work the outer pin.

Q. If the insulator were in between double cross arms as it appears to be on this photograph P-2 —that is correct, isn't it, the insulators are in between the two double cross arms? A. Yes.

Q. Could you utilize that pig in the manner you have described, where the insulator is? A. No.

Q. Not between the double cross arms that way? A. No.

Q. Why not? A. In the first place there is a big barrel type insulator there; it is twelve inches high, and to take and open this thing out wouldn't be any protection from it because this would not go near to the wire. The insulator would be away from it.

Q. Does the wire run underneath and in between those double cross arms, too, and is fastened around the insulator? A. Yes.

Q. Will you state the measure, state the length of that pig, Mr. Dolan? A. It is four feet long; about four feet (measuring it) four foot one.

Q. Four feet one inch long? Now, what can you say about that being a standard size and form of the pig in use? Is it or is it not? A. Question again.

Q. Is it a standard size and from the pig that is in use for electric work? A. Where it is used?

Q. Yes. Is it or is it not? A. It is.

Q. And where is it usually used? A. On the twenty-two hundred volt feeders.

Q. The twenty-two hundred volt feeders? A. Yes.

Q. Is it ordinarily used on the wires at a higher voltage? A. I never seen any used.

Q. You never saw it so used? A. No.

Q. My recollection is that when you were on the stand at the previous time in the trial you stated that there were eleven thousand volts on the feeders on the north side of pole 14 that Mr. Steidler was working on at the time that he was injured? A. Yes.

Q. Is my recollection correct? A. That is right.

Q. And that you also stated that the voltage was carried down into the sub-stations 3 and 4? A. Yes, sir.

Q. And what was its course after that, Mr. Dolan? A. Well, after it enters the sub-station?

Q. Yes. A. It goes through transformers and goes through rotary converters.

Q. Now, when the eleven thousand voltage is in the direct feeders what style or type of current is that? A. A. C. current, alternating current.

Q. Alternating current? A. Yes.

Q. And when it passes through the transformers and sub-stations then what becomes of it? A. It is transformed through rotary conductors to direct current.

Q. And it is supplied in that form to what? A. Third rail.

Q. And in what voltage? A. 650.

Q. 650 volts? A. Or 750, yes.

Q. In your experience as an electrician, have you ever observed linemen on poles work among the live wires? A. Yes.

Q. To what extent? A. I am handling it quite a few years.

Q. How long have you been employed by the Pennsylvania Railroad? A. About nine years.

Q. And where were you employed before that? A. New Haven Railroad.

Q. And where before that? A. Massachusetts Electric.

Q. And what was you work in the Massachusetts Electric and the New Haven Railroad? A. The power station and outside work.

Q. The same general line of work that you are now doing? A. Yes, sir.

Q. Well, you heard Mr. Jasper testify, did you not, about the rubber shield that he referred to as being placed upon the workmen, something after the manner of half an overcoat? A. Yes, I heard.

Q. Did you ever see any such sheet as that in use in all your experience? A. No.

Q. What would be the objection to such a shield in your opinion on the poles by the linemen? A. As I understood him it is—the half overcoat was attached to a piece of rubber that would set on the angle of the pole or irons; and it would be very awkward and its weight would be hard to handle up a pole; but I never saw one.

Q. You never saw anything like it? A. No; I never saw one.

Mr. Hartpence: That is all. Cross examine.

Cross Examination by Mr. Simpson:

Q. Mr. Cameron, the other gentleman who worked with you, you know is a lineman? A. Yes.

Q. You heard him say that the customary way to protect men working among wires carrying eleven thousand volts is to cut the current off? A. Yes.

Q. That is the fact, is it? A. Yes.

Q. Now, this alternating current is eleven thousand volts, and that, I understand you, by some method is changed into a direct current and applied to the third rail? A. Yes, sir.

Q. But still is electricity, isn't it? A. Yes.

Q. That is a method of work that is supplied

by a central power house, eleven thousand volts, and then in some way changed into a direct current of 650, you say? A. Yes.

Q. Well, what is the purpose of that, do you know? A. Well, the electric locomotives are equipped for D. C. current.

Q. For direct current? A. Yes.

Q. Not alternating?

Mr. Simpson: That is all.

Re-direct Examinaton by Mr. Hartpence:

Q. Now, Mr. Dolan, when you refer to cutting off the current you mean when linemen are working on wires themselves, do you not? That they sometimes—that that is sometimes customary to be done? A. Yes.

Q. You don't mean that that is done when people are working near the wires for other purposes, do you? A. No, only when the lineman would have to work on eleven thousand volts is when we kill the line.

Q. Yes, when they have to work on those wires themselves? A. Yes.

Q. Now, in your work for the Pennsylvania Railroad during the past five or six years has your duty called you in any way to be personally along the line of railroad where these poles were located, that Steidler was working on? A. My work?

Q. Yes. A. Yes.

Q. In what way are you called there? A. Trouble, serious trouble; I go out to the line.

Q. Have you observed the trains passing by there from time to time that you were out there? A. Yes.

Q. Do you know how many trains per day go over that section? A. No, I don't.

Q. Well, have you observed many or few? A. There is quite a few.

Q. They are running all the time, aren't they? A. Yes.

Q. Both ways? A. Yes.

Mr. Hartpence: That is all.

Re-cross Examination by Mr. Simpson:

Q. You speak of linemen working on these wires and deadening them. Well, a lineman is familiar with the work? A. Yes.

Q. You know all about wires and how to protect yourself and how to keep away from them, don't you? A. Yes.

Q. And yet when you go to work on these lines you want them deadened, don't you? A. Yes.

Q. You want these wires deadened, don't you, if you work on them or near them? A. No.

Q. Didn't you say that was the customary method? A. On the eleven thousand voltage.

Q. That is what I mean? A. Yes.

Q. Well, if you go to work, you who know all about them, when you go up working in the vicinity of these wires you prefer to have them deadened, don't you? A. Yes.

Q. And that is the customary—— A. If I am going to work up there.

By Mr. Hartpence:

Q. But if you were two or three feet away from them, with a wooden shutter, and an iron pole, giving a face of about 54 inches between you and the live wire, and you were pretty nearly three feet away from it in the ordinary progress of your work, and the wires on your side where you were were dead, you would not then have the current deadened in these wires that were so far away from you, would you? A. No, I would not.

Q. You would consider it reasonably safe, would

you not, for a workman working as I just indicated? A. I would.

Q. And in the ordinary course of your work there is no reason why you should not be reasonably safe with such a protection, is there, against that wire? A. He ought to be safe.

Mr. Hartpence: That is all.

By Mr. Simpson:

Q. Taking a painter who is not a lineman, who is simply a painter, would you consider him reasonably safe if he were working in the vicinity of wet paint and apt to slip within four inches of a wire carrying eleven thousand volts?

Mr. Hartpence: That is objected to as a hypothetical question, unless the facts are included.

Mr. Simpson: He has qualified this man as an expert. This is not my witness.

The Court: He is simply saying that your hypothetical question does not include all of the facts.

Mr. Simpson: Well, I am not asking him a hypothetical question. I have nothing to do with this case at all. I am cross examining this expert. It has nothing to do with this case.

The Court: Then it is not relevant at all.

Mr. Simpson: Yes; it is not a hypothetical question. It is to find out what his opinion is.

The Court: How can it be of any value unless it is applicable to this case.

Mr. Simpson: Because it may be so absurd that, linked up with the rest of the case——

The Court: I will sustain the objection.

Mr. Simpson: I ask an exception.

The Court: Because it is not based upon the facts in this case.

Q. Would you consider a man working within four inches of the wire carrying eleven thousand volts reasonably safe?

Mr. Hartpence: I object to that on the ground that it is incompetent, immaterial and irrelevant and not properly framed as a hypothetical question in this case.

The Court: I will sustain the objection.

Mr. Simpson: I ask an exception.

Q. What would you consider to be the safety in the situation you have described to Mr. Hartpence? A. Twelve inches.

Q. Twelve inches? A. Yes.

Mr. Simpson: That is all.

Mr. Hartpence: That is all.

SAMUEL A. SPAULDING, sworn.

Direct Examination by Mr. Hartpence:

Q. Mr. Spaulding, what is your profession? A. Electrical engineer.

Q. How long have you been such? A. About twenty-three years.

Q. About twenty-three years, and where are you located now? A. At the present time located with Gibbs & Hill, consulting engineers.

Q. Where? A. At the Pennsylvania station, New York.

Q. Are you familiar with the electrical plant and the supply of electricity by which the trains running from Manhattan Transfer toward New York are operated by the Pennsylvania Railroad? A. I am.

Q. Did you have anything to do with its installation? A. I did, yes.

Q. What? A. I had charge of the design, and part of the time of the construction of the substations and the transmission lines and the third rail construction.

Q. Where does the supply of power come from originally? A. The power is generated in the power house in Long Island City.

Q. And transmitted how? A. It is transmitted in lead covered cables and conduits in the walls of the tunnels to the substation number 3.

Q. And where is substation 3 located? A. Just at the west end of the tunnels, where the tunnels come out in the open and go across the meadow.

Q. That is the Jersey side of the tunnel? A. On the Jersey side.

Q. And then from substation 3 what becomes of it? A. The wires come in—the lead covered cables come in the substation and then they go through switches, come out through the roof of the building, and go as bare wires and steel poles over the substation number 4.

Q. And where is substation number 4 located? A. Near Manhattan Transfer.

Q. And what voltage is carried over those feeders? A. Why, the voltage between wires is eleven thousand volts, but the volts—the voltage between any single wire and the ground is only 6600 volts.

Q. 6600? A. That is on account of connection which is made at the power house.

Q. On account of what? A. On account of a connection which is made at the power house, which reduces the voltage between any wire and the ground to 6600 volts.

Q. And when you say it reduces the voltage between wire and ground, what do you mean by that? A. I mean that any man or anything making contact between the wire and the steel pole,

the steel poles are all grounded to a ground plate —copper ground plate—the maximum potential that a man could receive would be 6600 volts.

Q. 6600 volts. Now, when the 11000 voltage—what type current is that? A. Alternating current, frequency of twenty-five cycles.

Q. And when you have transmitted it to sub-station 4 what happens to it then? A. When it arrives at sub-station 4 it is stepped down with what is called static transformers to about 460 volts, and from the static transformers while it is still alternating current it goes into the rotary converters which change the current from alternating current to direct current, and raises the voltage to about—from 650 to 750 volts direct current.

Q. Direct current. And the direct current is supplied for what purpose? A. The direct current is transmitted to the third rail and from there to the shoes of the electrical locomotive.

Q. So that is is made over from the alternating current in transformers and the other apparatus you have referred to in substation 4, and supplied in the form of a direct current of between six hundred and seven hundred and fifty volts to the third rail? A. Yes.

Q. Are you familiar with the method of the New York, New Haven & Hartford, New York Central Railroad, and other plants that use high voltage—— A. Yes, sir.

Q. —electricity supply? A. Yes.

Q. Do you know what voltage the New York, New Haven & Hartford carries in its feeders? A. Why, they have a voltage of 22000 volts between their wires.

Q. How about the New York Central? A. The New York Central has eleven thousand volts. The Pennsylvania in Philadelphia, have forty-four thousand volts.

Q. In Philadelphia? A. Yes.

Q. How about Public Service high tension wires? A. They have thirteen thousand two hundred volts.

Q. In this vicinity? A. Yes.

Q. Do they in any way come in contact with the Pennsylvania Railroad system? A. Yes; their lines are connected with the Pennsylvania Railroad lines.

Q. Where? A. Very near the point where this accident occurred, I understand.

Q. And for what purpose? A. For the purpose of exchange of power in case of accident in power houses.

Q. And what voltage have they? A. They run a 13200 volt; but they do not have their neutral grounded; so there is a potential—may be a potential maintained between the wire and the ground of 13200 volts.

Q. Do they insulate the feeders there? A. They insulate the feeders on porcelain insulators.

Q. How about the New York, New Haven & Hartford and the New York Central, their feeders? A. They carry in general an open wire construction on porcelain insulators on steel poles.

Q. They are carried on bare wires, though, are they not? A. Bare wires.

Q. How about the Public Service that you just referred to? A. They have both kinds. I think the greatest part of their construction is open wire construction, except in the——

Q. Why do they have the arrangement connection between the Pennsylvania and Public Service? A. In case of trouble in the power houses or in any of the substations of either company, the Pennsylvania Railroad will help out the Public Service or the Public Service will help out the Pennsylvania.

Q. In other words, you supply current under such circumstances to the Public Service if they need it; is that right? A. Yes.

Q. And if you need it you get your supplies from the Public Service? A. Now, there is a connection in the sub-station number 4, also, similar connection for the same purpose.

Mr. Hartpence: That is all. Cross examine.

Cross Examination by Mr. Simpson:

Q. You just have an arrangement with the Public Service whereby you can use each other's current if you want to in your business; is that right? A. That is right.

Q. And the wires you say are bare carrying these eleven thousand volts? A. Yes.

Q. Did you say you installed them? A. I did not install them.

Q. What is the purpose of having them bare? A. Why, they are bare for the reason that there is sufficient separation from each other and from ground so that no insulation is necessary; and the insulation to a high potential like that is rather unsatisfactory, and cannot know at all times whether it is efficient or not.

Q. These poles you say that the wires are on are steel? A. Steel poles.

Q. Have you seen this pole 14 that has been talked of? A. I suppose I have seen it but I don't remember it in particular.

Q. You don't remember when you saw it? A. No, I do not.

Q. Is there any advantage in having steel poles to carry these wires? A. No advantage only that they last longer than the wooden poles.

Q. Than the wood poles. But if unpainted they would oxidize with the air, wouldn't they?

Mr. Hartpence: That is objected to as incompetent, immaterial and irrelevant.

Mr. Simpson: Well, he has said that he installed this system. I want to know whether he did or not.

Mr. Hartpence: He has not said he knows anything about steel construction.

Q. You don't know anything about steel construction, according to Mr. Hartpence?

Mr. Hartpence: I didn't say that. I ask that it be stricken from the record.

Q. Did you say you installed this plant? A. I did not.

Q. Did you have anything to do with its installation? A. I had something to do with the design of it.

Q. Did you design these poles? A. No, I did not.

Q. What did you design? A. I laid out the placing of the wires on the poles, designated the type of insulators and tie wires that should be used.

Q. And how many wires did you design for this pole 14; do you remember? A. We purchased the material and had installed one round wire at the very top of the pole, and nine eleven thousand volt wires, or three circuits; four twenty-two hundred volt wires; one positive six hundred and fifty volt wire, and one negative six hundred and fifty volt wire.

Q. Well, now, will you describe the manufacture of this electricity that you talked about, alternating current or direct current? Just describe, will you, how it is manufactured and used? A. The alternating current is generated by steam turbines, by alternating current conveyers in the power

house. The current is transmitted from the generators over cables and through oil circuit breakers to what is called a high-tension bus. From a high-tension bus the cables going to the various sub-stations are connected through oil circuit breakers which are automatic.

Q. Well, it is still electricity, isn't it? A. Yes.

Q. When it hits the shoe of the locomotive which it moves along it is still electricity? A. Still electricity, only in another form.

Q. Well, what is the purpose of originating an alternating current and transforming it through direct current? A. The purpose of it is the economical distribution of power by the alternating current system.

Q. It is more economical than to make direct current originally? A. No.

Q. I don't understand anything about electricity; I want to find out something about it. Why can't you apply the electricity, what you call the direct current, making it and applying it? Why do you have to have alternating and transform it into direct? A. On account of the distance. It is not necessary, however, to transform it into direct current, because the New Haven system uses the alternating current system.

Q. But on your system, the Pennsylvania, you do transform it into direct? A. Yes.

Q. And the reason for doing that is because it is easier to carry the alternating current; is that it, over large distances? A. Not easier, but more economical.

Q. Cheaper; is that it? A. Yes, cheaper.

Mr. Simpson: I think that is all.

Mr. Hartpence: That is all, Mr. Spaulding.

(Witness excused.)

Mr. Hartpence: I offer these two photographs, D-1 and D-2 in evidence.

Mr. Simpson: No objection.

(Marked D-1 and D-2 in evidence.)

Mr. Hartpence: We rest.

ALFRED STEIDLER, recalled in rebuttal:

Direct Examination by Mr. Simpson:

Q. Did you hear this witness, Bouton, on last Thursday, say in this room, (pointing to the room on the left) that he had painted under you on the day of the accident but he only painted about five minutes? A. Yes, sir, he did. He sat right alongside of me when he told me that.

Q. Now, I was present there, wasn't I? A. Yes, sir.

Q. Who else was present? A. Mr. Gilberti.

Q. Now, these gloves that they say they beseeched you to wear—did anybody ever offer you these gloves? A. No, sir; no, sir.

Q. This gentleman, the sub-foreman, says he offered you the gloves? A. No, sir; he never offered me a pair of gloves all the time I was there.

Q. He also says he instructed you in doing this work to keep the screen between yourself and these wires. Did he give you any such instruction as that? A. No, sir.

Q. What did he say? A. He said to keep in the center of the pole.

Mr. Hartpence: I object.

Mr. Simpson: Never mind. Cross examine.

Mr. Hartpence: All right I withdraw my objection.

Mr. Simpson: No; I will withdraw the question.

Alfred Steidler arecalledq, *for Plaintiff—Cross*
Angelo Gilberti, for Plaintiff—Direct

Cross Examination by Mr. Hartpence:

Q. Did you ever ask your foreman for a pair of rubber gloves while you were working there? A. Yes. He told us to get a pair of canvas gloves.

Q. Did you get the canvas gloves? A. Yes; I had to buy them myself.

Q. Didn't you see these rubber gloves? A. No, sir; we did not see the rubber gloves.

Q. Never did? A. No, sir. What we saw was a pair of rubber boots.

Mr. Simpson: That is all.

Mr. Hartpence: That is all.

(Witness excused.)

Angelo Gilberti, recalled.

Direct Examination by Mr. Simpson:

Q. Did you on Thursday last in my presence and in the presence of Steilder hear Bouton say that he had painted under Steidler, but he had only painted about five minutes?

Mr. Hartpence: Objected to as immaterial and irrelevant and not proper rebuttal.

Mr. Simpson: Well, I think that is too general an objection. If I am not asking this witness exactly what I asked the other, I would like to have it pointed out so that I can ask him exactly.

The Court: What do you mean by your objection, Mr. Hartpence?

Mr. Hartpence: Why, it seems to me the object and purpose is to discredit the witness Bouton.

The Court: Yes.

Mr. Hartpence: Now, the question is

whether or not what had been said was true, not what he told, or what this witness heard him say.

The Court: I do not understand that.

Mr. Simpson: Oh, no. I asked him if he did not make a statement in contradiction of his present testimony. Now, he denies that. I do not propose to be caught by any masked objection. That is a general objection which does not mean anything. If the objection is that I am not asking him in the actual language that I asked Bouton, of course, that is a good objection.

The Court: Is that the objection?

Mr. Hartpence: Oh, no, I object to it generally as incompetent, immaterial and irrelevant, and not proper rebuttal, not in proper form.

The Court: And the purpose of it is?

Mr. Simpson: To contradict the witness Bouton whose attention has been drawn to this statement. He has been asked if he made this statement.

The Court: I will overrule the objection.

Mr. Hartpence: Exception.

Q. Did you hear him say it? A. Yes. And somebody else was there, too, and he said it once there up in your office.

Mr. Simpson: That is all.

Cross Examination by Mr. Hartpence:

Q. Mr. Gilberti, what is your first name again? A. Angelo. I am called by the name of Harry.

Q. You are sometimes called Harry? A. Yes.

Q. You also have a brother who is called Harry? A. Henry.

Q. Henry? A. Yes, sir.

Q. Call him Henry and call you Harry? A. Yes.

Mr. Hartpence: That is all.

(Witness excused.)

Mr. Simpson: I would like to recall this fellow Bouton for just one question. A slip has been handed me and I would like to ask him that question on cross examination to lay a foundation to show his interest in this case.

JOHN BOUTON, recalled.

Cross Examination by Mr. Simpson:

Q. You know the witness Kelly, don't you? A. I do; yes, sir.

Q. Did you tell Kelly on Thursday, or at any time, that if didn't get any money you would not say a God damn word? A. I did not. I says, if I didn't get my two days pay I would not go on the stand.

Mr. Simpson: That is all.

By Mr. Hartpence:

Q. What you were asking for was to be compensated for the loss of time?

Mr. Simpson: I object to that.

A. Yes; that was the understanding I had over in New York, before I left New York.

Q. And you live, where, Mr. Bouton? A. 169th Street and Nelson Avenue, New York.

Q. New York City. And you work where? A. Interborough Rapid Transit Power House.

Mr. Hartpence: That is all.

Mr. Simpson: That is all.

(Witness excused.)

Thomas Kelly, for Plaintiff—Direct
Motion for Direction of Verdict

THOMAS KELLY, recalled.

Direct Examination by Mr. Simpson:

Q. Did this man Bouton say to you on Thursday or any time since, that if he did not get any money he would not say a God damn word? A. Correct, yes, sir.

Mr. Simpson: That is all.

Mr. Hartpence: That is all. That is the case.

(Witness excused.)

Mr. Hartpence: I move for a direction of verdict in favor of the defendant on the same grounds as stated on the motion for a nonsuit, if I may put it in that form; that there is no negligence shown on the part of the defendant sufficient to be submitted to the jury; that the accident to the paintiff resulted from a risk which was clearly assumed by him; that his own lack of care or his own negligence was the proximate cause of the injury complained of, and that both plaintiff and defendant were not engaged in interstate commerce at the time of the happening of the accident.

We also move in the alternative for a dismissal of the suit on that fourth ground mentioned, in case that be a proper motion, that the court is without jurisdiction because the plaintiff has not brought himself within the terms of the act; on the further ground that there is not sufficient evidence in the case to sustain the plaintiff's burden of bringing himself within the Federal act under which he sues to be submitted to the jury; and that there is not sufficient evidence in the case gen-

erally to warrant the court submitting the case to the jury.

The Court: Do you say, Mr. Hartpence, there is in this case any question of fact to be submitted to the jury upon the question of whether or not the plaintiff was engaged in interstate commerce at the time of the alleged happening?

Mr. Hartpence: No, sir; I should say there is no fact.

The Court: There is no fact.

Mr. Hartpence: No, sir.

The Court: Whatever there is by way of fact stands undisputed?

Mr. Hartpence: Yes, sir.

The Court: And it is purely a question of law?

Mr. Hartpence: Yes, sir.

The Court: I will decline to direct a verdict on the fourth point, and I decline to dismiss the action.

Mr. Hartpence: Your Honor will permit my objection to be noted. Do you also decline to direct on the other grounds urged?

The Court: On the other grounds, yes.

Mr. Hartpence: Your Honor will permit my objection to be noted on those grounds. In addition to the general objection now on the record to your Honor's rulings on the motions, I desire also my objection to be noted that your Honor's action in thus denying the motion denies the defendant a right, privilege or immunity which it claims under a Federal statute, treaty or the Constitution of the United States. The action is brought under the Federal Statute, and I desire to have it affirmatively appear on the record now that my objection to your Honor's

ruling is that that ruling denies the defendant a right, privilege or immunity which it has under a federal statute, treaty, or Constitution of the United States.

The Court: All right.

(Mr. Hartpence summed up on behalf of the defendant.)

(Mr. Simpson summed up on behalf of the plaintiff.)

CHARGE.

GENTLEMEN OF THE JURY:

This is an action by Alfred Steidler against the Pennsylvania Railroad Company, and is brought under what we commonly know as the Federal Employers' Liability Act, a statute of the Congress of the United States by and through which action the plaintiff is seeking to have a recovery for damages which he alleges he has sustained and is presently sustaining and will in the future sustain growing out of a happening to him on August 21st, 1917, which occurrence, he says, was brought about proximately by negligence either directly chargeable to the defendant company or imputable to it through the act of another servant of that company. The plaintiff says and alleges first, that this thing which happened to him was caused, and proximately caused, by this negligence: that the defendant company disregarded a duty which it owned him in law to provide, or to use reasonable care to provide, a reasonably safe place in which he was to perform his work; and, secondly, that the happening grew out approximately, of this negligence; that another servant of the defendant company, a fellow servant of this plaintiff, did not exercise a degree of

care which it was incumbent upon him to exercise; that he transgressed or broke or evaded a duty which rested upon him, and that that negligence so arising was the proximate cause of this happening to the plaintiff; and that that negligence of the fellow servant being another servant of the defendant company, was imputable to the defendant company itself, and, therefore, the defendant company, the Pennsylvania Railroad Company, the plaintiff alleges and says is responsible for the result thereof.

Now, before going into my charge, gentlemen, let me endeavor to impress upon you this, which is something which you must have in your mind, and which you must, in fact, continue having in your mind throughout your entire deliberations as to this case:

The mere fact that this thing of which plaintiff and his witnesses speak happened raises no presumption of negligence against the defendant company. Negligence does not arise in a case of this character by presumption of that sort, but it must arise, if it arises at all, by proof established by facts adduced through the testimony of witnesses. So start out with that in your mind, gentlemen,—that just because this accident, because it is known to you that an accident did happen, it raises no presumption of negligence as against the defendant company.

Again, because of the fact that application has been made to the court to nonsuit and to direct a verdict, you are not to be in any way influenced in your determination upon the facts in this case. They are matters, gentlemen, which do not in any way or in anywise concern you. In passing upon both of those motions the court does not say and did not say that the plaintiff had any right of recovery,—not by any means. In passing upon

both of those motions the court did not say that it believed the testimony. He did not say, or pass upon, the weight and the value and the truthfulness of the evidence that was in the case. I am making that statement to you, gentlemen, so that you may very clearly see how absolutely useless any thought that you may have had in that direction would be. It is not to control you, nor are you to use it; nor is it legal in your hands to use anything of that sort to assist or bring you to a conclusion in the case. You will let your minds be as if you had not heard those motions made and did not know what disposition the court had made of them; because, after all, gentlemen, so far as this case now is, and as it is coming to you, it is brought to you to determine what the facts are and what the weight of those facts is and for you to apply to the result of that trying out of the evidence the rules of law which the court will give you; and in doing that you arrive at your verdict. If you do that correctly and in the manner which I have indicated then you will arrive at such a verdict as at your hands would be a proper and legal verdict. With that, gentlemen, let me go back.

First, the plaintiff alleges that this thing which happened to him was the result of negligence; that that negligence consisted of a breach of duty which the defendant company owed to him as his employer, and that the defendant company did not use that care which in law it was required to use toward him as its servant in and about the place in which he was called upon to perform his work.

Primarily, therefore, it is necessary for you to know what the duty is in law that rests upon an employer. Generally it is this: The employer is to exercise reasonable care to furnish and provide

a reasonably safe place in which the servant is to work. I trust, gentlemen, that you will give close attention to the language or words that I use in these different rules of law that I am trying to give to you, because each has its particular significance. You will notice in what I have just read to you that in two places are to be found the words reasonable and reasonably. I will read it to you again, so that you will know what I mean by asking you to give the closest attention to what I read from these two rules, to what is meant by "The duty of the master is to use reasonable care to furnish and provide a reasonably safe place in which the servant is to work." Again, "Masters owe to their servants the duty of reasonable care in providing them a reasonably safe place in which to work and in maintaining it in a reasonably safe condition during the employment, having regard to the character of the services required and the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case." And again, "The duty of the master is discharged when he provides appliances in common and ordinary use and which are reasonably safe and fit for the purpose to which it or they are applied."

Now, you will see, gentlemen, all that those rules—and I could go on and give you the same thought in any number of differently worded rules, but in every one the main thought would be and is that what the master in law is required to do for and toward his servant with respect to the place in which that servant is to perform his work is that the master, acting as a reasonably prudent person would, considering the character of the services required, the danger that may exist about the place, all the circumstances, the physical situation—all those things which a reasonably prudent

man would be expected and should reasonably be expected to have in mind—then that reasonably prudent person under the circumstances of the case before you is required to do what? This sums it all up—exercise reasonable care to furnish and provide a reasonably safe place in which the servant is to work and also to maintain it in a reasonably safe condition.

Now, as I have just intimated to you, gentlemen, I could go on for an indefinite time and give you rule after rule, language somewhat changed, it is true, but in the main the same as I have read, and when you had heard all the rules possibly to be placed before you, they, after all, would come down to that one general rule which I first gave you. So that upon that phase of the case your first inquiry and the first thing before you for determination is this: taking the facts, taking the circumstances, taking the conditions, taking the physical situation, taking into consideration all of those things which a reasonably prudent person as a master would or should take into consideration, has the plaintiff satisfied you by a fair preponderance of the evidence that what the defendant company did in this case did not match up with that rule which I have given you? Has it been shown that, as reasonably prudent persons would or should have done, they did not use reasonable care in providing a reasonably safe place for this plaintiff to work? If the plaintiff has satisfied you of that and by a fair preponderance of the evidence—because the burden is upon him; he asserts it and he asks to have his recovery because of it, and, therefore, the law very rightly says the burden is upon him to establish it—if he has done that thing and in that manner, gentlemen, then the next and immediate thing following is, has he also established by a fair preponderance

of the evidence that this thing which happened to him through the negligence of the defendant because the defendant did not act up to that duty of using reasonable care to provide a reasonably safe place,—was that negligence, if established, the proximate cause of this occurrence? Was it the thing which moved or started in motion this thing which occurred to him? It is just as important, gentlemen, that he should have established that second thing as it is that he should have established the first, because the two must always appear, and the two must always be satisfied and must always be satisfied in that same manner (that is, by the plaintiff) by the same degree of evidence; namely: a fair preponderance of the evidence; because you can see situations may arise where it may be estatblished that a master has not lived up to that duty, to that rule of law which rests upon him to use reasonable care to provide a reasonably safe place, and a servant may be injured, but the injury may not come to that servant because of that dereliction on the part of the master; it may not be caused by the unsafe place, if there was one, in which he was working. So you see how necessary it is, gentlemen,—how necessary it is and how closely connected up those two issues are. Not only must the plaintiff establish the first, that is, that the master was negligent in not providing a proper place to work under the rules and under the evidence; he must also show that that negligence was the proximate cause of what happened to him.

If he has satisfied you of that, then, of course, he would be entitled to have a verdict, except for what I shall say to you later upon the question of assumption of risk, and also to a degree or in a manner upon the question of his own act. I mean the plaintiff's act.

If upon the point which I have just brought to your attention the plaintiff shall have not made out his case in the manner I have indicated, then the plaintiff still says: "I am entitled to have a recovery against the defendant for this: that another servant of the defendant company, a co-servant of mine and fellow servant of mine, who was operating and working upon this same pole upon which I was working, was negligent, and that his negligence consisted of this: that he painted upon this pole upon the same side that I was on and beneath me, and that that was contrary to the instructions that had been given" to not only the plaintiff but his fellow or co-servant of the plaintiff.

Of course, there was a duty resting upon this co-servant or fellow servant, and that is that he was to exercise reasonable care in the manner in which he acted and carried on his work with respect to the plaintiff in this case. He was obliged to use that care, too, which a reasonably prudent person would or should have used, considering the conditions, the circumstances and all the facts in this case. The burden is upon the plaintiff as to that issue, gentlemen, in this manner; that he must satisfy you by a fair preponderance of the evidence, first, of course, that this fellow servant did actually paint this pole on the side on which this plaintiff was, and beneath him; and, furthermore, that that servant in so doing, was negligent in that he did not under all the circumstances of the case as they are before you use that care which a reasonably prudent person would or should use. If that has been established in that manner, then again, as I said to you before, you will immediately have come in front of you the other question: was that negligence of that fellow servant the proximate cause of this happening?

Now, what plaintiff says, as I understand the evidence—and, of course, gentlemen, if I repeat what purports to be the evidence and it is not as you understand it and as you remember it you will disregard what I say about it and go back to your recollection—but, as I understand it, the plaintiff says that what happened was that this co-employee or this fellow servant of his negligently painted beneath him, the plaintiff, and that as the plaintiff was coming down the pole, progressing with his work, he slipped upon this wet paint that the co-employee or fellow servant had, as he said, negligently placed there. As I say, gentlemen, it is not only necessary for him to establish that this co-servant or fellow servant was negligent, but that that negligence, if any he has shown, of that fellow servant, was the proximate cause of this happening, and the burden is upon him to show it by a fair preponderance of the evidence. If he has then again I say to you, gentlemen, he is entitled to have a verdict except for what I shall have to say to you upon the question of assumption of risk, and whatever I have to say to you upon the question of contributory negligence.

If he has not shown to you in the manner I have indicated either one of those two things—either the negligence with respect to the proper place, reasonably proper place in which he was to do his work, or the negligence of the co-servant, and that either one or both of them was the proximate cause of this happening—if he has not shown those things then he is not entitled to have a verdict; because then he has not made out those things in his case which he must in order to have a verdict at your hands. So that if you arrive at that position or at that point, gentlemen, and come to that conclusion then you need not go any

further because then your verdict must be for the defendant.

If either one of those two allegations of negligence has been made out and also that such negligence as may be established, if any, was the proximate cause of the happening then you again turn to and you are confronted by another very serious matter, and a matter requiring your very serious consideration. That is what we ordinarily know as assumption of risk. It has been said to be and is this, and this is the position that an employee is in in law, and again I will say to you, gentlemen of the jury, that you are to give me your very strict attention, and also pay strict attention to the language that is used in these rules.

An employee (the plaintiff was an employee) assumes a risk of such dangers attending the progress of his work as he would discover by the exercise of ordinary care for his personal safety, and for hurt happening to him from those dangers the employer is not responsible.

Again, the general rule is that a master is bound to exercise reasonable care to provide a safe place for his servant to perform his work, and to furnish and adopt such means that he may be assured of reasonable safety and protection in his work, and to exercise reasonable care to maintain the place and means reasonably safe.

You see so far it is an exposition or re-exposition of the duty of the master toward the servant.

And then this: the qualifications are that the workman takes upon himself during the continuance of his employment all the risks and dangers which are obvious to him or can be perceived by him in the exercise of his senses. (That is, his senses of sight, hearing, feeling, and the like.) And the use of ordinary care and circumspec-

tion. The risks must be apparent and obvious and known to the servant and such as he should have known or perceived with the exercise of reasonable care on his part.

Again, the rule that the servant assumes not only the ordinary risks incident to the employment but also such special features of danger as are plain and obvious and also such as he would discover by the exercise of ordinary care for his personal safety is well established. The servant assumes as well the risks which arise or become known to him during the service as those in contemplation at the original hiring.

And again, and finally, an employee assumes the risk of such dangers attending the progress of his work as he would discover by the exercise of ordinary care for his personal safety, and for hurt happening to him from those dangers the employer is not responsible.

Therefore, gentlemen, upon the question of assumption of risk the question before you is this: this thing which brought about this happening, this thing which caused this happening, was it something which under those rules which I have given you was a risk assumed by this plaintiff? The thing to do, gentlemen, is to take the evidence in the case as you find it and determine what of it is the truth, and then apply to it these rules I have given you, using your good judgment as men of good, common, sound sense, and say to yourselves: was this brought about, was it caused, was it the result of—the proximate result—of a risk assumed in the work which this plaintiff was doing? If so, then, if all of the other things have been shown which I have said must be shown in order to allow the plaintiff to have a verdict, if it was caused by a risk assumed by this plaintiff pursuant to the facts and the rules of law I have

given you then again he cannot have a verdict; because you have heard it said through a reading of these rules of law that if it comes in that category, if it comes in that class the master is not responsible.

Now, let me say here, gentlemen, and it will apply to anything that may come up in this case: It is not for you and me to say to ourselves, or the one to the other, or to reason to the one side or the other, that this law or these rules of law are not satisfactory to you and me personally. We did not make them. Whether we like them or not is a matter of no consequence. Whether they are the rules that you would have promulgated, whether they are the rules of law that we would permit to continue in force is of no consequence to you or me. We are not making the laws; we are not making the rules; we are not responsible for their making; we are not responsible for their continuance. We are here simply, you and I,—on my part to lay before you as best I can the rules of law as they exist, you to apply those rules of law as they exist to the facts in the case. Whatever the result is coming from our thought is a matter, of course, of no consequence to you, except that such a result will be a proper verdict.

If, however, this was not a risk assumed, as shown by the evidence in this case, by application of these rules of law, and the plaintiff has shown that which is necessary for him to show and in the manner which I have indicated, for him to have a verdict, still there is another matter confronting you, and I think I have said to you, gentlemen, but for fear I have not—if you find that this happening was caused by and grew out of and was the proximate cause of an assumed risk then the plaintiff cannot have a verdict. He is

debarred from a verdict then and your verdict must be for the defendant. But if he has shown that, as in the other direction those things which would otherwise entitle him to have a verdict, and this was not a risk assumed, then you come to another phase of the case, and that is what as to the conduct of the plaintiff himself? Because in law there is also a duty resting and there was a duty resting upon him as to the care that he should take of himself in and about this work: He was under the obligation likewise to act as a reasonably prudent man and to exercise that care for his own safety that a reasonably prudent man would; and in determining what a reasonably prudent man would or should have done under the circumstances of a given case, or this particular case, you must take into consideration all of the facts, all of the circumstances and all of the conditions surrounding the particular employment, the particular happening and the particular acts of the parties whose conduct you are inquiring into, and then this question is before you: has the defendant (because the burden as to the question of negligence on the part of the plaintiff himself is a thing which must be established by the defendant by a fair preponderance of the whole evidence) have you been satisfied by a fair preponderance of the evidence in this case that this plaintiff himself transgressed that rule of reasonable care which was resting upon him? Did he act, or has it been shown that he did not act as a reasonably prudent person would under the circumstances as shown in this particular case, so that he was negligent, and that that negligence contributed to what happened to him? If that has been shown you, then if in other respects he is entitled to have a verdict he will still be entitled to have a verdict but in a reduced form to

which I will come in a moment. If it has not been shown that this plaintiff was guilty of contributory negligence, then, of course, the question of contributory negligence is entirely aside and you will not have to consider it; but he would be entitled, if he is otherwise entitled to a verdict, without that being taken into consideration.

If, however, it has been established in the manner I have indicated, that he was guilty of contributory negligence and is otherwise entitled to have a verdict, then this is the situation that you will be confronted with: At common law there could be no recovery in such a case; that is, where contributory negligence has been shown. Aside from this act under which this action is brought, if it had been established in this case to your satisfaction that the plaintiff himself was guilty of negligence that contributed to this happening it would not make any difference how slight an extent that negligence of his contributed; he would not be entitled to have a verdict at all; and it would not make any difference how negligent the defendant company was. But this action is brought under what I have said to you before is commonly known as the Federal Employers' Liability Act, and this language is directed to this act under which this action is brought, and it is this: "At common law there could be no recovery in such a case, the contributory negligence being a complete bar or defense. But this statute rejects the common law rule and adopts another deemed more reasonable by declaring (and this is the wording of the act) the fact that the employee may have been guilty of contributory negligence, shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee (and let me say again to you, gentlemen,

not that I fear at all that you are not giving proper attention to my charge, but because of the importance of these rules, and that you should have them clearly in your mind; I again say, give your best attention to this exposition by the court of that statute which I have just read you. The court goes on to say:) It means and can only mean, as this court has held, that where the casual negligence (that is the negligence which caused the happening) is attributable partly to the carrier (the defendant company in this case) and partly to the injured employee, he (that is the employee) shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both."

So that if the plaintiff is entitled to a verdict, of course, what you would find would be what he would be entitled to under the rules of law I have given to you as though this question of contributory negligence was not in the case. When you have done that, then if you have found under the evidence and the rules I have given you that this plaintiff was guilty of contributory negligence, you will, of course, find to what extent that went, and what he is entitled to have then as is said here is this: not that full damage which I have said you should first find, but that diminished sum which bears the same relation to the full damage as the negligence attributable to the carrier bears to the negligence attributable to both. If you find that the negligence of the defendant to the negligence of the plaintiff and the defendant combined is one fourth, that is, if the negligence of the defendant is only one fourth of the whole negligence, of the two together, then of that whole sum which he would be entitled to have

if there were no contributory negligence he would only be entitled to have a verdict for one fourth. You see, it is to be reduced in that proportion. The way I suggest (of course, you need not follow it, gentlemen, but I am suggesting it because it seems to be the simpler way for you to do it) is to consider first, what the whole damage would be that he would be entitled to under the rules and the evidence, and if the contributory negligence has not been established then, of course, you need not apply this rule; but if contributory negligence has been established then you shall have to determine what the negligence was as against this defendant company as compared to the negligence of both the company and the plaintiff; and if perchance that should be one eighth of the negligence of the two combined then the plaintiff would be entitled to a verdict of one eighth of that whole sum which you have already found; if it should be one fourth, he would be entitled to one fourth of that whole sum; if a half, to one half; if three fourths, to three fourths.

Now, as to what a verdict in a case of this character may be for provided the plaintiff is entitled to have a verdict; he is entitled to be compensated for pain and suffering, mental and physical, likewise any disability which by a fair preponderance of the evidence he, the plaintiff, has shown you he has suffered and endured in the past, that he is presently and at this time suffering and enduring, and that he will in reasonable probability suffer and endure in the future. You see, gentlemen, I have divided it into three parts, so that it may be more readily applied by you as you may find the evidence to warrant. For the past for the pain and suffering and the disability he is to have that sum of money which will compensate him, dependent upon his having shown you that he had

what their intensity was, and what their extent pain and suffering and disability in the past, and was. The burden is upon him so to do. If he has satisfied you in that direction then for the past he is entitled to be compensated as he may thus have shown you. If he has shown you by the same class and degree of testimony, namely, fair preponderance of the evidence, that he is at this time suffering pain and suffering and disability, or any of those ailments, then as he may have shown you he is entitled to be compensated in addition to the past for the present and to that extent that he may have shown you that he is being damaged; and the same thing applies to the future. The burden is upon him to satisfy you by a fair preponderance of the evidence that in reasonable probability he will suffer pain and disability in the future, and to show you what the degree of it will be, what their intensity will be, what their character will be and how far in the future those or any of those will go. As he may have satisfied you in those directions he is entitled to be compensated for the future.

He is also entitled to be compensated for any cost or expense that he has been under and paid or that he has contracted to pay, or will in reasonable probability be called upon to pay in and about effecting a cure—such things as physicians' bills and bills for medical services of that character. The burden in that respect is also upon the plaintiff to satisfy you by a fair preponderance of the evidence as to the necessity for the services; that they were reasonable, and that the price that he is asking to be compensated therefor is a reasonable and proper price under the circumstances.

He is also entitled to be compensated for loss of earnings or decreased ability to earn. That again, also applies, gentlemen, not only to the

past, that is, from the date of the happening of the occurrence in question up to the present time, but it may, the evidence warranting it, apply to the present time, and likewise, again the evidence warranting it, to the future; the burden being upon the plaintiff to satisfy you that he has had such a loss in the past and to satisfy you of it by a fair preponderance of the evidence, and as to what that loss has been if he is entitled to have a recovery in that direction for the past; for the present likewise the same situation is in front of him; he must satisfy you that he is at this time presently at a loss and what that loss is, and as for the future what, again in reasonable probability, will be his loss in the future—all of those things again, gentlemen, being dependent upon the showing that these pains and these sufferings, these disabilities, these inabilities to earn, or decreased ability to earn, the cost of effecting a cure, are the proximate result of this happening; because, you see, one may have disabilities and they may not have come through the negligence of the party against whom he is seeking to have a recovery. Of course, if that were so, it would be most unjust and unfair that the party as against whom he is complaining of negligence should pay for something that he did not cause. So, therefore, I say the further burden of the plaintiff is to show that these disabilities which he is claiming as the cause of his loss are the proximate result of the happening in question.

Finally, gentlemen, and to sum up entirely the question as to what a verdict may be for, let me say that what the plaintiff is entitled to have, if he is entitled to have a verdict, is only just what sum of money which will compensate him or put him back as nearly as may be in the position he would have been but for the alleged act of

negligence which he complains was the cause of his condition. He is not entitled to have one penny added beyond that. You are not to, nor shall you, nor should you permit any sum, however trifling, to be added by way of punishment; because it is no part of a verdict in a case of this character. Again, gentlemen—of course I have tried to say to you before and I will very plaianly say to you now, that you are in nowise to be carried away because of favor or because of your sympathy. You are simply to take the evidence in this case as you find it, try it out, determine what of it is the truth, and then you are to apply the tests as to whether or not the respective parties as the burden rests upon them to establish a certain issue or thing by a fair preponderance of the evidence, have established it; and then you are to apply the rules of law which I have given you and in that manner find your verdict.

There are one or two requests, gentlemen, which I have had made of me and which I am willing to charge you. The first is this:

"I. The plaintiff assumes the usual and ordinary risks of his employment, the existence of which are known to him or so obvious that he must be charged with knowledge of them, and the danger of which is appreciated by him, and among such risks, when in such manner assumed, is the risk of his fellow servant's negligence."

"IV. The burden of proving the negligence complained of is on the plaintiff throughout the whole case, and unless he has sustained this burden by a fair preponderance of the evidence, the plaintiff cannot recover against the defendant in this action."

"V. The plaintiff cannot recover against defendant in this action if it is established by a fair preponderance of the evidence that the injury

complained of resulted from one of the assumed risks of plaintiff's employment."

With that, gentlemen, you may take the case.

The Court: The defendant's attorney has requested the court under rule 110 of the Supreme Court to propound to the jury three certain questions——

Mr. Hartpence: Two questions. I will withdraw one.

The Court: Well, two certain questions. The court in the exercise of its discretion has declined to present them or require them to be answered, to which you wish to take an exception?

Mr. Hartpence: To which I wish to take an exception.

The Court: And there were five requests by the defendant to charge, of which I charged in the exact language requested, numbers I, IV and V; and numbers II and III I have declined to charge.

Mr. Hartpence: I ask an exception to your Honor's refusal to charge as requested.

The Court: Yes.

Mr. Hartpence: Then I desire to have my exception noted to those portions of your Honor's charge where it was left to the jury whether the painting by the fellow servant contrary to instructions could be considered as negligence, and to consider whether that negligence was the proximate cause of the injury; my thought there being as indicated on my motions, that the mere fact of the painting by Bouton on the same side as Steidler could not be predicated as an act of negligence in any event; and, therefore, should not be submitted to the jury.

I also desire to note my exception to your Honor's submitting the case to the jury in view of the motion to nonsuit and direct a verdict and

dismiss on the ground that the paintiff and defendant were not engaged in interstate commerce at the time of the occurrence of the injury.

Also to that portion of your Honor's charge where you charged the jury that plaintiff would be entitled to recover for all pain and suffering and other ailments that were mentioned, which was shown to be the proximate result of this happening; and also to such part where your Honor charged the jury that the plaintiff would be entitled to such sum as would put him back in the same position as he was before the accident.

The Court: All right.

Defendant requests the court to direct the jury, upon all the facts in this case, to answer in writing the following questions:

1. If you find a verdict in favor of plaintiff and against defendant, state the fact or facts upon which you base and find such verdict.

2. If you find a verdict in favor of plaintiff and against defendant, state to what extent or proportion you find, if at all, plaintiff's own negligence contributed to the injury complained of, and to what extent or proportion you have reduced the amount of your verdict because of plaintiff's contributory negligence.

DEFENDANT'S REQUESTS TO CHARGE.

I. Plaintiff assumes the usual and ordinary risks of his employment, the existence of which are known to him or so obvious that he must be charged with knowledge of them, and the danger of which is appreciated by him; and among such risks when in such manner assumed, is the risk of his fellow servant's negligence.

II. The mere painting of the pole, in which occupation plaintiff was engaged at the time of the occurrence of the injury complained of, was not an act which, under the circumstances of this case, constituted an engaging in interstate commerce by plaintiff within the provisions of the statute upon which this action is based.

III. The pole on which plaintiff was engaged in painting at the time of the occurrence of the injury complained of, was not, under the circumstances of this case, an instrumentality of interstate commerce in the sense contemplated by and comprehended within the terms and provisions of the Federal Employers' Liability Act, under which this action is brought by plaintiff.

IV. The burden of proving the negligence complained of is on the plaintiff throughout the whole case, and unless he has sustained this burden by a fair preponderance of the evidence, the plaintiff cannot recover against defendant in this action.

V. The plaintiff cannot recover against defendant in this action if it is established by a fair preponderance of the evidence that the injury complained of resulted from one of the assumed risks of plaintiff's employment.

Exhibit D-3

G. 76

PENNSYLVANIA RAILROAD COMPANY

Philadelphia, Baltimore & Washington Railroad Company
Northern Central Railroad Company
West Jersey & Seashore Railroad Company
Division New York, Aug. 22 1917

Statement of Angelo Gilberti, Occupation Painter
Business Address 242 West 31st, St. N. Y. C.
Home Address 339 Paterson Plank Road, Homestead, N. J.
Made to O. R. Reynolds, Foreman Carpts. at 242 W. 31st, Str. on the 8-22-17 day of Aug. 22, 1917 in the presence of James T. Shine with reference to Accident on high tension pole No. 14 to Alfred Steidler, just west of Secaucus Road.

NOTE: Have party making statement give names and addresses of all other persons he knows of who were witnesses or have any knowledge of the occurrence, and, if possible, have the statement signed by the person interviewed and attested by some person present other than the one to whom it was made.

Q. Where were you at the time of the accident?
A. Working on pole No. 13.
Q. Did you see accident?
A. No.
Q. What called your attention to accident?
A. When men where lowering injured man to ground.

Signature. Angelo Gilberti

D-4

1 Pair Rubber Gloves (p. 215)

D-5

1 Rubber Pig (p. 237

New Jersey Court of Errors and Appeals

ALFRED STIEDLER, Plaintiff-Respondent, vs. THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellant.	On Appeal.

BRIEF FOR PLAINTIFF-RESPONDENT

The plaintiff who was a painter employed by the Pennsylvania Railroad Company, sued under the Act of Congress entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" approved April 22, 1908, 35 U. S. Statutes at Large, 65. The facts which the jury might have found were as follows: The plaintiff was at work painting a metal pole. Upon these poles were wires used exclusively for the transmission of current to propel motors which take trains from the State of New Jersey at a point located at Manhattan Tranfer, in the County of Hudson, to the Borough of Manhattan, City and State of New York. The poles were exclusively used to carry these wires. At the time of the accident, the plaintiff was painting the poles. The method of painting

was for two men to work, one on each side. A wooden screen (p. 38), was erected between plaintiff and certain live wires. One of the men who was working in the gang with the plaintiff on the pole and whose duty it was to paint on the opposite side of the plaintiff, because that was the proper method of doing the work as testified to in the case (p. 48), without fault or knowledge on the plaintiff's part went underneath the plaintiff and began to paint underneath the plaintiff. This was a dangerous method of doing the work because the plaintiff's work called for him to descend. He descended by putting his feet in the open spaces produced by the angles of the iron on which the poles were constructed, the poles being constructed of a sort of lattice work, and it was very probable that when plaintiff placed his foot upon the wet paint he would slip. That this was an improper method was testified to by the foreman and others. The plaintiff having finished the work he was doing and it being necessary for him to descend, loosened his life belt in the proper manner, placed it in the lattice work, placed his foot on a lower portion of the pole and reached for his paint pot. Because the place where he was standing was covered with wet paint, placed there by his fellow servant, he slipped and fell backwards, his hand fell beyond the screen and touched the live wires and he received injuries from electricity which caused the amputation of his arm and a serious and permanent injury to his leg.

References to pages for foregoing facts are as follows:

Electric system, pp. 30 and 66.
Painting would keep poles from deteriorating, pp. 38, 39.

Wooden screens, p. 38.
Method of work, p. 48.
Working on pole, pp. 48-49.
Slipped on paint, p. 49.
Shutter 4 ft. high 16 inches wide, p. 55.
Description of poles and use, pp. 46-47.
Hands burned, p. 53.
Liable to slip if you leaned back, p. 144.
20 wires on pole, p. 56.
Bouton painted underneath plaintiff, pp. 59-121-122.
Slipped on wet paint, pp. 119-132.
Plaintiff paid attention to his work, not to Bouton, p. 144.
Could not see underneath you when you leaned back, p. 145.
Wet paint under him, p. 156.
Bouton seen painting under plaintiff before accident, pp. 163-164.
Body standing close to wet paint, p. 165.
Wrong to paint underneath, pp. 107-168-239.

Grounds of Appeal

The grounds of appeal consist of objections to the refusal to grant a nonsuit or direct a verdict or dismiss the action for want of jurisdiction, refusal to charge, refusal to put written questions to the jury and to the charge.

POINT I

The action was properly brought under this statute. The work that the plaintiff was doing was keeping up an instrumentality whose existence was not indifferent to interstate commerce, which is the test under *Pederson vs. Lackawanna,* 229 U. S., p. 146, where the Court said the true test is: Is the thing the plaintiff was doing a matter of indifference to interstate commerce? It was necessary to move the trains, to have electricity; to have electricity, to have wires; to have wires it was necessary to have the poles and to have the poles it was necessary to keep them in proper state of repair, which was the work which plaintiff was doing.

Roberts' Commentaries on this Act of Congress, p. 909, p. 851.
Deal vs. Coke & Coal R. R., 215 Fed., 289.

Roberts' Federal Liabilities of Carriers, Vol. 1, p. 850 says, with cases to support him in the notes:

> "Many instrumentalities of interstate commerce must be painted in order to keep them in a safe and proper condition for transportation of traffic. For, without paint, engines will corrode and the woodwork of cars and bridges will decay. Employes of common carriers by railroad, therefore, engaged in painting instrumentalities permanently devoted and assigned or used in moving interstate traffic at the time of an injury, are under the control of the federal statute."

Louisville & N. R. Co. v. Netherton,
175 Ky., 159; 193 S. W., 1035.

Also further on page 851, he says:

"Telegraph and telephone lines are maintained by railroad companies near to and parallel with their tracks partly for the purpose of enabling train dispatchers to transmit train orders and thereby direct the movement of interstate trains. A telephone or telegraph line is therefore, just as essential to the operation of a railroad as cars, tracks, or other equipment. Employes engaged in repairing such telegraph and telephone lines are employed in interstate commerce within the meaning of the act, for their work is directly and immediately connected with the work of interstate commerce."

Coal & Coke R. Co. vs. Deal, 145 C. C. A., 490; 231 Fed., 604;

So. Pac. Co. vs. Industrial Acc. Commission of California, 174 Cal., 19; Pac., 1143;

Collins vs. Michigan Cent. R. Co., 193 Mich., 303; 159 N. W, 535.

In the *Branson* case, cited in the brief of the appellant, it did not appear that the cars being painted were to be used in interstate commerce.

The case at bar is not a case where the plaintiff was about to be employed in something that might be used in interstate commerce, such as building new instrumentality, nor is it a case where, as in the "*Shanks*" case, it was not apparent the instrumentality under repair would be used in interstate commerce; but the instrumentality upon which Stiedler, the plain-

tiff, here was at work, to wit, the metal pole holding wires, which wires were used to carry the motive power of the trains, was not a matter of indifference to interstate commerce, because no pole, no wires; no wires, no electricity; no electricity, no motion. Therefore, it was proper to found this action upon a violation of this act.

POINT II

Negligence.

The negligence was the negligence of an employee of the defendant. Plaintiff fell because his foot slipped on wet paint. There was abundant testimony as recited in the first portion of this brief, whereby the jury could find as a fact that Bouton, the employee of the defendant, had painted underneath the plaintiff and that this was an improper thing to do. If he did, his act was actionable under the Statute in question, irrespective of the negligence of the defendant in failing to provide proper safe-guards, while he, the plaintiff was at work in a dangerous situation and the action was rested upon this negligence of the fellow employee. Acts of fellow employees held to be actionable.

Richee on Federal Employers Liability Act, p. 129, Second Edition.

POINT III

Obvious risk.

This Court has held in *Grybowski vs. Erie*, 98 Atl., 1085, that risk of fellow servant's negligence is never assumed.

The risk of this happening was not obvious to the plaintiff. It was not a risk inherent in the employment but flowing from the act of a fellow employee. Therefore it could not be said to be incident to the employment. It is not one which was so open and obvious to him that he must have known of it. He denies having seen Bouton, the employee painting under him. He explains that it was dangerous to lean back and look down. That he assumed that Bouton was about his work in a proper way. That he, the plaintiff did not watch Bouton but watched his work, all of which were proper things for him to do. As Mr. Justice Garrison said in the case of *Graiert vs. Central R. R.*, 81 N. J. L., 617,

> "If a servant should devote any considerable portion of his time to an investigation of his master's business methods outside of the work that he is set to do, or that he can devote a still greater portion of his time to looking out for dangers that may possibly result to him from work that other servants may be set to do, such proposition would be of no practical use in determining the relationship of master and servant, for the simple reason that such relation would itself be terminated by the master the moment he realized that he was paying the servant not to work for him but to criticise the methods by which others were doing their work and to keep a constant lookout for possible dangers that might come to him from outside sources."

In that case the Supreme Court cites

> Daum vs. N. J. Street Railway, 69 N. J. L., p. 1.

It cannot be said as a matter of law that it was an obvious risk.
See:

Horton vs. Seaboard Air Line, 233 U. S., p. 1062.

POINT IV

The fourth ground of appeal was a request to charge and refusal to charge as requested. If this request was charged, the language of the request would have determined the case, because it requested the Court to direct as a matter of law that the pole upon which the plaintiff was working was not an instrumentality of interstate commerce, and that was the point raised in the motion for nonsuit and direction of a verdict and was practically the same thing.

POINT V

The 5th ground of appeal consists of an objection to the failure of the Court to ask the jury certain questions. The language of the Practice Act is such (sec. 70, p. 23) as to make the putting of questions by the trial judge a matter of discretion.

It will be seen that this gives the Court permission to submit questions, but questions as to disputed facts. It does not make it mandatory upon the Court but leaves it a matter of discretion. The Court must have some discretion in the trial of a cause. The Act leaves it to the Court to say whether or not the questions must be submitted. The questions proposed did not ask him to find disputed facts, but ask him to render a general verdict of what the facts are which they found; whereas, the Act is for the purpose of

having straightened disputed facts, not to ask the jury for an opinion as to what were the facts in the case.

The second question was asking for an opinion as a matter of law upon what extent the plaintiff's alleged contributory negligence contributed to the injury and how much they would reduce the damages on that. But this was not the purpose of the Act. The Act says the questions and answers shall have the effect of a special verdict and does not provide for a foreign system of law such as this is in relation to the New Jersey system which has no doctrine of diminution of damages, but is rather the admiralty doctrine adopted by the Act of Congress. How can error be alleged upon the failure of the Court to exercise its discretion, even where it cannot be said that the questions were such as provided for by the Act.

The 6th Ground of Appeal contains over 12 distinct propositions, some of law, some of fact and some mixed law and facts and upon an objection of this kind the plaintiff in error attempts to raise a question of error. Under the cases cited, before any error could be alleged on this excerpt, the specification of errors relied on must have been pointed out.

Scheiber vs. Public Service, 98 Atl., p. 316.

If, however, the Court should allow error to be assigned, the defendant in error submits that none of these statements by the judge are erroneous.

Respectfully submitted,

ALEX. SIMPSON,
Attorney for Plaintiff-Respondent.

THE ARTHUR H. CRIST CO., COOPERSTOWN, N. Y.
New York Office, 220 Broadway

New Jersey Court of Errors and Appeals

ALFRED STIEDLER, *Plaintiff-Respondent,* *vs.* THE PENNSYLVANIA RAILROAD COMPANY, *Defendant-Appellant.*	Action at Law On Appeal from Hudson County Circuit Court.

BRIEF OF DEFENDANT-APPELLANT.

This is an action at law for damages, under the Federal Employers' Liability Act (Act of April 22, 1908, ch. 149, 35 Stat. L. 65), the pertinent provisions of which are as follows:

> An Act relating to the liability of common carriers by railroad to their employes in certain cases.
>
> § 1. That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the

next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

§ 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Plaintiff received injuries resulting from contact with an electric wire while engaged in paint-

ing a metal pole, designated as Pole No. 14, located near Manhattan Transfer Station of the defendant company, near Harrison, New Jersey, on August 21 1917 (Case, pp, 6, 129, 43, 47).

The pole is illustrated in the Exhibits D-1 and D-2, P-1 and P-2 (Case, pp. 305-308).

Plaintiff was not a permanent railroad employee, nor was he a railroad man in the usual sense. He was employed as a painter, in common with a number of other men, for the purpose of painting the metal poles extending from the entrance to the Pennsylvania Tunnel, near Homestead, New Jersey, westwardly to a point a short distance beyond Manhattan Transfer, and had been working in that capacity since July 19, 1917, a little more than a month. He was employed simply for the specific job on which he was then engaged, and for no other purpose. His employment was purely casual (Case, pp. 137, 138, 219, 259, 224, 256, 39).

The poles were painted chiefly for the sake of their appearance.

The witness, Reynolds, (Case, pp. 37, 38) testified as follows:

> "Q. What were they painted for? A. Well, various reasons we paint them for.
>
> The Court: Well, some of them are what? A. To protect them—where the paint scales—to make it look respectable along the line.
>
> Q. Keep them from deteriorating? A. One reason, yes, sir.
>
> Q. That is, the paint would preserve them? A. Paint would preserve them."

It was the only time they had been painted within the recollection of the Sub-Foreman Knudson in six or seven years (Case, p. 241).

And the witness Spalding (Case, p. 274) testified on cross-examination by plaintiff's attorney:

"Q. Is there any advantage in having steel poles to carry these wires?

A. No advantage, only that they last longer than the wooden poles."

Upon these metal poles were cross-arms and strung on them, running in a general easterly and westerly direction, were a number of wires, transmitting electrical current. These wires carried a 11000 volts alternating current, which was conveyed to the transformers in the Sub-Station. There it was transformed into direct current, and thereafter, in that form, it was supplied to the third rail in a 650 volts current. From that third rail the electric motors obtained the power which ultimately propelled defendant's trains from Manhattan Transfer, in New Jersey, to New York City, in the State of New York, and *vice versa*. (Case, pp. 169, 265.)

While the painters were at work on the poles, the wires on one side of the poles were deadened and those on the opposite side were live (Case, pp. 25, 55, 248, 258).

At such times large wooden screens or shutters were placed between the painters and the live wires for protection (Case, pp. 62, 218, 244, 265, 267, 270, 274, 277). These screens were about 10 feet high and about 21½ inches in width, the testimony in this respect varying slightly. They were fastened to the north face of the pole by stout twine or marlin and extended beyond each corner of the pole from 15 to 18 inches (Case, pp. 27, 55, 58, 77, 87, 131, 218, 219, 228, 243, 256, 257, 268).

The face of the pole at that point was about

sixteen inches wide. So that intervening between the painter and the live wires was a barrier, composed of the pole and the screens, about ten feet high and from four to four and one-half feet wide (Case, pp. 216, 257, 268). This was considered safe for all practical purposes, and the uncontradicted testimony shows that the particular dimensions of the screens were the safest that could be employed as evolved from experience in their use, a larger surface being more unweildy and presenting a less stable barrier because of the wind, thus rendering them more apt to come in contact with the wires (Case, pp. 84, 86, 219, 87-89, 256-7). The strongest test of their safety under ordinary conditions is the fact that no other accident occurred to any painter throughout the entire operation of painting these poles (Case, pp. 60, 140, 227, 269, 270).

And their efficacy is not called in question by the accident to plaintiff, as a precautionary measure of due care or lack thereof by defendant, because plaintiff's injury did not result from the ordinary pursuit of his work, but through an extraordinary occurrence, which defendant contends could not have been foreseen by it in the exercise of ordinary care or foresight, and through no fault of defendant itself (Case, pp. 140, 269).

It happened this way: Plaintiff had been painting near the top of pole Number 14 (Exhibits P-1, P-2) for about two hours in the morning (Case, p. 144). He then moved down the pole on the east face, with his back towards New York and his face towards Manhattan Transfer (Case, pp. 132, 136, 146). He had placed his feet in the angle formed by the cross-pieces of the lattice-work pole, had then fastened his life-belt to another portion of the

pole, and was in the act of reaching up for his paint pot, which hung higher up, when he lost his foothold and fell (Case, pp. 29, 49, 59, 144, 146). His right arm was thrown upward and backward, apparently, and his hand, being flung outside the easterly edge of the screen, came in contact with a live wire on the north side of the pole, which defendant's experienced witnesses testified was at least fifteen inches away from the north face of the pole (Case, pp. 86, 229, 232, 257), but which plaintiff stated was only about four inches away (Case, pp. 232, 86). In either event, it was sufficiently removed that the screens were an adequate protection in the ordinary operation of painting, and, so far as the evidence shows, to have extended the screens to a point where they would have prevented the contact in this extraordinary and not reasonably to have been anticipated situation, would have been to have rendered them impracticable and less safe for ordinary use.

The life-belt prevented plaintiff from falling off the pole (Case, p. 233), and later he was taken down by some of the linemen and his fellow painters (Case, pp. 53, 151, 157, 158, 159). A significant fact in this respect is that at least four men, in addition to plaintiff engaged in the performance of this feat without the deadening of the wires and in perfect safety (Case, pp. 53, 151, 157, 158, 159, 217, 218).

Plaintiff's contention is that because of Bouton's having painted the pole underneath him, which he should not have done, plaintiff slipped in the wet paint. Bouton denied having done so (Case, p. 251); none of the four men who went up the pole to aid plaintiff after the accident found any trace of wet pant; and it is inconceivable

that Bouton could have painted in that position right under plaintiff, within one step down from him, without plaintiff's having known it, for with but a glance of his eye he could see downward to a point at least half way down the pole (Case, pp. 61, 62, 63, 64, 150, 152, 154, Ex. P-2, Mark X, 155; and Exhibit D-3, pp 304, 122, 123, 260). It is significant, also, that Gilberti, who flippantly swore that he saw the whole occurrence, from the next pole, about 150 yards away, while he smoked a cigarette in lieu of performing his duties, (Case, pp. 57, 59, 161, 162, 122-3), had previously made the statement that he did not see the occurrence (Exhibit D-3, p. 304).

Knudson, the foreman in charge of the painters, also testified that he had been in a position to have observed if Bouton had painted underneath plaintiff, and that he had not seen him do so, and that if he had seen him he would have told him not to do it (Case, pp. 168, 239). Knudson was one of the men who helped take plaintiff down from the pole, and testified that he saw no evidence of fresh paint on the east side of the pole, underneath where plaintiff had been working, when he went up there after the accident (Case, p. 217). It is also significant that although Bouton had been subpoenaed by plaintiff and had been present in Court during the first days of the trial, he was not called upon by plaintiff to testify that he had painted as plaintiff said he had; and that later on when he was subpoenaed by defendant, when it was apparent from his absence from Court on that day that he was not going to be so used by plaintiff, he testified that he did not so paint on plaintiff's side of the pole; and that thereupon plaintiff sought to impeach him by

showing that he had endeavored to obtain pay for his testimony favorable to plaintiff, and failing that, had testified favorable to the defendant (Case, pp. 166, 278-282).

Plainiff's whole case lacks credibility, but taking it at its best, defendant contends, as was contended on the trial (Case, pp. 169-209, 281-283), that it fails to establish the negligence complained of as the proximate cause of the injury to plaintiff; that no negligence of defendant was shown, the proximate cause of which was plaintiff's injury; that there was not sufficient evidence thereof to warrant the submission of the case to the jury; that plaintiff had not sustained his burden of proof in that respect; that he had assumed the risk of that which had proximately resulted in his injury; that his own act, negligent or accidental as it may have been, was the proximate cause of his injury; and that he had not shown affirmatively that he was engaged in inter-state commerce at the time of his injury, or that he was one of those employees of defendant to whom the Act of Congress under which his suit was brought was intended to apply.

Plaintiff's injuries consisted of the loss of the lower portion of his right arm, about midway between the wrist and the elbow, and burns on the feet, which had almost entirely healed at the time of the trial. The arm had entirely healed. His own physician testified that otherwise he was in good health, and would be able to perform any work which a man with but one arm could ordinarily perform. The testimony of all three of the physicians was to the effect that with but slight treatment the feet would be entirely well, except from such slight interference as might result from the scar tissue and a slight ankylosis of the ankle joint (Case, pp. 106, 107, 108, 129, 211, 212).

The trial Court declined to request the jury to state the facts upon which they based the negligence of defendant, in case of a verdict against it, and to state to what extent they reduced the verdict, if at all, by reason of the contributory negligence of the plaintiff (Case, pp. 20, 21, 301).

A verdict for $35,000. was rendered in favor of plaintiff, which, upon rule to show cause, was reduced to $20,000., and judgment for that amount, with costs, was entered in the Hudson Circuit Court. From that judgment the present appeal is taken. The causes for reversal are stated at pages 2-5 of the State of the Case, and defendant respectfully submits that the judgment of the Hudson Circuit Court should be reversed, set aside, and for nothing holden, for the reasons herein stated.

I.

No negligence was shown.
Not sufficient negligence was shown.
Plaintiff did not sustain his burden of proof.
Plaintiff assumed the risks.

Plaintiff knew of the existence of the live wires, and their proximity was apparent (Case, pp. 141-142, 213, 214, 220, 258, 259); it is difficult to find in the testimony reference to any usable instrumentality for plaintiff's work which defendant did not supply; nor is there any evidence to show how defendant failed in any duty it owed plaintiff in equipping the pole for the performance of the ordinary work in which plaintiff was engaged; and the only remaining allegation of negligence (Sec. 6 of Complaint, as amended, Case, p. 7) is the general allegation of negligence of fellow servants

which, on the trial, was resolved into the alleged act of Bouton in painting the pole directly underneath plaintiff.

This of itself was not negligence (Case, pp. 168, 239), but even though it were, it was not shown to have been the proximate cause of plaintiff's injury. Plaintiff, both in his direct examination (Case, p. 132) and in his cross-examination (Case, p. 146) stated that he put his foot down into the angle of the cross-piece, had fastened his life-belt, and was reaching up for the paint pot, when he fell, and Gilberti, who claimed to have witnessed the accident, related it in the same manner (Case, pp. 59, 64). If he had slipped when he first put his foot on the angle iron, it might be contended that the wet paint had caused him to slip; but it is to be observed that he did not fall until after he had firmly placed himself in the angle iron, had proceeded to fasten the life-belt, and had reached for the paint pot above him. And then he was down several angle irons in the wet paint (Case, pp. 165, 166).

By that time he must have become aware of the wet paint there, if it was wet, in which event he must be taken to have assumed the risk resulting from its presence.

Boldt v. *P. R. R. Co.*, 245 U. S. 441.

Or, if it was not there, then his losing his footing was a risk which he assumed, for the pole itself formed its own ladder, and the only way to get up and down it was by means of the cross angle irons (Case, p. 63, 114).

The burden was on plaintiff to show the negligence alleged.

Richey, Fed. Emp. Liability (2nd Ed.) p. 303, Sec. 148.

II.

Defendant was entitled to have the jury answer the questions submitted (Case, p. 20). Rule 110 of the Supreme Court provides as follows:

> "110. The court may request the jury to return answers to written questions embracing the disputed facts in issue and the amount of damages. The questions and answers shall be entered upon the minutes and the court may enter a general verdict. In case of a rule to show cause for a new trial, or an appeal, a statement of the case, including the questions and answers, shall be prepared and filed, and shall have the effect of a special verdict. In considering the case upon review, the court may draw inferences of fact. (Rule 70, Pr. Act, 1912.)"

The trial Court (Case, p. 21) "in the exercise of its discretion" declined to present them or require them to be answered.

While the rule is directory in terms, it is mandatory in effect.

> "Where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to its aid, and who would otherwise be remediless."

Rock Island County v. *U. S.*, 4 Wall, 435.
Henry's Motion, 15 Ct. Cl. (U. S.) 166,
where the Court said:

"Where a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*, Rex v. Barlow, 2 Salk. 609; and when a statute confers authority to do a judicial act in a prescribed case it is imperative on the court to exercise the authority when the case arises."

See also,

Davidson v. *Davidson*, 17 N. J. Law, 171;
Vineland v. *Denoflio*, 74 N. J. Law, 326;
where the Court said:

"A settled canon of construction is that where a statute directs the doing of a thing for the sake of justice or public good, the word 'may' will be construed as mandatory."

N. Y. C. R. R. Co. v. *Banker*, 224 Fed. Rep. 351;
U. P. v. *Hadley*, 247 U. S. 330; 62 L. Ed. 751.

Had this been done, the Court could have determined to what extent the jury considered and applied Section 3 of the Federal Act under which the suit was brought, and the unreasonableness of the verdict (even in its reduced form) demonstrates that a definite right of the defendant was thus denied it, under both the Federal and the State procedure.

III

Both plaintiff and defendant were not engaged in Inter-State Commerce at the time of the occurrence of the injury complained of.

The mere painting of the pole was not commerce. The pole would have performed its function, and the trains would have run, just the same whether the pole was painted or not. The chief object in painting it was to improve its appearance. Its utility was in no wise affected. The act was too remote from the transportation to bring it within the purview of the statute.

Sou. Pac. Ry. Co. v. *I. A. C.*, 171 Pac. Rep. 1071;
Jackson v. *Ind. Bd. of Ill.*, 280 Ill., 526;
B. & O. R. R. v. *Branson*, 128 Md., 678; reversed in 242 U. S. 623, on authority of
M. & St. L. Ry. Co. v. *Winters*, 242 U. S. 353;
C. B. & Q. v. *Harrington*, 241 U. S., 177;
Shanks v. *D. L. & W.*, 239 U. S., 556;
D. L. & W. v. *Yurkonis*, 238 U. S., 439.

In *B. & O.* v. *Branson*, 128 Md., 678; reversed in 242 U. S., 623; 61 L. ed., 534; the declaration alleged that plaintiff was engaged in painting engines and cars used in the hauling of commodities between the States of the United States, and the Court, in commenting on the allegation said, that plaintiff was injured while "engaged in painting cars and engines of the defendant company used by it in the transporting of commodities and commerce through and between the States."

The Maryland Court of Appeals held that plaintiff was engaged in inter-state commerce when injured, but the Supreme Court of the United States reversed the Maryland Court of Appeals, in a memorandum opinion on the authority of

M. & St. L. v. *Winters*, 242 U. S., 353; 61 L. Ed. 358;

C. B. & Q. v. *Harrington,* 241 U. S., 177; 60 L. Ed., 941;
Shanks v. *D. L. & W.,* 239 U. S., 556; 60 L. Ed. 436;
D. L. & W. v. *Yurkonis,* 238 U. S., 439; 59 L. Ed., 1397.

See also,

M. & St. L. v. *Nash,* 131 Minn., 166; 242 U. S., 619;
Ill. Cent. v. *Cousins,* 126 Minn. 172; 241 U. S., 641;
Vollmers v. *N. Y. C.,* 223 N. Y., 571;
Killes v. *Gt. N. Ry. Co.,* 161 Pac. Rep., 69.

The presumption is that the commerce was intra-state, not inter-state. The burden is on plaintiff to establish the inter-state character of his employment.

Osborn v. *Gray,* 241 U. S., 16;
Richey, Fed. Emp. Lia. (2nd Ed.) p. 303, Sec. 148.

In *Jackson* v. *Industrial Board of Ill.,* 280 Ill., 526, the railroad had in its employ a gang of painters, including the deceased, "who painted buildings, bridges, and everything required to be painted along the railroad from Terre Haute to Chicago, and from Brazil, Ind., to LaCrosse, Ind." They had with them a bunk car, in which they slept, and all tools, etc. On the day of the injury, "all the gang except the foreman and the cook were engaged in painting the outside of a two-story interlocking tower" which operated the lines of the inter-state highway. Deceased had gone down the track to obtain a fresh supply of paint and was on his way back to the tower on a

"speeder" when he was hit by an inter-state train. He was in the act of removing the "speeder" from the track so that this train might pass. It was contended that he was therefore in the act of removing an obstruction to inter-state commerce when injured, but the Court, in denying this contention, and holding that he was not engaged in inter-state commerce at the time of his injury, said:

> "It is the employment that determines whether or not the injury to the employee is within the purview of the act, and not the act of the employee just at the time of his injury. The employment of the deceased was in painting, as already set forth in this opinion, and not in removing the speeder or an obstruction from in front of said train."

In *Ill. Cent.* v. *Cousins,* 126 Minn., 172, reversed by Supreme Court in 241 U. S., 641; 60 L. Ed. 1216; the plaintiff was injured by negligence of fellow employe while wheeling a barrow of coal to heat the shop in which other employes were engaged in making repairs to cars that had been and were to be used in inter-State commerce. The Minnesota Court held that he was engaged in inter-State commerce, but the Supreme Court of the United States reversed that Court on the authority of

D. L. & W. v. *Yurkonis,* supra;
Shanks v. *D. L. & W.,* supra.

In *Sou. Pac.* v. *I. A. C.,* 171 Pac. Rep., 1071, the facts were very similar to the case at bar, except that plaintiff was injured by coming in contact with the 11000 volts alternating current wire while in the act of repairing or cleaning some portion

of the apparatus, he being a lineman, employed for that purpose. The current was transformed and used by the same system as outlined supra in the present case.

The California Court of last resort held that plaintiff was not engaged in inter-State commerce when injured. There the lineman thus engaged in wiping the insulators on the power line transmitting the alternating current from the main power house to the sub-station of the electric inter-State railroad, where it was transformed into direct current for use in the motors, was held not to be within the Federal Act for the reason that his connection with inter-State commerce was too remote.

In *Vollmers* v. *N. Y. C.*, 223 N. Y., 571, the plaintiff was injured while employed as a plumber in inspection and repair of a passenger station at Hillsdale, then in use by the railroad as an instrumentality of inter-state commerce. The Workmen's Compensation Board dismissed the claim for compensation on the ground that deceased was engaged in interstate commerce when injured. The Court of Appeals reversed that determination holding that he was not engaged in inter-state commerce, on the authority of *Shanks* v. *D. L. & W.* supra.

In *Nash* v. *M. & St. L. R. Co.*, 131 Minn. 166; reersed by U. S. Supreme Court in 242 U. S. 619, 61 L. Ed. 531; the Supreme Court of Minnesota held that a section hand, assisting in moving an outhouse which was to be used as an appendage to a station provided for the accommodation of interstate as well as intrastate passengers, was engaged in interstate commerce; but this was reversed in the Federal Supreme Court.

In *Shanks* v. *D. L. & W.*, 239, U. S., 556; 60 L. Ed. 436, the Court said:

> "Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in *usable condition* a roadbed, bridge, engine, car, or other instrument when in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines, some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the Yurkonis Case, was too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce within the meaning of the Employers' Liability Act."

In *Killes* v. *Great Northern Railway Co.*, 161 Pacific, 69 (Washington Supreme Court, Nov. 22, 1916), Killes was laying planks of a scaffold on stringers laid across the rafters of the railway's freight shed used for handling interstate commerce. From the scaffold, Killes with others was to paint the ceiling of the shed. A stringer broke while he was trying to brace it and he fell and was injured. Considering the freight shed an instrumentality of interstate commerce, the Court said:

> "But it does not follow that the building of a scaffold to be used in the painting of an interstate commerce freight shed bears such a relation to the movement of interstate

freight, or is such an integral or necessary part thereof as to make such work fall within any definition or test or interstate commerce that has up to this time been announced."

Noting cases in which the repair of shops, roundhouses, stations and outhouses has been held employment in interstate commerce, the Court considered Killes' preparatory task of constructing a scaffold "at least one step removed from any connection with interstate commerce or any of its instrumentalities either directly or indirectly."

IV.

The Federal Statute was not intended to apply to casual employment. Its intention was to regulate the affairs of the large body of permanent employees in the operation of inter-state railroads, and plaintiff does not come within the purview of the statute.

So it is stated in the Report of the House Judiciary Committee on the Act of 1908

"It is thought that the adoption of the rule, as provided in this section, will be conducive to greater care in the operation of railroads."

See, Roberts "Injuries to Interstate Employees on Railroads" (1st. Ed., 1915) at page 332.

St. L. I. M. & S. v. Conley, 187 Fed. Rep. 949, at 952.

And in *El Paso & N. E. R. R. Co.* v. *Gutierrez*, 216 U. S., 87; 54 L. Ed., at page 111; Mr. Justice Day, speaking for the Supreme Court of the United States, said:

"When we consider the purpose of Con-

gress to regulate the liability of employer to employee, and its evident intention to change certain rules of the common law which theretofore prevailed as to the responsibility for negligence in the conduct of the business of transportation," etc.

So, also, in the Second Employers' Liability Cases, 223 U. S., 1; 56 L. Ed. 327; Mr. Justice Van Devanter, in discussing an objection to the validity of the Act, said:

"But this is a mistaken theory in that it treats the source of the injury rather than its effect upon interstate commerce as the criterion of congressional power."

And Richey, in his "Federal Employers' Liability" (2nd. ed., 1916), at page 5, in commenting on this decision, says:

"The criterion, therefore, is not whether the agency or employee inflicting the injury was engaged at the time in interstate commerce, but the effect of the negligent act or omission upon such commerce."

The title to the Act (supra) specifically limits its application to "certain cases."

It is this principle, we contend, that has moved the Courts, in cases cited and discussed herein, to hold that the Federal Act did not apply, and that should move the Court in the case at bar to so rule.

Other cases in which it plainly appears are these:

In *Kelly* v. *P. R. R.*, 151 C. C. A., 171; 238 Fed. Rep., 95 (3rd. Circt.), it was held that a carpenter making repairs to a coal chute and a round house used for both kinds of business, intrastate and in-

terstate, was not employed in interstate commerce.

In *Galveston H. & S. A. Ry. Co.*, v. *Chojackny*, 163 S. W. Rep. (Tex. Civ. Ap.) 1011, it was held that a gardner employed by a common carrier by railroad of inter-state commerce in taking care of the depot premises and burning trash gathered in the yard was not engaged in inter-state commerce.

And in *Gt. Northern Ry.* v. *King*, 165 Wis., 159, it was held that a janitor breaking up coal for a furnace in the general office of a railroad company engaged in interstate commerce was not thereby employed in interstate commerce.

Patchman - N. Y. C. v. White, 243 U.S. 188. 61 L. Ed. 667.

V.

The non-suit should have been granted. or a verdict directed in favor of defendant, or the action dismissed for want of jurisdiction.

(Case, p. 282, lines 10-20.)

VI.

It is respectfully submitted that the judgment under review should be reversed, set aside and for nothing holden, and judgment directed to be entered in favor of defendant, or the suit dismissed.

VREDENBURGH, WALL & CAREY,
Of counsel with Defendant-Appellant.