Return to
FILE COPY
Clerk, Supreme Court of Appeals
Richmond, Va.

202 VA 747

Records Nos. 5230, 5231

In the Supreme Court of Appeals of Virginia at Richmond

APPALACHIAN POWER COMPANY
v.
J. AUBREY MATTHEWS, ADMR., ETC.

HOME AND AUTO SUPPLY COMPANY, INC.
v.
J. AUBREY MATTHEWS, ADMR., ETC.

FROM THE CIRCUIT COURT OF SMYTH COUNTY

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5230

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 5th day of October, 1960.

APPALACHIAN POWER COMPANY, Plaintiff in Error,

against

J. AUBREY MATTHEWS, ADMR., ETC., Defendant in Error.

From the Circuit Court of Smyth County

Upon the petition of Appalachian Power Company, a writ of error and *supersedeas* is awarded it to a judgment rendered by the Circuit Court of Smyth County on the 20th day of May, 1960, in a certain motion for judgment then therein depending wherein J. Aubrey Matthews, Administrator of the Estate of Gilbert David Heath, deceased, was plaintiff and the petitioner and another were defendants.

And it appearing that a suspending and *supersedeas* bond in the penalty of twelve thousand dollars, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5231

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 5th day of October, 1960.

HOME AND AUTO SUPPLY COMPANY, INC.,
Plaintiff in Error,

against

J. AUBREY MATTHEWS, ADMR., ETC., Defendant in Error.

From the Circuit Court of Smyth County

Upon the petition of Home and Auto Supply Company, Inc., a writ of error and *supersedeas* is awarded it to a judgment rendered by the Circuit Court of Smyth County on the 20th day of May, 1960, in a certain motion for judgment then therein depending wherein J. Aubrey Matthews, Administrator of the Estate of Gilbert David Heath, deceased, was plaintiff and Appalachian Power Company and the petitioner were defendants.

And it appearing that a suspending and *supersedeas* bond in the penalty of twelve thousand dollars, conditioned according to law has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

* * * * *

MOTION FOR JUDGMENT.

To Appalachian Power Company and Home & Auto Supply Company, Inc.

The undersigned hereby moves the Circuit Court of Smyth County, Virginia for judgment against you and each of you in the sum of THIRTY THOUSAND ($30,000.00) DOLLARS, which amount is due by you and each of you to the undersigned on account of the following facts and circumstances:

1.

On or about the 6th day of April, 1959, you, the said Appalachian Power Company, was operating a business of supplying electric power in and about the Town of Marion, Smyth County, Virginia and other places, for hire, reward and profit, and in the course of your business you had set poles and erected and maintained overhead metal wires for the transmission of electric current on, over and through the streets and alleys and others places in the Town of Marion, Smyth County, Virginia.

2.

And at the same time you, the said Home & Auto Supply Company, Inc., were engaged in the business of
page 2 } distributing television signals by the use of metal wires attached to the poles of the said Appalachian Power Company at various places and along, over and through certain streets and alleys and over certain lots of land in the Town of Marion, Smyth County, Virginia, which business was carried on by you for hire, reward and profit.

3.

On the same day, to-wit, the 6th day of April, 1959, the said Gilbert David Heath, while working for one Brodie Thompson in and about the erection and construction of a certain building for the said Brodie Thompson at and near the intersection of South Church Street and a 12-foot alley, 186 feet South of and parallel with Cherry Street, on the property of the said Brodie Thompson which said building was

being built and erected adjoining the said 12-foot alley and South Church Street at and near the point where you, the said Appalachian Power Company, had erected and maintained metal wires and poles for the transmission of electric current and you, the said Home and Auto Supply Company, had erected and maintained metal wire for the transmission of television signals.

4.

That at the time of the beginning of construction of said building you, the said Appalachian Power Company, had notice that the building of the said Brodie Thompson would be erected at the edge of said 12-foot alley and that a wall thereof would adjoin said 12-foot alley near the point where your electrical transmission lines and poles were then and there placed and that the workers employed in the erection of said building would be working in close proximity to said high voltage electrical lines, which were then and there negligently left uninsulated.

page 3 }

5.

And you the said Home & Auto Supply Company likewise had notice that your signal transmission wires were also in close proximity to said building and was across the lot on which said building was being erected and that workers thereon would come in close proximity to said wire as the walls of the building were being raised.

6.

That on the said 6th day of April, 1959 while the undersigned's deceased was working on said building and while you and each of you had notice of construction of said building and that said employees were working in close proximity to your said wires you had negligently and carelessly not removed the same or taken steps to insulate said wires and while the undersigned's deceased was moving the signal transmission wire of you, the Home & Auto Supply Company from over said building to attach the same to a cross arm of the pole of the Appalachian Power Company, he accidentally came into contact with one of the uninsulated high voltage wires of you, the Appalachian Power Company which was used by you in the transmission of your electric power and by reason of touching and coming into contact with said wire the undersigned's deceased was electrocuted and thrown from said building and killed.

7.

That you and each of you, the said defendants, knew or should have known that the undersigned's deceased and other employees would be working on said building in close proximity and in easy reach of your wires, and it then and there became and was your duty to insulate said wires or to move the same and your poles and cross arms from the close proximity of said building or over the lot where said
page 4 } building was being constructed in order to avoid injury or death to persons working on said building, but notwithstanding your duty and your knowledge of the unsafe conditions and placement of your wires and the fact that the wires of you, the Appalachian Power Company were uninsulated, you negligently, carelessly and recklessly kept and maintained said wires in an uninsulated condition attached to a pole in close proximity and over the lot on which said building was being erected so that workers thereon were likely to touch or come in contact with said wires; and you, Home and Auto Supply Company notwithstanding your knowledge of the construction of said building, allowed your signal transmission wires to be negligently, carelessly and recklessly maintained on, over and upon said building being then and there constructed, and by reason of the negligence, carelessness and recklessness of you, and each of you, the undersigned's deceased was electrocuted and killed by reason thereof.

8.

On account of all of which judgment is asked against you and each of you for the said sum of THIRTY THOUSAND ($30,000.00) DOLLARS.

J. AUBREY MATTHEWS, ADMINISTRATOR OF THE ESTATE OF GILBERT DAVID HEATH, DECEASED
By Counsel.

RALPH L. LINCOLN
Marion, Virginia.

J. AUBREY MATTHEWS
Marion, Virginia
Counsel for Plaintiff.

Filed this 21 day of March 1960.

LLOYD E. CURRIN, Clerk.

* * * * *

page 7 }

* * * * *

DEMURRER.

The defendant, Home & Auto Supply Company, Inc., says that the motion for judgement is not sufficient in law.

HOME & AUTO SUPPLY COMPANY
By Counsel.

FRANCIS W. FLANNAGAN
Attorney for Home & Supply Company, Inc.

Filed this 5 day of April 1960.

LLOYD E. CURRIN, Clerk.

* * * * *

page 8 }

* * * * *

DEMURRER.

The defendants, Appalachian Power Company, says that the motion for judgment is not sufficient in law.

APPALACHIAN POWER COMPANY
By Counsel.

FRANCIS M. HOGE
Marion, Virginia

RALPH R. REPASS
Marion, Virginia
Counsel for Appalachian Power Company.

Filed April 11, 1960.

RUTH ALLEN, Deputy Clerk.

* * * * *

page 9 }

* * * * *

The defendants, Appalachian Power Company and Home & Auto Supply Company, for their Grounds of Demurrer state, pursuant to order of the Court:

1. The Motion for Judgment shows the plaintiff is guilty of contributory negligence as a matter of law.
2. The motion for judgment fails to show any duty owed by defendants to plaintiff, or any breach thereof.
3. The motion for judgment fails to show the defendants here guilty of any negligence in this action.
4. The motion for judgment fails to show that plaintiff has a right to maintain this action.
5. There is a misjoinder of parties.

HOME & AUTO SUPPLY
COMPANY
By FRANCIS W. FLANNAGAN
Attorney.

APPALACHIAN POWER CO.
By FRANCIS M. HOGE
RALPH R. REPASS
Counsel.

Filed this 25 day of April 1960.

LLOYD E. CURRIN, Clerk.

* * * * *

page 11 }

* * * * *

Circuit Court of the County of Smyth, on Monday, the 25th day of April in the year of our Lord, Nineteen Hundred and Sixty and in the One Hundred and Eighty-Fourth year of the Commonwealth.

* * * * *

This day came all parties by counsel and the defendant submitted to the Court the separate demurrer of each defendant.

On motion of plaintiff, it is ordered that defendants in writing file the grounds of the demurrers. Thereupon the defendants filed grounds for the demurrers; said demurrers were argued by counsel.

Upon consideration the Court doth overrule each demurrer, to which action each defendant excepts.

Defendants filed motion that plaintiff provide a bill of particulars setting out the items mentioned in said motion. Upon consideration, it is ordered that plaintiff shall file a bill of particulars setting forth (1) The specific acts of negligence as to each defendant. (2) In what capacity Gilbert David Heath was working for Brodie Thompson, at the time of the accident, and (3) the persons on whose behalf this action is maintained; which said bill of particulars shall be filed within five days and defendants shall file their responsive pleadings within five days thereafter; and this case is set for trial May 17, 1960.

* * * * *

page 13 }

* * * * *

BILL OF PARTICULARS.

Plaintiff for his Bill of Particulars in this action says:

1.

(a) The Appalachian Power Company was negligent in permitting its uninsulated high voltage line or wires to remain over, near and in close proximity to the walls of the Brodie Thompson building as the same was being constructed and after it knew that said building was being erected and that men would be working thereon.

(b) The Home & Auto Supply Company, Incorporated was negligent in permitting its wires to extend across the lot of the said Thompson and over his building, at a low height, after it knew, or with reasonable diligence should have known, that said building was in process of construction and men would be working thereon, and while the said company maintained said wire without any easement or right of way over said land.

2.

Gilbert David Heath was employed by Brodie Thompson as an hourly employee doing general work as directed in and about his tire and other businesses and in and about the construction of said building, and he had been so employed prior to the beginning of construction of said building.

3.

This action is brought by the duly qualified Administrator of the Estate of Gilbert David Heath, on behalf of Margaret N. Heath, widow, and Franklin Heath, son of the said Gilbert David Heath, they being the sole heirs at law of page 14 } the said Gilbert David Heath, deceased.

J. AUBREY MATTHEWS,
ADMINISTRATOR OF THE ESTATE OF GILBERT DAVID HEATH, DECEASED
By Counsel.

Counsel for plaintiff:

RALPH L. LINCOLN
J. AUBREY MATTHEWS

Filed April 30, 1960.

RUTH ALLEN, Deputy Clerk.

* * * * *

page 15 }

* * * * *

DEMURRER AND GROUNDS OF DEFENSE.

DEMURRER.

The defendant, Appalachian Power Company, by counsel, says that the bill of particulars filed herein by the plaintiff is not sufficient in law.

GROUNDS OF DEFENSE.

For answer and grounds of defense to the motion for judgment, the defendant, Appalachian Power Company, by counsel, says:

1. The allegations in paragraph 1 of the motion for judgment are admitted.
2. The allegations in paragraph 2 in so far as they relate to the defendant, Appalachian Power Company, are admitted.
3. The allegations of paragraph 3 in so far as they relate to this defendant are admitted.
4. The allegations in paragraph 4 of the motion for judgment are denied.
5. The allegations contained in paragraph 6 are denied in so far as they relate to this defendant.
6. The allegations in paragraph 7 of the motion for judgment are denied.

page 16 } 7. This defendant denies that it is liable to the plaintiff in the amount of $30,000.00 or in any amount.

8. The allegations in paragraph 1 of the bill of particulars filed by the plaintiff in so far as they relate to this defendant are denied.
9. Plaintiff's decedent was guilty of contributory negligence proximately causing or contributing to his death.
10. It was not foreseeable that Gilbert David Heath would come in contact with the wires of this defendant.

APPALACHIAN POWER COMPANY
By Counsel.

FRANCIS M. HOGE
Marion, Virginia.

RALPH R. REPASS
Marion, Virginia
Counsel for Appalachian Power Company.

Filed this 5 day of May 1960.

LLOYD E. CURRIN, Clerk.

* * * * *

page 17 }

* * * * *

DEMURRER.

This defendant says that the bill of particulars filed herein by plaintiff is not sufficient in law.

GROUNDS OF DEFENSE.

For its grounds of defense to plaintiff's motion for judgement and bill of particulars, defendant, Home & Auto Supply Company, Inc. states:

1.

The allegations contained in paragraph 2 of plaintiff's motion for judgement are admitted.

2.

The allegations contained in paragraph 3 of said motion for judgement, insofar as they apply to this defendant, are admitted except the allegations regarding a 12 foot alley, which allegations are neither admitted nor denied.

3.

The allegations of paragraph 5 of said motion for judgement are denied.

4.

All allegations contained in paragraph 6 of said motion for judgement, insofar as they apply to this defendant, are denied, except it is admitted that Gilbert David Heath was moving the signal transmission wire from one point
page 18 } on the pole of Appalachian to another point on said pole.

5.

The allegations contained in paragraph 7 of said motion for judgment, insofar as they apply to this defendant, are denied.

6.

This defendant denies that it is liable to plaintiff in the amount of $30,000.00, or in any amount.

7.

This defendant denies all allegations contained in paragraph (b) of plaintiff's bill of particulars.

8.

Plaintiff's decedent was guilty of negligence proximately causing or contributing to his accident and death.

9.

There is no causal connection between the alleged negligence of this defendant and the death of Gilbert David Heath.

10.

It was not forseeable that Gilbert David Heath, or anyone, would attempt to move the transmission wire of this defendent.

HOME & AUTO SUPPLY
COMPANY, INC.
By Counsel.

FRANCIS W. FLANNAGAN
Reynolds Arcade Building
Bristol, Virginia
Attorney for Home & Auto
Supply Company, Inc.

page 19 }

* * * * *

Received and filed, this the 7 day of May, 1960.

LLOYD E. CURRIN, Clerk.

page 20 }

* * * * *

GROUNDS OF DEMURRER OF HOME & AUTO SUPPLY COMPANY, INC.

For its grounds of demurrer to the bill of particulars filed

herein by plaintiff, defendant, Home & Auto Supply Company, Inc., states:

1. Said bill of particulars, together with plaintiff's motion for judgment fails to state a cause of action against this defendent.
2. Said bill of particulars together with plaintiff's motion for judgment fails to show any causal connection between the negligence and the death of plaintiff's intestate.

HOME & AUTO SUPPLY
COMPANY, INC.
By Counsel.

FRANCIS W. FLANNAGAN
Arcade Building
Bristol, Virginia.

Filed this 16 day of May 1960.

LLOYD E. CURRIN, Clerk.

* * * * *

page 23 }

* * * * *

DEMURRER.

Defendant, Home & Auto Supply Company, Inc. says that the amended bill of particulars filed herein by plaintiff is not sufficient in law for the reasons stated in the Grounds of Demurrer filed by this defendant on May 16, 1960.

HOME & AUTO SUPPLY
COMPANY, INC.
By Counsel.

FRANCIS W. FLANNAGAN
Arcade Building
Bristol, Virginia.

Filed this 17 day of May 1960.

LLOYD E. CURRIN, Clerk.

* * * * *

page 25 }

* * * * *

This day plaintiff moved the Court to amend its bill of particulars by adding paragraph numbered 1 (c).

"That said television wires of Home & Auto Supply Company were strung in close proximity to the high voltage wires of Appalachian Power Company, and while the deceased, Gilbert David Heath was working to remove said television wires, one of which was uninsulated, he came into contact with the high voltage Appalachian Power Company lines, and that the uninsulated wire of Home and Auto Supply Company contributed to the death of Heath by helping to conduct electricity through his body."

Said motion is accordingly granted and it is ordered that Plaintiff may amend his bill of particulars as herein set out.

Enter this the 16th day of May, 1960.

T. L. H., Judge.

* * * * *

page 51 }

* * * * *

At a pre-trial conference held on April 16, 1960, the attorneys for all parties being present, Home & Auto Supply Company, Inc. tendered its amended grounds of defense, and their being no objection from any of the parties, the same was ordered filed.

Thereupon defendants and plaintiff argued the demurrers filed to the bill of particulars by both defendants. Upon due consideration of which the court is of the opinion, and doth overrule said demurrers, to which action defendants except.

Thereupon certain pictures and drawings were shown to the court, indentified and marked by the clerk, and it was stipulated by all the parties that on a trial of this action same could be received in evidence without further proof.

During the argument on the demurrer by Home & Auto Supply Company, Inc. their counsel stated that there was no

allegation in the pleadings that the T. V. signal wire had any causal connection with the death of Heath, and during the statement of the issues by plaintiff, plaintiff stated that said wire, or wires, grounded Heath. Thereupon plaintiff moved to amend his bill of particulars to show that said T V wires contributed to the death of Heath by helping transmit the electric current through his body. Counsel for Home & Auto Supply Company, Inc. objected to said amendment. Upon due consideration of which said amendment was ordered filed, to which action Home & Auto Supply Company, Inc. excepted.

It was stipulated by all the parties that Gilbert David Heath, plaintiff's deceased, met death at approxi-
page 52 } mately 7:45 A. M., April 6, 1959, by electrocution, on the property of Brodie Thompson, Marion, Virginia.

Plaintiff asserted as an issue that Appalachian Power Company was negligent in locating and maintaing its pole in close proximity to the Thompson building, to which Appalachian Power Company objected as there is no such issue raised by the motion for judgment, or bill of particulars; the objection was overruled by the court and Appalachian Power Company, by counsel, excepted.

Enter, this 17th day of May, 1960.

T. L. H., Judge.

* * * * *

page 53 }

* * * * *

INSTRUCTION NO. P-1-A.

The Court instructs the Jury that a company maintaining electrical wires, over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others may have the right to go either for work, business or pleasure, to prevent injury. It is the duty of the company, under such conditions, to keep the wires perfectly insulated, and it must exercise the utmost care to maintain them in this condition at such places. And the fact that it is very expensive or inconvenient to so insulate them will not

excuse the company for failure to keep the wires perfectly insulated. So one who in the course of his employment is brought in close proximity to electrical wires, is not guilty of contributory negligence by coming in contact therewith, unless done unnecessarily or without proper precautions for his safety.

Granted.

T. L. H.

page 54 }

* * * * *

INSTRUCTION NO. P-1-D.

The Court instructs the Jury that it is the duty of companies engaged in the transmission of high voltage electric current to use reasonable care to inspect its lines and to remedy situations of danger where the same are known, or by the use of reasonable diligence should be known; in places where high voltage wires are maintained in close proximity to persons rightfully at work near such wires.

Granted.

T. L. H.

* * * * *

page 58 }

* * * * *

INSTRUCTION NO. P-8.

The Court instructs the jury that a company engaged in the distribution of television signals must use reasonable care to maintain and inspect its lines and appliances and remedy situations of danger, if any, where the same are known, or by the exercise of reasonable diligence should have been known, and if you believe from a preponderance of the evidence that Home & Auto Supply Company, Inc. failed to exercise reasonable care in permitting its T. V. cable to remain on or closely adjacent to the top of the building in such

manner as to constitute a hazard to workers on said building after it knew or by the use of reasonble diligence should have known of the construction of said building, then you are told that Home & Auto Supply Company was guilty of negligence.

Granted.

T. L. H.

* * * * *

page 69 }

* * * * *

INSTRUCTION NO. D-4.

The Court instructs the jury that if you believe from the evidence that Gilbert David Heath knew the location of the high tension wires of Appalachian Power Company over the Thompson building, that Gilbert David Heath was warned to avoid contacting such wires, that Gilbert David Heath wired the television cable to the cross arm on the electric power pole and that immediately thereafter he removed his gloves and took hold of the television cable and the uninsulated electric wire with his hands, you must find your verdict for the defendants.

Refused.

T. L. H.

page 70 }

* * * * *

INSTRUCTION NO. D-5.

The Court instructs the jury that if you believe from a preponderance of the evidence that Appalachian Power Company, through its agents and employees, did not know and, in the exercise of reasonable care should not have known, that the Thompson building was being erected to such height that a person could reach the uninsulated jumper wire on the power company pole from the roof of the building, then your

verdict should be for the defendant, Appalachian Power Company.

Refused.

T. L. H.

page 71 }

* * * * *

INSTRUCTION NO. D-4-1.

The Court instructs the jury that if you believe from the evidence that Gilbert David Heath knew the location of the high tension wires of Appalachian Power Company over the Thompson building, that Gilbert David Heath was warned to avoid contacting such wires, that Gilbert David Heath wired the television cable to the cross arm on the electric power pole and that immediately thereafter he removed his gloves and, with knowledge of the danger of electric current, took hold of the television cable and the uninsulated electric wire with his hands, you must find your verdict for the defendants.

Refused.

T. L. H.

* * * * *

page 80 } INSTRUCTION NO. D-A.

The Court instructs the jury that there can be no recovery of damages by the plaintiff against the defendant, Home & Auto Supply Company, Inc. unless the negligence charged in plaintiff's motion for judgment as causing Heath's death was the proximate cause of his death; that in order to warrant a finding by the jury that negligence is the proximate cause of an injury it must appear that the death complained of was the natural and probable consequence of the negligence, and that it ought to have been foreseen in the light of attending circumstances hence, if the jury should believe, from a preponderance of the evidence, that it was not, in the exercise of ordinary care, foreseeable that Heath would remove the T. V. cable of the defendants from its position on the pole of Appalachian's and raise that T. V. cable to a position in

closer proximity to the power line of Appalachian's and in so doing would touch an uninsulated wire of Appalachian's, then the court instructs the jury that the death of Heath was not the result that naturally and reasonably could be expected from the negligence; if any, of Home & Auto Supply Company, Inc., that it was not the natural and probable consequence of the negligence of the said Home & Auto Supply Company, Inc. and the jury cannot find any damages for the plaintiff against the said Home & Auto Supply Company, Inc.

Refused.

T. L. H.

page 81 } INSTRUCTION NO. D-E.

The Court instructs the jury that permission to string the T. V. Signal wires over the Thompson property need not be expressed in so many words, and need not be in writing. Permission may be implied from a course of conduct or relationship between the parties in which there is mutual acquiescence or lack of objection under circumstances signifying assent.

Refused.

T. L. H.

page 82 } INSTRUCTION NO. D-B.

The Court instructs that even though you may believe from the evidence that the defendents were guilty of negligence which was a proximate cause of the accident complained of, nevertheless if you further believe from the evidence that Heath was also guilty of negligence proximately contributing to his death, then your verdict must be for the defendants.

The law does not undertake to apportion or balance negligence of the parties where both are at fault, in order to ascertain which one is most in fault, but plaintiff is barred from recovery if Heath was guilty of any negligence which contributed in any efficient degree to his death.

Refused.

T. L. H.

page 83 } INSTRUCTION NO. D-G.

The Court further instructs the jury that the term "the preponderance of the evidence" does not necessarily mean the greater number of witnesses, but means the greater weight of the evidence or that degree of proof which you find more convincing and worthy of belief. The testimony of one witness in whom the jury has confidence may constitute a preponderance.

The jury are the sole judges of the weight to be given to the evidence and of the creditability of the witnesses. And in ascertaining the preponderance of the evidence and the creditability of witnesses, you may take into consideration the demeanor of the witness on the witness stand; his apparent candor or fairness; his bias, if any; his intelligence, his interest, or lack of it in the outcome of the case; his opportunity, or lack of it, for knowing the truth and for having observed the facts to which he has testified; any prior inconsistant statements by the witness if proved by the evidence; and from all these, and in taking into consideration all the facts and the circumstances of the case, you are to determine the creditability of witnesses and the preponderance of the evidence.

Refused.

T. L. H.

* * * * *

page 85 }

* * * * *

Circuit Court of Smyth County, on Tuesday, the 17th day of May in the year of our Lord, Nineteen Hundred and Sixty.

* * * * *

This day came J. Aubrey Matthews, Administrator of the Estate of Gilbert David Heath, in person and by his counsel, Ralph L. Lincoln; came also the defendant Appalachian Power Company, by its Attorneys Francis M. Hoge and Ralph R. Repass; came also the defendant Home and Auto Supply Company, Inc., by its Attorney, Francis W. Flannagan; came also John H. Spangler, Court Reporter who was duly sworn

to take down and transcribe the proceedings of this action.

And it appearing that the defendant Home and Auto Supply Company, Inc. has filed a demurrer herein on this date, and the Court having considered said demurrer doth overrule same. To the action of the court in overruling said demurrer the defendant Home and Auto Supply Company, Inc., by counsel excepted.

And upon the issue joined came a panel of thirteen persons who were selected by lot from the venire summoned for the trial of cases at this term of Court, who were examined and found free from legal exception and qualified in all respects to serve as jurors for the trial of this action. Thereupon counsel for plaintiff and counsel for defendants alternately struck off six of said jurors and the remaining seven jurors against whom no objections were found constituted the jury for the trial of this issue, to-wit: L. A. Brooks, W. H. Fullen, Walter W. Billings, Hugh M. Jones, Earle S. Horne, Clyde Burrows and Everett Duncan, who were sworn to well and truly try the issue joined between J. Aubrey Matthews, Administrator, plaintiff and Appalachian Power Company and Home and Auto Supply Company, Inc., defendants. Thereupon the evidence was introduced on behalf of the plaintiff, and when plaintiff had announced that he was through with his evidence in chief, with the exception of one witness to be heard out of turn, counsel for the defendant, Home and Auto Supply Company, Inc. out of the presence of the Jury moved the Court to strike the evidence of plaintiff on the grounds that the evidence disclosed no negligence on the part of Home and Auto Supply Company, Inc. and that the plaintiff was guilty of contributory negligence which was the proximate cause of his death, such motion being overruled by the Court, to the action of the Court in overruling said motion the defendant Home and Auto Supply Company, Inc., by counsel excepted. Thereupon the defendant Appalachain Power Company, by counsel, moved the Court to strike the evidence of the plaintiff on the grounds that no negligence had been shown on the part of the Appalachian Power Company and that the plaintiff decedent was guilty of contributory negligence which resulted in his death. Such motion being overruled by the Court, to the action of the Court in overruling said motion the defendant Appalachain Power Company, by counsel, after objecting and excepting to the Courts requiring the defendants to go forward with the introduction of their evidence, if they be so advised, prior to the conclusion of all evidence on behalf of the plaintiff, excepted. Thereupon certain evidence was intro-

page 86

duced on behalf of the defendant Appalachian Power Company and the hour for adjournment having arrived before the completion of said evidence, Court was adjourned until 9:00 A. M. May 18, 1960, after the Court having first advised the Jury not to discuss this case with anyone or permit anyone to discuss this case in their presence until they returned to Court and their Jury Box on the 18th day of May, 1960.

* * * * *

page 89 }

* * * * *

Circuit Court of Smyth County, on Thursday, the 19th day of May in the year of our Lord, Nineteen Hundred and Sixty.

* * * * *

This day came the same parties as on yesterday, came also the jury that was empanelled and sworn as of May 17, 1960, the Court Reporter previously sworn to take down and transcribe the proceedings of this action not being present on this date.

Thereupon the jury were sent to their room to consider of their verdict and after sometime returned into Court and presented their verdict in the following words, to-wit: "May 19, 1960, We the Jury find in favor of the plaintiff against Appalachian Power Company and Home and Auto Supply Company, Inc. for damages to be awarded to the widow in the amount of ($10,000.00) Ten Thousand Dollars, Signed Everett B. Duncan, Foreman." Thereupon said verdict was ordered received and the Jury was discharged from further consideration of this case. Thereupon the respective defendants by their respective counsel announced their intention of making motions to set aside the verdict of the Jury, upon consideration the Court doth direct that the defendants file their motions to set aside the verdict in writing and set the said motion for argument on May 20, 1960.

* * * * *

page 91 }

* * * * *

Comes now the defendant, Home & Auto Supply Company, Inc., and moves the court to set aside the jury verdict in this action and enter final judgment for the defendant, Home & Auto Supply Company, Inc., or order a new trial, for the following reasons:

1.

The verdict is *contray* to the law and the evidence and without evidence to support it.

2.

The court erred in refusing to sustain defendant's motion to strike the evidence for the reasons assigned in the record.

3.

The court erred in granting any instructions for the plaintiff and erred in granting instructions P-1-A, P-1-D, P-I-F P-I-E, and P-8, for the reasons assigned in the record and because same are plainly wrong.

4.

The court erred in refusing to grant instructions D-A, D-B, D-E, D-G, for the reasons assigned in the record and because same are plainly proper instructions in this action.

5.

The court erred in permitting introduction of evidence against the defendent regarding the notice Appalachian Power Company had of the Thompson building being constructed, and regarding conversations between officials of Appalachian Power Company and Brodie Thompson, or his employees.

page 92

6.

The court erred in permitting in evidence certain tables from the National Underwriters Code and permitting testimony as to the requirements under the National Underwriters Code regarding the erection of T. V. lines and power lines.

7.

The court erred in permitting evidence that the T. V. signal wire was moved following the accident.

8.

The court erred in permitting plaintiff to file an amended bill of particulars.

9.

The court erred in overruling the demurrers filed herein.

HOME & AUTO SUPPLY
COMPANY, INC.
By Counsel.

FRANCIS W. FLANNAGAN
Arcade Building
Bristol, Virginia.

Filed this 20 day of May 1960.

LLOYD E. CURRIN, Clerk.

* * * * *

page 93 }

* * * * *

MOTION TO SET ASIDE VERDICT.

To the Honorable Thomas L. Hutton, Judge of said Court:

The defendant, Appalachian Power Company, by counsel, moves the Court to set aside the verdict of the jury in the above case rendered May 19, 1960, and enter judgment for this defendant *non obstante veredicto* or award a new trial on the following grounds:

1. The verdict is contrary to the law and the evidence and not supported by the weight of the evidence.
2. Court improperly permitted evidence of precautions taken after the accident, including movement of the power pole, attachments and wires, to be considered by the jury.

3. The Court improperly permitted plaintiff's counsel to argue the evidence of precautions taken after the accident in support of proof of negligence on the part of this defendant.

4. The jury was permitted to see purported map of the scene as it existed after the accident and to observe the new location of the pole as shown thereon.

5. Debris near the scene of the accident as disclosed by a picture was improperly submitted to the jury and page 94 } the jury was permitted to speculate on the effect of such debris to contradict positive evidence that the decedent did not slip, fall or lose his balance.

6. Failure of the Court to sustain the several demurrers of this defendant filed herein.

7. Failure of the Court to sustain the several motions of this defendant to strike the evidence of plaintiff.

8. The granting of improper instruction for the plaintiff, No. P-1-A and No. P-1-D.

9. The refusal of the Court to grant proper instructions No. D-4, No. D-4-1 and No. D-5 for this defendant.

10. On the evidence at large the defendant was not guilty of any negligence that proximately caused or contributed to the death of the plaintiff's decedent.

11. On plaintiff's own evidence the decedent was guilty of contributory negligence which proximately caused or contributed to his death.

12. On the evidence at large the plaintiff's decedent was guilty of negligence which proximately caused or contributed to his death.

Respectfully submitted,

APPALACHIAN POWER COMPANY
By Counsel.

FRANCIS M. HOGE
Marion, Virginia.

RALPH R. REPASS
Marion, Virginia
Counsel for Appalachian Power Company.

Filed May 20, 1960.

RUTH ALLEN, Deputy Clerk.

page 95 }

* * * * *

Circuit Court of Smyth County, on Friday, the 20th day of May in the year of our Lord, Nineteen Hundred and Sixty.

* * * * *

This day came the respective parties by their respective counsel, thereupon counsel for the defendant Appalachian Power Company and Counsel for the defendant Home and Auto Supply Company, Inc. submitted their motions in writing to set the verdict of the Jury aside which was returned in this action on May 19. Thereupon the Court heard argument of counsel on said motions and at the conclusion of all of which it is the opinion of the Court and the Court doth so find that the motion of defendant Appalachian Power Company to set the verdict of the Jury aside be overruled and that the motion of defendant Home and Auto Supply Company, Inc. be overruled. To the action of the Court in overruling said motions the respective defendants, by their respective counsel, excepted.

It is accordingly ordered that the plaintiff do have and recover of the defendants Appalachian Power Company and Home and Auto Supply Company, Inc. the sum of Ten Thousand Dollars ($10,000.00) the amount ascertained by the Jury aforesaid and plaintiffs costs in this behalf expended.

Thereupon the respective defendants, by their respective counsel moved the Court to suspend execution of the aforessaid judgment for a period of ninety days to allow the defendants to appeal to the Supreme Court of Appeals for a writ of error, the judgment herein rendered, such motion

page 96 } being granted by the Court on condition that defendants or someone for them enter into a Suspension Bond in the penalty of $1,000.00 or a *Supersedeas* Bond in the penalty of $12,000.00 within 30 days from this date with surety to be approved by the Court or Clerk, conditioned according to law.

* * * * *

page 98 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR BY HOME AND AUTO SUPPLY COMPANY, INC.

NOTICE OF APPEAL.

You are hereby notified that the undersigned, Home and Auto Supply Company, Inc., will apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* from a final order and judgment entered in this case on the 20th day of May, 1960.

ASSIGNMENTS OF ERROR.

You are further notified that the undersigned will rely upon the following assignments of error:

1. The court erred in overruling the undersigned's motion to strike the evidence of plaintiff for the reasons assigned in the transcript of the evidence.

2. The court erred in not setting aside the verdict as contrary to the law and evidence and without evidence to support it, and in not entering final judgment for this defendant, or granting a new trial, but in entering judgment for the plaintiff, because the evidence wholly failed to show that this defendant was guilty of any actionable negligence and conclusively showed that the plaintiff's deceased was page 99 } guilty of negligence, as a matter of law, which proximately caused, or contributed, to his death.

3. The court erred in granting any instructions for the plaintiff and erred in granting instruction P-8 for the reason that there was no evidence to support same, and for other reasons assigned in the transcript; and in granting *instruct* P-1-E, dealing with the measure of damages, for the reason that there was no evidence to support a pecuniary loss to the son, and for other reasons assigned in the record.

4. The court erred in refusing to grant instructions D-A, D-B, D-E, and D-G.

5. The court erred in admitting the following evidence and in failing to instruct the jury to disregard such evidence insofar as this defendant was concerned:

(a) The evidence regarding the notice Appalachian Power Company had of the Thompson Building being erected adjacent to the power pole.

(b) Conversations between officials of Appalachian Power Company and Brodie Thompson, or his employees.

(c) The National Underwriters Code and testimony pertaining thereto.

(d) Evidence regarding the moving of the power pole following the accident.

6. The court erred in admitting the following evidence:

(a) The moving of the T V signal wire following the accident.

(b) The introduction of, and testimony regarding, the National Underwriters Code as applied to the erection and installation of T V signal lines on poles.

(c) The answers of Spangler to hypothetical questions found on pages 120 and 122 of the transcript because same were based on questions not imbodying all the facts, and the refusal of the court to permit cross examination along same lines at page 128 of the transcript.

7. The court erred in overruling the demurrers filed herein.

page 100 }

HOME AND AUTO SUPPLY COMPANY, INC.
By Counsel.

FRANCIS W. FLANNAGAN
Reynolds Arcade Building
Bristol, Virginia.

Received and filed, this the 7 day of July, 1960.

LLOYD E. CURRIN, Clerk.

* * * * *

page 102 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR BY APPALACHIAN POWER COMPANY.

NOTICE OF APPEAL.

You are hereby notified that the undersigned, Appalachian Power Company, will apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* from a final order and judgment entered in this case on May 20, 1960.

ASSIGNMENTS OF ERROR.

The undersigned will rely upon the following assignments of error:

1. The verdict is contrary to the law and the evidence and not supported by the weight of the evidence.

2. The Court improperly permitted evidence of precautions taken after the accident, including the moving of the power pole, attachments and wires, to be considered by the jury and the Court improperly permitted plaintiff's counsel to argue the evidence of precautions taken after the accident in support of proof of negligence on the part of this defendant.

3. The jury was permitted to see purported map of the scene as it existed after the accident and to observe the new location of the pole as shown thereon.

page 103 } 4. Debris near the scene of the accident as disclosed by a picture was improperly submitted to the jury and the jury was permitted to speculate on the effect of such debris to contradict positive evidence that the decedent did not slip, fall or lose his balance.

5. Failure of the Court to sustain the several demurrers of this defendant filed herein.

6. Failure of the Court to sustain the several motions of this defendant to strike the evidence of plaintiff.

7. The granting of improper instruction for the plaintiff, No. P-1-A and No. P-1-D.

8. The refusal of the Court to grant proper instructions No. D-4, No. D-4-1 and No. D-5 for this defendant.

9. On the evidence at large this defendant was not guilty of any negligence that proximately caused or contributed to the death of the plaintiff's decedent.

10. On plaintiff's own evidence the decedent was guilty of contributory negligence which proximately caused or contributed to his death.

11. On the evidence at large the plaintiff's decedent was guilty of *ngeligence* which proximately caused or contributed to his death.

12. The Court erred in denying the motion of this defendant to set aside the verdict and enter judgment for this defendant *non obstante veredicto* or award a new trial on the grounds stated in said motion.

APPALACHIAN POWER
COMPANY
By Counsel.

Margaret Heath.

FRANCIS M. HOGE
Marion, Va.

RALPH R. REPASS
Marion, Va.
Counsel for Appalachian
Power Company.

page 104 }

* * * * *

Received and filed, this the 14 day of July, 1960.

LLOYD E. CURRIN, Clerk.

* * * * *

page 4 }

* * * * *

MRS. MARGARET HEATH,
a witness of lawful age, called in behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

page 5 } By Mr. Lincoln:

* * * * *

page 7 }

* * * * *

Q. How far did your husband go in school, Mrs. Heath?
A. Sixth grade.
Q. And how tall was he?
A. Five foot six, or seven.

* * * * *

page 9 }

* * * * *

MR. BRODIE THOMPSON,

a witness of lawful age, called in behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Matthews:

Q. Your name is Brodie Thompson?

A. Yes, sir.

Q. I believe you live here in Marion, Mr. Thompson; is that true?

A. That's right.

Q. What is your business at the present time?

page 10 } A. Well, I am in the retail business—tires and farm machinery.

Q. Do you also have a recap shop?

A. Yes, sir.

Q. Where is your farm machinery *machinery* building and inventory located, Mr. Thompson?

A. Well, it faces Church St.

Q. Do you have a building that you use in this work?

A. Yes, sir.

Q. Where is this building located?

A. You mean in regard to Church St.?

Q. Church St., or anything else.

A. (Gesturing) There's an alley on this side—on the south side of the building.

Q. Now, Mr. Thompson, did you know Gilbert David Heath?

A. Yes, sir.

Q. Did he work for you?

A. Yes, sir.

Q. How long had he worked for you?

A. Well, off and on for several years, I guess.

Q. What was the nature of his employment?

A. He was a service man—what I call a "service man," that consisted of doing anything we had to do in our business—changing tires, or any other type of work

page 11 } that we had to do around our establishment.

Q. What's mainly his job—that of changing tires, and working with tires?

A. Well, not necessarily so.

Q. What else?

A. He drove the truck, and he could do most anything.

* * * * *

Brodie Thompson.

Q. What was that you saying about his employment?
A. I said that he was just a general service man around the establishment.
Q. What was his salary, Mr. Thompson?
A. I don't know; I'd have to get my record on that from our books we keep on salaries.
Q. Was he paid by the hour, or week?
A. Well, he was paid both, I say, both by the hour and by the week—I'd have to look it up to see exactly the scale that he was paid on.
Q. Was he killed while working for you, Brodie?
A. Yes, he was.
Q. What was he doing at that particular time?
page 12 } A. He was helping construct this new building where my farm machinery is now located.
Q. What type of building is that, Brodie?
A. That's a cinder block building.
Q. How many floors—
A. It's two floors.
Q. —or stories? What are the dimensions of that building?
A. To the best of my knowledge, it's 32 x 60.
Q. Are they the outside measurements on that building?
A. I think that's correct.

By the Court: (Interposing)
Q. What is it in height?
A. I don't know, your Honor, what the height is, exactly.
Q. Approximately?
A. I'd say 20 feet.

By Mr. Matthews: (Continuing)
Q. Have you measured it, Brodie?
A. No, I have not.
Q. The 32 feet—what position does that have in reference to the street?
A. That is kind of parallel to the street, I'd say—Church St.
Q. Does it measure 32 feet along Church St., or
page 13 } along the alley?
A. Along the alley.
Q. And extends back from the alley 60 feet?
A. Yes, it does.
Q. Now, Brodie, when was Mr. Heath killed around there, if you recall the date?

Brodie Thompson.

A. Some time in April; I don't know exactly what the date was.

The Court: Now, gentlemen, let's stop here. It was admitted yesterday, and again today, that the date of the accident was April 6, 1959—and refrain from asking that any further.
Mr. Matthews: Yes, sir.

Q. How long had your building been in the process of construction at the time of Mr. Heath's death?
A. I'd say 30 days—I'd say that now; that's not exactly, but approximately somewhere in that neighborhood.
Q. Now, before you began construction, or immediately thereafter, did you contact the Appalachian Power Co. concerning a guy on a pole that was located there?

Mr. Flannagan: Your Honor, this line of testimony would be objected to by Home & Auto Supply Co.
The Court: Well, the objection is overruled.
Mr. Flannagan: Save the exception.

page 14 } By the Court: (Interposing)
Q. The question was asked whether or not you contacted the Appalachian Power Co., and if so, for what purpose?
A. Yes, sir; I contacted them.
Q. When, and for what purpose? Proceed.
A. Well, to move a guy wire that was on the Appalachian pole.

By Mr. Matthews: (Continuing)
Q. And where was that guy wire in reference to where your building was located?

Mr. Flannagan: May it be understood that Home & Auto is objecting to all of these questions, and that the Court is overruling them.
The Court: Yes, sir.
Mr. Flannagan: We objecting to any of this conversation and transaction between Appalachian and Brodie Thompson as not being binding upon Home & Auto Supply Co.
The Court: Well, gentlemen of the jury, certainly this may be admitted as evidence against the Power Co. Now, Mr.

Brodie Thompson.

Flannagan is representing the Home & Auto Supply Co., who has the TV cable—and it would be hearsay, I take it—that's the grounds you're objecting on?

Mr. Flannagan: Yes, sir.

page 15 } The Court: As to the TV cable, or Home & Auto Supply? I'm going to overrule you on that because of a permit for the contract, or permission from Appalachian.

Mr. Flannagan: Save the exception.

By Mr. Matthews: (Continuing)

Q. Where was the guy wire located on your property, Brodie, in reference to your building?

A. To the best of my knowledge, it was about the rear corner of my building that I was going to erect.

Q. Had you already started the erection of the building?

A. No—I just made the measurements.

Q. Had you poured the foundation?

A. No.

Q. And were the measurements outlined there on the ground—was your building laid off on the ground?

A. Yes, sir.

Q. Did Appalachian representatives come there and see that?

A. Yes, sir.

Q. Did they move the guy?

A. Yes, sir.

Mr. Flannagan: I'm going to object on the grounds of leading, if not the other.

The Court: I don't think that's leading. Ob-
page 16 } jection overruled.

Q. With reference to the Appalachian power pole, where was your building laid off on the ground there, Mr. Thompson?

The Court: Which pole? The Appalachian has a million poles, more or less.

Q. The pole there at your—

The Court: Confine yourself to a particular pole at a particular location. Make your questions more definite.

Brodie Thompson.

A. It was erected, to the best of my knowledge, close to the center of the building—32 feet in that—more or less could be either way—could be a little bit, I mean, 15 or approximately that—I don't know exactly, a few feet of what the position was.

Q. How close was it to your wall there?

The Court: Now to what wall—the new wall?

Mr. Matthews: The 32 foot wall, new building.

Q. How close was it to your new wall under construction?

A. I couldn't say.

Mr. Hoge: We object to "what new wall"—it wasn't then under construction. The question is misleading.

The Court: Well, I think you ought to be more definite, so the jury may follow him.

Q. How close was this pole to the 32 feet measurement that you had laid off there on your grounds?

page 17 } A. I'd say approximately two feet—I don't know; it could be more or less; I didn't measure it—that's approximate.

Q. Was that pole located on your premises?

A. I do not think it was.

Q. Where was it located—on whose premises was it located?

A. I think it was located on the alley.

By the Court: (Interposing)

Q. Was the guy, Mr. Thompson, on this particular pole that the Power Co. moved?

A. Yes, sir.

By Mr. Matthews: (Continuing)

Q. Brodie, has that pole ever been moved since that time?

Mr. Repass: I object, your Honor.

The Court: Overruled.

Mr. Repass: Exception.

Q. The pole has been removed since that time?

A. Yes.

Q. When was it removed?

Brodie Thompson.

Mr. Repass: We object.
The Court: Overruled.
Mr. Repass: We except.

A. I do not remember when it was moved—that is, what date—a short time after the accident.

page 18 } Mr. Hoge: If your Honor please, I think we are required to state our grounds for this exception, if your Honor will give us an opportunity to state it for the record at the proper time.
The Court: You may state it.
Mr. Hoge: Mr. Repass made a study of that question.
The Court: Gentlemen, go to your rooms.

(The following took place out of the presence of the jury.)

The Court: Now, in the absence of the jury, you may state your grounds. He's already answered it, and I'm going to let him show the pole was moved. You admitted that yesterday.
Mr. Repass: We objected and excepted to the Court's ruling with reference to the question of whether or not the power pole has been moved since the accident, and if so, when it has been moved. Now, it is the view of the Appalachian Power Co. that this evidence as to moving of the pole after the accident is irrelevant; it is immaterial; and the only purpose that it could possibly serve in this trial is to introduce it in order to show, and to impress the jury with the thought that it was moved because it was not properly located to begin with, or because it was not in proper repair at the time of the accident, or because the Power Co.
page 19 } was negligent in setting the pole there, and leaving the pole there.

* * * * *

page 21 }

* * * * *

So we state the evidence-in-chief of this plaintiff, by introducing before the jury the fact that this pole was moved, and when it was moved after the accident, is not admissible; and the only purpose it would serve—it is not to rebut anything the defendant may introduce—but it is to use the re-

moval of the pole to another location to establish the fact that the Appalachian Power Co. negligently placed the pole there to begin with, and negligently left it there—and possibly go deeper into it and attempt to show by the mere moving and repair that something was wrong with the pole—all the way through—and the wire. There is no allegation in this case—there is not one allegation that's in the notice for motion—the motion for judgment, or in any pleading, bill of particulars or otherwise, that alleges that this pole was page 22 } negligently set there at this location—not one word has ever been alleged to that effect.

The Court: I disagree with that. We had that in the pre-trial on yesterday in the motion for judgment. The motion for judgment alleges that it was set—the location of the wires and poles as wrongfully. I don't think I care to hear any further, Mr. Repass. I am going to tell the jury that they can show that this was *per se* not evidence of negligence; it's a fact of the case, and shows the present location; and the burden's on the plaintiff to always prove negligence.

Mr. Repass: We except to your Honor's ruling.

Mr. Flannagan: Home & Auto Supply Co. also objects to the introduction of this evidence on the grounds already assigned by the Appalachian; and on the additional grounds that the evidence is not admissible against Home & Auto Supply Co.

The Court: Well, the rule of course is that anything which throws light on the question in controversy, the jury will have a right to consider. I am going to tell the jury the fact that the pole was changed to a different location is not *per se* evidence of any negligence on the part of the Power Co.—that's just a fact or circumstance of the case. I page 23 } asked you gentlemen about a view; one group wanted it; the other didn't want it, or indicated they might want it. And I don't know what the rule of the Court will be, or what the evidence will be. Certainly, if they have the view, the jury should be told the pole was changed to a new location. I'm going to instruct the jury expressly that the fact that the Power Co. has removed the pole for various and numerous reasons that one could imagine, and that the burden always remains upon the plaintiff to prove his case by a preponderance of the evidence; and the fact that the pole was removed was not *per se* evidence of negligence.

Brodie Thompson.

Mr. Flannagan: Exception by both defendants to the ruling of the Court.

(The jury returns to the courtroom).

The Court: Gentlemen of the jury, and gentlemen of counsel, an objection has been interposed to the question propounded as to the fact that a pole, some time shortly after this accident, had been moved to another location. I have permitted you gentlemen to hear that evidence. I am going to tell you that you have a right to consider that, but the fact that the pole was moved was not evidence *per se*—that is, *ipso facto*—of negligence, or that the Power Co.
page 24 } was negligent in placing this pole there in the first instance. I merely permitted that to go in to show the true state of facts. Some of you may pass by—you might see the pole; there may or may not be a view of the scene. The fact that the pole has been moved is not evidence in itself that the Power Co. was in any manner negligent in having the pole there. The burden of proof is upon the plaintiff to prove to the jury by a preponderance—that is the greater weight—of the evidence that the Power Co. was negligent, and the fact that the pole has been removed is not evidence in itself that the Power Co. was negligent—and with that understanding you may consider that evidence.

By Mr. Matthews: (Continuing)

Q. Mr. Thompson, did you do the recapping work for Appalachian Power?

Mr. Repass: We object.

The Court: I don't know that that's material.

Mr. Matthews: We think it's material to show, if he did, they were around that place where the building is.

The Court: You have shown they were around that place. I'll let you show the location of the pole.

Q. Were any of the employees of the Appalachian Power Co. around your premises there during the construction of this building?

page 25 } Mr. Repass: We object.

The Court: He said he didn't remember, and I guess that takes care of it. I'll let him show that, if they were there.

Brodie Thompson.

Q. Mr. Thompson, did Home Auto & Supply Co. have a right to go across your premises?
A. Easement?
Q. Easement. Had you given them an easement to cross it?

Mr. Flannagan: We object.

A. I did not.

Mr. Flannagan: We object to the question on the grounds it's immaterial, and on the grounds it calls for a conclusion of law of this witness.
The Court: The objection is overruled.
Mr. Flannagan: Save the exception.

A. I did not.

The Court: Explain what an easement is.

By the Court: (Interposing)
Q. Did you give him permission to extend this cable over your premises?
A. I did not.

Mr. Matthews: You may cross examine.
The Court: Just a minute. I'm going to tell the jury this one further thing—Gentlemen of the jury, there page 26 } are two defendants here—one the Power Co., and the other the Home & Auto Supply Co. The Court will make rulings, no doubt, throughout this case. Some of the evidence may or may not be admissible as to the Power Co., or to the other company. Keep in mind throughout the proceedings that there are two defendants.

CROSS EXAMINATION.

By Mr. Flannagan:
Q. Mr. Thompson, how long had Mr. Heath worked for you?
A. I'd say two or three years.
Q. Do you sell and install and repair television sets?
A. Yes, I do.
Q. Did Heath ever do any of this work?

Brodie Thompson.

A. Well, he's done some of it installing aerials.

Q. By installation of aerials do you mean he had hooked on to the wires of Home & Auto Supply Co.?

A. No, sir. He just put up aerials on homes.

Q. On homes?

A. Yes, sir.

Q. Did he work with electricity around your plant?

A. Well, I imagine so. See, we have a lot of it over there —we do all our recapping with electricity.

Q. During the entire time that Mr. Heath worked for you, was that pole of Appalachian's where it was at
page 26A } the time that Heath was killed?

A. Yes, sir; it was.

Q. It had the same electrical wires on it?

A. Yes, sir; to my knowledge, that's right.

Q. The same transformer?

A. Yes, sir; that's right.

Q. Would it be safe to assume that Heath knew that pole was there all—

Mr. Lincoln: I object.

The Court: I don't know whether he knows, or not—whether he can answer that question, or not. The pole's visible.

Mr. Flannagan: We'll withdraw the question, your Honor.

The Court: I think that's good.

Q. How long had this wire of Home & Auto been suspended on this pole, and across your property?

A. I don't know.

Q. Several years, had it?

A. I couldn't say; I don't even know—I don't know when it was put up, and I couldn't tell you—I just don't know.

Q. You knew it was there?

A. Not actually. I couldn't say I knew that that was the very line. If I had seen it, I would have thought it would have been a telephone, or electricity. I didn't pay any attention to it.

page 27 } Q. Had you granted any easement to the telephone company to go across there?

A. No.

Q. You knew that such a wire was across there, but you just didn't know what it was?

A. That's right.

Brodie Thompson.

Q. You made no objection to that wire?
A. Not a bit—I made no objections.
Q. In fact, you're interested in everyone in Marion having television, are you not?
A. I'm interested in television; yes, sir.
Q. Because you sell them?
A. Yes.
Q. You didn't attempt to inquire as to whose wire this was?
A. No, I did not.
Q. Now, when you started the construction of this new building, you knew that this wire would be right above this new building as it was raised, did you not?
A. Well, I didn't know what it was. But I didn't pay any attention to it. I didn't know that it was in the way when we got up there, and so—
Q. If anybody had looked they would have seen it, would they not?
A. That's right; you could see it, all right.
page 28 } Q. Did you ever call Home & Auto and ask them to move that wire?
A. No, I did not.
Q. Why not?
A. I didn't know it was in the way. I didn't even pay any attention to it—to the wire—to the position it was in.
Q. You didn't think there was any danger to any of your employees?
A. No, sir; I did not.
Q. Did you put up the building yourself, or have a contractor put it up?
A. No, I just supervised the building, with some of the other men that were there.
Q. You hired the men who worked on it?
A. Yes.
Q. So you were, then, in charge of the construction of this building?
A. To a certain extent, yes. I had some men there that drew up the plans and looked after it.
Q. Who were they?
A. Well, one of them was Glenn Reed Hilton.
Q. He was a regular employee of yours?
A. Yes, sir.

Brodie Thompson.

Q. Kelly Keesling—like he was a regular em-
page 29 } ployee?
A. Yes, sir. Two Halls worked on that building—from Rural Retreat.

Q. They had nothing to do with the management of the—in the construction of the building?

A. No.

Q. You hired them as carpenters and masons?

A. That's right.

Q. So that the only people that were in charge were your regular employees?

A. That's right.

Q. Now, did your regular employees, or people in charge, ever tell you that this wire of Home & Auto was in the way?

A. No.

Q. Did any of them, to your knowledge, ever request Home & Auto to move this wire?

A. Not to my knowledge.

Q. I believe you also had service in your old building from Home & Auto Supply Co., did you not?

A. That's correct.

Q. And you had no objection to them crossing your property?

A. Not a bit.

Q. In fact, it could be they asked you at one time if it was all right? Did they?

A. No, they did not.

page 30 } Q. You're positive of that?
A. Yes, sir.

Q. You made no objection?

A. No, no objection.

Q. Do you know why this Kelly Keesling, and the other man you said might have been in charge, did not call Home & Auto to move the wire?

A. No.

Q. Do you know why they had Heath move the wire?

A. I do not.

Q. Do you know the position of the wire on the pole before it was moved?

A. No, sir.

Q. Did I understand you correctly that you had started this building approximately 30 days before the death of Heath?

A. Well, I'd say around that. I don't know exactly the date.

Brodie Thompson.

Q. Could you tell us how long prior to the death of Heath the building—the walls on the building were as high as they were the day Heath was killed?

A. I don't believe I understand the question.

Q. Well, Heath, as I understand it, was killed on April 6th. Now, when did your building get to the height that it was on April 6th? Had it been a day before, or a couple

page 31 } of days before?

A. I imagine on the last day that they worked.

Q. On the last day that they worked? After the walls got to that height, they had laid all the roof rafters?

A. I think that's correct.

Q. Was that done in one day of work?

A. I wouldn't think so.

Q. So the walls had evidently been up more than a day before the accident?

A. I'd say so.

Q. You have any idea how long?

A. I wouldn't want to say—I just don't know how long.

Q. Who told the employees building that building just what to do, and when to do it, and where to do it, and the like?

A. Well, Mr. Hilton had charge of it, more or less, on the actual telling them what to do.

Q. That's the same Mr. Hilton who's a regular employee of yours?

A. That's right.

CROSS EXAMINATION.

By Mr. Repass:

Q. Mr. Thompson, was Mr. Heath a full-time employee throughout the construction of the building?

A. I don't know. I'd have to look at my records to see if he's on the payroll. Sometimes he wasn't on the

page 32 } payroll; sometimes he was—I'd have to look.

Q. Then throughout the two or three years, or three or four years, or whatever it was, that you have employed Mr. Heath, do I take it that he was not a full-time employee?

A. Yes, he'd be off a considerable length of time. I worked him right regular, though, when I could.

Q. Now, you have stated that you handled recapping business. Do you handle farm equipment and machinery?

A. Yes, sir.

Brodie Thompson.

Q. Do you handle such things as tractors?
A. Yes, sir.
Q. And repairs, and adjust those tractors?
A. Yes, sir; I do.
Q. And assemble them?
A. Well, certain pieces of equipment we assemble.
Q. And work with repairs and replacements, and have a service department in general on your farm equipment?
A. Yes, sir.
Q. You also have radio and television?
A. Yes, sir.
Q. And a full line of automobile accessories and equipment?
A. Well, I do, but not on accessories—I have to confine that at one of the other stores—the other store's on Main St.—tires, and recapping we do.
page 33 } Q. That's about your entire business—the items you mentioned?
A. Yes, sir.
Q. Now, Mr. Thompson, you requested that the guy wire attached to the pole in question—which was near the southern end of your new building—be reset, didn't you?
A. Yes, I did.
Q. To get the guy wire, that was close to the southwestern corner, out of the way—where you expected to build your building?
A. That's right.
Q. Did you request at that time that the pole be moved?
A. Not to my knowledge, I don't think I did. I wouldn't say; I don't know—I don't think that I did. But I wouldn't say that for sure. But I don't think that I did. I don't remember it, if I did.
Q. When you requested that the guy wire be moved, did the Appalachian Power Co. change the guy wire promptly?
A. Yes, sir; they did.
Q. And do you recall, at any future time after the construction of the building, that you requested the Appalachian Power Co. to move the pole, or in any way change it, or the wire?
A. Not to my knowledge, I don't remember asking them.
Q. Mr. Thompson, when you began your construction and laid out your plans, did you plan on having a two-
page 34 } story building, or a one-story building, in the beginning?

Brodie Thompson.

A. In the beginning I had planned on a two-story building.

Q. And that is the same building that was laid out on the ground at the time that the guy wire was moved by the Appalachian Power Co.?

A. Yes, sir.

Q. What was the purpose of the pole when it was set there in the little alley, and near your newly constructed building—what was the purpose of the pole being placed there?

A. The purpose of the pole being set there was to bring in electricity to the machinery I have in my recap shop.

Q. Then the pole served you on your premises only?

A. Well, that's what I think, unless they run it somewhere else—and I don't think they did.

Q. You don't recall whether or not those wires crossed your property?

A. I don't know about that; I couldn't tell you.

Q. Did they go anywhere, except into your building, when they leave the pole?

A. That's right.

Q. You think they serve you and your business alone?

A. I believe that's correct.

Q. Now, who owns the land that is north of the alley where your newly-constructed building is?

page 35 } A. I believe that's Mrs. Litton.

Q. North of the alley, where your new building is?

By the Court: (Interposing)

Q. On the ground where the building is located.

A. Behind my building?

Q. On the ground on which your building is located, he said.

A. I don't—

By Mr. Repass: (Continuing)

Q. You own the land on the south—you own the land all around that building, don't you?

A. Yes, I do.

Q. And that's the same alley you speak of the pole being there?

A. Yes.

Q. You had an old building near where your new one is—where the pole was, didn't you?

Brodie Thompson.

A. Yes, I did.

Q. And then you built a new alley some little distance—a new building some little distance south, that you have your tire recapping business in?

A. That's right.

Q. That you own now? Wasn't there some little building on west of that pole at one time—a little frame

page 36 } building?

A. We just moved the old building—we just tore it down and moved it right back there—didn't have it tore down—just slipped it over there.

Q. If you were going from Church St. on this little alley through your property, and you continued up through there, you would go into the building that you moved out there against the hill, wouldn't you?

A. Yes.

Q. Now, where the pole was standing there next to where you constructed your new building, did it interfere with passage from Church St. by the pole and into the moved building, on west of it against the hill?

A. I don't believe I understand you.

Q. With the pole standing where it was next to where you constructed your new building, did it interfere with passage from Church St. on due west?

A. Through the alley?

Q. Through the alley to the building that you—the old building that you moved and set against the hill there?

A. No, it didn't. I don't think we had no trouble with it—the passageway.

Q. And the newly-constructed building was constructed just a short distance—I believe you said something like maybe a couple of feet—

page 37 } A. Something like that.

Q. —from the new building wall?

A. To the best of my knowledge.

Q. You know about how much space is between the two buildings?

A. I think it's 34 or 35 feet.

Q. 34 or 35 feet?

A. Close to that; yes, sir.

Q. And you know about how wide the alley is that goes between the two buildings?

A. I don't know exactly; I think it's around 10 to 12 feet.

Q. Now, Mr. Thompson, did any of your representatives, or

employees or anybody working for you on this building, ever report to you that there was any danger to the men from the Appalachian Power Co. line?

Mr. Lincoln: We object, if the Court please.
Mr. Repass: That's been asked as to the T. V. line. We're asking now.
The Court: I think I'll let him answer that. You may proceed.

Q. Was there any report or complaint made to you by your employees as to being endangered by the Power Co. line?
A. No, sir.
Q. And no employee made any such report to
page 38 } you?
A. They did not.
Q. After this accident—immediate following the accident, did the work stop?
A. Yes, it stopped.
Q. How long?
A. I don't know; I don't remember, but it immediately stopped. I don't know what—how long it stopped.
Q. Did anyone work that same day?
A. I don't remember.
Q. Mr. Thompson, were you ever on top of the new building at any time prior to the accident?
A. Yes, I was.
Q. On more than one occasion?
A. Well, I don't remember. But I was up there.
Q. Was that after the rafters were put on—or the joists?
A. Yes, after the rafters were put on.
Q. What was your purpose for being up there?
A. I was just up there to observe, to see how they were doing.
Q. Were the men working at the time you were there?
A. Yes.
Q. Did you observe anything which indicated a dangerous condition under which your men were working at the time you were there?

page 39 } Mr. Lincoln: We object, if the Court please.
The Court: What do you mean by "a dangerous condition"—with reference to wires, poles; with reference to the construction?

Brodie Thompson.

Mr. Repass: I mean a dangerous condition with reference to the location of the power pole, all of the wires and equipment attached to the pole.

Mr. Matthews: If the Court please, we object to the question "dangerous situation."

The Court: What constitutes a "dangerous condition"? You can specify what was "dangerous," and let the jury, after they have been instructed as to the law, answer that question. That's a conclusion for this man.

Q. Mr. Thompson, did you see any of the lines of the Appalachian Power Co. that were attached to the pole, or near and interfering with the construction of your building, when you were on the roof?

Mr. Lincoln: It's irrelevant and immaterial whether they interfered or not.

The Court: I think, Mr. Repass, the question of the location of the wires and poles, or how close they were to the building, and so forth, is rather a conclusion.

Q. How close was the nearest Appalachian Power Co. wire to your building?

page 40 } The Court: At what stage?

Mr. Repass: At the time the building was ready for the roof, and the witness was standing on top of the building, or "observing," as he stated.

The Court: Let's confine it to about April 6th, the date of this boy's death.

Q. How long before April 6th was it that you were on the roof, Mr. Thompson?

A. I couldn't answer that; I don't know—I mean, I don't know exactly, and I don't want to say unless I know.

Q. But the rafters, as I understood you, were in place on your last trip up on the roof?

A. That's right.

Q. Had the roof been laid?

A. No, it had not.

Q. At the time that you were on the roof, were the rafters in place?—What did you observe with reference to the location of the Appalachian Power Co. line?

A. I don't know that I even observed it in any particular

Brodie Thompson.

way. In fact, I don't believe I went down to that end of the building—and I was up on the front end of the building, to the best of my knowledge—and I didn't observe that. I just don't know; I can't tell you; I would if I could.

page 41 } Q. Nothing attracted your attention with reference to the wires, or no observations were made by you with reference to them?

A. No. I didn't think about them, as far as the danger point on that particular end.

Mr. Flannagan: I omitted one question.

The Court: You may proceed.

Mr. Flannagan:

Q. Mr. Thompson, I believe that the Litton house that was served by the Home & Auto Supply Co. television wire—that Heath was removing—I believe that that Litton house is still served by a wire of Home & Auto Supply Co. which crosses your property?

A. It does. I think it does. There is a wire that comes in there.

Q. And you have no objection to that wire across your property?

A. I do not.

RE-DIRECT EXAMINATION.

By Mr. Matthews:

Q. Does this wire cross at the same location that it did?

A. It does not.

Mr. Flannagan: We object to that.

The Court: Overrule the objection.

Mr. Flannagan: Save the exception.

The Court: You asked the location—you invited it; the gentleman answered it.

page 42 } Q. Does it cross at the same location?

A. No, it does not. It crosses up at the other end, 60 feet on the upper end of the building.

Mr. Matthews: I would like to ask one additional question, your Honor.

James W. Ritter, Jr.

Q. You have talked about this alley—Is that alley maintained or kept open in any way by the Town?
A. No, sir; to my knowledge, it's not.
Q. Since you have been there, has the Town ever worked on it, put any equipment on it, or done anything toward maintaining it?
A. No, sir.

RE-CROSS EXAMINATION.

By Mr. Repass:
Q. Isn't the Town constructing an entrance on the west side of Cherry St., going into your property, where the alley is?
A. No, sir.
Q. You mean there is no crossover across the curb and gutter from the west side of Church St.?

The Court: You said "Cherry St."
Mr. Repass: I mean Church St.

A. Across the curb and gutter?
Q. Yes, sir.
A. No, sir.
Q. And there's no approach from the street into
page 43 } your property on Church St.?
A. Well, yes, it's on my property.
Q. Did you build it?
A. Yes, I did.

* * * * *

MR. JAMES W. RITTER, JR.,
a witness of lawful age, called in behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Lincoln:
Q. You are Mr. James W. Ritter, I believe?
A. Yes, sir.
Q. And what official capacity, if any, do you hold with the Town of Marion?
A. I am Town Manager.

James W. Ritter, Jr.

Q. How long have you lived here?
A. Since 1957.
Q. Now, did you, at our request, go to the Brodie Thompson property located at the intersection of West Cherry and South Church St. for the purpose of locating a building and alley, and other features there, of the Brodie Thompson property?
A. Yes.

page 44 } Q. (Indicating map) And I'll ask you if this map was prepared by you, showing the location of a 12-foot alley running from South Church St. in the direction of Park St.—but not all the way through; and showing the location—

Mr. Flannagan: We are objecting to him reading into the record what this map shows.
Mr. Lincoln: I'm asking him if he prepared it.
The Court: The objection is overruled.
Mr. Flannagan: Save the exception.

Q. —and showing the buildings of Mr. Thompson's recapping, and other business buildings?
A. I didn't prepare it, but I had it prepared.
Q. Were you present when it was prepared?
A. No.
Q. Is that an official map of this portion of the Town of Marion that it purports to show?
A. This map was drawn about four or five years ago by the Town Engineer from the court records.
Q. And the buildings and the alley were shown at your direction, were they?
A. Yes.

Mr. Flannagan: He hasn't offered it in evidence.

Q. We ask you if you will file this as part of your evidence in this case?

The Court: What is the objection?

page 45 } Mr. Flannagan: Home & Auto states their objection on the grounds that the witness said he wasn't present when it was prepared. He didn't prepare it. In addition, it does not show the situation at the time of this

accident, but it shows an entirely different situation from the time of the accident. If your Honor will look at the map, it is obviously in conflict, on it's face, according to measurements.

The Court: In what respect?

Mr. Flannagan: I'd rather not state it in front of the jury.

The Court: Go ahead and say.

Mr. Flannagan: Well, in regard to the measurement of the location of the pole.

The Court: If there's been a changed condition there, I think you ought to show the condition as of the time of the accident. If that map doesn't show that, I'm going to exclude it.

Mr. Lincoln: We think the buildings are shown. We don't think the alley has changed. Certainly the buildings have not changed in location. The only thing that's been changed is the pole.

The Court: We have shown that—the jury understands that.

page 46 } By the Court:

Q. Mr. Ritter, let me ask you a question. Does this truly reflect the present condition of those premises as of April 6, 1959?

A. Yes, except with the position of the pole.

The Court: Well, now, let's hear your other objection, Mr. Flannagan. Go ahead.

Mr. Flannagan: Your Honor, some of the other objections I would have to elicit on the testimony from this witness.

The Court: He said it truly reflected the locations of the buildings, the width of the alley, and the street, as of 4/6/59, except for the location of the pole.

Mr. Flannagan: We have stated all of our objections.

Mr. Hoge: We object to the introduction of the map for the same stated reasons.

The Court: Overrule your objections on the grounds that everything is the same, except the pole—and he can show the location of the pole as of that date.

Mr. Hoge: We except, your Honor.

Mr. Repass: May I add one?

The Court: Go ahead.

James W. Ritter, Jr.

Mr. Repass: As I understood Mr. Ritter, he remarked, in answer to a question, that the map had been
page 47 } prepared three or four years ago—and the testimony, according to Mr. Thompson, was that the building was under construction in 1959.

The Court: He said it showed the true conditions as of 4/6/59, as I understood it.

By the Court:

Q. Is that correct, Mr. Ritter?

A. Yes, sir.

Q. Save the location of the pole, does that show the new building, old building—or what building?

A. The new building.

Mr. Lincoln: The map was an old map, with this superimposed.

Mr. Repass: We except, your Honor.

The Court: Proceed. Mark it Exhibit #3 for Plaintiff.

(Plaintiff's Exhibit #3—Map.)

Mr. Flannagan: The defendants except.

By Mr. Lincoln: (Continuing)

Q. (Rearranging map) Now, perhaps it can be better shown this way. Does that run the same way that South Church St. runs?

A. Yes.

Q. I'll ask you if that map shows the location of West Cherry, and is so designated on the map?

A. Yes.

page 48 } Q. Does it likewise show the location of South Church St.—that is, is South Church properly designated on the map?

A. Yes.

Q. Now, how many blocks from Main St. is South Cherry St.—the area that's shown on this map at the intersection of West Cherry and South Church?

A. One block from Main St.

Q. Now then, do you know who owns the large area on which you have shown a building as "TYCB Building?"

A. That's Brodie Thompson's.

James W. Ritter, Jr.

Q. And does he own all of that area from a 12-foot alley to West Cherry St., along South Church St.?
A. I presume so.

The Court: Mark on that "Brodie Thompson Premises," or something like that, to indicate just what it is, and run a red line around it so the jury may know.

(Mr. Lincoln marks map).

The Court: How have you marked that?
Mr. Lincoln: "Brodie Thompson Premises."

Q. What is the length shown on the map from West Cherry St. back of the Brodie Thompson premises?
A. It shows 186 feet from this point. (Indicating)
Q. From the intersection of Cherry and South Church?
A. That's right.
page 49 } Q. Back to about a 12-foot alley?
A. Correct.
Q. Does he own property on the other side of the alley?
A. Yes, he does.
Q. And how far does that lot extend along South Church St.?
A. 75 feet beyond the alley.
Q. Now, is this 12-foot alley, shown on the map,—is that an alley, as far as you know, dedicated to the use of the public by the Town of Marion?
A. I don't know whether it is, or not.
Q. Has the Town ever opened it, and improved it, to your knowledge?
A. No, sir.
Q. Now, then, you have shown on the Thompson premises a building, "2S TYCB Building"—would you give us the dimensions of that building?
A. That building is 62 feet by 32 feet over-all.
Q. How far does that building sit back from Church St.?
A. It is not parallel with South Church St. The north line of it goes 43½ feet from Church St., and the south line of the building is 46 feet from South Church St.
Q. Does the south end of the building abut on the alley?
A. Yes.
Q. —12-foot alley? Now, what is the nature of
page 50 } that space between that building and South Church St.?

James W. Ritter, Jr.

A. It is space being used at the present time for storage of equipment.

Q. State whether or not people park there, and use it in going to the business of Brodie Thompson?

A. They do use it for parking, also.

Q. Is that also true of the 12-foot alley?

A. Yes.

Q. Now, then, you have shown, I believe, a building, "1SCB Building"—I guess the front?

A. Right.

Q. And that's marked—is that "9," or "B"? Seems like a "B" there—is that what it is?

A. Yes, sir; that's a "B."

Q. And what is that building?

A. The dimensions are 50 feet by 90 feet.

Q. And do you know what that's used for?

A. It's used for sales, and storage of tires.

Q. And do you know whether or not the recapping business is conducted there?

A. Recapping also, yes.

Q. And now how far is the front of that building located from the west side of South Church St.?

A. 16 feet.

page 51 } Q. And the area in front of that building, what does that—what type of area is that; is that open, or occupied?

A. It's open. It is being used for parking and storage of equipment.

Q. Now, how far does the alley extend from this west side of South Church St. in a western direction?

A. 106 feet to the back of the building—we don't show a dimension from the building to this point here. (Indicating)

Q. I'll ask you in this 108 feet could be it? (Indicating)

A. Yes, sir.

Q. Now, have you shown an electric light pole on that map?

Mr. Repass: We object on the grounds that the witness, Mr. James W. Ritter, testified that where he showed a light pole—on the grounds that the map is not a true representation of the lay of the land, and the location of the pole at the time of the accident, April 6, 1959.

The Court: Let's ask the witness where the pole was located on 4/6/59.

Q. Do you know where an electric light pole—an electric power pole was placed with reference to the building marked "2S TYCB Building," on April 6, 1959?

A. Not definitely, no.

page 52 } Q. Was it, to the best of your knowledge, in the same location that is now shown on the map?

Mr. Hoge: We object.

The Court: It's admitted it was not. Confine it to 4/6/59.

Q. Does that show the location of the electric power line as of April 6, 1959?

Mr. Repass: We object, because—

The Court: He said it was not the same location, as I recall. I'm going to require you to show the location of the power line and the transmission line as of 4/6/59.

Q. But it does not show that now, as I understand?

A. That is correct—it does not.

Q. Now, in its present location, how far is the electric power pole from the building marked "2STYCB Building"?

Mr. Repass: I object.

The Court: I don't think that is material at this stage. Let's confine our evidence to where the poles and line were on April 6, '59—at the time of this man's death.

Mr. Hoge: If your Honor please, before we proceed with my cross examination, we have an objection we think ought to be made in the absence of the jury.

page 53 } The Court: What is it?

Mr. Hoge: Measurements.

The Court: You may cross examine him. If the map is not correct, you can so show.

Mr. Hoge: I'd like to reserve my exception to the Court's ruling. I'd like to point out at this stage that the map itself shows a 12-foot alley, and the pole located nine feet across that alley—which is an impossible figure.

The Court: He said it was a true and correct map as of 4/6/59, with the exception of the pole—and I have ruled the pole out. I'm going to confine you to showing the location of the pole on the date of the accident, and not some other date. You may proceed with the examination, if you care to.

Mr. Hoge: At this specific point, it can't be ruled out—when the map itself has been introduced.

James W. Ritter, Jr.

The Court: We are not concerned with the present location of the line. If you want to introduce that map to show the location of the building and alleys—forget the line.

Mr. Hoge: We except.

Mr. Repass: As a matter of record—

The Court: No further argument. Forget the
page 54 } location of the line. I am certain the jury understands.

Mr. Repass: I have a motion.

The Court: State your motion.

Mr. Repass: The motion is that the map be eliminated from the record, and be not introduced as a part of the evidence. And we understood—

The Court: That motion is denied.

Mr. Repass: We except.

The Court: I told you gentlemen of the jury, and I'll tell you again—I am permitting the map to show the true location of the streets and the alleys and the building, and not the line, because he said the line had been changed. And let's forget what that map shows about any power pole. Consider it merely for the location of the building with reference to the streets.

CROSS EXAMINATION.

By Mr. Flannagan:

Q. Mr. Ritter, did I understand that you did not prepare that map?

A. That's correct.

Q. Did you make any of these measurements that you have testified to?

A. I have not.

Q. The measurements you testified to, you
page 55 } merely read off of that map?

A. That's correct. It was prepared—

Q. —Prepared by someone else?

A. That's correct.

Q. And you have no knowledge, of your own knowledge, as to these measurements you have testified to?

A. That's correct.

Q. Now, Mr. Ritter, immediately in front of "2-Story CB Building" you show Brodie Thompson's recap shop. Is there any shop there?

James W. Ritter, Jr.

A. No. (Indicating) This note refers to this building here.

Q. It is on a different place in the map?

A. There should be an arrow from this (Indicating) over to this building.

Q. There is no arrow?

A. That's correct.

Q. This map is incorrect in identifying this area as Brodie Thompson's recap shop?

A. The shop itself is not here.

Q. I'm asking if the map is incorrect in identifying this area as Brodie Thompson's recap shop?

A. (Indicating) There should be an arrow from page 56 } here to here.

Q. Mr. Ritter, I'm asking you if the map is incorrect in identifying the Brodie Thompson recap shop?

The Court: If the map is not a proper map, why don't you introduce a proper map, showing the location of the streets? And what's the use of mixing up the whole evidence with an incorrect map?

Mr. Lincoln: He says it was—he says simply because of the omission of an arrow.

The Court: I'm going to strike that map out, and give you gentlemen an opportunity to introduce a correct map. Your own witness says it's not correct. I'm just going to eliminate that map, and stop it right here, and let you introduce a correct map. Mr. Ritter is a very competent engineer; he can sit down and draw in a few minutes one showing the buildings and streets and alleys. And I'll eliminate that map. And gentlemen of the jury, you'll forget what that map shows.

Mr. Flannagan: Do I understand that all of his testimony is eliminated?

The Court: I just so ruled.

* * * * *

page 61 }

* * * * *

Mr. Lincoln: We'd like to call Mr. Sutphin as an adverse witness.

MR. JOHNNY SUTPHIN,

a witness of lawful age, called in behalf of the plaintiff, after being duly sworn, testified as follows:

By Mr. Lincoln:

Q. What is your—

page 62 } Mr. Hoge: We'd like to point out that there is no indication as yet that the man is adverse. Until there is an indication—

The Court: You may proceed.

Mr. Hoge: We take an exception.

By Mr. Lincoln: (Continuing)

Q. Your full name is what, Mr. Sutphin?

A. Johnny Sutphin.

Q. Where do you live, sir?

A. I live at #639 Cumberland St., Marion, Va.

Q. What is your age?

A. 59 years.

Q. And what is your employment, Mr. Sutphin?

A. I am a foreman for the Appalachian Power Co.

Q. And as foreman, what are your duties as foreman for the Appalachian Power Co.?

A. I supervise construction and maintenance of power lines.

Q. State whether or not you supervised the construction of wires and electric power pole that serves the property of Brodie Thompson on South Church St.

A. Yes, sir; I did.

Q. And are you familiar with the voltage carried by those wires?

A. Yes, sir.

page 63 } Q. Now, what voltage is carried by the wires running from South Church St. to the property of Brodie Thompson?

A. Well, it's a phase to phase, and it's 4100 volts; and from phase to ground it's 2300.

Q. How much from phase to ground?

A. 2300.

Q. Now, was that true of those wires as of April 6, 1959—that is, the voltage that they carried?

A. I presume that's right; yes, sir. That would be your voltage, if your voltage doesn't vary a little bit—which it might do.

Q. Would it be a significant variation?

A. No, sir.

Johnny Sutphin.

Q. Now then, are you familiar with the pole that was on the Brodie Thompson property as of April 6, 1959?
A. Yes, sir.
Q. How high was that pole?
A. 40 foot.
Q. And how far was the pole sunk into the ground?
A. Approximately 6 foot.
Q. Leaving 34 feet above ground?
A. That's right.
Q. And how wide are the crossarms on that pole?
A. You mean—I don't follow you—"How wide."
Q. How long are the crossarms?
page 64 } A. 8 foot.
Q. You mean from one end to the other, the crossarms are 8 feet?
A. That's right.

The Court: The height of the pole—I didn't get that.
Mr. Lincoln: 40 feet.
The Court: The height above ground?
Mr. Lincoln: 34 feet. It buried approximately 6 feet, he said.

Q. Now, on the particular pole to which you have referred (Showing picture to witness) I'll ask you if this picture represents the pole, transformer and wires of the Appalachian Power Co. near the Brodie Thompson building under construction, as it looked on April 6, 1959?
A. Yes, sir; that's it.

The Court: Let's get that picture into evidence.

(Plaintiff's Exhibit #4—Photograph).

Mr. Lincoln: (Showing picture to jury) Can you gentlemen all see? Let me pass that around to these gentlemen.
The Court: Hold it up, where everybody can see it. (The witness stands before the jury).

Q. I'll ask you what these wires coming down there are called? There are two wires coming earthward,
page 65 } apparently from the higher crossarm into a transformer—as shown on the picture.
A. That would be led from the main line into the transformer—that supplies the current to the transformer.

Johnny Sutphin.

Q. And does that line loop from the main line around and into the transformer?

A. That's right.

Q. And how many volts would this carry—the one nearest the building, extending downward from a higher crossarm to a lower crossarm, and looped into the transformer?

A. 2300 volts.

Q. Now, were you at the Brodie Thompson building on April 6, 1959, the date when a man named Heath was electrocuted?

A. I was called there after this accident happened.

Q. And how far was this pole from the wall of the building shown in this photograph—of which you can see the top cinder block; how far was that pole from that building at the—at its closest to the building?

The Court: How far from the building, approximately?

A. The butt of the pole was approximately 8 or 10 inches from the building.

Q. And how far was the top of the building, at the height of the building—how far was the pole from the building at the top of the building?

A. It wouldn't have been over an inch or two.

page 66 } Q. Just an inch or two? And you say the crossarms are 8 feet in length?

A. That's right.

Q. Then would those wires extend over the building a period—a distance of three feet, or more?

A. Approximately that; yes, sir.

Q. Then these wires that you have described as the "leadin wires," they were over the wall of the Brodie Thompson building, were they not?

A. I'm most sure they was; yes, sir.

Q. Do you know the height of this lead-in wire you have described, above the top of the wall of the building?

A. Yes, sir; it was approximately six foot eight, or ten inches.

Q. Now, I'll show you what appears to be a top of a platform located on top of the rafters shown in the picture, and what appears to be some debris, and ask you if you know what that is?

A. I would assume that was some lumber they was using in constructing the building.

Johnny Sutphin.

Q. I'm asking you about the dark-looking debris there, and ask you if you know what that is?

A. No, sir; I'm sorry, I don't know.

Q. You don't know what that is?

A. I don't know what that is.

page 67 } Q. Now, was this wire, you have described as the "leadin wire," was that insulated in any manner?

A. No, sir. We don't use insulated wire on that.

Q. Then it was uninsulated, and according to you, was extending over the building and about 6 feet eight inches above the top of the building?

A. That's right.

Q. Now, Mr. Sutphin, were you called around to the Brodie Thompson property at the beginning of construction of a building near your electric light pole—at the beginning of construction of a cinder block building that was being built there?

A. Yes, sir.

Q. Did you go there?

A. Yes, sir.

Q. Did Mr. Thompson state to you that he was going to build a building near that pole?

Mr. Flannagan: We object to that question. It calls for hearsay testimony.

The Court: The objection is overruled.

Mr. Flannagan: We except, as far as Home & Auto Supply Co. is concerned.

Mr. Hoge: Exception.

Q. Did Mr. Thompson tell you he was going to build a building close to where this pole was located?

page 68 } A. He was digging for the foundation—

Q. He was digging?

A. —of the building when I went there.

Q. Digging the foundations?

A. That's right.

Q. And it clearly showed the foundation?

Mr. Hoge: We object, your Honor, to that type of examination.

The Court: I don't know whether it's leading, or not. He hasn't finished his question.

Johnny Sutphin.

Q. Were the foundations that you observed there clearly visible?

A. Where he had worked it was. He was just starting on it.

Q. And where he was starting on these foundations, how far was that point away from your electric light pole at the nearest point of the foundations to your pole?

A. He was working on the southwest corner, I believe, when we were there.

Q. And please state whether or not that showed that the foundations would be very close to your electric power pole?

Mr. Hoge: Let him specify what he means.

The Court: I think, Mr. Lincoln, you better let him describe them—

Q. State how far—

page 69 } The Court: —in detail—just the location of the line, and the location of the proposed structure.

A. Well, I'd say it was approximately 12 or 14 inches from the pole, more or less.

By the Court: (Interposing)

Q. The *proposel* wall of the new structure?

A. Yes, sir; the proposed wall of the new structure.

Q. 12 to 14 inches from the power pole?

A. Yes, sir.

By Mr. Lincoln: (Continuing)

Q. Is that point you speak of at the base of the pole?

A. That's at the ground line.

Q. State whether or not that pole was closer to the building at the top than it was at the bottom of it.

A. Well, yes, it was.

Q. Then the pole leaned somewhat?

A. It was leaning some.

Q. And leaned toward the building?

A. If you'll allow me, I'll explain. The service line pulled it over the building we was serving. And customarily, when we pull the service off, the pole settles and comes back, and it

will be plumb. That pole was leaning a little by the northwest, I'd say.

Q. So that the top of the pole was closer to where the walls would be than the bottom of the pole?

page 70 } A. That's right.

Q. And was anyone else there with you?

A. Well, there was some men that worked for me there. I don't think they was around—we had went to move that scaffold.

Q. And he stated to you, and to them, he intended to build this building at the point indicated?

A. Yes.

Mr. Flannagan: I hate to keep objecting. Home & Auto objects to the statement by Thompson to the representative of Appalachian, on the ground previous assigned.

The Court: The objection is overruled.

Mr. Flannagan: Save the exception.

Q. Did you move anything connected with that pole for the purpose of getting it out of the way of this building?

A. Yes, sir.

Q. What?

A. Guy wire.

* * * * *

page 71 }

* * * * *

Q. Mr. Sutphin, what is the voltage inside of the tire recapping building that goes to the machinery there?

A. They have three-phase current in there, and voltage—three-phase motors, and 208 volts.

Q. And what about the lights?

A. The lights are 120 volts.

Q. Now, when you were around the pole, and Mr. Thompson showed you where the building was going, did you notice a wire of the Home & Auto Supply Co. attached to that pole?

A. Yes, sir.

Q Where was that wire attached, with reference to the crossarm?

Johnny Sutphin.

A. I'd say it was approximately 4 feet below the cross-arm.

Q. And where did the wire go to, and from?

A. It came from a pole out on the street, and went to a house—it would be about west of the building that he was constructing.

Q. And did that wire cross that area where Mr. Thompson indicated he wished to place his building?

A. Yes, sir.

page 72 } Q. Now, are you familiar with the National Underwriters Code as to distances that wires should be placed from buildings where people work?

A. Yes, sir.

Q. What are those standards, and based on various voltages?

A. It will vary with your voltage. 2300 volts, eight feet.

Q. Do you *men* the wire should be placed above where people might work, a minimum of eight feet?

A. Let me put it this way: If we was constructing a line, we would be sure to get as far as eight foot away from the building.

Q. Vertically?

A. Not vertically—horizontal.

By the Court: (Interposing)

Q. You mean by that, the overhang?

A. It would be overhang of eight foot.

Q. How many feet were these wires above the building at the time you inspected it?

A. The wire, when this accident happened, was six foot eight, or ten inches.

Q. That was what I had in my notes. Somebody mentioned six feet two inches; is that wrong, or is it six feet eight, or ten?

Mr. Lincoln: I think it showed six feet four after it had been bent.

A. After it had been pulled down. Originally it page 73 } was six feet, or six foot ten.

Mr. Lincoln: That's all.

Johnny Sutphin.

CROSS EXAMINATION.

By Mr. Hoge:

Q. Mr. Sutphin, why was the lead-in wire, or jumper wire, not insulated?

A. It isn't customary for our company to use insulated wire on those jumpers—we don't use it.

Q. Why not, please, sir?

A. Well, we haven't used it. And then if we insulated, we would more or less depend on it. And I'd say in a few years it would be deteriorated.

Q. Through what?

A. Weather.

Q. Weather conditions? Would it then be defective?

A. Then it would be hazard.

Q. By the insulation?

A. That's right. But we haven't made it a practice of using any insulated wires on high voltage.

Q. That is, I take it, where you are more than eight feet away from a building?

A. That's right.

Q. Was there any form of a building in that location when you originally installed the pole?

page 74 } A. Yes, sir. There was a building there that was, I would say, approximately eight or ten feet high.

Q. Eight or ten feet high?

A. It could have been twelve; it was just a small building.

Q. Did your wires *overhand* that building?

A. Yes, sir.

Q. And would you tell us approximately how much clearance you then had to the nearest wire?

A. I would say that it was eighteen to twenty feet.

Q. Eighteen to twenty feet clearance?

A. Yes, sir.

Q. Now, you spoke of the National Underwriters Code—When you made the original installation, were all wires properly located, with respect to safety requirements of the National Underwriters Code?

A. Yes, sir.

Q. Now, Mr. Sutphin, you have been asked certain questions with respect to conversations you had with Mr. Thompson when you moved the guy wire. Please tell us whether or not Mr. Thompson said anything to you with respect to the pole that was then in place?

Johnny Sutphin.

Mr. Flannagan: We have the same objection we stated previously.

Mr. Matthews: If the Court please, we enter an objection here, too, because we want to know whether Mr. Thompson had any control over that pole before this conversation came in.

page 75

The Court: You brought it out yourself.

Mr. Matthews: Not that phase of it.

The Court: I thought you did. You asked about the movement of the guy wire, and the position of the building, with reference to the poles and wires, and so forth. Now, Mr. Flannagan's objection—I'm going to overrule that on this theory: When you made, in your opening statement, some reference to the Power Co. and these lines of yours, and that the lines of the TV service were to be fastened, or annexed to the appliance of the Power Co—and it seemed to the Court that under those circumstances that there is some relationship between the Power Co., on the one hand, and the TV company on the other hand, and that you were to some extent occupying and to some extent using their appliance in your work. And I think that you have been interposing those objections throughout. And I think that under the circumstances that I shall overrule those objections and let that go on for whatever it may be worth. If it be necessary, I can give an instruction to the jury.

Mr. Flannagan: In order that I might keep from interrupting every time that is brought up, consider that I make—You want me to make it each time?

page 76

The Court: There may be some other point raised. We can control your theory of the case at the proper time.

Mr. Flannagan: Exception.

By Mr. Hoge: (Continuing)

Q. I believe you said that you had been asked certain questions with respect to the guy wire and to the pole, in the Thompson conversation to you; did he in that conversation state anything to you with respect to moving the pole?

A. No, sir. He asked me how high the pole was, and I told him it was 40 foot. He said, "How far in the ground is it?" And I said, "Approximately 6 feet." He said, "We'll have plenty of room for our building."

Q. Did he indicate that he did not want you to move the pole, in any of his objections, or conversation?

Johnny Sutphin.

A. He said he didn't want the pole moved, because he wanted to utilize all the space for a parking area.

Q. He did not want the pole moved?

A. He did not want the pole moved.

Q. Did you know, of your own knowledge, whether or not that pole was located on an alley, or on private property?

A. Well, we thought it was on an alley, because our map shows an alley going through there.

* * * * *

page 78 }

* * * * *

Q One further question—Did Mr. Thompson tell you at that time anything about the height of the building he was erecting?

A. No, sir.

Q. That's all.

By the Court:

Q. You see any plans as to how high that building would be?

A. No, sir.

Q. At that time or any other time?

A. No, sir.

RE-DIRECT EXAMINATION.

page 79 } By Mr. Lincoln:

Q. Did you ask how high the building was going to be, Mr. Sutphin?

A. I didn't ask him. I wasn't there but a few minutes, and I was called away on another job.

By the Court: (Interposing)

Q. On any other occasion did you go by to inspect, after the building was in the process of being constructed?

A. I wasn't by there again until this accident happened, and they called me back there.

By Mr. Lincoln: (Continuing)

Q. Did he tell you whether it would be a one-story, or two-story building?

Johnny Sutphin.

A. He didn't tell me.

Q. Did it occur to you that men might be working on the building that was to be erected there?

A. It *occured* to me they would work?

Q. Yes.

A. Yes.

Q. And yet you took no precautions—or your Company took none—to insulate those wires?

Mr. Hoge: That's a conclusion.

The Court: I think it is your witness, Mr. Lincoln.

Mr. Lincoln: They asked him about the insula-
page 80 } tion. We called him as an adverse witness.

The Court: You asked him whether or not he insulated the wires.

Q. Did you insulate the wires after he told you the building was going to be there?

A. No, sir.

Q. Would insulation have affected the current going through the wires in any way?

A. No, it wouldn't affect the current.

Q. All right.

RE-CROSS EXAMINATION.

By Mr. Flannagan:

Q. Mr. Sutphin, you mentioned that the TV signal wire was approximately four feet below the crossarm—was that the lowest crossarm?

A. Yes, sir.

Q. That's all.

By the Court:

Q. Had the wire been insulated—this particular wire that the deceased caught—what effect, if any, would the insulation have had?

A. Well, if it had been insulated heavy enough, you wouldn't have felt any current at all on the wire.

Q. What do you mean by "heavy enough"?

page 81 } A. If it was insulated heavy enough to carry that voltage.

Q. What thickness would that be?

Johnny Sutphin.

A. That would require a rubber insulation—and that type of wire is only used on the ground or in a building.

Q. I beg pardon?

A. That type of wire is only used underground or in buildings.

Q. What do you mean?

A. Insulated wire.

Q. You mean that it's only used by your Company?

A. Sir?

Q. Only used by your Company?

A. No, no. Everyone uses it that has a desire to, if it's in a building or underground.

Q. As I understand, the practice of your company is not to use it otherwise?

A. My company doesn't use it outdoors for that type of construction.

RE-REDIRECT EXAMINATION.

By Mr. Lincoln:

Q. Mr. Sutphin, will you describe the Home & Auto Supply wires that you saw there. Is it more than one, or—

A. I don't remember.

Q. That's all.

page 82 } By the Court:

Q. Let me ask you this—if you can answer, so state; if you can't answer, so state: It's alleged here that the deceased had this TV wire in one hand, and for some reason caught hold of the other wire. Now, what effect, if any, did the TV wire have in the completion of the circuit?

A. It gave him a return, or a ground; it would give him a ground through his body from the wire with the ground to the TV wire.

Q. Assume those are the facts—I don't know—the jury will have the evidence. Did you see the body of the deceased?

A. No, sir.

Q. Did you see any scorched places, or burned places, on the building?

A. I didn't see any burned or scorched places on it.

Q. No evidence of a current having burned or scorched anything?

A. No, sir.

Johnny Sutphin.

RE-RECROSS EXAMINATION.

By Mr. Flannagan:

Q. Mr. Sutphin, I don't believe you actually knew what this TV wire was composed of, do you?

A. Well, yes.

Q. I understood in answer to a question of Mr.
page 83 } Lincoln that you couldn't describe the wire.

A. The TV wire?

Q. Yes, sir.

A. I don't recall that question.

Q. Well, do you know what it was composed of?

A. The TV wire is a cable that they used to carry this signal from the antenna to the TV set.

Q. Do you know of your own knowledge whether that wire could transmit current from a wire of Appalachian's?

A. Yes, sir; if it had come in contact with it.

Q. Would the person have to be in contact with the ground in some manner before that could occur?

A. Well, no; if you get in contact with that wire, you would be in contact with the ground, because there is another wire attached to that to support that—it's called a "cable" that supports this wire that carries the signal—now, that wire is grounded.

Q. You know that of your own knowledge?

A. Yes, sir.

Q. Now, there has been testimony that the concrete wall had been there for approximately a day prior to this accident. Would such a concrete wall have afforded a ground?

A. It would be ground; I don't know to what percentage—to some percentage. But I couldn't say that—I don't know what percentage ground it would be.

page 84 } Q. And you don't know what caused the death of Heath on the day of his death?

A. I don't know.

Q. It could have been the wall?

A. It could have been the wall.

Q. It could have been the transformer?

A. If he would have come in contact with the transformer.

Q. In other words, the transformer, plus any metal supports on the transformer, are likewise grounded?

A. Yes, sir.

Q. And the cases of all transformers are grounded?

A. (The witness does not respond).

Q. So, any metal that he would have touched on that pole would have afforded a ground?
A. That's right.

RE-RE-REDIRECT EXAMINATION.

By Mr. Lincoln:
Q. One more question, Mr. Sutphin. You described, I believe, the television wire that had been attached to the pole—When you talked to Mr. Thompson about the building, you noticed it at that time, did you?
A. Yes, sir; that wire was attached to the pole, and I believe there was a telephone drop attached to the pole—I'm not sure.
page 85 } Q. Were you called around here following the death of Mr. Heath—to this particular pole and wire?
A. Yes, sir.
Q. When you got there was the television wire then hooked to the Appalachian—
A. No, sir.

Mr. Flannagan: We object to that, your Honor, on the grounds that they are attempting to show negligence through showing a change of conditions.
The Court: Objection overruled.
Mr. Flannagan: Save the exception.

Q. Do you know who removed it?
A. Well, I think Mr. Carter (?).
Q. Is he the owner of the Auto Supply Co.?

Mr. Flannagan: We object to what he thinks.
The Court: If he doesn't know—

Q. But did you make any inquiries about it?
A. No, I didn't make any inquiries about it. The wire was gone when I got there.

By the Court:
Q. When did you get there, with reference to the man's death—how soon thereafter, approximately?
A. I would say it was after ten o'clock.

James W. Ritter, Jr.

Q. A couple of hours after, or something like
page 86 } that?
A. I presume it was. I really don't know just what time the accident happened.
Q. What wire did you say had been removed?
A. The TV wire.
Q. Where was the TV wire? You didn't see somebody remove it? Where was the TV wire when you arrived at about ten o'clock?
A. When I arrived there it was attached to a telephone pole on the street, or near the street.
Q. And when you were there, and had seen the wire—When you were talking to Mr. Thompson, where was it?
A. It was attached to the Power Co. pole.
Q. On the crossarm?
A. Approximately four feet, I'd say, below the crossarm.
Q. And you didn't see anybody remove it?
A. No, sir.

Mr. Flannagan: We want to lodge the additional objection that it's of no probative force unless he can testify to who moved that wire.

The Court: I don't know about that. The objection is overruled.
Mr. Flannagan: Exception.
Mr. Hoge: We may want to call him as a witness on our behalf.
The Court: When he made the statement he was
page 87 } calling him as an adverse witness, I didn't hear
any further objection. I see nothing adverse about the gentleman's testimony. It seemed like he endeavored to answer the question fully and fairly for all parties concerned—including those propounded by the Court. And the Court rules that you are bound by his testimony.
Mr. Lincoln: We are willing to be bound.
The Court: I don't see anything adverse about him.

* * * * *

MR. JAMES W. RITTER, JR.,
having been sworn previously in this cause, is recalled to the witness stand.)

James W. Ritter, Jr.

RE-DIRECT EXAMINATION.

By Mr. Lincoln:

* * * * *

Q. Will you lay the map—

page 88 } Mr. Flannagan: We object to that—it hasn't been introduced into evidence.

The Court: Wait a minute. Let's take it easy. Is that the same map as before?

Mr. Lincoln: With certain changes on the pencil part.

Mr. Repass: May we see it?

The Court: Of course, these gentlemen have a perfect right to see the map before you introduce it. You may examine it—and I'll hear any objections.

(Defendants' counsel examine map).

The Court: Any objections, gentlemen?

Mr. Flannagan: We'd like to examine the witness before the map is introduced in evidence, your Honor.

The Court: Any objections to the map?

Mr. Flannagan: I said, we would like to examine the witness first.

The Court: I'll permit you to ask him questions, though not in great detail.

Mr. Repass: Appalachian Power Co. objects to the map being introduced because it shows the present location, as I understand it, or something close to the present location of that pole, and doesn't show where the testimony and the evidence of the plaintiff put it at the time of the page 89 } accident, April 6, 1959. We object to it on the grounds that there's either liability, or no liability on the defendant in this case as of the moment of this accident.

The Court: I concur in that statement. I don't see, Mr. Lincoln, why you can't have a map showing the conditions as of the date the accident occurred,—the location of that pole?—it's been changed. And I told the jury that it was the location as of April 6, 1959. Where it's changed to, I don't know. It has nothing to do with the facts in this case, and has no material bearing on it. I don't see why you use the same old map. Why can't Mr. Ritter, who is a very

competent gentleman, draw a diagram, showing the physical location of those buildings on the street?

Mr. Lincoln: We don't care anything about the pole.

The Court: Get a new map. I have ruled that one out—that's the same exhibit—and don't take it out and make other marks on it.

Mr. Lincoln: I think it was withdrawn from the evidence.

The Court: It's still part of the record. You gentlemen will withdraw from the scene, and make your map showing the physical location—and don't withdraw that map from the record; it's been marked as an exhibit.

Mr. Repass: The map's been changed since it
page 90 } was originally entered.

The Court: That's what I'm complaining about, Mr. Repass. Thank you for telling me about it—I just stated that.

* * * * *

MR. W. E. HALL,

a witness of lawful age, called in behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Matthews:

Q. Will you state your name?

A. W. E. Hall.

Q. Mr. Hall, where do you live?

A. Rural Retreat.

page 91 } Q. What is your occupation, Mr. Hall?

A. Carpenter.

Q. Mr. Hall, I ask you if on last April 6 you were in the employment of Mr. Brodie Thompson?

A. I was.

Q. Please look at the Judge, and talk to him—and then the rest of us can hear you—if you will, please sir.

Were you in his employment on that day?

A. Yes, sir.

Q. Where were you working?

A. I was working on top of the building.

Q. What building was that?

A. Cinder block building where the man got electrocuted.

Q. What were you doing at that time?

W. E. Hall.

A. Fixing to lay blocks. And they hadn't brought the mud up, and I was at the upper corner waiting for them to bring the mud up.

Q. How did you get up there?

A. I went up on a ladder.

Q. How was that ladder located?

A. It was—we had a scaffold up there; it was six two-by-eights laying there, and the ladder was set up agin them.

Q. And on what were those two-by-eights laid?

A. On the rafters that was up there.

page 92 } Q. What rafters were they laid on?

A. Right next to the light pole.

Q. Is that the rafters used for the support of the roof of that building?

A. Yes, sir.

Q. And the two-by-eights were laid on that?

A. Yes, sir.

Q. How wide was that platform?

A. They was six two-by-eights—make it close to four foot.

Q. And where were they laid?

A. They was laid right up that end, along by that pole.

Q. Were they adjacent to, and touching the wall?

A. Well, I couldn't say if they was touching the wall or not. They was close to it, if they wasn't touching it.

Q. You were working on those to lay the block on the wall?

A. Yes.

Q. Had you finished laying the block on the wall?

A. No—we lacked about a row across that end.

Q. Just exactly what spot were you working, Mr. Hall?

A. Well, I was working on the upper corner of that building.

Q. Do you mean by that, the west corner?

A. Yes.

page 93 } Q. On the south end, or the north end of the building?

A. It would have been the south end.

By the Court: (Interposing)

Q. The end towards Main St.?

A. Towards Mr. Brodie's garage.

By Mr. Matthews: (Continuing)

Q. Away from Main St.?

A. Yeah.

W. E. Hall.

Q. How far would you estimate that you were from that electric pole and the wires in your work there?

A. Well, I imagine I was close to 15 foot—something near that; I never did check it—the best I can get at it.

Q. Had anybody else gone up before you on that roof that morning?

A. Oh, yeah, that fellow that got electrocuted—he went in front of me.

Q. You were the next one to go up there?

A. I believe I was; I wouldn't be positive.

Q. Was there anybody else up on that scaffold, or platform, besides you two?

A. Just us two. The fellow making mud was coming up a ladder—he just started up on there when it happened.

Q. Do you know what Mr. Heath was doing?

page 94 } A. No, I don't; I couldn't say. When I went up there, he had that—he taken a wire loose, and had it in his hand, and I thought he was tying it around one of those crossarms—the way it looked to me; and I didn't pay much attention. And I went to the other corner, and that's all I ever seen of him until the wire had him.

Q. What was the position of that television antenna wire, as you call it, in reference to the rafters there on the building?

A. Well, he was standing with his face towards the pole, kind of at the far end of the building.

By the Court: (Interposing)

What he wants to know is, how close was the television wire to the rafters.

By Mr. Matthews: (Continuing)

Q. —before it was moved?

A. I never—I couldn't say.

The Court: Approximately how far.

Q. Could you work under it?

A. No.

Q. Could you step over it?

A. You could do that.

Q. And it was low enough to the roof so you could step over it?

A. I think so.

W. E. Hall.

Q. And did you actually see him doing anything
page 95 } with that wire?
A. All I seen was the television wire—he was pulling it up there. Looked to me like when he bent it up by him, he had it in his hand then, and I thought he was tying it to one of those cross-bars on the pole—is what I thought.

By the Court: (Interposing)
Q. What, on the pole?
A. Crossarms on the pole.

By Mr. Matthews: (Continuing)
Q. Did you, at the time when you went by him, say anything to him about it?
A. No, never said a word.
Q. What was the next thing that you saw after that, Mr. Hall?
A. I heard him make a racket of some kind—just a kind of a groaning racket, and I looked around, and he was standing there with his head drawn back, jerking all over. I started to run to him to catch him—I thought the man was taking a fit—I didn't know he had hold of that wire. Just before I got to him, somebody hollered from down under—two or three down there—I don't know which hollered—"Don't take hold of him." Well I, of course, by that time seen he had hold of that wire, and smoke was rolling out of his hand.

By the Court: (Interposing)
page 96 } Q. He had hold of which wire?
A. He had hold of the antenna wire in his left hand, and the live wire in his right hand.
Q. And when you said you heard a racket, what kind of a racket did you hear?
A. (The witness groans) Just all the racket there was.
Q. Did he ever speak or yell?
A. I never heard.
Q. Did he make an outcry?
A. No.
Q. Could you describe how he looked, standing there, when you turned and saw him after hearing that rocket?
A. Well, no, I couldn't do it exactly, because his head was drawed plumb back on his shoulders, and he was jerking all over, like that. (The witness indicates a quivering motion) So I didn't—

W. E. Hall.

Q. Now the position of his hands—You said one was on one wire, and one on the other?

A. One was on the antenna wire, and the other was holding the live wire.

Q. Stand up and indicate before the jury, and put your hands exactly as near as you can where his hands were.

(The witness stands before the jury, with left hand at left side, and right hand raised.)

page 97 } A. He was holding that antenna wire in the left hand, and the other hand up like that, holding the live wire.

By Mr. Matthews: (Continuing)

Q. In reference to the pole, was his front, or back, to the Appalachian Power pole and transformer?

A. He was facing the pole.

Q. He was facing it? And that meant he was sidewise to you?

A. Kind of sidewise, yes.

Q. How long did he remain there in that position with those wires in each hand?

A. It wasn't but a few seconds, I don't suppose. It seemed longer, I reckon, than what it was. And they turned him loose, and he reeled over and went off backwards.

By the Court: (Interposing)

Q. You mean he fell to the ground from the top of the building?

A. Yes.

By Mr. Matthews: (Continuing)

Q. Was there any indication of any fire, or any smoke, or anything burning about him?

A. Well, of course I didn't—after he went over there, I was on top, and I had to go down the ladder and come plumb around the building to get back to him—I don't know.

page 98 } Q. Did you see any smoke while he was up there?

A. Smoke was coming out of his hands.

Q. Out of which hand?

A. Looked like to me it was coming out of both of them.

Q. Do you know whether or not both hands were burned, or either of them?

W. E. Hall.

A. No, I never examined him, or touched him after he fell off.

Q. You had laid this entire wall of block, had you not?

A. Yes.

Q. How close was that pole of the Power Co. to that wall, Mr. Hall?

A. The bottom of it could have been out six inches, or maybe a little more than that—it went on in (The witness gestures) and the top of it come up right agin the block.

By the Court: (Interposing)

Q. The bottom was six inches?

A. Approximately that—I wouldn't say exactly; I never measured it—something, I'd say, similar to that.

By Mr. Matthews: (Continuing)

Q. And the top of that—

A. —leaned over toward the building; the top would be against the blocks. I pushed that pole back and put a two-by-four in it to hold it.

Q. You placed a two-by-four against—between
page 99 } the pole and the wall in order that you could continue to lay your wall straight?

A. That's right.

Q. Now, do you know, Mr. Hall, how far those crossarms extended out over the wall and the platform there?

A. No, I don't, exactly—just don't know how far.

Q. Did you have to walk around them to get by them?

A. A little, yes.

Q. You did?

A. I say they stuck out anywhere from 18 inches to two foot—something close to that; I never did measure it.

Q. And you had to walk around them to get by them?

A. Yes.

Q. In other words, the crossarms were lower to the building than your head was to the—

Mr. Hoge: We don't believe that is proper.

The Court: I sustain the objection.

Mr. Hoge: Let him testify.

The Court: The objection is sustained. Let's refrain, Mr. Matthews, please.

Q. Can you describe those wires there to the Court and jury, Mr. Hall—the power wires?

W. E. Hall.

A. Well, the wire that he had hold of was just a little short wire that come down there.

page 100 } By the Court: (Interposing)
Sir, will you turn your head, and speak out. Sit up straight on your chair.

A. The wire that he had hold of was a short wire that come down around there, didn't look to be longer than that. (Witness measure with hands)

Q. Three feet, or something?

A. Something like that.

By Mr. Matthews: (Continuing)

Q. Was it easily visible, or not, Mr. Hall?

A. Yes, you could see it as good as you could any of the rest of it.

Q. How big a wire was it?

A. I never paid too much attention—I wouldn't know; wasn't a very large wire.

By the Court: (Interposing)

Q. (Indicating) As big as this ordinary lead pencil?

A. I'd say something similar to that.

By Mr. Matthews: (Continuing)

Q. (Showing photo to witness) I show you this photograph. Is that an accurate and true picture of things as they existed at the time that Mr. Heath was electrocuted?

A. It looks to be.

Mr. Repass: If the Court please—
page 101 } The Court: What photograph is that?
Mr. Matthews: Photograph, Exhibit #4.

Mr. Repass: We object to the question, and the answer of the witness, on these grounds:—

The Court: You mean the last question and answer? State the grounds.

Mr. Repass: That the witness is called upon to testify to what he sees in the picture—which is Exhibit #4 of plaintiff—rather than to testify to what he saw and knows at the scene of the accident—and the picture in a general way can support and verify what he actually saw. But the question is, "What do you see in this picture"—at the point indicated by the attorney, Mr. Matthews. We think it's objectionable

on the grounds that the picture may be supporting testimony. But the question involved is, what did the witness see at the time, at a place where the accident happened on April 6, 1959.

The Court: He's heretofore undertaken to state that, and I'll overrule the objection. He was asked by both sides if it correctly represented the true situation, and he said it did.

Mr. Repass: Save the point.

The Court: The objection is overruled.

page 102 } Mr. Lincoln: That's all.

CROSS EXAMINATION.

By Mr. Flannagan:

Q. Mr. Hall, on the morning that Heath was killed, you said that you were approximately 15 feet from him?

A. Something near that.

Q. Who else was close to Heath?

A. Well, Claude Hall was, I believe, closer to him than anybody else.

Q. Is Claude Hall—You know where he is today?

A. (Pointing) He's right out there.

By the Court: (Interposing)

Q. Here in the witness room?

A. Yes.

By Mr. Flannagan:

Q. Claude Hall was closer than anyone else?

A. Yes.

Q. And who else was there?

A. Glenn Reed Hilton; Kelly Keesling was down on the floor below us.

Q. Where was Hilton?

A. I think he was down on the floor under—I know he was.

Q. And Keesling?

A. They was both down there together.

page 103 } Q. You and Claude Hall were the only ones on top of the building?

A. He wasn't exactly on top; he was coming up the ladder with a bucket of mortar.

Q. How far away from Heath?

A. He couldn't have been over three or four feet.

Q. From Heath?

A. Because the ladder leant up against the scaffold—the two-by-eights I was telling you about.

W. E. Hall.

Q. I believe you had laid all these blocks on the wall next to the pole; is that correct?

A. Well, I had laid the most of them—might have been somebody else laid a few—two or three—laid a few along there.

Q. Did you have any trouble with the wires of Appalachian, or of Home & Auto?

A. No, I didn't.

Q. You were able to work under them without difficulty?

A. Did all the time.

Q. Did other people assist you in constructing that wall?

A. Well, yes; my boy helped lay a little of that wall.

Q. Did he have any difficulty with the wires of Appalachian and Home & Auto?

The Court: What?

Mr. Lincoln: I object.

page 104 } The Court: He can tell what he knows, himself, Of course, what somebody else did—

Q. This TV wire that you have described, I believe that was located down below the drop that ran over to Brodie Thompson's building is that correct?

A. I wouldn't say—I just don't remember; I never paid much attention to that—where it was located; it was hooked in somewhere—as to saying where, I couldn't do it.

Q. It was hooked to the lower crossarm?

A. Yes.

Q. (Showing photo to witness) Referring to Exhibit #4, was the TV wire hooked below that point?—and I'll show this to the jury in a moment.

A. I couldn't say.

The Court: Hold it up so the jury can see.

Mr. Flannagan: He said he couldn't say.

A. I never examined it, and never looked to see where it was hooked.

Q. Now, after Heath's death, where was the TV wire?

A. It was fastened around the crossarm.

Q. Which crossarm? Point it out to the jury.

The Court: Stand up.

W. E. Hall.

(The witness stands before the jury).

A. Over the crossarm.
page 105 } Q. Am I pointing to it?
A. Yes.

Mr. Matthews: If the Court please, the man said "lower crossarm."
Mr. Flannagan: These bifocals—I can't get used to them.

Q. (To the witness) Put an "x" mark where the line was hooked. Was it the lower crossarm?
A. Yes.

Mr. Flannagan: Let Mr. Lincoln mark it.

(Mr. Lincoln marks on photograph).

Q. Was it on the edge of the crossarm?
A. Right on the end of it.

By Mr. Lincoln: (Interposing)
Q. The "X" is by the crossarm with the wire—
A. After he fell off.

By Mr. Flannagan: (Continuing)
Q. Now it was there after Heath fell off?
A. That's right.
Q. It was not there just prior to Heath's being killed, was it?
A. Well, I don't know whether he had hold of it in his hand.
Q. So it was not hooked to the crossarm at that
page 106 } time?
A. Well, it's bound to have been, because it would have fell off when he fell off.
Q. I say, when you first saw Heath, he had it in his hand?
A. He had it in his hand when I first went up there.
Q. It was not hooked across the crossarm?
A. He hooked it after I went out there.
Q. Do you know whether or not he took the TV wire off the pole?
A. No, I don't. I believe he took it loose from the pole; and I don't know whether he aimed to stretch it up and tie it tight—I never asked no questions, and didn't know nothing about it.

W. E. Hall.

Q. He was facing the pole at this time?
A. Yes, sir.
Q. Was there anything between him and the pole—the Appalachian pole?
A. Not a thing. He was standing up there on the roof; he was back, I'd say from the wall, 18 inches to 2 foot, holding it when I seen him.
Q. At that time was the Appalachian wire, that he later touched, in plain view of him?
A. It sure was.
Q. State whether or not it was over his head.
A. Yes, sir; it was over his head.
Q. To touch that wire, what would have had to
page 107 } be done?
A. He'd have to reach up to get it.
Q. Prior to your hearing Heath moaning, as you put it, did you hear any outcry from him?
A. No, sir; nothing other than groaning.
Q. Did you hear him slip, or fall?
A. No.
Q. Did you hear any outcry from him?
A. No.

CROSS EXAMINATION.

By Mr. Hoge:
Q. Mr. Hall, did you do any further work on that particular wall on the morning after this accident occurred?
A. Yes, I believe we worked some on it.
Q. What did you do, in particular?
A. I think we put some sheeting on it.
Q. Sheeting on the—
A. —Rafters.
Q. Did you lay any more block that morning?
A. I don't believe we did, after that happened.
Q. Did you continue working on the roof of the building, however, that morning?
A. We worked a little, but very little.
Q. Did you help in the sheeting on the building?
A. Yes.
page 108 } Q. How close were you to the pole after this accident?
A. Well, I was pretty close to it several times: as far as that's concerned, we were working around there.

W. E. Hall.

Q. You were working around that pole before the death of Heath?
A. Um-hum.
Q. Did you lay the block immediately adjacent to the pole? (Indicates on photo)
A. Like I said, there must have been some other fellows that laid a few of them. But I laid the biggest part of that whole end of the building.
Q. What did you rest on while you were laying those blocks past the pole in the south wall?
A. We had a scaffold up from the inside of the wall.
Q. From the inside?
A. Um-hum.
Q. Did you lay any of those blocks from standing on these two-by-eights adjacent to that wall?
A. Yes.
Q. You did?
A. Yes—laid one row.
Q. One row?
A. One row—that was laid after he fell off.

Q. At any time did you stand up on these two-
page 109 } by-eights here?
A. Sure, I worked on them.

Q. And you stood up in a standing position?
A. Um-hum.
Q. In standing up, how close did you come to the Appalachian wire above you—this jumper?
A. I guess it was, I'd say, a foot and a half up to that wire.
Q. A foot and a half from your head on up?
A. Yes.
Q. How tall are you?
A. Five nine. Now, I measured it from them things on up to the wire.

By the Court: (Interposing) Speak more distinctly.

A. It was six foot and four or five inches up to that wire.

By Mr. Hoge: (Continuing)
Q. Was that before, or after the accident?
A. After the accident.

By the Court: (Interposing)
Q. Made on the same day?

A. (Witness nods head).

By Mr. Hoge: (Continuing)

Q. Six feet four or five inches?

page 110 } A. Um-hum.

Q. Was the wire in any manner pulled, or was it in the original position?

A. The wire was pulled down some.

Q. Would you know how far, Mr. Hall?

A. I'd say from three to four inches, the best that I could tell by looking at it.

Q. Do you know what pulled that wire down in that position?

A. I suppose he did, when he had it in his hand.

Q. Was it in that position before the accident?

A. No.

Q. Was the measurement made at the place that you saw Heath holding to the jumper wire?

A. Yes, sir.

Q. Now, may I ask you whether or not at that point that jumper wire is directly over the building, or is it over the edge of the building?

A. That wire was mostly over the edge of the building, I'd say.

Q. Did it extend over the building?

A. Well, I couldn't say about that; I just don't know.

Q. Do you know about how far Heath was standing from the edge of the building?

A. Well, I stated a while ago—I'd say from

page 111 } 18 inches to 2 foot.

Q. From the edge of the building?

A. Yes.

Q. Will you please state whether or not when you saw him, and at any time, he was leaning outward over the edge of the building?

A. No, sir: I never seen him leaning out.

Q. Which direction was he leaning?

A. He was just standing there straight when I seen him.

Q. How was Mr. Heath working when you first saw him there that morning—did he have gloves on?

A. Yes, I think he did.

Q. What kind of gloves, please?

A. Leather palms and cloth-back gloves.

Q. You know how long he kept those gloves on?

W. E. Hall.

A. No, I don't. He had them off when he took hold of the wire, because I picked the gloves up after he fell off.

Q. You picked them up?

A. Yes.

Q. Where were they?

A. Lying on the two-by-eights laid down to walk on.

Q. How close to Heath were you—were the gloves, Mr. Hall?

A. I couldn't say, because I never picked up the gloves till after it was all over with, and I never paid too much attention.

page 112 } Q. How close to where you saw him last standing, when he had hold of the wire?

A. It wasn't too far—it couldn't have been. I wouldn't know how far now; I'd say four or five feet of where the gloves was.

Q. Do you know when he removed those gloves?

A. No, I don't—never seen him—don't know a thing about it.

Q. Were they the same gloves he had on when you first saw him?

A. They looked to be.

Q. And you two were the only two up on the roof?

A. Yes.

Q. Did you see any other gloves lying on the roof when you went up there that morning?

A. No, I didn't.

Q. Did I understand you to say that Heath was bare-handed when you saw him having the wires in his hands, when he was electrocuted?

A. That's right.

Q. Could you reach that wire above you—that jumper wire above you, Mr. Hall?

A. Could I reach it?

Q. Could you reach it?

A. Oh, yes, you could reach it by stretching up.

page 113 } Q. Do you have to stretch after it?

A. Not too much. It was—just figuring it out—it was about five or six foot and four or five inches up to it.

* * * * *

page 117 }

* * * * *

MR. H. M. SPARGER,
a witness of lawful age, called in behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Lincoln:

Q. You are Mr. H. M. Sparger?

A That's right.

page 118 } Q. Where do you live, Mr. Sparger?

A. Marion.

Q. And how long have you lived here?

A. 18 years.

Q. And in what business or profession are you engaged?

A. Architectural engineering work.

Q. Now, do you have any particular profession within that line?

A. I handle the engineering.

Q. And in particular, what kind of engineering?

A. Electrical.

Q. And where did you go to school?

A. University of North Carolina.

Q. And what kind of a degree did you receive there?

A. B. S. in engineering.

Q. And do you have a degree in Electrical Engineering?

A. I do.

Q. And do you have any certificates showing your qualifications for being an Electrical Engineer?

A. I am a registered professional Engineer in the State of Virginia.

Q. And since your graduation, has that been your profession—that of Electrical Engineer?

A. Yes, it has.

page 119 } Q. And you have practiced it regularly, have you?

A. Yes.

Q. Now, Mr. Sparger, I would like to ask you, that assuming that a man, standing on boards—we'll say dry boards— and that man would touch an uninsulated 2300 volt wire, in your opinion would touching that wire while standing on the boards—with nothing else touching him—would that electrocute him?

Mr. Flannagan: The question is objected to on the grounds the hypothesis is based on a statement of facts not in evidence in this case, namely, "dry boards."

H. M. Sparger.

The Court: I understood they said they were wooden boards, dry—at least I got that impression—two-by-eights.

Mr. Flannagan: Also the question doesn't contain all the elements—all the facts upon which to base a hypothetical question.

The Court: You might tell him further details as to type of shoes, and so forth.

Q. (Showing shoes to witness) And let's assume that man standing on the boards with shoes of this type. And I'll ask you if you know what kind of soles they are?

A. They appear to be rubber.

Q. And by grasping an uninsulated wire carrying 2300 volts, in your opinion would that kill a person by electrocution?

page 120 } Mr. Flannagan: Same objection.
The Court: I'll overrule that.

Mr. Flannagan: Exception.

The Court: Let him answer it.

A. In my opinion, it would not kill the man.

Q. Then suppose, on the other hand, that this man, while touching the 2300-volt wire, had in his other hand an uninsulated cable, what effect would that have?

The Court: What type of cables? Describe it more in detail.

Q. Do you know what kind of cable, or wires, are used by the Home & Auto Supply Co. in transmitting television signals over town to various receivers?

A. Approximately.

Q. And would you describe those to the jury?

A. Well—

Mr. Repass: If the Court please, we object on the grounds that at this particular point the question is calling for a description of the cables and wires in general—we think it should be limited to the point of this scene.

The Court: Well, if there is any difference in any other, you may bring that up. The objection is over-
page 121 } ruled.
Mr. Repass: Save the point.

H. M. Sparger.

A. I believe that's a steel cable that supports the television cable that carries the signals. The steel cable is there primarily for support of the other cable.

Q. And from your observation—what you have seen of them—have they been insulated—the steel cable being the support?

A. Yes.

Q. Is the television antenna itself insulated?

A. I believe it is.

Q. Now, then, what effect—

The Court: Rephrase your question, Mr. Lincoln, and assume all those facts.

Q. Let's assume a man standing on a group of two-by-eight boards which are laid over rafters on top of a building—the building made of—constructed of concrete block—grasping a wire carrying 2300 volts, being uninsulated, and holding in his hand a television antenna such as you have described; what would be the effect on that man—

Mr. Flannagan: We have the same objection—in not being based on a statement of complete facts; also on the basis that the preliminary question propounded to this witness clearly demonstrated that the witness had no knowledge upon which to predicate his answers—and in fact predicated his answers, I believe—

page 122 } The Court: Of course that's his opinion, Mr. Flannagan. The objection is overruled.

Mr. Flannagan: Save the exception.

The Court: You may answer, sir.

A. His body would then make a circuit between the high potential wire and the ground, and it would naturally carry a current that would cause death.

Q. And would such a current be calculated to cause death, under the circumstances I have described?

Mr. Flannagan: We object to that, your Honor. The witness is not qualified as an expert on the body.

The Court: The objection is overruled.

Mr. Flannagan: Save the exception.

H. M. Sparger.

A. I would say, it could have.

Q. Cause death? Would it, under the circumstances I have described, would it be likely to, or burn both hands in contact with the two wires?

A. Yes.

Q. Now, Mr. Sparger (Shows shoes to witness) would shoes of this type with the rubber soles—which are Exhibit #2—would those soles tend to insulate a person who was standing on anything such as planks, or like territory, or on planks from any moisture in the planks—if any was there?

A. Yes, they would.

page 123 } Q. Would the fact that there are tacks in the soles affect it any?

A. Well, yes.

Q. In what way would it affect it?

A. It would cut down the effective insulation of the shoes.

Q. In your opinion, standing on boards—even newly *sawn* boards—is there enough insulation in those shoe soles to protect a person if he touched a 2300-volt wire—assuming he did not have another piece of metal in his other hand?

Mr. Flannagan: Same objection—it is not based on all of the facts.

The Court: Overrule the objection.

Mr. Flannagan: Exception.

Mr. Repass: Save the exception.

A. I am unable to answer that. I think possibly he would get a little shock; I wouldn't know whether it would be enough to kill him, or not.

Q. You would be doubtful that it would be enough to kill him?

A. It would be—I would doubt it, yes.

Q. Now, are you familiar with the rules of wiring, as promulgated by the Department of Weights and Measures, I believe? Do you have a booklet in your possession showing how close, or how far electrical wires should be constructed from buildings?

page 124 } A. (Pointing to coat pocket) I have the National Electric Safety Code here.

Q. Would you let me see that? It does not purport to be a publication of the U. S. Department of Commerce, National Bureau of Standards?

A. Yes.

Q. Are there rules and regulations in the book governing the

standards that high voltage electric wires should be placed from buildings?

A. Yes, there are.

Q. Would you turn to that, please?

A. (Witness opens book).

Q. Now, to what page did you turn?

A. Page 122.

Q. And would you read? Is there a table listed on page 121?

Mr. Hoge: May we see it?

The Court: You may.

(Defendants' counsel examine book).

Q. (Passing book to witness) Would you read from Table 4, I believe, there, as to the distances, particularly of high voltages—listed in the category of high voltages?

Mr. Flannagan: Your Honor, Home & Auto objects to this testimony, on the ground there's no evidence page 125 } there was any voltage on the wire of Home & Auto Supply Co.

The Court: I'm going to let it go in.

Mr. Hoge: There's no point in reading the part about the 2300 volts; we're perfectly willing for it to go in.

The Court: You somewhere made references in your opening statement that the Power Co. erected the appliances in accordance with the standards of some association, and I'm going to let him read the pertinent parts of that that is applicable to this particular case.

Mr. Hoge: The pertinent part is only with reference to 2300 volts.

Q. Would you read the distances applicable to 2300 volts?

A. (Reading) "Clearances of Supply Conductors from Buildings. From 300 to 8700 volts the horizontal clearance is three feet from the building, and the vertical clearance is eight feet minimum."

Q. And what do you mean by "vertical clearance" and "horizontal clearance"?

A. The horizontal clearance would be to the side of the building—away from the building; and the vertical clearance I would take it to mean "above the roof."

H. M. Sparger.

By the Court: (Interposing)
Q. What are those distances?
A. Three feet horizontal, and eight feet vertical.

page 126 } By Mr. Lincoln: (Continuing)
Q. And will you file that booklet, in particular Table IV on page 122, as part of your evidence in this case?
A. Yes.

The Court: There may be objections to the book.
Mr. Lincoln: I don't see any need of it. Let the stenographer copy that one from that book.

(The following table is copied from booklet entitled "National Electric Safety Code," page 122:)

TABLE IV (Plaintiff's Exhibit #6).

Voltages of Supply Conductors	Horizontal Clearance feet	Vertical Clearance feet
300 to 8700	3	8
8700 to 15,000	8	8
15,000 to 50,000	10	10
Exceeding 50,000	10 (Plus 0.5 inch per KV in excess)	10 (Plus 0.5 inch per KV in excess)

CROSS EXAMINATION.

By Mr. Flannagan:
Q. Mr. Sparger, have you had any experience in handling high voltage wires?
A. Some.
Q. Would you be safer with, or without gloves on high voltage wires?
A. You should have gloves.
Q. You should have gloves? A person shouldn't take those gloves off and throw them away—

page 127 } Mr. Lincoln: I object.
The Court: Well, I don't know—I sustain the objection to that last statement, which is in the nature of an argument. Let him put the first statement—about the gloves being safer.

H. M. Sparger.

Q. You testified that these shoes would have insulated a person against 2300 volts. When you made that statement, did you take into consideration certain nails that I see in the soles of these shoes, as well as the heels, which nails go all the way through, and are visible on the inner sole of the shoe?

A. I was basing my opinion on a person standing on dry boards with those shoes on.

Q. Well, did you consider the fact that these nails—Did you examine the inside of these shoes?

A. No, I did not.

Q. How could you testify as to the nails not having any appreciable effect without examining the inside of the shoes?

A. I stated they would cut down the effectiveness of the shoes.

Q. If they went all the way through, they would carry a current as well as a naked wire, wouldn't they?

A. Yes.

Q. (Handing shoes to witness) Will you examine them, and see if they go all the way through?

page 128 } A. They apparently do.

Q. Do you want to change your testimony that these shoes would have effectively insulated that man?

A. The shoes by themselves would not.

Q. All right, sir.

The Court: Wait a minute. The shoes by themselves?

A. I don't believe the shoes by themselves would have effectively insulated a man.

Q. A man would have picked up a ground through these shoes, if he were standing on the ground, or standing on something which made connection with the ground?

A. Yes.

The Court: Confine it to the shoes.

Mr. Flannagan: He answered the hypothetical questions —I think that's what I was examining him on.

The Court: The Court rules that you must confine that to the two-by-eights. If he was standing on some other metal—confine it to the facts in this case. No argument.

Mr. Flannagan: I want to save the exception, in not being able to state it in the record.

H. M. Sparger.

Q. Will a concrete block wall, which has been raised approximately 24 feet, and is a day old, carry electrical current sufficient to ground a person?

page 129 } A. It would be possible.

Q. A cinder block wall?

Mr. Lincoln: If the Court please, we object to it on the ground it was shown this man was standing back from the wall on the boards.

The Court: I want to give Mr. Flannagan full leeway to examine this expert witness. At the same time I do not want to go far afield and bring in conditions and circumstances that the testimony has not disclosed. I don't mean to cut you off from anything that's material. Let's confine it to the factual situation.

Mr. Flannagan: I was not trying to disclose where this man was when he was electrocuted.

Mr. Lincoln: There isn't a witness who testified he saw him when he was electrocuted—they saw him afterwards.

The Court: The jury heard what was testified. And I'll ask him to confine it as nearly as possible to the factual situation as disclosed by the evidence here.

Q. Now, Mr. Sparger (Showing photo to witness) looking at Plaintiff's Exhibit #4, you see certain transformers and a guy wire. Are those transformers and guy wire grounded?

A. Yes.

Q. If a person touched a 2300 volt naked wire,

page 130 } and then touched any portion of the transformer, the supports or the guy wire, what would be the effect upon that person?

A. It would be my opinion that he would receive a shock.

Q. A lethal shock?

A. Depends on what part of his anatomy he might have touched, or had been in the circuit.

Q. Um-hum?

A. But assuming he had one hand on one, and one hand on the other, it would probably be lethal.

Q. Would it be lethal if he had his hand on one, and these shoes with the—the one with the nails—on the other?

A. Yes.

Q. You know what caused this abrasion on the shoe heel?

A. No.

Q. Have you ever inspected the television wire of the Home & Auto Supply Co.?

H. M. Sparger.

A. Not as such.

Q. Do you know of your own knowledge that that wire is grounded?

A. I think it's accepted standards that that wire is grounded every fifth pole.

Q. Now, you don't know of your own knowledge?

A. No. I haven't actually examined the wires.

page 131 } Q. So, when you answered the question, that if he touched the television Home & Auto wire, and then touched the electric wire, that the television wire would ground him, you made that statement without knowing whether this television wire was grounded; is that correct?

A. I assume it's grounded; it's supposed to be grounded.

Q. But you don't know of your own knowledge—when you answered that?

A. I didn't answer it on the basis that I had examined it.

Q. Were you called in to examine this installation immediately following the death of Heath?

A. No.

Q. Did you see Heath immediately following his death?

A. No.

CROSS EXAMINATION.

By Mr. Repass:

Q. Mr. Sparger, you testified you were an architect?

A. I said I am a member of an architectural firm, practicing architecture.

Q. As such, state whether or not you're familiar with wood, and with reference to dampness, and the effect of dampness?

A. Would you repeat?

Q. Are you familiar with wood lumber?

A. To some degree; yes, sir.

page 132 } Q. Wood is a pretty sensitive thing, with reference to moisture, isn't it?

A. Yes.

Q. Now, let's assume that at 7:45 on April 9, 1959—

The Court: April 6, 1959.

—at 7:45 here in Marion, with four-by-eights—two-by-eights lying on their sides on top of a building—what would

be your opinion as to whether or not those two-by-eights were damp at that hour in the early spring morning?

A. Would they be dry, or would they be wet?

Q. Assuming that it didn't rain that night?

A. They would be damp, but not wet.

Q. Well, would dampness, in your opinion, affect the capacity of a board—two-by-eights—with reference to conducting electric current, 2300 volts?

A. Yes.

Q. That's all.

The witness stands aside.

MR. CLAUDE HALL,

a witness of lawful age, called in behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Lincoln:

Q. You are Mr. Claude Hall?

A. Yes, sir.

page 133 } Q. Where do you live, sir?

A. Speedwell.

Q. And what do you do—what is your occupation?

A. Well, I work on buildings some, and farm some.

Q. On the 6th day of April, the day that Mr. Heath was killed, were you working on the Brodie Thompson building?

A. Yes.

Q. What was your particular job there?

A. Well, I was making mortar.

Q. And what time did you go to work that morning?

A. Well, I don't know exactly what time it was—the usual—I don't know. We begin seven or eight—I have just forgotten.

Q. Did you see Mr. Gilbert David Heath that morning?

A. Yes, sir.

Q. Where did you first see him?

A. Well, he was up on the building—he come up there.

Q. And when you first saw him, he was up on the building?

A. Yes, sir.

Q. Where were you?

A. Well, I was taking a box of mortar up on the roof.

Q. Now, how did you go up to take your mortar?

Claude Hall.

A. I went up on a ladder.

Q. Where was that ladder?

page 134 } A. That ladder was sitting in between the joists, up against the platform.

Q. Do you mean running from the second floor to the roof?

A. Well, the roof, rather, is the top—it wasn't the top. What I mean, we laid the scaffold up to the top row of block—we was laying block.

Q. What was the scaffold laid on?

A. It was laid on the joists.

Q. And what were those joists for?

A. They was two-by-eights.

Q. And what was their purpose?

A. Well, they was a scaffold for us to work on.

Q. The joists—was that the roof joists to support the roof?

A. Yes, that's right.

Q. Now, as you came up the ladder, what did you first notice in regard to Mr. Heath?

A. Well, he was holding the television cable—he was pulling at the cable.

By the Court: (Interposing)

Q. Pulling at the cable?

A. Yes, sir.

By Mr. Lincoln: (Continuing)

Q. In what manner was he pulling at it?

page 135 } A. With his left hand, kind of jerking it—it was hitting me on the head.

Q. Now, had you noticed that television cable prior to—the day before that, or—

A. Yes, sir; I had seen it the day before.

Q. How far was it above the roof joists you described?

A. Well, it wasn't too far—that's the reason it was moved—it was in the way of the joists along the floor.

Q. You say it wasn't too far? Give us your best estimate; how far above the joists did the wire hang?

A. Well, I just couldn't say exactly.

Q. Could you walk under it?

A. I don't think you could walk under this wire.

Q. Could you step over it?

Claude Hall.

A. You could step over it—it was loose—laid down on the building.

Q. Laid down?

A. At the time the end of it was down on the building.

Q. And as you came up the ladder, you say he jerked the wire and it hit you?

A. Yes, sir.

Q. Where did it hit you?

A. On my head.

Q. Then what did you observe?

page 136 } A. I ducked down to keep it from hitting me—I was afraid it would hit up in the wires, or something.

Q. And what next did you see, with reference to Mr. Heath?

A. Well, he kept pulling at the cable, and then he finally reached up and got that wire.

Q. And do you know what he was reaching for?

A. No, sir; I don't.

Q. Were those crossarms up in the vicinity of this wire?

A. I don't know—two or three crossarms; I don't—

Q. And he was pulling on the wire with his hand?

A. Yes, sir.

Q. And that's when he came into contact with the wire with his right hand?

A. That's right.

Q. What happened to him then?

A. Well, when he caught the wire he just went back like that. (The witness arches his head and body backward)

Q. Did the wire hold him there?

A. It held him some little bit.

Q. And then what happened?

A. Well, when it turned him loose, he reeled over and fell over backwards.

Q. (Showing photo to witness) Does this picture show the scaffolding as it existed that morning, as best you

page 137 } you can tell?

A. Yes, sir; it does.

Q. Do you what this dark looking stuff is there?

Mr. Hoge: We have the same objection, your Honor. We don't think it's proper to prove by this picture what it is. He can testify to what he saw, and identify it in the picture. To take the picture and prove facts—

The Court: The objection is overruled, for the reasons stated a while ago.

Claude Hall.

Mr. Hoge: We except.

A. Pieces of cinder block.

Q. Where was the television wire attached? Was it attached to the pole in any way?

A. Well, I couldn't tell you whether it was, or not; I absolutely don't know.

Q. All right. Now, did you hear him cry out, or say anything?

A. I didn't hear him say a thing.

Q. Did you hear anyone else holler at him?

A. No.

Q. And how far were you from him at the time he touched the wire?

A. Oh, I was two or three foot—something like that.

CROSS EXAMINATION.

By Mr. Flannagan:

page 138 } Q. Mr. Hall, now, as I understand it, you were coming up a ladder onto these rafters next to the scaffolding, about two or three from him?

A. Yes, sir.

Q. And he had the television wire in his left hand?

A. That's right.

Q. Do you know where the wire was before he took it in his left hand?

A. I couldn't tell you, unless it was laying down on the building; I couldn't say.

Q. And he shook the wire, and the wire hit you in the head?

A. Yes, sir.

Q. And you said you were afraid it would get into the wires?

A. Yes, sir.

Q. What do you mean by that?

A. I was afraid it would jerk up and hit a live wire and make connection.

Q. You were scared the shock would electrocute you?

A. Yes, sir.

Q. Were there wires close to where he was standing at that time?

A. Well, they was over his head.

Q. Over his head?

Claude Hall.

A. Yes, sir.

page 139 } Q. Now, what did he then do with that television wire after he shook it?

A. Well, he was holding to it when he caught this other wire.

Q. Which way was he facing when he caught the other wire?

A. He was facing this pole—(Indicating) like the pole sits here, and me here—he had his back to me.

Q. He had his back to you?

A. Yes, sir.

Q. And was he facing the wire he caught hold of?

A. Yes, sir; he was kind of looking up.

Q. Now, would you just stand up and show the jury just how he was, and how he grabbed that wire?

A. (The witness stands and illustrates) Like this is the pole, I was standing behind him, and he was up here, and he had the cable like that, and he reached up like that.

Q. Over his head?

A. Yes, sir—he had to.

Q. When he reached up, did he reach right to the wire?

A. Yes, sir.

Q. The first time?

A. Yes, sir.

Q. He didn't fumble around for the wire?

A. No, sir.

page 140 } Q. He didn't touch anything other than the wire?

A. Not that I ever seen.

Q. He wasn't falling?

A. He was standing about 18 inches on the platform.

Q. And the wire he reached was perfectly visible to him?

A. Yes.

Q. Is that correct?

A. That's right—what I think.

Q. And it was uniunsulated?

A. That's right.

Q. When you first saw him, did he have on leather gloves?

A. Well, no. When I saw him, see, he was up there—when I clum up the ladder—and his gloves was lying on the floor.

Q. On the floor?

A. On the floor.

Q. Close to him?

A. Yes, sir.

Q. By the "floor," you are speaking of two-by-eights?

Claude Hall.

A. Two-by-eights.

Q. Do you know if anyone had moved that television wire beforehand?

A. No, I couldn't tell you whether they had, or not.

Q. Do you know why Heath moved it?

A. No, I don't.

page 141 } By the Court:

Q. Mr. Hall, did any part of the television wire strike any part of the electric power line?

A. Not that I could see.

Q. None came in contact, as I understood you to say, other than the man with the power line?

A. He had the cable in his hand, jerking it.

Q. Nothing but the other hand came in contact with the power line?

A. That's right.

CROSS EXAMINATION.

By Mr. Hoge:

Q. Did you go ahead and do any further work at all that morning, by way of laying block?

A. I don't know. We worked that day, but I don't know whether they finished laying those blocks.

Q. Did they use the mud that you had brought up to the top of the building that morning?

A. I declare, I couldn't say; I don't know whether they used that—I don't much believe they did.

Q. And tell me, is it true that the television cable was looped through this hole on the end of this lower crossarm, after the accident?

A. I couldn't tell you that.

page 142 } Q. Did you ever see it *lopped* through there?

A. If I did, I didn't notice it.

Q. Now, tell me, too—as I understand you here, and as you have demonstrated, Heath reached up while he was looking at the bare wire, and looked straight at it, and took hold of it?

A. That's right.

Q. (Indicating on photo) Was this end of this crossarm closer to him than this point up here?

A. It's bound to be,—it's below it.

Q. And pretty close to him there, wasn't it?

Claude Hall.

A. Yes.
Q. How tall a man was Heath?
A. I don't know. I just heard somebody say he was five seven or eight, I believe.
Q. How tall are you?
A. Five eleven.
Q. Did you work around under this wire?
A. Yes.
Q. Did you come in contact with it in any way?
A. No, sir.
Q. Did you see it?
A. I seen it.
Q. Did you know it was a hot wire?
A. Yes, I did.
page 143 } Q. Could you reach it?
A. Oh, yes, I could have reached it if I'd wanted to.
Q. Would you have had to make an effort to reach it?
A. I'd had to reach up a little for it.
Q. For you to have reached it?
A. Yes.
Q. Did you help make any of the pier there?
A. No, sir; I didn't.
Q. And did Heath, in reaching up after that wire, make an effort to reach it?
A. Well, I don't know—it looks like he reached awful high.
Q. He reached awful high?
A. Yes, sir.
Q. Where'd you find the gloves after Heath's death?
A. They was laying right where he was standing.
Q. Where he was standing?
A. Yes.
Q. Was that with reference to the end of your ladder going up there—where was that?
A. I'll say between the ladder and the pole, I think, about four foot—they was back maybe 18 inches, or something like that.
Q. You know when this picture was made?
page 144 } A. No, sir.
Q. They was making some that day, but I don't know when it was.
Q. Would you know how long after the death occurred?
A. It seemed like they made some that day.
Q. Some that day? Would it be morning, or afternoon?

Claude Hall.

A. Well, I can't say. But I know they made pictures that day.

Q. And do I understand you to say that Heath was not falling at that time?

A. If he was, I didn't see him.

By the Court: (Interposing)

Q. Was the platform board which they made nailed down and secured in any way?

A. I don't know. They was laying solid.

Q. You didn't see any disturbance of the boards?

A. Not a thing.

By Mr. Hoge: That's all.

RE-DIRECT EXAMINATION.

By Mr. Lincoln:

Q. Mr. Hall, how far was this pole away from the building wall there?

A. Well, it was about four inches—two or
page 145 } four—I don't know; we put a block up in between
—it was a two-by-four block—this way (Witness gestures)—I have just forgotten.

Q. What did you put that in there for?

A. To hold it away from the wall so we could lay block.

Q. Was the wire you have described overhanging the roof?

A. Well, it was on the edge of the roof.

Q. And, now, is that pole in the same place that it was then?

A. It was moved.

Mr. Repass: If the Court please, we object.

The Court: The objection is overruled.

Mr. Repass: Exception.

Q. When was the pole moved?

Mr. Hoge: Objection.

The Court: Overruled.

Mr. Hoge: Exception.

Q. When was the pole moved?

Claude Hall.

A. It was moved that day.
Q. How long after Heath's death?
A. About twelve, they went to move it, as well as I remember.
Q. Now, I believe you stated that you ducked because the television wire was hitting you?
A. Yes, sir.
page 146 } Q. At the time you ducked, was that the time he came into contact with the wire?
A. Not right at that time. When I looked up to see what was going on, and that was about the time he caught the wire.

Mr. Repass: We think that's repetitious.
The Court: I think that is repetitious.
Mr. Lincoln: That's all.

RE-CROSS EXAMINATION.

By Mr. Flannagan:
Q. Mr. Hall, did you see any smoke coming from the hands of Mr. Heath?
A. Yes, sir.
Q. Which hand?
A. From the one he had the hot wire in—I never noticed the other.
Q. That's all.

The witness stands aside.

Mr. Lincoln: That's the case for the plaintiff, except, of course, saving Mr. Keesling.
The Court: What about Dr. Potter? Are you going to call him?
Mr. Lincoln: I believe we'll offer that with that deleted—subject to our exceptions.
The Court: Do you want to read that pertinent
page 147 } part to the jury?
Mr. Flannagan: That hasn't been identified—and when it is we want to show our objection.
The Court: I have already ruled it can be admitted.
Mr. Flannagan: We want to object.
The Court: The record shows that you object.

By Mr. Lincoln: (Reading) "Department of Health, Office of The Chief Medical Examiner, 4408 North 12th St.,

Richmond 19, Va. Report of Investigation by Medical Examiner—Accident of Gilbert David Heath. Age, 44; Sex, M (Male); Race, W (White); address, Chilhowie, Va.; Occupation, Laborer; Type of death is shown by electrocution; Date last seen alive was 4/6/59, 7:45 A. M.; Injury illness 4/6/59, 7:45 A. M.; Death, 4/6/59, 7:45 A. M.; Medical Examiner notified 4/6/59; View of body, 4/6/59, at 4:30 P. M.; Police notified 4/6/59 at 8:00 o'clock A. M.; Injury, or death, on receipt of illness; Employer, Easy-Pay Tire Co., Marion and Church St.; Viewing of body by Medical Examiner, Terrace Heights Funeral Home, Chilhowie, Va.; Description of the body showed an abrasion—a burn—burns on both hands and face; Probable cause of death listed as electrocution; Manner of death listed as accident; Name of physician, page 148 } or institution—None; Previous mechanical injury—None; Found dead by Robert McClure Kelly Keesling, of Rural Retreat, Va." And signed, of course, copy teste, by the Chief Medical Examiner—I can't make out his name.

Mr. Flannagan: Who signed the certificate?

Mr. Lincoln: Dr. Richard C. Potter, who was Acting Medical Examiner in this County. That's our case.

The Court: You save the introduction of the witness Mr. Keesling?

Mr. Lincoln: I didn't notice this: (Reading) "Weight, 180: Length, 5′ 10″—I didn't notice that.

The Court: Mr. Keesling?

Mr. Lincoln: —Advises me he'll be here in the morning at 9:00 o'clock.

The Court: Now then, you gentlemen for the defendants may, subject to Mr. Keesling being called, proceed as you are advised.

Mr. Repass: Mr. Keesling, as we understand it, seems to be a rather important and material witness—and was at the scene; and we feel that for us to go forward at this stage, until Mr. Keesling testifies—since the plaintiff expects to use him as its witness—we feel that we are in an page 149 } unfortunate position to go forward with our proof at this stage. We would like to expedite the hearing just as far as we can—this trial.

The Court: I thought we had that settled on yesterday. Mr. Keesling's father died—or some member of his family—and Mr. Lincoln announced to all of us yesterday—and the Court ruled then that we would go ahead this morning with the hearing; and I'm going to rule now that you gentlemen

may proceed as you may be advised—and we'll hear Mr. Keesling.

Mr. Repass: It's regrettable—and we're perfectly agreeable to suspending.

The Court: I'm not going to suspend at this hour. It's 3:30—and you gentlemen may proceed.

Mr. Hoge: We except.

Mr. Flannagan: Has the plaintiff rested?

The Court: That's what he announced, except for Mr. Keesling.

Mr. Flannagan: We have a motion to make.

(The following took place out of the presence of the jury.)

Mr. Flannagan: Your Honor, is it proper at this stage, since the plaintiff has rested, to make a motion to strike?

The Court: You may proceed with that.

page 150 } Mr. Flannagan: Is there any objection from the plaintiff?

The Court: You may proceed, Mr. Flannagan. Whether he objects, or not, I'm going to proceed with the hearing in accordance with the ruling of the Court on yesterday. You may proceed to make your motion, and if the Court doesn't rule on it, it will do so when Mr. Keesling has concluded. State your motion succinctly and briefly, please.

Mr. Flannagan: The motion is to strike the evidence of the plaintiff. The motion is being made on behalf of Home & Auto Supply Co. on the grounds that there is no showing by the plaintiff of any negligence on the part of Home & Auto Supply Co. in the installation or maintenance of its television wire; there is no showing that the wires were originally placed in close proximity to the high tension wires of Appalachian; and there is no showing that Home & Auto Supply Co. had either actual or constructive notice of the building being erected, or of their television wire being across the building, or being in close proximity to the building, or in the way of workmen on the building; there is no showing that anyone asked Home & Auto to move the wire, or to change it so that it would not be in the way of this

page 151 } construction: there is no showing that there was any energy in the wire of Home & Auto Supply Co.; there is a showing that the wire was grounded—by one witness; there is no showing that the wire contributed in any manner to the death of Heath. The expert, on being examined on the hypothetical questions, frankly admitted he had not taken into consideration several relevant factors, such as the nails of the shoes, the wetness of the boards,

and so forth, when he answered those questions. In addition, the showing by plaintiff convicts the deceased of contributory negligence—I think it's a matter of law. There is a showing that the wire was in plain, open view above his head; that workmen had worked there on that building all along, and were apprised of the situation that there was a dangerous wire, but they worked under it without touching it—it was no bother in their work. And then the evidence is that this deceased purposely, without calling Home & Auto to move this wire, grabbed this wire and raised it to the higher point, and then in full possession of his faculties, looked at a high tension wire over his head, and stretched and grabbed that wire, and he was electrocuted. Now, the plaintiff, as I understand it—the law, your Honor, in all these cases

page 152 } has got to show how this thing happened, and the only showing he has made is that it was an act by the deceased when he was in full possession of all of his faculties, and it was a purposeful act in reaching up—he didn't stumble, he wasn't reaching for something else, he wasn't confused—he just purposefully grabbed that wire. Their own witness says that he realized the danger, because when this wire hit him in the head, he got down out of the way, scared the wire would get tangled up with those wires, and that he would be electrocuted. The basis of our motion is that there has been no showing of negligence; that any negligence is a remote, and not a proximate cause; there's been no showing of any causel connection; and the evidence convicts the plaintiff of contributory negligence as a matter of law. For those reasons we move to strike the evidence of the plaintiff.

Mr. Hoge: We have the same motion, your Honor—the motion to strike the evidence of the plaintiff on the following grounds: The plaintiff has wholly and totally failed to show that the defendant, Appalachian Power Co., was negligent in any manner, nor that its negligence proximately caused or contributed to the death of this decedent, Gilbert David Heath. And further, that the evidence con-

page 153 } clusively proves and shows, on the basis of the record, that the decedent was guilty of contributory negligence, which proximately caused and contributed to his death. We point specifically to the surmise of the plaintiff as to how the death occurred; there doesn't seem to be a scintilla of evidence to indicate that he was doing anything except standing in an upright position, from 18 inches to two feet back from the edge of the building, on solid footing, and at that time with his hand on the wire, and

reached up, and looking at the wire, took hold of it—and that after he had removed his gloves, with which he was first working, and had thrown them down here on the roof top. Even assuming that the Appalachian Power Co. was negligent in any manner, of course does not relieve this man of his duty to exercise ordinary care for his own self-protection. And if you would assume that the Appalachian Power Co. were grossly negligent otherwise, I certainly do not believe it would be true. Still, here is an individual who does what—according to the testimony here—is something that no human being would do under any circumstances—a man five feet seven inches tall, reach up seven feet eight inches in height to a bare wire—which any human being knows he'll be electrocuted—which is highly dangerous. Now, I

page 154 } might say, too, in support of the first part of that motion, that they have proven no negligence—the pole, as your Honor will recall, was located where it had been for a period of four years—and always, with regularity, that pole is set in the street right-of-way—and an individual has a perfect right to build on his own property, as he did do in this case—Mr. Thompson built on his own property adjacent to that pole. He did not notify the Power Co. it would be in the way; as a matter of fact, he said he would rather not have it moved, according to Mr. Sutphin, who was there; and if it had been moved to another location it would be in his way—he wanted the pole to remain there. The other men worked on the building without difficulty or danger to them; they put the building up under the wires—and it's the same thing as if they had built a platform, or ladder, and gone up into the place. He did not have to go under any circumstances—it's not in the class of workmen who are working on those wires—that is an entirely different situation. That man reached up to get to it; he had to make a conscious effort—there's a great deal of difference in my mind of a man working in wires two or three feet away, and at body level. In *Ross* v. *Snider,* for example, a man was work-

page 155 } ing on top of a barn, where the wire—the low wire was three feet from the top of the barn, and he stood up and came in contact with the two wires—that man was working in those wires. Still, in that case the Court said the defendant was not negligent on other grounds, and did not hold the plaintiff negligent, because he did not know the wires were charged, and had been told they were not. This is a case of pure contributory negligence of the simplest form. It seems to me the plaintiff's evidence convicts him of contributory negligence on the basis of the evidence thus far adduced.

The Court: Gentlemen, the motion will be denied. You may proceed.

Mr. Flannagan: Show an exception.

Mr. Hoge: Exception.

MR. W. D. CLARK,

a witness of lawful age, called in behalf of the defendant, Appalachian Power Co., after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Hoge:

Q. What is your occupation, Mr. Clark?

A. District Superintendent of the Pulaski District of the Appalachian Power Co.

page 156 } A. And as such do you have any responsibility with respect to the operation in Marion?

A. Yes, sir.

Q. And what is that?

A. Supervision of the construction, maintenance and operation of the lines, and distribution lines in Smyth County.

Q. What age are you?

A. 59.

Q. How long have you been employed by the Appalachian Power Co.?

A. 27 years.

Q. Mr. Clark, were you at the Brodie Thompson building on April 6, 1959, after this accident occurred?

A. Yes, sir.

Q. About what time did you arrive?

A. It was between 10:30 and 11:00 o'clock—I would say fifteen minutes till eleven.

Q. And who was with you, please?

A. W. N. Spangler and O'Neal Amos.

Q. And where are these men from, and by whom employed?

A. They are from Pulaski, and they are employed by the Appalachian Power Co.

Q. Were there any local representatives of Appalachian Power Co. present?

page 157 } A. Mr. Johnny Sutphin.

Q. Did you see anyone else around the scene of this death?

A. You mean employees?

W. D. Clark.

Q. Employees of Appalachian, or anyone else?
A. Dallas Cassell was there.
Q. Was Mr. Thompson there?
A. Yes, sir.
Q. Did you talk with him?
A. Yes, sir.
Q. Did you see any of his other employees on the job?
A. Yes, sir.
Q. Please state whether or not any work was progressing on the building at that time.
A. Yes, sir; they were working on top of the building.
Q. How many employees were working up there?
A. There was three men up there.
Q. Now, Mr. Clark, did you take any measurements around the scene, as to the location of your wires?
A. Yes, sir.
Q. Would you, by referring to picture Exhibit #4, tell what they are? (Shows photo to witness)
A. We measure from—I had Dallas Cassell put a hot stick—an insulated pole we call a "hot stick"—on the boards laying on top of the rafters, and let that stick lay
page 158 } against this loop going over to the transformer—the 2300-volt loop that had been pulled down.
Q. Will you show the jury where you made that measurement, please?
A. (Indicating to jury on photo) I measured from the floor board on top of the rafters up to this loop that had been pulled down—the loop of the 2300-volt line going into the transformer. I had Dallas work the stick back and forth on that loop until it made a mark, then we took the stick away and measured from the end of the stick to the mark that was made by the loop, and it was six feet four inches.
Q. It was six feet four inches to the low point in the loop?
A. (Witness does not respond).
Q. That indicated it was six feet four inches from the floorboard up to the loop of the 2300-volt wire going into the transformer?
A. (Witness nods head).
Q. Did you measure any other distance there at the scene?
A. No, sir—that's the only measurement I made.
Q. You indicated that this wire had been pulled down in a loop—down about how far from its original position and the normal manner?

W. D. Clark.

A. Normally you make both loops level across there. And this loop (indicating) looked like it had been
page 159 } pulled down about four or five inches.

Q. Four or five inches? I show you here a picture that will be introduced in evidence—they have been stipulated.

The Court: You better identify them, and refer to them—for the record.

Mr. Hoge: We introduce Defendants' Exhibit #1, #2, and #3.

(Defendants' Exhibit #1, #2, and #3—Photographs.)

Q. I show you Defendants' Exhibit #3, and ask you what that picture represents, please.

A. That's the measurement we were making on that loop.

Q. And who was this?

A. This is the pole that we used to make the measurement on the loop.

Q. And who is that holding the pole?

A. Dallas Cassell.

Q. There is some other gentleman appearing in the picture.

A. That's me.

Q. Now, the other two pictures—will you explain them to the jury?

A. Well, Exhibit #1—that's the picture of the transformer bank on the pole; and here is the loop that has been pulled down.

The Court: (To the jury) You will have an
page 160 } opportunity to take those to the room with you.

Q. Now the next picture—the third one—Exhibit #2.

A. That is the front view of the transformer bank, with the loop pulled down.

Mr. Hoge: Cross examine?

CROSS EXAMINATION.

By Mr. Matthews:

Q. Mr. Clark, I take, frequently, due to construction and

other changes, you're called upon to move poles; is that right?

A. Yes, sir.

Q. In your construction and maintenance of the poles, what is the clearance above the roof of a building that you require in your company, for a voltage of 2300?

Mr. Hoge: If your Honor please, we'd like to point out that the plaintiff is adopting this witness as their witness for that purpose—it is a subject we did not go into with him—not that phase of it.

The Court: You showed the position of them. I'm going to let him examine him.

Mr. Hoge: I think they have a right to examine him, by making him their witness.

The Court: I overrule you on that.

Mr. Hoge: We except.

page 160A } Q. In the construction of your lines, what clearance do you require for lines of 2300 volts above the roofs of buildings?

A. We follow the National Electric Code of eight feet.

Q. I take it that eight feet constitutes a minimum; is that right?

A. Yes, sir.

Q. Does the effect of whether a wire is insulated, or not insulated, have anything to do with the height above the building?

A. No, sir.

Q. I take it, then, that you consider eight feet to be without the reach of a human, who might be on the roofs of buildings?

A. Yes. I—we follow the Code, and the Code says eight feet.

Q. In the placement of your poles, is there any standard, or minimum requirements concerning the position, or how close they may be to buildings or other structures?

A. The distance of a pole?

Q. Yes, sir.

A. From a building?

Q. Yes, sir.

A. No, sir.

Q. From the sides of buildings. is there a minimum distance or requirement for wires to be from the sides of buildings?

A. Yes, sir.

W. D. Clark.

Q. And what is that distance?

page 161 } A. Three feet.

Q. Now, you examined the premises there that day, did you not, Mr. Clark?

A. Yes, sir.

Q. Could you tell us if you measured the distance that your wires extended over the sidewalls of that building?

A. No, sir; I did not.

Q. You can't tell us, or you didn't measure it?

A. I didn't measure it.

Q. What is the length of your crossarms?

A. There are eight-foot crossarms on that pole.

Q. Could you tell us whether or not those wires did in fact extend over the roof of the building?

A. Yes, sir; they did.

Q. In your opinion, how far?

A. I say between two and three feet.

Q. You indicated something about you measured the distance from the floor to a loop in that wire as being six feet four inches; is that correct?

A. Yes, sir.

Q. State whether or not you know whether that wire was not in the same position at that time as it was before Mr. Heath came in contact with it?

A. Would you repeat that please?

page 162 } Q. Do you know whether or not that wire was not in the same position at the time you measured it, than it was when Mr. Heath came in contact with it?

A. I don't know; no, sir.

Q. Then you're merely going on supposition when you say that the wire was four inches higher than at the time he contacted it?

A. The wire—the companion wire on the other side, I based my judgment on that because we always make those loops the same, and this loop was pulled down about four inches more than the same wire on the opposite side.

Q. And the companion wire on the opposite side wasn't over the roof of the building, was it?

A. No, sir. That pole is not at the same location now as it was then.

Mr. Repass: Objection.

The Court: The objection is overruled.

Mr. Repass: Exception.

W. D. Clark.

Q. Did you order it moved from the present location?
A. I didn't order it moved; no, sir.
Q. Was that pole and wire, on April 6, 1959, under the control of Appalachian Power Co.?

Mr. Hoge: We object, your Honor. That is not the proper question in this case.
page 163 } The Court: Objection overruled.
Mr. Hoge: Exception.

A. Yes, sir.
Q. Could anyone, other than Appalachian, order that pole removed from where it was to where it was to be removed to?

Mr. Repass: We object, your Honor—it's a conclusion of the law.
The Court: Objection overruled.
Mr. Repass: We except.

Q. Could anyone, other than an employee of the Power Co., order that pole removed, and dictate where it was to be removed to?
A. No, sir.
Q. I believe that's all.

CROSS EXAMINATION.

By Mr. Flannagan:
Q. Mr. Clark, in Defendants' Exhibit #3, you showed there —you stated that Mr. Cassell was standing in the picture?
A. Yes, sir.
Q. How tall is he?
A. I would judge him to be six feet.
Q. And what kind of hat is that he has on?
A. That's the insulated type hard hat that the Power Co. uses.
Q. And what is he standing on?
A. On the two-by-sixes—or eights—lying flat-
page 164 } wise on—
Q. Now, referring to Defendants' Picture #2, is the bottom crossarm here the lowest crossarm on that pole—the bottom one that shows on the picture?
A. Yes, sir.

W. D. Clark.

Q. And there is a dark object just to the right of the brace on the right transformer; do you know what that is?
A. No, sir; I don't. It looks like something has been in that—there's a hole in it.
Q. A hole?
A. Is that a shadow on it? I don't know what it is.
Q. I was referring only to the hole.
A. That's a bolt-hole.
Q. Would you circle that bolt-hole.
A. (Witness marks on photo.)
Q. Now, how far, Mr. Clark, would that bolt-hole be from the metal brace on the right transformer?
A. That would be about six inches.
Q. About six inches? Does that bolt-hole also show in Defendants' Exhibit #1? (Shows witness a second photo)
A. Yes, sir.
Q. Will you circle that, please, sir?
A. (Witness marks on photo).
Q. And does that bolt-hole also show in Plaintiff's Exhibit #4? (Shows witness a third photo)
page 165 } A. Yes, sir.
Q. And would you circle it?
A. (Witness marks on photo).
Q. That's a cross mark beside it. Will you circle the bolt-hole, please, sir?
A. (Witness marks on photo).

Mr. Flannagan: That's all I have, your Honor.

RE-DIRECT EXAMINATION.

By Mr. Hoge:
Q. Mr. Clark, you were asked about clearance requirements. When this pole was originally installed, did it comply with the National Underwriters Safety Code?
A. Yes, sir.

Mr. Lincoln: We object, if the Court please. That was some time prior to this—I think they can show that, of course.
The Court: The time we are concerned with, gentlemen is the present time.

Q. And did the wires also—the location of wires also comply with the requirements of that Code?

A. Yes, sir.

Q. Were any changes made from then until the date of the accident?

A. No, sir; not to my knowledge.

page 166 } Q. You spoke of clearance requirements of eight feet up and three feet out from a building. Are both of those in effect at the same time with respect to the same wires? Or how is that interpreted?

A. No, sir. If you are up eight feet, the side clearance of three feet is to protect someone on a building from reaching out. If you are eight feet up, then the side clearance doesn't have to be as great.

Q. Did I understand that under the terms of the Code you can suspend wires eight feet over a building without observing the side clearance?

A. Yes, sir.

Q. And by the same token you can likewise—

Mr. Lincoln: I object.

The Court: I think that's wholly leading.

Mr. Hoge: They were the ones asking the question. I think he's their witness for that.

The Court: The Court has sustained the objection.

Mr. Hoge: I except to the Court's ruling. That's all.

The witness stand aside.

MR. JOHNNY SUTPHIN,

having been sworn previously in this cause, is recalled to the witness stand.)

DIRECT EXAMINATION.

By Mr. Hoge:

page 167 } Q. Mr. Sutphin, you have heretofore testified in this case. I'll ask you whether or not a model, showing the height and elevation over this building, was prepared in your office according to specifications given to you by your company?

A. Yes, sir.

Mr. Hoge: We have a model showing the height of the elevation of these two wires, which we would like to introduce at this time.

Mr. Lincoln: We object to a model made later on, if the Court please.

The Court: Let's see what it is. I don't know.

Q. Now, Mr. Sutphin, will you explain that model?

The Court: Mr. Lincoln?

Mr. Lincoln: We object to that as not representing the true situation there. I don't know when it was made—apparently some time for the purposes of this trial. It has nothing to do with the building then.

By the Court: (Interposing)

Q. Does that purport to represent the true condition on April 6, 1959?

A. Yes, sir.

The Court: Of course it's made to a smaller scale.

Mr. Hoge: As to height only, of the two wires in their respective positions, both before and after.

The Court: I reckon it would be most difficult
page 168 } to bring into the courtroom the whole length of this pole and transformers. I'm going to let him demonstrate this, and you can cross examine him on it, and show what scale it's drawn to. I'll permit it at this stage, and reserve the ruling of the Court until we see what he's going to develop. You may proceed, sir.

By Mr. Hoge: (Continuing)

Q. Will you tell the jury what measurements were used in making that model?

A. Yes, sir. The measurements that were used in making this were taken from the top of the building—just like the floor would be the top of the building, up to this structure here. (Indicating on model) That is the correct measurement that we have got from the top of the building to these wires.

Q. What are those here? (Indicating)

By the Court: (Interposing)

Q. What point at the top of the building?

A. Right under this structure that was there holding the building.

Q. As if they were sitting on the boards—we have heard

"two-by-eights"—lying on the roof rafters—is that what you mean?

A. Yes, sir.

page 169 } Q. The bottom of this would be sitting on the roof rafters — is that what you're telling the Court?

A. That's right, sir. This would be sitting on the roof rafters. And that is the correct measurement from the roof of this structure that is there.

By Mr Lincoln: (Interposing)

Q Hasn't this roof been put on a built-up roof?

A. It's what they had on there at the time.

By Mr. Hoge: (Continuing)

Q. I believe if you'll tell us the measurements that were used to the low point of each wire, it will clarify that point.

The Court: Find first when the measurements were taken by which this was made.

Mr. Hoge: We had Mr. Clark on the stand for that today.

The Court: I understand what Mr. Clark said.

By the Court: (Interposing)

Q. Where did you get your information by which you made it? Did you measure it?

A. I have that.

Q. Is that what the former witness, Mr. Clark, gave you?

A. That's right.

The Court: All right. Proceed, sir.

By Mr. Hoge: (Continuing)

Q. What—

Mr. Matthews: Save the exception.

page 170 } Q. What measurement—Was it from a point on the floor level here?

A. Yes, sir.

Q. The wire on your right—will you describe that for the record?

A. That wire is the original shape of the wire before it was disturbed.

Johnny Sutphin.

Q. And what is the measurement from floor level to that wire, as the model now stands?
A. That's six feet eight inches.
Q. How tall are you?
A. Five foot seven.
Q. Could you reach up and take this wire in your hand?
A. (The witness reaches up and grasps wire).

Mr. Lincoln: We object to all that.
The Court: I take it that he wants to show the distance up there. I'll let it in for whatever it may be worth.

Q. Mr. Sutphin, will you tell us, please, whether or not there is any distinction between the wire that is now on the model, and the wire that was on the poles at the Thompson building?
A. No, sir; it's identically the same wire.

By the Court: (Interposing)
Q. What number?
A. Number 6.
page 171 } Q. Copper?
A. Number 6, copper.
Q. Uninsulated?
A. Uninsulated.

By Mr. Hoge: (Continuing)
Q. Is that the wire that is commonly called a "jumper wire"?
A. Yes, sir.
Q. And from what does it lead, and to what?
A. From the main line into the transformer—this wire here (Indicating) goes into the transformer.
Q. Where, with reference to that wire, are the transformers located on the pole?
A. They was on this back side here, similar to where this can is, like that—the transformers were on that side of the board.

By the Court: (Interposing)
Q. The transformers come down further on the pole than they do on the model?

A. They were longer.
Q. Where would they come to on that model?
A. (Indicating) To this arm. But the current goes in relative to where this interior bushing is made.

(The witness retakes the witness stand.)

By Mr. Hoge: (Continuing)

page 172 } (Omitted).

Q. What I don't recall the answer to is that
page 173 } you were asked this question when you were on the stand before—What time was it when you came to the Thompson building on the morning of April 6th?
A. I really don't know exactly the time, but it was between 10:00 and 11:00 o'clock, or between 10:00 and 11:30, I'll say.

Mr. Hoge: Cross examine? May I ask one or two more questions further, before you go ahead?

Q. How long had this pole been installed in that location, Mr. Sutphin?
A. I really don't know the length of time it had been—several years, I would say—four, five, or six years.
Q. Are you familiar with the requirements of the National Safety Code?
A. Yes, sir.
Q. Would you state whether or not the pole—not the pole, but the wires, were installed at that time in compliance with all requirements of the National Safety Code?
A. Yes, sir.

The Court: He's already shown that. I'll let him show it by this witness, also.

Q. Were any changes made in the location of the wires by your company, or by you, after its original installation?
A. No, sir; there wasn't any changes whatsoever.
Q. I believe you have already testified to the
page 174 } change in the guy wire?
A. That's the only wire that was changed—the guy wire.

Johnny Sutphin.

The Court: Now, Mr. Flannagan, anything that you have?
Mr. Flannagan: These gentlemen may cross examine as to both.
The Court: Supposing you go forward.

DIRECT EXAMINATION.

By Mr. Flannagan:
Q. Mr. Sutphin, (Indicating on model) does this crossbar here represent any particular crossbar on Plaintiff's Exhibit #4?

The Court: You mean the lowest? Speak so the record will be plain.

A. (Indicating on photo) This lower one there is the one here. (Indicating on model)
Q. That's the bottom crossbar in Plaintiff's Exhibit #4?
A. Yes, sir.
Q. So that the center crossbar does not show in the mock-up you have made?
A. (Indicating on model) This one?
Q. Yes, sir.
A. That's the top one.
Q. It's the top?
A. That is this one here. (Indicating on photo).
Q. The center one in Plaintiff's Exhibit #4 page 175 } would be on the top of the mock-up, and the top crossbar does not show in the mock-up?
A. No, sir; it does not show.
Q. This arm that comes down off of your Zerex can on the mock-up would be the metal support arm that shows in Plaintiff's Exhibit #4, next to the circled hole in the lower crossarm?
A. This here, you mean? (Indicating on model)
Q. (Indicating on photo) This is the one I was referring to?
A. Yes, sir; that's it.
Q. That's all I have.

The Court: Before we conclude, where is the television cable on this model?

Johnny Sutphin.

A. (Indicating on model) That would have been down in this area.

By the Court: Put an "X" there where you say it would be.

A. (Witness marks on model) Approximately four feet beneath the arm.
Q. Was that where the bolt was fastened to?
A. You mean, where the wire was fastened to?
Q. With the bolt into the wooden part?
A. That was just a little bracket that was screwed into the pole—a short bracket.
page 176 } Q. That's the location?
A. Yes, sir.
Q. Where it was attached to the pole?
A. That's right.

Mr. Flannagan: Might I go a little along that line?

By Mr. Flannagan: (Continuing)
Q. That was the position of the TV cable wire?
A. Yes, sir.
Q. Do you know its position at the time of Heath's death?
A. No, sir; I do not.
Q. If it had been on the lower crossarm, it would have been raised from this position up to this position? (Indicating on model)
A. Yes, sir.

CROSS EXAMINATION.

By Mr .Lincoln:
Q. You put—

Mr. Lincoln: Subject to our objection, we will cross examine him.

Q. You put a crossmark there (Indicating on model) where the TV wire would have been above the roof?
A. It was approximately four foot; and I can't, just looking at it, I can't tell you.
Q. Is this built to scale above the roof?
page 177 } A. Yes, sir.
Q. This would mark the spot the TV wire was above the roof?

Johnny Sutphin.

A. It would be four from the bottom arm.
Q. Approximately 18 inches above the roof?
A. (The witness does not respond).
Q. All wires sag some, don't they?
A. Yes, sir; in a span.
Q. In other words, they are lower in the middle than they are on both ends?
A. Yes, sir.
Q. After this TV wire left the pole, it started down gradually, I presume, did it?
A. Um-hum.
Q. And as it got over the—I'll ask you to measure this, Mr. Sutphin, and tell us how high that would have been above the roof.

The Court: Let him measure four feet from the cross-arm down.

A. (The witness measures on model).

By the Court: (Interposing) Put your "X" at the four-foot point, please, sir.

(The witness marks on model).

By Mr. Lincoln: (Continuing)

page 178 } Q. Now, we have an "X" mark just above the crossbars, within about a couple of inches of this point on this contraption you have here; is that right?
A. Yes, sir.
Q. Then from what you have said there, would the television cable have been just very little, or a few inches above the roof of the building?
A. Yes, sir.
Q. Now, as people were working on top of the rafters, and going from place to place on top of that roof there, would that wire have been in their way?
A. I presume it would; yes, sir; it would be in their way.
Q. And going from one side of the building to the other it would be necessary to step over, or go under it, I take it?
A. Yes, sir.

Johnny Sutphin.

Q. As a matter of fact, if we call this desk the building, and face this around this way, this wire would be over the edge of the building?

The Court: "This wire" doesn't mean a thing in the record.

Q. That's the loop that has been identified as the loop touched by the decedent; is that right?
A. That's right.
Q. Now, then, did that wire, at the time it was measured, clear that roof by eight feet?
page 179 } A. No, sir; that wire cleared by six foot four inches.
Q. And then at that time, as the building was built, your company was in violation of the safety rules?

Mr. Hoge: We object to the question.
The Court: Objection overruled.
Mr. Hoge: Exception.

A. Well, I can't say that we was in violation—violating any safety rule, due to the fact the building went up under this structure we had there.
Q. Mr. Sutphin, you know buildings don't just grow?
A. That's true.
Q. You know, in order—when Mr. Thompson told you that the building was going to be built where it was, men would necessarily have to build it?

Mr. Flannagan: We object to this conversation on the part of the witness and Mr. Thompson.
The Court: Objection overruled.
Mr. Flannagan: Exception.

Q. You know that as those walls progressed up, those men would come near to that wire?
A. Yes, sir. In 99 cases that we have run into, when people put up a building of this type, when they are getting close to the wire or something, or any of our apparatus, they notify us.
page 180 } Q. Couldn't you have reasonably have anticipated that as the wires went up there, that they would come near your wires?

Johnny Sutphin.

A. When I talked to Mr. Thompson and gave him the height of the poles, he said he would have room to construct his building.

Q. And you followed it up no more?

A. No, sir.

Q. Never went back there again?

A. No, sir.

Q. Did anyone, to your knowledge, from Appalachian go back to check on that?

A. No, they did not.

Q. They left it right as they found it, knowing the building was going to be built?

A. (The witness does not respond).

Q. Now, then, from the pictures and the evidence here, the people working on that roof were working with two-by-eights, apparently—or two-by-sixes—on a scaffold, were they not? Could you tell whether those are two-by-sixes, or two-by-eights?

A. They look like two-by-sixes, or two-by-eights.

Q. Is that lumber sheeting?

A. It looks like it.

The Court: Can anyone tell the length of that material being used?

Mr. Lincoln: We haven't proved it yet.

page 181 } The Court: I noticed you hadn't proved it—that's the reason I asked.

Mr. Lincoln: We'll try to get somebody to show it.

By the Court: (Interposing)

Q. You know the length of those two-by-eights, sir? You went up there. You know how long?

A. The length of the two-by-eights?

Q. Yes, sir.

A. I'd say they was approximately eight feet; they'll run from seven to eight and a half, or nine feet. But that's when you buy building material—unless you specify.

Q. I'm talking about these particular ones that were on top of the building—the rafters and other materials being used there. You know the lengths of them—10 feet, 12 feet, or what?

A. I couldn't say what they was—but about eight foot long.

Johnny Sutphin.

By Mr. Lincoln: (Continuing)

Q. Where was that pole—how far was that, would you say, from the corner of the building there? Was that about the center of the building?

A. No, sir; it's near this end. (Witness gestures)

Q. Nearer that end?

A. Yes, sir.

By Mr. Repass: (Interposing)

page 182 } Q. Which end?

A. That would be the back end of the building—the west end.

By Mr. Lincoln: (Continuing)

Q. (Indicating on photo) One continuous plank seems to run from the pole to the end of that side of the building, does it not—as best you can tell from that picture?

A. That looks like one continuous plank.

Q. If that building is 32 feet wide, the plank would probably be longer than eight feet, don't you think?

A. That particular one would be; yes, sir.

Q. Now, are these crossarms—this crossarm to scale with this crossarm?

A. Yes, sir.

Q. And what scale was used?

A. On this? (Indicating model)

Q. Yes.

A. Those crossarms are two foot.

Q. What scale was used to get the difference that this crossarm has—the top crossarm—the length of the top crossarm from the bottom crossarm?

A. That was the correct measurement we taken there on the pole.

Q. You mean that's the distance on the pole?

page 183 } A. Yes, sir.

Q. Now, then, you weren't there when Mr. Heath was killed, were you?

A. No, sir.

Q. And you weren't there prior to the time he was killed?

A. No, sir—for some time.

Q. And you say that men working around in the vicinity of this wire—where these planks that you have described, lying on top of the roof—couldn't have hit that and knocked it down that way?

A. Well, they had to hit it pretty hard to knock it down.

Johnny Sutphin.

Q. A man would have to pull it pretty hard?
A. Yes.
Q. Could have been with a plank easier than it would with a hand, if the plank was dropped in this point?
A. Well, it would be pretty hard to get a plank in there in that close place.
Q. Suppose the end of a plank hit?

Mr. Hoge: We'll have to object to this kind of testimony. There's no evidence it was hit by a plank. If Mr. Lincoln wants to—
The Court: The objection is overruled.
Mr. Hoge: We'll except.

page 184 } Q. The plank could have hit that and pushed it down in the way that the other wire is pushed down, could it not?
A. It could have; yes, sir.
Q. Well, now, as a matter of fact, Mr. Sutphin, isn't the wire shown over here—being the death wire—being considerably longer than that wire?
A. I don't think it is.
Q. If we pull the other one down, it would be the same? You say that is six feet—this is six feet four from the top; is that right?
A. That's right.
Q. I'm about six feet five—four and a half, or five—

Mr. Hoge: If Mr. Lincoln is going to testify, we'll have to ask him to be sworn so we can cross examine him.
Mr. Lincoln: I was just testing his knowledge of the thing.
The Court: I'll get Woody to come in here and stand under it.

Q. You don't think that wire is any longer—as between the two—than this wire?
A. I don't think it is.
Q. It wouldn't have stretched any by reason of a man being electrocuted on it?
A. It would take quite a bit of weight to stretch it.

page 185 } Q. Now, high voltage wires coming into contact with human muscles contract the muscles, do they not?

A. Yes, sir; I guess they do.

Q. Now, Mr. Sutphin, you say that the crossarms on your exhibit are the same distance apart that the crossarms on the pole were?

A. Yes, sir.

Q. Now, does that wire—

A. —These arms right here. (Indicating on photo)

Q. —the wire that it's testified Mr. Heath came into contact with, are they built out over the wall to scale,—assuming the desk is the wall of the building?

A. No, sir; it isn't.

Q. And then your model isn't to scale, and doesn't correctly reflect the true situation that existed there, does it?

Mr. Hoge: We announced that it doesn't have anything to do with width—it was height only.

The Court: Mr. Hoge, I think, if you are going to use the model, it should have been built to scale, so that the jury and the Court might have a true picture of what transpired. If you built part to scale, and part not to scale, I don't know just how good it is as a picture of what transpired there. And I don't know whether this is very helpful, or not. I'll let it in as to the height, and not as to the width.

page 186 } Q. Assuming the desk to be the wall, the so-called "death wire"—the one that Mr. Heath came into contact with—would have been further over the wall than is shown by that model, would it not?

A. Yes, sir.

Q. It would have been right where men were going under as they walked on the scaffold, would it not? As men worked toward the edge of the scaffold, they'd walk under that wire?

A. They'd be close to it.

RE-DIRECT EXAMINATION.

By Mr. Flannagan:

Q. Mr. Sutphin, you testified that the TV wire was four feet up—four feet below this lower crossarm?

A. Yes, sir.

Q. Did you see the TV wire in that position?

A. Well, I did see it there when I went there to move the guy wire.

Q. Now, referring to Plaintiff's Exhibit #4 (Photo) could you tell us what these three bright metal objects are down the pole?

A. Yes, sir. Those are bolts in the pole there; and there's a bracket there that supports this wire, that goes over to the other building, where they are operating now—that's the secondary wire that goes into the other building where they are operating.

Q. Is that the wire that serves Brodie Thomp-
page 187 } son's old building?
A. Yes, sir.

Q. Is the TV wire below the lowest of those wires running into Brodie Thompson's building?

A. Yes, sir; below there.

Q. Do you know how far below?

A. No, sir; I do not; I can't say just how far below that wire it was.

The witness stands aside.

MR. DAN THOMPSON,

a witness of lawful age, called in behalf of the defendant, Appalachian Power Co., after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Hoge:

Q. Your name is Dan Thompson?

A. Yes, sir.

Q. Where do you live, Dan?

A. #104 Cherry St., Marion.

Q. And what age are you, sir?

A. 24.

Q. And your occupation?

A. Salesman.

Q. I believe you're Brodie's son?
A. Yes, sir.
page 188 } Q. Do you work out there in the recap shop?
A. Yes, sir.

Q. How long have you been working there, Dan?

A. I'd say five years.

Q. Now, Dan, of course you knew Gilbert David Heath?

A. Yes, sir.

Q. Were you there on April 6, 1959, when he was electrocuted?

A. No, I was not.

Dan Thompson.

Q. What size man was Heath?

The Court: Isn't that repetitious of the evidence in the report? Is there any issue about it?

Mr. Hoge: The report says one thing, and we say an other.

Q. How tall was he?

A. I would say probably five four.

Q. Five four? How tall are you?

A. Five eight and a half.

Q. And with reference to his height, was he shorter or taller?

A. Shorter.

Q. About how much *shoter?*

A. I would say he would come to about here on me (Witness indicates mouth)

Q. You're showing mouth height, or just under-
page 189 } your-nose-height, are you?

A. Yes, sir.

Q. Dan, did you work with Gil there in the shop?

A. I was with him as manager of the shop—quite a bit, as a matter of fact.

Q. And how long would you say he was employed there?

A. I really couldn't say offhand; I would have to check the records.

Q. A matter of some time, or years?

A. Oh, yes; I would say about two years.

Q. Do you—

A. —maybe more; I'm not sure.

Q. You all use any electricity about the shop—the recapping shop?

A. Yes, sir.

Q. Did Gilbert David Heath work with electricity in any way about the shop?

A. Well, he worked with the recapping molds at times, which are electrical.

Q. Electric?

A. Yes, sir.

Q. What was his experience with respect to electricity, if any?

A. In what respect?

page 190 } Q. His apparent knowledge of electricity.

A. I would say, that working around there, he would have a knowledge of electricity.

Dan Thompson.

Q. Did he demonstrate any knowledge of electricity at any time?

A. Well, he could take 110 without seemingly hurting him.

Q. How do you know that, sir?

A. Well, we have a vulcanizing machine that sometimes will short out, and it will be current on it, and he could grab it—I don't know whether with the shoes, or what not. I wouldn't touch it.

Q. With one hand, or two hands, did he take it?

A. I want to say "two"; I believe two hands—there's a handle on it.

Q. A handle to it? Did he apparently suffer any ill effects from having taken 110 volts there?

A. No, sir.

Q. How often did you see him do that sort of thing?

A. I couldn't say definitely.

Q. More than once?

A. I would say so, yes.

Q. Several times? Could you give us an idea of how many times?

A. I wouldn't want to say, because I definitely
page 191 } don't remember any certain number of times.

Q. Would you say more than once?

A. Yes, sir; I would.

Q. Was there any reason why he should take hold of that machine when it was shorted out?

A. Well, it if had an inner tube in it, I would have put on a pair of gloves if I were going to do it myself.

Q. What was the purpose of taking hold of the machine in that way, do you know?

A. I would say probably to, you know, just to show us that he could.

Q. To show you that he could take that amount of electricity?

A. And that he could take hold of the machine with the short.

Q. You recall any other experience that he might have had in your presence, and your knowledge, with respect to electricity and electric current?

A. No, sir.

Q. Do you know, or did you at any time discuss with these men that were working with you on the building—in-

cluding Gil David Heath—the fact there were wires overhead of the building when it was under construction?

A. No.

page 192 } Q. You did not? Did Gil David Heath work on any tractors or trucks, or anything of that nature, involving electricity at any time?

A. Trucks or tractors? Not to my knowledge.

Q. All right.

Mr. Hoge: Cross examine?

CROSS EXAMINATION.

By Mr. Flannagan:

Q. Your father described him as a service man for Thompson Supply Co. down there. In his capacity as service man, did he make electrical connections?

A. No, he was not that type of service man, unless it could have been utilized perhaps at times, which I'm not sure on —maybe a television installation.

Q. You say he could just grab hold of these shorted machines to show people?

A. That was just one machine that would ever short.

Q. And he would just grab hold of it to show people he could take electricity?

A. Yes, sir.

Q. Didn't he also go around showing people how he could grab hold of spark plugs, when a motor was running?

A. That I have never seen; I don't know.

Q. All right, sir. That's all.

page 193 } CROSS EXAMINATION.

By Mr. Matthews:

Q. Do you know a little bit about electricity?

A. No, I don't.

Q. You don't know anything about it?

A. Very little.

Q. Would you grab hold of those machines like he did?

A. I'll say this: I have touched this one vulcanizing machine.

Q. Have you done it since then?

A. No, sir.

Q. Why?

Dan Thompson.

A. When I say "since then"—I have when it's in proper condition.

Q. I understand that. When there are 110 volts running there, have you touched it without using precautionary measures such as gloves?

A. No.

Q Why?

A Because I don't want to get shocked.

Q And you know enough to know it will shock you?

A. Well, now, I would say I wouldn't mind touching it, because it's in repair.

Q. I understand that. But the 110 volts are
page 194 } not going through it—they're going into you?

A. That's right.

Q. What you have testified to is that this man went around touching these wires when it wasn't necessary—the wires of the machinery when 110 volts of current was running there; is that what I understand?

A. When it was shorting. Now, I don't know how many volts were running through it.

Q. Would it be reasonable to assume that he knew such a little bit about electricity that he would do that

A. I don't know enough about electricity to know—I mean, as far as that goes.

Q. If you don't know anything about it, how do you know he knew anything about it?

A. Because I have known that the machine was shorting.

Q. And that he would touch it?

A. Um-hum.

Q. And you don't know anything about it, but you wouldn't touch it because you knew it would shock you?

A. If electricity is running through it.

Q. Now, Dan, have you ever measured this man?—you say he's five four; did you measure him?

A. That's purely estimating there in judging. I'm in a close contact with him during every-day business,
page 195 } and having to talk to him.

Q. How tall do you say you are?

A. Five eight and a half.

Q. How much did he weigh?

A. Approximately, I would say, 150 to 160 pounds.

Q. Now, Dan, wasn't this man mainly changing tires, and

working around tires—not with the recap part—but taking them off and handling them in that manner?

A. Yes, sir; I would say it was a combination type job, in that a man has to know it all, and to do it all.

Q. I ask you, did you have another man working for you, that could handle the tires—changing them—that Gilbert Heath could do in the same period of time?

A. Now—

Mr. Flannagan: That's objected to, your Honor.

The Court: I think a whole lot of this is immaterial.

Mr. Flannagan: We except.

Q. Did you have any employee who could change tires as rapidly and quickly as Gilbert Heath?

A. I would say yes. However, I mean he was good at it.

Q. All right. That's all.

* * * * *

Mr. Hoge: Could we have that model identified?

page 196 } (Defendants' Exhibit #4—Model of power pole, with crossarms, transformers, wires and braces.)

* * * * *

MR. F. K. KEESLING,

a witness of lawful age, called in behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Matthews:

Q. How old are you, Mr. Keesling?

A. 37

Q. Where do you live?

A. I live in Rural Retreat.

Q. Where do you work?

A. I work for Brodie Thompson. I went to work for Mr. Thompson in November, '58.

Q. Were you working for Mr. Thompson on April 6, 1959?

A. Yes, sir.

F. K. Keesling.

Q. On that date what were you doing?
A. We was constructing the new building.
Q. What are your duties as an employee of Mr. Thompson?

The Court: Why is that material? Why don't
page 197 } you get to the issue?
Mr. Matthews: I think it is necessary to show what his job is.
The Court: Let's get to the issue. He was present.

Q. On the day Mr. Heath was killed, what were your duties?
A. Well, I was just working, as far as I know. Actually, I drew the plans for the building, and I was—
Q. Were you in charge of the construction of the building?
A. I wouldn't say so—that I was in charge of it in any way. In other words, me and Glenn Reed Hilton was working with the men we had hired.
Q. On that particular morning where were you and what were you doing at the time Mr. Heath was killed?
A. I was on the second floor, and we was fixing to move the television cable so we could sheet the roof—and we was going to sheet that day.
Q. Why did you help to move the television cable?
A. Well, it was swagged down there where it would be in our way to put sheeting over it.
Q. How close was it to the rafters, or joists of the roof?
A. Well, to the best of my knowledge now, I think it touched them; I think it was down on the roof.
Q. Is that the television cable that was hooked on to the power pole?
A. Yes.
page 198 } Q. Do you know where that cable went from the power pole?
A. It went—I don't know who lives there at the house above Mr. Thompson.
Q. Was there any attachment between the power pole and the house that wire was hooked to?
A. I don't think so; not to the best of my knowledge, there wasn't.
Q. And what would you estimate that distance to be between the pole and the house?

F. K. Keesling.

A. Roughly, I'd say 150 feet, or something like that.

Q. Now, did you ask, or tell anyone to move that cable that day?

A. That morning I told Gib to move the cable—to take it loose and throw it over the edge of the building, and I'd call the company and let them put it the way they wanted to rearrange it.

Q. Did he go up to do that?

A. I don't remember if he went to do it, or if he was already up there—I just don't remember. But I know I told him to move it, or I told him I would move it, I believe, and he says, "No, I'll move it"—I believe is the way it was.

Q. Now, how did he go about removing that cable, if you know?

A. Well, he tied it up to the crossarm, and it still sagged down in the way, and I told him to take it loose—
page 199 } it was still going to be in the way like that—and throw it over; and he said he believed he could pull enough slack out of it so it would be out of the way.

Q. Now, what was he standing on when he was doing that?

A. Just two-by-eights we had laid on the rafters for a walk where we was laying blocks.

Q. The two-by-eights you had laid on the rafters—were they fastened to the rafters?

A. You mean nailed?

Q. Yes, sir.

A. No, I don't think so.

Q. Were they fastened by any other means than by nailing, do you know?

A. No, not that I know.

Q. Do you know the length of those two-by-eights that were placed there for that walkway, or scaffolding?

A. I can't say for sure, but I believe they were 16 foot stuff. I believe all those on the top part of the building that was left over, I believe they was 16 foot.

By the Court: (Interposing)

Q. What was the length of the rafters?

A. I think they were 16 foot—I knowed at the time, but I don't remember that now.

By Mr. Matthews: (Continuing)

page 200 } Q. And there were some that were left over from the rafters that were to be used as rafters?

A. Yes.

F. K. Keesling.

Q. Now, Mr. Keesling, if you will just tell the Court and jury exactly what you saw at the time Heath was killed?

A. Well, after he tied the wire—the television wire to the crossarm, I told Gib that it was still sagging, and was going to be too low and in our way, and just take it loose and throw it over the edge of the building—it would be completely out of the way then; and let the company take care of it the way they saw fit. And he says, "No, I believe I can still put it up here." And I told him to watch it—those wires up there was hot. And I don't think he answered me after that. And the next thing I knew he had hold of the wire, and I hollered at him and he didn't answer me. And then Glenn Reed Hilton, standing beside me, said, "Watch them wires." I figured he was already dead.

Q. Did he answer you at all when you told him to watch those wires, they were hot?

A. I don't remember him answering me—I have been asked that several times. I don't remember of Gib answering me when I told him to watch the wires, they was hot.

Q. After you saw him, and saw what happened, what happened next there?

A. Well, Mr. Hall was laying block up there,
page 201 } and he started to catch hold of him, and I hollered
at him and told him not to touch him—I figured it would kill him, too, if he touched him. And Mr. Hall said he thought he was having an epileptic fit, or something like that, until I hollered, and he stepped back then. And he just hung there momentarily—it seemed like a long time, as far as that goes—until he dropped and hit the edge of the building; and he just kind of hit and bounced off and fell to the ground. I reckon that's about all I can say about it.

Q. Did you actually see him at the moment he came in contact with the hot, or energized wire?

A. I couldn't say—I mean, I wondered about it since, whether I actually stood there and seen him catch it, or if I looked off and looked back and seen he had hold of it. And as far as saying definite, I couldn't swear to it either way.

Q. At the time—

A. —But it couldn't have been more than a few seconds I glanced off, when he grabbed the wire.

By the Court: (Interposing)

Q. Could you tell us what you did see, what he had in his hands, and his position?

F. K. Keesling.

A. He had this television cable in his hand, and the other wire—the hot wire—in this hand (Indicates right hand); and he was standing more or less facing—if you know what I mean—the recapping shop.

page 202 } By Mr. Matthews: (Continuing)

Q. Facing the power pole?

A. Facing the power line, really. He was, well, at kind of that (Witness gestures) angle, with—if that was the pole, looking over kind of in this (Witness gestures) direction, and he had hold of it like that (Witness holds clenched right hand to front) and his head was drawn back.

By the Court: (Interposing)

Q. Did you see him stumble, or fall, or anything, before he reached up there? Did he slip, or anything like that?

A. No, I didn't see him.

Mr. Matthews: Cross examine?

CROSS EXAMINATION.

By Mr. Flannagan:

Q. Mr. Keesling, we all sympathize with you over the death of your father, and regret you have to come to Court today following his funeral. I show you Plaintiff's Exhibit #4. Do you recognize that as being the top of the building you were constructing, and the power pole in question?

A. Yes.

Q. You see—

The Court: Let the witness show the jury.

Mr. Flannagan: I will show that to the jury after I have shown it to the witness.

page 203 } Q. You see a hole that is circled on the lower crossarm?

A. (Witness nods head).

Q. Had Heath hooked the television cable into that—the crossarm, through that hole?

A. I think that's right.

(Witness retakes the witness stand.)

F. K. Keesling.

Q. Where had he brought the television cable from prior to hooking it into that hole on the crossarm?
A. I think there was a hook on the pole, with the wire—the television cable anchored to it.

(The witness stands before the jury).

Q. That hook was below the drop to Brodie Thompson's building?
A. Yes, I think that's right.

(Witness retakes the witness stand).

Q. You know how long that television wire had been there?
A. How long the television wire—No, I don't know how long it had been there. It was there as long as I had been there.
Q. It was there since you went to work in 1958?
A. That's right.
Q. And of course it was there when you started putting up the building?
A. Yes.
Q. Now, at any time did you call Home & Auto page 204 } and ask them to move that wire?
A. To tell you I called—actually, I thought it was the telephone line all the time, and I called the telephone company to come and move it—the line; and they came and moved the line, but it was one that wasn't actually in the way. And then I found out it was a television cable.
Q. How long before Heath's death was it that you called the telephone people?
A. I don't remember now—I just don't.
Q. After you found out that it was the television wire, did you call Home & Auto and ask them to move the wire?
A. No. I told Gib, or Glenn Reed, or some of them there that morning that what I had done, I'd called the telephone company to move that wire—when actually it was the television wire. And I told him to throw that wire over the building, and I'd call them and have them to move it.
Q. You did not call them until after Heath was electrocuted?
A. No.
Q. Now, as you were putting up your rafters on the build-

ing, the wire—the television wire was touching those rafters at that point; is that correct?

A. Um-hum.

Q. And had you propped that wire up off the rafters so it was not on the building?

page 205 } A. Not to my knowledge. I don't remember—we could have. I'm telling all of it to the best of my knowledge and recollections at the time, and I don't recollect it being propped up.

Q. Now, when Heath took the television wire loose from the pole, down below the lowest drop to Brodie Thompson's building, and put it up in the crossarm, did he receive any hurt or injury from handling the television wire?

A. Not to the best of my knowledge.

Q. Now, at the time did he have gloves on?

A. I think he did.

Q. Now, he then took it and hooked it into the crossarm, and you told him to take it loose from the crossarm; is that correct?—and throw it over the side of the building?

A. Yes, sir.

Q. Now, in doing that, you weren't trying to get it off your property? You were trying to get it out of your work-way?

A. Off the building; in other words, we were going to throw it off on our property side.

Q. Off on your property side, and leave it on your property?

A. Yes.

Q. In other words, you were merely getting it out of your work area?

A. That's right.

Q. Now, then, when you told Heath to do that,

page 206 } you told him to watch out for those wires, that they were hot?

A. He said he believed he could draw the slack up out of it. I said, "Gib, you watch those wires up there—they are hot."

Q. And then what did he do?

A. He says—I don't think he answered me after that.

By the Court: (Interposing)

Q. What?

A. I don't think he answered me after that.

By Mr. Flannagan: (Continuing)

F. K. Keesling.

Q. When you said, "Watch out, those wires are hot," he had not grabbed hold of the hot line?
A. No.
Q. He did that after you warned him about it?
A. Yes, sir.
Q. You know why he grabbed hold of the hot wire?
A. The only thing I have got is an opinion. I figured he was pulling at that wire, and just didn't—like anyone would pull anything to get leverage from—that's just opinion.
Q. Like anyone would? You wouldn't have pulled on that wire, would you—that hot wire of Appalachian's?
A. Not knowingly I wouldn't.
Q. Was there anything to hide that wire from Heath's view?
A. No.
Q. Now, you drew the plans for this building, as
page 207 } I understand it?
A. Yes.
Q. You know how high the building was going to be?
A. Yes.
Q. Before you ever started construction?
A. Yes.
Q. At any time did you call Appalachian or Home & Auto and ask them to move the wire, it would be in the way of your building?
A. No.
Q. Why not?
A. Well, in the first place, it wasn't my job, I reckon.
Q. Did you ask Mr. Thompson to call them and ask them to move the pole or the TV wire?
A. Well, we just asked, and it was decided, I think, that it wouldn't be in the way—I believe we did; I'm not—I just can't come out and swear to it truthfully, or anything like that definitely. I don't remember.
Q. Did you think there was any danger to Mr. Heath when you asked him to move that wire?
A. Well, I didn't realize the danger that was there, myself, until it was too late—as far that goes.
Q. You didn't think at the time he moved it there was any danger?
page 208 } A. Oh, no.
Q. You didn't expect him to reach up and grab it?
A. My intentions—I was going to do it myself—I was

going to move the wire myself; I was going to take it loose and throw it over there. There was enough slack in the wire to where I had room to throw it over the edge of the building. It crossed over at an angle like this table (Witness puts hand on desk to indicate an angle) and I'd have enough slack—I could have bent over it.

Q. Now, how long had Heath been working on that building?

A. I couldn't answer that, because—I mean, exactly—because he came back to work there—he had been off from work a while, and he came back to work on the building.

Q. Had he been sick just before this accident?

A. I don't think so.

Q. He had been off from work?

A. (Witness nods head).

Q. Do you know why he was off from work?

Mr. Matthews: We object, if the Court please. I think that's entirely immaterial—why he had been off.

The Court: I don't see why that's necessary.

Mr. Flannagan: All right.

Q. Had he been up on the roof of the building after you had put the rafters on?

A. Yes.

page 209 } Q. Did you ever ask—Did you see what Heath did with his gloves immediately before this accident?

A. I didn't see him remove his gloves. But after the accident, they was laying on the boards—these two-by-eights—at his feet.

Q. At his feet?

A. Um-hum—or close by where he was standing, I'll say.

Q. And I understood you to say he had his gloves on when he raised the TV cable?

A. I am—I said I'm pretty sure he had them on—I couldn't swear to it.

Q. I believe that's all.

CROSS EXAMINATION.

By Mr. Hoge:

Q. Mr. Keesling, as I understand it, you were intending to move that wire yourself?

A. That's right.

F. K. Keesling.

Q. Had you worked around on top of that building?
A. Yes, sir.
Q. You know the position of the power pole and the wires —location of the wires?
A. Yes.
Q. And did you know the location of the TV wire?
A. Yes, sir.
page 210 } Q. Now, were those wires above the Power Co. wires—above your head-height?
A. Yes.
Q. All of them?
A. Um-hum. (Pointing to model) You mean those wires?
Q. How tall are you?
A. Five seven.
Q. Five seven? And you were starting up on the building to move this cable yourself, and you were going to throw it over the side of the building?
A. Yes.
Q. And that's what you told Gib to do?
A. Yes.
Q. Did he do what you told him to do?
A. No. He said he believed he could tie it up.
Q. And he tied it up? And did he tie it up, as far as you know?
A. (Witness does not respond).
Q. Was he working with his gloves on at that time?
A. The best I can remember, he was, yes.
Q. And where were you at that time, while he was engaged in tying up this wire?
A. I was standing on the second floor, looking through the rafters.
page 211 } Q. And the building was not sheeted at that time?
A. No.
Q. And you could see him at work?
A. Yes.
Q. How long did it take him to tie up the wire?
A. I'd say maybe three or four minutes, give five minutes, maybe. If I may say—Now, I think that he removed his gloves to run the line. I guess you have done gone through how the wires was constructed. It was a rubber insulated wire, with steel wire on the outside of it, as support. And you could pull this here steel wire—and away from the insulated wire, and get slack in it; in other words, you could

bunch the insulated wire up and it would leave you a string of steel wire there. And I think Gib took his gloves off to run this steel wire through the hole in the crossarm.

Q. Do you know that of your own knowledge, or are you just presuming that?

A. What?

Q. Did you see him take his gloves off at any time? Did you actually see him take the gloves off?

A. No.

Q. You don't know?

A. No. I just said that's what—when I think he took the gloves off.

Q. You're assuming that, rather than something
page 212 } of your own knowledge?

A. Yes.

Mr. Lincoln: I object to the argument with the witness. He can state what he knows, and not some assumption.

The Court: The objection is overruled.

Q. You said you worked around on the top of the building. Did you see these wires in place up there—these open wires?

A. Yes.

Q. And they were above your head-height? Did you at any time get up into these wires?

A. No. Me?

Q. Yes.

A. No, sir.

Q. If Gib Heath had done what you told him to do, he would have taken the TV wire loose from the power pole down at about the building-top level?

A. I think that's right.

Q. And taken it and carried it and thrown it over the side of the building; is that right?

A. Um-hum.

Q. There would have been no occasion for him to be up in these wires at all, if he had done what you told him to do?

A. I think that's right.

Q. When you told Gib you'd go up there and
page 213 } move that TV wire, and he said, "No, I'll do it,"
did you at any time tell him to watch those hot wires, or watch those wires up there, they were hot?

A. Not at that time.

Q. It was after he got up on the building?

F. K. Keesling.

A. Yes.
Q. And after he tied it up the first time?
A. And he was—that's when he said he believed he could pull that slack up. I believe it's been about a year ago, and I'm confused now, as far as that goes. I think that's right, though.
Q. What size man was Gib Heath?
A. Gib was about my height, the best I remember. I believe Gib and me was about the same height. But I'm heavier than him.
Q. Heavier, but about the same height?
A. Yes.

By the Court: (Interposing)
Q. How tall are you?
A. Five seven.

By Mr. Hoge: (Continuing)
Q. Would you stand up.

(The witness stands near model, Defendant's Exhibit #4).

Q. The wire on your right over here—my right—represents a wire in place before the accident, and over here afterwards. Will you stand on my right, and reach up to that wire, please, with your hand in the same position as you saw Gilbert with his hand on that wire?
page 214 } A. (Witness reaches and hesitates).
Q. Which way now?
A. I don't remember.
Q. For the record, that would have to be setting at this angle (The Court indicates).
A. (The witness moves model) And he touched it like that (Witness demonstrates by grasping right-hand loop in right hand).
Q. And for the record, you have got a hand-hold with your fingers looped, or just the fingers looped over the wire, have you not?
A. Yes.
Q. And your arm at full length from your shoulder—elbow not bent; and you're standing—a matter of how?—one foot out from under, and directly behind the wire; is that right?
A. That's about right.

F. K. Keesling.

Q. Is that approximately correct? Now, at that time, would you show us—Did you see Gib take hold of that wire?

A. I couldn't say. I don't think I actually saw him grasp the wire.

Q. Did you see him have the TV wire in his left hand?

A. Yes.

Q. Show us in what position.

A. (Witness demonstrates) He was standing with it in his hand like that. He was standing at this angle.

page 215 } Q. At that time, too, was there a crossarm to which he had attached the TV antenna—Is that correct?—right there?

A. Yes.

Q. And that was within a matter of just almost shoulder-height, or less-than-shoulder-height to him, wasn't it?

A. I don't think it was lower than that. I guess that's about right.

Q. Where he had attached it?

A. I guess that's as near right as it can be. I don't remember exactly.

Q. That lower crossarm on the pole was at that stage within easy reach of his hand and arm?

A. Yes.

(The witness retakes the witness stand).

Q. Did I understand you to say you and Mr. Thompson discussed the location of the power pole when you were planning construction of the building?

A. That was before we started anything. I asked him—I said something about the power pole, and he said he didn't want it moved.

Q. He didn't want it moved? Why not, please?

Mr. Matthews: That calls for an opinion.

The Court: You had Mr. Thompson on the stand, and of course that wouldn't—if you're liable—that

page 216 } wouldn't relieve you from liability. I'm going to —you could ask Mr. Thompson that, and ask this man what he thinks what somebody said.

Q. Was there some reason you did not want to move that pole?

A. Me?

Q. Yes.

Glenn Reed Hilton.

A. No.

Q. It was located there at the edge of your alley, beside your new building, where it would be out of the way, I take it?

A. That's right.

Q. And in any other location in that area, you'd have to work around it; is that right?

A. Um-hum.

The witness stands aside.

(The following took place out of the presence of the jury.)

The Court: I understand that completes your testimony in chief?

Mr. Lincoln: Yes, sir.

The Court: Now then, gentlemen, I gave you an opportunity yesterday to restate your grounds at the conclusion of the plaintiff's testimony, and if it's OK to you, you can assign the same grounds, and the Court will make the same ruling.

page 217 } Mr. Flannagan: We want to renew.

The Court: The Court will make the same ruling—that applies to both defendants. And note your exceptions.

Mr. Hoge: We except.

The Court: You're ready to proceed with your case?

(The jury return to the courtroom).

MR. GLENN REED HILTON,

a witness of lawful age, called in behalf of the defendant, Appalachian Power Co., after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Hoge:

Q. Your name is Glenn Reed Hilton?

A. Yes.

Q. Mr. Hilton, where do you live?

A. Rural Retreat—address at Rural Retreat. I actually live at Cedar Springs.

Q. What is your age?

A. 42.

Glenn Reed Hilton.

Q. Where are you employed?
A. Brodie Thompson's.
Q. On Church St. in Marion?
A. Yes, sir.
Q. How long have you been employed there?
A. Over a year—I don't know exactly how long.

Q. Mr. Hilton, on April 6, 1959, 7:45 A. M., were
page 218 } you present when Heath was electrocuted?

A. I was.
Q. Where were you when that incident occurred?
A. I was standing on the second floor right under the scaffold.
Q. What were you doing, sir?
A. What was I doing? Well, at that time the mason went up, and said this wire would have to be moved.
Q. Who?
A. Hall. And I says, "OK, I'll get it." And I started up and Gilbert Heath, he sort of passed me up on the ladder like, and said, "I'll get it for you," and goes on up.
Q. What wire were they talking about?
A. The TV wire that runs across the building. He goes on up and takes it loose from the pole. And Keesling says, "Throw it over the side of the building." And then Gilbert, he looked up and says, "I'll put it in this crossarm." So he unwinds the outside coating, and pulls it through a hole and ties it. And he had on a pair of leather gloves, and he turns around facing me and Kelly, and he throws these gloves down. I looked down at the gloves, and when I looked back up, he was—had hold of this TV wire, with his back to us, and was reaching for this wire up here. And I hollered, "Watch that wire!" And Kelly says, "He can't hear you.

He's done gone." And he sunk down from the
page 219 } wire and went off the building—I don't know how

he went off. And then I run to him on the ground.
Q. Did he stumble, or fall?
A. Not any way I saw.
Q. Where was he looking when he reached up to get this wire?
A. (Witness looks up) He was more or less looking up like that.
Q. Looking up at the wire?
A. Um-hum.
Q. Would you stand up in front of the Court, and show us in what manner he was holding the wire, and reaching?

Glenn Reed Hilton.

(The witness stands before model, Defendants' Exhibit #4).

A. When I saw him, he reached out and got the TV wire, and was ready to take hold of the electric wire.

Q. Was he in the act of falling, or was he over-balanced in any way, or was he standing up?

A. He wasn't over-balanced no way I could tell—if he was over-balanced at all.

Q. Was he standing up straight?

A. Yes.

Q. What type of gloves was that that he was wearing?

A. Leather palm glove with a cloth back in them.

Q. And just when did he take those gloves off—
page 220 } before, or just after he tied the wire in the pole?

A. Just after he tied the wire in the hole.

Q. How did he tie the wire?

A. It's got a *bracked* on it, and he sort of pulled it through, and tied it over the wire.

Q. Had you worked with Gib for a period of time prior to that?

A. Yeah, I worked with him there for, I'd say, six or seven months at that time.

Q. What was his experience, if any, with electricity?

A. Well, he didn't seem to be afraid of it in any way. I have seen him, on trucks and stuff, take hold of spark plug wires, and that kind of stuff. He didn't seem to be afraid of it.

Q. You mean with the motor running?

A. With the motor running.

Q. How much shock does that give you?

A. Not too much—not enough to kill you, by no means. But it stings a little.

Q. Does it sting you?

A. Pretty hard, yes.

Q. Did you ever see him do any other thing with electricity where he might have taken any shock of any current?

A. There's a little old machine in the shop that would get
shorted out. I have seen him take hold of it a few
page 221 } times.

Q. You know how much current was on that machine?

A. No, I don't.

Q. Were you ever shocked on that machine?

Glenn Reed Hilton.

A. Huhn-un.
Q. Would you touch it in the same way he did?

Mr. Lincoln: I object.
The Court: Objection sustained. I'll let you show his knowledge of electricity. Not all these little specific instances—let's get along. I'll let you show his general knowledge.

Q. Do you have any other knowledge of his knowledge of electricity, and the use of it?
A. No.
Q. While you all were working on that building, were the location of these wires above the building discussed in any way in the presence of Gib Heath?
A. Yeah, we talked about them wires, I think, in the presence of Gib.
Q. What was said, if anything?
A. Well, we said we was going to move that wire—on Saturday, I believe it was, when we was putting our joists up, before we started the sheeting; it was down pretty close to the building—I don't know how close; it may have been, I say, in less than a foot of it.
page 222 } Q. Was anything said about the electric power wires above the building—the hot wires?
A. Yeah, we talked about them all during the time of the building.
Q. What was said, if you please, as far as you can recall?
A. We said not to get around them too close—and watch them.
Q. Were those statements made in the presence of Heath?
A. I don't remember.

The Court: Unless they were made in his presence, they are not material, and you gentlemen of the jury will ignore them.

Q. How many of you were working on the building?
A. Four, I believe.

CROSS EXAMINATION.

By Mr. Flannagan:
Q. (Showing photo to witness) I am referring to Plain-

tiff's Exhibit #4. Do you recognize this? This is the building you all were putting up, and the Appalachian pole in question. This is a picture of that. (The witness stands before the jury)

A. Um-hum.

Q. This is the lower crossarm, and there is a hole in the lower crossarm that is circled.

A. That's right.

page 223 } Q. Is that where Heath put the wire?

A. Where he tied the wire.

Q. After he fell off the building, was the wire still tied there?

A. Yes, sir.

Q. He did not pull it off?

A. No, sir.

(The witness retakes the witness stand).

Q. This accident occured on Monday morning, I believe; is that correct?

A. Yes, sir.

Q. And on Saturday morning you had discussed moving the television wire?

A. We said it would have to be moved, yes.

Q. Was that the television wire, only, you were referring to?

A. Yes.

Q. Did you call Home & Auto to move it at that time?

A. No, sir.

Q. Did you call them at any time before Heath's death?

A. No, sir.

Q. Why didn't you call them to move it?

A. Why I didn't?

Q. Yes, sir.

page 224 } A. I don't know that now.

Q. What was Heath's attitude as he passed by you on the ladder, and said he would go up and move the line?

Mr. Lincoln: I object to his attitude.

The Court: Objection sustained.

Q. What was the demeanor—

Glenn Reed Hilton.

Mr. Lincoln: I object to the demeanor.

By the Court: (Interposing) Tell him what he did, if anything.

A. He was a type of fellow that would go ahead and do things like that for you.

By Mr. Flannagan: (Continuing)
Q. Were you going up the ladder, when he passed by you on the ladder?
A. I was fixing to get on the ladder—we was both at it.
Q. And he went on?
A. Um-hum.
Q. What was the purpose in grabbing hold of spark plugs? Why would he grab hold of spark plugs with the motor running?
A. I can't tell you that. I have saw several fellows do that.
Q. Was he doing it to show he could take an electric shock?

The Court: I'm going to let you show his general knowledge of electricity. and these specifics no more.

page 225 } Q. He knew electricity would shock him?
A. Yes.
Q. He knew sufficient electricity would kill him?
A. Sure did.

CROSS EXAMINATION.

By Mr. Lincoln:
Q. Mr. Hilton, just before Heath went up the ladder, didn't Mr. Keesling say they'd have to move that wire?
A. No. Mr. Hall said—
Q. Mr. Hall said that?
A. (The witness does not respond).
Q. You didn't hear Mr. Keesling say anything about the wire having to be moved?
A. Yes.
Q. He was right beside you, and you didn't hear him say, "Throw the wire over the—"

Mr. Flannagan: He's trying to impeach the witness.

Glenn Reed Hilton.

Mr. Lincoln: I'm trying to find out if he heard what he said.

The Court: That is your witness. You may proceed.

Q. Now, did you hear him say to throw the wire over the side of the building?

A. Mr. Keesling told Gilbert to throw the wire over the side of the building.

page 226 } Q. And instead of doing that, he tried to tie it through there?

A. Yes,—he didn't try; he tied it.

Q. Did he take off the gloves when he stuck the cable through there?

A. No, sir.

Q. Was both the cable and the other wire through this hole?

A. No—just the outside wrapping.

Q. What happened to the cable?

A. He throwed it back in a loop.

Q. And where was the cable?

A. He looped it back to the crossarm when he pulled the slack up.

Q. Do you mean he slid the cable through the hole, too?

A. No; the outside wrapping on the cable went through the hole—the cable wouldn't go through the hole.

Q. Where had he put the cable, then? Show me on here where the cable was.

A. (Indicating on model, Defendants' Exhibit #4) The outside went through the hole, and the cable naturally formed a loop with the slack, you see.

Q. He pulled the little wire, that carries the television signal, through the hole?

A. Um-hum.

page 227 } Q. That still left the wire sagging across the building, and in the way?

A. It was sagging some, yes.

Q. And then when Mr. Keesling said to throw it over the side, didn't he say, "I believe I can get the slack out of it," and raised it high enough to get under it?

A. I don't recall that.

Q. If that was said, you didn't hear it?

A. That's right.

Q. Would tying the wire to this crossarm that is circled, raise it high enough so you could walk under it?

Glenn Reed Hilton.

A. You couldn't have walked under it.

Q. Now, from the telephone pole, where did that cable and wire go from the power pole?

A. What angle?

Q. Where did it go from that point?

A. Went up to some of these houses up there; I don't know whose house it went to.

Q. It went all the way across the building at an angle?

A. Yes.

Q. Take that table as the building, and show about what angle it went across.

A. (Indicating with hand) From here to that fellow.

Q. Mr. Flannagan?

page 228 } A. Yes.

Q. Now, from the power pole on that building it went to—how far would you say that would be?

A. The house, I'd say, would be about 175 feet, would be a guess.

Q. 175 feet from the power pole to the house where the line went? With the cable, and the size of the one supporting the wire, that makes a pretty heavy weight over a distance of 175 feet; isn't that right?

A. It might have been fastened to that little building—I don't recall.

Q. Would it make a pretty heavy weight, and be hard to take the slack out of?

Mr. Flannagan: We object to the question. I don't know what a "pretty heavy" weight is.

The Court: I don't think that's definite. If the gentleman knows the tensile strength of the cable—"Pretty heavy" is elastic and indefinite.

Q. State whether or not he had to exert strength to take the slack out of that wire?

A. Yes, it took some pulling to pull it out of the way there.

Q. Now, and when Mr. Keesling told him to throw it out over the side, and he said he believed he could

page 229 } take the slack out of it, was he pulling on it in order to take the slack out of it?

A. Mr. Keesling told him to throw it over the building before that. But he had his hand on the wire—he was pulling on it.

Glenn Reed Hilton.

Q. And he was still pulling on it, trying to get the slack out of it at the time he touched the other wire, wasn't he?

A. Yes, I reckon you could say he was pulling on it to get the slack out of it.

Q. You know whether his foot slipped, and he grabbed at that wire?

A. I don't know.

Q. You don't know? Let me ask you about this dirt. You see that dirt that—

Mr. Hoge: We have the same objection to that question with relation to what appears in the picture.

The Court: You gentlemen have introduced the picture by agreement. And if the gentleman knows what's in the picture, he say *say* so; if he doesn't know, he cannot state it. If the gentleman knows what's in the picture, the objection is overruled, and he may answer it.

Mr. Hoge: We except.

Q. Do you know what that material is?

A. Pieces of cinder block.

Q. And you couldn't say—you do say he was pulling on that wire—on the cable when he touched the hot
page 230 } wire? And you couldn't say whether his foot slipped, or not?

A. I didn't see his foot slip.

Q. You were under him, and under the boards?

A. That's right.

Q. You say you have seen other people take hold of these spark plug wires, have you not?

A. Yes, sir.

Q. It's something that's commonly done, as a matter of fact, isn't it?

The Court: I'll let you show that man's general knowledge, or lack of knowledge of electricity and electrical appliances, and dangers that there will be about electric current. Now this testing of spark plugs—Let's get along.

Q. Did you in the plant—what is the voltage inside there on the machine that recaps tires?

A. 220, I guess; I wouldn't say.

Q. You don't know?

A. No.

Q. You don't know whether he knew, or not?
A. No.
Q. All right. That's all.

CROSS EXAMINATION. (Continuation)

By Mr. Flannagan:
page 231 } Q. Mr. Hilton, you testified on direct examination that when you observed Heath, just before he grabbed the wire, that he was not off-balance, he was not stumbling, and he was not—

Mr. Lincoln: I object.
The Court: Propound your question, and let's don't testify ourselves, please.

Q. Did he stumble or fall over this piece of cinder block?
A. Not as far as I know, he did not; I didn't see him.

The Court: Let's refrain from that type of examination. Let's don't recite what somebody else said, or has done.

The witness stands aside.

MR. FIELDING O. SANDERS,
a witness of lawful age, called in behalf of the defendant, Appalachian Power Co., after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Repass:
Q. I believe your name is Fielding O. Sanders?
A. That's right.
Q. You live here in Smyth County?
A. No, sir. I *life* in Trout Dale, Grayson County.
Q. Mr. Sanders, were you working in Marion on April 6, 1959?
A. Yes, sir.
Q. Where were you working—what was your
page 232 } business here?
A. I was working for Home & Auto Supply Co., and working for Marion TV Service and—
Q. Were you working for them some time prior to that?
A. Yes, sir.

Fielding O. Sanders.

Q. Are you now working for them?
A. Yes, sir.
Q. Have you worked for them at all times since the accident happened?
A. Yes, sir.
Q. Now, Mr. Sanders, did anyone call you at any time with reference to the TV wire and the building on Mr. Thompson's property?
A. Not prior to the accident.
Q. Did you have any knowledge of any construction, or the location of your wire, until after the accident?
A. No, sir.
Q. When were you called after the accident?
A. I'd say approximately 8:30.
Q. On the same day?
A. The same day of the accident.
Q. In the morning, or at night?
A. In the morning.
Q. Do you know who called you?
A. Gerald Parks.
page 233 } Q. And who was Gerald Parks?
A. He's the TV repairman for Brodie Thompson.
Q. And what was the occasion of the call?
A. He said that there had been a man—

Mr. Lincoln: I object to what he may have said.
The Court: That would be hearsay. He got the call, and without repeating the conversation, go forward.

Q. Without stating what he said to you, what was the nature of the call?

By the Court: (Interposing)
Q. Did he advise you a man had been killed?
A. He said a man had been seriously injured, and wanted me to come and move the cable.

By Mr. Repass: (Continuing)
Q. And did you go to move the cable?
A. Yes, sir.
Q. Did you go—how long after the call about 8:30 that morning?
A. Immediately.

Fielding O. Sanders.

Q. You went immediately?
A. Yes, sir.
Q. Now, then, you got there. Did you find the cable—the TV cable?
A. Yes, sir; I found it.
page 234 } Q. Did you know that it was there before?
A. I didn't know that it was on that pole before; no, sir.
Q. You refer to the "TV cable"; what is the "TV cable"?—what type of wire?
A. It is a coaxial cable; it is composed of a strand—I have a piece here, if you would like to present it. (Indicates wire).
Q. Is it the same type of wire?
A. It is identically the same type of wire as we had run through there.
Q. Just explain about the cable.
A. How do you mean?
Q. That you're exhibiting.
A. That is just coaxial cable; we use it as a service drop to the houses of our customers. (Indicating) This strand is only to support the cable.
Q. You refer to "this cable," indicating a black wire; is it insulated—the black wire?
A. Yes, sir; the black wire is insulated.
Q. The black wire is the cable?
A. That's the cable.
Q. What do you call the bare wire, consisting of strands, that you have in your hands?
A. It is a messenger wire, or support wire; the sole purpose is to hold this cable up.
page 235 } Q. To carry the weight of the cable between the two poles?
A. Yes, sir.
Q. Will you file—Do you state that is the same wire that you found on the pole when you went to the scene of the accident—the same type?
A. This is like the wire—it's not the same wire.
Q. It's not taken as a part of the wire, but it's the same kind of wire, and the same dimensions?
A. Yes, sir.
Q. Will you file the cable and the supporting wire that you have exhibited?

Mr. Repass: And mark it Defendants' Exhibit #5.

Fielding O. Sanders.

(Defendants' Exhibit #5—Cable and supporting wire.)

Q. Mr. Sanders, when you went on Mr. Thompson's property there at the building that was being constructed, where did you first go?

A. I went to the building that was being constructed.

Q. And where did you go after you got to the building?

A. I went up on the building, on top.

Q. You mean on top of the rafters that were there for the roof?

A. Yes, sir.

Q. Now, then, you got there. I take it that you inspected this wire?

page 236 } A. I looked at the wire; yes, sir.

Q. What was the position of the TV cable and supporting wire, with reference to the pole that it was attached to?

A. It was fastened to the lower crossarm. There was a hole in the crossarm—it was attached by this messenger wire being folded—it had been put through this hole, and had been folded as this is. (Demonstrates with wire)

Q. You indicate that the supporting, or the messenger wire—

A. It had been folded and stuck through a hole in the crossarm, and brought back and wrapped around it there.

Q. What part went through the hole in the crossarm?

A. This wire. (Witness apparently indicates bare wires)

Q. And you have referred to this wire as the strand of wire known as the "supporting wire"?

A. Supporting wire, or messenger wire.

Q. And it was sticking through the hole in the lower crossarm?

A. Yes, sir.

Q. (Shows photo to witness, as witness stands before the jury) If you will take a look at that picture, Mr. Sanders. It is Plaintiff's Exhibit #4, and take your time and step up here where you can indicate what we are looking at. Do you see, first, the point that you have referred to as being the hole in the crossarm where the wire was tied?

page 237 } A. Yes, sir.

Q. It's a hole here where there is a circle. Indicate with your finger so these gentlemen of the jury can see.

Fielding O. Sanders.

A. (Indicating) A hole right here, circled.

Q. And you were standing on top of the building near the pole when you first saw it?

A. Yes, sir.

(Witness retakes the witness stand).

Q. Where was the end of that crossarm, with reference to the top of the building?

A. It was protruding over the building.

Q. And what did you do, if anything, after observing the wire?

A. What do you mean, what did I do?

Q. Did you observe the wire as it passed beyond the pole?

A. Yes, sir.

Q. Was it still passing beyond the pole?

A. Yes, sir; it continued on to Mr. Litton's house.

Q. And was the wire disturbed in any way, insofar as you could tell, except by sticking the wire through the hole?

A. No, not that I could tell.

Q. Was the wire in any other manner attached to the pole, or crossarm?

page 238 } A. At the time I found it?

Q. Yes, sir.

A. No, sir; that was the only support—attachment to the pole at that time.

Q. Did you see any indication of any attachment, or place of attachement of the wire to the pole?

A. You mean where I thought it had originally been through?

Q. Any equipment, or anything that indicated the point that it was attached to the pole?

A. I found a hole down 50 inches under the lowest service drop from the Power Co., going into the building of the recap shop. 50 inches under that there was a hole where a driver hook (Indicating hook) that's something similar to that, had been—which is our normal way of fastening onto a pole.

Q. Did you see any other hole of any nature on the pole?

A. I didn't see any; no, sir.

Q. Did you examine the pole, for instance, from where the hole was, up to the crossarm?

A. Not completely to the crossarm; no, sir. I try to stay away from those power lines as much as possible. I measured down from what I could see eye-level with this hole—I didn't

get any closer. I could see there was no hole of any nature I could observe from there.

Q. And you were standing about how far from page 239 } the pole?

A. I had a ladder on the pole—laying against the pole when I was measuring this.

Q. Now, Mr. Sanders, did you observe the jumper wire, or bare wire, that was on the second crossarm above where you found your line attached?

A. I looked at it; yes, sir.

Q. What did you see?

A. I saw what appeared to be flesh, or skin, that had been burned, hanging on the wire.

Mr. Repass: Take the witness.

CROSS EXAMINATION.

By Mr. Lincoln:

Q. Did you test it to see whether it was flesh or skin, or examine it in any way?

A. No, sir.

Q. It just appeared to be flesh or skin?

A. Yes, sir.

Q. You don't know what it was?

A. No, sir.

Q. Would you show us again how this wire was looped through the hole?

A. (The witness demonstrates on model, Defendants' Exhibit #4.)

Q. Did it go through the hole in the crossarm?

A. The wire went through the hole in the cross-
page 240 } arm, and it was doubled back on itself and twisted.

Q. That crossarm is how far above the rafters comprising the roof?

A. I didn't measure it, sir.

Q. At any rate, it was higher than the wire had been when it was normally hooked to the pole on this hook you have there?

A. It was very much higher than it normally would have been.

Q. When the wire—if the wire was hooked to the—whatever you call that piece of metal—would that have put the television wire within a foot or so of the top of that building?

Fielding O. Sanders.

A. That, sir, I didn't measure; I couldn't tell you definitely.

Q. You say it was 50 inches below the lowest crossarm?

A. I said it was 50 inches below the lowest service drop going to the recap shop.

Q. What do you mean?

A. (The witness demonstrates on model) The wires going down off the pole here—they are fastened opposite these brackets you can see here—this is the opposite end of the insulator where these wires, going down to the shop, are fastened. I measured the hole that I found, and it was 50 inches under the lowest one—50 inches under that, and you can see it.

Q. Then it was below the roof top—50 inches below that bracket?

page 241 } A. Yes, sir; according to the way the picture looks, it would be, sir.

Q. And that would put your television cable right across the roof of that building, wouldn't it—lying on it—?

A. I suppose it would have, sir; I didn't see it before it was moved.

Q. What did you do when you moved the cable—what did you do with it?

A. Where did I move the cable to?

Q. Yes.

A. I moved it to the opposite end of the building that was being constructed.

Q. You mean the end toward Main St.?

A. Yes, sir.

Q. And you took it completely away from the building where they were working on it?

A. I took it and attached it to the opposite end of the building.

Q. Was it still then—

By the Court: (Interposing)

Q. Was it connected on the power pole, or anything?

A. No, sir; it was attached to the building.

Q. And not to a power pole?

A. No, sir.

page 242 } By Mr. Lincoln: (Continuing)

Q. And you did this about 8:00 or 8:30 in the morning, the same morning this man was killed?

A. The same morning; yes, sir.

Fielding O. Sanders.

Q. When you got there and saw your cable, how close was it to the rafters then?

A. That, sir, I didn't measure. It was tied into the cross-arm.

By the Court: (Interposing)

Q. You saw it there?

A. Yes, sir.

Q. Approximately?

A. I'd say it was approximately at a point over the building, just approximately, two and a half to three feet over the building at the point it was attached—that's just approximately.

By Mr. Lincoln: (Continuing)

Q. If it had been 50 inches lower, it would have had to come over and cross the building and go over to the Littons?

A. I would think so.

Q. How far is it from this power pole to the Litton's?

A. That, sir, I couldn't tell you, because—

Q. Could you estimate?

A. I would say, just an estimate of 125 feet.

Q. Was there any place to support this cable
page 243 } between the power pole and the Litton house?

A. No, sir.

Q. It was one continuous line, without further support, from the power pole to the Litton house?

A. Yes, sir.

Q. Now, where does your cable come from—the one that came to this pole?

A. It comes off the main line on Church St.

Q. And is your main line running down Church St.?

A. Yes, sir.

Q. South, or north?

A. It comes out of Church St. toward Main St.—it would be running north, I'd think.

Q. Does your company take any precautions whatsoever to examine your lines from time to time to see whether they are interfering with other people, or not?

Mr. Flannagan: We object to the question.

The Court: Objection overruled.

Mr. Flannagan: Save the exception.

Fielding O. Sanders.

A. Unless—Normally when we have a call, we do go and check those things.

Q. You don't go until you do get a call?

A. We observe the line in driving along—anytime.

Q. Haven't you driven by Brodie Thompson's
page 244 } while this building was being built?

A. Yes.

Q. And you saw your line was going to interfere with this construction?

A. I didn't know that line was there.

Q. You didn't know it was there?

A. No, sir.

Q. Are you in charge of the servicing of these lines?

A. No, sir.

Q. Who is?

A. Mr. Walton—I'm directly under him.

Q. Do you do the work on servicing?

A. All of us do work on it.

Q. You didn't know that line was there at all?

A. I had had no occasion to know that line was there—and I wasn't employed there when that line was put in.

Q. You don't know who put it in?

A. Mr. Campbell put it in.

Q. Did Mr. Walton and Mr. Campbell go around in a car, or otherwise, to inspect the lines from time to time?

A. That I couldn't tell you.

Q. Have you ever been with them when they did it?

A. Not personally; no, sir.

Q. But you don't know yourself of any inspec-
page 245 } tions made of these lines?

A. I couldn't tell you, sir.

Q. That's all.

CROSS EXAMINATION.

By Mr. Flannagan:

Q. Mr. Sanders, (Indicating hook) would you file that? What is it?

A. We call it a "drive hook."

Q. Would you file this drive hook as Defendants' Exhibit #6?

A. Yes, sir.

(Defendants' Exhibit #6—Drive hook.)

Fielding O. Sanders.

Q. Would you make an arrow on Plaintiff's #4, pointing to the metal?

A. I don't know—that's the opposite end of the bolt that holds the insulator where those wires are fastened, going into the recap shop.

Q. Would you draw an arrow, then, on Plaintiff's Exhibit #4, to the bottom metal object, which is the bottom drop to Brodie Thompson's building?

A. (Witness marks on photo).

(Mr. Flannagan passes photo to the jury for inspection).

Q. As I understand it, you found this drive hook 50 inches below that object where you drew the arrow?

page 246 } A. I found a place where the drive hook had been.

The Court: He found a hole in the post there?

Mr. Flannagan: Yes, sir.

Q. Is there any current on this naked wire of Defendants' Exhibit #5? (Indicating TV cable)

A. No, sir.

Q. Is there any current on the black wire—the cable portion of it?

A. As you would think in volts, no. You'd have to measure that in microvolts. If you measure that current that was on that wire, you would find there would be less than one-tenth the amount that would be in one flashlight battery.

By the Court: (Interposing)

Q. One-tenth of what?

A. One flashlight battery.

Q. How many amperes, or volts, or watts?

A. You never have more than three to five thousand microvolts.

By Mr. Flannagan: (Continuing)

Q. What is a microvolt?

A. A millionth of one volt.

Q. So it's less than one volt on this?

A. Yes, sir.

Fielding O. Sanders.

Q. And how much voltage is in a small flash-
page 247 } light battery?
A. One and a half volts.

Q. How long had this drop to the Littons been on the particular pole in question?

A. (Examining notebook) I have the date when it was hooked on. From our records, Mr. Litton was hooked on the second month, twentieth day in '56.

Q. In '56?

A. Yes, sir.

Q. Did you also supply Brodie Thompson's building with service?

A. Yes, sir; we did.

Q. When was his building supplied with service?

A. (Reading) Fifth month, first day in '55.

Q. (Showing photo to witness) Now, do you recognize this picture?

A. Yes, sir.

Q. Would you state what it represents?

A. That's the end of the building that was being constructed, where we attached our cable after we moved it from the pole where we found it.

Q. Would you file that as Defendants' Exhibit #7?

A. (The witness does not respond).

(Defendants' Exhibit #7—Photo).

Q. Would you stand up here, Mr. Litton, please.

page 248 } (Mr. Flannagan and the witness stand before the jury, and Mr. Flannagan indicates on photo.)

Q. Which end of the building is this, with relationship to the end of the building that the power pole was on?

A. It was the opposite end.

Q. The north end?

A. Yes.

Q. Who owns the property underneath the building?

A. I assume Brodie Thompson.

Q. Where did you hook the wire, first of all?

A. (Indicating) I had our transmission wire—this wire coming here, is coming from the main line to the building; this one is going on to the customer.

Q. You're identifying a wire that makes a "V," coming

from the top right of the picture, and ending at a house in the picture?

A. Yes, sir.

Q. Does that wire cross Brodie Thompson's property?

A. Yes, sir.

Q. Why did you hook the wire at this particular point?

A. Gerald Parks and Ray Martin, servicemen for Brodie, asked us to attach to the building here at this point, because this shop was going to be located in this corner, so we could split the line here and serve them from the same line.

Q. They asked you to make the Litton connec-
page 249 } tion at that point?

A. Yes, sir.

The Court: Anything further?

Mr. Flannagan: Yes, your Honor.

Q. In removing the cable and the wire from the lower cross-arm, did you receive any shock of any kind?

A. No, sir.

Q. Did you wear gloves?

A. No, sir.

Q. Can you handle this wire, when it is transmitting a signal, without gloves?

A. Yes, sir.

Q. Is there any danger to a person from this wire?

A. No, sir.

Q. That's all.

RE-CROSS EXAMINATION.

By Mr. Lincoln:

Q. As a matter of fact, it's easier to handle it without gloves than it is with gloves on, isn't it?

A. I don't see there would be any particular difference.

Q. It would be if you were sticking it through a small hole?

A. The gloves that you normally work with, they could be handled easily enough.

Q. Heavy leather-palm gloves?

page 250 } A. I don't know how heavy you mean, sir, when you say "heavy."

Q. I don't know either. But they have been described as "heavy."

Fielding O. Sanders.

Mr. Flannagan: I don't think they have been described as "heavy." They were described as "leather gloves with cloth back."

The Court: Well, I think you should make the question more specific.

Q. Did you service—You say one of your wires serviced Brodie Thompson?

A. Yes, sir.

Q. And where did it go—to the Easy-Pay Tire Store?

A. Went to the Easy-Pay tire recapping shop.

Q. And that was another building?

A. Another building located right beside it.

Q. Now, this hole that you identified as being the hole that the support was hooked on—How did you go about measuring from the lower bracket on the pole, and wire going into the Brodie Thompson building—which I believe you drew an arrow at this point (Indicating on photo); how did you measure that 50 inches?

A. I set a ladder on the pole. This measuring was done after the poll was removed.

Q. When was it moved?

page 251 } Mr. Hoge: We object.
The Court: Overruled.
Mr. Hoge: Exception.

Q. Was that pole moved to the other place some time during the day, after the accident had happened?

A. (Witness does not respond).

Q. And you didn't measure it until after the pole had been moved?

A. No, sir.

Q. What happened to the metal bracket that the cable was on?

A. I could not say, sir.

Q. You took it off?

A. No, sir.

Q. You know whether anybody at Appalachian did?

A. I could not say, sir.

Q. You don't know where it went to?

A. No, sir.

Q. You know, as a matter of fact, where it was hooked?

A. I said I found a hole where a hook similar to that had been—which was the normal way of hooking it.

W. H. Spangler.

By the Court: (Interposing)

Q. What kind of an agreement, if any, did you have with the Power Co. to hook on there?

page 252 } A. I wasn't employed at the time it was hooked, sir.

Q. Do you know what agreement there was between the Power Co. and the TV company?

A. They have an agreement; yes, sir.

Q. Have you seen it in writing? Do you know anything about it?

A. No, sir. It's in writing.

The witness stands aside.

MR. W. H. SPANGLER,

a witness of lawful age, called in behalf of the defendant, Appalachian Power Co., after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Hoge:

Q. Mr. Spangler, by whom are you employed?

A. Appalachian Power Co.

Q. And where, sir?

A. Pulaski, Va.

Q. And what is your specific job?

A. District Line Supervisor, and also District Safety Director.

Q. And how long have you been employed by the Power Co.?

A. 34½ years.

Q. And your age, please?

A. 54.

pae 253 } Q. Now, Mr. Spangler, were you at the Brodie Thompson building on South Church St. on April 6, 1959?

A. I was.

Q. About what time of day, sir?

A. It was between 10:30 and 11:00—I couldn't say just exactly.

Q. Were you familiar with that installation prior to that time?

W. H. Spangler.

A. Yes, I had seen it before then.

Q. Had you seen it at any time while the building was under construction?

A. No, I hadn't.

Q. Were you familiar with the original installation?

A. Yeah, I was familiar with the installation.

Q. Are you familiar with the requirements of the National Underwriters Safety Code?

A. I am.

Q. Will you state those requirements with respect to the height of wire over a building, and beside a building, please?

A. Over top of a building—which is vertical—we allowed eight foot for 300 volts up to 15,000; and horizontal, we allowed—not get any closer than three foot.

Q. Are those measurements in the ultimate, or cumulative; in other words, do you have to observe both in the same location?

A. No—if I get what you mean. From the edge page 254 } of the building up is eight foot.

Q. Now, the question I'm asking you—If you are eight feet over a building, or anything beyond that—more than eight feet—do you also have to be three feet away from the building?

A. No, no.

Q. You do not?

A. No.

Q. And of course if you're three feet to the side, it's immaterial where the wires are with respect to the building height?

A. Yes. There is one thing with the horizontal—We can't cross a window, or doorway, or fire escape; in other words, we can't swing close to those.

Q. Is that with respect to your wires?

A. With respect to the wires.

Q. And what you mentioned with respect to the horizontal measurement—three feet away from the building—?

A. Yes.

Q. Do these measurements that you mentioned have anything to do with the locations of the poles?

A. No.

Q. They do not? Will you state whether or not this original installation met all of the requirements of the National Safety —National Underwriters Safety Code?

Mr. Lincoln: We object. We are not concerned with the original installation.

page 255 } The Court: I'll let him show what inspections, if any, have been made. Of course, our primary concern at this stage is with what were the conditions on 4/6/59. File your objection. You may answer that. I might say that all these cases—of which I have read many—which you gentlemen have furnished me in your briefs—those conditions are shown, for example, in the Orchard case—It was shown when it was installed—and in numerous other cases. You may proceed, and answer the question.

Q. The question was whether or not the original installation complied with the requirements of the National Underwriters Safety Code.

A. It was, because I was there before the building was started. About the time they was moving the guy wire, I happened to go by—when they moved the guy.

Q. And your pole was then in place?

A. That's right.

Q. Did you talk to Mr. Thompson at that time?

A. I never talked to Mr. Thompson.

Q. Anything said to you about the height of the building?

A. No.

By the Court: (Interposing)

Q. Did you make any inquiries, sir, about the

page 256 } height of the building?

A. No, sir, I didn't.

Q. What did you find at the time they were moving the guy wire?

A. When they was moving the guy wire, it was in the way of the foundation, and I just assumed he was building a building. I say at the time they were moving the guy, it was in the way of the foundation.

Q. I heard that.

A. And I thought maybe Mr. Sutphin knew the height of the building, and everything—that's our Area Supervisor's job, to check on that.

Q. That's not your function? That's Mr. Sutphin's job?

A. That's right. Of course I help them out, if I can, on anything.

By Mr. Hoge: (Continuing)

Q. What did you find when you returned there on April 6th?

W. H. Spangler.

A. I found the building was built up within six foot four inches of our conductor.

Mr. Hoge: (Indicating paper) This paper hasn't been marked. This is the same one with the additional scale added—a half inch to one foot.

The Court: Identify it some way in the record.

Mr. Hoge: We introduce this as Defendants' Exhibit #8.

(Defendants' Exhibit #8—Sketch.)

page 257 } Mr. Hoge: Cross examine?

There was a question that that had not been stipulated. Since that has been stipulated—

The Court: The jury and the Court wants to know what it is.

By Mr. Hoge: (Continuing)

Q. (Showing paper to witness) What is this?

A. This is the sketch that Mr. Clark, our Supervisor, and myself took into Pulaski to get drawn up for our report. We have to make a report on all that—that's company policy.

Q. I notice a measure here of six feet four inches. Stand up here.

(The witness stands before the jury and indicates on sketch.)

Q. Tell us what these measurements are—indicate this measurement of six feet four inches, what is it.

A. From the board roof they was putting down, to the loop after it had been pulled down. We figured it had been pulled down, according to the other loop, about four inches.

Q. Was that measurement made—by whom?

A. By one of our linemen.

Q. And the sketch was drawn according to the measurement?

A. Yes, sir.

Q. Are these—

A. —to scale.

page 258 } Q. Are the crossarms, and *et cetera* here, drawn to scale?

A. That's right.

Q. And what is the length of those crossarms?

A. Eight foot.

W. H. Spangler.

By the Court: (Interposing)
Q. The total number of wires on all those crossarms?
A. How many are there?
Q. Yes—the total number of everything.
A. On top, we had a four-wire service coming off.
Q. Seven wires on the pole?
A. Yes, sir.

Mr. Hoge: Cross examine?
Mr. Flannagan: I have no questions.

CROSS EXAMINATION.

By Mr. Matthews:
Q. Mr. Spangler, do I understand that you were present with Mr. Johnny Sutphin prior to the actual beginning of construction of this building, and the moving of the guy?
A. I was present then.
Q. You were there when the guy was removed?
A. Um-hum.
Q. Then you knew that a building was being constructed there?
A. According to Mr. Sutphin, there was going page 259 } to be a building.
Q. When you came back on April 6, 1959, were your wires located in compliance with the National Safety Code?
A. No, sir.
Q. They were closer than the minimum requirements?
A. That's right.
Q. I take it that the eight feet vertical, or overhead, and three feet horizontal, or side, are minimum requirements?
A. That's right.
Q. That's the least that you can do to come within this Code?
A. That's exactly right.
Q. Which of those wires there above this building were insulated, Mr. Spangler?
A. None of the high voltage wires.
Q. None of the high voltage wires?
A. No, sir.
Q. How about the other wires?
A. They was insulated—weather-proof.

W. H. Spangler.

The Court: Specify.

Q. The wires leading to the building were insulated as they came out of the transformer?
A. Yes, out of the transformer.
Q. What voltage did those wires carry?
A. 120 to 208.
page 260 } Q. You tell the Court and jury the 208 and 120 volt wires were insulated?
A. It's weather-proof—it's really not insulated.
Q. Is there any reason why the high voltage, or 2300 volt wires, can not be insulated?
A. They could be, but according to our safety factor, we have a length of time—your insulated wires on high voltage will deteriorate, and give you a false security for your men; it's for our own men's protection, so they won't take any chance—if they have a bare wire they're close to, they'll be careful.
Q. Do I understand that you insulate for your men, and not for the public?
A. The public doesn't work on our wires—our men do all the time.
Q. So you insulate for your men, and not for the public?
A. That's right.

Mr. Hoge: I believe that was an improper question.
The Court: I don't think so. I'll overrule that.
Mr. Hoge: We except.
The Court: Yes, I'll overrule that, and give you the authority for it later, if you want it—a little later on.

Q. Mr. Spangler, (Showing paper to witness) is this map, which has been introduced in evidence—Defendants' Exhibit #8—drawn to actual scale?
page 261 } A. All but the blocks. As far as the structure and transformers—actual scale.
Q. Then the building that you have placed there is not in scale?
A. The height is.
Q. How about the width of the building?
A. No.
Q. Can you tell us how far over the walls and roof of that building that your wires extended?
A. That's four foot—eight-foot arm—half of eight would be

four feet. And we was out by six or eight inches from the building, which would make it three foot and something.

Q. Were you out three—or six or eight inches from the top of the building?

A. Pretty close. I didn't measure it.

Q. If it took a two-by-four to go between your pole and the building, you couldn't have been six or eight inches out?

A. I didn't measure it.

Q. How close to the end of the crossarm was this wire with the loop on it, as shown on your scale model?

A. The pins are put in four inches from the end of the arm; in other words, this insulator here—we come in four inches; and then from there to the other transformer—to the transformer is about four inches; and then they'll
page 262 } vary about two inches to the transformer.

Q. Would you say that wire was at least three feet over the edge of the wall onto the roof of the building?

A. Yes, I'd have to say it was, yes.

Q. As Safety Director for this District, did you order that pole and wires removed from over that building the same day—

Mr. Hoge: We object again for the same reason.

The Court: I will let him show what was done. I have already ruled, and told the gentlemen of the jury we are concerned with it as it was at the time of this man's death. The burden is on the plaintiff to prove his case by a preponderance of the evidence. You may proceed. The object is overruled.

Mr. Hoge: Exception.

A. No, I didn't issue any orders on moving it.

Q. Was the removal of the pole discussed in your presence?

Mr. Hoge: We again object.

The Court: Same ruling.

Mr. Hoge: Exception.

A. It wasn't in my presence.

Q. Was that pole at that time—on April 6, 1959—under the exclusive control of Appalachian Power Co.?

A. At that time, yes.

W. H. Spangler.

Q. And at this time it is still under the exclusive control of the Power Co.?

page 263 } A. That is true.

Q. Mr. Spangler, are there any minimum requirements concerning the attachement of any other wires, cables, or attachments to your pole?

A. We have an agreement with the telephone company, and also the TV company, on the requirements on that.

Q. And what are those requirements?

A. I don't know, offhand, what they are.

Q. Does your company have a contract with Home & Auto to allow them to attach on to your poles?

A. We do.

Q. Do they have the use of your right-of-ways which you may have, other than over the streets and alleys of the Town of Marion?

A. I can't answer that—but I think so. I couldn't answer that now.

Q. Does the National Electrical Safety Code, or your Fire Underwriters Code, carry any minimum requirements for other wires or cables to be attached to your pole?

A. It does.

Q. Can you give us those, please?

A. If I can find it, sir. I have a book right here. (Witness examines booklet)

page 264 } Mr. Flannagan: Home & Auto makes the same objection to this that they did to the use of the tables heretofore introduced, on the basis that it's not a question of what the table shows, but a question of next proximate cause.

The Court: I take it, Mr. Flannagan, they have used it all through here with that objection—and yesterday. I take it that these gentlemen are trying to show that their appliances were standard, and exercised reasonable care in compliance with this Code. I think they have a right to show this. This Pulaski case made reference to it, where the wire was broken—I know that was in that case. And the Orchard case we referred to so often here—that was referred to as I recall; and numerous other Virginia cases. The Orchard case is *Northern Virginia Power Co.* v. *Bailey*, 194 Va. 464; and the Norfolk case is 192-776; and in all that line of cases they mentioned the fact that these codes were there.

Mr. Flannagan: That's true, your Honor. But the evidence in this case conclusively shows the wire had been moved

at the time of Heath's death. The tables, insofar as Home is concerned, are inapplicable.

The Court: It shows the wire was down on that building. It had to be moved by somebody. I'll overrule your objection.

page 265 } Mr. Flannagan: Save the exception.

A. According to the code, power conductors below communication conductors 30 inches; power conductors along and above communication conductors, less than 300 volts, 24 inches; exceeding 300 volts, 30 inches—that's our spacing.

By Mr. Matthews: (Continuing)

Q. Can you explain that to the Court and jury?

A. In other words, if we have a—

Mr. Flannagan: We object to explaining the table.

The Court: The objection is overruled.

Mr. Flannagan: Save the exception.

A. In other words, where we have three wires going to a house, and we have to drop down 24 inches—I mean, the telephone company, or any communication, or the TV, is 30 inches below the rack, or 24 inches above, they can go across the top of our voltage—24 inches above. This 24 inches, from 300 and over—300 volts—it's 24 inches, 300 volts, and 30 inches if it's over 300 volts. Usually most of our poles have 110 and 220 volt circuits, and they'll drop down 24 inches—that's the requirement by the code, and also their contract.

Q. Mr. Spangler, you are familiar with electricity, are you not?

A. Fair.

Q. Would leather gloves with a cloth back af-
page 266 } ford any insulation for 2300 volts?

A. It will, but I couldn't say to what degree.

Q. All right.

By the Court:

Q. Mr. Spangler, what was in the code, if it does mention anything about the duties of inspection?

A. I didn't get that?

Q. What is in the code—if there is a code—about the duty of inspection of your various appliances from time to time?

W. H. Spangler.

A. Well, now, we really don't—some places have an inspection setup.

Q. Does the code you have in your hand have any reference to it?

A. We just try to follow it.

Q. Does that code, which you have in your hand, mention an inspection?

A. I don't believe it does.

Q. The reason I asked you this especially, in *Andrews* v. *Appalachian Power*, 192 Va. that point was raised.

A. It does not have anything on inspection.

Q. According to good usage, what standard do you apply?

A. We all try to follow this code book as close as we can, and help the customer out. We try to help the customer on his wire, because this is not new to us, but it is to a lot of our customers.

page 266A } Q. How often do you inspect your wires, say, in the vicinity of Marion? What inspection system do you have?

A. We have an inspector that inspects all of our territory once every five years.

Q. You said Mr. Sutphin's duty was to inspect that area. What are his duties?

A. His duties are to maintain service, and look after all the company property in this territory.

Q. Detail his duties with reference to a new building being erected.

A. Usually the contractor will get in touch with our office, and the electrical contractors—electrical contractors, I'm talking about—get together on the wiring, and Johnny Sutphin knows a building is to be erected—

Q. Assume that he knows this building is going to be erected in this particular location—what are his duties? What I'm trying to find out, what are his duties on this particular building? You said he had some duties. What I want to know is, what are those duties?

A. His duties is to take care of the customers' complaints —which this complaint was to move the guy wire from out of the way of construction; and any other complaints the customer gives us on it.

Q. Do you have any duty from the company on a new building that's being erected, as to the wires, or their proper position?

W. H. Spangler.

A. No, sir; not to enforce—that's just one of
page 267 } those things we do, or try to do.

Q. What are his duties? Spell them out.

A. All right. His duties is to see that the meters are read here—All of his duties, you want?

Q. With reference to new construction near to a power line.

A. To check and see what kind of service they want, if they want a service.

Q. I'm talking about from a safety standpoint—not if they want service. You said a while ago it was his duty, because this was his territory. What are his duties with reference to promoting safety where new buildings are being constructed or erected underneath your power line?

A. To try to maintain safety. We try to move all of our wires and everything to a safer position—if we know it.

Q. How often do you inspect—or do you inspect to ascertain it?

A. The only inspection—all hours they work for the company, and they are passing by and always checking and looking—all our men are instructed to do that.

Q. When he finds a new building is going up, what are his duties?

A. To check and see the location and everything.

Q. And to do what if he finds they are going to be under wires?

A. We move them.

page 268 } Q. Now, then, the next point. What does the code say with reference to insulation of wires near to new construction?

A. We have a case every day.

Q. I'm talking about the book now.

A. Sir, I didn't get that?

Q. What does the code say, if anything, with reference to the duty of the company to insulate wires where buildings are being erected close by, or near to your power line?

A. I don't think it's in here. (Witness inspects book) Here's one—(Apparently reading) "Protection on buildings or structures. Where open conductors are subject to mechanical disturbance, or are readily accessible, they shall be of electric metal tubing, and shall be of multiple conductor cable approved for the purpose, or shall have equivalent protection."

Q. Now, what standard, if there is a standard, where this

building was being erected—what were *you* duties, or the duties of Mr. Sutphin—the duty of your company, if there was a duty?

A. After finding that the building was going to be as high as it was, and under our measurements—what we are allowed—then our duty was to move the pole and get it in a safer position.

The Court: All right. Any questions by anyone?

Mr. Flannagan: Yes, your Honor.

CROSS EXAMINATION.

By Mr. Flannagan:

page 269 } By the Court: (Interposing)

Q. I want to find this out: What were your duties, if any—I'm talking about the Power Company's duty—with reference to this TV cable; whose duty was it to inspect that, as between you and the public?

A. Well, that's our man in the area here.

Q. Is he instructed—is Mr. Sutphin instructed to inspect those additional appliances, like the TV cables?

A. That's right; our Area Supervisor goes over that.

Mr. Flannagan: We would like to move that all of his testimony regarding the duty of Appalachian be struck as to the defendant Home & Auto, and the jury be instructed to disregard it.

The Court: Of course, as I stated at the outset, there's certain evidence which is applicable to the Power Co., and certain evidence applicable to the TV company; and there are two defendants, and you have to consider throughout this case that there are two defendants. And the Court will undertake at the proper stage—if we arrive at that stage— in the instructions to explain to you in detail the law applicable to each. Now, this evidence is here, and there is a contract, or agreement between the Power Co. on one side, and the TV company on the other side, by which the TV com-
page 270 } pany is utilizing the poles and equipment of the Power Co. And we'll have to consider those things. I'll undertake to explain to you in detail the law applicable to each defendant. I'm going to let the evidence go in at this stage, and overrule your objection.

Mr. Flannagan: Exception.

W. H. Spangler.

By Mr. Flannagan: (Continuing)

Q. Mr. Spangler, on the day you saw this installation at Brodie Thompson's, was that before the building had gone up?

A. That was the time that they were pouring the base.

Q. At that time did you observe the TV wire on that pole?

A. I did not; no, sir.

Q. Did you observe any installation on that pole which was improper, or not in accordance with the code that you have referred to?

A. We did, as well as I remember. There was an unauthorized light on that pole.

Q. Did that light have anything to do with this accident?

A. No.

Q. That was the only violation of the code that you observed on that pole before the building started up?

A. That's right.

Q. And was that at the time that the guy wire was being moved?

A. That's the time the guy wire was being moved.

page 271 } Mr. Flannagan: As I understand, your Honor, I asked this without waiving my objection.

Q. As I understand the requirements you mentioned for the stringing of a TV wire, or a telephone wire, applicable to this installation, would have been 24 inches.

A. 24 inches under the 300 volt line.

Q. Now, the 30 inches—

A. 30 inches above.

Q. It would have been 24 inches below?

A. Or above.

Q. Or above?

A. 300 volts.

Q. Would that, then, have been 24 inches below the drop wire shown in picture #3, going to the right from the pole?

A. I would say at least 24 inches; but I don't know where the TV antenna was. We don't have to—I mean they—just so we get that much clearance—some of them drop, and some of them go down.

Q. What I'm asking is, would the 24 inches you refer to be below the bottom wire?

A. That's right—that's less than 300 volts.

W. H. Spangler.

RE-DIRECT EXAMINATION.

By Mr. Hoge:

Q. Mr. Spangler, when did you first learn that this building was of a height that caused a violation of the
page 272 } code?

A. On the day of the accident.

Q. Were you notified at any time prior to that, that the building would be that height?

A. No, sir.

Q. Was anyone in your organization—in the Appalachian Power Co., to your knowledge, notified that the building would be a two-story building?

A. To my knowledge, no one was notified.

Q. And the only thing you know, or observed, was the guy wire—request for the guy wire to be moved?

A. That is the request we got.

Q. Do you know on what date that occurred—that request occurred, or the date the guy wire was moved?

A. No. We could find out by a work order number, and the date on it—that's about the only way; I can't think of that—only just when it was—the date of it. Mr. Sutphin will know.

Q. You were asked something about installation of wires, and the space of an insulator, or space as an insulator.

A. Space?

Q. Yes.

A. Yes, sir.

Q. Is that the purpose of eight feet over the building?

Mr. Lincoln: I think he's leading the witness a little bit.

The Court: I don't think so. Space is an in-
page 273 } sulator, he says. Let's get along.

Q. All right. That's all.

RE-CROSS EXAMINATION.

By Mr. Matthews:

Q. Does your company require a periodic inspection of all its lines, Mr. Spangler?

A. We try—have set up an inspection. We have an inspector that inspects the district, and it takes us about five years to get over the district—and at this time he's in Carroll and Grayson Counties.

W. D. Clark.

Q. I take it that's an outside inspector?
A. All the poles, and everything on it.
Q. Is that someone regularly employed by your company?
A. That's right.
Q. Well, now, for instance, your local supervisor—Is he required to make any inspections at all, periodically?
A. That's all our duties is—to look and see if we can find any hazards, or anything that's not according to par. If it is, we have a form we bring into the office and report it.
Q. I take it all of your employees are required to do that, but it is not a specific duty of anybody?
A. It's just one of those requirements that we require.

RE-REDIRECT EXAMINATION.

By Mr. Hoge:
Q. Were you by this building any time from
page 274 } the time the guy wire was moved, until April 6th?
A. No, sir.
Q. That's all.

The witness stands aside.

MR. W. D. CLARK,
having been sworn previously in this cause, is recalled to the witness stand).

RE-DIRECT EXAMINATION.

By Mr. Hoge:
Q. Mr. Clark, did you examine this particular pole on April 6th, or any other time?
A. Yes, sir.
Q. What did you find, sir? When did you examine it?
A. I examined it on the day of the accident.
Q. What did you find, sir?

The Court: Didn't he testify about that?
By the Witness: No, sir.

Mr. Hoge: Not to my thinking.

A. I found this loop that appeared—
Q. You testified.

The Court: Don't repeat. I'll let you show something you omitted. He testified about that loop?
Mr. Hoge: He testified about that loop?

Q. Did you examine the pole?
A. I examined the pole; yes, sir.
page 275 } Q. What did you find on the pole?
A. I found on the pole, a good bit below the top of the building, where there was a mark around the pole, that would indicate to me that the messenger in this sort of a cable (Indicating cable and support wire) right here, had been wrapped around the pole. And on above that, a couple of feet, there was another mark, where it indicated to me that this television cable had been moved up from time to time.
Q. How many of those marks would you say were on the pole?
A. I definitely saw two.
Q. Now, did you observe any marks on this wire that had been pulled down—the jumper wire?
A. There was a bright spot that would indicate to me that there had been a burn there.

The Court: He stated that yesterday.
Mr. Hoge: I don't recall that.

RE-RE-CROSS EXAMINATION.

By Mr. Lincoln:
Q. Did it indicate to you—those marks on the pole—that the television wire had been raised from time to time?
A. Yes, sir.
Q. That's all.

By the Court:
Q. Did anybody, to your knowledge, do that, sir?
A. No, sir.
page 276 } Q. You don't know who did it?
A. No, sir.

The witness stands aside.

Mr. Hoge: We rest, your Honor.

Mr. Flannagan: Home & Auto rests.

The Court: You gentlemen for the plaintiff have any rebuttal?

Mr. Lincoln: Plaintiff rests.

* * * * *

Mr. Flannagan: On behalf of Home & Auto Supply Co., Inc., I move to strike the evidence, at the conclusion of all the evidence, on the grounds previously assigned by said defendant at the conclusion of plaintiff's evidence.

The Court: Any additional grounds?

Mr. Flannagan: No additional grounds.

The Court: I'm not going to permit any argument on that. I'm going to deny your motion.

Mr. Flannagan: Save the exception.

page 277 } The Court: Mr. Hoge, or Mr. Repass, any additional grounds?

Mr. Hoge: No additional grounds, but plenty of testimony—

The Court: You may state it briefly and succinctly, just what the grounds are, if you have any additional grounds.

Mr. Hoge: I do not have lack of negligence on the part of the defendant, and contributory negligence on the part of the plaintiff.

The Court: That's your grounds, too?

Mr. Flannagan: Yes. sir. And I had additional grounds there was no foreseeability.

The Court: That goes to proximate cause?

Mr. Flannagan: Yes, sir,—the doctrine of forseeability.

The Court: I'm going to make the same ruling the Court made on yesterday. And now gentlemen, the next point—

Mr. Hoge: Exception.

* * * * *

page 287 }

* * * * *

Mr. Flannagan: Defendant Home & Auto Supply Co. objects to the giving of any instructions on behalf of the plaintiff for the reasons assigned in the motion to strike the evidence.

* * * * *

page 289 }

* * * * *

The Court: D-4. What do you have to say as to D-4.

Mr. Lincoln: I think that instruction is susceptible to objection on the grounds that there is no evidence that David Heath was warned, or if so, that he heard that warning.

The Court: I beg leave to differ. Mr. Keesling said he warned him.

Mr. Lincoln: He didn't know whether he heard him. Both of the Halls said they heard no warning, and they got no answer. And I gathered from the evidence that page 290 } the man was dead about the time he hit the wire, or the time he made the warning. Certainly it—

Mr. Matthews: Certainly the warning, unless it was effectively received by him, was no warning. We think that should be in there.

Mr. Lincoln: Furthermore, it's repetitious of D-2, we think.

Mr. Matthews: I assume it was passed.

The Court: One of the chief objections I see to it in my own mind, is that it covers only a partial view of the situation, pointing out certain factors there.

Mr. Hoge: May I point out, if your Honor please, in this connection it's the burden of proof of the plaintiff to win on all points, while the defendant can prevail on any one point, and the case will turn upon that fact. If he was guilty of contributory negligence in any respect, then he's bound by it.

The Court: I'm going to refuse that instruction with the language as it is. For example, something might have happened to him—I don't know what inference might be drawn from the evidence. And it's the duty of the jury to draw inferences from the facts. "Knowingly," or "intentionally" —if you leave those words out—I'm going to refuse D-4, gentlemen.

Mr. Hoge: Defendant excepts.

The Court: I have already given you an in- page 291 } struction on contributory negligence. You can argue those facts.

Now, No. D-5. I'll refuse that on my own motion, because they said they didn't know it.

Mr. Hoge: Did know the building was being erected to that height.

The Court: They owed a duty of inspection, and they can't hide behind ignorance. I'll refuse No. 5.

Mr. Hoge: For the record, may we also state our exceptions. The grounds of the exceptions to the Court refusing Instruction No. 4-D—

The Court: And D-5.

Mr. Hoge: With respect to D-4, this defendant considers that a correct statement of the law, and that this defendant is entitled to the instruction, setting forth to the jury the specific facts which they may consider in determining whether or not this plaintiff's decedent was guilty of contributory negligence. With respect to D-5, the instruction is supported by the evidence, and a preponderance of the evidence, that the Power Co. through its agents and employees did not know, in the exercise of reasonable care—should not have known the Thompson building was being erected to such a height that a person could reach the wires from the top of the building. And under the circumstances, the defendant is entitled to that aspect of the case being placed
page 292 } before the jury on proper instruction.

* * * * *

The Court: The Court grants instruction on contributory negligence, D-2-1. You have no objections, I take it? Granted without objection.

I refuse D-4-1. I'll give you a general instruction on it. I can't confine it to the particular facts, any more than I can confine the other to the particular facts. You may state your exception to the refusal of the Court.

Mr. Hoge: The defendant Appalachian Power Co. by counsel excepts to the Court's refusal to grant Instruction D-4-1 for the reasons assigned to the refusal of Instruction D-4; and the further fact that the Instruction incorporates the facts which the defendant is entitled to have presented to the jury, on which the plaintiff's decedent may be held guilty of contributory negligence according to law.

The Court: For example, Mr. Hoge, in the second to the last line—"Took hold of the television cable"—if he took hold of it through inadvertency, or through some other reason—if he became sick or suddenly dizzy.
page 293 } There's no evidence what made him take hold, except one witness said he was anchoring himself to pull this cable, he thought. That was his opinion.

You could assign that, or some other reason. I can't give you that D-4-1.

Mr. Hoge: We'll reserve our objection to it.

* * * * *

Mr. Repass: The Power Co. objects to the Instruction P-1-A on the grounds that it is a statement of law, and not a proper instruction. The proposed instruction makes the Power Co. an absolute insurer, regardless of the possible negligence on the part of the plaintiff. There is page 294 } no evidence in this case as to the cost of maintaining wire perfectly insulated, with reference to whether it would be more expensive, or less expensive than bare wires. It is submitted that under the Trimyer case that the duty of insulating in the sense of covering wires is not absolute, and that there are other types and methods of protecting the wires; and there is a provision that the Power Co., maintaining the wires, must reasonably anticipate that people would come in contact with them in order to require any insulation whatsoever.

The Court: All right. Mr. Flannagan, do you have any objection?

Mr. Flannagan: Home & Auto would object on the grounds that this is a statement of law, and an abstract statement of the law; that it ignores the fact the *the* defendants' only duty in a negligence case is to use ordinary care to see that his wires are insulated, and so forth. This makes him an insurer to see that they are insulated.

The Court: Consider P-1-B. First, the Power Co. State them succinctly, please.

* * * * *

page 296 }

* * * * *

The Court: I can't give you both. Elect between P-1-A and P-1-C. Let's pass on to P-1-D. What do you say to that, Mr. Power Company?

Mr. Repass: We object to the last clause of Instruction P-1-D. "Particularly is this true in places where high voltage wires are maintained in close proximity to persons rightfully at work near such wires."

The Court: You want them to strike out, Mr. Plaintiff,

"particularly is this true in places where high voltage wires are maintained"?

Mr. Lincoln: Strike out after the word "particularly."

The Court: Strike out "particularly is this true in places"?

Mr. Lincoln: If the Court thinks it—

The Court: They objected to it on that score—the only objection.

Mr. Lincoln: We think it contains—

page 297 } The Court: "By the use of reasonable diligence high voltage wires should be maintained in close proximity."

Mr. Lincoln: That's all right. I don't object to that.

The Court: "Particularly is this true"—I'll delete that, then, from the instruction.

Mr. Hoge: May I ask this question? Is the Court then telling the jury that this man, Gilbert David Heath, was any place where high voltage rights were maintained, and he was rightfully at work?

The Court: I think he had a right to be there.

Mr. Hoge: Did he have a right to do the work as he was instructed?

The Court: What is your question?

Mr. Hoge: He was instructed to take the wire off the pole and drop it off the side—he would not have been in any danger. Here the Court is telling the jury he is in a place he had a right to be—up there reaching for the wire.

The Court: I'm not going to tell them that.

* * * * *

page 301 }

* * * * *

I'm going to refuse P-1-B. Now, this is the way the following instructions P-1-A is granted; P-1-B is refused; P-1-C is refused; P-1-D is granted; P-1-E is granted; P-1-F is granted. Now, you may state succinctly your exceptions.

Mr. Hoge: The defendant Power Co. excepts to the Instructions just granted by the Court to the plaintiff, for the reasons previously stated; and for the further grounds that the evidence does not support the Instructions for the plaintiff granted in sum total.

Mr. Flannagan: Home & Auto excepts to the Instructions just granted by the Court, on the basis that the Court should

give no instructions on behalf of the plaintiff, and for the reasons specifically assigned to each numbered Instruction heretofore.

* * * * *

page 304 }

* * * * *

The Court: Now, then, for Home Supply. Home & Auto offered "D-A," "D-B," "D-C," "D-D," "D-E," and "D-F," and "D-G." Now let's take a few moments to read these over, and I'll come back to them. Now, gentlemen, in order to get along, the Court, on its own motion, is
page 305 } going to refuse "A" as offered. The first part is OK, but the last part is wholly repetitious, and argumentative. I'll give him the first part. The first paragraph of "B" is OK; the second paragraph is argumentative; and I think he is just stating in another way what the first part has already stated. I don't think it would be helpful to the jury. I'll give the first paragraph of #1. "D," "C" seem to be OK, as far as I know. It has the same language on it as the Power Co. "D" on its instruction, which I said was applicable to a criminal case, and not to a civil case. I'll grant "C"; "D"—I'll grant that. Now, "E"—I want to put a question mark after that. "F", I think, is all right, unless I hear some reasons to the contrary—it's repetitious, is the chief objection I see at the present. And "G"—the first paragraph is repetitious of what has already been stated; and the second paragraph is already covered in another instruction. I don't know—it's no use giving it twice. I have already given it once in this case, and I don't see any use repeating it. So you may state your exceptions, if any, which you have.

Mr. Flannagan: I want to be certain I have your ruling correct. "D-A" is refused?

The Court: In that form. But I'll give the
page 306 } first part of it there.

Mr. Flannagan: "D-B"?

The Court: Wait just a minute. I'll give you "A" down to "in the light of attending circumstances." I'll refuse the whole thing as written, for the record. Marked refused—"D-A." I'll give you the first paragraph of "B," if you want it. I'll give you "C"; I'll give you "D." I want to hear you on "E." And I want to on "E" and "F." And "G" is really repetitious of the ones heretofore granted.

The bottom part of the past paragraph of "G," of course, is a correct statement of the law. And the first one is a correct statement of the law. I think that's just another way of saying what constitutes the evidence. You can argue that—and so I don't see that it would be helpful. I'll give that first paragraph of "G," if you want it.

Mr. Flannagan: Home & Auto Supply excepts to the refusal of the Court to grant Instruction "D-A," "D-B"—

The Court: "D-B" is OK—not the first paragraph. "C" is OK. "D-D" is OK. I want to hear you on "G."

Mr. Flannagan: "D-G"?

The Court: "D-G" is repetitious. I'll give you the first paragraph of that one.

Mr. Flannagan: Although the Home & Auto Supply Co. excepts to the refusal of the Court to grant the
page 307 } refused Instructions, on the basis that the Instructions are clear and correct and applicable to the factual situation in this case; and that Home & Auto, being a separate defendant, is entitled to an instruction on its view and theory of the case, even though same to a certain extent might be repetitious of other instructions heretofore granted, we'll reoffer, without waiving our exceptions.

The Court: I'll mark "D-B" refused, then, for the record. And now I'll mark "C" granted, and I'll mark "D-D" granted; I'll pass "D-E"; I'll pass "D-F" until I hear from you gentlemen. I'll mark "D-G" refused, because it is repetitious, although I'll give you section one, first paragraph in "D-G."

Now, let's get along, gentlemen. I take it you're objecting for the plaintiff?

Mr. Lincoln: Yes, sir.

The Court: What do you gentlemen say?

Mr. Hoge: We have no objections one way or the other.

The Court: Mr. Flannagan, do you want to reoffer something?

Mr. Flannagan: I'll reoffer, without waiving my exceptions, "D-A" and "D-B" through the portions indicated.

The Court: Do you have them there?

Mr. Flannagan: I need these for the record—
page 308 } these refused. I have got this for the record here. "D-B" and "D-G."

The Court: I'll give you "D-A" down to "attending circumstances" down to the word "hence," about the ninth line.

Mr. Lincoln: May I make a comment? I believe it's wrong. It says "must be his—was the proximate cause of his

death." At the time Appalachian Power Co. and the Home & Auto together contributed to his death.

The Court: As to this defendant, he's entitled to separate instructions on that. You all never did ask for the contract, and nobody sought to introduce the contract.

Mr. Flannagan: That is "D-A-1"?

The Court: Granted. I'll grant you "D-B" down to the bottom paragraph. I'll delete the bottom paragraph—it's purely argumentative.

Mr. Flannagan: No, sir; I don't want to reoffer that.

The Court: "D-C"—this is already covered in Appalachian Power Company's instruction. "D-C" is granted; "D-D" is granted. Now, I'd like to hear everybody on this "D-E."

Mr. Lincoln: We certainly do not believe that Instruction "D-E" contains the correct statement of the law. By going upon a person's land does not imply that you
page 309 } have a right to do it. You are still a trespasser by reason of the fact you go upon the land. And mere acquiescence does not confer a right in law to maintain power lines, or otherwise, across another's property. In order to maintain lines legally, it can be done only through a grant of a right to do so—not by mere acquiescence.

Mr. Flannagan: I'd like to be heard on that. This isn't a question of an easement; it's not a question of right in real estate; it's a question of the right to do an act which is a permission for allies—

The Court: Depending on whether or not these people are trespassers, or were there with permission.

Mr. Flannagan: Yes, sir. And the permission—the language of the instruction is taken *form* the case of *Hinton* v. *Indemnity Insurance Co.*, 175 Va. 205.

The Court: Assuming they had permission? You're turning on hot and cold. You, Mr. Hoge, said the same thing in substance—it wasn't a question of permission, or lack of permission at all—that's in the pre-trial I'm talking about now. And now you're coming back with that instruction. The other side hadn't raised the point whether they were trespassers or not.

Mr. Flannagan: I have expected something like this—and they have this in their pleadings.

page 310 } The Court: In the pleadings? Suppose you had permission, what better shape would you be in? If you didn't have permission, what better shape would you be in? How is this going to help, whether you did, or didn't have permission?

Mr. Flannagan: They charged we did not have permission. We have introduced evidence that we did have. And I think we are entitled to an instruction on it, in my opinion.

The Court: Mr. Thompson said you did not have permission. I don't know of any positive evidence you introduced to the effect that anybody gave you permission to do it.

Mr. Flannagan: That's exactly what I'm getting at—permission is not just expressed rights.

The Court: Squatters' rights?

Mr. Flannagan: We are not talking about real estate; we're talking about the right to string a wire.

The Court: Do you all have in mind what you are going to argue out there about it?

Mr. Lincoln: I don't know right now.

The Court: What is your objection to this instruction?

Mr. Lincoln: He had no right to be there, and it was so proven.

The Court: How would that affect the status
page 311 } of the plaintiff's right to recover? He knew the thing was there.

Mr. Lincoln: He didn't, in so many words, object to it.

The Court: You're talking about between the TV company and Thompson. I'm talking about the TV company and Administrator. Thompson is not a part of this litigation. It looks to me like you all said it was in the barn, in the pre-trial—and I'm going to hold you to that. And I'm going to grant you that instruction.

Mr. Flannagan: Save the exception. And in addition to the reasons already stated, it is not blowing hot and cold about instructions of—

The Court: I am coming to the instructions of everybody. Give me your attention, please. Instruction "D-F"—I was of a mind to give you that one, unless I hear some valid reasons to the contrary. I have got it marked OK. I'll hear you gentlemen on that. Does that take care of your situation, Mr. Hoge?

Mr. Hoge: The one thing I wanted to mention—Sanders said he had permission to pass over.

The Court: I think this will take care of "E." And I think "E" and "F" are repetitious—one or the other. I am going to grant "F," unless you—

Mr. Lincoln: We object to the granting of Instruction "F"

for the reason, that as stated in the first line
page 312 } down through "death of Heath," states a correct proposition of law. But when you go further on, and say it must be proximate cause—

The Court: Proximate cause, instead of—

Mr. Lincoln: Then that leaves Home & Auto Supply Co. in the condition that, if they contributed to the death along with Appalachian Power Co., they are not liable.

The Court: I don't see that, Mr. Lincoln. The only thing that strikes me, Mr. Lincoln, is this: I think they were trespassers *ab initio*. And now I don't know whether a trespasser ever claims permission. I'm going to give him the benefit of the doubt, and grant that instruction.

Mr. Lincoln: Plaintiff by counsel excepts to the granting of Instruction "D-F," for the reasons stated.

The Court: Now, then, let's see yours, Mr. Flannagan. D-A is refused as offered; D-B is refused; and granted for defendant Home & Auto Co., is D-A-1, D-C, D-D and D-F. Does that cover yours?

Mr. Flannagn: Have you refused "G"?

The Court: You heard me. That's the reason I called them. You didn't mention one.

Mr. Flannagan: "D-G."

The Court: It is refused. I told you I'd give
page 313 } you "D-G," the first paragraph. And I refused the bottom because I have already instructed on they are the sole judges of the weight.

Mr. Flannagan: Without waiving out objections to granting "D-B," we offer "D-G-1," which is the first part.

The Court: I'll grant "D-G-1," the first part. That's a mere commentary on one that's already granted. Your distinguished Supreme Court has told the trial lawyers and judges in Virginia not to grant repetitious instructions, and I think we should accede to that command. Is that all from all sources?

Mr. Lincoln: One for the Home & Auto Supply Co. We don't have an instruction touching them, and we have one just about prepared.

* * * * *

page 316 }

* * * * *

The Court: What objection to P-8? Thereupon, plaintiff offered P-8. Let's hear your objections. Any
page 317 } you have?

Mr. Flannagan: Home & Auto objects to the granting of P-8 for the following reasons: It is general, and misleading, and refers to situations of danger, without relating that danger to persons; and adjudicates that, permitting the TV cable to cross the building at a low height was negligence, which is an incorrect statement of the law.

The Court: I disagree. In such a manner as to constitute a hazard to workers on such building after they knew or should have known the building was under construction. I'm going to grant that, and you can except to it.

Mr. Flannagan: Defendant excepts for the reasons stated.

(Court and counsel return to the courtroom).

(The Court made the following statement to the jury, preparatory to reading the Court's written instructions:)

The Court: There are two defendants—Appalachian Power Co. and Home & Auto Supply Co.—and I want you to bear that in mind throughout your deliberations, and throughout the argument. And I have three batches of Instructions here—they all are the Instructions of the Court, and they are to be read and considered together. Now,
page 318 } there were objections interposed as to the other defendant. It's right difficult to govern the introduction of proof where you have two separate and distinct defendants—two or more. Some of these Instruction, you'll notice, apply to one defendant; some to the other; and some to both. I want to make this broad general statement: That in considering the case, you'll consider the evidence applicable to the various defendants, the same as introduced. The fact that the Court overruled counsel—that doesn't mean the Court favors one over the other—the Court is impartial. You take this case and consider it on the law and the evidence. The gentlemen of counsel have the right to base their argument upon the law and the evidence—and not otherwise. Now, I'll read you the following Instructions, which constitute the law of this case.

(The Court instructs the jury).

(An objection was made to the closing summation of Mr. Matthews, extract of which follows:

Mr. Matthews: * * * As a matter of fact, their own witness told you those were not the facts—we are mistaken; we were too low to that building. And I tell you, if they had not been too low, they would have told you—and that's why they made those measurements there that day. And, gentlemen, when they got there and found that
page 319 } situation, what did they do? I believe his Honor told you that you could not consider this in determining negligence on the part of the defendant, but you could consider it along with the other evidence presented. They immediately—not the next day, not later on—that afternoon, they immediately took steps to remove that dangerous instrument away from that building where those men were working, because they knew that there was a definite and decided possibility had they left it, others would reach that same fate, that—

Mr. Hoge: If your Honor please, I hesitate to object to that statement. It is not in compliance with the law, and we must object to it.

The Court: It is in substance in compliance with what the Court said. The Court simply tells you that we are concerned with the conditions as existing on 4/6/59—that's April 6, 1959—as of the date this man met his death. What happened thereafter—you may know the location of the lines at present. That *per se,* as I told you earlier—*ipso facto* is not evidence of negligence—the fact that the pole was removed. You may proceed.

Objection overruled.

Mr. Hoge: Exception.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

Page

Writ of Error and *Supersedeas* Awarded—Record No. 5230 1
Writ of Error and *Supersedeas* Awarded—Record No. 5231 2
Record 3
Motion for Judgment 3
Demurrer of Home & Auto Supply Company 6
Demurrer of Appalachian Power Company 6
Grounds of Demurrer 7
Order—April 25, 1960 7
Bill of Particulars 8
Demurrer and Grounds of Defense of Appalachian Power Company 9
Demurrer and Grounds of Defense of Home & Auto Supply Company 11
Grounds of Demurrer of Home & Auto Supply Company, Inc. 12
Demurrer of Home & Auto Supply Company, Inc. 13
Order—May 16, 1960 14
Order—May 17, 1960 14
Instructions 15, 188
Order—May 17, 1960 20
Order—May 19, 1960 22
Motion of Home and Auto Supply Company, Inc., to Set Aside Verdict of Jury 23
Motion of Appalachian Power Company to Set Aside Verdict of Jury 24
Judgment—May 20, 1960 26
Notice of Appeal and Assignments of Error by Home and Auto Supply Company, Inc. 27
Notice of Appeal and Assignments of Error by Appalachian Power Company 28
Witnesses:
- Mrs. Margaret Heath 30
- Brodie Thompson 31
- James W. Ritter, Jr. 50, 73
- Johnny Sutphin 59, 118
- W. E. Hall 75
- H. M. Sparger 89
- Claude Hall 98
- W. D. Clark 111, 185
- Dan Thompson 131
- F. K. Keesling 136
- Glenn Reed Hilton 149
- Fielding O. Sanders 158
- W. H. Spangler 171

Proceedings 36, 74, 106, 108, 149, 187, 197