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Record No. 5201

In the Supreme Court of Appeals of Virginia at Richmond

STEPHEN J. CRAIG, ET AL.

V.

JOHN BOWMAN KENNEDY

FROM THE CIRCUIT COURT OF AUGUSTA 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. 5201

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 9th day of June, 1960.

STEPHEN J. CRAIG, ET AL., Appellants,

against

JOHN BOWMAN KENNEDY, Appellee.

From the Circuit Court of Augusta County

Upon the petition of Stephen J. Craig and Myrtle L. Craig an appeal and *supersedeas* is awarded them from a decree entered by the Circuit Court of Augusta County on the 14th day of October, 1959, in a certain chancery cause then therein depending wherein John Bowman Kennedy was plaintiff and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

BILL OF COMPLAINT.

To the Honorable William S. Moffett, Jr., Judge of said Court:

Your complainant, John Bowman Kennedy, respectfully represents and says as follows:

I.

That by deed of June 24, 1947, of record in the Augusta County Clerk's Office in D. B. 353, page 321, Karl E. Yount, et als., conveyed to him, John Bowman Kennedy, a tract of land, lying and being in Middle River District of Augusta County, Virginia, near Crimora, adjoining the lands of the C. J. Barger Estate, the B. F. Spitzer Estate, the E. C. Geiman farm, formerly the Samuel Yount place, containing 98 Acres, 3 Roods and 20 Poles, of which 35 Acres, more or less, is located between the mill race of the Crimora Mills property, South River, and the lands of Clarence Weaver;

II.

That by deed of August 1, 1957, of record in said Clerk's Office in D. B. 431, page 257, Ella H. Benson conveyed to Stephen J. Craig and Myrtle L. Craig, husband and wife, jointly and to the survivor, a tract of land, of 19.51 Acres, made up of two tracts, of which Five (5) Acres is, or was, the Crimora Mills property, with the mill building thereon, the dwelling house and outbuildings, long since abandoned as a floor milling operation;

page 2 } III.

That the river bottom land, of about 35 Acres, conveyed to the Complainant in the aforesaid deed, is so located and situated that it cannot be reached from the remainder of the farm of the Complainant, save and except by and over the mill property, now owned by the Craigs;

IV.

That there is now and there always has been, for a great number of years, 100 or more years, a right of way as appurtenant to the river bottom land of the Complainant, crossing the race just below the mill, thence around in front of the mill building out to Secondary Highway #612, never at any time questioned by owners prior to the Craigs;

V.

That recently, in the last ten days or two weeks, the Defendants have built a barbed wire fence, enclosing the five (5) Acre tract along Secondary Road #612, and have wrongfully erected a gate at the entrance of the lane at said Secondary Highway; and, moreover, have chained the gate and forbidden the Complainant to open or use the gateway or the right of way;

VI.

That the Complainant has crops on his bottom land, a field of wheat of about 14 acres, and a field of alfalfa of 11 Acres, ready to make, which should be made forthwith, and the remainder of the bottom land is in grazing or pasture land, with 19 head of livestock grazing thereon;

VII.

That in a deed of February 17, 1956, of record in the aforesaid Clerk's Office in D. B. 417, page 37, W. F. Shaver and wife conveyed to Ella H. Benson 19.51 Acres, of which the 5 Acre tract at the mill is a part, with this provision in said deed:

page 3 } "It is understood and agreed, however, that this conveyance is made subject to any easements, rights of way or privileges as to any telephone and electric pole lines and roads, in, over and across the property herein conveyed."

of which provision the said Defendants had notice, and if not actual notice, certainly constructive notice, of the fact that the roadway was appurtenant to the Complainant's bottom land and passed out over the Five (5) Acre mill tract; furthermore, in the chain of title is the deed of February 19, 1943, of record in the said Clerk's Office in D. B. 317, page 258, from

Mary C. Bolick to W. F. Shaver, conveying the Crimora Mills property, in which the same or identical provision appears with reference to roadways or easements, and the same provision appears in a deed of February 17, 1956, from Ella H. Benson to Cloyd J. Denny, et als., of record in the said Clerk's Office in D. B. 417, page 39; and

VIII.

That the wrongful and illegal fencing of the said right of way by the Craigs has rendered it impossible for the Complainant to harvest and store his crops mentioned above, now ready for immediate attention, and to salt and look after his livestock, and he is accordingly advised that it is his right to apply to this Court and have issued an injunction, requiring the Defendants to remove the said gate and gateposts, and desist hereafter in any further interference with the free and unobstructed use of the said right of way by the Complainant, and the Complainant will suffer irreparable damage unless injunctive relief is given, and he alleges that his loss of crops alone will amount to at least One Thousand Five Hundred Dollars ($1,500.00), and he will otherwise be damaged.

page 4 } WHEREFORE, the Complainant prays as follows:

(1) For a mandatory injunction, requiring the Defendants forthwith to remove the gate and posts connected therewith, and to free the right of way;

(2) For an injunction, enjoining and restraining the Defendant, Stephen J. Craig, from abusing, threatening, or otherwise molesting or mistreating the Complainant in his free and unobstructed right to use the said roadway easement;

(3) For any and all damages sustained by the Complainant as a consequence of the wrongful and illegal obstruction of the said right of way; and

(4) For all other incidental relief, etc.

Respectfully,

JOHN BOWMAN KENNEDY.

State of Virginia,
City of Waynesboro, to-wit:

This day before me, the undersigned Notary Public, per-

sonally appeared John Bowman Kennedy, who after first being duly sworn, does, upon his oath, depose and say that the allegations of the foregoing bill of complaint are true, to the best of his knowledge, information and belief.

Given under my hand this the 4th day of June, 1958.

JOHN BOWMAN KENNEDY.

Subscribed and sworn to before me this 4th day of June, 1958.

DORIS R. MILLER
Notary Public.

My commission expires on the 1st day of March, 1959.

Filed in the Clerk's Office of the Circuit Court of Augusta County, the 5th day of June, 1958.

Teste:

RUDOLPH L. SHAVER, Clerk.

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TEMPORARY INJUNCTION ORDER.

Upon the prayer of the within verified bill of complaint, an injunction is granted the Complainant, John Bowman Kennedy, enjoining and restraining the defendants, Stephen J. Craig and Myrtle L. Craig, from use of the roadway and right of way across the lands of the defendants, which roadway leads out from the lands of the Complainant through the lands of the defendants, Stephen J. Craig and Myrtle L. Craig, over and along and in front of the old Crimora Mill building, leading from the river bottom lands of the Complainant across the old tail race at the said mill, thence continuing to the public road, Secondary Highway #612; and, further, to enjoin and restrain the said defendants from suing out and having issued criminal warrants for trespass against the said Complainant, his agents or servants, on account of the

use by the said Complainant or his agents and servants of the said roadway, and, also, from otherwise molesting, mistreating or abusing the said Complainant, until the further order of the Circuit Court of Augusta County, Virginia; this injunction order shall be enforced and effective from the date of execution thereof on the said defendants, until the 1st day of September, 1958, unless prior thereto it shall be dissolved, enlarged or a further injunction granted, but this order shall not become effective until the Complainant shall page 6 } enter into bond before the Clerk of this Court in the sum of $500.00, conditioned according to law.

Enter June 5, 1958.

WM. S. MOFFETT, JR., Judge.

* * * * *

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* * * * *

ANSWER AND CROSS-BILL.

For answer to bill of complaint filed against them by John Bowman Kennedy, defendants, Stephen J. Craig and Myrtle L. Craig, answer and say as follows:

1. That they admit the allegations of paragraph 1 of the bill of complaint;
2. That they admit the allegations of paragraph 2 of the bill of complaint;
3. They say that under present conditions it is difficult to reach complainant's river bottom land, but that arrangements could be made to get machinery to and from the land provided complainant was willing to undertake the expense of so doing;
4. That they are not advised as to paragraph 4 of the bill of complaint, and call for strict proof;
5. That they deny that they have wrongfully erected a gated entrance of the lane leading to the property referred to as the Crimora Mill property, and that they deny that they have chained the gate and forbidden complainant to open the gate or use the gateway or right-of-way;
6. That they admit that complainant is cropping and pasturing the lands adjacent to the mill property;

7. That they are advised that W. F. Shaver and wife were the predecessors to Ella H. Benson and the said deed contains the quoted provision referred to in paragraph 7 of the bill of complaint; these defendants, however, neither ad-
page 10 } mit nor deny the legal effect of the wording in this deed, or the other deeds referred to, and call for strict proof of the allegation that the roadway is appurtenant to complainant's bottom land;

8. That they deny any wrongful or illegal fencing of the right-of-way, and deny that they made it impossible for complainant to harvest and store his crops and to care for his livestock;

9. Defendants deny that they have done or committed any act which entitles complainant to an injunction, as prayed for in the bill of complaint.

CROSS-BILL.

Defendants, having answered the bill of complaint, for Cross-Bill say as follows:

1. That they are the owners of the property designated in the bill of complaint as the Crimora Mill property, which contains a mill building used by defendants for storage purposes. Formerly, there was no gate at the public road, at the entrance to this property, which resulted in numerous unknown persons trespassing on the land, thereby creating a nuisance and creating a hazard as to possible fire and the loss of valuable personal property stored in the mill building;

2. In order to protect their property, as they clearly had a right to do, defendants fenced a portion thereof and erected at the entrance to the mill property a sturdy wire and metal gate, supported by two posts, 14′ 8″ in width, and sufficiently wide for two vehicles to pass each other, as evidenced by a photograph of the gate marked Exhibit "A" and asked to be read as a part of this cross-bill, and a photograph of two vehicles passing at the gate opening, filed herewith, marked Exhibit "B" and asked to be read as a part of this cross-bill. This gate has been fastened, but never locked;

3. That if complainant has a right-of-way or easement through the mill property for purpose of access to his land, which is not admitted, these defendants, as the fee simple owners of the mill property land, have the right to
page 11 } fence their land and erect a gate thereon, so long as this does not interfere with the use by defendant of the alleged right-of-way;

4. Following the erection of the gate, complainant was seen to deliberately run his truck into the gate in an apparent attempt to damage it, and has boasted that he would make sure that the gate would never be closed, although it in no way has interfered with his use of the alleged right-of-way except to require him to alight from his vehicle or machinery in order to open and close the gate;

5. That prior to June 6, 1958, a gate already erected, leading from the mill property into the Kennedy property, at the rear, had been kept closed, and this gate was only 11′ 9″ in width, and apparently that proved wide enough for such use as complainant made of the road with machinery and the like. On June 6, complainant opened this gate and permitted it to remain open, and has now removed it, which defendants say was an improper act on his part;

6. That defendants are advised and believe, and, therefore, aver that complainant's institution of this cause is for the purpose of harrassing them, and that his suit is frivolous, has no basis in fact, and has been brought only because complainant does not wish to open and close a gate when using the alleged right-of-way through defendants' property.

Wherefore, defendants pray that the Court will determine whether complainant has any right-of-way or easement of any kind or description over and across their lands; that the temporary injunction may be forthwith dissolved; that complainant may be restricted and enjoined from harrassing defendants and in any way interfering with defendants' right to their lawful and proper use of their property; that they may be awarded counsel fees and court costs and incidental expenses made necessary in the defense of this suit and the prosecution of their cross-bill, since the bill of complaint was instituted without just cause; that complainant may be enjoined from damaging or attempting to damage defendants' property, including the gate and fence, in any manner whatsoever; and that they may have all such other, further and general relief as the nature of their case may require.

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Respectfully submitted,

STEPHEN J. CRAIG
MYRTLE L. CRAIG

State of Virginia,
County of Augusta, to-wit:

This day before me, the undersigned Notary Public, per-

sonally appeared Stephen J. Craig and Myrtle L. Craig, who, after first being duly sworn, do upon their oath depose and say that the allegations of the foregoing answer and cross-bill are true, to the best of their knowledge, information and belief.

Given under my hand this 24th day of June, 1958.
My Commission expires on the 28th day of February, 1960.

DOROTHY H. RHICARD
Notary Public.

Filed in the Clerk's Office of the Circuit Court of Augusta County, June 24, 1958.

Teste:

C. M. WAYBRIGHT, Dep. Clk.

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ANSWER TO CROSS-BILL.

The complainant, John Bowman Kennedy, answering the cross-bill, says as follows:

1. That the Crimora Mill property, long since discontinued as a milling operation, and the farm of the complainant were at one time owned by the same person, John Koiner, who died in 1852, leaving his last will and testament, dated January 3, 1852, and probated on February 23, 1852, of record in the Augusta County Clerk's Office in Will Book 31, page 437, whereby he named his son, Henry Koiner, and his nephew, Samuel Coiner, Jr., as Executors, and vested in them full power and authority to sell and convey his real estate, and acting under the authority, the said Executors, by deed of March 29, 1852, of record in the said Clerk's Office in D. B. 72, page 195, conveyed to Samuel Yount, by metes and bounds, a tract of land, containing 95 Acres, 2 Roods, and 9 Poles, the same being the valuable farm of the complainant, of which the river bottom land is a part, and the plat thereof plainly and unmistakenly discloses the roadway in question,

the same being the tract of land acquired by John Koiner from James Maupin and wife, in a deed of September 27, 1851, of record in D. B. 71, page 368 of the said Clerk's Office;

2. That subsequently, by deed of February 25, 1876, of record in the said Clerk's Office in D. B. 90, page 541, the said Executors of John Koiner, deceased, conveyed to page 15 } William Patterson the two tracts of land on the waters of South River, one known as the Koiner's Mill, adjoining D. Yount, I. Koiner, et als., described by metes and bounds, of which 5½ Acres is the mill property owned by the defendants, over which the roadway easement of the complainant passes, always necessary for farming operations of the bottom land, cut off or inaccessible from the remainder of the farm of the complainant by a high rock ledge or bluff, extending from the mill property of the defendants north along the tail race to South River, and it was and is impossible to move farm machinery or crops up, over and down the said rock ledge, and the only way of ingress and egress to and from the bottom land is over the easement appurtenant to the bottom land of the complainant, always, for more than 100 years, free and unobstructed by gates, or otherwise, and so recognized by every owner of the property now owned by the defendants;

3. True it is, as in the cross-bill alleged, there never has been a gate at any time erected at the *entrace* to or from the right of way on Secondary Road 612, but it has always been free, open and unobstructed, and the complainant denies that a nuisance or a fire hazard was created, or that numerous unknown trespassers entered upon the right of way of the complainant to the detriment of the defendants or of their property;

4. Answering Paragraph 2 of the said cross-bill, the complainant denies that the defendants had a right to erect a gate at the entrance to the right of way of the complainant, and obstruct his entrance or exit at Secondary Road 612 by a gate, or otherwise, as by so doing, the defendants created a dangerous situation for the complainant and a traffic hazard in entering the said right of way or leaving the same, as there is much motor traffic on Secondary Road 612, interfered with by the farming equipment, etc. of the complainant partially blocking the said highway; also, the gate is a page 16 } nuisance to the complainant, as it requires opening and shutting on numerous occasions when the complainant is attending his farming operations of the bottom land;

5. Answering Paragraph 3 of the said cross-bill, the complainant alleges and charges that the claim of fee simple ownership of the mill land by the defendants is now and always has been subject to the free and unobstructed right of way of the complainant, created as aforesaid, and of which the defendants had notice in the recorded title and, furthermore, the right of way was open and obvious to them at the time they acquired title, subject to which they became owners of the mill property;

6. Answering Paragraph 4 of the said cross-bill, the complainant emphatically denies that he deliberately, at any time, ran his truck into the said gate, although the defendants well knew and were so informed that it was wrongful and illegal for them to bar the right of way of the complainant by the erection of the said gate and, thereupon, the complainant protested the barring of his right of way by a gate, thereby requiring him to stop his farm machinery and equipment in the much-travelled highway at the entrance to the right of way, creating a hazardous situation, and requiring him to alight to open the said gate and to leave his farming machinery and equipment standing in the said highway;

7. Answering Paragraph 5 of the said cross-bill, the complainant says that the gate referred to therein serves two purposes, that is to say, when pasturing the field along the tail race, the gate is closed, and when the cattle are removed therefrom and are pasturing in the other bottom lands, the gate is swung around to confine the cattle therein, page 17 } but in any event, this gate is not involved in the question of whether *nor* not the complainant owns a free and unobstructed right of way and easement appurtenant to that part of his farm known as the bottom land;

8. Further answering the said cross-bill, the complainant says that notwithstanding the injunction order of June 5, 1958, enjoining and restraining the said Stephen J. Craig from suing out and having issued criminal warrants for trespass, the said Stephen J. Craig had issued, on the 26th day of June, 1958, a criminal warrant, charging that the complainant "did unlawfully destroy and injure personal property of the said S. J. Craig," a trespass emphatically denied by the complainant, the said warrant being in contempt of the said injunction order, the complainant verily believes; and

9. Finally answering the said cross-bill, the complainant denies that the defendants are entitled to any and all relief prayed for therein, and the complainant accordingly prays that a rule may be issued against the said Stephen J. Craig,

requiring him to show cause, if any he can, why he should not be held in contempt for issuing a criminal warrant against this complainant, in violation of the said injunction order.

And now having answered, etc.

JOHN BOWMAN KENNEDY.

State of Virginia,
City of Waynesboro, to-wit:

This day before me, the undersigned, a Notary Public in and for the City and State aforesaid, personally appeared John Bowman Kennedy, and after first being duly sworn, does upon his oath, depose and say that the facts and statements contained in the foregoing answer to cross-bill are true, to the best of his knowledge, information and belief.

Given under my hand this the .... day of July, 1958.

JOHN BOWMAN KENNEDY.

page 18 } Subscribed and sworn to before me this the 10th day of July, 1958.

DORIS R. MILLER
Notary Public.

My term of office expires on the 8th day of March, 1959.

July 10, 1958.

G. H. BRANAMAN, p. q.
Waynesboro, Virginia.

Filed in the Clerk's Office of the Circuit Court of Augusta County, July 14, 1958.

Teste:

C. M. WAYBRIGHT, Dep. Clk.

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AMENDED BILL OF COMPLAINT.

To the Honorable William S. Moffett, Jr., Judge of said Court:

Your complainant, John Bowman Kennedy, respectfully represents and says that recently he has been informed and believes it to be true, not known to him before, the roadway in and over and around the mill premises from the Crimora-New Hope Road, Secondary Highway 612, to the bottom land of the complainant, a distance of about 300 feet, was, and still is, a public way and the complainant, therefore, begs leave and permission to amend paragraph IV of his Bill of Complaint in the words and figures as follows:

IV.

That is is now and it has always been, for a great number of years, from the establishment of the mill, a grist and saw mill at first, about the year of 1810, a public road leading from the New Hope-Crimora Road, Secondary Road 612, then the New Hope-Turks Gap Road, over and across the mill property and in front of the mill building to the bottom land of the complainant a distance of about 300 feet, thence continuing on and along the Southern boundary line of the bottom land and of the adjacent landowner to South River, then fording the river and continuing until intersecting another public road less than a mile distance from the river ford; that as time passed and the construction of other public roads east of the said river, the public road crossing the bottomland of the complainant was abandoned and was no longer page 21 } in use, and grew up in brush, etc. and finally, some 45 years ago, the complainant's predecessor in title, as well as the owner of the bottom land adjoining to the South, cleared the roadway in the bottom land, surveyed the line, built a division fence, and thereafter and for a long time before, the road across the bottom land from the tailrace to the river ford was never used as either a public or a private way; however, the roadway, a public one in front of the mill, was never vacated or closed and has always remained an open, free and unobstructed way to the bottom land of the complainant; likewise, the roadway east of South River is an open, unobstructed, free way for the use of the

owners of the lands thereon, extending now to U. S. 340 and has never been vacated.

Wherefore the complainant prays that he may be permitted to amend his Bill of Complaint as heretofore set forth.

JOHN BOWMAN KENNEDY (Seal)

State of Virginia,
City of Waynesboro, to-wit:

This day before the undersigned Notary Public personally appeared John Bowman Kennedy, who first being duly sworn, does upon his oath, depose and say that the allegations of the foregoing Amendment IV to his Bill of Complaint are true to the best of his knowledge, information and belief.

Given under my hand this the 17th day of February, 1959.
My term of office expires on the 19th day of November, 1960.

RAYMOND E. FREED
Notary Public.

Filed in open Court by leave of Court Feb. 17, 1959.

C. M. WAYBRIGHT, Clerk.

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DEMURRER, AND ANSWER TO AMENDED BILL OF COMPLAINT AND CROSS-BILL.

DEMURRER.

Defendants say that the Amended Bill of Complaint filed against them by John Bowman Kennedy is insufficient in law, and assigns the following grounds for this, their Demurrer:

1. That Paragraph IV of the original Bill of Complaint in this cause alleged that complainant had a right of way over defendants' land;
2. Complainant now claims that the roadway in question is a public way, or road:

3. That if the road in question is a public way, or road, as alleged by complainant, the proper party to maintain an action for any alleged obstruction to the use of the public road would be the Commonwealth of Virginia, or County of Augusta, which has the responsibility for maintenance of the said public road;

4. That the said Commonwealth of Virginia or County of Augusta would have an adequate remedy at law for obstruction of a public road.

ANSWER.

For Answer to Amended Bill of Complaint filed by John Bowman Kennedy, Stephen J. Craig and Myrtle L. Craig, to much thereof as they are advised it is necessary and proper for them to answer, say as follows:

1. That they deny each and every material allegation of the Amended Bill of Complaint;

page 24 } 2. That they neither admit nor deny that the roadway running in to the mill was ever a public way, and calls for strict proof thereof;

3. That if the roadway leading from Route 612 to the mill was ever a public road, it has long since been abandoned, and the land reverted to the original owners;

4. The complainant now says that the public way runs across his lands, as well as the lands of these defendants, which contention is inconsistent with the actions and belief of complainant, as indicated by the fact that he has heretofore placed no trespassing signs on his line fence between his property and that of these defendants.

CROSS-BILL.

Defendants, having answered the Amended Bill of Complaint filed by complainant, for their Cross-Bill say as follows:

1. That they heretofore filed a Cross-Bill on the original Bill of Complaint filed by complainant;

2. That for the purposes of this present Cross-Bill, they adopt and incorporate by reference paragraphs 1, 2, 4, 5 and 6 of the original Cross-Bill;

3. That in the paragraphs of the original Cross-Bill referred to above, these defendants made averments as to an alleged right of way claimed by complainant. The defend-

ants now, however, say that since complainant has abandoned his claim that he has a right of way through defendants' property, and now alleges that this is a public highway, the question of whether or not complainant has a right of way over the property of these defendants is not now an issue in this case.

Wherefore, defendants pray that the Court will forthwith dissolve the temporary injunction heretofore issued complainant; that complainant may be restrained and enjoined from harrassing defendants or in any way interfering with their lawful and proper use of their own property; page 25 } that they may be awarded counsel fees and court costs and incidental expenses made necessary in defense of this suit and the prosecution of their Cross-Bill, since the Bill of Complaint was instituted without just cause; that complainant may be enjoined from damaging or attempting to damage defendants' property, including the gate and fence, in any manner whatsoever; and that they may have all such other, further and general relief as the nature of their case may require.

Respectfully,

STEPHEN J. CRAIG
MURTLE L. CRAIG
By Counsel.

PHILIP LEE LOTZ
15 Lawyers Row
Staunton, Virginia
Counsel.

Filed in the Clerk's Office of the Circuit Court of Augusta County, March 6, 1959.

Teste:

C. M. WAYBRIGHT, Dep. Clk.

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ANSWER TO SECOND CROSS-BILL.

John Bowman Kennedy, the complainant, for answer to the second cross-bill filed in the above entitled cause, says as follows:

1. That he adopts the allegations herein of his answer to the first cross-bill, save and except as may be herein amended or modified by reason of after-discovered evidence, to the effect that the roadway in question is a public road over which he has the right to travel over the mill property a distance of about Three Hundred (300) feet to and from his bottom land, in cultivating and grazing it;

2. Answering Paragraph 3 of the second cross-bill, this complainant denies that he has "abandoned his claim that he has a right of way through defendants' property," and avers and charges that he has always heretofore, as did his predecessors in title from the earliest time, so shown by the record in this case, had a free and unobstructed roadway from the New Hope-Turks Gap Road, before Crimora was established, about 1882, to the complainant's bottom land, never at any time obstructed by gates, or otherwise, but from the earliest time recorded and acknowledged as a free public roadway, always necessary in operating the Crimora Mill, a semi-public institution, until its discontinuance in 1927; not, however, affecting the character of the roadway in front of the mill building and over the mill premises to the bottom land of the complainant;

page 27 } 3. Further answering the second cross-bill, the complainant says that once a public road, clearly established in this proceeding, always a public road thereafter until vacated by the public authorities, in this case never done, and by reason thereof, the defendant Craigs illegally and wrongfully obstruct by a gate the entrance from Route 612 and free passage over the said road to the bottom land of the complainant, John Bowman Kennedy; and

4. And now having answered, etc., and for affirmative relief, the complainant prays that the injunction heretofore granted, enjoining and restraining the defendants, Stephen J. Craig and Myrtle L. Craig, from interfering with the use of the roadway across their lands may be made perpetual, free and clear of gates or other obstructions, and from interfering with the free use of said roadway by the complainant in going to and from his bottom land from Secondary Road 612, that damages may be awarded against the said Craigs for the losses sustained from barring the use of the right of way by

gates, or otherwise, and that the complainant may recover his costs in this cause expended.

JOHN BOWMAN KENNEDY
By G. H. BRANAMAN
Counsel.

Filed in the Clerk's Office of the Circuit Court of Augusta County, March 25, 1959.

Teste:

C. M. WAYBRIGHT, Dep. Clk.

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DECREE.

This cause came on this day to be heard upon the bill of complaint and temporary injunction order served on the defendants, upon the answer and cross-bill of the defendants, upon the amended bill of complaint and second cross-bill filed thereto by the defendants, upon the taking and filing of depositions herein with exhibits by both the complainant and the defendant, and upon both written and oral arguments by counsel.

Upon mature consideration whereof, the Court is of the opinion and doth Adjudge, Order and Decree as follows:

1.

That the first and second cross-bills of the defendants are hereby dismissed;

2.

That John Bowman Kennedy and his successors are entitled to a roadway easement free and unobstructed by gates or otherwise, for ingress, egress and regress from Secondary Road 612 over and across the lands of the defendants to the property line of the thirty-five acre tract of land owned by the complainant at which property line the said John Bowman Kennedy shall provide and maintain a suitable and effective

cattle guard or a gate, the gate to be kept closed when livestock are on the bottomland of the complainant or the premises of the defendants;

3.

That the injunction heretofore granted in this cause on June 5, 1958 is hereby made permanent;

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4.

That the defendants shall remove the gate and wire gap by the 25th day of October, 1959 and not again erect a gate or otherwise obstruct or impair the entrance so as to render the entrance impassible to the roadway easement from Secondary Road 612 and if they or their successors in title so elect they may install and maintain an adequate and substantial cattle guard at said entrance sufficient to carry farm machinery, trucks and tractors, along with a gate conveniently located and maintained immediately to the east of the said cattle guard for the passage of livestock to and from the bottomland of the complainant;

5.

That the evidence herein is insufficient to award a rule against the defendants for contempt or support a judgment for damages;

6.

That the Clerk of this Court shall index and record a copy of this decree in the appropriate indices and deed book in his Clerk's Office and shall deliver copies thereof to the Sheriff of Augusta County for service on the defendants and accordingly make return herein of such service; and

7.

The complainant shall recover of the defendants his court costs about this suit in his behalf expended and the Court will retain this cause on the docket for such further proceedings herein as shall be necessary, to which action of the Court the complainant and the defendants by their counsel except.

Enter 10/14/59.

WM. S. MOFFETT, JR., Judge.

* * * * *

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* * * * *

NOTICE OF APPEAL.

Notice is hereby given of an appeal by defendants, Stephen J. Craig and Myrtle L. Craig, from the judgment of the Circuit Court for Augusta County, Virginia, entered in the above-captioned cause on October 14, 1959, which judgment or decree dismissed the first and second cross-bills of defendants; granted complainant a permanent injunction; directed that defendants shall remove a gate placed where the claimed easement, or right of way, entered secondary road 612; decreed that complainant and his successors in title were entitled to a roadway easement, free and unobstructed by gates, for ingress, egress and regress from secondary road 612 over and across the lands of defendants, to his property line at the rear; and assessed the costs of this proceeding against the said defendants.

STEPHEN J. CRAIG
MYRTLE L. CRAIG
By Counsel.

PHILIP LEE LOTZ
15 Lawyers Row
Staunton, Virginia.
Counsel.

Filed in the Clerk's Office of the Circuit Court of Augusta County, Dec. 11, 1959.

Teste:

RUDOLPH L. SHAVER, Clk.

* * * * *

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* * * * *

ASSIGNMENT OF ERROR.

Defendants, Stephen J. Craig and Myrtle L. Craig, in their

petition to the Supreme Court of Appeals of Virginia for a writ of error from the decree and judgment of the Circuit Court for Augusta County, Virginia, entered in the above-captioned cause on October 14, 1959, will assign error as follows:

1. The trial court erred in dismissing the first and second cross-bills filed by defendants;
2. The trial court erred in failing to act upon and sustaining defendants' demurrer to the amended bill of complaint;
3. The trial court erred in decreeing that plaintiff, John Bowman Kennedy, and his successors, were entitled to a roadway easement, free and unobstructed by gates or otherwise, running from secondary Route 612, over and across the lands of the defendants to the property line of the said plaintiff in the rear thereof;
4. The trial court erred in granting plaintiff a permanent injunction;
5. The trial court erred in ruling that defendants did not have the right to erect a gate, which could be opened and closed by plaintiff, where the alleged right of way entered the lands of defendants from secondary road 612;
6. The trial court erred in assessing the costs in this cause against the defendants.

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STEPHEN J. CRAIG
MYRTLE L. CRAIG
By Counsel.

PHILIP LEE LOTZ
15 Lawyers Row
Staunton, Virginia.

Filed in the Clerk's Office of the Circuit Court of Augusta County, Dec. 11, 1959.

Teste:

RUDOLPH L. SHAVER, Clk.

* * * * *

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* * * * *

JOHN BOWMAN KENNEDY,
the plaintiff herein, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Branaman:

Q. Please state your name and where do you live?

A. My name is John Bowman Kennedy. I live at Crimora, Virginia, on the Yount Farm.

Q. In what community were you raised?

A. I was raised in Crimora.

Q. And how old are you?

A. 61.

Q. And that means, what year were you born?

A. 1897.

Q. And you have lived in the Crimora community all of your life?

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A. Yes.

Q. What is your occupation?

A. I am a farmer.

Q. And do you own a farm in Crimora section?

A. Yes, I own the Professor Walter Yount Farm, or sometimes known as the Daniel Yount Farm.

Q. Who was Daniel Yount?

A. He was Professor Walter Yount's father.

Q. Do you have a copy of your deed?

A. Yes, sir, I do.

Q. (Indicating document) Is this the certified copy of your deed?

A. Yes, sir.

Q. How many acres did you acquire under that deed?

A. 98 and a fraction: under the deed there is 95 in one tract, and then 3 acres purchased from Mr. Coiner.

Q. 3 acres?

A. Yes, makes up the 98 acres.

Q. And is that referred to in the deed?

A. I don't remember, but anyhow I know—yes, that is right, it does.

Q. Your source of title is recited in the deed?

A. That is right, it is.

Q. And will you file that deed with your deposition, marked Plaintiff's Exhibit A?

A. Yes.

John Bowman Kennedy.

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page 6 } Plaintiff's Exhibit A, the deed last above referred to, filed.

Q. And the grantors in the deeds that you referred to are whom?
A. Karl and Dee Yount.
Q. Who were they?
A. They were the sons of Professor Walter Yount, and they were the only heirs.
Q. Did or did not *Proffesor* Yount leave a Will?
A. Yes, he did.
Q. I hand you a copy of the Will of Professor Walter Yount. Will you file it, marked Exhibit B?
A. Yes.

Plaintiff's Exhibit B, the Will just referred to, filed.

Q. In your deed reference is made to an inheritance by Professor Walter Yount from one Daniel Yount?
A. That is right.
Q. Who was Daniel Yount, if you know?
A. Professor Walter Yount's father.
Q. Did he own the farm that you live on?
A. Yes, sir, he did.
Dep. Q. Do you have a certified copy of the deed con-
8/15/58 veying the 95 acre tract to Daniel Yount?
page 7 } A. Yes, sir. That is the same. (Indicating document)
Q. Will you file the deed dated January 24th, 1861, from Samuel Yount to Daniel Yount, as Exhibit C?
A. That is right. Samuel Yount was Daniel Yount's father.

Plaintiff's Exhibit C, the Deed last referred to, filed.

Q. I hand you a Deed dated January 23, 1851, made by Samuel Coiner, Junior, and Henry Koiner, Executors of John Coiner, conveying a tract of land containing 95 acres, two roods, nine poles, to Samuel Yount. Is this a part of the acreage that you now own, and where you live?
A. Yes, sir, that is the same.
Q. And will you file it as Plaintiff's Exhibit D?
A. Yes, sir.

John Bowman Kennedy.

Plaintiff's Exhibit D, the deed last referred to, filed.

Q. In the conveyance you have just filed as an Exhibit, the Executors-conveyed-land, purported to be the property of Henry Koiner—I now hand you a certified copy of the Will of John Coiner. Will you file that as Plaintiff's Exhibit E?

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A. I do.

Q. I hand you a Deed dated September 27, 1851, from James D. Maupin and wife to John Koiner, conveying 5 acres, 2 roods and 9 poles. Is this a part of your home place?

A. That is the home place.

Q. And will you file it, marked Plaintiff's Exhibit F?

A. Yes, sir.

Plaintiff's Exhibit F, the Deed last referred to, filed.

Q. Now do you have any Plat of the home place?

A. Yes, sir, I do.

Q. When did you get it, and from whom?

A. I got it in 1947, from Karl Yount, when I purchased the Yount Farm.

Q. What is the date of the Plat?

A. September 18, 1851.

Q. Will you give the date in September?

A. 16th, I think.

Mr. Lotz: September 16, 1851, looks like to me: could be a '7', 1851.

A. The reason I got this plat: when I bought the Yount Farm, I asked Karl about this right-of-way, and he said—

Q. (Interrupting) Don't tell what he said.

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Mr. Lotz: You can't testify to what he told you.

Q. And you got the plat from Karl Yount, when you bought the farm it was handed down to you?

A. That is right.

Q. And the date of the plat, I believe you stated was?

A. September 16, 1851.

John Bowman Kennedy.

Q. And what is the date of the deed from Maupin to John Koiner?
A. September 27, 1851.
Q. Is the deed?
A. That is right, yes.
Q. And the plat is dated?
A. September 16, 1851.
Q. Have you a photostatic copy of the plat?
A. Yes, sir, I have.
Q. And will you file your photostatic copy of the plat as a part of your deposition?
A. Yes, sir.

Plaintiff's Exhibit G, the plat last referred to, filed.

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Q. How long have you been farming the Yount place?
A. Since November 1925. I went there as a tenant, or sharecropper, and in 1947, I bought the farm. 33 years.
Q. State to the Court how it is located?
A. Well, it is located about a mile west of Crimora and it is on State Road 612 and along South River and of course—Do you want the acreage?
Q. Yes.
A. I have 98 acres, 3 acres acquired from Mr. Coiner—you have that. It lies, the buildings and part of the farm, is on a hill and then there is a large bluff which separates some bottom land from the hill land, and this bluff runs the whole length of the farm, steep, rocky, rough, impassable; and then I have the bottom land; there is 35 acres of that; and of course that is (the) farmland, grazing land.
Q. How do you reach the bottom land?
A. Well, I have to go this Route, 612, go up east a short distance, turn left into the lane or right-of way, or bottom land, over this 5-acre mill property.
Q. What do you do with your bottom land?
A. Well, I have part of it in farming; I raise corn, wheat, barley, alfalfa. Do you want me to divide it up?

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Q. Yes, the rotation you use?
A. Well, I had 14 acres in corn this past year: 20, back in wheat; and 11 acres in alfalfa; and about 10 acres in pasture.
Q. As I understand, you come down 612. What road is that?

John Bowman Kennedy.

A. Well, that is the old Turks Gap Road, I think that used to be the name of it, and goes through the Village of Crimora, and on up across the mountain.

Q. In the Early Days?

A. That is right.

Q. And do you go over the Road laying over the Mill property, owned by Mr. and Mrs. Craig?

A. Yes.

Q. How far from the Road, that is 612, do you pass over the Mill property to your bottom land?

A. 300 feet.

Q. Approximately 300 feet?

A. Approximately 300 feet.

Q. Describe it to the Court?

A. Well, it is open road, a lane, and it lies right in front of the Mill building, the Race on one side, right side as you go in, and it goes down over a hill and crosses a Race, and then enters my bottom land.

Q. Is that the main Race leading from the Dam, or not?

A. That is the main Race.

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Q. And do they call it the 'Tail Race?'

A. That is right.

Q. It is immediately in the rear of the Mill place?

A. That is right.

Q. Well, state whether or not you can reach your bottom land with your farming operations, without going over the Mill property?

A. Absolutely no other way.

Q. Why?

A. This tall bluff, it is impassable, straight up, in places, just impassable; cattle can get over it but they can't, you know, just go up and down.

Q. What machinery do you use?

A. I use modern machinery, I would say: baler, combines, large machinery now.

Q. Tractors-trailers?

A. Tractors-trailers, combines; rubber-tired wagon, to pull up behind a baler and load hay: the likes of that.

Q. Have you, or not, experienced any difficulties in going to and from your bottom land, recently?

A. Yes—you mean, by getting in?

John Bowman Kennedy.

Q. Going and coming?

Dep. 8/15/58 page 13 } A. Well yes. Back in April, Mr. Craig started—let me go back—back in 1890 was open land, was no fence; back in 1943, Shaver bought the place; he run a fence along Route 612 down to my driveway, or right-of-way, and along the right-of-way down to my land.

Q. Was that the first time that it had ever been fenced, in your recollection?

A. The first time that lot was ever fenced; was a fence around the yard, tenant house and garden, but this lot was always open.

Q. You speak of Shaver building the fence. Did he cross your right-of-way?

A. No, sir, the right-of-way was never crossed until back in April, Mr. Craig tore the fence down, running from Route 612 to the Race, my land; he tore that fence away and put it across my right-of-way and erected a gate, and that is when I went to him and said to Mr. Craig, I said—I never seen the man, seen him around, never met him—I went to him, asked him if he was Mr. Craig, and he said he was; I introduced myself; I asked him "Are you going to close up my right-of-way?" He said, he was; I said "Can you do that?" I said "It has been open for hundreds of years. I have a right-of-way through there and I don't think you can close it." He said "Well, he was going to close it. He was going to come to Staunton the next day and see about it." He said

Dep. 8/15/58 page 14 } he knew the right-of-way was through there, but he was going to close it. Well, it went on; I didn't say anything more. Along then, awhile after that, the first of May I believe, he erected a gate, you know, on the driveway: well, he tied the gate open, left the gate open; it was open for quite awhile. I went to see Supervisor Ed Long and he said—

Q. (Interrupting) Don't tell what he said, Mr. Kennedy.

A. Well, Mr. Long and Mr. Bowman, the Clerk of the Supervisors, they come down and looked the situation over and advised me to see Mr. Taylor, Commonwealth's Attorney, which I did. Well, Mr. Taylor wrote Mr. Craig a letter: didn't have any effect; so the gate was closed on June 1st, the first time I seen it, the gate was closed and chained.

Well, I didn't know what to do. I didn't know it was closed; been using the road for 33 years, first time had anything—so I went down, June 1st, to see about my cattle, see about my crops: as I come down my driveway, I noticed a

John Bowman Kennedy.

pickup truck behind me; I was going downhill, watching the truck, not knowing the gate was closed; the road was blocked; I went to make a turn to the driveway, gate was closed: I applied my brakes, skidded my tires and run right up to the gate. Well, I skidded right into it, you might say, but I didn't know what—I was just surprised. I got out and looked: all I did was look—corner of my bumper

Dep. 8/15/58 page 15 } was in a wire.

Q. Which bumper?

A. Front bumper.

Q. On which side?

A. Left side.

Q. What kind of gate was it?

A. Metal gate, pipe frame, with 1047 wire over it.

Q. And you hung your right bumper over it?

A. Just the corner. Didn't amount to anything. I got out and looked at the gate. I seen the wire. So I got over inside, went to get my wire loose; I didn't want to damage the gate. About that time I heard somebody coming, cussing and raring, here come Mr. Craig from the house, down, had a club the size of a baseball bat, surprised me, I didn't know what it was all about, came a-cussing and threatening. I just stood there and looked; I couldn't say anything, I was so surprised. He walked up to me with the club in his hand and said "Damn you, I will get a warrant out for you tomorrow, if you damage that gate." I just looked at him. He cussed and threatened. He brought his boy with him, his oldest son, I suppose. The boy didn't say anything, didn't open his mouth, any time. He kept that up until, I guess, he got tired talking. Of course, I wouldn't use the language he did. Says "I am not going to talk to you any more," and walked over to the Mill road. He

Dep. 8/15/58 page 16 } says "I know you have a right-of-way over here, one thing I didn't like about this place when I bought it. You cannot use it. If I ever catch you in here, I am going to kill you."

Q. What did you do, then?

A. I turned around; after I got to my senses, I looked to see how the gate was fastened; the gate had a chain around it twice, with a small hook clamp shut. I seen I couldn't get in there. I went back to the house, got my wife—I was going to take her to Church, anyhow—we went down and stopped; I showed her the skidmarks where I skidded my tires and showed her where the gate was chained—wasn't damaged, just one wire kinked, as big as your finger. I taken her on

John Bowman Kennedy.

to Church. I didn't know; I was surprised; I always had good neighbors; the thing had never been closed; been there 33 years; you know how surprised you would be, to go down there and see something you never saw before. We looked at it. 2nd of June, I come on, and talked to—I had my crops down there.

Q. What crops?

A. Alfalfa—should have been cut; I lost the first cutting of alfalfa by it.

Q. How long did he keep you out?

A. I didn't get in there until the 21st day of June.

Q. What did you do?

Dep. 8/15/58 page 17 } A. I came up to see you; we didn't know what to do. We got an injunction, I could go through and harvest my crop: that was the 5th of June.

Q. When did you go in?

A. He kept the gate chained until about the 18th of June, then taken the chain off and put a latch on it. I went in, the 21st of June, started mowing hay, grass.

Q. Why didn't you go in after the Court granted you the injunction, before the 21st of June?

A. Well, the gate was chained and fastened; I would have had to go to a lot of trouble to open that chain and how would I know the man would come back with the club, while I was working on that?

Q. Are you handicapped?

A. Yes. I lost my hand several years back and it bothers me, opening or shutting a gate, or getting off an implement or anything. It does handicap me.

Q. Did you, then, go in, on the 21st?

A. Yes, I went in on the 21st.

Q. Was the gate open, then?

A. No. I had to open and shut it.

Q. It had a latch?

A. Yes, had a latch on it. I went in, on the 21st, and mowed some grass; and then on the 25th, I baled the first hay.

Dep. 8/15/58 page 18 } Q. Of June?

A. Of June, went in the afternoon; my daughter was working; she drove the tractor for me. I baled some hay, the first hay; on the 26th, I went down to the bottom land to rake some hay and I got in there, raked my hay, taken my wagon with me; I was going to bale a load and take it out with me, come rain, I had to hurry out, between 11:30 and 12:00 I had to hurry out with my hay. I got

to the gate; it began to rain pretty hard, the gate where it was latched; when I went in, there was a wire around the gate, twisted 6 or 8 inches long; with one hand I had to reach through and untwist that wire to get out.

Q. Where was the latch?

A. Still there but had been a wire put on it.

Q. And that was on the 26th?

A. That was on the 26th. I went to the farm, of course too wet to go back to the field. Friday morning, I was in the barn spreading the hay out, trying to get it dry, here come Deputy Sheriff Furr—you know my surprise—come in there with a paper, spoke and we talked and he says "Kennedy, I have got a warrant for you." I said "Warrant for me?" "Yes," says "Craig down here has got a warrant for you." I said "What had I done?" He said "The Warrant says, 'destroying personal property.'" I said "What have I destroyed?" He didn't know. I said "I haven't destroyed any 'personal property.'" I wanted to go to a funeral that afternoon, so I couldn't go with him. He said "Go up to see Mr. Mason, give bond and get the warrant." So I went up there that afternoon, right after the funeral. Mr. Mason wasn't there; a lady was there. I couldn't get it. She said "Come back Saturday morning" she said "at nine o'clock." I was there at eight, waiting. Mr. Mason was there. I said "Mr. Mason, what have I 'destroyed'"? He didn't know. He didn't write the warrant. Well, I gave him $50.00, cash bond, and got the warrant, sauntered on down to Mr. Branaman's and turned it over to him.

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Q. I hand you a warrant, dated the 26th of June. Is that the warrant you refer to?

A. Yes, sir, but that is the only one I ever had.

Q. Had you ever been arrested, before?

A. No, sir.

Mr. Branaman: We will file that as plaintiff's Exhibit H.

Plaintiff's Exhibit H, the warrant last referred to, filed.

Q. And that has to be tried, on the 19th?

A. Yes, has to be tried. Let me finish this: I went on up there, gave bond, got this piece of paper; so they set the date down for the 15th of July, I believe it was. Well, I got some friends, went with me, Mr. Branaman, went up to Staunton, waited, no

Dep. 8/15/58 page 20

John Bowman Kennedy.

Craig, no lawyer up here. Well, we didn't know—Mr. Branaman got another date set, now for the 19th, that is Tuesday.

Q. Did you have any explanation of the charge in the warrant, in connection with the County Court, filed against you? (Handing document to the witness) Do you have it, in your hand?

A. Yes.

Q. And will you file that as Exhibit I with the warrant?

A. Yes.

Plaintiff's Exhibit I, last above referred to, filed.

Q. In your operations, in your farming operations, did you, or did you not use the Mill property, during the Derendeau operations?

A. Yes.

(Continuing) To go back now, Mr. Branaman, Derendeau bought that property in 1900 and he operated, was operating it when I moved in, that was in 1925, and I had used that tract through there, and he always called it 'open right-of-way,' in his milling operation if he had a truck or wagon anywhere, when hauling by there, he would move it, always had to have an 'open right-of-way,' he never blocked us, never.

Dep. 8/15/58 page 21

Q. When did his operation cease?

A. About 1927 or 1928, I don't know for sure about the date, he went busted, in fact that was the end of the Mill.

Q. And has it been operated, since?

A. No, that was the last operator.

Q. Who bought it, after Derendeau discontinued the Mill?

A. Derendeau, before he discontinued it, he sold it to Miss Margaret Harman; she sold it to Grover Coiner, as a trustee.

Q. As a loan?

A. Yes. And Coiner then, he sold it, or transferred it to his sister, Mrs. Mary Bolick, I believe it was, and she kept it up until 1943; she sold it, then, to Mr. Fred Shaver, and Fred was there 13 years; he sold it to Mrs. Ella Benson, and Mrs. Benson, she sold it to a fellow by the name of Denney, I don't know his first name; Denney didn't stay there too long, he went kind of flunked, so it was put up then as a foreclosure sale, I guess you would call it, at Staunton, at the Staunton courthouse; Mrs. Benson, of course, had it bought back, then Mrs. Benson sold it to the Craigs.

John Bowman Kennedy.

Dep. 8/15/58 page 22

Q. When did Mr. and Mrs. Craig take possession?

A. August 1957.

Q. A year ago?

A. A year ago, just about a year ago.

Q. And they have been living there ever since?

A. That is right.

Q. Did Craig make inquiry about the right-of-way before he put up the fence?

A. None whatever. I never seen the man, or talked to the man, until I went in there and—

Q. (Interrupting) That was after the fence?

A. Yes.

Q. Did you ever speak to Mrs. Craig?

A. Yes. When he hung the gate, I went in, the second time, to see Mr. Craig; Mrs. Craig came to the door; I asked for Mr. Craig; she said "He is at work," I said "I see he is going to shut up my right-of-way;" she said "Yes, he was advised to put a gate on, if I didn't want to open and shut the gate, he would put a lock on it and let me stay out." I had crops in there, and I was afraid he would order me out, tell me to stay out.

Mr. Branaman: It is agreed that the photographs now exhibited and placed in evidence are as follows:

(1) is taken from the road, looking east, showing a part of the Bowman Kennedy Farm on the hill?

A. That is right.

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Mr. Branaman: (Continuing) (2) is a photograph taken in the bottom land, looking west, with the Mill property barely observable in the grove, and the dwelling house of Mr. Kennedy observable on the hill, to the right;

(3) is a photograph taken from the same location as No. 2, showing the bluff, continuing with the barn in view on top of the hill.

Mr. Lotz: That is the Kennedy barn?

Mr. Branaman: Kennedy barn.

(Continuing) (4) is taken from the same location as Nos. 2 and 3, and show the northern end of the bluff;

John Bowman Kennedy.

(5) is a photograph taken near the entrance to the bottom land, looking to the north, with the trail going up the bluff and showing the barn, Kennedy barn, on the hill;

(6) is taken at about the entrance to the Kennedy bottom land, looking to the southwest, showing, in part, the 'Tail Race,' and the lane or road leading by the Mill, on the way to 612;

(7) was taken across 612, looking north, showing the gate in question, the lane around in front of the Mill.

Mr. Lotz: I might add: it shows the gate and the lane.

Mr. Branaman: That is right.

(Continuing) (8) is taken from the secondary road, 612, looking northwest, taken near the bridge over the Race, showing the gate and the roadway and the culvert top;

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(9) was taken from the C. J. Barger Estate land, looking north, showing the yard, the dwelling, chickenhouse, on the Craig 5-acre tract, and in the north, the top of the barn on the Bowman tract;

(10) was taken from the C. J. Barger Estate land, across 612, showing the gate, the culvert, top of the road in front of the Mill building, and the Mill building, and also the post across the road, planted by Shaver.

By Mr. Banaman: (Continuing)

Q. Do you have any small photographs of your equipment in the road about to enter the lane at the Mill property?

A. I do.

Q. I hand you a small photograph, No. 11. What does it show?

A. It shows us on State Road 612, with a baler tractor wagon, two tractors and wagon. I am opening the gate to enter the lane.

Q. I hand you another photograph. Will you tell the Court what it depicts, 12?

A. That shows my daughter coming out with a tractor and hay rake and me, with a tractor and a load of hay, and shows we blocked the State road, it is impassable to get by; we have got to stay out around that culvert and get right out in the highway and block the highway, to stop and shut the gate.

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Q. I hand you another photograph, No. 13, and ask you what it depicts?

A. Well, my daughter came out with the baler;

she is in front; and me with a load of hay. We had to park on the highway, blocking the traffic off this one-way bridge, so we could get the gate shut; me, with one hand, I had to block that tractor and use the brake, it is just hard to do.

Q. Now do you have a gate at the entrance to your bottom land in the rear of the Mill, after you cross the Tail Race?

A. Yes, sir.

Q. How is it operated?

A. Well, I have two entrances: there is one entrance that goes, turns to your left and goes into my pasture land; then, if I go straight in, the land, I go into the farming land.

Q. And does the one gate serve, both?

A. Yes, the one gate serves both.

Q. Explain that to the Court?

A. Well, if I open the gate from the pasture land, open it clear around to your left, I can go through to the pasture land; if I want cattle and pasture land, I swing it around and shut off that place; if to the pasture land, to the hay field, open the gate and swing it around and shut up the hayfield, so the cattle can come out of the pasture to the hay field. That is only for pasture. It is not done very often. The gate stays open practically all the time, to the framing land.

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Q. I hand you another picture of that gate you just mentioned. What does that depict?

A. That gate is open, to go into the pasture land; and I have another one, it shows three different positions.

Q. This is shut, to go into the pasture land?

A. That is right.

Q. And is open to go into the farm land?

A. Yes. (Indicating on picture) Now this one is open, to go into the pasture land, you see. You go in the pasture land, here. I have that marked. Then there is one which opens—works in three different directions.

Q. In other words, as we understand, this one gate is hung so that when you are not using the pasture land, it may be opened?

A. That is right.

Q. Or, when you have got your cattle in the pasture land, you pull it around and close it, that opens to the farm land?

A. That is correct.

Q. I hand you another picture, here. Please explain it to the Court, No. 17?

A. We will have to get back to this baling operation for this. We were baling that hay; when we got the warrant, we quit that; and this picture

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John Bowman Kennedy.

was taken: we had to come out of the bottom with the baler, that is when we was coming out, stop, and combine some barley, get that in. Well, when we went back to the bottom, about the first of July, we found a car parked right beside my driveway, so close, just left us a small space to get through, between the Mill building and this here car parked here. (Indicating on picture)

Well, that car stayed there.

We finished baling hay July 4th about 8:30 that evening, but the car was still there. Saturday morning, the car was moved and hasn't been back, since.

Q. How was it parked, with reference to your driveway?

A. Just beside it, just got room to get by with the tractor and wagon.

Q. Just barely get by?

A. That is right.

Q. Well, have you had any difficulty getting to and coming from your bottom land, recently?

A. The last difficulty we had was when we was baling the hay. Every time I go down by myself, 'specially happened one Saturday—if I was down in the field coming out with a load of hay—well, in fact the latch was removed from the gate; that was done at the same time he got the Warrant for me, and Saturday morning following—and on Saturday, I come out with a load of hay, Saturday afternoon, and it was all right, first load—the man with me, he brought me a new baler—we got out all right; I went back for the second load, and found the gate wired inside, twisted; I untwisted it with one hand, reached around untwisted it, blocking the highway all the time; so I got through, went on to the field, loaded up my load of hay, came back to the gate, and I found the gate wired on the outside, with this same wire twisted that far; I had to reach through with one hand again, untwisted that—so I quit haying that afternoon: after my daughter came, we went down and got part of the load of hay.

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Q. Is it wired, now?

A. Yes, it is wired now, latch taken off and wire put on, ever since this warrant got out.

Q. But your access is much easier, with the latch on?

A. Yes, with one hand I could raise the latch and open it a whole lot easier than untwist the wire.

Q. Do you haul in both directions, or not?

John Bowman Kennedy.

A. Yes, I do. You see, I own the Kennedy Place, the old home place.

Q. Where is that?

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A. A mile east of Crimora, right at the Station, you might say. I come over there with a tractor and baler and wagon, went to take a turn in the gate,—there is a 1-way bridge, the bridge has 13-foot clearance over the rails, gate too close, when I went to turn I had to stop right in the highway, and while I was stopped in the highway a car bearing an Ohio license, going east, they had to stop, while I was getting off the tractor and getting the gate open, the car was parked there, the trailer-truck of hay came down, they had to apply their brakes and stop there. I had the car, with a truckload of hay, tied up until I got out and opened the gate and moved up the road, and I never got such a bawling out as that man give me, asked me if we had a Virginia Law—

Q. (Interrupting) You had a tractor and trailer?

A. Yes.

Q. And that is when you pulled the three units in together, you can't make the turn in?

A. That is right.

Q. Is there any difficulty turning west?

A. Yes.

Q. Towards your home?

A. Yes. Mr. Cecil Craun combined my wheat. He had a 10-foot combine, and his son had a tractor and cart, you might call it, that hauls the wheat in; then I was back with a pick-up. He come down to the gate, had to park on the

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highway, blocked the whole road; I come around to open the gate; there was another car piled up behind: at that time, it was the Tax Assessor. I believe they had to wait until we got the combine, and that machinery off the road. They didn't look too pleased about it, but didn't say anything.

Q. When you are cropping the bottom land, what rotation do you use?

A. I use a 5-year rotation. I have corn, barley, wheat and alfalfa.

Q. Does this necessitate frequent passage to and from the bottom land?

A. Yes, sir, quite a bit.

Q. Have you any estimate of your passage to and from the gate to the bottom land, during the year 1957?

A. Yes, sir, I have.

John Bowman Kennedy.

Q. What is it?

A. Which crop would you like to have? I had corn, 14 acres, last year.

Q. How many trips were you required to make in connection with the corn preparation until it was cut?

A. Well, I went to the field 186 times.

Q. That was plowing?

A. Plowing, cultivating. Of course now, just with one hand, I may not get the work done as some people would with two hands; so it is necessary for me to make more trips, you see, possibly.

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Q. Do you work mostly, yourself?

A. I do. So I made 186 trips.

Q. Round trips?

A. Round trips.

Q. Well, when you make a round trip, what does it necessitate, when opening and shutting the gate?

A. I made 372 opening and shutting the gate; that is just for the corn crop, alone.

Q. What other crop do you have there?

A. Well, I have hay, alfalfa, well, 11 acres of alfalfa. I made 69 trips mowing, raking, baling, running in and out of the rain; that run was 69 trips, 138, opening and shutting gates, be twice for each trip.

Q. Do you go home for dinner?

A. Yes. And here lately, in an hour or two you get there, it rains you out.

Q. You have been plagued with rain, showers?

A. Yes. Then I have cattle down there; I manure my pastures.

Q. And in that manure operation, how many times?

A. 112 loads and 70 loads on my pasture.

Q. Do you fertilize?

A. I fertilize, and go down once a week to see about my cattle, in the summer; and in the winter, I haul hay down each day for the cattle. So, for the pasture, in 1957, I made 258 trips, which would have been 516 times, to open and shut a gate.

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Q. I believe the Craigs moved on the Mill property in August of 1957?

A. That is right.

Q. So they weren't there when you were going, many times?

A. That is right. I had to take this back, when the crop was finished, to get a complete record.

John Bowman Kennedy.

Q. Now when you thrashed with the combine this summer, this year, how much acreage of wheat did you have?

A. 14 acres.

Q. What did it produce?

A. It yielded between 400 and 500 bushels.

Q. And how many trips did that necessitate, to go in and out, for the wheat, alone?

A. Starting last fall, cutting and disking the cornstalks down, until I got the wheat in the barn, I made 46 trips with the wheat crop.

Q. Round trips?

A. Round trips, two times, to open and shut the gate, 92.

Q. In hauling the wheat from the combine, how many trips were made?

Dep. 8/15/58 page 33 } A. The convoy he hauled with a tractor and a *binn* made for the purpose and Brown hauled with a pickup truck: to haul the wheat, we made 14 trips; and then the straw, baled the straw, made 11 trips to bale the straw.

Q. Do you have anything else, now, we have overlooked you wish to say to the Court at this time?

A. Well, it is a great inconvenience.

Q. Really a nuisance?

A. It is a nuisance, and what land is acquired there, it is on the bank of a Race, waste land, and back of the Mill wash land; it is useless.

Q. I asked you, I believe, whether Mr. Shaver had ever fenced the right-of-way?

A. Not right-of-way. I fenced along the road. The right-of-way was never fenced.

Q. And before that time, in the Derendeau regime, do you know whether or not it was ever fenced?

A. It was never fenced. Back when the Yount boys gave me that plat, before I bought the farm, they said—

Mr. Lotz: (Interrupting) They will have to testify to that.

Q. Was there any question about the lines of your property adjoining the Mill property?

Dep. 8/15/58 page 34 } A. No, sir. Been surveyed, when Mr. Shaver came there, it was surveyed and a new fence put up.

Q. Were you present?

A. Yes.

Q. Anyone else?

John Bowman Kennedy.

A. Karl Yount came up.
Q. And the lines were run, as they are today?
A. Practically the same.

Mr. Branaman: That is all.

CROSS EXAMINATION.

By Mr. Lotz:
Q. Is it your contention, Mr. Craig hasn't any right to put a gate up and keep it fastened?
A. Well, I don't see why he would.
Q. In other words, that is what you are saying?
A. That is right.
Q. Asking the Court, he can't put a gate up across the right-of-way?
A. Never been any gate put up.
Q. And you don't think he has a right to put one up?
A. No, sir.
Q. Was any fence actually strung over the right-of-way, other than the gate put up?
A. Fence, other side of the right-of-way.
Dep. Q. I mean across the right-of-way, itself?
8/15/58 A. No, just a gate.
page 35 } Q. Do you claim the gate was ever locked, so it could not be opened?
A. Wasn't locked, it was chained, so couldn't be opened. There was a chain around the gate, and a post, round twice, the chain hooked and hooked clamped shut.
Q. And you had to unsnap the hook and unwind the chain?
A. I would have had to have some tools to done it.
Q. What kind of hook was it?
A. Just hook on the end of the chain.
Q. Like a snap on the collar of a dog?
A. No, no.
Q. It was open?
A. No, not open, it was bent shut.
Q. How long was that on the gate?
A. From June 1st to June, about the 18th; I didn't get in there until the 21st.
Q. And was it during that period of time that you ran into the gate, after coming down the road, because you didn't realize it was shut?
A. The first day it was shut, I didn't know it was shut.

John Bowman Kennedy.

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Q. Well now, according to the photographs you introduced, Mr. Kennedy, referring to Photograph No. 8, as I understand it, the house shown in that photograph is Mr. Craig's house?

A. That is right.

Q. And is it true, there is an unobstructed view of this gate from the time you pass his house until you get to the gate?

A. The pickup truck was following me; I was looking in the mirror at the truck, not knowing there was any gate there. I went to make a left-hand turn—been through there 33 years, never anything in the way: why should I know there was a gate?

Q. Hadn't the gate been put up?

A. Hung, but tied up.

Q. Had Mr. Craig told you he intended to fasten the gate?

A. Mrs. Craig did.

Q. But you said you didn't see the gate that morning because you were watching traffic behind?

A. That is right. There was a pickup truck following me.

Q. Do you contend that Mr. Craig doesn't have a right to put a fence around his land?

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A. Doesn't have a right to fence a right-of-way that has been open 102 years.

Q. Do you think he has a right to put a fence up around the rest of his land?

A. Well, the rest of his land was fenced, but he tore the fence away and put it across the right-of-way.

Q. Just to make it clear, there has never been a fence across the right-of-way, the gate is the only thing across the right-of-way, is that true?

A. The gate.

Q. But a 'gate' and 'fence' are different things. I am talking about a 'fence,' you put on a post and nail it on. Do you contend Mr. Craig doesn't have the right to fence around his property, if he doesn't put it across your right-of-way?

A. I didn't say 'fence around his property,' if he didn't fence the right-of-way. He has a right to fence his land but I have got free and unobstructed right-of-way through there, according to my deed, and his deed.

Q. Of course that is one of the questions involved here. Assuming, for the minute, you had the right-of-way, that you are right about that, for the purposes of this question. What

John Bowman Kennedy.

we are arguing about in this matter: you don't think Mr. Craig can put a gate up there and leave it shut?

A. That is right.

Q. And if he puts a gate up there, he has to leave it open?

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A. I didn't state that.

Q. What do you want him to do? I would like for you to state, on the record.

A. The right-of-way has always been open, never been closed. I have a plat that shows the right-of-way and this land, and this land also. I had 102 acres of land, woodland, clear cross the river to the flatwoods, to this 102 acres of land, and also led to one of the Yount heirs, Mrs. Susan Wine, and they had a farm across the river; this was land, led from one farm to the other, from one woodland to the farm and always used as a clear, unobstructed right-of-way.

Q. Well, I would like to get your statement, if you care to make it, as to whether, first, you think that Mr. Craig has a right to put up a gate at all, and enclose his property in, if the gate isn't locked?

A. No, sir. It has always been open.

Q. And you don't think he has a right to put it up, now?

A. I can't see how you get it, when it is in the deed I have a right-of-way through there.

Q. You mentioned, one time, there was a gate there? I mean, the gate, at one time, was just fastened by a latch. Now do I understand the latch to be, for the purpose of this record, a latch that has two sides, lift up one side it opens one way, lift up the other side, opens the other way?

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A. Yes.

Q. And you don't feel, if he has that type of latch, has has no right to keep the gate closed?

A. It is still, a gate.

Q. Isn't it true, Mr. Kennedy, the opening between the two posts of the gate along Route 612 is wider than the opening between the two posts where you, or somebody, hung a gate, going into the bottom land from the Craig property?

A. I never measured it, but it would have to be. When I go through my land, through my gate, I go straight in; when I go in the gate on the Craig land, I have to go down and make a left-hand turn. You can't clear the same gate.

Q. So the gate at the front, then, is either as wide, or wider than your gate, you would say?

A. I don't know.

John Bowman Kennedy.

Q. I will ask you to look at a snapshot, filed as Exhibit B, on behalf of Mr. Craig. Does that show a pickup truck and car at the entrance of the gate going to the Mill from 612?

A. Yes, it does.

Q. And I believe, also, Mr. Kennedy, that the opening between the posts of the gate erected by Mr. Craig is wider than the lane which you used, as it goes by the side of the Mill?

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A. No wider than the tracks.

Q. No fence on the left side of it as you go into your land?

A. On the right side, you mean? There is a fence on the left as you go in.

Q. Does that run along the right-of-way, as you go up to your property?

A. Yes, until Craig tore it away.

Q. In the Photograph, Exhibit 6, we are looking towards Route 612 coming out from your land?

A. Yes.

Q. And speaking of this photograph, the right, as being the right part of your land, no fence in the bushes, as I understand?

A. Yes, on the opposite of the Mill, there was a fence there; Shaver kept that fence; Craig tore the fence away and put it across the right-of-way.

Q. Where was that fence, with reference to the two tracks shown in the lane?

A. (Indicating on photograph) The fence did lie along this side: Mr. Shaver pastured that land.

Q. How close to the pasture, did it run?

A. I would say, just roughly, 30 feet.

Q. But there was no fence along the right-of-way, nor is there any, now?

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A. It is there, what Craig hasn't tore down, yes.

Q. Immediately next to the tracks, no fence?

A. Not at the Mill. That is what he tore away and put across the right-of-way.

Q. To your knowledge, Mr. Kennedy, and it may appear from some of the papers you filed, copies of the deeds, any width ever been prescribed, any papers dealing with this particular road we have under discussion?

A. I don't think so.

Q. And when was the date that you were coming down the road, not realizing the gate was closed and struck the—?

John Bowman Kennedy.

A. (Interrupting) June 1, Sunday morning.

Q. Was that a clear day?

A. I don't remember.

Q. Was there anything to affect your visibility, as far as you recall?

A. I was watching the pickup behind me, not dreaming there was a gate across the road.

Q. Was there anything to obstruct your visibility, other than you were watching the truck behind you?

A. I don't recall.

Q. When was it, that you say the chain was taken off and a wire was placed there, wound around to fasten the gate?

Dep. 8/15/58 page 42 } A. Well, I come out of there the 26th, when he got the warrant, and the latch was taken off and a wire put on, between that and Saturday.

Q. How long had the latch been on?

A. The latch had been on there from around the 18th until the 26th or 28th, whenever it was taken off.

Q. Wasn't the latch taken off by your hitting it with one of your vehicles?

A. Absolutely not. I never hit it.

Q. How wide is Route 612, Mr. Kennedy, if you know?

A. I don't know. It is just heavy traffic on it.

Q. You mentioned the bridge being 13 feet wide: on either side of the bridge, I take it, the road is a little wider than it is right in the bridge?

A. I think so but there is a culvert on one side of the bridge: one side, not too wide.

Q. Turning to your left, as you come out of the Craig property, you would have to cross the line of traffic that would be approaching from your left?

A. Yes.

Q. How far is the bridge from the gate?

A. Oh, approximately, I would say 45 feet.

Dep. 8/15/58 page 43 } Q. And of course you could go beyond the bridge and pull over, couldn't you?

A. No, sir. It is one-way, I expect 100 feet.

Q. Is the bridge that long?

A. Bridge over the main Race and concrete bridge over across the wasteland.

Q. Unless several pieces of equipment stop short of that bridge, one tractor and one unit behind?

A. Yes, but we hardly ever have that.

John Bowman Kennedy.

Q. How many acres are there in the bottom land, Mr. Kennedy?

A. Approximately 35.

Q. As I check your figures here and add them up, as you go along, it would seem that in 1957, you estimated you made 559 trips to that tract, is that correct?

A. Yes.

Q. Do you farm the rest of your farm?

A. Yes.

Q. Do you crop it, also?

A. On the hill?

Q. No, the other 60 acres, how much of that is cropped?

A. I cropped about 40-some acres.

Q. So what you crop on the hill is little more than what you crop on the bottom land?

Dep. 8/15/58 page 44 } A. This big bluff takes up approximately 20 acres of it.

Q. I was getting a comparison between the land you crop around the house and barn, and the land in the bottom, and as I understand it, it would be about 5 acres more around the house than it would be in the bottom land, is that correct?

A. I just never did figure it.

Q. Does Mr. Craig, to your knowledge, use the old Mill building for the purpose of storing personal property?

A. Well, the door stands open all the time, I will say practically all the time: just what I see, going back and forward there, I don't see anything in there but junk.

Q. Does he have anything in it?

A. Part of an automobile; you might say, 'junk.'

Q. How is the gate fastened today? Did you look at it before you came in here this morning?

A. I was through it yesterday afternoon: it was wired.

Q. You object, very much, to getting off your equipment to open the gate and close it?

A. It makes a road hazard: it is dangerous.

Q. Mr. Kennedy, how many times during the year 1957 did you have to open and close the gate behind the Mill that leads into the pasture field to the bottom land?

Dep. 8/15/58 page 45 } A. I leave that open, to the crop land: that stays open; I don't open and close that, at all, unless I have got cattle in the pasture.

Q. Since this difficulty has arisen between you and Mr.

John Bowman Kennedy.

Craig, have you moved the fence that is at the rear of the Craig property, where you enter your land, from one post to another?

A. Moved the 'fence?'

Q. Yes.

A. No, that gate has been in there 15 years, or more.

Q. Hasn't been moved, at all?

A. Just open and shut, yes.

Q. Now Mr. Kennedy, from the land that you crop there behind the Craig place, it is only about a quarter of a mile to your house, isn't it, by walking?

A. You can't walk, without coming out on the road, unless you climb the bluff.

Q. Would it be a fourth of a mile?

A. Around the road?

Q. No, through the land, over the bluff, and to the house?

A. I wouldn't know. It is impossible to get over it.

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Q. I believe you told Mr. Craig, on one occasion, did you not, Mr. Kennedy, you would see to it he would never close that gate?

A. Absolutely not. I never talked to Mr. Craig but one time in my life.

Q. And he told you, then, he would put the gate up?

A. He didn't say what he would do—going to see about it.

Q. Do you deny you ever told him he would never close that gate?

A. I never. I never talked to Mr. Craig but once in my life and that is the day I asked him about the right-of-way.

Q. One further question: Will you state, for the season of 1958, what crops you have on this land you cropped behind Craigs?

A. 1958?

Q. This summer?

A. 14 acres of wheat; 11 of alfalfa; the rest pasture.

Q. 25 acres cropped?

A. Yes.

Q. As I understand, that land that you cultivate is separated from the pasture by your own fence?

A. Yes.

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Q. How many head of livestock do you keep back there?

A. I have 19 in there; this winter, put 40 or 50 in there, and haul hay to them, the Lord willing.

John Bowman Kennedy.

Q. Is there any shelter on that land?
A. Nothing but the shelter of the bluff, and trees.
Q. Do they stay there all winter?
A. If it gets too bad, I have to bring them out.
Q. Of course those cattle wouldn't have any trouble walking through this bluff to your own big barn?
A. Right smart, time you get 40 or 50 cattle over that bluff, it is no fun.
Q. No pasture in the wintertime?
A. I feed them hay.
Q. You could feed them hay—
A. (Interrupting) I don't have to water.
Q. What water is there in the pasture land?
A. Runs to the river, and also this Tail Race runs the length of the place; there is always water in that Tail Race.
Q. Are you sure, now, Mr. Kennedy, that you made approximately 550 trips to that piece of land, in 1957?
A. I figured every one, and would be more.
Dep. 8/15/58 page 48 } Q. You tried to figure it the best you could, for the purpose of testifying here?
A. That is right. A lot of times you go down there, unexpected—a calf get in a field, the other night a calf got through the gate and in the alfalfa; I don't count that trip at all; lots of trips I don't count.

Mr. Lotz: That is all.

RE-DIRECT EXAMINATION.

Mr. Branaman:
Q. Going towards Crimora, you turn across the Race, bridge right close to you?
A. Turn left.
Q. Where do you go, then?
A. Over to the Kennedy Farm.
Q. You have got the home place?
A. I bought it this past spring.
Q. That is along the river?
A. Yes.
Q. And when you turn west, you turn up the hill?
A. Up the hill.

D. B. Kromer.

Q. Isn't the culvert top, as you go out?
A. Yes, from the gate out in the road, you have to pull in the center of the road; you block the highway.
Dep. 8/15/58 page 49 } Q. And going west is on your way home?
A. On your way home.
Q. Your difficulty is the hazards to the equipment?
A. Hazard, just with one handling it, bothersome.
Q. Then getting in and out—?
A. Yes.
Q. (Continuing)—of the gate is a nuisance?
A. Yes. You take a tractor, the brakes are made for field work, not to hold a 2 or 3 ton load on a hill; you have to leave the tractor in gear, cut your motor off, to hold your load; when you get back on, possibly the gears are jammed, you have a time getting it started.
Q. And there is nothing else you have to say at this time?
A. No.
Q. These are your trips? (Indicating document)
A. That is right.
Q. We will just file these 'trips.'

Mr. Lotz: That is the same thing he testified about?

A. Yes.

Mr. Branaman: Yes, but we will file the trips.

Plaintiff's Exhibit J, the document just referred to, filed.

Mr. Branaman: That is all.

* * * * *

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* * * * *

D. B. KROMER,
called as a witness on behalf of the plaintiff herein, being first duly sworn, testified as follows:

D. B. Kromer.

DIRECT EXAMINATION.

By Mr. Branaman:

Q. Please state your name?

A. D. B. Kromer.

Q. Where do you live?

A. In Waynesboro, on Maple, 505.

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Q. How long have you lived in Waynesboro?

A. About 12 years.

Q. Did you ever farm the Bowman Kennedy place, known as the Daniel Yount property?

A. I certainly did.

Q. When did you move on the property?

A. About 1913.

Q. 1913?

A. That is right.

Q. And how long did you stay?

A. 12 years.

Q. What crops were raised?

A. Wheat and corn and hay.

Q. Did you or did you not farm the bottom land?

A. I did farm the bottom land, yes.

Q. What rotation?

A. Corn, wheat and hay.

Q. Did you farm with horse power, or machinery?

A. Horse power.

Q. How did you reach the bottom land?

A. Well, if we had wagons, went around the road; if teams, would go down the bluff.

Q. Sometimes you would go down the trail on the bluff?

A. Yes. You could get a horse down there, but you couldn't take a wagon.

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Q. Or none of your equipment?

A. No.

Q. How did you reach the bottom land? Tell the Court.

A. We would go out, take the New Hope Road, Mine Road, go to the Mill and turn in at the Mill, go down through the bottom, down to the bottom.

Q. Did you pass around the Mill?

A. Yes, sir, we would go right by the Mill.

Q. Through the Tail Race?

A. Yes, sir.

Q. And into the fields?

A. Yes, bottom land.

D. B. Kromer.

Q. And you did that when you were cultivating the crops, harvesting the crops?
A. Yes.
Q. Was there, or was there not, any fence or gates?
A. No, sir.
Q. That obstructed passage from the Mine Road, I believe you called it, that is Road 612, you mean?
A. Yes.
Q. What was there in the way of fencing?
A. No fences until we got to the bottom; when we got to the bottom, a gate you go into the bottom.

Dep. 8/15/58 page 57 } Q. Any gate on the Mill property?
A. No, sir.
Q. Was there any fencing on the Mill property 5-acre tract?
A. No, sir, not to interfere with us.
Q. Along the road?
A. No, sir.
Q. Who was operating the Mill?
A. Derendeau.
Q. When did he discontinue the operation?
A. Must have been along about 1927, as well as I recollect.
Q. Was your roadway in blocked, at any time, from 612 to the bottom land?
A. No, sir, it was not. I never seen it.
Q. Did you ever experience any teams?
A. If teams got in the way, somebody got them out of the way.
Q. It was a free and open way?
A. Yes.
Q. Did you know Derendeau?
A. Quite well.
Q. You dealt with him?
A. Yes.

Dep. 8/15/58 page 58 } Q. And sold your wheat there?
A. Yes, sir.
Q. Was your roadway in ever blocked at any time by fences or gates, during your 12 or 13 years?
A. By 'gates?'
Q. Gates or fences?
A. No, sir, I never seen a gate there.
Q. It was known as an open way?
A. It certainly was, yes.
Q. Now have you ever seen the plat of the bottom land on

D. B. Kromer.

the Kennedy place? Have you ever seen the plat? (Showing to witness)

A. No, I don't think that I ever did.

Q. Was there a roadway, after you entered the bottom land, crossing it?

A. Yes, sir. I guess this is it, here, isn't it? (Indicating on Plat)

Q. Was there a roadway across the bottom land, along the bottom land?

A. One time, a road in there, growed up with brush: when I went there, me and Kennedy grubbed it.

Q. Who owned that property?

A. Walter Yount.

Q. And you were farming for him?

Dep. A. Yes, I was farming for him.

8/15/58 Q. Point out to Mr. Lotz where the old roadway
page 59 } was?

A. (Witness does as requested).

Q. Was that on the road or lane, on the bottom lane?

A. As we go from the highway down to the bottom?

Q. To get in the bottom?

A. Yes, that road run across.

Q. This river, over here?

A. Yes.

Q. Ran across the river?

A. One time we closed it: we had nobody complaining about it, at all.

Q. Professor Yount came up—?

A. (Interrupting) Yes, came up and had Coiner run the line.

Q. What Coiner?

A. K. B.

Q. Had it grown up?

A. Yes, just woods.

Q. And you cleaned it out?

A. Yes.

Q. And Coiner run the line. Who put the fence up?

A. Sam Kennedy.

Dep. Q. How far did the fence extend?

8/15/58 A. About a half a mile across there. (Indi-
page 60 } cating on plat)

Q. From what points?

A. From the Race to the river.

Q. There is no crossing at the river, then, it had been abandoned?

D. B. Kromer.

A. No, sir. No one crossed that.

Q. Was there or was there not, a tenant house on the Yount Place, the Kennedy Place?

A. Yes.

Q. Where was it located?

A. Located down the bluff, along close to the Race, just a little piece down, after you went in on the bottom land.

Q. And the tenant house on the Yount property?

A. That is right.

Q. Can you point that out on one of these pictures?

A. I don't believe it shows on this No. 5. It is a little lower down.

Q. Did you tear the tenant house down?

A. No, sir.

Q. Who did?

Dep. 8/15/58 page 61 } A. I guess that man did. (Indicating plaintiff)

Q. Was there a tenant house on the Mill property?

A. Yes, two of them.

Q. Where did they stand?

A. Well, one of them stood right above the Mill and the other one, up in the corner, right along the New Hope Road.

Q. Was that back of the residence?

A. Yes. I reckon it would be right down here, somewhere. (Indicating on Photograph)

Q. Was it on the west side of the Tail Race?

A. Yes, sir.

Q. Where you pointed with your thumb, is on the east side of the Tail Race. So you are wrong in that?

A. Yes.

Q. So it is on the west side?

A. Yes, barn there, a little north from the barn down the bluff, I think.

Q. Mr. Kromer, look at Exhibit No. 10 and tell us where the tenant house was, if you could locate it on No. 10?

A. It was right up in this corner, right in front of the Mill.

Q. To the left, up from the Mill, in the corner?

A. Yes.

Dep. 8/15/58 page 62 } Q. Now, up from the northwest corner of the Mill?

A. I think you would call it 'northwest.'

Q. Was there another tenant house?

A. Yes, one back of the big house.

D. B. Kromer.

Q. Look at Photograph No. 9 and point out to Mr. Lotz where the other tenant house was?
A. (Indicating on Photograph).
Q. Beyond the west end of this Photograph?
A. Yes.
Q. Does that Photograph show the yard of the Craig property, and the residence?
A. Yes, it does.
Q. And you tell the Court that you farmed with horse power?
A. Yes, sir.
Q. What about entering the bottom land, farming with machinery, what have you to say about that?
A. Well, I always taken them down there with horses.
Q. Took the horses down?
A. Yes.
Q. You didn't go down with machinery, down the trail?
A. No, no, you couldn't go down there with machinery.
Q. Could you get up, with machinery?
A. No.
Q. What kind of formation is it, the bluff?
A. Very rocky and steep.
Q. Is it limestone and steep?
A. Yes.
Q. And some of it is perpendicular, isn't it?
A. Very steep.

Dep. 8/15/58 page 63

Mr. Branaman: That is all.

CROSS EXAMINATION.

By Mr. Lotz:
Q. As I understand it, Mr. Kromer, horses could go down the bluff and back? Whatever you were working at in the field, take horses from the field to dinner and come back, but if you were going to take a wagon, you would have to go by the Mill?
A. Yes.
Q. And sometimes, when the Mill was open there, people would stop their teams there, loading and unloading, and some would have to move so you could get by?
A. No, no, we had no trouble getting through.
Q. You just had to wait?
A. Yes, if they didn't move them out of the way.

D. B. Kromer.

Dep. 8/15/58 page 64

Q. Now as I understand it, when you went there, there was a gate leading from the Mill property into the bottom land?

A. Down after you cross the Tail Race, yes; we had the gate there to keep the stock out; down at the bottom land, only place I seen a gate.

Q. Now did the Mill put the gate up, or Yount put it up?

A. I kept it up. I don't know who put it down.

Q. And that shut off the bottom land from the Mill land, when it was closed?

A. Yes.

Q. So the cattle couldn't stray?

A. Yes.

Q. And as I understand, this road that ran through the bottom land, grown up, you all fenced that off, and nobody objected to it?

A. Yes. I never heard objection to it, no, sir.

Q. Now one other question: you referred to the tenant house being on the Yount land?

A. Yes.

Q. I wasn't quite clear where you said that was located. Was it on the land you farmed?

A. No, it was right on the side of the old bluff.

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Q. Was it on the side of the bluff close to the land you farmed?

A. Right up on the bluff.

Q. About how far was it located from the land you were farming?

A. I would say a hundred feet.

Q. Did anybody live in it?

A. Yes, I kept a man there for awhile.

Q. And I take it, you kept your machinery and horses up at the barn or house, where Kennedy now lives?

A. When we had machinery, we would go around the road.

Q. You mean, you kept it there, over winter, though?

A. Yes.

Q. And did you actually live up there, Mr. Kromer?

A. Yes, for 12 years.

Q. Lived on the property?

A. Yes.

Mr. Lotz: That is all.

D. B. Kromer.

RE-DIRECT EXAMINATION.

By Mr. Branaman:

Q. How did people, occupying the tenant house, go to and from where they lived?

Dep. 8/15/58 page 66 } A. They would go out by the Mill.

Q. There was access there, never fenced?

A. No, sir.

Q. At any time?

A. No, sir, only the bluff was fenced in; have to open a gate to come out of that bluff.

Q. Out in the Mill road and out to 612?

A. Yes.

Q. Did Derendeau, during his proprietorship, ever block your way?

A. No, sir. I never seen the road blocked, in my life.

Q. Did Mr. Derendeau, during his proprietorship, ever block your way?

A. No, sir, he never did.

Q. And when you were on your way out and any teams were in the way, in front of the Mill, did he ever tell them to move, or anything like that?

A. Sure, tell them to move them out of the way, if was occupied for a few minutes.

Q. Recognizing the right-of-way?

A. Yes.

Mr. Branaman: That is all.

RE-CROSS EXAMINATION.

By Mr. Lotz:

Dep. 8/15/58 page 67 } Q. You have to go through this gate, you spoke of, back of the Mill property?

A. After you cross the Tail Race.

Q. Have to open and close the gate?

A. Throw it open and leave it open all day long.

Q. And close it when you left?

A. Yes.

Q. And that wasn't any particular trouble to you?

A. No, sir.

Mr. Lotz: That is all.

E. S. Koiner.

RE-RE-DIRECT EXAMINATION.

By Mr. Branaman:

Q. And you never were blocked on your way out to the road?

A. No, sir.

Q. All free and open?

A. Yes.

Q. And never nothing else?

A. They would drive out of the way.

Q. The lane or road, across the bottom land, along the Weaver fence, now that was a private way?

A. Yes, at one time yes.

Dep. 8/15/58 page 68 } Q. And you cleaned it up, you and Mr. Walter Yount?

A. Yes.

Q. Or you and Mr. Kennedy?

A. Mr. Tom Kennedy.

* * * * *

E. S. KOINER,

called as a witness on behalf of the plaintiff herein, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Dep. 8/15/58 page 69 } By Mr. Branaman:

Q. Please state your name?

A. E. S. Koiner.

Q. How old are you, Mr. Koiner?

A. Well, I started, since Wednesday, in my 86th year. I was 86 years old, Wednesday.

Q. Then you will be in your 87th?

A. Starting on 87, but I don't believe I will ever get through them.

Q. Let's hope you do. What is your father's name?

A. K. B. Koiner.

Q. Who was your grandfather, on the Koiner side?

A. His name was John.

Q. Was he a Koiner?

A. Yes.

Q. Who was Henry Koiner?

A. He was father's half brother.

Q. Did he, at one time, own the Crimora Mill property?

E. S. Koiner.

A. Yes.

Q. Did your grandfather ever own the Kennedy-Yount property?

A. Yes. I heard my father tell, one time, he owned it a good while.

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Q. How far do you live from the Crimora Mill property owned by Mr. Craig?

A. Well, it is about a little over a mile, I reckon.

Q. Do you live on the old Rockfish Road?

A. Yes, sir.

Q. On part of the K. B. Koiner home property?

A. Yes.

Q. Was that the home of your grandfather?

A. Yes, sir. That is the place down here every Koiner who come to this country, settled, right there.

Q. Ancestors of all the Koiners?

A. Yes.

Q. Do you know when the Shenandoah Valley Division of the Norfolk and Western Railway was built?

A. Yes, sir.

Q. Were you a boy then?

A. I was about 9 or 10 years old.

Q. Then it was built about 1882?

A. Yes, that is right.

Q. Did you ever have occasion to go to and from the Crimora Mill during the ownership of your Uncle, Henry?

A. On the right-of-way through there?

Q. No, the Mill property?

Dep. 8/15/58 page 71

A. Yes, been through there many and many a time.

Q. Did you deliver wheat or produce at the Mill?

A. Yes.

Q. Wheat?

A. Yes.

Q. Do you recall whether or not, during your memory of the Mill property, there was a fence along the road, that is 612, and a gate?

A. This place never was enclosed since I knowed anything; the only fence there was a little bitty fence along the hill, 'round the garden beyond the Mill, only fence I remember of being there.

Q. There was no fence except the garden fence down by the Mill?

A. Yes.

W. Frederick Shaver.

Q. Was there ever any gate in there?
A. No, sir.
Q. Did you, or did you not ever have occasion to go around from the New Hope-Crimora Road into the bottom land of Mr. Kennedy here?
A. Yes, I went across that road as a boy several times, and the bottom there, farming there, a dozen times.
Q. So there was no fence to keep you from going 'round back of the Mill across to the bottom land?
Dep. A. No, sir.
8/15/58 Q. No gate was ever erected there?
page 72 } A. Well, I believe had sort of a gate to go into that field, but it was always open, unless they had shoats in there.
Q. Gate back of the Mill?
A. Yes. That was his own gate. He kept stock in there—kept it closed, if didn't have stock left it open.
Q. As far as your mind is concerned, it is as good as it ever was, you can still remember things of your childhood days?
A. Yes.

* * * * *

W. FREDERICK SHAVER,
called as a witness on behalf of the plaintiff herein, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Branaman:
Dep. Q. Please state your name?
8/15/58 A. W. Frederick Shaver.
page 73 } Q. Where do you live, Mr. Shaver?
A. I live over on what they call the Rockfish Road, about two and a half miles northwest of Crimora.
Q. How near Mr. Emmett Koiner, who just testified?
A. I live on the adjoining farm.
Q. Are you employed? And if so, where?
A. I am employed at General Electric.
Q. Do you farm?
A. Yes, sir.
Q. You live at Koiner's store?
A. Yes.
Q. How much farm do you own there?
A. I have about 165 acres.

W. Frederick Shaver.

Q. Did you ever own the Crimora Mill property?
A. I did.
Q. When did you buy it?
A. I think it was in the spring of 1943.
Q. Did you move there?
A. I did.
Q. And how long did you live on the property?
A. I lived there for 13 years.
Q. During that time, did you operate the Mill?
A. No, sir.
Dep. Q. Did you use it for any purpose?
8/15/58 A. I used it for storage and to keep chickens in,
page 74 } is about all.
Q. Did you close it up, or lock it, or what?
A. Well, part of the time it was open; part of the time, closed. If I had chickens, I usually had the doors open and the chickens just run in and out of it all the time.
Q. And was this property fenced, when you bought it?
A. No, sir.
Q. Did you fence it?
A. I did.
Q. What part of it?
A. I fenced the part along the road, from in front of the Mill all along Route 612 and on over to the adjoining, Mr. Kennedy's side.
Q. Was the roadway left open in front of the Mill?
A. Yes, sir.
Q. Why?
A. Well, like I say, I built the first fence along the road down to the entrance to the Mill, then I went on straight back, then to Kennedy's line. Beg pardon, it wasn't 'straight,' it was down the bluff and on back and
Dep. adjoined him.
8/15/58 Q. You didn't fence the roadway in front of the
page 75 } Mill?
A. No.
Q. Why not?
A. I was told it was open right-of-way, and it wasn't any benefit to me to close it, as I had chickens there; I was going in and out every day hauling feed; I didn't have much advantage to close it.
Q. When you went to your home, how did you go into it?
A. Up and down the road.
Q. Well, did you go in front or in the rear?
A. Both.

W. Frederick Shaver.

Q. With your automobile?
A. Both.
Q. Both ways?
A. Both ways.
Q. As I understand you, you got in your automobile and stopped in front of the Mill?
A. Yes.
Q. So it was a handicap even for you to have a gate there?
A. I didn't need a gate there.
Q. You would have been handicapped?
A. Yes.

Dep. 8/15/58 page 76 } Q. Then as I understand, you extended your fence from 612 west of where Mr. Craig had his fence around by the bluff and connected with the Bowman fence, the Kennedy fence?

A. That is right.
Q. And left the right-of-way open for Mr. Bowman Kennedy to use to go in and out of his property?
A. I did.
Q. Was he farming the bottom land, when you were there?
A. Yes.
Q. Was any survey made of your property while Mr. Kennedy lived on the hill, do you recall?
A. Yes.
Q. Who did that?
A. Mr. Crawford, County Surveyor.
Q. You had him come and make a survey?
A. I did.
Q. Was there any change in the lines, run approximately the same?
A. Run approximately the same. They were changed a little bit on the Weaver side; Weaver and I came to a new agreement as to the new line.
Q. That is to the east of the Mill property?
A. Yes.

Dep. 8/15/58 page 77 } Q. Were there any buildings, other than your house and the Mill building on the 5-acre tract, when you went there?

A. When I first went there, there was an old tenant house kind of between my house and the Mill, a little to the north, and people were living in it at that time, but it was rather dilapidated piece of property and a few years later, they moved and I used it for chickens, and I gradually tore it down, finally tore it down.

W. Frederick Shaver.

Q. How did they reach this tenant house on your property?

A. Two different ways; they come in front of my house, drove over to, or drove in front of the Mill, and walked up to the house.

Q. I show you Exhibit No. 7, a Photograph of the Mill property, and ask you to point out to Mr. Lotz and to me, about where the tenant house was located, if you can from this Photograph?

A. There was a house right there: (Indicating on Photograph) that is the basement of it, right there; the house set right over that hole.

Q. You have got the telephone pole, to the left of the tree?

A. That is right.

Q. Between that and the apple tree on the hill?

Dep. 8/15/58 page 78 }

A. That is right.

Q. And you say that the tenants in that house would come out in front of your residence property to 612, or else down by the Mill property?

A. Yes. While they were living there; they didn't live there very long. I believe, sometimes, they would drive right here and just walk. (Indicating on Photograph)

Q. Stop under the big tree and walk over to it?

A. Yes, or drive over this way and walk over to it. (Indicating on Photograph)

Q. Can you point out to Mr. Lotz and to me where you built your fence, from Road 612?

A. You don't have it all on this Photograph. This one is better, if I may use it? (Indicating Photograph)

Q. You are referring to Photograph 9?

A. Photograph 9. I put this post in here to drive, cross the driveway in front of the house, down Route 612 to the brush pile, which was the tree or brush there at the side of the road; and from there, from this point, I stayed right along the bluff, went on top of there, and went on down here. (Indicating on Photograph)

Q. And joined with the Kennedy line?

A. That is right.

Q. Was the post, standing now, in this picture No. 7 (indicating) used in the construction of the fence?

Dep. 8/15/58 page 79 }

A. Yes.

Q. Will you point it out to Mr. Lotz and describe where it is, if you can?

A. This is how far I come. (Indicating)

W. Frederick Shaver.

Q. And that is across the road from the electric light pole?
A. Yes.
Q. And it is a distinct post, is it not, in the northern road line of '12?'
A. Yes.
Q. And from there you went to what point?
A. I followed, that is one of the posts.
Q. Steel post?
A. Yes.

Mr. Lotz: Leaving the road leading generally toward the Mill Road?

A. From this post, I had to erect this one, I went to a little locust tree, showing point to the left of the Mill building and to the left side of the lane. (Indicating on Exhibit)
Q. Thence, to connect with the Bowman Kennedy fence line, boundary line?
A. Yes.
Q. And did anyone object to your erecting a fence there?
Dep. 8/15/58 page 80
A. No, sir.
Q. You never closed the right-of-way or roadway going to the bottom land of Mr. Kennedy, in any way, shape or form?
A. No, sir.
Q. Let me hand you a picture, Exhibit 6, and ask you whether that depicts the roadway to the bottom land and through the Tail Race, by the Mill?
A. It does.
Q. From secondary road 612, is that it?
A. It does.
Q. Can you point out on that picture where your fence was located?
A. Approximately—it has grown up quite a bit with weeds, when this was taken: as I say, when I come from 612 north, fastened it to these locust trees.
Q. On the bank?
A. On the bank. I come down and, I believe this is the post, I am not positive, and come on across the Race. (Indicating on Exhibit)
Q. The Tail Race?
A. Tail Race, and right straight back.
Q. Toward the Kennedy line?

W. Frederick Shaver.

A. That is right.

Dep. 8/15/58 page 81 } Q. And that was left open for the roadway to the bottom land?

A. That is right.

Mr. Branaman: That is all.

CROSS EXAMINATION.

By Mr. Lotz:

Q. You say Mr. Craig now owns the land, you formerly owned all the land he owns?

A. That is right.

Q. This fence you erected came from your house down towards the Mill, left the Highway, went north. Was that dividing some of your own property?

A. Yes.

Q. Or line on your own property?

A. That is right.

Q. You had property on both sides of the Mill, on one side, and residence part on the other side?

A. That is right.

Q. Referring to the Photograph, No. 7, you will have to fix the directions—Photograph 10 instead of 7, which shows the present gate. Did you have any fence running from the gate east along the Mill property?

A. No, sir.

Dep. 8/15/58 page 82 } Q. And how long did you own the land?

A. For 13 years.

Q. And to whom did you sell it?

A. A Mrs. Benson, of Staunton.

Q. Mr. Shaver, was a survey made by Mr. W. A. Crawford, Surveyor of Augusta County, when you were getting ready to sell it, or what was the purpose for which a survey was made?

A. To establish the new line fence between Kennedy and myself: the old line fence was down, right in one corner; the fence didn't come out to a square corner; we didn't know where it was cut off: supposed to be square, or what-not. So we decided to get Crawford to establish a new line.

Q. When you owned this property, was there a gate between the back of this property and the bottom land which Kennedy farmed?

A. Yes, I think so.

W. Frederick Shaver.

Mr. Lotz: That is all.

RE-DIRECT EXAMINATION.

By Mr. Branaman:

Q. Back of the property, it was necessary, to keep the cattle in for grazing, his cattle?

A. Yes.

Q. So he had a gate there to serve two purposes, is that right?

Dep. 8/15/58 page 83

A. Yes.

Q. And he farmed about 35 acres of the bottom land?

A. Approximately. I didn't know the acreage.

Q. And the Tail Race is in the pasture land, is it not?

A. It runs all the way through the farm.

Q. And is there a bluff there?

A. Yes.

Q. Is it steep, or not?

A. Very steep.

Q. Is it limestone formation?

A. Yes.

Q. And that is thrown into the grazing land?

A. That is right.

Q. And when Kennedy is grazing there, Tail Race in the bluff, the gate is closed so as to keep the cattle in?

A. Yes.

Q. And when grazing the bottom land, swung around and closed off there?

A. Yes, I think so.

Q. One gates serves two purposes?

A. Yes, sir.

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Q. The Mill building, you never used except for chickens?

A. And some storage, and that is about all.

Q. There is no milling operation there, any more?

A. No. It was when I bought the property; it was full of machinery but I wasn't a miller and I gradually sold out the machinery, piece by piece.

Q. And got rid of it?

A. Yes, sir.

Q. Do you recall whether there was a concrete 4-bay in the Mill, at the Mill, when you bought it?

A. There was.

W. Frederick Shaver.

Q. Was that installed during the time when W. E. Bolick owned the property?

A. That is right.

Q. But it was never used, or very little?

A. No. The Mill, I don't think the Mill was ever in operation while Bolick had it.

Q. And there was no fence across the 4-bay to the Weaver land, was there?

A. No, sir.

Q. And I believe you did testify that you and Mr. Weaver, who owns the bottom land adjoining Mr. Kennedy here and the road, ran the line there and established it?

Dep. 8/15/58 page 85

A. Yes, sir.

Q. Now the remainder of your acreage, is east of the Race, between the river and the road, is it not? Some 19 acres?

A. It is more southeast. May I make a correction? That is approximately 15 on that side of the road and approximately 5 on the north side, brings it up to 19 and a fraction.

Mr. Branaman: That is all.

RE-CROSS EXAMINATION.

By Mr. Lotz:

Q. What did you store in the Mill? You spoke of storing, you used it for, in addition to a chickenhouse.

A. For several years, I let my father store baled hay in there: he was short on space so he stored baled hay in there. Other than that, it was used for chickens, old tools and things that accumulate on a farm, took them down and would stick them in there, to get them out of the way.

The building was pretty water-tight, if good enough to store hay?

A. Yes.

Mr. Lotz: That is all.

RE-RE-DIRECT EXAMINATION.

By Mr. Branaman:

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Q. Any trespassing bothering you storing in your Mill?

A. I have never lost anything. I know of people would drive in there to fish and go frog-hunting.

John H. Brown.

I have given different ones permission to go in the old Mill and shoot pigeons, used to be quite a few of those, but I have never lost anything out of it, of any value, that I know of.

Q. You never had trouble of depredation?

A. No.

Mr. Branaman: That is all.

RE-RE-CROSS EXAMINATION.

By Mr. Lotz:

Q. Did you ever have trouble, people parking there?

A. The Mill, right in front of my house, it was rather close for that.

Mr. Lotz: That is all.

(Witness excused).

Mr. Branaman: Do you waive signature, Mr. Shaver?

Mr. Shaver: Yes.

* * * * *

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* * * * *

JOHN H. BROWN,

called as a witness on behalf of the plaintiff herein, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Branaman:

Q. State your name, age and place of residence?

A. John H. Brown. 70 years old. I live on Route 785.

Q. How far from the Crimora Mill?

A. It is 3 miles.

Q. Are you a farmer?

A. Yes, sir.

Q. Did you ever do any business at the Crimora Mill?

A. Yes.

John H. Brown.

Q. When?

A. I did business there from, had connection with the Mill in there, for 30 years, I expect.

Dep. 8/15/58 page 92 } Q. Were you a patron of the Mill when Derendeau was operating it?

A. Yes, sir.

Q. Did you or did you not deliver wheat and corn there?

A. Yes, sir.

Q. Do you recall whether the Mill property that we have been talking about was fenced or gated along the northeast side of 612, Road 612?

A. No, sir, it was not.

Q. How long does your memory serve you on that question, of whether it was gate-d or fenced?

A. I can remember when they used wagons, they had a wagon shed right out from the Mill, in front of the Mill, and there was no fence along there.

Q. Was there any gateway or any other obstruction to go in the road or land 'round by the Mill?

A. No, sir.

Q. Not in your memory?

A. No.

Q. You have been by there, recently?

A. Yes, sir.

Q. When did you first see a gate, if there was one erected there?

A. This spring, this last spring.

Dep. 8/15/58 page 93 } Q. Did you observe it?

A. Yes, sir.

Q. Did you go in it, open it?

A. No, sir.

Q. How was it fastened?

A. It was chained.

Q. When you went by, it was chained?

A. Yes.

Q. Was anyone with you at the time?

A. My wife.

Q. And what is her name?

A. Lillie Brown.

Q. She was along?

A. Yes, sir.

* * * * *

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JANIE KENNEDY,
called as a witness on behalf of the plaintiff herein, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Branaman:
Q. Please state your name?
A. Janie Kennedy.
Q. Are you the wife of John Bowman Kennedy?
A. That is right.
Q. Mrs. Kennedy, you live with your husband at the Daniel Yount Place he owns on the hill?
A. That is right.
Q. Do you recall being with your husband on the morning that he happened to run into the gate, on his way to the bottom land?
A. I was with him, when he taken me to Church.
Dep. 8/15/58 page 100 }
Q. Was that after he had the episode at the gate?
A. Yes.
Q. And that was on a Sunday?
A. June 1st.
Q. First Sunday, June first?
A. That is right.
Q. Did you observe any marks on the highway, there?
A. Yes, I did.
Q. What were they?
A. Where he had skidded there.
Q. There had been skidmarks where you turn into the gate?
A. Yes.
Q. I assume he told you about the incident?
A. Yes.
Q. You weren't present, though?
A. No.
Q. How was the gate fastened?
A. He had a chain on it.
Q. On June 1st, it had a chain?

Janie Kennedy.

A. Yes.

Q. Was it one wrap, or more?

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A. I didn't notice.

Q. You didn't notice?

A. No.

Q. But it did have a chain on it?

A. Yes.

Q. And you went with your husband to Church?

A. Yes, he taken me to Church.

Q. What Church?

A. Methodist Church, at Crimora.

Q. M. E. Church, at Crimora?

A. Yes.

Q. Have you been present, at any time, when Mr. Kennedy talked to either Mr. Craig or Mrs. Craig?

A. No, sir.

Q. Have you had any experience in bombings, down your way?

A. July 21st, we did.

Q. What was that?

A. A big explosion, about 9:00 o'clock.

Q. Where did it take place?

A. Right in our front yard, on the highway.

Q. Did you find out any reason for it?

A. No, sir.

Q. Well, what did it come from, do you know?

A. (Demonstrating) It was about this high and this big 'round and had a wooden block on it: it was a flash bomb, flash aero bomb.

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Q. Aerial bomb?

A. Yes.

Q. Was that set near your house?

A. I imagine, about 100 feet.

Mr. Lotz: I object, unless it is related to any evidence about any firecrackers or any type of explosion, and unless the witness is prepared to show that the defendants are in any way responsible for it.

Q. Did you have any children around your home?

A. No, sir.

Q. And this happened after the episode about the gate?

A. Yes.

Q. How many explosions did you have, did you experience?

Janie Kennedy.

A. Just the one night there was one in front of the house and one on the east side.
Q. Two?
A. Yes.
Q. And did you come out?
A. I did not.
Q. Did you come out of your home?
A. No, I did not. I went on the porch.
Dep. 8/15/58 page 103 } Q. You were outside?
A. Yes, on the kitchen porch.
Q. Did you see any evidence of lights in the Heavens, any place?
A. Yes.
Q. Did you look down at the Craig Place?
A. Yes, I looked down that way.
Q. What did you see down there?
A. Saw a light flashing around.
Q. Had a flashlight flashing around your place?
A. I don't know what it was.
Q. How many children do the Craigs have?
A. I think four. I don't know very much about them.
Q. Did you, or did you not examine the gate, as your husband took you to Church did you stop?
A. No, I didn't examine it; I didn't see anything.
Q. What kind of a gate was it?
A. It was a big iron gate.
Q. Wire interior?
A. Yes.
Q. Woven wire?
A. Yes.

Dep. 8/15/58 page 104 } Mr. Branaman: All right.

CROSS EXAMINATION.

By Mr. Lotz:
Q. Mrs. Kennedy, you recall talking about this trouble between your husband and Craigs?
A. Well, was something said one day about it and she said she was sorry it ever happened, and I said I was, too.
Q. Do you recall telling her your husband told you he didn't hit the gate?
A. No, I didn't tell.
Q. No use for you to testify, you didn't know anything about it?

Janie Kennedy.

A. I don't know whether I did or not. I don't remember telling her.

Q. Do you recall any time recently somebody shooting down near the Mill?

A. I don't know anything about any shooting.

Q. You didn't hear any shots, any time, at night?

A. No.

Q. Did you ever admit anybody in your house late at night?

A. No.

Dep. 8/15/58 page 105 }

Q. Was your husband ever down to the Mill, as far as you know?

A. Not that I know of; he is always at home.

Q. You say, this particular day that you were going to Church, you saw some marks in the road, you understood were marks made by your husband's truck, and you saw a chain but didn't look at it closely?

A. No, I did not.

Q. Have you ever seen the gate fastened by anything other than a chain?

A. Yes, I seen one of the latches on it for awhile, and the latch disappeared and it was tied with wire.

Q. Do you know where the latch disappeared to?

A. No, I do not.

Q. That is commonly found on gates, to make them easy to open?

A. That is right.

Q. How long was that on, Mrs. Kennedy?

A. I just don't know.

Q. Several weeks, or more?

A. Probably. I just don't know.

Q. Since that, the gate has been fastened with wire, wrapped around the post and wrapped—?

A. (Interrupting) Yes.

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Mr. Lotz: That is all.

RE-DIRECT EXAMINATION.

By Mr. Branaman:

Q. I believe your husband has lost his left hand above the wrist, one hand, is that right?

A. Yes.

Q. And it is much easier for him to open the gate with the latch on, than untie the wire?

A. Yes.

Lois Kennedy.

Q. Did you have the shell of this bomb that exploded on your place?
A. Yes.
Q. Where is it?
A. At home.
Q. And it was an aerial bomb?
A. Yes.
Q. How far did it sit out in the road?
A. About a hundred feet.
Q. The road that leads out to 612?
A. That is right.

Mr. Branaman: That is all.
Mr. Lotz: You mean, the public road, or in your lane?

A. It was in the lane leading from the highway to the house.

By Mr. Branaman: (Continuing)
Dep. 8/15/58 page 107 } Q. You say, a hundred feet out in front of the house?
A. I guess so. I never measured it.
Q. I suppose that is a hundred feet from the house out to the road, public road?
A. I guess so.

Mr. Branaman: That is all. Stand aside.

(Witness excused).

LOIS KENNEDY,
called as a witness on behalf of the plaintiff herein, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Branaman:
Q. Please state your name?
A. Lois Kennedy.
Q. How old are you?
A. I am 23.
Q. Do you live with your father, John Bowman Kennedy, and your mother on the Yount Place?
A. Yes, sir.
Q. Where do you work?

Lois Kennedy.

A. At the Advance Store.

Q. Where is that?

Dep. 8/15/58 page 108

A. That is in Waynesboro.

Q. On Main Street?

A. Yes, sir.

Q. Do you pass by the gate at the Mill, on your way to Waynesboro?

A. I usually do.

Q. When you come to Waynesboro, you go by way of Crimora, sometimes?

A. I mostly do, yes.

Q. And that takes you by the gate?

A. Yes.

Q. State whether or not, after the difficulty your father has had with Mr. Craig, the gate was wired or chained?

A. Well, it was chained, first, and it is wired, now.

Q. Was there ever a latch on the gate?

A. Yes, sir, there was.

Q. And after that was taken off, it was wired?

A. Chain—wire, yes.

Q. And it is closed, today?

A. I didn't come that way this morning, I had business up the other way; I came the other way, this morning.

Q. Were you at the scene when your father skidded his truck and struck the gate?

Dep. 8/15/58 page 109

A. I was gone that morning, but you could see the marks on the road, when I came back.

Q. Did those marks lead into the gate?

A. Yes.

Q. You weren't present when Mr. Craig contacted your father?

A. No, sir.

Q. There is a photograph here, which shows your father in his tractor, I believe it was passing in front of the Mill on the way to the bottom land. Do you recall that?

A. Yes, sir.

Q. Where was the Craig car parked?

A. Well now, there was one old car down at the Mill and, of course, some is up at the house.

Q. How close was it to the roadway?

A. You mean, 612?

Q. Was it in the roadway?

A. Wasn't exactly in the road.

Q. Was it difficult to get by?

A. At times, yes.

Lois Kennedy.

Q. Took part of the roadway, to squeeze by?
A. Yes, so to speak, with large machines, yes.
Q. Was anybody around the Mill?
A. I didn't see anybody around it.

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Q. What about the doorway to the Mill, recently?
A. It was usually open, now and then you see it closed.
Q. Since this episode took place, with your father, it was closed?
A. Yes.
Q. Stood open before that?
A. Yes.
Q. Practically all the time?
A. Yes, sir.
Q. Do you know when your father struck the gate? Do you recall the day?
A. It was about the first of June.
Q. Did you look at the gate, after that?
A. I looked at it a couple times; I didn't see anything wrong with it.
Q. Did you look at it, that day?
A. No, sir, not that day.
Q. Was it bent or damaged?
A. I haven't looked at it, everyday; I haven't seen any damage to it.

Mr. Branaman: That is all.

CROSS EXAMINATION.

By Mr. Lotz:

Dep. 8/15/58 page 111

Q. Do you know if hay is stored in the Mill, different times?
A. I don't know.
Q. How often have you been back in there?
A. I haven't counted.
Q. You have no information about hay stored in the Mill since the Craigs had the land?
A. I don't know. I haven't been in the Mill.
Q. This car wasn't parked on the road, you drive back and forth in the lane?
A. It was somewhat in our way; we couldn't get the machinery through there.

Lois Kennedy.

Q. Were you at home on the morning your father claimed he accidentally hit the gate, didn't know it was there?
A. I left early that morning.
Q. Did you leave before your father did?
A. Yes.
Q. Do you know why he would go back in there?
A. Lots of times he goes down to check the cows and lots of time to see about the crops.
Q. Do you know what happened that day?
A. No, sir.
Q. Did you ever see this catch on the gate?
A. I have seen a latch, and chain, and wire.
Q. Do you know what happened to the latch?
A. No, sir.

Mr. Lotz: That is all.

Dep.
8/15/58
page 112 } RE-DIRECT EXAMINATION.

By Mr. Branaman:
Q. Were you at home when the bombs exploded?

Mr. Lotz: I object, for the same reason.

A. Yes.
Q. Were you at home, as well as Mrs. Kennedy and your father?
A. Yes.
Q. What time did it take place?
A. About 9:00 o'clock.
Q. How many explosions?
A. Well, it was a real big one, on one side of the house, and the other one on the other side of the house.
—Down in the field, wasn't as close.
Q. Did you come out of the house?
A. I did not.
Q. Did your father come out?
A. Yes.
Q. And your mother?
A. Yes, sir. She came out on the porch.
Q. Were there three explosions?
A. Yes.

W. A. Crawford.

Q. Did you ever have that experience before, since you have been living there?
A. No, sir.

Dep.
8/15/58
page 113 } Mr. Branaman: That is all.

RE-CROSS EXAMINATION.

By Mr. Lotz:
Q. Who lives in the house there? Your father and mother —anyone else?
A. No one.
Q. Just the three of you?
A. Yes, sir.

Mr. Lotz: That is all.

(Witness excused).

W. A. CRAWFORD,
called as a witness on behalf of the plaintiff here, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Branaman:
Q. Please state your name, and if you are not too modest, give us your age?
A. W. A. Crawford. 52.
Q. What is your occupation?
A. Surveyor.
Q. How long have you been surveying?
A. Since 1935.
Dep. Q. At one time you were County Surveyor?
8/15/58 A. Yes.
page 114 } Q. Are you still County Surveyor?
A. Well, I was appointed County Surveyor in 1943; and there has been no one else appointed since then.
Q. So you assume you are still in office?
A. Yes.
Q. Do you ever recall surveying this Mill property? Crimora Mill property.
A. Yes.

W. A. Crawford.

Q. And if so, when? Crimora Mill property.
A. The map is dated "May 20, 1944."
Q. Where did you get your data to make the survey?
A. Well, from various sources.
Q. Mr. Crawford, I hand you a deed of J. Lee Koiner and wife, to Wallace de Rundean, dated July 2, 1900, of record in the County Clerk's Office, in Deed Book No. 132, Page 298, and tell the Court if you obtained your metes and bounds from that deed for the survey?
A. Yes. I used that deed as the basis of part of the survey.
Q. What is the Tract No. 1, in the Survey, in the Deed?
A. (Referring to document) Tract No. 1 is a 5-acre tract on which the Mill is located.

Dep. 8/15/58 page 115

Q. Where is the remainder of the land conveyed located?
A. Along the Mill Race that runs from the Mill to the dam and South River.
Q. And between the road, river and the dam?
A. Yes.
Q. When was the survey of the Mill tract made, according to that deed?
A. Made 1810.
Q. Did you look at that survey?
A. Yes.
Q. Of 1810?
A. Yes.
Q. What deed book is it in?
A. I didn't go back to the original deed. What I copied from was Deed Book 132, Page 298.
Q. And that is the deed you have before you?
A. Yes.
Q. And you never made any examination for the survey made in 1810?
A. No.
Q. So you don't know what deed book it is in?
A. No.

Dep. 8/15/58 page 116

Q. The 5-acre tract, as I understand you, is the Mill property?
A. That is right.
Q. And does that adjoin the Kennedy-Yount farm?
A. Yes.
Q. And do you know whether the Deed of April 12, 1876,

from William Patterson to Henry Koiner, Deed Book 90, Page 543, has courses and distances in common with the Bowman Kennedy tract? (Handing document to the witness)

A. Yes, this Deed has practically the same courses and distances that are found in the Deed for the 5-acre Mill tract.

Q. I hand you a Deed of March 16th, 1874, from Henry Koiner and Samuel Coiner, Executors of John Koiner, deceased, to William Patterson, of record in the Augusta County Clerk's Office, Deed Book 90, Page 541, conveying 104 acres and 32 poles. Are the courses and distances in this Deed, along the Bowman Kennedy tract, the same?

A. There are slight differences between the descriptions in these two Deeds, but essentially, they go to the same points on the ground.

Q. That is, the tract of 104 acres mentioned in those Deeds included the 5-acre Mill tract, is that right?

A. (No reply).

Q. That is right, isn't it?

Dep. 8/15/58 page 117 } A. No. Those Deeds leave out the Mill tract, 5-acre Mill tract.

Q. Let's get this straight. Which Deeds do you speak of?

A. Maybe we had better correct that.

Q. Does the Deed from Henry Koiner and Samuel Coiner, Executors of John Koiner, to William Patterson, include the Mill tract?

A. It does.

Q. All right. That is all. (Continuing) Have you visited the land recently, the Kennedy Farm?

A. Yes.

Q. And did you, or did you not observe the bluff?

A. Yes, I did.

Q. Was it the practice to go up and down the bluff to farm the 35 acres bottom land?

A. No.

Q. With machinery?

A. It is so steep that you couldn't go up there, take any machinery up and down there, in its present shape.

Q. You have referred to the Deed from *Henry* Koiner's Executors to William Patterson. I hand you a Will, Exhibit

E, dated the 23rd day of January, "One thousand eight hundred and Fifty two, "of record in the Augusta County Clerk's Office, Will Book 31, Page 437; and in this Will, Henry Koiner is appointed, along with a Nephew of the testator, Samuel Junior, as Executors; and in this Will there is mention made of "my merchant and Saw Mills."

Dep. 8/15/58 page 118

Could you tell us whether or not the Deed from his Executors to William Patterson carried title to the Crimora Mill property? He mentioned just "the Mills. Also the land as bought from Yount adjoining the Mill tract, as well as the tract of Timber Land * * *"?

A. I don't believe I can answer it.

Q. Will you file it as an Exhibit? But it is already in. (Continuing) Did I ask you whether you found the lines, between the Mill property and the Bowman Kennedy Place, in conflict?

A. No, there was no conflict there.

Q. When you surveyed the property was there a lane from secondary road 612 to the Bowman Kennedy bottom land?

A. Yes.

Q. And is it well defined?

A. Yes.

Q. Any obstruction in the road, from the bottom land out to the highway?

A. No, there is no obstruction in the road.

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Q. Is the bluff steep, or not?

A. It is quite steep, in places.

Q. Does it drop off perpendicular, at points?

A. Yes, it is almost a perpendicular drop.

Q. And impractical to move machinery back and forth, to farm the bottom land?

A. Without spending a big sum of money to put a road in there.

Q. Is it rock formation?

A. Yes.

Q. Limestone rock?

A. Limestone ledges.

Q. Have you seen the photographs put in evidence?

A. Yes.

Q. Do they fairly depict it?

A. Yes, I think they do.

Q. And do you say it shows it as steep, as it actually is?

James O. Willberger.

A. No, I don't believe so, because a photograph hardly ever shows the steepness of a slope.

Mr. Branaman: That is all.
Mr. Lotz: No questions.

(Witness excused).

W. A. CRAWFORD,
resumes the stand.

Dep. 8/15/58 page 120 } By Mr. Banaman: (Continuing)
Q. Have you examined or seen the plat we introduced in evidence in this case, showing the 95 acres? Did you see this plat?
A. Yes.
Q. Does that contain practically all of the Bowman Kennedy land, except the 3 acres from K. B. Koiner?
A. Yes.
Q. Does the roadway, shown on that plat, come out on the New Hope-Crimora Road?
A. I don't believe that I examined it, with that in mind.
Q. Is it so marked, in this plat?
A. Yes, comes to a stake in the Mill road.

Mr. Branaman: That is all.

CROSS EXAMINATION.

By Mr. Lotz: Do you know whether that refers to a 'public road,' the words 'Mill Road,' what road that refers to?

A. That is the road now used as a 'public road.'
Mr. Lotz: That is all.

(Witness excused).

JAMES O. WILLBERGER,
called as a witness on behalf of the plaintiff herein, being first duly sworn, testified as follows:

Dep. 8/15/58 page 121 } DIRECT EXAMINATION.

John Bowman Kennedy.

By Mr. Branaman:

* * * * *

Dep. 8/15/58 page 122 }

Q. When did you first see that it was fenced?
A. This spring.
Q. What time?
A. I don't know. I would say—I can't tell you when that fence was put up, gate was put up there—but pretty close to June.
Q. Was a gate erected?
A. Yes.
Q. Where was it?
A. Down where the road goes through, by the Mill.
Q. And the road that goes through by the Mill, is the road on the way to the bottom land of Mr. Kennedy's farm, is that right?
A. Yes.
Q. Please state whether or not it was blocked, closed, or what was the situation?
A. Double chain around, one Sunday morning we went to Crimora Church.
Q. And you know there was a double chain on it?
A. Yes, one Sunday morning it was on there.
Q. Did you notice it, when you returned?
A. Yes.
Q. Chain still on it?
A. Yes.

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Q. After that, did you go by the gate?
A. I was by there.
Q. Do you recall noticing it?
A. I don't recall seeing the chain but once.
Q. Did you notice anything else?
A. Gate been shut some, wired some, been open some.

* * * * *

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* * * * *

JOHN BOWMAN KENNEDY,

recalled.

John Bowman Kennedy.

DIRECT EXAMINATION.

By Mr. Branaman:

Q. Mr. Kennedy, I hand you a Photograph, Exhibit No. 5, and I will ask you to point out to Mr. Lotz, and to me, if you can, the approximate location of the tenant house that was mentioned here in evidence by Mr. Kromer? Will you do that?

A. Yes, sir. It is growed up here now: in this clump of bushes, right around there. (Indicating on Photograph) If you look close, you can still see the old posts the building was built on, high posts: it was right in this clump of bushes.

Mr. Lotz: Will you mark it?

Mr. Branaman: I am making a mark of "X" about where the old house was.

Dep.
8/15/58
page 125 } A. (Indicating on Photograph) Be right in here.

Q. It was really in the center of those bushes?

A. That is right.

Q. There is a penmark made there, you can see by looking?

A. Yes, and the Race runs along the foot of the bluff.

Q. Between the trees on the east side and west side?

A. Yes.

Q. That is the Tail Race?

A. That is right.

Q. Did anybody live there, while you were on the property, a tenant?

A. Yes.

Q. Who lived there?

A. Charlie Forbes.

Q. How long did he live there?

A. I don't know, two or three years.

Q. How did he get out?

A. Up through here, along the edge of the Race, opposite of the Race, of our lane, and came out on the other road. (Indicating on Exhibit)

Dep. Q. Where did he hit your lane?
8/15/58 A. Right where you go into the edge of the
page 126 } Race.

Q. The Tail Race?

John Bowman Kennedy.

A. Yes.

Q. Followed by the corner of the Mill, on out into the road?

A. Yes.

Q. What went with the tenant house?

A. In 1941, it got so you couldn't live in it, and Mr. Yount gave me permission to tear it down, the building and a brood house; so I tore it down and built a brood house up on his farm.

Q. Do you know anything about where the houses were located on the Mill property?

A. Yes.

Q. I hand you Exhibit 10 and, if you will make a mark where the house Mr. Shaver was talking about, was, it will be helpful?

A. Well, now—

Q. (Interrupting) You are referring to Exhibits 9 and 10?

A. Yes. That house was up in here. (Indicating on Exhibit)

Q. Will you mark on that?

A. It laid right up from the Mill, on that band: its foundation is there, yet; if I am not mistaken, that is the foundation, right there. (Indicating on Exhibit)

Dep.
8/15/58
page 127 } Mr. Lotz: That is, on Exhibit 9?
Mr. Branaman: That is right.

Q. Where was the other tenant house?

A. The other tenant house was up above where Mr. Craig has a garden, in that lot right in the corner of 612 and my line fence. (Indicating on Exhibit)

Q. That is to the southwest of the dwelling house that Mr. Craig lives in, up at the corner?

A. Right up in the corner.

Q. Where the lines begin?

A. That is right. That is true.

Q. Is there anything else you want to say, give us light on, Mr. Kennedy?

A. I don't know of anything else.

Mr. Branaman: That is all.

Stephen J. Craig.

Mr. Lotz: No further questions.

(Witness excused).

* * * * *

STEPHEN J. CRAIG,
a witness of lawful age, being first duly sworn, deposes and says as follows:

DIRECT EXAMINATION.

By Mr. Lotz:
Q. What is your full name?
A. Stephen Jack Craig.
Q. What is your age?
A. Forty-four.
Q. Where do you live?
Dep. A. Crimora.
11/10/58 Q. How long have you lived there?
page 2 } A. Well, I was there a year the first of August this year.
Q. How much land do you own in the place where you live?
A. Twenty acres.
Q. From whom did you purchase that land?
A. I bought it through Clem and Company, from Mrs. Benson—Mrs. Emma Benson.
Q. You bought it from her?
A. Yes.
Q. Do you recall what you paid for it?
A. Ninety-five hundred dollars ($9,500.00).
Q. Will you state for the record what buildings are on the property that you own, aside from your house?
A. Well, there is a barn there—it's no good—have to destroy it, the barn; there is a little house behind the barn, it was a building at one time, I use it more or less to keep feed and stuff like that in. And I use the Mill.
Q. Is that the property referred to as Crimora Mill?
A. Yes, sir.
Q. What is the road that runs in front of your property?
A. Route 612.
Q. Do you know what direction the road runs?

Stephen J. Craig.

A. It runs east and west.
Q. East and west, generally, by your place?
A. Yes.
Q. What side of the road is your property located on?
A. On the north side.
Q. Is the mill to the east or west of your house?
A. East of my house.
Dep. Q. For what purpose do you use the mill?
11/10/58 A. Well, the mill is the only outside building
page 3 } I have I can store stuff in so it won't get wet. It has a roof on it so I can keep stuff dry. I have lumber in there—valuable lumber in the mill, I have a car I bought in the mill; my boy has probably $2,000.00 worth of car parts in there, he has a lot of valuable parts in there. I also have three tons of hay, lots of stuff I can't use at the house I keep stored in the mill.
Q. How far would you say the mill is located from the public road?
A. I would say fifty (50) feet.
Q. When you first bought this property was there a fence around it?
A. There was in front of the mill.
Q. Subsequent to the time you bought it, did you put one up?
A. I put fence across 75 foot of the front that was open and erected a 15 feet gate.
Q. Where is this gate erected with respect to the mill?
A. It is between the mill and the road.
Q. What kind of a gate did you put up?
A. I put a pipe—1-1/4″ pipe frame with regular gate fence on the frame.
Q. Did you have someone make it for you?
A. I had a fellow makes gates help me make it.
Q. What kind of posts did you put up for the purpose of hanging the gate?
A. Six (6) inch locust posts, four feet in the ground.
Q. What width is there between the two posts?
A. 15 feet 4 inches.
Q. Is that actual measurement?
A. Yes, sir.
Q. How far is that located from the edge of the hard surface of the road?
A. I have a pick-up truck; a 3/4 ton Dodge truck that is

Stephen J. Craig.

8 feet from bumper to bumper. You park it there between the gate and the road and looking at it roughly it has clearance there on each side.

Dep. 11/10/58 page 4 } Q. Then it is at least 18 feet from the hard surface?

A. I would say 18 feet.

Q. Now, when you first erected that gate, was it closed in any manner?

A. No, sir.

Q. When you first put it up did you close it?

A. I left it hanging on the post open for over three weeks before I shut it.

Q. Then when you shut it, do you know about when that was?

A. I had been cutting grass, and I put it in the mill all that week. The boy had all this stuff stored there and tools scattered about, and the hay was wet and I had to leave it open. I had finished putting hay in there and on May 31 was when I shut the gate.

Q. How did you fasten it when you shut it?

A. With the latch I have here in my pocket.

Q. Will you produce the latch?

(Mr. Craig produces latch.)

Q. We would like to offer this as Exhibit "A."

Was the gate ever fastened with a chain or lock of any type?

A. It never has been.

Q. You are sure of that?

A. I am sure.

Q. This catch, is that a clasp that lifts and open the gate?

A. That catch was fixed so that the gate wouldn't open toward the road; it would only open towards the inside.

Q. You lift the latch and open it, and when you shut it it shuts itself?

A. Yes. These screws here—it takes a right smart impact to bend them like both of these were when Mr. Kennedy broke the gate.

Q. When you put the gate up, did Mr. Kennedy say anything to you about it?

A. I started the fence on April 10 from my house toward the mill, tightening up wires, putting in extra posts. Mr.

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Kennedy came by my place late that evening, he come in my yard, he didn't say "good morning, good evening,"
Dep. the first thing he said was "what are you trying to
11/10/58 do to my right-of-way?" I was the 75 feet then,
page 5 } going that direction.

Q. Did you have any other conversation with him that day?

A. No.

Q. He came on your property at the time the fence was 75 feet from the mill?

A. I was 75 feet from the right of way then, going towards him.

Q. Did you have any conversation with him after that time?

A. I told him "Mr. Kennedy, I haven't tried to do anything to your right-of-way yet, but if it is satisfactory with you I would like to go ahead and put in a cattle guard there to the mill. He stood there about a minute and then he said "no, I won't have no cattle guard—I am not going to have nothing there, you can't put nothing there." I said "Mr. Kennedy, to pasture this land and to use the mill as a barn—use it as a storage, to keep people from breaking in, and parking there, I would have to have a gate." He said "you cannot put up nothing." That was April 10th.

Q. When you got the gate up then what happened?

A. When I went down there and planted the posts 15 feet 4 inches apart, he come up the road. Then he come back then there later—it was Sunday morning—he walked down through my field by the old barn—never said nothing to nobody—he went down there and he measured, he stepped off the gate, he went to the mill, he fooled around about half an hour, then he went back up over the hill to the house.

Q. At that time was the gate up or just the posts?

A. Just the posts. A few days later I brought the gate in and laid it down beside the mill and went down to the mill working. He comes down there in his pick-up truck, parks it in front of the mill and blocked me in. He got out of the truck and went down in to his land—he *waslked* down—and left me stranded for about an hour.

Q. Did he leave the keys in the truck?

Dep. A. I don't know, I didn't look. He finally goes
11/10/58 home or somewhere, and May 1st, or somewhere
page 6 } along about that time, I don't know just exactly, he moved a herd of cattle from the land he calls his and instead of bringing them up over his right-of-way, he

Stephen J. Craig.

takes them behind my mill and stomped down a whole wire fence and drives his cattle on—and he never opened his mouth.

Q. Could they have been driven down the river and up the other bank?

A. They could have.

Q. Did he say anything to you?

A. He never said anything to me—he never opened his mouth.

Q. When the gate was put up and left open, did you have any conversation about it?

A. May 14, I got a letter from Forest T. Taylor which you have there somewhere. The gate was hung then, but it wasn't shut. I had a letter from Forest T. Taylor saying that I had erected a gate on the right-of-way of Mr. Bowman Kennedy. He advised me to come and talk with him.

Q. Did he indicate he was representing Mr. Kennedy?

A. Yes, sir. I went and talked with him personally, Mr. Taylor said—

Mr. Branaman: Don't testify what Forest T. Taylor said that's hearsay.

Mr. Lotz:

Q. Let me ask you this, Mr. Craig. Did Mr. Taylor indicate to you when you spoke with him that he was representing Mr. Kennedy, or whether he was writing to you as Commonwealth's Attorney.

A. He had a letter there, and he said Mr. Kennedy had a right-of-way. I think he said the best thing for you and Mr. Kennedy to do is get together and put in a cattle guard there.

Q. Did he say he was representing Mr. Kennedy?

A. He didn't say.

Q. That was the letter, I believe, dated May 14. Pursuant to that letter you did go see him?

A. Yes.

Dep. 11/10/58 page 7 } Q. At that time was the gate hung?

A. Yes, but not closed.

Q. What developed then?

A. I waited, like I said. I said I am going to write him a letter, and explain to his wife. I waited until May 29th. He came by down there on the tractor, and I asked him if you have ever decided anything about the right-of-way. He said "I done told you what you can do."

Stephen J. Craig.

Q. Was he referring to what he told you before?
A. Yes.
Q. Then what did you do?
A. Like I say, May 31, Saturday evening when I finished work I shut the gate, to keep the mill open because I thought I'd maybe keep it from burning up.
Q. Did you put the clasp on it then?
A. I put it on then .
Q. Was anyone there?
A. Mr. Hinkel was there.
Q. Then it was shut with the latch then?
A. It was.
Q. What happened next?
A. Well, June 1st, which was Sunday morning, we was all out in the yard, looking at the flowers, etc. Mr. Kennedy came down the road—it was a bright, sunshiny morning—he come down and then he went in about a foot and stopped; then he went up and scraped his wheels in the gravel, pushing against the gate—
Q. What was he driving?
A. His Ford pickup. He backed off, come back again, scraped his wheels in the gravel again, he backed off again, about 6 or 8 inches, he got out, walked up and around it, crawled through the fence, went over to the roadside, picked up a piece of lumber, walked out, struck the middle of the gate and got up and jumped up and down on it. Then he goes in the mill, takes out a piece of iron rod 3″ by 6 foot long—

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Q. When he went in the mill, what did you do?
A. I said "let's go down and see what he is doing." We went down. I asked him "what are you trying to do? If you want to come in, why don't you .....? Just because it's shut doesn't mean we are trying to keep you out, but if you damage it or anything I am going in and get a warrant for you."
Q. Did he answer you?
A. He didn't open his mouth.
Q. Did he go in?
A. No.
Q. How far is it from your house down to this gate, would you estimate?
A. From my house to that gate I would say 150 feet.
Q. Is there anything to obstruct your view as you drive down the road?

Stephen J. Craig.

A. From the top of the hill to the gate is 100 yards, 300 feet. I could see the gate from the time he hit the top of the hill.

Q. Is it a clear view?

A. It's a clear view.

Q. Mr. Craig, you mentioned having parked the pickup truck between the gate and the road. Do you have a photograph showing that?

A. Yes, I have that there. (Introducing photograph, Exhibit "B").

Q. Whose truck is that?

A. That's my truck.

Q. Is that the one you referred to?

A. Yes, sir.

Q. That's the one 18 feet long?

A. 18 feet from bumper to bumper.

Q. Mr. Craig, the other end of this road runs between the mill and goes into the Kennedy property. Will you state whether or not when you put this gate up any cattle were back there?

A. He had a gate going into his field—

Dep. 11/10/58 page 9 } Q. Was that so fastened that it would .....

A. .....

Q. Did he have livestock back in there?

A. Well, he has two fields back in there, and he wouldn't have had to open and shut it unless he wanted to, I would say.

Q. (Introducing another snapshot—as Exhibit C) Is this the same truck?

A. Yes.

Q. Is the building shown on the right—is that your house?

A. That's my house.

Q. That shows the road, Route 612?

A. Yes, sir.

Q. Now, how wide is the gate that Mr. Kennedy has up at the back of your property and his?

A. That gate measures 10 feet 11 inches.

Q. Is this a picture of the Kennedy gate?

A. Yes, sir.

Q. I would like to tender that as Exhibit D.

Q. Do I understand you to testify that when you asked Mr. Kennedy what he was trying to do when he jumped on the gate, he didn't answer you?

Stephen J. Craig.

A. No, sir.

Q. Was the gate then kept shut with this clasp on it?

A. It was kept shut from June 11th, that Sunday morning, he never used that gate any more until June 19th. June 19th he started using it again, started going through there. He broke the latch on the gate June 26th.

Q. Were you at home when the latch was broken?

A. No, sir.

Q. When did you first learn anything had heppened to the latch?

A. I was working at Crimora. I came home to dinner and it was hanging half way open.

Q. Did you go look at it?

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A. I didn't even get out. I saw it hanging there and I went on to the house and my wife told me—

Q. You saw it open?

A. Yes, and I saw him using that latch from the 19th until the 26th.

Q. And the 26th you saw it hanging open?

A. Yes, sir.

Q. Did you check it then and saw that it was broken?

A. Yes, I saw it was broken.

Q. But you were not present when it happened?

A. No, sir.

Q. After this latch was broken, how has it been fastened?

A. Since that latch has been broke, I was advised by Mr. John Kent to put a wire on it.

Q. A wire that wraps around the gate and post?

A. Yes, sir. And that latch stayed on the post from June 26 until June 28 waiting on the man to investigate before it was took off. It was taken on June 28th.

Q. Have you talked to Mr. Kent since this was broken?

A. No, sir.

Q. Is there a fence between what we know as the mill property, where the gate is, and the rest of your property?

A. There had been, but the wire was laying on the ground when I went there.

Q. Is that still up?

A. It's down.

Q. Your tract is the one tract without any fence?

A. With a gate there at that mill I can pasture that whole entire thing, but without a cattle guard or a gate I have to divide my place up into three parts.

Stephen J. Craig.

Q. Have you had any difficulty with people trespassing?
A. I had before I put the gate there.
Q. Tell the Court whether you find beer cans in there, and such?
A. I find beer cans, yes, and I went down last fall twice at midnight and put out fires.
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Q. And you have trouble with people coming in there and parking?
A. Yes, with people parking there. I also had John Kent down there.
Q. The gate is more satisfactory for your purpose than a cattle guard, as far as keeping people out of there, is it not?
A. As far as keeping people out, the gate answers best.
Q. Mr. Craig, is this a frame building?
A. Yes, sir. I am paying taxes on the building and I have got insurance on the building.
Q. Was there any right-of-way reserved in your deed from Mrs. Benson to any adjoining property, including Mr. Kennedy's, do you know?
A. No, sir.
Q. I wish to state for the record that the Clerk has prepared a number of deeds showing the chain of title to the Craig land the Craig mill property, but they have not been certified, but we reserve the right to introduce them for the record.

CROSS EXAMINATION.

Mr. Branaman:
Q. Mr. Craig, you bought the property you live on, which included the Crimora mill, by deed of August, 1957?
A. Yes, sir.
Q. From Mrs. Benson?
A. Yes, sir.
Q. You knew that there was a right-of-way in there, didn't you?
A. No, I did not.
Q. Did you tell Mr. Bowman Kennedy you knew there was a right-of-way there?
A. No. All I knew was what he had told me.
Q. You could see there was a road leading from your mill down to his bottom land, for about 300 feet?

Stephen J. Craig.

A. I saw the road, yes.

Q. You saw that there was an entrance to his bottom land there?

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A. I could tell where it was going to.

Q. Didn't you see it went immediately to his gate?

A. No.

Q. You looked the property over before you bought it, didn't you?

A. I looked it over, but not for roads.

Q. You saw the road in front of the mill?

A. Well, sure, from everybody going in.

Q. Then you looked in back of the mill, didn't you?

A. Sure.

Q. You saw it go across to the bottom land of Mr. Kennedy, didn't you?

A. No.

Q. Can you see very well, Mr. Craig?

A. I think my sight is very good.

Q. Why didn't you see it, then?

A. I wasn't supposed to, they didn't say there was a right of way there.

Q. You tell the Court you didn't see the road leading from the mill to the bottom land of Mr. Kennedy?

A. I seen the road, but I couldn't say whose land it went to.

Q. Did you see his gate? Didn't it lead immediately to his gate?

A. There were two roads there.

Q. Did it lead immediately to the gate?

A. One did.

Q. Where did the other go?

A. The other come up in the bottom—back of the mill.

Q. Which is back of the mill?

A. It would be on the east side of the mill.

Q. That land belongs to who?

A. Me.

Q. Do you own all the bottom land between Mr. Kennedy and the road that leads across the bridge to Crimora?

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A. No.

Q. I understood you to say there's a road back there?

A. Yes.

Q. Isn't that property fenced in?

Stephen J. Craig.

A. It belongs to Mr. Weaver. There's a fence between Weaver and me and this road goes through there and a gate—the same kind as the one behind the mill now.

Q. Is it open?

A. That's where he drove the cattle through the first of May.

Q. I don't get the location.

A. There are two bridges there, two culverts before you get to the mill; one is a race culvert and one a sewer. Beyond that culvert there had been a road sometime or other there.

Q. That road is not in use and hadn't been in use for a great number of years, had it?

A. There had been one there, yes.

Q. But the road that leads from Route 612 in front of the mill and across the tail race into Kennedy's bottom land is the one we are speaking of?

A. I would say yes.

Q. It has been there for over a hundred years, hasn't it?

A. I don't know, I am only forty-four years old.

Q. You bought the property in August, 1957 and paid $9,000.00 for it?

A. Yes, sir.

Q. How much down did you pay?

A. I paid $1,000.00 down at the time.

Q. Then you owe $8,500.00 on it, less the payments you've made?

A. Not quite that much.

Q. You keep the payments up?

A. Yes.

Q. There was a fenced off grazing part of the 5-acre tract when Mr. Shaver lived on the property, wasn't there?

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A. There was a fence laying on the ground—I don't know what it was used for.

Q. You saw the fence Mr. Shaver used in fencing off the grazing part on the 5 acres?

A. No.

Q. Wasn't that about twenty feet west of the entrance to the mill—the post standing there?

A. There wasn't any post there—there's only one post there.

Q. That's where the fence closed?

A. Yes.

Stephen J. Craig.

Q. Mr. Shaver then grazed the land between your yard fence and that fence that he ran across to the bluff?

A. I wouldn't know.

Q. There was a fence there?

A. It was down, there were maybe three wires, I would say.

Q. The only contention that you have here is that you have a right to erect a gate, as it is now erected, to the entrance to the land going back of your mill to the Bowman Kennedy land, is that right?

A. I think I do.

Q. You have a right to erect a gate?

A. I feel since he refused the cattle guard, I do.

Q. That is all you claim? The right to bar the entrance to his land?

A. I wouldn't say that.

Q. But the gate is the main issue in the case?

A. It is helping the building and the material in the building.

Q. The issue here is the question of whether you can maintain the gate closed at the entrance of 612?

A. I am going to pasture that land.

Q. Is there any pasture in front of the mill?

A. Plenty of it.

Q. If Mr. Shaver at the time he owned the 5-acre tract fenced down to the post in front of the mill, down across to the bluff, he had practically all of the property enclosed didn't he, except the right of way?

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A. I don't know what Mr. Shaver had in mind, but I don't think there is any law says I have to buy that place and do like Mr. Shaver did.

Q. I asked you whether there was any pasture in front of the mill, along the roadway leading from the gate at 612 around to the Kennedy tract?

A. Sure, there is.

Q. I hand you Exhibit 10 with the plaintiff's evidence and ask you whether that is a fair picture of the mill property?

A. Yes, sir.

Q. Do you see the post we speak of, erected by Mr. Shaver? Is that where he ran the fence across?

A. That's where it was then—I don't know who put it there.

Q. There was a fence there?

A. There was—laying on the ground.

Stephen J. Craig.

Q. That continued across to the bluff around to your land?
A. Yes.
Q. That's a fair picture of the mill property and premises?
A. I don't see a thing wrong with it.
Q. The roadway we speak of goes from the gate in the picture, on No. 612, around back and down through the tail race to the Kennedy land?
A. Yes.
Q. So now, as I understand it, the only question in this case is whether or not you can erect and maintain a gate there closed?

Mr. Lotz: The issue is whether or not there is a valid right of way. It is still the issue in the case.
Mr. Branaman: Since you say that you do not admit that Mr. Kennedy has a right of way that has been enjoyed by this property for well over a hundred years, isn't that an issue in this case, also?

A. I told him he had a right of way as long as he kept the gate shut.

Dep.
11/10/58
page 16 } Mr. Branaman:
Q. I misunderstood counsel then. You are not contending that Mr. Kennedy does not have a right of way?
A. No, I never have.
Q. The only issue is whether you can erect a gate there?
A. I feel I can.
Q. That's the real issue?
A. It should be.
Q. That's the only issue in the case, whether you can erect a gate there, maintain it there on the right of way at 612?
A. Sure, I guess so.
Q. It's the only issue?
A. The land belongs to me. The mill wasn't put there until somebody built it. Same way with the gate—there never was one there until I put it there.
Q. Until you put it there?
A. That's right.
Q. In over 200 years?
A. I don't know— a thousand years maybe.

Stephen J. Craig.

Q. Now, you swore out a warrant for Mr. Kennedy here for breaking the gate, didn't you?
A. For breaking the latch on the gate.
Q. Where did you get the warrant?
A. Here in Staunton.
Q. Where?
A. At Sheriff Kent's office.
Q. Did you go over there and get it out yourself?
A. Yes, sir.
Q. Who got it for you?
Dep. A. Mr. Hickman.
11/10/58 Q. Were you there before Mr. Hickman when
page 17 } the warrant was got out in his office?
A. Yes.
Q. What did you tell him?
A. I just told him Mr. Bowman Kennedy had broke the latch on the gate that went to his property and he left without making himself known.
Q. Did you swear to that?
A. I don't remember if I did or not.
Q. Didn't you tell him that he had broken the gate?
A. I told him the latch on the gate.
Q. When that warrant was returnable here and they came to try it, you weren't present?
A. That wasn't my fault.
Q. Then it was set and we came again and it was adjourned over to a definite date?
A. I think so.
Q. You filed papers in that case saying the gate had been broken?
A. I said the latch. I don't think my wife would have lied.
Q. Did you know it was set up in your Bill as breaking the gate?
A. That was Mr. Lotz's part of the matter.
Q. Did you then amend your Bill of Particulars and say that he broke the lock?
A. He was damaging and injuring personal property.
Q. I hand you the bill,—don't that say he broke the lock on the gate? You told your attorney that he broke the lock on the gate, didn't you? Will you look at this and see if that is the style of your case? Doesn't it say "lock"?
A. I don't know what it says.
Q. Can you read?

Stephen J. Craig.

A. I can read, but you can lay a paper down there and be anything on it.

Q. I introduce in the evidence the amended bill of particulars, dated the 22nd day of August, 1958, in which you charge Mr. Bowman Kennedy with breaking the lock on the gate, is that right?

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A. There wasn't nothing else holding it but that, so that would have to be the lock, wouldn't it?

Q. You never appeared when the warrant came up for trial before Judge Elder, did you?

A. I didn't get any notice,—I mean Mr. Lotz, he didn't notify me. I am working out of town.

Q. Now, as I understand it, it was about the first of June that you came down from your home to the mill, about less than 100 *hards,* and approached Mr. Kennedy here about going through the gate?

A. I certainly did.

Q. What day was it?

A. The first day of June.

Q. Did you curse and abuse him?

A. I never said one thing to him.

Q. Didn't you cuss him?

A. No, sir.

Q. Did you have a stick in your hand?

A. The only stick I saw was the one he was prying on the gate with. His bumper looked 6 inches away,—I don't see where he was trying to get his bumper loose.

Q. After that episode, were you served with an injunction order to not interfere with Mr. Kennedy in going to and from his land?

A. He had it issued against me June 5th.

Q. That prevented you from interfering with Mr. Kennedy or his wife?

A. I never had bothered the man.

Q. Didn't it enjoin you from getting out a warrant having him arrested?

A. I hadn't done anything,—I was trying to get along.

Q. After that, I mean?

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A. After he broke the latch, yes.

Q. Did you have him arrested then?

A. Evidently they served it on him.

Q. Where were you?

A. I came here to Staunton.

Q. Then where did you go?

A. Back home.

Stephen J. Craig.

Q. Where are you working?
A. I am working.
Q. Where were you working then?
A. At that time I was helping Mr. Ed Hammer at Crimora.
Q. Which way does the gate open, Mr. Craig? Inside or outside?
A. That's what this latch was put on there for—
Q. I didn't ask you that. Which way does it open?
A. It opens inside.
Q. That is, around toward the mill?
A. Around toward the mill.
Q. It does not open out towards the road?
A. It could now, since he broke the latch.
Q. Did you ever have any wire on the gate?
A. I put wire on it after John Kent advised me to.
Q. Were you at home when it was broken?
A. No, sir.
Q. Where were you?
A. Over at Mr. Hammer's.
Q. It was broken on the inside or outside?
A. It was broken on the inside—the one that holds it from going outside.
Q. Was one broken off?
A. The latch that holds it was special made, so that you couldn't open it to go to the road—it had to stay put. It was broken on the side the impact was on.

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Q. Mr. Craig, this type of latch, when you swing the gate back against it, if it is hard, they often fly open, don't they?
A. That's the reason that latch was fixed like that,—so that it wouldn't go all the way through. That was welded so that it would not let this latch open and the gate to go clear through on to the road.
Q. About what time was the latch broken during the day?
A. —
Q. You don't know then?
A. I know what my wife told me.
Q. You weren't there?
A. I was not there.
Q. Has Mr. Kennedy been using the right of way recently?
A. Well, I would say he used it twice as much as before we had trouble.
Q. I asked you if he had been using it recently?
A. Yes, sir, he would have to be. The last three or four days he uses it three or four times a day now.

Stephen J. Craig.

Q. Has he cattle in the bottom land he is feeding?
A. There's cattle down there—what he is doing I don't know.
Q. He does go and come very frequently?
A. Recently he does.
Q. He is farming there in the bottom land—?
A. I don't know.
Q. You haven't been there?
A. I was there until this happened.
Q. Did he cultivate the bottom land?
A. He did this year.
Q. Did he last year?
A. I wouldn't know.
Q. Did he the years before?
A. I don't know.
Q. You don't know how much he used it before you bought the mill property?
A. I do not.

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Q. But he has been using it frequently since you have been there?
A. He has been using it and has had the right to open the gate there so that he can. He can go and come as much as he wants to.
Q. Is that your attitude?
A. Mine and my family's.
Q. Has your family interfered with him?
A. No, sir.
Q. What is your son's name, the elder one?
A. Stephen Edward Craig.
Q. Were you at home on Saturday, September 27th, about noon?
A. I was there pretty close to the time that Mr. Kennedy was down there.
Q. I ask you a point blank question: whether you were there from nine until four in the afternoon Saturday, September 27th?
A. I was there between that time—I got back home at 1:00 that day.
Q. Were you at home between 12:00 and 1:00?
A. I couldn't have been if I got there at 1:00.
Q. But you had been away before that time?
A. I had been away.
Q. Was your son there?
A. Yes, sir.
Q. All day?

A. I would say yes.
Q. Was your wife at home?
A. She was there after 1:00 o'clock.
Q. She had been away?
A. Yes, with me.

RE-DIRECT EXAMINATION.

By Mr. Lotz:

Q. I will ask you to refer to plaintiff's Exhibit 7. I believe that was the mill, and takes in more area between the mill and your house than No. 10 does, is that right?

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A. Yes, sir. I would like to say in these pictures here I see that it only shows my mill and the gate I erected; it doesn't show the gate on the north side of the road which this road used to go through. There is the one here (pointing to Exhibit "E"); the gate shown in this picture shows where the public road used to go.

Q. That shows the road that he is using,—part of the road?

A. That's Barger's side.

Q. Will you refer to the photograph which has been marked Exhibit "E", which shows a wooden gate, with the mill in the background. What is the significance of that gate?

A. That gate shows where the old road come through there and crossed the road over where my gate is now.

Q. Is that a public road?

A. It was at one time, I understand.

RE-CROSS EXAMINATION.

By Mr. Branaman:

Q. Mr. Craig, aren't you confused about the gate you refer to? That is a gate to the C. P. Barger Estate land, isn't it?

A. That's right.

Q. Once upon a time didn't it go through 612, went up the race, cross the race near the dam, followed down the river on the way to Crimora?

A. I didn't know that.

MYRTLE L. CRAIG,

being first duly sworn, testified as follows:

Myrtle L. Craig.

DIRECT EXAMINATION.

By Mr. Lotz:

Q. What is your full name?

A. Myrtle L. Craig.

Q. What is your age?

A. Forty-four.

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Q. You are the wife of Stephen J. Craig, is that correct?

A. That's right.

Q. Your husband has testified as to the land and all those things—it won't be necessary to go into that. I will ask you, do you recall when Mr. Craig first put a gate up to the entrance to the Crimora mill property?

A. Yes, he hung it around the 8th of May.

Q. Was it open for a time, without being closed in any manner whatsoever?

A. Yes.

Q. Did he subsequently close it?

A. Yes.

Q. What did he use?

A. He put that latch on the gate (referring to Exhibit "A").

Q. Were you at home on the morning that any damage was done to that gate?

A. Yes, I was.

Q. Will you tell the Court what happened?

A. Well, may I start—he hung the gate on May 8th. On May 10, at quarter of 7:00 Mr. Kennedy pulled up in front of the house. At that time Mr. Craig was working at Elkton. He come up on the porch, he went to the door, he said "is Mr. Craig home"? I said "no, he is working." He said "well, I see he has hung a gate."

Q. Was it at that time shut or open?

A. Open. I said "yes, he hung it last night." He said "well, I told him before he hung it that he wasn't going to hang it. I'll show you it won't hang there—it's coming down." I said "Mr. Kennedy, he only done what he'd bee*en* advised to—he asked different law officials about it." He said "well, it won't hang there." I said "if you have anything further to say, wait until evening and say it to him." And then on Sunday morning, June 1, we were out in the yard, down along the roadway looking at the flowers, a pretty

Myrtle L. Craig.

Sunday morning; the children and my husband he was there fooling with the car. He comes down—Mr. Kennedy—he was alone in a pickup truck. Well, my husband had shut the gate the night before. As he said, he goes down, bumps into the gate, goes back and then *numps* into it again, then he pulls away, backs off. I didn't go down to the gate, I stood and watched.

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Q. Did you son go down?

A. Yes.

Q. Did you look at the gate after he left?

A. Yes.

Q. What was the condition of it?

A. He had bent the wires that went through it.

Q. You could tell they were bent?

A. I certainly could, and I seen him do it.

Q. You could see that from where you were?

A. Yes, I could.

Q. Did you have any conversation with Mr. Kennedy?

A. No.

Q. After that date of the early part of May and following the time the pickup truck bumped the gate several times, did you ever talk with Mr. Kennedy?

A. No, I did not. The talk I had was with Mrs. Kennedy.

Q. Did Mrs. Kennedy make any statement to you as to whether he had or had not done it?

A. I talked to her two weeks from the day the gate was hit. She said "Mrs. Craig, what do you think of what's happened between Mr. Craig and Bowman"? "Mrs. Kennedy, I'm awfully sorry, he really hit it." She said "well, I told him he should stay on the hill and let other peoples' business alone," she absolutely did. So she said "well, what is Mr. Craig going to do, is he going to stay put and let Bowman do him like that"? I said "well, I guess he will try to find out his rights." She said "who is his lawyer"? I said "you (nodding to Mr. Lotz), in Staunton. She said "don't be afraid to tell me anything because I won't say anything to him." I said "did he tell you what he done to the gate"? She said "all he said is what the other fellow done," word for word.

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Q. Did you subsequently see anything happen to the gate?

A. I see him the day he broke the latch.

Q. Tell the Court what happened that day.

Q. I was out front,—my husband was working for Mr.

Myrtle L. Craig.

Hammer, he come up with his tractor with a load of hay, he got off and give it a slam.

Q. Was he coming off his land?

A. Yes. And the gate just slammed against the trees and rocks back there, made a terrible noise—

Q. You could hear it?

A. You certainly could. He come on through, he pulled off through.... and off on the road. After he done that he went back and give it another slam, and when he did the gate kept on going through. That was the 26th day of June, ten minutes after twelve, on a Thursday.

Q. Before that time had it been fixed so it couldn't go on through?

A. Yes, when the latch was on.

Q. Did you go down when that happened?

A. I didn't go down then, no. I went down after my husband come.

Q. When he came you told him what had happened and went to see, and what did you see about the latch on the gate?

A. The latch was—one side had got broken off.

Q. And did that let it swing open to the road?

A. Yes.

Q. Mr. Kennedy stated specifically that he never slammed into it, and you tell the Court that he did?

A. He certainly did.

Q. After that was broken, was anything put on it to keep it from swinging open?

Dep. 11/10/58 page 26 } A. The gate hung loose a couple of days and Mr. Kent said to go ahead and put wire on it.

Q. Since you have been living there, before the gate was up, did people come in the mill property at night?

A. Very often, yes.

Q. Have you ever made complaints to the Sheriff about that?

A. We certainly have.

Q. You were alarmed about that?

A. Yes.

CROSS EXAMINATON.

Mr. Branaman:

Q. Mrs. Craig, you say this gate episode took place on June

Myrtle L. Craig.

26, 1958, about ten minutes after twelve. Was it raining that day?

A. It was beginning to come—a little mist.

Q. It was misty, sort of overcast; did Mr. Kennedy have a load of anything on his wagon?

A. He had hay on.

Q. A hay wagon loaded with hay, attached to a tractor?

A. Yes.

Q. He came up and opened the gate?

A. Yes, he did.

Q. He opened it inward toward the mill?

A. Yes.

Q. Then he came through and stopped the load in the road?

A. Yes, he pulled out and made his turn.

Q. He stopped, opened the gate, came out, and went back to close the gate?

A. Yes.

Q. Did he go inside and throw the gate around?

A. Yes, he did, he gave it a slam.

Q. On the inside?

A. Yes.

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Q. And swinging it around, then, did he go on through?

A. Yes, he did.

Q. Then where was the gate?

A. The gate was hanging out towards the road. He pushed it up to the post.

Q. About two feet from the post?

A. Yes, he pushed it back against the post and got on the tractor and went on. Then, after that, in about ten minutes after he went up with the load of hay he came back in his pickup truck, pushed the gate open, went on down in the bottom land, he come right straight back, gets out, pulls it up against the post again.

Q. That's what happened on the day the latch was broken?

A. Yes.

Q. You saw it?

A. I absolutely did.

Q. Your husband was away?

A. He came in five minutes after it happened.

Q. Following that, you got out a warrant for Mr. Kennedy's arrest?

A. Yes.

Stephen Edward Craig, Jr.

Q. What disposition was made of that warrant?
A. Well, I just don't know— think it was the thing to do, if anybody can break a latch and can get by with it.
Q. What disposition was made with the warrant?

Mr. Lotz: I think we know what disposition was made of it. The warrant was dismissed because it was involved in a civil proceeding.

Mr. Branaman:
Q. Then, as I understand it, it was dismissed, is that correct?
A. That morning when the trial was he was out of town and didn't get to come in, but I appeared because I was the one who seen it.
Q. What is the value of the latch you speak of?
A. I just don't know how much, but if you can break one you can break another.
Dep. 11/10/58 page 28 } Q. Well, was it 25¢, $25.00?
A. Cents make dollars, don't they?
Q. There wasn't any damage done to the gate, was there?
A. Yes, there was.
Q. The gate is a wired interior with a metal frame, isn't it?
A. Yes, and it's sprung.
Q. Isn't it true that Mr. Kennedy hung his bumper on the gate?
A. No.
Q. Why did he undertake to get it loose, then?
A. That's what I want to know.

RE-DIRECT EXAMINATION.

Mr. Lotz:
Q. The screws in the latch were bent at the top?
A. Yes.
Q. Caused from a blow of some kind?
A. Yes.
Q. That's all.

STEPHEN EDWARD CRAIG, JR.,
being first duly sworn, testified as follows:

Stephen Edward Craig, Jr.

DIRECT EXAMINATION.

Mr. Lotz:

Q. You are the son of Mr. and Mrs. Stephen Craig, are you not?

A. Yes, sir.

Q. What is your age?

A. Twenty.

Q. Do you live with your parents?

A. Yes, I do.

Q. Were you living with them at the time your father put a gate up which was left open for some period of time?

A. Yes, sir.

Q. Do you recall how long it was left open?

Dep. A. Three weeks.

11/10/58 Q. How was it fastened after that?

page 29 } A. It was fastened with that clasp, right there (pointing to Exhibit A).

Q. Since the clasp has been broken, how has it been fastened?

A. Mr. Kent come down and advised him to put a piece of wire on it.

Q. Was it ever shut with a chain?

A. No.

Q. Were you home the morning that has been testified about here when Mr. Kennedy's truck hit the gate?

Q. Did you see what happened?

A. Yes. I was standing in the *hard* about fifteen minutes after ten, we were all in front, Mr. Kennedy come down the road—

Q. Alone?

A. Yes. He took his truck and run up against it, spun his wheels in the gravel, he backed up and run in again and did the same thing; then he backed back 6 inches, got out of the truck, crawled under the fence, and at this point he walked over where the gate is and lumber is laying on the ground and he picked up a board 1 inch thick, 3 inches wide, stuck the board through the wire on the gate and down into his bumper, and he pried on the board, and it broke. Then he threw it down on the ground and left it, and he walked back inside the mill—the door was left open—this was Sunday morning—he picked up a piece of flat iron 3 inches wide and a half inch thick, stuck it between the wire of the gate and the bumper on the truck and he pried on that. My father and I went in and we asked him what he was doing.

Stephen Edward Craig, Jr.

He never said a word. I told him he had permission to go through as long as he didn't ...., but there wasn't no reason to pry the wire. He didn't say nothing, just stood there. Then he asked me" are you his son"? I said "yes." He then crawled under the fence again, got in his truck and went back to the house.

Q. Now, have you driven that road many times from your house to the gate?

A. Yes.

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Q. Does anything obstruct your view of it?

A. No.

Q. You can see the gate?

A. Yes, it's in plain view.

Q. Were you at home the day the lock was broken?

A. No, sir, I come home an hour after it happened.

Q. And did you learn about it then?

A. They told me, yes.

Q. Did you go down and look at it?

A. Yes, sir.

Q. Was it broken?

A. Yes, sir.

Q. You did not see that happen?

A. No, sir.

Q. Have you ever noticed people parking around the mill property at night?

A. I have, quite a few times.

Q. Did you ever block that roadway that runs in there?

A. No, sir. When I pull in I park clean to the left—about 30 feet in front of the mill.

Q. Have you ever seen it blocked by any equipment of your father's, or your own?

A. No, sir, it's never blocked.

Q. Has Mr. Kennedy ever stopped there between the mill and the gate?

A. A few times.

Q. Does he leave his equipment or truck there and walk away?

A. Yes. One time he parked right in front of the mill, my father and I were in the mill and we couldn't get out. Just left his truck sitting there, there was no reason at all for him to leave it there. I would also like to point out three weeks ago one night, me, Harold Hinkel, Gary Scrogham, we were in the mill working on two or three cars, we'd been there a

Stephen Edward Craig, Jr.

half an hour and we heard a car outside; we thought somebody else was coming in. We went out and looked and there was Mr. Kennedy backing out and he headed on towards Crimora. He had been over and been looking in.

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Q. Was it at night?

A. Yes.

Q. He wouldn't be feeding livestock at that time of night?

A. He had no business down there whatsoever.

CROSS EXAMINATION.

Mr. Branaman:

Q. Mr. Craig, where were you on the 27th day of September, 1958, about twelve o'clock?

A. I was working in the mill. No, at twelve I had come out and started toward the house.

Q. Before that you had been in the mill?

A. Yes.

Q. Did you see Mr. Kennedy?

A. I did.

Q. Did you come out and give him a tongue-lashing and cuss him?

A. No, I did not.

Q. What did you do?

A. Mr. Kennedy come out and my car was sitting side the mill; he pulled up and got out and went to my car. First he looked at the front, then he looked inside, then he looked in the back, he took the license number and wrote it down; then he went back and looked again. At that time I asked him what he was doing. He never said a word, he just stood there. I told him then "you have a right of way, but no personal attitude to bother nothing else that don't concern you. He stood there 5 minutes, and then he went and got his wife and come back in his truck. I was starting out and he pulled up crossways and wouldn't let me out. He got out and started to measure where my car was.

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Q. Was Mrs. Kennedy there?

A. She was.

Q. And you cursed and swore before her, didn't you?

A. No, sir.

Q. You are on oath. Didn't you run your car at the truck in which she was sitting and frighten her?

Stephen Edward Craig, Jr.

A. I pulled the car out and got out and told Mr. Kennedy he was blocking the road and to move the truck so I can get out. He leaned there and stood there. I asked him the second time, but nothing. Then the third time when he still wouldn't do anything I said "all right, if you don't I'll push it out." I got in my car, and she got out and asked him to move.

Q. That is the truth? On your oath?

A. Yes, sir.

Q. You say that Mr. Kennedy, the day the latch was supposed to have been broken, got out of his truck, which was in the road about ready to enter the right of way, and crawled under the fence?

A. The day the latch was broken? The day he pried the gate?

Q. His truck was out in the highway, wasn't it?

A. No, it wasn't, it was clear off the road, there was three inches back of his truck.

Q. The day Mr. Kennedy's truck bumper got caught in the wire?

A. It didn't catch in the wire.

Q. What did it do?

A. He pushed against it twice.

Q. Then he got out and crawled under the fence?

A. Yes.

Q. And went over and got a board by the mill and came back and what was he doing?

A. He stuck the board between the wire on the gate and his bumper—he was 6 inches from the gate.

Q. Why did he do that?

Dep. A. We would like to know.

11/10/58 page 33 } Q. Are you sure that he did crawl under the fence, go over to the mill to get a board, come back, get on the gate and place the board between it and the truck?

A. I am not lying.

Q. Is that true?

A. That's what he did, yes.

Q. Did you stand there looking at him do that?

A. Yes, we were standing in the yard.

Q. Who?

A. My father, mother, sister and brothers.

Q. Did you go down then?

Stephen Edward Craig, Jr.

A. Not until he went into the mill?
Q. Why did he go into the mill?
A. To get the iron bar?
Q. Why did he get the iron bar?
A. I reckon he wanted something strong.
Q. What did he do with it?
A. The same thing. He placed the iron between the wire in the gate and his bumper.
Q. Why did he do that?
A. That's what we would like to know.
Q. Wasn't his bumper hung in the wire?
A. No, his bumper was 6 inches from the wire.
Q. Doesn't that sound extraordinary to you?
A. Not to me, it doesn't.
Q. Let's see about the episode—you have set off aerial bombs several times, haven't you?
A. No, sir, I have not.

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Q. How about here recently, going in his lane from Route 612, you and a couple of your buddies?
A. I have never been in his lane, no time, day or night.
Q. Your car was parked there.
A. Not my car. I wasn't there.
Q. You deny you were present?
A. I deny it.

RE-DIRECT EXAMINATION.

Mr. Lotz:
Q. Do you keep automobile parts in this mill?
A. Yes, sir.
Q. Is there hay in it?
A. Yes, sir.
Q. Is there lumber in it?
A. Yes, sir.
Q. Is it an old frame building?
A. Yes, sir.
Q. Would it burn easily?
A. Pretty easily if a fire started.
Q. This particular day that Mr. Kennedy was on his way around ....., he blocked you in?
A. Yes, sir, he did.
Q. You had to ask him three times to move and he didn't

Stephen Edward Craig, Jr.

do anything. You finally said if he didn't move his truck you would have to push it away?

A. Yes. And another instance at night he came down there and was looking in at us.

RE-CROSS EXAMINATION.

Mr. Branaman:

Q. What date was that and the time of night?

A. I don't recall the date. It was a Thursday night three weeks ago, at eight o'clock.

Q. What date would that be?

Dep. A. Either the 16th or 23rd of October.

11/10/58 Q. Which window was it you say Mr. Kennedy page 35 } was looking in?

A. First he was at the door. There isn't a window there, the door has got a crack in it as wide as your hand on this little portion.

Q. What little portion?

A. Right beside that door.

Q. Was the door shut?

A. Yes, but the boards is off it there and anybody can see through it.

Q. Point out to the Court any boards off the door.

A. They can't be seen in this picture.

Q. You mean to tell the Court that Mr. Kennedy got out of his truck, walked up two steps to this door and peeped through a hole to see what you were doing?

A. Yes, sir, he did.

Q. Where were you?

A. Inside.

Q. What were you doing?

A. Working on an automobile. I have quite a few of them there.

Q. Was it eight o'clock?

A. Round about eight.

Q. What was the day?

A. It will be about four weeks ago this coming Thursday.

Q. Was it three weeks ago or when?

A. It will be four weeks this coming Thursday.

Q. Give us the day of the month this episode happened.

A. It has been about four weeks.

Q. What day of the week was it?

A. It was Wednesday or Thursday.

Q. What Thursday would it be—four weeks ago?

A. It would be about the 16th, or somewhere along there.
Q. The 16th, you said?
Dep. A. Along there somewhere.
11/10/58 Q. Well, what date was this?
page 36 } A. I don't know for sure.
Q. You will say the 16th though?
A. I will say somewhere around that.

MR. FRANK SCROGHAM,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Lotz:
Q. What is your age, address and occupation, please?
A. I am a contractor, forty-eight, I live at Crimora.
Q. Are you related to Mr. or Mrs. Craig?
A. No.
Q. Do you know the road where the Crimora mill is located?
A. That's right, have for a lifetime.
Q. Did there come a time when you saw a gate hung there that was open?
A. Yes.
Q. Do you recall when that was?
A. The date I can't say.
Q. Did it hang there for some time open?
A. Yes, it did.
Q. Was the gate later closed?
A. It has been closed for some time, yes.
Q. Do you know how it was closed?
A. Well, I couldn't tell you what type of latch held it, no.
Q. It did have a latch?
A. Yes.
Q. Did you observe that from going back and forth by there?
A. Yes, at the time I was picking Mr. Craig up
Dep. every morning.
11/10/58 Q. Did you ever see a lock and chain on it?
page 37 } A. I never have.
Q. Did you ever see anything besides a latch on it?
A. No, sir.
Q. How is it fastened now?
A. It is wired now, I noticed that.

Frank Scrogham.

Q. Did you ever examine a damaged latch?
A. No.
Q. You wouldn't know anything about that?
A. No.
Q. Did you ever see any automobiles parked there?
A. Yes.
Q. In the right of way or off?
A. I have never seen it blocked.
Q. Have you seen Mr. Kennedy go in and out of there?
A. Oh, yes, I have.
Q. Do you know anything about the incident that happened when Mr. Craig was blocked in the mill?
A. No.
Q. Other than this information as to the gate, do you know anything about this difficulty?
A. Not too much, I have heard a lot of talk.
Q. But from your own knowledge, you don't know anything about it?
A. No.
Q. As I understand you, you saw the gate with a catch on it and later a wire, and that's all you know.
A. Yes.

CROSS EXAMINATION.

Mr. Branaman:

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Q. Before the wire was placed on the gate, it could have been fastened with a chain, couldn't it?
A. No, I don't think so—not when I saw it there was no chain on it.
Q. But there could have been a chain on it, couldn't there?
A. Between times that I have seen it, possibly; maybe it was locked at night, I don't know.
Q. Maybe there was a lock or chain on it then?
A. There could have been at night, but days that I travelled by there was no lock or chain.
Q. That has been recently?
A. Yes.
Q. In the last couple of months?
A. That's right.
Q. You weren't passing back and forth by there before a couple of months ago?
A. At that time I was working across county.
Q. Then there could have been a chain on it?

C. E. Morris. (Clinton Elmer)

A. At night there probably could.

Q. The first time you ever saw a gate there was during the summer of this year?

A. That's right.

Q. You never saw a gate there before that, did you?

A. No, sir.

Q. There was one below the mill but never above it. Have you been in and out to the bottom land any?

A. No, I don't have any business down there.

Q. Have you been back of the mill?

A. I was down last summer fishing.

Q. Did you know there has been a road there for over a hundred years?

A. Oh, yes, clean to the Blue Ridge Mountains, they told me when I was a kid.

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Q. But there has been no gate to block the passage?

A. No, that's right.

Q. Only since Mr. Craig came?

A. That's right.

Q. And you have seen the gate latched and then you have seen a wire around it?

A. Yes.

Q. But it may have been chained, too?

A. I don't think it was—I said if it was it was at night.

* * * * *

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* * * * *

MR. C. E. MORRIS (CLINTON ELMER), being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Lotz:

Q. What is your age, Mr. Morris?

A. Sixty-six.

Q. Where do you live?

A. At Waynesboro, Park Station.

Q. Are you related to Mr. or Mrs. Craig?

C. E. Morris. (*Clinton Elmer*)

Q. What is your relationship?
A. He's my brother in law.
Q. Do you have occasion to visit his house frequently?
A. Yes, I have been *doing* down some the last month or so on account of my working away, my wife goes down a lot.
Q. Did you visit him before that time?
A. Oh, yes.
Q. You crossed that road fairly often?
A. Yes, sir.
Q. Do you recall a time when Mr. Craig put a gate there?
A. Yes, sir.
Dep. 11/10/58 page 44 } Q. Was it left open for a time?
A. Yes.
Q. Now, was it subsequently fastened?
A. Well, yes, it was fastened with a latch.
Q. Did you ever see it fastened any other way?
A. I've seen a wire on it since the latch was taken off, yes.
Q. Other than being fastened with a wire and a latch, have you ever seen it fastened any other way?
A. No.
Q. Were you at the Craig place on the 4th of July?
A. Yes.
Q. Was Mr. Kennedy there that day?
A. Mr. Kennedy was there in the road with his machinery.
Q. Was he making some measurements and taking pictures?
A. That's right.
Q. He was taking pictures and moving trucks around there and machinery?
A. He was moving equipment there and making measurements?
Q. What type of equipment did he have there?
A. Well, he had the tractor and wagon that he hauls stuff on, I don't know what you call it.
Q. Was he actually doing any hauling that day?
A. I didn't see him haul anything, no.
Q. You weren't there any time any damage was done to the gate and the lock?
A. No.
Q. Any information about that would be what somebody else told you?
A. That's right.

Dora E. Morris.

CROSS EXAMINATION.

Mr. Branaman:

Q. You're a brother in law of Mr. Craig?

A. Yes.

Q. You visit at his home at Crimora mill frequently?

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A. That's right.

Q. Do you know when he first put up the gate?

A. No, I don't know.

Q. You don't know when he erected the gate?

A. No.

Q. All you know is that they told you that there was a latch broken,—that's all you know?

A. That's all.

Q. You never saw it, though?

A. I saw that that's the latch, and I see it's broken.

Q. Do you actually know whether that latch is the one—did you get out and examine it?

A. Yes, I went through the gate and worked the latch.

Q. When was that?

A. I can't say what day it was because I can't remember very well, but it was a few days after it was put on.

Q. When was that, do you know?

A. No, I don't, I can't remember.

Q. You don't have a good memory?

A. I can't recall things very well.

Q. Really, you don't know anything about this case, do you?

A. I do know that latch was on the gate and I do know I used it.

Q. You never saw what happened—it's all hearsay, except knowing it was there.

A. Yes.

MRS. DORA E. MORRIS,

being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Lotz:

Q. Are you the wife of the gentleman who just testified?

A. That's right.

Dora E. Morris.

Q. What is your age?
A. Fifty-eight.
Dep. Q. Are you related to the Craigs?
11/10/58 A. He is my brother.
page 46 } Q. And you visit them occasionally?
A. Yes, sir, real often.

Q. Do you recall that a gate was put up between the mill property and the road?

A. Yes, sir.

Q. Do you know of your own knowledge that it was left open for a time?

A. Yes, I do.

Q. Did you see later that it had been shut?

A. Yes, sir.

Q. Do you recall the date the gate was put up and left open?

A. No, I can't say exactly the date it was left open, but we were there on the 4th of July—we spent the whole day. Mr. Kennedy was down there taking pictures, and I think he had about all the machinery he had down there.

Q. Kind of a machinery show?

A. Yes, I said it seemed it was more like Mr. Kennedy's property than Mr. Craig's.

Q. Did you ever observe the gate after it was kept shut?

A. Yes, I did. And I noticed a little wire on it after the lock was broken—this catch, here.

Q. Did you ever see the catch on it?

A. Yes, I seen this here.

Q. *If* was fastened with a clasp first?

A. Yes.

Q. And later with a wire?

A. Yes.

Q. Have you ever seen it fastened with anything else?

A. No, sir, I have not.

CROSS EXAMINATION.

Dep. Mr. Branaman:
11/10/58 Q. Did you ever pass through the gate into the
page 47 } mill property?
A. Oh, yes, I have. The 4th of July we walked down there and looked around.

Q. And the gate was shut and the latch was on, is that right?

A. Yes. No, I think it was a wire on it then.

Odell Austin Woody.

Q. You don't know when it was broken?
A. No, I don't know nothing about that.
Q. Really, you don't know anything about the case of your own personal knowledge, do you?
A. No, none of the facts. Just what I have seen.

RE-DIRECT EXAMINATION.

Mr. Lotz:
Q. You did see the latch on it and then the wire on it?
A. Yes, sir.

MR. ODELL AUSTIN WOODY,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Lotz:
Q. Mr. Woody, what is your age?
A. Thirty-seven.
Q. Where do you live?
A. Charlottesville.
Q. What relation are you to the Craigs?
A. He's my brother-in-law.
Q. Mrs. Craig is your sister?
A. Yes.
Q. As a relative, did you visit them often?
A. Yes, I am over there just about every week.
Q. Do you recall the time Mr. Craig was fencing there and put a gate up?
A. Yes.
Q. Do you recall when that was? Do you know the month?
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A. No, not the exact date.
Q. Do you know whether the gate was left open for a time?
A. Yes, it was for a couple or three weeks, I guess.
Q. And thereafter was it shut?
A. Then it was shut with that latch.
Q. Is it still fastened with a latch?
A. No, there's a piece of wire on it now.
Q. Now, were you present the time the latch was put on the gate?
A. No, sir, I wasn't.

Odell Austin Woody.

Q. Did you ever see that the latch on the gate was in a broken condition?

A. Yes, I have seen it broke and when it was working.

Q. You saw it working and then broken? What was broken?

A. One part was broken off like it is now.

Q. Did you observe any damage to the gate?

A. Yes, it is sprung some.

Q. You were not present any time that any incident developed between these parties?

A. No, sir, all I know is that there was a latch on it and when it got broken there was a wire on it.

Q. Did anybody ever park any vehicles or machinery so as to block the entrance when you were there?

A. I have seen people come in and turn around, but I haven't seen it blocked.

Q. You never saw anything parked there?

A. No.

CROSS EXAMINATION.

Mr. Branaman:

Q. The gate was erected when, do you know?

A. I don't know the exact date.

Q. Do you know the month?

A. It was in May.

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Q. Was it,—it stood open then for awhile?

A. Yes, sir, three weeks, I think.

Q. Then the gate was shut after three weeks?

A. Yes, sir.

Q. You don't know anything about it after that save that it was wired shut for awhile after the latch episode, is that right?

A. That's right.

Q. Is it still wired shut?

A. It's still wired, yes, sir.

Q. The gate opens inward?

A. Yes, sir.

Q. It never does open out?

A. Not when the latch was working on it. It opened inward only.

Q. Would it open outward?

A. With the latch broke, it would.

Q. But it never opened outward as far as you know?

A. Not that I know of.

Odell Austin Woody.

Q. You could raise the tongue of the latch and open it out, couldn't you?

A. If the latch was working properly you couldn't.

Q. It was the outward piece that was broken? The outside toward the road?

A. That's right.

Q. Then they wired the gate after the latch was broken?

A. That's right.

Q. You know nothing about the breaking of the latch?

A. No, sir.

Q. You have never seen a chain or a lock on it? There wasn't any on it at any time?

A. No, sir, never was.

Q. Are you sure?

A. As many times as I have been there I have never seen one.

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Q. Could there have been a chain or a lock on it when you were not around?

A. I *spose* yes.

Q. You were over there how often in the month of June?

A. Almost every week.

Q. Twice a month?

A. I would say three times a week.

Q. When you came there did you drive up there in back of the house or in the yard?

A. Most of the time in the back.

Q. That's the usual way to go in to the house, is it not?

A. You can go in either way. The road goes all the way around.

Q. You ever go in back and come out in front?

A. Sometimes, yes.

Q. They don't use this road that Mr. Kennedy uses to his bottom land only to go into the mill property?

A. That's right, I guess.

Q. How far is the mill from the house?

A. Oh, it's a good hundred yards.

Q. Just about three hundred feet?

A. Yes, sir.

Q. How far is it from the road around to the Kennedy place?

A. I don't know.

Q. You ever been around there?

A. No, sir.

Harold P. Hinkel.

* * * * *

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* * * * *

HAROLD P. HINKEL,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Lotz:
Q. What is your age?
A. Twenty-one.
Q. Where do you live?
A. In Crimora.
Q. Do you know Mr. Craig?
A. Yes, sir.
Q. Are you related to him?
A. No, sir.
Q. Do you know where his property, the old Crimora Mill, is?

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A. Yes, sir, I go over there every other day, about, hunting, messing around.
Q. You hunt and fish there?
A. Yes, sir.
Q. Were you there the day he was doing some work there?
A. Yes, sir.
Q. What was he doing?
A. He was putting a latch on the gate.
Q. Do you know when that was?
A. It was about the first of May, the 7th or 8th. Sometime in May.
Q. You don't recall the exact date?
A. No, sir.
Q. You were there and he was putting a latch on it?
A. Yes.
Q. Did you help him?
A. No, I was getting ready to go hunting and he said I could park there.
Q. He said you could park there? In other words, you asked him whether you could go in—

Harold P. Hinkel.

Mr. Branaman: I object to the conversation between Mr. Craig and this witness.

Mr. Lotz: I am just asking him if he asked permission.

Q. And did you park on this little road or off it?

A. I parked to the left of it, next to an iron.....

Q. How long were you in there that day?

A. Well, in the evening I get off from work at 2:30, I imagine one and a half hours.

Q. Was Mr. Craig finished when you came out?

A. Yes.

Q. Was the gate shut?

A. No, it was open.

Q. You have no other information of this case of your own knowledge?

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A. Only I have been in there when the gate was open and when it was wired up.

Q. You have seen it wired up?

A. I have, and loosened it myself.

Q. Did you ever see any lock or chain on it?

A. No, I have been in and out of there a lot.

Q. Then Mr. Kennedy can go in there often?

A. Yes, sir, real often.

Q. And you have seen a latch on it and a wire since the latch was off?

A. Yes, sir.

CROSS EXAMINATION.

Mr. Branaman:

Q. Are you a buddy of Eddie's—you and he fish and hunt together?

A. Yes.

Q. Where do you work?

A. Houff & H ....., Waynesboro.

Q. On the by-pass?

A. No, sir.

Q. You don't really know anything about this case, do you?

A. I would say I know the type of person we are dealing with.

Q. I asked you if you knew anything about his coming and going and trouble with the gate.

A. I have been over there and seen him going through a lot.

James Edward Hammer.

Q. Going to his bottomland, is that right?
A. Yes.
Q. That's all you have seen?
A. I have seen how the gate was held shut.
Q. It never had a lock or a chain on it?
A. It never had a lock, unless you want to call this a lock (pointing to Exhibit "A").

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Q. That doesn't lock the gate?
A. No. With a lock you use a key.
Q. There was no lock and no key?
A. No.

Q. And this Exhibit "A" you spoke of is what you had in mind?
A. Right.
Q. It's a butterfly lock?
A. If you could call it that. It's really nothing but a latch.
Q. Mr. Craig called it a lock in his papers.
A. Mr. Lotz called it a lock.
Q. It's a latch, isn't it?
A. Yes, it is.
Q. Were you with young Craig on the night of October 31st?
A. Well, I was down at the Esso station—some of us were there messing around.
Q. You were messing around with young Eddie Craig?
A. All of us were down there—there's a bowling machine in there, we all loaf there—he might have been around.
Q. Was young Scrogham with you?
A. I didn't see Gary.
Q. Were you there when some aerial bombs were shot that night?
A. If you'll tell me where I can buy some I'd like some.
Q. Somebody bought some—they were shooting them. Were you present?
A. No.

MR. JAMES EDWARD HAMMER,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Lotz:
Q. Mr. Hammer, where do you live?

James Edward Hammer.

A. Crimora.

Q. Did you help Mr. Craig build a gate?

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A. Yes, sir.

Q. Did you help him hang it?

A. No, sir.

Q. I think the pictures show the gate. Tell the Court how the gate was constructed, what it is constructed of.

A. The gate is made of pipe, 1-1/4" pipe, and it's got the diagonals in there—it's a right strong gate.

Q. Do you recall when it was that you were working on the gate, as far as time is concerned? About what time of year it was?

A. It was sometime in the first part of May. I can't recall the exact date.

Q. Did you ever see it up?

A. Yes, sir.

Q. Do you know how it was fastened when it was up? What was it fastened with?

A. Well, it hung on the regular hangers, and it had this latch on it.

Q. Did you ever see any damage to this gate?

A. Yes.

Q. What type?

A. Well, the gate has been sprung. Something had hit the gate and kind of tore the wire loose.

Q. You do not know what that was, of your own knowledge?

A. No, sir.

Q. Have you seen the gate recently?

A. Not close to it, I've passed by.

Q. Did you see how it was fastened now?

A. No, sir, I haven't.

CROSS EXAMINATION.

Mr. Branaman:

Q. The picture you have before you, marked Exhibit 10, is a fair view of the gate, is it not?

A. When I was over there with Mr. Craig—yes, it is.

Q. Exhibit "O" depicts the gate as it is hung, is that right?

A. That's right. That's the way it was hanging when I was there.

Q. That's all.

Stephen J. Craig—John Bowman Kennedy.

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page 59 } MR. STEPHEN J. CRAIG,
is recalled to the witness stand.

DIRECT EXAMINATION. (Recalled)

Mr. Lotz:

Q. Mr. Craig you mentioned about the piece of wire—what did he do when he finished pulling it?

A. Throwed it down.

Q. What is the amount of your fire insurance?

A. $2,000.00.

Q. If a fence were put there, could livestock get to the race?

A. There would be no way of getting to the race.

Q. Have you done some work on the basement of the mill?

A. Yes. And with a gate or a cattle guard, my stock can go underneath there and use all the bottom land. With a fence there I'd have to break it up into three parts.

Q. That's all.

* * * * *

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page 4 } JOHN BOWMAN KENNEDY,
the plaintiff herein, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Branaman:

Q. Mr. Kennedy, in taking the evidence for the defendants, Mr. Craig stated that your truck was parked so as to leave him stranded. Do you know anything about this occurrence?

A. No, sir, I never parked my truck there at any time. I don't know when it could have been.

Q. Did you park your truck in front of the mill?

A. If I was going to the bottom land, I would have to go in my tractor. You can't get across the tailrace. I would either have to have rubber boots or go in the trailer or tractor.

Q. In other words, you did not park your truck so that it

John Bowman Kennedy.

would block Mr. Craig?

A. I never did. I never had any occasion to.

Q. Mr. Craig also said you drove some cattle back of the mill and tracked your fence down.

A. Well, I drove the cattle last Spring from the Yount farm to the spring, but I came out and went on through the waste land, and there was no fence there.

Q. Is that back of the mill?

A. Yes, back of the mill, through the overflow from the run, and then out into the highway.

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Q. In other words, you went through the overflow and waste land out onto Highway 612?

A. Yes, sir.

Q. Was any fence trespassed on at that time?

A. No, sir, that was before they put the fence up on that end. There was the fencing on the upper part, but it was not connected then to Mr. Weaver's fence. It was all open.

Q. There has been some mention of a cattle guard. How would that affect you?

A. Well, you can't drive cattle over a cattle guard. How could I transfer my cattle? It would be impossible.

Q. Is there any other practical way out?

A. No, sir.

Q. What about up the bluff to the barn?

A. You can go over the bluff to my barn, but it would be impossible to get them together to drive.

Q. Do you mean they would scatter over the bluff?

A. Yes, sir.

Q. Could you bring them around the house to 612?

A. I don't have any fence there for about 100 yards or more and they would scatter.

Q. You say there's no fencing for about 100 yards or so?

A. Yes, I would say roughly, yes.

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Q. As I understand, when you are transferring your cattle from the bottom grazing land to the other farm at Crimora, about a mile, you bring them out your old roadway by the mill?

A. That's right.

Q. And when you transfer then from the other farm to the pasture land in the bottom and along the race back of the mill, you use the roadway in front of the mill?

A. That's right, yes.

Q. Have you any grazing on the high land where your buildings are?

John Bowman Kennedy.

A. There's an orchard and a small lot, just about enough for a milk cow that you don't want in with the others.

Q. And you don't have any blue grass grazing land elsewhere on the high land?

A. No, sir, just a small piece.

Q. Well, how many cattle do you run now, and what are they, do you have a list?

A. Yes, I do.

Q. Will you file the list as "Exhibit Cattle" with your deposition?

A. I do.

Q. Have you extended a fair valuation of these Hereford cattle?

A. Yes, sir.

Mr. Lotz: I object to that on the grounds it is irrelevant and, further, the witness is now covering matters which he has covered.

Mr. Branaman: To which, counsel for plaintiff replies that this has never been exhibited, only shown. And it is an important element to know how many livestock Mr. Kennedy runs on his farm.

Dep.
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page 7 } Q. As I recall, you were not permitted to use the gateway over your road from June 1st to about the 18th or 19th, is that correct?

A. That's correct.

Q. And it was during that time you appealed to the Court for an injunction?

A. That's right.

Q. And the injunction was granted the 5th day of June?

A. That's right.

Q. Was the gate open after that?

A. No, sir. The chain stayed on the gate and it was clamped shut until the 18th of June. I couldn't get in.

Q. What were you called up to do in regard to your crops during that time?

A. I had alfalfa which was supposed to have been sprayed, but I couldn't get in.

Q. Why did you have to spray the alfalfa?

A. Over the alfalfa beetle, and they eat the crop up. I sprayed the field on the hill and I mowed it three times and could have gotten the fourth cutting, but it's there now.

John Bowman Kennedy.

Q. And what do you estimate you lost on this?
A. Well, I estimated it at a ton per acre, or $275.00.

Mr. Lotz: I move this be stricken, no damages in an injunction suit, and not re-direct examination. The plaintiff, Mr. Kennedy, is not answering anything on the defendant's evidence, and it's just trying the case all over again.

Dep. 12/18/58 page 8 } Mr. Branaman: To which the plaintiff replies he was deprived of spraying his alfalfa for bettle and lost the alfalfa. He did not know at the time the evidence was taken before the crop was destroyed, and in the bill damages were set out and alleged.

Q. Have you made a statement of the loss of the alfalfa crop, that is, what it will cost you to re-seed?
A. Yes, I have.
Q. Have you a statement of it?
A. I have an estimate.
Q. Will you file this estimate, "Reseed Alfalfa List."
A. Yes, sir.

Mr. Lotz: I object for the same reasons.

Q. At the time we took the depositions before, you were not aware you had lost your alfalfa completely?
A. No, sir, it was something that showed up later.
Q. And it is a complete loss?
A. Yes, it has to be reseeded.
Q. Did you cut some timothy?
A. I did.
Q. That came up through the alfalfa?
A. Yes, and there's dead alfalfa I am using for bedding. It's not good hay, but I pick over it.
Q. Now, Mr. Kennedy, I hand you an Exhibit A, filed with Mr. Craig's depositions, a lock of the gate, and also the two screws, and I will ask you whether or not you broke that lock?

Dep. 12/18/58 page 9 } A. I did not.

Q. You were charged with breaking the lock on the 26th day of June, 1958. What occurred on that date, if you recall?
A. Well, I was in the bottom, bailing a load of hay, and a thunder storm came up and I came out of the field to the Craig gate at the mill. The gate was shut, wired with a latch on it.

John Bowman Kennedy.

The wire was twisted at least six inches outside. It was raining. I stopped, had to reach through with one hand to reach the wire. Mrs. Craig and the two children were sitting on the porch. I opened the gate after I got the wire off, drove through, stopped, shut the gate, latched it, taken my load of hay to the barn, pulled it into the barn, put my canvas cover for the bailer in the pick-up, went back to the bottom in the pick-up, through the gate, covered up my bailer with the canvas, came back out, shut the gate, latched it, went on up 612 to the house, got to my lane and met my wife, and her son coming out of my driveway in a car, going to a funeral. They came by the gate, from the time they got to the road down to the gate, it was open.

Q. Did you break the lock?

A. No, sir, I did not break the latch. That latch was removed sometime between the 26th of June and the 28th of June. I went back in the field on Saturday, the latch was gone and there was wire on the gate.

Q. I believe it has been testified a warrant was sworn out against you.

A. Yes, for destroying personal property.

Q. And you were arrested?

A. Yes, falsely arrested, and no one showed up.

Dep. 12/18/58 page 10 } Q. They filed the original bill of particulars in the case, and exhibited it with the original depositions?

A. That's right.

Q. Subsequently, I understand a second bill of particulars, a so-called amended bill of particulars was filed.

A. That's right.

Mr. Branaman: I file this as Amended Bill of Particulars.

Q. Was the warrant tried?

A. Yes, after about the third try. They tried it then.

Q. Mrs. Craig testified?

A. Yes, sir.

Q. And on motion, the Court dismissed the warrant?

A. Yes, sir.

Mr. Lotz: Let the record show the Augusta County Court dismissed the warrant because a civil proceeding was pending in the matter.

John Bowman Kennedy.

Q. I hand you a certified copy of the warrant and ask you to file it as Exhibit Warrant.

A. Yes, I do, the first one ever served on me.

Q. Now, in Mr. Craig's testimony, as I recall, mention was made of the fact that he would not be able to reach the tail race for water if he decided to pasture his lot in front of the house. What was the location of the Shaver fence with reference to water in the tail race?

A. Well, the Shaver fence, the one Mr. Craig tore away, was along my right of way to the bottom land, and it led across the race and back to my line fence—left him a water gap and taken in all the pasture, all the grass land. The rest of the land is just waste land, overflow land, and useless.

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Q. Mr. Craig testified there was pasture land in front of his mill. I ask you to look at Exhibit 7 and state whether or not there is any pasture land.

A. Absolutely not. Pasture does not grow on gravel and gravel lanes.

Q. On the south side of the fence, what is that?

A. That's just a waste overflow from the river and the race, and there's water holes there six to eight feet deep, it's washed out brush land, briars, just useless.

Q. I hand you Exhibit 6, which shows a right of way back of the mill. What is between where you cross the tail race back of the mill up to Route 612?

A. That's just a waste, overflow. When they run the mill, they would let the water run around the mill when the river was up.

Q. Is there any growth in the way of bluegrass?

A. No, sir, just brush and briars.

Q. And that is between the mill and the Weaver line fence?

A. Yes, sir.

Q. About 100 feet?

A. Yes, sir.

Q. And there is no grazing in there?

A. No, sir. I wouldn't say there is an acre in there. It's just a waste spot.

Q. Young Mr. Craig testified that you were peeping in through a door at him one night or evening.

A. I had no occasion to peep in at him. I go by that mill

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hundreds of times with the door open. I can see anything without peeping. I am always at home with my
Dep. family at 8 o'clock at night. That's when he said it
12/18/58 happened.
page 12 } Q. Have you occasion to go to the pasture land at 8 o'clock at night?

A. Not in this length of time. I have, but not in this length of time.

Q. Young Mr. Craig testified on the 27th of September you blocked his way in front of the mill or at the gate. What happened on that date, please tell the Court?

A. I was getting ready to sow barley.

Q. Where?

A. Over in the bottom. That morning about 7, I taken the tractor, went through the road at the mill to my bottom land, harrowed until lunch time, and I had finished with my pulverizer. I brought the pulverizer and the tractor out by the mill. When I got to the mill, the gate was closed, and the Craig boy had his car parked in half the gate way, back far enough that the gate would swing open. I stopped my tractor, got off to open the gate. The Craig boy came to the mill door and sicked two dogs on me. They run up to me barking. I paid no attention to them, so he came to the mill door, laughing and hollering at me "why don't you do something about it." I never answered. I went on, just looked at him. He came out of the mill with a wrench in his hand, came on walking towards me to the gate, just cussing. And he said "Well, why dont' you say something." I never opened my mouth. He cussed and carried on for quite a while. He got tired, I suppose, and went back in the mill. I saw I could move by coming out the gate at an angle to get my pulverizer through and tractor. I came out, stopped, shut the gate, went on to the barn. So I wanted to sow barley in the afternoon and I didn't think I had
Dep. room to get the drill in the gate by the car. I
12/18/58 measured my drill. It was nine feet wide.
page 13 } I got in the pick-up me and my wife. We went back to the mill gate. I couldn't get in with the pick-up. I went on across the bridge to Mr. Weaver's field, turned around, came back and parked on the right-hand of 612, got out of the truck and and measured from his car to the post to see if I could get in with my drill. It measured 7½ feet and I had a drill 9 feet wide. At that, the boy had been in the mill all the time. He came out and he was just a

John Bowman Kennedy.

cussing, just as he had before. My truck was parked out in the highway. My wife was setting in the truck.

Q. Was it parked at the gate entrance?

A. Yes, at the gate entrance. He came out and he cussed and he rared. After so long a time, he said "I'm going to knock that g. d. truck across the highway." At that, he jumped into his hot rod and ran into the truck.

Q. Where was your wife?

A. Setting in the truck.

Q. Was there any damage?

A. He bent the front of the rear fender, backed up and was going to do the same thing again. My wife jumped out and started up the road. We got in the truck and came on to Waynesboro. It was on a Saturday afternoon and Mr. Branaman was out of town.

Q. Is this the same young man who gave you an aerial bombing on Halloween night?

Mr. Lotz: I object on the grounds this is a conclusion of counsel, which has been denied by the witnesses.

Q. Tell the Court about the episode which happened in your lane on Halloween night, October 31, 1958.

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page 14 } Mr. Lotz: I further object on the grounds this has no bearing on the issue in the injunction suit.

Mr. Branaman: It will certainly show the attitude of young Mr. Craig toward Mr. Kennedy.

Mr. Lotz: As far as my objection of the pleadings are concerned, young Craig is not a party to this suit.

Mr. Branaman: To which I reply young Craig testified he did no bombing on October 31st.

A. At about 10:30 that night the fireworks started. I went out, went to the road through the field, saw Craig's hot rod parked beside the highway. He and two other boys were up in my driveway, shooting the bombs, or whatever you call them.

Q. Did they leave from that location?

A. Yes, sir.

Q. Where did they go then?

John Bowman Kennedy.

A. Then they went west half of a mile, shot some bombs there, turned and came back by my driveway, went over in Mr. Barger's driveway, stopped and shot some more bombs there.

Q. Is that the Barger driveway a short distance east of your lane?

A. Yes, sir.

Q. Were you close enough to identify the Craig car?

A. Yes, I was lying there in the alfalfa, looking at them when they came back.

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Q. Does this gate remain open from time to time that we spoke about?

A. Yes, on Saturdays and Sundays it is most always wide open, until I happen to go in to feed the cattle. I can go through the gate open and when I get through feeding and come out, the gate is closed. For example, the 10th of November, about 4 o'clock in the afternoon, I taken my feed and went to the bottom. The gate was open. I went in and fed. While I was in the bottom, this little Craig girl came out on the hill, looking about something. As I crossed the race going towards the mill, coming out, she ran back to the mill. When I got to the mill, Mr. Craig, the Craig boy and Gary Scrogham were standing in the mill door. The gate had been closed, wired, and the wire wrapped about six inches twisted shortly. They stood in the mill door, laughing and making fun of me with one hand opening the gate. I drove through the gate, got out, shut the gate, drove up on the hill. Mr. Craig came out, throwed open the gate and left it wide open and went on walking to the house. We can see from our house, from my porch. My wife watches them and she knows who shut and opened the gate.

Q. Mr. Kennedy, have you kept any record of your going to and from your bottom land and pasture land since we took the depositions in September?

A. Yes, I began the 1st of September, marking each and every trip to the 10th day of December.

Q. Have you a record?

A. Yes, sir.

Q. Will you file it as "No. Trips to and From Bottom Land and Pasture Land, September 1, 1958 to December 10, 1958?"

A. Yes, sir.

Mr. Lotz: I think it is entirely irrelevant, and I object.

John Bowman Kennedy.

Dep.
12/18/58
page 16 } Q. Mr. Kennedy, I hand you an office copy of the will of Henry Koiner, marked "Exhibit—Henry Koiner to J. Lee Koiner Mill." Will you file this as your exhibit, so noted?

A. I will.

Q. I hand you a certified copy of a deed, marked "Exhibit —William Patterson to Henry Koiner." Will you file this as your exhibit?

A. I will.

Q. I hand you a deed, marked "Exhibit—John Koiner as Executor to William Patterson, Deed, Copy," will you file this as Exhibit Deed with your deposition?

A. I will.

Q. I hand you deed dated July 2, 1900, from J. Lee Koiner and wife to Wallace de Rundean. Will you file this marked J. Lee Koiner deed?

A. I will.

Q. Mr. Kennedy, have you any other item you wish to dispose of at this time? If so, state it. Was it about young Mr. Craig?

A. That's right.

Q. What is it?

Mr. Lotz: Same objection with regard to young Mr. Craig as was made to the other references to him.

A. He made the statement that his car would always be parked in the gateway, the gate would always be shut, and I would be untwisting wire the balance of my days.

CROSS EXAMINATION.

Dep.
12/18/58 By Mr. Lotz:
page 17 } Q. Now, Mr. Kennedy, you don't claim to own this mill?

A. Absolutely not.

Q. Do you claim Mr. Craig did not have the right to take down a fence on his property?

A. I didn't make that statement.

Q. Now, Mr. Kennedy, let's deal a little with this matter

John Bowman Kennedy.

of young Craig, although it has no bearing on the case. As I understand, you could have gotten through the gate all along?

A. No, sir.

Q. But you have just stated you drove through with your tractor and pulverizer.

A. I drove through with the tractor, but that's seven feet wide, and the drill is nine feet wide.

Q. Did I understand you to say when you came out with the tractor and the pulverizer you came around the car?

A. Yes, but I had to come out diagonally.

Q. But you came out though?

A. I had to head east to get through.

Q. And before that you had an argument with the Craig boy?

A. I never opened my mouth.

Q. You had no occasion for discussing the matter with the Craig boy?

A. He came out cussing, *threatning* to kill me with a wrench. I never have spoken to the boy but one time in my life.

Q. You stopped there for what reason?

A. What do you mean?

Q. Why did you stop there?

Dep. A. I stopped to get in with my grain drill.

12/18/58 Q. This argument you said took place as you
page 18 } came out. Why did you stop except to start an argument?

A. He sicked the dogs on me and laughed at me. He was cussing, arguing and threatening me.

Q. How long would you say you were there at that time?

A. Until he run out of breath and went back in the mill.

Q. The Court, I am sure, and I can only figure time in seconds, minutes and hours. How long were you there?

A. I didn't time it. It seemed like hours. I would say five or ten minutes. He just run out of breath.

Q. When did it occur to you for the first time this boy had run his car into your vehicle?

A. When I saw it happen.

Q. You never made any reference to it when the depositions were taken before.

A. What do you mean? It just happened the 27th of September. We took the evidence the 12th of September.

John Bowman Kennedy.

Q. And young Craig and the other boy are not correct when they gave their version in Staunton?

A. Absolutely not.

Q. Did you see young Mr. Craig shoot any fireworks?

A. I saw him.

Q. Did you see him shoot any fireworks in your driveway?

A. Yes, I did.

Q. How many fireworks were shot?

A. Altogether 24, two at the gateway and the rest in my driveway.

Q. Did you see him light all these fireworks?

A. Not all, there were other boys along.

Dep. 12/18/58 page 19

Q. Did you see him light any of these fireworks?

A. He was there and he got in the car and drove off.

Q. Then, Mr. Kennedy, you cannot say he lit any fireworks?

A. But his car was parked there and the fireworks were shot off.

Q. But you cannot identify Mr. Craig personally and state he shot off the fireworks?

A. I seen him in my driveway and the fireworks shooting off.

Q. And that is the extent of your knowledge so far as young Craig and the fireworks are concerned?

A. I saw him going off and coming back and he stopped at Mr. Barger's lane, just as I testified before.

Q. And did you see him personally shoot off any fireworks there?

A. No, I wouldn't say that I could identify any special one.

Q. On that night did you fire a shotgun?

A. I don't have a shotgun.

Q. Do you have any gun?

A. No, I don't, wait a minute, I have a 22, but I don't know when it was last fired.

Q. Now, you say had cut the alfalfa three times and there was another cutting which wasn't cut?

A. That's right.

Q. And you were bailing alfalfa on the day this trouble started?

A. No, the bettle had eaten the alfalfa at that time.

Q. You said you were bailing on that day.

John Bowman Kennedy.

A. I was bailing some timothy and there was some old dead alfalfa mixed in.

Dep. 12/18/58 page 20 } Q. Is the alfalfa on the hill dead?

A. No.

Q. You say one part, the part not cut was affected by the beetles and the other crop was not affected by the beetles?

A. I sprayed on the hill. Mr. I. H. Wagner, O. D. Cupp sprayed my alfalfa to the 6th day of June. The gate was chained and we couldn't get in the bottom to protect that.

Q. Now, Mr. Kennedy, you stated there was not a lock on the gate in your first testimony, is that correct?

A. There was no lock, but it was chained.

Q. And you could have gotten in?

A. I could have broken in.

Q. If you claim there was a link which was pried, that could have been opened and you could have gotten into the land?

A. Mr. Craig met me at the gate on June 1, Sunday morning, with a club in his hand and said if I went in he would kill me.

Q. Is that the reason you tell the Court you didn't go in?

A. Yes, I didn't go in after he threatened to kill me.

Q. Now, to get back to the question, the gate could have been opened for spraying?

A. Anytime a man threatens your life, you—

Q. Could the gate have been opened so you could have gone through?

A. Yes, and it was opened on the 18th day of June. Mr. Craig opened it, I guess. I don't know. Somebody opened it.

Q. Now, we want to get this date of November 10th. I want you to be sure. You said you saw Mr. Craig at the mill property?

A. Yes, I did.

Dep. 12/18/58 page 21 } Q. What time of day was it?

A. The time I usually fed, 4 or 4:30.

Q. Was it before you fed or just after?

A. After, when I came out of the bottom.

Q. Who else was there?

A. His son, Gary Scrogham, and his little daughter, who was on the lookout.

John Bowman Kennedy.

Q. You say Mr. Craig talked to you on this day, November 10th?

A. No, sir.

Q. Did any of them say anything to you?

A. No, sir, they just stood and watched me.

Q. Mr. Kennedy, you have removed the wire from the gate, have you not?

A. No, sir.

Q. Is the wire there now?

A. I don't know. I haven't been in today.

Q. Did you take the wire off this past week?

A. No, sir, I never removed the wire.

Q. I specifically direct your attention to Saturday, December 13, and ask if you removed the wire on that date?

A. No, sir, the gate was open when I went in and when I went out, and I left it that way.

Q. Was the wire on that day?

A. I don't know. The gate was open and it stayed open.

Q. Now, Mr. Kennedy, I understand your cattle can go up to your property without coming out by the mill.

A. If they have a mind to.

Dep. 12/18/58 page 22

Q. But you can get them out without coming this way?

A. You can't drive them unless they have a mind to.

Q. Did you testify there is no fence along the lane?

A. That's right.

Q. And they might stray from the lane?

A. It's sure human nature for a cow to stray if there's a way.

Q. You state that is one of the reasons why you didn't take them up the bluff?

A. I can take them either way.

Q. You state they can stray on Mr. Craig's land?

A. They don't have far to stray, one acre of waste land.

Q. And what really made you unhappy was the fact they took the fence down, isn't that right, Mr. Kennedy?

A. What is worrying me is the right of way has been handed down to the Younts for 100 odd years and it has never been closed. Mr. Craig jumped in there and closed it.

Mr. Lotz: I moved this be stricken, as it is not responsive

to the question, and what is now being stated is a short speech by Mr. Kennedy.

Mr. Kennedy: I will answer the question when I get around to it. No, it didn't bother me.

Q. Mr. Kennedy, since the hearing in Staunton, have you been accustomed to opening the gate by pushing against it with your truck and causing the wire to unwind?

A. No, it would be impossible for this reason. The gate is hung and doesn't have any brace whatever. The gate is made of 1½″ piping. The piping extends about 3″ above and below the railings, and it is digging in the ground and has worn a crevice about 3″ deep, and you have to take it and lead it open.

Dep.
12/18/58
page 23 } RE-DIRECT EXAMINATION.

By Mr. Branaman:

Q. Mr. Kennedy, when Mr. Shaver was there, he had a fence up for a while, did he not?

A. That's right.

Q. And that fence, after Mr. Shaver left, was torn down?

A. That's right.

Q. And the fence was only three strand barbed wire?

A. Three or four, I think.

Q. And how did this fence run?

A. It was stretched around the cliff from 612 and tied to the Kennedy line fence, which left a water hole for the cattle. Mr. Shaver has been away for some years. He sold the place and left, and the wire fence fell down partly.

Q. Was there some fence stretched around the road?

A. Partly, and the rest around the race.

MRS. JOHN BOWMAN KENNEDY,
called as a witness on behalf of the plaintiff herein, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Branaman:

Q. Mrs. Kennedy, may I ask you a few questions?

A. Yes, sir.

Q. You are Mrs. John Bowman Kennedy?

Mrs. John Bowman Kennedy.

A. That's right.

Dep. 12/18/58 page 24 } Q. You were with Mr. Kennedy when he came from the barn with his tractor and grain drill on the day that young Craig came out of the mill and created an episode?

A. Yes, sir, when he came to the house with the tractor and pulverizer, he said he was going back down there and couldn't hardly get through, and asked me to go down there with him and we went down there and he turned his truck, seeing if he could get through. The Craig boy came out of the mill. His hands were all greasy and he was wiping them with a rag and cussing. I never heard a man cuss so much in all my life. He got in his car and run into the truck. He backed up and it looked like he was going to do the same thing again, and I got out of the truck and started up the hill.

Q. Was the car parked at the entrance to the gate?

A. Yes, sir.

Q. And you were sitting in it?

A. Yes, sir.

Q. And Mr. Kennedy was making measurements to see if he could get by with the grain drill?

A. Yes, sir.

Q. Did the boy get in his car?

A. Yes, sir.

Q. What did he do then?

A. He came on as hard as he could and hit the truck on the side where I was.

Q. The truck was headed west?

A. Yes, sir.

Q. And you were seated on the side where the car hit?

A. Yes, sir.

Dep. 12/18/58 page 25 } Q. Did it frighten you?

A. Yes, sir. I got out and started up the road.

Q. What happened then?

A. Bowman got in the truck and I got in the truck with him and we went home.

Q. Mrs. Craig testified that when you were at the church in Crimora, she came to you and had a conversation with you about the affairs between Mr. Kennedy and Mr. Craig.

A. That's right.

Q. Mrs. Craig stated that you made the statement you did not know why Mr. Kennedy did not stay on the hill and mind his own business.

A. No, I never said that.

Mrs. John Bowman Kennedy.

Q. Did she come to you?
A. Yes, she came and sat down by me.
Q. What did she say?
A. She asked me if Mr. Kennedy told me about running into the gate. Yes, I said there was a truck close behind him and he hung his bumper in it.
Q. Was there any further conversation at that time?
A. No, sir.
Q. Do you know whether or not the gate leading in by the mill is left open from time to time?
A. Yes, quite a bit.
Q. You go by and see it open?
A. Yes, sir.

Dep.
12/18/58
page 26 } CROSS EXAMINATION.

By Mr. Lotz:
Q. Mrs. Kennedy, as I gather from the testimony of both your husband and you, Mr. Kennedy never asked the boy to move the car?
A. He never said anything to the boy while I was there.
Q. What part of the car the boy was operating struck your truck?
A. It was the front part.
Q. Was it the fender, bumper or what?
A. I was too scared to look.
Q. Didn't you know the boy had asked Mr. Kennedy to move his truck.
A. He was just a cussing and said if he didn't move it, he was going to knock it off the highway.
Q. He did ask him to move it?
A. He told him he was going to knock it clear off the highway.
Q. And the car struck the truck while you were in it?
A. Yes, sir.
Q. And you don't know what part of the car hit the truck?
A. I don't know. I was too scared. I didn't look.

RE-DIRECT EXAMINATION.

By Mr. Branaman:
Q. Did the Craig boy drive immediately at the truck?
A. Yes, sir.

Lois Kennedy.

Q. Did he ask you to move the truck?
A. He never opened his mouth to me.
Q. But he was cursing and abusing Mr. Kennedy?
A. Yes, just as he said.

Q. Did Mr. Kennedy give him any occasion to do this?

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A. I didn't see any occasion. He was in the mill and came out from there cussing.

Q. Do you recall, Mrs. Kennedy, passing the gate the day Mr. Kennedy came out with a load of bailed hay from the bottom land, the 26th of June?

A. Yes, my son and his wife and I met Mr. Kennedy going in the lane just as we were going out. When we went by the mill I noticed the gate was closed. When we came home about 4:30, the gate was open just about that far (indicating). The next day here come Mr. Furr and brought the warrant and said the lock was broken.

Q. You were with your son?
A. Yes, sir.
Q. What is his name?
A. Russell Estes.
Q. Where does he live?
A. Here in Waynesboro, on Western Road.
Q. Does he work at DuPont?
A. No, at Metalcrafters.

LOIS KENNEDY,

called as a witness on behalf of the plaintiff herein, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Branaman:

Q. You were with your father at the time he was transferring some cattle he has testified about from the bottom land to the homeplace?

A. Yes, sir.

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Q. What was done to transfer the cattle over the mill property?

A. Usually one goes in front and one behind.

Q. And before Mr. Craig put the fence up, they did go through the waste land back of the mill?

A. Yes, sir.

Q. Have they gone out that way since this episode has started?

A. No, that was before.

John Bowman Kennedy.

Q. They would go out to the east, between that and the Weaver land?
A. Yes, sir.
Q. Have you been along with your father at anytime since the Craigs have put the fence up to the gate?
A. Yes, sir.
Q. And how were the cattle brought out?
A. The last time, we came through the gate. The gate was opened and we took them on down to the bottom land.
Q. Well, when the grass is short, perhaps in the pasture, in the tail race, or bottom, you transfer them to the home property?
A. Yes, sir.
Q. And you transfer them back on occasions when the grazing is on the bluff and in the bottom land?
A. Yes, sir.
Q. And it is difficult to drive them over the bluff?
A. Yes, sir.
Q. Have you had that experience?
A. Yes, sir.
Dep. Q. And it was a great inconvenience?
12/18/58 A. Yes, sir.
page 29 } Q. Is there any fence stretched from the gate posts east over the forebay to the Weaver land?
A. There wasn't until Mr. Craig put it up.
Q. And there never had been any fence at the roadway?
A. No, sir.
Q. It never had extended that far?
A. No, sir.
Q. And as I understand, the Shaver fence was built around the bluff, around the private way to the tail race, leaving a water gap for any stock in front of the house, is that correct?
A. Yes, sir.

JOHN BOWMAN KENNEDY RE-CALLED.

RE-CROSS EXAMINATION.

By Mr. Lotz:
Q. Mr. Kennedy, was the car which young Mr. Craig drove at your truck the same one you referred to as a hot rod?
A. Yes, sir.
Q. What kind of a car is it?
A. Oh, it's made up of different parts.
Q. What part of the car hit the truck?

John Bowman Kennedy.

A. The front.
Q. What part of the front hit the truck?
A. I don't know.

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Q. You said you stood there and watched it. Did the bumper hit your truck?
A. I don't know.
Q. And then what did young Craig do?
A. He went back to the mill, and kept on cussing.
Q. Did it do any damage to the car?
A. I don't know about the car, but it bent the fender on my truck.
Q. Did you observe the car as it drove into your truck?
A. Yes, sir.
Q. Where were you standing at that time?
A. I was at the culvert.

At the taking of the evidence in Staunton, reference was made to the following deeds:

J. Lee Koiner and wife to Elsom and deRundeau, dated July 2, 1900
Wallace deRimdeau to R. N. Page, dated July 25, 1900
Margaret P. Harman, single, to Grover B. Coiner, dated July 25, 1919
Grover B. Coiner, Trustee, to Mary C. Bolick, dated September 21, 1938
Mary C. Bolick, widow, to W. F. Shaver, dated February 19, 1943
W. F. Shaver and wife to Ella H. Benson, February 17, 1956
Ella H. Benson, widow, to Cloyd J. Denney and others, February 17, 1956
Respondents tender these as one exhibit, marked "SEVEN DEEDS TENDERED AS ONE EXHIBIT FOR RESPONDENTS"

* * * * *

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W. A. CRAWFORD,

called as a witness on behalf of the plaintiff herein, being first duly sworn, testified as follows:

Dep. 3/23/59 page 4 }

DIRECT EXAMINATION.

By Mr. Branaman:

Q. You are a surveyor, are you not?

A. Yes, sir.

Q. How long have you been a surveyor?

A. Since 1935.

Q. Were you at one time County Surveyor?

A. Yes, sir, and I have recently been appointed again.

Q. You are still the County Surveyor?

A. Yes, sir.

Q. Are you familiar with the maps in the Illustrated Historical Atlas, Augusta County, Virginia, 1884?

A. Yes, I am.

Q. Mr. Crawford, will you read the title page into your deposition?

A. Historical Atlas of Augusta County, Virginia, maps from original surveys by Jed Hotchkiss, T. E., its annals by Joseph A. Waddell and topography by Jed Hotchkiss C & M. E.

Q. What does that mean?

A. Civil and Mining Engineer.

Q. Will you please turn to the map of Middle River District in the Atlas?

A. All right.

Q. Have you it before you?

A. I do.

Q. Please examine the photograph entitled Map of Middle River District and say whether or not that is a picture of Middle River District of Augusta County, Virginia.

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A. It seems to be a photograph of this page from the Atlas of Middle River District.

Q. What appears on the map in the way of roads, if any?

A. The County roads are shown, also the rivers and streams and most of the post offices and villages of the County over the District.

Q. Do you find on the map Route 612, which we call the New Hope-Crimora Road? If so, point out the location of the road and the Crimora Mill property, if you can.

A. Do you mean 612, the road from New Hope to Crimora?

Q. Yes.

A. That road appears on this map.

W. A. Crawford.

Q. Do you find Crimora Mill identified by a marker on the map?

A. There is a star on the map, with the word "mill" written by it.

Q. Is it named?

A. Yes, it is Henry Koiner's Mill.

Q. Is 612 near the mill?

A. Yes, sir.

Q. Does it turn in any direction when it gets near the mill?

A. There are several turns in the vicinity of the mill.

Q. In what direction do they go?

A. One turns in a southeastern direction near the mill and another road turns in a northeastern direction.

Q. Where does the northeastern direction road go?

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A. It goes on the west side of the mill, crosses South River and crosses the railroad, and heads on in the direction of Harriston.

Q. Does it connect with another road northeast of the railroad and river crossings?

A. Yes, after it crosses the river and railroad it connects with another road. I am not certain just now what road it is.

Q. Is there a water tank marker on the map?

A. Yes, a water tank is shown on the railroad.

Q. When the map was made, was that a public road so far as indicated on the map?

Mr. Lotz: (Interrupting) I object to the witness giving his own opinion.

Q. The road you mentioned going south and the one going north on the map and crossing the river, is there any indication of the character of the road, considering the map as a whole?

A. It doesn't appear to be any different from any of the other roads on the map. The roads, as shown on this map, are supposed to be public roads, and there is nothing to indicate that this is not.

Q. Later a road was built across the bottom land southeast of the mill, and a bridge was thrown across the river. Are you familiar with that road?

A. Yes, sir.

Q. Is that road shown on the map?

W. A. Crawford.

A. No, sir.

Q. Does U. S. Highway 340 show on the map?

Dep. 3/23/59 page 7

A. No, it's not on the map either.

Q. Why?

A. It hadn't been built or located at that time.

Q. State whether there is a road running north after crossing the railroad at Crimora and between Crimora and 340.

A. I don't see any.

Q. You are not familiar with that road? It was used before 340 was built.

A. No, sir.

Q. Does the road from the mill to the railroad pass across the bottom land of Mr. Kennedy and I believe it is Mr. Weaver now on the south?

A. I am not familiar with who owns the land on the south.

Q. Did you make the survey for Shaver and Weaver fixing the line for the mill property and the Weaver land?

A. Yes, sir.

Q. The Mr. Weaver owned the land south at the time?

A. Yes, sir.

Q. Do you see any dots on the photostatic copy of the map I hand you near or close to the mill property?

A. Yes, sir.

Q. What do they represent?

A. They would represent dwellings.

Q. Is there any dot in the Weaver bottom land close to the fence of Mr. Kennedy?

A. Those are the dots I was referring to before. There are three dots on the map to the north of the mill. One of them would be the bottom land between the road and the river.

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Q. And is that on Henry Koiner's mill property?

A. Yes, sir.

Q. The other two dots you mentioned have the name Rev. Daniel Yount by them, is that correct?

A. Yes, sir.

Q. Is that the Bowman Kennedy property?

A. Yes, that's in the general location of the Kennedy home.

Q. Will you file the Exhibit Middle River District Map of 1884, as well as the enlarged cross-section of the area with your deposition as a part of it?

A. Yes.

W. A. Crawford.

Plaintiff's Exhibits, Middle River District Map of 1884 and enlarged cross-section of the area, just referred to, filed.

CROSS EXAMINATION.

By Mr. Lotz:

Q. Do you know by whose authority this map was made by Mr. Hotchkiss?

A. As I understand, he undertook the job of making it himself.

Q. And it is *nor* part of the official records of Augusta County?

A. No, sir.

Dep. 3/23/59 page 9 } Q. It seems to have a 46 page forward by Mr. Waddell. I don't believe I have seen that before. Mr. Crawford, referring to the two exhibits *place* in evidence, you have referred to a road running from New Hope to Crimora, on which there is a branch going off to the left as you go towards Crimora, which I assume would be generally to the north?

A. Yes, sir.

Q. This road is shown as intersecting another road running from the top of the map to the bottom, running across the whole map north and south?

A. Yes, sir.

Q. And following that road up to near the top of the map, we have shown a few dots, under one is T. Koiner, and under the other J. E. Ott, and it is true, is it not, that these are designated by the same type lines as the road running to the Crimora Mill. Would that indicate that is a public road or lane, would you know?

A. You mean the road leading off.

Mr. Lotz: (interrupting) Off to the dots representing the Koiner and Ott residences.

A. I would think that it would be a lane, because it doesn't connect with any other road.

Q. It is designated by the same marking, being two lines with the same space between them?

A. Yes, sir.

Q. Mr. Crawford, was it you who made a survey to determine the line between Weaver and Shaver?

A. S. Taylor.

A. I made a survey of the mill property at the time Mr. Shaver bought it. I don't recall the date. It was, I would say, around 1940. I am not certain of the date.

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Q. At that time, do you know if Mr. Weaver owned the land to the rear of the property, that is, land from which you would have to leave the public road and go past the mill building to reach?

A. I can't recall now without seeing the survey of the property, because it has been some time since I did the work.

Q. Do you recall if at that time there was a fence back into the mill property where it joined other lands?

A. Which side do you mean the back?

Q. As distinguished from the part that fronts on the road.

A. As I recall, there was a fence along the Weaver line, and since there were some discrepancies in the survey, it was decided to use the fence as the property line between Weaver and the mill property.

Q. This road which you have referred to and pointed out on the map being the spur going north of the mill at that time was not a public road from the Crimora road to the mill road?

A. Are you referring to the road that turns off and goes north in front of the mill?

Q. Yes, I mean was there a public road from the mill property to Crimora that you could drive across?

A. It was an open road, but I didn't investigate it.

Q. Did it stop, or didn't you go up in there?

A. Yes, it went on past the mill; as I recall it crosses a little stream on past the mill, but I didn't follow it any farther than the mill property.

Dep. 3/23/59 page 11

Q. Was the property in cultivation back of it?

A. I can't recall it.

(Witness Excused).

A. S. TAYLOR,

called as a witness on behalf of the plaintiff herein, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Branaman:

Q. Please state your name and age.

A. S. Taylor.

A. A. S. Taylor, 81 years old.
Q. Where do you live?
A. Over at Crimora, a little below Crimora.
Q. Is it near and south of the Norfolk and Western water tank?
A. Yes, about a quarter of a mile.
Q. Do you own any land along the east side of 340, between that and the railroad?
A. Yes, sir, the so-called old "Bob Claytor Place".
Q. Are you familiar with the Crimora mill property?
A. Yes, I am.
Q. How long have you known it?
A. Oh, I reckon 75 years anyhow.
Q. Did you or not ever live on the property?
A. Yes, sir.
Dep. Q. Where?
3/23/59 A. In the old house up on the hill.
page 12 } Q. Was that the house that stood back of Mr. and Mrs. Craigs' home where they now live?
A. Yes, sir.
Q. How long did you live there?
A. I couldn't tell, just about three years, I reckon.
Q. Did you or not have occasion to use the road leading from the mill northeast across the bottom and thence across the river?
A. Yes, sir.
Q. And following down to the intersection of the road with the highway that comes by Jacob Kirby's place?
A. Yes, sir.
Q. When did you use that generally?
A. When I was a boy until I was a man.
Q. Did you or not haul over the road?
A. I did.
Q. From where?
A. Plain's.
Q. What Plain?
A. J. C. Plain.
Q. Is Mr. Plain's farm located on the map that was offered in evidence?
A. I think so.
Q. I hand you a photostatic copy of the map that was introduced in evidence, and can you see well enough to point out and locate the Plain place?

A. S. Taylor.

A. I haven't seen it yet.

Dep. 3/23/59 page 13 } Q. Do you see the water tank written on the map?

A. Yes, sir.

Q. Can you see J. C. Plain here?

A. Yes, sir.

Q. Did you or not live on his place a number of years?

A. Yes, sir.

Q. What did you do?

A. Drove a team.

Q. How many years did you work for him?

A. About eleven years.

Q. State whether or not you used the roadway we have been talking about.

A. That was the only road we had, that is to call it a public road.

Q. Did you go over to the mill by the Plain place?

A. Yes, sir.

Q. Was it a public road?

A. Yes.

Q. How do you know that?

A. That was the only road. The road we got now wasn't built until later. It was about sixty years ago we hauled across the bottom land. If we wanted to go to Crimora, we just had a pig path.

Q. Was the road kept up by the public?

A. It was kept up by the State.

Q. How do you know?

A. I worked on it for the State

Q. Did Mr. Plain have to contribute to the road upkeep.

A. Yes, everybody had to help keep the road up.

Dep. 3/23/59 page 14 } Q. Who was the supervisor of the road at that time?

A. Old man Sam Ham.

Q. Did he supervise the farmers who worked on the road?

A. Yes, sir.

Q. How old were you when you went to work?

A. I suppose the first time I went to work I was around 17 or 18.

Q. What did you do?

A. Hauled rock, picked up rock.

Q. On this road?

A. Yes, sir.

Q. Did many people use the road during those days?

A. S. Taylor.

A. All below there used it coming over this way.

Q. And you tell the farmers contributed to the upkeep of the roads in those days?

A. Yes, that's right, they all had to work on it. I don't know when the State took it over.

Q. Do you know when the road was abandoned?

A. No, I can't tell you the day or year.

Q. Is the road between the river on the east and the mill on the west used anymore?

A. No, it was closed long ago.

Q. Where did the road lead past the mill?

A. It went through Mr. Barger's and then crossed over and then went around and came back just about where the bridge is now.

Dep. 3/23/59 page 15 } Q. You don't know when they built the road and erected the bridge over South River?

A. No, I can't say.

Q. Was there a road just beyond Crimora Station that went north beyond the post office and came into the highway near your home?

A. You mean from Crimora? Yes. There was a road. It wasn't a public road at that time.

Q. You tell the Court you have driven teams over this road we speak of?

A. Yes, we used to haul wheat over it.

Q. It was the only way you could get there?

A. Yes, that's right.

Q. And you rocked it and kept the road up?

A. Yes, that was a part of our work.

Q. So, as I understand, it was a public road?

A. Yes, sir.

Q. Was it fenced?

A. Yes, sir.

Q. Both sides?

A. Yes, sir.

Q. Is that road still open east from Van Fossens home to 340?

A. Yes, it's the only way out.

Q. Are there any other people using this road?

A. None now.

Q. The Wades did live there and Cales, and others?

A. Yes, sir.

Q. They used that road out?

A. Yes, the only way.

Q. They didn't use the river?

A. S. Taylor.

A. The river got bad, the ford washed out.

Dep.
3/23/59
page 16 } CROSS EXAMINATION.

By Mr. Lotz:

Q. Mr. Taylor, you remember doing some work sixty years ago on this road?

A. Yes, sir.

Q. Has it been that long since it was used as a public road?

A. It wouldn't be more than 40 years, I think.

Q. It wasn't used as a public road in World War I?

A. No, sir.

Q. Did you go by the mill?

A. Yes, sir.

Q. Did you go through the land Mr. Kennedy owns behind the mill?

A. Weaver owns one side and Kennedy owns the other.

Q. Do you go part across the Kennedy land and part across the Weaver land?

A. Yes, sir.

Q. And after that across Mr. Emmett Barger's land?

A. Yes, sir.

Q. Is there a fence along the road now in front of Mr. Barger's property?

A. I don't remember, it might have been.

Q. Do you know if there is one there now?

A. Yes, there is a fence across there now.

Q. When people stopped using the road, were various fences taken down?

A. What was this?

Dep.
3/23/59
page 17 } Q. Did the land owners take the fences down when people stopped using the road?

A. I don't think so. I haven't been there in years. If the fences are down now, they just rotted down.

Q. At that time, the last time you were there, who owned the mill property?

A. I can't recall.

Q. Then, as I understand, Mr. Taylor, without fixing the date, this road hasn't been used for forty years?

A. That's right.

D. G. Kromer.

RE-DIRECT EXAMINATION.

By Mr. G. H. Branaman:

Q. Has the road from the Crimora New Hope road into the mill to Mr. Kennedy's bottom land ever been closed?

A. Not to my knowing. It has always been open.

Q. You tell the Court you have driven into this road many time delivering wheat, with six horses?

A. Yes.

Q. Does Mr. Kennedy have a fence around his bottom land to the mill property?

A. No.

Q. Does he have a gate?

A. Not to my knowing. I haven't been there in 10 or 12 years.

(Witness excused).

Dep.
3/23/59
page 18 } D. G. KROMER,

called as a witness on behalf of the plantiff herein, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By G. H. Branaman:

Q. Mr. Kromer, I believe you testified before when we were taking evidence in July or August of 1958, did you not?

A. Yes, sir.

Q. At that time you stated that you were the tenant on the Yount place, now owned by Mr. Kennedy, from 1912 to 1925?

A. Yes, sir.

Q. You made some mention of the fact that you and another Mr. Kennedy claimed the old roadway through the bottom land and erected a fence, do you recall that?

A. Yes, sir.

Q. Please tell the Court if the roadway was fenced?

A. That wasn't fenced. There had been a fence there, and the old posts were still there.

Q. Were there two fences, one on each side?

A. Yes, sir.

Q. Did you dig any post holes there?

A. Yes, we did.

Q. How was the ground?

D. G. Kromer.

A. Some of it was rocky.

Q. Was there any indication rocks had been hauled into it for the roadbed?

Dep. 3/23/59 page 19

A. It looked that way.

Q. How was that?

A. It was 15 to 25 feet wide from fence to fence where there had been traffic.

Q. And there were indications rock had been hauled in?

A. Where we dug post holes, it had been hauled in.

Q. I believe you testified people had stopped using the road as a way to go through the bottom land.

A. Yes, you couldn't tell where the ford was.

Q. Why was it abandoned?

A. There was no one using it. They built other roads.

Q. Where?

A. One would come up north by the river and around back, and from lack of use and other roads it was abandoned.

Q. Was it or not a public road?

A. I can't say. They all said it was, and it seemed to be.

Q. It was generally thought of as a public road in the community?

A. Yes.

Q. Was the road ever closed in front of the mill by fence or otherwise?

A. I never seen a gate, no.

Q. Was the mill patronized very much?

A. Yes, sir.

Q. Do you know the capacity?

A. When I first went there, they said it was a 100 barrel mill. Afterwards, it was smaller, only about a 75 barrell mill, or something like that.

Dep. 3/23/59 page 20

Q. Did it operate night and day?

A. Yes, sir.

Q. And there was an open way in front of the mill?

A. Always.

Q. Did you ever travel the road after you leave the mill south along the race towards the dam over the Barger land?

A. Yes, sir.

Q. Was that a part of the land that came across the bottom of Mr. Kennedy's?

A. Yes, sir.

D. G. Kromer.

Q. Was that the route you would take in those days to cross the race near the dam?

A. Yes, sir.

Q. Then did you follow down the river and pass over and ford the river before the bridge was built?

A. Yes, sir.

Q. And you went on to Crimora that way?

A. Yes, sir.

Q. After you passed over the river at Crimora, state whether or not a road went north through Mr. Taylor's property to Mr. Kennedy.

A. Yes, sir.

Q. And thence by the tank?

A. Yes, sir.

Q. To what I call the Jake Kirby road?

A. Yes, sir.

Q. And you tell the Court that there was no fence or gate ever erected at the road when you leave 612 in front of the mill?

Dep. 3/23/59 page 21

A. There wasn't no gate there while I was there.

Q. And that was a part of the road that continued across the bottom land?

A. Yes, sir.

Q. *Now,* Mr. Kromer, as I understand, you, at one time, either owned or worked the land we call here the Bowman Kennedy land?

A. Yes, sir.

Q. Did you put this fence as a line fence between the Crimora mill property and the Kennedy farm?

A. No, sir.

Q. Was there already a fence between the bottom land and the mill property?

A. No, sir.

Q. Was there a gate?

A. No, sir.

Q. Is there a gate there now?

A. Yes, I see a gate along the road.

Q. Is there a line fence between these two properties, Mr. Kromer?

A. There was at the time I was there, but no line around the mill.

Q. No, I am talking about his land that adjoins Mr. Kennedy.

D. G. Kromer.

CROSS EXAMINATION.

A. No, sir.

By Mr. Lotz:

Q. Mr. Kromer, there have been filed in this case, as you may know, a number of photographs, and one photograph is identified as "Exhibit B." I wonder if you would identify that.

Dep. 3/23/59 page 22 }

A. I didn't bring my glasses.

Q. Can you say whether the land shown there is the Kennedy land, behind the gate?

A. Well, it looks something like it. This is the river goind down there, and the race is down here.

Q. When you leave Route 612 and drive past the mill and keep going, you get to Mr. Kennedy's property, do you not?

A. Yes, sir.

Q. And Mr. Kennedy has a fence and gate?

A. Yes, sir.

Q. And know Mr. Emmett Barger's road is across the road and has a gate there?

A. Yes, sir.

Q. He has a fence along 612?

A. Yes, sir.

Q. When was it, Mr. Kromer, you were last on that land?

A. I left there in '25.

Q. And when was it you took those old posts out?

A. 1914.

Q. And the road wasn't used after that time?

A. No, and for a while before that time either.

RE-DIRECT EXAMINATION.

By G. H. Branaman:

Q. You spoke of the road over and along the Bargerland. No one lives in that direction so that it would be necessary to use that road?

A. No one except Bowman Kennedy.

Dep. 3/23/59 page 23 }

Q. Can he reach the land to and from the bottom land by any other route than over this road?

A. I don't see how.

Q. Did you say the ford over the east end of the river had washed out?

William C. Van Fossen.

A. Yes, it hasn't been used for some time.
Q. That was true when you and some other Mr. Kennedy cleaned up and built the line fence?
A. Yes, sir.
Q. And it has been out of use for some time?
A. Yes, sir.
Q. And the public used other roads?
A. Yes, sir.
Q. The newer roads make it wholly unnecessary to use the the road over the Barger land to the race?
A. Yes, sir.
Q. There is no occasion for the public to use the road Kennedy and Weaver closed?
A. I wouldn't think so.
Q. Rather, the road was closed when Mr. Yount owned the property.
A. Yes, sir.

CROSS EXAMINATION.

By Mr. Phillip Lotz:
Q. If someone wanted to go down to fish, they could couldn't they?
A. Yes, sir.

(Witness excused).

Dep.
3/23/59
page 24 } WILLIAM C. VAN FOSSEN,
called as a witness on behalf of the plaintiff herein, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By G. H. Branaman:
Q. What is your name?
A. William C. Van Fossen?
Q. How old are you?
A. 47 years, 6 months.
Q. Where do you live?
A. On the east side of South River, where this road came through.
Q. Do you or not have occasion to use the ford at the river and cross to the Bowman Kennedy bottom land?

William C. Van Fossen.

A. I only have an automobile, and I don't *hink* it would make it over there.

Q. Why not?

A. The ford has washed out and I don't think I could get through.

Q. How do you get out from your home to Highway 340?

A. Over this old road.

Q. Your home and where you were born is at the east end across South River from the bottom land road we are speaking of?

A. That's right.

Q. Between the railroad and the river Walter's name is on the map. Where is your home in connection with it?

A. It's right there.

Q. Who owned it before you acquired it?

Dep. A. There was a Batton, I believe, L. G. Batton.

3/23/59 Q. Then did your father own it?

page 25 } A. Yes, sir.

Q. How long did he live there?

A. He bought it somewhere around 1900.

Q. You were born there?

A. Yes, it still is my home.

Q. How do you get out to the highway 340?

A. This road goes direct by my house to 340.

Q. Who keeps it up?

A. I do.

Q. Do you know whether or not it was a public way?

A. I was right young at the time. I know from my past it was a public road. I could show you every inch of it from the railroad to where it crosses the river.

Q. Does anyone else live near you?

A. Charles Wade owned a place down there. He travelled that road also. Roy Wade owns it at the present time.

CROSS EXAMINATION.

By Philip Lee Lotz:

Q. I understand after you explained the location of your land it is east of South River?

A. Yes, sir.

Q. And you are familiar with Mr. Emmett Barger's property?

A. Yes, sir.

William C. Van Fossen.

Q. This road that you described is still used to get out to 340?

A. Yes, sir.

Dep. 3/23/59 page 26

Q. Do you still live at the home place?

A. That's my home. I bought a trailer and set it up on 340.

Q. As I understand, the river cannot be forded any longer?

A. Somebody with horses might do it, but I don't think it can be crossed with an automobile.

Q. How many other properties do you go across in order to get out to 340?

A. That's all at the present time.

Q. You don't have to cross anyone else?

A. Well, Roy Wade does use the same route.

RE-DIRECT EXAMINATION.

By G. H. Branaman:

Q. Are there any gates on this road that go to the highway?

A. Yes, in the years gone by Father put a gate to keep the cows off the railroad.

Q. No one complained?

A. No, Wade could get out if the gate was shut.

RE-CROSS EXAMINATION.

By Phillip Lee Lotz:

Q. Can he get out now?

A. Well, to tell the truth, the gate is just hanging on its hinges. It's been open for years.

RE-DIRECT EXAMINATION.

By G. H. Branaman:

Dep. 3/23/59 page 27

Q. Do you recall a road north along the E. R. Kennedy land?

A. I travelled it many a time.

Q. Do you know whether or not there was ever a gate way at the mill leading into it from 612?

A. No, not until just recently. I worked at the mill in my younger days.

Q. How long did you work there?

A. Four or five years.

Q. Was it a public road?
A. Always to my hearing.
Q. Was the mill well patronized?
A. Yes, it was a busy place.
Q. Was any night milling done?
A. Oh, yes, sir.

RE-CROSS EXAMINATION.

By Philip Lee Lotz:
Q. When you worked at the mill, people went in one way and went out the same way, is that correct?
A. Yes, it is.
Q. Was there a gate back of the mill property and a fence around Mr. Kennedy's land?
A. I helped Mr. Kennedy to haul wheat out many a time. If there was a gate there, I never opened it or shut it. It was always open, if one was there.
Q. What year would you place that, Mr. Van Fossen?
A. Around '46 or '47, as well as I remember.
Q. And when was it you worked at the mill last?
A. I went there when I was 14 years old. I don't know if it was against the law or not.

Dep.
3/23/59
page 28 } H. F. WILLBERGER,
called as a witness on behalf of the plaintiff herein, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By G. H. Branaman:
Q. I believe you testified before, Mr. Willberger?
A. Yes, sir.
Q. Since then the question of whether this was a public road or not has arisen? Did you or not use the road as an undertaker?
A. Yes, sir.
Q. When was that?
A. Before 1915. The last time that I crossed there was when J. C. Plain died in 1914.
Q. Did you bring the body out over that road to Waynesboro?

H. F. Willberger.

A. No, I took him to Crimora and shipped him from there. I went over there, got his body, brought it up the road by Mr. Taylors, out by the post office, and that was a public road.

Q. Before that, did you have any occasion to use the road?

A. On November 14, 1914, for Albert Wade's funeral; Fannie Wade's funeral on December 10, 1914, Ernest Brown, August 25, 1915, that is one in 1915; C. R. Mill, March 6, 1913, J. H. Craig for William Craig on September 30, 1912; C. R. Mayo for Willie A. Mayo, on August 12, 1912; Giles Wade for child, on November 18, 1911. My hearse and two horses went in across the mill, down around the mill, forded the river and out by Mr. Van Fossen's.

Q. Was there any fence?

A. Yes, sir.

Dep. 3/23/59 page 29 }

Q. And it was generally known as a public road?

A. Yes, I went through there a number of times.

Q. Is that the road that appears on the Map of Middle River Magisterial District, Augusta County, Virginia, made by Jed Hotchkiss, this being a large part of it?

A. Yes, this is Henry Koiners' mill, and here you cross the river.

The witness identifies the road Mr. Crawford pointed out.

Q. Was any obstruction at either end of the road, either when you enter the road or leave it?

A. No.

Q. Why was it abandoned?

A. The reason we abandoned it was because the ford could not be crossed after automobiles come in. We got the first hearse in 1915.

Q. Do you know when Mr. Derendeau ceased his operation?

A. I can't say. It hasn't been so long.

Q. It has been testified it was in 1927. Is that about right?

A. Yes, sir.

Q. Was the mill in active operation?

A. Yes. We went there *were* hearses and they would have the mill wagon setting across the road and a chute leading

down from the mill. That's the way they loaded. They would ask if we had time, or if we were in too big a hurry and if we were, they would pull the wagon back and we would go through. They would not obstruct the highway.

Q. Have you ever known in your time a gate from 612?

A. Not until just recently.

(Witness excused).

Dep.
3/23/59
page 30 } JOHN BOWMAN KENNEDY,

the plaintiff herein, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By G. H. Branaman:

Q. Mr. Kennedy, have you had occasion to use the way in and out to your bottom land since you testified the last time?

A. Yes, quite a few times.

Q. Have you a record of this?

A. Yes, sir.

Q. What crops do you have planted there now?

A. I have wheat on part and where the beetle eat the alfalfa, I have some corn.

Q. Do you have any cattle?

A. Yes, 39. I'm feeding them hay.

Q. I hand you an exhibit, marked "1959, Trips made to the bottom through gate. Feb. and to Mar. 23, 1959," showing your trips to and from the bottom land in farming and feeding your cattle. Will you identify that and mark it as an exhibit?

A. Yes, I will.

Q. You have a memo here of February 18, something about an argument at the gate.

A. I had taken a load of brush down to the bottom, and Mr. Arthur Morris come by and wanted to buy some hay for his cow. I stopped by the road to talk to him. Craig saw us down there. Here he come busting down there with paper and pencil. He called Morris to the truck and got in an argument with him.

John Bowman Kennedy.

Dep.
3/23/59
page 31 } CROSS EXAMINATION.

By Philip Lee Lotz:

Q. Now, Mr. Kennedy, with reference to the brush, where did it come from?

A. It was brush from some apple trees.

Q. And you had no place on which to burn it except the bottom land? You couldn't burn it there where it was cut?

A. No, there are too many buildings around.

Q. How many acres do you have?

A. 40 or 45 acres.

Q. What do you use the other land for, other than the part that is in the orchard and buildings?

A. I have part in alfalfa and the other in general farming.

Q. Do you have any grazing land?

A. No, all my grazing is in the bottom, except for the little lot.

(Witness excused) .

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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