

# Record No. 5505

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In the  
Supreme Court of Appeals of Virginia  
at Richmond

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SOUTHERN RAILWAY COMPANY,  
ET AL.

v.

MALCOLM L. ANDERSON, ET AL.

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FROM THE CIRCUIT COURT OF SCOTT COUNTY

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## RULE 5:12—BRIEFS.

§5. NUMBER OF COPIES. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 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.

### NOTICE TO COUNSEL

This case probably will be called at the session of court to be held. **OCT 1962**

You will be advised later more definitely as to the date.

Print names of counsel on front cover of briefs.

Howard G. Turner, Clerk

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**Record No. 5505**

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**VIRGINIA:**

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 19th day of April, 1962.

**SOUTHERN RAILWAY COMPANY AND THE VIRGINIA AND SOUTHWESTERN RAILWAY COMPANY,**  
Plaintiffs in Error,

*against*

**MALCOLM L. ANDERSON AND AUDREY JACQUELINE ANDERSON,**  
Defendants in Error.

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From the Circuit Court of Scott County  
Joseph N. Cridlin, Judge

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Upon the petition of Southern Railway Company and the Virginia and Southwestern Railway Company a writ of error and *supersedeas* is awarded them to a judgment rendered by the Circuit Court of Scott County on the 30th day of October, 1961, in a certain proceeding then therein depending wherein Malcolm L. Anderson and another were plaintiffs and Southern Railway Company and another 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 one thousand dollars, with condition as the law directs.

**RECORD**

\* \* \* \* \*

page 2 }

\* \* \* \* \*

**NOTICE.**

You are hereby notified that the undersigned will, on the 10th day of November, 1959, at 10:00 a. m., or as soon thereafter as the same may be heard, file the attached petition in the Circuit Court of Scott County, Virginia, and move the Judge of the Circuit Court of Scott County, Virginia for the appointment of Commissioners as set out in said petition, to determine whether wagonway and roadway be constructed across the premises of the Southern Railway Company at a point near Yuma, Virginia, as set out in said petition, and as set out in said notice, pursuant to Section 56-16 of the Code of Virginia. Said motion and application to said Court will be made at the Court House at Gate City, Virginia on November 10, 1959, or as soon thereafter, as the same may be heard; a copy of said petition is attached hereto and made a part of this notice.

MALCOLM L. ANDERSON  
AUDREY JACQUELINE  
ANDERSON,  
petitioners  
By Counsel.

QUILLEN & CARTER, p. q.  
By CECIL D. QUILLEN  
Gate City, Virginia.

page 3 }

\* \* \* \* \*

**PETITION.**

To the Honorable E. T. Carter, Judge of said Court:

Your petitioners would respectfully represent, aver and show unto the Honorable Court as follows:

I.

That your petitioners are the owners of that certain tract or parcel of land situate adjacent to the Southern Railway Company property, Estillville Magisterial District, Scott County, Virginia, near Yuma, Virginia.

II.

That said Southern Railway Company's right of way passes through these lands.

III.

That the said Southern Railway Company's right of way and tracks lie between this tract or parcel of land and the public highway.

IV.

That your petitioners have no means of ingress and egress to their said premises from the public highway.

page 4 }

V.

That petitioners have given notice to the Southern Railway Company, pursuant to Section 56-16 of the Code of Virginia, requesting the Southern Railway Company, its agents, servants and employees, to construct a suitable wagonway and roadway across said lands within a period of ten (10) days from the date of service of notice thereof; a copy of said notice so served on the said Southern Railway Company is exhibited herewith.

VI.

That the location of said wagonway and roadway to be constructed over the said Southern Railway Company's property from the lands of petitioners to the public highway has been pointed out to the Southern Railway Company, its agents and servants, and is at a point approximately 200 feet east of the Morehead and Anderson line, near the Yuma Station.

VII.

That the Southern Railway Company, its agents, servants and employees have failed and refused to construct said

wagonway and roadway across the said Southern Railway to the premises of petitioners.

### VIII.

This petition is to be filed and application to be made pursuant to Section 56-16 of the Code of Virginia for the appointment of Commissioners to determine whether said wagonway and roadway should be constructed.

page 5 } THE PRAYER OF PETITIONERS is that the said Southern Railway Company be required to construct a wagonway or roadway across the Southern Railway premises as set out in said notice and as pointed out to the said Southern Railway Company, its agents and servants; that the Court appoint Three (3) disinterested persons whose lands do not abut on said railroad right of way, who shall constitute a Board of Commissioners, whose duty shall be to go upon said lands and determine whether said wagonway or roadway should be constructed, who shall report their findings to the Circuit Court of Scott County, Virginia, and that your petitioners may have all such other, further and general relief in the premises as the nature of their case may require, or to the Court should seem proper.

Given under our hands, this the 26th day of October, 1959.

MALCOLM L. ANDERSON  
AUDREY JACQUELINE  
ANDERSON, petitioners  
By Counsel.

QUILLEN & CARTER, p. q.  
By CECIL D. QUILLEN  
Gate City, Virginia.

Received and filed Nov. 5, 1959.

page 6 } FERNA DARNELL, D. Clerk.

\* \* \* \* \*

DEMURRER.

Comes now the defendant, Southern Railway Company, and says that the petition filed against it in this Honorable Court

is not sufficient in law and for grounds of said Demurrer states:

I.

The petition is insufficient because the land in question and the exact location of the proposed wagon way across the railroad are not described with particularity and could not be identified from the said petition as the description therein is vague and indefinite. The point at which it is desired to have the said wagon way constructed is not designated as required by statute.

II.

Because the petition shows on its face that this is an effort to have the defendant Railway Company construct a private crossing leading from the petitioners' land to the public highway and the statute in such cases made and provided does not provide for the construction of a wagon way from lands to a public highway.

III.

Because the notice given in this case by the petitioners is inadequate and insufficient.

And for other grounds to be assigned at bar.

SOUTHERN RAILWAY  
COMPANY  
By Counsel.

FRED B. GREER  
Assistant Division Counsel.

page 7 }

\* \* \* \* \*

Received and filed Nov. 5, 1959.

FERNA DARNELL, D. Clerk.

\* \* \* \* \*

page 8 }

\* \* \* \* \*



## ORDER.

This cause came on this day to be heard upon notice and petition under Section 56-16 of the Code of Virginia; upon demurrer filed by the Southern Railway Company, and upon argument on said demurrer, after which this cause was taken under advisement.

Upon consideration whereof, and it appearing unto the Court that the demurrer filed herein should be overruled, the Court doth adjudge and order that said demurrer be overruled.

And it further appearing unto the Court that the petitioners are entitled to have appointed three (3) disinterested persons to act as commissioners as provided in Section 56-16 of the Code of Virginia, the Court doth adjudge and order that B. J. Broodwater, Gould A. Kiser and E. V. St. Martin, three distinterested persons whose lands do not abut on the railroad of the defendant, who shall constitute a board of commissioners, whose duty it shall be to go upon the land and to determine whether the wagonway asked for in the petition filed herein should be constructed; the said board of commissioners shall prepare its decision in writing and if favorable to the petitioners, it shall set forth the points at which

the wagonway shall be constructed, giving also a  
 page 9 } description of what should be done by the defendant  
 company to make a suitable and convenient way.  
 The decision and report of the Board of Commissioners shall be returned to and filed in the Clerk's Office of this court, until the coming in of which report this cause is hereby continued.

The defendant by counsel excepts to the entry of this order.

Enter this order, this the 10 day of October, 1960.

E. T. CARTER, Judge.

\* \* \* \* \*

page 12 }

\* \* \* \* \*

## REPORT OF COMMISSIONERS.

The undersigned, E. V. St. Martin, G. A. Kiser and George L. King, who were appointed commissioners by the Honorable

Court on the 10th day of October 1960 to go upon the lands of the defendant railway company and determine whether the wagonway requested by petitioners should be constructed, would report unto the court as follows:

We proceeded to go upon said premises pursuant to said order of said court and viewed said premises at the site of the wagonway or crossing requested by the petitioners at the Yuma Siding, Scott County, Virginia. We find that such crossing should be constructed.

The location of the crossing or wagonway to be so constructed by the defendant railway company is 150 feet north of switch point in main line at south end of Yuma siding, said switch point is 1174 feet north of Mile Post 44. The crossing is also 55 feet south of derail on siding and 90 feet south of a switch point in siding for house track.

The defendant railway company is to construct a wagonway or crossing of their tracks for a distance beginning at a point 10 feet east from center line of siding to a point 10 feet west, of main line and to grant petitioners the right to construct and maintain a road crossing right of way on property of said defendant railway company to said crossing for ingress and egress. The defendant railroad company is to construct said crossing so as to make a suitable and convenient way as provided by law.

page 13 } The petitioners are to construct at their cost the *road* from limits of track crossing as set forth in this report.

The location of center line of *road* to be at 90 degrees to center line of main line of track, and to extend from west property line to east property line and of sufficient width to constructed a roadway 14 feet wide plus cuts and fills.

The petitioners are to furnish all necessary pipes for drainage where needed beyond the limits of construction by said railway company.

Respectfully submitted, this the 16th day of November, 1960.

G. A. KISER, Commissioner  
G. L. KING, Commissioner  
E. V. ST. MARTIN,  
Commissioner.

Filed Jan. 16, 1961.

FERNA DARNELL, D. Clerk.



page 14 }

\* \* \* \* \*

## EXCEPTION TO THE REPORT OF COMMISSIONERS.

The Southern Railway Company, by counsel, excepts to the Report of Commissioners filed in this cause on January 16, 1961, and for its grounds of exception and objection says that the report should not be confirmed by the Court for good cause shown as follows:

## I.

The proceeding is contrary to law in that the railroad of the defendant does not pass through the lands of the petitioners. The railroad of the defendant runs by the land of the petitioners.

## II.

The decision of the commissioners is arbitrary and without foundation in fact or at law.

## III.

There is no justification in *face* or in law for the placing of a crossing at the place set forth in the commissioners' report.

page 15 }

## IV.

The petitioners have other means of ingress and egress to their lands.

## V.

And for other grounds to be assigned at bar.

SOUTHERN RAILWAY  
COMPANY

By Counsel.

GREEAR, BOWEN, MULLINS  
AND WINSTON

Attorneys at Law

Norton, Virginia

By LES. M. MULLINS

Received and filed Jan. 28, 1961.

FERNA DARNELL, D. Clerk.

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page 17 }

\* \* \* \* \*

# ORDER.

This cause came on this day to be heard upon all former proceedings had in said cause, and it appearing unto the Court that Virginia and Southwestern Railway Company, lessor for the Southern Railway Company, and owner of the right of way mentioned in this proceeding, is a necessary party to this action and on motion of petitioner and the defendant, by counsel consenting, and counsel for Virginia and Southwestern Railway Company consenting, the Court doth adjudge and order that Virginia and Southwestern Railway Company may be made a party defendant to this petition; and

It appearing unto the court that Virginia and Southwestern Railway Company has accepted service of said petition, the Court doth adjudge and order that Virginia and Southwestern Railway Company file its answer to said petition by May 1, 1961.

ENTER THIS ORDER, this the 20th day of April, 1961.

JOSEPH N. CRIDLIN, Judge.

page 18 }

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## ADDITIONAL EXCEPTIONS TO THE REPORT OF COMMISSIONERS.

The Southern Railway Company, by counsel, further excepts to the Report of Commissioners filed in this cause on January 16, 1961, and for its additional grounds of exception to the exceptions heretofore filed, says that the Report should not be confirmed by the Court for good cause shown as follows:

### GROUND V.

That heretofore the railway company acquired a right of way through certain lands known as the Tate Farm. That

the railway company has established one or more crossings from one portion of the Tate Farm to another portion of the Tate Farm prior to the Farm being subdivided. That the persons who acquired the portions of land of the Tate Farm should have acquired a right of way by virtue of necessity from their grantors in a chain of title. That in effect the persons who bought each parcel or subdivision of the Tate Farm, in compelling the railway company to establish a crossing for each parcel, is imposing an undue burden upon the railway company in the establishment of separate crossings for each parcel.

# GROUND VI.

That the Southern Railway Company has here-  
page 19 } tofore established grade crossings from one portion  
of the original Tate Farm to the other portions,  
and the petitioners, or their predecessors in title, have already received the benefits of the relief sought in this proceeding and are not entitled to proceed with this proceeding.

VIRGINIA AND SOUTH-  
EASTERN RY.  
SOUTHERN RAILWAY  
COMPANY  
By Counsel.

GREEAR, BOWEN, MULLINS &  
WINSTON  
Attorneys at Law  
Norton, Virginia  
By LESLIE M. MULLINS

Received and filed May 17, 1961.

FERNA DARNELL, D. Clerk.

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page 27 }

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# OPINION OF THE COURT.

The petitioners are the owners of an eight acre tract of land which they purchased from A. C. Morefield and wife on

May 25, 1955. The land lies north of and adjacent to the right of way and tracts of the defendants. South of defendants' right of way and adjacent, is the public road. The petitioners here have proceeded pursuant to Section 56-116, Code of Virginia, to have a wagon way established running from their property across the property of the defendants to the highway.

Upon the filing of the petition, the defendants demurred principally upon the ground that the defendants could not be required under Section 56-16, to construct a private crossing for petitioners from their land to the public highway and that this section of the Code is only applicable where the Railroad right of way runs through the lands to give the land-owner access from one part of his land to another.

page 28 } The court, presided over by Judge E. T. Carter, overruled the demurrer and commissioners were appointed pursuant to petitioners' prayer. The commissioners reported to the Court, that a wagon way should be constructed and set forth the location and particulars thereof. To this report and action of the commissioners the defendants excepted, contending again that Section 56-16 does not authorize such a crossing and also that the commissioners' decision is not justified under the circumstances.

Evidence was heard on the exceptions. A number of witnesses appeared in support of petitioners and the commissioners' report, and also in support of the defendants.

The exceptions filed by the defendants fall into two classifications. (1) Section 56-16, Code of Virginia, does not contemplate a situation such as this where the railroad runs adjacent to the lands of petitioners and between the lands and the public road, and (2) that the action of the commissioners in finding that there was a necessity for the crossing was erroneous.

The Court has passed upon the question set out under Exception (1) on the demurrer. An order overruling the demurrer was entered on October 10, 1960.

The defendants filed no answer. They seek to present the same defense by excepting to the report of the commissioners. Can the Court again consider this question?

page 29 } "Where the Court has adjudicated a question raised by demurrant adversely to him, it is justified in ignoring the same when it is again raised by the party in a later pleading." 106 A. L. R. 466.

"It is often important to determine whether the judgment on demurrer is final so as to preclude another action for the

same cause, or the same defense to another action. If the ruling on the demurrer to a declaration involves the merits of the cause so as to preclude a recovery on the facts stated, the judgment is final and bars recovery not only in that action, but in any other based on the same facts. A judgment on demurrer involving the merits is as conclusive as one rendered on the proof." Burks Pleading and Practice, Paragraph 215, Page 366.

"On the overruling of a demurrer, the general rule is that judgment is final if the merits are involved. \* \* \* And when the substantial import of the decision of the Court, as overruling the defendants' demurrers to the plaintiffs' declaration is that the declaration is sufficient to entitle the plaintiff to judgment, the judgment is one on the merits." 41 Am. Jur. Plead. Sec. 254, Page 471-72.

"The entry of a final decree in a chancery cause and adjournment of court puts an end to any further proceedings in the cause, save proceedings to compel the performance of the Court's mandate, or an appeal to a higher court. The Court can, on motion, reinstate the cause for further proceedings; and on the other hand, all decrees and orders therein, however erroneous, must stand until altered or reversed by proper proceedings, either by bill of review in the same court or by a higher court." Lile's Equity Pleading and Practice, Section 172 Page 99.

"No principle is better settled or of more universal application, than that no court can reverse or annul its own final decrees or judgments for errors of fact or law, after the term in which they have been rendered." *Owens v. Owens*, .... Va. ....; 162 S. E. 46.

"If the decree was final it must stand no matter page 30 } how erroneous it may be. And also all decrees, orders and proceedings ahead of it." *Battaile v. Maryland Hospital for Insane*, 76 V. 63.

"All final decrees and final judgments irrespective of terms of court, remain under the control of the trial court and subject to be modified and vacated for twenty-one days after the date of entry and no longer. Rule 2; 22, and 3; 21, of Rules of Court.

It is the opinion of the Court that this ruling on the demurrer involved the merits of the case and the order is now final. The Court cannot now consider the same questions on the exceptions to the commissioners' report.

As to the propriety of establishing a crossing as set out in the report of the commissioners, the Court recognizes that the

report is *prima facie* correct. Great weight must be given the report. The petitioners introduce two disinterested witnesses in support of the report. The commissioners went upon the property and were aided by a competent civil engineer. It was their opinion that the crossing was needed and nothing irregular appears on the fact of the report.

Section 56-16 provides that the Court shall confirm the report "unless good cause be shown against it." The Court does not feel that good cause has been shown against confirmation of the report.

The exceptions to the report are therefore overruled and the crossing is to be established in accordance with the commissioner's report.

page 31 } A decree carrying out the views above expressed will be prepared by counsel. In the event counsel cannot agree upon a time in which the crossing is to be constructed the time will be fixed by the Court after hearing the parties relative thereto.

This the 12 day of September, 1961.

JOSEPH N. CRIDLIN, Judge

page 32 }

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### ORDER.

This cause came on this day to be heard upon all the former proceedings had in said action and to be heard upon the exceptions to the report of commissioners filed in this action on January 16, 1961, which exceptions were filed on January 28, 1961 and additional exceptions were filed on May 17, 1961 by the Southern Railway Company and Virginia & Southwestern Railway Company, and evidence was heard on said exceptions by the Court *ore tenus*.

Upon consideration whereof, and it appearing unto the court that the exceptions so taken by the defendants, Southern Railway Company and Virginia & Southwestern Railway Company, are not well taken and should be overruled, the court doth so decide and doth overrule said exceptions; and

It further appearing unto the court that the report of the commissioners filed in this action should be confirmed and ratified, the court doth ADJUDGE AND ORDER that said report of said commissioners be confirmed and the Court doth

ADJUDGE AND ORDER that said crossing be  
page 33 } established in accordance with the report of said  
commissioners and the court doth further AD-  
JUDGE AND ORDER that said crossing be established and  
constructed by the defendants in accordance with Section  
56-16 of the Code of Virginia; the court doth further find that  
in accordance with the report of the commissioners, the loca-  
tion of the crossing or wagonway to be so constructed by the  
defendant railway company is 150 feet north of switch point  
in main line at south end of Yuma siding, said switch point  
is 1174 feet north of Mile Post 44; the crossing is also 55 feet  
south of derail on siding and 90 feet south of a switch point in  
siding for house track.

The defendant railway company is to construct a wagonway  
or crossing of their tracks for a distance beginning at a point  
10 feet east from center line of siding to a point 10 feet west,  
of main line and to grant petitioners the right to construct and  
maintain a road crossing right of way on property of said  
defendant railway company to said crossing for ingress and  
egress. The defendant railroad company is to construct said  
crossing so as to make a suitable and convenient way as pro-  
vided by law.

The petitioners are to construct at their cost the road from  
limits of track crossing as set forth in report.

The location of center line of road to be at 90 degrees to  
center line of main line of track, and to extend from west  
property line to east property line and of sufficient width to  
construct a roadway 14 feet wide plus cuts and fills.

The petitioners are to furnish all necessary pipes for drain-  
age where needed beyond the limits of construction by said  
railway company.

page 34 } The Court doth ADJUDGE, ORDER AND DE-  
CREE that the defendants proceed to establish  
and construct said crossing which is to be completed on or  
before the 31st day of Dec., 1961.

And nothing further remaining to be done in this action, the  
defendants are hereby ordered to pay the costs of these pro-  
ceedings. Defendants except to the entry of this order.

And the defendants by counsel having made a motion for  
suspension of execution of this order herein rendered, and  
having signified their intention to apply to the Supreme Court  
of Appeals for a writ of error, the court doth ADJUDGE  
AND ORDER that execution of said order be suspended for a  
period of sixty (60) days and thereafter until such petition  
for writ of error is acted upon by the Supreme Court of Ap-  
peals, if such petition is filed within the specified time, pro-  
vided that the defendant, or someone for him, shall give bond



before the Clerk of this court in the penalty of Five Hundred Dollars, with approved surety thereon, conditioned as prescribed by law in accordance with Section 8-465 of the Code of Virginia. Said bond to be given within fifteen (15) days from the date of this order.

Enter this order, this the 30 day of October, 1961.

JOSEPH N. CRIDLIN, Judge

page 36 }

NOTICE OF APPEAL AND  
ASSIGNMENT OF ERROR.

The Defendants in the above styled case in the Circuit Court of Scott County, Virginia, hereby give notice of appeal from the Order entered in this case on October 30, 1961, and sets forth the following assignments of error:

I.

The Court erred in not sustaining the Demurrer filed by the Southern Railway Company in this case and the joining in of the Demurrer by the Virginia and Southwestern Railway Company.

II.

The Court erred in not sustaining the exceptions taken to the Commissioner's Reports filed on January 28, 1961, and the additional exceptions filed on May 17, 1961, and overruling the same.

page 37 }

III.

The Court erred in ratifying and confirming the Commissioner's Report on judging that the crossing in this case be established and constructed by defendants in accordance with Section 56-16 of the Code of Virginia as set forth in said Order of October 30, 1961.

## IV.

The Court erred as the judgment of the Court is contrary to the law and contrary to the evidence and not supported by the evidence.

Respectfully,

SOUTHERN RAILWAY COM-  
PANY AND VIRGINIA AND  
SOUTHWESTERN RAILWAY  
COMPANY,  
By Counsel.

LESLIE M. MULLINS

Attorney at Law  
Norton, Virginia

Counsel for Defendants.

Filed Dec. 28, 1961.

FERNA DARNELL, D. Clerk.

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## LIST OF WITNESSES.

	DE	CE	REDE	RECE
John R. Shipley	6	15	18	
Robert B. Rust	18	24		
John H. King	25	26		
Malcolm Anderson	28	30	35	
H. H. Taylor	35	38		
E. V. St. Martin	41	44	46	47
George L. King	47	50	54	
W. B. Bragg	55	57	65	
G. A. Kiser	68	69		
George L. King	73	73	73	73
Malcolm Anderson	74	75		
H. H. Taylor	77	77		
E. V. St. Martin	78	78	80	

LIST OF EXHIBITS.

Exhibit 1—Deed dated May 25, 1955, from A. C. Morehead and Chloe E. Morehead to Malcolm Lee Anderson and Audrey Jacquelin Morehead Anderson.

Exhibit 2—Deed dated August 14, 1937, from D. R. Taylor and Ruby Kate Taylor to A. C. Morehead.

Exhibit 3—Deed dated December 18, 1941, from A. C. Morehead and Chloe E. Morehead to D. R. Taylor and Ruby Tate Taylor.

Exhibit 4—Deed dated April 18, 1906, from J. E. Tate and Barbara E. Tate to Virginia and Southwestern Railway Company.

Exhibit 5—Deed dated April 18, 1906, from J. E. Tate and Barbara E. Tate to Virginia and Southwestern Railway Company.

page 2 } Exhibit 6—Deed dated April 18, 1906, from J. E. Tate and Barbara E. Tate to Virginia and Southwestern Railway Company.

Exhibit 7—Map of property in question.

Exhibits Photographs 7-11—Photographs of property in question.

page 3 }

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The Court: I understand the Commissioners have gone on the land and recommended a certain point for a crossing, and you have disagreed and filed exceptions.

Mr. Mullins: Yes.

The Court: It will be your burden then.

Mr. Mullins: That was my understanding. I just wanted to have an understanding. According to Section 56-16 of the Code, that is a *prima facie* case. Counsel for both sides have agreed that certain deeds can be entered without the Clerk being put on as a witness. I have three deeds I desire to file, the first one from A. C. Morehead and his wife, Chloe E. Morehead, dated the 25th day of May, 1955, of record in the Clerk's Office of the Circuit Court of Scott County in Deed Book No. 169, Page 312, and we agree that will be Exhibit 1; and another deed between D. R. Taylor and Ruby Kate Taylor, his wife, to A. C. Morehead dated the 14th day of August, 1937, of record in the Clerk's Office of the Circuit Court for Scott County in Deed Book 101, Page 312, which will be introduced as Exhibit 2; then a partial conveyance

from Exhibit 2 back to D. R. Taylor and Ruby Kate Taylor by A. C. Morehead and Chloe E. Morehead, his wife, dated December 18, 1941, of record in the Clerk's Office of Scott

County, Virginia, in Deed Book 115, Page 289. Coun-  
page 4 } sel and I have agreed if there are any other deeds  
that either side desires to submit to the Court, that  
we can have copies of such prepared and submitted to the  
Court. I want to call Mr. Shipley as a witness. Is Your  
Honor ready to proceed?

The Court: Yes. I was looking here. You filed exceptions  
two different times?

Mr. Mullins: Yes, sir. I might say the first exception by  
Southern Railway—but this right of way is owned by Virginia  
and Southwestern Railway, and there is a lease agreement  
with Southern Railway. It is my *understand* that Southern  
Railway Company owns all the stock in Virginia and South-  
western Railway Company. There might be some question  
raised by the petitioners about this, inasmuch as the deeds  
involved in this case show Virginia and Southwestern, and  
I wanted to clarify that.

Mr. Quillen: We added Southwestern by agreement as a  
party in the answer by the plaintiff.

Mr. Mullins. I think it can be stipulated by counsel that  
this right of way runs through a farm owned by J. E. Tate,  
and we desire to file Exhibits 4, 5 and 6 with the Court. Your  
Honor, I think we can briefly summarize our contentions to  
you. The first contention is a matter of law, mainly that the  
statute provides that if the railroad runs through—emphasizes  
the word “through”—the lands of a person that may petition  
for a crossing for a wagon way across the railroad track; it is  
our contention Mr. Anderson owns land only from the north  
side of the track, and that the railroad runs by his property,

but not through it. So he doesn't come in the pur-  
page 5 } view of the statute of the class of persons to come  
within the statute. The railroad does not run  
through his land and bisect it and divide it, but runs by it. I  
think we can stipulate the railroad runs by his land rather  
than through it.

Mr. Quillen: With this further stipulation, that this parti-  
cular tract is carved out of the original Tate land which lay  
on both sides of the railroad quite some distance.

Mr. Mullins: Yes, we can stipulate that it did at one time  
run through it, but it runs by it.

The Court: Why does he want a roadway?

*John R. Shipley.*

Mr. Mullins: He is trying to get to the highway on the opposite side of his land. Our second point is that there is a crossing 600 feet away which leads from lands on the original J. E. Tate tract and which at one time was a wagon way from one part of the J. E. Tate tract to the other part of the J. E. Tate tract. Therefore the crossing was established and in effect. He wants another crossing 600 feet away. We say there is no necessity for it. There is a suitable means for him to extend his present roadway without going across the railroad at all. In other words, considering the parties and the crossing of the railroad, and considering the burden put on the railroad by having to be on the lookout for more cars and having to cross a railroad crossing, it would be more feasible, suitable and just between the parties to extend the means of egress and ingress to the Morehead property, from whom Mr. Anderson bought his property, and in his deed he has a right of way to cross the Morehead property.

Mr. Quillen: So the record may be kept straight, page 6 } we have no right of way for approximately 200 feet to get to this crossing, and the inconvenience and impracticability of building a road from this property along the south side of the railroad to this crossing entails expenditure on the part of the petitioners to about \$2,000.00.

Mr. Mullins: It is our contention he has a right of way from his predecessors by implication.

Mr. Quillen: That is another law suit.

Mr. Mullins: We think the deeds will show there was a reservation by necessity.

The Court: Am I supposed to decide that too, whether he has a right of way? Suppose he said he had a right of way to go over it and they came in later and said he didn't have?

Mr. Mullins: We would have to come back and seek regress from the Court.

The Court: He is not a party to the proceedings, is what I am getting at. How am I going to decide whether he had a right of way when the party through whom you claim he had a right of way is not a party?

Mr. Mullins: That is the reason we submit the deeds.

The Court: Go ahead.

JOHN R. SHIPLEY,  
after being duly sworn, testified as follows:

*John R. Shipley.*

DIRECT EXAMINATION.

By Mr. Mullins:

Q. What is your name?

A. John R. Shipley.

Q. What is your age?

A. Forty-six.

page 7 } Q. What is your occupation?

A. I am a civil engineer with Southern Railway Company.

Q. What is your address?

A. 5913 Maryland Drive, Knoxville, Tennessee.

Q. What is your title?

A. My title is Assistant Engineer. I am a civil engineer. I work for the Southern Railway Company.

Q. In what capacity?

A. Assistant engineer is my title.

Q. What schooling have you had to prepare you for your engineering training?

A. I graduated with a degree in B. S. in Civil Engineering in 1938 from the University of Tennessee.

Q. What have you been doing since then, Mr. Shipley?

A. With the exception of four years that I spent in service, I have been one year I have been practicing engineering one year with Knoxville Housing Authority and landscape architect the remainder of the time with Southern Railway Company.

Q. At Southern Railway Company what have you been doing with reference to engineering?

A. We make plans and estimates for tracks, property, all kinds of engineering work.

Q. In other words, do you actually practice your engineering profession?

A. Yes.

Q. Have you made a map of the proposed area, I mean of the area where the crossing is proposed to be located by Malcolm Anderson in this proceeding?

page 8 } A. Yes, sir.

Q. Do you have that map with you?

A. Yes, sir, I have a print of that drawing with me.

Mr. Mullins: We desire to introduce that, sir, as Exhibit 7A.

*John R. Shipley.*

Q. Who made that map?

A. I made this map myself.

Q. What is it made from? I mean was there a ground survey?

A. Yes, sir, I made a survey at this location.

Mr. Mullins: To orient the Court, how could we best proceed?

The Court: Bring it up here on my desk. (Map was taken to the Court's desk)

Q. Point out the Southern Railway or Virginia and South-western tracks.

A. This is a single line drawing, a scale of one inch equals 100 feet, and the line here half way between the right of way lines indicates the line of the main track. There are two other tracks to the south of that in the area just south of the Morehead house.

Q. Point out Malcolm Anderson's tract of land.

A. This area marked "property of Malcolm Anderson" is the property I understand belongs to Mr. Anderson.

Q. Can you point out the proposed crossing? Is it so marked on the map?

A. The proposed crossing is indicated on the map and so marked.

page 9 } The Court: Is that the crossing the Commissioners have set out?

Mr. Mullins: Yes, sir, that is substantially so.

Q. Can you point out the existing crossing nearby?

A. The existing crossing is shown on the drawing approximately at Station 200+08.4.

Q. Point out the roadway going on both sides of the track. Is there a roadway on the opposite side of the track from the county road?

A. From the county road after you cross the tracks going west there is a dirt road which goes up to the Morehead house, and going east is a gravel road which serves seven or eight houses. One house not shown on the drawing is past the end of the road east and one house trailer.

Q. Point out the county road and point out the gravel road.

A. The county road runs substantially parallel to the tracks



*John R. Shipley.*

on the south side. The access road to the existing access road to the houses on the north side of the track cross the track at the station I mentioned and then runs east and west essentially parallel with the tracks.

Q. Have you indicated anything by pencil with reference to the map? I direct your attention to a pencil mark where it says "200 feet."

A. I have indicated in pencil on this print of this drawing which we are submitting, approximately a 200 foot road which would be necessary to go from the end of the dirt road at the Morehead house to the approximate property line page 10 } of Mr. Anderson. That is the east property line.

Q. About what is the distance going across the railroad tracks at the scene of the crossing to the property of Malcolm Anderson?

A. That is approximately 120 feet.

Q. Is there any reason by terrain or otherwise that Mr. Anderson, that it wouldn't be practical and feasible for him to extend this roadway into his property from the dirt road in front of the Morehead house?

A. Looking on the ground when I made the survey, I saw no reason why this road couldn't be extended.

The Court: Who owns this property?

Mr. Mullins: This property is owned by Mr. and Mrs. Morehead. And for the Court's benefit so he can follow, I would like to offer Exhibit 1 for inspection of the Court, and let the record show I am showing the Court Exhibit 1, which is a deed from A. C. Morehead to Malcolm Lee Anderson which conveys eight acres and which provides therein "There is reserved a right of way 16 feet wide along the Railroad right of way over the land of the parties of the first part of this deed, for ingress and egress of the parties of the second part of this deed."

The Court: That is the deed from Morehead to Anderson on this tract?

Mr. Mullins: Yes, sir.

Mr. Quillen: No, I think it is a question of fact on there. It is Taylor's, it is east of the Morehead property for a distance of about 200 feet.

page 11 } Mr. Mullins: I wanted to show that Morehead did have a right of way—that he did have a right of way across Morehead.

Mr. Quillen: There is a portion of this property that belongs to Taylor and Morehead does not own to the crossing.

*John R. Shipley.*

E. R. Taylor owns that strip.

Mr. Mullins: We have Exhibits 2 and 3 which will clarify that. Exhibit 2 shows that D. R. Taylor and wife conveyed to A. C. Morehead a certain tract of land, excepting and reserving a right of way for ingress and egress on the property conveyed to A. C. Morehead. The said E. R. Taylor reserved a right of way for egress and ingress to the property of Morehead. In other words, Taylor reserved a right of way, then Morehead conveyed it back, part of it, to E. R. Taylor in that portion of it. Of course he already had a right of way; he reserved a right of way by necessity to the highway. Of course Morehead received Taylor's reserved right of way, and Taylor had a right of way, and the two became merged.

The Court: Who owns the land between the railroad right of way and the county road?

Mr. Mullins: As far as I know, there has been an existing crossing there for a good many years.

Mr. Quillen: As for the proposed crossing, the railroad owns to the highway.

The Court: Nobody claims this?

Mr. Mullins: The crossing has been there ever since the railroad came through.

The Court: What is to hide the track from the page 12 } other land there?

Mr. Mullins: I think we can agree it is substantially level.

Mr. Quillen: No.

Mr. Mullins: There is no embankment going off the railroad.

Mr. Quillen: I am advised there is.

Mr. Mullins: On the other side?

Mr. Quillen: Yes.

Mr. Mullins: How deep?

Mr. Anderson: About a 20-foot cut.

The Court: What I really asked was here at the proposed crossing.

Mr. Quillen: At the proposed crossing that is level. Excuse me. I thought you were talking about the area here (indicating). At the crossing, that is level. There is no question about that.

Mr. Mullins: Up here of course it is a little higher.

Mr. Quillen: I misunderstood.

*John R. Shipley.*

The Court: These people, indicating the house, where do they get across the track?

Mr. Mullins and Mr. Quillen: (Agreed) At the existing crossing.

### DIRECT EXAMINATION.

Resumed by Mr. Mullins:

Q. Mr. Shipley, what problems would the railroad have or what causes would they have to prevent Mr. Anderson from building his main egress along the right of way along the north side rather than the proposed new crossing from an engineering and operational viewpoint?

A. I am not familiar with train operation in that location, but I do know this, that a crossing at that point would be dangerous because of the curvature in the main track; that from that crossing you don't have a clear view  
page 13 } for any great distance in either direction.

The Court: What is the view from the crossing west and from the crossing east? Do you know?

A. I didn't measure that accurately as far as taking a tape and measuring it, but I do know from that proposed crossing to the east you can only see approximately to the existing crossing, which is somewhere around 700 feet. And the other direction would be somewhere close that. I didn't measure that either, but your main track is on what you might say a reversed curve, and this crossing is in the point of a reversed curve. That is the greatest objection from the railroad's standpoint. Of course, you do have the cost of a crossing going in there, which is much more expensive than extending the road parallel to the main track, and the cost of installation and the cost of maintenance, which is a continual factor.

The Court: What do you estimate to be the cost of establishing a crossing at that proposed point, that is, the initial cost?

A. I haven't made a detailed estimate on that, but from my experience in crossings I believe it would cost around \$500.00 to put a crossing in, plus drainage on either side which you would have to have to carry water parallel to the tracks on through the road. That is \$500.00 for your crossing plus

*John R. Shipley.*

whatever the road on the right of way would cost for the 100 foot length.

Mr. Quillen: We object to that second portion. The Commissioners prescribed certain things we were to do and certain things the railroad was to do; and insofar as drainage is concerned and approaches to the point, that would be the end of the construction on the part of the railroad. We page 14 } have at all times offered to bear that, and it is fixed in the report of the Commissioners.

The Court: In view of that it would be \$500.00 for the crossing itself?

A. Yes, sir.

The Court: Any other questions you want to ask him?

Mr. Mullins: Yes, sir. In constructing a crossing at that point, what all would have to be done by the railroad initially and then thereafter?

A. Initially the railroad company would have to install new cross ties in the tracks, the two tracks in the area, which would be covered by the pavement of the crossing itself, Sub-drainage would have to be installed; this is exclusive of drainage in ditches which parallel the tracks. This is sub-drainage which must be installed at the ends of the ties to drain any water out of the crossing that would get in there; and then crossing timbers would have to be placed parallel to the rails on each side of each rail. In addition to that, the ballast or gravel which would be placed between those rails and between the tracks and for approximately five feet outside of the outside rails 10 feet from the center of the track would have to be paved for the width of the crossing.

Q. How about maintenance of the crossing over the years?

A. Of course you have to maintain the track. In order to maintain the surface on it, that track has to be tamped up at intervals. In order to tamp up the crossing, the guard timbers must be taken out and some of the macadam sur- page 15 } face must be removed for the equipment to get under the ties to tamp them up and resurface the track.

Q. Does that cost the railroad companies anything to do that?

A. The railway company pays all that cost.

*John R. Shipley.*

Q. Is that a considerable or trivial cost?

A. It is considerable cost because it is all hand work.

Q. Is there any safety factor involved from the viewpoint of the operation of trains, particularly in the winter time when you have snow and ice?

A. Your grade distance and sight distance is a big factor in handling trains and being able to stop in case there is anything on the track, and because of the short sight distance here, if anyone should be stalled on the crossing it would be impossible for a train to stop at this location.

Q. How about the obligation of the railway company to blow its whistle and ring bells provided by statute at these private crossings?

A. I am not personally familiar with laws on that.

Mr. Quillen: There is no statutory duty.

Mr. Mullins: I think we can stipulate that to save time; there is no statutory duty.

#### CROSS EXAMINATION.

By Mr. Quillen:

Q. Mr. Shipley, you say at this crossing you merely looked in both directions, you didn't actually measure to ascertain the amount of visibility from the crossing either east or west?

A. I have the location that is accurately measured, and my survey is a measured survey. I have a station on the existing crossing and I have a station on the proposed crossing as located on my drawing, so I have that as measured distance, which is from the proposed crossing to the east.

Q. I believe it is about 700 feet from this proposed crossing to the crossing east, is that correct?

A. The measured distance from the center line of the existing crossing to the center line of the proposed crossing is 729 feet.

Q. In constructing a roadway from the Anderson property over to the Morehead property you would have—there is about a 20-foot cut there, isn't there, right in front of the Morehead house?

A. The Morehead house sits on top of a ridge.

Q. And to get through that property to tie into this driveway or roadway that comes in the Morehead property you would have a 20-foot cut?

*John R. Shipley.*

A. No, sir.

Q. How much cut would you have?

A. He wouldn't have any cut because the existing dirt road going to the Morehead house just goes up the side of the hill. It is about 3 or 4 feet lower than the house itself, but it goes across the top of the hill. They didn't cut the road level with the railroad up to their house.

Q. The railroad I believe goes through about a 20-foot cut?

A. Yes, sir.

page 17 } Q. In order to get a road from the Morehead property over to the Anderson property, you would have to certainly cut the bank away, wouldn't you?

A. No, sir.

Q. You would take all the Morehead yard if you did that.

A. The road as shown on the drawing could simply be extended.

Q. I am talking about the part you are speaking of being extended. Wouldn't you take about all the Morehead yard?

A. No, sir, I do not believe so. The existing road is only about ten feet in width.

Q. These private crossings the railroad constructs, you use cross tie material that you put between the tracks there? That's correct, isn't it?

A. Between the tracks?

Q. Yes. It is parallel with them and then you put asphalt surface over there?

A. No, they have a special crossing timber. That timber has to be cut and drilled especially for that purpose. It is not a cross tie.

Q. What do you use on either side up to the point that is left of the construction there for the crossing? Do you use the same type of timber?

A. Sometimes the crossings are made of timber. Generally they are made with just what we call crossing timbers on either side of the rails and macadam surface between the rails and between the tracks; the macadam surface is between the rails.

page 18 } Q. This \$500.00, you haven't made a detailed analysis of the construction cost of this crossing, have you?

A. Not this particular crossing, no, sir.

*Robert B. Rust.*

RE-DIRECT.

By Mr. Mullins:

Q. Mr. Shipley, what would be the relative cost of bulldozing a roadway on down from the existing Morehead road to a point near the garage you indicated in pencil to the Anderson property?

A. Well, that would depend on what your cost per hour. Bulldozers are usually rented by the cost per hour. It would depend on how long it would take to do that. I imagine somewhere in the neighborhood of \$15.00 an hour. It would take him maybe half a day. There isn't much grading; it is really just a smoothing up process.

Q. At \$15.00 an hour and an eight-hour day, half a day would be roughly \$60.00?

A. Approximately that, yes, sir.

Witness stood aside.

ROBERT B. RUST,  
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Mullins:

Q. State your name, please.

A. Robert B. Rust.

Q. Were you sworn?

A. Yes.

Q. What is your age and occupation?

A. Age forty-eight; I am Assistant Division Engineer for Southern Railway Company.

page 19 } Q. Where do you live, Mr. Rust?

A. 429 Taylor Street, Bristol, Tennessee.

Q. Are you Assistant Division Engineer for this division or the part of the division where the proposed crossing is sought to be established?

A. Yes, sir, that is part of my territory at this location.

Q. Have you visited the site of the proposed crossing?

A. Yes, sir, I have.

Q. Have you examined the maps made by Mr. Shipley who just testified preceding you?

A. Yes, sir, I have.



*Robert B. Rust.*

Q. State what schools you attended.

A. I graduated from Virginia Military Institute in civil engineering.

Q. Have you as Assistant Division Engineer been practicing your engineering profession with the railroad company?

A. Yes, sir, primarily in the maintenance of way work.

Q. In the maintenance of way work, is it necessary for you to make crossings and ways and to know the cost of material and labor and so forth?

A. We have—that is part of our duties, is to construct the track crossings and maintain the track and structures on the railroad.

Q. Have you made an estimate of the cost of putting in the proposed crossing to the Malcolm Anderson land from the county road?

page 20 } A. Yes, sir.

Q. What estimate did you have?

A. I estimated \$532.00. Of course that excludes any parallel drainage in the ditch.

Q. Have you made an estimate of the cost of bulldozing a road from the existing road on the lands of Mr. Morehead as shown on the map to the Malcolm Anderson property along the 16-foot right of way which his deed calls for?

A. I looked at it and considered it about an eight-hour day's work with a bulldozer. Normal prices run around \$15.00 an hour.

Q. Eight-hour day, does that include actual time of bulldozing?

A. That would allow him time to come and go, if he didn't have too far to go.

Q. Would you give us the estimate of the cost of finishing a road or bulldozing it down there on a reasonable grade or reasonable contour of the land along Malcolm Anderson's 16-foot right of way over the Morehead land?

A. I would estimate \$120.00.

Q. Would it be a feasible and practical proposition to put in the proposed crossing from an operational viewpoint of the railroad?

A. It certainly wouldn't be desirable. In other words, there is another crossing a short distance away, and it would increase the hazard of the operation of automobiles and vehicles being hit by one more crossing to be located there.

page 21 } Q. Is there any substantial difference in the distance between the end of the dirt road on the

*Robert B. Rust.*

Morehead property to the Malcolm L. Anderson line than the distance crossing the railroad to get to his property?

A. I believe from his property line to the existing road is approximately 200 feet.

Q. And crossing the railroad, I believe the other engineer measured it 120 feet?

A. Yes, sir.

Q. That would make a difference of 80 feet?

A. Yes, sir.

Q. Would it be feasible and practical, based on your experience as an engineer in the construction and maintenance of railroad rights of way and other ways, for him to build a dirt road up to the Morehead property, that is, Mr. Anderson, from his property line?

A. I would say it would be feasible. It would be similar to existing roads where other roads are now built to houses, etc.

Q. Is there any real need for a proposed crossing, for a crossing from the county road to the land of Malcolm L. Anderson?

A. Not in view of the fact that we have an existing crossing nearby. I would say no.

Q. Is there anything else you can think of, Mr. Rust, why this crossing should not be established, any other reasons?

A. Of course, we have the initial expense, which page 22 } is considerable; then in addition, we have the expense thereafter of maintaining the track at the existing road crossing. Where you have a road crossing the track, it is of necessity covered up with ballast material. To do any work on the track, such as renewing cross ties, you have to remove all that and remove all that material and dig it out and put ties in, which is expensive and a slow process. If you have a low place in the track, you have to correct the surface, you have to take out all cross timber and pull it to take it up to the proper surface and tamp it. The fact that the crossing is covered with material makes it at best you can't get good drainage. The fact that a crossing is there is going to increase maintenance throughout the years. There will be periodic work to be done on maintaining the surface of the wagonway or surface to be used as a road. Anything that is used continually is going to require some upkeep. There are a number of items of expense there, and it is just another increase in the number of crossings which we already have a large number of. It increases the hazard of automobiles or

*Robert B. Rust.*

other vehicles being struck by a train at a location like that. Of course the train couldn't stop if the vehicle was on the crossing if it got stuck there and didn't see the train, it would be impossible for a heavy train to stop.

The Court: What speed does the train normally maintain in that area? How far does it take one to stop if an obstruction was seen or a car was seen on the crossing?

A. It would be greater than the sight view. I would say if he had two or three cars he might stop, but ordinarily they would have a long string of cars and it would take over 1,000 feet at best.

Q. What length car trains are you operating over that line now, on the average?

A. I would say over 100 cars.

Q. A train with 100 cars, it takes about how far to stop it?

A. It depends on the speed of it. I would say going at a slower speed it would take 1500 feet. If the train is going at a good substantial, say a faster speed than they operate at that location, it would take close to a mile in some places for him to stop.

Q. I believe the map indicates there is a curve immediately west of the proposed crossing; is that true?

A. Yes, sir, there is a curve both east and west. In the direction of Bulls Gap there is a 7 degree curve and a lighter degree curve in the direction of Gate City.

Q. How many tracks would the proposed crossing have to cross?

A. It would cross two tracks, which of course would increase the cost over just one track, as well as the maintenance.

The Court: Do you know what the visibility is either east or west?

A. Approximately 700 feet in each direction.

Q. Why is visibility cut off east of the proposed crossing, that is, in the direction of the present or existing crossing, where the existing crossing is located?

A. Because of curvature and the height; it is higher ground adjacent to the track.

Q. In other words, an embankment cuts off the sight distance?

A. Yes.

*John H. King.*

CROSS EXAMINATION.

By Mr. Quillen:

Q. Did you go on the Morehead property there and look that property over with an idea of ascertaining the cost of the road?

A. Yes, sir, I was over there.

Q. Would you say that was swampy there?

A. I wouldn't consider the area as being too swampy.

Q. It was swampy though?

A. No. It might be where there is a little ditch coming down through there; you might consider it such. But that would be just in that particular area.

Q. Did you examine the Taylor property to ascertain the condition of that land for building a road there?

A. I walked over it.

Q. And you say visibility is about 700 feet looking east. Isn't it a fact that you can see a quarter of a mile looking east and about half a mile looking west?

A. I didn't find that, no.

The Court: Where is the Taylor property on the map?

Mr. Quillen: That is not shown on the map. That is property between Morehead and the crossing now in existence. The map shows only the Morehead property. All right, I believe that is all.

Witness stood aside.

page 25 }

JOHN H. KING,  
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Mullins:

Q. Your name is John H. King?

A. Yes.

Q. What is your age and occupation?

A. Fifty. Claim Agent for Southern Railway Company.

Q. Where do you live?

A. Bristol, Virginia.

Q. Have you visited the site of this proposed crossing?

A. Yes, I have, sir.

Q. Have you had considerable experience with reference

*John H. King.*

to access on these private crossings in the course of your claims against Southern Railway Company?

A. Yes, sir, about twenty years of it.

Q. From the viewpoint of safety, would this be a safe place to put in a proposed crossing?

A. Not in my judgment, no, sir.

Q. Why?

A. Because it is right in a curve in the middle of a curve and the view is limited in either direction; and I think it would be dangerous for all concerned.

Q. Did you notice the road leading from the existing crossing up to the Morehead house?

A. Yes, sir. I didn't go on it.

Q. From your experience and from your observation, was there any practical reason why that road could not  
page 26 } be extended from the Morehead garage or a point  
near the Morehead garage along the 16-foot right  
of way that Malcolm Anderson has across the Morehead property to his own land?

A. None that I know of. But actually I am not too familiar with that type construction.

Q. Was there any unusual hills or hollows or anything of that nature?

A. Not that I saw, sir.

Q. Is there any substantial difference in the 200 feet required to extend the road along the north side of the railroad right of way along the Anderson property, and the 120 feet for it to cross the tracks, or a difference of 80 feet?

A. Approximately 80 feet difference.

### CROSS EXAMINATION.

By Mr. Quillen:

Q. During all your time as Claims Representative of the railroad, you have never had a claim as a result of an accident there at the crossing east of this point, have you?

A. Mr. Quillen, I will have to modify that to say that I have been back on this territory three years this coming August. During that time I have not had any difficulty.

Witness stood aside.

Mr. Mullins: We would like to move the Court, at the convenience of the Court, to have a view of the proposed crossing.

*Malcolm Anderson.*

Mr. Quillen: We join in that motion.

The Court: A view by me?

Mr. Mullins: Yes, sir.

The Court: Where is the crossing located with page 27 } reference to Gate City?

Mr. Quillen: Six miles south of Gate City.

Mr. Mullins: We would like to have the chain of title. We take the position, without any admissions, that the fact that this property is a part of the J. E. Tate tract of land has no bearing and would not give the petitioners any right under the statute; but without waiving that and not admitting that they have a right to claim under the original Tate farm if the petitioner is going to claim under that, that they should file their deeds and the chain of title, most of which, I think, have already been filed.

Mr. Quillen: We will furnish those.

The Court: What about the railway company? Where did they get the right of way from?

Mr. Mullins: At this particular place we got the right of way from J. E. Tate, who owned on both sides. That is the common source of title. J. E. Tate owned the land and it was subdivided. It is our position we should not be compelled to put in a proposed crossing for each subdivision of the J. E. Tate land. That is an undue and unjust burden placed on the railroad company.

The Court: I will be glad to look at the property if both of you gentlemen want me to do so. I would be glad to take a look at it, but I can't do it today.

Mr. Quillen: We understand that. At the Court's convenience.

Mr. Mullins: I also concur; at the Court's convenience.

page 28 } MALCOLM ANDERSON,  
after being duly sworn, testified as follows:

### DIRECT EXAMINATION.

By Mr. Quillen:

Q. Your name is Malcolm Anderson?

A. That's right.

Q. You and your wife, Jacqueline Anderson, are the petitioners in this suit?

A. Yes.

*Malcolm Anderson.*

Q. The property you acquired from Mr. Morehead, what acreage is in that?

A. Approximately ten acres.

Q. Where do you work, Mr. Anderson?

A. Penn-Dixie Cement Corporation, Kingsport, Tennessee.

Q. Are you proposing and have you proposed for some time to build your home on this property which you bought from Mr. Morehead?

A. I intended to build there about two years ago and ran into this trouble. It has been approximately two years since I first started to try to build.

Q. Explain the situation you have there with reference to using the crossing which is about 700 feet east of the proposed crossing.

A. I would be glad to use the crossing that was there if there was any possible way to get back to my place without so much expense, but where I would have to go across, you have to go through a swamp across D. Taylor's, which they have been leveling out; it stands in water. Like this morning, I couldn't get up through the Morehead property. And we would have to cut out the biggest part of Morehead's front yard. She hasn't got much. If you fixed the road, you would have to go across her and down a steep bank through her apple orchard and mountain on this right of way between me and Morehead; there is an abandoned well, and I believe Mr. Hiram Taylor said a fellow broke a bit off, besides the grade. Through the apple orchard there is low land and will take considerable draining and tile, besides going out through Morehead's field to get back to my place.

Q. Do you have an idea as to the cost of putting a road in there even if you had a roadway?

A. We had some work down at the church a couple or three weeks ago, and according to the way it run, it will cost me \$1,500.00 to \$2,000.00 to go from the existing crossing, from there across the D. Taylor property, up to Morehead's property and down through her orchard and on out to my property.

Q. You know where the Commissioners have located the proposed crossing, do you not?

A. Yes.

Q. I believe under the report and under your agreement, you will furnish all the drain tile that parallels the rail road and you will construct a roadway beyond the limits, that is, five feet from the rail on either side, at your expense?

*Malcolm Anderson.*

A. At the time that Fletcher, I believe he is supervisor over that part, he looked it over. He said he would put a crossing in there. I said, "If you will, I will put tile in and take it from there to my property on both sides. I will tend to that myself."

page 30 } Mr. Mullins: We take the position that Mr. Fletcher was not authorized by the railroad company to make any such proposal. He is not an agent for the company in making that proposal.

The Court: I assume that would not be considered a contract.

Mr. Quillen: I mention that to show we are willing to carry that across, and the Commissioners are so directing.

Q. Mr. Anderson, what about the visibility from that point, the point of the proposed crossing, both east and west?

A. As far as I can see, it is very different from what they state. You can stand and look west towards the existing crossing. It is straight through there. They said it was curved, but anybody can go and see you can see down through there for at least half a mile, and the other way you can for at least a quarter of a mile. There is a curve on the other end, but you can see plenty far for a train.

### CROSS EXAMINATION.

By Mr. Mullins:

Q. Mr. Anderson, you, I believe, are the son-in-law of Mr. Morehead?

A. Yes.

Q. You married Mr. Morehead's daughter?

A. That's right.

Q. Of course, you bought the adjoining land? Your land adjoins Mr. Morehead's on the west?

A. That's right.

Q. You have a right in your deed from your father-in-law for a right of way 16 feet in width, do you not?

A. That's right.

page 31 } Q. It was contemplated at the time, naturally, that you acquired the property that you were to have a right of way and that was put in the deed?

A. Yes, it was.



*Malcolm Anderson.*

Q. Then you are not using the right of way given in your deed, but seeking to go across the railroad adjacent to your property, is that right?

A. Yes, sir.

Q. There is an existing road up to the Morehead house and garage?

A. There is supposed to be. There isn't now. It is washed out. Moreheads don't live there now. The house is vacant and it is washed out.

Q. It could be if you take a bulldozer, you could grade it and smooth it up?

A. It would take a lot of bulldozing work besides big tile.

Q. How many hours of bulldozing do you estimate?

A. I don't know. I have been working with a bulldozer the past three weeks and it takes longer than a man figures.

Q. It comes on Morehead property for about 300 feet; you have an existing road, and it wouldn't take long to smooth it up?

A. From the Morehead property to my property?

Q. That is the distance, 200 feet according to the survey.

A. The condition the ground is in—if it was level  
page 32 } it wouldn't take long.

Q. Do you have any pictures showing the bank or maps or anything?

A. No, not with me I don't.

Q. And are you proposing the railroad company—what kind of road were you going to build from the existing road to your property for \$1,500.00 to \$2,000.00?

A. I don't know whether you could build it for that.

Q. How wide?

A. At least 16 feet.

Q. You were going to build a 16-foot roadway into your property, is that your estimate?

A. I wasn't figuring on building it there at all.

Q. I just realize you aren't. The Court wanted to know the visibility. How wide were you going to build it and were you going to pave it?

A. No.

Q. Did that estimate include putting down gravel?

A. Yes.

Q. And tiling it all the way?

A. Yes, sir. You would have to have it tiled, but there

*Malcolm Anderson.*

are such steep banks on each side and swamps on each side of the hill.

Q. You never have operated a bulldozer?

A. Yes, sir, I have.

Q. To what extent?

A. I don't do it for a living, but I have operated  
page 33 } them.

Q. Just briefly, for fun or what?

A. Just learning.

Q. Your contention is that it would cost more money to go across the front of the Morehead property than to have the railroad at its expense to build a road for you?

A. If you go straight across, I can't see how it would be much expense because it is level. I agree to put in the tile. I believe that would be the biggest expense.

Q. The railroad would have to keep it up. In effect, you are asking the railroad company to build a roadway into your property.

A. I know they would have expense keeping it up.

Q. If the Court adjudicates you are entitled to a crossing, would you be willing to let them bulldoze a road in there from the existing crossing to your property line?

A. They would have to have more than bulldozer work.

Q. What do you want them to put in—put you a tile or do you want the road paved?

Mr. Quillen: That would be immaterial to any issue here.

Mr. Mullins: I might say as a last resort we would rather do that than put in a crossing.

Mr. Quillen: Do you quarantee a right of way all through there?

Mr. Mullins: We can go into that.

Q. You haven't had trouble with Mr. Morehead?

A. He is deceased. But you all keep leaving out the Taylor property. That's where the trouble is.

page 34 } Q. Are you familiar with what we call an im-

plied easement by reservation?

A. At the present time there might not be trouble, but in the future you can't tell. He has several kids. It is my understanding he has the property deeded to them if they build.

Q. You are not familiar with the deeds?

A. No.

*H. H. Taylor.*

Q. And you are not familiar with the law concerning conveying the property?

A. No, sir.

Q. In other words, Morehead got the property from Taylor?

A. That was before my time. I don't know. I believe that's right.

Q. One of the deeds shows there was a right of ingress and egress granted. Are you familiar with that?

A. No. That was before my time.

Q. When you say you don't have a right of way, you don't know for sure whether you have a right of way in the deeds or by implication?

A. I have been basing it on older people that lives there that knows about the deeds.

Q. You don't know of your own knowledge by operation of law or deeds then whether you have a right of way over Taylor or not?

A. I know I have over Morehead, but I don't know whether I have over Taylor.

page 35 } Q. Are you sure about that, if you are not familiar with the deeds and not familiar with the law?

A. No, I'm not sure.

Q. If you do have a right of way across the Taylor property by deed or operation of law, you could get to the existing crossing by virtue of rights given in the Morehead deed to you and your wife?

A. Provided they built the road.

Q. In other words, you want the railroad company to build a road to your property regardless?

A. I want a crossing put in.

H. H. TAYLOR,  
after being duly sworn, testified as follows.

DIRECT EXAMINATION.

By Mr. Quillen:

Q. Your name is H. H. Taylor?

A. Yes.

Q. Where do you live?

A. Yuma.

Q. How old are you?

A. Eighty-one years old.

*H. H. Taylor.*

Q. Are you acquainted with the Malcolm Anderson property and the crossing situation there at Yuma?

A. Yes, sir.

page 36 } Q. Do you know that land from the standpoint of to whom it belonged prior to the time the railroad was built in there and later the public road?

A. It belonged to J. E. Tate and wife.

Q. I believe the railroad was built and later on the public road, or was the public road built in there?

A. Yes, later on there was. There was a public road and has been for the past sixty-two years. That is as long as I have known that section; and where the railroad is located now, the county road used to run under that, and when they built the railroad the railroad company purchased from J. E. Tate and Gene Ayers a strip 50 feet and kept it all on the right hand side of the river.

Q. Did Tate and his wife own all the property on both sides except for the Ayers property?

A. Yes, they owned to the top of Clinch Mountain.

Q. Was that property ever divided during Mr. Tate's lifetime?

A. No, sir.

Q. How many crossings are there between what we call Warm Springs at Holston River, and say within a distance of a couple of miles there?

A. Well, there is a crossing on Harry Wolfe's land and one down at Yuma and the next is near Zack Goins.

Q. How far is Zack Goins from Yuma?

A. It is half a mile, right close it.

page 37 } Q. Are you familiar with the proposed location of the crossing which the Commissioners have dealt with there?

A. Yes.

Q. State to the Court if that crossing is in a good location? Is it accessible and level at that point where the crossing would be made?

A. Why, yes, it is practically level on the lower side of the road, but there is a ditch line on the right hand side or on the north side of the railroad where the ditch line drains there, and that is where Mr. Anderson proposed when Mr. Greear was there, to buy the tile and put that in and make that road from the cross ties.

Q. From that point where the crossing is, what about visibility east and west?

*H. H. Taylor.*

A. You can see for east, I would say you could see  $\frac{1}{4}$  mile, you can see up right from the piece above where the present crossing is; and west you can see from there down to where the county road goes under the railroad and farther on half a mile down there, you can see a train coming from the west in there above my barn, you can see it very easily.

Q. What distance is that?

A. That is almost half a mile.

Q. What about the general topography and terrain of the Morehead property, which is adjacent to the Anderson property with reference particularly to getting a road in there to use at the existing crossing?

A. Well, they would just have to take Mrs. Morehead's yard and there is right in front of her house a 20 page 38 } or 25-foot cut where the railroad cut there whenever it was being built, and they would have to take about all of her yard to build a 16-foot road.

Q. Have you examined the ground as to whether or not it is swampy?

A. Well, there is a swag on the west side of her house where some swamp is, and on the other side the same way.

## CROSS EXAMINATION.

By Mr. Mullins:

Q. Mr. Taylor, you say this land at one time belonged to J. E. Tate?

A. Yes.

Q. I believe after J. E. Tate's death, could you give us a brief history of the land, particularly the tract of the petitioners?

A. When Uncle Joe Tate and Aunt Liz Tate passed away, they had Walter Smith and J. H. Wilhelm and myself summoned before the Judge in the Court to testify as to whether we thought—there was eleven of those heirs—whether that there could be a legitimate division of that and give all the heirs equal shares, and we didn't think it could be, the shape the land was in. And they got an order from the Court to sell the land and divide the money. It had two million feet of timber on it, and when the land was sold, C. D. Tate and M. W. Quillen and I believe Judge Carter was connected in that sale some way, and Appalachia Lumber Company bought the timber, and M. W. Quillen was connected in that deal too, M. W. was a son-in-law of Uncle Joe Tate, and he proposed

*H. H. Taylor.*

to buy the farm and never paid for it. Finally Judge Carter and Charlie Tate had to take it over, and this land  
page 39 } that is in controversy, Judge Carter and Charlie Tate and Charlie Tate's widow and Jim Tate was into it; they sold this boundary of the land from the railroad to the top of Clinch Mountain to D. R. Taylor. Later D. R. Taylor sold half of it to A. C. Morehead and later purchased from Morehead from a point over near the foot of the ridge on the north side and Morehead kept about 20 acres; about 20 acres is what Morehead kept and built a home on it.

Q. Morehead then owned all the lands, I understand, near the railroad?

A. He owned just half. They divided it from the railroad to the top of Clinch Mountain, D. Taylor and him did.

Q. Then from the site of the existing crossing to the Morehead house, is all that all Morehead's or part on Taylor land?

A. About fifteen to twenty rods of it on Taylor land.

Q. At one time I believe Morehead owned all of it and sold Taylor back part of it?

A. No. Morehead never did own the east end of that land. He just owned—him and D. Taylor divided it from the railroad to the top of the mountain. D. Taylor still owns that if he hasn't deeded it to his children.

Q. I understand D. R. Taylor owned the whole thing.

A. Yes, D. R. Taylor bought it from Judge Carter and the Tates.

Q. And sold half to Morehead?

A. Yes.

Q. At the time D. R. Taylor sold to A. C. More-  
page 40 } head, the only way Morehead could get to the existing crossing was to go across D. Taylor's land?

A. Yes. That was the only way out because there was a cut and the railroad was there, and that was going over D. Taylor to get to the crossing, was the only way to get out.

Q. Morehead sold part of it to Anderson?

A. He sold the west end after he sold to D. Taylor all from the point near the foot of the ridge to the top of the mountain. D. Taylor bought all that from Morehead, and Morehead retained ten or twelve acres, might have been sixteen or eighteen.

Q. The only way Morehead could get from his tract of land where the Morehead house is, he had a road going to the existing crossing?

A. Yes, he had to go over D. Taylor to the crossing. That's

*E. V. St. Martin.*

how he got in and out and built his house and hauled his material in over that road where he built his house.

Q. There is an existing road to Morehead's house; it might be rough; it is seven or eight feet wide?

A. You drive cars up and down there, yes.

Q. They could drive a car up to the Morehead house and garage. I believe he had a garage to the west of his house?

A. I think he had a garage all the time, some kind of little building there; I believe he used it for a garage part of the time.

Q. Talking in terms of a 16-foot wide road, Mr. Anderson doesn't need a 16-foot road for one car, as a practical proposition, does he?

page 41 } A. You hardly ever hear of a road being narrower than 16 feet. The average farm road is not that wide.

Q. This would be going on private property, the private road would be six to eight feet wide.

A. The distance of the road over the Morehead property would be about 440 feet into the property of Anderson; he has got frontage on the railroad of about 440-some feet.

Q. Getting back to the road; in other words, Mr. Anderson, all he would need to get to his property would be what we call a one-way drive road.

A. If he had a one-way drive, it would be all right, but it would be unhandy to have to travel 800 feet, to start on the road, when his dwelling house is there, when he could go across to the public road and not have to travel more than 20 or 30 yards; he would have to cross the railroad either place.

Q. There is an existing crossing he could use by extending the Morehead road some length and graveling it a little bit?

A. Yes, he could use that when he got to it.

Witness stood aside.

E. V. ST. MARTIN,  
after being duly sworn, testified as follows.

## DIRECT EXAMINATION.

By Mr. Quillen:

Q. Your name is E. V. St. Martin?

A. Yes.

*E. V. St. Martin.*

Q. What is your occupation or profession?

A. Civil engineering.

Q. What schools did you attend?

page 42 } A. Two or three of them, Baltimore Polytechnic  
School of Marine Engineering, Fordham University.

Q. Mr. St. Martin, have you had experience in engineering, construction and maintenance of railroads?

A. Well, I worked, I started out on the railroad and worked with the railroad ten years, maintenance and so forth.

Q. Did you do engineering on a number of roads in this area?

A. Clinchfield.

Q. I believe you were one of the Commissioners designated by the Court to go to the site down at Yuma and pass upon the question as to whether or not the crossing should be located across the railroad tracks at Yuma to the Anderson property.

A. That is correct.

Q. George L. King, and G. A. Kiser were the two others?

A. Yes.

Q. I will ask you to go ahead and state to the Court briefly the practicability of that crossing where you gentlemen located it, the necessity for it and the estimate of cost, and whether or not you so reported it advisable, and give your reasons.

A. Due to the fact that the man would have to travel about 800 or 850 feet to go over the divided ridge in some places. It isn't prohibitive, but it is pretty steep. He would have to construct about 800 feet of road or more than that. It would be cheaper and more economical if he wanted to keep a road up across the railroad right of way than it would be 800 feet. I understand the right of way is on the adjacent property and goes in somebody's yard. I have been told  
page 43 } that.

Q. Did you look at that land there where you would have to go out, that is by building this road to get out? By that I mean did you look at the topography of it?

A. I was on that water line job. We put water up to this house. I know that road.

Q. Would that be a rather expensive proposition?

A. It isn't half way constructed. Maintenance of the road would be a continuous expense.

Q. Do you consider that the location of the crossing you



*E. V. St. Martin.*

made there to be a practicable location from an engineering standpoint?

A. It is an economical one. I didn't like the crossing too well; there isn't much way if you go below the switch point, you go on the property of others. It would take considerable fill. You would have to cross over on the property of others to get to the county road, and Mr. Bragg owns a strip between the railroad right of way and county road, and you would have to cross it. If there was nothing in there, you could go on across property of other people. And the fill is heavy if you go below the switch point. The practical crossing is where we located it in regard to the cost of construction.

Q. I believe you gentlemen provided in there that Mr. Anderson was to provide the drainage paralleling the railroad and also to construct the road from the limits of the track crossing at his own expense?

A. Yes, that was what we understood, that was page 44 } the agreement.

### CROSS EXAMINATION.

By Mr. Mullins:

Q. Mr. St. Martin, there is an existing roadway. I hand you herewith the map that has been introduced as an exhibit. I believe a road is shown on the map from the existing crossing up to the Morehead house in front of it and the garage?

A. Yes.

Q. It would be feasible and could be done to extend the road along Mr. Anderson's 16-foot right of way he has in the deed from his father-in-law over to his own land?

A. Yes, you could.

Q. In other words, you could build a road, and where there was a road you would build into a piece of property like this, you wouldn't want a 16-foot road, but about the width of the average farm road?

A. No, I don't believe in narrow roads.

Q. It depends on who is paying for them, as to what a fellow wants?

A. You have to have room to maintain a road and cut weeds back, and if it goes back to another man's property, you have to have a reasonable width. I don't count less than twenty feet a reasonable road.

Q. You think you should have a 20-foot road?

A. Right of way.

*E. V. St. Martin.*

The Court: Are you speaking of 16 feet of traveled portion or including ditch lines?

Mr. Quillen: Including ditch lines, cuts and fills.

page 45 } Q. In other words, your big reason for wanting to put the crossing there where you Commissioners decided to put it or proposed to put it, was due to the difference in the maintenance cost of the road from the existing crossing across the Morehead property to the Anderson property?

A. That was my judgment.

Q. In other words, you thought it would cost more to maintain it over the years?

A. Yes.

Q. Of course on the other hand if the railroad company had to put in the crossing and maintain it, there is considerable expense to that, is there not?

A. Yes, but not as much. I wouldn't think it would be in proportion to what it would be to maintain that length of road.

Q. The railroad company of course in maintaining a roadway to get to Mr. Anderson's land, would not get any benefits out of that crossing, would they?

A. Not as I know of.

Q. But on the other hand if Mr. Anderson had to build and maintain his road, he would be getting benefits out of it?

A. That is what it is for, I think.

Mr. Quillen: Of course, whether the railroad gets benefits at the crossing, that is wholly immaterial in this case.

Mr. Mullins: We don't think so.

Q. There is an existing underpass down there, I believe, shortly west of there?  
page 46 } A. Yes. It needs widening too.

Q. In other words, you are a good engineer and you believe in good wide roads all the way, don't you?

A. In this day and time, the way travel is, I would say yes. That was built back in horse and buggy days. It is a dangerous underpass.

Q. But there is one there and it comes up to the rear of the house immediately west of Mr. Anderson's house, doesn't it? There is a roadway there?

A. No, I would think the house immediately west of Mr.

*George L. King.*

Anderson's property, the Harrisons own that, but there is a piece of property I think there where you can walk in and out. If they have got any way in, they have got it recently.

Q. About how many—could a bulldozer extend the road from the Morehead property over to the Anderson property in five or six hours' work? What would be your estimate?

A. It wouldn't take long to doze it or throw up a road.

Q. Could you give us an estimate?

A. I didn't look at it. I imagine about half a day.

Q. In other words, a road could be bulldozed in there in about half a day, you think?

A. Yes.

REDIRECT.

By Mr. Quillen:

Q. You have not gone into the cost of rock or anything like that?

A. No, sir. You can put stone on it. It depends on the depth and width you put it.

page 47 }

RECROSS.

By Mr. Mullins:

Q. You knew Malcolm Anderson works for Penn-Dixie Cement and they sell crushed stone?

A. Yes.

Q. He could probably get a good price?

A. I don't know about that.

\* \* \* \* \*

GEORGE L. KING,  
after being duly sworn, testified as follows.

DIRECT EXAMINATION.

By Mr. Quillen:

Q. You are Mr. George L. King?

A. Yes.

Q. Where do you live?

A. Weber City.

Q. Were you one of the Commissioners designated by the

*George L. King.*

Court to go on the premises there of Southern Railway Company near Yuma and report back to the Court as to the feasibility of the crossing across the tracks?

A. Yes, sir.

Q. What has been your business? Maybe you are retired at this time.

A. Construction engineer.

Q. How long have you been engaged in construction engineering?

A. Between forty and fifty years.

Q. What has been your experience, Mr. King?  
page 48 } What companies have you been associated with?

A. Well, I have worked with some of the largest construction companies in the country. W. J. Oliver Company, Lang and Lang, Lane Brothers. I helped build the Panama Canal almost six years.

Q. Then I believe before you retired, you were associated with Penn-Dixie Company?

A. I was associated with Penn-Dixie Company for twenty years.

Q. State to the Court briefly what the situation is there with reference to the need for this crossing and what the general situation of the plan is.

A. The way we saw it it looked like the man was due a crossing there to get to his property. It would make it very inconvenient to use the present crossing. The underpass down there, you go down through there, there is quite a knoll coming through there. And as I seen it, if you build a road through the knoll and the house setting on top of it, it will leave the house setting up there with no way to get to it. You would have to grade anywhere from fifteen to twenty feet to get a road through there and there would be no approach to his house.

Q. State whether or not you would consider it inconvenient for Mr. Anderson in getting out the way you just described.

A. Yes, I think it would. He would have to go through the underpass and back up through there.

Q. Now what about the general lay of the land  
page 49 } where the proposed crossing has been located;  
that is, with reference to putting in a crossing.

A. We considered two different places to make a crossing and finally decided this is the most economical straight across the clearance point. We first planned to recommend to put it on a single track. We thought it would be cheaper to run it straight across. Of course it crosses two tracks.

*George L. King.*

We tried to get around that by going down lower.

Q. This other crossing 700 or 800 feet down, does that also cross two tracks?

A. No, it crosses one. Yes, there are two tracks up the other way.

Q. One track, what you call a side track?

A. Yes, one of them is at the end of the switch.

Q. In other words, they are not main line tracks?

A. No, not where the proposed crossing is.

The Court: What?

A. The proposed crossing is not a main line. It is the end of a switch.

Q. Do you have an idea as to what the cost of installing the crossing would be?

A. No, I don't.

Q. Have you seen crossings, that is, installation of them, and know about what it costs?

A. I say around \$300.00 or \$400.00.

Q. Do you have any idea as to the cost of constructing a road through the Morehead property and Taylor property?

A. No, sir, I don't.

page 50 } Q. You say there would have to be a fifteen or twenty foot cut?

A. Yes, if you come up from the underpass there.

Q. Mr. King, can you see any particular hazard to the traveling public or the railroad by the location of this crossing at the point where you would locate it?

A. No, sir.

Q. What about visibility in either direction, that is, from the crossing looking both ways?

A. You can see quite a distance both ways, as much so as you can at most any crossing they have there.

### CROSS EXAMINATION.

By Mr. Mullins:

Q. Mr. King, you say when you went there and looked at the property with reference to Mr. Anderson getting into his property, did you also consider the cost to the railroad, a normal crossing there, what did you estimate it would cost the railroad to construct a crossing there and maintain it from year to year?

*George L. King.*

A. I didn't estimate maintenance from now on. That is quite an item to figure. We figured about \$300.00 or \$400.00 to put it in. We figured it wouldn't cost any more to maintain that one than it would any present crossing they have.

Q. But it costs something to maintain a crossing?

A. Yes, I know that, but it shouldn't cost any more to maintain that one than any other crossing they have.

Q. Every other crossing would be more expense put on the company?

page 51 } A. Yes.

Q. I hand you a photograph and ask you if that isn't a photograph leading to the Morehead property from the present crossing?

A. Yes.

Q. You talked about making a 20-foot cut. There would be nothing wrong with bulldozing that road out and going over the property to the hill?

A. Going through there, yes.

Q. There is already a cut there where the road has been cut down leading to the Morehead property?

A. A small cut. It lacks a lot being done.

Q. It would take about half a day to bulldoze it?

A. You probably might do it in half a day.

Q. A bulldozer costs about \$15.00 an hour in this area?

A. Well, as I seen it, if you did that it would leave the house setting up and no way to get to it.

Q. Wouldn't it be perfectly all right to leave the roadway where it is? Why do you want the Panama Canal in front of this man's house rather than going on the present roadway?

A. You go down, and in bad, snowy weather and if you try to get out and there is no gravel in there, you would want it graded down yourself.

Q. You could put gravel on the roadway.

A. You could if it didn't wash it away. It is sloped on both sides, and if you don't drain it, the gravel would wash away.

page 52 } Q. The roadway leading to Morehead's garage, all you would have to do is extend it to Mr. Anderson's property?

A. It would be perfectly all right if you wanted to do that.

Q. In other words, you could bulldoze it down to the level of the railroad, but that would be foolish?

A. I don't know. But you could also go over the hill.

*George L. King.*

Mr. Mullins: I desire to introduce this photograph as Exhibit 7.

Q. You said there would be no visibility. If the railroad parked cars on its siding right up to the point of this crossing, the railroad engineer couldn't see a car approaching through the parked side cars, and likewise a person driving on the crossing couldn't see for parked cars on the siding?

A. He couldn't see it until he got to the crossing. If a man was coming into the crossing he could see it and see the train.

Q. In other words, it would be blind until he got to it?

A. Too close to the crossing.

Q. Do you consider by the time a man got past the parked cars on the side and got the front of his automobile out, he would be on the rails of the main line?

A. No, he would be on the side track. He wouldn't be on the main line.

Q. He would have to be on the side track and have the front end of his car, if he was going across the main line, sticking out the necessary amount for him to see page 53 } from the windshield of the car and the front end of his car would be on the main line?

A. No, it wouldn't be on the main line. He could see without being on the main line.

Q. How many feet would he be away if the railroad company parked cars at the end of the proposed crossing and he had to go on the siding before he could see?

A. He would be far enough off, he would be off the main line.

Q. The front of the car would be only a few feet, three or four feet?

A. I didn't look at it close enough. He would have plenty of room to see without getting up on the main line.

Q. The railroad company couldn't use their siding to put their cars on if you had to have a crossing there, could they?

A. I don't see why they shouldn't. It doesn't interfere.

Q. If they parked a car on the siding and decided to extend the siding, they certainly couldn't do that because they would have to leave a gap between the cars?

A. If they extended the siding further down, of course it would make a difference.

Q. In other words, when you talk about making a 20 foot

*W. B. Bragg.*

cut from the Morehead house, you were going to cut off level instead of going over the hill?

A. Cut it down to the level.

Q. The present roadway leading to the Morehead house is on a grade, isn't it?

page 54 } A. Yes.

Q. And goes up the hill?

A. Yes.

Q. But there is nothing to keep a person from bulldozing down the other side to the Anderson property, is there?

A. No, nothing to keep him from it.

Q. It would be a short distance from the Morehead property to his property?

A. Yes.

Q. Taking into consideration that Mr. Anderson had an easement from his father-in-law, Mr. Morehead, for 16 feet along the front of his property, that is "his property", I mean in front of the Morehead house in front of the Anderson property.

A. The Commissioners weren't aware of that detail of it.

Q. The Commissioners weren't aware he had such an easement to his property from the Morehead property?

A. No, sir.

\* \* \* \* \*

page 55 } W. B. BRAGG,  
after being duly sworn, testified as follows.

### DIRECT EXAMINATION.

By Mr. Quillen:

Q. What is your name?

A. W. B. Bragg.

Q. Where do you live?

A. Yuma.

Q. How old are you?

A. Seventy-one years old.

Q. I believe you are retired?

A. That's right.

Q. What was your occupation?

A. Construction section laborer for Southern Railway.



*W. B. Bragg.*

Q. Are you in that area down there where the present crossing is?

A. Yes, sir.

Q. Where do you live with reference to where the present crossing is, Mr. Bragg?

A. I live up about 100 yards west of it.

Q. About 100 yards?

A. Yes.

Q. Do you know where the proposed crossing is?

A. Yes.

Q. You know the location?

A. Yes.

Q. State to the Court, Mr. Bragg, the general situation as to the need for that crossing on the part of Mr. Anderson.

A. Well, it would help Mr. Anderson a lot to  
page 56 } have that crossing. If there would be some more  
houses built over there by Mr. Anderson, they  
would have a better outlet that way.

Q. How many crossings are there from Warm Springs along that area?

A. There is one—just two from the Warm Springs.

Q. I believe the other crossing is 700 or 800 feet away. You say at this particular crossing—does another family live there?

A. No other family, not unless they would build more houses.

Q. What about the situation with reference to getting out to the other crossing?

A. There would have to be a road built out there.

Q. Do you consider that that crossing is necessary to the Anderson property?

Mr. Mullins: We object to that as being leading and suggestive, Your Honor.

The Court: I guess that is true, and probably asks for a conclusion. Go ahead, and I will consider it, the manner in which the questions are asked, and so forth.

Q. Go ahead.

A. I think it would be a great advantage to Mr. Anderson.

Q. Can you see any particular hazard or danger at that crossing?

A. All railroad crossings are hazardous, more or less. I would say.

*W. B. Bragg.*

page 57 }

CROSS EXAMINATION.

By Mr. Mullins:

Q. Mr. Bragg, you of course live in this community, do you not?

A. Yes.

Q. I hand you a photograph marked Exhibit 8 and will ask you—I believe that shows the Anderson property, does it not, about the scene of the proposed crossing looking from the highway?

A. I would say it does.

Q. I hand you herewith Exhibit 9. I believe that is the scene of the proposed crossing looking towards the Morehead property?

A. Yes, it is.

Q. I hand you Exhibit 10. I believe that is a photograph looking west from the scene of the proposed crossing?

A. Yes, that goes west.

Q. I hand you herewith another photograph marked Exhibit 11 and will ask you if that looks east from the scene of the proposed crossing.

A. Yes. Right up there is that crossing.

Q. You are pointing to a gap between it where the train has been cut?

A. Yes.

Q. In that connection, it is a standard practice for railroads when they do have a crossing across the siding to cut the train, is it not?

A. Yes.

page 58 } Q. Then it is impossible for the engineer to see a person approaching the crossing until they get right on them when the train is cut there, parked on the side?

A. Yes, sir, it is a right smart hazard right there.

Q. In other words, that is the proposed crossing?

A. Yes, the one down there is the proposed crossing.

Q. Any time you have a crossing going across a side track, it becomes more hazardous?

A. Yes.

Q. That would be true if they parked cars up to the scene of the proposed crossing on the side adjacent to the main line?

A. They are supposed to not park below right there (indicating).

Mr. Quillen: What is that point?

*W. B. Bragg.*

A. That is the loading point.

Q. If the railroad company desired to extend the crossing and make it much longer there, they would have a problem in having to cut trains all the way through?

Mr. Quillen: That isn't the situation, Court please. That is speculative future construction.

The Court: That would be true.

Mr. Mullins: We want to show that the railroad company by virtue of Dieselization has had to extend a number of sidings.

The Court: Go ahead.

Q. Looking at Exhibit 11, the Morehead house is shown up on the hill?

page 59 } A. Yes.

Q. And there is a road coming from the existing crossing up to that house, isn't there?

A. Yes, there is a road from there up there.

Q. Coming up on the hill to the Morehead house on the hill?

A. Yes.

Q. It would be practical and feasible to continue the road on down to Mr. Anderson's property?

A. Yes, it could be done. But 16 feet don't give you much right-of-way.

Q. The proposed crossing isn't wider than that?

A. No.

Q. They are going to make it 16 feet also, so it would be the same width?

A. Yes.

Q. Being a railroad man, you know these crossings are hazardous, every one of them?

A. To an extent they are, yes.

Q. Looking at Exhibit 10, of course, that shows—thinking about the scene of the proposed crossing—it shows there is a curve immediately west of this crossing?

A. The crossing would be back and not too far from that.

Q. But it does show a curve to the west?

A. Yes, going around west.

Q. Photograph 11 looking east shows there is a curve to the east of the proposed crossing?

A. Yes, but here is plenty of view up that way, more so than there is down here.

Q. Considering the length of time it takes to stop a train,

*W. B. Bragg.*

that is not too much? In other words, you couldn't stop a train after you saw it if you had any cars at all?

A. No. They are hard to stop. About the length of them, I guess. I don't know these Diesels. The others about the length of the cars.

Q. There is no difficult grade to get from the—I show you Exhibit 9, and that shows there is no difficult grade to get to the Morehead house from the Anderson property.

A. It is pretty steep. It runs up more so going up there from the Anderson property than it does any other way. This is more hazardous going up this way.

Q. But the photographs do show the property pretty well?

A. Yes, pretty well. I know these two trees standing on the Anderson property.

Q. Did you know Mr. Anderson had a right of way from the Morehead property down to his property in his deed?

A. I don't know anything about the deed about the right of way.

Q. Of course he bought the property knowing there wasn't any crossing there?

Mr. Quillen: We object to that. How would this gentleman know what Mr. Anderson knew?

page 61 } A. I don't know.

Q. You know there is no way to get into the property unless you go by the Morehead property unless the Court grants this proposed crossing, isn't that right?

A. That is the only way I know of.

Q. It is by the Morehead property and by his easement to his own property?

A. But as far as knowing anything about the deed or anything, I know nothing.

Q. The Moreheads have been using the road to get to the present crossing forty or fifty years?

A. No.

Q. Or since the existing crossing was established?

A. Since they built up there.

Q. There has been no contention about them having that right?

A. No, not as far as I know.

Q. Of course, being a railroad construction man, you know it costs something to put a crossing up?

A. Yes, it certainly does.

*W. B. Bragg.*

Q. It costs something to install them?

A. Yes.

Q. And if the railroad company had to put a crossing to every house east of that, they wouldn't be able to use their siding, would they?

Mr. Quillen: We object.

Q. If they gave everybody else the same propo-  
page 62 } sition they gave Mr. Anderson, it would render  
their siding useless, wouldn't it?

Mr. Quillen: We object to that. It is speculative, immaterial and irrelevant. It doesn't reflect the present situation.

Mr. Mullins: We think it does, sir. The map shows immediately east of the proposed crossing are a large number of houses shown on the map and if you had to build a separate crossing for the convenience of each one, the company would be deprived of the use of their siding.

The Court: I won't limit you too strictly what you might put in the record, because some other court would like to hear what you have to say about it. Go ahead. Try to limit it to matters which you feel certain are material. I don't want to cut your evidence down because I realize you may use it in some other tribunal. Go ahead.

Q. You know there are a number of houses located east. I show you a map that has been introduced showing a house trailer and seven houses east of the existing crossing, isn't that true?

A. I don't know how many there are.

Q. There are some several there?

A. Yes. This crossing (indicating)?

Q. Yes. Shown on the map.

A. They are all east of this property.

Q. They have a dirt road to go over and some gravel?

A. Some gravel, I don't know how much.

Q. If you put in a siding for each of these houses—I mean  
a crossing, that would render the siding useless?

page 63 } Mr. Quillen: We object. That is not an issue in  
this matter at all.

The Court: Let your objection be stated.

Mr. Quillen: I say that is not an issue in this matter at all.

*W. B. Bragg.*

The Court: I say let your objection be stated in the record and proceed with the evidence and I will take a look at it in the end and consider it.

A. These people have a 40-foot right of way.

Q. On the Moreland property there is no limit on the right of way?

A. No, the D. Taylor line—

Q. The average car is six or seven feet wide and you don't need a big wide road where you have to build it yourself?

A. You could do on less if you had to do it yourself, no doubt. The state is supposed to take that over. I don't know whether they will or not.

Q. Most of the houses east are further away from the proposed crossing than Mr. Anderson's property, are they not?

A. I would say that you are away out there.

Q. Indicating the house on the map shown to the furthest east.

A. Yes, there are four, about five of these houses set pretty close together.

Q. So that there are property owners using the existing crossing who live twice as far away as the Anderson property from the existing crossing?

A. Well, now I would say three of them houses, page 64 } they only have a walk way out to the crossing.

Q. But of course the map shows that some of these parties are twice as far away as the Anderson property would be from the existing crossing?

A. These three out here, I don't think the three out there have anything but just a walk way out.

Q. In other words, there is nothing to prevent Mr. Anderson from bulldozing a roadway across the Morehead property to his own and having a way in and out?

A. I don't think you can bulldoze it.

Q. You heard Mr. St. Martin say they could bulldoze it in half a day; and he is a good engineer.

A. He is a good engineer, but Morehead's is up the hill.

Q. You could use the existing grade?

A. It is pretty steep.

Q. Looking at the photograph—I hand you herewith Exhibit 7. This is not an unusually steep road, is it? In other words, you people got up there, and the road shows they have been getting up there for years and they have a garage in back of the house.

A. No, that's down the other way. That map shows the rail-

*W. B. Bragg.*

road. This comes out here and goes up pretty steep. I don't know the grade. I have seen that.

page 65 } RE-DIRECT EXAMINATION.

By Mr. Quillen:

Q. Now, Mr. Bragg, this picture that is designated Exhibit 11, I believe in response to a question by Mr. Mullins, as I understood you, you spoke of the hazard being at the existing crossing.

A. Yes, there is more hazard there than at the proposed crossing.

Q. Would you mind stepping up here so we can show the Court what you are talking about. You spoke of no cars beyond this point there that you indicated. Explain that to the Court. You spoke awhile ago of no cars beyond a certain point and pointed it out on the picture.

A. This ain't supposed to be blocked where it is blocked now. Of course, in emergency it would be.

Q. If I understood you, in normal usage of the track in the present condition and present situation, there would be no cars beyond where the tracks curve, which is the loading point?

A. That's right.

Q. So there would be no cars on the side track from that point to the proposed crossing except as you say in case of emergency?

A. Yes.

Q. What you refer to in the picture is a loading point?

A. Yes. That has to be kept clear.

The Court: Where is the proposed crossing on this picture?

A. It ain't there, but it is below this derail on the side track, somewhere close where that is.

page 66 } Mr. Mullins: If the railroad company wanted to park up here (indicating)—?

A. There is nothing to keep them from it, but you know they are supposed to stay clear of this (indicating)—?

Mr. Mullins: In other words, that is if they want to clear the switch going into the rear track?

*W. B. Bragg.*

A. Right here is Morehead's and there is a right smart curve. When you go east up there, there is a right smart curve up to this Morehead property. I don't know how much, 20 feet or more, the street—it is less hazardous at this crossing than that (indicating).

Q. Which one do you refer to as "less hazardous"?

A. It is less hazardous at the proposed crossing than the existing crossing.

The Court: On what basis?

A. When you got a train, up here you have to look both ways, and down here you have to look just one way. As far as that map, I don't know too much about it.

The Court: What kind of road is that that goes east down to a number of other houses on the north side of the railroad?

A. It has got a little gravel on it, not too much.

The Court: Is it level?

A. No, there is a little—right in here somewhere (indicating)—there is a little dip in there, not too much. Going right down in there, if I am right, there is a right smart little dip in there. I mean that is all there is.

Q. With respect to the road which is east of the page 67 } crossing, which I understood in examination by Mr. Mullins, there is a 40-foot right of way?

A. Yes.

Q. Has that right of way been transferred to the state?

A. I wouldn't know.

Q. Is there an effort being made to get this portion taken in?

A. It has been talked three or four years.

Q. People living on the north side of the track use the existing crossing?

A. Yes, that's the only thing they have got to use.

Q. The 40-foot right of way ends at D. Taylor's line. I am talking about going west.

Mr. Mullins: We object. The deeds would be the best evidence.

Q. Do you know how far the 40-foot right of way extends



*G. A. Kiser.*

A. It comes to Morehead's property from Taylor's, as far as I know.

Q. That is over the Taylor property?

A. Yes, sir.

Mr. Mullins: If I understand correctly, there is a 40-foot right of way from the proposed crossing to the Morehead property?

A. Taylor told me when that road was laid out, Dr. Pierce sold the property and they had to have a 40-foot right of way out of there and he gave them a 40-foot right of way from the right of way where he lives, some way.

Witness stood aside.

page 68 }

G. A. KISER,

after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Quillen:

Q. Your name is G. A. Kiser?

A. Yes.

Q. What is your occupation?

A. Farmer.

Q. Are you also a nursery man?

A. Yes.

Q. Do you hold an official position in Scott County?

A. I am on the School Board

Q. What district?

A. Estilville.

Q. Mr. Kiser, were you one of the Commissioners designated by the Court, along with Mr. King and Mr. St. Martin, to go on the premises of the railroad near Yuma and pass upon the proposition as to whether or not a crossing should be established across the railroad track to the Anderson property?

A. I was.

Q. Just go ahead and state to the Court, Mr. Kiser, what you found there and what were the things you took into consideration in making up your mind and reporting to the Court that the crossing should be established?

A. First thing, after you went down there, you got to consider if there is any other way you could work out there to

*G. A. Kiser.*

have—of course, nobody wants a crossing much if you could work it out any other way; but after considering sufficiently and looking everywhere, it is hard for Mr. Anderson, page 69 } son, we thought to get in most any other way without considerable work, and we walked up and down the railroad and around. We stayed several hours.

Q. You gentlemen spent several hours there looking the situation over?

A. Yes, we did; walking up and down the railroad.

Q. I believe you concurred in the opinion of the other two gentlemen that the crossing should be in the location proposed?

A. We consulted and looked it over and walked over it.

#### CROSS EXAMINATION.

By Mr. Mullins:

Q. Who all went with you that day?

A. Mr. St. Martin was already there, and Mr. King and myself. I don't know whether there was anybody else at that present time. Mr. King and I went together. Of course, there was several other people there after we got out there.

Q. Who else was there?

A. Well, I don't know. I believe Mr. Bragg was probably out there. I don't know whether Hiram Taylor was or not.

Q. They were the two witnesses who testified in this case?

A. I believe they were.

Q. They were interested enough in the case to go out there, even when the Commissioners were going there?

A. I don't know the reason why they was out there. Of course, we didn't talk to them.

Q. But they were there and they testified in the case also?

A. I don't know whether they was close down page 70 } the road, but they was probably on the county road.

Q. Do you know that Mr. Anderson has a 16-foot right of way along the front of the property from Morehead's across Morehead property to his own land?

A. You mean next to the railroad?

Q. Yes, sir.

A. No, sir, I don't know whether he has or not.

Q. Did you or did you not know he had a right of way across Morehead property in his deed?

A. There is more houses east.

Q. Yes, sir. That is east of that.

A. That is coming towards Gate City.

*G. A. Kiser.*

Q. Let me show you the photograph.

A. I believe that Morehead's house is setting—

Q. I hand you herewith Photograph Exhibit 7. Did you all go up that road to the Morehead house?

A. I believe that is looking west.

Q. Yes. That's right; from the existing crossing.

A. I walked up this road a piece.

Q. There would be nothing to keep the road from being bulldozed and a few gravels put on and use it?

A. I see the possibility, but it would be rather expensive. If I visualized that right, you have about a 20-foot cut in front of the house.

A. Why not use the existing grade? There is nothing to prevent you from doing that, is there?  
page 71 }

A. I don't know. You probably would have something like 800 feet going up and down, and considering, I don't know what degree that is, but it is a little steep.

Q. It is only 700 feet from crossing to crossing. Have you measured that?

A. I say 700 to 800 feet, but you start up here at a grade and go up a little knoll.

Q. Of course, the practical way to grade the road is to go over the knoll and grade wider and keep on going.

A. The way I consider it, if you go up there you will cut close to his house. I couldn't say right off; you would have 20 or 30 feet between the house.

Q. What about the existing road on Exhibit 7? There is no reasons why you couldn't use that, is there?

A. You have got a grade up, and of course the maintenance problem would be fairly heavy and there would be erosion. I believe that is clay. There is already erosion on it now. I don't believe anybody uses it, from the looks of it. It looks like a walk way.

Q. You didn't know about the right of way at the time you filed the report?

A. Over the Morehead property and then to his?

Q. Yes.

A. I don't think it was mentioned.

The Court: Would it have made any difference in your conclusion if you had known?

Witness: What did you say, Judge?

page 72 } The Court: Would it have made any difference in your report you filed if you had known of the right of way?

*George L. King.*

A. I don't think it would. You have to take a lot of things in consideration when you are on a Commission that way. There are several good house sites over there, if you could make a good road up here and come down with not too much expense, it would work out very well. But of course the maintenance and work up there, and I don't know what the people in the Morehead house are going to say about cutting down enough to make a right of way; but answering your question there, coming back there, I don't think we thought too much about him having a right of way and how much cutting. I am sure it would take a lot of cutting.

Mr. Mullins continuing cross examination.

Q. In other words, you were going to level it down to the level of the railroad?

A. You would have to cut it so you could go over it. If you done any cutting, I think it would run into where his house is setting on top. It would put them on a cut.

Q. If you were doing it at your own expense, just for a private roadway, you could go over the top of the hill along the contour of the road where they joined up with the Morehead house road and keep on going, couldn't you, and it wouldn't be too steep?

A. It is just according to how you are going across there.

Q. You have streets in Gate City steeper than that?

A. I would say there are, because there are several streets pretty steep.

Q. The majority of them are steep and would be steeper than this grade?

A. There are a few, yes.

Witness stood aside.

GEORGE L. KING,  
after being duly sworn, testified as follows:

#### DIRECT EXAMINATION.

By Mr. Quillen:

Q. There has been considerable question about the right of way through the Morehead property, whether there is or isn't or whether there is a right of way through 200 feet of

*Malcolm Anderson.*

the Taylor property to the Anderson property. Would it have made any difference to you in your findings had you known or not known about the right of way?

A. I don't believe it would have made any difference if I had known.

CROSS EXAMINATION.

By Mr. Mullins:

Q. With reference to the grade going up over top of the hill in front of the Morehead house getting down to the Anderson property, there are lots of streets in Gate City that are lots steeper than that grade would be?

A. Yes, there are probably some steeper.

RE-DIRECT EXAMINATION.

By Mr. Quillen:

Q. Are those streets which are steeper paved?

A. Yes, they are surfaced.

RE-CROSS EXAMINATION.

By Mr. Mullins:

Q. There is nothing to keep Mr. Anderson from paving his if he wanted to?

page 74 } A. No, I guess not.

RE-DIRECT EXAMINATION.

By Mr. Quillen:

Q. If he wanted to go into two or three thousand dollars and build a boulevard across there?

A. It is only about 20 feet from the railroad right of way to Morehead property if you go and look at it, you can see it for yourself. It is about 20 feet. The road would be on the railroad right of way.

Witness stood aside.

MALCOLM ANDERSON,  
after being duly sworn, testified as follows:

*Malcolm Anderson.*

DIRECT EXAMINATION.

By Mr. Quillen:

Q. How many house sites are there on your property over there?

A. I have got—of course, it depends on what size lots you have, 429 feet front, approximately 4 lots of 107 feet by 300 feet back.

Q. Does anybody live on the west of you that joins you?

A. Kelly Winegar, his property joins mine on the west side.

Q. Does he have to walk out of there now?

A. Yes, he parks in front of where I was wanting my crossing, and they walk to their house.

Q. He would be served by this crossing?

A. It would be as much benefit to him as it would to me.

Mr. Mullins: We object to that, in that Kelly Winegar does not live on the J E. Tate tract of land and page 75 } doesn't have lands which are lying on both sides of the railroad, to come within the purview of the statute and would have no right to a road across it.

The Court: Does this man have a right of way over your property?

A. No, sir, he doesn't.

Q. I was coming to that. In the event the crossing is established, would you be glad to let him come out over you?

A. Yes, I would accommodate anybody like that.

Mr. Mullins: We object to that, in that the Winegar property has another way out, roadway leading to it from the rear and is not a part of the J. E. Tate land and doesn't lie on both sides of the railroad and does not come within the purview of the statute involved in this case.

The Court: I don't think it is material. This crossing is being asked for the convenience of the petitioner and nobody else here.

CROSS EXAMINATION.

By Mr. Mullins:

Q. I believe you have a right of way in your deed?

A. Yes, across the Morehead house, but I do not have one in the deed across the Taylor property.

*H. H. Taylor.*

Q. You have a 40-foot right of way Mr. Bragg testified about coming across in front of the Taylor property to the Morehead house?

A. No.

Q. If the Moreheads have it, you have it.

A. I don't know about that. Looks like to me what they have in their deed would be between Morehead and Taylors and wouldn't involve me.

page 76 } Q. Do you know anything about easements by necessity or implication?

The Court: That is a matter of law and he wouldn't be supposed to know. I don't think we should go into that.

Q. At the time you bought the property, you had no improvements on it?

A. No, sir.

Q. You had a provision put in your deed for a right of way to the Morehead property, that being your means of exit and entrance to your property?

A. The reason for that, the only barn there is on hers and there is a tobacco lot, and that is the only way you can get to this barn. There is a hay field and you had to get the baler out there now to bale the hay.

Q. Of course you haven't bulldozed the road on your property at all?

A. No.

Q. You just own on one side of the railroad track?

A. Yes, sir.

Q. You do not own any land on the other side of the tracks?

A. No.

Witness stood aside.

page 77 } H. H. TAYLOR,  
after being duly sworn, testified as follows:

### DIRECT EXAMINATION.

By Mr. Quillen:

Q. With respect to this 40-foot right of way, do you know about that right of way? If you do, go ahead and explain to the Court.

A. When Pierce divided his farm out there, he owned some land on the north side of that railroad.

*E. V. St. Martin.*

Q. Let me interrupt—was that we refer to as the John Henry Jones land?

A. That's right.

Q. It wasn't the Tate farm?

A. No. And he brought his bulldozer in a trade with D. Taylor who owned the Tate land, next to the railroad, he built a road through the valley to D. Taylor land on the back side for a 40-foot right of way from his land to the Morehead railroad crossing and built that road and put gravel on it before he had his sale.

### CROSS EXAMINATION.

By Mr. Mullins:

Q. The Moreheads have been using the existing crossing since their house was built, have they not?

A. Yes.

Q. There has never been any dispute they had a right of way out of there to the existing crossing?

A. Never that I heard anything about.

Witness stood aside.

page 78 } E. V. ST. MARTIN,  
after being duly sworn, testified as follows:

### DIRECT EXAMINATION.

By Mr. Quillen:

Q. Now, what about the space between the railroad right of way and the Morehead property there, with reference to being wide or narrow?

A. It is narrow. I haven't measured it lately, but there is not much road. By the time you take a road, you wouldn't have much yard.

### CROSS EXAMINATION.

By Mr. Mullins:

Q. Mr. St. Martin, I hand you herewith this photograph, and if you are just interested in having a private way in and out, all that would be necessary at small expense would be to widen the road in front of the Morehead property on the same grade and go right on across the hill?

A. Yes, you can.



*E. V. St. Martin.*

Q. And lots of streets in Gate City are steeper than that and they have been used by the public continually?

A. Well, it is about equal to the worst we have got.

Q. A man who uses engineering experience could engineer a nice little road across there?

A. It wouldn't take much engineering; just straight up a knoll.

Q. You say it would take about half a day to bulldoze it?

A. It wouldn't take that long. Of course, you would have to pay for moving it in and out.

Q. But a bulldozer in this area costs about \$15.00 page 79 } an hour, doesn't it?

A. Yes, for this kind of work.

Q. And you could bulldoze the road in there in half a day for around four hours at \$15.00, would be \$60.00 plus moving time?

A. Yes, about \$100.00.

Q. Of course, the amount of gravel you put on would be another determining factor about the condition of the surface?

A. That's right.

Q. There is a number of quarries—not a number, but a quarry that sells stone at a very reasonable price?

A. Yes, about \$3.00 a ton.

Q. About how many tons would you put there to go across here to put it on, what would be convenient and necessary, not trying to build a super-highway, just what would be necessary for a private roadway?

A. Let's see, it is about 700 or 800 feet of road.

Q. About 700 according to survey, I believe.

A. Yes, it would cost something.

Q. But to grade it in there with a bulldozer and lightly surface it with crushed stone, it wouldn't cost any more than \$200.00 or \$300.00?

A. You can get a pretty good rock road for about \$300.00. The grading, I was counting the rock; it would give it some weight.

Q. Could you do it for \$300.00, considering the bulldozing also?

page 80 } A. No. I would say about \$400.00. You have a few pipes on it.

Q. You could put a pretty good road?

A. You can build that road for \$500.00.

Q. That would be a good road in there?

A. It would be pretty good.

*E. V. St. Martin.*

RE-DIRECT EXAMINATION.

By Mr. Quillen:

Q. Of course, there would be upkeep and maintenance on the road?

A. Yes, that would be perpetual.

Q. What about that grade in the wintertime, snow and rain?

A. You would slip and slide.

Q. You couldn't get in and out, could you?

A. If you cleaned it off, you could.

RE-CROSS EXAMINATION.

By Mr. Mullins:

Q. The people that have the roadway out east of there, they have the same problem in the wintertime slipping and sliding?

A. My recollection of the road is it is much better grade.

Q. But in the wintertime, any road—

A. Going up steep grade with snow on, you have trouble. The state don't maintain them; that's bad.

Q. Of course, it would be expense on the railroad company trying to maintain the crossing if the Court ordered the crossing put in? The lower crossing. Mr. Anderson could shovel the snow off of it. It is a short distance.

page 81 } A. He could shovel the snow off of it, yes.

Q. I believe by actual survey there is about 200 feet difference between extending the roadway from Mr. Anderson to his property and coming across the railroad, isn't it? Just a short distance?

A. About 700 feet to go by the upper crossing and about 100 —I don't believe it is 100 feet all the way across to the Yuma road.

Q. Did you measure that or survey it?

A. The right of way is 50 feet, isn't it?

Q. I don't know.

A. Then it is a short piece across the piece of property there; I think this gentleman's land ends right there.

Q. Let's put it another way. If it costs him \$500.00 to construct a road into his property and cost about \$500.00 for the crossing, the two prices would be the same, wouldn't they?

A. The crossing costs you all that much?

*E. V. St. Martin.*

Q. The engineer testified it would cost a substantial sum of money. I have forgotten that price, sir. Well, it has been testified it costs quite a bit of money to put crossings in. That would be a factor to consider.

A. Yes. It is going to cost somebody something.

Witness stood aside.

\* \* \* \* \*

A Copy—Teste:

H. G. TURNER, Clerk.

# INDEX TO RECORD

	Page
Writ of Error and <i>Supersedeas</i> Awarded .....	1
Record .....	2
Notice .....	2
Petition .....	2
Demurrer .....	4
Order—October 10, 1960 .....	6
Report of Commissioners .....	6
Exception to Report of Commissioners .....	8
Order—April 20, 1961 .....	9
Additional Exceptions to Report of Commissioners .....	9
Opinion of Court .....	10
Judgment—October 30, 1961 .....	13
Notice of Appeal and Assignments of Error .....	15
Proceedings .....	16, 33
Witnesses:	
John R. Shipley .....	19
Robert B. Rust .....	28
John H. King .....	32
Malcolm Anderson .....	34, 65
H. H. Taylor .....	39, 67
E. V. St. Martin .....	43, 68
George L. King .....	47, 64
W. B. Bragg .....	52
G. A. Kiser .....	61