

2713 - No 16
191-148
Dec 5/2/50

Record No. 3666

In the
Supreme Court of Appeals of Virginia
at Richmond

TOWN OF GRUNDY

v.

TRULA GOFF

FROM THE TRIAL COURT OF BUCHANAN COUNTY

RULE 5:12—BRIEFS.

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

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

M. B. WATTS, Clerk.

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

191 VA 148

NOTICE TO COUNSEL

This case probably will be called at the session of court to
be held APR 1950

You will be advised later more definitely as to the date.
Print names of counsel on front cover of briefs.

M. B. WATTS, Clerk.

RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned, and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of the record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) The opening brief of the appellant shall be filed in the clerk's office within twenty-one days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. The brief of the appellee shall be filed in the clerk's office not less than twenty-one days, and the reply brief of the appellant not less than two days, before the first day of the session at which the case is to be heard.

(b) Unless the appellant's brief is filed at least forty-two days before the beginning of the next session of the Court, the case, in the absence of stipulation of counsel, will not be called at that session of the Court; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) Counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

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

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

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

INDEX TO PETITION

Record No. 3666

	Page
Proceedings in Trial Court.....	1*
Issues	2*
Assignments of Error.....	2*
Facts and Argument.....	3*
Title	7*
No Title by Adverse Possession can be acquired in a public street	15*
Possession	17*
Peaceable or Forcible Entry.....	19*

Table of Citations, of Cases, Statutes and Other Authorities

<i>Adams v. Tilley</i> , (W. Va.) 104 S. E. 601.....	19*
141 A. L. R. 251.....	27*
American Legion Press, 168 Va. 1.....	28*
American Jurisprudence, 926-7.....	24*
13 Am. & Eng. Encyc., 750.....	19*
<i>Basic City v. Bell</i> , 114 Va. 157.....	17*
<i>Bellenot v. Richmond</i> , 108 Va. 314.....	17*
<i>Boswell v. Lipscomb</i> , 172 Va. 33.....	28*
<i>Buntin v. Danville</i> , 93 Va. 200.....	16*
36 C. J. S. 1156.....	24*
36 C. J. S. 1157.....	25*
36 C. J. S. 1154.....	19*
Code of Virginia, Sec. 2039 (32).....	14*
Code of Virginia, Sec. 5445.....	26*
Code of West Virginia, (1937), Sec. 5413.....	26*
<i>Commonwealth of Virginia Ex. Rel State Highway Com- missioner of Virginia v. T. D. Kinzie et al</i> , 165 Va. 505	13*
<i>Dobson v. Culpepper</i> , 23 Gratt. 365 (64 Va. 518).....	20*
<i>Norfolk v. Chamberlaine</i> , 29 Gratt. 534.....	16*
<i>Peery v. Dixie Guano Co.</i> , 175 Va. 436.....	28*
<i>Shorter v. Shelton</i> , 183 Va. 819.....	25*
<i>South Hill Motor Co. v. Gordon</i> , 172 Va. 193.....	28*
<i>Supervisors v. N. & W. Ry. Co.</i> , 119 Va. 763.....	17*
<i>Taylor v. Comt'h</i> , 29 Gratt. 780.....	15*
<i>Virginia Hot Springs Co. v. Lowman</i> , 126 Va. 424.....	17*
<i>Wiles v. Walker</i> , 88 W. Va., 147, 106 S. E. 423.....	26*

IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 3666

TOWN OF GRUNDY, Plaintiff in Error

versus

TRULA GOFF, Defendant in Error

PETITION

*To the Honorable Justices of the Supreme Court of Appeals
of Virginia:*

Your Petitioner respectfully represents that it is aggrieved by an order entered by the Trial Court of Buchanan County, Virginia, on the 11 day of July, 1949, refusing to set aside the verdict of the jury in case in which your petitioner was the defendant and Trula Goff was the plaintiff. Transcript of the record of the proceedings in said Trial Court, containing the judgment and order, is herewith exhibited.

PROCEEDINGS IN TRIAL COURT.

This was an action of Unlawful Entry and Detainer by Trula Goff, (hereinafter called the Defendant in Error) against Town of Grundy, a municipal corporation, (hereinafter called Petitioner) to recover of and from the petitioner the possession of a small strip, lot or parcel of land situate, lying and being within the corporate limits of the Town of Grundy, in Buchanan County, Virginia.

Said summons alleged that the said Town of Grundy was in possession of and unlawfully detained and withheld from Defendant in Error the above described land; and that the entry thereof and the possession so unlawfully withheld had been within three years.

The case was tried before a jury on April 13, 1948; the jury rendered verdict for the Defendant in Error; Petitioner moved the court to set aside the verdict of the jury, which motion the court, after delay of more than a year, overruled and entered judgment for Trula Goff.

2*

*ISSUES.

In this case the questions for decision are:

(1) Was the Defendant in Error in possession of the strip of land in controversy within three years prior to the institution of her suit?

(2) Did Petitioner take the possession from the Defendant in Error within said three years?

(3) If so, was the taking peaceable or forcible?

(4) If peaceable, was Petitioner the true owner—If so, taking not unlawful, and Petitioner entitled to retain possession.

(5) If the taking of possession was forcible, then Defendant in Error entitled to recover if ousted within three years prior to institution of the suit, and whether town had title is immaterial.

Town of Grundy contends that the small strip of land involved in this suit is a part of what is known as the "Back Street" or "Back Alley" of the town; that same is and has been for more than fifty years one of the streets and highways of said town, and has been used by the general public as far back as the earliest memory of the towns oldest citizens extend. Defendant in Error contends that the property belonged to her husband, Marcus L. Goff, at the time of his death in May, 1944, and now belongs to her children, subject to her right to use and control under the will of her said husband; that she was lawfully in possession of said property and was ousted from possession by the town within three years prior to the institution of her suit.

ASSIGNMENTS OF ERROR.

Petitioner is advised and believes and charges that the judgment rendered against it by the trial Court and the verdict of the jury on which said judgment was based are both erroneous and, therefore, assigns the following as 3* errors committed by the Trial *Court to the prejudice of petitioner, to-wit:

(1) The Court erred in overruling motion of petitioner (defendant in the Court below) to strike the evidence of the plaintiff when plaintiff had introduced all of her evidence and rested (R., p. 57).

(2) The Court erred in refusing to strike the evidence of plaintiff after the defendant had introduced its evidence and the plaintiff had introduced evidence in rebuttal, and the evidence on both sides had been closed (R., p. 158-159).

(3) The Court erred in refusing to set aside the verdict of the jury, which refusal of the Court is contained in its order dated July 11, 1949 (R., p. 8), and which motion to set aside the verdict is in writing and is found in the record on pages 10, 11, and 12. These reasons contained in the motion to set aside the verdict are twelve in number, and need not be here repeated.

FACTS AND ARGUMENT.

After a brief summary, the facts in this case and the arguments thereon will be presented under the headings "Title", "Possession" and "Peaceable or Forcible Entry," rather than as set out in the questions for decision under "Issue," *ante*.

The sole land in controversy is a strip about 4.9 feet wide, fronting on Main Street, in the town of Grundy, in Buchanan County, Virginia, and extending back 52.8 feet. Caudle B. Belcher, surveyor, refers to this strip in his evidence as being about 6 feet, but it is about 5 feet. Without this strip, Defendant in Error (plaintiff below) Trula Goff, would have a lot fronting 20.6 feet on said Main Street, the side of which would front on Back Street a distance of 52.8 feet; and if she gained this 4.9 feet, she would have about 25.6 feet fronting on Main Street, and fronting 52.8 feet on Back Street. Should

Trula Goff gain the extra 4.9 feet, the town of Grundy 4* would be reduced *to 18 feet for its Back Street, of which 4 feet is occupied by sidewalk along the south side of Back Street, leaving only 14 feet for public use.

A survey of the strip of land in controversy and of the surrounding land marks and contentions of the parties was made by Caudle B. Belcher, surveyor, and a plat made by him showing same, which plat was introduced in evidence by Trula Goff (R., p. 46). As this plat was on a rather small scale (20 feet to the inch), and as it was more or less involved and complicated to one not entirely familiar with the situation, petitioner has prepared another plat entitled "Plat filed with petition for Writ of Error, case Trula Goff v. Town of Grundy, Buchanan Co., Va.," and here files same. This plat is on a scale of 5 feet to the inch, thus being four times as large as the Caudle B. Belcher plat, and is much easier understood. On this plat the strip of land in dispute is colored red. The uncontroverted land marks are labeled. The only line in controversy is the location of the north line of the "Taxi Stand Lot," and this, of course, would be the south line of Back Street. In other words, the question in controversy is the location of the line between Back Street and the taxi stand lot, said lot being owned by the heirs at law of Marcus L. Goff, deceased, and Trula Goff, the plaintiff, owns an interest therein.

The plat filed with the petition is, of course, not introduced in evidence, but is made by scale from the plat which was so introduced.

From the plat made by Caudle Belcher and the evidence of several witnesses, it was conclusively, and without contradiction, shown as follows: that the controverted strip of land is on the corner of Main Street and Back Street; that a taxi stand is operated on the Goff lot, a part of which is in 4½* controversy, same being marked "Taxi Stand" on this map; that just south of this taxi stand is located the bus terminal; that a number of bus lines going in and out of Grundy use this bus terminal, and each of these bus lines run several buses per day; that through buses use this terminal from Pikeville and into Bluefield, Norton and other places; that the bus terminal fronts on Main Street, and the buses going into the bus terminal for unloading use this Back Street and enter the bus terminal from the rear or east side thereof back of the taxi stand and over the A. S. Richardson property marked "Unimproved" on the plat; that some large and some small buses use this bus terminal and this Back Street; that if the width of Back Street were cut down by the 4.9 feet claimed by Trula Goff, the continued use of Back Street by the buses would be difficult, if not impossible, and dangerous to pedestrians and others; that just south of the

bus terminal, the bank is located on the corner of Walnut Street and Main Street.

The taxi stand and the lot fronting on Main Street and across Back Street from the taxi stand were both formerly owned by the late R. E. Williams, as will be hereinafter shown by the deeds mentioned. The Back Street or public alley, as it is sometimes called, is located between the taxi stand and the "Wigwam." After Williams conveyed both of these properties to W. L. Dennis, excepting therefrom the public alley, Dennis constructed a store building on the taxi stand lot and, in order to protect the foundation of the store building, a rock wall was laid a foot and a half or two feet to the north of said store building (See evidence of V. C. Smith, R., p. 154). *This old rock wall was later covered by dirt* when the town improved the Back Street, but the surveyor, C. B. Belcher, stated (R., p. 47) that, when he 5* made the plat, each end of the rock wall was *uncovered; that witness saw it; that it was well laid out of rock. This rock wall is shown on the plat to be on the north side of the taxi stand, and it is this rock wall that the town of Grundy claims was the southern boundary line of the Back Street, and the north boundary line of the taxi stand lot.

As is more particularly hereinafter detailed, some five or six witnesses, the oldest men of the community, stated that this Back Street had been used by the public as far back as they could remember, this recollection, in some instances, extending back over a half century. After W. L. Dennis built the store on the taxi stand lot, the northern side of the store extending within one to two feet south of the rock wall, it was rented along about 1916 to V. C. Smith (present member of the House of Delegates from Buchanan County, Virginia). A year or so after this, V. C. Smith, admittedly knowing that the Back Street belonged to the town, and that it had been used by the public as far back as he could remember, built a small addition about six to eight feet wide, and some five feet beyond and north of the rock wall and into Back Street, there being a soda fountain therein, and continued to use it as long as he used the property. Smith said he did not claim this land either for himself or his landlord, W. L. Dennis, and knew it belonged to the public, and Dennis said he consented to it, but was not claiming the land as against the public or against the town.

Dennis later sold the property to M. L. Goff, with the same exception as to the Back Street, and the store was continued in use until it was destroyed by fire about April 29, or 30th, 1940 (R., p. 93). Immediately after it was burned, the town

again took possession of it, and an Appalachian Electric Power electric light and service pole was, by and with 6* the consent of the town, placed on *the controverted strip of land adjoining and just north of the rock wall. From then until the case was tried in February, 1948, the town improved this Back Street, and built it up until it has become an important street of the town. The use of said Back Street from about 1895 or before, until about 1917, included the controverted strip, and said use extended up to said rock wall.

The foregoing facts were proven by witnesses known all over the State of Virginia for their honesty and integrity; R. E. Williams, former Commonwealth's attorney of Buchanan County, Virginia, and at one time member of the State Corporation Commission; W. L. Dennis, for many years Clerk of Buchanan County, Virginia; George O. McGuire, W. Clyde Payne, and Reece McClanahan, former mayors of the town of Grundy; V. C. Smith, member of the House of Delegates of Virginia; and old citizens whose statements breathe truth and honesty with every breath, such Anderson Elswick, Carl E. Looney, Levi Clevinger, and others; and the above detailed evidence was not controverted.

In further reference to the plat filed by Belcher, the surveyor, it is pertinent to note that, after M. L. Goff bought the property from W. L. Dennis, he constructed a building, lying between Slate Creek and Back Street, labeled "Wigwam" on said plat, thus, arbitrarily, and without anything whatever to tie to, fixed the northern line of Back Street by the construction of the southern wall of his Wigwam building. A sidewalk was then built south of this Wigwam building, taking up 4 feet along the north line of Back Street. Goff then attempted arbitrarily to establish the north line of the taxi stand lot, and did this by the subterfuge of conveying the lot to I. S. Ratliff, wife of A. M. Ratliff, who held it some few months and reconveyed it to M. L. Goff. Goff was dead at the time of the trial, but A. M. Ratliff frankly stated that neither he nor his wife paid Goff anything 7* *when the lot was conveyed to I. S. Ratliff, and Goff paid them nothing when the lot was reconveyed to him. These deeds fix the width of the taxi stand lot at 26 feet, which covers the controverted strip of land about 4.9 feet in width.

TITLE.

It is believed that a brief history of the title to this land will assist the court, so question of title is discussed first. Beginning with the year 1905, this is as follows:

By deed dated August 10, 1905, and recorded August 22, 1905, in the Office of the Clerk of the Circuit Court of Buchanan County, Virginia, in Deed Book 30, page 20, R. E. Williams and wife conveyed to W. L. Dennis a certain lot or parcel of land in the town of Grundy, * * * "excepted from the operation of this deed and not hereby conveyed the public alley running parallel with and near Slate Creek." This deed is set out in full (R., p. 129).

By deed dated May 24, 1924, and recorded May 28, 1924, in said clerk's office, in Deed Book No. 58, page 441, W. L. Dennis and wife conveyed to M. L. Goff, the same lot with the same exception—Deed copied in full (R., p. 2 & 3).

By deed dated August 25, 1938, and recorded October 18, 1938, in said clerk's office in Deed Book No. 79, page 298, M. L. Goff and wife, conveyed a lot to I. S. Ratliff, but this was conveyed by different description. Williams had conveyed to Dennis and Dennis to Goff all of the land from the present bus terminal on Main Street, in Town of Grundy, to Slate Creek, excepting the Alley. M. L. Goff and wife merely conveyed from the bus terminal lot to an arbitrary point fixed by them as the south line of the alley, being eighteen feet from the building built by them on the bank of Slate Creek, known as the "Wigwam." By their deed to Ratliff they attempt to *arbitrarily* make the width of the alley 18 feet 8* and the width of their lot 26 feet. *This deed was introduced, (R., p. 51) and is a part of the record.

By deed dated February 13, 1943, and recorded in said Clerk's office in Deed Book 94, page 69, I. S. Ratliff and husband reconveyed to M. L. Goff last above mentioned lot by same description. Said deed was introduced, (R., p. 51) and is a part of the record.

The lack of good faith of M. L. Goff is quite apparent from the subterfuge or sham to which he resorted in order to attempt to obtain a public record of the width of his lot covering the controverted strip. The deed from M. L. Goff to I. S. Ratliff, dated in 1938, and deed from I. S. Ratliff to M. L. Goff, dated in 1943, conveys or purports to convey a lot fronting 26 feet on Main Street. A. M. Ratliff, husband of I. S. Ratliff, testified as to these deeds. He stated that no consideration was paid for either of these deeds, and that the conveyance was made to his wife for convenience. The description of 26 feet which the lot is described as fronting on Main Street, first appears in any record in the deed from M. L. Goff and Trula Goff, his wife, in 1938, and this 26 feet is purely arbitrary and based on nothing except the approxi-

mate northern location of a shed or small addition which V. C. Smith placed out in the Back Street, according to his own statement, after he rented from Dennis, and on the witness stand he and Dennis both admitted frankly that they had no claim whatever to this controverted strip, and Smith stated he only placed the addition out there *temporarily*.

M. L. Goff died May 17, 1944, leaving a will dated March 30, 1944, probated June 6, 1944, and recorded in Will Book 2, page 129; by which he bequeathed and devised unto his wife, Trula Goff "during her natural life, or so long as she remains my widow, for the benefit of herself and our children, all the rents, royalties and profits from all of my real estate wheresoever situated or located, with all 9* *the rights and remedies for the collection of same."

The will is set out in full (R., p. 18 and 19).

It will be seen from a reading of the deed from Williams to Dennis that R. E. Williams, in 1905, being the owner of the entire lot through which the public traveled (from present bank building to Slate Creek) recognized that the Town of Grundy had, prior to that time, acquired a right of way for alley or street through said property. Whether this had been acquired by written dedication and acceptance, or by mere user and acceptance by the public for more than twenty years, was unknown. It was proved by W. L. Dennis that it was used when he first came to Grundy in 1895, or ten years prior to conveyance by Williams to Dennis, but how long prior to that time it was used Mr. Dennis did not know. Recognizing the rights of the town, Mr. Williams attempted to rededicate said alley to the town by excepting same for the benefit of the public in his deed to Dennis. Though he specified no width of the alley, both Mr. Williams and Mr. Dennis stated at the time of the conveyance that the south line of said alley (the only line in dispute in this case) ran with a rock wall, and with the fence of Mr. Williams' garden. Both stated positively that the alley was used by the public to the rock wall and fence on the south side. In response to the question: "Where was the south line of that Back Street or alley where you excepted?" Mr. Williams stated: "It was along the rock wall, that is the part that was used and was used then for years." (R., p. 147). And (R., p. 142-3-4), he states: That he has lived in Grundy since 1903; that he lived on a lot just beyond and adjoining the bank building; that the lot in controversy was a part of the lot he originally owned; that when he first came here the alley "was used by anybody that wanted to use it, the public generally, to haul

over and travel over, and a good deal of it was used by 10* hitching *racks for horses.”; that “it was used up to that wall”—a rock wall on the north side of the store building and on the south side of the back alley—; that he had a coal house and plank fence enclosing the garden on up the back street about in line with the rock wall; that the public used the fence—hitched to it until they tore it down; that this fence was “at the edge of it” (the alley). On top page 145 he again states that the rock wall was “on the south line of that street.” The location of this rock wall was shown by the map made by C. B. Belcher to be the south line of the back street as claimed by the Town. Trula Goff claims about five feet to the north of this old wall.

W. L. Dennis states, (R., p. 126) that he came to Grundy on July 6, 1895, or 53 years prior to the date of the trial; that the alley was there and used as such when he came to Grundy, (R., p. 128). When asked why the exception of the alley was put in the deed from Williams to him, he stated:

“Well, that was considered the public alley and public passway, highway.”

On page 131, Mr. Dennis identified the rock wall as the south line of the alley, in the following testimony:

Q29. “Where was the south line of the back street at that time? (when lot conveyed to him)

A. “Well that would be, I reckon, when this building was there then that little fill had been built there.

Q30. “What kind fill?

A. “It was loose rock wall is my recollection, built up something like two feet high.

Q31. “Where was the street that was used there, did it go up to the rock wall or to the building or where?

A. “That street they generally used the whole street back there as a public back street.

11* Q32. “Up to what point?

A. “Up about as far as the end of the building, the rock wall.

Q33. “Did the street come to the rock wall?

A. “That old street there was used by the public.

Q36. “You mean clear up to the rock wall?

A. “Yes.”

In cross-examination as to the width of the alley, he excepted in his deed to Goff, Mr. Dennis, (R., p. 133) stated:

"I don't know that anything was said about how wide, just excepted the back street, which was a back street when I first came here, was all used from this south side of this building back down to where the bank slopes down to the creek. I would say it would be from 20 to 30 feet wide when they first used it back there" * * *

And on bottom page 134 states practically same as to width.

At the time W. L. Dennis bought the property from R. E. Williams, there was a small store building situate on the lot now owned by M. L. Goff's estate. Dennis rented this building to V. C. Smith from about the year 1916 (R., p. 151), to about 1920 (R., p. 155). V. C. Smith states (R., p. 156) that the original store building must have been about 18 feet wide; that he built a little addition to the store next to the alley—"just boxed around of lumber, just put a frame out there and put a floor on it"; that it was about six feet wide—wide enough to put a fountain in—six to eight feet. V. C. Smith further states (R., p. 153-4) that a wall was laid up along by the edge of the original store building out of more or less split rock; that this wall was something like a foot and a half to two feet from the store building; that the public used the back street right up to that wall at that time and up until he put the little building or addition up along by the side of the building. And on page 146 he states that he extended the little addition out into what they (the
12* public) had used, they used it principally *hitching rack; that the extension or addition took in the rock wall, what had been used for hitching rack and beyond that; and that he didn't think he asked anyone about using it except Mr. Dennis.

Mr. Dennis stated in reference to the little addition that Verne C. Smith put a little building there, must have been seven or eight feet (R., p. 132), and on page 135, when asked whether he claimed the land that Smith built that house on (addition), he stated "No."

Carl Looney testified (R., p. 117) that he first began to come to town (Grundy) about thirty-four years before the trial; that at that time there was a rock wall a foot or two from the original building; that the alley adjoined the rock wall; that the rock wall ended pretty close to where the store building was, then continuing about that rock wall line up Slate was a hitching post, plank fence; that this plank fence was just about on that line clean to the rear of Williams' garden. Looney states that Verne Smith put the addition on

the building in 1917; that he doesn't think it would be over seven feet; that it was built beginning at the rock wall and running north into the street as it had been used all the time, took in the rock wall. When asked "how much of the street do you think it took in?" he replied, "It couldn't have taken in more than eight feet. He states that the building burned, and since that time it (the controverted strip) has been used by the general public.

Anderson Elswick states that he was 73 at the time of the trial, and was born in Buchanan County; that he was about 25 years of age when he started coming to Grundy; remembers the alley and hitching horses on side next to the store; that there was a rock wall there and hitching post two or three feet from it, to which the public hitched their horses.

L. V. Clevinger states (R., p. 137) that he had been 13* coming to Grundy, fifty years or more, (R., p. 139) that he used to hitch horses right up beside the house—pretty close to the house (R., p. 140) maybe a foot and a half or two feet of it; that the hitching rack was along the side of the building before Verne Smith put the addition to it—hitching rack didn't take up more than a foot.

It will thus be seen six people fix the south line of the alley as being used to the same place. Four of them—R. E. Williams, W. L. Dennis, V. C. Smith and Carl Looney, all state positively that the alley was used right up to the rock wall, and, with the exception of the time the little addition which Verne Smith built was there, has been used all the time in the same way to that line. Anderson Elswick and L. V. Clevinger also remember the rock wall and hitching rack, but were less definite as to the extent of the user. Neither Williams nor Dennis, grantor and grantee in deed in 1905, claimed that the lot conveyed extended beyond the rock wall, but both agreed that said rock wall and garden fence of Williams was the line between the land claimed by them and the public alley, and who should know better than they?

Defendant in Error contends that the exception of an alley in the deeds from Williams to Dennis and from Dennis to Goff is void because no width is given.

In the case at bar the width of the alley is not in controversy—merely the establishment of the south line of said alley, or street. The case of *Commonwealth of Va. Ex. Rel. State Highway Commissioner of Virginia*, v. T. D. Kinzie et al (Tazewell County—1936) the Court said:

"In locating a highway, the highest degree of certainty is not required. If places are designated which will enable per-

sons familiar with the locality to locate the way with reasonable certainty, the description will be deemed sufficient."

In the case at bar the alley is located merely as 14* "parallel to *and near Slate Creek", but it is contended that this is sufficient—that as a matter of fact, even though no exception at all had been in the deed, under Section 2039 (32) Code of 1942, this is not necessary. This section states:

"Where a way has been worked by road officials as a public road and is used by the public as such, proof of these facts shall be *prima facie* evidence that the same is a public road. * * * And in all such cases the center of the general line of passage, conforming to the ancient landmarks where such exist, shall be presumed to be the center of the way, and in the absence of proof to the contrary, the width shall be presumed to be thirty feet."

No contention was made in this case that the way had not been worked by road officials—but it was definitely proved that it had been so worked since 1940 at least. This was proved by the testimony of three of the Town's past mayors—W. Clyde Payne, who took office in 1939, about 1940 filled in holes in the street and made it passable (R., p. 96); Geo. O. McGuire, who took office on September 1, 1941, states, (R., p. 100-101) that he was mayor for four years; that they filled up holes in the street several times; had truck to haul rock and gravel; got steam shovel and put it down in the creek and put sand and gravel on the road, and had Mr. McClanahan and two of his boys spreading it out; that they improved it right up to the light pole (Appalachian Power Company electric light pole); and that he thinks this was done "right about the last part of my first term—in the summer—which would have been the summer of 1943. R. M. McClanahan states (R., p. 59) that he took office as mayor September 1, 1945, and served two years; that he had the road scraped and hard surfaced. As to the use by the public as a road as heretofore stated, this has been definitely proved for period of fifty-three years. These facts having been established, the Defendant in Error has certainly not proved that she has any title further to the north than the rock wall, but on the 15* other hand, the Town has *definitely proved that said rock wall was the south line of the alley. It was not encumbent upon the town to prove even this. Having proved the use by the public, and that the town had worked said lot,

then the burden was upon Defendant in Error to prove the location of her line rather than upon the Town to prove where its line was. In other words, the presumption is that the right of way of the Town is 30 feet wide, and the burden is upon Defendant in Error to prove otherwise. M. L. Goff, husband of Defendant in Error, prior to his death, *arbitrarily* fixed the north line of the back street 26 feet north of where she claims the south line to be located, and 4½ feet north of the rock wall. This rock wall is still there, a few inches under the top of the present ground, (R., p. 47).

It is the contention of the Petitioner that the Town had perfected its title to the strip of land in controversy in 1905, when the then owner of the land and his vendee agreed on where the line of the alley ran on the side in controversy, and if the Town had not at that time perfected its title, that this title was certainly perfected in 1915, before V. C. Smith put the addition on, as was proved by Dennis.

NO TITLE BY ADVERSE POSSESSION CAN BE ACQUIRED IN A PUBLIC STREET:

Neither Mr. Dennis nor his tenant, V. C. Smith, ever made any claim to the land covered by the addition constructed by V. C. Smith taking in a part of Back Street.

This seems to have been the law in Virginia since the case of *Taylor v. Commonwealth* (Jan. 1878), 29 Gratt. 780, in this case the Court said:

“A valid dedication of a street to the public use, perfected by acceptance, as the instruction supposes, *makes it a highway*, an unlawful obstruction of which is not legalized by lapse of time. The three instructions asked for by the Commonwealth were properly given by the Court.” * * *

16* Nor can there be any doubt of difficulty in *the case as to the question of law in regard to the effect of lapse of time and adverse possession upon the public right.” * * *

Syllabus 7—same case:

“The streets of the city of Manchester having been dedicated to the public by William Byrd, when he laid off the town, and this dedication having been accepted by the act of the House of Burgesses in November, 1769, the streets are public highways; and any occupation of a street, or a part of a street, by the owner of an adjoining lot, however long con-

tinued, cannot give such occupant a right to hold it, or bar the right of the public to the use of the street to its full width and extent."

In this case defendants had been indicated for nuisance for obstructing street in Manchester. House and its enclosures had been there for sixty years. City Council directed that the enclosures be removed and defendants asked for injunction to prevent removal.

Case of Norfolk v. Chamberlaine (1877), 29 Gratt. 534:

"It is well settled that a street in a city or town is a *public highway*. The word "highway" is considered as the genus of all public ways, so that a common street in any city or town, being common to all people is a public highway. Angell on Highways, Sec. 24, p. 19, and notes.

"Public streets, unless there be some special restrictions when dedicated or acquired, are for the public use, and the use is none the less for the public at large as distinguished from the municipality, because they are situate within the limits of the latter. In other words, public streets are not the property of the municipality, but of the public at large." * * *

In this case Chamberlaine had occupied part of the street with wall and steps under unauthorized permission of city council. Court held city not estopped as act of council *ultra vires*.

Buntin v. Danville, 93 Va. 200:

Syllabus 2—

"When dedication has become complete and irrevocable, no obstruction of the subject of the dedication, and no encroachment upon it by the original owner or any one else, for any length of time, will affect the dedication or impair the rights of the public to it, unless the land so dedicated has been abandoned by the public, or by the proper authority. Time does not run against the State, nor bar the right of the public." * * *

17* *In this case porch or old hotel projected several feet beyond the wall and over the ground in dispute, and when the new hotel was built three verandas extended beyond the wall. The Court said:

"No such encroachment or obstruction could any more effect the right of the public than the awnings, windows and verandas that are to be seen projecting over the sidewalks from houses in every city. Nor does it matter how long a time the porch or veranda so hung over the ground or obstructed it. No title by adverse possession could be acquired to it. Time does not run against the State nor bar the right of the public."

Cities Taylor's Case, *Norfolk City v. Chamberlaine*, *Yates v. Warrenton*, 84 Va. 337, and others.

Bellenot v. Richmond, 108 Va. 314:

Quotes from *Buntin v. Danville* as above, and cites the other three cases. Distinguished from case relied on by plaintiff by saying:

"So far as that case holds that the statute of limitations constitutes a bar to the right of the city to recover, it is in conflict with the current of authority in this State."

Virginia Hot Springs Co. v. Lowman, 126 Va. 424—to same effect; Also *Basic City v. Bell*, 114 Va. 157.

Supervisors v. N. & W. Railway Co., 119 Va. 763:

"When the dedication is implied from the long and continuous use by the public for the prescriptive period of twenty years, and there has been acceptance by competent authority title to a right of way for a public road may be obtained by prescription. *Com't v. Kelly*, 8 Gratt. (49 Va.) 632."

POSSESSION.

Petitioner having proved title to the strip of land in controversy, the next question is who was in possession.

The contention of petitioner is that, as soon as the building ing on the lot, including the addition thereto which jutted out over the street, burned, it took possession of that part which

had been covered by the addition up to the rock wall; 18* that the Town Council authorized *the Appalachian

Electric Power Company to place an electric light pole as near the rock wall as possible and on the line claimed by the town, and that W. Clyde Payne, then Mayor of the Town, went to the place and showed the workmen where to place this pole. This was done in 1940, (R., p. 96) and after that

the street was used in the same manner all the time; that said street was improved by covering same with sand and gravel all the way over to the light pole in the summer of 1943—(R., p. 100-101) more than three years prior to the institution of this suit—the suit having been instituted in July, 1947. This evidence was not controverted nor denied. The street continued to be used in the same manner to the rock wall until plaintiff had two locust posts put in the way, and on what she contended was the line between the alley and her lot, which defendants contends constituted merely a scrambling possession at most. Hassell Goff, son of plaintiff and the only person who could possibly be said to be representing the plaintiff present at the time of the controversy over the removal of the posts, testified that his conversation with Mr. McClanahan, Mayor, in reference to this “was approximately around July 18, 1946,” (R., p. 7) and (R., p. 12) he states:

“I don’t recall who put the posts in, I noticed the posts when I came to town that day, *they had been put up either that day or the day before.*” (italics ours). (R., p. 13) “When I got to town the front one had already been removed” (R., p. 17) “It only stayed there a short time, a few hours?” A. “That is right.” and (R., p. 15) “When I came to town one had been removed and they were in the process of removing the second one when I halted them.” The plaintiff testified (R., p. 31) that she didn’t know how long the stakes were there before the asphalt and gravel were put in “one stake didn’t stand there longer than a week, but the other stake stood there longer than that, maybe a month or two.” Reece McClanahan states that the posts were not there long, could have been a day or two or longer; that he had com-
 19* plaints *from the buses that they couldn’t get in; that he thinks a bus knocked down one of the stakes, and he removed the other. In view of this testimony, it is insisted that, the town having been in possession since 1940, this putting of two locust posts in by the Defendant in Error which were removed within a short time by petitioner and knocked down by bus, did not constitute a retaking of the possession by Trula Goff. A mere scrambling or interrupted possession is insufficient to warrant recovery for forcible entry and detainer. Her prior possession must have been *actual, peaceable, and exclusive*. See 13 A. & Eng. Encyc. 750; 36 C. J. S. 1154, 19 Cyc. 1132.

Trula Goff also contended that she was in possession of the controverted strip by renting same as a taxi stand and taxi parking over to where she claimed the line. However,

it was proved, and is so notorious a fact that the Court should have taken judicial notice of it; that at that time—before the installation of parking meters, the taxis parked on all the streets and alleys of the town and everywhere, in fact, where they could find sufficient space. If the taxis did park over the line this parking was not exclusive and peaceable possession as the public continued to drive over and use the space when not occupied by a taxi.

PEACEABLE OR FORCIBLE ENTRY.

Conceding, for the sake of the argument, that Defendant in Error had possession of the controverted strip within three years prior to the institution of the suit, and that the petitioner ousted her from this possession, then the question arises as to whether this ouster was forcible or peaceable. If peaceable and the town had title, then it is entitled to retain possession. The entry of the true owner upon land is not unlawful if peaceable. See *Adams v. Tilley*, (W. 20* Va.), 104 S. E. 601, *where, after citing numerous authorities the court said:

“These decisions emphatically deny that an entry merely *against the will* of the occupant is forcible.”

Petitioner contends that there was absolutely no proof of force, threats, multitude of people, or putting in fear in this case—it was merely a re-entering *against the will* of Trula Goff's son—the only person present; or more accurately, a peaceable re-entering to which Defendant's in Error son objected, saying he would have to take legal action.

One of the first definitions found in Virginia as to what constitutes forcible entry is found in 23 Gratt. 365 (64 Va. 518) in note to *Dobson v. Culpepper*. The court cites *Franklin v. Geho*, 30 W. Va. 27, 3 S. E. 168, and *Pauley v. Chapman*, 2 Rob. 235. This note is as follows:

“A forcible entry, under our statute giving civil redress by summary proceedings, is precisely what would constitute a forcible entry for which at common law a party might be punished criminally. It, therefore, lies when a party enter on land in the possession of another, and, either by his behavior or speech, gives those who are in possession just cause to fear he will do them some bodily harm if they do not give way to him; whenever the entry is “with stronghand or multitude of people.”

We find no case in Virginia where this rule of definition of forcible entry has been changed.

The only ones who could or did testify as to what happened and the conversation which took place at the time Defendant in Error contends Petitioner took possession, were W. Hassell Goff and R. M. McClanahan.

On this subject Hassell Goff testified as follows:

(R., p. 4) * * * "I happened to be in town and I noticed Mr. McClanahan, Mayor, there pulling up the stakes and I immediately went over and inquired as to why *there* were pulling them up and they told me they were preparing to surface the street and I told them those stakes were not to be pulled up, and he said, "We are only going to surface 12 feet of the alley" and that he didn't intend to go 21* *beyond the place marked by the stakes. Upon his telling me that (interrupted)

(R., p. 5) "After he said they were removing the post at the time and he informed me they wouldn't go beyond that line with the pavement, then I told him if he did go further over than that, then I wanted to take some legal action or get an injunction to stop it, and he assured me that he was only going to surface the twelve feet of the street."

(R., p. 6) He states that he went on home shortly after he conversed with Mr. McClanahan and came back approximately 7 o'clock and noticed the street had been surfaced, etc.

(R., p. 7) When asked whether he had any further conversation with any of the town officials after stakes pulled up, etc., he stated:

"No one except Mr. McClanahan, and I just talked to him, more or less, trying to obtain some information.

When asked whether he learned at whose instance the asphalt and improvements were placed on the lot, he stated:

(R., p. 7) "Yes, I did, I happened to be down there one day when Mr. Pobst came down and instructed, he and some more to extend it on over to the post.

He stated (same page) that he didn't remember who was along with Mr. Pobst, and didn't know whether Mr. Pobst represented the town, but (R., p. 8) states, "Mr. McClanahan

was present, "and (R., p. 9) states that he didn't know whether the town sergeant was present or not; that the best he remembered there were quite a few people around—didn't say whether they were by-standers, his friends, or who, except that he thinks Bill Goodman, the fellow that had the cab stand rented from his mother, was present. His next testimony as to the conversation was bottom of page 14 and top 15, on cross examination, when he states that Mr. McClanahan said, "I have plenty of room in here to put what I want, which is only 12 feet of pavement."

R. M. McClanahan's evidence as to the removal of the posts and conversation relative thereto, is as follows:

(R., p. 64) "Was anyone there when you were there?

"A. Some of the taxi men and Hassel Goff came over
22* *when we were taking the posts out and objected to our moving the posts and I told him we were moving them under the advice of the city attorney, and if there was any further dispute about it, to have the court settle it."

* * * (practically repeated.)

Q35. "At the time in talking to Hassell Goff, he stated that you said, "That is all right, we are not going to put anything but a 12-foot strip of asphalt on the road at this time, so you needn't worry about it."

A. "There wasn't anything said about that, he didn't say very much about it."

Q36. "Did you tell him you only intended to use 12 feet?

A. "No, sir, I didn't.

Q38. "Was there any force or threats used?

A. "No, sir.

Q39. "No arguing?

A. "No— * * *

and (R., p. 70) on Cross Examination:

Q15. "And when you talking to Hassell about this, Hassell told you that was where they claimed their line come to?

A. "Yes, sir.

Q16. "And he requested that you, as Mayor of the town, not to take any part of that lot he claimed, and improve it as a part of the alley, didn't he?

A. "He asked me not to move the posts, that is what I figured he had reference to.

and (R-77) By the Court:

Q. "Who was with you at that time that was done and at the time you talked to Hassell Goff?"

A. "Sherman McGlothlin was one and I don't remember who else but someone else with us."

Q. "Did Sherman McGlothlin have any connection with the town?"

A. "He was Chief of Police of the town at that time."

The foregoing is all the testimony on the alleged taking or putting out of possession. Under the foregoing definitions 23* of forcible entry (or under any definition which we have found), we are unable to see how anyone could contend that there was a "forcible entry" in the case at bar. R. M. McClanahan states positively that no force or threats were used, and there is nothing in Hassell Goff's testimony even intimating that any force or threats were used; that he was "put in fear" or had just cause to fear from McClanahan's speech or behavior that he was in danger of any bodily or other harm. The chief of police of the town was there, but there is no showing that he spoke one word or did anything. Hassell Goff didn't know him, and stated that he didn't know whether he was present or not. When Hassell Goff was asked if he talked to any other official of the town he stated: "No one except Mr. McClanahan, and I just talked to him, more or less, trying to obtain some information." According to Hassell Goff's own testimony, his only reason for not further protesting was that R. M. McClanahan told him he was only going to hard surface 12 feet of the alley, which R. M. McClanahan emphatically denied. At most this could only constitute a misrepresentation, but could certainly not constitute force or forcible entry. According to the testimony of R. M. McClanahan at the time the controversy over the removal of the posts took place, he and Sherman McGlothlin and one other person he thought were present. Hassell Goff testified that on one occasion Mr. Pobst was present, but this seems to have been on a different occasion. He says, "I happened to be down there one day" but just when that was no one says—whether before or after the posts were removed.

The foregoing facts are all the facts in reference to the forcible entry and, as can be plainly seen, are uncontroverted. In other words, we are fully cognizant of the conclusiveness of a verdict of the jury as to questions of fact; in the 4* case here, there is *no controversy as to any of the material facts and, hence, the matter becomes a question of law.

At Common Law, there seems to be no doubt but that a forcible entry is such only *where it is made with actual physical force*. See 22 Am. Jur. pages 926-927, as follows:

“Since the primary purpose of actions of forcible entry and detainer is to prevent a breach of the peace, it is well settled that under the British statutes and in those jurisdictions in which the definition has not been broadened by legislation or judicial construction, a forcible entry is such only where it is made with actual physical force in and upon the premises, or by violence directed or threatened against the person in occupancy. It signifies only such entry as is made with a strong hand, with *unusual weapons*, or with an unusual number of servants or attendants, and with menace to life or limb. Consequently, an entry without force by a party entitled to possession, or an unlawful entry without actual force, violence, or menaces, which has no force other than the law implies in every trespass, is not a forcible entry within the meaning of the statutes. Many entries may, therefore, be plainly unlawful, and yet not give rise to a proceeding for forcible entry and detainer, although it is without contradiction that every forcible entry as above defined is unlawful. This distinction accounts for the failure of the plaintiff to recover, in some instances, where he has declared upon a forcible entry and has given evidence of an entry that is merely unlawful. In some jurisdictions, however, the courts have widened the conception of forcible entry to include the obtaining of land by fraud, stealth, or other unlawful means, as well as by actual violence.”

In Virginia we have no statute to include the obtaining of land by fraud, stealth or other unlawful means, so it would seem clear that Virginia follows the old common law, and requires physical force or other circumstances, as above detailed.

To the same effect, see 36 C. J. S. page 1156, as follows:

“As a general rule, to render an entry forcible it must be accompanied either by actual violence, or by circumstances tending to excite terror in the owner or other persons in possession, and to prevent them from maintaining their rights. There must be at least apparent violence or some unusual weapons, or the attendance of an unusual number of people, some menaces or other acts giving reasonable cause to fear that the person making the forcible entry will do some bodily harm to those in possession, if they do not

give up the same. An entry merely against the will of the occupant is not forcible.”

25* *And see a similar quotation on next page of 36 C. J. S. (page 1157) under the heading “Threats and Appearance of Violence.”

As has been hereinbefore stated, we find no late Virginia case directly on the point. We do find, however, a case involving the same principle. We refer to the case of *Shorter v. Shelton*, 183, Va. 819, decided in 1945. In that case, the question at issue concerned the rights of a landlord entitled to possession of the leased premises. In that case, Mrs. Shorter did not claim that she was entitled to possession of the room from which she was evicted, but claimed that Shelton, the owner of the hotel, had wrongfully evicted her from the room by force and violence. In other words, he had made a forcible re-entry. The facts, as claimed by Mrs. Shorter, were that, about noon, Shelton, accompanied by three of his employees, knocked at Mrs. Shorter's door; that she opened the door slightly, whereupon, Shelton placed his foot in the opening and forced his way into the room; that Shelton's servants then removed Mrs. Shorter's effect from the room. Mr. Shelton's evidence was practically to the same effect. He stated that, after Mrs. Shorter had opened the door in response to this knock, he placed his foot in the opening to prevent her closing the door, and that she offered no physical resistance to his entrance into the room, although she did vigorously protest against the removal of her belongings.

At page 825, Mr. Justice Eggleston, in delivering the opinion of the Court, said:

“At common law a landlord, entitled to possession of the leased premises which were being wrongfully withheld from him, had the right to make re-entry by such reasonable force as was necessary, short of that which threatened death or serious bodily harm, to regain possession. *Allen v. Gibson*, 4 Rand. (25 Va.) 468, 471; Restatement of the Law of Torts, Vol. 1, section 87, pp. 204-5; 32 Am. Jur., Landlord and Tenant, section 1010, p. 847.”

And on pages 826 and 827, the Court said:

26* *“(It will be observed that the statute does not in express terms deprive the owner of the common-law right to take possession by reasonable force of premises to which he may be entitled.”

We can see no distinction from the foregoing principle when applied to landlord and tenant than when applied to owner and trespasser. Trula Goff, and her husband before her, and W. L. Dennis, by his tenant, V. C. Smith, had for years trespassed upon and used the Back Street of the town of Grundy, and the Town had repossessed same in 1940, as hereinbefore detailed, and had continued in possession until the year 1946, when Trula Goff drove two stakes about five feet out into the Back Street.

The case of *Wiles v. Walker*, 88 W. Va. page 147, 106 S. E. 423, was an unlawful entry and detainer case. A comparison of the West Virginia statute on unlawful entry and detainer (Sec. 5413, 1937 Code of West Virginia) with the Virginia statute (Section 5445) reveals the fact that the pertinent language in both statutes are identical. The four syllabi in this case are as follows:

1. In an action of forcible entry and detainer, wherein the relation of landlord and tenant does not exist, and the entry of the defendant was peaceable, without violence or threats of violence, express or implied, under claim of right and color of title, the right to possession depends upon the true ownership of the land.

2. Though an action of forcible entry and detainer relates only to possession and does not settle or adjudicate title, yet, where the entry of the defendant was peaceable, the result may depend and turn on proof of title as showing the one entitled to the possession.

3. The mere fact that the entry was against the will of the plaintiff does not constitute it a forcible entry, if in other respects it was peaceable.

4. In such action the plaintiff carries the burden of proof, and cannot prevail, unless, by a preponderance of the evidence, he shows a possessory right superior to that of the defendant.

27* *A microscopic search of the evidence in the case at bar will reveal no violence, threat, intimidation, show of numbers, or any other fact, or even circumstances which will measure up to the requirements as laid down in the *Wiles* case, in the general law and the early Virginia cases hereinbefore cited.

The last several pages of this petition has dealt with the question of forcible entry, and on the theory that Trula Goff was actually in possession of the controverted strip in 1946, when the two stakes were by her driven out into the street,

and all of said argument has been based upon absolutely the most favorable view which Trula Goff can claim. As a matter of fact, however, it is clearly shown by the evidence that Trula Goff had no possession whatever of the controverted strip. She merely drove two locust stakes about 5 feet out into the street. These stakes were driven into where the road had been surfaced. There is an immaterial conflict as to just how long these stakes remained, as has been hereinbefore detailed. Whether they remained a few hours or a few days is immaterial. At most, it was merely a temporary or scrambling possession, which is not recognized as a possession on which even an action of unlawful entry and detainer can be based. At no time since April, 1940, had Trula Goff had actual, peaceable and exclusive possession of the controverted strip of land. Such possession, if any, as she may have acquired by the driving of the stakes into the street, or by the parking of taxis on the edge of Back Street, was shared in by the general public.

If, therefore, any force was used by the Town (but there is no evidence of such force) it was only in furthering the effort of the Town to maintain its possession which it had and held since 1940.

See 141 A. L. R. page 251, commenting on American 28* Law *Institute, Restatement of the Law of Torts, Vol. 1, Sections 88-96, as follows:

“As a matter of procedural fact the question in such cases is usually as to the sufficiency of the possession of the person whom the owner seeks to oust to bring suit for the latter’s forcible entry. In commenting on the “privilege” described, existing only when the re-entry is made for the purpose of regaining the possession of land, the Restatement on page 205 says that to avoid the literal application of the statutes of forcible entry and detainer, the courts have treated the actor ousted from possession under the conditions stated as still in possession of the land, thus regarding his forcible re-entry as the use of force in defense of his possession of the land rather than a violation of the statutes.”

IN CONCLUSION, we submit that plaintiff’s evidence is absolutely insufficient to sustain the verdict of the jury. Conceding, for the sake of the argument, that everything proved by Trula Goff is true, the only verdict which could have been rendered would have been for the Town of Grundy. The verdict of the jury was plainly wrong.

“While a verdict of a jury, confirmed by the trial court, is

potent, it is not insurmountable, and it is the duty of the Supreme Court of Appeals to set aside a verdict where the same is not justified by the law and the evidence." *American Legion v. William Byrd Press*, 168 Va. 1, 190 S. E. 140.

"While the Supreme Court of Appeals recognizes the weight which should be given to a jury's verdict, confirmed by a judgment of the trial court, it will not hesitate to reverse when they are not supported by the evidence." *South Hill Motor Co. v. Gordon*, 172 Va. 193, 200 S. E. 637.

"We are aware of the force of a verdict of a jury which is sustained by the court, but this court has never hesitated to exercise its power to set aside a jury's verdict and reverse the judgment of the trial court when it thought them clearly wrong. *Boswell v. Lipscomb*, 172 Va. 33, 200 S. E. 756.

"It is as obligatory upon the Supreme Court of Appeals to set aside and reverse a verdict and judgment based upon inadequate and inconclusive evidence, as it is to uphold and affirm such verdict and judgment which is in accord with the evidence. This it cannot hesitate to do when, in its judgment, it attains the ends of justice and right." *Perry v. Dixie Guano Co.*, 175 Va. 426, 9 S. E. (2d) 302.

29* *For the foregoing reason, it is respectfully submitted that a writ of error and *supersedeas* should be awarded herein, to the end that the judgment complained of should be reviewed and reversed, and final judgment entered in favor of the defendant, the Town of Grundy.

Counsel for petitioner hereby certify and state that, on September 29th, 1949, in the town of Grundy, Virginia, we delivered to George C. Sutherland, of opposing counsel for Trula Goff in the Trial Court, a copy of this petition.

Counsel for petitioner further state that this petition is being presented to and filed with Mr. Justice A. C. Buchanan, Tazewell, Virginia, and if writ of error is awarded, this petition is adopted as the opening brief of Counsel for Petitioner.

Respectfully submitted,

POBST & COLEMAN,
Attorneys for Town of Grundy.

We, both being attorneys of the state of Virginia, residing at Grundy, Virginia, and being duly qualified to practice in the Supreme Court of Appeals of Virginia, do state that, in our opinion, the judgment complained of in the foregoing and

hereto annexed petition ought to be reviewed and reversed.
Given under our hands this September 29, 1949.

H. CLAUDE POBST.
MARJORIE COLEMAN.

Received September 29, 1949.

A. C. B.

Writ of error and supersedeas awarded. No bond required.
This November 2, 1949.

A. C. BUCHANAN.

Received November 4, 1949.

M. B. W.

RECORD

VIRGINIA:

In the Circuit Court of Buchanan County.

Trula Goff, Plaintiff

v.

Town of Grundy, Defendant

SUMMONS IN UNLAWFUL ENTRY AND DETAINER.

Pleas before the Circuit Court for the County of Buchanan,
on, the day of, 1949.

Present: The Honorable Frank W. Smith, Judge presiding.

BE IT REMEMBERED, that heretofore, to-wit, on the 24th day of May, 1947, the following summons in unlawful entry and detainer was duly served upon the defendant by H. M. Keen, Deputy for G. B. Keen, Sheriff of Buchanan County, Virginia, by delivering a duplicate copy thereof to R. M. McClanahan, Mayor of said Town of Grundy, which said notice is in the words and figures following, to-wit:

In the Circuit Court for Buchanan County, Virginia.

Trula Goff, Plaintiff

v.

Town of Grundy, Defendant

SUMMONS IN UNLAWFUL ENTRY AND DETAINER.

page 2 } The Commonwealth of Virginia:

To the Sheriff of Buchanan County,—Greeting:

We command you, that you summons The Town of Grundy, a corporation, to appear before the Circuit Court for Buchanan County, Virginia, at the courthouse, in the court room, on the first day of the next term of said court, as fixed by law (14th day of July, 1947), to answer the complaint of Trula Goff, that the said Town of Grundy is in possession and unlawfully detains and withholds from her, the said Trula Goff, the possession of a certain lot and parcel of land, situate, lying and being within the corporate limits of the Town of Grundy, Virginia, and bounded and described as follows:

BEGINNING at a stake in the edge of Main Street, 3½ feet Northeast of a locust, near the Northwest Corner of the R. E. Williams dwelling house, thence S 79 30 E 52.8 feet to a stake; thence N 5 30 E 87.5 feet to a stake in Slate Creek, thence down Slate Creek, N 79 30 W 52.8 feet to a stake in Slate Creek, thence S 5 30 W 87.5 feet to the BEGINNING.

The entry whereof, and possession by the defendant the said Town of Grundy so unlawfully withheld from the said plaintiff has been within three years.

And have then and there this writ.

WITNESS, Jennings L. Looney, Clerk of our said Court, at the Courthouse, the 22nd day of May, 1947, and in the 171st year of the Commonwealth.

JENNINGS L. LOONEY,
Clerk.

page 3 } And at another day, to-wit:

Circuit Court of the County of Buchanan, on Tuesday, the 15th day of July, in the year of our Lord, nineteen hundred and forty-seven.

Present: The Honorable Frank W. Smith, Judge.

Trula Goff, Plaintiff

v.

Town of Grundy, Defendant

ORDER (EJECTMENT)—CASE NO. 703.

This day came the plaintiff by counsel and moved that this case be continued until the October term next and the defendant did not oppose said motion; therefore, the court doth so order.

And at another day, to-wit:

Circuit Court of the County of Buchanan, on Tuesday, the 21st day of October, in the year of our Lord, nineteen hundred and forty-seven.

Present: The Honorable Frank W. Smith, Judge.

Trula Goff, Plaintiff

v.

Town of Grundy, Defendant

ORDER.

This day came the plaintiff by her attorney, and also came the defendant, by its attorneys, and the defendant asked leave of the court to file its plea of not guilty, which page 4 } leave was granted, and said plea is here filed in open court; and upon said plea issue is joined.

And this case is continued.

The Plea of Not Guilty, filed by defendant, is in the words and figures following:

Trula Goff, Plaintiff

v.

Town of Grundy, Defendant

PLEA OF NOT GUILTY.

The said defendant, by its attorney, comes and says that it is not guilty of the trespass in this action laid to its charge, or any part hereof, in manner and form as the plaintiff hath complained.

And of this the said defendant puts itself upon the country.

H. CLAUDE POBST

MARJORIE COLEMAN, p. d.

And at another day, to-wit:

Circuit Court of the County of Buchanan, on Tuesday, the 13th day of April, in the year of our Lord, nineteen hundred and forty-eight.

Present: The Honorable Frank W. Smith, Judge.

page 5 } Trula Goff, Plaintiff

v.

Town of Grundy, Defendant

ORDER (EJECTMENT)—CASE NO. 703.

This day came the plaintiff in person and by counsel and also the defendant by its counsel and the defendant having heretofore, at a former term of court, filed its plea of not guilty, and issue being joined between the plaintiff and the defendants, thereupon came the following jury, to-wit: George W. Keen, John B. Childress, James George, Bart Elswick, Claude W. Boyd, J. C. Davis and Clint Sutherland, who were summoned and selected as provided by law and sworn to well and truly try and a true verdict render on the issue joined between the plaintiff and the defendant, according to the law and the evidence. And after hearing a part of the evidence and adjourning time having arrived, the jury was adjourned over until tomorrow morning at nine o'clock.

And on the following day, to-wit:

Circuit Court of the County of Buchanan, on Wednesday, the 14th day of April, in the year of our Lord, nineteen hundred and forty-eight.

Present: The Honorable Frank W. Smith, Judge.

Trula Goff, Plaintiff

v.

Town of Grundy, Defendant

ORDER (EJECTMENT)—CASE NO. 703.

page 6 } This day again came the plaintiff in person and by counsel, and the defendant by its counsel, and the same jury who were adjourned over on yesterday again appeared in open court, and after hearing the remainder of

the evidence, the defendant by counsel moved the court that the jury be allowed to view the premises, which motion the court granted. And after viewing the premises, and adjourning time having arrived, the jury were instructed by the court not to converse with anyone or permit anyone to converse with them touching this trial, and were adjourned over until tomorrow morning at nine o'clock.

And on another day, to-wit:

Circuit Court of the County of Buchanan, on Thursday, the 15th day of April, in the year of our Lord, nineteen hundred and forty-eight.

Present: The Honorable Frank W. Smith, Judge.

Trula Goff, Plaintiff

v.

Town of Grundy, Defendant

ORDER (EJECTMENT)—CASE NO. 703.

This day again came the plaintiff in person and by counsel, as well as the defendant by its counsel, and the same jury who were adjourned over on yesterday again appeared in open court and having heard the evidence and receiving the instructions of the court and hearing arguments of counsel for the plaintiff and the defendant, the jury went to their room to consider of their verdict, and after due consideration returned into court having found the following
page 7 } verdict, to-wit: "We, the jury, find that the defendant unlawfully withholds from the plaintiff the possession of the lot of land described in the notice in this case, which is the same land described in the deed from W. L. Dennis to M. L. Goff, dated the 24th day of May, 1924, and of record in Deed Book No. 58, at page 441, the description of which is as follows:

BEGINNING at a stake in the edge of Main Street, 3-1/2 feet Northeast of a locust, near the Northwest corner of the R. E. Williams dwelling house, thence S 79 30 E 52.8 feet to a stake; thence N 5 30 E 87.5 feet to a stake in Slate Creek, thence down Slate Creek, N 79 30 W 52.8 feet to a stake in Slate Creek, thence S 5 30 W 87.5 feet to the BEGINNING.

Except the eighteen (18) feet public alley, which is described as follows:

BEGINNING at the corner of the M. L. Goff brick building, known in this record as the Wig Wam building, which corner is on Main Street, which is the Southwest corner of said building, thence with the line of said building, S 79 30 E 52.8 feet to the Southeast corner of said building; thence S 5 30 W eighteen (18) feet to a stake; thence N 79 30 W 52.8 feet to a stake in the line of Main Street, thence with the line of said Main Street, N 5 30 E 18 feet to the BEGINNING.

C. H. BOYD,
Foreman

Thereupon the defendant by counsel expressed a desire to file its motion in writing at a later day of this term of court, moving the court to set aside the verdict of the jury in this case and award a new trial. This case is continued until a future day of this term of court.

page 8 } And at another day, to-wit:

At a Circuit Court of the County of Buchanan, at the Court House of said court, in said county, on Monday, the 11th day of July, in the year of our Lord, one thousand nine hundred and forty-nine, and in the one hundred seventy-fourth year of our Commonwealth.

Present: The Honorable Frank W. Smith, Judge.

Trula Goff, Plaintiff

v.

Town of Grundy, Defendant

ORDER (UNLAWFUL ENTRY AND DETAINER)
CASE NO. 703

This day came the plaintiff by her counsel and the defendant by its counsel. And the Court having now maturely considered the motion of the defendant made at a former term of this court to set aside the verdict of the jury and award a new trial in this case, and the reasons in writing assigned in support of said motion and this day filed in open court, doth overrule said motion, to which ruling of the Court the defendant, by its counsel, objected and excepted. It is therefore considered and ordered by the Court that the plain-

tiff do recover of and from the said defendant possession of the lot of land in accordance with the verdict of the jury heretofore rendered in this case, the description of which is as follows:

BEGINNING at a stake in the edge of Main Street, 3-1/2 feet Northwest of a locust, near the Northwest corner of the R. E. Williams dwelling house, thence S 79 30 E page 9 } 52.8 feet to a stake; thence N 5 30 E 87.5 feet to a stake in Slate Creek, thence down Slate Creek, N 79 30 W 52.8 feet to a stake in Slate Creek, thence S 5 30 W 87.5 feet to the BEGINNING.

Except the eighteen (18) feet public alley, which is described as follows;

BEGINNING at the corner of the M. L. Goff Brick building, known in this record as the Wig Wam building, which corner is on Main Street, which is the Southwest corner of said building, thence with the line of said building, S 79 30 E 52.8 feet to the Southeast corner of said building; thence S 5 30 W eighteen (18) feet to a stake; thence N 79 30 W 52.8 feet to a stake in the line of Main Street, thence with the line of said Main Street N 5 30 E 18 feet to the BEGINNING.

It is further ordered that the plaintiff do recover of and from the defendant her cost in this action expended. Thereupon the defendant, by its attorney, moved the Court to suspend the execution on its judgment in this case until October 1, 1949. Which motion the Court granted, upon the condition that the defendant, or someone for it, enter into and acknowledge a bond before the Clerk of this Court in the penalty of One Thousand (\$1,000.00) dollars, with approved surety, conditioned and payable according to law.

The Motion of defendant to set aside the verdict of the jury is in the words and figures following:

page 10 } Trula Goff, Plaintiff

v.

Town of Grundy, Defendant

(MOTION OF DEFENDANT TO SET ASIDE THE VERDICT OF THE JURY.)

The defendant, by Counsel, moved the Court to set aside the verdict of the jury and render judgment for the defendant for the following reasons:

(1) Because the defendant proved that the back street or alley had been worked by road officials as a public road, and used by the public as such, which created a *prima facie* presumption that same was a public road, thirty feet in width, and which presumption the plaintiff failed to overcome.

(2) Because defendant proved title to the strip of land in controversy by dedication thereof, by the exceptions in the deeds from R. E. Williams to W. L. Dennis and from W. L. Dennis to M. L. Goff, and acceptance of such dedication by the public by its user and by the expenditure of public funds thereon.

(3) Because the evidence clearly defines the location of the back street, of which the controverted strip is part and parcel, the north line being defined by brick building which M. L. Goff, predecessor in title of plaintiff, constructed, contending that that was the north line of the back street or alley, and hence plaintiff is estopped to deny this. The South line is definitely fixed as being the rock wall testified to by several witnesses for defendant and not attempted to be denied by any witness for the plaintiff.

(4) Because adverse possession does not run
page 11 } against a public street, and hence the fact that V.
C. Smith built an addition to his building, extending six or eight feet over the alley and over the rock wall, and the holding of said addition by M. L. Goff or anyone else did not divest the town of title to the controverted strip of land.

(5) Because the town re-took possession and control of the controverted strip of land about the latter part of April, 1940, and used it as public property until the time of the trial in 1948, except for a few hours, or at most a day or two when Plaintiff drove two locust posts into the alley.

(6) Because the re-entry by the town was more than three years prior to the institution of said suit.

(7) Because the placing of these two locust posts by plaintiff, or her agents, did not constitute a re-taking and peaceable and exclusive possession by the plaintiff, but was at most a mere scrambling possession.

(8) Because any use made by the taxis belonging to plaintiff's lessee in parking along the south side of said back street was not an exclusive use, such use being indulged in by the public generally along and on the edges of all of the streets of the town, and the Surveyor's stakes driven into the ground by plaintiff's agent did not interfere with public traffic and parking on the strip in controversy.

(9) Because, even if plaintiff acquired any possession or right by the driving of the locust posts along the north line of the controverted strip, the re-entry on said controverted strip by the defendant was not forcible, nor with page 12 } show of force or threat of arms, and, the entry being peaceable and the town owning the land, the entry and detainer were lawful.

(10) Because the Court, over the objection of the defendant, gave, at the instance of the plaintiff, Instruction Numbers 1-P, 2-P, 6-P, 7-P, 9-P and 10-P.

(11) Because the verdict of the jury is contrary to the law and the evidence, and without evidence to support it.

(12) Because, even conceding that M. L. Goff had title to the controverted strip, Trula Goff, plaintiff, under the will of M. L. Goff, deceased, acquired no title in same, either legal or equitable, so was not entitled to maintain the action of unlawful entry and detainer, If Marquis Goff owned the land it passed to his children under his will, with right to Trula Goff to collect the rents but with no right of possession.

TOWN OF GRUNDY

By POBST & COLEMAN, p. d.

page 1 } Virginia:

In the Circuit Court of Buchanan County:

Trula Goff, Plaintiff,

v.

Town of Grundy, Defendant.

This case came on to be heard on this the 13th day of April, 1948, before his Honor, Frank W. Smith, Judge of the Circuit Court of Buchanan County, Virginia, and a jury of seven men, duly impaneled and sworn to try the case.

Appearances: George C. Sutherland and W. A. Daugherty, Counsel for the Plaintiff; and

H. Claude Pobst and Miss Marjorie Coleman, Counsel for the Defendant.

Opening statement on behalf of the plaintiff was made by Mr. George C. Sutherland, and for the defendant by Mr. Pobst.

WHEREUPON, the plaintiff introduced the following evidence in her behalf:

By Mr. Sutherland: I desire to introduce the record of a deed dated the 24th day of May, 1924, between W. L. Dennis and Mary A. Dennis, his wife to M. L. Goff, recorded in Deed Book No. 58, at page 441. (Reading) "This Deed, Made this 24th day of May, in the year one thousand nine hundred and twenty-four between W. L. Dennis and Mary A. Dennis, his wife, parties of the first part, and M. L. Goff, party of the second part.

WITNESSETH: That in consideration of the sum of Five (\$5.00) Dollars, and other good and valuable considerations, the receipt of which is hereby acknowledged, the said parties of the first part do grant unto the said M. L. Goff, with the exceptions hereinafter mentioned, with General Warranty, all that certain lot or parcel of land lying and being situate in the town of Grundy, Buchanan County, Virginia, on Main Street thereof, bounded and described, to-wit:

"Beginning at a stake in the edge of Main Street, three and one half feet northeast of a locust near the northwest corner of R. E. Williams' dwelling, thence S 79 30 E 52.8 feet to a stake, thence N 5 30 E 87.5 feet to a stake in Slate Creek, thence N 79 30 W 52.8 feet to a stake in said creek, S 5 30 W 87.5 feet to the beginning."

There is, however, excepted from the operation of this deed and not hereby conveyed the public alley running parallel with and near Slate Creek.

The above described lot being the same that was conveyed to W. L. Dennis by R. E. Williams and Garnett Williams, his wife, by deed dated August 10th, 1905, and recorded in the Clerk's Office of Buchanan County, Virginia, in Deed Book No. 30, page 20, to which reference is hereby made for *more* particular description.

The said parties of the first part covenant that they have the right to convey the said land to the grantee; page 2½ } that they have done no act to encumber the said land that the grantee shall have quiet possession of the land, free from all encumbrances, and that the said parties of the first part will execute such further assurances of the said land as may be requisite.

Witness the following signatures and seals:

W. L. DENNIS (Seal)

MARL A. DENNIS (Seal)

page 3 } WHEREUPON, the plaintiff introduced the following evidence on her behalf.

W. HASSELL GOFF

the first witness called for and on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Geo. C. Sutherland:

Q.1 Is your name Hassell Goff?

A. That is right.

Q.2 What was your father's name?

A. M. L. Goff.

Q.3 Usually called Marquis Goff?

A. Yes, sir.

Q.4 How old are you?

A. Twenty-six.

Q.5. Where do you live?

A. In what is commonly known as Poe Town.

Q.6. In the town of Grundy?

A. Yes, sir.

Q.7. Where were you living at the time this house on the corner out here on Main Street was burned?

A. Same place—Poe Town.

Q.8. Do you remember when it burned?

A. Well, not definitely, I just have a vague remembrance of it.

Q.9. After it burned, do you know what anybody used the lot for?

A. I do, it was used by a Mr. Mann, who, at that time had what was known as Hi Hat up here and he set up a page 4 } cab stand on the lot.

Q.10. At the time this little house burned, or for some time thereafter, was there any marks or anything along there to indicate where the edge of that building was?

A. Nothing only debris.

Q.11. When you rented this to the people for a taxi stand, did you do anything or was anything done to the lot to mark the line along next to the alley down there?

A. Well, the lot was cleared of debris and the ground leveled up so he could get his cab on the lot.

Q.12. Then was there any markers or anything placed on the edge of that lot by you or anyone else?

A. I don't remember of any, no sir, not at that time.

Q.13. Well, when were any post put there, if there was?

A. Well, I came out of service in April, '46, and when I came home there was some discussion concerning the lot at

W. Hassell Goff.

that time. Of course I wasn't too well informed on it but later on when they started surfacing the streets—Poe Town road was surfaced about the same time but that, I think, was the last street that was surfaced, but there had been several surveys run on the lot and stakes placed there, and I happened to be in town and I noticed Mr. McClanahan, Mayor, here pulling up the stakes and I immediately went over and inquired as to why they were pulling them up and they told me they were preparing to surface the street and I told them those stakes were not to be pulled up, and he said, "We are only going to surface 12 feet of the alley" and that page 5 } he didn't intend to go beyond the place marked by the stakes. Upon his telling me that (interrupted)

By Mr. Pobst: We object to that, I don't think it could be shown Mr. McClanahan could give up any right of the town by any statement he would make, he was at that time, I presume, Mayor, and by any alleged statement that he made, he couldn't bind the town, it would be purely and wholly outside his rights, that would be up to the Council.

By the Court: I don't suppose there is any contention made, is there, Mr. Sutherland, as to what he said being binding on the town?

By Mr. Sutherland: Not so as to run an estoppel of their claiming the land but only to show why he didn't stand there and tell the people that actually poured the asphalt.

By the Court: Does that take care of your objection? What he says is not binding on the town but what was done at this time was incidental to the removal of these stakes.

By Mr. Pobst: All right.

By the Court: Go ahead.

Q14. Go right ahead and tell what happened.

A. After he said they were removing the post at page 6 } the time and he informed me they wouldn't go beyond that line with the pavement, then I told him if he did go further over than that, then I wanted to take some legal action or get an injunction to stop it, and he assured me that he was only going to surface the twelve feet of the street.

By Mr. Pobst: Same objection.

Q15. What time of day was it you were talking to Mr. McClanahan?

W. Hassell Goff.

A. It was around noon or little after.

Q16. At that time, what official position, if any, did Mr. McClanahan hold in the town?

A. Mayor.

Q17. Have you measured from the—or had you at that time, the distance these stakes were from the wall of the bus station, or was the bus station completed then?

A. Yes, sir, the bus station was completed at that time. I didn't measure it but I think my younger brother was with the surveyor when it was measured at one time.

Q18. Do you know what the distance is?

A. No, sir, I don't, just a vague idea, about 30 feet.

Q19. When had you next noticed the place along there where they took up the stakes?

A. Well, I went on home shortly after I conversed with Mr. McClanahan and came back approximately 7 o'clock and I noticed the street had been surfaced and the equipment was still in the alley and had the alley blocked.

Q20. Where had they put this pavement with page 7 } reference to where these stakes were?

They extended beyond the line where the stakes were approximately three feet over to the telephone pole.

Q21. Can you give the jury the date this was, or as near the date as possible?

A. Well, I would say it was approximately around July 18, 1946, I am not too sure.

Q22. July, 1946?

A. Yes, sir.

Q23. Did you have any further conversation with any of the town officials after you noticed where they pulled these stakes and poured this asphalt or where they improved the street?

A. No one except Mr. McClanahan, and I just talked to him, more or less, trying to obtain some information.

Q24. Did you learn who it was or at whose instance it was this asphalt or improvement was placed upon the lot over to the post?

A. Yes, I did, I happened to be down there one day when Mr. Pobst came down and instructed, he and some more, to extend it on over to the post.

Q25. Who were the other parties along with Mr. Pobst at that time, I mean by that, was it any of the town council?

A. I don't remember.

Q26. Do you know whether or not at that time Mr. Pobst

W. Hassell Goff.

was representing the town, what is called the council for the town?

A. No, I don't.

By Mr. Pobst: If Your Honor, please, we object page 8 } to that for the same reasons we objected to the statement alleged to have been made by Mr. McClanahan. Neither Mr. Pobst nor anybody else could bind the town.

By Mr. Sutherland: Yes, sir, they can bind the town so far as taking possession of that property, bind them as to that fact.

By the Court: Objection overruled.

By Mr. Pobst: They can't bind them by any admission, your Honor, we save the exception.

By the Court: The question, as I understand it, is the taking of possession, of course they would have to show that possession was taken for the town by someone acting for the town.

By Mr. Sutherland: That is the purpose of this.

By Mr. Daugherty: That is the only way it could take it would be by the action of its officials.

Q27. Do you remember any of the other parties besides Mr. Pobst?

A. Mr. McClanahan was present.

Q28. Do you know who was town sergeant at that time?

A. Yes, I think—

Q29. Do you remember whether or not there was a Mr. McGlothlin there at that time?

page 9 } A. I am not too sure, I wouldn't say one way or the other.

Q30. Do you remember whether or not the town sergeant was present at that time?

A. No, sir, I don't remember whether he was present or not.

Q31. Now, these statements that you mentioned of Mr. Pobst making and he used the word we, was Mr. McClanahan present at that time so he heard that?

A. Yes, sir.

Q32. That was Mr. Reece McClanahan, the Mayor?

A. That is right.

Q33. Now, I would like for you to tell just what it was, if you remember the exact words Mr. Pobst or Mr. McClanahan said at that time about taking possession.

W. Hassell Goff.

By the Court: Do you expect to show Mr. Pobst was acting for the town?

By Mr. Sutherland: I expect to show he was their attorney and was acting for the town.

A. The best I remember there were quite a few people around, I don't remember who all, but I do remember Mr. Pobst and Mr. McClanahan, and as I previously stated, there had been several surveys run on the lot and the stakes had been pulled down and quite a bit of controversy over it, and I happened to be present when Mr. Pobst came down and they were discussing it and he instructed Mr. McClanahan to proceed with the laying of the asphalt. I think Bill Goodman, the fellow that has the cab stand, was also present, page 10 } I think he will verify what I have said.

Q34. Do you know who it was that was actually putting down the hardtop?

A. No, sir, I don't remember the name of the construction company.

Q35. It was a construction company, not anybody that lives here in town?

A. No, they weren't residents of this county.

Q36. Who built this building that is near the edge of this alley or between the alley and Slate Creek?

A. That was built by my father, M. L. Goff.

Q37. At the time he built it along there, was there any improved road or just what was the condition, if you remember, of the place where this street is now?

A. Well, it was not paved and in very bad condition as far as the alley itself was concerned, so far as the road was concerned, for the operation of vehicles on.

Q38. Was it level?

A. Well as near so as possible, I guess, very ruffy.

Q39. Do you happen to know how far it was from the building that your father put up over there up to this little wooden building on the corner of the other lot.

A. No, sir, I don't.

Q40. Is there any side walk along by the side of the building?

A. There is a temporary board walk that was put in there by someone, it wasn't put in there by any member of the family, evidently it was put in by the tenant, Mr. Erderly. Dad didn't want to extend the side walk out there any further, he had constructed on the line.

W. Hassell Goff.

Q41. The board walk, as I understand, is there at the present time was not made by your father nor you nor any of your family?

A. That is right, it wasn't constructed by any member of our family.

Q42. Did any of the family direct anybody else to do it?

A. No, sir.

Q43. How long can you remember your father using this wooden building on the corner?

A. As far back as I can remember.

Q44. What did he use it for?

A. As a store, dry goods, merchandise and used the side as a feed store next to the alley.

Q45. At that time, which was next to Slate Creek?

A. That is right, the feed room.

CROSS EXAMINATION

By Mr. Pobst:

Q1. You say you came back from service in April, 1946, how long had you been in service?

A. Since October, 1942.

Q2. You had been backwards and forwards some?

A. One time.

Q3. When was the last time you had been back?

A. When my father died.

Q4. When did he die?

page 12 } A. In May, 1944.

Q5. You spoke of when you got back or a little bit afterwards they were surveying the lots and paving the street?

A. I got back just before they started paving.

Q6. And they were surveying at the time you came back?

A. My mother had had a survey run on it a time or two before that.

Q7. And the stakes you spoke of were little stakes the surveyor had driven in?

A. Yes.

Q8. They weren't posts?

A. One instance posts were put in.

Q9. Those posts were put up by some member of your family out in the alley, a post three or four feet high?

A. I don't recall who put the posts in, I noticed the posts when I came to town that day, they had been put up either that day or day before.

W. Hassell Goff.

Q10. And they were put out into the path in the alley some three or four feet from the inside of what is now the big electric light pole, is that right?

A. I don't—

Q11. I mean it was further into the street—it was further into the back street than the light pole, these three or four foot post?

A. Two posts about three or four feet in length were placed at the survey markers because the previous stakes had been pulled up.

page 13 } Q12. Those other little stakes were just surveyor stakes?

A. That is right.

Q13. And just temporary stakes or regular stakes used by surveyors?

A. Yes.

Q14. Those were in the back street or back part of the street and were taken out and some stobs driven into the ground about three or four feet. Large enough to interfere with the traffic?

A. I wouldn't say they interfered with the traffic, but they were driven in where the temporary stakes were driven.

Q15. They were three or four feet further into the road than the light pole?

A. Yes.

Q16. And they had been broken off by the traffic?

A. When I got to town the front one had already been removed.

Q17. It only *staid* there a short time, a few hours?

A. That is right.

Q18. And the Mayor or sergeant had taken it out?

A. That is right.

Q19. Who put that stake in the street?

A. Caudle Belcher, the surveyor.

Q20. For whom was he surveying?

A. For my mother.

Q21. And he put that in there a short time before?

A. Yes.

Q22. That was after you got back?

A. Yes.

page 14 } Q23. And that was the posts you spoke of in your examination in chief?

A. Yes, sir.

Q24. After those little surveyor's stakes were put in there

W. Hassell Goff.

the same use was made of the street as formerly until the bigger stakes or fence posts were put in?

A. Will you state that again?

Q25. I say the surveyor's stakes weren't sufficient to divert traffic?

A. No.

Q26. But the bigger stakes or fence post did divert traffic until they were torn down by the Mayor or sergeant?

A. No, they weren't put in there for the purpose of diverting traffic.

Q27. You couldn't get in there without coming in contact with those stakes, could you?

A. You still had plenty of room.

Q28. And those stakes were put where your mother claims the property?

A. That is right.

Q29. Where did she get the measurements of that claim?

A. All I know that it was surveyed and the stakes were put there by the surveyor.

Q30. You say that Reece McClanahan, when you objected to his covering up inside of where the surveyor's stakes had been, with the hard-surface, told you he wasn't going to go over that but was only going to make it 12 feet
page 15 } wide?

A. That is right.

Q31. Didn't he tell you he was going to put it all over it, isn't that a fact, didn't he say that? He didn't mention any width and said he was going to pave that back street and that if you had any objections, you had a course in court you could take?

A. He did not, when the stakes were pulled out he said he did not intend to go beyond that line, he says, "I have plenty room in here to put what I want, which is only 12 feet of pavement."

By the Court:

Q. I didn't understand how long the stakes *staid* there before they were pulled up by Mr. McClanahan.

A. How long?

Q. Yes.

A. Well, I don't know exactly when the survey was run off, but I happened—Mother had told me she had replaced the small stakes, that she thought someone had pulled the small stakes up, those were replaced by stakes three or four feet

W. Hassell Goff.

in length and about a couple or three inches in diameter—when I came to town one had been removed and they were in the process of removing the second one when I halted them.

Q. How long had they been in there before they were removed?

A. I don't know, I don't know when she had them placed in there, she may have placed them in there that morning or the day before.

page 16 } By Mr. Sutherland: I want to introduce the record of the will of M. L. Goff, found in Will Book No. 2, at pages 128-130 and 131. I don't care to read all of it, I want to read that that pertains to the possession of this property.

"I hereby bequeath and devise to my wife, Trula Goff, during her natural life, or so long as she remains my widow, for the benefit of herself and our children, all the rents, royalties and profits from all of my real estate wheresoever situated or located, with all the rights and remedies for the collection of same."

By Mr. Pobst: We object to the introduction of the will because it confers no title in the plaintiff.

By Mr. Sutherland: Not necessarily that, she has possession of it is all.

By Mr. Pobst: All it says is all the rents and rights for collecting same. I don't think it gives her any right to sue.

By Mr. Sutherland: You couldn't have the use of the property without the possession of it.

By Mr. Pobst: It isn't the use of the property at all, it says, rents and royalties, it doesn't say anything about use or possession of the property, just says rents and royalties.

page 17 } By the Court: Overruled.

By Mr. Pobst: Exception.

RE-DIRECT EXAMINATION

By Mr. Sutherland:

Q1. Did your father own this lot at the time of his death that I introduced the deed for?

W. Hassell Goff.

A. I couldn't tell you, sir I was in service at the time.

By Mr. Sutherland: I want to read that part of it that shows when it was probated. It appears to have been probated the 6th day of June, 1945, and it recites that M. L. Goff died on the 17th day of May, 1944.

By the Court: Are you introducing the whole will?

By Mr. Sutherland: Yes, sir, but those are the parts that are pertinent.

By Mr. Pobst: The introduction is objected to.

By the Court: Overruled.

By Mr. Pobst: Exception.

The will is as follows:

page 18 } I, M. L. Goff, being of sound mind and disposing memory, do hereby make, acknowledge and publish this, my last will and testament, hereby revoking all previous wills and codicils.

(1) It is my desire that my executors provide for a decent burial of my body.

(2) It is my will that all of my just debts be paid.

(3) I hereby give, bequeath and devise to my wife, Trula Goff, during her natural life, or so long as she remains my widow, the house and lot, curtilage, and out-buildings connected therewith where we now live, situated in the town of Grundy, Virginia. I have in force at this time a life insurance policy in the Jefferson Standard Insurance Company in the sum of TWENTY-FIVE HUNDRED DOLLARS (\$2,500.00), payable to my wife, Trula Goff. This is intended to be her share in my money and personal property.

(4) I hereby bequeath and devise to my wife, Trula Goff, during her natural life, or so long as she remains my widow, for the benefit of herself and our children, all the rents, royalties and profits from all of my real estate wheresoever situated or located, with all the rights and remedies for the collection of same.

(5) I hereby give, bequeath and devise to my children, viz., Warren Hassel Goff, Annabelle Goff, Clarence Ellis Goff, Ralph Eugene Goff, Edith Goff, and Colleen Goff, all the rest and residue of my property, both real and personal, wheresoever situated or located. As to my personal property, it is my desire that in the distribution of the same, my oldest son, Warren Hassel Goff, shall receive One Thousand Dollars

W. Hassell Goff.

(\$1,00.00) less and my daughter, Annabelle Goff, page 19 } Seven Hundred Fifty Dollars (\$750.00) less than the remainder of my children. Otherwise, it is my desire that my property be equally divided and distributed among my children. It is my intention, by this bequest, to make my children, in my opinion, equal in the distribution of my personal estate, and I have heretofore expended on Warren Hassel Goff in his education \$1,000.00, and on Annabelle Goff \$750.00, and, therefore, my other four children will receive \$750.00 more than Annabelle Goff and \$1,000.00 more than Warren Hassel Goff. It is my intention by this clause to dispose of all or any remainders in my property as well as all present estates.

(6) At the expiration of the interest in my property hereby bequeathed and devised to my wife, it is my desire that my executors take charge of the same and use it for the support and maintenance of my family until the youngest has reached the age of twenty-one years, then to dispose of the same in accordance with previous provision number 5.

(7) I hereby nominate and appoint Trula Goff and A. M. Ratliff as the executors of this my last will and testament, with the full right and power to convey to the State Highway Commissioner of Virginia the right of way over my lands in the town of Grundy, for the state highway now being used by the said State Highway Commissioner, and such additional land for said highway as may be agreed upon by said executors and said State Highway Commissioner.

Witness my hand, this the 30th day of March, 1944.

M. L. GOFF (Seal)

(Attestation Certificate)

(Probated June 6, 1944—Recorded in Will Book 2, page 129)

page 20 }

TRULA GOFF

the plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Sutherland:

Q1. Is your name Trula Goff?

A. Yes, sir.

Q2. Where do you live?

A. Grundy—in what is known as Poe Town.

Q3. Are you the widow of M. L. Goff?

A. Yes, sir.

Q4. Did you also qualify as the Executor of his will?

A. Yes, I did.

Q5. Are you now acting as executor of his will?

A. Yes, sir, I am.

Q6. At the time that your husband, M. L. Goff, died, did he own this lot in question here in the town of Grundy?

A. Yes, sir, he did.

Q7. What did you do after his death about the possession of this lot after the house burned?

A. Well when the property burned, he rented it to Mr. Mann and Mr. Mann cleaned it up and did some filling in there so they could use it as a taxi place.

Q8. Did your husband first rent it to him during his life time?

A. Yes, sir, he did.

Q9. Was there anything on the lot to fix the boundaries of it?

A. Well, I don't know, till I had Caudle Belcher to survey it, he had several surveys done.

page 21 } Q10. You mean you had surveyor Caudle Belcher to run this lot out that is in question?

A. Yes, I did.

Q11. That is the one that the wooden house was on, the corner?

A. Yes, sir.

Q12. After Mr. Belcher, surveyor, surveyed it for you, what, if anything, was done to mark the lines of the lot?

A. Well, there were some stakes placed there and they were small, I don't know whether they were pulled up or broken off, but anyway we had it surveyed again and I had locust posts put in and the bus broke the front one off partly and someone pulled it up, and I went to Charleston and some-

Trula Goff.

one pulled the other one up and had the hard-top on it while I was gone.

Q13. Where they had the asphalt and improvement on the street?

A. That is right.

Q14. Where were those posts placed with reference to where this wooden building that was burned stood?

A. Well they were put on the line as markers.

Q15. You mean when they were put on the line, you mean that was the line of the building that was burned?

A. That is right.

Q16. Did you ever claim any time that your lot extended any farther towards the Slate Creek than where the edge of that wooden building, where it was?

A. No, sir, I didn't.

Q17. How much of your lot did this asphalt page 22 { cover up or how far past where you had these stakes placed?

A. I just don't know, it shows in the survey.

Q18. Well, now after your husband died, who took charge of his property or his real estate and buildings?

A. I did.

Q19. What have you done with this lot?

A. Rented it.

Q20. For what purpose?

A. Taxi cab stand.

Q21. Do you have it leased today?

A. Yes, I do.

Q22. Has there been any time since your husband died that you haven't had it leased to someone?

A. No, sir, there hasn't.

Q23. Have the parties that you leased it to, what have they done with it?

A. Used it as a taxi cab stand.

Q24. Has it been used continuously?

A. Yes, sir, it has.

Q25. What, if anything, did you do to it with reference to putting it in condition that it could be used by this taxi company?

A. I didn't get that.

Q26. Did you do anything to the lot towards improving it?

A. Oh, yes, there have been several loads of gravel and cinders put on it.

Trula Goff.

Q27. Did you do that or did the people renting it?

A. They had it done and I paid them for it, I believe Mr. Arrington put one or two loads of gravel on there that he didn't ask anything for.

Q28. Did you have anyone to make a survey of this lot?

A. Yes, sir, I did.

Q29. What was the occasion for your having that done?

A. The first time I had it surveyed when Dr. Richardson was putting his building in there.

Q30. You mean the bus station?

A. Yes, he claimed he set back over there farther than what he was and that is why I had it surveyed, to get the line, and the next time was when the town come up and tried to claim so much off it, and I had it surveyed, and that is when I put the post in.

Q31. I don't know whether the jury understood what you meant, which line was it you were having run at that time?

A. Well, I don't hardly know but he was claiming some part, Mr. Belcher can explain that to you better than I can because I had him to run.

Q32. What I mean by that, whether or not that was the line between your property and Dr. Richardson's property?

A. It was.

Q33. And you had it run so as to fix the line and to see whether or not the building was all on his property or whether it come up to the line?

A. That is right.

page 24 } Q34. Who was it put these posts in for you, if you remember?

A. Well, the last ones was Caudle Belcher and my youngest son and I put them in there.

Q35. What is that boy's name?

A. Eugene Goff.

Q36. Where is he now?

A. In school.

Q37. Give the jury some idea of how long those posts *staid* there when you put them up.

A. I just don't hardly know, I would be afraid to say for I don't know.

Q38. You can give them some idea whether it was a week, a month, or a year.

A. They might have *staid* there a month or maybe longer.

Q39. Had you had any conversation with any of the town

Trula Goff.

officials before you went away, you stated that you went away and were gone when this asphalt was poured?

A. No, sir, I didn't, I didn't know they were going to put it down then.

Q40. Had you had any talk with any of them about why you were putting these posts up?

A. I considered I had the right to, it was my lot, I considered I had a right to do what I wanted to with it.

Q41. I wanted to know whether or not you told any of the town officers, the Mayor or anyone, why you were putting the posts up?

A. Some of them were there, Perry Combs, I page 25 } think was one that was by.

Q42. Was Perry Combs town sergeant?

A. I don't know what he was.

Q43. He was an officer of the town?

A. He was something.

Q44. Do you remember what other officers were there when you put them up?

A. No, I don't.

Q45. After you husband's death and after you had leased this lot to these people for a taxi-stand, what part of it did they use?

A. All of it.

Q46. At the time you put these posts up there, how much of it were they using?

A. Out as far as the posts were.

Q47. What did they do with the—you say they used it, just explain to the jury how they used it.

A. Well, the traffic was trying to crowd them off and they wanted something to show how far out they could put their cabs, they didn't have room for their cabs, they had on it at this time.

Q48. That is the very thing I was getting at, what were they putting on this lot and how were they using it, in other words, where did they park their cabs with reference to your lot?

A. On that lot.

Q49. Where did they park it with reference to the stakes?

A. On the inside of those stakes.

page 26 } Q50. How close out to the stakes did they park their cabs?

A. Just as close as they could get without getting on the street or alley.

Trula Goff.

Q51. Of course you didn't see them all the time but how much of the time did you actually see the cabs parked there?

A. I couldn't say, because sometimes I would be through there and there wouldn't be a cab on there, they would be out, and sometimes the lot would be full.

CROSS EXAMINATION.

By Mr. Pobst:

Q1. You say those big stakes you put down there, they were just fence post, weren't they?

A. Locust post, sawed post.

Q2. How big?

A. I don't know.

Q3. Three or four inches?

A. I would be afraid to say, they were large.

Q4. And how high would you say they stuck out of the ground, three or four feet?

A. I guess they did.

Q5. How many times were those put in?

A. I put two large ones in the last time. There were markers there before that but they broke them off.

Q6. And you don't know how long they *staid* there?

A. No, I don't.

page 27 } Q7. You heard Hassel say they *staid* there a few hours.

A. He wasn't home at the time I put them in there.

Q8. You didn't put them in there but once you say?

A. Not that time he wasn't home.

Q9. How many times did you put them in?

A. Twice, the markers.

Q10. The big stakes, I am talking about?

A. Once.

Q11. Then you say at the time they were put there that the taxi stand was using clear out to that point?

A. That is right.

Q12. You mean they were parking between those big fence post and the light pole?

A. They sure were because the light post was over on my property and it is yet.

Q13. They weren't parking outside of the line of that light post?

A. That is why I set the stakes there, so they could have room.

Trula Goff.

Q14. They didn't park out in that alley beyond where that light post was?

A. They sure did.

Q15. How long?

A. I don't know.

Q16. They parked in the street and out in the front of the parking lot there, all along there, didn't they?

A. Not on my lot they didn't.

Q17. They have used anywhere they could park a taxi, haven't they?

A. They use only the property I leased to them is what they used.

page 28 } Q18. And that is all they used?

A. That is all they used.

Q19. How do you know?

A. They didn't use any more what time I seen them, they were only on the lot.

Q20. Don't they now park on the front street?

A. They don't go beyond the lot that they have a lease on.

Q21. Now, Mrs. Goff, you have introduced a deed from W. L. Demmis to your husband, that started at the edge of the main street and went back up Slate Creek parallel with Slate Creek 52.8 feet, and then turned and went down to Slate Creek and into Slate 89.5 feet, and then down Slate Creek 52.8 feet and back along the main street 87.5 feet, you were talking about a lot that you had Caudle Belcher to survey off, where did you get any measurements for that lot to survey it by?

A. Well, that alley through there was supposed to be 18 feet alley and they measured from the corner of the Wig Wam.

Q22. You say supposed to be 18 feet alley, where did you get that?

A. Well, that's what it has always been.

Q23. You mean that is just what your husband left there or tried to leave there between the two buildings?

A. That is what it has always been said it was.

By Mr. Pobst: We object to what has been said and move to exclude it.

Q24. You know of no paper fixing that alley at page 29 } 18 feet or anything else, do you?

A. I know there is just an alley through there.

Trula Goff.

Q25. You don't know how wide it is, do you?

A. No, all I have got is on my line where the building was.

Q26. I mean no paper?

A. Well, I didn't know anything about the deeds until I had to take over his business, farther than that I don't know, because I never handled it until I had to come over it as administrator.

Q27. He at one time conveyed—didn't you and your husband convey to Arthur Ratliff's wife, Ida S. Ratliff, some of that property?

A. There was something to that effect but it was deeded back to him before his death.

Q28. Why was that deeded back, I mean why was it deeded to Arthur Ratliff?

A. I don't know.

Q29. Did your husband ever discuss that with you?

A. I don't know whether he did or not.

Q30. What did Arthur Ratliff pay for that property?

A. I don't know, the deed may tell that.

Q31. I think the deed said \$8,500.00, did he ever pay that for it?

A. I don't know.

Q32. Did he ever pay anything for it?

A. I don't know, I don't think he paid for it.

Q33. Well, why did he buy it, do you know?

page 30 } A. You will have to ask him.

Q34. You are certain you didn't hear your husband say anything about making the deed?

A. I might have but it's been so long, I have forgotten.

Q35. And you don't remember anything that was said?

A. No, I don't.

Q36. Now, so there may be no confusion, am I correct in saying you had the lot surveyed off twice by Caudle Belcher, the first time was when Dr. Richardson was building his bus station?

A. That is right, he wanted it surveyed to get my line.

Q37. That wasn't when you put these big locust post in?

A. No.

Q38. From these post to the Dr. Richardson building, how much is it?

A. Eighteen feet.

Q39. No, I mean the lot you have?

A. I don't know just how many feet it is.

Trula Goff.

Q40. And you don't know where Caudle Belcher got his figures for those measurements?

A. No.

By The Court:

Q. The first time it was surveyed, did you put any stakes up along the line where you claimed the alley was?

A. You mean when Dr. Richardson was putting the building up?

Q. Yes, did you put any stakes along there then?

A. I don't remember whether we did or not, page 31 } might have put some markers, I believe there were some markers.

Q. When was the next time that you had it surveyed?

A. Well, it come up over the lot, they were trying to cut the cabs out of a parking place.

Q. When was that?

A. I don't remember, but that was when I put those posts up to show them where they could park.

Q. Before you had it surveyed the second time and put these post up, who occupied that part that is now in dispute?

A. I believe it was Bill Goodman and E. G. Arrington.

Q. I mean was it open to use by the people traveling the alley or was it used by the cab stand?

A. It was used by the cab people, the ones that had the cabs on it, and the cars would get on there and they didn't have room to park sometimes, they would park in their way.

Q. How long was it after you had the survey made the second time till you put these large stakes or posts in before the posts were torn down and the asphalt or gravel put in?

A. I don't know, one stake didn't stand there longer than a week, but the other stake stood there longer than that, maybe a month or two.

Q. My question was how long was it from the time those posts were put in before the asphalt and the gravel was put in the alley?

A. I don't know just how long it was.

Q. As I understand you, then these posts were torn down when the asphalt and gravel was put on the alley? page 32 }

A. Yes, sir, one was.

Q. When were the others torn down?

A. There weren't but two, one didn't stay there more than a week till a bus run over it and broke it and them somebody pulled it up.

Trula Goff,

By Mr. Pobst:

Q41. You spoke of a marker put down in the first survey, you mean the surveyor's stakes?

A. Yes.

Q42. You didn't mean any stone?

A. That's right.

Q43. When was Dr. Richardson's bus building built?

A. I don't know that.

Q44. About how long ago?

A. I would be afraid to state.

Q45. As a matter of fact it was a little over two years, isn't that right?

A. I guess it has been.

Q46. Didn't they leave my little bus station up here and begin to operate the new bus station in February, 1946, two years ago, isn't that right?

A. I don't know.

Q47. That is about right.

A. I would be afraid to say.

Q48. Well, the bus station had been constructed the winter and fall before, is that right? In other words they started work on the bus station around two and one-half page 33 } to three years ago, that's about right, isn't it?

A. (None)

Q49. I don't mean to *pen* you down but is that something near right?

A. Well, I just then said I would be afraid to state, I never kept up with it.

RE-DIRECT EXAMINATION.

By Mr. Sutherland:

Q1. What did your husband use this wooden building for?

A. Well he used it as a general store.

Q2. How long did he use it like that?

A. I don't remember just how long he did use it.

Q3. I mean by that, did he use it continuously all the time after he bought it, either have goods in there or have it rented to somebody?

A. Part of the time he had goods himself and then he rented it to other people.

Q4. Was there any time it wasn't used by somebody after he bought it?

A. No, sir.

Bill Goodman.

Q5. Where did you try to put these stakes with reference to where that building was located when you had it surveyed?

A. Well, I tried to put them on the line where the building was.

Q6. Who was it complained to you, you stated on cross examination that the town was crowding the people that you had leased to?

page 34 } A. Well, it was the ones that had it leased.

Q7. Who was that?

A. Mr. Arrington and Bill Goodman.

Q8. And it was then you had it run out and the stakes put there?

A. That is right.

RE-CROSS EXAMINATION.

By Mr. Pobst:

Q1. When did the building burn?

A. I believe it was 1940, I know I was in the hospital at the time.

Q2. About the 28th or 9th of April, 1940?

A. I don't know.

By Mr. Pobst: Is that right, Mr. Sutherland?

By Mr. Sutherland: Yes, sir, the last days of April, 1940, I believe the 30th.

Witness stood aside.

BILL GOODMAN

the next witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Sutherland:

Q1. Where do you live, Mr. Goodman?

A. Up Slate Creek here about two miles.

page 35 } Q2. What do you do?

A. I operate a cab stand.

Q3. Where is that cab stand?

A. Located down by the bus station between the Wig Wam and the bus station.

Q4. Whom do you lease from?

Bill Goodman.

A. Trula Goff.

Q5. What improvements or what's on that lot now, if anything?

A. There is nothing on it, but a little building 10 x 14.

Q6. Who put that there?

A. I did.

Q7. After you leased it?

A. Yes.

Q8. Do you remember about the time that the town improved this alley or street between this lot and Wig Wam building?

A. Yes, I was down there, I don't remember the date.

Q9. Did you have that lot leased from Trula Goff at that time?

A. Yes.

Q10. About how long had you been using it before that time?

A. I bought the place in November 7, 1945, the cab stand, that was on there and I have been there every since.

Q11. Who, if anybody, ever pointed out to you the size of this lot, or the part that you were to occupy, or did anybody ever show you how big the lot was?

A. Yes, sir, after the people began running through the alley down there, they seemed to think we were
page 36 } crowding them, but when I leased the lot, I was to have all the property the deceased M. L. Goff owned in that lot, and I went to Mrs. Goff and told her she would have to put some posts up so we could stay on the inside of our line, so we wouldn't have any controversy about it.

Q12. So what was done then?

A. She brought Mr. Belcher up and he surveyed it off once and then she brought him back the second time and then she put the posts up.

Q13. After they surveyed it the first time, was there any stakes?

A. Yes, I think she drove some of those markers, just like a nail head to me, I think she drove some of those there.

Q14. After she did that, what part of that lot did you use?

A. Well, I used what she told me was hers as long as I could get along with the city. At one time I had 14 cars down there and I parked 9 of them inside of the posts that she had had surveyed off and put the posts, parked nine cars on the inside there.

Bill Goodman.

Q15. At the time the town improved that street through there, tell the jury how much of that lot of how far out towards Slate Creek you were using that lot at that time?

A. I was using 18 feet from the Wig Wam, I used that for a while until they knocked the posts down and then I had to get back in again.

By The Court: I didn't get clear what he meant.

A. I was using all the property outside the 18 page 37 } feet from the Wig Wam over.

Q16. There were 18 feet from where you were using this lot over to the Wig Wam building, is that right?

A. That is right, where the posts were—I kept my cabs just inside the posts and it measured 18 feet from the posts that were there to the Wig Wam building.

Q17. Now, were you using that much of this lot at the time the town improved the street back there and put that asphalt down?

A. Yes, sir, that is the reason I went to Mrs. Goff and had her to put me right where I could park.

Q18. Did the town put the asphalt on any part of this lot that you were using at that time?

A. Yes, it runs out there a little, I don't know how far, I was out of town at the time, it was done when I got back, it was hardtopped and the post gone.

Q19. Have you measured it now from the Wig Wam over towards the lot where you are using it to see how much the town is using?

A. It has been measured several times, I have measured it and everybody else has. I told the Mayor the other day, I got a ticket for parking one of the cars in front of the little office building I put there, and I told him until the thing was settled, I was on my own lease, there is one spot there that is about on the line 18 feet from the Goff building across the street and I kept a car sitting in front of the office practically all the time and I got a ticket the other day and I page 38 } went to the Mayor and told him I would wait until this matter was settled before I paid any fine. They had been using this certain spot there, I wasn't using the whole thing but of course I pulled in there and out of it every hour I guess.

Bill Goodman.

CROSS EXAMINATION.

By Mr. Pobst:

Q1. About all the time you and the other taxicabs down there are parked on the road, just wherever you could get your cars?

A. No, sir, I have got that lot for my cabs.

Q2. I thought you said you at one time had so many cars there you could hardly get them all on it?

A. Yes, 14.

Q3. And you could get only 9 on the lot?

A. Yes, sir, and the rest were parked on Dr. Richardson's lot in the back.

Q4. Then you sometimes parked at different places?

A. Yes, sir, but we generally kept 9 cars on the lot.

Q5. It was awfully crowded, wasn't it?

A. Not so bad.

Q6. It is a crowded place?

A. It is now a little bit but it wasn't before they started the new street.

Q7. When did they begin the construction of the bus station?

A. I don't know the exact date, I would say some time in December or January.

page 39 } Q8. When?

A. I couldn't say the date.

Q9. It has been about two and one-half years since they started it, hasn't it?

A. I bought the Black Diamond Cab Co. November 27, 1945, and it hadn't been started then but it was started a few days after that.

Q10. It was started some time in last of '45 or early winter '46?

A. Well, it could have run into that.

Q11. And it was completed then and began to be occupied in February, 1946?

A. It was occupied some time, I couldn't say the exact date, but I don't think it took them over six or eight months to get the building so they could use it.

Q12. You didn't buy there until 1945, it must have been started before you bought, don't you think so?

A. I wouldn't say, I didn't pay that much attention.

Q13. At any rate it was close to that time?

Bill Goodman.

A. Yes, I never seen any steel or material laying around there.

Q14. And they have been in it now about two years?

A. Yes, sir.

Q15. And were some five or six months building it?

A. That's about what I would say.

By The Court:

Q. Now, for my benefit as well as everybody else's, let me ask you this: when did you say you leased this lot
page 40 } from Mrs. Goff?

A. The best of my knowledge, it was November 27, 1945.

Q. Now, what use did you make of it?

A. Cab stand.

Q. I mean particularly with reference to this disputed part, what use did you make of that strip there that is in dispute?

A. What use did I make of it?

Q. Yes, what use was being made of it, that part of it?

A. It was being used as a cab stand, the Black Diamond Cab Company was in there when I went there, there were several cars in there when I went there.

Q. When you went there, was there any stake or anything to show where the line as claimed by Mrs. Goff was or between Mrs. Goff and the alley?

A. I don't know whether there was a stake or not, but when I built that building there on the lot, I left enough room in front of that building, from what I was told about the whole lot, to park a car in front of the building, the building was 12 to 14 feet long, but I did leave enough room in there to park a car in front of the office. At that time there were so many surveying down there you couldn't hardly tell where there was a stake or a line.

RE-DIRECT EXAMINATION.

By Mr. Sutherland:

page 41 } Q1. When you say you used that as a cab stand,
how do you mean that you used it?

A. Transporting passengers, about all I would call it.

Q2. The whole lot—it doesn't have a building on it, does it?

A. No, just a building there for telephone, office or sitting

Bill Goodman.

room for people coming there hunting a cab, to get out of the weather.

Q3. It was being used for your cars to stand there when you were not using them, is that right?

By Mr. Pobst: That is getting awfully leading, your Honor, let him ask him, don't tell him what to say.

By Mr. Sutherland: I tried to ask him without leading, I think it is a little leading myself, your Honor, but I think I am entitled to it.

By Mr. Pobst: Don't tell him.

By The Court: Objection is sustained, it is leading.

Q4. Where were your cars when they were not being used for transportation of passengers?

A. They were sitting on the lot and all time they weren't out on trips, they were sitting on the lots or at the garage or service station.

Q5. Is that what you mean when you say you were using it as a taxi-stand?

A. Yes, sir, the building was built there for the
page 42 } people, if they came there on the lot and had to
wait for a cab, for men that works in the office to
come in and set around.

RE-CROSS EXAMINATION.

By Mr. Pobst:

Q1. You leased then sub-leased it to a number of individual taxi drivers?

A. Yes.

Q2. You had 15 or 20?

A. Fourteen.

Q3. More than you could accommodate on any lot you had?

A. No, we accommodated them, we accommodated them with the business, and business was so good the cars moved in and out so fast.

Q4. If they were all there at one time, they would have more than covered up your lot?

A. Yes, nine was all that you could get on the lot.

Witness stood aside.

CAUDLE BELCHER

the next witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Sutherland:

Q1. Mr. Belcher, where do you live?

A. Three miles above Grundy.

Q2. How long have you lived at that place?

page 43 } A. Since '40.

Q3. What do you do?

A. Engineering.

Q4. How long have you been an engineer?

A. Since 1925.

Q5. What work have you done as engineer?

A. Mining engineering and land surveying.

Q6. How much time have you put in in surveying land?

A. Well, around 21 years.

Q7. What preparation did you have for surveying before you started work?

A. Course with the American Correspondence School.

Q8. Did you make a survey of this lot for Mrs. Trula Goff?

A. Yes, sir.

Q9. When did you do that, if you remember?

A. I don't remember exactly, I don't have my note book.

Q10. Did you make a drawing or plat or map showing the matter in dispute and the other things there on the ground?

A. I surveyed it twice, I did the last time I made a survey.

Q11. Is that map or plat drawn to scale and from actual measurements?

A. Yes, sir.

Q12. Do you have it with you?

A. Yes, sir. (exhibiting the map)

Q13. I will ask you to explain that map to the jury.

A. This is the survey of the entire lot that is owned by Mrs. Goff.

page 44 } Q14. As you passed your pencil around, what kind of line was that?

A. The dotted line, or this square within this line is the Wig Wam building, the square on the opposite side of the hatched area is the taxi-stand, this black hatched area is an eighteen (18) foot strip that is parallel with the Wig Wam

Caudle Belcher.

building and 18 feet from this. This red hatched area is an 18 foot strip as is now being used for the street.

Q15. How far is it from the plaintiff's property line, South line, how far is it to the hatched line or where the street is?

A. It is 20.6 feet.

Q16. What is the entire distance from her property line to the Wig Wam building?

A. Forty-three and four tenths feet.

Q17. Then how much is in dispute or point to the jury how it is shown on your map, the part that is in dispute?

A. The part in dispute is the area between this black hatched area and the red hatched area.

Q18. And that would be how much, how many feet?

A. It is approximately 6 feet.

By The Court: You mean a strip six feet wide?

A. Approximately that, it is a little bit different at each end.

By Mr. Sutherland:

Q19. And the width of the lot is how much?

A. It is 52.8 including the walk and the street.
page 45 } Q20. Is there anything on the street along by
the side of the Wig Wam building?

A. There is a board walk.

Q21. Is that shown on this map?

A. Yes, sir, I have it lettered as board walk.

Q22. Do you remember about the date it was that you made this survey for Mrs. Goff?

A. (None)

Q23. Did you say you had surveyed this twice?

A. Yes, sir.

Q24. What was the difference in the time between the two surveys?

A. Well, it was approximately six months.

Q25. About what was the date of the last one?

A. It was six months after Richardson started his bus terminal.

By Mr. Pobst:

Q. Was that the time of the last one or first one?

Caudle Belcher.

A. Last one.

Q26. At the time you made the first survey, did you put any markers or stakes where you ran this line?

A. I ran the South line and put markers in that so that Dr. Richardson might dig his places for his footers for his bus terminal.

Q27. Did you put any markers on the side of the alley?

A. I measured over 18 feet from the Wig Wam building and put some hubs in.

Q28. Explain to the jury what you mean by hubs?

A. It is a stake you drive down smooth with the page 46 { ground and put tacks in.

Q29. When you surveyed it, six months after that did you find any of the hubs?

A. No, sir.

Q30. What did you put in the ground the next time you surveyed it?

A. I replaced those hubs at the same place and I think the following day we put in some posts.

Q31. Describe to the jury the kind of posts and how you put them in.

A. They were locust posts and we dug the hole with a post hole digger and a bar.

Q32. About how deep did you put them in the ground?

A. About three feet.

Q33. When was the next time you noticed these posts after you put them in?

A. All I remember seeing, I think it was the following day the one nearest the Main street was broken off.

Q34. Where was the other one at that time, was it still there?

A. I didn't look, I didn't recall seeing it any more.

By Mr. Sutherland: We desire to introduce this map as part of this witness' testimony, marked "EXHIBIT MAP".

By Mr. Pobst: That is objected to because it is not shown how it was made or if it was made from anything, page 47 { to show what his measurements were based on at all.

By the Court: Overruled. I think what you stated, Mr. Pobst, is true, but I think it is permissible to show what he did.

Caudle Belcher.

CROSS EXAMINATION

By Mr. Pobst:

Q1. Mr. Belcher, you have laid off on this map on the Southeast side thereof, which you labeled taxistand, lot and going from the bank building or bus building towards Slate Creek the first thing you have labeled here is rock wall, what is that rock wall?

A. That was a rock wall uncovered by Perry Combs and some others, running parallel with the street.

Q2. You mean parallel with the back alley?

A. The back alley.

Q3. Did you see that rock wall?

A. Yes, sir, he uncovered each end of it.

Q4. And what did it appear to be?

A. It was a wall laid up out of rock.

Q5. And you didn't know anything more than that about the rock wall?

A. That is right.

Q6. How far was the South side, that is, of the taxi lot, up towards the bus station, how far would it be from there to the rock wall, 20.6 feet?

A. Yes, sir.

page 48 } By Mr. Pobst: The rock wall, shown there (indicating on map) inside of a power pole, that's the land leased, up here is the bus terminal, up here the bank, up here the court house, you go out the court house and turn to the right and cross (interrupted)

By Mr. Daughterty: What is he doing?

By Mr. Sutherland: Testifying.

By Mr. Pobst: The attorney desires to withdraw that, I didn't think about it, I was just trying to explain the position of the map.

Q7. Mr. Belcher, you have labeled here, bus terminal, is that south of the taxi stand?

A. Yes, sir.

Q8. Then up on south of that is the bank building, is that right?

A. Yes, sir.

Q9. So if you would go out of the court house and turn to the right you would first cross Walnut Street?

A. Yes, sir.

Caudle Belcher.

Q10. Then come to the bank building?

A. Yes.

Q11. Then the bus station?

A. Yes, sir.

Q12. And that is what you have labeled bus terminal?

A. That is right.

Q13. And the rock wall you have pointed out is
page 49 } on the other side walking on down by the taxi
stand?

A. Yes, sir.

Q14. Then you have an 18-inch power pole?

A. Yes, sir.

Q15. Is that the Appalachian Electric Power Company
pole?

A. Yes, sir.

Q16. It is standing outside and further on towards Slate
Creek? outside of the taxi lot?

A. Outside of the rock wall.

By Mr. Pobst: Now then you can see there (exhibiting
map to the jury).

Q17. The line that she claimed to is on beyond this rock
wall a distance of approximately how much?

A. Six feet.

Q18. So that she was claiming in all how much from the
bus station?

A. Twenty-five and four-tenths feet.

Q19. Is that what she claims now according to her claim?

A. Yes, sir.

Q20. What did she measure that 25.6 feet by, by any paper?

A. She told me the alley was 18 feet. I measured off 18
feet from the Wig Wam building.

Q21. And this 25.6 feet stops 18 feet from the Wig Wam
building?

A. Yes, sir.

Q22. And that is why you stopped there?

A. Yes, sir.

Q23. Did she show you any paper, or writing,
page 50 } showing the alley was 18 feet wide?

A. No, sir.

Q24. Do you know of any writing or paper fixing the width
of the alley?

A. No, sir.

Caudle Belcher.

Q25. Did you have before you, when you made that survey, any other title paper? In other words, did you have the deed from M. L. and Trula Goff to I. S. Ratliff or from them back to M. L. Goff, did you have that paper before you?

A. Yes, sir.

Q26. Who gave you that paper, Mr. Belcher, Mrs. Goff?

A. I think I copied it off the record.

Q27. Did you talk to her about that paper?

A. Not to my remembrance.

Q28. Did you ask her anything about it?

A. No, sir.

Q29. Do you know how much, what width, that gives this taxi-stand lot, these two deeds that I spoke of?

A. The only deed—I had the Dennis deed and it says, excluding an alley.

Q30. It doesn't say how wide the alley is?

A. No.

Q31. Do you know the width given in this deed from M. L. Goff to I. S. Ratliff, what width he gives in that deed?

A. No, sir.

Q32. Assuming that we have it copied correctly here, and as to that we will see when the deed book comes, page 51 } how wide would the taxi lot be according to that deed?

A. Twenty-six feet.

Q33. And you say you have it 25 something?

A. 25.6 feet.

By Mr. Pobst: We desire to introduce the two deeds, one from M. L. Goff and wife to I. S. Ratliff, dated August 25, 1938, and recorded in the Clerk's Office in Deed Book No. 79, page 298.

We now have the deed book here, see if the deed book shows the width of the lot is 26 feet as you stated.

A. (Examining the deed) Yes, sir.

By Mr. Pobst: We now ask to introduce both deeds, one from M. L. Goff and wife, dated August 25, 1938, and recorded in Deed Book No. 79, page 298. Read that description over (to witness).

By Mr. Pobst: The other deed, I show you is from I. S. Ratcliff and A. M. Ratcliff, her husband, dated February 13,

Caudle Belcher.

1943, and recorded in Deed Book No. 94, page 65, both of said deeds recorded in the Clerk's Office of this court.

Q34. Do both of those deeds convey the same property?

A. Yes, sir.

Q35. By the same description?

A. Yes, sir.

Q36. Do you know where, from your survey, could you tell where anybody got a 26 feet measurement, which page 52 } they call for in the deeds, do you know anything about that?

A. The only place they could get it would be measuring 18 feet from the Wig Wam building.

Q37. Could you tell me when the Wig Wam building was constructed?

A. No, sir, I was in here before 1937.

Q38. Do you mean it was made before 1937?

A. Yes, sir.

Q39. Now, if that line is established according to the contention of the plaintiff, out in the back street there, what will be the distance between the board walk next to the Wig Wam and her property line on this side?

A. It would be 39.4 feet.

Q40. I don't believe you understand my question. I asked you this: If the plaintiff establishes the north line of the taxi lot according to her contention, what will be the distance from that line over to the edge of the board walk along by the Wig Wam building?

A. It will be 14 feet.

Q41. In other words, the town will have 14 feet in the alley?

A. Yes.

By the Court:

Q. How wide is the board walk?

A. Approximately four feet.

By the Court: As I understand the plaintiff doesn't claim the land the board walk is on?

page 53 } By Mr. Daugherty: This is correct, your Honor.
By the Court: What does the town claim? Do they claim the space the board walk is on?

By Mr. Pobst: The town claims, your Honor, that the line of the original property, as always used, was inside this rock wall, and that Vern Smith took possession of it, that was in

Mrs. Trula Goff.

my opening statement, we will show that, and built outside the rock wall.

By the Court: Where do you claim the line was over next to the creek?

By Mr. Pobst: Over next to Slate Creek, there never was any line so far as we know, there was nothing there to show, it was a creek bank. In other words, we don't know whether M. L. Goff put the Wig Wam building on the line or not.

By the Court: In other words, the town doesn't know where that alley is next to the creek?

By Mr. Pobst: We can't show, no, your Honor.

RE-DIRECT EXAMINATION

By Mr. Sutherland:

Q1. I believe this deed that was introduced from M. L. Goff to I. S. Ratliff, in describing this lot, gives the width of it as about 26 feet, is that right?

A. Yes, sir.

page 54 } Q2. Now then that was made while the wooden building was still standing, wasn't it?

A. I don't know.

Q3. Well, the deed is dated August 25, 1938, at that time, August 1938, the wooden building was still standing there, wasn't it?

A. I remember of some Assyrian having a store there about 1938.

Q4. And he had a store in there at the time it burned in 1940, is that correct?

A. I wouldn't say, I don't remember.

Witness stood aside.

MRS. TRULA GOFF

recalled for further examination in chief, stated as follows:

DIRECT EXAMINATION

By Mr. Sutherland:

Q1. Do you know when your husband, M. L. Goff, built what they call the Wig Wam building?

A. No, sir, I don't but I have it in a book at home when he leased it.

Q2. Whom did he first lease it to?

Mrs. Trula Goff.

A. Mr. A. G. Law.

Q3. At that time he put up Mick or Mack store?

A. That is right.

page 55 } Q4. And that is the first store in that building?
A. That is right.

Q5. And how soon was that after it was completed?

A. He leased it before it was completed, but he didn't move.

Q6. And you have a record at the house you can fix that by?

A. When he leased it.

Q7. After he leased it to Mr. Law, whatever date that was, tell the jury whether or not that building has been continuously occupied from that date till the date this suit was started.

By Mr. Pobst: I don't see the materiality of that, if he is on the town's property on that side.

By Mr. Sutherland: If we are in possession of a part of that lot, we have introduced a deed here describing that lot, which the surveyor says went from the bus station to the middle of Slate Creek, if we are in possession of any part of that, we are in possession of all of it to the boundaries of that deed and then if they undertake to claim there is an alley through there, they have to limit that alley.

By Mr. Pobst: If your Honor, please, that is a question of title. That part of it wasn't leased to Law at all, wasn't claimed to have been an alley separates it, the only thing he is trying to restrict the use of the alley there.

page 56 } By the Court: There is no question here—so far as I can see, there is no question here about the plaintiff or M. L. Goff's being in possession of the part of this land that was conveyed from W. L. Dennis to M. L. Goff, they have been in possession of it all the time.

By Mr. Pobst: What he is talking about is on the other side of the alley.

By the Court: I think it is immaterial to show he was in possession of it in two places, if that is admitted.

By Mr. Pobst: We don't admit anything, you prove the case, we say that isn't material.

By Mr. Sutherland: All right, I want her to answer then, if they have had possession of that building every since it was built until the institution of this suit?

Mrs. Trula Goff.

By Mr. Pobst: We object.

By the Court: Overruled.

Q8. Have you had possession of this Wig Wam building since it was constructed up to the time this suit was instituted?

A. You mean have I had it leased?

Q9. That is right?

A. Yes, I have.

page 57 } Q10. Has there been any time after it was completed up till this suit was started that there was not somebody living in that or occupying that building?

A. No, sir.

Q11. The deed that was introduced from your husband, M. L. Goff, and you to I. S. Ratliff, is dated in August, 1938, was the wooden building still on the lot at that time?

A. Yes, sir.

By Mr. Sutherland: With that record that will fix the time that this Wig Wam building was started, we will want to introduce that, and with that the plaintiff is hrough.

By the Court: You reserve the right to put that in and the plaintiff rest?

By Mr. Sutherland: That is right, to put in that piece of evidence.

Witness stood aside.

WHEREUPON, the following motion was made in the absence of the jury:

By Miss Coleman: Defendant by counsel moves the court to strike the evidence of the plaintiff in this case for the following reasons:

(1) The plaintiff has failed to prove that the town of Grundy is in possession of this property.

page 58 } (2) That any entry was made in three years next preceding the institution of the suit.

(3) That they have failed to prove that the town unlawfully entered or unlawfully detained the lot in controversy.

By the Court: Overruled.

Reece McClanahan.

Court was adjourned until Wednesday morning at 9'o'clock.

WEDNESDAY MORNING
April 14, 1948

TRULA GOFF

again resumed the stand and testified as follows:

DIRECT EXAMINATION

By Mr. Sutherland:

Q1. When was the date you first leased that building which is known as the Wig Wam building?

A. December, 1936.

Witness stood aside.

WHEREUPON, the defendant introduced the following evidence on its behalf:

REECE McCLANAHAN

the first witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Pobst:

Q1. Mr. McClanahan, you live in the upper end
page 59 } of the town of Grundy, do you?

A. Yes, sir.

Q2. Were you formerly Mayor of the town of Grundy?

A. Yes.

Q3. When did you take office?

A. September 1, 1945.

Q4. And you served how long?

A. Two years.

Q5. You served till September 1, 1947?

A. Yes, sir.

Q6. During your term in office as mayor, state what, if anything, was done toward improving the back street or back alley between the Wig Wam and the taxi stand.

A. What repairs were made?

Q7. Yes.

A. Well, I had the road scraped and hard-surfaced.

Reece McClanahan.

Q8. What kind hard-surface?

A. Asphalt with gravel.

Q9. Paved with gravel?

A. Yes.

Q10. When was that, if you know?

A. Well, it was done in 1946. I don't remember the exact date.

Q11. When you started to hard-surface that or were preparing for it, state what, if anything, was done by some one of Mrs. Goff's in reference to putting posts out in the street.

A. Well, there were two posts put out in that page 60 } alley beyond that light pole from here.

Q12. You mean north of the electric light pole?

A. Yes.

Q13. About how far from the light pole?

A. I don't know, must have been four or five feet, I didn't measure it.

Q14. Who put those stakes up?

A. I don't know, I didn't see them put up.

Q15. After they were put up, I believe Caudle Belcher testified that that left about 14 feet in the travel part of the alley, is that approximately correct?

A. Yes, approximately correct from the board walk over.

Q16. That is not including the board walk?

A. No.

Q17. How do the buses get into the bus terminal?

A. They go down and turn in through that alley and come around to the back.

Q18. You mean they turn up the alley and turn into the bus station?

A. Yes.

Q19. Were there at that time, and are there yet a great many buses driving in and out of that bus station daily?

A. Yes.

By Mr. Daugherty: We object to that, the necessity of the defendant to have this property doesn't have anything to do with its right to use it.

page 61 } By Mr. Pobst: I am not so certain about that, your Honor, I believe it would, an alley was reserved—no particular width was designated in the deed for the alley, The plaintiff seeks to restrict it to just what she wishes. The plaintiff's husband constructed a Wig Wam

Reece McClanahan.

building on the other side of it and without, so far as we know, establishing anything and admittedly having nothing by which to establish the line because she doesn't know the width of the alley but just said she had heard it was 18 feet. An alley reserved must be reserved with reference to a particular point. Now we think that does have something to do with it.

By the Court: I think the evidence is admissible to show the alley was used.

By Mr. Pobst. That is true, your Honor, it would certainly go to show how far the alley was used.

By the Court: I think the evidence is admissible according to the way you gentlemen are arguing.

By Mr. Daugherty: Exception.

By the Court: The use of the alley at that particular time of these buses using it might not determine the existence and the width of the alley, it would depend upon its use
page 62 } not on one particular occasion or one particular time, I don't think.

By Mr. Pobst: Possibly not.

By the Court: I would say I think the evidence is admissible, go ahead.

By Mr. Sutherland: We save the exception.

By the Court: The evidence may be admissible for several reasons, the controversy over this strip is that the town took it to use as an alley, that is what the plaintiff claims, and the defendant's position is that it was already a part of the alley. Now the use that is made of the alley would be, I think, admissible.

By Mr. Sutherland: Exception:

(Question re-read)

A. There is, yes, sir.

Q20. Can you give me any idea of the number?

A. I don't know how many we have a day.

Q21. How many lines do you know are served there?

A. Consolidated, G & H, Knox Creek Bus Lines, Selfe Bus Lines.

Q22. Is there a local line?

A. Local line, yes.

Q23. Do each of those bus lines run several buses a day?

A. Yes, sir.

page 63 } Q24. What is the size of those buses?

A. I don't know, some large and some small.

Reece McClanahan.

Q25. Do they have some of the through buses coming and going into Grundy?

A. Yes, sir, Pikeville bus.

Q26. Bluefield bus?

A. All the buses that come in here I reckon.

Q27. The part of the traveled street that remained after the stakes or locust posts were up there by some one out into the street, was there enough street left for the buses to get in and out of this bus station?

A. That is how come me to first know the posts were up there, I had some complaints that the buses couldn't get in, so I went down to see and I came back and didn't do anything about it until I went to see the City Attorney about it and under his instruction he told me to remove the posts and that is what I did.

Q28. How long had they been there at that time?

A. I don't know just exactly, not very long.

Q29. Do you mean a matter of hours or over night?

A. I wouldn't say, could have been there a day or two or longer.

Q30. Had they been there a month?

A. I don't think so.

Q31. Did you remove one on the advice of the city attorney?

A. Yes.

Q32. Did you remove both of them?

page 64 } A. As well as I remember one was knocked over by a bus.

Q33. Was anyone there when you were there?

A. Some of the taxi men and Hassell Goff came over when we were taking the posts out and objected to our moving the posts and I told him we were moving them under the advice of the city attorney and if there was any further dispute about it, to have the court settle it.

By the Court: I didn't understand you.

A. (Continuing) Hassell came over when we were down there removing the posts and he objected to our removing them and I told him I was taking them out under the advice of the city attorney, and if there were any further complaint, that they had the court to come to.

By the Court: Were you mayor at that time?

A. Yes, sir.

Reece McClanahan.

By Mr. Pobst:

Q34. The matter was never carried to the court about taking the posts out?

A. No.

Q35. At the time, in talking to Hassell Goff, he stated that you said, "That is all right, we are not going to put anything but a 12-foot strip of asphalt on the road at this time, so you needn't worry about it."

A. There wasn't anything said about that, he didn't say very much about it.

page 65 } Q36. Did you tell him you only intended to use 12 feet?

A. No, sir, I didn't.

Q37. Did you intend to use on over to where you did put it?

A. Yes, sir.

Q38. Was there any force or threats used?

A. No, sir.

Q39. No arguing?

A. No, back out this side of there at Dr. Richardson's property, I surfaced it further than that.

Q40. How far did you surface there?

A. Where he set back and where he said was parallel with this rock wall you have been talking about. Then I surfaced a block in there for the Consolidated Bus Company I did that for them.

Q41. Did you surface along, you know what the north side of this taxi stand is?

A. Yes.

Q42. That is the side next to Slate Creek?

A. Yes, sir.

Q43. Along this back street, how far up did you surface in reference to this rock wall?

A. I surfaced it up to that light pole.

Q44. And you included the light pole in the street then?

A. Yes, surfaced up to the very edge of it.

Q45. Do you know where the rock wall is, have you had it uncovered?

A. Yes, sir.

page 66 } Q46. Both ends of it?

A. Yes, sir.

Q47. And what sort of a rock wall was it?

A. I don't know, it was just a rough rock wall. We just dug down to the top of it.

Reece McClanahan.

Q48. How far is the light pole from the rock wall?

A. It was right close to it.

Q49. Did you surface up to the edge of the rock wall?

A. No, up to the edge of the pole.

Q50. Now, who paid for that surfacing?

A. The town of Grundy paid for the alley there.

Q51. Did you do anything on the alley, I believe you said you scrapped it and then surfaced it?

A. Yes.

Q52. Did you ever do any other work since then?

A. Yes, sir, repair work, holes come in the hard-surface.

Q53. And you kept that repaired?

A. Yes, sir.

Q54. And did the town pay for that?

A. Yes, sir.

Q55. Mr. McClanahan, do you remember at the time that store building burned?

A. I know when it burned, I don't remember how long its been.

Q56. Well, it has been stated it burned in April, 1940—

A. I don't know exactly.

Q57. Did you pay any attention to that road from that time on, would you say whether this road has been page 67 } used all the time?

A. No, not so much attention to it.

Q58. You lived here, did you?

A. Yes, sir.

Q59. Were you town sergeant during the time?

A. A good deal of the time.

Q60. Could you speak of the width of the road used from the time of the burning up to the time of the hard surfacing?

A. The alley has been used, cars going around there.

Q61. Has it been restricted to the place where some one set these fence posts out in the alley, except that day or something like that that you said the posts were there?

A. Not as I know of.

Q62. You don't know anything about a survey that Caudle Belcher made?

A. No, sir.

Q63. Was the town in any way consulted or invited to be present in that survey?

A. Not that I know of, I wasn't.

Q64. Were any of the town officials present at the time the survey was made?

Reece McClanahan.

A. No, sir not that I know of.

Q65. So you don't know of any of the whys or wherefores for the reasons for the survey?

A. No, I don't.

Q66. You were mayor at that time the new bus station was put in?

A. Yes, sir.

page 68 }

CROSS EXAMINATION

By Mr. Sutherland:

Q1. You stated that after this house was burned, that is the house that was on the lot just immediately next to the bus station now, that they used an alley through there all the time since that house burned?

A. So far as I know.

Q2. What is the width of it, that is hard surfaced now?

A. I don't remember just what it is.

Q3. I believe you stated that the posts put in there would have restricted it to about 14 feet over to the board walk?

A. Yes, sir.

Q4. Now then, how much more did you take in when you hard surfaced it past those posts?

A. I would say five or six feet, approximately.

Q5. Don't you remember that for a few years after this house burned, that the debris from the house was considerably closer to what they call the Wig Wam building than those posts were set, and that they only used a very narrow way through there for several years?

A. It was all open through there after the house burned, I don't know just how much of it they used, I was town police for several years.

Q6. But you wouldn't attempt to say how wide an alley they used?

A. No.

Q7. I believe you said, when you started to im-
page 69 } prove this alley, that Dr. Richardson told you that
that rock wall they uncovered along there was the
line on the plaintiff's lot?

A. Yes, sir.

Q8. He is the same fellow that built this walk next to his building on up, including the alley some four or five feet further than the Wig Wam building extends, isn't that right?

A. It is his walk.

Reece McClanahan.

Q9. But it extends up in the alley some four or five feet further than the Wig Wam building?

A. Yes, sir.

Q10. What kind of walk is that?

A. Concrete.

Q11. Now, never since you have been mayor or since you were policeman or town sergeant for the town of Grundy, or at any time you have been connected with the town in an official capacity anywhere, has there been any markers along there fixing the width of that alley?

A. Not as I know of.

Q12. And there has never been any marker to say how wide it is where it leaves Main Street?

A. No, sir.

Q13. And as it goes up Slate Creek there is no marker to show whether it gets wider or narrower?

A. Not as I know of.

Q14. At the time that you removed these posts, and after you had this conversation with Hassell Goff, you
page 70 } could tell that the people operating that taxi stand were using this land, this lot all up to those posts?

A. They were using all of it, using the alley and all, and used to come out over the main street the other wall, they parked in this side of the alley and went out over Main Street a good while and there was a complaint about it and made them go out in the alley and come back, the taxi-cabs were using all the lot and the alley too.

Q15. And when you were talking to Hassell about this, Hassell told you that was where they claimed their line come to?

A. Yes, sir.

Q16. And he requested that you, as the Mayor of the town, not to take any part of that lot he claimed, and improve it as a part of the alley, didn't he?

A. He asked me not to move the posts, that is what I figured he had reference to.

RE-DIRECT EXAMINATION

By Mr. Pobst:

Q1. Were you Sergeant under George McGuire when he was Mayor?

A. Yes, nearly four years.

Q2. Pretty near his whole term?

Reece McClanahan.

A. Yes, sir.

Q3. State what was done on that road while you were sergeant?

A. I don't remember ever working on that, Mr. Pobst.

Q4. Did you make repairs on it, did you do any filling in there?

A. I think George made some, I didn't, I don't know how much he did.

page 71 } Q5. Was any creek sand and gravel hauled during that time and placed in this alley?

A. There may have been, I don't remember, George did some work, I don't know how much he did.

Q6. That was done by the town, George McGuire as Mayor?

A. He was.

Q7. We talked about the buses not being able to turn there after the locust posts were put down, were they in the way of trucks turning in there, could they turn in there without danger?

A. Well, it was pretty narrow there for a big truck, of course the big buses could hardly get around there at all.

Q8. How about a trailer-truck?

A. I don't remember seeing one go around there but it is pretty close.

Q9. Does that add to the danger of that intersection?

A. More or less.

Q10. Could you pass in what was left there?

A. No, not in those buses.

Q11. Could two cars pass?

A. Two cars might pass.

Q12. Could two coal trucks pass?

A. I doubt it.

Q13. State whether at any time during the time you were mayor or sergeant, while that place was used as a taxi stand, you had trouble with the taxicabs parking all around there.

By Mr. Sutherland: We object to that, your Honor.

page 72 } By the Court: I don't see what bearing that would have.

By Mr. Pobst:

Q14. State whether or not the taxis were parked on the taxi lot as well as off of the taxi lot on the streets most all around them.

A. They parked on the lot and in the alley, I had lots of

Reece McClanahan.

complaints and I had to send the police down there lots and lots of times.

By Mr. Sutherland: We object to that, we don't see the materiality of that.

By Mr. Pobst: They tried to show they had possession, that is certainly material, we want to show they had no more possession of this strip than anybody else. Merely because they parked out in the street, they parked in the street other places.

By Mr. Sutherland: If they did park out in the street, does that enlighten the jury on this question?

By Mr. Pobst: They claim for a small space of time, or maybe over night, they had these posts up there, they attempted to show that during those few hours or days what the plaintiff did, that they parked out to those posts. Now at any other time it can't be shown where they were parked unless they were doing it exclusively, that they were holding any possession for the plaintiff. The witness says page 73 } it was all crowded and congested or he says they were just parking everywhere.

By the Court: Overruled.

By Mr. Pobst: Exception.

Q15. Reece, did the taxicabs there at any time park there and use this strip they are lawing over, that is down to where they had the locust posts, to the exclusion of the general public at any time?

A. Not after we got it surveyed, I don't think they did, might have parked on some part of it some, but most of the time they have moved back further because the big buses couldn't get around, in fact we had to insist that they do park back further so they could get around there.

Q16. What was the line with reference to this rock wall?

A. They come out to the rock wall.

Q17. You stated on your cross examination there was nothing to show the line in the alley, the rock wall was there, wasn't it?

A. The rock wall was there, but I don't know whether that was the line or not.

Q18. But the rock wall was there?

A. Yes, sir.

Q19. After these locust posts were put in to the alley as you have stated, did the taxi company move their cars right out in line with those locust posts?

Reece McClanahan.

A. You mean while the posts were there?
page 74 } Q20. Yes.

A. I don't remember about that, Mr. Pohst, might have been out there and might have been back, some of them out further than others some times.

Q21. If they were, were they moved back after the locust posts were removed, get back to the line?

A. Yes, they had to get back so the big buses could get around there.

Q22. Before the locust posts were put up there and after they were taken down, did they regularly park on that strip and use it for a parking place?

A. No, I didn't have any complaints until they put the posts there.

Q23. When the buses went around there, was there any room?

A. Well, I had the complaint that they couldn't get around.

Q24. And then when they could get around there the taxis were moved back to near the rock wall?

A. Yes.

Q25. Then did the public use up to—how far did the public use up to?

A. I don't know exactly, they used the alley coming around there, I don't know whether they used all that was surfaced or not.

Q26. Could they get around that alley after the posts were down there without getting on that strip we are lawing over?

A. I don't think the big buses could have, a car might have.

Q27. Would a car in turning use a part oh this
page 75 } controverted strip, suppose you were going down
the street and turn in, would it have to use a part
of this strip we are lawing over now?

A. Possibly could get around without getting on it with a car.

Q28. Could a person ordinarily do it?

A. I don't know.

Q29. Suppose he was meeting a car coming out of the alley, what would the car going East towards the Methodist Church do, where would it go?

A. He would more than likely be over on this strip.

RE-CROSS EXAMINATION

By Mr. Sutherland:

Q1. You stated that that rock wall was there, is it covered up?

Reece McClanahan.

A. Yes.

Q2. How deep is it covered up?

A. I think possibly four or five inches under the top of the ground.

Q3. And has it ever been since you have been connected with the town, has it ever been above the surface of that street along there so it was visible?

A. Not as I know of.

Q4. I believe you said after you removed those posts and after you had had that complaint, you improved the street or alley some few feet towards the bus station building, and that the town immediately took charge of it and has been using it every since?

A. Well after we surfaced it there and after we page 76 } took the posts up, the buses go around there, and I didn't have any further complaints.

Q5. Didn't have any more complaints?

A. Nothing more than taxis parking in the way there, they had 12 to 15 and they couldn't all get on the lot at one time and they would park any where they could get one parked.

Q6. You endeavored to keep the taxis off that strip so it could be used by the buses and the public?

A. Yes, sir, to give room enough for the buses around there.

Q7. Well, now in answer to some of Mr. Pobst's questions, you stated it was necessary to use this strip along there to take trucks in there and to pass there, if those walks were removed from the other side of the building or alley, it would give about as much room as you took off this lot, wouldn't it?

A. Somewhere near it, I imagine the walks must be around 3½ feet.

RE-DIRECT EXAMINATION

By Mr. Pobst:

Q1. Would it be dangerous?

A. Yes.

Q2. Is there any other building back of the Wig Wam you have to approach by that walk?

A. Yes, sir, Dr. Richardson's.

Q3. What kind building?

A. Furniture store.

page 77 } Q4. Then up stairs?

A. I think so, I don't know.

Reece McClanahan.

Q5. People living up there?

A. I believe they do.

Q6. Do you see women and children going back there?

A. I have seen lots of them.

Q7. Now, if you are going to get to the Wig Wam up stairs, do you use the walk?

A. The walk or alley way.

Q8. And that Wig Wam building is the M. L. Goff building?

A. Yes.

Q9. Is there any doctor's office or dentist's office up stairs?

A. Dr. Speers.

Q10. And to go to his office, you have to use this board walk?

A. Yes or walk in the alley.

By the Court:

Q. When was it you pulled up the posts and paved it up to the light post right at the wall?

A. It was in '46, I don't remember the exact date we did that.

Q. Who was with you at that time that was done and at the time you talked to Hassell Goff?

A. Sherman McGlothlin was one and I don't remember who else but someone else with us.

Q. Did Sherman McGlothlin have any connection with the town?

A. He was Chief of Police of the town at that page 78 } time.

Q. How long had those posts been in there?

A. I don't know, I didn't see them put in but they hadn't been in but a very short time.

Q. How was this strip that is in dispute used before the posts were put in there?

A. Well, those taxis had parked in there, some of them were out but at that time I believe most of them come out over the street and after the bus station went in there, we had to make them change and go out in the alley way because so many people walking along the street, they used to come out that way practically all the time then.

Q. Before these posts were put there, how was this strip used, was it used as an alley or used for parking?

A. They parked over it and it was used as an alley too,

Reece McClanahan.

the buses went in there and the cars too went around there, I don't know whether you could say it was used for just parking cars, it was used for both, the buses used it.

Q. How long had buses been using this alley?

A. I don't remember how long they had been using it before the posts were put up there, it was some time.

Q. About how long?

A. Oh, I would say they had been using it 8 to 10 months.

Q. The buses started to use it when the bus station was built, is that right?

A. Yes.

Q. Had there been any occasion for buses to go page 79 } in the alley before the bus station was built?

A. Not that I know of.

Q. Had there been any complaint about the encroachment upon the property or the alley not being wide enough before the buses started using it?

A. Yes, we had quite a bit of complaint, the taxis parked there a lot and blocked the alley and you couldn't get around there.

By Mr. Pobst:

Q11. The court asked you whether prior to the time the buses used it, it was used as an alley, what about trucks, did they use it?

A. Yes, the trucks went around there.

Q12. Different kinds of trucks go around there?

A. Yes, sir.

Q13. I believe you said there was a furniture store around there?

A. As well as I remember.

Q14. What is that other building on the back end of the Arthur Goff building?

A. That old wooden building, they used that to keep caskets in, funeral home, got some in there now.

Q15. Did trucks go up there at that time to serve those buildings?

A. Yes, sir, trucks have went around there every since I have been around Grundy, hauled coal around there and lots of them when the traffic out here was jammed up that it would go around that way.

Q16. Jammed on Walnut Street?

page 80 } A. Yes.

Q17. What about ambulances?

A. M. Ratliff.

A. Ambulances too, all the traffic goes around there all time.

Q18. That has been true every since from the time that building burned to the present time?

A. Yes, sir, and before.

By The Court:

Q. You mean by the buses, the commercial buses coming in from different places?

A. Yes, sir.

Q. Do you remember before the Goff building burned there on the corner?

A. Yes.

Q. Where was that with reference to the point up to which you have paved the alley?

A. Well, I think the side part of that building, the little side on the far side was out over this we have paved, I don't know just how much, it was out on part of that I think.

Witness stood aside.

A. M. RATLIFF

the next witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pobst:

Q1. Mr. Ratliff, are you the husband of I. S. Ratliff?

A. Yes.

page 81 } Q2. And have been and were on August 25, 1938, and prior thereto?

A. Yes, sir.

Q3. I find a deed dated August 25, 1938, and recorded October 18, 1938, in Deed Book 79, page 298, from M. L. Goff and Trula Goff to I. S. Ratliff, for a lot on Main Street, then adjoining the R. E. Williams place, you know that lot, do you?

A. Yes.

Q4. The description of that lot is: Beginning at a stake in the edge of Main Street 3½ feet N. E. of a locust near the Northwest corner of the Williams dwelling, thence S 79 30 E 52.8 feet to a stake, thence North 5 30 E about 26 feet to a stake.

A. Yes.

A. M. Ratliff.

Q5. I mean that Goff and wife conveyed to your wife?

A. Yes, sir.

Q6. And that lot seems to have been 26 feet in width along Main Street?

A. I don't remember exactly, but I imagine that would be right.

Q7. How come that lot to be conveyed to your wife, Mr. Ratliff?

By Mr. Sutherland: We object to that.

By The Court: Sustained.

page 82 } By Mr. Pobst: We want to show really this deed was made for the purpose of trying to push that alley over further than it really was and trying to make the lot 26 feet in width when really it wasn't that much. Now, we think that is most material. The plaintiff says the surveyor—neither the surveyor nor Mrs. Goff, the plaintiff, give you any starting place at all and we want to show this deed was made by the parties for the purpose of getting a starting place. Neither the plaintiff nor surveyor Belcher can give you the width of the alley at all by any paper or writing, now we say there is bad faith here and we are entitled to show it to the jury.

By The Court: Your question was if he knew the purpose for which that deed was made.

By Mr. Pobst; Yes, sir, and I asked him again whether it was a good faith sale, did any consideration actually pass, was any money paid?

By The Court: I think the question—

By Mr. Pobst: The jury are entitled to the facts, whether any money passed?

By The Court: You are not asking him that.

page 83 } By Mr. Pobst:

Q8. Then I will ask him whether any money was paid for that conveyance.

By Mr. Sutherland: We object to that.

By The Court: Overruled.

By Mr. Sutherland: Exception.

By Mr. Pobst:

Q9. Did your wife pay any money for that, Mr. Ratliff?

A. No.

A. M. Ratliff.

Q10. Did your wife and you afterwards convey that back, by deed dated February 13, 1943, and recorded December 29, 1944, in Deed Book 99, page 65?

A. Yes, sir.

Q11. Was any money paid that time?

A. No.

Q12. If no money was paid, then state the circumstances under which it was conveyed to your wife.

By Mr. Daughtery: We object to that, I don't see where that affects this suit.

By The Court: All the circumstances might not. If there is any circumstance bearing upon the location of this alley, it would be admissible.

page 84 } By Mr. Pobst: We want to show that there was nothing.

By The Court: Otherwise it might be prejudicial and certainly would not have any bearing upon this case.

By Mr. Pobst: She fixes a point where she says her line goes to. We say she has nothing to fix it except this made-up scheme or sham between these parties. The witness states that no money passed; that it was conveyed back without any money and we want to go further and see why he did it. Now if we can show it was done for the purpose of establishing a corner that didn't exist, except for this sham or this deed that was intended to deceive somebody, including the public, we are entitled to show that, and certainly the jury is entitled to it. In other words, they were trying to take some of that alley when it didn't belong to them, and they wanted to establish something to measure that, and they arbitrarily used the distance they got from nowhere according to their own statements.

By The Court: Let him go ahead and state.

By Mr. Sutherland: We save the exception.

A. You mean tell what caused it all to come about?

By Mr. Pobst: Yes.

page 85 } By The Court: Let the jury go out.

WHEREUPON, the jury retired and the following proceedings were had in the absence of the jury:

A. Well, what brought it about, Marquis couldn't talk and

A. M. Ratliff.

he said the reason he wanted to make the deed was because we could defend it better than he could, and that the town some time or other might want some of it, and he said he felt like he owned the 26 feet the way he made the deed and he wanted a price set if they did condemn it so they could have it.

Q13. He knew the law suit was coming?

A. He said the town would some time want to condemn it, he didn't say he didn't own it, all of his conversation about it, he felt like he owned it but he wanted a price set.

Q14. He also wanted some measurements set?

A. He always left the impression on me that he felt like he owned about 26 feet there.

Q15. And that is why the 25 feet was put in there?

A. I don't know about that, but the price in the deed was set so if there was a condemnation suit that would be something to go by.

Q16. Did you collect the rents from that then or did he collect them?

A. I collected them and turned them over to him.

Q17. Did you charge him anything for it?

A. No, sir.

page 86 } Q18. At the time that deed was made, had the Wig Wam been built on the other side of the street?

A. No.

Q19. Why didn't he convey you all of it?

A. Well, I don't know about that, I reckon he felt like the line on that side was established, I reckon there was never nothing said about it.

By Mr. Pobst: That is true, he says he owns 26 feet and the only thing to establish his 26 feet, as a matter of record is a deed that he hatched up that was not *bona fide*, that didn't represent anything except an attempted frame-up on the town. We think we are entitled to show it was nothing but a frame-up.

By The Court: If he hadn't undertaken to use it, you were the one that brought that deed into this case. Now you are trying to do away with the effect of it.

By Mr. Daugherty: Never mentioned until you brought that in.

By Mr. Pobst: She is relying on the 26 feet.

By The Court: She is not relying on that deed for estab-

A. M. Ratliff.

lishing it, it was only brought into the suit at the instance of the defendant on cross examination.

page 87 } By Mr. Pobst: That is right, to show where she arrived at her point to put her locust posts, the surveyor says that gives her 25.6 feet.

By The Court: I think I will let it go in, I don't think it will hurt or help, one way or the other. The deed is in. Mr. Ratliff states it wasn't for that purpose.

By Mr. Pobst: While that is true so far as he knew, Mr. Goff told him one purpose it was for to create a false impression as to the value and another thing here is the hidden thing he evidently didn't tell Mr. Ratliff but it is there.

By The Court: But he says he thought the town was going to condemn it, that goes to show he was claiming it in good faith.

By Mr. Pobst: He wanted to set up his 26 feet by a title he had never had before, he was seeking to frame up the town on the question of damages, that is one of the questions of damages, that he was getting out there further in the alley than he should have been was another.

WHEREUPON, the jury returned into the jury box and the following proceedings were had in their presence:

By Mr. Pobst:

Q20. Mr. Ratliff, go ahead, and tell if any money was paid.

page 88 } A. Well, the deed was made also for the purpose of condemnation suit on the lot.

Q21. You spoke of a condemnation suit, was something like that contemplated by Mr. Goff?

A. He felt like the town some time or other would have to have it, they had been talking about it, as well as I remember.

Q22. And he stated to you, what did he tell you then?

A. He wanted to deed it to my wife so it would be a price set so if they did condemn it, he would get something for it.

Q23. What did he say about conveying it back?

A. I don't think there was at that time anything said, it went on four or five years, and I was fixing to leave here, going to Staunton and buying a farm there.

Q24. But it was understood between you that you were to convey it back?

A. I think that was it, there wasn't any contract.

Q25. Did you collect the rents during that time?

A. M. Ratliff.

A. Yes, sir.

Q26. What did you do with them?

A. I paid it over to Marquis.

Q27. Did you charge him anything for it?

A. No.

CROSS EXAMINATION.

By Mr. Sutherland:

Q1. Are you any relation, or your wife any relation, to M. L. Goff?

page 89 } A. No, not that I know of.

Q2. You just knew him as a business associate and as a friend here?

A. Yes.

Q3. And do you know how that you arrived at that, about 26 feet that was put in your deed?

A. No, I don't know anything about that.

Q4. Do you know whether or not that was the width of the building or whether this deed covered any more than just what the building covered?

A. The best of my recollection it taken in the little ware room and the main building too.

Q5. It took in the little ware room that was put on that side of it?

A. Yes, sir.

Q6. I believe you stated that Marquis said he owned all he deeded to you?

A. Yes, he claimed he owned that.

Q7. He claimed all he deeded to your wife?

A. Yes, sir.

Q8. Was Mr. Goff at that time physically incapable to see about his business in a general way?

A. He couldn't talk.

Q9. What methods of communication did he use?

A. He had to write everything he wanted to tell you about.

Q10. Did that have anything to do with his conveying you this lot, or conveying it to your wife?

page 90 } A. Yes, sir, that is what he said, that he wasn't able to get up and talk to the court, and he wanted somebody to handle it.

Q11. Had you heard that the town was talking about condemning a part of this lot?

A. M. Ratliff.

A. Well, I don't remember exactly, but I think there was some talk about it.

Q12. At least Marquis told you the town was going to condemn a part of this lot, after he had learned it, and he wanted you to be able to represent it in court rather than he?

A. Yes, sir, that is the reason he wanted to make the deed.

Q13. Do you know whether or not there were any measurements made before that time the deed was made to your wife?

A. No.

Q14. I believe the reconveyance was by the identical description that it was conveyed to your wife?

A. Yes, sir.

Q15. The lot was not reconveyed until after the building had burned on it?

A. No, about two and one-half to three years after it. The building burned in '40 and we reconveyed in '43, I believe.

Q16. And I believe you gave your reason for reconveying it was you purchased a farm at Staunton?

A. Yes.

Q17. And couldn't be available around here?

A. Yes, we figured on living up there and I wanted to get it settled up before we went and he thought so too,
page 91 } so he prepared the deed and me and my wife signed it.

Q18. During the time that this lot was in your wife's name, who paid the taxes on it?

A. Well, I paid the taxes but he paid them back to me.

Q19. Out of the rent you collected?

A. No, I am not right sure whether I paid them or not. I believe I paid the town taxes, I am not positive whether I paid the taxes on it, I might have one or two years and I believe along towards the last he paid them himself.

Q20. After that deed was made to your wife up until this house burned, was it occupied all the time, somebody in it?

A. Well, I don't remember if at the time it burned it was occupied, I think John McCoy had a little office in the back store room.

Q21. Do you remember a fellow by the name of Elderman?

A. He was in there.

Q22. Don't you remember he got out part of his merchandise and carried it over to George Mullins' new hotel and disposed of it over there?

A. Yes, I little believe I do remember it now, but I didn't at the time, but I knew he paid me rent.

W. Clyde Payne.

Q23. Then how soon after that was it after the house burned, was it till it was leased to this fellow man for a taxi stand?

A. It wasn't very long, he come to lease it from me and the old junk was on the lot when he leased it.

RE-DIRECT EXAMINATION.

By Mr. Pobst:

page 92 } Q1. I believe you stated neither one of these deeds included any of the Wig Wam property?

A. No.

Q2. He owned the Wig Wam property at that time?

A. Yes, so far as I know.

By The Court:

Q. Was the store building on it?

A. Yes, sir, on the one he deeded to us, the old plank building.

Witness stood aside.

W. CLYDE PAYNE

the next witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pobst:

Q1. Mr. Payne, were you formerly mayor of the town of Grundy?

A. Yes.

Q2. You lived in the town, did you?

A. Yes, and do now.

Q3. What years were you mayor?

A. I think from September '39 to September '41.

Q4. Two year term?

A. Yes, sir.

Q5. And who followed you?

A. George McGuire.

Q6. Its been stated that a building, the old building formerly used as a store building, now used as a taxi
page 93 } stand on the corner between Main Street and the
Back Street, was destroyed by fire about April 29
or 30, 1940.

W. Clyde Payne.

A. I think so.

Q7. Was it burned during your term of office?

A. Yes, sir.

Q8. You were here at the time it burned or knew of it right away?

A. No, I knew of it right away.

Q9. Prior to that time, had any discussions been made by you or other officials of the town as to the little part of that building which the town claimed was built on that street?

A. Yes, sir, there had.

Q10. It had been discussed between you?

A. Yes, the council discussed it.

Q11. What was the nature of the discussions, did they agree on anything?

By Mr. Sutherland: We object to that.

By The Court: Sustained.

Q12. Was any definite action ever taken by the council, any suit ordered or anything?

A. I don't think so.

Q13. When the building burned, then what did you do on behalf of the town?

A. Well, we decided that if part of it belonged to the town, it was the time to get it before they put a building back on it.

page 94 } Q14. What did you do in order to get it?

A. We authorized the Appalachian Electric Power Company to set that pole back.

By Mr. Sutherland: We object to that, they couldn't do that except by order of the council and further that wouldn't be binding on the plaintiff unless they had notice of it.

By Mr. Pobst: If your Honor, please, it is a case not of their legal functioning but their action in taking possession.

By Mr. Sutherland: If they drove any stakes on the lot, I don't object to it, but what they secretly did in the meeting is certainly not admissible.

By Mr. Pobst: He sustained that and I think he is right and I don't make any exception to it. Now, I asked him what was done.

By The Court: Overruled.

W. Clyde Payne.

Q15. Now, what did the town do in reference to the light pole?

A. They authorized him to set the pole.

By Mr. Sutherland: What we are objecting to is what they authorized somebody to do. If the officials were there—

Q16. Regardless of what the council did, what did you as mayor for the town do?

A. You mean the day they set the pole?
page 95 } Q17. Well, yes.

A. Well as well as I remember, somebody raised an objection—Mr. B. K. Wright, manager of the Appalachian Electric Power Company, came and got me and I think he had already dug the hole and already got it set and asked me if that was where we wanted it and I told him it was.

Q18. And did he put it there?

A. So far as I know.

Q19. Did you know about the rock wall?

A. Well, there was a rock wall there, I don't remember whether it was a rock wall or foundation.

Q20. Did you see that rock wall or have you seen it lately?

A. No.

Q21. It is covered up now?

A. Yes.

Q22. It was visible at that time?

A. Yes.

Q23. How far from the rock wall was the post set?

A. I couldn't remember, but seems to me like a foot or two.

Q24. Was there a hole or anything there?

A. I think there was.

Q25. Whereabouts?

A. Well, where the building burned, then on both sides of it too.

Q26. Was there any hole on the back street side of the rock wall?

A. I think so.

Q27. What, if anything, did the town do towards
page 96 } filling any holes and making that back street so it
could be traveled?

A. Well we filled it up and made it so we could get over it.

Q28. How far did you fill it?

W. Clyde Payne.

A. I don't know.

Q29. Did you make all of the back street that way so it could be traveled over?

A. You mean all of it between that and the Wig Wam?

Q30. And up towards Slate Creek?

A. They made it passable, I don't remember just what they did.

Q31. Who paid for that?

A. The town I suppose, I don't know.

Q32. It was public work?

A. That is right.

Q33. That was, you say, around '40?

A. I think so.

Q34. What has been the use of that since that time and up to now, that back street?

A. We used it as a street.

Q35. Who uses it?

A. Public.

Q36. With what?

A. Trucks and automobiles.

Q37. How far do they use up to the walk?

A. So far as I know they use right over to it.

Q38. Do you ever use the street in an automobile?

A. Yes, sir.

Q39. In turning in that back street, first, in go-
page 97 } ing from the court house down Main Street and
turning in that alley, ordinarily would you pass
close to the pole?

A. I don't know about that, I haven't paid any attention to that pole since it was put up there.

Q40. Is there any change now from the time you say you filled up some holes there and made the back street passable, you say it has been used every since?

A. So far as I know.

Q41. Well you have seen it used often, haven't you?

A. Practically every day.

Q42. Is there any difference in the use, of course there may be greater traffic, but is there any difference in the use of the back street now than in 1940?

A. I don't think so.

Q43. Has there been any material change since 1940 until now?

A. No.

W. Clyde Payne.

CROSS EXAMINATION.

By Mr. Sutherland:

Q1. Do you remember when that light poles was put there, there was a concrete slab that had been a part of the walk, that extended on down towards the creek past that light pole?

A. I don't remember about that.

Q2. And don't you remember not until 1946 was that street ever improved wider than where that walk came to fronting on Main street, wasn't that the width of that alley that went up there at that time?

A. I don't know about that.

page 98 } Q3. You don't tell the jury the town improved that street wider than from the end of that walk down to the Wig Wam until 1946?

A. Well, we did some work and I don't know how much the town improved that street, the width of it, I don't know whether it brought the cars and trucks over to that pole or not, immediately, but we did improve it.

Q4. I believe you said that B. K. Wright came over to see you when they had started putting that pole in?

A. That is right.

Q5. B. K. Wright, was he a member of the town council at that time?

A. I don't think so.

Q6. He was representing the Appalachian Electric Power Company?

A. That is right.

Q7. And he said to you that somebody had objected to their putting the pole there?

A. If I remember right, that is how I got into it.

Q8. But it was the Appalachian Electric Power Company that put the pole in there, did all the work?

A. Yes, sir, set the pole.

Q9. I mean, there was no officer of the town, so far as you knew, there directing the work and seeing how it was done?

A. No one except me, I was there, I left before it was finished.

Q10. All you did was to show them where to set the pole, wasn't it?

A. He had already been instructed where to put the pole, and I told him to carry out those instructions.

George McGuire.

Q11. I believe you said you thought it would be page 99 } a good time for the town to get possession of it as soon as the building burned down?

A. If it belonged to the town.

Q12. And you never took any actions, the town never did proceed by any legal action to get possession of it?

A. Not that I know of.

Witness stood aside.

GEORGE McGUIRE

the next witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pobst:

Q1. Mr. McGuire, where do you live?

A. Here in the town of Grundy.

Q2. And have for some time?

A. Twenty-five years, I guess, twenty.

Q3. Were you mayor of the town of Grundy?

A. Yes.

Q4. Who followed you?

A. R. M. McClanahan.

Q5. Reece McClanahan was mayor as long as—

A. Two years.

Q6. When did Reece come in?

A. In 1945, I believe, '46 and '47, Pete Combs came in last fall, didn't he?

Q7. Mr. McClanahan states he went out on the page 100 } first day of September, 1947, and that he came in on the 1st day of September, 1945.

A. Yes, that is right.

Q8. Did you go out of office then on the first of September, 1945?

A. Yes.

Q9. And how long had you served?

A. Four years.

Q10. Then you went in on the 1st day of September, 1941?

A. Yes, sir.

Q11. Whom did you follow as mayor?

George McGuire.

A. I believe Mr. Payne.

Q12. W. Clyde Payne, who just testified here?

A. I believe so.

Q13. Mr. McGuire, what work, if any, has the town done on the back street, or between the taxi stand and the Wig Wam during your term of office, what did you do?

A. Well I filled up holes out there several times, had truck to haul rock and gravel, then I got a steam shovel and put it down in the creek and we put sand and gravel on that road in Poe Town and up in the bottom, base for the surface.

Q14. That was done during your term?

A. Yes, sir.

Q15. Do you know about how long after you went in this was done?

A. It seems to me like it was right about the last part of my first term.

Q16. In other words, about 18 months or two page 101 } years after you first went in?

A. Yes.

Q17. After you went in September 1, 1941, it was about 18 months until you had the gravel and sand hauled and put in there?

A. I wouldn't say for sure but it was in the summer we put it in there, because I had Mr. McClanahan and his boys, two or three of them following the trucks and spreading it out.

Q18. Do you remember the rock wall that was there on the north side?

A. I remember a wall there before I went in, but I didn't see any rock wall there, they had filled that up, I guess, I don't remember seeing one.

Q19. You know about where it was?

A. Yes.

Q20. About where did the town improve and level off and put sand and gravel on it with reference to the rock wall?

A. Well, I don't know—but my understanding was that the street was between that light pole and the Wig Wam, I forget the number of feet through there, and we improved it on up his way.

Q21. Was the light pole setting in the street or on the private property of M. L. Goff?

A. I couldn't say that.

Q22. You improved it up to the light pole, you say?

A. Yes.

Q23. Who paid for all that?

George McGuire.

A. The town of Grundy.

page 102 } Q24. You say that you have been here about 25
years, you worked in the county before that,
didn't you?

A. Yes, I have been in the county since 1912, I guess.

Q25. During all the time, do you remember that back street,
when you first were here before you moved here?

A. Yes, I remember there was always a street back there
but I never paid much attention to it.

Q26. Who used that back street?

A. The public, anybody that wanted to.

Q27. From the time you came in as mayor, September 1,
1941, up to the present time, who used it?

A. The public.

Q28. What did they use it for?

A. Automobiles, trucks, people walk, and I have driven
around there a good deal on account of this bad road back
here.

Q29. Back of the jail and court house?

A. Yes.

Q30. Is it a much used street?

A. Yes, it is used all the time, the only trouble, you can't
pass back there.

Q31. You mean if you meet anybody?

A. I mean if they park on one side and they are going both
ways all the time.

Q32. On which side do they park?

A. They don't have any particular side to park on, but
since they have the bus station out there, they have kinda
stopped so much of it.

page 103 } Q33. While you were mayor, did you have
trouble with people parking on the street there
and off the street too?

A. Had trouble with everybody that had an automobile
almost.

Q34. Why?

A. Just didn't have the room I guess.

Q35. State whether or not the traffic in the town of Grundy
and through the town of Grundy, it is great or small?

A. Oh, it is greater than it was a few years ago.

Q36. About how long has it been so great?

A. Well, all my term, that was my biggest headache, was
the traffic.

George McGuire.

Q37. State whether or not the streets of Grundy are wide or otherwise?

A. They are narrow.

Q38. Is there enough really parking space on the streets of Grundy or adjacent to the streets of Grundy, to take care of the traveling public in a reasonable way?

A. No, not half enough.

Q39. Has there been any change in the use of that back alley or street from the time you went in until the present time, I don't mean the number of cars but in the way it was used?

A. Well it is used more because you have more traffic.

Q40. I mean, has there been any change in the kind of use and the extent of use, I don't mean the number of cars, but the width of the street, has that been changed from the time you took charge?

A. No.

page 104 } Q41. But of course you do have more cars?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Sutherland:

Q1. Now, Mr. McGuire, when you started to improve this alley, along by the Wig Wam, you didn't intend to take Mr. Goff's property for the street, did you?

A. No, sir.

Q2. Do you know how wide you made the street?

A. No, sir, I don't.

Q3. You don't know whether you made it over 18 feet from the Wig Wam to the edge of the street or not?

A. I understood that was the line, where the pole was, that was there, and I didn't measure it, I don't know what width it was.

Q4. You never did discuss the line along there with Marquis Goff at the time?

A. If I did, I don't remember it.

Q5. I believe that Marquis died during your term as mayor?

A. Yes, sir.

Q6. And after his death, you never did discuss it with his wife or any of the children as to where his line was along there?

George McGuire.

A. I wouldn't say if I did, I don't remember it.

Q7. At any rate you never got your understanding of where the line was from Marquis or any of his family?
page 105 } A. No, sir.

Q8. And I believe Arthur Ratliff owned it a part of the time you were mayor?

A. If he did, I don't remember it.

Q9. You never talked to Arthur or his wife about it?

A. No.

Q10. I believe you said you had been in the town for a considerable while, what was the first use that you ever knew of being made of that alley or back street, Mr. McGuire?

A. Well, as far as I can remember it was always used as pass way.

Q11. The first you can remember of its being used, people rode horse back or took a wagon around there, didn't they?

A. I guess that is right.

Q12. You can remember when it was first used there were no automobiles, is that right?

A. I don't know, I think that is right.

Q13. And the wagon road used about seven or eight feet, it was seven or eight feet wide?

A. I think the wagon path was about eight feet.

Q14. And that was about all, that eight feet was about all that was necessary back at that time?

A. (None)

Q15. Well now at that time, don't you remember it was not straight and there was nothing up there to fix the lines to it?

A. I don't guess it was.

Q16. And there were some people had their
page 106 } hog pens there between the alley and the creek?

A. I remember Uncle Dan Adkins had some cow sheds out there.

Q17. And on the other side some garden spots?

A. I don't remember any gardens, some old barns and things.

Q18. You don't remember Mr. Williams' garden?

A. Yes, I remember it.

Q19. Do you know how wide it was being used when you first remember they started using it over there?

A. No, sir, I couldn't say.

Q20. You would be safe in saying it was not over eighteen feet wide when you first knew of its being used, wouldn't you?

B. K. Wright.

A. I guess it was but of course I don't know, you can be fooled in distance in looking at it.

Witness stood aside.

B. K. WRIGHT

the next witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pobst:

Q1. Where do you live, Mr. Wright?

A. About a mile down the river.

Q2. How long have you lived around the town of Grundy?

A. Sixteen years.

Q3. What position do you occupy, if any?

A. Local superintendent for the Appalachian Electric Power Company.

Q4. How long have you occupied that position?
page 107 } A. Well, every since I have been here.

Q5. Do you remember the occasion when the old store building that was on this taxi stand lot burned down?

A. Yes, sir.

Q6. It has been stated that it was in the latter part of April, 1940, is that about right?

A. Yes, that is about right.

Q7. At that time, was there any electric light pole there that the wires of this company were attached to, that burned down? Or did you replace a pole?

A. I don't remember, there was a pole there somewhere but I can't remember just where.

Q8. Did your company afterwards put up a pole?

A. Yes, sir.

Q9. How long after the building burned was this pole put up?

A. I believe it was two or three days after the building burned, as I remember it was right soon after the fire.

Q10. You found it necessary to put a pole up?

A. Yes.

Q11. Did you have any right to put it on the lot owned by M. L. Goff?

A. No, sir.

B. K. Wright.

Q12. Where did you have a right to put it?

A. I put it where the mayor instructed me to.

Q13. Did your company have a right to put it on the public streets in the town?

page 108 } A. Yes, sir.

Q14. You know where the pole is now?

A. Yes, sir.

Q15. Is it in the same place you put it in 1940?

A. Yes, sir.

Q16. Its been there something like 8 years?

A. Right close 8 years.

Q17. What was the condition of the taxi lot and the back street at the time you put the pole up?

A. Well, as I remember, there was a whole lot of tin laying there, especially on what is used now as a taxi lot and right outside of that there was a rock wall and great big hole in there.

Q18. Next to the rock wall?

A. Yes, probably two feet or maybe more, the rock wall showed a little and I set the pole right at this end of that.

Q19. Where did you put the pole in reference to what the mayor claimed was the back street, inside the back street or not?

By Mr. Sutherland: We object to the leading, and to what the mayor claimed.

By Mr. Pobst: That was the taking of possession.

By The Court: He may state where he put the pole, just merely putting the pole on there wouldn't be taking possession, would it?

By Mr. Pobst: That was one act of possession.

page 109 } By The Court: Let him state where he put the pole.

By Mr. Sutherland: We don't object to where he put the pole but it was the question of his stating what the mayor claimed was the back street.

By The Court: Overruled.

By Mr. Sutherland: Exception.

A. I set the pole about a foot out from the corner of this rock wall.

Q20. And did the mayor claim he was letting you set it in the street?

A. Yes.

B. K. Wright.

Q21. How much of the rock wall was exposed at that time?

A. There was very little right at the corner but as I remember up the street probably five or six feet, there was a great big hole, probably the rock wall showed two feet or more for a distance of maybe ten or 12 feet.

Q22. What kind rock wall was that?

A. Just an old rough rock wall as I remember, it didn't have any concrete in it.

Q23. You have seen the old walls citizens used to use as foundations for their buildings?

A. Yes.

Q24. Was it that sort of rock wall or some other sort?

A. Apparently a rock wall used for a retaining
page 110 } wall or underpenning wall, I wouldn't say it was
foundation to build on, just rough rock wall.

Q25. What was done with those holes?

A. Filled up.

Q26. Do you know who filled up that hole?

A. No, I don't.

Q27. I mean was it done by private individuals or public?

A. I don't know.

Q28. What use has been made of that back street since that time?

A. It has been used as a street or alley by the general public.

Q29. Is it used much or little?

A. Yes, sir, it is used considerably.

Q30. Do you ever use it?

A. Yes, sir, practically every day.

Q31. Is there any difference between the use, I don't mean the number of cars on it, but the extent of the use or user, is there any difference in the use from the time you put the pole in there up to the present, between those times?

A. Not to my knowing.

Q32. Is it used more now or less?

A. More than a few years ago because there is more traffic.

By The Court:

Q. Where was this hole, was it where the house was?

A. It was where the shed projected out, the hole was under the shed.

page 111 } Q. What do you mean by the shed?

A. There was the main part of the building and

B. K. Wright.

then a little addition to it, this place on the outside of the wall was on this shed side.

Q. What some of them referred to as a ware room?

A. Yes, sir.

By Mr. Pobst:

Q33. The pole was put down where this little shed was but more out toward the street?

A. About a foot out in the edge towards Wig Wam.

Q34. Where was the pole put in reference to the eave of the original building, if you know?

A. I don't know.

By The Court:

Q. It is not quite clear to me whether this pole was put where this shed or wareroom was?

A. It was.

By Mr. Pobst:

Q35. Since that time, how far up, in reference to that light pole, has the back street been used by the public?

A. Up to the pole.

Q36. Since that time it was put in, has there been any material change in that respect that you know of?

A. No, more than the street has been hard-surfaced.

Q37. Has there been any fire plug put there?

A. Yes.

Q38. Where is it with reference to the pole?

page 112 } A. Right beside it, I believe.

Q39. Is it down beyond it, closer to Slate Creek or up this way?

A. I believe to the side of it towards the river.

Q40. In front of it?

A. On Main street is my remembrance, on the Main street side.

CROSS EXAMINATION.

By Mr. Sutherland:

Q1. When was this fire plug put there?

A. In the last year, I couldn't say.

Q2. When you set this light pole, I believe you set that, you said, just a short time after the building burned?

A. As I remember.

B. K. Wright.

Q3. And at that time, you could pretty well tell just the ground the building had covered?

A. Yes.

Q4. And you said that on the side of that rock wall there was a hole, wasn't there a hole on both sides of the rock wall?

A. No, I don't think so, it seems there was a whole lot of tin on the inside.

Q5. But at places couldn't you tell there were holes under that tin?

A. I don't remember but I remember mentioning to Mr. Payne, "If you make a street out of it, you have a lot of filling to do."

Q6. I believe the sidewalk or the concrete walk page 113 } on Main street extends past this pole towards Slate Creek, doesn't it?

A. I believe it does.

Q7. And didn't you place that pole practically as close to that concrete as you could get it?

A. About a foot I expect, we usually try to get a foot each way on the street. I won't say that is correct.

Q8. And Mr. Payne didn't tell you whether the place you were putting that pole was on Main Street or the back alley?

A. No, sir.

Q9. And now you don't know how wide that alley is?

A. No.

Q10. They are using more room, or it is wider now than the use of it the first time you can remember, isn't it?

A. Yes, sir.

Q11. Did you see the town or any of the town officials do any work along on this alley on the part of the land that is South of the end of that concrete walk?

A. Well, I have seen them working on that street, I wouldn't say I have or I haven't.

Q12. But you wouldn't say what part of it you saw them working on?

A. No, I wouldn't say, just doing general repair work.

Q13. Was there any question by anybody made at the time this light pole was put there as to whether it was being put on the street?

A. No, sir, if there was I can't remember it.

Q14. You never did talk to Marquis Goff any-
page 114 } thing about putting it there or whether it was on his property at all?

Carl Looney.

A. No, I can't remember it.

Q15. You do remember that after his death, his widow talked to you and asked that you give them some writing showing it was on their land, do you?

A. Yes, sir.

By The Court:

Q. Mr. Wright, do you know whether or not that hole where that part of the building covered had ever been used for a street?

A. No, sir, the only reason I remember it, was because I made mention to the mayor at the time I set the pole, that if he was going to use it for a street, he had a lot of filling to do.

Witness stood aside.

CARL LOONEY

the next witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pobst:

Q1. Have you been sworn?

A. I believe I was sworn yesterday.

Q2. Where do you live?

A. In Grundy.

Q3. Where were you born and raised?

A. On Looney's Creek, in Buchanan County, Virginia.

Q4. I believe your father was called Little
page 115 } Johnny Looney, who was treasurer and member
of the House of Delegates at one time?

A. Yes.

Q5. How old are you?

A. Forty-one.

Q6. Do you remember what they call the back street, that is the street between the taxi stand and the Wig Wam from early days?

A. Yes, sir.

Q7. About how old were you when you first remember and how do you come to remember it?

A. Well, about the first time I remember it, I was around

Carl Looney.

seven years of age, I rode in from Looney's Creek, with my father, and he had a barn out there about where the end of the A. S. Richardson building now is, and he put his horse in that barn and we walked back down to the main street.

Q8. Was this building that they say burned down in April, 1940, was it there at that time?

A. Yes.

Q9. Being used as a store?

A. Yes.

Q10. At that time where was the south side of the back street located in reference to the building, describe what was there?

A. You want the side this way?

Q11. Yes.

A. There was an old hitching post in there, the page 116 } way that thing worked in there, there was a swinging bridge across Slate Creek (interrupted)

Q12. Where was it with reference to where the bridge is now?

A. I wouldn't say it was exactly in the center, but I would say pretty close the center of the present bridge. That old bridge was removed and this new bridge put in, those high posts were put in there by prisoners about 1916, and this wall that you have reference to, you came around up to dodge those old swinging bridge post, you came up as you came from Looneys Creek, that was the main highway, that was the way you came in with the main road.

Q13. Did you go under that swinging bridge?

A. Yes, sir.

Q14. Then would you be driving up Slate Creek or down?

A. You would come up Slate Creek and make the circle, the reason we came up in that alley and out to my father's barn and put his horse up.

Q15. You didn't hit main street?

A. No, hit the alley.

Q16. And that alley, what was it when you first knew it along the north side of the taxi lot?

A. That was just creek bank practically in there, just sloping down, you came up through there, you made the circle in there approximately where the Wig Wam and Richardson buildings join now.

Q17. And you mean at the back end of the Wig Wam building?

Carl Looney.

A. Yes.

page 117 } Q18. And about how far from the main street?

A. I reckon 30 to 40 feet.

Q19. Then you got into the alley and came on to Main street?

A. Yes.

Q20. Was there any rock wall that you remember on the south side of the old store building, which is now the taxi lot?

A. Yes.

Q21. What kind of wall was that?

A. I am most sure that was just rough rock wall, just creek rocks, it wasn't a dressed masonry wall.

Q22. How far was that rock wall from the old original store building?

A. That original store building, as I remember, was built on that rock wall, might have been a little offset there, a foot or two, but practically on the edge of it.

Q23. Where did the back street then, or that road as it was then known, that public pass way, where did it come in reference to that rock wall?

A. It adjoined it.

Q24. At the time then that you first began to come to town, which you say was about thirty-four years ago the first time when you were seven, that was part of the street?

A. That is right.

Q25. What was back of that rock wall on up Slate Creek and towards the back end of the Methodist Church?

A. Well, if I remember correctly, the rock wall ended pretty close to where the store building was then
page 118 } continuing about that rock wall line up Slate was a hitching post, plank fence.

Q26. You mean a picket fence?

A. Board fence, sawed planks.

Q27. Solid?

A. Yes, the cracks were about like that, and it was built vertical, and R. E. Williams' garden was over on the inside of this.

Q28. And you say that fence was just about on that line clean to the rear end of William's garden?

A. Yes.

Q29. And that was two or three times the depth of this taxi lot?

A. Yes, sir, possibly lapped over on some of the bank property there

Carl Looney.

Q30. What was that fence or hitching post used for at that time?

A. Well that was a jockey ground in there, the people hitched their horses to it.

Q31. Who?

A. The public.

Q32. How long did they hitch horses there?

A. Oh, I would say around—my father died in '22—I know I hitched a horse shortly after he died, so I would say it was probably abandoned somewhere around '23.

Q33. Up to some twenty-odd years ago?

A. Yes.

Q34. Now, you say that the original building, that old store building that was on the taxi lot, was on or close
page 119 } to the rock wall that you spoke of, is that right?

A. Yes, sir, it practically joined, might have lacked a few feet adjoining the rock wall.

Q35. What do you mean by a few feet?

A. Two or three, not over five.

Q36. Do you recall then when any addition was put there and who put it there on the back street side of this building, on the north?

A. Yes, sir, Vern Smith put it there.

Q37. When?

A. In 1917.

Q38. What did he do with it?

A. Used it for a soda fountain.

Q37. Do you remember when that was put up?

A. Yes.

Q38. Do you know how wide that was?

A. I don't think it would be over seven feet.

Q39. Where was it built?

A. It was built beginning at the rock wall and running north into the street.

Q40. You mean into the street as it had been used all the time?

A. Yes, sir.

Q41. And it took in the rock wall then, did it?

A. Yes, sir.

Q42. And about how much of the street do you think it took in?

A. It couldn't have taken in more than eight feet.

Carl Looney.

Q43. That has been referred to as a shed or
page 120 } wareroom or addition—

A. Yes, sir.

Q44. How long did that stay there, do you remember?

A. It *staid* there until it burned down.

Q45. Well, since that burned down, has that property been
used by anybody travelling over it?

A. Yes, sir, it is used by the general public.

Q46. Have you been here all, or practically all the time,
probably lacking a month or so at a time?

A. I would say reversing that, except for the last year I
have been here about 98% of the time, beginning December
1940 up until April of last year, about a month a year would
be about all I would be in Grundy.

Q47. Did you frequently return to Grundy?

A. Yes.

Q48. Is there any change as far as you have observed in
the street?

A. Yes.

Q49. What has been done?

A. The street has been filled and built up level.

Q50. Well, now after it was filled and built up level from
that time, has it been used in the same way?

A. Yes.

Q51. Do you ever use it?

A. Yes.

Q52. Does the public use it?

A. Yes, sir.

Q53. What for?

page 121 } A. To drive in, you drive in it to go to the
parking lot or to this alley here to go out that
way (indicating).

CROSS EXAMINATION

By Mr. Sutherland:

Q1. I believe you said that addition was made to that build-
ing, your recollection was in 1917?

A. Yes, sir.

Q2. You were still living down on Looneys Creek at that
time?

A. Yes, sir.

Q3. Now then the deed to the plaintiff's husband was in
May, May 24, 1924, and it excepts a public alley running

Carl Looney.

parallel with and near to Slate Creek, that deed couldn't have excepted a public alley that was covered by that building that was put on it, could it?

By Mr. Pobst: We object. You are trying to make a lawyer out of him.

Q4. It was not being used by the public at that time?

A. The cause of that, the reason that Vern Smith encroached there, my father owned an interest in that at one time.

Q5. You say your father owned an interest in it?

A. He bought an interest in that store with Vern Smith in 1919, the reason that they went out there, the county prisoners built a bridge and the old swinging bridge was abandoned. They changed the road and started going through Main street, you didn't go back up through the alley, the alley wasn't as valuable and wasn't used as much, page 122 } so that is when the encroachment went out there.

Q6. My question is, in 1924, the date of the deed to Mr. Goff, the public was not using the alley up there that was covered by that building?

A. Couldn't.

Q7. And the public never did use it any more until the building was burned in 1940?

A. No, not the part where the building was on, they used the alley.

Q8. The first time that you remember coming up there that was kind of a pass way up the creek bank that was used by everybody and the people coming to town used it for hitching their horses out there?

A. About like the automobiles today, wherever they could when the hitching posts were filled, they went to the trees.

Q9. And they didn't pay any attention whether that was privately owned or whether it was owned by the town, did they?

A. No.

RE-DIRECT EXAMINATION.

By Mr. Pobst:

Q1. You said after this bridge was built straight across, that back street, where you came up out of the creek wasn't used as much?

A. Yes.

Anderson Elswick.

RE-CROSS EXAMINATION.

By Mr. Sutherland:

Q1. The part that the building was on was not used by the public?

page 123 } A. No.

Q2. I believe you stated when you first noticed this rock wall was when you drove up and hitched to the hitching post back there, when what was between this rock wall and Slate Creek was that they called the creek bank?

A. Just this pass way, no buildings in there, and it was just used by the public in there.

Q3. Just an old road like most of them were at that time?

A. That is right.

Witness stood aside.

ANDERSON ELSWICK

the next witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pobst:

Q1. Where do you live?

A. Big Rock, Buchanan County.

Q2. That is down the river towards Kentucky?

A. Yes, sir.

Q3. How old are you?

A. Seventy-three.

Q4. Where were you born, in Buchanan County?

A. Yes.

Q5. How close to where you live now?

A. Right close.

page 124 } Q6. Did you from the time you were a small boy travel from down the river up towards and into Grundy?

A. Yes.

Q7. Do you remember the old store building that was on what they call the taxi lot now on the back street?

A. Yes.

Q8. Do you remember whether there was a street or an alley called back street just to the north of that store building?

Anderson Elswick.

A. Yes, sir, there was an alley in there where we hitched our horses out there.

Q9. Where did you hitch your horses in reference to the building?

A. All along on the lower side.

Q10. Did you hitch your horses on the side next to the store building?

A. Yes.

Q11. How far from the old store building?

A. It seems there was a rock wall there and a hitching post a few feet from it.

Q12. When you say a few feet, do you mean 20 feet?

A. Two or three feet.

Q13. Who hitched their horses there?

A. Public.

Q14. It wasn't private?

A. No.

Q15. How far did that rock wall extend up Slate Creek?

A. Well, I don't remember.

Q16. You don't know whether it extended beyond the back of the house or not?

A. No, I don't.

page 125 } Q17. Do you remember now when was your earliest recollection of that hitching post in there?

A. About the first time I ever come up here, I guess.

Q18. About how old were you then, give us an idea?

A. Well, I guess I was 25.

Q19. Then for some 50 years is when you first remember hitching your horse up out there?

A. The first time I was up here is when I remember.

Q20. I say you think it has been about as much as 50 years, if you were 25 when you first began coming up here?

A. No, it ain't been that long.

Q21. It would be 48?

A. It has been a long time.

CROSS EXAMINATION.

By Mr. Sutherland:

Q1. Do you know who put up those hitching posts for the people to hitch their horses to, whether it was the merchants as a convenience for their customers or the Board of Supervisors?

W. L. Dennis.

A. No, I don't know who put them up.

Q2. The people just hitched their horses wherever they could find a post whether it was on the county's property or private property?

A. Wherever they could find a hitching post.

Witness stood aside.

page 126 }

W. L. DENNIS

the next witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pobst:

Q1. Mr. Dennis, have you been sworn?

A. Yes.

Q2. How long have you lived in the town of Grundy?

A. Fifty-three years, I think, I came here the 6th day of July, 1895.

Q3. Have you lived here every since?

A. Yes.

Q4. And live here now?

A. Yes.

Q5. Do you remember this back street that we have been talking about?

A. Yes.

Q6. Was it there and used as such when you first came here or not?

A. Yes, sir, the back street was there.

Q7. Just tell where it went to, this back street.

A. Well, the time I came here, the back street went up the back way, and like it goes now in a sense; there wasn't nothing on the north side, that is, next to Slate Creek, just sloping, the creek bank was along there, but this street went on back of the Church house.

Q8. You mean the Methodist Church house?

A. I mean the Methodist Church and Mrs. Buskirk's place, and the people traveled back that way and went
page 127 } up by where I lived and by Mr. Hibbitts' and
crossed, they didn't use this street like they do
now, they joined up there.

Q9. By this street, do you mean Walnut street?

A. Yes.

W. L. Dennis.

Q10. In other words, the first street north of the court house is Walnut street?

A. Yes.

Q11. And the next street is back street?

A. Yes.

Q12. You say 53 years ago that back street went on back of the Methodist Church and crossed the street and joined the Walnut street?

A. Yes, where that garage is, went down in the creek and up in front of where the high school is.

Q13. The Methodist Church fronts on Walnut Street?

A. Yes, sir.

Q14. And the back—

A. And Mr. Hibbitts informed me that that street went back there in front of where Earl Smith lives and in front of the High School.

Q15. At that time, who owned that?

A. Joe Hibbitts.

By Mr. Sutherland: That is objected to.

By The Court: Sustained.

Q16. Now is there a street back of the Methodist Church?

A. No.

page 128 } Q16. When they go up towards that way now, where do they go to?

A. They come back up this alley beyond Goff's store up there.

Q17. Are you the same W. L. Dennis, who at one time owned the store and other land down there?

A. Yes, sir.

Q18. And where did you get it, from whom did you get it?

A. From R. E. Williams.

Q19. And did he convey it to you by deed dated August 10, 1905 and recorded October 22, 1905, in Deed Book 30, page 20?

A. Yes, sir.

Q20. That deed contains this exception, " * * * excepted from the operation of this deed and not hereby conveyed the public alley running parallel with and near Slate Creek," that exception was in the deed, was it?

A. Yes.

Q21. Why was it in the deed?

W. L. Dennis.

A. Well, that was considered the public alley and public pass way, highway.

Q22. Who used that public alley and public pass way?

A. General public.

Q23. How long has it been used by the general public?

A. Been used every since I have been here, 53 years.

By Mr. Pobst: We desire to introduce that deed, Your Honor, from Williams to Dennis, Deed Book 30, page 20,

page 129 } WHEREUPON the deed was introduced and is
in the words and figures following:

EXHIBIT DEED—WILLIAMS TO DENNIS

This Deed made this the 10th day of August, 1905, by and between R. E. Williams and Garnett Williams, his wife, parties of the first part, and W. L. Dennis, party of the second part,

WITNESSETH: That for and in consideration of the sum of Five Hundred and Sixty Dollars, paid and to be paid by the party of the second part to the parties of the first part as follows, to-wit: Two Hundred Dollars cash in hand paid, the receipt of which is hereby acknowledged, the residue Three Hundred and Sixty Dollars to be paid three months from the date hereof, and evidenced by note bearing even date with these presents, the said parties of the first part do grant and convey unto the said party of the second part, with the exceptions hereinafter mentioned, the following described lot or parcel of land lying and being in the town of Grundy, Buchanan County, Virginia, on Main Street thereof, and bounded as follows, to-wit:

BEGINNING at a stake in the edge of Main Street 3½ feet N. E. of a locust near the N. W. corner of said R. E. Williams dwelling, thence S 79 30 E 52.8 feet to a stake, thence N 5 30 E 87.5 feet to a stake in Slate Creek, thence N 79 30 W 52.8 feet to a stake in said creek, S 5 30 W 87.5 feet to the BEGINNING.

There is, however, excepted from the operation of this deed and not hereby conveyed the public alley running parallel with and near Slate Creek. And the said parties of the first part do covenant that they will warrant generally the title to

W. L. Dennis,

the property hereby conveyed. Witness the following signatures and seals.

R. E. WILLIAMS (Seal).
GARNETT WILLIAMS (Seal).

page 130 } Q24. Was there or not at the time you bought this property a store building on it?

A. Yes.

Q25. Was that the building that they say burned about 1940?

A. Yes.

Q26. Do you remember a little addition that they say Vern Smith put on the building on the alley side of it?

A. Yes.

Q27. Was that addition on it when you got it?

A. No, sir.

Q28. When you got it, where was the south line of that alley or where did they use it to or where did it come to, I mean the line up towards the bank building?

By Mr. Sutherland: We object, according to their own testimony, when he conveyed it away it was not being used there and he would be in effect contradicting his own deed if he should testify or describe it a different place. When this witness made the deed he said it was a public alley.

By Mr. Pobst: That is exactly what we do want to prove.

By Mr. Sutherland: That would be him contradicting his own deed. He says it is a public alley when he makes his deed.

By The Court: It is a question of the location of the alley.

By Mr. Sutherland: When? When the deed
page 131 } was made to him or when he conveyed it to the plaintiff?

By Mr. Pobst: We are talking about when it was conveyed to him now.

By The Court: I think he may answer.

By Mr. Sutherland: Exception.

Q29. Where was the south line of the back street at that time?

A. Well that would be, I reckon, when this building was there then that little fill had been built there.

Q30. What kind fill?

W. L. Dennis.

A. It was loose rock wall is my recollection, built up something like two feet high.

Q31. Where was the street that was used there, did it go up to the rock wall or to the building or where?

A. That street they generally used the whole street back there as a public back street.

Q32. Up to what point?

A. Up about as far as the end of the building, the rock wall.

Q33. Did the street come to the rock wall?

A. That old street there was used by the public.

Q36. You mean clear up to the rock wall?

A. Yes.

Q37. How far up Slate Creek did that extend?

A. Up to the end of the building.

Q38. You mean the rock wall?

page 132 } A. Yes.

Q39. Then how far was it up to where Mr. Goff's ware house was?

A. Mr. Williams had a fence there, in front of that fence they had a hitching rack, I would call them, and at one time they had rails on there and used for the public to hitch horses to when they first came to town. Then they used that back street as a jockey street.

Q40. Did the public use it from the time you first came here?

A. Yes, sir.

Q41. Do they still use it?

A. Yes, sir.

Q42. Mr. Dennis, you later conveyed this property by deed, which has been put in evidence, to M. L. Goff—

A. Yes, sir.

Q43. And I believe the language you used is the same when you conveyed it away as when you got it?

A. Yes.

Q44. And as I understand it between the time you got it and the time you conveyed it away, had there been any little shed or addition to the old store?

A. Mr. Vern C. Smith put a little building there, must have been seven or eight feet and he used it as a sort of soda fountain.

Q45. When he did that, whom did the building belong to?

A. It belonged to me at the time he put the building there.

Q46. Did he say anything to you about putting it there?

W. L. Dennis.

A. Yes, I suppose he did.
 page 133 } Q47. What did you tell him, do you remember?

A. I told him he could go ahead and build it, of course he wouldn't have built it without asking me.

Q48. He showed you where he was going to build it too, didn't he?

A. Yes.

Q49. And you knew he was going back into the back street or alley when he was doing that, didn't you?

By Mr. Sutherland: That is objected to, it is leading.

By Mr. Pobst: I will withdraw it, cross examine.

CROSS EXAMINATION.

By Mr. Sutherland:

Q1. How wide was that alley that you excepted in your deed to Mr. Goff?

A. I don't know that anything was said about how wide, just excepted the back street, which was a back street when I first came here was all used from this south side of this building back down to where the bank slopes down to the creek, I would say it would be from 20 to 30 feet wide when they first used it back there, there wasn't no buildings back there.

Q2. They used the creek bank and all as a public alley?

A. Along the edge of the creek bank, along where the road is now.

Q3. Now you put in your deed that you were excepting a public alley running parallel with and near Slate
 page 134 } Creek, at the time you made that deed the public was not using that part of the land that was covered by that building that Vern put on there, was it?

A. No.

Q4. Isn't it a fact there was a hitching post that was put along by the side of that building for the benefit of the customers that came to that store?

A. I don't remember but I remember beyond where Mr. Williams lived there was a hitching post up that back street.

Q5. Didn't it begin there at Main Street and go all the way up?

A. I don't remember.

W. L. Dennis.

By The Court:

Q. Do you mean to ask him if there was a hitching post where the addition was put there?

By Mr. Sutherland: Yes.

By The Court:

Q. Do you remember whether there was?

A. No, I don't remember.

By Mr. Sutherland:

Q6. How much of that creek bank was used for public riding along there, just ordinary wagon road?

A. Just regular pass way there, yet I would say must have been anywhere from twenty to thirty feet wide when I first came here.

Q7. That was from that building over to where page 135 } you got into the creek?

A. Edge of the creek bank.

Q8. And I believe you said that road extended on up back of the Methodist Church?

A. Yes.

Q9. And it has been closed up from that other alley for how many years?

A. That has been closed up, I guess 40 years I would say, part of it.

Q10. And the town at one time talked about opening it up back there after Thomps Elswick bought it, didn't they?

A. I think so.

Q11. And decided they didn't have any title to it?

A. I don't know what they decided.

Q12. Well, did you mean to tell the jury that you and Vern Smith took part of this public alley that was in your deed?

A. Well, I expect he must have built out over on it some for I don't think the lot that was deeded to me by Mr. Williams, I don't think covered where that building was.

Q13. Your deed went to the middle of Slate Creek?

A. Part of it but not this alley.

Q14. Tell the jury whether or not you and Vern Smith meant to take that part the addition was put on?

A. No, didn't mean to take it, I guess he just built in there.

Q15. Did you claim that land that you built that house on?

A. No.

Q16. You built it on the public's land and kept it and used it?

L. V. Clevinger.

page 136 } A. (None)

By The Court:

Q. When did you decide or make up your mind you were on the public?

A. I don't know whether they ever made it up it was on the public.

Q. When did you decide it was part of the alley? You said you built that place?

A. It was built there, I don't know at the time whether it was taking part of the alley and still don't know whether it took part of the alley but it probably did.

Witness stood aside.

L. V. CLEVINGER

the next witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pobst:

Q1. Have you been sworn, Mr. Clevinger?

A. Yes.

Q2. How old are you, Mr. Clevinger?

A. Sixty-eight.

Q3. Were you born in Buchanan County?

A. Yes.

Q4. On Bull Creek, I believe?

A. Yes, that is right.

Q5. That is down the river from the town of Grundy?

A. Yes.

page 137 } Q6. About how long can you remember coming back up to the town of Grundy?

A. I don't remember, I would come with my daddy before I could come by myself and before I got my own horses and then when I got my own horse, I come when I wanted to and got ready.

Q7. How old were you then?

A. I was 19.

Q8. Then you have been coming up here some 50 years or more?

A. Yes, they had court then every month and I always liked to come to court.

L. V. Clevinger.

Q9. That was the old county court?

A. That is right.

Q10. Do you remember how you would get into the Main street of the town back in those days?

A. Back when I first came here, as we came up we just forded Slate Creek and come up the back and into the town.

Q11. Was there any bridge where the bridge is now?

A. No.

Q12. Was there any swinging bridge or walking bridge?

A. If there was a swinging bridge, I don't remember it, when I first began coming.

Q13. Later on there was?

A. Yes.

Q14. In coming to town later on, did you come under that bridge?

A. After I got to coming pretty frequently, sometimes I would ride under the swinging bridge and come
page 138 } up on the back alley and hitch there and sometimes I would come this main street road up this bank and turn down in there and hitch the horse.

Q15. If you were coming up the river with the wagon and come under the swinging bridge about where did you get into the back street?

A. Well, as a usual thing I would come up into the main street and then turn back down, if I was hauling from the farm anything, then turn back down that main alley, I had a barn there that I would unload in.

Q16. You had a barn on the back alley?

A. Had it rented.

Q17. Those days, do you remember the store building that burned down in 1940?

A. Yes.

Q18. And that was on what they call the taxi lot now?

A. That is right.

Q19. Did you see a rock wall there or near or under that store?

A. Yes.

Q20. Do you know about how far it was from the north side of the store building?

A. Well, I haven't anything right particular to go by except out next to the Slate Creek, I called it on the bank of the creek, I have a way of fixing it that make me remember it. There was another wall built up out of loose rock, about as high as my head, it run off a little lower and little lower back

L. V. Clevinger.

this way (indicating up Slate), and out about Mr. Williams' barn, I had occasion to notice there had been a page 139 } wall built along there but I don't remember which side of the barn set on the wall.

Q21. I am talking about, do you remember a rock wall near the north end of that old store building on the side of the old store building next to the alley?

A. The one next to the creek?

Q22. No, next to the store building?

A. Yes.

Q23. Where was the alley located in reference to that?

A. I don't know where it was located, but I know what we called the alley.

Q24. Where did the public use it?

A. When I first come to town we had what we call a hitching rack, I don't know who put them up. Now this addition to the house was built and he didn't put it up from pillars here, I believe he put it up from what I call bents myself, and let it rest on them, and of course we still extended the hitching posts or racks on through there, I don't know who put them there.

Q25. Did Vern Smith put this little addition over where you used to hitch horses, you say you use to hitch right up beside the house?

A. Yes.

Q26. How close?

A. Pretty close.

(Noon).

page 140 }

Afternoon Session
One o'clock

L. V. CLEVINGER

the witness who was on the stand at the close of the morning session again resumed the stand and testified as follows:

By Mr. Pobst:

Q27. What do you mean by pretty close, was it a few feet or 20 feet?

A. No, at the time that we used that for hitching ground, they would usually put a hitching rack or pole across the lower side of this house, maybe in a foot and half or two feet of it, something like that, we called it a hitching rack, is what we called it.

L. V. Clevinger.

CROSS EXAMINATION.

By Mr. Sutherland:

Q1. Now, if I understood you correctly, this hitching rack was along by the side of that building before Vern put the addition to it?

A. That is right, we hitched to it many times.

Q2. Now then the hitching rack took up about as much room in that road when the horses were there as the building did?

A. No, that hitching rack didn't take up more than a foot.

Q3. But when the horses were hitched along there, you couldn't use it?

A. No, the length of the horses was still out down this way.

Q4. At that time, there were some alders and
page 141 } small saplings and bushes all along the creek
bank, wasn't there?

A. Well, I don't remember about whether there was or not, but naturally back in that day the banks hadn't been cleared off as they are now. There was another wall I don't believe Mr. Pobst asked me about, but there was another wall thrown up over there, I remember we had a run away there one time.

Q5. How far apart were those two walls?

A. They must have been 18 to 20 feet, I am not positive.

Q6. You think 18 to 20 feet would have covered the distance between the two walls?

A. I don't know whether Mr. Goff built over on this side of that wall, but that wall wasn't built in the creek, we always called it in the edge of the creek, it run off to a narrow wall over here, I mean it wasn't very high.

Q7. How much of that wall was still there when the narrow gauge railroad was built over there by the W. M. Ritter Lumber Co.?

A. I couldn't tell you, I wasn't interested in it, I couldn't say whether he built up over this way or not.

Q8. You can't say whether the side of his building next to the alley is about where the other wall was or not?

A. It couldn't be so far off, but I am not going to say it was built on it but it is not so very far neither way, I don't think.

Witness stood aside.

page 142 }

R. E. WILLIAMS

the next witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pobst:

Q1. Mr. Williams, you live in the town of Grundy, do you?

A. Yes.

Q2. You have lived here since when?

A. Since 1903.

Q3. About 45 years?

A. Yes.

Q4. Where did you live most of that time?

A. On a lot just beyond the bank building.

Q5. Where was that lot just beyond the bank building on which you lived in reference to the back street or back alley that has been testified about and the taxi lot?

A. Well, that was a part of the lot that I originally owned, the Goff lot.

Q6. You acquired the property from Jim Charles, I believe, all of it?

A. I did.

Q7. And the part that Dennis sold to Goff was a part of that deed you got?

A. It was.

Q8. And it was that part you conveyed to Dennis in 1905?

A. I think that is right.

Q9. Now, when you first came here, Mr. Williams, and knew the property, was the back street or back
page 143 } alley being used there, and if so, by whom?

A. It was used by anybody that wanted to use it, the public generally, to haul over and travel over, and a good deal of it was occupied by hitching racks for horses.

Q10. Where did that use extend to in reference to the south line of the alley, that is along the line of this respective property and the taxi lot, where did the use extend to?

A. Well, it was used up to that wall, there was a wall along there.

Q11. Is that the rock wall you heard testified about here?

A. A rock wall on the north side of the store building.

Q12. That would be on the south side of that back alley?

A. That is right.

Q13. And it was used up to that rock wall?

A. Yes.

R. E. Williams.

Q14. Now was that rock wall always there or do you remember about that, or when it was put there?

A. I think it was there when I bought the property.

Q15. How far back did that rock wall extend, that is, paralleling the alley and leading on up Slate Creek, I mean with reference to the building?

A. It went back towards the end of the building, I had an entrance there into my back yard, I think that was next to my coal house and up the alley above the lot, it was there but I think there was another rock wall behind my coal house and on up there.

Q16. Well now practically on the line of this page 144 } rock wall leading up Slate Creek, did you have anything built there to indicate your possession?

A. I had a coal house.

Q17. What else?

A. Had a fence inclosing the garden on up the back street from the coal house, and the back yard.

Q18. Was this fence a continuation off or on the line of the rock wall or otherwise?

A. Well, yes, it was about on the line with the rock wall.

Q19. And what kind of fence was that?

A. I think I put up, as I recall, a solid plank fence, the planks running vertical.

Q20. And you mean planks up and down?

A. Yes.

Q21. And they were nailed on 2 x 4's?

A. Yes.

Q22. Did the public make any use of that fence at that time?

A. They hitched to it till they tore it down, then I built another one.

Q23. How long did that hitching continue there?

A. Until the automobile came into use.

Q24. Now where in reference to what you considered the south line of the alley or back street was your fence constructed?

A. Where was it?

Q25. Yes, where was it with reference to the south line of the alley?

A. At the edge of it.

page 145 } Q26. And where was the wall that you spoke of with reference to the alley?

A. On the south line of that street.

R. E. Williams.

Q27. The rock wall was?

A. Yes.

Q28. How far did that—approximately—this back street or alley extend from the main street up beyond the Goff building where it turns and connects with Walnut Street?

A. It would be a guess—200 to 250 feet to make a guess.

Q29. And then it connected with the alley that runs above the Goff building out to Walnut Street?

A. That is right.

Q30. Do you remember when Vern Smith put a little lean-to or shed or addition on the alley side of his store?

A. I remember that it was done but I wouldn't undertake to say what year.

Q31. All up until that time, from the time you came here, what was that back street or alley used for or by whom?

A. The public generally, wagons were used on it then, hauling coal or feed, the barns were on the lower side of the back street, between back street and Slate Creek, and for passage on around to Walnut Street.

Q32. After Vern Smith placed this little addition there, there was a period of a good many years until that burned down, in which, of course, the public couldn't use the place the addition was on, but did the public continue to use the back street?

page 146 } A. Yes, sir.

Q33. Would you say the traffic over it is heavy now?

A. It is heavy now.

Q34. The intersection of this back alley and Main street, is that a dangerous intersection?

A. Yes, you have to watch what you are doing to get out of that alley in a car, it is a very busy section.

Q35. When you conveyed to Dennis in 1905, by deed which has been introduced in evidence, this, or approximately this language, was used in your deed: "Excepted from the operation of this deed and not hereby conveyed the public alley running parallel with and near Slate Creek," do you remember why that was excepted?

A. Because it was being used by the public, it was the only way the people could reach the property above that.

Q36. Was there any alley there when you came here?

A. Yes, sir.

Q37. And it was being used?

A. Yes, sir.

R. E. Williams.

Q38. Did you intend by this language to exclude, as you say, this back alley from the deed?

By Mr. Sutherland: That is objected to.

By The Court: Sustained.

Q39. Mr. Williams, at that time you made the conveyance and excluded or excepted therein the back alley you page 147 } did not state the width, did you know the width?

A. No.

Q40. Well now what was your intention at that time, you made the deed of where the south boundary line of that alley was?

By Mr. Sutherland: We object.

By the Court: Sustained, the deed is the best evidence and speaks for itself.

By Mr. Pobst: It doesn't locate the line.

By the Court: He may state if he knows where it was.

By Mr. Pobst:

Q41. Where was the south line of that back street or alley where you excepted?

A. It was along the rock wall, that is the part that was used and was used then for years.

CROSS EXAMINATION

By Mr. Sutherland:

Q1. How long had you owned this lot before you made this deed to Mr. Dennis?

A. My recollection is, I acquired it in May and possibly got a deed to it in June, 1904, it was in the spring of 1904 I acquired the lot.

Q2. And then in the next year you made the page 148 } deed to Mr. Dennis?

A. That is right.

Q3. Now in your deed there is no mention of an alley or a road up Slate Creek?

A. I don't recall.

Q4. You got that from Mr. J. M. Charles?

A. James Charles and Rose Charles.

Q5. And it extended from the center of Slate Creek south

R. E. Williams.

to the boundary line here on what they call the Yellow Popular Lumber Company lot, didn't it?

A. Well, it was the lot the bank is now on was the south line of the lot I got from Charles and the Yellow Poplar lot, which is the lot on which the Richardson building stands.

Q6. The lot that you got extended from what is now the north part of the bank building to the center of Slate Creek?

A. That is right.

Q7. Now, you say while you lived there, Vern Smith built an addition to the store building that was on there?

A. Yes.

Q8. Before he built that addition to it, do you know whether or not your fence was fastened to the building?

A. My fence inclosing the back yard connected with the back end of the building.

Q9. Now in making that deed to Mr. Dennis, did you include any more land up Slate Creek than was covered by the building? In other words, was the building as long as the lot was wide?

A. There were a few feet he wanted it extended back of the building that was there then.

Q10. That was inclosed as a part of your back yard then, is that right, the building your fence came up to and adjoined, it included the little part that that deed extended beyond that building, into your back yard?

A. That is correct.

Q11. Now, when Vern built this addition to the store building, did you move your fence on out even with the building?

A. No, I don't have any recollection making any change. I had to rebuild that fence once or twice, but I don't recall that I changed the position.

Q12. Did you build your coal house, which I believe you said was built upon the edge of this alley, did you build that before Vern built this addition?

A. I think I moved that building out that that was right by the side of the back wing of the one-story building I lived in, I moved it out of my recollection is when I built in 1910. It had been the kitchen and was very close to and entirely detached from the other part of the main building.

Q13. And in repairing your fence after Vern built this addition to the building you don't have any recollection as to whether you changed it or not?

A. No, I don't remember whether it was on any different location or not.

R. E. Williams.

Q14. Did you or anybody else make any objection to Vern building this addition at the time and place he did?

A. I didn't, Mr. Dennis owned the property at page 150 } that time.

Q15. There was still ample room to serve the public after he built it for what it needed along there, that is, room for the people who rode horse back, and for the wagons to haul stuff in?

A. Yes, sir, they used it for that purpose but they didn't do any more hitching there after Vern built, that is, where the addition was.

Q16. They moved on up to your fence then?

A. We had more customers on the upper end then.

Q17. Do you remember there was any saplings or bushes or alders along between your house and this alley and the Creek?

A. I don't think there were, I couldn't be sure but I can't recall any. I know Dr. Waldron built the rock wall along by the side of Slate Creek and he used to come out the alley and under the swinging bridge first and under the first wagon bridge to reach the back end of his property in hauling coal.

Q18. About when was this alley first used for automobiles or vehicles?

A. Well, when the automobiles came here, I don't remember when the first one came here. I remember the first car I had, I had a garage on the lower side of the alley.

Q19. About what was the distance of your garage from your coal house or was it practically opposite your coal house?

A. It was above.

Q20. About what was the width of the alley?

A. I don't remember, I found it was too narrow to get any way to get in there, I could back out of there and page 151 } get out in the alley, I would back out next to the fence, and I had to back pretty straight out of there too before I could begin to cut.

Q21. At the time you made this deed to Mr. Dennis, this alley was not used by automobiles at that time?

A. No.

Q22. Were there any here at the time he made the deed to Mr. Goff in 1924?

A. Yes, there were automobiles here then.

Q23. And did you say at that time automobiles and trucks

V. C. Smith.

were using that alley, at the time Dennis made the deed to Goff in 1924?

A. Yes, but not as much as they are now, of course, but they were using it some, those who had cars used it.

Witness stood aside.

V. C. SMITH

the next witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Pobst:

Q1. You live in the town of Grundy?

A. Yes, sir.

Q2. How long have you lived here?

A. Been here all my life.

Q3. How long is that?

A. I will be 56 in June.

page 152 } Q4. What official position in the state do you hold, if any?

A. Member of House of Delegates.

Q5. How long have you been Member of the House of Delegates?

A. When I have served out this term will be 12 years.

Q6. Do you know the little building on the corner of what used to be R. E. Williams' yard, that used to be located at the intersection or back street and Main Street of the town of Grundy, Virginia?

A. Yes, sir.

Q7. Did you ever keep store in that?

A. Yes.

Q8. When did you begin?

A. About 1916.

Q9. Whom did you rent from?

A. Mr. W. L. Dennis.

Q10. Were you born and raised principally from the time you were a small chap in the town of Grundy?

A. Yes, I was born right out there (indicating) and I have lived right around here.

Q11. Born in four or 500 feet of it?

A. Yes.

Q12. And grew up close to it?

V. C. Smith.

A. Yes.

Q13. What is your earliest recollection of that back street what was it used for and by whom?

A. Well, when I was a very small boy, it was used principally by the people who wanted to come to town, page 153 } at that time they rode a horse or mule in here and they used it around there for hitching purposes. Of course it was used by the public for anything they wanted to take around that way.

Q14. Has it been used ever since by the public?

A. Yes, sir.

Q15. You say they had hitching post where they hitched the horses near the side of that store building?

A. Yes, sir, and used to be one along by the side of it. What they would do, they would put down posts and put a pole across from one to the other, then instead of hitching to the post, they hitched to the rail.

Q16. Who put those posts in?

A. I think back at that time maybe the town did, anyhow they had an ordinance they wouldn't let them hitch on the street here.

Q17. You mean Walnut street and Main Street?

A. Yes, sir.

Q18. Was there ever a rock wall right along there and on the north side of this store building?

A. Well, there was a wall just put up out of creek rock along next to Slate Creek there, I suppose it was put in there to hold the street up and when the creek would get up against it, just little up out of rough rock.

Q19. Was there any other rock laid up?

A. Yes, sir, a wall laid along by the edge of the building, that wall was laid out of more or less split rock.

Q20. Do you remember whether any cement page 154 } was used in it?

A. I don't remember that there was.

Q21. The outside of that wall on the back street side, how close was that to the edge of the store building?

A. I would say something like two feet because I know that the building run up there and it had a projection out from the rock and the wall came out further than that, something like a foot and half to two feet.

Q22. Little further than the drip of the house?

A. Yes, sir.

V. C. Smith.

Q23. How close to that wall did the public use this back street?

A. Well, they used right up to it at that time.

Q24. Well then all the time that you remember it was used up to that place?

A. Yes, up until I put this little building up along by the side of the building.

Q25. Just a minute about that, first back of the building and along the back street on the same side, who owned that?

A. Mr. Williams.

Q26. Did he have any fence up?

A. Yes, he had a gate between his coal or wood house that he used for coal and wood, he had a gate between the back corner of the store building and it, the gate come in close next to the building then the fence started and run along up the alley to an old barn, the Yellow Poplar Lumber Company owned the property and I think Mr. Stinson or the bank got it from them, anyway the bank ended up with it.

Q27. That fence was along Williams' garden page 155 } on the back street?

A. That is right.

Q28. Was it in line or not in reference to the rock wall?

A. I don't know, never paid any particular attention but I imagine it run about in line with that wall. As well as I remember, they had a little rough wall laid up underneath this fence.

Q29. That was split rock?

A. No.

Q30. You say you rented from Dennis?

A. Yes, sir.

Q31. And how long did you rent from Dennis from 1916 to about when?

A. I think up to maybe 1920, anyway we built a building and moved out of that building in 1920 or '21.

Q32. Did you put any addition to that store building you rented from Dennis?

A. Yes, I put two additions to it, I put one room to the back of it, which was on Mr. Williams' property then I put a little addition next to the alley.

Q33. Back street?

A. Yes.

Q34. How was that little addition next to the alley built?

A. It was just boxed around of lumber, just put a frame out there and put a floor on it.

V. C. Smith.

Q35. About how wide was it?

A. About six feet, it was wide enough to put a fountain in there, and work at the back of it, and put a couple
page 156 } tables in the back of the little room, I would say
six to eight feet.

Q36. Where did you put that little addition in reference to what had been the traveled part of the back street and the rock wall?

A. Well, I just extended it from the building on out.

Q36. Out into the traveled portion of the street?

A. Out into what they had used, they used it principally for a hitching rack.

Q37. Did you extend it out far enough to take in the rock wall?

A. Yes, sir, beyond the rock wall.

Q38. Did you take in what had been used for a hitching post?

A. Yes and beyond that.

Q39. Did you ask any town or county or public authority for authority to do that?

A. I don't think I asked anyone except Mr. Dennis, I don't remember what he told me.

Q40. He increased his rent, did he?

A. No, I paid for it myself.

Q41. Do you know about how wide the original store was?

A. I would say it must have been about 18 feet.

Q42. Before you put the other on?

A. Yes.

Q43. And then you think the total would be, after you put the addition, on, would be 21 to 23 feet?

A. Something like that.

Q44. Well, 24 to 6 feet all together?

A. Yes.

page 157 } Q45. You knew they had been using that as a
public alley and hitching place?

A. Yes.

Q46. You didn't intend to take the public property, did you?

A. Well, I (interrupted).

By Mr. Sutherland: We object to that.

By the Court: That wouldn't show title one way or the other.

By Mr. Pobst: That is all.

By Mr. Sutherland: Stand aside.

Mrs. Trula Goff.

By Mr. Pobst: If your Honor please, we rest, except we desire to ask that the court take the jury for a view of the premises, and we want to ask Mrs. Goff or somebody as I understand it—let me ask Mrs. Goff.

MRS TRULA GOFF

having heretofore testified, was recalled and further cross examined as follows:

DIRECT EXAMINATION

By Mr. Pobst:

Q1. Mrs. Goff, you claim that the line of your lot goes to 18 feet from the upper or south side of the Wig Wam, is that right?

A. That is right.

page 158 } Q2. And that is where the locust fence posts were?

A. That is right, I had it measured 18 feet from where the Richardson building joins to my building to where I had those stakes put in.

Witness stood aside.

WHEREUPON, the following proceedings were had in the absence of the jury:

By Mr. Pobst: The defendant by counsel at this time renews its motion for the court to strike the evidence of the plaintiff from the record for the following reasons:

(1) Because the defendant has shown title by exception in deeds conveying the property and by long user of the back street up to the rock wall in controversy;

(2) The admitted construction of the addition put to the original store building by Vern Smith, no matter how long continued, cannot change public title;

(3) Because the town after having been out of possession of that part of the back street, which was covered by the addition placed thereon by V. C. Smith, for a number of years, retook possession and use of the controverted part of the back street about the latter part of April, 1940, and has since that time used it up to the rock wall. No change in the user was effected by the placing thereon the tar or macadam;

(4) The surveyors' stakes testified to by evidence for the the plaintiff constituted no retaking of possession because as the surveyor himself stated and other witnesses stated they were mere reference or surveyor's stakes driven into or on the level of the ground and with a tack therein and those stakes were soon obliterated and on resurvey were not found;

(5) And because the placing of the locust posts thereon by the plaintiff or by her agents was not a retaking of possession and only lasted a short time, and hence could not be anything but what is known as a scrambling possession. She stated that she didn't know how long it was, it might have been a week and might have been a month, she was gone. Her son stated it might have been a few hours or might have been all night. R. M. McClanahan stated it was a very short time, perhaps a day or words to that effect; and

(6) The entry of the town being peaceable, without force or threat of arms or arbitrary force used, they had a right to take the property which had belonged to the town, which V. C. Smith unlawfully took into his building.

By the Court: Overruled.

By Mr. Pobst: To which ruling of the court the defendant by counsel excepts.

By Mr. Sutherland: The plaintiff moves to strike out all the evidence of the defendant and enter the judgment for the plaintiff because the exception in the deed
page 161 } excepting the alley is void for uncertainty and
all the defendant's claim of right is based on that exception; and further the plaintiff moves the court to enter judgment for the plaintiff irrespective of any other evidence because the testimony of Reece McClanahan, the Mayor, amounted to forcible entry after the showing that the plaintiff was in peaceable possession and regardless of title the plaintiff is entitled to recover.

By the Court: Motion overruled.

By Mr. Sutherland: Exception.

Whereupon the jury went to the scene of the property in question and inspected same, after which it returned into court.

page 161 } In the absence of the jury, counsel for the respective parties presented to the court their instructions and asked that the court give same. The plaintiff's instruction are as follows:

INSTRUCTION NO. 1P.
(Given).

The court instructs the jury that the issue in this case is the right of the parties to the possession of the strip of land in controversy.

(1) The plaintiff is entitled to the possession of this land if the evidence satisfies you by a preponderance thereof that she has the title to the said strip of land;

(2) That irrespective of whether or not the plaintiff has shown title, if you believe that she had the possession of said land in the summer of 1946, and that the defendant forcibly took said possession from her, then she is entitled to recover this possession back and in this connection you are further instructed that if you believe that the officials of the town, including its Mayor and Chief of Police, in taking possession, gave the son and agent of the plaintiff reasonable grounds to believe, and he did believe that any resistance at the time without resort to the court, would be useless, then this was a forcible entry;

(3) If you believe by a preponderance of the evidence that the plaintiff, in the summer of 1946, when the defendant was improving this back street or alley, had the peaceable possession of this lot of land, and that such possession extended out to where she had placed the locust posts, then any entry on the same by the defendant is unlawful, and the plaintiff is entitled to the possession of said lot, unless the
page 162 } defendant has shown by a preponderance of the
evidence that it has title to the said strip of
land.

INSTRUCTION NO. 2P.
(Given).

The court instructs the jury that if you believe by a preponderance of the evidence that the plaintiff was in possession of the land in dispute within three years prior to the institution of this action, and that the defendant entered upon the same by putting asphalt on it or by destroying the posts or the stakes that the plaintiff had placed on said lot to mark the boundaries of her lands, then you will find for the plaintiff unless the defendant has shown by a preponderance of the evidence in this case that it has a better title to the land than the plaintiff has.

INSTRUCTION NO. 3P.
(Refused).

The court instructs the jury that if you believe from a preponderance of the evidence in this case that in the summer of 1946, the Town had the street or alley improved by putting down asphalt and gravel, that the plaintiff was in possession of any part of the lot and parcel of land conveyed to M. L. Goff by the deed dated the 24th day of May, 1924, by W. L. Dennis and wife, the record of which has been read to you, then this possession extended to every part and parcel of said land so conveyed; unless the defendant has shown to you by a preponderance of the evidence the location of the alley excepted in the aforesaid deed and this location is to include the width of the same and the place where same is located on the ground of said lot.

page 163 } INSTRUCTION NO. 4P.
(Refused).

The court instructs the jury that the burden of locating the exception of the alley mentioned in the deed from Dennis to Goff, which was read to you, is on the defendant, and unless you are satisfied by a preponderance of the evidence, that the alley has been definitely located, both as to its width and the place it was located on the grounds at the time the deed to M. L. Goff was made and delivered, then so far as you are concerned in the deliberation in this case, said exception of an alley is void and you will consider this case as if no exception is contained in said deed.

INSTRUCTION NO. 5P.
(Refused).

The court instructs the jury that the only description in the deed to M. L. Goff of the alley claimed by the defendant is: "The public alley running parallel with and near Slate Creek", and if you believe from a preponderance of the evidence in this case that at the time said deed to M. L. Goff was made and delivered, which was in May, 1924, the building erected by V. C. Smith covered the land in controversy in this case, and excluded the public from the use of the same, then the defendant gets no title to the land in controversy by said exception and your verdict should be for the plaintiff.

INSTRUCTION NO. 6P.
(Given).

The court instructs the jury that before you can find for the defendant, under its claim that it took possession of this disputed land or strip of land, in 1940, you must
page 164 } believe from the evidence that the defendant, through its officers and agents, made such improvements or did other acts of ownership or dominion on said strip of land in dispute, that the plaintiff knew or by the exercise of reasonable diligence should have known that the defendant was claiming the land, and that this dominion and control by the defendant was such as to exclude the plaintiff from using the said strip of land for her private business.

INSTRUCTION NO. 7P.
(Given).

The court instructs the jury that the use of this disputed lot by the Appalachian Electric Power Company, by placing its light and power poles on the same does not alone constitute possession by the defendant, Town of Grundy, although you may believe permission was given to said power company by the officials of the town to put said pole at the place it did.

INSTRUCTION NO. 8P.
(Refused).

The Court instructs the jury that before you can find for the defendant, under its claim, that it took possession of this disputed strip of land in 1940, you must believe by a preponderance of the evidence that the defendant, through its officers and agents, made such improvements or did other acts of ownership or dominion that the plaintiff, along with the public, was bound to take notice of a change in the dominion and control of said strip of land.

INSTRUCTION NO. 9P.
(Given).

The Court instructs the jury that the burden is on the defendant to locate the line of the alley along adjacent to the plaintiff's lot with reasonable certainty and unless you shall
page 165 } believe from the evidence in this case that the defendant has done so, you should find for the plaintiff, if you shall believe by a preponderance

of the evidence she was in possession of the strip of land in controversy at the time the town started to improve the alley in 1946.

INSTRUCTION NO. 10P.
(Given).

The court instructs the jury that the burden is on the defendant to prove its claim of right to the possession of the strip of land in dispute by dedication, and in this connection the court further says that to show a dedication there must be both a dedication by the owner of the land, and the acceptance of the land for the purpose indicated in the dedication, and unless the defendant has shown by a preponderance of the evidence in this case, the dedication by the owner of a definite piece of land and the location of the boundaries thereof, so as to include therein the land in dispute, and the acceptance of that same certain piece of land for the purpose indicated by the donor, then you should find against the defendant, the Town of Grundy, on its claim of right to the possession of this strip of land by dedication.

INSTRUCTION NO. 3P.
(Substituted). (Refused).

The court instructs the jury that if you believe from a preponderance of the evidence in this case, that in the summer of 1946 the defendant, Town of Grundy, had the street or alley improved by putting down asphalt and gravel, that the plaintiff was in the possession of any part of the lot and parcel of land conveyed to M. L. Goff, by the deed dated the 24th day of May, 1924, by W. L. Dennis and wife, the record of which has been read to you, then this possession extended to every part and parcel of said land, and the defendant had no right to enter any part of the same, unless you believe by a preponderance of the evidence the defendant has with reasonable certainty located the alley excepted in this deed, and that this location included the land in dispute in the said alley.

page 166 } WHEREUPON counsel for the Defendant filed
in writing the following objections to Plaintiff's
instructions:

Instruction 1-P: To the last four lines of Section 2, because there is no evidence to support same. There was no show of force nor threat nor intimidation.

Instruction No. 2-P: Objected to because it does not state that defendant's entry was within three years before the suit was instituted.

Instruction 3-P: Objected to for following reasons:

(a) Because plaintiff's possession did not extend to every part and parcel of the land conveyed to Goff by Dennis.

(b) Because there is no evidence to support the assumption that the putting down of asphalt and gravel in 1946 by the Town was the first time the Town took the controverted strip of land in possession.

(c) The last part of the instruction requires the defendants to show by a preponderance of evidence the location of the alley excepted in the above mentioned deed, said location to include the width of the alley and the place same is located on the ground of said lot. This is more than the law requires the defendant to do.

Instruction 4-P: The following objections are made:

(a) Because it is not incumbent on the defendant to definitely show the width of the alley, as the location of the line on the opposite or north side of the alley is not in controversy herein.

(b) The location of the alley is sufficiently shown in this case if the defendant locates the south line thereof.

(c) Because under the facts detailed, the in-page 167 } struction tells the Jury that the exception of an alley is void.

Instruction 5-P: Objected to because:

(a) The burden is placed on the defendant to prove the width of the alley, which it is not required to do.

(b) The instruction is a finding instruction and does not cover the facts to which the defendant is entitled according to its theory of the case.

Instruction 6-P: Objected to because:

(a) Evidence has shown no way nor circumstances under which the plaintiff did make her claims reasonably apparent to the defendant. The surveyors' reference stakes or hub stakes driven into the ground or on the level therewith are not sufficient, and the locust posts, which only remained in

the street a few hours or perhaps overnight, is a mere scrambling possession, and is not sufficient.

(b) Instruction tells the jury that possession is not confined to actual occupancy or enclosure, and to this statement the defendant objects.

(c) There is no evidence showing any act of the plaintiff in taking any possession after 1940 sufficient to sustain an action of trespass, except the placing of the locust posts in the street, which was a mere scrambling attempt at possession, as they were immediately removed.

Instruction 7-P: The defendant objects to this instruction because its contention is that the placing of the light pole in the street does not constitute possession by the defendant.

Instruction 8-P: The defendant objects to this page 168 } instruction because:

(a) The acts of dominion and control were of the same kind and character from 1940 until the present time.

(b) Because some of the improvements and other acts of ownership and dominion exercised by the defendant over the disputed strip of land was done after the year 1940 in the way of building up the road and putting creek sand and gravel thereon and smoothing it.

Instruction 9-P: This is a finding instruction and the matters to which the defendant is entitled in its theory of the case is not given.

To No. 3-P Substituted:

For reasons a, b and c set out of objections to plaintiff's instructions by the defendant.

(d) Because the instructions still require the defendant to locate the alley with reasonable certainty, while the defendant is only required to locate the south line of the alley.

To No. 7-P:

Defendant claims that this does not correctly state the law. Defendant claims that the placing of the light pole on the land in dispute, by permission of the officials of the town, did constitute possession by the defendant.

WHEREUPON, the Defendant asked the court to give the following instructions to the jury:

page 169 }

1-D.
(Given).

The court instructs the jury that if you believe by a preponderance of the evidence that the defendant had legal title to the lot in controversy herein, by dedication and acceptance for public use, and if you further believe that the defendant's entry upon said lot was peaceable and not forcible, then you must find for the defendant.

2-D.
(Given).

The court instructs the jury that if you believe by a preponderance of the evidence that on May 22, 1947, when this suit was instituted, the defendant had possession of the small strip of land in controversy, and that said possession at that time had continued for more than three years, you must find for the defendant.

3-D.
(Given).

The court instructs the jury that before you can find for the plaintiff in this case you must believe by a preponderance of the evidence:

(a) That the plaintiff was in peaceable possession of said lot, and the defendant, not having title to the lot, entered upon same and peaceably or otherwise ousted plaintiff from possession, or,

(b) That plaintiff was in peaceable possession of said lot, and the defendant, having title to said lot, forcibly ousted plaintiff from possession, and

(c) That, in either case, the defendant took possession of the land in controversy not more than three years next preceding the institution of this suit.

page 170 }

4-D.
(Given).

The Court instructs the jury that a street in a city or town is a "Public Highway", and, if you believe by a preponderance of the evidence that the defendant had acquired legal title to said street, by dedication and acceptance for public use, then no obstruction of nor encroachment upon said street

by the plaintiff or her predecessors in title, for any length of time, will impair the rights of the public to said street, unless said street was abandoned by the public, nor by proper authority. Time does not run against the State, or bar the right of the public.

5-D.
(Given).

The court instructs the jury that if you believe from a preponderance of the evidence that Town of Grundy has been in peaceable possession of the lot in controversy for more than three years last preceding the commencement of this action, then this cause of action is barred by the Statute of Limitations, and you must find for the defendant.

6-D.
(Given).

The court instructs the jury that any owner of land who is competent to sell same may dedicate it to the public. By dedication is meant the giving or donating of such land to the public. Such dedication may be either oral or in writing, and may be express or implied. Acceptance by a town of a street or alley may be also implied by such long use by the public as to render its reclamation unjust and improper. When the dedication is accepted title is complete, and when complete is irrevocable, and no individual possession thereof will bar the right of the public thereto no matter how long continued.

page 171 }
7-D.
(Given).

The Court instructs the jury that if you believe that the plaintiff in 1946 when she placed locust posts in the back street or alley had not theretofore since the burning of the store been in actual, peaceable and exclusive possession of the disputed strip of land, and that the posts were very soon thereafter, in a matter of hours or days, removed by the defendant, the plaintiff did not, by the placing of said posts, take and hold possession of the disputed strip of land. A mere scrambling or interrupted possession is not sufficient to maintain this action.

WHEREUPON, the following proceedings took place in the presence of the jury:

The court read to the jury the following instructions: Plaintiff's instructions 1-P, 2-P, 6-P, 7-P, 9-P and 10-P.

The plaintiff excepted to the action of the court in refusing Instructions 3-P, 4-P, 5-P, 8-P and 3-P (Supplemented), while counsel for the defendant excepted to the court's giving 1-P, 2-P, 6-P, 7-P, 9-P and 10-P.

The Court then read the defendants instructions Nos. 1-d through 7-D, to the jury, after which counsel argued the case, and the jury retired to their room to consider of their verdict, and after some deliberation, returned into court, having found the following verdict:

We, the jury, find that the defendant unlawfully withholds from the plaintiff the possession of the lot of page 172 } land described in the notice in this case, which is the same land described in the deed from W. L. Dennis to M. L. Goff, dated the 24th day of May, 1924, and of record in Deed Book No. 58, at page 411, the description of which is as follows:

BEGINNING at a stake in the edge of Main Street, 3½ feet Northeast of a locust, near the Northwest corner of the R. E. Williams dwelling house, thence S 79 30 E 52.8 feet to a stake; thence N 5 30 E 87.5 feet to a stake in Slate Creek; thence down Slate Creek, N 79 30 W 52.8 feet to a stake in Slate Creek, thence S 5 30 W 87.5 feet to the BEGINNING.

Except the eighteen (18) feet public alley, which is described as follows:

BEGINNING at the corner of the M. L. Goff brick building, known in this record as the Wig Wam building, which corner is on Main Street, which is the Southwest corner of said building, thence with the line of said building, S 79 30 E 52.8 feet to the Southwest corner of said building; thence S 5 30 W eighteen (18) feet to a stake; thence N 79 30 W 52.8 feet to a stake in the line of Main Street, thence with the line of said Main Street N 5 30 E 18 feet to the BEGINNING. C. H. Boyd, Foreman.

By Mr. Pobst: If Your Honor please, we desire to lodge a motion with reference to the verdict, which we will file later when we have put it in writing.

page 173 } COURT'S CERTIFICATE.

The undersigned Judge of the Circuit Court of Buchanan County, hereby certifies that the foregoing stenographic report and transcript of testimony, and other incidents of the trial in the case of Trula Goff v. Town of Grundy, embracing

as it does all the testimony adduced at the trial, objections to testimony, exceptions to rulings thereon; also embracing and setting out all the instructions that were offered and given in the case; and motions to set aside the verdict of the jury, was on the 22nd day of August, 1949, presented to the undersigned Judge of said Court for authentication, and the said transcript appearing to be correct, full and complete in all respects, and it appearing that plaintiff's counsel, George C. Sutherland, had notice in writing of the time and place when this would be presented to the Judge for his signature, it is hereby certified and authenticated as the true transcript of all the proceedings had at the trial of said cause, and the same is transmitted to the Clerk of said Court to be filed with and made a part of the record in said case.

This the 25th day of August, 1949.

F. W. SMITH,
Judge. (Seal)

Received this the 22nd day of August, 1949.

F. W. SMITH,
Judge.

page 174 } CLERK'S CERTIFICATE.

Virginia:

In the Clerk's Office of the Circuit Court of Buchanan County:

I, Jennings L. Looney, Clerk of the said Court do certify that the foregoing is a true and correct transcript of the record and proceedings had in the law action of Trula Goff v. Town of Grundy, and all things touching said action as fully and completely, as they now exist among the records of my said office.

I further certify that George C. Sutherland, attorney of record for the opposite side had notice of the making of this transcript and that the same was being made for the purpose of presenting the same to the Supreme Court of Appeals of Virginia for a writ of error.

Given under my hand, this the 8th day of September, 1949.

JENNINGS L. LOONEY,
Clerk.

A Copy—Teste:

M. B. WATTS, C. C.

INDEX TO RECORD

	Page
Petition for Writ of Error	1
Record	26
Summons in Unlawful Entry and Detainer	26
Plea of Not Guilty	28
Jury Impaneled	29
Verdict and Motion to Set Aside	30, 32, 147
Judgment, July 11, 1949,—Complained of	31
Hearing, April 13, 1948	34
Deed, W. L. Dennis and wife to M. L. Goff, May 24, 1924.	35
Evidence	36
W. Hassell Goff	36
Trula Goff	47, 69, 137
Bill Goodman	56
Candle Belcher	62
Reece McClanahan	72
A. M. Ratliff	86
W. Clyde Payne	93
George McGuire	98
B. K. Wright	103
Carl Looney	108
Anderson Elswick	114
W. L. Dennis	116
L. V. Clevinger	123
R. E. Williams	127
V. C. Smith	133
Deed, R. E. Williams and wife to W. L. Dennis, August 10, 1905	118
Motion to Strike Plaintiff's Evidence	71, 137
Motion to Strike Defendant's Evidence	138
Instructions	139
Judge's Certificate	147
Clerk's Certificate	148