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Clerk, Supreme Court of Appeals
Richmond, Va.

# Record No. 5224

## In the
## Supreme Court of Appeals of Virginia
## at Richmond

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## JAMES T. EUBANK

v.

## JAMES WILLIAM HAYDEN

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FROM THE CIRCUIT COURT OF CAROLINE COUNTY

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### RULE 5:12—BRIEFS.

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

# Supreme Court of Appeals of Virginia

AT RICHMOND

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## Record No. 5224

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 4th day of October, 1960.

JAMES T. EUBANK, Plaintiff in Error,

*against*

JAMES WILLIAM HAYDEN, Defendant in Error.

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From the Circuit Court of Caroline County

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Upon the petition of James T. Eubank a writ of error is awarded him to a judgment rendered by the Circuit Court of Caroline County on the 6th day of April, 1960, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and James William Hayden was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

# RECORD

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## NOTICE OF MOTION FOR JUDGMENT.

### COUNT ONE.

You are hereby notified that at the expiration of twenty-one days from the date that the attached notice is served upon you, the undersigned will move the Circuit Court for the County of Caroline at the Court House thereof at Bowling Green, Virginia, for a judgment against you in the amount of $15,000.00, which sum is justly due and owing from you to the undersigned for the damages and wrongs hereinafter more fully set forth:

(1) That the Plaintiff is now and for twenty-one years has been the husband of Margaret C. Eubank;

(2) That on or about March 23, 1958 and for many months prior thereto while Plaintiff was living with his wife, Margaret C. Eubank, at Corbin in Caroline County, Virginia, Defendant wrongfully contriving to injure Plaintiff and to deprive him of the company, society and assistance of said wife, well knowing the said Margaret C. Eubank to be the wife of the Plaintiff, unlawfully, wickedly and maliciously gained the affections of the said Margaret C. Eubank and sought to persuade her and entice her to leave the Plaintiff;

(3) That on or about March 23, 1958 the Defendant enticed and unlawfully and maliciously induced the said Margaret C. Eubank to desert Plaintiff and refuse to co-habit with him as his wife;

page 3 } (4) That on the said March 23, 1958 when the Defendant deserted the Plaintiff as aforesaid, she took with her $3,000.00 of the Plaintiff's money, causing financial loss to the Plaintiff, all through the enticement and inducement of the Defendant;

(5) That by reason of the premises, the said Margaret C. Eubank has become estranged from Plaintiff and her affections and regard for Plaintiff have been destroyed and Plaintiff has been, and still is, wrongfully deprived by Defendant of the company, society, support and advice of his said wife, and the happiness and benefits he otherwise would

have received at her hands, and has suffered great distress of body, mind, and estate, to his damage in the sum of $15,000.00;

Wherefore, at the time and place aforesaid, the undersigned will move the Court for judgment against you in the sum of $15,000.00 compensatory and punitive damage for the wrongs hereinbefore complained of.

COUNT TWO.

You are hereby notified that at the expiration of twenty-one days from the date that the attached notice is served upon you, the undersigned will move the Circuit Court for the County of Caroline at the Court House thereof at Bowling Green, Virginia, for a judgment against you in the amount of $15,000.00, which sum is justly due and owing from you to the undersigned for the damages and wrongs hereinafter more fully set forth:

(1) That one Margaret C. Eubank is, and for more than twenty-one years has been the wife of the Plaintiff and at the time of the commission of the wrongs hereinafter mentioned Plaintiff and his said wife were living together as man and wife at Corbin in the County of Caroline, State of Virginia;

page 4 } (2) That Defendant, well-knowing the said Margaret C. Eubank to be the wife of the Plaintiff and contriving and wrongfully and maliciously intending to injure, disgrace and distress and wound the feelings of Plaintiff and to dishonor Plaintiff and his family and to deprive Plaintiff of the comfort, society, aid and assistance of said wife, Margaret C. Eubank, heretofore, on or about March 9, 1958 and at divers other days and time prior to that time at the house of the Plaintiff at Corbin in Caroline County, Virginia, and elsewhere, wickedly, wilfully, and maliciously debauched and carnally knew the said Margaret C. Eubank without the privity, consent or connivance of the Plaintiff;

(3) That by reason of the premises, the affection of the said Margaret C. Eubank was wholly alientated and destroyed, and Plaintiff has been injured in his reputation and in that of his family and wounded in his feelings and disgraced, and has suffered great distress of body, mind and estate to his damage in the sum of $15,000.00.

Wherefore, at the time and place aforesaid the undersigned will move the Court for judgment against you in the

sum of $15,000.00 compensatory and punitive damage for the wrongs hereinbefore complained of.

COUNT THREE.

You are hereby notified that at the expiration of twenty-one days from the date that the attached notice is served upon you, the undersigned will move the Circuit Court for the County of Caroline at the Court House thereof at Bowling Green, Virginia, for a judgment against you in the amount of $15,000.00, which sum is justly due and owing from you to the undersigned for the damages and wrongs hereinafter more fully set forth:

(1) That Plaintiff is now and for twenty-one years has been the husband of Margaret C. Eubank;

page 5 } (2) That on or about March 9, 1958 and divers other days and times before that time, at the house of the *Defendat* at Corbin in Caroline County, Virginia and elsewhere, while Plaintiff was living with his wife at Corbin in Caroline County, Virginia, the Defendant wrongfully contriving to injure Plaintiff and to deprive him of the company, society and assistance of his said wife, unlawfully, wickedly and maliciously gained the affections of the said Margaret C. Eubank and enticed her to have carnal intercourse with him and sought to persuade her and entice her by offers of money and otherwise to leave the Plaintiff;

(3) That on or about the said March 9, 1958 and at divers other days and times before that time as aforesaid the Defendant carried on his wrongful intercourse with the said Margaret C. Eubank and on or about March 23, 1958 enticed, unlawfully and maliciously induced the said Margaret C. Eubank to desert the Plaintiff and refuse to co-habit and live with him as his said wife;

(4) That by reason of the premises, the said Margaret C. Eubank has become estranged from Plaintiff, and her affections and regard for Plaintiff have been destroyed, and Plaintiff has been, and still is wrongfully deprived by Defendant of the company, society, support and advice of his said wife, and the happiness and benefits he otherwise would have received at her hands, and has suffered great distress of body, mind, and estate to his damage in the sum of $15,000.00.

Wherefore, at the time and place aforesaid the undersigned will move the Court for judgment against you in the sum

of $15,000.00 compensatory and punitive damage for the wrong hereinbefore complained of.

JAMES T. EUBANK, Plaintiff
By GEORGE C. RAWLINGS, JR.
Of Counsel.

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* * * * *

ORDER.

A verdict having been rendered by the Jury in behalf of the Plaintiff against the Defendant in the sum of THIRTY-FIVE HUNDRED ($3,500.00) DOLLARS on December 22, 1958, and the Defendant having moved the Court to set the verdict aside for the following reasons:

(1) That the verdict is contrary to the law and the evidence;
(2) That the Court erred in permitting the introduction of a check in the sum of $3,000.00 which was drawn by the Plaintiff's wife from their joint account and in which the evidence failed to disclose the Defendant had any knowledge of said transaction or received any benefit therefrom;
(3) That the verdict was based upon false testimony of the Plaintiff and his sons.

And the Court having duly considered said motion and reviewed the testimony of witnesses, and being of the opinion that an error was committed by this Court in permitting the introduction of certain evidence over the objection of counsel for the Defendant and that said verdict should be set aside, therefore, it is ordered that the verdict of the Jury be and the same is hereby set aside for the reasons as set forth in a written opinion of said Court dated July 30, 1959 and filed August 19, 1959.

page 65 } And it is further ordered that a new trial be awarded to the Plaintiff to which ruling of the Court in setting aside said verdict and granting a new trial, Plaintiff objects and takes exception.

Enter 8 December 1959.

LEON M. BAZILE, Judge.

I ask for this order.

FRANK B. BEAZLEY, p. d.

Seen, objected to and exception noted:

FRANKLIN & RAWLINGS, p. q.,
Law Building
Fredericksburg, Virginia
By GEORGE C. RAWLINGS, JR.

* * * * *

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* * * * *

Filed 19 August 1959.

L. M. B.

## OPINION OF THE COURT.

This is an action for alienation of affections. It resulted in a verdict for the plaintiff and the defendant has moved the Court to set aside the verdict as being contrary to the law and the evidence, for an alleged error in the admission of evidence and because it is alleged the verdict is based on perjured testimony of the plaintiff and his sons.

The plaintiff and the defendant had been the closest kind of friends. The plaintiff brought the defendant to his home and got the defendant to drive him and his wife about the county and adjoining counties. Mrs. Eubank left the home of the plaintiff in March 1958 and has not been heard from since. The plaintiff obtained a divorce from her on the ground of desertion.

In that suit he testified:

"Q. Where is your wife?

"A. I don't know, gone away somewhere or hid somewhere.

* * * * *

page 67 } "Q. Have you seen your wife since she left?

"A. No I haven't.

"Q. Do you know where she is?

"A. No."

In this case he testified:

"I have seen her and Hayden in the car twice since she left." Both times by the gravel pit between Green's Store and the Golf course.

He testified that she left 22 March 1958 and that he slept with her and had intercourse with her the night before she left. That he and his wife were in love and she left Sunday morning.

That he had known Hayden and they were good friends and "I never took my wife to the beach unless he went along." That the week before she left he and his wife drove to Hayden's place and asked him if he wanted to go with them to the beach.

He thought that his wife was pregnant but he kept having intercourse with her. He claimed that he had been operated on and could not get her pregnant.

After she left he got Hayden to drive him around to look for his wife.

George Boulware testified that he lived 200 feet from the Eubank home. That the day Mrs. Eubank left home he saw her walking down the road with a suit case in her hand. That he knew Hayden. On the day she left he did not see Hayden at all.

page 68 } William Herman Eubank 18 years old testified once when he was in his bed room in February while he did not hear Hayden come in that he heard him drop his shoes on the floor of his mother's room and heard him get in bed and that he recognized his voice. He said "Nobody was with me." That he knew of no other such occasion. He said "I did not tell my mother about this." On cross examination he testified that his mother had the door locked and said "I was afraid to tell Father." Later he said "I heard him in there but I did not tell my Father. I told him about it the second day after she left."

George Lee Eubank, 16, who had been excluded while his brother was testifying, testified that while his father was at work Hayden went to bed with his mother. "I heard him pull his shoes off and heard the bed squeak." On cross examination he testified that his brother was present at the time and I went to sleep. Brother did not get up and did nothing but went to sleep.

That he did not tell his father about it until two days after his mother left.

His brother when asked on cross examination why he did

nothing said that his mother had the door locked and that he called to her but got no answer and the door was not opened.

It is manifest from the testimony of these young men that both did not tell the truth. The older boy swore that he was alone in the room at the time this event occurred. His brother swore that they were together at the time and that both of them went to sleep. The oldest boy says page 69 } that he got up and found the door locked and called to his mother but got no answer. The youngest boy said that his brother did not get up at all but turned over and went to sleep.

The plaintiff swore directly opposite to what he swore was the truth in the divorce case.

In Moore on Facts Sec. 1139 it is said: "In one of the master productions of his luminous intellect, Lord Storvell referred to the testimony of a witness who, as he said, was totally unimpeached as to general character, and therefore *a priori* entitled to be fully credited, and then proceeded as follows: 'However, it is a good safe rule in weighing evidence of a fact which you cannot compare with any other evidence to the same fact, to compare it with the actual conduct of the person who describes it. If their conduct is clearly such as upon their own showing it could not have been, taking the fact in the way they represented it, it is a pretty fair inference that the fact did not so happen. If their actings, at the very time that the fact happened, represent it one way and their relation of it, at a great distance of time, represents it another way, there can be no doubt which is the authentic narrative, which is the naked truth of the matter. (*Evans* v. *Evans,* 1 Hopkins 35, 64, 4 Eng. Ecc. 310, 323). In another case the same great magistrate said 'I am not deaf to the fair pretensions of human testimony, but at the same time I cannot shut my senses against the ordinary course of human conduct.' Conduct of a witness clearly inconsistent with his testimony and not satisfactorily explained is one of the most fatal species of impeachment" (*Johnson* v. *The Anne,* 15 Fed. Case, Case No. 7,370 at p. 727)" because the trier of facts is thus justified in disbelieving page 70 } the testimony, without any degree reflecting upon the integrity of the witness who it may be presumed is a victim of the proverbial fickelness of memory-especially after considerable time has elapsed or of various perturbing psychological influences which affect men of the highest probity as well as those of indifference moral natures and operate with peculiar force if the witness is interested or otherwise biased. Thus the instincts of self interest usually induce all men, in their business transactions to make full and

exact entries of moneys received or paid, and the conclusion, in the absence of any proof that this was done, as between a principal and agent, that the parties did not recognize the existence of the relation, notwithstanding their subsequent testimony to the contrary. * * *"

William Henry Eubank was 18 years of age; he was no longer a child. His brother was 16 years of age almost old enough to be drafted into the army. Their testimony cannot be treated as that of children. If there was any adultery between Mrs. Eubank and Hayden it must depend wholly on the testimony of these two young men.

Their evidence is wholly in conflict. One swears that he was alone. The other swears that they were together when the alleged act of adultery occurred. One says that he went to his mother's door and found it locked and that he called on her to open it. The other says that the older boy was in bed and that instead of getting up he turned over and went to sleep and he did the same thing.

Then consider their conduct thereafter. Would page 71 } any normal boy 18 or 16 fail to tell his father of such a horrible occurrence which concerned him and his whole family? They did nothing of the kind but waited unitl after their mother had left to tell him about it.

Manifestly a part of their evidence was fabricated and the suspicious circumstances of their conduct cast a doubt upon the truth of their whole testimony. In Section 588 of Moore on Facts, Volume 1 p. 587 it is said: "I feel bound to suppose that this is an attempt to bolster up the case by a forged document," said Lord Brougham, in a case in the House of Lords, 'Any other evidence which there is, he continued,' I must, under those circumstances view with the greatest suspicion; for it is not enough to say they may discard this, that they may have a very good case without it." (The Tracy Peerage, 10 C 1 & F. 154, 191) In a case where there was some evidence that the plaintiff's name on a hotel register introduced in evidence by him was not orginally entered under the date where it appeared, the court instructed the jury that if they were satisfied the entry was made "for the purpose of manufacturing evidence in the plaintiff's behalf it should weigh strongly against the plaintiff because the attempt to put false testimony into the case justly causes doubt as to the justice of the case itself. A righteous cause needs no support of falsehood or perjury. * * *"

The evidence to establish the alleged adultery of Mrs. Eubank was so tainted no credit can be given it.

Therefore, the question as to the admission of the check

drawn by Mrs. Eubank on the joint account must be now considered.

page 72 } The wife cannot be guilty of any offense when she converts her husband's property and this is especially true when she draws money out of a joint account which belongs to her as much as to him.

Of course where one who alienates the affections of another's wife and commits adultery with her who receives the husband's property in eloping with her is guilty of larceny. Clark & Marshall Crimes (2nd. Ed.) Sec. 313 p. 444. In such case the adulterer, however must participate in the taking and carrying away of the property. *Rex* v. *Taylor Cox C. C.,* 627 and the other authorities cited in note 73.

The introduction of the check in this action was admitted on the theory that the accused had committed adultery with Mrs. Eubank and carried her off. When the evidence to establish this did not come forward error was committed in admitting the check and this error resulted in the verdict for $3,000.00 the exact amount of the check.

Clearly there is nothing in *Harlow* v. *Harlow,* 152 Va. 910, 143 S. E. 720 (1928) which conflicts with this opinion. In that case it was the defendants who drew the money out of the bank. In this case there was no proof that the defendant received any part of the $3,000.00 drawn out of the joint bank account by Mrs. Eubank. The defendants were also the beneficiaries of the insurance policy in that case except Edwin Harlow against who the verdict of the jury was set aside.

For this error on the part of the Court the ver-
page 73 } dict will have to be set aside and a new trial awarded the parties.

LEON M. BAZILE, Judge.

30 July, 1959.

page 74 } INSTRUCTION NO. P-1.

The Court instructs the jury that damages recoverable in this case under Count one, if the jury believes that the Plaintiff Eubank is entitled to recover on that Count, actual or compensatory damages;

"Actual or compensatory damages are the measure of loss or injury sustained, and may embrace shame, mortification, humiliation, mental pain and suffering, the value of the wife's

services, and the value of the loss of her society, affections, assistance, aid and companionship."

Given 6 April '60.

L. M. B.

page 75 } INSTRUCTION NO. P-3.

The Court instructs the jury that Count one charges the alienation of the affections of Mrs. Margaret C. Eubank for the Plaintiff Eubank by the Defendant Hayden and if the jury believes from the evidence that the said Defendant Hayden did alienate the affections of Mrs. Eubank, then they shall find for the Plaintiff and assess his damages, actual or compensatory in accordance with the instructions heretofore given, in any amount not to exceed the amount sued for, but if the jury shall find for the Defendant, they shall say so and no more.

Given 6 April '60.

L. M. B.

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page 77 } INSTRUCTION NO. P-6.

The Court instructs the jury that the divorce awarded to the Plaintiff Eubank from his wife, Mrs. Margaret Eubank, should be considered only to show the present status of the Eubanks' marriage and has no bearing on the liability of the Defendant Hayden and does not effect the Plaintiff's right to recover against the Defendant for alienation of affection.

Refused 6 April '60.

L. M. B.

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page 80 } INSTRUCTION NO. D6.

The Court instructs the Jury that before you can find your verdict for the plaintiff under Count #1, you must believe from a preponderance of the evidence, that the defendant alienated the affections of the plaintiff's wife, Margaret C.

Eubank, without the connivance, knowledge or consent of the Plaintiff, James T. Eubank; and that the plaintiff's wife deserted him as a result of defendant's alienation of her affections.

* * * * *

page 82 } INSTRUCTION NO. P-2.

The Court instructs the jury that Count three charges that the Defendant Hayden committed an act or acts of criminal conversation with Mrs. Margaret C. Eubank and alleges alienation of affections as an aggravation thereof. If the jury believes that said Defendant Hayden did not commit criminal conversation with the said Mrs. Margaret C. Eubank, then they shall find for the Plaintiff Eubank and assess his damages, actual or compensatory and exemplary or punitive, in accordance with the instructions heretofore given in an amount not to exceed the amount sued for, but if the jury shall find for the Defendant they shall say so and no more.

Refused 6 April '60.

L. M. B.

page 83 } INSTRUCTION NO. P-4.

The Court instructs the jury that criminal conversation means the commission of one or more acts of illicit intercourse by a third person, here the Defendant Hayden, with a married person, here Mrs. Margaret Eubank. You are further instructed that in order for the Plaintiff to recover damages against the Defendant it is not necessary that the Plaintiff prove any one act of illicit intercourse between the Defendant Hayden and Mrs. Eubank that occurred on one particular date, which is conclusive of guilt, but the jury must consider the opportunity for the commission of the act, the conduct of the parties, and all the circumstances, and then determine from the whole of the testimony whether it should convince unprejudiced and cautious persons of the guilt of the parties; and if upon a consideration of all the evidence in the case the jury are satisfied of the commission of one act of illicit intercourse then their verdict should be for the Plaintiff on Count three.

Refused 6 April '60.

L. M. B.

page 84 } INSTRUCTION NO. P-7.

The Court instructs the jury that the continuation of marital relations between husband and wife after the husband knows or has reason to believe his wife guilty of adultery or infidelity does not prevent recovery by the husband against a third person for criminal conversation or alienation of affections; and regardless of whether the Plaintiff Eubank knew or had reason to believe that his wife had committed adultery, if you believe from the evidence that the Defendant Hayden is guilty of criminal conversation and/or alienation of affections as defined in the Court's other instructions, then you should find for the Plaintiff Eubank.

Refused 6 April '60.

L. M. B.

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S. A. Cunningham, a qualified court reporter was duly sworn to truly make a record of this case as presented to the court by the attorneys in the cause, the witnesses testifying under oath and rulings of the Court.

This day came the parties by their attorneys and the issue having been duly joined, thereupon came a jury, who were selected and summoned in the manner prescribed by law, to-wit: F. Ray Blanton, Ginter O. Gwathmey, Amos W. Clary, John Norwood Satterwhite, Leslie Jones and G. Marion Tribble, who were sworn to well and truly try the matter on the issue joined between the plaintiff and the defendant. Whereupon the court proceeded to hear the evidence and argument of counsel. After hearing the evidence and argument of counsel the court, upon motion of the attorney for the defendant, struck the count of criminal conversation from the Notice of Motion and the attorney for the plaintiff excepted to the ruling of the court. Whereupon after being instructed by the court, the jury retired to its room to consider its verdict. After some time the jury returned to the court, having found a verdict in the following words and figures: "We the jury on the issue joined find the defendant not guilty. Amos W. Clary, Foreman." 6 April 1960

Whereupon the jury was excused. After the jury was excused, the attorney for the plaintiff moved the court to set aside the verdict because the court had stricken the allegation of criminal conversation from the Notice of Motion, and because the verdict was contrary to law and evi-
page 90 } dence. Whereupon after listening to argument of counsel, the court overruled said motion and the attorney for the plaintiff excepted to the ruling of the court in overruling said motion. Thereupon it is ordered that the plaintiff take nothing for his false clamor but that the defendant recover of the plaintiff his costs by him about his defense in this behalf expended.

LEON M. BAZILE, Judge.

6 April 1960.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To T. E. Campbell, Clerk, Bowling Green, Virginia.

In accordance with the provisions of Rule 5:1, Section 4 of the Rules of the Supreme Court of Appeals of Virginia, notice is hereby given of the intention of the Plaintiff, James T. Eubank, to appeal the judgment of this Court in the above styled cause and of the intention of said Plaintiff to present to the Supreme Court of Appeals of Virginia a petition for a writ of error to the final judgment entered herein, and the Plaintiff assigns the following errors:

(1) The Court erred in striking Count Two of the Plaintiff's Notice of Motion for Judgment because the said count was not repetition as held by the Court in as much as each of the three counts in the notice of motion set forth a distinct cause of action.

(2) The Court erred in setting aside the verdict of $3,500.00 returned by the jury in favor of the Plaintiff at the first trial of the case held on December 22, 1958 because the verdict was clearly supported by the evidence; the creditability of the witnesses and all conflicts in the evidence were

page 94 } resolved by the jury's verdict; no prejudicial error was committed by the Court during the trial; and the Court's action was contrary to the law and the evidence of the case.

(3) The Court erred in the second trial of the case held on April 6, 1960 in refusing to admit evidence offered by the Plaintiff of the withdrawal by Mrs. Margaret Eubank of $3,000.00 from the joint bank account of James T. and Margaret Eubank several days before she left the Eubank home and in refusing the admission of the cancelled check showing said withdrawal because this evidence was proper to show the Plaintiff's damages resulting from alienation of affections and criminal conversation committed by the Defendant if proven, and also it could have been considered by the jury in assessing punitive damages therefor.

(4)) The Court erred in the second trial of the case in striking the Plaintiff's evidence as to criminal conversation and submitting the case to the jury only on the question of alienation of affections because the Plaintiff's evidence was sufficient to support a verdict on criminal conversation and any conflict in the evidence and the creditability of the witnesses were matters for the jury. The Court's action in this regard was clearly contrary to the law and the evidence of the case.

(5) The Court erred in the second trial of the case in refusing to give Plaintiff's Instruction P-2 because the Court's refusal to give the instruction was based upon its erroneous ruling in striking the Plaintiff's evidence as to criminal conversation, which ruling was contrary to the law and the evidence of this case, and because the Plaintiff's evidence was clearly sufficient to support a verdict on criminal conversation and to warrant an instruction thereon, and any conflict in the evidence and the creditability of the witnesses were matters for the jury.

(6) The Court erred in the second trial of the case in refusing to give Plaintiff's Instruction P-4 because its refusal to give said instruction was based on its erroneous ruling

page 95 } in striking the Plaintiff's evidence as to criminal conversation, which ruling was contrary to the law and the evidence of this case, and because the Plaintiff's evidence was clearly sufficient to support a verdict on criminal conversation and to warrant an instruction thereon and any conflict in the evidence and the creditability of the witnesses were matters for the jury.

(7) The Court erred in the second trial of the case in refusing to give Plaintiff's Instruction P-7 because its refusal to give said instruction was based on its erroneous ruling in

striking the Plaintiff's evidence as to criminal conversation, which ruling was contrary to the law and the evidence of this case, and because the Plaintiff's evidence was clearly sufficient to support a verdict on criminal conversation and to warrant an instruction thereon, and any conflict in the evidence and the creditability of the witnesses were matters for the jury.

(8) The Court erred in the second trial in striking from Plaintiff's Instruction P-1 the fourth paragraph thereof which reads as follows: "the Court further instructs the jury that damages recoverable in this case under Count Three for criminal conversation if the jury believes that the Plaintiff is entitled to recover on either or both of these counts, are the same two kinds (1) actual or compensatory damages or (2) exemplary or punitive damages, as explained hereinabove, except that if the jury believes that the Defendant Hayden committed an act or acts of criminal conversation with Mrs. Margaret C. Eubank, then bad motive, wantoness and recklessness are to be presumed and exemplary or punitive damages may be awarded for the act or acts of criminal conversation without actual proof of said bad motive, recklessness or wantoness" and refusing to give the said instruction as offered because its refusal to give said instruction as offered and striking the fourth paragraph thereof was based on its erroneous ruling in striking the Plaintiff's page 96 } evidence as criminal conversation, which ruling was contrary to the law and the evidence of this case, and because the Plaintiff's evidence was clearly sufficient to support a verdict on criminal conversation and any conflict in the evidence and the creditability of the witnesses were matters for the jury.

(9) The Court erred in the second trial of the case in striking from Plaintiff's Instruction P-1 the words "are of two kinds" in the first paragraph thereof following the word "count" and preceding the number "(1)"; in striking therefrom the words "and (2) exemplary or punitive damages" in the first paragraph after the words "compensatory damages" and in striking the third paragraph thereof which reads as follows: "exemplary or punitive damages are something in addition to full compensation, not given as the Plaintiff's due, but given rather with a view to the enormity of the offense, to punish the Defendant and thus make an example of him so that others may be deterred from committing similar offenses. Exemplary or punitive damages are given only where the wrongful act is done with a bad motive, or is characterized by circumstances of aggravation, or in a manner so wanton or reckless as to manifest a wilful disregard of the rights of others" because exemplary dam-

ages may be awarded for alienation of affections in a proper case and the evidence herein would have supported such exemplary damages and because this action by the Court was contrary to the law and the evidence of the case.

(10) The Court erred in the second trial of the case in striking the words "and exemplary or punitive" from Plaintiff's Instruction P-3 following the word "compensatory" therein and refusing to give the said instruction as offered because exemplary or punitive damages may be awarded for alienation of affections in a proper case and the evidence herein would have supported such damages and because this action by the Court was contrary to the

page 97 } law and the evidence of the case.

(11) The Court erred in the second trial of the case in striking the words "and for criminal conversation" from Plaintiff's Instruction P-6 following the word "affection" therein, and in refusing to give said instruction as offered because its refusal to give said instruction was based on its erroneous ruling in striking the Plaintiff's evidence as to criminal conversation, which ruling was contrary to the law and the evidence of this case, and because the Plaintiff's evidence was clearly sufficient to support a verdict on criminal conversation and to warrant an instruction thereon and any conflict in the evidence and the creditability of the witnesses were matters for the jury.

(12) The Court erred in the second trial of the case in giving Defendant's Instruction D-6 as offered because the instruction was misleading and it should have been changed and the jury clearly instructed that the Defendant's actions need not have been the sole cause of the alienation of affections and because the Court in giving said instruction held that the Defendant's actions must be the sole cause of said alienation of affections as set forth in the record.

(13) The Court erred in the second trial in overruling the Plaintiff's motion to set aside the verdict and award to the Plaintiff a new trial and in entering judgment on the jury's verdict for the Defendant, because the said verdict was contrary to the law and evidence in the case.

It is requested that yon proceed to make up the record in this cause in accordance with Rule 5:1, Section 5 of the Rules of the Supreme Court of Appeals of Virginia.

JAMES T. EUBANK, Plaintiff
By GEORGE C. RAWLINGS, JR.
Of Counsel.

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page S-1 }

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## STATEMENT OF FACTS AND TESTIMONY TRIAL HELD ON DECEMBER 22, 1958.

The first trial in this case was held on December 22, 1958. Upon motion by counsel for the Defendant, the Court struck out the second count of the Plaintiff's Notice of Motion for Judgment on the grounds that it was repetition. The counsel for the Plaintiff objected upon the ground that each count in the Notice of Motion set forth a distinct cause of action, that is to say, Count One charged alienation of affections; Count Two charged criminal conversation and Count Three charged criminal conversation aggrevated by alienation of affections. An exception to the Court's ruling was noted by counsel for the Plaintiff.

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page S-2 } James T. Eubank and Margaret Louise Covington, who are members of the white race, were married on October 1, 1936, in Caroline County, Virginia. From the date of their marriage until March 23, 1958 they lived together as husband and wife in Caroline County. Three children were born of their marriage; namely, James T. Eubank, Jr., age 21; William Herman Eubank, age 18; and George Lee Eubank, age 16. The parties lived near Corbin, Virginia, on Route #608, which is the road leading from Route #2 to Summit, Virginia. Mr. and Mrs. George Boulware lived 200 feet west of the Eubank home, and Mr. and Mrs. Lewis Bruce lived in a house 250 feet west of the Eubank home. The two youngest sons, William Herman Eubank and George Lee Eubank, lived at home with their parents.

On March 23, 1958, Mrs. Margaret Eubank left the Eubank home, taking certain of her personal belongings, and to the date of the trial had not returned home, nor did the Plaintiff or his sons know where Mrs. Eubank was living.

On August 23, 1958, the Circuit Court of Caroline County awarded James T. Eubank a divorce from the bonds of matrimony from Margaret Covington Eubank.

James T. Eubank was an operator at the American Viscose Corporation in Fredericksburg, Virginia, and about six years prior to March 23, 1958, the Plaintiff and the Defendant,

*Dr. George Reynolds—James T. Eubank.*

James William Hayden, became acquainted while working together at the Plant. During the intervening years, Mr. and Mrs. Eubank saw a great deal of Hayden. Eubank invited Hayden to his home on the first occasion that he went there and from that time on Eubank consistently invited Hayden to his home on numerous and sundry occasions and to take him to the beach and to Washington, D. C. and other places, even though Eubank stated that he knew that Hayden page S-3 } and his wife were getting friendly with each other and that he did not take his wife to the beach unless Hayden was along; and that after his wife left him and he was advised by his two sons that they had heard Hayden in the room with their mother at eleven o'clock at night, take off his shoes and get in bed with their mother, he then went to Hayden and had him take him to Washington, D. C. to try to find his wife; that Hayden visited in the Eubank home on various and sundry occasions when Eubank was present and also on various and sundry occasions when he was not present; that Eubank took cake to Hayden while he was working up at the Sylvania Plant and advised him that his wife sent him the cake.

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## DR. GEORGE REYNOLDS,

Dr. George Reynolds, a Bowling Green physician, testified that he performed a vasectomy on James E. Eubank on November 19, 1942, which involved making an incision on each side of the upper end of the scrotum, removing a section of the male cords and tying the same with silk thread; that the object of the operation was to sterilize James T. Eubank that he considered the operation successful, although he stated that no absolute statement could be made in medicine, and there were cases where a child had been begotten after the tubes had been tied; that he considered the chances less than one in five thousand that Eubank could become the father of a child; and that the operation was performed after written permission was given by Mr. and Mrs. Eubank.

## JAMES T. EUBANK,

The Plaintiff, James T. Eubank, testified on direct examination that prior to the day that his wife left home he loved her and gave her no reason for leaving home; that he was

very much upset when she left; that he provided for her and gave her everything that she needed; that he tried to locate her in Washington and other places and after she left but was unable to find her; that at the time she left, Mrs. Eubank was large and he thought that she was pregnant; that page S-4 } since he had been operated on some years before he was not capable of being a father and that her pregnancy could not have been caused by him; that he knew she had left because she had treated him wrong; that he lost his love for her and employed an attorney for the purpose of obtaining a divorce which was granted to him; that he did not know where Mrs. Eubank was, but he had seen her and James William Hayden together in a car twice since she left—both times by a gravel pit near the Golf Course; that he had a bank account in the Farmers & Merchants State Bank containing about $5,000.00 which money was accumulated from his earnings since Mrs. Eubank had no income; that he deposited his money in a joint banking account with his wife, Mrs. Eubank, and that she drew on said funds for the purpose of paying bills and regular expenses; that on May 21, 1958, Mrs. Eubank drew a check on the account in the amount of $3,000.00 which cancelled check was offered by the Plaintiff as Exhibit P-2 and that Mrs. Eubank was not authorized to withdraw $3,000.00 for her own use.

The Defendant's counsel objected to the introduction of the evidence concerning the checking account and the withdrawal of the $3,000.00 and to the introduction of the cancelled check for $3,000.00 on the grounds that no connection between the withdrawal of the money and the Defendant had been made, nor had it been shown that the Defendant received any of the money, but the evidence was admitted by the Court, to which ruling of the Court the counsel for the Defendant excepted.

The Plaintiff testified that Hayden had first come to the Eubank home at his, Eubank's request to help with the killing of hogs; that Hayden had returned on many occasions when the Plaintiff was at home, sometimes at his, Eubank's invitation, and sometimes at his own.

The Plaintiff further testified that he became page S-5 } worried about Hayden's attention to his wife, and on occasions told him to stay away from the house; that once during the fall before his wife left he told Hayden to stay away and another time when he, Eubank, was going on the eleven o'clock shift he went back and told Hayden to go home and Hayden finally left; that he was suing for

*James T. Eubank.*

damages in the sum of $15,000.00, but claimed his damages were more than $50,000.00.

Upon cross examination Eubank testified that he had intercourse with his wife the night before she left home, and that he had had intercourse over the past year regularly, and also two days before she left, although he thought she was getting big and that Hayden was the father of her child, and although he knew that she had not menstruated for sixty to ninety days before she left; that he and Hayden were good friends and Hayden had come to his home at Eubank's invitation and Hayden never took Mrs. Eubank to the beach unless the Plaintiff went along; that he knew that they were getting friendly and went to Hayden and told him to leave his wife alone; that the Plaintiff, Hayden and Mrs. Eubank went to the beach in Hayden's car the week before she left home; that the Plaintiff and his wife drove to Hayden's place and asked him to go to the beach with them; that Hayden was at Eubank's home frequently; that he, Eubank, knew one Herman Hall who talked to him about Eubank taking cake to the plant to Hayden from Mrs. Eubank that Hall asked the Plaintiff what happened to him and his wife and that Hall stated to the Plaintiff that it had been going on for a long time and that it was as much the Plaintiff's fault as it was his wife's fault; and Eubank also testified that his love for his wife was dead when she left.

The counsel for the Defendant introduced a letter from James Eubank to Mrs. Margaret Eubank dated April 15, 1958, marked Exhibit D-1, which the Plaintiff admitted having sent. Counsel for the Defendant further introduced a letter dated April 2, 1958, from George C. Rawlings, Jr., to Mrs. Sally Covington which the Plaintiff admitted page S-6 } authorizing. The Plaintiff further testified that he did not remember when he employed his attorney to get a divorce; that he would have taken his wife back several weeks after she left, but when she refused to come back he decided to go ahead with the divorce, since she had gone off with someone else and was carrying another man's child; that he did not expect to take her back after the divorce; that he had started seeing another woman six weeks prior to the trial; that after the divorce he had presented her a ring and expected to marry her sometime during the next year; that he, the Plaintiff, had never hit or abused his wife and that he did not threaten to leave home or threaten her in the presence of her mother, Mrs. Sally Covington; that he gave his wife a right to check on the joint account for regular

expenses; that the last place they bought was in both names, but the home place was in his name.

Eubank further testified on cross examination that he came home from work on the 23rd of March, 1959 and found his wife gone; that the next day he talked to his two sons, William Herman Eubank and George L. Eubank, and they advised him that they had heard Hayden go in their mother's room at eleven o'clock at night, that they heard him take off his shoes and get in bed and heard the bed screak, and that three days later Eubank went to Hayden, the Defendant, and asked him to take him to Washington, D. C. to try to find his wife, and that he and Hayden and his son went to Washington to the home of Mrs. Covington, his wife's mother to try to locate his wife, and that he (Eubank) never accused Hayden of taking his wife away or alienating her affections until he instituted this suit.

GEORGE K. BOULWARE,

George K. Boulware who was employed by the American Viscose Corporation and is a brother-in-law of James Eubank, having married his sister, testified that he knew Mrs. Eubank; that she had not been home since March 23, 1958; that he lived 200 feet from the Eubank home; that on that day he saw her walking down the road with a suitcase in page S-7 } her hand; that he knew James William Hayden, but did not see him on the day Mrs. Eubank left; that he had seen Hayden go to the Eubank home numerous times; that he knew Mr. Eubank was not at home on those occasions because he, Boulware, and Eubank worked separate shifts; that he had seen Hayden in the yard and in the house; that he recalled one time when he and Mr. Eubank were working the same shift and Eubank started to go to work while Hayden was at the Eubank home; that Eubank went back to his home and Hayden then left, but he did not know what Hayden said or what was said to Hayden and did not know when it was when the event took place, but it was quite a few years ago; that he never heard any cross words between Mr. and Mrs. Eubank, though he saw them every day; that he never heard an argument between them; that she took care of the finances and got everything she wanted. Upon cross examination Mr. Boulware stated that he did not know what went on in the house; that he and Eubank had not worked on the same shift for the last five years; that on the occasion he referred to, Eubank went back to the house to get Hayden

away from there; that at that time he, Boulware, told Eubank that people in the community were talking about it and he ought to run Hayden away from the house; that he had seen Mrs. Eubank and Hayden riding around in Hayden's car, but he had not seen them at the beach.

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page S-8 } LEWIS B. BRUCE,

Lewis B. Bruce, who worked for the American Viscose Corporation, and lives two houses from the Eubank house, testified that he knew the Eubanks well; that they were not at the time of the trial living together; that Mrs. Eubank left in March, 1958, and had not been back home; that James Eubank now lives at the Eubank home; that he had seen the Eubanks together and that Eubank was a perfect gentleman; that he knew James William Hayden and had seen him sometimes at his garage and sometimes at the Eubank home; that he had seen Hayden at the Eubank home sometimes when Eubank was working and sometimes when he was not working; that he had seen Hayden come from the Eubank house on a number of occasions; that Hayden would sometimes come to the back and that he saw him park his car in the back on the far side of the Bruce home and walk to the house some five or six times; that he did not tell Eubank anything about what he had seen before she left or after she left, because it did not concern him and that he did not see anything improper between Mrs. Eubank and Hayden. Upon cross examination, Bruce testified that he had seen Hayden come to the Eubank home when Eubank was at home and when he was not there; that when Eubank was home Hayden would park in front of the house and when Eubank was away from home Hayden parked in the back and came in through the back way; that so far as he knew Hayden was a good friend of the family.

MRS. GEORGE BOULWARE,

Mrs. George Boulware, who is James Eubank's sister and wife of George Boulware and lives next door to the Eubank home, testified that she knew Mrs. Eubank was not at home; that she did not know where she was; that Mrs. Eubank left on a Sunday morning about eight or nine o'clock; that she, Mrs. Boulware, saw her leave with a suitcase in her hand

and a hat on her head; that she knew James William Hayden and saw him on the same day that Mrs. Eubank left home; that he drove down the road in his car going in the page S-9 } same direction as Mrs. Eubank who was walking; that when Hayden came by Mrs. Eubank was then out of sight; that she had seen Hayden at the Eubank home on many occasions; that he came in his car and parked in the road sometimes and sometimes he went in the front door and sometimes he went in the back way; that most of the time that Hayden came Eubank was not at home; that she had never heard Eubank tell Hayden anything; that she had never seen Eubank strike his wife nor had she heard an argument between them and that so far as she knew theirs was a perfect marriage. Upon cross examination Mrs. Boulware testified that she did not know that Mrs. Eubank was leaving for good on the day she left; that Hayden was driving a tan Chevrolet convertible; that she, Mrs. Boulware, did not see them together that day; that she visited the Eubank home on a number of occasions, but she did not know what went on when she was not there; that she had lived in the Eubank home some ten years before Mrs. Eubank left home but not since that time.

## THOMAS JACKSON,

Thomas Jackson, colored, testified that he lived on State Highway No. #2 and is an electrician by trade; that he had known James Eubank and his wife for some time and had known Eubank since he was a boy; that he knew James William Hayden; that he had been to Eubank's home off and on; that Eubank sent for him to come to his place to fix a light three or four times in the last year; that one time he saw James William Hayden there about 7:30 or 8:00 in the morning; that he was at the table eating alone; that Mrs. Eubank was there and let him in and told him what to do; that he did not see Mr. Eubank, although Mr. Eubank could have been there asleep and that he did all of his work in the kitchen where Mrs. Eubank and Hayden were.

## WILLIAM HERMAN EUBANK,

William Herman Eubank, age eighteen, and one of the sons of James and Margaret Eubank, testified that his page S-10 } mother was not living at home on the date of the trial; that he did not know where she was; that

*George Lee Eubank.*

she had left in March and had not been back since; that he did not know what efforts his father had made to find her; that when his mother left home she looked like she was pregnant; that he knew James William Hayden but did not know how long he had known him; that Hayden had been to his home sometimes when his father was there and sometimes when his father was working; that he did not see him every time he came; that sometimes he came at night; that he heard Hayden in his mother's room one night after 11:30 p. m.; that he heard him take off his shoes and get into bed; that he did not see him when he came in but heard and recognized his voice; that his father was working; that he, William Herman Eubank, was in his bedroom at the time; that both his room and his mother's room were on the same side of the house—hers in front and his in back; that nobody was with him; that he did not tell his father about this; that his father treated his mother all right and that if his mother wanted his father to do anything he did it. Upon cross examination, William Herman Eubank testified that his mother on the occasion in question when he heard Hayden in his mother's room, had her door locked; that he called her but could not open the door; that he was afraid to tell his father because Hayden had a gun; that he did not know of anything improper happening in the room; that his father invited Hayden to go to the beach with him and his mother; that it was during the month of February that he heard Hayden in his mother's room and that she left in March; that he did not know if his mother was pregnant but that she looked so; that he did not tell his father about the incident at the time but told him the second day after his mother left; and that his father got Hayden to take him to Washington to look for his mother three days after he had told his father that he had heard Hayden take off his shoes and get in bed with his mother, and further that nobody was in the room with him page S-11 } when he heard Hayden in the room with his mother and knew of no other such occasions that took place except the one in February.

GEORGE LEE EUBANK,

George Lee Eubank, age sixteen, and the son of James and Margaret Eubank, testified that his mother left home about nine months before the trial; that he did not know where she was: that his father got a detective to try to find his mother; that he did not notice anything unusual about her

appearance but that she looked bigger; that after his father left for work Hayden would come to the home; that on one occasion when he and his brother were in the bed and his father had gone to work Hayden came and went to bed with his mother; that he heard Hayden pull off his shoes, get into bed and heard the bed screech; that he could tell his voice and was sure it was Hayden; that he heard this about two weeks before his mother left; that Hayden came to the Eubank home about two weeks before that at night when he, George Lee Eubank, heard the same thing; that he did not tell his father because he was afraid someone might get hurt; that he did not know how long Hayden stayed because he, George Lee Eubank, went to sleep.

Upon cross examination, George Lee Eubank, stated that on the occasion in question he went to sleep because he was played out; that his brother was in bed and did not get up; that he told his father something about it the next day after his mother left; that he and his brother were asleep in bed when his mother left home; that three days after she left his father got Hayden to drive to Washington to look for his mother; that he could not explain why his father did that; that on the night he heard his mother and Hayden his brother did not go to the door and that his mother was up doing her house work the next morning.

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ERNEST E. SALE,

Ernest E. Sale of Woodford, Virginia, and an operator at the American Viscose Corporation testified for the Defendant that he knew James Eubank and James William Hayden all of his life; that he worked with them at the Plant; that Eubank worked at the Plant at the time of the trial, but Hayden had stopped working there; that when Hayden and Eubank were working there together, he, Sale, saw them often at lunch time; that Eubank brought Hayden cake and told him that his wife had sent it to him; that he gave the cake to Hayden and never gave him, Sale, cake; that he had seen Hayden and Eubank together a few times;

that Eubank brought his wife to Hayden's place; that he, Sale, had seen them, Hayden, Eubank and Mrs. Eubank, go around together; that when he saw them, Mrs. Eubank was in the middle and all three on the front seat; that after Mrs. Eubank left Eubank told him, Sale, that "I guess you have heard Billy ran off with my old lady," that Eubank had told him that he knew it had been going on a number of years and that it was as much his fault as it was Hayden's.

page S-13 } HERMAN HALL,

Herman Hall of Woodford testified for the Defendant that he worked at the American Viscose Corporation six years before and was present when Eubank and Hayden were employed there; that they ate their lunch together on a number of occasions; that Eubank brought cake from home to Hayden and told him his wife sent it, but never gave him, Hall, any cake; that he, Hall, went by Hayden's place in November, 1957, and was present when Eubank asked Hayden to stop work early and take him and his wife to the beach.

MRS. SALLY COVINGTON,

Mrs. Sally Covington of C Street, N. W., Washington, D. C. testified for the Defendant that Mrs. Margaret Eubank was her only daughter; that Mr. James Eubank and her daughter were married; that she had known James Eubank for twenty years and had visited his home the last time two weeks before Mrs. Eubank left; that she heard Eubank curse his wife back in 1951 and there was a great change after that; that at Christmas of 1951 her daughter had a black eye; that she had seen James Eubank hit his wife in her cook room in Washington; that at the time Eubank told Mrs. Covington's son to go get some beer but she did not remember the date which was about two years ago; that Eubank tried to get his young son to hit his wife; that she, Mrs. Covington, saw Eubank strike his wife in her house; that Eubank told his wife to get out and she, Mrs. Covington, had heard him say he would kill his wife; that she, Mrs. Covington, was present in the Eubank home and was in the boys' bedroom on one occasion, and Eubank was in the kitchen, when Eubank said "I am going to kill her yet;" that she, Mrs. Covington, thought a lot of Mr. Eubank so long as he treated his wife right and since 1951 she did not think Eubank treated his wife right.

THOMAS HAYDEN,

Thomas Hayden of Spotsylvania testified for the Defendant that he had seen Hayden and Eubank together with Mrs. Eubank; that he did not see them in the car, but saw them at the auto race track and theater in Fredericksburg about two years before; that in the early part of 1958, page S-14 } Eubank and his wife came to the Hayden shop and talked to Hayden. The Defendant rested his case.

The Court gave the following instructions offered by the Plaintiff: P-1; P-3; P-6; P-8; and P-9 and P-4 were given as changed. The following instructions offered by the Defendant were given: D-1; D-2; D-3; D-4; D-5; D-6; D-7; and D-9. Instruction P-7 offered by the Plaintiff and D-8 offered by the Defendant were refused.

After having been instructed by the Court the jury deliberated for some time and then returned a verdict as follows: "We, the jury, on the issue joined find for the Plaintiff against the Defendant and assess his damages in the sum of $3,-500.00." The Defendant by his counsel then moved the Court to set aside the verdict as being contrary to the law and evidence; that the Court erred in permitting the introduction of a check in the sum of $3,000.00 which was drawn by the Plaintiff's wife from their joint account and in which the evidence failed to disclose the Defendant had any knowledge of said transaction or received any benefit therefrom; that the verdict was based upon perjured testimony of the Plaintiff and his sons. The motion was taken under advisement by the Court and continued for the presentation of memoranda by counsel. Memoranda was filed by counsel for both parties and the motion was argued some months later. On December 8, 1959, the Court entered an order setting aside the said verdict returned by the jury at the trial on December 22, 1958, to which ruling the Plaintiff by his counsel excepted on the grounds that it was contrary to the law and evidence in the case; that no error had been committed by the Court in the trial; and that all conflicts in the evidence and creditability of the witnesses had been resolved by the jury's verdict.

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page 2 }

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*Dr. G. A. Reynolds.*

Mr. Beazley: If your Honor please, in his pleadings he has alleged the withdrawal of $300.00 from the joint bank account—

Mr. Rawlings: $3,000.00.

Mr. Beazley: And he has this check, also, in the file, that was put in as evidence the last time, and your Honor has ruled it is improper in your written opinion.

Mr. Rawlings: That all depends, the way I read his opinion, on the evidence in the case, and we won't know until the evidence is in whether it is proper or not.

The Court: Let me see that opinion.

Well, until you prove adultery I am going to exclude the check.

Mr. Rawlings: I am operating on that basis. When we get to that point we will have another conference and see what you decide.

page 3 } Mr. Beazley: If the adultery is proved still the check is not admissible, unless he shows the defendant got part of it and had knowledge of it and connived with Mrs. Eubank.

The Court: That is right; he has to prove he got the money.

Mr. Rawlings: I humbly say you are both wrong.

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page 8 } DR. G. A. REYNOLDS,

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

DIRECT EXAMINATION.

By Mr. Rawlings:

Q. State your name and residence, please, sir.

A. George A. Reynolds, Bowling Green.

Q. And what is your occupation?

A. Physician.

Q. Are you acquainted with James T. Eubank?

A. Yes, I am.

Mr. Beazley: Excuse me. Now, if your Honor please, I assume that this testimony is predicated upon the assumption that Mr. Rawlings is going to prove that this woman was pregnant; if she wasn't or if he doesn't prove that, then this testimony is not admissible.

*Dr. G. A. Reynolds.*

The Court: I don't know what he is going to prove.

Mr. Rawlings: We will introduce it at this time to be tied in with later evidence.

Mr. Beazley: I want to put him on notice that I will insist that this testimony be stricken unless he can prove
page 9 } that Mrs. Eubank was pregnant when she left there the 23rd of March.

Mr. Rawlings: I believe we can prove that, sir.

The Court: All right.

Q. You say you were acquainted with Mr. Eubank?

A. Yes, sir, very well.

Q. Is he now or has he ever been a patient of yours?

A. He has on a great many or quite a few occasions.

Q. Did you at any time perform any type of operation on him?

A. Yes, I did a minor operation on him.

Q. Will you explain to the jury what it was and when you did it?

A. On November 19, 1942, he had a small or rather a minor operation, which we call a vasectomy, the purpose of which is to sterilize a man; it was requested by Mr. Eubank and he signed a permit, which states it plainly, which I will just read that, if it is all right.

Mr. Beazley: I don't know about that, sir.

Mr. Rawlings: You can look at it.

Mr. Beazley: Your Honor had better examine it before you let that in; that is hearsay evidence as to what Mr. Eubank told him and authorized him to do.
page 10 } Mr. *Rawlins*: He is explaining what he did and operation he performed.

The Court: I think the statement can come in.

Q. Mr. Reynolds, Mr. Eubanks signed an authorization authorizing you to do this?

A. Yes, sir, and his wife signed it.

Q. His wife signed it too?

A. Yes, sir.

Q. Explain to the jury what is involved in this operation and what you do.

A. A small skin incision is made on each side at the upper end of the scrotum under local anesthesia and the male cord on each side is located and I took a double silk suture and tied up *on* and then the other, and then I cut each one and

then cut out a small section of each one and in turn close up the incision. That is simply what it amounts to; it is a very thorough way of accomplishing a permanent sterilization.

Q. Was the operation successful in Mr. Eubanks' case?

A. Very successful, I think.

Mr. Rawlings: All right, that is all.

## CROSS EXAMINATION.

By Mr. Beazley:

page 11 } Q. Doctor, have you examined him since that time to ascertain whether or not it was successful?

A. Do you mean have I made a sperm test?

Q. Yes, sir.

A. No, I haven't made a sperm test.

Q. Now, it is possible that he could have gotten a child after that, isn't it?

A. Well, I will say it is practically impossible to have, and explain that in this way: We seldom like to say never in medicine, but for all practical purposes I imply that he could not; it would have never been possible for him to become potent or produce pregnancy again.

Q. History *shoes* that this has happened, doesn't it?

A. Well, as I have said, there are supposedly reports that refute almost anything in medicine.

Q. And there are verified—

Mr. Rawlings: Let the doctor finish.

Mr. Beazley: I thought he had finished.

A. As I say there are sources, that it could be called hearsay in medicine, as to what has happened after such procedures, so, we hesitate to say never, but I will say this: Knowing what I did and how I did it, that I used silk suture and removed a section from the cord, as far as I am concerned it is absolutely impossible for him to ever regain his ability, and, of course, I couldn't give you statistics on a thing like that,

page 12 } but I don't think it would happen once in ten thousand times.

Q. Didn't you testify in this case before, Doctor?

Mr. Rawlings: Now, I object to him talking about what

*Dr. G. A. Reynolds.*

happened before. I was under the impression this was a new trial.

The Court: No, he is on cross examination, and can be cross examined about his testimony in another trial.

Mr. Rawlings: Well, if we are going to talk about that I think we ought to tell the jury all that happened.

The Court: No, sir, he is a witness.

Mr. Rawlings: I know that, but I will take an exception to your Honor's ruling.

Q. You testified in the Court here, did you not?

A. May I tell you what I testified to?

Q. No, I am going to ask you about that. Didn't you testified that it was possible and the chances were one to five thousand?

A. I did say that, and I also said I had just as soon say from one to ten thousband.

Q. There is always a chance, isn't there?

A. I have explained that. You might say that there is a chance based on vague unconfirmed reports, usually of this, that and the other, but for all practical purposes I page 13 } don't think there is a chance.

Q. You don't know what happened to those tubes when the silk rotted, do you?

A. Silk doesn't rot.

Q. It breaks?

A. No, it just forms a scar and is permanent; that is why we use it.

Q. You want to change that from one to 5,000 to one to 10,000?

A. At that time I said I would just as soon say 1 to 10,000. I don't consider that I have changed my statement at all.

Q. I will grant you that before you said it was possible and said now it is possible. You didn't make a test—a smear test—to determine whether or not he could?

A. I never had any reason or occasion to make the test.

Mr. Beazley: All right, sir.

A. There was no request from the pateint or his wife that I ever make a test.

## RE-DIRECT EXAMINATION.

By Mr. Rawlings:

Q. Dr. Reynolds, you have testified that this operation for

all practical purposes would sterilize Mr. Eubank.
page 14 } Would it have had any effect on his ability to engage in marital relations?

A. No, it does not affect ones sexual ability.

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THOMAS JACKSON,

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

DIRECT EXAMINATION.

By Mr. Rawlings:

Q. Please state your name and where you live?

A. My name is Thomas Jackson; my Post Office is Woodford, Virginia.

Q. Are you acquainted with James T. Eubank and his family?

A. Yes, sir, I am.

Q. How far do you live from them?

A. I live about a couple of miles; back of me it wouldn't be a mile.

Q. What kind of work do you do?

A. I am an electrician.

Q. Have you ever done any work for Mr. Eubank?

A. Yes, I have.

Q. Are you acquainted with James William Hayden?

A. Yes, sir.

Q. Do you know him when you see him?
page 15 } A. Yes, I know him when I see him.

Q. In doing work for Mr. Eubank have you ever been to his home?

A. Yes, sir, I have been to his home.

Q. Have you ever been to Mr. Eubank's home when Mr. Hayden was there?

A. Yes, I was there when Mr. Hayden was there.

Q. Who else was there when you were there and Mr. Hayden was there?

A. Mr. Eubank's wife.

Q. When was this? What time of day was it?

A. This was the early part of the night, just about dark good.

Q. And where was Mr. Eubank?

A. He was sitting down at the table eating.

*Thomas Jackson.*

Q. Mr. Eubanks.
Q. Mr. Eubanks. His wife said he was at work.

Mr. Beazley: I object to that.
The Court: That is hearsay. Strike that.

Q. Who showed you what work to do?
A. She did.
Q. And what were they doing when you arrived?
A. Mr. Hayden was sitting down at the table eating; it seemed like he was eating dinner or supper or what; I don't know what she was doing, she met me at the door.
page 16 } Q. How long were you there?
A. I don't think I was there over a half an hour.
Q. While you were there where did you go in the house?
A. I don't think I went any further than the first room: I am not sure.
Q. What is the first room?
A. That is the kitchen, and that is where she was and he was.
Q. Did Mr. Hayden leave while you were there?
A. No, he didn't.
Q. At any time while you were did you see Mr. James Eubank?
A. No, I didn't see him at all.
Q. Now, do you recall approximately when this was?
A. It has been so long I just cannot tell the dates now, but it was during the time him and his wife was at home and he was married and everything; I don't recall the dates.

Mr. Rawlings: Thank you, sir.

CROSS EXAMINATION.

By Mr. Beazley:
Q. You don't know what year it was, either, do you?
A. No, I don't; I have been here before, but I never set it down.
Q. You didn't see anything improper about what
page 17 } was going on there, did you?
A. No, I didn't.
Q. So far as you could tell Mr. Hayden was acting properly?
A. Yes, he was acting all right as far as I saw.

*George Lee Eubank.*

Q. He didn't try to hide or anything of that kind, did he?
A. No, he didn't try to hide.
Q. He was sitting at the table when you walked in?
A. Yes, sir.
Q. And he continued to sit there?
A. That is true.
Q. You don't know who else was in the house, do you?
A. No, I don't know.
Q. You don't know whether Mr. Hayden had been invited there by Mr. Eubank or Mrs. Eubank or why he came there, do you?
A. I don't know why he was there.

* * * * *

GEORGE LEE EUBANK,
another witness for the plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

page 18 } By Mr. Rawlings:
Q. Please tell us your name and age?
A. George Eubank, seventeen.
Q. What is your relation to James T. Eubank and Margaret Eubank?
A. They are my father and mother.
Q. Is your mother living at home now?
A. No, sir.
Q. Are you living at your father's home?
A. Yes, sir.
Q. When did your mother leave home?
A. Two years this March just past.
Q. Has she been back home since then?
A. No, sir.
Q. Do you know where she is now?
A. No, I don't
Q. When your mother left home did she take anything with her?
A. Yes, she did.
Q. What did she take?
A. A vacuum cleaner, a fan and hot plate.
Q. Did she take her clothes with her?
A. Yes, she took her clothes, too.

*George Lee Eubank.*

Q. During the time that your mother and father lived together up to the time she left did your father at
page 19 } any time mistreat or abuse your mother?
A. No, sir.
Q. Did he support her and take care of her?

Mr. Beazley: I object to those questions; they are leading.
The Court: Yes, they are leading.
Mr. *Rawlins*: Your Honor, I don't believe they are leading.
The Court: Yes, you asked for an answer and you are telling him what the answer is.

Q. How did your father treat your mother?
A. He treated her nice.
Q. Did your mother work?
A. Around the house she did, not out.
Q. Did your father give your mother, to your knowledge, any reason for leaving home?

Mr. Beazley: I object.
The Court: Any reason for what?
Mr. Rawlings: Leaving home.
The Court: No, that doesn't give him the answer, that is all right.

Q. After your Mother left home what, if anything, did your father do to locate her?
A. He went to Washington and tried to find her and got a detective to look for her.
page 20 } Q. At the time your mother left could you tell the Court what her appearance was?
A. She was pregnant.
Q. She was what?
A. Pregnant.
Q. How did you tell that?
A. She was big in her stomach.
Q. Do you know James William Hayden?
A. Yes, I do.
Q. How long have you known him?
A. About five or six years, I reckon.
Q. During the time that you knew him prior to the time that your mother left, did he at any time come to your home?
A. Yes, he did.

*George Lee Eubank.*

Q. Who was there when he came to your home?

A. My father was there sometimes when he come to visit, and he come there at night when my father had gone to work.

Q. Can you tell the jury and Court about the times that he came there at night?

A. He come there when I was in the bed, I heard him come through the front door, take his shoes off and get in the bed, I heard him talking.

Q. He got in what bed?

A. My mother's bed.

Q. Where was your mother at that time?

page 21 } A. She was in the bed.

Q. How do you know it was James Hayden?

A. Because I could recognize his voice.

Q. How many rooms are there in your house?

A. Four.

Q. What room did you stay in?

A. In my bed room.

Q. Where was your bed room in the house? What part of the house was it in?

A. It is the back of the house.

Q. Where was your mother's bed room?

A. The front of the house.

Q. What is between those two bed rooms?

A. Nothing but a wall.

Q. What time of night was it that you heard Mr. Hayden in that room?

A. After 11 o'clock.

Q. Where was your father at that time?

A. He was gone to work.

Q. Do you know how long Hayden was there at that time?

A. No, I don't, I went to sleep before he left.

Q. Do you recall how long that was before the time that your mother left?

A. About a month, the last time I heard him.

Q. You said the last time. Can you tell us about

page 22 } any other time you heard James Hayden there?

A. Yes, I heard him come about three months before she left.

Q. What did you hear at that time?

A. I heard the bed screech and him come in.

Q. How did you know it was Hayden?

A. I heard his voice.

*George Lee Eubank.*

Q. On the other time you heard him where was your father?

A. He was at work.

Q. What time of the day or night did you hear him the other time?

A. It was a little after 11 o'clock.

Q. Did you hear him on any other occasion in the front room?

A. No, I didn't.

Q. Can you tell the Court why you didn't hear him on other occasions?

Mr. Beazley: Your Honor, I object; he just told him that he didn't hear him on any other occasion.

The Court: He said he didn't hear him.

Mr. Beazley: In the first place it is a leading question, and in the second place it is an improper question.

page 23 } Mr. Rawlings: Mr. Beazley has got leading questions on the brain. When he gets to conducting his examination he is going to be doing exactly the same thing.

The Court: He said he didn't hear him on any other occasion. If he didn't hear him then he didn't hear him.

Q. Who stays in the room with you?

A. My brother.

Q. Was he present with you on either of these occasions?

A. I heard him one time when he was not there.

Q. What was your brother doing?

A. He was in the bed.

Q. Did you tell your father about this?

A. No, I didn't.

Q. At any time did you tell him?

A. After she left I told him.

Q. Can you tell the Court how your father acted when your mother left?

A. He was all upset.

Q. How did your mother and father get along before she left?

A. All right.

Q. You said that your father was upset. What page 24 } did he do that made you feel he was upset?

A. He started crying the first night she left, the first night she was gone.

*George Lee Eubank.*

Mr. Rawlings: Your witness, Mr. Beazley.

CROSS EXAMINATION.

By Mr. Beazley:

Q. Mr. Eubank, you said your brother was in the room with you on one occasion when you heard Mr. Hayden in the next room. What brother is that?

A. William H. Eubank.

Q. Does he live there?

A. Yes, he does.

Q. Now, that was the only time that he was there when you heard it?

A. That is right.

Q. And you only heard it on two occasions?

A. Yes.

Q. One time was about a month before your mother left and the other time was about two months, is that correct?

A. About three months.

Q. About three months. Now, when you heard Mr. Hayden in there with your mother, what did you hear?

A. I hear the bed screeching.

Q. Did you hear anything else?

A. I heard them talking, but I couldn't under-
page 25 } stand what they said.

Q. Did you hear anything else?

A. No, I didn't.

Q. That is all you heard?

A. I heard him come in the house, take his shoes off and get in the bed.

Q. How do you know he was taking off his shoes?

A. She had already took hers off.

Q. Did you see her go to bed?

A. She didn't have any shoes on when she left out the kitchen.

Q. How do you know she didn't turn over and get out of bed and move a chair?

A. I can tell the sound of a chair; that won't any chair.

Q. You were only a few feet from your mother's room, weren't you?

A. That is right.

Q. In the bed?

A. Yes.

Q. And George was in there with you?

A. William.

*George Lee Eubank.*

Q. I mean William was in there with you. Excuse me. Did you know what was going on in there?

A. Yes, I did.

page 26 } Q. And you didn't do anything about it?

A. No, I was scared to go in there.

Q. You were about as large then as you are now, weren't you?

A. Just about.

Q. Did you have a shot gun in the house?

A. Not in my room, I didn't.

Q. Was there a shot gun in the house?

A. Yes, it was.

Q. Where was the shot gun?

A. In her room.

Q. Now, how old is your brother that was in the room with you?

A. Twenty, I think.

Q. He was eighteen at that time, that was about two years ago. He was fully grown?

A. Yes, sir.

Q. How much did he weigh?

A. Me?

Q. How much did you weigh then?

A. About 150 pounds.

Q. How much did your brother weigh?

A. I don't know, about 165.

Q. How tall is he?

A. I don't know, about six feet, I reckon.

page 27 } Q. Both of you were there in the bed?

A. Yes, sir.

Q. In the next room to your mother?

A. Yes, sir.

Q. And you heard a man come in the door, pull *of* his shoes, get in the bed and the bed start to screaching, and you knew what he was doing, he was having intercourse with your mother, you say?

A. Yes, sir.

Q. And you stayed there in the bed and didn't get up, boy?

A. No, I didn't get up.

Q. Did you want him to have intercourse with your mother?

A. No.

Q. Was it satisfactory with you that he would do that?

A. No.

*George Lee Eubank.*

Q. Did you talk to your brother, about it?
A. Yes, I did.
Q. What did you say to him?
A. I said, "Hayden is in the house."
Q. What did he say?
A. He said, "Oh, yes."
Q. But did he do anything about it?
A. It won't nothing we could do.
page 28 } Q. There wasn't but one door between you and your mother, was there?
A. Yes, but he carried a pistol.
Q. How did you know he had a pistol?
A. Because I had seen it in his car.
Q. You didn't know he had a pistol that particular night though, did you?
A. No, I didn't.
Q. Did your brother William get up?
A. No.
Q. You are sure he didn't?
A. No, he didn't get up.
Q. He didn't get up and go to the door?
A. One time he got up.
Q. When was that?
A. That time I forgot.
Q. That time you forgot?
A. He got up and went to the door and the door was locked.
Q. You are sure of that?
A. Yes.
Q. You are sure of that. You know you are on the stand and have taken an oath to tell the truth, don't you?
A. Yes, sir.
Q. And is that the truth? George, I am asking
page 29 } you for the truth.
A. That is the truth.
Q. That your brother got up out of that bed and went to the door?
A. Yes, and the door was locked.
Q. And the door was locked. Did he tell you the door was locked?
A. Yes, sir.
Q. What did he do then?
A. Got back in the bed.
Q. Both of you then went to sleep?
A. Yes, sir.

*George Lee Eubank.*

Q. Was that the month before your mother left or three months before she left?

A. The month before she left.

Q. Now, you are positive that he got up and went to the door and tried the door and the door was locked?

A. That is right.

Q. He then came back and got in the bed and you and he turned over and both of you went to sleep?

A. That is right.

Q. You made no effort to break the door in?

A. I won't going in there.

Q. Mr. Eubank, you testified in this Court at the last hearing, didn't you?

page 30 } A. Yes, sir.

Q. And didn't you testfiy on this stand as follows: "My mother was in the front room, my brother heard Hayden and my mother, he positively didn't go to his mother's room, he didn't leave the room, but turned over and went to sleep." Didn't you testify to that before?

A. I don't remember.

Q. You don't remember it?

A. No, I don't.

Q. Do you deny that you testified to that before?

A. No, I don't deny it.

Q. You don't deny it. Well, why do you remember so vividly now that he got up and before you said that he didn't get up. Can you tell us that?

A. I remember he said the door was locked.

Q. You remember now that he said the door was locked. Do you remember me asking you: Are you sure that your brother didn't get up and go to the room, to which you answered, "I am sure he didn't get up."

Now, isn't it true that you have changed your statement because your brother testified after you did on the stand before that he got up and went to that room and isn't that the reason that now you have changed your story?

A. No, that is not the reason.

Q. And is the statement that you have made

page 31 } now as true as the statement you made before?

A. Yes, sir.

Q. Can you tell me why you testified before that your brother didn't get up and go out and didn't say a word, but turned over and went to sleep and now you come here, that was 12 months earlier than this when your mind was more alert to what had happened—fresh in your mind. Why is it

that you testified at that particular time that he didn't go out and now you come here and tell this Court and jury that he did go out? You know that is perjury, don't you?

A. I didn't go out.

Q. I mean that your brother didn't go out. Tell us why? Tell the jury why?

A. Tell them what?

Mr. Rawlings: Your Honor, I object to this.

The Court: It is cross examination.

Mr. Rawlings: I know, but he has no right to charge this man with perjury.

Mr. Beazley: That is what he has done.

Mr. Rawlings: That is your opinion.

The Court: He has got him on cross examination.

Mr. Rawlings: I know that, but he has no right to charge him with perjury. It is up to the jury and not

page 32 } Mr. Beazley.

Mr. Beazley: It may be up to the Commonwealth's Attorney.

Q. I want you to tell this jury why you testified before that your brother didn't get up and now you say he did get up. Isn't it true you have talked to your brother and talked to your father and now you know what he testified to before?

A. No, that isn't true. I have talked to none of them.

Q. You haven't talked to a soul about it. Then, why do you change your story?

A. I don't remember changing it.

Q. You don't remember changing it. The record shows you have changed it.

Now, you don't know whether your mother was pregnant when she left or not, do you?

A. She was pregnant, then she was.

Q. You don't know what caused her to be larger, do you?

A. She was pregnant.

Q. How do you know?

A. Because she was bigger than she usually be.

Q. How do you know she didn't have a tumor?

A. She didn't have any tumor.

Q. How do you know?

A. I stayed there long enough, I ought to know.

page 33 } Q. Did she ever go to see a doctor to see what was wrong?

A. Yes, sir.

Q. Your father saw her every day, didn't he?

*George Lee Eubank.*

A. Yes, sir.

Q. They slept together every night, didn't they?

A. When he was at home, when he wasn't working at night.

Q. You heard this terrible thing happen to your mother, this man there having intercourse with her in the next room three months before she left. Did you tell your father about it?

A. No, I didn't tell him until after she left.

Q. Why didn't you tell him?

A. I was afraid somebody was liable to get killed or hurt.

Q. Isn't it true that the reason you didn't is because you never heard anything?

A. No, sir.

Q. Did you say anything to Hayden about it?

A. No, sir.

Q. Did you say anything to your brother about it, this first time?

A. Yes, I told him.

Q. Where were you when you told him?

page 34 } A. I was in the bed when I heard him in the house.

Q. I understood you to say that the first time you were by yourself and your brother was with you the second time, is that correct?

A. Sure, he was with me the second time.

Q. Was he with you the first time?

A. No.

Q. All right, after you had this experience the first time, you heard Hayden go into your mother's room and have intercourse with her, did you tell your brother?

A. Yes, I told him I heard it.

Q. When did you tell him that?

A. About a couple of days later after I heard him in in there?

Q. But you didn't tell your father?

A. No.

Q. Did you say anything to your mother about it?

A. No.

Q. Why didn't you? She wasn't going to hurt you, was she?

A. I was scared—I don't know.

Q. And you tell this Court and jury that you lay there

*George Lee Eubank.*

in your bed and your mother was in the next room having intercourse with a man other than your father and that you never said anything to her about it or mentioned
page 35 } it to your father?
A. No, I didn't say anything.
Q. But you talked to your brother about it?
A. Yes.
Q. Do you know whether he did anything about it or not?
A. No, didn't do nothing.
Q. Then three months later you heard him come in and you heard the same thing happen?
A. Yes.
Q. But this time your Brother, William, was laying by your side?
A. No, the last time he was laying by my side.
Q. I say the last time, which was three months after the first time?
A. The month before she left was when he was in the house.
Q. Didn't I understand you to say that it was three months difference between the first time and the last time?
A. Yes, sir.
Q. And yet you and your brother talked about this and you did nothing about it but went to sleep?
A. That is right.
Q. And the next day you didn't even tell your father?
A. No.
Q. And you never said anything to your mother
page 36 } about that?
A. No.
Q. Did you tell your married brother about that, the one that wasn't living at home?
A. No, I didn't tell him until after she was gone.
Q. Now, did you see your mother when she left home?
A. I seen her that night, she left that morning.
Q. She left the next morning?
A. Yes, sir.
Q. You didn't see her when she left, did you?
A. No, I was asleep.
Q. How do you know what she took with her?
A. The stuff was missing out of the house.
Q. Did you see her take it?
A. No.

*George Lee Eubank.*

Q. How do you know she took it?

A. It won't nobody else there to take it, nobody had a key to the house.

Q. Do you know how she left there?

A. No, I was asleep.

Q. So, you don't know what she took from there other than what somebody told you or what was missing from the house?

A. That is right, what was missing.

Q. Isn't it true that for several years prior to March 23rd, the day she left, that Mr. Hayden visited your

page 37 } home when your father was there?

A. Yes, he visited when my father was there.

Q. Your father brought him there, didn't he, the first time he ever came there?

A. I don't remember.

Q. Isn't it true that your father would go to see Mr. Hayden and get him to take him to the beach?

A. Yes, he hired him to help saw some wood and stuff.

Q. There were other people in the neighborhood that could help him, weren't there?

A. They helped, some of them did.

Q. As a matter of fact your Uncle and Aunt live right next door to you, don't they?

A. Yes.

Q. They could have helped, couldn't they?

A. Yes.

Q. Isn't it true that your father would go down to the shop where Mr. Hayden was working and get Mr. Hayden to stop his work and take him to the beach?

A. When he wanted to go somewhere he did.

Q. And every time he took your mother with them, didn't he?

A. Yes, she wanted to see her mother.

Q. And she rode in the middle, didn't she?

A. Yes. sir.

page 38 } Q. And isn't it true that the next day after your mother left home that your father went to Mr. Hayden and asked him to take him to Washington?

A. Yes. he did.

Q. And he took him up there, didn't he?

A. Yes, he did.

Q. Did you go up there with them?

A. Yes.

*George Lee Eubank.*

Q. Did you tell your father about what you had heard then?

A. I told him two days after she left.

Q. What day did you go to Washington?

Q. The day after she was gone.

Q. Didn't you go up there on the following Sunday?

A. I don't remember that.

Q. She left on the 23rd, which was Sunday. Didn't you go to Washington to see if you could find her on the following Sunday?

A. I don't remember.

Q. You don't remember?

A. No, sir.

Q. You wouldn't deny you didn't go up there on the following Sunday, would you?

A. I won't deny it.

page 39 } Q. But you told your father after she left on Sunday, you told your father about this on Tuesday?

A. Yes, sir.

Q. You are sure about that?

A. If she left on Sunday it was on Tuesday, but I don't remember what day she left.

Q. How do you remember it was two days after she left?

A. I remember that.

Q. But you don't remember the day of the week she left?

A. Yes.

Q. How do you arrive at this two days proposition?

A. I can remember that a whole lot easier than I can the date.

Q. So, if you went up there on Sunday after she left then your father had been told before you went up there that Hayden had been in the bed with her on two occasions?

A. Two days after she left, yes.

Q. I say if you went up there on the following Sunday then your father knew all about it, that is what you knew, because you had told him two days after she left, isn't that right?

A. Yes.

Q. You did go to Washington?

A. Yes, I did.

Q. Did you talk to her?

page 40 } A. Talk to who?

Q. To Mrs. Covington, didn't you?

A. Yes, sir.

*George Lee Eubank.*

Q. Did you see her son up there?
A. Mrs. Covington's son?
Q. Yes.
A. Yes.
Q. Now then after that your father went to Mr. Hayden and asked him to take him to the beach, didn't he, to see if he could find your mother. Isn't that correct?
A. I don't know.
Q. You don't remember?
A. I don't.
Q. Now, Mr. Hayden, you knew when you were riding to Washington with your father and Mr. Hayden everything that you know now about the intercourse between the two of them, didn't you?
A. Sure, I knew it all.
Q. And yet you set up in that car and rode right along with him, didn't you?
A. Yes, I did.
Q. It didn't bother you at all?
A. Yes, it did too.
Q. Isn't it true, Mr. Eubank, that this is an afterthought about hearing your mother and Hayden in the bed?
A. What is that?
page 41 } Q. I say this is an afterthough on your part and the part of your father when he wanted to institute this suit against Mr. Hayden, wasn't it?
A. I don't follow you.
Q. This story you are telling is one you concocted after your father decided he wanted to bring this suit against Mr. Hayden, isn't it?
A. I don't know what you are talking about.

Mr. Rawlings: He doesn't understand.
Mr. Beazley: He knows what I am talking about all right.

Q. The story that you are telling about Mr. Hayden being in the bed with your mother is a story which you made up. Do you understand that?
A. No, it is not a story I made up.
Q. After your mother left, when you and your father decided you would have a suit against Mr. Hayden, isn't that true?
A. No, it wasn't any story I made up.

*George Lee Eubank.*

Q. Then, why didn't you say something about it before?
A. Before when?
Q. Before your mother left.
A. I was afraid to.

By the Court:
Q. What were you afraid of?
page 42 } A. I was afraid somebody was liable to get hurt, shot or something.

By Mr. Beazley:
Q. There is one thing certain you weren't going to shoot anybody, were you?
A. No, I won't.
Q. Irrespective of what was happening to your mother, it was satisfactory with you?
A. No, it won't.
Q. You weren't scared that Mr. Eubank, your father, would shoot Mr. Hayden after your mother left, were you?
A. It was too late to shoot him then.
Q. He didn't go anywhere, did he? He was right up there in the neighborhood, wasn't he?
A. Yes, sir, I reckon he was.
Q. Hadn't he been living there all the time?
A. Yes.
Q. He is sitting here in the room now, isn't he?
A. Yes.
Q. So, if you are afraid somebody was going to get shot while your mother was there you weren't afraid of that after she had left, were you?
A. Nobody was there to get shot then.
Q. Mr. Hayden was here in the County, wasn't he?
A. Not at my house, though.
page 43 } Q. Your father went to see him after that and after you told him, isn't that true?
A. Yes, sir.
Q. What kind of door do you have between the *haul* that leads into your mother's room?
A. A wooden door.
Q. You have an ordinary lock on it, don't you?
A. Yes, sir.
Q. I believe you said on direct examination that your father and mother got along right well?
A. Yes, sir.

Q. They did have right many fights and some fusses, didn't they?

A. No, they never had any fights.

Q. They never had a fight?

A. No, sir.

Q. You have never seen any bruises on your mother?

A. No, sir.

Q. Did you go to Washington with your mother and father and Mr. Hayden here about two weeks before she left?

A. I don't remember; I have been up there with them.

Q. You have been up there with them, but you don't recall whether you went up there with them two weeks before or not, do you?

A. I can't remember.

page 44 } Q. Do you know whether your mother and father and Mr. Hayden went up there two weeks before she left?

A. No, I don't remember that.

* * * * *

WILLIAM H. EUBANK,

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

DIRECT EXAMINATION.

By Mr. Rawlings:

Q. All right, state your name and age and where you live?

A. William Herman Eubank, I live at Woodford, Virginia.

By the Court:

Q. What is your age?

A. I was born December 29, 1939.

By Mr. Rawlings:

Q. What is your relationship to James Eubank and Margaret Eubank?

A. I am their son.

Q. Is your mother living at home now?

A. No, sir.

Q. Do you know where she is?

*William H. Eubank.*

A. No, sir.
page 45 } Q. Do you recall the date that she left home?
A. It has been a little over two years.
Q. Has she been back home since that time?
A. No, sir.
Q. At the time that your mother left home did you notice anything about her appearance?
A. She was kind of large to me.
Q. Large where?
A. Through the stomach.
Q. Do you know James William Hayden?
A. Yes, sir.
Q. How long have you known him?
A. Four or five years I guess.
Q. Prior to the time or before the day that your mother left home did Hayden ever come to your house?
A. Yes, sir.
Q. Who was there when he came to your house?
A. He came there when my father was there and sometimes he came when he won't there.
Q. What time of day did he come?
A. I was working during the day, I don't know what time he come.
Q. Were you at home at night?
A. Yes, sir.
Q. Did he come at any time during the night?
page 46 } A. Yes, sir.
Q. Can you tell us about the time he came at night or do you know?
A. He came one night when I was in bed, I heard him when he came in.
Q. Where did he come in? What door?
A. He came through the front door.
Q. Where did he go?
A. Into my mother's bed room.
Q. What did you hear?
A. I heard his voice but I couldn't recognize what he was talking about.
Q. You heard his voice, did you recognize his voice?
A. Yes, sir, I recognized his voice, but I didn't make out what he was talking about.
Q. Did you hear anything else at that time?
A. No, sir.
Q. Now, who stays in the room with you?
A. My brother, George.

*William H. Eubank.*

Q. What time of night was this that you heard Hayden in the *fron* room—the bed room?
A. I guess it was between ten thirty and eleven o'clock.
Q. Do you recall approximately when this was?
A. It was about two weeks before my mother left home.
Q. Do you know of any other time he was
page 47 } there?
A. He came once before that.
Q. You said something else. What did you say?
A. I heard him when he took his shoes off.
Q. What else did you hear? Where was he when he took his shoes off?
A. He was in mother's bed room.
Q. What else did you hear?
A. After he took his shoes off I heard him when he got in bed.
Q. Are you sure it was Hayden? Positive?
A. Yes, sir.
Q. Will you tell the jury again why you are sure it was Hayden?
A. It couldn't have been nobody but him.

By the Court:
Q. What?
A. It couldn't have been nobody but him.

By Mr. Rawlings:
Q. Now on the two times that you have testified that you heard Hayden in the front room with your mother, who was with you at those times, if anybody?
A. I was by myself one time and one time my brother was in the room in bed.
Q. You were by yourself one time?
A. Yes, sir.
page 48 } Q. And your brother was with you the other time?
A. Yes, sir.
Q. What kind of an occupation do you have?
A. I work at a service station.
Q. What hours do you work?
A. I work mostly day work, seven to five, sometimes a little later.
Q. Were you doing this at the time your mother left?
A. Yes, sir.

*William H. Eubank.*

Q. When your mother left home did your father do anything to find her?

Mr. Beazley: I object to the question as leading. He asked when his mother left home did his father do anything to find her. I submit that is a direct question.

The Court: Yes, that is leading.

Q. What did your father do when your mother left home?

A. He had a detective look for her and he went to Washington looking for her himself.

Q. How did your father act when your mother left home?

A. He went all to pieces.

Q. You say he went all to pieces. What did he do?

A. He was a nervous wreck.

Q. Before your mother left home how did your mother and father get along together?

page 49 } A. They got along fine.

Q. On the two times, the times that you heard Hayden in the front room with your mother where was your father?

A. He was working—shift work.

Q. Are you positive that he was not at home?

A. No, sir, he won't home.

Mr. Rawlings: All right, your witness.

CROSS EXAMINATION.

By Mr. Beazley:

Q. Mr. Eubank, you say you are nineteen years of age?

A. No, I am twenty.

Q. You are twenty?

A. Yes, sir.

Q. When did your mother leave?

A. She left in March of '58, the 22nd.

Q. Was it the 22nd or 23rd?

A. To my knowing it was the 22nd.

Q. Do you know the day of the week?

A. No, sir.

Q. Now, you said your father hired a detective to look for your mother. Was that detective Mr. Hayden here?

A. No, sir.

Q. You are sure it wasn't him?

A. Yes, sir.

*William H. Eubank.*

Q. Your father did get him to look for her,
page 50 } didn't he?
A. My father got him to take him to Washington.
Q. What detective did he hire?
A. I don't know, he just said it was a detective he hired to look for her.
Q. Now, Mr. Hayden came to your home quite frequently with your father, didn't he?
A. He came there quite a bit.
Q. He went visiting with your father and mother, didn't he?
A. Yes, sir.
Q. He went to the beach with them and your father solicited him to go with them, didn't he?
A. That is right.
Q. He went to Washington with them and your father solicited him to go, didn't he?
A. Not always, mother solicited it sometimes.
Q. What?
A. My mother, most of the time she decided to go to Washington.
Q. But your father was the one that got Mr. Hayden to take them, isn't he?
A. Yes, sir.
Q. Even after your mother left your father got Mr. Hayden to take him to Washington to look for your mother, isn't that true?
page 51 } A. Yes, sir.
Q. Did you go?
A. No, sir.
Q. And he went down to see him several times to get him to take him places where he thought your mother was after she left?
A. Not as I know.
Q. You don't know about that?
A. No, sir. I won't with him either one of the times.
Q. Mr. Eubank, how much do you weigh?
A. The last time I weighed, 168.
Q. How tall are you?
A. Five feet eleven. I believe.
Q. You are about that same size and height in March 1958, weren't you?
A. I don't really know.

*William H. Eubank.*

Q. Now, you said that on one occasion about two weeks before your mother left that you heard Mr. Hayden come in the house?
A. Yes, sir.
Q. And go in her room?
A. Yes, sir.
Q. That you heard his voice?
A. Yes, sir.
Q. But you didn't hear anything else?
page 52 } A. I heard him when he came in and I heard his voice the same night.
Q. On that particular occasion you didn't hear anything else?
A. No, sir.
Q. But you heard him come in the front door and heard his voice in your mother's room?
A. Yes, sir.
Q. What, if anything, did you do?
A. I tried to get in the door the same night but couldn't get no answer.
Q. You got no answer?
A. No, sir.
Q. Where was your brother?
A. He was away at the time.
Q. You are sure of that?
A. Yes, sir.
Q. You cannot be mistaken about that? There can't be any mistake now on your part about that?
A. No, sir.
Q. Now, could that have been three weeks before she left?
A. No, sir.
Q. Could it have been a month before she left?
A. No, sir.
Q. You know it wasn't more than two weeks?
page 53 } A. Yes, sir.
Q. And your brother wasn't in the room?
A. No, sir.
Q. You went to the door, the door was locked and you went back in your room and got back in your bed and went to sleep, is that right?
A. Yes, sir.
Q. Did you tell your mother about it the next day?
A. No, sir.
Q. Did you tell your father about it when he came home from work?

*William H. Eubank.*

A. No, sir.
Q. Why didn't you?
A. I was scared someone would get hurt.
Q. Those words sound very familiar. You and your brother have talked about this matter, haven't you?
A. No, sir.
Q. You haven't talked about it?
A. No, sir.
Q. Who were you scared would get hurt?
A. I was scared that my father or Hayden would get hurt.
Q. Did you ever tell your father?
A. I told him after she left home.
Q. How long after she left?
A. I guess about a week.
page 54 } Q. You said a week?
A. Yes, sir.
Q. Did you and your brother talk about it?
A. I told him about it once.
Q. Your mother left—You say you don't know whether she left on a Saturday or Sunday?
A. No, sir, I can't remember.
Q. The next day after she left you talked to your brother, George?
A. No, sir.
Q. You didn't talk to him?
A. No, sir.
Q. Did you talk about it the second day?
A. I can't remember that, that is a right good while, I can't remember.
Q. About a week after your mother was gone you told your father?
A. Yes, sir.
Q. Did he seem to be surprised?
A. Yes, sir.
Q. Did he tell you that he had heard anything about that before?
A. No, sir.
Q. But just seemed to be startled. Did he break down and cry when you told him?
page 55 } A. He didn't break down and cry, but he was worried about it.
Q. That was at least a week after your mother had left?
A. Yes, sir.
Q. What was the occasion for your telling him that? You

had kept it from him all this time when your mother was there, why did you tell him then?

A. I figured he should know.

Q. Didn't you feel he should know after you heard it the first time?

A. Yes, sir, but I was afraid somebody would get hurt.

Q. Were you afraid somebody would get hurt after she had gone when you told him?

A. No, sir, she had left home then.

Q. You said awhile ago that *your* were afraid that your mother or Mr. Hayden would get hurt. Hayden hadn't left, he was here in the County, wasn't he?

A. Yes, sir.

Q. And your father and Hayden were still riding around, going to Washington and to the beach, weren't they?

A. No, sir.

Q. Didn't Hayden take him to Washington after your mother left there?

A. Yes, sir, but he didn't go to the beach.

page 56 } Q. He didn't go down there and look for your mother?

A. No, sir, not as I remember.

Q. You are sure of that?

A. Yes, sir.

Q. You say you were in the room by yourself?

A. Yes, sir.

Q. Your brother wasn't there when you went to the door?

A. No, sir.

Q. You are sure of that?

A. Yes, sir.

Q. There isn't any question in your mind, Mr. Eubank. I am going to ask you the second time and ask it over again. You are sure your brother was not there in the bed?

A. No, sir, he wasn't there.

Q. Let me direct your attention to the first time. How long was that before the last time? How long was it between the first and the second time that you heard Mr. Hayden in the room and heard his shoes fall?

A. I guess about a week or more.

Q. About a week before that. It couldn't have been a month?

A. No, sir.

Q. It couldn't have been two months?

A. No, sir.
page 57 } Q. It certainly wasn't three months?
A. No, sir.

Q. Those are the only two times you heard Mr. Hayden or any other man with your mother, other than your father, isn't it?

A. Yes, sir.

Q. That is just as true as anything else you have said on this stand, isn't that right?

A. Yes, sir.

Q. Was your brother in the bed with you on that occasion?

A. No, sir.

Q. He was not?

A. No, sir.

By the Court:

Q. He wasn't there.

A. (No reply).

By Mr. Beazley:

Q. Your brother was not in bed with you the first time you heard him, was he?

A. No, sir, he wasn't.

Q. In other words, your brother was not in the bed with you on either of the two occasions you have testified about?

A. On the second occasion he was there.
page 58 } Q. Mr. Eubank, I have just spent fifteen minutes asking you if you were postive he wasn't there on the second time you heard Mr. Hayden there and you said that he was not.

A. I told you the second time he was.

Q. You told me positively he was not, that was the time two weeks before your mother left, and I asked you if it could have been thirty days or three weeks and you said, "No, sir, it was two weeks, and nobody was in that bed with me." I asked you again, Mr. Eubanks, when you went there to rattle that door was your brother in the bed and you said, "No, he was not."

A. I said he was not, that was the first time.

Q. He was not?

A. No.

Q. That was the first time. Are you sure about that?

A. Yes, sir.

Q. There isn't any question in your mind, let's get that

*William H. Eubank.*

straight, that the time you went to the door and rattled it was the last time, is that right?

A. The first time.

Q. And your brother was not in that room at that time, was he?

A. No, sir, he wasn't.

Q. Are you sure of that, now?

A. Yes, sir.

page 59 } Q. You told me that you were sure about it the other time, you said he wasn't there. I want to be absolutely and positively sure this time. Think good, now.

A. He wasn't there.

Q. The time you heard him, the first time, was about two weeks before the second time, isn't that right?

A. No, sir.

Q. How long was it?

A. It was a week.

Q. In other words it was only a week difference between the two times you heard him, is that correct?

A. As well as I remember.

Q. And the first time your brother was not in the bed with you?

A. That is right.

Q. That time you heard him come in the front door, and you heard this shoes drop, and you heard him get in the bed?

A. Yes.

Q. Did you hear anything else?

A. No, sir.

Q. What did you do?

A. I tried to get in the front door the first time.

Q. You tried to get in the front door?

A. Of my room, the door between us.

Q. Was it the front door or the door to your

page 60 } mother's bed room?

A. There is a door between the kitchen and our room and there is a door between the dining room and her room.

Q. What door did you try to get in?

A. I tried to get in the door between—there is one door between the front room and her room.

Q. There is a door between the hall and her room?

A. Yes, sir.

Q. And you tried to get in what door?

A. I tried the door from the hall.

*William H. Eubank.*

Q. That led into her room?
A. Yes, sir.
Q. When did you try to get in that door?
A. After I heard him come in.
Q. Which occasion?
A. When he came in the first time.
Q. It was the first time that you tried the door?
A. That is right.
Q. You didn't try it the first time?
A. Yes, sir.

Mr. Beazley: I don't know whether the jury is getting this, but I am certainly getting thoroughly confused.

Q. Let me go back again. The first time was about two weeks before she left?
A. That is right.
page 61 } Q. Is that right, and the second time was about a week before she left?
A. That is right.
Q. And the space of time between the first time you heard him in the room and the second time was about a week, is that right?
A. Yes, sir, as far as I can remember.
Q. Those were the only two times you heard him in that room, is that right?
A. Yes, sir.
Q. The first time you heard him come in, nobody was in that room with you?
A. No, sir.
Q. You heard his shoes fall and you heard him come in the door, and you say you did what then?
A. I heard his voice the first time, the first time he came.
Q. You didn't hear his shoes fall the first time?
A. No, sir.
Q. You heard his voice?
A. Yes, sir.
Q. What else did you hear?
A. I heard him when he came in and I heard his voice and I tried to get in the room, and I couldn't get no answer.
Q. You tried to get in. Did you call him?
page 62 } A. No, sir.
Q. Did you call your mother?
A. No, sir.
Q. After you didn't get any answer what did you do?

*William H. Eubank.*

A. I went back to bed.
Q. And you went to sleep, didn't you?
A. Yes, sir.
Q. Do you know when Mr. Hayden left?
A. No, sir.
Q. Do you know whether he stayed there all night?
A. I don't suppose he did.
Q. Was he there the next morning at breakfast?
A. No, sir.
Q. Did you talk to your mother about it?
A. No, sir.
Q. Did you talk to your father about it?
A. No, sir.
Q. Did you tell your father what had happened?
A. No, sir.
Q. Didn't you think he was entitled to know that was happening?
A. He should have known.
Q. Why didn't you tell him, then?
A. I was afraid that somebody might get hurt.
Q. Did you have a shot gun in the house?
page 63 } A. Yes, in her room.
Q. Did you get the shot gun out of there after the first time to prepare for another time if it should happen?
A. No, sir.
Q. Did you tell your brother, George, about it after the first time?
A. No, sir.
Q. You didn't tell a soul anything about what you had heard and what transpired in that room, did you?
A. No, sir.
Q. As a matter of fact you didn't tell the Court and jury about that when you came here the last time, did you?
A. No, sir, I didn't think of it at the time.
Q. And that was less than a year after your mother left when that was fresh in your mind, wasn't it?
A. I just didn't think of it at the time.
Q. Didn't you testify, Mr. Eubank, that you never heard Mr. Hayden in your mother's room but one time?
A. I did.
Q. You testified to that, didn't you?
A. Yes, sir.
Q. Didn't you testify that your brother George was in the bed with you when you heard him?

*William H. Eubank.*

A. The first time.

Q. Before? When you testified in this case be-
page 64 } fore?

A. Yes, sir.

Q. Didn't you testify there was only one time that you had heard it?

A. The first time, I did.

Q. And now you want to change that and tell the jury that you heard him twice?

A. Yes, sir.

Q. Let's stop and reconsider. Don't you want to testify that you heard him more than twice?

A. Just two.

Q. You are sure you don't want to testify that you heard him more than that?

A. No, sir.

Q. This thing didn't make a very strong impression on your mind, did it?

A. It certainly did.

Q. If it made such a strong impression on your mind, will you tell this Court and jury why, when you testified before you only testified to one time?

A. I just didn't think of it when I was down here.

Q. You didn't think of it?

A. That is right.

Q. You testified that your brother was in the bed with you—

A. Repeat that.

page 65 } Q. I say that you further testified that you didn't hear it but one time and the time you heard him that you went to the door and rattled the door and couldn't get any answer and that you went back and got in the bed and went to sleep?

A. Yes, sir.

Q. That was your testimony before?

A. Yes, sir.

Q. Now you come before this same Court and another jury and tell them that "Oh, no, there was another time, and I was by myself that time—"

A. I didn't rattle the door the last time.

Q. You didn't rattle it the second time?

A. Yes, sir.

Q. Didn't you testify before that you rattled the door the only time you heard it?

A. I rattled it the first time I heard it.

Q. Didn't you testify on cross examination and on direct

*William H. Eubank.*

examination before that the only time you heard it was when your brother was by your side in the bed?

A. Yes, I testified to that.

Q. It wasn't true, was it?

A. Yes, sir.

Q. Now, you say that isn't true, that the last time you didn't go and rattle the door?

page 66 } A. I said I didn't go rattle the door the last time, I rattled the door the first time.

Q. The last time you didn't rattle the door, the time you rattled the door was the first time and your brother was in the bed with you?

A. I rattled the door the first time, he won't in bed.

Q. Now, you want to change the whole story?

A. No, sir.

Q. You are changing it. Tell the Court and jury why you are changing your story.

A. I haven't changed my story.

Q. What?

A. I didn't change my story.

Q. If you said your brother wasn't in the bed the last time—

Q. He was in the bed the last time.

Q. The last time you testified, you said he wasn't in the bed with you?

A. I remember now he was.

The Court: The first time, he testified he rattled the door.

Mr. Beazley: He testified the first time that there was only one time that he ever heard this, that his brother was in the bed with him—that there wasn't anybody in

page 67 } *in* the bed with him; he was alone in the bed, and that was the only time. Here is what his words were—

Mr. Rawlings: Mr. Beazley, have you got that down in shorthand? Did you take down every word he said?

Mr. Beazley: No, sir.

Mr. Rawlings: Then I object to his introducing it, he hasn't got a transcript.

The Court: If he took it down he can read it.

Mr. Beazley: I am not reading the statement, I am asking him if he didn't make certain statements.

Mr. Rawlings: All right.

Q. At the last trial here, didn't I ask you, Mr. Eubank, if anyone was in the bed with you when you heard Mr. Hayden's voice in the next room and heard his shoes drop, and didn't you say that no-one was in the room with me?

A. That is right.

Q. Didn't I ask you further: Did you ever hear him in that room at any other time, and wasn't your answer: "I don't know of any other occasion when he was in that room."

A. Yes, but I didn't think of it at the time.

Q. Oh, you didn't think of it at that time?

page 68 } A. That is right.

Q. Now you think of another time. How do you know your mother was pregnant when she left home?

A. She was large through the stomach.

Q. Is every person who is large through the stomach pregnant?

A. She was; she was thin through the stomach, but she was large when she left home.

Q. Now, Mr. Eubank, when you testified in this case before, didn't you say that the time you heard Mr. Hayden in your mother's room was in February '58?

A. Not as I know of.

Q. What?

A. Not as I know of.

Q. Do you deny that you testified that the one time you heard him in there was in February?

A. Not as I know of.

Q. In the month before your mother left?

A. Not as I know of.

Q. You don't deny that you testified to that?

A. No, sir.

Q. Why do you fix it now at one week and two week intervals?

A. I figured it was two weeks before, I don't know exactly how far it was apart.

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RANDOLPH POWELL,

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

*Randolph Powell.*

DIRECT EXAMINATION.

By Mr. Rawlings:

Q. Please state your name.

A. Randolph Edward Powell.

Q. Where do you live?

A. Salestown.

Q. Where do you work?

A. At the Sylvania Plant.

Q. Are you acquainted with James Eubank?

A. Yes, sir, I am.

Q. Do you know Mrs. James Eubank—Mrs. Margaret Eubank?

A. Yes, I did.

Q. Do you know whether Mr. and Mrs. Eubank are living together now?

A. No, they are not.

Q. Do you recall when she left home, approximately the time?

A. Around March sometime, in March in '58.

Q. Have you seen her since that time?

page 70 } A. Yes, I have.

Q. And where did you see her?

A. On the Street in Fredericksburg.

Q. And will you tell the Court—will you describe to the Court her appearance at that time?

A. Well, she looked like she was pregnant at the time I saw her on the street, to what she was when I saw her at Mr. Eubank's.

Mr. Rawlings: That is all I want to ask.

CROSS EXAMINATION.

By Mr. Beazley:

Q. Mr. Powell, what time did you see her in Fredericksburg?

A. I would say it was about two o'clock in the evening.

Q. What date?

A. I don't remember the date right now.

By the Court:

Q. Do you remember the month?

*Randolph Powell.*

A. It was somewhere in April in '58.
Q. That was after she left?
A. That was after she left Mr. Eubank.

By Mr. Beazley:
Q. Was anyone with you?
A. No, no-one was with me.
Q. What were you doing in Fredericksburg?
page 71 } A. I was *drying* through Fredericksburg, I drive through to go home every day.
Q. What street did you see her on?
A. Main Street, I call it; Caroline Street, it is the Main Street.
Q. You live in King George County?
A. I live in King George.
Q. Don't you drive down Princess Anne Street?
A. No, sir, I don't.
Q. What route do you take?
A. I drive down Williams Street and get on Caroline and straight on out.
Q. Where do you get on Williams Street?
A. At the plant, at the end of Lafayette Boulevard extended.
Q. You get on that before you get to the railroad tracks, don't you?
A. After you get to the railroad tracks.
Q. Then you go down Lafayette Boulevard?
A. No, it is at the end of Lafayette Boulevard.
Q. Then you come up Caroline Street, which side of the street did you see her on?
A. The left-hand side.
Q. What was she wearing?
A. She was wearing a blue coat and I don't know
page 72 } what else.
Q. Was it a long coat?
A. Yes, a long coat and it was open.
Q. Now did you stop your car?
A. Yes, I stopped my car.
Q. Then you talked to her?
A. No, I didn't.
Q. Why did you stop your car?
A. To go in Duncan's.
Q. Then you parked it on Caroline Street?
A. I parked on Caroline.
Q. Did you meet her?

*Randolph Powell.*

A. No, I was on the opposite side of the street from her.
Q. You were on the opposite side of the street?
A. Yes, sir.
Q. And you tell this Court that you drove down the street she was on, and that she was on the west side of the street and you were on the east side and you people were close enough for you to tell that she was pregnant?
A. Yes, she was.
Q. Yet, she had on a long coat?
A. Yes, she had on a long coat.
Q. Mr. Powell, what interest do you have in this case?
A. None at all.
page 73 } Q. Did Mr. Eubank ask you to come down and testify to this?
A. Mr. Eubank summoned me to testify.
Q. Didn't he ask you before he summoned you?
A. No, he didn't; he asked me to testify before when it was down here but I didn't testify because my name wasn't called.
Q. You don't know whether she was pregnant or not, do you?
A. No, but I know she was a whole lot larger when I seen her than she was at Mr. Eubank's.
Q. She had on a long coat and you thought she was pregnant?
A. Yes, the coat was open.
Q. How long do you say that was after she left?
A. It seems to me it was sometime in April; I don't remember the date, but it was in April after she left in March.
Q. Did you tell Mr. Eubank about this?
A. I talked to him.
Q. When did you tell him?
A. Oh, it was probably the same week.
Q. Did you tell him where you had seen her?
A. Yes, I told him where I had seen her.
Q. Do you know whether he went there to look
page 74 } for her?
A. Indeed I do not because he was at work when I talked to him.
Q. You think that was about a week after she left?
A. I didn't say a week after she left, it was sometime in April when I saw her.
Q. You told him within a week after you saw her?
A. It might have been a week or it might have been a couple of nights, we were in the plant at the time I talked to him.
Q. Why did you tell him that?

*George Bowler.*

A. We were just talking on the subject, that is all.
Q. Did he seem surprised?
A. No, indeed.

* * * * *

GEORGE BOWLER,
another witness for the plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Rawlings:
Q. Please state your name and where you live?
A. George H. Bowler, Woodford, Virginia.
Q. Where do you work?
A. American Viscose, Fredericksburg, Virginia.
Q. What kind of work do you do there?
page 75 } A. Inspector—paper inspector.
Q. Do you work day work or shift work?
A. Shift work.
Q. What is your relation to James Eubank?
A. James Eubank is my brother in law, I married his sister.
Q. Where do you live with relation to his home?
A. I live right next to him, approximately two hundred yards.
Q. Do you know Mrs. Margaret Eubank?
A. I do.
Q. Is she living at home now?
A. She is not.
Q. Do you know where she is?
A. No, I do not.
Q. To your knowledge has she been at home since March 1958?
A. Not to my knowing.
Q. Do you recall the day that she left?
A. I am sure it was March 22, 1958.
Q. Did you see her on that day?
A. I did.
Q. What was she doing?
A. Well at that time I was working 11 to 7 and I had gone upstairs at approximately—well say between eight
page 76 } and nine o'clock, I saw her leave her house and walk up toward number two highway with her suit cases in her hand.

*George Bowler.*

Q. Have you seen her since that time?

A. No, I haven't.

Q. Are you acquainted with or do you know James William Hayden?

A. Yes, I do.

Q. Did you see him on the day that Mrs. Eubank left?

A. No, I didn't.

Q. Prior to the time—before the time the day that Mrs. Eubank left had you seen James William Hayden at the Eubank home?

A. Oh, many times I have, yes, sir.

Q. When you saw him at the Eubank home where was Mr. Eubank?

A. Well, I have seen him in the Eubank home when Mr. Eubank was there and when Mr. Eubank wasn't there; sometimes Mr. Eubank would be working and he wasn't there and Mr. Eubank would be there sometimes.

Q. Could you tell us the number of times you have seen him there when Mr. Eubank was working?

A. Oh, quite a few times, I don't know the exact number.

Q. How did you know Mr. Eubank was not at home?

A. At that time we were on different shifts, you see, I would be at home when Eubank was working.

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Q. What was the relationship between Mr. and Mrs. Eubank before she left home?

A. Well, as far as I know there was nothing wrong with it, I mean they got along good together as far as I know.

Q. What was Mr. Eubank's attitude toward his wife?

A. Well very good as far as I know, I mean I have never him say a bad word to her or treat her wrong as far as I know; I have lived up there now eight years next*t* to the Eubank family.

Q. Could you tell the Court what the reaction of Mr. Eubank was to his wife leaving?

A. What do you mean?

Q. What was his reaction to it?

A. Well, when his wife left him he was in bad shape, I mean as far as being a nervous man; it hit him right hard.

Q. At the times when you saw Hayden there when Mr. Eubank was away, do you know what time of the day you saw him there?

A. At different times of the dav.,

Q. Did you see him there at night at any time?

*George Bowler.*

Mr. Beazley: Don't lead him.
Mr. Rawlings: He said at different times.
Mr. Beazley: Ask him what times of the day.

page 78 } Q. What times of the day?
A. Like I told you I have seen him in the morning, at night, in the evening, at all times of the day.

Mr. Rawlings: That is all.

CROSS EXAMINATION.

By Mr. Beazley:
Q. Mr. Bowler, I believe you said you saw her, you think, on the 22nd leave the house?
A. Yes, the 22nd, I think it was March 22, 1958.
Q. Do you recall what day of the week it was?
A. No, I don't remember.
Q. How do you arrive at the 22nd, rather than the day of the week?
A. I don't know the day of the week, I just happen to know the day I saw her, on March 22, 1958, I saw her leave the house.
Q. This bill alleges that she left on the 23rd, and if it does it is wrong?
A. I cannot *bee* to sure, it was the 22nd or 23rd.
Q. Now awhile ago, you told the jury that you knew definitely that it was on the 22nd.
A. I saw her when she left, that is the time I saw her with my own two eyes.
Q. Did you see a vacuum cleaner on her back?
A. No. Why would she have a vacuum cleaner?
page 79 } Q. I am asking you.
Did you see her with a fan in her hand?
A. No.
Q. Did you see her with a hot plate?
A. She had her suit cases, that is all I saw her with.
Q. One or two?
A. One suit case.
Q. How do you know she didn't come back?
A. She might have had something under her clothes, I don't know about that.
How do I know she didn't come back? She didn't come back that day because my wife watched for her.

*James T. Eubank.*

By the Court:

Q. You said she had one suit case?

A. She had one suit case in her hand; I don't know what she had in her left-hand.

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JAMES T. EUBANK,

a witness in his own behalf, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Rawlings:

Q. Please state your name and age?

A. James T. Eubank, fifty-two.

Q. What is your occupation?

A. Press operator, American Viscose people, Fredericksburg, Virginia.

Q. Where do you live, Mr. Eubank?

A. Woodford, Caroline County, Virginia.

page 85 } Q. Describe the exact location of your home? Whereabouts? On what road?

A. It is two miles west of Corbin on 208, going toward Summitt.

Q. Who lives in the houses on each side of your house?

A. Mr. Bruce lives in the first one there and my son lives in the second house, I live in the third house and Mr. Bowler lives in the next one on the west side of me.

Q. Mr. Bruce, who is Mr. Bruce? What Mr. Bruce is that?

A. That is Mr. Lewis Bruce, that is Mr. Ben Bruce's boy.

Q. How far is his house from your house?

A. Oh, just about hollering distance, I should say.

Q. On March 23, 1958, were you married?

A. Yes, sir.

Mr. Rawlings: Your Honor, in the papers is the marriage certificate. Do you accept that?

Mr. Beazley: Yes, we will admit he was married.

The Court: Is it in the bill?

Mr. Rawlings: Actually it was introduced before, but I can introduce it now.

The Court: No, it is not necessary.

page 86 } Mr. Beazley: That is not questioned.

Mr. Rawlings: He was married on that date to this woman, and I would like to read the date they were married.

The Court: All right.

Mr. Rawlings: They were married according to this marriage licence on October 1, 1936 in Caroline County.

The Court: When were they divorced?

Mr. Beazley: Show who he was married to. Read the whole thing.

Mr. Rawlings: He was married to Margaret Louise Covington, that were her maiden name; she was seventeen and the Groome, James T. Eubank was twenty-nine.

Mr. Beazley: What date was that?

Mr. Rawlings: That was October 1, 1936.

Q. Are you married to Margaret Covington at the present time?

A. No, sir.

Q. What happened to that marriage?

A. The first one?

Q. Yes.

A. Well, Mr. Hayden there broke my home up.

Mr. Rawlings: I am going to bring that out, if

page 87 } that is all right with you.

The Court: All right.

Q. You are divorced from Margaret Covington?

A. Yes, sir.

Q. Why did you get a divorce from her?

Mr. Beazley: If your Honor please, I object to that; they cannot go into the divorce proceedings, that is another entirely separate proceeding, unless he is going to attempt to impeach his witness by something he may have said in the testimony in that particular suit to show he was divorced, but why he was divorced is not germane to this proceeding and is not admissible in this suit.

Mr. Rawlings: I feel that is pretty much wrapped up in this case and why he got a divorce is proper in this case.

Mr. Beazley: Your Honor ruled on that the last time.

The Court: Let me see the divorce decree.

*James T. Eubank.*

Mr. Beazley: If we are going to argue that I wish that the jury be withdrawn.

The Court: No, I don't think you can go into that.

Mr. Rawlings: All right, that is all right, it is
page 88 } not that important, but I thought it ought to come in.

Q. Where was your wife living at the time she left home?

A. At our place, in my place there at home.

Q. How long had she been living there?

A. She had been living there fourteen years, in the house I built for her.

Q. Is your wife living there at your home now?

A. No, sir.

Q. Has she been back since she left in March, 1958?

A. Not as I know of.

Q. Do you know where she is?

A. No, sir.

Q. Will you tell the jury how you felt when you had learned she had left home?

A. It made me feel pretty bad, just as bad as you can, when a young man, he is old enough to know better, if he had been a teen ager it would be something different; I took him to be a friend.

Mr. Beazley: If your Honor please, he is arguing the case.

Mr. Rawlings: He is testifying.

A. I paid him for every hour he ever worked for me, on my car or sawing wood or anything that he ever did for me; I took him to be a friend.

page 89 } Mr. Beazley: He is arguing his case, if your Honor please.

The Court: You are getting into the argument—

A. I took him to be a friend.

The Court: Just a minute. You are getting into argument now. You answer the questions he asks you.

A. I will sure do it.

Q. At the time your wife left home did you notice anything about her appearance?

A. Oh, yes, she was large all right.

*James T. Eubank.*

Q. What do you mean large?
A. Well, she was in trouble by him, of course.
Q. What do you mean by "in trouble by him"?
A. Well, she was pregnant.
Q. You say that she was in trouble by him. How do you know it was not you that was the cause of her pregnancy?
A. I know I couldn't.
Q. Why couldn't you?
A. I know when I got the other three, the first three.

Mr. Beazley: If your Honor please this is his witness. You are cross examining him.
Mr. Rawlings: No, I am asking him why.
The Court: That is all right. Go ahead.

page 90 } A. I know when I got the first three, and I know when the fourth one happened with the same woman.
Q. You seem to be pretty sure it was not your child?
A. Oh, no, it wasn't mine.
Q. Is there any other reason why you are so sure?
A. It just couldn't be mine.
Q. Will you tell the jury just exactly how you and your wife got along before she left home?
A. We got along fine, never had a minutes trouble at all; she worked at home and I worked away; I bought the place for her and the children both.
Q. What did you do when your wife left?
A. I got Mr. Hayden to take me to Washington to her mother's, I went down to his shop and paid him to take me up there and back. I did it to see just what kind of front he would put on, I paid him cash money to take me up there. I could have killed Mr. Hayden, but I didn't want to do it, I didn't want to take the law in my hands, I want you all to protect me, that is what I am doing now.
Q. All right. You say you went to Washington and tried to find your wife. Did you look any other place besides Washington?
A. I went to Washington and had a detective looking for her for a little while too, of course, but that wasn't only a short time.
page 91 } Q. Have you seen your wife since she left home?
A. I saw her once.
Q. Where did you see her?
A. I met them on the highway.

*James T. Eubank.*

Q. You met who?
A. Mr. Hayden and her.
Q. Where was that?
A. That was between here and Fredericksburg.
Q. Where were you going?
A. I was coming from work.
Q. What direction were they going?
A. They were going north, I was coming south toward home the last time I seen them.
Q. You say the last time you saw them, what do you mean?
A. The first time that was coming out, that was before I got my divorce from her. The last time I seen them I was coming from work, and they were going north.
Q. Are you acquainted with James William Hayden?
A. Oh, yes.
Q. How long have you known him?
A. I don't know, five or six years I guess.
Q. At the time Mrs. Eubank left home how old was she?
A. Thirty-eight, I guess.
Q. How did you happen to get to first know Mr. Hayden?
A. He worked up in the plant with us; I don't
page 92 } know how many years he worked with us, but he had right much trouble while he was up there, he didn't stay too long, I know that.
Q. And at that time did Mr. Hayden come to your home?
A. Oh, yes, he come to my house sometimes, I asked him to come sometimes, sometimes I didn't ask him to come and he come any way.
Q. Did you see him on any other times other than at your home?
A. No, unless I had to come work on my car or truck or something of that kind. Of course, I seen him at the shop once in the while. I ain't going to tell nothing wrong on the boy.
Q. How did he happen to start coming to your home?
A. I wanted to be friends with him, he lives on the road there below me and he come out there and carried me to the plant and brought me back, it won't out of the way none, and I paid him for carrying me and bringing me back.
Q. Did you welcome his visits? Were you glad for him to come?
A. Once in the while I did, but not all the time.
Q. What do you mean by not all the time?
A. I didn't invite him a whole lot of times that he come, now, I didn't ask him to come, he come any way.

*James T. Eubank.*

Q. You are the plaintiff in this suit, are you
page 93 } not?
A. Oh, yes.

Q. And how much damages are you *ask* from the jury?

A. I couldn't tell you. A hundred thousand dollars wouldn't take care of it, my home and the children have been broken up.

Q. Mr. Eubanks, how many children do you have?

A. I have three.

Q. And what are their names?

A. James, Jr., is the oldest boy, and William Herman is the second and George Lee is the youngest.

Q. What affect did Mrs. Eubank's leaving have on these children?

A. It worried them to death, it worried them almost as bad as it did me, but they are a lot younger than me and they get over those things quicker.

Q. Where are your children living now?

A. The two youngest ones live with me; the oldest one lives in the place next door to me.

Mr. Rawlings: Now your Honor, I have finished examining Mr. Eubank, but I will reserve the right to recall him at a later time. I have one more witness to put.

The Court: Do you want to split his examination up in two sections?

Mr. Rawlings: I want to do that, or I want to
page 94 } introduce the $3,000.00 check now.

The Court: No, you can't do that. You haven't proven that he got any of that. If you want to call him and ask him if he got any part of it, you can do that.

Mr. Rawling: I am going to take exception to your Honor's ruling in not allowing me to introduce the $3,000.00 check.

The Court: I cannot let you introduce the $3,000.00 check. You see she had as much right to it as he did, but if the defendant got any part of it, then he would be guilty of larceny.

Mr. Rawlings: It is my feeling that Mr. Eubank had the right to this money and enjoy it and this man by taking her away deprived him of it.

The Court: If she took the money she had as much right to it as he did. When a man puts his money in a joint account she becomes the joint owner.

Mr. Rawlings: I think as between the bank and the owner she is, but between the man and his wife, she isn't.

*James T. Eubank.*

page 95 } The Court: According to the Court of Mr. Rawlings: I will note an exception. Your witness, Mr. Beazley.

CROSS EXAMINATION.

By Mr. Beazley:

Q. Mr. Eubank, I believe you stated on direct examination that your wife left you on the 23rd day of March, 1958, is that correct?

A. That is correct, the 23rd day of March.

Q. When did you learn she had left you?

A. Learn?

Q. Yes, sir.

A. I learned it that night when I came from work.

Q. Who, if anyone, was at home?

A. Wasn't no-one at home.

Q. How did you know she wasn't out visiting?

A. Well, I could miss things out of the house, that was one thing. Another thing, my sister next door told me she went down the road with a suit case in her hand.

Q. Was that all the information you had that she had gone?

A. Well, I say for a couple of hours.

Q. What?

A. For a couple of hours.

Q. Were either of your boys at home that night?

page 96 } A. They came in later in the night. I came in at 3 I was working from 7 to 3.

Q. Three o'clock in the afternoon?

A. Yes, sir.

Q. What time did they come in?

A. The youngest one came in about five o'clock, I guess.

Q. Did you have any conversation with him?

A. I just told him that his mother was gone.

Q. What time did the other one come in?

A. He came in, I guess, about around eight or nine o'clock.

Q. Did you have any conversation with him?

A. Not to amount to anything, I was too worried to have any conversation with anybody.

Q. You were too worried to talk with your boys?

A. At the time I was too shocked.

Q. How did you know that your wife wasn't visiting?

A. She never had done that before, she always told me if she was going to visit anybody.

*James T. Eubank.*

Q. I see. You said that you were very broken up when you got back and found out she had gone?
A. Yes, sir.
Q. And you knew that Mr. Hayden had taken her away?
A. I didn't know it then, no.
Q. Didn't you testify—
A. I couldn't say he took her away, no.
page 97 } Q. Didn't you testify on direct examination that when you got back and found she was gone that you knew that Mr. Hayden had taken her away?
A. No, they had been running together, and I guess they were going to keep on going together, that is what I told you.
Q. You didn't testify that you knew he had; that you had talked to your boys and they never said anything?
A. I told you I talked to the boys.
Q. You did later on.
A. Later on that night.
Q. What did they tell you.
A. They said she was gone, that is about all they said at that time.
Q. Just that she had gone?
A. Yes.
Q. Did they tell you, who she had gone with?
A. They just told me she was large all right.
Q. I am not asking you that. Did they tell you who she went with?
A. No, they didn't.
Q. Now sir, you asked Mr. Hayden to your house the first time he ever came there, didn't you?
A. Yes, I asked him to get out and come to the house, he was parked out by the mail box.
page 98 } Q. You all worked in Fredericksburg at the same place at that time, didn't you?
A. At the same place.
Q. Did you invite him there from time to time?
A. Yes, sometimes I invited him and sometimes I didn't.
Q. It was perfectly satisfactory for him to come, wasn't it?
A. No.
Q. It wasn't?
A. I told him to go away.
Q. You did?
A. I told him to go away and stay away.
Q. When?

*James T. Eubank.*

A. I told him that two or three different times that when I needed him I would send for him.

Q. Then, you would go and get him and haul him around with you and your wife, wouldn't you?

A. No, I didn't.

Q. You didn't?

A. No, sir.

Q. When was the last time you gave him money to take you somewhere?

A. I cannot recall, I cannot give you the time, I didn't set it down.

Q. Did you go with him and take your wife to
page 99 } Washington the week before she left?

A. No, I don't remember.

Q. You don't remember?

A. Yes. I have got the hours down on the sheet to show the hours I worked, I worked seven days a week around the clock.

Q. You heard your boys testify, didn't you?

A. Why sure I did.

Q. Didn't you hear your boys testify that you and your wife and Mr. Hayden went to Washington a week before she left?

A. May be the boys told you that, but it wasn't no week.

Q. They are mistaken about that?

A. Because I had worked for seven days, and I come off in the middle of the week.

Q. Isn't it true that three weeks before she left that you all went down to Colonial Beach?

A. No, three weeks before. I don't remember that.

Q. You don't remember that?

A. No, I don't remember.

Q. It is rather strange that you can't remember these trips, isn't it?

A. I don't remember her going.

Q. You don't remember her going?

A. I remember Hayden and myself going.

page 100 } Q. Don't you recall that just before she left you went down to Mr. Hayden's place of business at Clark's Corner and insisted that he stop his work and take you and your wife down to Colonial Beach?

A. Sometimes I would ask him and sometimes he would ask me.

Q. Yet knowing this man was running with your wife, and knowing she was infatuated with him and he was infatuated

with her, you went down and asked him to take you all out and to the beach, isn't that true?

A. Once in the while but not every day, remember that.

Q. You were in love with your wife, weren't you?

A. Yes, I told him to stay away but he didn't do it.

Q. You weren't in love with her enough to keep him from there, were you?

A. A whole lot of times I didn't go after him.

Q. How about the times you went after him?

A. Once in the while I went after him but not every month or every day.

Q. On various and sundry occasions he would make trips to your house to bring things there for you, wouldn't he?

A. That was the excuses he had for coming there while I was gone; he would get a couple of dozen eggs or bring along some vegetables and have them sitting there in the floor waiting for me when I come home. He claimed he

page 101 } was getting them from Mrs. Chester; he was getting them just for a blind to come by my house while I was working.

Q. That is what you think?

A. That is right, I do.

Q. Did you have a conversation with your son two days after your wife left in which he told you that he *hard* Mr. Hayden in the bed room having intercourse with your wife?

A. Yes, he told me two days after she left.

Q. Two days afterwards?

A. One of them did.

Q. And isn't it true that after that you went to Mr. Hayden and had him take you to Washington to see if you could find your wife?

A. Oh, yes, I didn't want to shoot Mr. Hayden, I could have killed him all right, but I just wanted to see what kind of a front he would put on. I never said a cross word to him, we were just like friends, but I knew the rat, I knew the whole thing.

Q. As a matter of fact you wanted an opportunity to get rid of your wife, didn't you?

A. I could have shot him, I felt sorry for that boy, but I just wanted to see what kind of front he would put on.

Q. You knew when you went down there after him, you knew your son had told you what he had heard in the other room?

page 102 } A. I didn't go to him until the very evening we went; she left on Sunday and I went to him on

*James T. Eubank.*

Wednesday Evening and I went up there on Wednesday Night.

Q. And he told you on Tuesday what he heard?

A. I don't remember nothing about Mr. Hayden telling me anything.

Q. I am not talking about Mr. Hayden, I am asking *ou* if your son James, your youngest son—

A. George.

Q. If he didn't tell you on Tuesday that he had heard Hayden in the room with your wife and heard the bed screeching and heard him having intercourse with her?

A. What do you mean a couple of days before she left or after she left?

Q. Name the date, Mr. Eubanks. You heard me. She left on Sunday, did he tell you on Tuesday?

A. Yes, he told me Tuesday.

Q. And on Wednesday you went after this man and had him ride you up to Washington to look for your wife, didn't you?

A. That is right. He said he was willing to go, and I paid for the gas.

Q. And you came back and asked him to take you to the beach to look for her, didn't you?

A. No, I didn't ask him to take me to the beach.

Q. Didn't you tell him that you thought she
page 103 } had gone down to the beach and gotten a job?

A. No, Mrs. Eubank's mother started that tale, I didn't start that.

Q. Now, when you were up at Washington on the pretense of looking for your wife, you and Mrs. Covington's son went down the street and got about half drunk, didn't you?

A. No, I didn't even go down the street.

Q. You deny that you and Mrs. Covington's son went down the street?

A. No, sir, I didn't leave the house the day he carried me up there looking for my wife, he knows I didn't.

Q. Let me ask you this: About three weeks before that when you and your son and your wife and Mr. Hayden went up to Mrs. Covington's, your mother in law, didn't you and your wife at that particular time have some words and didn't you kick her out of the door?

A. No.

Q. In the presence of Mrs. Covington?

A. No, I never kicked her out the door, that is something I never done in my life is kick my wife.

*James T. Eubank.*

Q. You deny that?
A. I didn't do that.
Q. Isn't it true that you slept in the bed with your wife up until the day she left?
page 104 } A. Yes.
Q. Isn't it true that on Saturday night that you had intercourse with her on Saturday night?
A. No, it wasn't Saturday night. I ain't told you Saturday night before when I was down here. You look on your record.
Q. When did you have it?
A. It wasn't Saturday night.
Q. It was Friday night?
A. It could have been Friday night, of course, but it wasn't Saturday.
Q. Even though you knew she was running around with Mr. Hayden, that she was infatuated with Hayden, yet you had intercourse with her the day before she left. Isn't that correct? Isn't that true?
A. That is what you say.
Q. I am asking you.
A. Yes, that is true.
Q. Yet, you saw that she was big—pregnant? You knew she was pregnant and knew she wasn't pregnant by you. You say so?
A. Yes, sir.
Q. Nevertheless you were having intercourse with her night after night in that condition?
A. No, not night after night, you are wrong
page 105 } there.
Q. All right, let's go into it in a little more detail. You had it with her on Friday night?
A. That is right.
Q. When did you have intercourse with her before that?
A. About ten days later.
Q. Later?
A. Before that.
Q. Was she big then?
A. Oh, yes, she was big then.
Q. That didn't affect you?
A. Oh, yes, I could have shot both of them, like I told you, but I didn't want to do that.
Q. Do you mean to tell this jury and please listen to me,—Do you mean to tell this jury and this Court and the others in the sound of my voice that you would deliberately have

intercourse with a woman whom you knew had gone out and had intercourse with another man and was then pregnant by him, a woman whom you had married and who had given birth to your three children? Would you do such a thing as that? Would you answer my question?

A. Yes, I did.

Q. So, you didn't care anything about your wife just so long as you satisfied your lust, that was all you were interested in?

page 106 } A. I cared for her, I could have done worse than that, but I didn't do that, that is what I am doing down here looking at you.

Q. At that same time you were running around in Fredericksburg, weren't you?

A. No, not when I was living with my first wife.

Q. I mean with the woman that you later married?

A. No, not when I was married to her, I didn't run with no woman, I stayed with her.

Q. Isn't it true that she left you on the 23rd day of March, and didn't you *got* and employ an attorney on the 2nd day of April to bring a suit for divorce?

A. Yes, I guess I did, I didn't keep note of it, but I guess I did.

Q. Nine days after she left you?

A. Do you know it won't no later than that?

Q. I am asking you if it wasn't that date.

A. I don't know exactly.

Q. You had lost all of your love for her, hadn't you?

A. No.

Q. You hadn't?

A. No, I hadn't lost all my love for her, if I did I would have run them away from there, run her away.

Q. You still loved her although you knew she was pregnant by another man?

page 107 } A. No, I didn't want to kick her out because I knew she was pregnant by somebody else; that would be bad too, wouldn't it?

Q. Do you remember testifying in the last trial here? You remember that, don't you?

A. Yes, I remember being down here with you, yes.

Q. And didn't you testify in the last case that after you found out she was pregnant that you lost all your love for her?

A. No, I didn't lose all my love for her.

Q. Didn't you testify to that before?

*James T. Eubank.*

A. I don't know what I said before about that; I didn't lose all my love for her because she wouldn't have stayed in my house if she hadn't been pregnant if I did.

Q. You don't deny that you made that statement on the stand here before, do you?

A. I don't remember.

Q. You don't deny that you did?

A. I don't remember whether I made it or not.

Q. Now, Mr. Eubank, isn't it true that exactly forty-two days from the day your wife left you that you instituted your suit—forty-seven days—that you instituted your suit in this Court asking for a divorce?

A. Yes.

Q. Isn't that true?

page 108 } A. Yes, I guess you might be right on the date, but I don't know the date unless I get my papers and find out.

Q. And you were granted an absolute divorce on December 23, which became final on December 23, 1958?

A. I guess you are right.

Q. And isn't it true that you were married on December 26th?

A. That is right.

Q. Three days later?

A. That is right. What was wrong with that?

Q. There was right much wrong with it if you were so much in love with your former wife?

A. What is wrong with that? Wasn't I entitled to somebody, too?

Q. You weren't so much in love with your first wife then, were you?

A. She didn't show any love for me, it looked like she had lost all her love for me when she left home.

Q. It didn't look like you were so much in love with her when you instituted suit for divorce on May 9, 1958, when you filed suit for divorce to get rid of her?

A. You may be right, I don't know about that date in '58.

Q. Isn't it true that you instituted this suit asking for damages—

A. Why sure, I remember that.

page 109 } Q. On the 23rd day of July, 1958?

A. '58? May be so, I don't know the date, but I remember doing that.

Q. Isn't it true that you filed a suit in this Court on Octo-

ber 7, 1958, against your wife and asking the Court to take from her every bit of the real estate she had in her name?

A. No, I don't want to take every bit away from her.

Q. Didn't you file that suit in this Court?

A. That hasn't been straightened out yet.

Q. I know it hasn't, but you filed it and it is a matter of record.

Mr. Rawlings: Mr. Beazley knows all about that. Are you planning to introduce those suit papers in this case telling them what kind of a suit it is and what we asked for?

Mr. Beazley: No.

Mr. Rawlings: You have gone into it and I feel that if he is going to refer to it he should tell them what kind of suit it was.

Mr. Beazley: I am entitled to introduce in to this Court Mr. Eubank's actions after she left showing that he didn't have any love for her; he never had any love for her and show how he felt toward her.

page 110 }

The Court: All right.

What is the suit about?

Mr. Rawlings: It is a suit for partition, your Honor.

The Court: Partition—

Mr. Rawlings: I will wait until he finishes.

Q. Now Mr. Eubank, after doing all of those things, do you still say you are in love with your wife?

A. Why sure, I never forget a woman after staying with her twenty-one years and a half; I cannot forget her.

Q. Isn't it true you are more in love with what you can get out of this case than you were in love with your wife?

A. No, I don't want nary a cent unless it is right; if it is wrong I don't want a cent; if it is right then I want what I am entitled to.

Q. You stated on direct examination that you saw your wife on two separate occasions after she left you?

A. Yes, I seen her the second time.

Q. The first time how long had she been gone when you saw her?

A. I couldn't tell you, I don't even know the date, I couldn't tell you exactly the date; I was going to work the first time I seen her.

page 111 }

Q. Do you mean to tell this jury that here was a woman that you said you loved so much, and

whom you had gone to Washington trying to find, and hired a detective to look for—

A. Yes.

Q. And you saw her up here on the road and it didn't make enough impression on you for you to tell us when it was?

A. I didn't put that down. It wasn't long.

Q. Was it a month or a year?

A. It might have been four or five days, something like that. Put it like that.

Q. That was after she left?

A. Yes.

Q. When did you see her the second time?

A. I don't know how long it was, it had to be a right smart little while, I guess it has been a year or more since I seen her.

Q. Was it before December, 1958?

A. No, it was in '59, when I seen her.

Q. In '59?

A. Yes, the last time I seen her.

Q. But you saw her, there isn't any question in your mind that you saw her before July 8, 1958, didn't you?

A. I don't know whether it was in July or not.

Q. The first time?

page 112 } A. Oh, no.

By the Court:

Q. If it was four or five days after she left it must have been sometime in April?

A. Yes, it was no time—four or five days.

By Mr. Beazley:

Q. Then you certainly saw her before July 8th?

A. Oh, yes, the first time.

Q. There isn't any question in your mind about that?

A. I think I saw her then.

Q. Do you recall when you testified down here before? You recall that day, don't you?

A. Yes.

Q. Didn't you testify at the last trial down here that you saw you saw your wife riding with Hayden between here and Fredericksburg?

A. Yes.

Q. On two occasions within ten days after she left?

A. It was something like that; I told you I didn't set it down.

*James T. Eubank.*

Q. On two occasions within ten days. Didn't you testify to that before?

A. I told you I didn't set it down, how many days it was I don't know, but I remember I saw her.

Q. You saw them twice?

A. I saw them once in '58, and once in '59.

page 113 } Q. Didn't you testify before that you saw her twice within ten days?

A. I don't remember twice; I don't remember twice.

Q. Do you deny that?

A. I seen her once.

Q. Do you recall testifying in your divorce case on July 8, 1958?

A. Yes, I remember that.

Q. Didn't you testify in that case that you hadn't seen your wife since she left you on the 23rd day of March, 1958?

A. No, I don't remember testifying to that; you may have wrote it down, but I don't remember that.

Q. You didn't tell me, but didn't you testify in Mr. Rawlings Office in Fredericksburg when he took your deposition in your divorce case that you hadn't seen your wife since she left?

A. Probably I did, I remember telling him I had seen her one time.

Q. Let's see what you said. He asked you this question:

"Have you seen your wife since she left?" Answer: "No, I haven't." Question: "Do you know where she is?" Answer: "No." Question: "Have you tried to locate her?" Answer: "Yes." Question: "Did you look for

page 114 } her?" Answer: "Yes." Question: "Where?" Answer: "All around town."

How can you reconcile that, Mr. Eubank, with your statement today, that you saw her within ten days after she left?

A. Probably it was ten days, the first time, after she left.

Q. This, Mr. Eubank, was in July—July 8th—On July 8, 1958, three—nearly four months after your wife had left and then you told—you swore you hadn't seen her, and now you come here and say to this jury that you saw this woman within two or three days after she left, she and him riding together?

A. I have seen them riding together.

Q. How do you reconcile those statements, Mr. Eubank?

*James T. Eubank.*

A. I cannot remember the date, I didn't set it down myself.

Q. You don't think this was forged, do you?

A. No, I think you put it down.

Q. I didn't put it down, the stenographer who took your deposition put it down?

A. I can't remember the date.

Q. You swore to that, was that false?

A. I can't remember.

Q. Was what you said in Fredericksburg false?

A. No, sir, it was right, but I can't tell you the
page 115 } dates.

Q. If you hadn't seen her then in four months please tell us how you tell us now that you saw her within four or five days?

A. They was going towards town, both of them, of course.

Q. As a matter of fact the whole scheme is concocted, wasn't it? You haven't seen anybody?

A. No, sir, I am not trying to pull nothing over on you.

Q. You pulled it over on yourself. Here is your testimony and I am asking you about it.

And you didn't testify last time down here that you saw her once in '58 and once in '59.

A. I don't remember whether I told you or not.

Mr. Rawlings: You keep on saying that. We tried the case in '58.

A. No, he is just keeping on the same old thing over and over again.

Q. Now, from your own statement you didn't see her twice before the other trial, did you?

A. I don't remember what I said about that.

Q. You don't know what you said?

A. I don't remember what I said.

Q. As a matter of fact you don't know what year it was or anything, do you?

A. I have forgotten about that.

Q. And you forgot her, too, you were living
page 116 } with that woman in Fredericksburg that you are married to now, weren't you?

A. Sure I am living with her. Do you want to get on that, too?

Q. No, I am not interested in that.

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page 119 }

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LOUIS BRUCE,
another witness for the plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Rawlings:

Q. Mr. Bruce, will you please give your full name and where you live?

page 120 } A. Yes, sir, Louis Benjamin Bruce, Woodford, Virginia.

Q. Describe where you live, the exact location of your house?

A. I live—

Q. What road do you live on?

A. I live on Summit Road up there at Long Branch School, right about a hundred yard from Mr. Eubank's house.

Q. From who?

A. Eubank.

Q. You live about a hundred yards from Mr. Eubanks?

A. Just about, I didn't measure it.

Q. Do you know James T. Eubank?

A. Yes, sir.

Q. Did you know his former wife, Mrs. Margaret Eubank?

A. Yes, sir.

Q. Do you know whether they are living together at the present time?

A. No, sir.

By the Court: You don't know?

Mr. Rawlings: He said, no they are not.

A. I said, no, sir.

Q. Well, do you know whether they are living together? I asked you that and you said, no, sir.

A. What must I say?

The Court: That would mean you didn't know.

*Louis Bruce.*

page 121 } Q. Are they living together?

A. They are not living together, then. How is it that way?

Q. Do you remember approximately when Mrs. Eubank left home?

A. Yes, sir, it was in March of '58.

Q. Has she been back since then to your knowledge?

A. She has not.

Q. How long have you been living where you now live?

A. It will be five years Christmas Eve.

Q. Before the time Mrs. Eubank left home, could you tell the Court what the relationship was between Mr. and Mrs. Eubank?

A. It seems to me they got along real nice. We used to visit over there and it looked like they got along mighty nice.

Q. Can you tell the jury what the effect of Mrs. Eubanks' leaving was on her husband, Mr. Eubank?

A. What effect?

Q. How was he affected by her leaving? I will put it this way: How did he act when she left?

A. Jim?

Q. Yes.

A. Jim looked like he like to have went crazy he carried on awful for two or three weeks, crying and carrying page 122 } on. I used to go over there to see him, and he was crying and carrying on.

Q. Did you know James William Hayden?

A. Yes, sir, at least I didn't know him until I moved up there and got to living there.

Q. At any time before the date Mrs. Eubank left home did you see James William Hayden at the Eubank home or go in the Eubank home?

A. Yes, sir.

Q. Will you tell the Court what you saw and what you know about his going there?

A. I used to see him go there sometimes when Jim was there and quite a few times when Jim won't there.

Q. Can you tell us how many times you would say you saw him go *ther* when Mr. Eubanks wasn't at home?

A. I didn't count them, quite a few times, I will put it that way. I didn't count them and didn't keep no record of it; it won't none of my business.

*Louis Bruce.*

Q. Will you tell the Court the times you saw him go there when Mr. Eubank was not at home how he went there?

A. Sometimes he would come in the front way and sometimes the back way.

Q. What do you mean by come in the back way?

A. He would go around that old sawmill road and park his car or truck in the back down where I live and

page 123 } stop.

Q. Then what would he do?

A. He walked to the house.

Q. What would he do then?

A. He would go to the house and go on *it.*

Q. What door would he go in?

A. In the back door.

Q. Are you sure it was Hayden?

A. Yes, sir. I know you and Mr. Beazley apart and I certainly ought to know him.

Q. What time of day was it that he would go in that way?

A. Mostly late, about the edge of dark or may be a little later.

Q. When you saw Mr. Hayden go there to the house where were you at the time you saw him?

A. One time I was down there raking up some pine tags, and he come so close to me I could have almost hit him over the head with the pitch fork, I squatted down in some small pines, and I can carry anybody in this Court Room there and show them where I squatted down and where he walked along. If I had a long fishing pole I could have hit him easy. You see I won't out there looking for nobody, I was there attending to my own business and he just come there.

Q. Have you seen Mrs. Eubank since she left home?

A. One time.

page 124 } Q. Where did you see her?

A. I was coming home from work and I see she and Mr. Hayden coming up this way, headed this way in the car.

Q. And when was that, would you say?

A. That was sometime last year, July or August, I don't know exactly, I don't exactly remember, but it was around July or August, it was in the summer time.

Q. What year was that?

A. In '59.

Q. You are sure that it was Mrs. Eubank?

A. Yes, sir, positive.

*Louis Bruce.*

By the Court:

Q. How were they travelling?

A. I was in my car and I rode up on them and overtook them, I passed them, I could see them from the front and back, their faces and I should know them.

Mr. Rawlings: All right, that is all.

CROSS EXAMINATION.

By Mr. Beazley:

Q. Mr. Bruce was it day or night?

A. That was in the daytime.

Q. What time in the day?

A. After I got off the seven to three shift, I say may be twenty minutes past three.

Q. What road were you on?

page 125 } A. Route two.

Q. Where did you meet them?

A. Coming up that hill between the Spotsylvania and Caroline County line, almost right there.

Q. Hick's Hill?

A. Yes, sir, just at the bottom of Hick's Hill coming up that way.

Q. Can you tell us how she was dressed?

A. She was dressed in a dress and he was in his usual clothes.

Q. Do you know what color clothes she had on?

A. I didn't take that much notice, sir.

Q. He was coming down the hill and you were going up?

A. No, I was coming from my work and overtook him.

Q. You overtook him?

A. That is right and passed him.

Q. Was anybody with you?

A. Who me?

Q. Yes.

A. I was by myself coming from work.

Q. When you passed him of course she was on the opposite side from you?

A. That is right.

Q. What kind of a car was he driving?

A. '54 Ford.

page 126 } Q. What color?

A. It was a '54 Ford, may be two toned.

Q. May be two toned?

*Louis Bruce.*

A. Two toned then.

Q. What color was it?

A. It was light blue and dark green. I have seen him driving it a lot of times, light blue and dark green.

Q. You are sure of that?

A. Yes, sir, I saw the car.

Q. You and Mr. Eubank are good friends, aren't you?

A. We are good friends.

Q. You are such good friends that you call him by his first name and he is twice your age?

A. No, not twice my age, sir.

Q. And you haven't seen Mrs. Eubank since before the 23rd day of March, 1958?

A. Yes, sir.

Q. And you passed her in the road and recognized that it was Mrs. Eubank?

A. I should know, I have seen her many times, I should know.

Q. Now, you said that you saw Mr. Hayden going to Eubank's home. You don't know who was there, do you?

A. Won't nobody there but Margaret; the two boys were working at the filling station and Jim was work-
page 127 } ing.

Q. Did you go in the house?

A. No, I didn't go in the house.

Q. Then, how do you know?

A. I know the boys went to work that morning and had never come home and Jim was working the three to eleven shift.

Q. Couldn't somebody else have been in the house?

A. I didn't go in there.

Q. I say, couldn't somebody else have been in the house?

A. They could have been and couldn't.

Q. He went in both the front and back door of that house when Mr. Eubank was there?

A. Yes, sir, sometimes.

Q. So, it wasn't any unusual for him to go in the back door, was it?

A. I don't say that; I know he won't suppose to hang around that house when Jime was working.

Q. How do you know that?

A. Suppose somebody come to your house while you were working, how would you feel?

Q. It would depend on what they came there for.

*Louis Bruce.*

He was hanging around there when Jim Eubank was there, wasn't he?

A. Sometimes.

Q. So, it looked like he didn't object to it?

A. That won't my business; I didn't go in there
page 128 } and tell him to get out.

Q. When did you tell Mr. Eubank about this?

A. That didn't concern me.

Q. I asked you when did you tell Mr. Eubank about this?

A. Tell what?

Q. What you had seen?

A. I ain't told Mr. Eubank, I am telling you and all these people here.

Q. You have never told Mr. Eubank about this?

A. Sure, he knew it; he knew it.

Q. Did you tell him?

A. Sure I told him.

Q. When did you tell him?

A. I told him after it come to trial, I didn't mention it until it come to trial.

Q. The last time we were in Court you told him after that?

A. After that.

Q. You hadn't told him before?

A. Before what?

Q. Before the trial?

A. When I got the summons, I told him, sure.

Q. Before you got your summons you hadn't told Mr. Eubank you had seen this boy there at his house when he was not at home?

page 129 } A. Sure he knew it and I did too.

Q. When did you tell him?

A. When did I tell him?

Q. Yes.

A. I told him when I got that summons.

Q. You didn't tell him until after you got the summons?

A. He knew it.

Q. How did he know it if you didn't tell him, will you tell me that?

A. Tell you what?

Q. How did he know you had seen Hayden go to Eubank's house if you didn't tell him?

A. I told him.

Q. When did you tell him?

A. I told him when I got that summons, when I was summoned down to Court.

*Louis Bruce.*

Q. But you hadn't told him before you got the summons?
A. That didn't concern me.
Q. I don't care whether it concerned you or not.
A. Was I supposed to tell him that somebody had gone to his house?
Q. Did you tell him before you got the summons?
A. Yes, sir.
Q. When did you tell him?
A. When did I tell him.
page 130 } Q. Yes. How long did you tell him before you got the summons, or was it after you got the summons?
A. A month or so.
Q. You testified in the last trial, didn't you?
Q. Didn't you testify in the last trial that you never told Mr. Eubank anything about it until that day?
A. I didn't say no such thing.
Q. You didn't say it?
A. No.
Q. Do you deny that?
A. No, I might have, it has been a year.
Q. When did you tell Mr. Eubank about seeing Mr. Hayden there at his house?
A. I tried to tell you right then and you wouldn't listen.
Q. Didn't I ask you this question when you testified here before: "When did you tell Mr. Eubank about seeing Mr. Hayden?" And didn't you answer: "I didn't tell Mr. Eubank anything, it wasn't none of my business." Didn't you testify to that when you were here before?
A. I tried to tell you and you wouldn't listen.
Q. Now you come and say that you told him a month before you got this summons. How do you reconcile those two statements?
page 131 } A. I ain't trying to reconcile them. You are trying to *scar* me out of something.
Q. I am asking you the truth.
A. I am telling you the truth.
Q. Are you telling the truth now or did you tell the truth before?
A. I telling it right today.
Q. If you said you didn't tell him before you got the summons—
A. I didn't write what I said on a piece of paper like you did. How can I keep everything—

Q. Now you are saying that you told him a month before you got the summons.

A. If I wrote everything I said on a piece of paper I would know. If you wrote everything I said down you have got a book.

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page 132 }

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LEO SHACKELFORD,

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

DIRECT EXAMINATION.

By Mr. Beazley:

Q. Will you please state your name, residence and occupation?

A. My name is Leo H. Shackelford, I own the Whitings Furniture Market in Fredericksburg; I live at Stafford, Virginia.

Q. Mr. Shackelford, where was your place of business located in '57 and '58?

A. 1506 Princess Anne Street.

Q. Are you located there now?

A. No, sir.

Q. Are you acquainted with Mr. James William Hayden?

A. Yes, sir.

Q. How long have you known him?

A. It has been since '49.

Q. In what capacity have you known him?

A. Well, he is a mechanic and I had a used car lot and he did all my mechanical work for me.

Q. Were you acquainted and are you acquainted with Mrs. James Eubank?

page 133 } A. Well, I would say I was acquainted with her; I was introduced to her and I have seen her off and on for quite a few years.

Q. You did know her, as having seen her?

A. Yes, I have never visited in her home or anything like that.

Q. Do you know Mr. Eubank?

*Leo Shackelford.*

A. Yes, sir.

Q. Please state whether or not you have seen them at your place of business and if so under what conditions?

A. Mr. Eubank and Mr. Hayden and Mrs. Eubank I have seen them together. One time I believe at the Casino at Colonial Beach; I have seen them together there quite a few times.

Q. Let's explore that time at Colonial Beach. Can you tell us about when that was?

A. It was in 1957, the summer of '57.

Q. Who was it that you saw together?

A. Mr. Hayden, Mr. Eubank and Mrs. Eubank.

Q. Where did you see them down there?

A. In the Casino—the Little Reno Casino.

Q. They were all three together?

A. Yes, sir.

Q. Have you seen them up at your lot?

page 134 } A. Yes, most of the time it would be on Fridays. Sometimes Mr. Eubank would come in by himself in his pickup and have some groceries or something in his car, and then again Mrs. Eubank would be with him also, and he would come in and say, "Have you seen Billy—that is Mr. Hayden?" And I would say, "Yes, may be yesterday or the day before." And he would say, "If you see him tell him to come down to the house, that I want to see him."

Q. Did you ever see them riding together?

A. No, sir.

Q. The three of them?

A. No, sir.

Q. When was the last time you saw Mrs. Eubank?

A. The last time I saw Mrs. Eubank it was in '57, that was at the beach.

Q. At the beach?

A. Yes.

Q. You didn't see her in '58?

A. No, sir—no, sir.

Q. But you do tell this Court and jury that Mr. Eubank came to your place a number of times looking for Billy?

A. Yes, sir.

Q. That is Mr. Hayden here?

page 135 } A. Yes, sir. Also, there was one occasion, I think it was one Christmas, I cannot be sure but it was either Christmas of '56 or '57, Mr. Eubank and I believe his son and Mr. Hayden came out to my house one Christman Day, I think it was Christmas Day.

*Ernest E. Sale.*

Q. They came out to your house?
A. Yes, sir.
Q. How often would you say that he came there looking for Mr. Hayden?
A. I will tell you it would be hard to say because Mr. Hayden came back quite often, it was mostly on Friday because he had groceries in the pickup truck and his wife did her shopping at the Safeway, which was next door to my place.
Q. Did you ever see Mrs. Eubank come there after Mr. Hayden by herself?
A. No, sir. I have been knowing Mr. Hayden since 1949 and have never seen him with any woman by himself.

Mr. Beazley: Your witness.
Mr. Rawlings: No questions.

* * * * *

ERNEST E. SALE,
another witness for the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Beazley:
Q. Will you please state your name, residence and occupation?
page 136 } A. Ernest E. Sale, I live at Woodford, Virginia.
Q. Where do you work, Mr. Sale?
A. The Sylvania Plant.
Q. Are you acquainted with Mr. James William Hayden?
A. Yes, sir.
Q. Are you acquainted with Mr. James Eubank?
A. Yes, sir.
Q. How long have you known these gentlemen?
A. All my life.
Q. Were you acquainted with either of these gentlemen in 1952?
A. Yes, sir.

The Court: He said he had known them all his life.

Q. Where did you work in '52?

*Ernest E. Sale.*

A. The Sylvania Plant—American Viscose.

Q. Where were they working?

A. American Viscose.

Q. While you were working there did you see Mr. Hayden and Mr. Eubank and hear any conversation between them, and if so what?

A. Well, he used to bring—Mr. Eubank used to bring cake right often, a slice of cake where his wife sent Mr. Hayden, and a number of times Mr. Eubank asked Hayden to take him so and so places. It seemed like he couldn't go

page 137 } anywhere without Hayden.

Q. He couldn't go anywhere without Hayden.

A. That is the way it seemed, as far as taking trips.

Q. What about this cake?

A. Eubanks' wife always sent Hayden a piece of cake or something like that.

Q. Did she ever send you any?

A. No.

Q. Did you ever know of her to give anybody else any?

A. Sometimes Jim would have a piece for somebody, but it looked like there was always a special piece of cake for Hayden.

Q. Did he tell him in your present who sent him the cake?

A. He said the old lady.

Q. Do you know whether Mr. Hayden is working at the plant now?

A. No, sir.

Q. When did he stop working there?

A. I wouldn't like to say for sure, I believe it was somewhere around 1955—somewhere around that time.

Q. Where was he working in 1958, in March of '58?

A. Well, he had his garage up here on Route 2, about seven miles up the road.

Q. Did you see Mrs. Hayden in the month of

page 138 } March '58 in Mr. Hayden's place—Mrs. Eubank?

A. I don't say it was in March, it may have been, but I have seen her and Mr. Eubank, which is her husband, at Hayden's Garage several times.

Q. Do you know for what purpose they were there?

A. A lot of times Mr. Eubank would want Hayden to go to the beach or make plans to go up to the mountains on Sunday in his car, or somewhere like that.

Q. Did you hear him make that request of Mr. Hayden?

A. Yes, sir.

Q. How late in '58 was that?

*Herman Hall.*

A. I wouldn't like to say for sure.

Q. Do you recall when Mrs. Eubank left home?

A. It must have been somewhere in May or something like that, or latter part of April of '58; I reckon somewhere around that.

Q. Did you have any conversation with Mr. Eubank after she left?

A. Yes, it was a few days or may be a week after she had left.

Q. What did he say, if anything?

A. He was telling me she was gone and telling me that he knew it had been going on for a long time, and reckoned it was as much his fault as anybody else's.

Q. And that was a few days after she left?

page 139 } A. It was a few days or a week, something like that.

Q. And you don't recall how long before she left it was that you last saw her?

A. No, I don't remember.

* * * * *

HERMAN HALL,

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

DIRECT EXAMINATION.

By Mr. Beazley:

Q. Will you please state your name, residence and occupation?

A. Herman Hall, Woodford, laborer.

Q. Where do you work, Mr. Hall?

A. Sylvania.

Q. Were you working there in 1952 and 1953?

A. Yes, sir.

Q. Are you acquainted with Mr. James Eubank and Mr. James William Hayden?

A. Yes, sir.

Q. Were they working at Sylvania Plant while you were working there?

A. Yes, sir.

Q. What time was Mr. Hayden working there?

page 140 } A. Mr. Hayden was there in '50—'53, back in there.

Q. Did you ever hear any conversation between Mr. Eu-

bank and Mr. Hayden while you were working up there, and if so, what was it?

A. I have heard them talking about different things.

Q. What did you hear them talking about?

A. All about Jim and Hayden going to the beaches together.

Q. Who would ask who to go?

A. Mr. Eubank would ask Billy.

Q. To take him to the beach?

A. That is right.

Q. Did you ever see them together going to the beach?

A. I never have seen them, no.

Q. Do you know whether or not they went to the beach together?

A. I don't know, I never have seen them; I have heard Jim ask Billy to them at his place of business at the garage.

Q. Did he have his wife with him when he asked him?

A. He had his wife with him.

Q. How long before March 23, 1958, was that?

A. That must have been in '57.

Q. You have heard him do that since they worked—

page 141 } Mr. Rawlings: I have sit here and listened to Mr. Beazley to see how he would act, and how far he would go in leading his witness—

The Court: All right, it is leading.

Mr. Rawlings: I didn't want to delay the case with objections—

Mr. Beazley: You know how to stop me.

Mr. Rawlings: Well, it just takes up time and everything.

Mr. Beazley: Witness with you.

Mr. Rawlings: No questions.

* * * * *

JOHN DILLON,

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

DIRECT EXAMINATION.

By Mr. Beazley:

Q. Will you please state your name, residence and occupation?

*John Dillon.*

A. Well, my name is John Dillon, I live at 216 Powell Street, Fredericksburg, and my trade is body and fender mechanic.

Q. Mr. Dillon, where did you work in March '58?

A. Well, I was working part time for Mr. Hayden.

Q. Where was that?

A. That was up here on that road that turns

page 142 } toward Guinea on Route 2.

Q. Do you know Mr. James Eubank?

A. Yes, sir.

Q. Do you know his wife?

A. Well, I have seen her.

Q. Did you know her by sight? Did you know when you saw her who she was?

A. Yes, I know her pretty much.

Q. Did you see Mr. and Mrs. Eubank and Mr. Hayden at Mr. Hayden's place of business just prior to the 23rd of March, 1958?

A. I have seen them around there several times in February and March.

Q. Did you see them in March?

A. I cannot recall the exact date, but I am pretty sure right around March, it was in there.

Q. Do you know about the time she left home?

A. Yes, I heard something about it the time she left—about that time.

Mr. Rawlings: I object to what he heard.

The Court: You have enough testimony here about when she left.

Mr. Beazley: I know, but I have to hook that up with something else.

Q. Did Mr. Eubank come to the—

page 143 } Mr. Rawling: Now Mr. Beazley, that certainly is leading.

Q. Please state whether or not Mr. Eubank—

*The Court*: I object to that too, it is leading.

The Court: That is not leading. "Whether or not."

Q. Please state whether or not you saw Mr. Eubank at Mr. Hayden's place of business after Mrs. Eubank had left home

and if you heard any conversation between them and if so what you heard?

A. Well, I don't know what time she left, but I had seen him without her and seen him looking for Mr. Hayden and wanted to go some place. Several times they had been there after him to come up to supper, but I don't know the date she left.

Q. Do you know the last time you saw her?

A. Like I said around the first of March or last part of February.

Q. Did you at that time have an opportunity to observe her?

A. Oh, yes, I was working and she walked right by me.

Q. Please state to the jury whether or not you detected anything unusual about her and if so what?

A. No, I didn't see anything unusual about her, page 144 } she just looked like a normal person to me.

Mr. Beazley: Your witness.

Mr. Rawlings: No questions.

By the Court:

Q. Mr. Dillon, do you know when it was Mrs. Eubank was at Hayden's?

A. Do I know what date it was?

Q. Yes, sir.

A. No, sir, I can't recall.

Q. Do you know what month?

A. Yes, sir.

Q. What month?

A. It was the latter part of February or first part of March. Of course, I had seen him all during that winter there, I mean off and on in 1958.

* * * * *

THOMAS M. HAYDEN,

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

DIRECT EXAMINATION.

By Mr. Beazley:

Q. Please state your name, residence and occupation?

A. Thomas M. Hayden—T. M. Hayden, I live at 1305 Blake

*Thomas M. Hayden.*

Road, Fredericksburg, I am an attendant at a
page 145 } service station.

Q. Mr. Hayden, are you acquainted with James T. Eubank?

A. Yes, sir.

Q. Were you acquainted with his wife, that is the wife he had in 1958?

A. I knew here—I have seen her, I really didn't know her personally.

Q. You knew her by sight?

A. Yes, sir.

Q. Are you related to Mr. James William Hayden, here?

A. Yes, sir, his brother.

Q. You are his brother. Please state whether or not you have seen Mr. and Mrs. Eubank and your brother together during the year 1958, and if so where and under what conditions you saw them?

A. I have seen them together on several occasions. I cannot swear it was in '58, but I have seen them at the race track in Fredericksburg, the three of them together; I have seen them in the Victoria Theatre, the three of them together, and they would always have Mrs. Eubank in the middle.

Q. Do you know when she left home?

A. I don't know the exact date.

Q. Do you know the approximate date?

A. I have heard some of them say.

page 146 } Q. How long was it before you saw her the last time?

A. I couldn't rightfully say.

Q. You haven't any idea?

A. No, sir, a couple of months before that I think she was down in the shop when I was there.

Q. In the shop. What shop?

A. At the shop.

Q. Whose shop?

A. James!

Q. You saw her a couple of months—

A. It was a couple of months or so, I am not exactly sure.

Q. Tell us again how would they travel when they went out?

A. I have seen them at the races and in the theater, the three of them sitting together and she would always be sitting in between them.

Q. Please state whether or not you have seen your brother with her alone?

A. No, sir, never.

Mr. Beazley: Witness with you.
Mr. Rawlings: No questions.

* * * * *

page 147 } MRS. SALLIE COVINGTON, another witness for the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Beazley:

Q. Mrs. Covington, will you please state your name and your residence and occupation?

A. My name is Sallie Covington, 4424 C Street, S. E. Washington, D. C.

Q. And I assume you are—

A. I do house work.

Q. You keep house?

A. I keep house; I don't do much of that because I have heart trouble.

Q. Mrs. Covington, will you state whether or not you are acquainted with Mr. James Hayden, here?

A. Yes, sir, I am.

Q. Are you acquainted with Mr. James T. Eubank?

A. Yes, sir, I am, he was once my son in law.

Q. Was Margaret Eubank your daughter?

A. My daughter, she was my daughter.

Q. Is your daughter, I say.

A. She is my daughter.

Q. Mrs. Covington, while they were married did you have occasion to visit in their home in Caroline County?

page 148 } A. I did.

Q. When was the last time you visited in their home?

A. Two weeks before she left.

Q. What was the condition in the home at that particular time, that is with regard to the relationship between Mr. and Mrs. Eubank?

A. Mr. Eubank was always quarrelling with her, saying that he didn't want somebody sitting around doing nothing and he working and eating up his food. He found fault with everything; he picked flaws when she fixed the meals. He will tell you he did.

*Sallie Covington.*

Q. Turn around and face the jury.

A. And she also raised hogs and Jim used to sell one to one of my neighbors there in Washington every fall, and he would bring it up there dressed.

Q. Did you hear any conversation between Mr. and Mrs. Eubank on your visit there and tell the Court and jury what you heard?

A. When I stayed there four weeks—two weeks before Little George was born—

Q. Mrs. Covington, I am not interested in what happened twenty years ago.

A. He brought home some flour and she burned it up in the cook stove—

Q. When was that?

page 149 } A. That was before George was born, I stayed there two weeks before he was born and two weeks after he was born.

Q. I understood you to say a moment ago that you visited there about two weeks before she left, is that correct?

A. Yes, sir.

Q. Did you hear any conversation between them at that time, and if so what?

A. Mr. Eubanks said that he wanted her to go, he didn't want somebody there eating up what he worked for, and he wished she would get out; that he could have married another woman before he married her, and he wished he had her. He told her that before when I was here, he sure did.

Q. How long did you visit on that occasion?

A. I went on Saturday and left on Wednesday evening and William told me that Jim said he—

Mr. Rawlings: I object to what somebody else told her.

Q. Don't tell what you heard William say.

Now, after that visit, when did you see your daughter next?

A. Later.

Q. The next time after your visit down here two weeks before she left.

A. She came to my house on the following Sunday.

Q. Who brought her there?

page 150 } A. Jim Eubank brought her there, he drove his truck and brought a load of wood, and brought Billy with her and my son went back with them.

Q. Did you have any conversation with Mr. Eubank on that

visit and did you hear any conversation between Mr. and Mrs. Eubank?

A. He was always, it looked like to me, picking a fuss—picking an argument, and she told him not to start a fuss and he picked her up and kicked her and hit her. She told him that she didn't come up there to get in a fight and fuss and go to the beer garden and drink.

Q. Did he kick her?

A. Yes, sir, he kicked her on her leg.

Q. That was on the last visit to your home?

A. Yes, sir, right in my cook room; I told you all about it before.

Q. Yes, but this is not the same jury.

Did she make any statement to you then after that?

A. She told me—

Mr. Rawlings: I object to what she said, she is not a party to this case.

The Court: Unless it was in Mr. Eubank's presence.

Q. Was Mr. Eubank there when she told you that?

A. No, sir.

page 151 } Q. But he kicked her on the leg there in your presence?

A. He kicked her on the leg and smacked her too.

Q. And that was a week or so before she left?

A. That was a week or ten days and he went right on to the beer garden with my son after I had taken him in there and talked to him. I said, "Jim, I thought you would be good to her when she married you." I said, "It is your wife, but she is my daughter."

Q. And from there he went to the beer garden?

A. Him and my oldest son went to the beer garden.

Q. When you visited your daughter two weeks before she left, did you see her in house clothes, just ordinary clothes?

A. Yes, sir.

Q. Did you see anything unusual about her?

A. No, sir, I didn't. What do you mean?

Q. Was she any larger than usual?

A. No, sir, she wasn't any larger when she came to Washington than the week after that or two weeks after that.

Q. Did he complain to you at any time that his wife was pregnant?

A. No, sir, he didn't. He came to my house one time looking for her after she left and when he came in, Billy brought

him and his youngest son, George, and when he came in we went out into my back *hard* to talk. He said, "Mar-
page 152 } garet is gone." I said, "I don't believe it." And I went in and asked George if James knows, because she would give her life to James, her son James, that he always protected her. I said, "Did you go anywhere? What is the trouble? What have you done to her? Have you run her off?" He said, "I haven't done anything." I said, "Where did you all go Saturday." He said, "I went with Billy to the beach." I said, "Why didn't you take her?" He said, "It was that time of the month, she couldn't go."

Q. Said what?

A. He said, it was that time of the month. I guess you know what that is, she was menstruating. I hate to say it in front of all these men.

Q. How long was that before she left?

A. She left on the next Sunday or the Sunday after that, I don't know which. If I had known all this was coming I would have wrote down what was said.

Mr. Beazley: Take the witness.

## CROSS EXAMINATION.

By Mr. Rawlings:

Q. Mrs. Covnigton, you have testified about what Mr. Eubank said to you about the time he came looking for his wife. Didn't you tell him at that time that if he knew what was wrong with him that he wouldn't want her back?

A. No, I didn't, absolutely I didn't—absolutely
page 153 } I didn't, and he knows I didn't. I told him—I asked him what had they done to her, and I asked James the same words when he came on Sunday.

Q. Have you seen your daughter since she left home?

A. Is that important?

Q. Yes.

A. Yes, sir. You all don't have any objection to me seeing her, do you?

Q. No, indeed, I don't object to your seeing her, it is perfectly all right for you to see her. Where was she when you saw her?

A. She was at my door knocking.

Q. When was that?

A. That was two weeks to Christmas.

Q. Which Christmas?

*Sallie Covington.*

A. The last past two Christmas.' I didn't know anybody would have any objection, I don't have but one girl and she is the best girl that ever walked on the face of this earth; she has never given me any trouble.

Q. Was she by herself?

A. She was by herself.

Q. What did she do then?

A. Well she came in the house when I opened the door, she came in and hugged and kissed me.

Q. How long did she stay there?

page 154 } A. One day and one night and went away the next day, but I didn't check to see what time she left.

Q. December, 1959, that was?

A. That was last Christmas, the last past Christmas.

Q. That was the first time you saw her since she left home?

A. No, sir, I have seen her other times and been with her at other times.

Q. Since she left home?

A. Yes, sir, since she left Mr. Eubank.

Q. When was the first time you saw her?

A. I couldn't remember; I couldn't tell you, I didn't mark down any dates whatsoever.

Q. How long after she left home did you first see her?

A. I couldn't exactly give a date on that.

Q. Was it one week or two weeks?

A. I guess it was longer—I don't believe it was longer than that, I suppose may be it was three or probably four weeks. She had a right to visit me.

Q. How long did she stay at your house on that time?

A. She spent the day with me and that night.

Q. Do you know where she is living?

A. I do not; I don't know the address, but the letters is always mailed at Fredericksburg, and she don't miss a week writing.

page 155 } Q. How often does she come to see you?

A. She don't have no certain time. She has been a child that has never done anything to me; I have never had to worry over her; she has been a good child.

* * * * *

Mr. Beazley: Now, if your Honor please, I move to strike the evidence—the plaintiff's evidence on the ground, first, that the plaintiff has not made out a case either of alienation of affections or of criminal conversation.

Taking them up in the inverse order. The Criminal conversation.

George Lee Eubank testified that he heard his mother and Hayden in the room adjoining his room, and that his brother was in the bed with him on one occasion and was not in the bed with him on another occasion. He testified, and the Court must take judicial notice of the testimony page 156 } of this young man at the previous hearing, at that time that William didn't get up, he didn't go out of that room, and I asked him a number of times and on cross examination he testified to that; and he further testified that he was confused, but his *testiony* is diametrically opposite from what it was at the last hearing before this Court, and this Court wrote its opinion and based its opinion on the testimony of those two boys.

Now, the testimony today is more in conflict than it was before.

Before, William H. Eubank testified that he was in the room by himself, that his brother was not in that room and that he got up and went to that door, and that there was only one time he ever heard anything. Today he comes here and says his brother was in the room, and his brother attempts to corroborate him. If what he has told us at this trial is true, then what he told us at the other trial was a lie.

Mr. Eubank shows conclusively that he has made a statement at one hearing, he testified before, and this page 157 } Court will take notice of that, because it had it in its opinion; he testified that he saw them on two occasions within ten days after she left him on the 23rd day of March, 1958, and today he comes here and says that he saw her once in ten days after she left, two or three days after she left, and he saw her the other time after the trial we had a year ago.

Now, that is an inconsistent statement and all he says in response or explanation of that is I don't remember.

In addition to that he went on the stand in Fredericksburg, Virginia on July 8, 1958, and testified under oath that he hadn't seen his wife from the time that she left up until that date.

Now, that is perjured testimony and can only be that, I submit.

That is the only testimony you can convict this man on of criminal conversation.

The Court: Mr. Beazley, I think you are probably right as to the criminal conversation part of the thing because I don't think anybody could believe those two boys that testi-

fied; they testified to so many various and con-
page 158 } tradictory things that you cannot believe them.
But, I would only strike that part of the evidence, I am going to submit it on the alienations of affections.

Mr. Rawlings: Now, your Honor, it is apparent that your Honor, based on his opinion in setting aside the verdict in this case, and from his observation of the witnesses in the first case, has formed the opinion, which is apparently concurred in by Mr. Beazley, or Mr. Beazley has formed the opinion, which is concurred in by your Honor, that these boys are not telling the truth.

The Court: I think that is the truth.

Mr. Rawlings: I submit to your Honor, and I say this in all seriousness, and I haven't practiced law very long, but I know, and I have read the cases, that when there is a conflict in the evidence it doesn't matter whether they are completely at variance, they may be in conflict at various points, that unless the point is settled that there is no criminal conversation or adultery that it has got to be submitted to the
jury. The Court only takes the case away from
page 159 } the jury when there is no doubt, but when there is
a conflict in the evidence as to whether there was adultery or not, then it is for the jury to say.

The Court: You have got to produce the evidence of somebody that manifestly is not lying. They didn't testify to the same thing on cross examination as they did on direct examination.

Mr. Rawlings: That is for the jury to decide and not for your Honor.

The Court: Then, moreover it is absolutely incredible that those boys would let anything like this happen and not immediately bring it to their father's attention. One was a man and the other was almost a man. I think it is incredible.

Mr. Rawlings: That is not up to you to decide.

The Court: I am going to decide it because I would have to set the verdict aside if they brought in a *verdit*.

Mr. Rawlings: I would prefer your Honor doing that.

The Court: I am going to let it go to the jury on alienation
of affections.
page 160 } Mr. Rawlings: I think your Honor is being un-
reasonable and I will except to your ruling and see what happens.

The Court: All right, sir.

Have you got any instructions?

Mr. Rawlings: Your Honor, the instructions I have in regard to criminal conversation I am going to let it go in the record that I have offered them.

The Court: All right, you can offer them and I will refuse them.

Mr. Rawlings: Here are my remaining instructions. Instruction P-2, P-4 and P-7 were offered and refused by the Court on the ground that there was no evidence to support them, and to which action of the Court the plaintiff, by counsel, objects and excepts.

The Court: Mr. Beazley, what have you to say about his instructions?

Mr. Beazley: You cannot have exemplary damages unless there is criminal conversation.

The Court: I think your instructions are all right.

Mr. Rawlings: Your Honor, I am going to object to one of his.

page 161 } The Court: Which one are you going to object to?

Mr. Rawlings: Six.

The Court: What is the matter with six?

Mr. Rawlings: Well, that instruction should be modified to the effect that the defendant's actions don't have to be the sole contributing cause of this alienation of affections. I think that is the law, that it has to be one of the causes or possibly one of the major causes, but it doesn't have to be the only cause.

The Court: Read the instruction. I think that instruction is correct, it tells them that if he has alienated her affections.

Mr. Rawlings: I think it ought to be headed that it doesn't have to be the sole cause.

The Court: It doesn't say sole cause.

Mr. Rawlings: It leaves that impression.

The Court: No, it doesn't. The impression I get is that it tells them that if he alienated the affections of the plaintiff's wife, without the collusion or connivance of the plaintiff, and she deserted him because of *of* that, then

page 162 } the defendant is liable. That is the only cause you have attempted to prove.

Mr. Rawlings: I know, but Mr. Beazley has attempted to prove some other reasons she left home.

The Court: If she left for mistreatment that is a different matter.

Mr. Rawlings: That could be one of the reasons, but not the sole reason, it could be that this man alienated her affections regardless of what happened to her.

The Court: If he alienated her affectoins then you get your verdict and if he didn't you don't.

Mr. Rawlings: I will except to your Honor's ruling on that. I am going to object to your giving Instruction D-6.

The Court: Because of what?

Mr. Rawlings: Because I think it is misleading and because I think it ought to have something in there that his actions did not have to the sole cause.

The Court: I think his actions had to be the sole cause.

I don't think the cruelty has got anything
page 163 } to do with the alienation of affections.

Mr. Rawlings: Mr. Beazley is going to argue that she left because of some sort of cruelty or mistreatment. Why else would he introduce that evidence?

Mr. Beazley: You are a wise man.

Mr. Rawlings: That is what he is going to do and if you are not going to let him do it, it is all right with me.

I think the jury ought to be properly instructed.

The Court: I don't think the cruelty has got anything to do with the alienation of affections. If he was good to her, like his evidence shows, and this man alienated her affections, they ought to return a verdict against him. If, on the other hand, he kicked her and struck her, as Mrs. Covington says, and that was the cause for her leaving they ought not to bring in a verdict.

Mr. Rawlings: It is my understanding of the law that even if he kicked her and struck her, which we don't admit, if he alienated her affections we can still recover.

The Court: I note your exception. The steno-
page 164 } grapher has your objection.

Now, what about his instruction 6?

Mr. Beazley: Instruction 6, if your Honor please, the last part of it must be cut out where it says recover from the defendant for alienation of affections and criminal conversation.

The Court: Criminal conversation comes out.

Mr. Beazley: Then where it says that the Court instructs the jury that the divorce should be considered to show, etc.

If your Honor please, this may have some affect on it but it goes to show to the jury that he didn't have the affection for her he said he had because he filed a suit for divorce from her before she hardly got out of the house. So, he was glad to get rid of her.

The Court: It seems to me this instruction is wrong. It comments on part of the evidence and I cannot do that. You have me telling them in effect,—

Mr. Rawlings: I think you probably gave it before.

Mr. Beazley: Yes, he did, and I excepted.

page 165 } The Court: It comments on the evidence.

Mr. Rawlings: I will note an exception to that.

The Court: His number 5 is all right.

Note: Number 5 was given as amended without objection by counsel for the plaintiff. Instruction P-3 was given as offered.

Mr. Beazley: The other one is all right if he has that right about punitive damages.

The Court: I am going to cut out the punitive damages.

Mr. Rawlings: Your Honor, I am going to except to that.

The Court: I don't understand that the law is that you get punitive damages where there is no criminal conversation.

Do you know of anything to the contrary, Mr. Beazley?

Mr. Beazley: No, sir.

Mr. Rawlings: Of course, Mr. Beazley agrees with you but the cases don't bear you or him out.

The Court: Get me a Virginia case that says you can recover punitive damages where you only show
page 166 } alienation of affections.

Mr. Rawlings: In the case of *Harlow* v. *Harlow,* in that case it was a case where a man was sick and they took him away from his wife and carried him to Alexandria and wouldn't let his wife see him, and they got hold of his bank account and insurance policies and took those, and whenever his wife would go to see him they would shut the door on her, and the Court held that they had alienated his affections and they held that their deliberate actions entitled her to punitive damages. I think that is sufficient authority that I am entitled to punitive damages here, provided the jury think I am entitled to it.

The Court: I think I am going to limit you to compensatory damages.

Mr. Rawlings: Will you note my objection and exception on the ground that the plaintiff is entitled to punitive damages in a case of alienations of affections, if we can prove the willful and wanton conduct on the part of the defendant.

The Court: All right.

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Mr. Rawlings: I would like to make a motion that you set this verdict aside and grant us a new trial.

The Court: On what grounds?

Mr. Rawlings: That it is contrary to the law and the evidence; that your Honor is in error in having struck the evidence as to criminal conversation.

The Court: Well, sir, I am firmly convinced that I didn't make an error in striking the evidence as to criminal conversation. I think that the evidence on that is just incredible, and I think I would have had to set aside the verdict if I had allowed it to stay in, because it is incredible for me to believe that those boys would not have told their father immediately it happened; I think that is an incredible statement; and, then the evidence is so conflicting.

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Mr. Rawlings: Of course, I felt it was up to the jury to decide.

The Court: Their evidence was in conflict with each other and in conflict with themselves, and, therefore, I did not commit an error there.

I don't think there is any error committed in this case, it was solely a question for the jury to say whether there was any alienation of affections, and if they had brought in a verdict for the plaintiff I couldn't have done anything about it and if they brought in a verdict for the defendant I cannot do anything about it. The evidence was in conflict as to whether there was any alienation of affections. Mr. Eubank testified there was alienation of affections and Mr. Bruce corroborated him. Mrs. Covington testified to the reverse; she testified that Mr. Eubank beat his wife, kicked her, slapped her and struck her, and that was the cause of his trouble and why she left.

The evidence was conflicting and I cannot do anything about a verdict based on conflicting testimony, the jury resolves that.

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Mr. Rawlings: You overrule my motion?

The Court: I overrule your motion.

Mr. Rawlings: And I note an exception to your ruling.

The Court: Yes, sir.

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A Copy—Teste:

H. G. TURNER, Clerk.

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