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182-731

# Record No. 2813

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In The  
Supreme Court of Appeals of Virginia  
At Richmond

Hannah J. Kerr  
V.  
Vincent B. Kerr's Heirs

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FROM THE CORPORATION COURT FOR THE CITY OF STAUNTON

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## RULE NO. 14.

¶ 5. NUMBER OF COPIES TO BE FILED AND DELIVERED TO OPPOSING COUNSEL. Twenty copies of each brief shall be filed with the clerk of the court, and at least two 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 names of counsel shall be printed on the front cover of all briefs.

M. B. WATTS, Clerk.

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

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182 VA 731



## RULE 14—BRIEFS

**1. Form and contents of appellant's brief.** The opening brief of the appellant (or the petition for appeal when adopted as the opening brief) shall contain:

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

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

(c) A clear and concise statement of the facts, with references to the pages of the record where there is any possibility that the other side may question the statement. Where the facts are controverted it should be so stated.

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

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

The appellant may adopt the petition for appeal as his opening brief by so stating in the petition, or by giving to opposing counsel written notice of such intention within five days of the receipt by appellant of the printed record, and by filing a copy of such notice with the clerk of the court. No alleged error not specified in the opening brief or petition for appeal shall be admitted as a ground for argument by appellant on the hearing of the cause.

**2. Form and contents of appellee's brief.** The brief for the appellee shall contain:

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

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

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

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

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

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

**4. Time of filing.** (a) *Civil cases.* The opening brief of the appellant (if there be one in addition to the petition for appeal) shall be filed in the clerk's office within fifteen days after the receipt by counsel for appellant of the printed record, but in no event less than twenty-five days before the first day of the session at which the case is to be heard. The brief of the appellee shall be filed in the clerk's office not later than ten days before the first day of the session at which the case is to be heard. The reply brief of the appellant shall be filed in the clerk's office not later than the day before the first day of the session at which the case is to be heard.

(b) *Criminal Cases.* In criminal cases briefs must be filed within the time specified in civil cases; provided, however, that in those cases in which the records have not been printed and delivered to counsel at least twenty-five days before the beginning of the next session of the court, such cases shall be placed at the foot of the docket for that session of the court, and the Commonwealth's brief shall be filed at least ten days prior to the calling of the case, and the reply brief for the plaintiff in error not later than the day before the case is called.

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

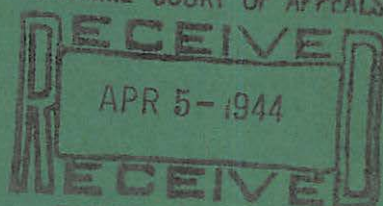
**5. Number of copies to be filed and delivered to opposing counsel.** Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

**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 names of counsel shall be printed on the front cover of all briefs.

**7. Non-compliance, effect of.** The clerk of this court is directed not to receive or file a brief which fails to comply with the requirements of this rule. If neither side has filed a proper brief the cause will not be heard. If one of the parties fails to file a proper brief he can not be heard, but the case will be heard *ex parte* upon the argument of the party by whom the brief has been filed.



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SUPREME COURT OF APPEALS



RICHMOND, VIRGINIA

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IN THE  
SUPREME COURT OF APPEALS OF VIRGINIA  
AT RICHMOND

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In re

ESTATE OF VINCENT B. KERR, Deceased

HANNAH J. KERR ..... *Plaintiff in error*

v.

VINCENT B. KERR'S HEIRS ..... *Defendants in error*

*To the Honorable Chief Justice and Associate Justices of the  
Supreme Court of Appeals of Virginia:*

Your petitioner, Mrs. Hannah J. Kerr, respectfully represents to the Court that she is aggrieved by an order entered on July 14, 1943, by the Corporation Court for the City of Staunton, Virginia, denying her the right to qualify as administratrix of her husband, Vincent B. Kerr, deceased, on the ground that she had willfully deserted and abandoned him prior to his death. The order was entered for reasons stated in writing and made a part of the record. Your petitioner duly excepted to this order. Certificate No. 1 was duly signed by the Judge of the Corporation Court on September 14, 1943.

This proceeding is entirely statutory and arose on the motion of your petitioner to qualify as administratrix of her deceased husband by virtue of Section 5360 of the Code of Virginia giving the wife the right to qualify. He had died intestate leaving his wife and no children, but several nephews and nieces as his heirs at law who resisted the appointment and relied on Section 5123 of the Code of Virginia. On this issue most of the evidence was taken before the Honorable Floridus S. Crosby, then Judge of  
2\* the Corporation Court for the City of \*Staunton (Rec. page 11-16) and completed before the Honorable J. H. May, the present Judge of this Court (Rec. page 67-93). This evidence, when read by those who did not take it, seems fragmentary and scattered. The counsel for the petitioner and two of the

counsel for the heirs at law who took this evidence are now in the Armed Forces. Seven witnesses testified for the heirs at law and five of them were heirs at law or their consorts. None of them lived in Staunton where the husband and wife last lived together. Their evidence, it is submitted, is vague and indefinite and can be disregarded or assumed without effect on the issue of whether or not the petitioner willfully deserted and abandoned her husband. The two disinterested witnesses were the family doctor, Dr. Obenschain, and a neighbor, C. B. Yeago. The former testified that the wife's health was worse than the husband's and that Mrs. Kerr had written him that she was "miserable while she lived in Staunton." The other witness testified that he saw Mr. Kerr take home what he must have assumed were supplies of food and knew nothing else. Mrs. Kerr testified at some length and several times why she and her husband separated. Miss Anie Kerr, a distant cousin of the husband, testified for your petitioner and gives in a sentence what kind of a sadist the husband was, "he would let her canary bird out just to antagonize her" (Rec. page 53). Mrs. L. B. Robertson, a witness for Mrs. Kerr and a next door neighbor in Staunton, seems to have been more or less incoherent from age but was clear that his treatment of his wife was unbearable and ordinarily would amount to mental cruelty. The only other witness for Mrs. Kerr was a nurse, Mrs. Lucy Garrett, who gives a grim picture of the husband and his actions while his sister was ill. It seems

clear that Mrs. Kerr would have been a mental and  
3\* \*physical wreck if she had continued to live at the house in Staunton with her husband. This is not a case of "crabbed age and youth." Although Mrs. Kerr was ten years younger than her husband, she was fifty-five when she married him in 1922 at her home in Purcellville, Loudoun County, Virginia, where the last Trial Judge says she had spent her "maidenhood," which must have been prolonged. Although neither was wealthy, each of them certainly had enough to live comfortably at their ages and in their station in life. According to the Trial Judge's opinion (Rec. page 98) "Mrs. Kerr owned a house and lot in Purcellville, 77½ acres of land nearby, and possessed personalty of a value in excess of \$5,000. At the time of his death, Mr. Kerr owned real estate, consisting of 157 acres of land in a remote section of Augusta County, and several dwellings in or near Staunton, of the appraised value of \$11,250.00, and personalty of the value of \$4,605.62." Mrs. Kerr paid for the wedding trip (Rec. page 33). After two years in the west, they came to Staunton. He had formerly lived in Au-

gusta County. He had no occupation and he lived on his and his present wife's income from their investments. It is said in the opinion of the Trial Court (Rec. page 98) that they lived in "an adequate dwelling situated in a good residential section owned by the husband." The Judge seems to have taken judicial notice that the house was in a good residential section, but it is carrying judicial notice to the breaking point to say the house was adequate. Something was certainly wrong with the bathroom and she frequently had to sleep on the floor in the garret. It is admitted that she paid for her maintenance except for food, and it is disputed whether she received adequate food. It is conceded the food was frugal. It is a concession that he was a frugal, parsimonious and cranky. \*His only amusements, according to the

4\* record, were going to church and reunions of his family. He was a Baptist and she is a Friend. After having lived in Staunton for about fourteen years, his wife found it impossible to continue to live in Staunton and returned to her home in Purcellville and asked him to go with her. He did not do so and they never lived together again, although she asked him to come to Purcellville. He died on June 10, 1941. The evidence will be considered more fully under subsequent headings. After completion of the evidence, the Trial Judge entered the order complained of, denying your petitioner the right to qualify as administratrix (Rec. page 96). His *ratio decidendi* seems to be that Mrs. Kerr had not proved that she had grounds for divorce from her husband. Your petitioner respectfully avers that many statements in the opinion of the Trial Judge are merely assumptions and not supported by any evidence in the record. This, however, is more or less immaterial because of fundamental errors. Your petitioner challenges the postulates of the Trial Judge in reaching his decision. It is submitted that this opinion is in error about the burden of persuasion, the matrimonial domicile and the difference between desertion and separation. It is also contended that the evidence, however sketchy it may be, also shows that Vincent B. Kerr was guilty of cruelty to his wife.

### BURDEN OF PERSUASION

In the opinion at page 100, it is said: "In order for Mrs. Kerr to justify her desertion of her husband and her change of domicile, and to relieve herself of the provisions of Section 5123 of the Code, she must establish the fact that the conduct of her husband

5\* was such that it could be made the foundation of  
 \*a judicial proceeding for divorce.' Section 5123 of the  
*Code of Virginia is as follows:*

"If a wife wilfully deserts or abandons her husband and such desertion or abandonment continues until his death, she shall be barred of all interest in his estate as tenant by dower, distributee, or otherwise."

This section is a result of an amendment in 1930. The former statute was as follows:

"If a wife, of her own free will, leave her husband and live in adultery, she shall be barred of her dower, unless her husband be afterwards reconciled to her, and suffer her to live with him."

This statute was modelled on the *English Statute of Westm.* 2, 13 Edw. I, 4 Kent's Commentaries, page 53 (Oliver W. Holmes Edition). Such statutes create a "penal forfeiture," *Id.*, page 53. Mr. Justice Brandeis says:

"By the common law dower is not barred even by misconduct during marriage." *Loughran v. Loughran*, 292 U. S. 216, 227.

Two Virginia cases interpret Section 5123, one the old statute, the other the new statute. In neither case was the penal forfeiture enforced. Judge Sims in *Harman v. Harman*, 139 Va. 508, 124 S. E. 273, 280, carefully considers the history of the old statute and the burden of persuasion. He says:

"Our view of the proper construction of this statute is that, before a widow can be barred of her dower in her husband's estate thereunder, it must be proven (a) that the wife of her own free will—i.e., voluntarily—deserted her husband; and (b) that afterwards, when requested by him so to do, she refused to return to him, without just cause for such refusal.

This statute, while somewhat different in its precise phraseology, is held, by all of the authorities on the subject, to be the same in meaning as the English statute *Westm.* 11, 13 Edw. I, c. 34; and such authorities are uniform in the holding that the construction thereof just stated is the proper and correct construction."



The Trial Judge oversimplifies Section 5106-a of the *Code of Virginia* in his opinion (Rec. page 101): "By Acts of 1938, 6\* \*ch. 242, page 382, it is no longer necessary to allege and prove an offer of reconciliation when a divorce is sought on the grounds of abandonment and desertion—See also, *Bowman v. Bowman*, 180 Va. 200. Therefore an offer of reconciliation is not a matter of concern in a proper determination of the motion." The purpose of this Section is to change rules of pleading and the burden of introducing evidence, not the burden of persuasion. Mr. William R. Shands says, in the 1938 *Report of the Virginia State Bar Association*, Volume L, page 417:

"Section 5106-a has been added to the Code. The new section provides that it shall not be necessary in any suit for divorce from the bond of matrimony or from bed and board upon the ground of abandonment or desertion, to allege or prove an offer of reconciliation. This changes the law set forth by the Supreme Court of Appeals in *Inman v. Inman*, 38, where the court held that there might be facts and circumstances which would excuse a husband or wife for not having sought a reconciliation before filing suit for divorce on the grounds of desertion, but that where such facts and circumstances exist they should be pleaded and they must be proved to sustain the bill. 38 158 Va. 597, 164 S. E. 383. Also see *Colbert v. Colbert*, 162 Va. 393, 174 S. E. 660."

This statute is declaratory of what many other authorities had held in the absence of such a statute. It is submitted that this section does not abolish the rule in *Devers v. Devers*, 115 Va. 517, *Tutwiler v. Tutwiler*, 118 Va. 724. In the first case, the husband was "a little too stout" to seek a reconciliation, and in the other case "it was his duty then and afterwards to seek a reconciliation and invite her to return." Both *dicta* are peculiarly applicable in this case. On the merger of a divorce a *mensa* into a divorce a *vinculo*, Section 5115 requires that it must be affirmatively shown that no reconciliation has taken place or is probable. In Virginia it is obvious that the courts are opposed to taking away property constructively. In *Gum v. Gum*, 122 Va. 32, it is held that a 7\* divorce a *mensa* does \*not affect the property rights of the parties if the decree is silent about them. Mr. Justice Gregory in *Mitchell v. Kennedy*, 166 Va. 346, 186 S. E. 40, 41, a case under the present Section 5123, does not elaborate the requirements for the burden of persuasion, but he does say "the charge of deser-

tion made against Mary, the surviving widow, had not been sustained." In three out of four cases in West Virginia the forfeiture was not enforced. In *Thornburg v. Thornburg*, 18 W. Va. 522, the misconduct of the wife was assumed and the sole question was whether the statute was *ex post facto*. The forfeiture was not enforced in *Stuart v. Neeley*, 50 W. Va. 508, 40 S.E. 41, *Shriver v. Johnson*, 101 W. Va. 335, 132 S. E. 656, *Hatten v. Hatten*, 110 W. Va. 208, 157 S. E. 582. The last mentioned case is analogous to the present case. The head-note in the case says:

"Separation by agreement and acquiescence of parties does not constitute 'desertion,' respects wife's right to dower."

It is said in the head-note to in *In Re Philips Estate*, 114 A. 375, 376, 271 P. A. 129, mere separation by mutual agreement or consent is not desertion "within the meaning of the intestate's act. . . . providing that no husband who deserts his wife shall have any right to claim any interest in her estate after her death." The head-note in *James Black Dry Goods Company v. Iowa Industrial Com'r.*, 186 Iowa 657, 173 N. W. 23, 24, says:

"To constitute 'desertion' within Code . . . creating conclusive presumption that surviving spouse is wholly dependent upon deceased employe unless she willfully deserted him, there must be cessation of marriage relation, intent to desert and absence of consent or misconduct of party alleged to have been deserted."

In the same case, it is said:

"In divorce cases, the rule seems to be there are four elements necessary to constitute desertion: First, the cessation of the marriage relations; second, the intent to desert; third, a continuance of the desertion during the statutory period; fourth, the absence of consent or misconduct of the deserted party. The  
8\*      \*divorce cases may not be precisely analogous. The divorce statute provides for desertion for a specified time, which is not the case in the statute as to compensation. Otherwise, we think there is but little, if any, difference."

It seems obvious that a high degree of proof should be required to enforce this penal forfeiture and to find the wife guilty of willful desertion and deprive her of dower to which she has been

entitled from the early days of the English law, whatever misconduct she may have been guilty of. The Court is asked to deprive Mrs. Kerr of her dower rights which her husband never attempted to do either by divorce or by will. The burden of persuasion requires that every element of this matrimonial offense must be established. The opinion seems based on the theory that Mrs. Kerr had to show that she had grounds of divorce from her husband, otherwise she was guilty of willful desertion. This theory is based on *dicta* that must refer to the burden of introducing evidence. If they do not refer to the burden of introducing evidence, they must be oversimplified, otherwise we could have divorce in Virginia by consent. It is true that there are numerous *dicta* in the Virginia divorce decisions, unfortunately not restricted to them, confusing the burden of introducing evidence with the burden of persuasion. A familiarity, however, with the first Virginia divorce case, *Bailey v. Bailey*, 21 Gratt. 43, and the two leading cases, *Latham v. Latham*, 30 Gratt. 307, and *Carr v. Carr*, 22 Gratt. 168, and the other Virginia divorce cases, will demonstrate that a mere separation by mutual agreement or consent or acquiescence is not willful desertion. The head-note in *Pretlow v. Pretlow*, 177 Va. 524, says:

"2. Divorce—Generally—Marriage cannot be dissolved by mutual agreement.—Marriage contracts cannot be dissolved by mutual agreement."

In *Black v. Black*, 134 Va. 246, 248, it is said:

9\*      \*"... but the policy of the law is against divorce. . . ."

It is submitted that the Virginia decisions fundamentally agree with the burden of persuasion defined in *Barnett v. Barnett*, 27 Ind. App. 466, 61 N. E. 737, 739:

"In Schouler on husband and wife, Section 516, it is said: 'According to the latest authorities, it may be laid down that legal desertion in the present sense of our divorce acts imports three things: (1) A cessation of co-habitation for the period specified; (2) The willful intent of the absent spouse to desert; (3) Desertion by that spouse against the will of the other. Unless these three things concur, there is no legal desertion established such as to justify a divorce'."

It is believed that the following Virginia decisions, along with many others, clearly define the burden of persuasion in divorce for desertion in Virginia. In *Walker v. Walker*, 120 Va. 410, 412, Judge Prentis says:

"The desertion to justify a decree for an absolute divorce must be a willful desertion, and the court to which the evidence is submitted can only determine whether or not such desertion is willful by having all the facts and attendant circumstances fully and frankly presented. It is difficult to find an event which stands alone entirely unconnected with previous events. The evidence in such a case should show all of the circumstances immediately preceding the separation—such as, whether the departure was secret or open, whether it was accompanied by any threat to remain away or by promises to return, and every other pertinent declaration or circumstance to enable the court to determine whether or not the desertion was willful. It should also show the events immediately succeeding the separation, such as the efforts, if any, to ascertain the new place of residence of the consort complained of, as well as the efforts at reconciliation, if any, of either of the parties. The policy of the law is against divorce by consent, and if the sanctity of the marriage tie is to be preserved and divorces by consent prevented, full and satisfactory evidence should be required, so that the court may determine the legal questions involved from the facts presented and a decree for an absolute divorce for desertion should not be granted unless the evidence proves willful desertion without justification or excuse.

A separation by mutual consent, or because of the fault of either of the parties, may be just as well inferred from the evidence submitted in this case as a \*desertion by the wife, and it falls far short of proving the allegations of the bill."

Judge Kelly in *Grim v. Grim*, 126 Va. 245, 246, says:

"The learned judge of the circuit court was of opinion that the evidence is entirely consistent with a separation by mutual consent because of mutual disgust." If we could take this view of the case, we would unhesitatingly affirm the decree. The policy of the law is against divorce by consent. A preservation of the sanctity of the marriage tie demands that there shall be full and satisfactory proof of willful desertion without justification or excuse before a divorce on this ground shall be granted."



Judge Saunders says in *Dinsmore v. Dinsmore*, 128 Va. 403, 414:

"The courts should consider the testimony in an uncontested application for a divorce with the most painstaking and scrupulous care, and if collusion or consent appears, directly or indirectly, should deny the relief sought."

Mr. Justice Browning says in *Phipps v. Phipps*, 167 Va. 190, 192, 188 S. E. 168:

"This court has held in a number of cases that full and satisfactory evidence of desertion should be required, so that the court may determine the legal questions involved from the facts presented, and a decree for an absolute divorce for desertion should not be granted unless the evidence proves willful desertion without justification or excuse."

It is submitted that if the burden of persuasion is properly defined, the heirs fail to sustain it.

### MATRIMONIAL DOMICILE

It is clearly oversimplified if not absurd in these modern times to say that the husband has the absolute right to choose the matrimonial domicile. It is true, generally speaking, that the husband has the right to choose the place and the house where the spouse shall live simply because "he who pays the piper can call the tune."

There are exceptions to this generality. It is said in *Klein* 11\* v. *Klein*, 26 Ky. L. 1042, 96 \*S. W. 848, 849:

"It may be conceded that it is the duty of the husband to provide a comfortable home for his wife and to surround her with agreeable associations and do everything within reasonable and proper limits that can be done to make her happy. The provision that the husband should make for his wife in respect to home, companions and surroundings necessarily depends upon such a variety of circumstances involving the social standing, pecuniary condition, employment or business of the husband and his place of business, that no rule of general application can be laid down. Each case must be adjudged on the facts upon which it rests. What would be reasonable and proper in one, might be wholly unsuitable and

inadequate in another, and it is also true that within reasonable bounds he has the right to determine the place where he will live, and it is the duty of the wife to accept such residence and such place as the husband may, without unwarranted parsimony or stubbornness, select."

The head-note in *Hall v. Hall* (W. Va.), 71 S. E. 103, 34 L. R. A., N. S. 758, says:

"Mere absence of one spouse from the other, though voluntary, does not constitute desertion."

In this decision, Judge Poffenbarger quotes Redfield, C. J., in *Powell v. Powell*, 29 Vt. 148:

"Now, while we recognize fully the right of the husband to direct the affairs of his own house, and to determine the place of the abode of the family, and that it is in general the duty of the wife to submit to such determinations, it is still not an entirely arbitrary power which the husband exercises in these matters. He must exercise reason and discretion in regard to them'."

In the opinion by the Trial Judge (Rec. page 100), it is said: "He had provided an adequate home, and maintenance for her, frugal though it may have been according to his meager  
12\* income. \*If she rejects the home, and leaves the domicile simply because she never liked Staunton anyway, or because, as stated by her, 'I knew I had made a bad bargain in marrying him,' she became a deserter." The same reason is repeated on page 102: "So she broke the marital relation, left the matrimonial domicile and removed to the home of her maidenhood. It is clear that she had not in law sufficient or just cause for her act and she became a deserter." It is also said at page 99: "Finally in September, 1938, she left his home and removed her furniture and herself to her dwelling in Purcellville, with the parting words to her husband, 'If you need me, you sell your things and come over to live with me'." Your petitioner cannot find any evidence for the statement "adequate home." At times she had to sleep on the floor in the garret and certainly there was no adequate bathroom. In the Trial Judge's opinion, it is admitted on page 99: "Each contributed to the maintenance of the home, and Mrs. Kerr apparently provided for herself clothing, furniture and such articles as she

might desire, beyond a sustenance in her home." By "sustenance," it is assumed, it meant food. It is certainly clear that the preponderance of the evidence shows that she had difficulty in getting sufficient "sustenance," unless she bought it with her own funds. The maintenance, which seems to have been "sustenance," is admitted in the opinion to have been frugal. The evidence, it is urged, shows it was inadequate. Her husband would not let her have any servant at any time. Frequently, they would have guests, his relatives, and (Rec. page 74) "they come five at a time," and she would have to sleep on the floor in the garret. His sister seems to have lived with them, certainly at times. If she was like her brother, it did not help the harmony of the home. It is clear from the 13\* evidence of Dr. Obenschain, \*the family doctor and witness for the heirs, that Mrs. Kerr's health was not good while in Staunton. She went to Purcellville in 1938 and she must now be about seventy-six years old. Her health in 1938 was certainly worse than her husband's, because his only disability was deafness, although in 1938 he was eighty-one and she was seventy-one. It is offensive to local pride that she should prefer to live in Purcellville instead of Staunton, and that she never liked Staunton, however, it is submitted that she had the legal right to choose Purcellville and tell her husband to come there to live. She offered her husband a home in Purcellville as explicitly as any female would do so. She reached her limits of endurance in Staunton, and she went to Purcellville to try to be comfortable in her old age. It is believed that neither her house nor her "sustenance" was adequate in Staunton. Her health admittedly was bad in Staunton. There was no valid reason why the husband should not have gone to Purcellville. The opinion volunteers: "He could engage in no gainful occupation" (Rec. page 99), and could have added, he never had had one. According to the record, his only amusements were going to church whenever it was open and reunions of his family. The record shows that he was not a member of the Staunton Baptist church, but of the Laurel Hill Baptist church, about ten miles north of Staunton. It is not known, but there is probably a Baptist church at Purcellville. It may be that the sect to which Mrs. Kerr belongs has a meeting-house in Purcellville. It might not have been possible for him to have so many family reunions. This however, is not a valid reason why the wife should not change the matrimonial domicile, and consequently increase the matrimonial harmony. Most of the evidence in the record of the heirs 14\* and their consorts relates \*to Mrs. Kerr's reluctance to at-

tend his family reunions. The Court will probably take judicial notice that no normal consort revels in reunions of in-laws. If too many and too enthusiastic reunions of in-laws are not cruelty, they are certainly not conducive to matrimonial happiness. On the fundamental question of maintenance and money, Mrs. Kerr certainly had the right to select the matrimonial domicile. Under the accepted Virginia doctrine, the husband is liable for the necessities for his wife. It is admitted in the opinion that Mrs. Kerr paid for all her necessities out of her own funds, except for "sustenance" (food), which her husband, it is said, frugally provided for her. If she lived in Purcellville at her home, with "77½ acres of land nearby" belonging to her, it is obvious that her "sustenance" would not be so frugal. The question of food should not arise. Both of them lived on their income and they would have been able to live better and at less expense there than in Staunton. In the opinion, it is said (Rec. page 99): "He could engage in no gainful occupation; depended solely from the small income from his estate for a livelihood; he was prudent; and to him frugality was an essential virtue." It is also said (Rec. page 102): "His small income was derived solely from the small estate he owned. Mrs. Kerr possessed separate estate, which, under her husband's prudent management, produced small income . . . He was necessarily frugal and counted the last penny." It is respectfully submitted that most of these conclusions are not based on evidence in the record. It is said that he had no gainful occupation, and it could be added, never had had except matrimonially. It is rhetorically said (Rec. page 104): "Vincent B. Kerr is dead and cannot speak." It would be interesting if he could speak on who fixed his first matrimonial domicile and where \*and whether he, although so prudent, had as much money at his death as he received under his first wife's will. It would be more accurate to call him a miser than frugal. The evidence shows that he was so stingy, that he willingly would have let his wife be ill-fed, ill-clad and ill-housed. The evidence shows that Mrs. Kerr was canny about her own money and had no intention of letting her husband get all of it under the process of "loans." Mrs. Kerr certainly had as much property as her husband had. She paid for their wedding trip and let her husband have money at other times. She paid for necessities for which her husband was legally liable. The house in Staunton was not comfortable, and her health was bad in Staunton. Her "sustenance" was not sufficient. She knew that she could be comfortable in Purcellville and it is shown that she was right, be-



cause she is still living, and she is an old woman. She offered him a home in Purcellville as explicitly as any female would do so. He refused merely from "unwarranted parsimony or stubbornness." *Klein v. Klein*, supra.

## SEPARATION

Mrs. Kerr is charged with the willful desertion and abandonment of her husband. That means not separating from her husband, but willfully forsaking him. It is true that desertion and separation are frequently confused, but they are fundamentally different both in law and in semantics. 12, *Words and Phrases*, Permanent Edition, page 261. The Civil War was fought about the difference. In this case, it is submitted that the evidence does not show willful desertion. Mrs. Kerr offered him a home in Purcellville which, if he had not refused from mere perversity, 16\* would have prevented the judicial wailing (Rec. \*page 104): "... she never returned until the day of the funeral. When the shadows were falling across the evening of her aged husband's life, she returned not to comfort and nurse him, although she knew of his illness." The letter dated May 11, 1941 from Mrs. Kerr to her husband, filed by the heirs (Rec. page 49) was written shortly before his death and certainly does not read like one from a willful deserter, and this letter should be read. It completely confutes some of the statements in the Trial Judge's opinion. An offer to return and look after him and his sister would probably not be framed any more explicitly by any female than by "if I had been there to have kept up the fire, neither would have been sick. Also to have the regular meals." It is not likely that any female would make such an unaccepted overture twice. In this same letter, after telling about the activities and advantages of her place, she says (Rec. page 51): "Mr. Doome said he asked you to come over with him so you had better come next time and see things well done." This demonstrates that she kept open her offer to him of her home in Purcellville. In the opinion, in spite of the evidence, it is said (Rec. page 103): "Mrs. Kerr's intention to desert increased and became more fixed as time passed. Upon leaving she removed her articles of furniture and personal effects; in due time she transferred her registration as a voter to Purcellville and voted in several elections; in a letter to her husband dated February 1, 1940, (Ev., p. 34), she stated: 'I greatly appreciate what you have done for me and think it is time for us

to close out;" she conferred with an attorney about obtaining a divorce; she never returned until the day of the funeral." It was three years before she changed her registration, which contradicts "due time." The evidence about the change of registration

17\* seems convincing to any Virginia lawyer who \*has taken part in the mechanics of politics that it was a separation—not a willfull desertion, because Mrs. Kerr got her husband to get her transfer to vote from the Registrar in Staunton to the Registrar in Purcellville, and he got it for her (Rec. page 44). It demonstrates that he consented to her living in Purcellville. It is true that she used the expression "close out," but not in the sense that the opinion indicates. It referred to her taking over the collection of interest on the loan or loans belonging to her that her husband was collecting for her. He had complained to her "of his feet hurting him when running around about it" (Rec. page 40). It is true that in the period between 1938 and the letter mentioned, supra, Mrs. Kerr threatened to get a divorce, but only after her husband had threatened proceedings against her. He abandoned his threat or indication of action after he found that she would fight. Mrs. Kerr must be a rugged individual or she could not have stood Vincent B. Kerr for sixteen years. He was a perfect curmudgeon, which cannot be denied. In the opinion, it is said: "There is nothing express or implied in the evidence in this matter to induce the view that the separation was by mutual consent" (Rec. page 100). The evidence of Mrs. Kerr is not contradicted, expressly or impliedly, "that was three years before I left him that he told me he wished I would leave him" (Rec. page 77). She stuck it out in Staunton as long as she could do so. She was asked on cross-examination: "Did you ever return to live with him after you left? A. No, sir. He did not want me. He was hunting another wife all the time." (Rec. page 38). It cannot be safely denied that after 1938, he had at times waves of senile Don Juanism and asked other women to marry him. It is as true in

18\* divorce law as in other branches \*of the law *volenti non fit injuria*.

### CRUELTY

In Virginia, the divorce decisions indicate that a consort must have almost unlimited equanimity before getting a divorce, and these decisions indicate that marriage is "a field of battle, not a bed of roses." It, however, is not conceded that the Virginia decis-

ions hold that a woman is guilty of willful desertion, if she leaves an ogre who has not beaten her black and blue or committed adultery. The Trial Judge seems to have based his opinion solely on the fallacious theory that Mrs. Kerr had not proved that she would have been entitled to divorce on the grounds of cruelty. Although only part of the evidence was taken before the Trial Judge who decided the case, it is assumed that on the question of cruelty his decision has the weight defined by Mr. Justice Gregory in *Mitchell v. Kennedy*, supra, page 41 :

"In considering this appeal we must give to the judgment of the lower court the weight to which it is entitled. The rule is clearly stated in *Royal Indemnity Co. v. Hook*, 155 Va. 956, 157 S. E. 414. It was held in that case that when a case is submitted to the court without the intervention of a jury, on appeal this court has no authority under section 6363 of the Code to interfere with the judgment of the court below unless it appears from the evidence to be plainly wrong, or without evidence to support it."

Your petitioner avers that the judgment of the court below is plainly wrong and that it is also without evidence to support it. On the question of cruelty the Trial Judge must have ignored the error in prolonged and repeated cross-examination by counsel (Rec. page 81) : "Q. You have used the word, "mean," several times: You have not accused him of any cruelty, have you? A. No, sir,

I did not. He did hit me several times." This evidence is 19\* not contradicted. It is submitted that this evidence \*along with the evidence of the disinterested witnesses, Dr. Obenschain,

Miss Annie Kerr, Mrs. B. L. Robertson and Mrs. Lucy Garrett, would certainly show actual cruelty and the evidence abounds with proof of constructive cruelty. It is submitted that the heirs at law have failed to sustain the burden of proof or burden of persuasion as it is called by the great authority on evidence, Professor Morgan.

## CONCLUSION AND PETITIONER'S PRAYER

For the reasons stated herein and on the authorities herein cited, petitioner prays that a writ of error may be allowed; that the order of the Corporation Court for the City of Staunton of July 14, 1943 herein complained of may be reviewed and reversed; that a

writ of supersedeas may be granted her.

HANNAH J. KERR

By Counsel.

WAYT B. TIMBERLAKE, JR.

JOHN D. WHITE

Counsel.

November 8, 1943.

We, J. M. Perry and Herbert J. Taylor, counsel for the Kerr heirs at law, do hereby this day acknowledge receipt of a copy of said petition.

HERBERT J. TAYLOR,

J. M. PERRY

Counsel for Vincent B. Kerr's Heirs.

20\*

#### \*STATEMENTS

I. Plaintiff-in-error adopts this petition as her opening brief.

II. Counsel for Plaintiff-in-error desires to state orally the reasons for reviewing the order complained of.

III. I, John D. White, certify that on the 12th day of November, 1943, a copy of the foregoing petition was delivered by me to Herbert J. Taylor and J. M. Perry, counsel for the heirs at law, and that the said Herbert J. Taylor and J. M. Perry, attorneys, were advised that this petition will be filed with the Honorable George L. Browning, a Justice of the Supreme Court of Appeals of Virginia, on the 13th day of November, 1943, at his office in Orange, Virginia, at which time and place counsel will request permission to state orally the reasons for reviewing the order complained of.

JOHN D. WHITE

Of Counsel for Hannah J. Kerr.

#### CERTIFICATE

I, John D. White, of Staunton, Virginia, an attorney practicing in the Supreme Court of Appeals of Virginia, hereby certify that in my opinion there is error in the order of July 14, 1943, entered in this case by the Corporation Court for the City of Staunton, as set out in the foregoing petition, and that the same should be reviewed by the Supreme Court of Appeals.



JOHN D. WHITE.

Received 11-13-43.

G. L. B.

December 7, 1943. Writ of error awarded by the court. Bond \$300.

M. B. W.

## RECORD

page 1 } VIRGINIA:

CORPORATION COURT FOR THE CITY OF STAUNTON:

Pleas before the Corporation Court for the City of Staunton, at the Court House thereof, on the 14th day of July, 1943:

PRESENT: Honorable J. H. May, Judge.

IN RE:

ESTATE OF VINCENT B. KERR, Deceased

HANNAH J. KERR

v.

VINCENT B. KERR'S HEIRS

BE IT REMEMBERED that heretofore, to-wit, on the 6th day of March, 1942, there was filed in the office of the Clerk of the Corporation Court for the City of Staunton the petition of Richard C. Peyton, Curator of the Estate of Vincent B. Kerr, deceased, which petition is in the words and figures, following, to-wit:

### PETITION

*To the Honorable J. H. May, Judge of the Corporation Court for the City of Staunton:*

Your petitioner, Richard C. Peyton, Curator of the Estate of Vincent B. Kerr, respectfully represents unto Your Honor, that Vincent B. Kerr departed this life on June 10, 1941;

that by order of this court entered on August 5, 1941, page 2, } Richard C. Peyton was appointed Curator of the Estate of Vincent B. Kerr, pending litigation before this court between the widow and heirs of Vincent B. Kerr; that the said Richard C. Peyton expects to be called into the services of the armed forces of the United States in the near future, and the said Richard C. Peyton therefore desires to be relieved by order of this Court of his duties as Curator of said estate.

Your petitioner further represents, that as said Curator, he has had the estate of the said Vincent B. Kerr appraised, and said appraisal filed in the clerk's office of this Court; that he, the said Curator, has collected the balance due on the annuities in all; that he, the said Curator, has collected the rents from the different parcels of real estate owned by the said deceased, numbering approximately 6 different parcels in all, and has also had the responsibility of caring for these properties, keeping the same in repair, and securing tenants for the same; that the said Curator has also sold the numerous crops grown on the farm belonging to the said deceased, located near Mount Solon, Virginia, and has collected the proceeds therefrom; that the said Curator has paid all of the just debts owing by the estate of the said deceased, after having each claim properly sworn to, and has performed numerous other duties in connection with the said estate. Your petitioner has therefore performed duties in connection with the real estate of the said deceased, which would not be performed by an administrator as such.

page 3 } Your petitioner therefore prays, that by order of this court, he be relieved of his duties as Curator of the Estate of Vincent B. Kerr, and that he be permitted to make his settlement before the Commissioner of Accounts of this Court; that your petitioner further prays that he be allowed as commissions, 5% of the value of the personal property belonging to the said estate, and that in addition thereto, he be allowed a reasonable and just fee for his services in connection with the real estate of said estate, and that said commission and fee be paid unto Richard C. Peyton by said Curator, from the funds belonging to the estate of Vincent B. Kerr now on deposit in Farmers & Merchants Bank of Staunton.

Your petitioner further represents unto Your Honor, that George M. Cochran, Michael E. Kivlighan, and William T. Grasty, were appointed and acted as appraisers of said estate of Vincent B. Kerr.

Your petitioner therefore prays that each of said appraisers be

allowed by order of this court a reasonable and just compensation for their services as such, to be paid from the funds belonging to the said estate.

Your petitioner further prays that Hannah Kerr, widow of the said Vincent B. Kerr, and Walter L. Kerr, Verona K. Cowger, William F. Kerr, Samuel R. Kerr, Herbert N. Kerr, M. Gordon Kerr, Carroll W. Kerr, Floyd N. Kerr, Blanche K. Taylor, Helen K. Crabill, Elizabeth K. Lennox, W. A. Paxton, and Earle K. Paxton, heirs-at-law of the said Vincent B. Kerr, be made parties to this petition, and that proper process be  
 page 4 } issued as to the said parties; and your petitioner further prays that an order be entered by this Court permitting the filing of this petition.

That your petitioner will ever pray, etc.

RICHARD C. PEYTON

Curator of the Estate of Vincent B. Kerr—Petitioner.

page 5 } AND ON ANOTHER DAY, at a Corporation Court for the City of Staunton, to-wit, on the 6th day of March, 1942:

### ORDER PERMITTING FILING OF PETITION OF CURATOR

This day Richard C. Peyton, Curator of the Estate of Vincent B. Kerr, tendered his petition and asked leave to file the same, which is hereby granted and the petition accordingly filed.

It is hereby further ordered, that Hannah Kerr, Walter L. Kerr, Verona K. Cowger, William F. Kerr, Samuel R. Kerr, Herbert N. Kerr, M. Gordon Kerr, Carroll W. Kerr, Floyd N. Kerr, Blanche K. Taylor, Helen K. Crabill, Elizabeth K. Lennox, W. A. Paxton and Earle K. Paxton, be made parties to this petition, and it is further ordered and directed that the Clerk of this Court issue due process in accordance therewith.

J. H. MAY, Judge.

page 6 } AND ON ANOTHER DAY, at a Corporation Court for the City of Staunton, to-wit, on the 26th day of February, 1942:

### ORDER CONTINUING MOTION OF HANNAH J. KERR FOR APPOINTMENT AS ADMINISTRATRIX

Hannah J. Kerr, having heretofore moved the Court for the appointment of an Administrator of the estate of the estate of Vincent B. Kerr, deceased, who died intestate in the City of Staunton on June 10, 1941, and objection having been made to the granting of said motion by the heirs at law of said Vincent B. Kerr, deceased, on the ground that the said widow, Hannah J. Kerr, deserted Vincent B. Kerr in his lifetime without cause, and that such desertion continued until the time of his death, and evidence having been taken in support of said motion and in support of the objection thereto, it is accordingly ordered that said proceeding be and it hereby is continued for the purpose of permitting all parties to introduce such further evidence as they may see fit to present to the Court.

· FLORIDUS S. CROSBY, Judge Designate.

page 7 } AND ON ANOTHER DAY, at a Corporation Court  
for the City of Staunton, on the 24th day of March,  
1942:

ORDER DISCHARGING RICHARD C. PEYTON AS  
CURATOR AND APPOINTING F. C. HAMER  
CURATOR

This matter came on this day to be heard upon the petition of Richard C. Peyton, Curator of the Estate of Vincent B. Kerr, filed in this cause, and upon the order of this Court permitting the filing of this petition and directing that the widow and heirs of the said Vincent B. Kerr be made parties to said petition, and upon the subpoenas in chancery duly served as to the said parties; and was argued by counsel.

It appearing to the Court, from the said petition, that Richard C. Peyton, requests that he be relieved of his duties as Curator of the Estate of Vincent B. Kerr, for the reasons set out therein, it is therefore, adjudged, ordered and decreed, that upon his settlement with the Commissioner of Accounts of this court, that he, the said Richard C. Peyton, be and he is thereby relieved and discharged of his duties as Curator of the Estate of Vincent B. Kerr, and that the said Richard C. Peyton, and the United State Fidelity and Guaranty Company, his surety, are thereby relieved and discharged of any further liability upon his bond executed in this matter.

It further appearing to this court, that aside from the duties of the said Richard C. Peyton, as said Curator in



page 8 }connection with the personal estate of the said Vincent

B. Kerr, that he has rendered valuable service in connection with the real estate of which the said Vincent B. Kerr died seized and possessed, and that he, the said Richard C. Peyton, in addition to his compensation for the handling of the said personal estate, is entitled to a reasonable and just compensation for his services in connection with the said real estate. It is therefore adjudged, ordered and decreed, that Richard C. Peyton be, and he is hereby allowed as commissions 5% of the value of the personal property belonging to said estate, and in addition thereto, the sum of \$200.00 for his services in connection with the said real estate, and it is hereby ordered and decreed, that the said commissions and fee be paid unto the said Richard C. Peyton from the funds belonging to the estate of Vincent B. Kerr now on deposit in the Farmers & Merchants Bank of Staunton, said fee to be a charge against the Vincent B. Kerr real estate or any fund arising therefrom.

It further appearing to the court, that George M. Cochran, Michael E. Kivlighan and William T. Grasty, rendered valuable services as appraisers of said estate, it is therefore adjudged, ordered and decreed, that the said Richard C. Peyton, Curator of the Estate of the said Vincent B. Kerr, do pay unto each of said appraisers, the sum of \$7.50 for their said services.

It is further adjudged, ordered and decreed, that F. C.  
page 9 }Hamer be and he is hereby appointed Curator of the Es-

tate of Vincent B. Kerr, in the place and stead of the said Richard C. Peyton, with the power and authority to take over and conserve the personal estate of the said intestate, giving his receipt therefor to be filed with said settlement, and to control, maintain and collect the rents from the real estate of which Vincent B. Kerr died seized and possessed, pending further action of the Court upon the widow's motion to appoint her, or whomsoever she might designate as Administrator of said estate. But before said Curator enters upon his duties as above prescribed, he shall give bond before the Clerk of this Court with sufficient surety thereon, in the penalty of \$4000.00, conditioned for his faithful performance of his duties according to law. And it is further adjudged, ordered and decreed that said F. C. Hamer shall receive as compensation for his care and control of the Vincent B. Kerr personal estate, 2% thereof, and for his care and supervision of the Vincent B. Kerr real estate, 15% of the rents and profits aris-

in therefrom during the period in which he serves as curator.

J. H. MAY, Judge.

page 10 } VIRGINIA:

IN THE CORPORATION COURT FOR THE CITY OF  
STAUNTON

IN re:

ESTATE OF VINCENT B. KERR, Deceased

HANNAH J. KERR

vs.

VINCENT B. KERR'S HEIRS

CERTIFICATE NO. 1

The following evidence on behalf of the plaintiff and the defendants, respectively, as hereinafter denoted, is all of the evidence which was introduced at the trial of this case before the Honorable J. H. May, in the Corporation Court for the City of Staunton, which includes certain evidence taken before the Honorable Floridus S. Crosby, prior to his resignation, which evidence, pursuant to stipulation of counsel found at Page 67 of this certificate, although not authenticated by Judge Crosby, was taken and read as a part of the evidence at the final hearing. Motions, objections, rulings and exceptions to the ruling of the Court were made during the progress of the trial, as are herein set forth in this certificate.

page 11 } IN THE CORPORATION COURT FOR THE  
CITY OF STAUNTON

HANNAH J. KERR

v.

January 23, 1942.

VINCENT B. KERR'S HEIRS

PRESENT: Hon. Floridus S. Crosby, Judge of the Corporation

Court; W. B. Timberlake, Jr., Counsel for Hannah J. Kerr; Herbert J. Taylor and Charles H. Davidson, Counsel for the heirs of Vincent B. Kerr.

Motion by Mr. Timberlake:

Hannah J. Kerr this day appeared and again moved the Court to permit her to qualify as Administratrix of the estate of Vincent B. Kerr, deceased, who died intestate in the city of Staunton, on June 10, 1941, the basis of her motion being that she is the widow of the decedent. In support of this motion and in lieu of the introduction of formal evidence, Mrs. Kerr relies upon the following stipulation:

### STIPULATION

It is stipulated by and between counsel for Mrs. Hannah J. Kerr and for the Vincent B. Kerr Heirs that Mrs. Hannah J. Kerr and Vincent B. Kerr were lawfully married at Purcellville, Virginia, on November 22, 1922, and that at the time of Mr. Kerr's death these parties had not been divorced.

The plaintiff, Mrs. Hannah J. Kerr rests her case.

page 12 } Mr. Taylor: Counsel for the Vincent B. Kerr heirs state their position to be that the widow has no right to qualify as Administratrix by virtue of her being his widow, but the heirs contest this right on the ground that she abandoned and deserted the said Vincent B. Kerr, which abandonment and desertion continued up to the time of his death.

Mr. Timberlake: Counsel for Mrs. Hannah J. Kerr has made his motion and the basis of the objection has been made, and I have proven that Mrs. Kerr was lawfully married to Mr. Kerr and was not divorced during his life time. In the absence of proof on the objection, I insist that the motion be granted.

The Court. It is now incumbent upon the parties objecting to the motion to go forward with their objection.

Earle K. Paxton, a witness of lawful age, called on behalf of the heirs of Vincent B. Kerr after being duly sworn, testified as follows:

### DIRECT EXAMINATION

By Mr. Davidson:

*Earle K. Paxton*

Q. You are a nephew of the late Vincent B. Kerr?

A. Yes, sir.

Q. What is your occupation?

A. I am a teacher at Washington & Lee University,  
page 13 } at Lexington, Virginia.

Q. Did you have occasion to visit your uncle in Staunton prior to the time of Mrs. Vincent B. Kerr's leaving him?

A. Yes, sir.

Q. Do you recall the time she left the late Vincent B. Kerr?

A. Yes, sir. Some time the latter part of September, 1938.

Q. Do you know whether she ever returned to live with him prior to his death?

A. She did not return.

Q. When did he die?

A. On June 10, 1941.

Q. Did he have a serious illness prior to his death?

A. Yes, sir, he had a stroke of some kind about the 22nd of May, 1941.

Q. Do you know whether Mrs. Vincent B. Kerr knew of this illness prior to his death?

A. She knew he was sick before he died.

Q. Did she make any attempt to come and comfort him and perform the usual duties of a wife at that time?

A. No, sir, she made no attempt to return at that time. She was not there.

Q. Did she ever return so far as you know from the time she left Vincent B. Kerr in 1938?

A. I do not know directly. She did not return to live with him; I know that.

Q. Was she present at his funeral?

page 14 } A. Yes, sir.

Q. Do you recall any statements she made at that time with reference to him?

A. No, she made no statement to me.

Q. How often would you say you visited Mr. Vincent B. Kerr and his wife in their home prior to the separation?

A. I would say I was in the home at least once every six weeks, or possibly oftener than that, on an average.

Q. From your visits and the opportunity you had while you

*Earle K. Paxton*

were there to observe them, how would you say they got along together?

A. I saw no altercations between them when I was there.

Q. Of your knowledge was he an ample provider for the home as far as food was concerned?

A. We had meals there; we always had plenty to eat; and we have been there—just come in around the middle of the day—and always food on the table. They would ask us to sit down and have something to eat; but, of course, we had had our lunch and food.

Q. Did you ever have occasion to observe Mrs. Kerr mistreat the decedent?

A. I never saw any case of her mistreating him.

Q. Did she ever make a statement to you as to why she let him?

A. I have not seen her, except at the funeral and at the sale of my aunt's property and this afternoon.

page 15 } Q. In your visits and relations with Vincent B. Kerr, did you have occasion to ever hear Mrs. Kerr criticize or belittle or antagonize the decedent?

A. I never heard her criticize him, and I never heard her fuss with him.

Q. Where were you when the desertion occurred?

Mr. Timberlake: The question is objected to, on the ground that no proof of desertion has been offered.

The Court: The objection is overruled.

Mr. Davidson:

Q. Where were you when the desertion occurred?

A. I was in Lexington.

Q. What did you do when you first heard of it? Did you make a trip down here?

A. We did not make an investigation particularly. We came down to see my uncle and his sister.

Q. Why did she leave him?

A. I do not know.

Q. Do you recall how old your uncle was at the time of the desertion in 1938?

A. He was 80 years old.

Q. Do you know how old Mrs. Kerr was at that time?

A. No, sir.

Q. Do you know if she was considerably younger?

A. I don't know.

*Earle K. Paxton*

page 16 } Q. What was the general condition of his health in 1938?

A. He was rather vigorous for a man of 80, but he was getting deaf and getting worse all the time.

Q. That was in 1938?

A. Yes, sir.

Q. Do you know whether Mr. and Mrs. Vincent B. Kerr went around together to social functions or to religious affairs?

A. They went around together very little, and sometimes I would come and take them somewhere and my brother would come and possibly other people, but they did not go together to church very much.

Q. Did your uncle have church affiliations in Staunton?

A. Not a membership in Staunton but at Laurel Hill.

Q. Was he a regular attendant at church?

A. Yes, sir, at some of the churches.

Q. Did she go with him?

A. We would come down here on Sunday afternoon sometime, and he would go to church in the morning and she did not go.

Q. Did I understand you to say that you saw Mrs. Vincent B. Kerr at the funeral of her husband?

A. Yes, sir.

Q. Do you recall several years back the funeral of Miss Margaret Kerr?

A. Yes, sir.

Q. Do you recall whether Mrs. Vincent B. Kerr went page 17 } with her husband at the time?

A. She came to the funeral along with the rest of the family; she did not sit with the family. She turned off between the middle and the back of the church; she did not sit with the rest of them.

Q. She did not sit with her husband?

A. No, sir.

Q. Do you recall the date of the funeral?

A. I think it was in 1934.

### CROSS EXAMINATION

By Mr. Timberlake:

Q. All of your knowledge of the facts to which you have tes-

*Earl K. Paxton and Mrs. Earle K. Paxton*

tified, as far as the relations of the parties in the home, is based upon what you saw and observed on occasional visits of possibly once every six weeks or so?

A. Yes, sir.

Q. As to what went on in the interim, other than the times in which you were visiting these people, from the time of the marriage until the time of Mr. Kerr's death, you, of course, know nothing, as far as your personal knowledge is concerned?

A. I did not observe anything.

Witness leaves the stand.

Mrs. Earle K. Paxton, another witness of lawful age,  
page 18 } called on behalf of the heirs of Vincent B. Kerr, after  
being duly sworn, testified as follows:

## DIRECT EXAMINATION

By Mr. Davidson:

Q. You are the wife of Professor Paxton?

A. Yes, sir.

Q. Did you have occasion to visit in the home of the late Vincent B. Kerr with your husband on numerous occasions in the past?

A. I certainly did.

Q. Approximately how often in the course of the year would you make these visits to Mr. Vincent B. Kerr?

A. Not less than once in six weeks and sometimes oftener, on an average from a month to six weeks.

Q. On the occasions of your visit what was your observation as to Vincent B. Kerr being a provider for his wife?

A. We did not have a great many meals there. They asked us for dinner at Christmas and Thanksgiving, and there was always an abundance of food. We often went in at meal times and there was always plenty of wholesome food. We did not eat with them often, very seldom, except when specially invited; but I saw evidence of food.

Q. How did Vincent B. Kerr treat his wife on the occasions you visited them?

A. Always all right as far as I could tell.

*Mrs. Earle K. Paxton*

Q. Did his wife reciprocate in equally courteous treatment?

page 19 } A. As a rule.

Q. Do you recall any exception to that when visiting in the home?

A. She ridiculed him; made fun of everything he said or did; his religion, his church activities, his friendships.

Q. Did she make such ridiculing statements in the presence of others?

A. Yes, sir, anybody who happened to be there.

Q. Why did she make these statements?

A. She just seemed to feel that way about it.

Q. Did she ever make any reference to his age or his affliction or deafness?

A. She did not to me.

Q. I believe it has been testified that Mr. Vincent B. Kerr was affiliated with the Baptist Church: Is that correct?

A. Yes, sir.

Q. Did she attend church with him?

A. I do not think so, not very often.

Q. Do you know whether he was a regular attendant at church?

A. Absolutely.

Q. I believe you were present at the funeral of Vincent B. Kerr?

A. Yes, sir.

Q. Did you have any conversation with Mrs. Kerr at the time?

page 20 } A. I did.

Q. What was it?

A. I spoke to her while the grave was being filled and before the flowers were put on, and Mrs. Kerr asked me what was wrong with Mr. Kerr, what he died of. I then asked her if she knew Aunt Harriett, Uncle Vincent's sister, was dead. She replied she knew but not until she was buried. I asked her: "Did you know Uncle Vincent was ill?" She said: "Yes."

Q. Did she make any further statement to you?

A. Yes, sir. Mrs. Kerr asked me if Aunt Harriett, Mrs. Arm-entrout, had made a will. I replied: "Yes." Then she asked me: "Did she make Earle Administrator?" I replied: "Yes." She said: "Did Vincent make Earle Administrator of his estate?" I



*Mrs. Earle K. Paxton*

said: "I don't know." Then Mrs. Kerr said: "What did Vincent do with his property?" I said: "I don't know."

Q. Do you know the date that Mrs. Vincent B. Kerr left her husband?

A. I do not know the exact date; it was in September, 1938.

Q. Do you know of your personal knowledge whether she ever returned to live with him up until the time of his death?

A. Oh, no, she did not.

Q. Do you know whether Mrs. Vincent B. Kerr had any active church affiliations here?

page 21 } A. I do not think so.

### CROSS EXAMINATION

By Mr. Timberlake:

Q. You said Mrs. Kerr, from your observation, was inclined to ridicule Mr. Kerr from time to time?

A. Yes, sir.

Q. You yourself would have been inclined to ridicule some of the crazy ideas he had?

A. Well, maybe so.

### REDIRECT EXAMINATION

By Mr. Davidson: Being familiar with the family as you were would you ridicule your husband under such circumstances and humiliate him as this lady has been doing?

Mr. Timberlake: The question is objected to; that has nothing to do with the issues in this case—Mr. Paxton's family life or the inclination of his wife to ridicule him.

The Court: The objection is sustained.

Mr. Davidson:

Q. Do you know whether or not Mrs. Vincent B. Kerr on occasions did criticize her husband in such a manner as to humiliate him?

Mr. Timberlake: The question is objected to on the page 22 } ground that it is repetition.

The Court: The objection is sustained.

Witness leaves the stand.

*Walter A. Paxton*

Walter A. Paxton, another witness of lawful age, called on behalf of the heirs of Vincent B. Kerr, after being duly sworn, testified as follows:

## DIRECT EXAMINATION

By Mr. Davidson:

Q. Where do you live?

A. In Wilmington, Delaware.

Q. What is your occupation?

A. Secretary and in charge of Works Activities of the Pyrites Company.

Q. I believe you are a brother of Mr. Earle K. Paxton?

A. Yes, sir.

Q. Did you have occasion to visit in the home of Vincent B. Kerr prior to the time of his separation from his wife?

A. I made it a rule to visit him practically every summer, or any time I was home on vacation; probably once or twice a year I got down here.

Q. From your visits and observation how would you state the couple got along together?

A. I never saw anything out of the ordinary. They seemed to get along all right, except the last visit I made.

page 23 } Q. What was the date of that visit?

A. This particular time I was taking them to Luray, Virginia, to a family reunion, and my aunt, Mrs. Harriett Armentrout, was along.

Q. When was that?

A. June 26, 1938. We went to a family reunion at Luray.

Q. What happened.

A. Her attitude at that time was quite different from any time I had ever seen her before. She was belittling him all the way over and all the way back, and I do not think I heard her say a pleasant word to him, and she was constantly butting in on some conversation he was having as though his presence irritated her.

Q. Did you see them together after that?

A. No, sir.

Q. Do you recall whether or not Mrs. Kerr participated in the reunion after you arrived at Luray?

A. She went to the old family home of the Farrars. She went

*Walter A. Paxton and Wilbur L. Kerr*

to the services at 10:30 approximately, and then she went with us to the old church grounds, and then at 1:00 o'clock they had dinner at the Mimslyn. She did not go to dinner; she stayed out in the car.

Q. Did Mr. Kerr go in?

A. Yes, sir, and my aunt and myself.

Q. That was in June, 1938?

A. Yes, sir.

page 24 } Q. Do you know when she separated from him?

A. All I know I heard through correspondence with my brother's wife and my aunt Harriett, and I was informed she had left; I do not know the exact date.

The Court:

Q. The family advised you they had separated?

A. Yes, sir.

CROSS EXAMINATION

By Mr. Timberlake:

Q. Did you hear Mr. Kerr say a kind word to his wife on this trip?

A. He did not say an unkind word and his attitude to her was normal, I would say. Nothing about his attitude, but an unusual attitude on her part.

Q. You felt she was going out of the way to be disagreeable to him?

A. Yes, sir, she was.

Q. You do not know what might have been the background for this disagreeable attitude?

A. No, sir. All I saw this one time.

Witness leaves the stand.

Wilbur Kerr, another witness of lawful age, called on behalf of the heirs of Vincent B. Kerr, after being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Davidson:

*Wilbur L. Kerr*

page 25 } Q. Where do you live?

A. At Swoope.

Q. Are you any relation to Vincent B. Kerr?

A. Yes, sir.

Q. What kin?

A. A cousin, but not a first cousin.

Q. Do you know Mrs. Vincent B. Kerr?

A. Yes, sir.

Q. Did you ever have occasion to visit in the home while they were living together?

A. Yes, sir.

Q. How did they get along?

A. All right, as far as I know. I did not see they were not getting along when I was there.

Q. Do you know of any occasion when Mrs. Kerr indulged in ridicule?

A. Not to my knowing. All right, as far as I know when I was there.

Q. From your observation in visiting the family would you say Vincent B. Kerr was an ample and comfortable provider?

A. As far as I know, yes, sir.

### CROSS EXAMINATION

By Mr. Timberlake:

Q. When were you last in the Kerr home?

A. I have not got no dates. I was there at dicerent times.

page26 } Q. Have you any idea when was the last time you were there while Mr. and Mrs. Kerr were living together?

A. I have not got no date but not so long before she left him.

Q. You cannot give a more definite time?

A. No, sir.

Q. About how often were you there?

A. No regular time, but I was there different times.

Q. They were married in 1922 and separated in 1938; that is a period of 16 years approximately. Could you give us any idea of how many times during the 16 years you were there?

*Wilbur L. Kerr and Walter L. Kerr*

A. I expect the last 8 years, maybe a dozen times. I guess, no dates and no numbers.

Q. What about the first 8 years?

A. About that much the first 8 years.

Q. Did you come to pay a call; or did you stay over night?

A. Sometimes to call; I never stayed over night. I was there twice for meals.

Q. And the rest of the time you just made a call, and there twice for meals?

Witness leaves the stand.

Walter L. Kerr, another witness of lawful age, called on behalf of the heirs of Vincent B. Kerr, after being duly sworn, testified as follows:

page 27 } DIRECT EXAMINATION

By Mr. Daviddon:

Q. Where do you live?

A. At the junction of Christians Creek and Middle River, on R. F. D. 3, Staunton, Va.

Q. Are you any kin to the late Vincent B. Kerr?

A. A nephew.

Q. Do you know anything about this matter that is being discussed here?

A. I have heard more than I know.

Q. What do you know of your own knowledge and observation as to how they got along?

A. I popped in up here. I did not see so much, but the last time I saw them both was at the Kerr reunion in September, 1940. I was president and he was vice president.

Q. Where was it held?

A. In Gypsy Hill Park.

Q. How did they get along on that occasion?

A. She was picking at Vincent the whole time it occurred to me. What about I don't know; I don't remember the little incident now.

Q. What day was that?

A. Sunday, in September, 1940.

*Walter L. Kerr and Dr. C. P. Obenschain*

Q. Mrs. Vincent B. Kerr was with him then?

A. No, I have got the reunions mixed. I reckon it page 28 } was in 1938. We had one in 1940 too.

Q. How was she ridiculing him? What did she say and do on that occasion? Do you remember?

A. No, sir. I know Wilbur took them home, up on the hill, after the reunion.

Q. Did you talk with them on that day?

A. I believe I have got the reunions mixed. Uncle Vincent and Aunt Harriett were there. We had several.

Q. That was in 1940 when he and his sister were present?

A. Yes, sir.

Q. When have you seen Vincent B. Kerr and his wife together when she was ridiculing him and humiliating him and mistreating him?

A. She has been at Laurel Hill three times. Once on a homecoming occasion, and at my mother's funeral, and the other time at the burial of her late husband, which was last June.

Q. Do you recall of any specific instances of what was said and done on the part of Mrs. Vincent B. Kerr?

A. I think she spent the night, the night before the homecoming. I don't know—she seemed rather ill at ease. I don't know why. I don't think she liked the homecoming much.

Q. How did she like Vincent B. Kerr?

A. I don't think he did exactly to suit her, but I don't recall exactly what was said.

page 29 } NO CROSS EXAMINATION

Witness leaves the stand.

Dr. C. P. Obenschain, another witness of lawful age, called on behalf of the heirs of Vincent B. Kerr, after being duly sworn, testified as follows:

#### DIRECT EXAMINATION

By Mr. Taylor:

Q. Were you the attending physician in the family of Vincent B. Kerr before he and his wife separated?

*Dr. C. P. Obenschain*

A. At times, yes sir.

Q. Were you there more than one time during their married life together?

A. Yes, sir, I was there several times.

Q. What seemed to be the situation there, so far as the attitude of Mr. and Mrs. Kerr towards each other was concerned?

A. I do not think there was any occasion for me to doubt; just like in any other family. I did not go into questions along that line.

Q. Did they seem to be getting along in a normal manner?

A. Yes, sir, the only thing I knew was a letter from Mrs. Kerr after she moved away. The letter said something about it.

The Court:

Q. Have you got the letter?

A. I think I could find it: I do not know for certain.  
page 30 } Mr. Taylor:

Q. What was her attitude as disclosed by the letter?

A. That she had not been enjoying her married life. In other words, they did not get along together. She had been more or less miserable.

Q. Did she make any declarations of returning or not returning in that letter?

A. No, sir.

Q. You do not know how long that was after they separated?

A. I cannot give the date of it.

Q. When you were visiting in the home before the separation, did there seem to be sufficient food supplies?

A. I did not see the food at all. I do not know anything about that.

Q. You never took any meals with them?

A. No, sir.

Q. Was he growing feeble at that time?

A. He always was more or less feeble; not much different than what you would expect at that age. He was very hard of hearing and it was hard to get him to understand things at some times.

CROSS EXAMINATION

By Mr. Timberlake:

*Dr. C. P. Obenschain and Mrs. Hannah J. Kerr*

Q. What was the condition of Mrs. Kerr's health during the latter years of his life time?

A. It was not overly good. Have occasions to be indisposed.

page 31 } Q. She was not a strong woman?

A. At times, no.

### REDIRECT EXAMINATION

By Mr. Taylor:

Q. Was she apparently much younger than he?

A. Yes, sir. He was one of the oldest men we had around here.

Q. You do not know what the difference in their ages was?

A. No, sir, I do not know.

### RECROSS EXAMINATION

By Mr. Timberlake:

Q. Do you know what was the cause of her ill health?

A. I could not recall everything without looking at my records; she had hypertension occasionally.

Witness leaves the stand.

Mr. Davidson: We rest our case.

Mrs. Hannah J. Kerr, another witness of lawful age, called in her own behalf, after being duly sworn, testified as follows:

### DIRECT EXAMINATION

By Mr. Timberlake:

Q. You are Mrs. Hannah J. Kerr?

A. Yes, sir.

page 32 } Q. What was your name before your marriage?

A. Hannah J. Thomas.

Q. Where was your home prior to your marriage?

A. A mile above Round Hill, Virginia, Loudoun County; I lived in the country.



*Mrs. Hannah J. Kerr*

Q. When were you and Mr. Kerr married?

A. In 1922.

Q. What was the date of the marriage?

A. November 2, 1922.

Q. Where and when did you first meet Mr. Kerr?

A. In Purcellville, at his niece's, Mrs. Harry Taylor.

Q. About when was that?

A. I just do not remember.

Q. Did you have any property and estate of your own at the time you and Mr. Kerr were married?

A. I owned a house and lot in Purcellville and 77½ acres of land a mile from Round Hill, my old home and part of my father's estate.

Q. As I understand it, you were married in Purcellville in 1922?

A. Yes, sir.

Q. And you immediately came to Staunton?

A. No, sir, we went out west and stayed two years travelling.

Q. How did Mr. Kerr treat you during those first two years of your married life?

A. He was very close in providing for the table.

page 33 } Q. That was while you were out west?

A. Yes, sir. He would buy fruits but no substantial food. He did not buy meats or anything of that kind. He did eat meats and would not get them for me; and on occasions I got low blood pressure; I did not have sufficient food.

Q. Did he call on you to provide any money for living expenses?

A. I did not take much money with me. My sister gave me money to get silver ware for the table with the money. I let my sister have the family silver ware, and I bought food with the bridal present. I did not take much with me. I thought he would support me. I had it in the bank in Purcellville.

Q. Did he get any money from you at the time you were married?

A. Before we started west he borrowed \$200.00 from me.

Q. Did he give that back to you?

A. He never intended to.

Q. That is the money that was used on the wedding trip?

A. Yes, sir, I paid for my own wedding tour.

*Mrs. Hannah J. Kerr*

Q. After the two years you spent out west, where did you and Mr. Kerr move to?

A. The corner of Institute Street, in Staunton.

Q. Did you live there continuously until 1938?

A. Yes, sir.

Q. How did he treat you from the time you came  
page 34 } back to Staunton?

A. I hate to speak ill of the dead; it is not right. He was mean from the beginning to the end to me. He wanted my money in his possession and he was mean to me because I did not give it to him. He had enough of his own, and I did not think he needed mine, and it just got worse and worse, and finally when he bought the farm in Mt. Solon, he borrowed \$1000.00 from me, and it seemed to throw him all to pieces that he had to pay me principal and interest. He was not used to equal rights. He thought that it ought to be his, and he was so disagreeable to me, and I had not very good health, and I had a home and I told him he was treating me so meanly, I had to go back to my home. Before I left, I said: "If you need me, you sell your things and come over and live with me." Anything I did for him, in kindness, to help him, he would rant and charge: 'It is not your home; it is my home; and you are just a bossing.' I did these things for kindness. Everything I did was wrong.

Q. He resented your using your money for having things fixed?

A. Yes, sir, everything was wrong.

Q. Did he provide you with any help about the home?

A. No, sir.

Q. Provide you with any clothing?

A. No, sir.

page 35 } Q. Did he ever provide you with any clothing?

A. No, sir, I did not expect him to; I had enough money to get my own clothes.

Q. Did he provide the necessary food for your use and his own?

A. Not always. He generally was out of money when the time for buying flour came, and I would go and buy flour and corn meal and fruits and fish and pay for them and have them sent up, and he would enjoy those things very much.

Q. Did you and he eat the same type of food?

A. He did not have much health and could not eat everything.

*Mrs. Hannah J. Kerr*

Q. He would buy the food and groceries from time to time?

A. Not always.

Q. Did he do it on occasions?

A. Yes, sir.

Q. When he bought the food and groceries, would he buy the food you ate?

A. Not always, unless I gave him the money to buy it with.

Q. Unless you gave him the money, he bought only the food he ate?

A. Yes, sir.

Q. Did you have to have medical assistance from time to time?

A. Yes, sir, I had flu every winter.

Q. Would he call the doctor?

page 36 } A. No, sir, I had to go to the doctors or write to them to come. He would not phone for them to come to me, and fuss because I had them, and I paid for them.

Q. Did that treatment that you have described get better or worse until 1938?

A. It got worse; he could not get my money, and it got worse.

Q. In 1938, you told him you could not get along any longer?

A. Yes, sir; I had heart trouble and I just could not stand it.

Q. Who is Miss Ann Kerr?

A. A distant cousin of my husband's.

Q. Did you have occasion to help her from time to time?

A. She came and asked Vincent to loan her money to go to college on; she was very anxious to teach; and, of course Vincent did not let her have it. She came to the house and I said: "I will let you have the money. How much do you want?" She told me and I gave her the check; she wanted to go to college in Tennessee.

Q. Did he resent that?

A. He almost drove me from his home because I had done a kind deed.

The Court:

Q. How much was the check for?

A. It was \$200.00 at first and I let her have about \$300.00 later.

page 37 } Mr. Timberlake:

Q. How old are you?

A. I will be 75 in May.

Q. I have here what purports to be a copy of a deed to certain

*Mrs. Hannah J. Kerr*

timber on a piece of property in Loudoun County, Virginia, by Hannah J. Kerr and Vincent B. Kerr to Holbert A. Myers and John A. Myers, partners, trading as Myers Lumber Company, of Winchester, Virginia, this instrument being dated April 9, 1941, and I ask you if you and Mr. Kerr signed the original of that deed to the timber and is that a copy of the paper that was signed?

A. Yes, sir, we both signed it. I had a hard time to get him to sign it. I sent it to Mr. Taylor (Herbert J.) and he was a long time signing it.

Q. He and you both signed it and acknowledged it before a Notary Public?

A. Yes, sir.

Q. I wish to file this paper, and have marked it "Defendant's Exhibit No. A." This \$1000.00 was a loan and not a gift?

A. He gave me a note and paid me interest for a short while and it just happened some one owed him and paid him and he paid it to me.

Q. He did not owe you anything on that?

A. No, sir.

### CROSS EXAMINATION

By Mr. Davidson:

page 38 } Q. How old were you when left Vincent B. Kerr?

A. I have not counted that up.

Q. When did you leave him?

A. September 18, 1938, I think.

Q. That would make you 70 then?

A. Yes, sir, 70 or 71.

Q. Do you know how old he was at that time?

A. He was 80 that summer, or 81, I don't know which. They had a reunion on his eightieth birthday; he may have been 81.

Q. Did you ever return to live with him after you left?

A. No, sir. He did not want me. He was hunting another wife all the time.

Q. Did he tell you he was hunting another wife?

A. No, sir, other people told me so.

Q. Did you ever have any correspondence with him, agreeing to close out matters entirely with him?

*Mrs. Hannah J. Kerr*

A. He wrote to me and asked if I was willing to give everything up, and I went to a lawyer in Leesburg.

Q. What happened then?

A. The lawyer wrote to Mr. Taylor and to Vincent that I wanted a divorce and alimony and he was to pay the Court costs, and I never heard anything from him after that.

Q. Were you living Purcellville in February, 1940?

The Court:

Q. You went to this lawyer for the purpose of obtaining a divorce and he wrote to Mr. Kerr's counsel and advised him that you did want a divorce?

A. Yes, sir.

Mr. Davidson:

Q. Were you living in Purcellville on February 1, 1940?

A. I don't just remember; I don't keep up with dates.

Q. Did you have any correspondence with Vincent B. Kerr after you separated from him in 1938?

A. He collected a good bit of my interest over here and sent it to me.

Q. Did you sign your name Hannah J. Kerr?

A. Yes, sir.

Q. Will you look at this letter and tell me if that is your signature?

A. Yes, sir.

Q. I wish to introduce this letter, which I have marked "Plaintiffs' Exhibit No. 1," and read it into the record:

"PLAINTIFFS EXHIBIT NO. 1

Purcellville, Va., Feb. 1, 1940.

Dear Vincent:

I went thru all of your letters and cards and found a letter you had sent Oct. 3rd, with 3 dollars from Rebecca Borden and \$12.50 from Stuart Hall interest. I had forgotten all about it and am very sorry to have caused you any uneasiness.

I find I am getting very forgetful as I grow older.

page 40 } We have had three long weeks of very cold weather.

It is a little warmer today. Plenty of snow on side walks which makes walking dangerous. I would like to have the addresses of Dora Kelly and Oneida C. Nolen and J. A. Nolen, Carroll R.

*Mrs. Hannah J. Kerr*

Doome and Janie Doome. The manager of Stuart Hall finance, also Lottie Adam's note and Rebecca Borden note. Then I think you will be through with me.

You need not be in such a hurry to get the addresses as the interest will not be due soon.

I greatly appreciate what you have done for me and think it is time for us to close out.

Very sincerely,

HANNAH J. KERR."

That is your handwriting there (handing witness the letter?)

A. Yes, sir, looks like it. I wanted him to fix it so they could send the interest direct to me, instead of through him. I meant I could get the interest they owed me; send it direct to me. He complained of his feet hurting him when running around about it.

Q. Did you thank him?

A. Yes, sir.

Q. And you said you were willing to "close out?"

A. I do not remember that. I meant we would be closed out from him collecting my money.

Q. Did you ever have any trouble with Vincent B. page 41 } Kerr about Virginia Public Service Company stock?

A. Yes, sir. I did not think I got all the interest on it. I had \$800.00 in it, and I did not think I got any interest, only on \$300.00. I don't know what went with that.

Q. Did you make an accusation against your husband?

A. I fussed a little with him.

Q. Did you accuse him of stealing the stock?

A. I don't know whether I did or not. I had my business in his hands and I thought, of course, he was upright; but I did not get all the interest.

Q. You don't know whether you accused him of stealing or not?

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

Q. I have another letter I would like you look at and identify. It is dated October 14, 1940. Is that your signature?

A. Yes, sir.

Q. I have marked this letter "Plaintiffs' Exhibit No. 2," and I wish to file it and read it into the record:

*Mrs. Hannah J. Kerr*

"PLAINTIFFS' EXHIBIT NO. 2

Purcellville, Va., Oct. 14, 1940.

Dear Vincent:

I received the five hundred which they took their time in sending and made me so uneasy about it. I had a place to put it in right away, so do not have to bother you and page 42 } Herbert Taylor.

In sending me my business papers I find a \$500.00 dollar stock in the Virginia Public Service Co., I had never received any interest on. I was so proud to get my \$3.50 and \$10.50 every six mos. and you were getting nearly twice that much of my money. I don't know how you made out to get it but is grounds for a law suit right now. The \$500 stock was given to me July 11th, 1929. It draws interest until 1936 or 1937. I don't just remember when they stopped paying interest but will calculate up to 1936 which makes 7 yrs.

1936	\$5.00 at 7 percent
1929	.07
<hr/>	<hr/>
7	35.00
	7 yrs.

---

\$245.00 which you owe me.

I have the Va. Public Service to back me whom they payed the interest to and if you don't quietly send me a check for the amount I will put it in Mr. E. B. Lipscomb's hands to collect. I will also employ a lawyer here in Leesburg to attend to it for me.

If you have not the ready money you can borrow from your loving sister Harriet whom you held so much above me in every way. I was treated and talked to like I was a brute but I never took one little cent of your money.

I tried to help you save your money in every way I could and all those 7 years you were stealing from me. They say there is page 43 } two lives. One good old woman not living in Staunton a just God. How could you a praying Christian lead the two lives. One good old woman not living in Staunton page 43 } said she did not know how I stood you and Harriet as long as I did.

*Mrs. Hannah J. Kerr*

I need the money now to help me in several different ways. Try to replace it soon as you can.

Very sincerely,

HANNAH J. KERR."

Q. You wrote that letter?

A. Yes, sir; I did not do anything and it did not amount to anything.

Q. You did write that: "all those seven years you were stealing from me?"

A. Yes, sir; I did not do anything about that; I knew I would not get it.

Q. Did you mean he was stealing the stock?

A. I did not get the interest.

Q. Do you know why the interest was not paid?

A. They said they were runnin lines into Maryland; they said that was the reason they could not pay.

Q. Did you request that the local registrar here have your voting precinct moved to Purcellville?

A. Yes, sir.

Q. Do you recall when that was done?

A. No, sir. It was before the election.

Q. I have a letter here, dated May 7, 1941, addressed to the Registrar. Is that your letter?

A. Yes, sir.

page 44 } Q. I wish to file this letter and have marked it  
"Plaintiffs' Exhibit No. 3," which I wish to read into the  
record:

### "PLAINTIFFS' EXHIBIT NO. 3

Purcellville, Va., May 7, 1941.

Dear Registrar:

I am sorry I do not know your name. I would like to have my voting precinct moved to Purcellville, Loudoun Co., Virginia, so I can vote for our Mayor in June.

Yours very truly,

HANNAH J. KERR."

Q. Do you know whether your voting precinct was changed?

A. Yes, sir, it was sent over to me, and I directed the letter to Vincent. I was afraid the Registrar would not get it, you know.



*Mrs. Hannah J. Kerr*

Q. You had no intention of coming back to live in Staunton after writing this letter?

A. No, sir; I never liked Staunton any way.

Q. Do you recall how long after this letter was written that the late Vincent B. Kerr died?

A. No, sir; that was the last kind deed he did for me, to go and get that changed. I never knew he was sick until after he died. I would have come and tried to nurse him and help him.

Q. You never knew he was sick until after he died?

A. No, sir.

Q. You are sure you did not write him a letter about page 45 } keeping the fires up?

A. I do not remember that.

Q. Did you make any statements to Mrs. Earle K. Paxton about his being sick?

A. She would have been the one to send word to me. If they had told me how they were situated for a nurse or housekeeper I would have come over and helped them all I could.

Q. Did you ever at any time agree to sign deeds to any property that Vincent B. Kerr owned?

A. I did. I told him I had been kind in all business matters, going security three different times when he was settling up his brothers' and sister's estates, and he borrowed money from the Planters Bank and I went his security, and I was kind in any of his transactions and signed any deed he wanted me to sign to land.

Q. Did you ever sign any deeds of his?

A. No, sir, he never sold anything.

The Court:

Q. Did he ask you, or did you refuse?

A. He never had any deed to sign; he never sold anything while I was living with him.

Q. I want to know if he asked you after your separation from him in September, 1938, to sign any deed selling any property?

A. I never refused; I told him I would do it.

page 46 } Q. Did you ever contemplate getting a divorce after your separation?

A. Yes, sir. After he wrote and asked me if I would give everything up, I wrote to his lawyer and to him and told them I wanted a divorce with alimony and for him to pay the expenses of the divorce, and I never heard anything more.

*Mrs. Hannah J. Kerr*

Mr. Davidson:

Q. During this period of time you claim Mr. Kerr did not treat you right: Did you ever belittle him or humiliate him in the presence of others?

A. No, sir, I do not remember doing that. I did not talk about him to anybody.

Q. Did you ever ridicule or nag him?

A. No, sir, I did not.

Q. Do you recall taking the trip with Mr. Walter Paxton to Luray?

A. Yes, sir.

Q. Do you recall ridiculing or humiliating him?

A. I do not remember anything about that. I know some of them had dinner in the hotel and he gave Mr. Paxton dinner and he did not give me any.

Q. He testified that you were continuously nagging and ridiculing your husband on that day?

A. I did not do that; it is not so.

Q. You deny that?

page 47 6 A. Yes, sir, I do. I had no occasion to do it.

Q. Do you recall attending the funeral of Miss Margaret Kerr several years back with your husband?

A. Yes, sir.

Q. Did you sit with your husband and the rest of the family during the ceremony?

A. No, sir, I was very nervous and I was going up the aisle with Harriett. I would have walked up with them, and I was nervous and they were crying, and I just sat down in the seat; I could not stand it.

Q. What church affiliation was Mr. Vincent B. Kerr?

A. Baptist Church at Laurel Hill.

Q. Was he a regular attendant?

A. He did not go to Laurel Hill but twice while I lived with him.

Q. Did he attend the church in Staunton?

A. Yes, sir, every time the bell rang.

Q. Did you go with him?

A. I went right often until my health gave out.

Q. Are you a Baptist?

A. No, sir, I am a Friend. I went as long as I was able. I was

*Mrs. Hannah J. Kerr*

a stranger in the Baptist Church, and I would walk down there and all of them would get up and go to the Sunday School room downstairs and I was the only one not going out, and when he would never come and sit by me at all. I was among  
page 48 }strangers; I did not know scarcely any one at all.

Q. Do you recall how many times you attended church with your husband during 1936-1938?

A. No, sir.

Q. Does your particular faith have a meeting house in Staunton?

A. No, sir.

Q. You did attend very often?

A. I did until my health got bad. There is a steep hill from the church to our house and I would come up the hill and had to hurry and get dinner ready, and I was not physically able to do it.

Q. He was older than you?

A. Nearly 10 years, I reckon.

Q. I believe you have already testified that you knew nothing of your late husband's sickness until you came to the funeral?

A. I had a wire telling me he was dead.

Q. Do you recall the date of the wire?

A. No, sir; I don't know exactly. It was two days before he was buried; it must have been the 8th of June.

Q. I have here a letter, dated May 1, 1941, addressed to "Dear Vincent," in which you said: "If I had been there to have kept up the fire, neither would have been sick. Also to have the regular meals." Did you write that?

A. Yes, sir, that was before he got bedfast. They  
page 49 }were sick; before they got bedfast.

Q. How long was Mr. Vincent B. Kerr bedfast?

A. I don't know; I don't know anything about the last sickness.

Mr. Timberlake: I object to this line of questioning. Mr. Davidson, you do not contend Mr. Kerr was in extremis from May 11th until his death on June 10, 1941.

Mr. Davidson: I contend his last sickness was practically a month. He was bedfast for six months.

Q. I understood you to say you had no knowledge of his sickness.

*Mrs. Hannah J. Kerr*

A. I knew he and Harriett were in bad health and did not have regular meals; no one to cook for them.

Q. I wish to introduce this letter of May 11, 1941, which I have marked "Plaintiffs' Exhibit No. 4," and to read it into the record:

"PLAINTIFFS' EXHIBIT NO. 4

Purcellville, Va., May 11th, 1941.

Dear Vincent:

Received the transfer and your letter. Thank you very much for doing the business for me. Mr. Doome and wife were here last Nov. and paid his interest on note. I'm sure I had no chance to play with him. All I have to pet now are some little page 50 } white baby rabbits. I take them out of the nest and talk to them and call them my babies. You would not let me have them when I lived in Staunton. Would not let me do a thing I wanted to do. I was treated like a Negro slave. If I had been there to have kept up the fire, neither would have been sick. Also to have the regular meals. Do pay Dora Kelly something. Poor woman works so hard at home, then walk away there to work. From the provisions Earle and Marie bring you, I would surely leave the house I was living in to them unconditionally.

The gardens are very late on account of no rain. I guess pasture is short too. I am going to have plenty strawberries and raspberries. Soon as I get thru housecleaning, I am going to make hay in the back lot. The blue grass and orchard grass are in bloom now. Everything to eat has gone up in price here. I have a hundred dollars I would like to put on interest; no one here seems to borrow. The Mr. Nolan has never paid a bit of interest and Herbert Taylor said he had found a man who would take the note but I have never seen any money yet.

If Mr. Doome came twice I was not home. I did not see him but once. You forget you cannot hear and get things wrong. The reason I got people to do things for me, if I asked you to do just a little thing you did nothing but fuss all the time you were doing it. I strained myself and overworked many times to keep page 51 } from asking you to help. Mr. Doome said he asked you to come over with him so you had better come next time and see things well done. If you are bad yourself you need not

*Mrs. Hannah J. Kerr and Miss Annie Kerr*

think everybody is bad. My motto is "A good name is rather to be chosen than great riches. I try to be kind to every one who appreciates and deserves it. A widower told my neighbor he was going to come and help me raise rabbits. I will be very thankful if you can get some one who wants the hundred.

Very truly,

HANNA.'

### REDIRECT EXAMINATION

By Mr. Timberlake:

Q. Mr. Paxton has testified that on occasions, usually about six weeks apart, during the period that you and Mr. Kerr lived together, he would come over with his family, or some members of his family, and have a meal or meals with you: Is that correct?

A. Yes, sir.

Q. And he stated he always found nice meals were prepared and apparently abundant meals?

A. When I had invited guests, I would go down and order everything on the table and pay for it with my money.

Witness leaves the stand.

page 52 } Miss Annie Kerr, another witness of lawful age, called  
on behalf of Mrs. Hannah J. Kerr, after being duly  
sworn, testified as follows:

### DIRECT EXAMINATION

By Mr. Timberlake:

Q. Where do you live?

A. Washington, D. C.

Q. Are you related to either Mrs. Hannah J. Kerr, or Mr. Vincent B. Kerr?

A. I am a very distant relative of Mr. Kerr.

Q. Did you know and come in contact with Mr. and Mrs. Kerr during the entire time that they were married and living together?

A. I met Mrs. Kerr for the first time in 1926.

Q. You knew your cousin, Mr. Kerr, before that time?

A. I think I had met him one time.

*Miss Annie Kerr*

Q. You first met Mrs. Kerr in 1926 and you recollect you had met Mr. Kerr prior to that?

A. Yes, sir.

Q. From 1926 on, what opportunity did you have to see and visit Mr. and Mrs. Kerr?

A. Very little, until January, 1934. I made short calls, probably several, yes, sir.

Q. Did you have an opportunity to observe how Mr. Kerr treated Mrs. Kerr on the occasion of your calls prior to 1934?

page 53 } A. Yes, sir, in 1926, I noticed he was very antagonistic towards her and seemed to want to meddle into affairs that did not concern him.

Q. Up until 1934, your calls were fairly infrequent: After 1934, what contact did you have?

A. From June, 1934, to March, 1935, I was in Staunton and in the home a great deal.

Q. What did you observe?

A. Regardless of her kindness, it seemed he was every ungrateful for her extreme kindness to him and antagonistic about the smallest things, and he seemed to go out of his way to make this impression. He would let her canary bird out just to antagonize her.

Q. After that period, what contact did you have with Mr. and Mrs. Kerr?

A. During the summer of 1935, I was in Staunton several weeks and I visited some during that time and in Washington some during the fall. During the winter of 1935 and 1936, I was nursing near Staunton during the winter and spring.

Q. Did you observe the same attitude and conduct on the part of Mr. Kerr towards Mrs. Kerr during these latter years?

A. It seemed not to improve in any way.

Q. Did you notice it was more extreme?

page 54 } A. My calls were brief and not very frequent; I was only there half an hour to an hour, and I did not see him very often.

Q. You are a trained nurse?

A. No, sir, a practical nurse.

Q. Did Mrs. Kerr lend you money for your education?

A. I did not ask her; she offered to lend it to me.

*Miss Annie Kerr*

Q. When?

A. In September, 1926.

Q. Did you first appeal to your relative, Mr. Kerr?

A. Yes, sir.

Q. Did he agree to let you have it?

A. He said he did not have it; that it was tied up and not available?

Q. Then Mrs. Kerr let you have the money?

A. Yes, sir.

Q. She first let you have \$200.00?

A. Yes, sir.

Q. Did she later let you have any more?

A. I paid 6% interest on that until 1931 and I paid it, half of it, back at that time, and later she did make me another loan after that.

Q. What was Mr. Kerr's reaction to this assistance of Mrs. Kerr to you?

A. He seemed to be very disagreeable with her about it.

Q. He did not like it?

A. No, sir.

page 55 } CROSS EXAMINATION

By Mr. Davidson:

Q. When was the last time you visited the Vincent B. Kerr home?

A. While they were still living together?

Q. Yes.

A. I visited it a number of times during the last part of the summer of 1938. I was there when she was packing up to go to her home.

Q. What was the condition of Mr. Kerr's health at that time?

A. I did not notice that it was changed from that time the previous year. I could not observe any change.

Q. Do you know whether he was hard of hearing?

A. Yes, sir, he was; he had been for some time.

Q. What do you mean when you said Mrs. Kerr was "packing up and leaving." Do you mean that Mrs. Kerr was removing her possession?

A. Yes, sir.

*Miss Annie Kerr*

Q. Did she take all her property away at that time?

A. I was not here when she did move. She was making preparations to move.

Q. Was that the summer of 1938-

A. Yes, sir.

Q. Did you see Mr. Vincent B. Kerr after that?

A. No, sir.

Q. Did you correspond with Mrs. Kerr after that?  
page 56 } A. Yes, sir, we corresponded occasionally.

Q. Have you been living in the home of Mrs. Vincent B. Kerr at Purcellville?

A. I did not see her from the summer of 1938 until this past summer. I was in Philadelphia and not in Virginia at all.

Q. When did you last live with Mrs. Kerr at Purcellville?

A. I spent four weeks with her last summer, and that was the only time I was with her since 1938.

Q. You spoke of four weeks in 1941: When was that? Was that prior to June?

A. No, sir. I would say from the middle of July to the middle of August.

## REDIRECT EXAMINATION

By Mr. Timberlake:

Q. Did you notice any effect on Mrs. Kerr's health from the conditions under which she lived at home as you described them?

A. I noticed it affected her nerves a great deal. The nerves affect the physical condition of any one.

Q. Was she highly nervous?

A. I would say she was.

## RECROSS EXAMINATION

By Mr. Davidson:

Q. I believe you were referring to the nervous condition of Mrs. Vincent B. Kerr? From your knowledge do you  
page 57 } think that would so react on a person that they would become subject to nagging and ridiculing others?

A. I think that would depend on her self control. She impressed me as being a person that had a great deal of self control.



*Mrs. B. L. Robertson*

Witness leaves the stand.

Mrs. B. L. Robertson, another witness of lawful age, called on behalf of Mrs. Hannah J. Kerr, after being duly sworn, testified as follows:

#### DIRECT EXAMINATION

By Mr. Timberlake:

Q. Where do you live?

A. 303 N. Madison St., Staunton.

Q. How long have you lived there?

A. I moved there in 1876.

Q. You were a neighbor to Mr. and Mrs. Vincent B. Kerr while living there?

A. A next door neighbor.

Q. Do you recall when Mr. and Mrs. Kerr moved there?

A. Yes, sir.

Q. You knew them and came in contact with them from that time on?

A. Yes, sir.

Q. Did you see them daily?

A. Yes, sir.

Q. Would you be in their home?

page 58 } A. Yes, sir, there frequently; sometimes 3 or 4 times  
a week.

Q. Based upon the contract you had with this household, describe the nature of the treatment by Mr. Kerr to Mrs. Kerr over that period?

A. Mr. Kerr was very disagreeable, and refused to do anything that he should do. I have often heard her ask him to move things around the home; he refused to move a table, chairs or anything. She would have to hire a man and when the man would come and do it he would meet him on the street and tell him not to come back.

Q. Did you ever hear him abuse her?

A. Yes, sir.

Q. Do you know whether he provided food and clothing?

A. No clothing whatever and criticized her the way she made her clothing.

*Mrs. B. L. Robertson*

Q. Would he furnish her with necessary medical attention?

A. Not at all.

Q. What would happen when she got sick?

A. The neighbors called the doctors and they would furnish her food during the time, because he would not give her a glass of water.

Q. Did that continue during the entire period?

A. Yes, sir, he got worse before the last and she was just physically unable to stand his treatment.

The Court:

Q. What year did you say you went there?  
page 59 } A. In 1876.

Q. That would be 66 years ago?

A. I have lived there about 40 years; came there about 1901 or 1902.

### CROSS EXAMINATION

By Mr. Taylor:

Q. You and Mr. Kerr did not get on very well?

A. Not a bit.

Q. As a matter of fact did he not ask you to keep away all the time?

A. No, sir.

Q. You only went there when he was not there?

A. I went there when he was there.

Q. You said the neighbors sent in things to eat: What neighbors and when?

A. I did for one and others.

Q. Who else?

A. I don't know who else. There were roomers, but not there now. I cannot tell you exactly. When she was very ill one time.

Q. You only know of your own knowledge that you took meals in?

A. Yes, sir.

Q. You disliked Mr. Kerr very much?

A. I did not care for him and I do not think any one did.

Q. Didn't you have a dispute with Mr. Kerr on one  
page 60 } occasion and following that you only went there when  
he was away?

*Mrs. B. L. Robertson and Walter A. Paxton*

A. That is a mistake.

Q. You are quite sure of that?

A. I certainly am. I even went there after she decided to leave him and he was right there.

Q. Did he rebuke you for interfering in family affairs?

A. No, sir, I never interfered.

Q. Did you give her any advice to leave him?

A. No, sir, I did not. He heard some one did. He accused me and two other different ones. He asked me about it. I said I had not said anything to her. He said he knew Mrs. Williams was her friend, and I did not know at the time it was Mrs. Williams who advised her, but heard afterwards she was.

Q. Were you there about the time she left?

A. I was there the day she left.

Q. Something has been said about her packing things to leave: What did she take?

A. I suppose she took her own things; I never saw what she took.

Q. Did she take anything in the way of furniture?

A. She took her own furniture.

Q. Did not you hear her say she would not come back?

A. She told him the day she left if he would come over to see her, she would take care of him. She offered to take care of him if he got helpless or sick.

page 61 } Q. You know all these things of your own personal knowledge?

A. Yes, sir, I do.

Witness leaves the stand.

Mr. Timberlake: Mrs. Hannah J. Kerr rests her case.

### REBUTTAL TESTIMONY

Walter A. Paxton recalled:

### DIRECT EXAMINATION

By Mr. Davidson:

Q. You heard the testimony of Mrs. Vincent B. Kerr, relative

*Walter A. Paxton*

to the trip which you and Vincent B. Kerr took to Luray, in which she stated that she made no accusations in the form of ridicule and humiliating remarks at that time. You stated she had. Do you wish to change your testimony in the light of her testimony?

A. No, sir, but I could add something. She said she did not go in to dinner. I am positive my uncle asked her to go in to dinner and I asked her to go in, and she was very decided not to go in and she decided to stay in my car; and when I found she had made up her mind not to go to dinner, I told her it would be uncomfortable in the car and sunshine and she better wait on the veranda of the hotel, but she insisted on staying in the car.

Q. Do you wish to change your testimony about the ridiculing?

A. No, sir. As I remember she did not say a pleasant word all the way over or on the way back, and when he would say something to the rest of us, she would butt in and in a very criticizing way say such and such a thing.

#### NO CROSS EXAMINATION

Witness leaves the stand.

Mr. Davidson: The heirs of Vincent B. Kerr rest their case.

The Court: The Court will take this matter under consideration. I may wish Miss Bumgardner to write up the record; and, if so, I will advise her.

page 63 } DEFENDANT'S EXHIBIT NO. A

THIS DEED made this NINTH day of APRIL in the year NINETEEN HUNDRED FORTY-ONE between HANNAH J. KERR and VINCENT B. KERR, her husband of the First Part and HOLBERT A. MYERS and JOHN A. MYERS, partners, trading as MYERS LUMBER COMPANY of Winchester, Virginia, of the Second Part,

#### WITNESSETH:

THAT said Parties of the First Part have this day sold to said Parties of the Second Part all the standing timber situated on about seventy-seven and one-half acres of land on the farm of said Parties of the First Part in Jefferson Magisterial District, Loudoun County, Virginia, conveyed to Hannah J. Thomas by Sarah B.

Nixon by deed of record in the Clerk's Office of the Circuit Court of LYoudoun County, Liber 9 F's, Folio 119 adjoining the lands of J. D. Thomas on the north and Daniel Moats on the south, and Russell Smith on the east with ingress and egress thereto from the county road over the lands of the said Parties of the First Part and over any and all of the rights of way belonging to the above described property for which said Parties of the second part are to pay the sum of Twenty-one hundred dollars (\$2100.00) upon the delivery of this deed.

It is understood and agreed between the Parties hereto that said Parties of the Second Part are to have all the laps, slabs, etc., from said timber and is to use proper care in the cutting of  
page 64 } said timber so as to protect any fencing on the property of said Parties of the First Part and should any said fences be damaged by the negligence of said Parties of the Second Part, they agree to restore the same.

Said Parties of the Second Part agree to cut, saw and remove said timber purchased under the terms of this contract within three years of this date.

Owing to the unsettled conditions of transportation, markets, etc., it is provided and agreed that should said Parties of the Second Part be unable to complete this contract within said three years, due to conditions beyond their control, caused by strikes, financial matters which may arise unexpectedly which may cause an unexpected drop in the values of timber or have a tendency to make it difficult to market the same then this agreement shall be continued for a reasonable length of time until such conditions have been restored to normal.

It is agreed between the Parties hereto that should at any time during the said period of three years or a reasonable extension thereof said Parties of the Second Part is deprived of a reasonable outlet to the public road for the marketing of said timber said Parties of the First Part are to supply said Parties of the Second Part with a reasonable outlet to remove said timber sold him under the terms of this conveyance.

Said Parties of the Second Part shall have the right to locate their mills and other equipment at some appropriate  
page 65 } and convenient places on the land for the purpose of the sawing of the timber on said land, with the right to use the water on the property of said Parties of the First Part at the most convenient point.

WITNESS the following signatures and seals.

\_\_\_\_\_(SEAL)

\_\_\_\_\_(SEAL)

\_\_\_\_\_(SEAL)

page 66 } PLAINTIFFS' EXHIBITS NOS. 1, 2, 3, & 4

(Original letters copied into the record as follows:

Exhibit No. 1 on page .....	39
Exhibit No. 2 on page .....	41
Exhibit No. 3 on page .....	44
Exhibit No. 4 on page .....	49

page 67 } IN THE CORPORATION COURT FOR THE CITY  
OF STAUNTON

HANNAH J. KERR

v.

MAY 4, 1942.

VINCENT B. KERR'S HEIRS

PRESENT: Hon J. H. May, Judge of the Corporation Court; W. B. Timberlake, Jr., Counsel for Hannah J. Kerr; Herbert J. Taylor and Curry Carter, Counsel for the heirs of Vincent B. Kerr.

NOTE: Charles H. Davidson, of counsel for the heirs of Vincent B. Kerr, who appeared at the former hearing of this case, on January 23, 1942, has withdrawn from the case, having been called for military service.

STIPULATION: It is stipulated by counsel as follows: That the evidence taken in this case before Hon. Floridus S. Crosby in open court on January 23, 1942, which is not authenticated by the Judge, shall be taken and read as part of the evidence before the Judge now sitting as if taken in open court before him, and he will sign said evidence and make it a part of the record in this case.

*Walter A. Paxton*

page 68 } Walter A. Paxton, a witness of lawful age, called on behalf of the Vincent B. Kerr heirs, after being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Taylor:

Q. You are a nephew of the late Vincent B. Kerr and reside in Wilmington, Delaware?

A. I do.

Q. Since the last hearing have you received a letter from the widow of the late Vincent B. Kerr?

A. I received a letter about February 7th or 8th from his widow.

Q. Will you examine this letter and state whether or not you received it? Also I hand you the envelope in which the letter came. Will you examine the letter and state whether you received it and whether the handwriting is that of Mrs. Hannah Kerr?

A. Yes, sir, this is the letter I received, and it is all like the handwriting I have seen of hers.

Q. This letter seems to be postmarked Wilmington, Delaware. No stamp postmark appears on it: Do you know how that happened, or anything about that?

A. No, sir, that was the way I received it.

Q. It was delivered to you in Wilmington, Delaware?

A. Yes, sir.

Q. I have marked the letter "Defendants' Exhibit No. 5," and the envelope "Defendants' Exhibit No. 5-a," and herewith file both, and I will ask you to read that letter to the Court?

page 69 } A. The letter reads as follows:

'DEFENDANTS' EXHIBIT NO. 5

"Purcellville, Va.,  
Feby. 3, 1941.

Dear Walter:

I suppose by now you think of me as being the biggest liar in the state of Va.

When the lawyer asked me about criticizing Vincent.

My mind was blank.

*Walter A. Paxton*

As for the trip to Luray I was physically unfit for the long drive. I was then taking medicine from Dr. Campbell for my heart trouble.

When we reached near the place for reunion I was utterly sick and exhausted, then we had to wait in hot sun without even a place to sit.

I may have fussed about Vincent staying so long but I forgot it the minute after I said it.

No doubt it might not have sounded good to a stranger. I was just as poorly as I could be all.

As for the critisizing I never use the word only of a person's dress or manner of an author or a sermon.

If I said anything about Vincent it must have been pure fussing. I have been trying to think what I could have said ever since the hearing.

I know you never thought much about me and now you must utterly hate me.

Very truly,  
HANNA.'

page 70 } Q. I believe Mrs. Kerr testified at the hearing on the 23rd of January, 1942?

A. Yes, sir.

Q. You also testified at that time?

A. Yes, sir, I did.

Q. That letter has reference to her testimony at that time?

Mr. Timberlake: The question is objected to on the ground that the letter and the testimony heretofore taken both speak for themselves.

Mr. Carter: It seems to me that is a material question to ask Mrs. Kerr, or else the Court will have to dig through the evidence to find out what she is driving at.

The Court: The objection is overruled.

Mr. Taylor:

Q. Please state whether or not that letter refers to statements Mrs. Kerr made when on the witness stand on January 23rd?

A. Yes, sir, it does.

NO CROSS EXAMINATION



*C. B. Yeago*

Witness leaves the stand.

page 71 } C. B. Yeago, another witness of lawful age, called on  
behalf of the heirs of Vincent B. Ker, after being duly  
sworn, testified as follows:

### DIRECT EXAMINATION

By Mr. Taylor:

Q. What is your occupation?

A. I am a wholesale grocer.

Q. You manage what concern?

A. Staunton Wholesale Cash Grocery.

Q. That is on Johnson Street?

A. Yes, sir.

Q. Were you a neighbor of Mr. and Mrs. Vincent B. Kerr  
when they were living together as man and wife?

A. Yes, sir.

Q. Where were you living with reference to their home?

A. Right across the street from them.

Q. How long did you live there?

A. I suppose around 12 years.

Q. During that period did you see Mr. Kerr coming and going?

A. Yes, sir.

Q. State whether or not you saw Mr. Kerr carrying supplies,  
groceries, from time to time when you lived there?

A. Yes, sir, I did. I have seen him carrying cases of merchandise, and I can tell the name of several of them. One of the special was milk—Whitehouse U. S. brand—I remember that clearly. I have seen him bringing many a bag of flour into the home and many a time small packages, which I could not see what was on them.

page 72 } Q. Do you know anything special about the relationship of Mr. and Mrs. Kerr in their home?

A. No, sir, I could not say.

### CROSS EXAMINATION

By Mr. Timberlake:

Q. When did you move away from up there?

*C. B. Yeago and Hannah J. Kerr*

A. I left up there 3 years ago last January.

Q. It was the preceding 12 years that you lived there?

A. Yes, sir.

Witness leaves the stand.

Hannah J. Kerr, another witness of lawful age, called in her own behalf, after being duly sworn, testified as follows:

## DIRECT EXAMINATION

By Mr. Timberlake:

Q. You are Mrs. Hannah J. Kerr, the widow of Vincent B. Kerr?

A. Yes, sir.

Q. You formerly testified in these proceedings?

A. Yes, sir.

Q. I hand you a letter, which has been introduced as Defendants' Exhibit No. 5, and ask you to read that letter over. Did you write that letter?

A. (After reading the letter) Yes, sir.

Q. To whom is the letter addressed?

A. Walter Kerr.

Q. Is he the gentleman that just testified?

page 73 } A. Yes, sir.

Q. Was it not Mr. Walter Paxton who testified?

A. It is addressed to Walter Kerr; I made a mistake.

Q. Whom did you intend that letter to go to—Walter Paxton or Walter Kerr.

Q. The letter is mailed from Wilmington, Delaware: Were you in Wilmington?

A. No, sir. I was not.

Q. How was it mailed from Wilmington? Do you know?

A. It says, "Not Here," all I see (reading from envelope).

Q. Did you post it from Purcellville, or give it to some one to mail for you?

A. I put it in the office. I wrote the letter through perfect kindness; I contradicted his evidence here, and I wanted to tell him I was not physically fit to remember anything I said, if I said a word against Vincent at the time.

*Hannah J. Kerr*

Q. What occasion or occasions did you have reference to in the letter?

A. We went over the Massanutten Mountain to a reunion; Walter Paxton took Harriet Armentrout and Vincent and me, and when I got there I was perfectly exhausted; it exhausts me to ride in the open air, I am not used to it; I had heart trouble and I did not know I was not able to go there. When I got there, I was utterly exhausted and Vincent went out to find out where the reunion was to take place and I suppose he stayed a long time and

I was waiting in the sun for him to come back, and I  
page 74 } may have said something; but I do not remember saying anything against him. I wrote the letter through perfect kindness. I think every one who came here to visit with him during the 16 years knows I worked hard and had to do all my work and was not allowed to have any help. They came five at a time. I had only one guest chamber, and when men and women come, I would have to give my bed to the men and the women who would have the guest chamber, and I slept on the floor in the garret, and I wonder if any of the nieces and nephews would do that for me.

Q. Did the letter have reference to a reunion which you testified about and Mr. Walter Paxton testified about at the hearing?

A. Yes, sir.

Q. As I understand from you, you wrote that letter after the hearing?

A. Yes, sir, through perfect kindness. I did not know it would be turned over to the Court; I did not think of such a thing.

Q. What did you mean by saying that Mr. Paxton must think you were an awful liar?

A. Because I contradicted his testimony about criticizing Vincent, and I had no memory of it at all, that I said a word about Vincent.

Q. In what respect did you contradict him?

A. I said I did not criticize Vincent; I had nothing to criticize him about.

Q. He testified that you did criticize him?

A. Yes, sir.

page 75 } Q. Can you state, from your own knowledge, whether or not you did?

A. I have no memory of it. I was ill; I was perfectly exhausted.

*Hannah J. Kerr*

Q. Are you disposed to agree with Mr. Paxton that you did criticize and fuss with him as being correct?

A. I do not think I ought to agree with it; I have no memory of it.

Q. Do you have any recollection of the conversation that took place on the way to Luray?

A. We talked very little.

Q. How did you sit in the car?

A. I sat back with Mrs. Armentrout, my sister-in-law; Mr. Paxton and Vincent sat on the front seat.

Q. Do you recall what was the manner and line of conversation that took place between you and Mr. Kerr and you and the other people?

A. I said very little to him, if I said anything.

Q. Do you recall or know whether you fussed with or criticized Mr. Kerr?

A. No, sir, I do not remember a thing of it.

Q. Mr. Paxton testified that on this trip, your attitude was quite different from any time he had ever seen you before; that you were belittling him all the way over and all the way back, and that he did not think he heard you say a pleasant word to him; and that you were constantly butting in on some conversation. Mr.

Kerr was having as though his presence irritated you:  
page 76 } In your testimony you stated that was not correct?

A. I certainly do not have any memory of anything of the kind.

Q. In writing the letter did you mean to infer whether his memory was better than yours?

A. I do not know anything about that. He gave testimony that I criticized all day, but I declare I do not know anything about it; I was not well.

Q. In your testimony you testified to a number of things that took place during the period from 1922 to 1928, during the time you and Mr. Kerr lived together as man and wife, the substance being that Mr. Kerr did not do anything to provide you with medical attention, clothing or other necessities of life; that he was disagreeable and mean to you; and that your health got in such a state that you felt you had to go to your home, at which time you suggested that he go back with you—

Mr. Carter: We have let this examination go on because we did

*Hannah J. Kerr*

not think it was very material, but the Court has possibly lost sight of the fact that Mrs. Kerr is Mr. Timberlake's own witness and that he is now trying to go over testimony that was given at a former hearing of this case. He merely wants her to verify what she said and patch up some holes that she may have left open when testifying before.

Mr. Timberlake: I have not completed my question.  
page 77 } I ask you whether you undertook, or intended to undertake, in the letter which you hold in your hand (Defendants' Exhibit No. 5) to repudiate or cast any doubt on the correctness of that testimony, the substance of which I just outlined?

A. I just do not understand what you are talking about.

Q. Was the testimony covering the matters I have just outlined in your former examination the truth and correct?

A. Yes, sir, it was. It is all the truth; and on two occasions he told me he wished I would leave him, and I knew he was an old man and helpless, and I knew I had made a bad bargain in marrying him and I tried to stick to it as long as ever I could. That was three years before I left him that he told me he wished I would leave him.

Q. What income do you have at the present time?

A. It is very little.

Q. What does it consist of?

A. I have interest on \$2000.00, and that is about all.

Q. Do you have any rent?

A. No, I own the home I live in, and I have to pay my taxes and fire insurance and expenses of the home.

Q. Is your farm rented?

A. Not rented now.

You have not heretofore undertaken to place a valuation on the farm: Do you know what the farm is worth?

A. I hold it for \$3000.00, but no one seems to want it.

page 78 } CROSS EXAMINATION

By Mr. Carter:

Q. When you wrote this letter to Mr. Walter Paxton, on Feby. 3, 1941 (1942), you started out by saying: "I suppose by now you think of me as being the biggest liar in the state of Va." I am using that word, "liar," not with reference to you, but repeating you

*Hannah J. Kerr*

as using it: Why did you think or suppose he would think that of you?

A. Because I contradicted him here in his evidence.

Q. In what particular did you contradict him?

A. I said I had no remembrance of saying a word against him. I was perfectly exhausted when I got to the place we stopped and I suppose I may have been a little impatient; I don't know.

Q. You thought Mr. Walter Paxton had reason to believe you were a big liar?

A. I contradicted him.

Q. When you use "him," who are you referring to?

A. Mr. Walter Paxton.

Q. When you wrote this letter, you were conceding Mr. Paxton told the truth and you did not?

A. I was trying to explain it to him, that I was telling the truth.

Q. Why did you suppose he would think of you "as being the biggest liar in the state of Virginia"?

A. I would not say that I would have believed that unkindly of him. I always treated Vincent's people very kindly. I did not dream of the letter being misconstrued in any form.

page 79 } Q. You said you did not expect the letter to get into the Court's hands?

A. No, sir.

Q. Would you have written it if you had known he was going to present it to the Court?

A. No, I don't believe I could.

Q. You would not have minded the Court knowing how kind you were to them?

A. No, sir.

Q. You had other reasons for not wanting the Court to see it?

A. I thought it was a plain kind letter. I thought the Court business was all over with it.

Q. If you had known that the Court would see what you thought about the evidence, you would not have written that letter?

A. I don't suppose I would.

Q. You have spoken about Mrs. Harriet Armentrout living with you: Is she still living with you?

A. No, sir, she died.

*Hannah J. Kerr*

Q. There is something in the evidence about "roomers": Did you ever have any roomers?

A. Vincent had them.

Q. Do you recall the name of any of them?

A. Harriet Armentrout and Marguerite Kerr, his sisters.

Q. Are they the only two roomers that were in the house while you lived there?

A. That was all. I nursed them when they were sick, and I might say I was a night nurse for Harriet Armentrout's page 80 { nurse come at 6:00 in the morning and stayed until 6:00, and I would sit up until 12:00 and give her her nourishment, and then go to bed, and the only thanks I got was, she said, "I was neglected." That was the only thanks I got for my kindness to her.

Q. Was Mr. Kerr's hearing good?

A. No sir; I could not make him hear me unless I went right to him to talk.

Q. Would you have to raise your voice?

A. No sir, I talked in common conversation when I got close to him.

Q. Was he difficult to talk to?

A. I don't know about that; he never agreed with some things I said to him.

Q. Did he hear you?

A. Yes, sir, when I got close to him.

Q. Was he as easy to talk to from the standpoint of hearing what you said as Judge May is?

A. I don't know; I made him hear every time I talked to him.

Q. Was that difficult or easy?

A. Easy enough when I went right to his ear.

Q. You got right close to him?

A. Yes, sir, went right close to his ear.

Q. How long was his hearing impaired before his death?

A. I cannot remember.

Q. Was it impaired when you married him?

A. No, sir.

Q. His deafness came on some time after you were married?

A. Yes, sir.

page 81 { Q. Did you ever make a remark to Miss Annie Kerr with reference to Mr. Kerr's deafness to this effect:—

*Hannah J. Kerr*

That you were getting tired of trying to talk to him and hollering at him, and you were going home?"

A. No, sir, I never said anything of the kind.

Q. Did you say that to Miss Annie Kerr shortly before you left—that it was so difficult for you to talk to him that you were going to leave him and go back home?

A. I never said that.

Q. Did you make such a statement as that to Mrs. Harriet Armentrout?

A. No, sir.

Q. Do you deny that you made that statement, or a statement in substance, to that effect?

A. No, sir, I talked very little against Vincent; but I heard after I left him he went all over the town talking about me.

Q. Do you deny you made the statement to Mrs. Harriet Armentrout:—That he was getting so deaf that you were getting tired of trying to talk to him and you were going home?

A. That was not why I left him, and I never said it. The reason I left him, he just treated me so mean I could not stand it any longer. My health was bad and I could not stand it.

Q. You have used the word, "mean," several times: You have not accused him of any cruelty, have you?

A. No, sir, I did not. He did hit me several times.

Q. You are attempting now to mend your holes by page 82 } saying he hit you?

Mr. Timberlake: The question is objected to. I think this manner of cross questioning the witness is improper.

A. I love to help garden and he would be gardening, and he could not see, and I said: "Vincent, let me help you drop the seeds?" And he picked up a clod of dirt and hit me and I would have to get into the house as fast as I could get there.

Q. He did that to get you out of the garden?

A. Yes, sir.

Q. When did that occur the last time?

A. I just cannot remember.

Q. Can you give us any idea?

A. In gardening time; I don't know when.

Q. Did you say anything about that when you testified before?

A. No, sir. I had so much else to say I did not think of that.



*Hannah J. Kerr*

Q. When you left Mr. Kerr, you testified that you never expected to return: That is right?

A. No, sir, I never said that.

Q. Didn't you say before: "Before I left, I said: "If you need me, you sell your things and come over and live with me?"

A. That is all true.

Q. Does not that indicate that you never expected to come back?

page 83 } A. I never told him that; I never said a word about never expecting to come back.

Q. Didn't you tell people over and over again that you never expected to come back?

A. No, sir. I went to Harriet's sale because I knew her things from Vincent's; that is the reason I went back.

Q. After the sale was over, you returned home?

A. Yes, sir.

Q. How long did you stay over here?

A. I think I stayed one night.

Q. Where did you stay?

A. With Mrs. Robinson.

Q. She was a next door neighbor to your own home?

A. Yes, sir.

Q. Why did you not stay at your home?

A. There was no one to entertain me; they had a housekeeper and a woman to stay with her at night, and I did not see any place for me. Mrs. Robinson had invited me to come any time I wanted to.

Q. What all did you take out of the house when you left?

A. I took what I had furnished the house with, and I left several pieces with Vincent. He said he would pay me a certain amount, but I never saw the money.

Q. You took everything except what he agreed to pay you for?

A. Yes, sir.

Q. That included bed room furniture and things of that kind?

A. Kitchen range and hot water tank, I put in and I left them, but he promised to pay little or nothing for it, but I never saw it, and I think the range is in the house.

page 84 } Q. You took everything belonging to you, except what he agreed to pay for?

A. Yes, sir.

*Hannah J. Kerr*

Q. How long had you been down in Purcellville before you changed your voting place?

A. I do not remember just when; I moved there in 1938, I think, and I don't know when the voting took place; I think about a year ago and I wanted to vote for Mayor, and he has since died.

Q. You did vote for him?

A. Yes, sir.

Q. And you made a statement in order to get your transfer that you had transferred your residence, didn't you?

A. Yes, sir.

Q. At that time you were in good faith a resident of Purcellville, were you not?

A. Yes, sir.

Q. Did you vote there at the next election?

A. Yes, sir.

Q. You have voted there at every election after that?

A. Yes, sir.

Q. And your home is there?

A. Yes, sir.

Q. You pay your capitation tax there and your personal property taxes there?

A. Yes, sir. They make you pay the capitation tax when you pay your other taxes, and you don't have to pay them extra, you know.

Q. You spoke of collecting some interest on a \$2000.00 bond, didn't you?

page 85 } I don't remember.

You do collect interest on some investments?

A. Yes, sir.

Q. How much have you got owing to you?

A. Very little over \$2000.00, if I have that much. I let out some money and lost it.

Q. How much did you lose by bad investments?

A. About \$3000.00.

Q. Was that later, since you left here?

A. Yes, sir.

Q. You lost \$3000.00 in investments since you left Mr. Kerr?

A. Yes, sir.

Q. Have you got any Virginia Public Service Company stock?

A. Not now; I collected it to help pay a debt I owed down

*Hannah J. Kerr*

there; I had a person to forge two checks on me, and instead of paying 6% interest to the bank, I just paid the whole thing off; collected what I could and paid it off.

Q. You have all the real estate you had when you married?

A. Yes, sir.

Q. You have all the personal property, tangible personal property, in addition to money, that you had when you married?

A. Yes, sir.

Q. Except for this bad investment you are better off now financially than you were when you married?

A. No, sir, I was better off when I left Staunton than I am now, a good deal.

Q. You made those losses since you left Staunton?

A. Yes, sir.

page 86 } Q. You have not had good business advice available?

A. When any one forges checks on you—I could not send them to the penitentiary, so I had to pay it off, or pay the bank 6% interest on it.

Q. It appears on the envelope of this letter that you wrote to Mr. Walter Paxton and erroneously addressed it to "Mr. Walter Kerr." On the face the envelope also has this: "Care Pyrites Co. Inc., Ft. of Christiana Ave." Did you write that on there?

A. No, sir, I did not know his address, and I sent it to a friend and he put that there.

Q. What friend did you send it to?

A. I will have to study. His name is Hoopes.

Q. Where does he live?

A. In Wilmington, Delaware. Lyneas is his name.

Q. That explains why that letter is post-marked Wilmington?

A. Yes, sir. Was not Walter Paxton living there then? Was he not in that company?

Q. You did not mail that letter in Purcellville? You sent it to your friend in Wilmington, so he could drop it in the mail there?

Q. You are mistaken about mailing that letter from Purcellville?

A. Yes, sir, I forgot it.

Q. Your memory is not particularly good?

A. Not right at the present time, but I can remember when I was younger more clearly than I can now.

*Mrs. Lucy Garrett*

Witness leaves the stand.

page 87 } Mrs. Lucy Garrett, another witness of lawful age,  
called on behalf of Mrs. Hannah J. Kerr, after being  
duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Timberlake:

Q. Where do you live?

A. 200 W. Peabody St.

Q. What is your profession or occupation?

A. Nursing.

Q. Did you ever have occasion to nurse in the home of Mr.  
Vincent B. Kerr?

A. Yes, sir.

Q. For whom were you nursing?

A. His sister, Mrs. Harriet Armentrout.

Q. Do you recall about when that was?

A. No, sir, I don't know.

Q. Would you say 2, 3, 4, or 5 years ago?

A. I imagine 5 years ago.

Q. That was when Mr. and Mrs. Kerr and his sister were liv-  
ing on Institute Street?

A. Yes, sir.

Q. Who employed you?

A. Mrs. Armentrout.

Q. About how long did you work up there?

A. I would say two weeks, or 1½ weeks.

Q. She was ill at the time?

A. Yes, sir.

Q. Did you nurse her until she had recovered from the ill-  
ness?

page 88 } A. Until her temperature was normal for 3 days  
and she was able to be out on the porch.

Q. During that time you were in and about the Kerr home?

A. Yes, sir.

Q. What hours of duty did you have?

A. 12 hours.

Q. You would go in the morning and leave in the late evening?

*Mrs. Lucy Garrett*

A. Yes, sir.

Q. Did you get your meals there?

A. No, sir.

Q. Why not?

A. The food was not there; there did not seem to be any food in the house, and I preferred taking my meals out.

Q. That was the situation you found existed while you were in the home?

A. Yes, sir.

Q. Did you have occasion to get any food from the neighbors?

A. Mrs. Howard Shaffer one day.

Q. That was for yourself?

A. Yes, sir.

Q. Did you see or observe any fussing on the part of Mr. Kerr, any abuse of Mrs. Kerr by him?

A. Yes, sir.

Q. Was there an instance in connection with a bed for Mrs. Armentrout?

A. He did not like that.

Q. What took place with reference to the bed?

A. He came in and wanted to know who was the cause of getting the bed for her (Mrs. Armentrout), and Mrs. Kerr told him that it was hers.

Q. How did any question about the bed come up?

A. She (Mrs. Armentrout) was just on a cot, lying down in a hole, on a feather bed, and you cannot nurse any one that way, so I asked Dr. Campbell about taking her off this feather bed, if he thought it would hurt her. He said he certainly did not. I knew it would be hard to nurse her in the condition she was in. I asked him (Dr. Campbell): "Do you think it would hurt to put her on a mattress?"; and I suggested putting her on a mattress; and I went to Mrs. Kerr and talked it over with her, and she quickly agreed that she would come down the street and make preparation for a bed and mattress, and she had it up there in a short while.

Q. Do you know whether she or Mr. Kerr purchased the bed?

A. I heard her tell him that she purchased the bed and paid for it.

Q. What took place?

*Mrs. Lucy Garrett*

A. He got very angry and wanted to know who was the head of it.

Q. Who was the cause of getting the bed?

A. Yes, sir; he knew I was the cause of it, Dr. Campbell and myself together, and Mrs. Kerr told him she had purchased it herself.

Q. What was his attitude towards her about it?

A. He did not seem to like it; I don't remember the words; I knew he was angry with her.

Q. Did he get angry with you too?

A. I think he did.

page 90 } Q. You nursed there for 1½ or 2 weeks, until you could leave Mrs. Armentrout, and then you left?

A. Yes, sir.

Q. Did you have any occasion to go back later?

A. No, sir.

Q. Did you ever go back to the Kerr residence after that, or do you know?

A. I think I did go back once.

Q. Just to call?

A. Yes sir, just to see how they were getting along.

Q. Did Mr. Kerr have any bath tub, or anything like that, in the house?

A. No, sir.

Q. Did he have a bath tub?

A. Yes, sir.

Q. Where located?

A. Just in the kitchen, right back of the door.

Q. It was just sitting there on the kitchen floor?

A. Yes, sir.

Q. That tub constituted the only bathing facilities?

A. Yes, sir, that was all.

## CROSS EXAMINATION

By Mr. Taylor:

Q. You think this was about 5 years ago?

A. I think so as well as I can remember.

Q. You were there about 1½ weeks?

A. Yes, sir.

*Mrs. Lucy Garrett*

page 91 } Q. Mrs. Armentrout employed you?

A. Yes, sir.

Q. She paid you?

A. Yes, sir.

Q. About this food: Was Mrs. Armentrout able to take any solid food?

A. Not any solid food, just liquids.

Q. The question of meals for her did not come up?

A. That is right.

The Court:

Q. What were your hours of duty?

A. 7:00 to 7:00, I think, or 8:00 to 8:00, I will say.

Q. Just during the day?

A. Yes, sir.

Q. Who looked after Mrs. Armentrout after you left?

A. I think Mrs. Kerr looked after her.

## REDIRECT EXAMINATION

By Mr. Timberlake:

Q. Did Mr. Kerr express any interest or curiosity as to whether Mrs. Armentrout was going to live or die?

A. He seemed to be a little uneasy if she were not going to die. He said: "What do you think of her? She might live 8 months, or 6 months?" I said: "She might live 6 years." I just took it for granted that she was going to get well; she lived 5 years after that; but I don't think she was ever well.

Q. That was the first occasion you had to go to the page 92 } Kerr home?

A. Yes, sir.

Q. And the only time, except possibly some call you made later on?

A. Yes, sir.

Q. Did you know Mr. and Mrs. Kerr and Mrs. Armentrout prior to that time?

A. Yes, sir, because they go to the same church I go to, and I just knew them in the church.

## RECROSS EXAMINATION

*Mrs. Lucy Garrett and Earle K. Paxton*

By Mr. Taylor:

Q. Did Mr. and Mrs. Kerr go to church together?

A. I never did see them together?

Q. You said something about the insinuation being made to you that Mr. Kerr did not care whether Mrs. Armentrout lived or died: Was there any occasion for him to be interested in her dying?

A. I cannot answer that.

Q. You know, as a matter of fact, she left a will, in which she left nothing to him?

A. I do not know anything about that.

Q. Did Mrs. Armentrout continue to live at the Kerr house until her death?

A. I think she did, as far as I know; I never heard of her leaving; only go and visit her nephew at Lexington, Mr. Earle Paxton, but she would come back to Mr. Kerr's.

Q. Do you know long Mrs. Armentrout lived at page 83 {the Kerr house, all told?

A. No, sir.

Q. How long has it been since you were at the Kerr house?

A. I would say 5 years.

Q. Do you know there is now in that house and was at the time Mr. Kerr died a fully equipped bath room upstairs?

A. I do not know about that.

Witness leaves the stand.

Mr. Timberlake: I wish to reserve the right to call Dr. Campbell at a future time; he was not available for this hearing.

#### REBUTTAL TESTIMONY FOR DEFENDANTS

Earle K. Paxton a witness of lawful age, called on behalf of the heirs of Vincent B. Kerr, after being duly sworn, testified as follows:

#### DIRECT EXAMINATION

By Mr. Taylor:

Q. You are a nephew of Mr. Kerr and testified heretofore in this case?



*Earle K. Paxton and Mrs. H. J. Kerr*

A. Yes, sir.

Q. You have heard the testimony of Mrs. Garrett in reference to a bath tub in the Kerr House: What have you to say about that?

A. There is a bath room upstairs with a bath tub, a fully equipped bath tub, and off the kitchen there is a closet in which he had a bath tub.

page 94 } Q. Was that bath room in there sometime before his death?

A. It was there when he bought the house, as far as I know.

Q. There was always a bath room in the house from the time he purchased it?

A. Yes, sir.

### CROSS EXAMINATION

By Mr. Timberlake:

Q. You are one of the heirs at law of Mr. Vincent B. Kerr?

A. Yes, sir.

Q. You, along with his other nephews and nieces, will participate in any distribution of his estate, subject to any rights that Mr. Kerr's widow would have in that?

A. Yes, sir.

Witness leaves the stand.

### REBUTTAL FOR MRS. HANNAH J. KERR

Mrs. H. J. Kerr recalled:

### DIRECT EXAMINATION

By Mr. Timberlake:

Q. You, of course, lived in the house on Institute Street with your husband from the time it was purchased until 1938?

A. Yes, sir.

Q. Did that house have a bath room in it?

A. Yes, sir.

Q. Where was it located?

A. Located in the northwest corner of the house upstairs.

*Mrs. H. J. Kerr*

Q. Was that bath room in condition or a state of repair that permitted it to be used, or its facilities?  
 page 95 } A. We could not use the bath room; the water run into it but would not run off, and we hardly ever used the tub. We had a tub in a closet in the kitchen that we used. The bath room was a cold room and not lined and it always froze up every winter and we did not use that.

Q. That situation continued over a period of years?

A. Yes, sir.

### CROSS EXAMINATION

By Mr. Carter:

Q. You did not make a point of that?

A. No, sir; I did not have anything to do with it. I did paper his house for him and I thought that he would pay me for papering the house, and I guess it was so big—I never saw any money.

Witness leaves the stand.

page 95a} DEFENDANT'S EXHIBIT NO. 5

Original letter copied into record  
 Page 69

page 95b} DEFENDANTS' EXHIBIT NO. 5-a

(Envelope)

FEB. 7-1942

(Wilmington)

( Feb. 5 )

(Cancelled Stamp)

(10:30 p. m.)

( 1942

( Del. )

NOT HERE

Mr. Walter Kerr

care Pyrites Co. Inc.

Wilmington

Del.

(Wilmington)

( Feb. 6 )  
( 8:00 p. m. )  
( 1942 )  
( De.1 )

page 96 } AND NOW ON THIS DAY, at a Corporation Court  
held for the City of Staunton, to-wit, on the 14th day  
of July, 1943:

ORDER DENYING MOTION OF HANNAH J. KERR  
FOR APPOINTMENT AS ADMINISTRATRIX

This day came again the parties, Hannah J. Kerr moving that she be appointed administratrix of the estate of Vincent B. Kerr, dec'd, who died intestate in the City of Staunton, Virginia, on June 10, 1941, and nieces and nephews of said Vincent B. Kerr, dec'd, opposing the said motion as distributees of the estate of the said Vincent B. Kerr, dec'd, by their respective attorneys.

Whereupon, upon consideration of the evidence adduced by the respective parties, for reasons stated in writing and now made a part of the record of this cause, it is considered by the Court that the said Hannah J. Kerr, who intermarried with the said Vincent B. Kerr on November 22, 1922, wilfully deserted and abandoned her said husband, Vincent B. Kerr, and that such desertion and abandonment continued until his death, wherefore, being barred of all interest in the estate of said Vincent B. Kerr as tenant by dower or as distributee or otherwise, the said Hannah J. Kerr may not be granted administration of the intestate's estate; and that the motion aforesaid of the said Hannah J. Kerr for her appointment as administratrix accordingly should be and it is hereby denied.

page 97 } To which said Hannah J. Kerr, by counsel, excepts.  
J. H. MAY, Judge.

page 98 } OPINION OF TRIAL COURT

This proceeding comes before the court upon the motion of Hannah J. Kerr for her appointment as administratrix of the estate of Vincent B. Kerr, who died intestate in the City of Staunton, Virginia, on June 10, 1941, leaving to survive him, his widow, Hannah J. Kerr and certain nieces and nephews. The motion is made under Sec. 5360 of the Code of Virginia, which in part provides—

"administration shall be granted to the distributees who shall apply therefor, preferring first the husband and wife."

The distributees contest the motion of the widow and rely on Section 5123 of the Code of Virginia, which provides—

"If a wife wilfully deserts or abandons her husband, and such desertion or abandonment continues until his death, she shall be barred of all interest in his estate as tenant by dower, distributee, or otherwise."

The parties were married in Purcellville, Loudoun County, Virginia, on November 22, 1922. Vincent B. Kerr was then 65 years of age and Hannah J. Kerr was 55. Following their marriage, they spent several years in the southwest. They then came to Staunton and occupied, until their separation, an adequate dwelling situated in a good residential section owned by the husband. Mrs. Kerr owned a house and lot in Purcellville, 77½ acres of land nearby, and possessed personalty of a value in excess of \$5,000. At the time of his death, Mr. Kerr owned real estate, consisting of 157 acres of land in a remote section of Augusta County, and several dwellings in or near Staunton, of the appraised value of \$11,250.00, and personalty of the value of \$4,605.62. He could engage in no gainful occupation; depended solely from the small income from his estate for a livelihood; he was prudent; and to him frugality was an essential virtue.

These parties lived together as husband and wife upon varying degrees of dissatisfaction at the husband's home in Staunton until September, 1938. Each contributed to the maintenance of the home, and Mrs. Kerr apparently provided for herself clothing, furniture and such articles as she might desire, beyond a sustenance in her home. Her husband managed her investments, and in spite of caustic criticism in several of her letters to him, he handled the same honestly and without loss during the depression years. Her losses were sustained after she left him.

The husband was quite religious, and attended worship every time the church doors were open, according to his spouse. A puritanical atmosphere pervaded the same. As he grew older his hearing became less acute, and it was exceedingly difficult to converse with him. In the mind of Mrs. Kerr matters became progressively worse—his ill temper, neglect, and parsimony increased. Finally in September, 1938, she left his home and removed her furniture and herself to her dwelling in Purcellville, with the parting words

to her husband, "If you need me, you sell your things and come over to live with me." (Ev., p. 29). There she remained page 100} continuously from that day in September, 1938, until the day of Vincent B. Kerr's death on June 10, 1941. The marital relation was never resumed.

This is a probate matter. Probate jurisdiction is purely statutory. The statute confers no general equity jurisdiction. *Gooch v. Suhor*, 121 Va. 35 (41).

There is nothing express or implied in the evidence in this matter to induce the view that the separation was by mutual consent. It is conceded that the wife left her husband's home of her own free will, and remained away until his death, although she knew of his last illness as stated to Mrs. Paxton at the funeral. (Ev., p. 15).

In order for Mrs. Kerr to justify her desertion of her husband and her change of domicile, and to relieve herself of the provisions of Section 5123 of the Code, she must establish the fact that the conduct of her husband was such that it could be made the foundation of a judicial proceeding for divorce. *Gentry v. Gentry*, 161 Va. 786, 172 S. E. 157; *Hendry v. Hendry*, 172 Va. 368, 1 S. E. (2nd) 340. He had provided an adequate home, and maintenance for her, frugal though it may have been according to his meager income. If she rejects the home, and leaves the domicile simply because she never liked Staunton anyway (Ev., p. 38), or because, as stated by her, "I knew I had made a bad bargain in marrying him," (Ev., p. 68) she became a deserter. *Robinette v. Robinette*, 153 Va. 342, 149 S. E. 493; *Beuhring v. Beuhring*, 111 W. Va., 125, 161 S. E. 25; *Burus v. Burus*, 121 W. Va. 13, page 101} 1 S. E. (2nd) 179; *Harbert v. Harbert*, (W. Va.) 11 S. E. (2nd) 749.

By Acts of 1938, ch. 242, page 382, it is no longer necessary to allege and prove an offer of reconciliation when a divorce is sought on the grounds of abandonment and desertion—See also, *Bowman v. Bowman*, 180 Va. 200. Therefore an offer of reconciliation is not a matter of concern in a proper determination of the motion.

The Hendry case, supra, is in many respects similar to the instant case. The question was, whether the wife had just cause for leaving. Mr. Justice Gregory stated the rule and case clearly and concisely as follows:

"(1) We have held that one spouse is not justified in leaving the other unless the conduct of the wrongdoer could be made the foundation of a judicial proceeding for divorce. Nothing short of such conduct will justify a wilful separation or a continuance of

it. *Towson v. Towson*, 126 Va. 640, 102 S. E. 48; *Gentry v. Gentry*, 161 Va. 786, 172 S. E. 157.

(2) When we examine the conduct of Dr. Hendry prior to the time Mrs. Hendry left him we observe that he was cold and indifferent. At times he was unkind. But all that may be urged in criticism of him may be directed at Mrs. Hendry. They both made married life very disagreeable but their conduct was not just case in a legal sense for one to desert the other. Mrs. Hendry was not legally justified in deserting her husband. There is not sufficient evidence of cruelty on his part to justify her in leaving him.'

page 102} The court thereupon held that the husband was entitled to a divorce a mensa et thoro, on his answer and cross bill.

At the time of the separation, Vincent B. Kerr was about 80 years of age and his wife was 70. He was very deaf and infirm physically. His small income was derived solely from the small estate he owned. Mrs. Kerr possessed separate estate, which, under her husband's prudent management, produced small income. No doubt he was cool towards her, irritable, and impatient. He was necessarily frugal and counted the last penny. The evidence fully discloses that she was nervous, fault-finding, and given to ridicule. At times she was caustic in the extreme. She without cause, accused her husband of stealing from her and threatened prosecution. Their relations were strained; conditions grew progressively worse; she did not like Staunton; she knew she "had made a bad bargain in marrying him"; she wanted to be relieved of the burdens of the bargain. So she broke the marital relation, left the matrimonial domicile and removed to the home of her maidenhood. It is clear that she had not in law sufficient or just cause for her act and she became a deserter.

Counsel for Hannah J. Kerr in his note of argument relies strongly on the recent case of *Babcock v. Babcock*, 172 Va. 219, 1 S. E. (2nd) 328. It is considered that the facts in that case do not accord with those in the instant matter. In the *Babcock* case the parties were married on May 1, 1937, and separated page 103} on July 22, 1937. The marriage lasted eighty-two days.

On July 16, 1937, he ordered his wife to leave his house. On July 22, 1937, he again ordered her to leave. She left at that time and spent the night with a neighbor. The next morning she removed her furniture from her husband's dwelling, and was further insulted and charged by him with stealing. On the day he

ordered his wife to leave, namely, July 22, 1937, he inserted over his name, a notice in the local newspaper that he would not be responsible for any debts other than those personally made by him. On July 27, 1937, he leased his home, and a part of the consideration was that the lessee, an attorney, would represent him in litigation between himself and wife. In the able opinion of Mr. Justice Browning, it was said: "In our opinion the evidence shows quite conclusively that Mrs. Babcock was *forced* by Mr. Babcock to leave his home; she had no alternative." In the instant case the evidence does not disclose that Mrs. Kerr was forced to leave her home by her husband. On the contrary it shows that he accused Mrs. B. G. Robertson with contributing to her decision to leave. Ev., p. 52. One cannot escape the conclusion that he did not want her to leave. This view is fortified by his future conduct toward her and aid in investments.

Mrs. Kerr's intention to desert increased and became more fixed as time passed. Upon leaving she removed her articles of furniture and personal effects; in due time she transferred her registration as a voter to Purcellville and voted in several elections; in a letter to her husband dated February 1, 1940, (Ev., p. 34), page 104 } she stated: "I greatly appreciate what you have done for me and think it is time for us to close out"; she conferred with an attorney about obtaining a divorce; she never returned until the day of the funeral. When the shadows were falling across the evening of her aged husband's life, she returned not to comfort and nurse him, although she knew of his illness.

Vincent B. Kerr is dead and cannot speak. The charges made against him are vague and are not cogently supported either by his wife or others. She had letters from him which she did not produce, or explain her reasons for not doing so. She has failed to furnish the court with such a cause for leaving him that could be made the foundation for a judicial proceeding for a divorce, as required in *Hendry v. Hendry*, *supra*.

Judge Chichester, in *Butler v. Butler*, 145 Va. 85, 88, 133 S. E. 756, said: "The law does not permit courts to sever marriage bonds and to break up households merely because husband and wife, through unruly tempers, lack of patience and uncongenial natures, live unhappily together. It requires them to submit to the ordinary consequences of human infirmities and unwise selections, and the misconduct which will form a good ground for legal separation must be very serious and such as amounts to extreme cruelty, entirely subversive of the family relations, rendering the association

intolerable." Cited with approval in *Toler v. Toler*, 168 Va. 302.

Since it is not deemed necessary, the court will refrain from discussing Mrs. Kerr's unusual letter of February page 105 } 3, 1941, to W. A. Paxton.

For the reasons herein stated, the motion of Hannah J. Kerr for appointment as administratrix of the estate of Vincent B. Kerr, deceased, is denied.

J. H. MAY, Judge.

page 106 } ATTEST: This 14th day of September, 1943, to  
Plaintiff's Certificate No. 1, the same having been tendered to the undersigned on the 14th day of September, 1943, after notice to defendants' attorney, as required by law.

J. H. MAY,

Judge of the Corporation Court for the City of Staunton,  
Virginia.

page 107 } STATE OF VIRGINIA,

CITY OF STAUNTON, to-wit:

I, Kathryn H. Taylor, Acting Clerk of the Corporation Court for the City of Staunton, Virginia, do certify that the foregoing is a true transcript of the record in the case of Hannah J. Kerr v. Vincent B. Kerr's Heirs as the same appears on file and of record in the clerk's office of said court. I further certify that it has been made to appear to me that the notice required by law has been given to the attorneys for the defendants in this case.

Given under my hand this 17th day of September, 1943.

KATHRYN H. TAYLOR,  
Acting Clerk.

Fee for transcript—\$17.50.

A Copy, Teste:

M. B. WATTS, Clerk.



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