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which never contemplated a partition deed expressly purporting to create a tenancy by entireties—said that a partition deed is incapable of conferring an interest on someone who, although named, had no prior interest. To apply this rule to these facts is to lose sight of the goal of litigation and to become enslaved by strict stare decisis. If John Smith had conveyed the tract, once it had been allotted to him, to a third party who had reconveyed to the spouses as a unity, Smith's mother's intent would have been carried out. But more important, if the court had followed the reasoning of the courts which allow the creation of estates by the entirety by (1) conveying to one's self and one's spouse by a joint deed, (2) conveying a one-half undivided interest to one's spouse, where the intent is clear, or (3) merely conveying the whole to one's spouse, where the intent is likewise clear,[31] the intent of his mother would have been effectuated. In ignoring the devices used by the courts to facilitate the creation of estates by the entirety and in adhering adamantly to a rule which, when stretched to fit the facts of the principal case, leads to an unjust result, the court sacrificed substance for form.

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RELEVANCY OF CHARACTER EVIDENCE ON DAMAGES FOR WRONGFUL DEATH

Plaintiff's decedent was killed as a result of an accident caused by the negligence of the defendant. Plaintiff, a daughter of the deceased, qualified as administratrix of the estate and brought an action for wrongful death in the case of *Basham v. Terry*.[1] The plaintiff's evidence, bearing upon the measure of damages, showed that prior to the accident the decedent, being retired from employment, had helped with the laundering and cooking at home, had given considerable time to gardening for the family, and had visited his wife and son in nearby institutions in which they were undergoing treatment.

The defendant then sought to introduce evidence in mitigation of damages tending to show the conduct, habits, and family relations of the deceased. Through cross-examination of the plaintiff, another daughter, and the widow of the deceased, the defendant attempted to

[31]See notes 26, 28 and 29 supra and accompanying text.

[1]199 Va. 817, 102 S.E.2d 285 (1958).

prove that the deceased was "accustomed to doing some drinking . . . ."[2] Further, through the testimony of a clerk of court, the defendant undertook to introduce evidence that on two occasions the plaintiff and the wife of the deceased had sworn out warrants against the deceased charging him with physical assault upon the wife. To all of this, counsel for the plaintiff objected: "Your Honor, I take the position that any such alleged evidence of his being a worthless bum is irrelevant in a case of this kind."[3] The trial court sustained the objection of plaintiff's counsel and excluded the defendant's evidence: "At this stage of the record, the Court thinks the matter has not been placed in issue."[4] Judgment against the defendant was entered in the amount of the statutory maximum, $25,000.[5]

The Virginia Supreme Court of Appeals reversed the trial court and remanded the case for a new trial.[6] In the opinion, the court reiterated its previous holdings that a jury, in ascertaining damages for wrongful death, may take into consideration the beneficiaries' loss of the decedent's care, attention, and society and may award additional sums for solace and comfort for the sorrow, suffering, and mental anguish occasioned by the death.[7] The court held that the excluded evidence was clearly relevant as revealing the extent of these elements of damage.[8]

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[2]Administratrix was questioned by defendant's counsel and answered as follows:

"*Q.* As a matter of fact, Miss Terry, your father had been accustomed to doing some drinking, hadn't he?

"*A. Yes, sir.*"

Id. at 289.

[3]Ibid.

[4]Ibid.

[5]The statutory maximum has since been raised to $30,000. Va. Code Ann. § 8-636 (Supp. 1958).

[6]Basham v. Terry, 199 Va. 817, 102 S.E.2d 285 (1958). The sole ground for reversal was the prejudicial result of the trial court's erroneous refusal to admit the evidence of the character of the deceased. The court found no error in the trial court's refusal to instruct on the possible contributory negligence of the deceased—the other ground upon which the defendant had sought reversal.

[7]E.g., Gough v. Shaner, 197 Va. 572, 90 S.E.2d 171 (1955); Matthews v. Hicks, 197 Va. 112, 87 S.E.2d 629 (1955); Wolfe v. Lockhart, 195 Va. 479, 78 S.E.2d 654 (1953); Ratcliffe v. McDonald's Adm'r, 123 Va. 871, 97 S.E. 307 (1918); Chesapeake & O. Ry. v. Ghee's Adm'x, 110 Va. 527, 66 S.E. 826 (1910); Pocahontas Collieries Co. v. Rukas' Adm'r, 104 Va. 278, 51 S.E. 449 (1905); Anderson v. Hygeia Hotel Co., 92 Va. 687, 24 S.E. 269 (1896); Baltimore & O.R.R. v. Noell's Adm'r, 73 Va. (32 Gratt.) 394 (1879); Matthews v. Warner's Adm'r, 70 Va. (29 Gratt.) 570 (1877). See generally 5 Michie's Jurisprudence of Va. & W. Va. Death by Wrongful Act § 14 (1949).

[8]The court further stated that while the two criminal warrants sworn out against the decedent were somewhat remote, if the warrants had been tendered they

The basis of relevancy of the excluded character evidence in the above case is clear. The approach taken by the plaintiff's counsel and the reluctance of the trial court to admit the evidence is probably indicative of a widespread misconception that evidence of a party's character traits or habits is not admissible even though in fact it may bear directly on an issue in the case. Such a misconception must have its basis in the well-recognized rule that evidence of a party's character as an indication of his conduct on a specific occasion is normally not admissible.[9] For example, in an action for injuries sustained as a result of an automobile accident, evidence of prior convictions of the plaintiff for traffic violations would not be admissible as tending to show contributory negligence on the part of the plaintiff, because of the unfair prejudice, and possible unjust condemnation, which such evidence might induce.[10] Consequently, even though character evidence may have some basis of relevancy, it is held inadmissible because it is believed that the usefulness of the evidence is greatly outweighed by the undue prejudice and confusion which might result in the minds of the jurors.[11]

It has long been recognized, however, that where evidence of certain character traits or habits has a substantial independent basis of

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should have been admitted in evidence to show the true relationship between the deceased and his wife. Basham v. Terry, 199 Va. 817, 102 S.E.2d 285, 291 (1958).

[9]1 Wigmore, Evidence § 64 (3d ed. 1940).

[10]Nesbit v. Cumberland Contracting Co., 196 Md. 36, 75 A.2d 339, 341 (1950). Wigmore says that "a fact may be logically relevant, and thus far admissible, and yet be excluded by reason of one of the auxiliary principles of policy . . ., particularly those of Confusion of Issues, Unfair Surprise, or Undue Prejudice." 1 Wigmore, Evidence § 29(a) (3d ed. 1940).

[11]As early as 1864 courts saw the evils of the admission of such evidence: "Many considerations concur in rejecting such evidence in civil cases. Evidence of this character has but a remote bearing as proof to show that wrongful acts have or have not been committed, and the mind resorts to it for aid only when the other evidence is doubtful and nicely balanced. It may then perhaps serve to turn the wavering scales. Very rarely can it be of substantial use in getting at the truth. It is uncertain in its nature—both because the true character of a large portion of mankind is ascertained with difficulty, and because those who are called to testify are reluctant to disparage their neighbors,—especially if they are wealthy, influential, popular, or even only pleasant and obliging. It is mere matter of opinion, and in matters of opinion men are apt to be greatly influenced by prejudice, partisanship, or other bias, of which they are unconscious; and in cases which are not quite clear they are apt to agree with the one who first speaks to them on the subject, or to form their opinions upon the opinions of others. The introduction of such evidence in civil causes, wherever character is assailed, would make trials intolerably long and tedious and greatly increase the expense and delay of litigation. It is a kind of evidence that might be easily manufactured—is liable to abuse and if in common use in the courts, as likely to mislead as to guide aright." Wright v. McKee, 37 Vt. 161, 163-64 (1864).

relevancy—i.e., where the traits or habits tend to prove or disprove some operative issue in the case other than the alleged conduct of the party on a specific occasion—the evidence may be admitted for that purpose. It appears that such character evidence is most frequently admitted upon issues relating to damages. For example, in a father's action for seduction of his daughter, damages are based primarily on the loss of the daughter's services. But in addition, the father is allowed to include compensation for the impairment of the family honor and for his own mental suffering; and evidence of the daughter's actual chaste character is relevant to establish the extent of his mental suffering.[12] By the same reasoning, character evidence is admissible in actions for criminal conversation, alienation of affections,[13] indecent assault,[14] and breach of promise to marry.[15]

The *Basham* case is illustrative of another action where evidence of character is admissible upon issues relating to damages, that is, the action for wrongful death.[16] Under the Virginia rule of damages for wrongful death, which permits damages to be recovered for loss of companionship and solace, the independent basis of relevancy for the admission of character evidence is strong and should present no difficulty. In fact, under the Virginia rule, it seems that almost any element of character might be relevant and admissible as bearing on the loss of companionship and solace. However, the Virginia measure of damages for wrongful death is almost unique. Only three other states[17] expressly allow recovery for sentimental losses.[18]

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[12]1 Wigmore, Evidence § 210 (3d ed. 1940).

[13]The actual bad character or conduct of a plaintiff may serve in mitigation of damages inasmuch as the loss of his wife's virtue can mean little to a person of his behaviour. Id. § 75.

[14]In a civil action for assault, where the assault is claimed to have been made for indecent purposes, the actual chaste character of the woman is material as affecting the extent of the injury to her feelings. Id. § 212.

[15]Evidence of the unchaste character of the promisee of marriage is admissible, for the disgrace of the promisee would naturally be less or lacking if she were already unchaste. Id. § 213.

[16]Wigmore suggests that evidence of character may be admissible in an action for wrongful death if it can be shown that the evidence sought to be admitted is material to the inquiry of the measure of damages: "[I]t would seem that the particular bad acts of a deceased person would be receivable to evidence his moral character, so far as that character might be material in estimating the damages payable to next of kin in an action for loss of support due to death by wrongful act." Id. § 210(a).

[17]Louisiana, South Carolina, and West Virginia appear to be the only states which adopt the Virginia measure of damages. McCormick, Damages § 99 nn. 62 and 65 (1935); 16 Am. Jur. Death § 177 n. 3 (1938); Annot., 74 A.L.R. 11 (1931).

[18]"Sentimental losses" is the term adopted in this comment to replace loss of the decedent's care, attention, and society and damages for the beneficiaries' sorrow, suffering, and mental anguish occasioned by the death.

In the majority of jurisdictions recovery of damages for sentimental loss is rejected, and recovery is limited to the value of the pecuniary interest that the beneficiaries had in the life of the deceased: the present value of the net earnings which the deceased would have accumulated had he lived his normal life expectancy.[19] It would seem that in these states it would be very difficult to overcome the reluctance of the court to admit character evidence and to establish an independent basis of relevacy upon which character evidence might be admitted. The logical basis of relevancy of this evidence would be in reference to the decedent's probable gross income, living expenses, or similar pecuniary items. Surprisingly few cases have considered the issue of admissibility of character evidence in this context, but these same cases have generally allowed such evidence without specifying the basis of relevancy.[20]

In the North Carolina case of *Hanks v. Norfolk & W. Ry.*,[21] the defendant was permitted to introduce evidence that the decedent had

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[19]The pecuniary relief afforded by the statutes of the various states which govern wrongful death are of two general types:

(1) Damages based upon loss of contribution to the enumerated relatives determined by the present worth of the contributions and support which the deceased probably would have given to the survivors or beneficiaries had he lived. McCormick, Damages § 98 (1935); Developments in the Law—Damages—1935-1947, 61 Harv. L. Rev. 113, 167 (1947).

(2) Damages based on the loss to the estate of the deceased. These damages are determined in some jurisdictions by the present value of the decedent's probable future earnings less his probable personal expenses. In other states the damages are what the deceased would have accumulated or saved out of his earnings, deducting all probable expenditures. In a few jurisdictions the estate may recover the deceased's total probable earnings with no deductions for expenses. Developments in the Law—Damages—1935-1947, supra.

[20]Taylor v. Western Pac. R.R., 45 Cal. 323, 334 (1873) (evidence of education, sobriety, and economy admissible to show greater earning capacity than that of an uneducated, drunken spendthrift); McDonald v. Price, 80 Cal. App. 2d 150, 181 P.2d 115, 116 (1947) (evidence of habitual intemperance and gambling admissible as showing value of decedent's life to his family); Pell v. Herbert, 33 Cal. App. 730, 166 Pac. 386, 387 (1917) (evidence of dissolute and unthrifty habits admissible as measure of damages); Townsend v. Armstrong, 220 Iowa 396, 260 N.W. 17, 20 (1935) (evidence of drunkenness admissible to show effect on earning capacity); Holmberg v. Murphy, 167 Minn. 232, 208 N.W. 808, 809 (1926) (evidence of unserved jail term admissible as bearing upon amount of pecuniary loss); Wolters v. Chicago & A. Ry., 193 S.W. 877, 879 (Kansas City Ct. App. 1917) (evidence of habitual sobriety admissible to aid in determining pecuniary loss); Craig v. Boston & Me. R.R., 92 N.H. 408, 32 A.2d 316, 320 (1943) (evidence of lewd and lascivious conduct admissible as bearing upon amount of probable contribution to children); Umphrey v. Deery, 78 N.D. 211, 48 N.W.2d 897, 909 (1951) (evidence of industry, sobriety and trustworthiness admissible to show substantial pecuniary loss); Fleming v. City of Seattle, 45 Wash. 2d 477, 275 P.2d 904, 910 (1954) (evidence of habit of intoxication admissible to show deceased was less valuable to family).

[21]230 N.C. 179, 52 S.E.2d 717 (1949).

previously entered a plea of guilty to a charge of nonsupport of his two minor children. The court said that the evidence "showed the neglect and disregard of a parent for his children which had necessarily continued for sometime before he was hailed into court."[22] That statement was made by a court in a state which purports to have as the measure of damages "the present worth of the net pecuniary value of the life of the deceased to be ascertained by deducting the probable cost of his own living and usual and ordinary expenses from the probable gross income... based upon his life expectancy."[23] It seems that this evidence is quite minimal in its effect on the deceased's gross income or on his living expenses, if indeed it is relevant at all. It is rather difficult to understand how the decedent's treatment of his family might reduce his income or increase his expenses. Such evidence might have a relevancy to the amount of the decedent's net income which he would have given to the beneficiaries, but this is not a part of the measure of recovery in North Carolina.

In most states the measure of damages for wrongful death, although limited to pecuniary loss, is not governed by such a crystallized formula as North Carolina has laid down. In these states some basis for admission of character evidence has been found. A Washington court[24] admitted evidence tending to show a habit of drinking intoxicants in mitigation of damages because "such a habit tends to lower a man's earning capacity, to shorten his expectancy of life, to impair his usefulness as a father, and to lessen his protection and support of his family."[25] An Iowa court[26] permitted the introduction of evidence of sober and industrious habits of a deceased because the evidence tended to show the value of the services of the decedent and the loss to his estate caused by his death. A California court[27] held the same type of evidence was relevant as showing "the extent of his probable usefulness to his beneficiaries."[28]

Admitting that there is some basis of relevancy for this evidence of character, it seems to be so slender that some attempt should have been made by these courts to rationalize the general rule of evidence which excludes similar evidence when introduced to prove conduct on a specific occasion because of the possibility of resulting prejudice

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[22]Id. at 719.
[23]Id. at 723 (dissenting opinion) (citations omitted).
[24]Lundberg v. Baumgartner, 5 Wash. 2d 619, 106 P.2d 566 (1940).
[25]Id at 567.
[26]Van Gent v. Chicago, M. & St. P. Ry., 80 Iowa 526, 45 N.W. 913 (1890).
[27]Barboza v. Pacific Portland Cement Co., 162 Cal. 36, 120 Pac. 767 (1912).
[28]Id. at 770.