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Evidence-Dying Declarations-Appeal and Error

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E: DENCE—DYING DECLARATIONS—APPEAL AND ERROR—S. was convicted of murdering his wife by poisoning her with bichloride of mercury. Defendant appealed to the United States Circuit Court of Appeals, contending that a statement of Mrs. S. to her nurse had been erroneously admitted in evidence as a dying declaration. The statement was, "Dr. Shepard has poisoned me." It was made two days after Mrs. S.'s illness had begun, at a time when she was greatly improved and was not thought by her physicians to be dangerously ill. At the trial, the declaration was offered and received as a dying declaration. The defense had advanced the theory of suicide, and produced evidence that indicated a suicidal intent on the part of Mrs. S. The United States Circuit Court of Appeals held that the statement was not admissible as a dying declaration, but was admissible for the purpose of rebutting the evidence of suicidal intent, and affirmed the conviction. Defendant brought certiorari to the Supreme Court of the United States. Held, judgment reversed. Testimony admitted at the trial for an illegitimate purpose cannot be considered in the appellate court as if admitted for a different purpose unavowed and unus-

pected, where the purpose in reserve would be unlikely to occur to uninstructed jurors.¹

The holding that the declaration was not admissible as a dying declaration, since the declarant, at the time of making it, was not shown to have spoken without hope of recovery and in the shadow of impending death, is in accord with the Indiana rule on dying declarations.² The great weight of authority in other states also holds that a dying declaration is not admissible as such unless it be shown that declarant was conscious of approaching death and had no hope of recovery.³

The unique feature of the principal case is its decision that evidence admitted for an express purpose cannot be considered on appeal as if admitted for another purpose, even though no instruction limiting its effect was asked for at the trial. It is generally held that the trial court is not required to give instructions as to particular points, in a criminal case, where no request therefor is made.⁴ In Indiana and a majority of the other states, where evidence is admitted in a prosecution against two persons jointly, but is admissible against only one of them, the other cannot complain that the court did not limit the application of the evidence, where no such instruction was requested.⁵ However, none of the cases establishing this rule presented the question of evidence offered and received for an express purpose. Justice Cardozo, in the principal case, conceded that if the purpose of the evidence had been left at large, the rule of the cases cited above might apply, and defendant, not having asked for an explanatory instruction, might not be allowed to complain on appeal as to the purpose for which it was used. But where the testimony was offered for an illegitimate purpose, the court held that the trial would become unfair if testimony thus accepted could be used in the appellate court as if admitted for a different purpose, unavowed and unsuspected.

In support of this reasoning, the court cited a recent decision of the New York Court of Appeals, *People v. Zackowitz*.⁶ There it was held that where the state was erroneously allowed to introduce evidence tending to show murderous propensities on the part of defendant, the fact that defendant later took the stand, so that this same evidence would be competent to impeach his credibility, did not cure the error of admitting it.⁷

The writer was able to find only one other case propounding the doctrine of the principal case. In that case, the state moved to strike out

¹ *Shepard v. United States* (Kan.) (1933), 54 Sup. Ct. 22.

² *Williams v. State* (1907), 168 Ind. 87, 79 N. E. 1079; *Watson v. State* (1878), 63 Ind. 548; *Morgan v. State* (1869), 31 Ind. 193.

³ *Brennan v. People* (1906), 37 Colo. 256, 86 P. 79; *Fuqua v. Commonwealth* (1903), 73 S. W. 732; *Collins v. People* (1902), 194 Ill. 506, 62 N. E. 902; *Gardner v. State* (1908), 55 Fla. 25, 45 So. 1028; *People v. Brecht* (1907), 105 N. Y. S. 436, 120 App. Div. 769.

⁴ *Paulson v. State* (1903), 118 Wis. 89, 94 N. W. 771; *People v. Willett* (1895), 105 Mich. 110, 62 N. W. 1115; *Mead v. State* (1891), 53 N. J. Law 601, 23 A. 264; *Zell v. Commonwealth* (1880), 94 Pa. St. 258; *Commonwealth v. Selesnick* (1930), 272 Mass. 354, 172 N. E. 343.

⁵ *Thompson v. State* (1920), 189 Ind. 192, 125 N. E. 641; *State v. Romeo* (1912), 42 Utah 46, 128 P. 530; *State v. Shout* (1915), 263 Mo. 360, 172 S. W. 607; *Lytle v. United States*, 5 Fed. (2nd) 622.

⁶ 254 N. Y. 192, 172 N. E. 466.

⁷ *People v. Zackowitz* (1930), 254 N. Y. 192, 172 N. E. 466.

certain evidence. Before granting the motion the court inquired of defendant's counsel as to the purpose of the evidence. It was not admissible for the purpose named by counsel, and was stricken out. On appeal, defendant's contention that the evidence was offered for a different purpose was not allowed.³

In the instant case, the court went on to say that aside from the fatal objection outlined above, this particular declaration would not have been admissible as evidence of deceased's state of mind, even though it had been so limited at the trial. This declaration was an accusation of defendant. It was hearsay evidence of defendant's guilt. As Justice Cardozo put it, "Other tendency, if it had any, was a filament too fine to be disentangled by a jury."

The rule of the principal case seems to be a reasonable restriction of the doctrine that it is never error for the court to fail to limit the evidence to its legitimate purposes, where an instruction to this effect is not asked.

S. F. S.

PERSONS—HUSBAND AND WIFE—WIFE'S RIGHT TO EARNINGS—Appellant, the administrator of the estate of Lydia Offenbacher, prosecuted this appeal from a judgment in favor of appellee, who is the wife of Lydia Offenbacher's son. For nineteen years prior to her death Mrs. Offenbacher, an invalid, lived in the home of her son and appellee and was cared for by them. For about five years of this period she was confined to her bed by illness so that she required the exacting and constant attention of her son or appellee. Mrs. Offenbacher frequently told appellee and her husband that she expected to compensate them for their services, and after her death, both filed claims against the estate, which were allowed. Appellant contends that such services as were rendered by appellee belong to her husband, and that when his claim was allowed it necessarily included any sum earned by appellee. Held, that such earnings were the separate property of the wife.¹

The apparent conflict of Indiana cases arising under the statute which provides that "the earnings and profits of any married woman, accruing from her trade, business, services or labor, other than labor for her husband or family, shall be her sole and separate property"² is due to the failure of the court to analyze the fact situation of each individual case. It has repeatedly been held in this state that services of the wife, unless performed in her separate business,³ or for third persons,⁴ belong to her husband as at common law.⁵ It is also settled that the husband may give

¹ *Lindsay v. State* (1898), 39 Tex. Cr. R. 468, 46 S. W. 1045.

² *Offenbacher v. Offenbacher* (1933), 187 N. E. 903 (Ind.).

³ Section 8740, Burns' Ann. St. 1926.

⁴ *Wilson v. Wilson* (1887), 113 Ind. 415, 15 N. E. 513; *Boots v. Griffith* (1883), 89 Ind. 246; *Wetzel v. Kellar* (1894), 12 Ind. App. 75, 39 N. E. 895.

⁵ *Kennedy v. Swisher* (1905), 34 Ind. App. 676, 73 N. E. 724; *Elliott v. Atkinson* (1910), 45 Ind. App. 290, 90 N. E. 779; *Kedey v. Petty* (1899), 153 Ind. 179, 54 N. E. 798; *Arnold v. Buchanan* (1915), 60 Ind. App. 626, 111 N. E. 204; *City of Jacksonville v. Griggs* (1924), 82 Ind. App. 104, 144 N. E. 560.

⁶ *Baxter v. Prickett's Administrator* (1867), 27 Ind. 490; *Jenkins v. Flinn* (1871), 37 Ind. 349; *Yopst v. Yopst* (1875), 51 Ind. 61; *Knippenberg v. Morris* (1881), 80 Ind. 540; *Board of Commissioners of Tipton County v. Brown* (1891),