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Persons-Husband and Wife-Wife's Right to Earnings

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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),

his services to his wife,⁶ or may release to the wife his right to her services even as against his creditors,⁷ and conversely the wife may give her services to her husband.⁸ In *Commissioners of Tipton County v. Brown*,⁹ which was one of the first cases to arise under this statute, the husband's pauper brother, who was badly crippled, was cared for by the husband and his wife in their home. The husband filed a claim for compensation for the services rendered his brother, and it was allowed on the theory that the services of the wife were a part of the household duties which she owed her husband. It is obvious that this holding is entirely inconsistent with the principal case. The court does not consider this case, but does attempt to distinguish *Hensley v. Tuttle*¹⁰ which arose a few years later and which relied upon *Commissioners of Tipton County v. Brown*.¹¹ In the *Hensley* case¹² the husband was allowed to recover for the services rendered by himself and his wife in nursing and caring for one who was not a relative. It was there stated that the services of the wife were rendered for her husband and were in the line of her household duties, but the court made the further statement that the wife may give her services to her husband, so the basis of the decision is somewhat inconclusive. If *Hensley v. Tuttle*¹³ is put on the ground that the services of the wife belong to the husband it is even more difficult to harmonize with the principal case than *Commissioners of Tipton County v. Brown*¹⁴ because the person cared for was a stranger and there is no justification for saying that the services were rendered "for her husband or family." However, it is followed and cited with approval by the comparatively recent case of *Bower v. Starbuck*,¹⁵ but is in direct conflict with *Arnold v. Rifner*¹⁶ and *Kennedy v. Swisher*,¹⁷ although all of the cases arose out of facts substantially the same as those of *Hensley v. Tuttle*.¹⁸ *Hamilton v. Hamilton*¹⁹ and *Elliott v. Atkinson*,²⁰ both rather recent cases in which the wife cared for relatives of her husband in her home, reach the result of the instant case.

It is apparent from the foregoing discussion that the cases on this point are flatly inconsistent. Part of this conflict may be due to the poorly drafted statute which makes no attempt to define the meaning of "separate

⁴ Ind. App. 288, 30 N. E. 925; *Hensley v. Tuttle* (1897), 17 Ind. App. 288, 46 N. E. 594; *Citizens Street Railway Company v. Twiname* (1889), 121 Ind. 375, 23 N. E. 159; *Cincinnati Street Railway Company v. Cook* (1910), 45 Ind. App. 401, 90 N. E. 1052; *Indianapolis Rapid Transit Company v. Reeder* (1912), 51 Ind. App. 533.

⁶ *Cooper v. Ham* (1875), 49 Ind. 393.

⁷ *Farman v. Chamberlain* (1881), 74 Ind. 82; *Roche v. Union Trust Co.* (1889), 52 N. E. 612 (Ind. App.); *Powers v. Fletcher* (1882), 84 Ind. 154.

⁸ *Hensley v. Tuttle* (1897), 17 Ind. App. 253, 46 N. E. 594.

⁹ (1891), 4 Ind. App. 288; 30 N. E. 925.

¹⁰ (1897), 17 Ind. App. 288, 46 N. E. 594.

¹¹ (1891), 4 Ind. App. 288, 30 N. E. 925.

¹² (1897), 17 Ind. App. 253, 46 N. E. 594.

¹³ *supra*.

¹⁴ (1891), 4 Ind. App. 288, 30 N. E. 925.

¹⁵ (1917), 186 Ind. 309, 116 N. E. 301.

¹⁶ (1896), 16 Ind. App. 442, 45 N. E. 618.

¹⁷ (1905), 34 Ind. App. 676, 73 N. E. 724.

¹⁸ (1897), 17 Ind. App. 253, 30 N. E. 925.

¹⁹ (1901), 26 Ind. App. 114, 59 N. E. 344.

²⁰ (1910), 45 Ind. App. 290, 90 N. E. 779.

account of the wife" or "services rendered for family." The Indiana statute is apparently the only one in the United States using the latter phrase, and there is no ruling of our court upon whether "family" includes near relatives of the wife or husband when they all live in the same home. Statutes of a few other states²¹ use the phrase "performed on the separate account of the wife," but differ so much in other respects²² that decisions rendered under them are of little value to this court. Another explanation of the conflict is the apparent tendency of the court toward a more liberal construction of statutes emancipating the wife, manifested by five decisions in the last thirty-seven years favoring the wife with only *Bowers v. Starbuck*²³ contra.

²¹ 1921 Ark. Code, Sections 5580, 5581; 1921 Colo. Comp. Laws, Section 5578; 1918 Conn. Rev. Section 5274; 1906 Fla. Gen. Statutes, Section 1368; 1923 Kan. Rev. Statutes, Section 23; 1923 Neb. Comp. Statutes 1511; 1860 N. Y. Acts c. 90, Section 2. See L. R. A. 1917 E, 288, for various interpretations of this phrase.

²² Joseph Warren, *Husband's Right to Wife's Services*, 38 Harv. Law Rev. 421, 622 (1924-25).

²³ (1917), 186 Ind. 309, 116 N. E. 301.