Michigan Law Review

Volume 6 | Issue 8

1908

Note and Comment

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MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE, $2.50 PER YEAR. 35 CENTS PER NUMBER

NOTE AND COMMENT

THE LIABILITY OF A PHYSICIAN FOR THE ACTS OF HIS PARTNER.—The general doctrine that one partner is liable for the acts of another partner, so long as they are within the scope of the partnership business, applies to partnerships between physicians quite as fully as to other partnerships. Each partner is the agent of the firm in the prosecution of the partnership affairs, and the firm is liable for the torts of each partner so long as they are within the purview of the agency. If one partner has failed to bring to a case the learning, skill, care and judgment that the law requires, all of the physicians who constitute the partnership are liable for the results of his shortcoming. See *Whittaker* v. *Collins,* 34 Minn. 299.

But while there is no question as to this general doctrine, its application becomes at times a matter of no little difficulty. This is well illustrated in the recent case of *Haase* v. *Morton & Morton,* decided by the Supreme Court of Iowa, April 10, 1908, and reported in 115 N. W. Rep. 921. W. M. and L. B. Morton were physicians practicing their profession under the firm name of Morton & Morton. The plaintiff was advised by the senior member of the firm that a surgical operation would be necessary for the relief

of a difficulty from which she was suffering and that it would be safer for her and more convenient for all concerned if the operation could be performed at a hospital located near the plaintiff's home. The plaintiff accepted the advice and authorized the physician to make the necessary arrangements at the hospital, which he did. A few days thereafter, Dr. W. M. Morton took plaintiff to the hospital where the operation was properly and successfully performed by him, his partner Dr. L. B. Morton being present and administering the anaesthetic. After the operation the plaintiff, while still unconscious, was placed upon a car used for conveying patients from one part of the hospital to another in order that she might be taken to the elevator and thence to her room on the floor below. The defendants and an attendant nurse put plaintiff upon this car, and she was wheeled to the elevator by the nurse, defendant, Dr. L. B. Morton, accompanying her and going ahead. The car had six rubber-tired wheels, the two wheels in the center being larger than the two at each end. When either set of end wheels rested upon the floor, the car inclined in the direction of that set and was very easily put in motion in that direction. Upon reaching the elevator room, the persons in charge of the plaintiff found the elevator door open and the elevator below. The attendant stopped the car upon which plaintiff was resting so that the front end thereof, with its wheels upon the floor, was only about a foot from the open door of the elevator. Dr. L. B. Morton then left the car and attempted to raise the elevator from the floor below. While doing this, his head and shoulders were inside the elevator well. The machinery not responding at once to his efforts, the nurse told him that she would go and call the janitor, and she left the car for that purpose. But when she was seven or eight feet away, the doctor said to her, "Never mind, I can get it from here." Just at this time the car was started by some motion of the plaintiff, and before the nurse could return to her post, the car, with the plaintiff thereon and still in an unconscious condition, rolled into the elevator shaft, and the plaintiff was precipitated to the floor below and severely injured. She brought her action for damages against the two physicians, claiming that both were liable on account of the partnership relation.

It should be noted that the senior partner, Dr. W. M. Morton, after assisting in placing plaintiff upon the car, left the operating room for the surgeon's dressing room at once, and had nothing to do with the moving of plaintiff; that Dr. L. B. Morton had before this time, after assisting in operations at this hospital, also assisted in removing the patients operated upon from the operating room to their own rooms, this same car and elevator being used. It appeared that the nurse who assisted had performed this duty frequently before, but never without the attendance of a physician, and also that the elevator was operated by the janitor, when he was present, but that in his absence, the physician attending, operated it, as the defendant L. B. Morton was attempting to do when this accident happened.

At the close of the evidence, the trial court refused to direct a verdict for the defendants, and submitted the case to the jury, who found for the plaintiff.

The reviewing court, after disposing of the contention of the appellants "that the accident was not one which the defendant, L. B. Morton ought reasonably to have foreseen might occur as the result of his act, and that a mere failure to guard against an accident which could not reasonably have been expected is not negligence" by suggesting that "it is enough to constitute negligence if the result of the act is the natural, though not the necessary or inevitable, thing to be expected," proceeds to discuss the defense that the removal of the patient to her private room was not within the scope of the ordinary business of the firm, and that any negligence in that regard of which one of the partners may have been guilty, cannot form the basis of an action against the firm. It is suggested by the court that it appears from the evidence that in this hospital the doctors as a rule assisted in removing patients from the operating room, and up and down in the elevator when necessary; that before this time, defendant, L. B. Morton, had "assisted in operations at the same hospital and had also assisted in removing the patients operated upon from the operating room by means of the same car and elevator;" that he was familiar with his duties and with the surrounding conditions; that it was incumbent upon someone to see that plaintiff was properly and safely removed from the operating room to a place suitable for such further treatment as her case might require, and that while a physician in charge of such a case may not under ordinary circumstances be responsible for this duty, he may make himself so by assuming it to be within the scope of his employment. "While it is shown," says the court, "that neither of the defendants owned or controlled the hospital, it does appear that they made all arrangements for plaintiff's stay there, and a jury would be justified in finding that defendants, as part of their employment, undertook to care for plaintiff from the time she entered the hospital until she was ready for discharge therefrom. And while this might not ordinarily include the work of hospital employees, the doctors might assume the duty of returning the patient to his room, and in such event each member of the firm would be the agent of the other in carrying on the work." The reviewing court concludes that it was for the jury to say whether defendant L. B. Morton was acting for the firm when the accident occurred, and that there was evidence to sustain the finding that he was not only negligent, but he was so acting. "It cannot be held," says the court, "as a matter of law in all cases that after a serious surgical operation and while the patient is still unconscious, the physician may leave the patient on the operating table to find his way to his own room the best he may."

From the conclusion of the majority, WEAVER, J., dissents, contending that the holding makes the defendants liable for the negligence of the hospital managers or their servants. "There is no pretense," says the dissenting opinion "that defendants had any connection with or control over the hospital or the attendants there employed, except as practicing physicians who went there to treat their patients. The matter of service, nursing, watch, care and personal attendance and assistance were peculiarly the duties assumed by the hospital, and the physicians were charged with no more responsibility or liability with respect thereto than would have been the

case had plaintiff been in her own home and surrounded by her own family and servants. There was nothing in the peculiar offices or duties of their profession requiring defendants or either of them to assume the responsibilty of carrying or wheeling the patient between her room and the operating room," or to accompany her, unless it might have been for the purpose of administering restoratives or something of the kind, which it does not appear was necessary in this case. The dissenting judge concludes, and, as it seems to the writer, with much reason to sustain him, that the holding of the prevailing opinion must operate to increase greatly, and to an extent not justified by the law, the liability of the medical profession, and further that to charge the absent partner, under the circumstances disclosed, is an unwarrantable extension of the doctrine of agency as applied to partners. In this particular also the dissenting opinion commends itself to the writer, "Even if we assume," says the opinion, "that the former (Dr. L. B. Morton) was wheeling the car at the time of the accident, though it is conceded he was not, he was engaged, not in the business of the partnership, but was voluntarily doing or assisting in the work of a hospital attendant. His partner was not present, took no part in the service being performed at the time, and should be exonerated from all liability." H. B. H.

MUNICIPAL TAXATION BY APPOINTIVE BOARDS OR COMMISSIONERS.—Of late years there has been a growing tendency on the part of state legislatures to deprive the regular municipal officers of certain powers or functions, and delegate those powers to local commissioners who hold office by appointment, not by election. The powers as granted may be very broad or carefully limited. They range from a grant of the entire government of the city, as in the case of Galveston, to a mere delegation of the power to manage waterworks or a police department. The question is primarily political and social, but the desire for complete local self-government has brought the constitutionality of such legislation before the courts. This is especially true where the commissioners are given the power to levy taxes. Constitutional provisions, the numberless statutes, the extent of the powers granted and the purposes for which they are granted are so varied in the different states that it is difficult to deduce many definite principles from the cases. Nevertheless certain conflicting views stand out more or less clearly.

The question came before the Supreme Court of Kansas in the case of *Wulf* v. *Kansas City* (1908), — Kan. —, 94 Pac. Rep. 207. By statute cities above a given population were required to maintain a system of parks and boulevards which were to be under the power and control of a board of park commissioners, appointed by the Mayor. Broad power was conferred upon this board. It could purchase and sell property, create and provide for the payment of debts, draw warrants on the city treasurer, levy taxes not exceeding one-half mill on the dollar on the taxable property of the city, and could, with certain limitations, issue bonds of the city. Taxpayers brought suit to enjoin the levy of the tax provided for in the act. The court in an exhaustive opinion, while recognizing the conflict on the fundamental question involved, held that the power of the legislature was absolute in

the absence of an express limitation by which an implied limitation could be sustained, and that there was no implied limitation upon the power of the legislature over parks and boulevards, or upon its power to create a board of park commissioners and delegate the power of taxation to it.

The question is primarily constitutional and involves the construction of state constitutions, seldom the federal constitution. GRAY in his LIMITATIONS OF THE TAXING POWER, § 638, divides the decisions into three classes: Cases in which the power of the legislature over its municipalities is held to be practically unlimited in the absence of express constitutional restriction; cases in which local self-government is sustained as being inherent in the local subdivisions; and cases which recognize this right as regards matters of local concern but "differ as to what are matters of purely local concern." It is between the decisions of the first two classes that the conflict on constitutional construction is most clearly brought out. On the one hand it is claimed that the state constitution is a grant of limitations, not a grant of powers and the legislature is supreme in the absence of an express restriction. At the other extreme is the view that every state constitution has an implied limitation in favor of local self-government which prevents legislative interference. This last view is said to have had its source in *People* v. *Hurlbut*, 24 Mich. 44, where the question was discussed. It is followed in *State ex rel.* v. *Barker*, 116 Ia. 96; *State ex rel. Geake* v. *Fox*, 158 Ind. 126; *City of Lexington* v. *Thompson*, 113 Ky. 540; *People* v. *Common Council of Detroit*, 28 Mich. 228; *Blades* v. *Water Com'rs*, 122 Mich. 366, 379; *State* v. *Moores*, 55 Neb. 480, overruled by *Redell* v. *Moores*, 63 Neb. 219 and *Ex parte Lewis*, 45 Tex. Cr. R. 1, which the Supreme Court of Texas declined to follow in *Brown* v. *City of Galveston*, 97 Tex. 1. It is denied or ignored in *Cole* v. *Gray*, 7 Houst. (Del.) 44, 84; *Churchill* v. *Walker*, 64 Ga. 681; *Americus* v. *Perry*, 114 Ga. 871; *People ex rel.* v. *Walsh*, 96 Ill. 232; *Baltimore* v. *State*, 15 Md. 376; *Redell* v. *Moores*, (supra) and *Brown* v. *City of Galveston*, (supra). In *State* v. *Smith*, 11 Nev. 128, while there is no violation of the principles of local self-government the court apparently considers the legislature supreme.

But this theory of implied limitations finds its most powerful and reasonable support where the power to tax is delegated to the appointive board. It is said that the taxing power is sovereign and legislative and that there is an implied prohibition against its delegation by the legislature which is fully as binding as if it were expressly written in the constitution. "There is an implied limitation upon the power of the legislature to delegate the power of taxation." *State* v. *Mayor*, 103 Ia. 76, 89. It is said "when the constitution creates a department, on which sovereign power is conferred, the grant is exclusive, except as its delegation may be authorized by the granting instrument . . . . Whoever, in such case, asserts competency to delegate, assumes the onus to show constitutional authority express or implied." *Schultes* v. *Eberley*, 82 Ala. 242. Other cases to the same effect are *Barnes* v. *Lacon*, 84 Ill. 461; *Vallelley* v. *Board of Park Com'rs* (1907), — N. D. —, 111 N. W. Rep. 615; *Levee District* v. *Dawson*, 97 Tenn. 151, 174. *Com'rs of Wyandotte Co.* v. *Abbott*, 52 Kan. 148, would seem, in the

last analysis, to rest on this view. On the other hand the power to delegate the taxing power is recognized or taken for granted in *Commissioners* v. *State*, 45 Ala. 399; *Baltimore* v. *State*, 15 Md. 376; *State* v. *West Duluth Land Co.*, 75 Minn. 456; *People ex rel.* v. *Flagg*, 46 N. Y. 401; *Brown* v. *City of Galveston*, 97 Tex. 1. It has been held that the commissioners are not officers of the city, but, it would seem, are agents of the legislature to act for it in collecting the taxes. *Astor* v. *Mayor*, 62 N. Y. 567; *David* v. *Portland Water Committee*, 14 Ore. 98; *Philadelphia* v. *Field*, 58 Pa. St. 320.

The cases which fall under Gray's third class hold that the legislature has complete power over matters of general or governmental concern, but that over those of purely local concern legislative control is impliedly limited by the right to local self-government. This recognizes the dual nature of municipal corporations. They are, at the same time, both general governmental, political instruments and the instrument of local self-government with some of the rights and franchises of a corporation. The police are generally held to be under legislative control. *Churchill* v. *Walker*, 68 Ga., 681; *Baltimore* v. *State*, 15 Md. 376; *Newport* v. *Horton*, 22 R. I. 196; So also are streets and roads. *People ex rel.* v. *Walsh*, 96 Ill. 232; *People ex rel.* v. *Flagg*, 64 N. Y. 401; The fire department on the other hand is considered a matter of purely local concern. *State ex rel.* v. *Denny*, 118 Ind. 449; *State ex rel.* v. *Fox*, 158 Ind. 126; *Lexington* v. *Thompson*, 113 Ky. 540. So also is the matter of a water supply in *State ex rel.* v. *Barker*, 115 Ia. 96; and in *Blades* v. *Water Com'rs*, 122 Mich. 366. The contrary is held in *Cole* v. *Gray*, 7 Houst. (Del.) 44, and in *David* v. *Portland Water Committee*, 14 Ore. 98. Parts, under consideration in the principal case, are held to be local in nature in *People* v. *Common Council of Detroit*, 28 Mich. 228 and *Vallelley* v. *Board of Park Com'rs* (1907), — N. D. —, 111 N. W. Rep. 615, but they are considered of general interest and subject to legislative control in *Astor* v. *Mayor*, 62 N. Y. 567 and *State* v. *West Duluth Land Co.*, 75 Minn. 456. It is difficult, if not impossible, to state where the weight of authority lies with regard to the points involved, but it cannot be denied that the delegation of broad powers to boards or commissions is becoming more and more common. Municipal politics seem to demand it, and the states will go even to the lengths of a constitutional amendment to get it.

F. B. F.

THE RIGHT OF A MARRIED WOMAN TO RECOVER FOR PERSONAL INJURIES.—Plaintiff's wife was injured through the negligence of defendant. Plaintiff brought this action to recover for the injuries. The action was dismissed, and on exceptions by plaintiff, *held*, that where during coverture a wife suffers personal injury either from the direct act of the wrongdoer by use of force, or from his negligence, the wife alone, by reason of the statutes conferring upon her absolute control over her person and the right to sue as if sole, can maintain an action for the damages sustained which upon recovery become her separate property. *Hey* v. *Prime* (1908), — Mass. —, 84 N. E. Rep. 141.

At common law the wife could not maintain a suit to recover damages

for her personal injuries, as that right was vested in her husband, with whom she must join. However, this common law disability has been removed by statutes in nearly all of the states. The tenor of these statutes has been to permit a married woman to sue in her own name for any injury to her property, person, or character. The statutes relating to married women in a few of the states do not permit the wife to sue in her own name to recover damages for personal injuries. These states are as follows: Florida, in which state a married woman cannot maintain an action in her own name, unless she has been licensed to transact business in her own name. (Florida R. S. of 1892, § 1005). See also *Smith* v. *Smith,* 18 Fla. 789; Nevada, where the husband must be joined in all actions where the wife is a party unless the action concerns the wife's separate estate or is between husband and wife, in which cases the wife may sue alone. (Nevada C. L. § 3102); New Mexico, where the wife has been given the right to contract and to hold property, nothing, however, being said about her right to sue in her own name. (Laws of New Mexico, 1907, ch. 37); the law in this regard in North Carolina is similar to that of Nevada. (North Carolina R. C. of 1905 § 408). See also *Harper* v. *Pinkston,* 112 N. C. 293, 17 S. E. 161. In South Carolina a similar rule prevails (South Carolina Code of Civ. Proc., 1902). In Tennessee the husband must be joined as a formal party (Tennessee Code Supp., 1896-1903, p. 679). The right of the wife to sue in her own name for personal injuries has been denied in Texas, on the ground that such damages are community property, and suit should, ordinarily, be brought by the husband. See *Western Union Tel. Co.* v. *Campbell,* 36 Tex. Civ. App. 276, 81 S. W. 580.

The wife having the right to sue in her own name in most of the states, the question arises as to the extent of her recovery. The common law rule that the husband is entitled to the services of his wife is still enforced in all of the states. It necessarily follows that the wife cannot recover for the loss of her services, or for medicine, doctor's bills, or nursing made necessary because of the injury. It has been held by one court that a married woman may recover for the loss of her time. See *Fife* v. *City of Oshkosh,* 89 Wis. 540, 62 N. W. 541. However, this case stands alone, as it has been held in the following cases that there can be no recovery for loss of time by a married woman in an action for personal injuries unless she is engaged in a separate and independent employment. *City of Bloomington* v. *Annett,* 16 Ill. App. 199; *Tuttle* v. *The C. R. I. & P. R. R. Co.,* 42 Iowa 518; *Thomas* v. *Town of Brooklyn,* 58 Iowa 438, 10 N. W. 849; *Fleming* v. *Town of Shenandoah,* 67 Iowa 505, 25 N. W. 752; *City of Wyandotte* v. *Agan,* 37 Kan. 528, 15 Pac. 529.

Another point on which the courts are not in accord is the right of the wife to recover for the impairment of her working capacity. In *Powell* v. *The A. & S. R. R. Co.,* 77 Ga. 192, 3 S. E. 757, the court held that the wife herself had such an interest in her working capacity, that she could recover something for its destruction. See also *Metropolitan R. R. Co.* v. *Johnson,* 90 Ga. 500, 16 S. E. 49. The impairment of a wife's working capacity was considered a proper element of damage in *Jordon* v. *Middlesex R. R. Co.,*

138 Mass. 425; *Harmon* v. *Old Colony R. R. Co.,* 165 Mass. 100, 42 N E. 505, 30 L. R. A. 658. In *Hamilton* v. *Great Falls Ry. Co.,* 17 Mont. 334, 43 Pac. 713, the court decided that a woman's working capacity was her own and she could recover for its impairment. The case of *Reading* v. *Pennsylvania R. R. Co.,* 52 N. J. L. 264, 19 Atl. 321, decided that the marriage of a woman could not affect her right to recover damages for the loss of her capacity to earn money. In New York, the wife was given the right to sue and recover damages for the loss of her earning power over and above her domestic services by Act of March 18, 1890. See *London* v. *Cunningham,* 1 Misc. 408, 20 N. Y. S. 882. Prior to the enactment of this statute, the wife could not recover for the impairment of her earning capacity unless the complaint contained an allegation that she was entitled to the fruits of her labor. See *Uransky* v. *D. D. E. B. & B. R. R. Co.,* 118 N. Y. 304, 23 N. E. 451, 16 Am. St. Rep. 759. On the other hand it has been held in *Giffin* v. *City of Lewiston,* 6 Idaho 231, 55 Pac. 545, that loss of ability to labor by the wife is community property, and damages might be recovered in an action by husband and wife. That the wife cannot recover for the impairment of her working capacity, see the following cases: *City of Joliet* v. *Conway,* 119 Ill. 489, 10 N. E. 223; *Hall* v. *Town of Manson,* 90 Iowa 585, 58 N. W. 881; *The A. T. & S. F. R. R. Co.* v. *McGinnis,* 46 Kan. 109, 26 Pac. 453; *Central City* v. *Engle,* 65 Neb. 885, 91 N. W. 849; *Carr* v. *Easton,* 7 Pa. Co. Ct. R. 403, on the ground that the wife had no independent employment; *Readdy* v. *Borough of Shamokin,* 137 Pa. St. 98, 20 Atl. 396; *Walter* v. *Kensinger,* 13 Pa. Co. Ct. R. 222.

Another question which frequently arises is the wife's right to recover for the alienation of her husband's affections. A leading English case on this subject is *Lynch* v. *Knight,* 9 H. L. Cases 589, in which it was decided that a wife could recover damages for the loss of the consortium of her husband. In a note on p. 228 of his work on Torts, Judge COOLEY in commenting on this case, says: "We see no reason why such an action should not be supported, where by statute the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her." The law on this point is settled in most of the states. The following cases hold that the wife has the right to maintain such an action: *Humphrey* v. *Pope,* 122 Cal. 253, 54 Pac. 847, in which case it was held that the wife could maintain the action when her husband had deserted her; however, the statute has since been broadened so as to allow her to sue at all times in her own name. (California Statutes 1901, p. 126 § 370); *Williams* v. *Williams,* 20 Col. 51, 37 Pac. 614, on the ground that husband and wife are equal under the law in respect to the conjugal affection and society which each owes to the other; *Foot* v. *Card,* 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 824; *Bassett* v. *Bassett,* 20 Ill. App. 543; *Betser* v. *Betser,* 186 Ill. 537, 58 N. E. 249, 78 Am. St. Rep. 303, 52 L. R. A. 630, decided on the ground that husband and wife are equal; *Haynes* v. *Nowlin,* 129 Ind. 581, 29 N. E. 389, 28 Am. St. Rep. 213, 14 L. R. A. 787, overruling the case of *Logan* v. *Logan,* 77 Ind. 558, decided ten years earlier, in which the court held that a married woman

could not maintain an action to recover for the loss of support and society of her husband, even though she was permitted by statute to sue in her own name for damages to her person or character. This case was decided by a majority of one; *Price* v. *Price,* 91 Iowa 693, 60 N. W. 202, 51 Am. St. Rep. 360, 29 L. R. A. 150, under a code provision which permitted a wife to sue in her own name to protect her rights; *Nevins* v. *Nevins,* 68 Kan. 410, 75 Pac. 492; also see *Mehrhoff* v. *Mehrhoff,* 26 Fed. 13; *Deitzman* v. *Mullin,* 108 Ky. 610, 57 S. W. 247, 22 Ky. Law Rep. 298, 94 Am. St. Rep. 390; 50 L. R. A. 808; *Wolf* v. *Frank,* 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102, holding that the gist of the action is the loss of consortium; *Warren* v. *Warren,* 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545, which case expressly overrules the case of *Mitchell v. Mitchell,* 49 Mich. 68, where the court was equally divided; *Lockwood* v. *Lockwood,* 67 Minn. 476, 70 N. W. 784; *Tucker* v. *Tucker,* 74 Miss. 93, 19 So. 955, 32 L. R. A. 623, in which case the gravamen of the action was malice; *Clow* v. *Chapman,* 125 Mo. 101, 28 S. W. 328, 46 Am. St. Rep. 468, 26 L. R. A. 412, on the grounds that husband and wife are equal; *Hodgkinson* v. *Hodgkinson,* 43 Neb. 269, 61 N. W. 577, 27 L. R. A. 120, 47 Am. St. Rep. 759; *Seaver* v. *Adams,* 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597, in which case the court held, "As in natural justice no reason exists why the right of the wife to maintain an action against the seductress of her husband should not be co-extensive with his right of action against her seducer, nothing but imperative necessity would justify a decision that she could not maintain such an action;" *Warner* v. *Miller,* 17 Abb. N. C. (N. Y.), 221; *Jaynes* v. *Jaynes,* 39 Hun (N. Y.) 40, distinguished from *Van Arman* v. *Ayers,* 67 Barb. (N. Y.) 544, where the wife was not permitted to recover for the alienation of her husband's affections under a statute which gave her the right to sue for all injuries affecting her person or character; *Bennett* v. *Bennett,* 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553, which expressly overruled the case of *Van Arman* v. *Ayers,* supra; *King* v. *Hanson,* 13 N. D. 85, 99 N. W. 1085; *Westlake* v. *Westlake,* 34 Ohio St. 621, 32 Am. Rep. 397, decided by a majority of one; *Gernerd* v. *Gernerd,* 185 Pa. St. 233, 42 Wkly. Notes Cas. 49, 39 Atl. 884, 64 Am. St. Rep. 646, 40 L. R. A. 549, on the ground of equality of husband and wife; *Knapp* v. *Wing,* 72 Vt. 334, 47 Atl. 1075, the gist of the action being the loss of consortium; *Beach* v. *Brown,* 20 Wash. 266, 55 Pac. 46, 72 Am. St. Rep. 98, 43 L. R. A. 114, because a married woman's civil disabilities have all been removed. In one state the wife can maintain an action of this nature if her husband joins as a formal party. See *Smith* v. *Smith,* 98 Tenn. 101, 38 S. W. 439, 60 Am. St. Rep. 838. In North Carolina she may bring the action in her own name when her husband has deserted her. See *Brown* v. *Brown,* 121 N. C. 8, 27 S. E. 998, 38 L. R. A. 242.

On the other hand a few states have vigorously contested the doctrine that the wife can maintain an action of this nature. A leading case taking this view is *Doe* v. *Roe,* 82 Me. 503, 20 Atl. 83, 17 Am. St. Rep. 499, 8 L. R. A. 833, in which case the court held that the wife's remedy was by divorce, whereby she could obtain a restoration of all her property, and also secure

alimony. This action was brought under a statute which permitted a married woman to prosecute a suit at law or equity either in tort or contract in her own name for the preservation and protection of her property and personal rights or for redress of her injuries as if unmarried (Maine R. S. of 1883, ch. 61 § 5). The above holding has been sustained in *Morgan* v. *Martin*, 92 Me. 190. In Massachusetts the rule is somewhat different. That no action can be maintained by the wife for the alienation of her husband's affections, unaccompanied by adultery, see *Houghton* v. *Rice*, 174 Mass. 366, 47 L. R. A. 310; *Crocker* v. *Crocker*, 98 Fed. 702. These actions were brought under statutes which permitted a married woman to sue and be sued as if she were sole. (Stat. 1874, ch. 184 § 3, Pub. Stat. ch. 147 § 7). But the wife was permitted to recover damages for the intentional debauching of her husband, whereby his affections were alienated, in *Nolin* v. *Pearson*, 191 Mass. 283, 77 N. E. 890, 114 Am. St. Rep. 605, 4 L. R. A. (N. S.) 643. In New Jersey no action can be maintained. See *Hodge* v. *Wetzler*, 69 N. J. L. 490, 55 Atl. 49, see article on this case in 2 MICH. LAW REV., pp. 236-237. Another leading case holding that the wife cannot maintain an action of this nature is *Duffies* v. *Duffies*, 76 Wis, 374, 45 N. W. 522, 20 Am. St. Rep. 79, 8 L. R. A. 420, 31 Cent. Law Jour. 29, in which the wife's right of action was denied under a statute permitting her to sue for any injury to her person or character (Laws of 1881, ch. 99). This decision was approved in *Lonstorf* v. *Lonstorf*, 118 Wis. 159, 95 N. W. 961, although in the latter case there were two dissenting opinions. A leading Canadian case on this point is *Quick* v. *Church*, 23 Ont. 262, in which the wife was permitted to maintain her action under a statute permitting her to sue for protection and security of her separate property as if she were a feme sole. (Ontario R. S. of 1887 ch. 132). However this decision did not stand for any length of time, as it was expressly overruled four years later in the case of *Lellis* v. *Lambert*, 24 Ont. App. 653. Both these cases were brought under the same statute.

J. E. W.

WHAT IS CORPORATE ACTION?—The case of *American Soda Fountain Co.* v. *Stolzenbach* (1908), — N. J. L. —, 68 Atl. 1078, in which Judge DILL handed down the opinion, had for its main point, the question as to whether the acts of an officer of a corporation acting in his official capacity were the direct acts of the corporation itself. The facts in the case were briefly these: The American Soda Fountain Co., a New Jersey corporation, sold and delivered a fountain to one Brownley, who gave his notes therefor to the company, secured by a chattel mortgage upon the property, which was duly recorded. Subsequently, a judgment-creditor of the mortgagor seized the property in the mortgagor's possession. The American Soda Fountain Co. thereupon instituted an action in replevin, in which the defendant claimed title under a judgment, execution and sheriff's sale, the company, in opposition to this claim, relying upon its chattel mortgage. The statute of New Jersey concerning chattel mortgages requires that all such mortgages have annexed thereto "an affidavit or affirmation made and subscribed by the

holder of said mortgage, his agent or attorney, stating the consideration of said mortgage and as nearly as possible the amount due or to grow due thereon." The affidavit attached to the mortgage was as follows:

"Alfred H. Lippincot, of full age, being duly affirmed according to law, saith that he is Vice-President of American Soda Fountain Co., the mortgagee named in the foregoing chattel mortgage, etc.; (stating the consideration and the amount due and to grow due).

Affirmed and subscribed to before me this
twenty-third day of October, 1901.

A. H. LIPPINCOT,
Vice-President.

DANIEL S. MANN,
Commissioner of Deeds for New Jersey."

The lower court held this mortgage to be void as to creditors, "because it was verified by the Vice-President, as such, and did not recite that he was the agent or attorney of the company, or that he was specifically authorized to make it." In considering this holding, the court takes the view that a corporation cannot act of itself, but that it does act when those who are responsible for it act in their official capacity; in other words, the court expressly distinguishes between the officers and the agents of a corporation, holding that the former are the inherent actors for the corporate body, and that their acts are the direct acts of the corporation, while those performed by agents and attorneys are entirely intermediate and are governed by the ordinary laws of Principal and Agent. The stand taken is best stated by the following extract from the original opinion which has been slightly changed in the publications: "At the outset it should be kept in mind that we are not dealing with the every-day authority of an officer, agent or attorney to create a corporate contract liability under the law of Principal and Agent where the corporation denies and resists the liability. The issue is only as to the *prima facie* authority of an administrative officer to perform, in behalf of the corporation and in its name, a statutory duty requisite to the obtaining by the corporation of a statutory benefit, the act being ancillary and beneficial to the corporation.

The question is still further narrowed in that the authority of the officer is not questioned by the corporation, but on the contrary the corporation comes into court insisting that the act was authorized and is a valid corporate act, and claiming the statutory benefit thereof. The authority of the officer is challenged by a stranger to the transaction, who, offering no evidence to support his position, seeks to have the statutory benefit accruing to the corporation by reason of the act of the officer declared *nil* on the ground that the record does not show that under the law of Principal and Agent the corporation had precedently conferred upon the officer the authority to perform the act.

If the statute limited the class of persons by whom the affidavit might be made, to agents and attorneys of the holder, there would be more force in the criticism of the defendant-in-error;—but it does not.

On the contrary, the statute specifically provides that the affidavit is to be made by the 'holder' of the mortgage, adding in the alternative 'his agent or attorney.' Inasmuch as a corporation may be a holder of a chattel-mortgage, a judicial decision that as such holder it may make the affidavit only by an agent or attorney would rest either upon the denial of the right of a corporation to be a holder within the meaning of and entitled to the benefits of the statute, or else upon the assumed right of the Court to nullify one of the three modes by which the Legislature has allowed the affidavit to be made. There is, however, no necessity for assuming either of these untenable positions. A corporation may be a holder of a chattel-mortgage and may make this statutory affidavit, as such holder, through its administrative officers, or it may make it by a duly authorized agent or by its attorney."

Most of the cases which might seem to bear upon this question are cases where the proposition is looked at as a question of agency, but there are enough decisions viewing it in the other light to justify the holding here set down by the present New Jersey court. As early as 1834, in the case of *New Brunswick Steamboat Co.* v. *Baldwin*, 14 N. J. L., 2 Green. 440, the question was brought before Chief Justice HORNBLOWER, as to whether the affidavit attached to an appeal bond from a lower court, made by the president of the appellant corporation and acknowledged by him, was made by the *party* appealing, and in regard to that he said, "My opinion is, that an affidavit, made by the president, secretary or other proper officer or agent of a corporation where the corporation is a party to the suit, is, in legal contemplation, an affidavit made by the party," and the same was held to be true as to acknowledgments of deeds made by a corporation in New Jersey. *Hopper* v. *Lovejoy* (1890), 47 N. J. Eq., 2 Dick. 573.

There seem, however, to be two distinct lines of cases on this subject, which apparently conflict on the ground of implied powers inherently attaching to the officers of a corporation. The smaller of these classes seems to give the officer only such powers regarding the acts of the corporation as are specially delegated to him by the directors, and no others outside of the performance of his merely ministerial duties; thus a president may not be allowed to make an affidavit for removal of a cause from the state to the Federal Court, or do any other thing which might affect the rights of the corporation. For this line see *Quigley* v. *C. P. Ry. Co.* (1876), 11 Nev. 350, 21 Am. Rep. 757; *Mahone* v. *Manchester and Lawrence Ry. Corporation* (1872), 111 Mass. 72, 15 Am. Rep. 9, and cases cited; see also *Bennet* v. *Knowles* (1896), 66 Minn. 4. These are cases which recognize in an officer no inherent power of representation at all, but they are distinguishable from the other line in that they treat the acts of the officers indiscriminately with those of agents and do not attempt to distinguish between the two. They are, however, greatly in the minority, and seem to be merely a remnant of the old idea of the strictness with which the acts of corporations were dealt.

Those courts which do recognize inherent powers in the officers of corporations, do not have any hesitancy in declaring what are acts of the cor-

porations themselves, when such acts are done by an administrative officer in his official capacity. Thus under a statute in California which provides that chattel mortgages must be accompanied by the affidavit of all the parties thereto, that it is made in good faith, with no provision for it being made by an agent or attorney, it was held that a certificate made by "W. K. James, secretary of the Commercial Bank of Santa Ana, the mortgagee in said mortgage named," and signed "W. K. James, Secretary" was sufficiently made *by the corporation* to come within the statute. *Yost* v. *Bank of Santa Ana* (1892), 94 Cal. 494. The same construction is put on statutes where the parties are required to verify the pleadings, and in many of these cases the principle upon which the acts of officers are taken as the acts of the corporation is stated to be solely the distinction between officers and agents. *American Insulator Co.* v. *Banker's, etc., Telegraph Co.* (1885), 13 Daly (N. Y.) 200, 205; *Schaft* v. *Phoenix Mutual Life Ins. Co.* (1876), 67 N. Y. 544; *Bank* v. *Hutchinson* (1882), 87 N. C. 22. And the New York Code has so far recognized the rule as to provide that where the party is a domestic corporation, the verification must be made by an officer thereof. § 525. In Wisconsin, where the statute required that the affidavit attached to a petition for change of venue be made by *the party,* the court held that since the affidavit of a corporation must be made by someone acting for it, the proper person is an officer, for they are the ones who give character to the corporate acts, their acts in their official capacity are the acts of the company, and so, such an affidavit made by one of the officers in his official capacity, is the act of the corporation itself. *Wheeler & Wilson M'f'g Co.* v. *Lawson* (1883), 57 Wis. 400. The same view is taken in regard to affidavits for removal of a cause from the state to the Federal Court. *Farmer's Loan & Trust Co.* v. *Maquillan* (1867), 3 Dill. (U. S.) 379, Fed. Cas. 4668; *Minnett* v. *Milwaukee & St. P. Ry. Co.* (1875), 3 Dill. (U. S.) 460, Fed. Cas. 9636; *Commercial Ins. Co.* v. *Mehlman* (1868), 48 Ill. 313. The Vermont court has placed the officer of the corporation as the head of the body, and where the statute requires a plaintiff to make a certain affidavit to secure an *alias* execution, an affidavit made by the president of the corporation stating him to be such, is considered as the affidavit of the corporation. *Ex parte Jabez Sarjeant* (1845), 17 Vt. 425. The same was held in regard to the signing a protest against certain street improvements, where it was required that the protest be signed by the owner of the property; *Los Angeles Lighting Co.* v. *City of Los Angeles* (1895), 106 Cal. 156; and also where an affidavit was required to be made by the party wishing to enforce a lien. *Chapman* v. *Brewer* (1895), 43 Neb. 890; *Bank* v. *Graham et al.* (1889), 22 S. W. (— Tex. Civ. App. —), 1101; *Forbes Lithograph Co.* v. *Winter* (1895), 107 Mich. 116. The acknowlegment of deeds by a corporation is allowed to be done in this manner. *Muller* v. *Boone* (1885), 63 Tex. 91. And there is also a long line of Illinois cases which hold that if an acknowledgment is made by an officer of the corporation in his official capacity, with the corporate seal attached, that is *prima facie* proof of the authority of the officer signing. *Sawyer* v. *Cox* (1872), 63 Ill. 130; *Indianapolis & St. Louis*

Ry Co. v. *Morganstern* (1882), 103 Ill. 149; *Consolidated Coal Co.* v. *Peers* (1894), 150 Ill. 340; *Springer* v. *Bigford* (1896), 160 Ill. 495.

There do not seem to be any English cases that are directly in point on the proposition, but the rule has been laid down by the Canadian courts the same as is expressed by the court of New Jersey. *Bank of Toronto* v. *McDougall* (1865), 15 U. C. C. P. 475.

Much of the confusion that has arisen from this subject is due to two causes: First, the failure to distinguish between acts done for a corporation by its regularly appointed agents, and acts done by the corporation itself through its proper officers. The former must, perforce, come under the rules of the law of Principal and Agent, but the latter are not so governed. There are certain things that must be done by certain officers; each has his own circle of acts and responsibilities, and as long as he stays within this orbit, performing his duties, all his acts are aside from his personality and are acts of the corporation, not by virtue of any agency relation, but by virtue of the office he holds, and he does not need any express authority conferred upon him in order to enable him to do the acts in question. The second cause for confusion comes in defining what are the inherent powers of an officer. It is this which will cause one to think at first blush, that the American Soda Fountain Co. case is in conflict with the case of *North Penn. Iron Co.* v. *Boyce* (1904), 71 N. J. L., 42 Vroom 434, but in the latter case an affidavit for the issue of a writ of attachment was made by the secretary of the plaintiff corporation and it was held void, not because an act of an officer could not be the act of the corporation, but because authority to make affidavits upon which litigation may be instituted is not one of the incidents attaching to the office of corporate secretary unless specially conferred; thus this becomes not a conflict, but a direct following. The same rule is applied in *Meton* v. *Isham Wagon Co.* (1888), 4 N. Y. Supp. 215, and in *Dodge* v. *N. W. Packet Co.* (1868), 13 Minn. 458. R. N. D.