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MUNICIPAL CORPORATIONS—TAXATION—ASSESSMENT FOR PAVING.—*Barber Asphalt Paving Co.* v. *French*, 58 S. W. 934. (Missouri, November, 1900.)

This suit was instituted for the purpose of enforcing the lien of a tax bill for paving a certain street in Kansas City. The assessment was made according to the front foot rule and one of the defences was that this method of apportioning and charging the cost of the pavement violates the limitation of the Federal Constitution that no state shall deprive any person of his property without due process of law.

The law in Missouri on this point was well settled, but the counsel for the defence deemed the decision of the Supreme Court of the

United States in *Norwood* v. *Baker*, 172 U. S. 269 (1898), of controlling weight on the other side. In that case land belonging to Mrs. Baker was condemned for the purpose of opening a street and, because other of her property fronted on the street when opened she was assessed on the basis of benefits done to that other parcel of land. The result of the whole proceeding was that the village of Norwood acquired her property for nothing and charged her about two hundred dollars for having deprived her of it. The decision of the court, speaking through Mr. Justice Harlan, was to this effect.

First, that the exaction from the owner of abutting property of the cost of a public improvement in substantial excess of the special benefits received by him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. Second, that in this case the special assessment upon the abutting property of Mrs. Baker of the entire cost of opening the street, including not only the full amount paid her for the strip condemned, but the costs and expenses of the condemnation proceedings, was a taking of her property for public use without compensation, in a word, that, while nominally it was an exercise of the taxing power, it was nothing less than confiscation. The court was careful to reiterate the general rule, while Justices Brewer, Shiras and Gray dissented, holding that the case came under the general rule.

From this it will be readily seen that *Norwood* v. *Baker* could easily be distinguished on the ground of its peculiar facts, and this is the basis of Chief Justice Gantt's decision in the present case.

The general rule is well known, yet a few authorities may not be amiss. The question of making the rule statutory is discussed by Judge Dillon in his work on "Municipal Corporations" (4th Ed., Vol. 2, § 752). "The courts," he says, "are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power or included within it. Whether the expense of making such improvement shall be paid out of the general treasury or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency."

There is nothing in the front-foot rule smacking of arbitrary or fraudulent conduct. This method of taxation has passed under the scrutiny of the courts of this country and has received their approval. Judge Cooley, in his work on "Taxation" (page 644), says: "Such a measure of apportionment seems at first blush to be perfectly arbitrary, and likely to operate in some cases with great injustice, but it cannot be denied that in the case of some improvements frontage is a very reasonable measure of benefits—much more than value could be—and, perhaps, approaching equality as nearly as any other estimate of benefits made by the judgment of

men." Judge Elliott, in his book on "Roads and Streets" (page 396), says: "The system which leads to the least mischievous and unjust consequences is that which takes into account the entire line of the way improved and apportions the expense according to the frontage; for it takes into consideration the benefit to each property owner that accrues from the improvement of the entire line of the way, and does not impose upon one lot owner an unjust portion of the burden." Chief Justice Sharswood, speaking for the Supreme Court of Pennsylvania in *Hammett* v. *City of Philadelphia*, 65 Pa. 146 (1870), says: "Perhaps no fairer rule can be adopted than the proportion of feet front, though there must be some inequalities if the lots differ in situation and depth." A rule so universally adopted and sustained can hardly be called arbitrary, or so unjust as to warrant a court to strike down the discretion of the municipality which adopts it.

The case of *Norwood* v. *Baker* was certainly peculiar on its facts, but why Mrs. Baker, had she benefited to the extent of more than her assessment, should have reason to complain, is hard to see. Had the court gone fully into the question of what benefits she had received, a different result might have been reached. However, there is no doubt of the correctness of the decision in the Missouri case; the other case was correctly distinguished, as it will have to be whenever this question arises. The validity of the front-foot rule is now too firmly settled to be overthrown by such a peculiar decision as *Norwood* v. *Baker*, however equitable that decision may have been. *J. M. D.*

Acceptance of Deed—Rights of Creditor—Attaching Before Assent by Grantee, *Knox* v. *Clark*, 62 Pac. Rep. (Col.) 334 (Sept. 10, 1900).—The facts and decision of this case, in so far as they are of special interest, are as follows: A husband being indebted to his wife, without her knowledge, executed and acknowledged certain deeds of land to her. The husband then had the deeds recorded and subsequently gave them to his wife, who until that time had no knowledge whatever of their existence. But between the time of recording and of such actual acceptance by the wife, the property deeded was attached by a creditor of the husband, and the present issue was as to whether the wife had by this conveyance secured an absolute title prior to the attachment or whether she took title subject to the lien of the attaching creditor.

Upon these facts the court held in effect that an absolute title had not vested in the wife prior to the attachment—either by virtue of the act of recording alone, or by reason of the recording and the subsequent assent. That the title did not vest by virtue of the recording because, first, since the wife herself had no knowledge of the deed at the time of the recording, the recorder could not have acted as her authorized agent to accept it; and, second, even if the intent on the part of the grantor had existed which would make the recording a delivery, yet the

presumption of acceptance by the grantee because of the manifestly beneficial nature of the deed would not obtain where as here the facts are known and show that the rights of a third person intervened before the actual acceptance. That the title did not vest by reason of the recording and the subsequent assent of the grantee because, although where a deed is delivered to a stranger for a third person the acceptance will relate back to the time of the first delivery, yet this is a legal fiction, no title passing until acceptance; so that where the interests of third parties attach to the property, they are superior to the title of a subsequently assenting grantee. Although there is some authority, notably the cases of *Merrills* v. *Swift*, 18 Conn. 257 (1847), and *Thompkins* v. *Wheelen*, 16 Peters (U. S.), 119 (1842), which holds to the contrary, the decision in this case is in accord with the great weight of authority and represents well the peculiarity and the justice of the law in such instance, for which it is held that acceptance of a beneficial deed by the grantee will be presumed until his dissent is shown—*Lessee of Mitchell* v. *Ryan*, 3 Ohio St. 377 (1854); *Hedge* v. *Drew*, 12 Pick. 141 (1831); *Read* v. *Robinson*, 6 W. & S. 329 (1843); and that acceptance by a grantee relates back to the time of a prior delivery by the grantor to a recorder or third person—*Hedge* v. *Drew*, 12 Pick. 141 (1831); *Bell* v. *Farmers' Bank*, 11 Bush (Ky.), 34, 39 (1874); *Stephens* v. *Rinehart*, 72 Pa. 434 (1872); from which last it should follow logically that the grantee would take free from an intervening attachment—yet the authorities hold that the grantee does take subject to a lien intervening before his assent, the presumption of acceptance by the grantee giving way to proof of the actual facts and the legal fiction of relation being disregarded to establish justice as between the parties.

A clear statement of the law on this point is contained in the following excerpt from the opinion of Mr. Justice Lindsay in *Bell* v. *The Farmers' Bank, supra:*

"A deed delivered to the registering officer or to an unauthorized third person, and subsequently accepted by the grantee, will take effect as between the grantor and grantee from the time of the first delivery; and in such cases volunteers claimin under and through the grantor, and ordinary creditors who have acquired no lien upon nor interest in the estate conveyed are entitled to no greater consideration than the grantor. Yet until the grantee is informed of the execution of the deed and does some act equivalent to an acceptance of it, it is manifest that he may refuse to accept it, notwithstanding the fact that by a fiction of law the presumption of an actual acceptance had all the while existed for his benefit as against the grantor, his liens, devisees and ordinary creditors. But this fiction will not be allowed to prevail to the prejudice of persons who have acquired title to an interest in or a lien upon the property before the date of the actual acceptance. As in the case of an escrow, whenever it becomes necessary for the purposes of justice that the true time of the acceptance of a deed so delivered shall be ascertained, the legal fiction will be disregarded and the intervening

claimant or lien holder allowed to show the actual facts of the transaction." This principle is further established and supported by the following leading cases and authorities: *Welch* v. *Suckett*, 12 Wis. 243 (1860); *Hibherd* v. *Smith*, 67 Cal. 547 (1885); *Cravens* v. *Rossiter*, 116 Mo. 338 (1893); *Samson* v. *Thornton*, 3 Metc. 275 (1841); *Hawkes* v. *Pike*, 105 Mass. 560 (1870); *Hubets* v. *Scovil*, 4 Gelm. 159 (1848); *Parmelee* v. *Simpson*, 5 Wall, 81 (1866); *Tuttle* v. *Turner*, 28 Tex. 759 (1866); *Devl. Deeds*, §§ 276, 291; *Am. & Eng. Enc. Law*, Vol. 9, p. 161.

C. T. B.

HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTIONS—WIFE'S RIGHT OF ACTION.—*Betzer* v. *Betzer*, 58 N. E. Rep. 249 (Sup. Court Ill.), 1900.—Elizabeth Betzer and William L. Betzer were married in Illinois on the twenty-sixth day of November, 1898, and lived together there until December 28, 1899, when they separated. In 1899 the wife brought this action against Shepherd B. Betzer, her husband's brother, for alienating her husband's affections by reason of which he deserted and abandoned her. Trial by jury was had and the verdict was for the plaintiff, assessing her damages at $3,700. On appeal the only question raised was whether a wife in Illinois has a right of action against a third party for alienating the affections of her husband. It was incidentally claimed that the plaintiff was barred of her right of action by a contract entered with her husband after separation, even if she were otherwise entitled to it. This the court set aside at once by declaring that "that contract in no sense waived any right of action against the defendant for the loss here sued for."

It was held that the wife had a right to sue for damages for the alienation of her husband's affections, and that the statute providing that a wife may sue and be sued without joining her husband to the same extent as if sole, obviated all common law bar to such suit.

The court said: "The authorities uniformly hold that a husband has a right of action at common law for alienating the affections of his wife or enticing her away from him; but the weight of authority, at least in a number of cases decided, holds that the wife cannot maintain a similar action for the loss of the affection or society of her husband. This discrimination against the wife has its origin in the ancient common law doctrine that the husband and wife are one; that one being the husband, and the wife's rights merged in him. That idea has, however, been exploded by the enlightenment of the present age and legislation. One of the difficulties which some of the courts find in giving the wife the right to sue in such a case is that she could only bring the action by joining her husband with her as a party plaintiff. It will be unnecessary to inquire as to the soundness of that doctrine; it being, as we think, now clearly settled, if not universally held, that where a statute has removed the disability of the wife to sue, vesting in her separate rights of property, she may on the same grounds and with the same right as

her husband recover for the loss of the affections of her husband, against one who has wrongfully deprived her of them."

In "Bigelow on Torts," page 153, this language is used: "To entice or corrupt the mind and affections of one's consort is a civil wrong for which the offender is liable to the injured husband or wife. The gist of the action is not the loss of assistance, but the loss of consortium of the husband or wife, under which term are included the person's affections, society and aid."

In Schouler's "Husband and Wife," page 171, and Cooley's "Torts" the doctrine is announced that, "except for the fact of coverture, there is no reason why such an action could not be maintained by the wife."

In an extended note to *Claw* v. *Chapman*, 28 S.W. Rep. 328, 1894, it is said: "It has therefore been held by state courts, other than those of Maine and Wisconsin, that a wife may, without joining her husband, maintain an action to recover damages for the alienation of his affections, and the consequent loss of his society, assistance and support, if under the statutes of the state she is given power to sue for personal wrongs without joining her husband." The question raised in this case is interesting as a study of the historical development of our law. The tendency of the age as well as of the law is to place a woman upon the same plane as a man. At common law a woman was not permitted to sue in her own name because the law regarded the husband and wife as one and the rights of that one as vested in the husband. The wife could neither sue nor be sued unless the husband was joined with her, and this still being *prima facie* the rule, the causes which enable her to sue must be alleged and proved. The authorities, however, are not unanimous upon this question, some of the cases holding that, "as the wife had no property in any damages recovered on her account, for any cause, neither could she have any cause of action to recover them." *Warren* v. *Warren*, 89 Mich. 123, 1891. In other jurisdictions, on the contrary, it has been held that the wife has, at common law, a property right in the damages recovered; but, owing to the disability of coverture the husband must be joined with her in the action: *Merhoff* v. *Merhoff*, 26 Fed. Rep. 13, 1886.

That the mere fact of marriage, at common law, was not an absolute extinguishment of all rights of action in the wife seems to be clearly demonstrated from the fact that a wife could sue in her own name in the following cases: (1) When her husband was *presumably* dead; (2) when he was civilly dead; (3) when he was an alien residing abroad; (4) when he had permanently abandoned her and the state, and (5) when he had been divorced from her "*a vinculo matrimonii*" or "*a mensa et thoro.*"

A wife, therefore, at common law, had in certain cases a right to sue in her own name. Whether she had such right in case a third person alienated her husband's affections was the point raised in the case under discussion. Mr. Justice Blackstone gives a reason for denying the wife's right of action in cases of this kind: "The inferior hath no kind of property in the company, care, or assistance

of the superior as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury." (3 Blackstone's Comm. 142.) This question is, as I have said, merely of historical interest, as at the present day most states have passed statutes specially regulating the rights of married women. I may add, however, that Mr. Justice Blackstone's view of the question has been abandoned by most courts, and a husband and wife are now regarded as equal under the law, at least with respect to the conjugal affections and society which each owes to the other. The husband owes to the wife all that the wife owes him. She has the same right to the consortium of her husband that he has to hers. Her right is the same in kind, degree, and value and an injury thereto is a violation of her person. She is as much entitled under the law and by moral right to the society, protection, and support of her husband as he is to her society and services in the household: *Lynch* v. *Knight*, 9 H. of L. Cases, 577, 1861; *Bennett* v. *Bennett*, 116 N. Y. 548.

Many statutes expressly provide that married women may sue alone, generally or in special cases; and usually the construction of such statutes involves no particular difficulty. The authority to sue alone in one class of cases does not, however affect the procedure in other cases; the statutes in this respect must be strictly construed. With regard to the implied powers under a statute, we experience more difficulty. When a married woman is absolutely entitled to the damages, she may, as a general rule, sue alone. In some jurisdictions the substantive right of a married woman to maintain an action at common law for the alienation of her husband's affections has been denied: *Morgan* v. *Martin*, 92 Me. 190, 1898; *Houston* v. *Rice*, 54 N. E. Rep. (Mass., 1899) 843; *Duffies* v. *Duffies*, 76 Wis. 374, 1890. Therefore in those jurisdictions the statute would have to expressly confer the right of action on the wronged wife.

On the other hand, it has been broadly ruled that a married woman, independently of any statute, has a right of action for the alienation and loss of her husband's conjugal affections and society, and may sue, therefore, in her own name, without joining her husband as co-plaintiff: *Foot* v. *Card*, 58 Conn. 4, 1889.

Still other authorities hold that a married woman has a cause of action against a party who wrongfully alienates the affections of her husband, but, by reason of the disability of coverture, the right remains in abeyance and cannot be prosecuted by the *feme covert* in her own name. *Hayes* v. *Nowlin*, 129 Ind. 584, 1891; *Smith* v. *Smith*, 98 Tenn. 101, 1896.

Of course the wife cannot sue by joining with her husband, since this would allow him to join in an action for an injury which he has caused, though he acted under the influence of another: *Bassett* v. *Bassett*, 20 Ill. App. 544, 1886. But, if the husband dies, or there is an absolute divorce, the right of action has been held to remain in the property of the wife and may be prosecuted by her as a *feme sole*, and the Statute of Limitations does not begin to run until the removal of the disability: *Postlewaite* v. *Postlewaite*, 1 Ind. App., 1891, 473.

The general tendency of the statutes in all jurisdictions and of the decisions under them has been to grant equal rights to both husband and wife, irrespective of any substantive right existing at common law, and to enable a wife, who has been wronged, to sue the wrongdoer even though he be her husband: *Huling* v. *Huling*, 32 Ill. 522; *Price* v. *Price*, 91 Iowa, 693, 1894; *Warren* v. *Warren*, 89 Mich. 123; *Lockwood* v. *Lockwood*, 67 Minn. 476 1897; *Leaver* v. *Leaver*, 66 N. Y. 142; *Westlake* v. *Westlake*, 34 Ohio St. 621, 1878.

In Pennsylvania the doctrine that a wife may sue for alienating the affections of her husband is pretty well settled; since, under our Married Womens' Acts, she is considered as a *feme sole* for nearly all purposes. In *Gernerd* v. *Gernerd*, 185 Penn. 233 (1898), Fell, J., said: "The right of a wife to maintain an action for the same cause (alienation of affections) has been denied because of the common law unity of the husband and wife and of her want of property in his society and assistance. There was certainly an inconsistency in a recovery when her husband was a necessary party to the action, and she had no separate legal existence or interest and the damages would belong to him, but the gist of the action is the same in either case. There is no substantial difference in the right which each has to the society, companionship and aid of the other; and the injury is the same whether it affects the husband or the wife. Where the wife has been freed from her common law liabilities and may sue in her own name and right for torts done her, we see no reason to doubt her right to maintain an action against one who has wrongfully induced her husband to leave her."

The general effect of the authorities, therefore, seems to be that the wife had, at common law, a right of action for alienating her husband's affections; but the right was in abeyance until the disability was removed by divorce, death, statute, or some other means.

M. H.