

Statement of Facts.

1st C. W. Walker bought a house and lot in Dayton Oregon paying a small portion of the Consideration money and giving to the grantor, a mortgage on the premises to secure the balance.

2nd C. W. Walker then traded said house and lot in Dayton to one Robinson for a tract of One hundred acres of land adjoining Weston, taking the deed sheets in the name of his wife Maria Walker.

3rd C. W. Walker went into partnership in the ware house business at Weston, with one G. W. Cary. The Company purchased a site and erected a warehouse and other buildings.

4th The partnership becoming involved and being indebted to a Mrs Hembree, said Walker & Cary and Maria the wife of Walker, joined in a confession of judgment in favor of said Mrs Hembree.

5th Walker & Cary then sold out their warehouse improvements to one Hall giving him a bond for a deed on the following conditions: One Thousand Dollars to be paid down (which was done) and Eight Hundred to be paid on the 1st of October last. An receipt of said last named sum, W. & C. were to give a good and sufficient deed to the

said premises, C. W. gave immediate possession.
6th Hall became insolvent, made default in
the last payment; abandoned the premises,
leaving no one in possession, and went to
San Francisco.

7th The firm of Walker & Bary became insolvent
and retired from business.

8th At the time of going into business, Walker
owned (in his wife's name) the one hundred
acre tract above referred to and Bary owned
a certain tract of land in his own right:
Since the insolvency of said firm, Bary
conveyed his land to H. J. Raymond, no
consideration actually passing.

On the foregoing statement of facts an opin-
ion is desired.

1st As to whether or not Walker and Bary can
recover possession of the premises described
in the bond for deed given by them to Hall
and if so, how said recovery is to be affected.

2^d As to whether Maria Walker can hold
the 100 acres conveyed to her by Robinson as against
the creditors of Walker - of the copartnership
of Walker and Bary and the confession of judg-
ment in favor of Mrs. Stembree.

3^d Can H. J. Raymond hold the tract of land
conveyed to him as above set forth against

the creditors of the Copartnership, and
4th, what remedy if any is left to Elkanah
Walker J^r one of the principal creditors of the
said Copartnership.

Opinion.

Question First. The legal title to the warehouse
site and its appurtenances is still in Walker
and Cary, notwithstanding the bond given by
them to Hall, and no one can maintain
an action in ejectment against them. They
own said premises absolutely, subject alone
to the rights of creditors. By the default made
by Hall in his last payment and his abandon-
ment of possession, he forfeited the amount
already paid. Nor can he recover it without
first placing himself in a condition to
compel the specific performance of the
Covenant contained in the bond for a
deed. To do this, he must first tender the
\$800⁰⁰ with legal interest thereon from the time
of his default to the time of tender, and de-
mand his deed. Should he do this and
Walker and Cary refuse, either from unwill-
ingness or inability, to make the deed
required by their covenant in their bond to
him, he could then maintain his action,
either for specific performance in the first

instance, or for the recovery of the \$1000th in the latter case. Walker & Cary, still having the legal title to the land can enter - take possession, exercise all acts of ownership that may be desirable and dispose of the land, subject as aforesaid to rights of creditors.

Question Second. Walker being in debt at the time of the transfer of the said 100 acre tract by Robinson to Maria Walker, and the consideration for said conveyance proceeding really from Walker instead of ^{from} any separate estate or funds of Maria, the said transfer would be held void as against the creditors of either Walker or the firm of Walker & Cary, after the partnership assets were exhausted. In contemplation of law, said transfer was fraudulent, and creditors could, by suit in equity, set aside said conveyance and subject the land to the payment, first, of Walker's individual debts: [?] - after the exhaustion of the assets of the partnership - the residue if any, remaining after the payment of Walker's individual debts to the payment of partnership liabilities.

The confession of judgment by Maria Walker, (jointly with the firm of Walker

and Cary) was void. A personal judgment cannot be entered against a feme covert (or married woman) by confession. The Common Law Courts in England and this Country do not allow a judgment in personam to be given against a feme covert. Such judgments are invariably set aside on motion, so long & so generally have they been held erroneous. (2 Wash. Pr. 472 2nd ed.; 6th Hill 242; 3 Taunt. R. 261) There is nothing in our code that removes the disabilities which the Common Law has thrown around a married woman in this respect and she can no more confess a valid judgment in personam than an infant.

At Common Law a woman under Coverture could virtually do nothing with her separate realty. Our Statute empowers her, by joining with her husband or by compliance with other conditions, to sell her land. This Statute, like all others in derogation of the Common Law, must be strictly construed as well as complied with: she therefore can create no lien upon her separate property not expressly provided for by Statute.

The confession of judgment made at that time however by Walker & Cary would be good so far as they are concerned, providing always that proceedings were regular.

See 24, N. Y. Reports 72. and 14th Howard 191.
Question Third.

After the partnership property has been applied to the payment of the partnership liabilities without liquidating them, the partnership creditors can by suit in equity set aside the conveyance from Gary to Raymond and subject the land to the satisfaction of their claims. As against creditors the conveyance is fraudulent.

Last Question.

Elkanah Walker 8th, being one of the principal creditors, is entitled to the benefits of the provisions of law referred to in the foregoing opinion. He can, by suit, set aside the fraudulent conveyances mentioned and subject all such property so fraudulently conveyed, as well as all other assets of the firm or members of the firm, to the satisfaction of his demands. This can be done either in the State Courts or in the Bankruptcy Court.

Dated Portland Nov. 27th 1842.

Dashaw and Thompson
Attys & Counsellors at Law.

Am & c

Walker & Cary

Opinion

Durham & Thompson
Attys at Law

1872