

NEW JERSEY COURT OF ERRORS AND APPEALS.

WM. PETERSON, AND SARAH HIS WIFE, }
 ads. } In Ejectment.
ALFRED MULFORD.

BRIEF OF DEFENDANT IN ERROR.

Alfred Mulford, the plaintiff below, recovered a judgment in the Cumberland Circuit Court, in October, 1869, against the defendant, William Peterson, took out execution, levied on the land previously conveyed to him and described in the case as lot No. 1, sold it at Sheriff's sale, and took a Sheriff's deed for the same. Against this *prima facie* case of the plaintiff, the defendants, (Sarah Peterson, the wife, having upon her application been made a co-defendant), offered in evidence the assignment to the said Sarah of a bond and accompanying mortgage upon said land, dated in February, 1866, which bond was made by her husband, and the mortgage by him and her, and testimony going to show that the money which purchased said assignment were the proceeds of her labor. Upon argument, and according to the rulings of the Judge stated in the case, the jury found a verdict for the plaintiff, who thereupon took judgment, which is brought up on writ of error.

To sustain this judgment, the plaintiff below, who is the defendant in error, contends that the attempted purchase of the husband's mortgage by the wife, was fraudulent both in fact and in law.

1. It was fraudulent *in fact*.

The plaintiff's judgment was recovered in October, 1869; he proceeded to enforce it; took out execution, advertised the land, purchased it at Sheriff's sale, and took a Sheriff's deed, January 29, 1870; whilst he was thus engaged, to wit, in the same month of January, (see testimony bottom of page

5), the defendant, Sarah Peterson, who was cognizant of these facts, for she admits (see her testimony top of page 6), "*my husband's creditors were trying to burst him up,*" with a view to protect him from them, (for she continues, "*and I wanted to help him,*") caused the mortgage to be assigned to herself, and *dated back* as of the 7th day of February, 1866, (see page 5, line 33,) being a date anterior to the recovery of the plaintiff's judgment; and she did this with the privity and at the suggestion of her husband: "*my husband told me I would have to take my money to save the house,*" (page 6, line 18).

Here are all the elements of actual fraud;—insolvency of the husband, the knowledge of such insolvency both on his part and hers, and an attempt, in which both co-operated, to put his property beyond the reach of the creditor; an attempt, in the suggestive language of the witness, "*to save the house.*"

2. It was also fraudulent *in law*.

There is no pretence that the assignment of the mortgage was purchased with the separate property of the wife, nor even that she had any separate property, using that term in its legal acceptation. The consideration of the assignment were *her earnings during coverture*; these are not a wife's property, but her husband's. The only way she can acquire title to them is by a distinct gift from her husband, and he cannot make such gift when he is involved in debt; as against his creditors, he cannot give or agree to give them to her; real estate purchased with them is his, and liable to be taken for his debts.

Belford et al. vs. Crane, 1 C. E. G., 265.

Cramer vs. Reford, 2 C. E. G., 367.

National Bank of Metropolis vs. Sprague, 5 C. E. G., 1.
Skillman vs. Skillman, 2 Beas, 403.

1 Pars. on Cont., (Ed. of 1853,) 286, and cases cited in note.

"Where a wife has no separate estate, she can acquire no property with her earnings during coverture; her earnings belong to her husband, and if she purchases with borrowed money, or on credit, the property belongs to her husband."

Bucher vs. Ream, 68 Penn. State Reports, 421, decided in 1871.

The cases above cited show that the only way a wife can acquire any property in her earnings is "by a distinct gift" from her husband.

The present case shows that no such gift was ever made, the testimony of the wife, on cross examination, (page 6, lines 20—25,) being that she kept the fact of the existence of her earnings a secret from her husband. It is obvious he could not give away that of which he did not know.

The only testimony which could be distorted into making any of their transactions wear the similitude of a gift, is where the wife testifies, (page 6, line 17,) "my husband told me I would have to take my money to save the house."

But this was not a gift to the wife of her earnings. It was a request that she should take them, and use them for *his* benefit, by covering up property from his creditors, the legal title of which was in him. If this transaction could be supported, then a husband who has lands worth \$10,000, on which there is a mortgage of \$1,000, can protect them from creditors to whom he is indebted many times their value, by requesting his wife to take her earnings and procure an assignment of the mortgage to her.

And even if the earnings of the wife had become her property by gift, she could not mix them with property of her husband, and hold it as against his creditors.

Quidorts Administrators, vs. Pergeau, 3 C. E. G., 472.

And, further, as seen above, he could not, when in debt, give her earnings to her if he would.

Cramer vs. Reford, 2 C. E. G., 367.

The wife could not keep the mortgage alive, and defeat her husband's creditors, by taking his funds, to wit, her earnings, and procuring an assignment of it to her. Such a transaction would simply be a payment, and the mortgage would become extinguished; the ruling of the Judge to this effect falls entirely within the case of

Shepherd's Executrix vs. McClain, 3 C. E. G., 128.

The only case cited by defendant's counsel, at the trial, seeming to conflict with those stated above is Stall vs. Ful-

ton, 1 Vroom, 430.

Nothing was said in that cause, necessary to its decision, which affects the one now under discussion. The creditors of the husband in that case attempted to maintain ejectment for lands, the legal title of which was in the wife, and never had been in the husband. The Court say expressly, pages 436 and 437, that this single aspect of the cause was sufficient for its decision. And although the Court looked farther, and considered the question as to whether the husband or wife owns her earnings, whatever was said upon this unnecessary matter was *dictum*, and not *decision*.

But even the dicta in that case do not protect the defendants below. The Court there say "the earnings of the wife belong to her, and not to her husband, "*until he does some act with intent to reduce them into possession.*"

In this case the husband did such an act by directing the wife "to take her money to save the house;"—*his* house. This was an act of appropriation upon his part.

It is, however, submitted, that, as what is said in *Stall vs. Fulton*, upon the subject of earnings, conflicts with the general line of New Jersey decisions above cited, it must, even if pertinent, yield to the weight of authority. That what is there said is not considered law may be assumed from the fact that, in the proposed revision of the married woman's act, under the care of two of the Justices of this Court, the following clause occurs:

"4. *And be it enacted*, That the wages and earnings of any married woman *acquired by her after the passing of this act*, and all investments of such wages and earnings, shall be her sole and separate property, as though she were a single woman."

No such provision is found in the law as it now exists, and the fact that its enactment is suggested shows, that, in the judgment of the revisers, such enactment is necessary in order to bring about that condition of the law which it proposes.

FRANKLIN F. WESTCOTT,
LESLIE LUPTON,

For Defendant in Error.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM PETERSON and
SARAH PETERSON, his wife, } On Writ of Error
 ads to
ALFRED MULFORD. } Cumberland Circuit Court. 10

NEW JERSEY, SS :

The State of New Jersey, to our Judge of our Circuit Court of the County of Cumberland, Greeting: For as much as in the record and proceedings, and also in the giving of judgment of a plea which was in our Court before you, between Alfred Mulford, and William Peterson, and Sarah Peterson, his wife, of a plea of ejectment, as it is said manifest error, hath intervened to the great damage of the said Sarah Peterson, impleaded with the said William Peterson, as by their complaint we are informed. We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given, then without delay you distinctly and openly send under your seal the record and proceedings aforesaid, with all things concerning the same to our Court of Errors and Appeals, on the second Tuesday of March, next, together with this writ. That the record and proceedings aforesaid being inspected, we may further cause to be done thereupon what of right and according to law ought to be done.

Witness, Hon. A. O. Zabriskie, Chancellor at Trenton,
this eighth day of February. A. D. eighteen hundred and
seventy-two. HENRY C. KELSEY, Clerk.

JAMES J. REEVES, Attorney.

CUMBERLAND CIRCUIT COURT.

WILLIAM PETERSON, and
 SARAH, his wife,
ads
 ALFRED MULFORD.

} In Ejectment.

As yet of the term of January, in the year of our Lord
 10 one thousand eight hundred and seventy-two.

CUMBERLAND COUNTY, SS:

Alfred Mulford, the plaintiff in this action, by Franklin F. Westcott, his attorney, demands of William Peterson, the defendant therein, the possession of the two following tracts of land, with the appurtenances, situate in the township of Downe, in the County of Cumberland, and State of New Jersey, and bounded and described as follows:

20 Lot No. 1. Beginning at a stone for a corner in the centre of the road leading from Newport to Dividing Creek, thence up said road north seventy-four degrees and fifty minutes west, one rod and seven links to a stone; thence south six and a half degrees west, eighteen rods and twenty-two links to a stone; thence south four and three-quarters degrees east to Charles Joslins' line; thence down the same, following the course thereof to said Joslins' corner; thence north ten and a quarter degrees west three rods and twenty-two links; thence north sixty-six degrees and three-quarters west one rod to a stone; thence north
 30 eighty-one degrees west eleven rods to a stake; thence north six and a half degrees east, twelve rods and nine links to the place of beginning, containing two and thirty-hundredths acres more or less.

Lot No. 2. Beginning at a stone in the Factory road, the same being a corner of a lot Clement J. Lee sold to Daniel F. Madard; thence along said lot north twenty degrees east, ninety-three perches and fifteen links to a stone in J. Hoglin's line for a corner; thence along said line south seventy-five degrees and twenty minutes, east fifty-
 40 seven perches and three links to a stone for a corner; thence south twenty degrees west ninety-eight perches and twenty-three links to a stone for a corner on said Factory road; thence down said road north seventy degrees west fifty-seven perches and three links to the place of beginning, containing thirty-five and thirty-six hundredths acres of land more or less.

And the plaintiff says that his right to the possession of the same accrued on the twenty-ninth day of January, eighteen hundred and seventy, and that the defendant wrong-
 50 fully deprives him of the possession thereof, to his damage

one hundred dollars.

This cause coming on to be heard at chambers upon a motion to admit Sarah Peterson, the wife of the above mentioned defendant, to appear and defend in the said cause in the presence of James J. Reeves, attorney of the said Sarah Peterson, and of Franklin F. Westcott, attorney of the said Alfred Mulford, and it appearing that legal notice of this motion, and the taking of the affidavit to be used thereon, hath been given to the said plaintiff, and upon reading said affidavit and hearing the argument of Counsel, it is by 10
Hon. B. Vansyckel, Judge of the said Circuit Court, on this sixth day of April, A. D. eighteen hundred and seventy, ordered and adjudged that the said Sarah Peterson, wife of the said William Peterson, the above named defendant, be admitted to defend in said suit.

B. VANSYCKEL, J.

And William Peterson and Sarah Peterson his wife, the said Sarah Peterson who is admitted in her own right as a proper person to defend this action by James J. Reeves, her 20
attorney, appears and defends this action with her said husband, and they say that they are not guilty of the injury whereof the said Alfred Mulford hath complained in his declaration, nor of any part thereof, and of this they put themselves upon the country and the said Alfred Mulford doth the like.

Wherefore, let a jury come before our Circuit Court, to be holden at Bridgeton, on the first Tuesday of January, one thousand eight hundred and seventy-two, by whom the truth of the matter may be better known, to recognize 30
on their oaths neither the said Sarah Peterson, together with William Peterson, her husband, is guilty of the wrongs and injuries in the said plaintiff's declaration mentioned, because the said Sarah Peterson, together with William Peterson, her husband as aforesaid, have put themselves upon the said jury; and the same day is given to the parties aforesaid, at which day comes as well the said plaintiff as the said defendant, and the jurors of that jury mention whereof is above made, being duly summoned also come, who, to speak the truth concerning the premises, being duly 40
empaneled, tried, and sworn on their oaths, say that the said Sarah Peterson, together with William Peterson, her husband, was guilty of the wrongs and injuries, in manner and form as the said Alfred Mulford hath above thereof complained against. Therefore, it is considered that the said Alfred Mulford do recover of the said Sarah Peterson and William Peterson possession of the premises and tenements aforesaid, particularly described in Lot No. 1 in plaintiff's declaration, with the appurtenances, and also the sum of one hundred and fifteen dollars and fifty-one cents 50

for his cost and charges by the Court now here adjudged to the said Alfred Mulford; and upon this the said Alfred Mulford prays the writ of the State to be directed to the Sheriff of the County of Cumberland, commanding him that he cause the said Alfred Mulford to have possession of the tenements aforesaid, with the appurtenances, and it is granted to him.

Judgment signed this fifth day of January, in the year of our Lord one thousand eight hundred and seventy-two.

10 STATE OF NEW JERSEY, }
CUMBERLAND COUNTY, } ss :

I, Theo. G. Compton, Clerk of the Court of Common Pleas, the same being a Court of record, do hereby certify that the foregoing is a true transcript of the judgment.

ALFRED MULFORD

vs.

SARAH PETERSON and

20 WILLIAM PETERSON, her husband.

} In Ejectment.

As recorded in Clerk's office of Cumberland County, in Book D of Judgments, page —, in testimony whereof, I have hereto set my hand and seal of Court, this 9th day of March, A. D. 1872. THEO. G. COMPTON, Clerk.

CUMBERLAND CIRCUIT COURT.

30 WILLIAM PETERSON and
SARAH PETERSON, his wife, }
ads } In Ejectment.
ALFRED MULFORD. } (Bill of Exceptions.)

CUMBERLAND, TO WIT :

Be it remembered, that at the Circuit Court of the County of Cumberland, of the term of January, A. D. eighteen hundred and seventy-two, came Alfred Mulford by Franklin F. Westcott, his attorney, into said Court at Bridgeton, and impleaded Sarah Peterson with William Peterson, her husband, in a certain plea of ejectment, on which the said Alfred Mulford declared against the said William Peterson, and the said Sarah Peterson impleaded with William Peterson aforesaid, filed her said plea, and thereupon issue was joined between them (prout the pleadings), and afterwards to wit at Bridgeton, at the January term of said Circuit Court before his honor, B. Vansyckel, Esq., the aforesaid issue so joined between the parties as aforesaid came on to be tried by a jury of the County of Cumberland, for that purpose duly empaneled, that is to say : Daniel Padgett,
50 William Dickeson, Hosea Sithens, John Griscom, Francis

Souder, Samuel English, John Combs, Chester Smith, David Sithens, Howard Davis, George Brown, and Lewis M. Brooks, good and lawful men of the County of Cumberland at which day came there as well the said Alfred Mulfred as the said Sarah Peterson, by their respective attorneys aforesaid, and the jury aforesaid being called, were duly sworn to try the said issue; and upon the trial of that issue the counsel for the plaintiff gave in evidence the following papers and records:

1st. A judgment obtained in the Cumberland Circuit Court by Alfred Mulford, executor of Ephraim Mulford, against said William Peterson, recorded in Book C of Judgments, page 549, for \$191 63, and the execution thereon issued October 22d, 1869. 10

2d. A certified copy of deed from Daniel Lore and wife to William Peterson for 2 30-100 acres land, dated April 27th, 1856.

3d. A deed from Samuel Peacock, Sheriff, to Alfred Mulford, dated January 29th, 1870, for the same land duly recorded. And the plaintiff also gave in evidence that the said judgment recovered by him against said William Peterson, and one other judgment offered in evidence, were recovered upon debts existing prior to the assignment of said mortgage to said Sarah Peterson. 20

The counsel for defendant, Sarah Peterson, gave in evidence the following papers:

1st. Mortgage deed from William Peterson and wife to Richard D. Bateman, dated February 9th, 1857. Recorded in Book N of Mortgages, page 239.

2d. Judgment bond accompanying said mortgage from William Peterson to Richard D. Bateman, bearing same date. 30

3d. Assignment of said mortgage from Richard D. Bateman to Sarah Peterson, dated February 7th, 1866, endorsed on mortgage.

4th. Assignment of said Bond from Bateman to Sarah Peterson, bearing date last aforesaid endorsed thereon. Which said Mortgage Deed, Judgment Bond and the assignments thereof are herewith also produced (prout the same). And upon the trial of the issue the Counsel for the Defendant called the Defendant, Sarah Peterson, who being duly sworn on her oath, gave in evidence among other things as follows: "I am the wife of William Peterson, who follows the business of oystering in Chesapeake Bay; I know of the Bond and Mortgage given to R. D. Bateman in 1857, (Mortgage exhibited to Witness who acknowledged the mark made thereon to be her mark, and the Mortgage given by herself and William Peterson, then and now her husband, to Bateman;) in January, 1870, I received a note from Bateman, that he wanted the debt paid (prout the letter); I went down soon after and took him the money; my 50 1866

husband went with me; my husband's creditors were trying to burst him up, and I wanted to help him; I paid all the money that I had at that time, viz: \$200 cash; gave my note to Bateman for the balance, and took an assignment of the Bond and Mortgage to myself; I have been in the habit of saving my money from time to time, and this money was of my own labors and savings, while I was married to William; no portion of the moneys paid Bateman was ever in the possession of my said husband: they were my own
 10 separate earnings; I gathered blackberries and huckleberries, and sold them from time to time; also butter, eggs, milk and calves; boarded also my husband's brother's two children for a year; took in washing and saved up my earnings from time to time; I took this money and paid Mr. Bateman, and took the assignment of the Bond and Mortgage to save my home; I had no other object; my husband told me I would have to take my money to save the house; I also paid the note I gave to Bateman out of my earnings."

20 On being cross-examined, Mrs. Peterson said: "My husband does something towards the support of the family, but I do the most of it; my husband didn't know that I saved the money; he didn't know that I had any money; I kept it in a secret place, and he knew nothing about it; my husband's brother's children were with me a year; he was to pay me \$1 a week for each one."

Whereupon the said Counsel for the said Sarah Peterson did then and there insist before his Honor the Judge, on behalf of the said Sarah Peterson, that the several matters
 30 so produced and given in evidence were sufficient and ought to be allowed as decisive evidence, to entitle the said Sarah Peterson to a verdict, and to bar the said Alfred Mulford of his action of ejectment; and the said Counsel for the said Sarah Peterson, did then and there pray the said Justice to allow the said matters so produced in evidence, to be conclusive in favor of said Sarah Peterson, to entitle her to a verdict in the cause; but to this the Counsel for the plaintiff insisted that the same were not sufficient as aforesaid; and the said Justice did then and there declare and deliver
 40 his opinion in his charge to the Jury, to the effect that the right of the husband during coverture to the services of his wife, and to the proceeds of her skill and industry is absolute, and if the Jury believe from the evidence that the assignment of the mortgage by Richard D. Bateman to Sarah Peterson was purchased with the proceeds of the wife's labor and industry, while her husband was involved in the debt which has been proved with intent to defraud the plaintiff thereof, the payment by Mrs. Peterson to Bateman of the sum which was the consideration of the assignment to
 50 her operated as a payment and satisfaction of the Mortgage,

and no title to the Mortgage passed to her by such assignment. Under such circumstances the transfer would be fraudulent and void as against the husband's creditors, and the wife cannot set up the Mortgage in defence of this suit, and even if the husband in this case could, as against his creditors, have made a gift to his wife of the avails of her services, there is no sufficient evidence that he made such gift, and the Jury aforesaid then and there gave their verdict for the Plaintiff, and against the Defendants of "guilty."

Whereupon the said Counsel for the Defendant, Sarah Peterson, on her behalf excepted to the aforesaid charge and insisted upon the said several matters as an absolute bar to said action; and inasmuch as the said several matters so produced and given in evidence on the part of the said Sarah Peterson do not appear by the record of the verdict aforesaid, the said Counsel for the said Sarah Peterson, prayed that the said Justice would set his hand and seal to this bill of exceptions, containing the several matters so proved and given in evidence as aforesaid, according to the form of the statute in such case made and provided; and thereupon the said the Hon. B. VanSyckel hath set his hand and seal thereto, according to the form of the statute in such case, made and provided at Bridgeton aforesaid, this 11th day of March, A. D. eighteen hundred and seventy-two.

B. VAN SYCKEL, J. [L. S.]

NEW JERSEY COURT OF ERRORS AND APPEALS.

Of the term of March, Anno Domini eighteen hundred and seventy-two.

WILLIAM PETERSON and
SARAH PETERSON, his wife,
ads
ALFRED MULFORD.

} In Ejectment.
{ (Assignment of Errors.)

Afterwards, that is to say, on the 6th day of April, Anno Domini eighteen hundred and seventy-two, before the Justices and Judges of the Court of Errors and Appeals, of the State of New Jersey, at Trenton, comes the said Sarah Peterson, impleaded with William Peterson, her husband, by James J. Reeves, her attorney, and says that in giving judgment aforesaid there is manifest error in this:

1st error. That it appears by the record and proceedings aforesaid, and also in the matters recited and contained in the said Bill of Exceptions, that the said Justice before whom the said cause was tried at Bridgeton aforesaid, did charge the Jury empannelled and sworn to try the issue joined between the parties, in matter of law contrary to the

law of the land, which said charge was excepted to by the said Sarah Peterson, and such bill of exceptions allowed and sealed accordingly.

- 2d error. There is error also in this, that it appears by the record and proceedings aforesaid, and also in the matters recited in the said Bill of Exceptions, and the charge given by the said Justice, that he instructed said Jury among other things 'that the right of the husband during coverture to the services of his wife and to the proceeds of her skill and industry is absolute, and if you believe from the evidence that the assignment of the Mortgage by Richard D. Bateman to Sarah Peterson was purchased with the proceeds of the wife's labor and industry, while her husband was involved in the debt which has been proved, the payment by Mrs. Peterson to Bateman of the sum which was the consideration of the assignment to her, operated as a payment and satisfaction of the Mortgage, and no title to the Mortgage passed to her by such assignment;' whereas by the law of the land the said Justice ought not to have given to said Jury that part of his said charge which stated to the Jury "that the right of the husband during coverture to the services of his wife and to the proceeds of her skill and industry is absolute, and that the assignment of the Mortgage to said Sarah Peterson, if purchased with the proceeds of her labor and industry, while her husband was involved in the debt which had been proved, and the payment of the sum which was the consideration of said assignment operated as a payment and satisfaction of the Mortgage and no title to said Mortgage passed to her thereby."
- 3d error. And there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said Alfred Mulford against the said William Peterson and Sarah Peterson his wife; whereas, by the law of the land, that judgment ought to have been given for the said William Peterson and Sarah Peterson against the said Alfred Mulford; therefore in that case, there is manifest error, and thereupon the said Sarah Peterson impleaded with William Peterson aforesaid prays that the judgment aforesaid, for the errors aforesaid, may be reversed, annulled and altogether holden for naught, and that she may be restored to all things she hath lost by reason of the said judgment.

JAMES J. REEVES,

Attorney for Plaintiff in Error.

NEW JERSEY, SS:

Sarah Peterson impleaded with William Peterson, puts in her place James J. Reeves, her attorney, to prosecute her Writ of Error, against Alfred Mulford, in a plea of Ejectment.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Of the term of March Anno Domini eighteen hundred and seventy-two.

ALFRED MULFORD,
vs.
 WILLIAM PETERSON, and
 SARAH PETERSON, his wife. } Joinder in Errors.

And the said Alfred Mulford, by Franklin F. Westcott,¹⁰
 his Attorney, also comes and says that there is no error
 either in the record and proceedings aforesaid, or in giving
 the judgment aforesaid, and therefore he prays that the
 judgment aforesaid, in form aforesaid given, may by the
 Court here be in all things affirmed.

FRANKLIN F. WESTCOTT,
 Attorney of Defendant in Error.