

\*DANIEL RHEA and others, Appellants, v. DANIEL RHENNER, Appellee.

*Married women.—Presumption of death.*

The law seems to be settled, that when a wife left by her husband, without maintenance and support, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts; and the law is the same, whether the husband is banished for his crimes, or has voluntarily abandoned the wife. p. 108.

By the laws of Maryland, a *feme covert*, who has been abandoned by her husband, is not permitted to marry a second time, until her husband shall have been absent seven years; and shall not have been heard of during that time. p. 108.

By those laws, a married woman cannot dispose of real property, without the consent of her husband; nor can she execute a good and valid deed to pass real estate, unless he join in it; the separate examination and other solemnities required by law are indispensable, and must not be omitted. A deed, therefore, executed by a married woman, of real property, acquired by her whilst a *feme sole* trader, and whilst she was abandoned by her husband, is void.<sup>1</sup> p. 109.

APPEAL from the Circuit Court for the District of Columbia. This was an appeal from the circuit court of the district of Columbia, and county of Washington; where a bill had been filed by Daniel Rhenner, the appellee, against Daniel Rhea and Elizabeth his wife, and William Erskine, an infant, the son of Elizabeth Rhea, by a former husband, Robert Erskine.

*Coze*, for the appellants.—1. This case stood before the circuit court, as to Elizabeth Rhea, upon the bill and answer; although there may have been a replication, yet no proof having been taken, the hearing was upon the bill and answer only. The proceeding is altogether irregular as to William Erskine the infant; the rule being, that when redress is sought against an infant, all the averments must be made out by proof.

2. Two contracts are set out in the bill, one of which is a parol contract, and which is denied on the answer; no proof was given, that such a contract had been made, and yet the decree proceeds upon it, as if it had been proved.

3. The deed executed by Daniel Rhea and wife, to the appellee, states the consideration to be a debt due by Daniel Rhea, to the grantee; and the bill alleges the debt to have been one of Elizabeth Rhea. The parties to a deed are not allowed to contradict it. 1 Ves. 128; 2 P. Wms. 204.

4. Elizabeth Rhea, being at the time the debt arose, the wife of Erskine, could make no contract. A married woman may act as a *feme sole* trader, \*106] but it does not follow, that she can execute a deed. The deed of a married woman is absolutely void; and to constitute a deed an estoppel, it should be a valid deed.

5. It was not a sufficient consideration, for the wife of Daniel Rhea to pass property away from her own son, for the payment of a debt which, by this deed of conveyance, is stated to be due by Daniel Rhea, to the appellee.

*Key*, for the appellee.—The court below have not given a decree upon the alleged parol agreement. The decree allows the property to be sold for the payment of the plaintiffs' claims, the proceeds to be brought into court, where the amount of these claims must be proved. Elizabeth

<sup>1</sup> See *Ayetsky v. Goery*, 2 Brewst. 302.

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Rhea was left by her former husband, Erskine, in 1814, carried on business as a *feme sole* trader, in Georgetown, and as such acquired the lot of ground conveyed to the appellee; she having contracted the debt to the appellee, in the course of her trading. The husband having allowed her to contract debts and to purchase property, thereby consented that the property should be liable for her debts. This is a proceeding in a court of equity, to sustain a claim, the justice of which cannot be denied; and it is easier to do so in such a proceeding, than it would be in a court of law. 2 Vern. 614, 104; Prec. Ch. 328. The absence of the husband, Erskine, is equivalent to abjuration of the realm, or banishment; in either of which cases, the contracts of a married woman are valid by the law of England. 1 Bos. & Pul. 357; 2 Esp. 554; 4 Ibid. 27.

The deed acknowledged by a privy examination is an estoppel. Comb. 232; 7 Mass. 14, 19.

DUVALL, Justice, delivered the opinion of the court.—This case is brought up, by appeal, from the circuit court for the district of Columbia and county of Washington, sitting in equity. The appellee, who was complainant in the court below, filed his bill in equity, in the year 1822, in the circuit court, against Daniel Rhea, and Elizabeth his wife, and William Erskine, an infant son of said Elizabeth. The bill alleges, that Elizabeth Rhea, formerly Erskine, was indebted to the complainant in the sum of \$300, for goods sold and delivered; that being pressed for payment, she, with the defendant, Rhea, with whom she then lived, agreed, that if allowed further time, they would secure the debt, by conveying to Rhenner a lot of ground, No. 165, in Beatty & Hawkins's addition to Georgetown; which was the property of said Elizabeth, and which had been conveyed to her, by the name of Elizabeth Erskine. That Rhea, together with the said Elizabeth, by their deed, \*bearing date May 13th, 1818, conveyed to the [\*107 complainant the lot of ground before mentioned, for the purpose of securing the debt, with interest; and stipulated, that if the debt was not paid in two years, it should be held in trust, with power to sell the same, and apply the proceeds, &c.

The bill further states, that the said Daniel and Elizabeth, a few days before the date of the deed to the complainant, viz., on the 10th of May 1819, but after the agreement to convey to the complainant, fraudulently conveyed the same premises to the defendant, Erskine, an infant son of said Elizabeth, in fee, in consideration of natural love and affection; that he, the said Rhenner, had, at a considerable expense, at the request, and with the knowledge and approbation of the defendants, erected improvements on the lot, and put a tenant in possession of the same; but that the defendant, by collusion, soon after obtained possession of the same, and still keeps it, claiming to hold it under the deed to the infant. The bill concludes with praying, that the deed to William Erskine may be declared void, and that the property may be sold to pay his claim, &c.

The defendant, Daniel Rhea, in his answer, admits, that his wife, before his intermarriage with her, viz., in May 1819, was the wife of one Robert Erskine, and was engaged in carrying on business for herself; that he did agree to join, and did join her, in the conveyance to the complainant, and in that to her son; that he had no title or interest in the premises; that the

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property belonged, in May 1819, to Elizabeth Erskine, who was a married woman ; and he denies all the other allegations in the bill.

Elizabeth Rhea, in her answer, avers, that she was married to Robert Erskine, in January 1812 ; that after her marriage, in the absence of her husband, one Adam Mayne conveyed to her the premises mentioned in the bill of complaint ; the deed bears date on the 7th of April 1817 ; that her husband, Erskine, left her in the year 1814, and she believed he was alive in May 1819 ; and that she was not, at that time, the wife of Daniel Rhea ; that in July 1821, Erskine having then been beyond seas more than seven years, she married Daniel Rhea ; having received no support from her former husband, since he left her.

The answer of the infant is put in by his guardian, in the usual form, submitting to the protection of the court ; without admitting or denying any of the facts alleged in the bill.

In this state of the proceedings, the court decreed a sale of the lot before mentioned, for payment of the claim of the complainant ; and appointed a trustee to make the sale, under the terms prescribed in the decree ; reserving the claim of the complainant for proof on it, and further order. From this decree, \*there was an appeal, and the cause is now before this court \*108] for their decision. The question submitted by the arguments of the counsel is, whether the contracts and engagements of Elizabeth Rhea, made in the absence of her first husband, and prior to her marriage with the defendant, Rhea, are obligatory ; and to what extent, a woman who has been abandoned by her husband, may contract debts, for which she is personally liable.

The law seems to be settled, that, when the wife is left without maintenance or support by the husband, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts. And the law is the same, whether the husband is banished for his crimes, or has voluntarily abandoned the wife. It is for the benefit of the *feme covert*, that she should be answerable for her debts, and liable to an action in such a case ; otherwise, she could not obtain credit, and would have no means of gaining a livelihood. A decision to this effect, by the court of common pleas, in England, is reported in 1 Bos. & Pul. 359. In delivering the opinions of the court, Mr. Justice BULLER refers to the case of *Lady Belknap*, whose husband was exiled. She was permitted to sue in her own name. The husband of Lady Sandys was banished by act of parliament, during life ; and it was decreed, in her case, that she might, in all things, act as a *feme sole*, and as if her husband was dead ; and that the necessity of the case required she should have such power. 1 Vern. 104. And the same reason applying where the husband had abjured the realm, the wife, in that case, was allowed to sue, as a widow, for her dower. In such case, she has been permitted to alien her land, without her husband, and is exempted from the disabilities of coverture. It has been uniformly considered, that banishment or abjuration is a civil death of the husband. In the case of *Deborah Gregory v. Paul, executor of Warburton*, reported in the 15th volume of Mass. reports, all these cases are reviewed by the supreme judicial court of Massachusetts ; and the law recognised.

In the case under consideration, there was a voluntary abandonment of the wife, by the husband, without having furnished her with the means

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of support. In his absence, she traded and dealt as a *feme sole*, and is liable for her debts. When the deed for the lot afore-mentioned was executed, her husband had been absent five years only; she continued under coverture, and was the wife of Robert Erskine, her first husband. There is no evidence, that she was, at that time, married to Daniel Rhea; and if the marriage had been proved, it would have been illegal and unavailing. A *feme covert*, who has been abandoned by her husband, is not permitted to marry a second time, with impunity, until her husband shall have been absent seven \*years, and shall not have been heard of, during that time. But by the laws of Maryland, which must govern in this case, [\*109 a married woman cannot dispose of real property, without the consent of her husband; nor can she execute a good and valid deed, to pass real estate, unless he shall join her in the deed. The separate examination, and other solemnities, required by law, are indispensable, and must not be omitted. The deeds executed by her and Daniel Rhea, in May 1819, are, therefore, inoperative and void.

The circuit court decreed, in this case, upon the bill annexed and exhibits, without further testimony. They do not, in themselves, contain sufficient matter for a decree. It does not appear, than any evidence was taken on commission, or otherwise, to establish, or disprove, the material allegations in their bill. The record being thus defective, this court cannot make a final decision. The decree of the circuit is reversed, and the record remanded for further proceedings.

Decree reversed.