

ROGERS vs. PHILLIPS AND WIFE.

No contract or agreement for materials, or work and labor, can be entered into with a feme covert, so as to enable a mechanic to enforce a lien upon the building for the materials found; and work and labor done.

Frequent protracted absence of the husband and the practice of his wife in transacting business as a feme sole, will not remove her disability.

Writ of Error to the Circuit Court of Pulaski county.

This was a *scire facias* to enforce a mechanics' lien, issued by Mark Rogers, against James Phillips and Mary Phillips, his wife, and determined in the Circuit Court of Pulaski county, on the 20th June, 1844, before the Hon. JOHN J. CLENDENIN, Judge. Issue was made up and the cause submitted to a jury, who found for the defendant. The plaintiff filed a bill of exceptions, incorporating all the evidence given and offered to be given on the trial. The only portion necessary to be stated, under the opinion of the court, is a covenant or sealed agreement entered into between the plaintiff and the defendant, Mary Phillips, then Mary Terbush, for the erection of the building upon which the lien was sought to be enforced; and the parol testimony that said Mary Phillips was, at the date of the contract, the wife of Peter F. Terbush, though a bill for divorce was then pending, upon which the court afterwards made a decree divorcing her from her husband; and the further testimony of witnesses, that her husband, at the date of the agreement, was absent, and that the wife always transacted her own business, and no one ever went to her husband. The Circuit Court refused to permit the agreement to be read in evidence.

CUMMINS, for plaintiff.

WATKINS & CURRAN, for defendants. The foundation of the plaintiff's claim is an alleged contract under seal, with Mary Terbush.

a *feme covert*, which is simply void. Terbush the husband could only be liable where it was shown that the wife acted as his agent or upon an implied assumpsit, where the husband in fact or for his use received the consideration. Terbush and wife had a joint interest in the lots sought to be charged with the mechanics' lien, and the plaintiff failed to show that Terbush ever assented to the contract, or derived any benefit from it, and if such showing had been made, Terbush was the only party in law who could have been made liable on the contract.

The suit was prosecuted to judgment in the name of James Phillips and wife, when it appears that they were married on the 13th April, 1842, and she was not divorced from Terbush until the 16th of May following, and then upon notice to him by publication.

A *scire facias* to enforce a mechanics' lien, is a proceeding at law, as held by this court, in *Brown v. Morrison & Sullivan*, 5 Ark. 217. It is not strictly a proceeding *in rem*, because the leading feature of a proceeding *in rem*, i. e. the conclusive presumption of notice to the world, so as to preclude the rights of all persons interested, whether before the court or not, is wanting in this proceeding. As various parties appear to have conflicting interests in the property, the only remedy of the plaintiff, if he has any, is in chancery.

CONWAY B., J. It appears from the record in this case, that Rogers, the plaintiff, was employed by Mary Terbush (wife of Peter F. Terbush) to erect, in this city, a two-story frame building; that after its completion, Rogers duly filed his account for the purpose of availing himself of the mechanics' lien act, and sued out *scire facias* against said Mary and others to enforce the lien.

The act gives no lien, unless the materials be furnished or labor done under *contract or agreement*, and there can be no contract or agreement without the mutual assent of two or more persons *competent* to contract; the *competency* of the parties being indispensable to its legal existence. If either party be incapacitated, the contract or agreement is futile and unavailing. 2 *Blackstone Com.* 442. *Chitty on contracts*, 4, 5, and 29. Marriage suspends or merges the legal existence of the woman, and, during coverture, she must perform

every thing under the wing and protection of her husband. 1 *Black. Com.* 442. As, therefore, Mary Terbush was a feme covert, when the alleged contract was made with her, and wholly incapable of making a contract or agreement, it was entirely nugatory as to her, and no legal lien could be based upon it. Terbush's frequent protracted absence, and the practice of his wife to transact business as a feme sole, did not remove her disability, unless indeed her husband was dead in law, which is not pretended in this case. *Vide Chitty on contracts*, 40-1. The judgment of the Circuit Court is, therefore, affirmed.
