

RUST *v.* KELLEY BROTHERS' LUMBER COMPANY.

Opinion delivered December 2, 1929.

1. MECHANICS' LIENS—ENFORCEMENT OF LIEN.—A materialman, commencing a suit to establish a lien within 90 days after the materials were furnished, was entitled to his lien, notwithstanding he failed to verify his account, as required by Crawford & Moses' Dig., § 6922, since a substantial compliance with the stat-

ute is all that is required as between the materialman and the owner.

2. **VENDOR AND PURCHASER—PURCHASE SUBJECT TO LIENS.**—Where a deed recited that it was made subject to all material and labor claims for construction of certain houses, the grantee had notice that a materialman was entitled to a lien, and was not a *bona fide* purchaser for value, and acquired no greater rights than his grantor had.
3. **MECHANICS' LIEN—SEVERAL HOUSES.**—Where a materialman furnished lumber and other materials for seven houses under an oral contract, the contract was entire, and the materialman might assert and establish his lien in one suit against all the lots.
4. **MECHANICS' LIEN—EQUALITY OF LIENS.**—The lien of a materialman furnishing materials for seven houses under a single contract and the lien of laborers performing labor on the houses separately *held* of equal dignity, under Crawford & Moses' Dig., § 6920.

Appeal from Washington Chancery Court; *Lee Seamster*, Chancellor; affirmed.

STATEMENT OF FACTS.

This appeal involves the priorities of claimants for materials furnished the owner in the erection of houses, and of laborers for services performed in the construction of the houses and the rights of subsequent grantees of the lots upon which the houses were erected.

Ona Hudson and other persons brought separate suits for an amount claimed by each of them for labor performed in the erection of certain houses in the city of Fayetteville for W. L. Elam. The cases were consolidated in the chancery court for trial, and separate judgments were entered in favor of each lien-claimant against the owner of the property, and laborers' liens were declared in their favor against the lots, and a decree foreclosing their liens was entered of record in the chancery court.

Kelley Brothers' Lumber Company brought suit in the chancery court against said W. L. Elam, asking judgment for the amount of its claim for materials furnished and used in the erection of said houses, and asked that its claim be declared a lien on the seven houses so constructed and the lots on which they were situated. Kelley

Brothers' Lumber Company did not file an itemized account of its claim for materials, duly verified by it, in the clerk's office, as required by the statute, but did bring a suit in the chancery court within ninety days after the materials were furnished, and the owner of the lots was made a party defendant to the action. An itemized account was filed as an exhibit to the complaint, but it was not verified.

The complaint of the Kelley Brothers' Lumber Company was filed on the 30th day of May, 1928. The decree in the case of Ona Hudson and the other claimants for labor was entered of record on the 27th day of August, 1928. On the 18th day of July, 1928, W. L. Elam and wife conveyed said property to Harry R. Rust, and said deed was duly acknowledged on that day. On the 17th day of August, 1928, the deed was duly filed for record in the clerk's office. The deed contains a recitation that it is made subject to all labor and material liens for the construction of the seven houses now located on the above described lots, together with a \$700 first mortgage, payable to Kelley Brothers' Lumber Company, which Harry R. Rust assumes and agrees to pay, according to circuit court records. On the 23d day of August, 1928, Harry R. Rust and his wife conveyed said property to D. H. Montgomery. Rust and Montgomery filed an intervention in the present suit, and asked that they be allowed to assert a prior right to said property to the claim of the Kelley Brothers' Lumber Company. The property having been sold, the funds were deposited in court, and those having liens for labor and for materials were all made parties to the suit for the purpose of determining their priorities as to the disposition of the fund in court.

The chancellor entered judgment in favor of the Kelley Brothers' Lumber Company against W. L. Elam for the amount of its claim for materials, and held that Harry R. Rust and D. H. Montgomery had actual knowledge of the claim of the Kelley Brothers' Lumber Company against W. L. Elam, and that Harry R. Rust purchased said lots subject to the Kelley Brothers' Lumber

Company's claim for materials, and also agreed to assume a \$700 mortgage executed by W. L. Elam in its favor on said lots. The chancellor further found that the laborers' liens and that of the materialmen were of equal dignity, and that the fund in court arising from the sale of the property should be prorated among all the lienholders herein set forth, and the commissioner of the court was directed to distribute the fund in accordance with the provisions of the decree. The laborers' lien claimants and Rust and Montgomery have duly prosecuted an appeal to this court.

George A. Hurst and *C. D. Atkinson*, for appellant.

John Mayes, for appellee.

HART, C. J., (after stating the facts). We will first consider the relation that the state of the record shows that appellee bore to W. L. Elam, as owner of the property now in controversy, for the enforcement of its lien. The amount of the materials furnished by the Kelley Brothers' Lumber Company was in the aggregate \$6,944.69. Although the itemized account attached to the complaint was not sworn to, the amount of materials furnished and the dates thereof were established by the evidence of appellee, and were not attempted to be contradicted. The record also shows that suit was commenced by appellee to establish its lien within ninety days after the materials were furnished, but it is insisted that appellee was not entitled to a lien because it failed to verify its account as required by § 6922 of Crawford & Moses' Digest. This does not make any difference. This court has uniformly held that, in an issue between mechanics or materialmen and the owner of the property, that a substantial compliance with the statute is all that is necessary. The result is that the bringing of a suit by the lien-claimant against the owner gives the latter all the notice that could be required as to the claim for a lien against his property. The neglect to comply fully with the requirement of the statute was intended for the protection of third persons who might acquire rights in or liens upon the same property. *Murray v. Rapley*, 30

Ark. 568; *Anderson v. Seamans*, 49 Ark. 475, 5 S. W. 799; *McFadden v. Stark*, 58 Ark. 7, 22 S. W. 884; and *Standard Lumber Co. v. Wilson*, 173 Ark. 1024, 296 S. W. 27.

In the last case the court said that the statute was wholly remedial in its nature, and that, when the controversy is between the holder of the lien and the owner of the land, an exact compliance with the statute at all points is not indispensable. So it will be seen, in so far as rights between appellee as the material furnisher and Elam as owner of the land are concerned, the bringing of the suit by the former against the latter for the purpose of asserting a lien for materials furnished and used in the construction of the houses within the period required by statute was all that was necessary to fix the lien of appellee.

Now, Rust purchased from Elam after the materials were furnished by appellee and used in the construction of the houses. His deed is dated July 18, 1928, and expressly recites that it is made subject to all material and labor liens for the construction of the seven houses now located on the above-described lots. This was notice to Rust that appellee was entitled to a lien on the lands for materials furnished and used in the construction of the houses. Hence Rust was not a *bona fide* purchaser for value, and acquired no greater rights than those possessed by the owner of the property. The last item of materials was furnished by appellee less than ninety days before appellee instituted this suit against Elam to establish its lien. Elam conveyed the lots to Rust after the materials were furnished, and within the time allowed by statute to appellee to bring suit to enforce its lien for material. Hence Rust was not an innocent purchaser for value, and acquired the title to the lots subject to appellee's lien for material. *Bell v. Koontz*, 172 Ark. 870, 290 S. W. 597.

Montgomery purchased from Rust, and was affected with notice in the title deeds of his vendor, so the notice recited in the deed that the conveyance was made subject to the liens of materialmen and laborers affected him

equally with Rust. *Union & Planters' B. & T. Co. v. Simmons*, 166 Ark. 285, 265 S. W. 963. Therefore we hold that Rust and Montgomery stand in the shoes of Elam, their grantor, and that appellee has a lien for materials furnished by it in so far as they are concerned.

This brings us to a consideration of the question as to whether there was any priority between the lien-claimants. It will be remembered that Ona Hudson and others had liens for labor performed on the seven houses, some of the laborers working on one house and some on another. Appellee furnished the lumber and other materials for all seven of the houses. It furnished the lumber under an oral contract for all the houses, and asserted its lien against all the lots. This contract was an entire contract, and appellee might assert and establish its liens in one suit against all of the lots for the material furnished in the erection of all of the houses. *Burel v. East Arkansas Lumber Co.*, 129 Ark. 58, 195 S. W. 378, 10 A. L. R. 1017, and cases cited.

But it is urged upon us that the rule would not apply to the laborers, for they performed labor upon the houses separately. This does not make any difference. Section 6920 of Crawford & Moses' Digest provides that the lien for work and labor done or things furnished as specified in the act shall be on an equal footing, without reference to the date of filing the account or lien, and that, in cases where the property is sold, the proceeds of the sale, when not sufficient to discharge in full all the liens against the same, without reference to the date of filing the account or lien, shall be paid *pro rata* on the respective liens; provided such account or lien shall have been filed and suit brought as provided by the act. It was the evident intention of the framers of the statute to establish the equality of liens as between claimants for work and labor done and those furnishing material for the construction of the building.

In the application of the statute in the present action the court properly determined that the proceeds of the sale of the property should be distributed *pro rata* among

the various lien claimants. Therefore the decree will be affirmed.
