MANSFIELD LUMBER COMPANY *v.* GRAVETTE.

Opinion delivered April 30, 1928.

1. MECHANICS' LIENS—TITLE TO PREMISES.—Where the owner of land placed a deed thereto in escrow, to be delivered to the purchaser when the purchase price was paid, but to be returned to the owner if the purchase money was not paid, the purchaser did not acquire such title to the premises as would give a materialman a lien for material furnished the purchaser for buildings on the land under Crawford & Moses' Dig., § 6906 *et seq.*, though the purchaser was placed in possession.
2. ESCROWS—WHEN TITLE PASSES.—When a deed is delivered as an escrow to take effect on performance of some condition by the purchaser in the future, no title passes until the condition has been performed.
3. ESCROWS—EFFECT OF DEED DEPOSITED WITH THIRD PERSON.—A deed deposited with a third person, to be delivered to the purchaser on the payment of notes executed by the purchaser in consideration of the conveyance, operates as an escrow.
4. EVIDENCE—CONDITIONAL DELIVERY OF DEED.—Parol evidence that a deed was delivered to a third person to be redelivered to the vendor on nonperformance of a condition by the purchaser, does not violate the rule that parol evidence is inadmissible to defeat a deed, as the evidence does not have the effect of engrafting a condition on a deed, but merely showing that the deed was not to become operative, unless the purchase price was paid.
5. ESCROWS—NONPERFORMANCE OF CONDITION.—Where a deed was placed in escrow on condition that it was not to become operative until the balance of the purchase price was paid, the purchaser failing to pay any balance of the purchase price acquired no interest in the property, and rights under the contract became forfeited for failure to make such payments.
6. MECHANICS' LIENS—NECESSITY OF TITLE.—To bring a materialman within Crawford & Moses' Dig., § 6906 *et seq.*, providing for a lien, there must be some element of title besides mere possession to bring a materialman within the provisions of the statute.

7. CONTRACTS—SUBSQUENT PAROL MODIFICATION.—A written contract may, subsequent to its execution, be modified by a parol agreement.

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

STATEMENT OF FACTS.

Appellant brought this suit in equity against appellees to foreclose a mechanic's lien for materials furnished of the value of $329.07.

According to the evidence adduced in favor of the appellant, it furnished to Mr. A. L. Beason and Mrs. A. L. Beason materials of the value of $329.07, which were used by Mrs. Beason in erecting improvements on two lots in the town of Gravette, Arkansas, which are described in the complaint. The improvements consisted of a large pigeon-house, forty feet long and thirty feet wide, with ninety nests in it, and also a large hen-house. Both of these buildings were so constructed that they could be removed without any injury to the land. On the 9th day of March, 1926, Eva M. Gravette executed a deed to Mrs. A. L. Beason to said lots, and said deed was delivered in escrow to the First National Bank of Gravette, to be held by it until Mrs. A. L. Beason had finished paying for the lots. The consideration was $6,000, and Mrs. A. L. Beason made an initial payment of $1,000. Mrs. Beason was then placed in possession of the lots, and the materials above referred to were furnished by appellant, and used by her in making the improvements in question, with the knowledge of Miss Eva Gravette that the improvements were being made.

Miss Eva Gravette was a witness for herself. According to her testimony, she did not authorize the materials to be furnished for making the improvements in question. She admitted executing the deed and delivering it in escrow to the bank, but stated that Mrs. A. L. Beason never made any payments on the lots except the initial payment of $1,000. While in possession of the lots, she damaged the dwelling-house on it to such an extent that such damage, with the rents, amounted to more than the $1,000 which Mrs. Beason had paid when

put in possession of the lots. She knew that Mrs. Beason was making the improvements on the place, but had been informed that she had paid for them. The improvements were not necessary, and did not add anything to the value of the place. Witness offered to allow the pigeon-house and hen-house to be removed from the lots. She could not allow the rest of the materials to be removed, because they had been used in repairing buildings already on the place. The deed was placed in escrow with the bank to be delivered to Mrs. Beason if she made the payments of the purchase money according to the terms in the deed. If she did not, the deed was to be returned to the witness.

The chancellor found the issues in favor of Eva Gravette, and a decree was accordingly entered of record in her favor. In accordance with her agreement, there was a provision in the decree allowing appellant to remove the pigeon-house and hen-house from the lots. The case is here on appeal.

Dobbs & Young, for appellant.

Rice & Dickson, for appellee.

HART, C. J., (after stating the facts). It is earnestly insisted by counsel for appellant that Mrs. A. L. Beason had an equitable interest in the lots described in the complaint, and that it had a lien for materials furnished by it, under the provisions of § 6906 *et seq.* of Crawford & Moses' Digest. We cannot agree with counsel in this contention. It is true that Miss Gravette executed a deed to Mrs. Beason to the lots in question, but the deed was placed in escrow with the First National Bank of Gravette, to be turned over to the grantee in the deed when the payments of purchase money were made; but, in case the payments of the purchase money were not made as expressed in the deed, the deed was to be returned to the grantor, and become inoperative. When a deed is delivered merely as an escrow to take effect upon the performance of some condition by the grantee in the future, no title passes until the condition has been

performed. *Bondurant* v. *Enis,* 152 Ark. 372, 238 S. W. 48; and *Ford* v. *Moody,* 169 Ark. 649, 276 S. W. 595.

A deed to real estate deposited with a third person, to be delivered to the grantee on the payment of notes executed by the grantee in consideration of the conveyance, operates as an escrow; and the conveyance thereof by the grantee, or sale under execution against him prior to the delivery of the deed, is inoperative. *Ober, Attawater & Co.* v. *Pendleton,* 30 Ark. 61.

It is claimed, however, by counsel for appellant that parol evidence cannot be introduced to show that the deed was on the condition above expressed. Parol evidence tending to show that it was understood that the deed was to be redelivered to the grantor upon the nonperformance of the condition by the grantee does not violate the rule that parol evidence cannot be introduced to defeat the deed. The parol evidence does not have the effect of ingrafting a condition on the deed, but merely shows that the deed was never to become operative unless the purchase price was paid. It was placed in the hands of a third party, subject to recall by the grantor if the purchase price was not paid according to the tenor or effect of the deed. The grantee never finished paying for the lots. It is true that the grantee made an initial payment, but, according to the testimony of the grantor, the accrued rentals and the damage to the property while in possession of the grantee amounted to more than the initial payment. However, if we are correct in holding that the deed was placed in escrow upon the condition that it did not become operative until the balance of the purchase price was paid, the grantee acquired no interest of any kind in the property, because she did not pay any of the balance of the purchase price, and her rights under the contract became forfeited for failure to make such payments. It is true that the grantee was in possession of the lots at the time the improvements were made, but the general rule is that there must be some element of title besides mere possession to bring the materialman within the provisions of our statute.

It is true that a contract in writing was entered into between the parties on the 28th day of February, 1926, and that its terms were changed when the deed was executed and placed in escrow on March 9, 1926; but it is well settled in this State that parties to a written contract may, subsequent to its execution, modify it by a parol agreement. *Cook* v. *Cane,* 163 Ark. 407, 260 S. W. 49. And, since a written contract may be changed or modified by a subsequent parol agreement, it was entirely competent for the parties to agree verbally to a modified or substituted performance. *Malley* v. *Quinn,* 132 Minn. 254, 156 N. W. 263.

It follows that the decree must be affirmed.