

NOWLIN *v.* NOTEWARE.

Opinion delivered June 25, 1928.

1. EVIDENCE—PAROL EVIDENCE TO EXPLAIN CONTRACT.—Where a lumber dealer signed his name at the end of a building contract, purporting to be that of another, preceded by the letters "O. K.," the contract was ambiguous, and it was competent to show by parol what the real contract between the parties was.
2. MECHANICS' LIENS—RIGHT OF MATERIALMAN.—Where a building contract provided that the contractor would carry on the job without advance payments until the roof was on, and the lumber dealer signed his name at the end of the contract preceded by "O. K.," held that the dealer did not bind himself to perform the terms of the contract, but only to withhold his claims for materials until the roof was on, to enable the owner to secure a loan, and such dealer was thereafter entitled to enforce his lien.

Appeal from Pulaski Chancery Court; *Frank H. Dodge*, Chancellor; reversed.

STATEMENT OF FACTS.

Ralph Noteware brought this suit in equity against E. C. Nowlin and Howard Veazey to recover judgment for \$65.60 and to cancel and remove from the lien record

certain claims for liens for materials filed by Nowlin against the property described in the complaint.

The complaint alleges that the plaintiff entered into a contract with the defendants, Veazey and Nowlin, as a partnership, to furnish all material and lumber to erect a six-room house at 2100 West Markham for the sum of \$2,275. The complaint further alleges that he was compelled to pay \$65.15 for materials furnished in said building which the defendants refused to pay. The complaint also alleges that the defendant Nowlin filed a lien against the property for the amount of \$172.59 for materials furnished.

The defendants denied that they had agreed as partners to erect said building, and the defendant Nowlin specifically denied that there was any partnership between him and Veazey to erect said building. By way of cross-complaint, he attempts to assert a materialman's lien on said building in the amount of \$188.99 and upon another building in the sum of \$246.70.

The contract which is the basis of this action commences as follows: "Specifications of house to be built by Howard Veazey." Then follow the plans and specifications of the house to be constructed. The contract concludes as follows:

"In consideration of the sum of twenty-three hundred dollars, I agree to do the above job. Further agree to carry job without any advance payments until the roof is on. Then it is agreed that the contractor may draw as the job progresses.

"O. K. for Nowlin L. Co. E. C. Nowlin.

"Renewed for Markham and Schiller 2/22/26. O. K. E. C. Nowlin.

"Howard Veazey.

"Howard Veazey.

"Howard Veazey.

"4/19-1926.

"Renewed for 2808 High St. O. K. E. C. Nowlin.
Job 3. 4/20/26."

Ralph Noteware was a witness for himself. According to his testimony, in the early part of 1926 he made a contract with Howard Veazey and E. C. Nowlin to build a house for him at 2100 High Street, Little Rock, Arkansas. A representative of the Nowlin Lumber Company introduced Veazey to the witness, and they, after some negotiation, agreed upon a price for the erection of a house for witness if E. C. Nowlin would sign the contract with Veazey. Veazey agreed to build a house for Noteware for \$2,275, and it was agreed that he would bring a contract signed by himself and Nowlin before any material was placed on the ground. This house was built, delivered and paid for without any trouble. The same contract was renewed for a house at Markham and Schiller Streets. All of the money due on this contract was not paid. Witness was compelled to pay \$65.15 for materials which went into the building. Subsequently the same contract was renewed for a house at 2808 High Street, Little Rock. This house was not completed. Before it was completed, Nowlin said that he would not be responsible for materials that Veazey bought anywhere except through his firm, and filed a lien on the house. Witness understood that Nowlin signed the contract as one of the builders, and that the witness' purpose in having Nowlin sign the contract was to have him guarantee that the houses would be built for the amount of money stipulated in each contract. Witness did not know why Nowlin signed the contract by placing the letter "O. K." before his name. Witness had nothing to do with writing the contract, and supposed that it was written by Nowlin.

According to the testimony of Howard Veazey, he saw an advertisement in the paper that Ralph Noteware was building houses, and went to see him about it. They agreed upon the price that Veazey would build Noteware a house for, and Noteware wrote the contract himself, and Veazey signed it in Noteware's office. Nowlin had nothing to do with the contract up to that time. Nowlin was not a partner in any of the transactions involved in

this suit. As far as the witness knew about Mr. Nowlin, he was to help Noteware finance the job until he could get a loan. Noteware paid Veazey all the time for materials and labor for the house. If Nowlin had been responsible under the contract, he would have forced witness to have bought all his materials from him. Witness had a right to buy materials anywhere he wanted to, but did buy some materials from other persons than Nowlin.

According to E. C. Nowlin, he was not a partner with Veazey in any of the contracts, and was not in anywise responsible for building the houses. Noteware made the contract with Veazey, and asked witness if he would O. K. the contract in so far as finances were concerned. Noteware then said: "If you will do this, as soon as I get my loan I will bring all the money out here and turn it over to you, so that you can pay yourself for any materials you will have furnished, and I would like to have you help me keep up with the job, so that we can see that all the bills are paid."

Witness thought he was helping Noteware, and selling material in addition to that. He had no understanding of any kind that he was a partner with Veazey. He had nothing in the world to do with Veazey's work, and only agreed to finance the job until the roof was on so that Noteware could obtain a loan on it for the amount expended in erecting the house. Witness was a dealer in material, and, on that account, could afford to finance the job in order to sell his material. If he had been a partner with Veazey, or in any manner bound to carry out the contract, he would have required all the material to be purchased from him. He handled everything that goes into a building, except plumbing and electric fixtures. He warned Noteware several times that Veazey had figured the contracts pretty close and that Noteware was liable to have to pay more than he agreed to pay. When Nowlin found out that Noteware intended to hold him as one of the signers of the contract, he quit financing the job, and filed his lien for materials. Nowlin

stated that his purpose in signing the contract with the letters "O. K." before his name was simply an agreement on his part to meet the payrolls for Noteware until the roof was on each house, and in this way he would get to sell some of the materials which went into the house.

The chancellor found that the plaintiff was not entitled to recover on his complaint and that Nowlin was not entitled to recover on his cross-complaint or to assert any liens against the property for materials. A decree was entered in accordance with the finding of the chancellor, and Nowlin alone has prosecuted an appeal to this court.

T. E. Helm and *A. W. Taylor*, for appellant.

F. L. Brown and *T. N. Robertson*, for appellee.

HART, C. J., (after stating the facts). Counsel for appellant seek to reverse the decree on the theory that the letters "O. K." before the signature of E. C. Nowlin render the contract ambiguous and let in oral proof of the contract between Noteware and Nowlin. In that contention we think counsel are correct.

In *Penn Tobacco Company v. Leman*, 109 Ga. 428, 34 S. E. 678, the Supreme Court of Georgia held, quoting syllabus: "A petition alleging that the letters 'O. K.' written on an order for goods, and followed by the signature of the person writing them, constituted a contract on the part of such person to pay for the goods in the event the persons sending the order failed or refused to pay at maturity, set forth a cause of action. These letters being ambiguous, their meaning may be explained by parol evidence." The court said that the letters "O. K." before the signature of the defendant rendered the contract ambiguous, and therefore parol evidence would be heard to explain the patent ambiguity appearing upon the paper. In that case it was alleged that the parties had agreed that payment of the account at maturity would be made by the defendant in case the purchaser failed to pay the same. In other words, it was held that parol evidence was admissible to show what the parties

had really agreed to, because all of the contract had not been expressed in writing. The letters "O. K." rendered the written contract ambiguous and let in parol proof as to what the parties meant by inserting these letters before the signature of the defendant.

It is true that the letters "O. K." have a very definite dictionary meaning, which is "all right; correct;" but the connection in which the letters are used must be taken into consideration. When this is done, we think that the letters "O. K." before the signature of Nowlin rendered the contract ambiguous, and that the significance of these letters should be interpreted in the light of the facts as they appear in the record, with the sole object in view of ascertaining the intention of the party or parties using them. If Nowlin had intended signing the contract as one of the builders, there would have been no sense in having the letters "O. K." before his signature. His assent was simply to the form of the contract, and no further. The contract being ambiguous by the use of the letters, it was competent for the parties by parol proof to show what the real contract between Nowlin and Noteware was. *Humphreys v. Sorrens*, 33 Wash. 563, 74 Pac. 690.

This brings us to a consideration of the case on its merits. Here we find the testimony of the parties in irreconcilable conflict as to what was the intention of Nowlin in signing the contract with the letters "O. K." before his signature. On the one hand, Noteware testified that Nowlin signed the contract for the purpose of guaranteeing that Veazey would execute it. On the other hand, both Nowlin and Veazey testified that Nowlin was not in any sense bound for the performance of the contract, and only signed it for the purpose of enabling Noteware to finance the building of the houses until they were partly completed and he could secure a loan upon them. The record shows that no loan could be secured until after the roof was on a house. Nowlin was a dealer in lumber and other building material, and, by financing the contract, had an opportunity to sell

his materials. This induced him to sign the contract with the letters "O. K." before his signature, and he was not in any sense bound by any of the terms of the contract of construction between Noteware and Veazey. In this view of the matter, the chancellor erred in dismissing the defendant's cross-complaint; for the evidence in his behalf shows that he filed a lien for materials furnished within the statutory period and that the materials were actually used in the construction of the houses.

Therefore the decree will be reversed, and the cause will be remanded with directions to the chancery court to enter a decree in favor of Nowlin for the amount of material furnished by him in constructing the houses, as shown by the record in this case, and for further proceedings in accordance with the principles of equity. It is so ordered.
