

J. W. BAIN, d/b/a BAIN
CONSTRUCTION COMPANY,

Complainant,

VS.

HENRY MAZEL,

Respondent.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

IN EQUITY NO. 4657

FINAL DECREE

This cause coming on to be heard on this date is submitted on the original and amended bills of complaint and the plea in abatement heretofore filed in this cause by the respondent, Henry Mazel, to test the sufficiency of the said plea in abatement.

It appears to the court that the complainant amended his bill of complaint in this cause on, to-wit, March 1, 1962, by striking Richard J. Trester and Eva Marie Trester as parties respondent, and that thereafter and on, to-wit, March 22, 1962, the respondent, Henry Mazel, filed a plea in abatement in this cause moving the court to abate this action because of the nonjoinder of Richard J. Trester and Eva Marie Trester, who are necessary parties to this action.

It further appears to the court that the plea in abatement of the respondent, Henry Mazel, was heretofore set down for hearing by agreement of the parties to determine whether or not it was sufficient. After the hearing the matter was taken under submission by the court, and it appears to the court from the complainant's original bill of complaint and from the amendment thereto which was filed on, to-wit, March 1, 1962, that Richard J. Trester and Eva Marie Trester entered into a written agreement with the complainant on, to-wit, the 20th day of February, 1959, for clearing the lands described in the original bill of complaint, that they are the parties liable for the debt due to the complainant and the parties named in the claim of lien filed by the complainant, which is made a part of his original bill of complaint, because of which they are necessary and indispensable parties to

this cause, without whom this cause cannot now proceed to a final judgment against the respondent, Henry Mazel;

Upon consideration of all of which it is, therefore,
ORDERED, ADJUDGED AND DECREED by the court as follows:

1. The plea in abatement of the respondent, Henry Mazel, is sufficient and is hereby sustained.

2. The complainant having refused to plead further, this cause shall be and it is hereby dismissed with prejudice.

3. The costs of this proceeding are hereby taxed against the complainant, for which execution may issue.

ORDERED, ADJUDGED AND DECREED on this the 17 day of June, 1963.

Hubert M. Wass
Judge

FILED

ALICE E. DUCK, CLERK
REGISTERED

RECEIVED

JUN 21 1963

COURT

FINAL DECREE

J. W. BAIN, d/b/a BAIN CON-
STRUCTION COMPANY,

Complainant,

VS.

HENRY MAZEL,

Respondent.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY NO. 4657

1st Div. No. 952

HENRY MAZEL

Baldwin

In Equity Circuit Court

No. 4657

Appellant.

vs.

J. W. BAIN doing business as BAIN CONSTRUCTION
COMPANY..... Appellee.

Dear Mrs. Duck: =

~~Dear Sirs~~

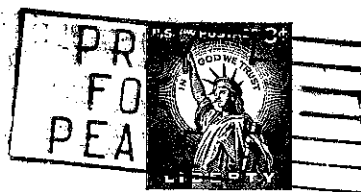
The CERTIFICATE OF APPEAL in the above stated cause
received and filed today.

Yours truly,

J. RENDER THOMAS,

November 10, 19 60.

Clerk Supreme Court.



THIS SIDE OF CARD IS FOR ADDRESS

Mrs. Alice J. Duck
Register Baldwin Circuit Court
Bay Minette, Alabama

J. W. BAIN, d/b/a BAIN
CONSTRUCTION COMPANY

Complainant

VS

RICHARD J. TRESTER, EVA
MARIE TRESTER AND HENRY
MAZEL

Respondents

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IN THE CIRCUIT COURT OF

BAIDWIN COUNTY, ALABAMA

IN EQUITY

NO. _____

TO THE HONORABLE HUBERT M. HALL, JUDGE OF THE CIRCUIT COURT OF BALDWIN
COUNTY, ALABAMA, SITTING IN EQUITY:

AMENDED COMPLAINT

Comes now the Plaintiff in the above styled cause and amends his
complaint by adding the following section thereto.

5.

That since the time of the filing of the original complaint in the
cause, Richard J. Trester and Eva Marie Trester have moved from Baldwin
County, Alabama to California, their exact address has not been ascertained
by your Complainant after due diligence.

Your Complainant further avers that the mortgage from Richard J.
Trester and Eva Marie Trester to Henry Mazel referred to in Section 4
of the complaint has been foreclosed and the title to the property set
out in the complaint was conveyed to Henry Mazel. The conveyance by
which Henry Mazel acquired title to the property described in this
complaint is recorded in the office of the Probate Judge, Baldwin County,
Alabama, in Deed Book _____, pages _____.

This instrument is a foreclosure deed transferring the title to the
aforesaid property from Richard J. Trester and Eva Marie Trester to Henry
Mazel.

Your Complainant further avers that the Complainant's lien upon the
property heretofore described in this complaint has in no wise been affect-
ed by this last mentioned conveyance; that your Complainant now has a
subsisting lien on the land described in Section 2 of the original complaint.

The Respondents Richard J. Trester and Eva Marie Trester no longer
being necessary parties to this suit are now by the Complainant stricken as
parties Respondent.

FILED

MAR 1 1962

ALICE J. DUCK, CLERK
REGISTER

WILTERS, BRANTLEY & NESBIT

BY:

Charles S. Nesbit
Attorneys for the Complainant

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

IN EQUITY

NO. 4057

J. W. BAIN, d/b/a BAIN
CONSTRUCTION COMPANY

Complainant

VS

RICHARD J. TRESTER, EVA
MARIE TRESTER AND HENRY
MAZEL

Respondents

AMENDED COMPLAINT

FILED

MAR 1 1962

ALICE J. DUCK, CLERK
REGISTER

Walters, Brantley & Nesbitt
Box 555
Robertsdale, Alabama

SUMMONS AND COMPLAINT

Moore Ptg. Co.

The State of Alabama, }

Baldwin County.

Circuit Court, Baldwin County

No. 1657

----- TERM, 19-----

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You Are Hereby Commanded to Summon

RICHARD J. TRISTER, EVA MARIE TRISTER, &

HENRY MAHEL

to appear and plead, answer or demur, within thirty days from the service hereof, to the complaint filed in
the Circuit Court of Baldwin County, State of Alabama, at Bay Minette, against

RICHARD J. TRISTER, EVA MARIE TRISTER & HENRY MAHEL, Defendant

by J.W. BAIN, D/O/a BAIN CONSTRUCTION COMPANY

-----, Plaintiff

Witness my hand this

23

day of

JULY

1952

Alice J. Duck

, Clerk

No. 4657 Page _____

The State of Alabama

Baldwin County

CIRCUIT COURT

J.W. BAIN, d/b/a BAIN

CONSTRUCTION COMPANY

Plaintiffs

vs.

RICHARD J. TRESTER, EVA MARIE

TRESTER AND HENRY MAZEL

Defendants

Summons and Complaint

Filed July 23, 1959

Alice J. Duck Clerk

Plaintiff's Attorney

Defendant's Attorney

Defendant lives at

Received In Office

19____

_____, Sheriff

I have executed this summons

this _____ 19____

by leaving a copy with

_____, Sheriff

_____, Deputy Sheriff

J. W. BAIN, d/b/a
BAIN CONSTRUCTION COMPANY

COMPLAINANT

VS

RICHARD J. TRESTER, EVA MARIE

TRESTER AND HENRY MAZEL

RESPONDENTS

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA,
IN EQUITY

TO THE HONORABLE HUBERT M. HALL, JUDGE OF THE CIRCUIT COURT OF BALDWIN
COUNTY, ALABAMA, SITTING IN EQUITY:

J. W. Bain, d/b/a Bain Construction Company presents this bill of
Complaint against Richard J. Trester, Eva Marie Trester and Henry Mazel
and thereupon your Complainant shows unto Your Honor and this Honorable
Court as follows:

1.

That your Complainant is over the age of 21 years and is a resident
of Baldwin County, Alabama; that the Respondents, Richard J. Trester,
Eva Marie Trester and Henry Mazel are over the age of 21 years and are
residents of Baldwin County, Alabama.

2.

That your Complainant and the Respondents, Richard J. Trester and
Eva Marie Trester, entered into a written agreement on to-wit the 20th
day of February, 1959, for the clearing of lands hereinafter described,
which included pushing stumps and scrub oaks, raking and leveling the
said lands and on that date your Complainant did commence the said work
and labor and that he did complete the contract on the following described
lands in Baldwin County, Alabama, to-wit:

North half of Southwest quarter of Section 12,
Township 6 South, Range 3 East;

That there is now due and unpaid a balance of \$881.25 with interest
thereon.

3.

The Complainant alleges that the above described property is the property of the Respondents, Richard J. Trester and Eva Marie Trester; that the said work or labor was done and performed on the said lands improving the same under and by virtue of the above mentioned contract with the said Richard J. Trester and Eva Marie Trester, the owners or proprietors thereof; that within six months after the said indebtedness had matured, on to-wit, the 18th day of June, 1959, Complainant did file in the office of the Judge of Probate of Baldwin County, Alabama, wherein said land is situated, a verified statement as required by law, a copy of which is attached hereto and made a part hereof and marked Exhibit "A"; wherefore, the Complainant claims a lien for said amount upon said land, buildings and improvements situated thereon.

That the above described tract of land is not in a city, town or village and that the above described lands include, but do not exceed, the area upon which the work and labor was performed by the Complainant.

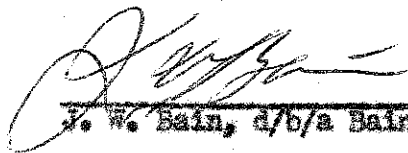
4.

Complainant farther avers that on January 6, 1958, the Respondents, Richard J. Trester and Eva Marie Trester, executed a mortgage on the above described lands to Henry Hazel and that the said mortgage was recorded in the office of the Judge of Probate of Baldwin County, Alabama, on April 9, 1959, in Mortgage Book 314, pages 254-6, subsequent to the entering into of the contract above described and commencement of work by your Complainant and that the lien claimed by your Complainant on the above described property and improvements thereon is superior to the lien of the mortgage given by the Respondents, Richard J. Trester and Eva Marie Trester, to Henry Hazel.

PRAYER FOR PROCESS AND RELIEF

WHEREFORE, the premises considered, your Complainant prays that your Honor will by proper process make the said Richard J. Trester, Eva Marie Trester and Henry Hazel, party respondents to this Bill of Complainant requiring them to plead, answer or demur to the same within the time and under the penalties prescribed by law and the practice of this honorable court.

Your Complainant further prays that upon a final hearing hereof, Your Honor will ascertain and fix the indebtedness due from the Respondents, Richard J. Trester and Eva Marie Trester, to the complainant; that a lien on the above described property be fixed and established in the form and manner prescribed by law; that the court will decree that the lien of your Complainant is superior to the lien created by the mortgage from the Respondents, Richard J. Trester and Eva Marie Trester, to the Respondent Henry Vazel; and in the event the amount due to the Complainant is not paid within a reasonable time to be fixed by this court that the above described lands be ordered sold to satisfy the said lien; Your Complainant prays for such other, further, different or general relief to which in equity he may be entitled and as in duty bound he will ever pray. Your Complainant offers to do equity.


J. W. Bain, d/b/a Bain Construction Co.

STATE OF ALABAMA

BALDWIN COUNTY

Before me, the undersigned authority, in and for said County, in said State, personally appeared J. W. Bain, who first by me being duly sworn, deposes and says: That he has read the foregoing bill of Complaint and that the statements contained therein are true and correct to the best of his knowledge.



Sworn to and subscribed before me on this the 22nd day of July, 1959.


Notary Public, Baldwin County, Ala.

FILED

JUL 23 1959

ALICE J. DUCK, Register

STATE OF ALABAMA

COUNTY OF BALDWIN

J. W. BAIN d/b/a BAIN CONSTRUCTION COMPANY files this statement in writing, verified by the oath of J. W. BAIN, who has personal knowledge of the facts herein set forth:

That said J. W. BAIN claims a lien upon the following property, situated in Baldwin County, Alabama, to wit:

The North half of the Southwest quarter, of Section 12,
Township 6 South, Range 3 East.

This lien is claimed, separately and severally, as to both the buildings and improvements thereon, and the said land.

That said lien is claimed to secure and indebtedness of \$881.25 with interest, from to wit 27th day of February, 1959, for pushing stumps, scrub oaks, rake and clearing the above lands.

The name of the owner or proprietor of the said property is
RICHARD J. TRESTER AND EVA MARIE TRESTER.

S/ J. W. Bain
Claimant.

Before me, HARRY J. WILTERS, JR., a notary public in and for the County of Baldwin, State of Alabama, personally appeared J. W. BAIN, who being duly sworn, doth depose and say: That he has personal knowledge of the facts set forth in the foregoing statement of lien, and that the same are true and correct to the best of his knowledge and belief.

S/ J. W. Bain
Affiant.

Subscribed and sworn to before me on this the 17th day of
June, 1959, by said affiant.

(SEAL)

S/ Harry J. Wilters, Jr.
Notary Public, Baldwin County,

Alabama

STATE OF ALABAMA, BALDWIN COUNTY

Filed 6-18-59 2 P.M.Recorded Deed Book 279 Page 271

S/ MC Stuart
Judge of Probate

FILED
JUL 23 1959
ALICE J. DUCK, Register

J. W. BAIN, d/b/a BAIN
CONSTRUCTION COMPANY,

Complainant,
VS.

HENRY MAZEL,
Respondent.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY NO. 4657

PLEA IN ABATEMENT

Now comes the respondent, Henry Mazel, who appears specially and only for the purpose of filing this plea in abatement, and shows unto the court as follows: -

The complainant amended the original bill of complaint in this cause on, to-wit, March 2, 1962, and, among other things, struck Richard J. Trester and Eva Marie Trester as parties respondent, who are necessary parties to this action.

WHEREFORE, respondent moves the court to abate this action because of the nonjoinder of Richard J. Trester and Eva Marie Trester.

Henry Mazel
Respondent

STATE OF ALABAMA)
*
BALDWIN COUNTY)

Before me, the undersigned authority, within and for said County in said State, personally appeared Henry Mazel, who, after being by me first duly and legally sworn, deposes and says: That has read over the foregoing plea in abatement and that the facts stated therein are true.

Henry Mazel

Sworn to and subscribed before me on
this the 22nd day of March, 1962.

[Signature]
Notary Public, Baldwin County, Alabama

FILED

MAR 22 1962

ALICE J. DUCK, CLERK
REGISTER

THE STATE OF ALABAMA - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1960-61

1 Div. 952

Henry Mazel

v.

J. W. Bain,
d/b/a Bain Construction Company

Appeal from Baldwin Circuit Court, In Equity

MERRILL, JUSTICE.

This is an appeal from a decree overruling the demurrer of Henry Mazel, appellant, to the bill of complaint of J. W. Bain, doing business as Bain Construction Company, appellee. The bill sought to enforce a mechanic's lien for clearing eighty acres of land.

2.

The bill alleged that appellee cleared the land under a contract with the owners, Richard and Eva Trester, executed February 20, 1959, and a balance of \$881.25 was still owed for the work; that on April 9, 1959, appellant Mazel recorded a mortgage on the lands executed by the Tresters on January 6, 1958; and that the lien claimed by appellee was superior to the lien of the mortgage. The Tresters were not served with summons.

The sole question, one of first impression here, to be decided is whether clearing land, which included "pushing stumps and scrub oaks, raking and leveling the said lands," is an improvement on land under Tit. 33, § 37, Code 1940, which grants a lien to "every person * * * who shall do or perform any work, or labor upon * * * any building or improvement on land, or for repairing, altering, or beautifying the same, * * *," under or by virtue of any contract with the owner.

In 1899, this court, in Bates v. Harte, 124 Ala. 427, 26 So. 898, in holding that the drilling of a well was such an "improvement" as would support a lien, said:

"The statute recognizes that improvements meriting the protection of a lien may be made upon land otherwise than by buildings, but as they may occur in unforeseen variety the scope of the term improvement is left for determination in particular cases as they may arise.

* * * "

Warvelle on Ejectment, § 557, defines improvement: "An improvement, generally speaking, is anything that enhances the

3.

value of the land." The word is defined in Black's Law Dictionary, Fourth Edition:

"A valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement of waste, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes."

The Supreme Court of Oklahoma, in construing its lien statute, 42 OS 1951, § 141, which gives a lien to any person who performs labor "for the erection, alteration or repair of any building, improvement or structure thereon," held that "labor performed with tractor and bulldozer and scraper in leveling and building up certain vacant lots to improve same for future construction of building thereon is a lienable item," and "the general word 'improvement' cannot be reasonably construed to have been used with the limitation in its meaning to buildings and things ejusdem generis" (of the same kind, class or nature). Green v. Reese, (Okla.), 261 P. 2d 596, 39 A. L. R. 2d 861, and annotation 39 A. L. R. 2d 866.

Some states, California, Florida, Hawaii, Iowa, Minnesota, Tennessee, Texas, Wisconsin and Washington, have defined the word improvement in their statute, and include excavating or grading in the definition.

In 1889, Justice McClellan, speaking for the court in Eufaula Water Co. v. Addyston Pipe & Steel Co., 89 Ala. 552, 8

4.

So. 25, said: "The whole theory of the statute is to give the materialman a preferred claim on a lot of land, for the amount he has contributed in improving that particular land, or the buildings situated thereon."

Again, in Crawford v. Sterling, 155 Ala. 511, 46 So. 849, McClellan, J. wrote:

" * * * The theory of our system (Civ. Code, 1896, c. 71, art. 1) is that the subject of the betterment afforded by the labor, material, or machinery furnished shall be charged with the payment therefor to the extent in interest and area defined by section 2723.

In other words, for a demand for labor, materials, or machinery applied to the improvement of real estate, there are as many separate liens as there are separate lots of the area described in the statute, unless, perhaps, a building as a unit rests upon two or more lots.

* * * "

This court said in Floyd v. Rambo, 250 Ala. 101, 33 So. 2d 360:

"The general policy of the statute is to secure to the materialman and laborer a just reward of his labor and material and is based upon the general equitable principle that one should not enjoy the benefits thereof without making just compensation therefor. * * * "

5.

And in our late case of Wilkinson v. Rowe, 266 Ala. 675, 98 So. 2d 435, we quoted from Montandon & Co. v. Deas, 14 Ala. 33, as follows:

" * * * This act should receive a liberal construction, as it is but an extension of the doctrine of lien, so much favored by the courts, as consonant with every principle of equity and justice as applied to personal property. Cross on Law of Lien, 24. The intention of the act was, to give to the mechanic who had expended his labor and furnished materials in improving the ground of another, a prior right of satisfaction by a lien upon the building, and the interest of the party contracting for its erection, in the land so improved. * * * "

(Emphasis supplied.)

It is argued that since a mechanic's lien is of statutory origin and "is in derogation of the common law, it is to be strictly construed, all matters of substance of necessity to be complied with." Tanner v. Foley Bldg. & Mfg. Co., 254 Ala. 476, 48 So. 2d 785. This strict construction is not applied to the theory of the statute but to the technical requirements of the statute to make the lien effective, such as, certainty as to the description, allegations that the claim has been properly filed in the office of the probate judge, and that the wording of the claim and the notices substantially follow the statute.

6.

There is no conflict in the case of Montandon & Co. v. Deas, 14 Ala. 33, and the principle enunciated in the Tanner case.

It is also argued that our statute does not give a lien for work on land in the absence of an improvement or building thereon. We think that construction of the statute is too strict and narrow. Under such an interpretation, a brick mason who built the foundation for a building, which was never built, would not have a lien. Yet in 1890, in Scott v. Goldinghorst, 123 Ind. 268, 24 N. E. 333, work done in excavating earth and constructing a brick foundation for a barn which was never completed was held to be lienable.

Again, construing the statute so strictly, the digging of a well would not be an improvement, but the adding of a well curb or a shelter over the well would be subject to the lien because it was added to the improvement (the well) which was already there. But that is not what this court held in Bates v. Harte, 124 Ala. 427, 26 So. 898, cited supra. There, the digging of a well was held to be an improvement.

The clearing, grading or excavation of land is a permanent improvement upon land, and since this question has not been previously presented to this court, it seems practical, useful and sensible to hold that this type of permanent improvement upon land is lienable under the statute.

We would still adhere to the holding in Bates v. Harte, 124 Ala. 427, 26 So. 898, quoted in Wilkinson v. Rowe, 266 Ala. 675, 98 So. 2d 435, that "the scope of term improvement is left for determination in particular cases as they may arise." This

7.

question of first impression in this state having arisen, we hold that the work described comes within the scope of the term "improvement" in the statute.

It follows that the trial court correctly overruled appellant's demurrer to the bill of complaint.

AFFIRMED.

Lawson, Simpson and Goodwyn, JJ., concur.

Livingston, C. J., Stakely and Coleman, JJ., dissent.

[OVER]

STAKELY, J.

8.

The suit was filed by J. W. Bain, doing business as Bain Construction Company, against Richard Trester, Eva Marie Trester and Henry Hazel, to enforce a mechanic's lien for clearing eighty acres of land. The two Tresters were not served. The relevant part of the bill of complaint is as follows:

"2. That your Complainant and the Respondents, Richard J. Trester and Eva Marie Trester, entered into a written agreement on to wit the 20th day of February, 1959, for the clearing of lands hereinafter described, which included pushing stumps and scrub oaks, raking and leveling the said lands and on that date your Complainant did commence the said work and labor and that he did complete the contract on the following described lands in Baldwin County, Alabama, to wit: * * * That there is now due and unpaid a balance of \$881.25 with interest thereon.

"3. The Complainant alleges that the above described property is the property of the Respondents, Richard J. Trester and Eva Marie Trester; that the said work or labor was done and performed on the said lands improving the same under and by virtue of the above mentioned contract with the said Richard J. Trester and Eva Marie Trester, the owners or proprietors thereof; that within six months after the said indebtedness had matured, on to wit, the 18th day of June, 1959, Complainant did file in the office of the Judge of Probate of Baldwin County, Alabama, wherein said land is situated, a verified statement as required by law, a copy of which is attached hereto and made a part hereof and marked Exhibit 'A'; wherefore, the Complainant claims a lien for said amount upon said land, buildings and improvements situated thereon.

"That the above described tract of land is not in a city, town or village and that the above described lands include, but do not exceed, the area upon which the work and labor was performed by the Complainant.

9.

"4. Complainant further avers that on January 6, 1958, the Respondents, Richard J. Trester and Eva Marie Trester, executed a mortgage on the above described lands to Henry Mazel and that the said mortgage was recorded in the office of the Judge of Probate of Baldwin County, Alabama, on April 9, 1959, in Mortgage Book 314, pages 254-6, subsequent to the entering into of the contract above described and commencement of work by your Complainant and that the lien claimed by your Complainant on the above described property and improvements thereon is superior to the lien of the mortgage given by the Respondents, Richard J. Trester and Eva Marie Trester, to Henry Mazel."

The question for decision is whether the allegations of the bill show that complainant performed services which entitle him to the lien claimed.

We think we can safely say that if the complainant has the right to a mechanic's lien for the services which he alleges that he performed in clearing the land described in the bill of complaint, it must be under § 37, Title 33, Code of 1940. We set out the pertinent part of § 37, Title 33, Code of 1940, as follows:

"§37 --Every mechanic, person, firm, or corporation who shall do or perform any work, or labor upon * * * any building or improvement on land, or for repairing, altering, or beautifying the same, * * * shall have a lien therefor on such building or improvements and on the land on which the same is situated, * * *."

Without question the foregoing statute gives a lien for work on an improvement on land but we do not think that the statute gives a lien for work on land in the absence of an improvement or building thereon. The statute gives a lien "on such building or improvements and on the land on which the same is situated." -- [Emphasis added.] If the graded land is the improvement, then there is a lien on the graded land on the land. In other words, there is a lien on land on land. We do not believe the statute warrants such a construction.

In this case it is well to remember that the right to a mechanic's lien is purely statutory. --Wilkinson et al. v. Rowe, 266 Ala. 675, 98 So.2d 435. There is no right to an equitable lien for work and labor done. --Lindsey v. Rogers, 260 Ala. 231, 69 So.2d 445; Emanuel v. Underwood, Coal & Supply Co., 244 Ala. 436, 14 So.2d 151.

In Tanner v. Foley Bldg. & Mfg. Co., 254 Ala. 476, 48 So. 2d 785, this court said: "and since such a statutory lien is in derogation of the common law, it is to be strictly construed, all matters of substance of necessity to be complied with.", and cases cited. --Richards v. William Beach Hardware Co., 242 Ala. 535, 7 So.2d 492, and cases cited.

It is clear that the clearing, grading or leveling, which the complainant did on the land, was not done in connection with the construction of any building or other improvement on the land. Does the clearing, grading and leveling of land constitute an improvement within the meaning of § 37, Title 33, Code of 1940 and entitle one who does such work to a mechanic's lien under the provisions of the statute? In the recent case of Wilkinson v. Rowe, supra, this court had occasion to consider whether the services rendered by a surveyor in surveying in part a subdivision was an improvement within the meaning of the statute now under consideration. In the case here referred to this court held that such services were not an improvement and that the party who rendered them was not entitled to a mechanic's lien. This court said:

11.

"Section 37, Title 33, Code 1940, provides that every person '* * * who shall do or perform any work, or labor upon, or furnish any material, fixture, engine, boiler, or machinery for any building or improvement on land, or for repairing, altering, or beautifying the same, * * * shall have a lien therefor on such building or improvements and on the land on which the same is situated, * * *,' etc.

"By its language, the statute gives the lien first on the building or improvement, then on the land. Unless the improvement on which the lien can be fastened exists, the lien never attaches to the land. The statute gives a lien for work on an improvement on land, but does not give a lien for work on land in the absence of an improvement or building thereon."

In other words before there can be a lien, there must be an improvement and the lien does not attach in the absence of an improvement or building.

In Wilkinson v. Rowe, supra, reference is made to the fact that some states have what is referred to as graders' statutes which give a lien on realty to one who clears, grades, fills or otherwise improves real property or any street or road in front of or adjoining the same. See Daugherty v. Gunther, 153 P. (Wash.),

336. In Wilkinson v. Rowe, supra, this court further said:

"Here, we are concerned with a remedy given by statute for work done on an improvement on land. If the 'improvement' contemplated by the statute does not exist, the remedy given by the statute does not apply.

"* * * A builder's or mechanic's lien is purely statutory. Its character, operation and extent must be ascertained by the terms of the statute creating and defining it. Of itself, it is a peculiar, particular, special remedy given by statute, founded and circum-

12.

scribed by the terms of its creation, and the courts are powerless to take it up where the statute may leave it, and extend it to meet facts and circumstances, which they may believe present a case of equal merit, or a necessity of the same kind, as the cases of necessities for which the statute provides.' *Copeland v. Kahoe & Ramsey, supra* (67 Ala. 594)."

Section 37, Title 33, Code of 1940, does not entitle J. W. Bain, doing business as Bain Construction Company to a mechanic's lien for clearing land for the reason that there are no improvements on the land to which such a lien can attach.

As fortifying our view that the word "improvement" in § 37 does not include leveling or grading of the land, we refer to § 38, Title 33, Code of 1940, which provides the method by which priority between a mechanics lien and a mortgage on the property may be determined. The mechanic's lien provided for in § 37 as to the land, buildings or improvements thereon "shall have priority over all other liens, mortgages or incumbrances created subsequent to the commencement of work on the building or improvement; * * *". But "as to liens, mortgages or incumbrances created prior to the commencement of the work, the lien for such work shall have priority only against the building or improvement, the product of such work which is an entirety, separable from the land, building or improvement subject to the prior lien, mortgage or incumbrance, and which can be removed therefrom without impairing the value or

13.

security of any prior lien, mortgage or incumbrance; and the person entitled to such lien may have it enforced by a sale of such buildings or improvement under the provisions of this article and the purchaser may, within a reasonable time thereafter, remove the same."

Assuming that the mortgage on the land was made prior to the work and labor for which the mechanic's lien was given, then the lien may be enforced by a sale of such buildings or improvement. There is no provision in the statute in this event for the sale of the land. Accordingly, if the improvement is the grading or leveling of the land, how can such grading and leveling be sold under section 38 without a sale of the land itself? We think this indicates that the Alabama statutes were not intended to give a lien for merely leveling or grading the land.

We quite understand that an equity court where there was a mortgage on the land in a suit to enforce a mechanic's lien can, under certain circumstances, order a sale of the entire property, adjusting priorities in the proceeds on equitable principles. — Baker Sand Etc. Co. v. Rogers Plumbing Etc. Co., 228 Ala. 612, 154 So. 591, 102 ALR 346. But the power of an equity court in this regard still does not determine the meaning of the word "improvement" in the statute.

It should be added that the demurrer raises no question of priority as between the lien claimed and the mortgage to Henry Hazel

14.

Of course, the legislature has the power to extend the right to a lien to cover clearing or grading land but the courts do not have the power to establish such a lien by judicial decree.

Since the views expressed by me are not in accordance with the majority opinion of the court, I respectfully dissent.

Livingston, C. J., and Coleman, J., concur.

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

1st Div., No. 952,

HENRY MAZEL, Appellant

vs.

J. W. BAIN d/b/a BAIN CONSTRUCTION COMPANY, Appellee,

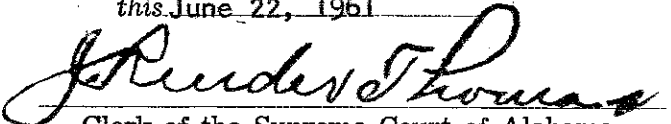
From BALDWIN Circuit Court.
IN EQUITY

The State of Alabama, }
City and County of Montgomery, }

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to fourteen inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, J. Render Thomas, Clerk of the
Supreme Court of Alabama,

this June 22, 1961


Clerk of the Supreme Court of Alabama

THE SUPREME COURT OF ALABAMA

October Term, 19 60-61

1st Div., No. 952

HENRY MAZEL

Appellant,

vs.

J. W. BAIN d/b/a BAIN CONSTRUCTION

COMPANY

Appellee.

From BALDWIN CIRCUIT Court.
IN EQUITY

COPY OF OPINION

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

October Term, 19 60-61

To the Register of the Circuit Court,
Baldwin County—Greeting:

Whereas, the Record and Proceedings of the Circuit Court
of said county, in a certain cause lately pending in said Court between
Henry Mazel, Appellant,

and
J. W. Bain d/b/a Bain Construction Company, Appellee,

wherein by said Court it was considered adversely to said appellant, were brought before our
Supreme Court, by appeal taken, pursuant to law, on behalf of said appellant:

NOW, IT IS HEREBY CERTIFIED, That it was thereupon considered, ordered, adjudged, and de-
creed by our Supreme Court, on the 22 day of June, 19 61, that said
Decree of said Circuit Court be in all things

affirmed, and that it was further considered, ordered, adjudged, and decreed that the appellant,
~~xxx~~ Henry Mazel, and J. B. Blackburn surety on the appeal bond
pay

the costs accruing on said appeal in this Court and in the court below, for which costs let execution
issue.

Witness, J. Render Thomas, Clerk of the Supreme
Court of Alabama, at the Judicial Department
Building, this the 22 day of June

, 1961


Clerk of the Supreme Court of Alabama.

THE SUPREME COURT OF ALABAMA

October Term, 19 60-61

1 Div., No. 952

Henry Mazel

Appellant,

vs.

J. W. Bain, d/b/a Bain

Construction Co.

Appellee.

From Baldwin Circuit Court.
In Equity No. 4657

**CERTIFICATE OF
AFFIRMANCE**

The State of Alabama,

Baldwin County.

} *Filed*

this 9th day of June 1961

Reis J. French

Div. No. _____

CERTIFICATE OF APPEAL. (Equity Cases.)

No. 4657

J.W. BAIN, d/b/a BAIN CONSTRUCTION COMPANY
Complainant.

VS.

RICHARD J. TRESTER, EVA MARIE TRESTER
and HENRY MAZEL Respondent.

I, Alice J. Duck Register of the Circuit Court In Equity,
Baldwin County, Alabama, hereby certify that in the cause of
J.W. Bain, d/b/a BAIN CONSTRUCTION COMPANY Complainant,

VS.

RICHARD J. TRESTER, EVA MARIE TRESTER, and HENRY MAZEL Respondent,
which was tried and determined in this Court on the 18 day of
October 1960, in which there was a decree in favor of the
Complainant

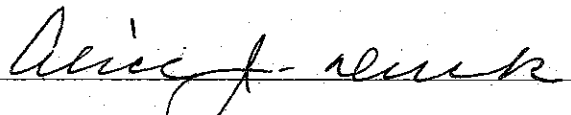
On the 8th day of November 1960 the Respondent, Henry Mazel
took an appeal to the
Supreme Court of Alabama, to be holden of and for said State.

I further certify that Respondent, Henry Mazel
filed security for cost of appeal, to the Supreme Court,
on the 8th day of November 1960, and that J.E. Blackburn

is
~~surety~~ surety on the appeal bond.

I further certify that notice of said appeal was on the 9th
day of November, 1960, served on _____
as attorney of record for said appellee.

Witness my hand and the seal of this Court, this the 9th day
of November, 1960


Register of the Circuit Court In Equity of

Baldwin County, Alabama.

J. W. BAIN, d/b/a BAIN)
CONSTRUCTION COMPANY,)

VS. Complainant,)

RICHARD J. TRESTER, EVA MARIE)
TRESTER and HENRY MAZEL,)

Respondents.)

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY NO. 4657

ORDER EXTENDING TIME FOR FILING TRANSCRIPT

On motion of the appellant, Henry Mazel, and for good cause shown, the time for filing the transcript in this cause with the Clerk of the Supreme Court of Alabama shall be and it is hereby extended until February 1, 1961.

Dated this 5th day of January, 1961.

Hubert M. Stace

Judge

FILED

JAN 6 1961

ALICE L. DUCK, CLERK
REGISTER

ORDER EXTENDING TIME FOR FILING
TRANSCRIPT.

J. W. BAIN, d/b/a BAIN CON-
STRUCTION COMPANY,

VS. Complainant,

RICHARD J. TRESTER, EVA MARIE
TRESTER and HENRY MAZEL,

Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY NO. 4657

J. W. BAIN, d/b/a BAIN CONSTRUCTION COMPANY,)	
)	
Complainant,)	IN THE CIRCUIT COURT OF
VS.)	BALDWIN COUNTY, ALABAMA
)	
RICHARD J. TRESTER, EVA MARIE TRESTER and HENRY MAZEL,)	IN EQUITY NO. 4657
)	
Respondents.)	

ORDER EXTENDING TIME FOR FILING TRANSCRIPT

On motion of the appellant, Henry Mazel, and for good cause shown, the time for filing the transcript in this cause with the Clerk of the Supreme Court of Alabama shall be and it is hereby extended until February 1, 1961.

Dated this 5th day of January, 1961.

Judge

J. W. BAIN, d/b/a BAIN)
CONSTRUCTION COMPANY,)
)
Complainant,)
VS.)
)
)
RICHARD J. TRESTER, EVA MARIE)
TRESTER and HENRY MAZEL,)
)
Respondents.)

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY NO. 4657

APPEAL

Now comes Henry Mazel, one of the respondents in this cause, and appeals to the Supreme Court of Alabama from the decree rendered in this cause on, to-wit, October 18, 1960, overruling respondent's demurrer to the bill of complaint in this cause.

Dated this 8th day of November, 1960.

HENRY MAZEL

By

~~Attorney for said respondent~~

SECURITY FOR COSTS

I hereby acknowledge myself as security for the costs of this appeal.

Dated this 8th day of November, 1960.

Taken and approved on this the
3 day of November, 1960.

Register of the Circuit Court of
Baldwin County, Alabama

APPEAL

J. W. BAIN, d/b/a BAIN CON-
STRUCTION COMPANY,

Complainant,

VS.

RICHARD J. TRESTER, EVA MARIE
TRESTER and HENRY MAZEL,

Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY NO. 4657

FILED

NOV 3 1960

ALICE L. DUCK, CLERK
REGISTER

J. W. BAIN, d/b/a BAIN CONSTRUCTION COMPANY,)	
)	
Complainant,)	IN THE CIRCUIT COURT OF
VS.)	BALDWIN COUNTY, ALABAMA
)	
RICHARD J. TRESTER, EVA MARIE TRESTER and HENRY MAZEL,)	IN EQUITY NO. 4657
)	
Respondents.)	


CITATION OF APPEAL

TO J. W. BAIN, d/b/a BAIN CONSTRUCTION COMPANY, AND TO WILTERS AND BRANTLEY, ATTORNEYS FOR THE SAID J. W. BAIN, d/b/a BAIN CONSTRUCTION COMPANY:

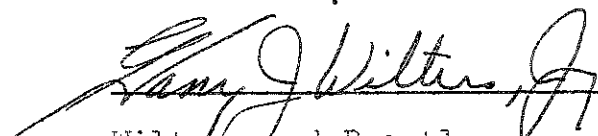
WHEREAS, Henry Mazel, one of the respondents in this cause, did on this date pray for and obtain an appeal to the Supreme Court of the State of Alabama from the decree rendered in the above stated cause by the Circuit Court of Baldwin County, Alabama, in Equity, dated October 18, 1960, overruling respondent's demurrer to the bill of complaint, and has filed security for the cost of said appeal:

NOW, THEREFORE, you are hereby cited to appear in the Supreme Court of Alabama and defend the said appeal, if you think proper so to do.

WITNESS my hand this 8th day of November, 1960.


Register

Service accepted on this the 9th day of November, 1960.


Wilters and Brantley
Attorneys for J. W. Bain, d/b/a Bain
Construction Company

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

Special
~~October~~ Term, 19 63

To the Clerk of the Circuit Court,
Baldwin County—Greeting:

Whereas, the Record and Proceedings of the Circuit Court
of said county, in a certain cause lately pending in said Court between
J. W. Bain, d/b/a Bain Construction Company, Appellant,
and
Henry Mazel, Appellee,

wherein by said Court it was considered adversely to said appellant, were brought before our
Supreme Court, by appeal taken, pursuant to law, on behalf of said appellant:

NOW, IT IS HEREBY CERTIFIED, That it was thereupon considered, ordered, and adjudged by
our Supreme Court, on the 26th day of September, 19 63, that said
judgment of said Circuit Court be in all things
affirmed, and that it was further considered, ordered, and adjudged that the appellant, and
Harry J. Wilters, Jr., Tolbert M. Brantley and Phyllis
S. Nesbit, sureties on the appeal bond,
pay

the costs accruing on said appeal in this Court and in the Court below, for which costs let execution
issue.

Witness, J. Render Thomas, Clerk of the Supreme
Court of Alabama, at the Judicial Department
Building, this the 26th day of
September, 19 63

J. Render Thomas
Clerk of the Supreme Court of Alabama.

THE SUPREME COURT OF ALABAMA

Special

~~XXXXXX~~
October Term, 19 63

1 Div., No. 170

J. W. Bain, d/b/a

Bain Construction Co.

Appellant,

vs.

Henry Mazel

Appellee.

From Baldwin Circuit Court.

CERTIFICATE OF
AFFIRMANCE

The State of Alabama,

Baldwin County.

} Filed

this

day of

19

SEP 27 1963

ALICE J. DUCK,

CLERK
REGISTER

SEP 26 1963

THE STATE OF ALABAMA - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1963

1 Div. 170

J. W. Bain,
d/b/a Bain Construction Company

v.

Henry Mazel

Appeal from Baldwin Circuit Court

MERRILL, JUSTICE.

Appeal from a decree sustaining respondent Mazel's plea
in abatement to an amended bill in equity seeking to enforce a
mechanic and materialman's lien.

2.

Appellant Bain filed his bill against Richard Trester and his wife, as the owners of certain land to be improved under a written contract with them, and against appellee Mazel, as mortgagee, who received and recorded his mortgage from the Tresters after the work had commenced but before it was completed. Exhibit A to the bill was appellant's recorded notice which was in proper form and listed the Tresters as the owners or proprietors of the land on which the lien was sought.

There was no service on the Tresters. Appellee Mazel demurred on the ground that the alleged work done by appellant in cleaning and grading the land was not an improvement which was lienable under Tit. 33, § 37, Code 1940. The demurrer was overruled, and the decree was appealed to this court under Tit. 7, § 755, prior to its amendment disallowing such appeals. We affirmed, Mazel v. Bain, 272 Ala. 640, 133 So. 2d 44.

After affirmance, appellant amended his bill stating that the Tresters had moved to California, that their mortgage to Mazel had been foreclosed, that title to the property was now in Mazel and the respondent Tresters "no longer being necessary parties to this suit are now by the Complainant stricken as parties Respondent." There still had been no service on the Tresters.

Appellee Mazel then filed a plea in abatement taking the point that the Tresters were necessary parties and since they were stricken, the action should be abated because of the nonjoinder of the Tresters. The plea in abatement was sustained and the cause was dismissed when complainant refused to plead further.

3.

A plea in abatement is the appropriate method of raising the question of nonjoinder. Becker Roofing Co. v. Pike, 230 Ala. 289, 160 So. 692.

The proper way of testing a plea in abatement in equity is to set it down for hearing and have the court determine whether or not it is sufficient. Cherry Investment Corp. v. Folsom, 273 Ala. 575, 143 So. 2d 181. That procedure was followed by the trial court.

The assignment of error argued in brief raised the question: Did the court err in sustaining the plea in abatement on the ground that the owners or proprietors of the land were necessary parties? We hold that the court ruled correctly.

The statute, Tit. 33, § 37, gives a lien for work or labor upon, or for furnishing material for any building or improvement on land "under or by virtue of any contract with the owner or proprietor thereof."

A mortgagor in possession before foreclosure is the owner or proprietor within the meaning of the statute, and he is thereby authorized to contract for improvements on the mortgaged premises, even though legal title is in the mortgagee or his assignee, and the lien may be enforced against both the mortgagor and the mortgagee. Sorsby v. Woodlawn Lumber Co., 202 Ala. 566, 81 So. 68; Central Lumber Co. v. Jacks, 222 Ala. 475, 132 So. 721.

We are not concerned here with the validity of the lien but with the attempt to enforce it in the equity court, and particularly with the question of whether the owners who did the contracting are necessary parties.

4.

He who is, at the time the suit is commenced, the owner of the building or land upon which the lien is sought to be enforced, "is a necessary party defendant without whose presence the lien cannot be declared or enforced." Hughes v. Torgerson, 96 Ala. 346, 11 So. 209; Roman v. Thorn, 83 Ala. 443, 3 So. 759. See Sturdavant v. First Ave. Coal & Lumber Co., 219 Ala. 303, 122 So. 178[4]; Woodson v. Wilson, 25 Ala. App. 241, 144 So. 122.

The Tresters were the owners of the land within the meaning of the statute when the suit was commenced and they were necessary parties. When they were stricken as defendants, the mortgagee's plea in abatement was properly sustained.

The owners being necessary parties, the court properly dismissed the bill because of their absence. Builders' Supply Co. v. Smith, 222 Ala. 554, 133 So. 721.

AFFIRMED.

Lawson, Goodwyn and Harwood, JJ., concur.

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

1st Div., No. 170,

J. W. Bain, d/b/a Bain Construction Company, Appellant

vs.

Henry Mazel, Appellee,

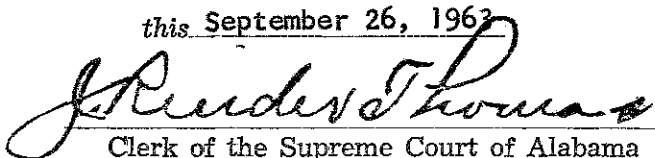
From Baldwin Circuit Court.

The State of Alabama,
City and County of Montgomery, }

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to four inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, J. Render Thomas, Clerk of the
Supreme Court of Alabama,

this September 26, 1963


Clerk of the Supreme Court of Alabama

THE SUPREME COURT OF ALABAMA

Special

~~October~~ Term, 19 63

1st Div., No. 170

J. W. Bain, d/b/a Bain Construction

Company

Appellant,

vs.

Henry Mazel

Appellee.

From Baldwin Circuit Court.
In Equity

COPY OF OPINION

J. W. BAIN, d/b/a BAIN
CONSTRUCTION COMPANY,

Complainant

VS

RICHARD J. TRESTER, EVA MARIE
TRESTER and HENRY MAZEL,

Respondents.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA


IN EQUITY

CASE NO. 4657

ORDER OVERRULING DEMURRERS

Upon consideration of the Demurrers filed by the Respondents to the Complainant's Bill of Complaint, the court is of the opinion that the said Demurrers should be overruled. It is, therefore, ORDERED, ADJUDGED AND DECREED that said Demurrers be, and the same are, hereby overruled.

This the 18th day of October, 1960.


Hubert M. Hall, Judge of the
Circuit Court

J. W. BAIN, d/b/a BAIN
CONSTRUCTION COMPANY,

Complainant

VS

RICHARD J. TRESTER, EVA MARIE
TRESTER and HENRY MAZEL,

Respondents

ORDER OVERRULING DEMURRERS

111

SUMMONS AND COMPLAINT

Moore Ptg. Co.

The State of Alabama, }

Baldwin County.

Circuit Court, Baldwin County

No. 1657

TERM, 19

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You Are Hereby Commanded to Summon RICHARD J. TRESTER, EVA MARIE TRESTER, &

HENRY MAZEL

to appear and plead, answer or demur, within thirty days from the service hereof, to the complaint filed in
the Circuit Court of Baldwin County, State of Alabama, at Bay Minette, against

RICHARD J. TRESTER, EVA MARIE TRESTER & HENRY MAZEL, Defendant

by J.W. BAIN, D/b/a BAIN CONSTRUCTION COMPANY

Plaintiff

Witness my hand this 23 day of JULY 1959

Alice J. Luck

Clerk

No. 4657 Page _____

The State of Alabama

Baldwin County

CIRCUIT COURT

J.W. BAIN, c/o/a BAIN

CONSTRUCTION COMPANY

Plaintiffs

vs.

RICHARD J. TRESTER, EVA MARIE

TRESTER AND HENRY MAZEL

Defendants

Summons and Complaint

Filed July 23, 1957

Alice J. Duck Clerk

Plaintiff's Attorney

Defendant's Attorney

Defendant lives at

Received In Office

19____

_____, Sheriff

I have executed this summons

this _____ 19____

by leaving a copy with

Sheriff

Deputy Sheriff

J. W. BAIN, d/b/a
BAIN CONSTRUCTION COMPANY

COMPLAINANT

VS

RICHARD J. TRESTER, EVA MARIE

TRESTER AND HENRY MAZEL

RESPONDENTS

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA,
IN EQUITY

TO THE HONORABLE HUBERT M. HALL, JUDGE OF THE CIRCUIT COURT OF BALDWIN
COUNTY, ALABAMA, SITTING IN EQUITY:

J. W. Bain, d/b/a Bain Construction Company presents this bill of
Complaint against Richard J. Trester, Eva Marie Trester and Henry Mazel
and thereupon your Complainant shows unto Your Honor and this Honorable
Court as follows:

1.

That your Complainant is over the age of 21 years and is a resident
of Baldwin County, Alabama; that the Respondents, Richard J. Trester,
Eva Marie Trester and Henry Mazel are over the age of 21 years and are
residents of Baldwin County, Alabama.

2.

That your Complainant and the Respondents, Richard J. Trester and
Eva Marie Trester, entered into a written agreement on to-wit the 20th
day of February, 1959, for the clearing of lands hereinafter described,
which included pushing stumps and scrub oaks, raking and leveling the
said lands and on that date your Complainant did commence the said work
and labor and that he did complete the contract on the following described
lands in Baldwin County, Alabama, to-wit:

North half of Southwest quarter of Section 12,
Township 6 South, Range 3 East;

That there is now due and unpaid a balance of \$381.25 with interest
thereon.

The Complainant alleges that the above described property is the property of the Respondents, Richard J. Trester and Eva Marie Trester; that the said work or labor was done and performed on the said lands improving the same under and by virtue of the above mentioned contract with the said Richard J. Trester and Eva Marie Trester, the owners or proprietors thereof; that within six months after the said indebtedness had matured, on to-wit, the 18th day of June, 1959, Complainant did file in the office of the Judge of Probate of Baldwin County, Alabama, wherein said land is situated, a verified statement as required by law, a copy of which is attached hereto and made a part hereof and marked Exhibit "A"; wherefore, the Complainant claims a lien for said amount upon said land, buildings and improvements situated thereon.

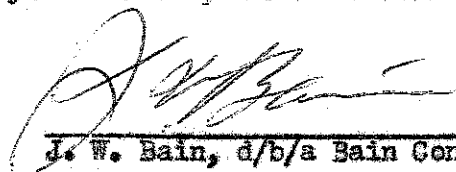
That the above described tract of land is not in a city, town or village and that the above described lands include, but do not exceed, the area upon which the work and labor was performed by the Complainant.

Complainant further avers that on January 6, 1958, the Respondents, Richard J. Trester and Eva Marie Trester, executed a mortgage on the above described lands to Henry Mazel and that the said mortgage was recorded in the office of the Judge of Probate of Baldwin County, Alabama, on April 9, 1959, in Mortgage Book 314, pages 254-6, subsequent to the entering into of the contract above described and commencement of work by your Complainant and that the lien claimed by your Complainant on the above described property and improvements thereon is superior to the lien of the mortgage given by the Respondents, Richard J. Trester and Eva Marie Trester, to Henry Mazel.

PRAYER FOR PROCESS AND RELIEF

WHEREFORE, the premises considered, your Complainant prays that your Honor will by proper process make the said Richard J. Trester, Eva Marie Trester and Henry Mazel, party respondents to this Bill of Complainant requiring them to plead, answer or demur to the same within the time and under the penalties prescribed by law and the practice of this honorable court.

Your Complainant further prays that upon a final hearing hereof, Your Honor will ascertain and fix the indebtedness due from the Respondents, Richard J. Trester and Eva Marie Trester, to the complainant; that a lien on the above described property be fixed and established in the form and manner prescribed by law; that the court will decree that the lien of your Complainant is superior to the lien created by the mortgage from the Respondents, Richard J. Trester and Eva Marie Trester, to the Respondent Henry Mazel; and in the event the amount due to the Complainant is not paid within a reasonable time to be fixed by this court that the above described lands be ordered sold to satisfy the said lien; Your Complainant prays for such other, further, different or general relief to which in equity he may be entitled and as in duty bound he will ever pray. Your Complainant offers to do equity.


J. W. Bain, d/b/a Bain Construction Co.

STATE OF ALABAMA

BALDWIN COUNTY

Before me, the undersigned authority, in and for said County, in said State, personally appeared J. W. Bain, who first by me being duly sworn, deposes and says: That he has read the foregoing bill of Complaint and that the statements contained therein are true and correct to the best of his knowledge.



Sworn to and subscribed before me on this the 22nd day of July, 1959.


Notary Public, Baldwin County, Ala.

FILED
JUL 23 1959
ALICE J. DUCK, Register

STATE OF ALABAMA

COUNTY OF BALDWIN

J. W. BAIN d/b/a BAIN CONSTRUCTION COMPANY files this statement in writing, verified by the oath of J. W. BAIN, who has personal knowledge of the facts herein set forth:

That said J. W. BAIN claims a lien upon the following property, situated in Baldwin County, Alabama, to wit:

The North half of the Southwest quarter, of Section 12, Township 6 South, Range 3 East.

This lien is claimed, separately and severally, as to both the buildings and improvements thereon, and the said land.

That said lien is claimed to secure and indebtedness of \$331.25 with interest, from to wit 27th day of February, 1959, for pushing stumps, scrub oaks, rake and clearing the above lands.

The name of the owner or proprietor of the said property is RICHARD J. CRASTER AND EVA MARIE CRASTER.

S/ J. W. Bain
Claimant.

Before me, HARRY J. WILTERS, JR., a notary public in and for the County of Baldwin, State of Alabama, personally appeared J. W. BAIN, who being duly sworn, doth depose and say: That he has personal knowledge of the facts set forth in the foregoing statement of lien, and that the same are true and correct to the best of his knowledge and belief.

S/ J. W. Bain
Affiant.

Subscribed and sworn to before me on this the 17th day of June, 1959, by said affiant.

(SEAL)

S/ Harry J. Wilters, Jr.
Notary Public, Baldwin County,

Alabama

STATE OF ALABAMA, BALDWIN COUNTY

Filed 6-18-59 2 P.M.

Recorded Deed Book 279 Page 271

S/ MC Stuart
Judge of Probate

FILED

JUL 23 1959

ALICE J. DUCK, Register

THE STATE OF ALABAMA
Baldwin County - Circuit Court

TO ANY SHERIFF OF THE STATE OF ALABAMA — GREETING:


Whereas, at a Term of the Circuit Court of Baldwin County, held on the
17th June, 1963 ~~Monday~~, 1963, in a cer-
tain cause in said Court wherein J.W. Bain, d/b/a Bain Construction Company
Plaintiff, and Richard J. Trester, Eva Marie Trester
and Henry Mazel Defendant, a judgement was rendered against said
J.W. Bain, d/b/a Bain Construction Company
to reverse which Judgment, the said Complainant

applied for and obtained from this office an APPEAL, returnable to the ~~1st~~ next
Term of our Supreme Court of the State of Alabama, to be held at Montgomery, on
the _____ day of _____, 1963 next, and the necessary bond
having been given by the said Harry J. Wilters, Jr., Tolbert M. Brantley and
~~with~~ Phyllis S. Nesbit, sureties,

Now, You Are Hereby Commanded, without delay, to cite the said Richard J. Trester, Eva
Marie Trester and Henry Mazel or Hon. J.B. Blackburn
, attorney, to appear at the next Term of our
said Supreme Court, to defend against the said Appeal, if they think proper.

Witness, ALICE J. DUCK, Clerk of the Circuit Court of said County, this 15th
day of July, A. D., 1963.

Attest:

 Clerk.

Received 15 day of July 1963
and on 22 day of July 1963
serve a copy of the within Citation
on J. B. Blackman

By service on _____

TAYLOR WILKINS, Sheriff
By W. A. Talbot D. S.
om

720.4667

CIRCUIT COURT
Baldwin County, Alabama

J. W. Bain Construction Co

Vs. { Citation in Appeal

Richard J. Trester

Issued _____ day of _____, 196____,

W. A. Talbot

H. J. Blackman

Div. No.

CERTIFICATE OF APPEAL (Equity Cases.)

No. 4657

J.W. BAIN, d/b/a BAIN CONSTRUCTION COMPANY
Complainant.

vs.

RICHARD J. TRESTER, EVA MARIE TRESTER & HENRY MAZEL
Respondent.

I, Alice J. Duck Register of the Circuit Court in Equity,
Baldwin County, Alabama, hereby certify that in the cause of
J.W. Bain, d/b/a Bain Construction Company Complainant,

vs.

Richard J. Trestler, Eva Marie Trestler & Henry Mazel Respondent,

which was tried and determined in this Court on the 17th day of
June 1963, in which there was a decree in favor of the
Defendants

On the 12th day of July 1963, the Complainant
took an appeal to the
Supreme Court of Alabama, to be holden of and for said State.

I further certify that the Complainant
filed security for cost of appeal, to the Supreme Court,
on the 12th day of July 1963, and that Harry J. Wilton
Jr., Tolbert M. Brantley and Phyllis S. Nesbit
are sureties on the appeal bond.

I further certify that notice of said appeal was on the 22nd
day of July 1963, served on Hon. J.B. Blackburn
as attorney of record for said appellee.

Witness my hand and the seal of this Court, this the 15th day of
July 1963

Alice J. Duck
Register of the Circuit Court In Equity of
Baldwin County, Alabama.

J. W. BAIN, d/b/a BAIN CONSTRUCTION COMPANY,)	
)	
VS. Complainant,)	IN THE CIRCUIT COURT OF
)	BALDWIN COUNTY, ALABAMA
RICHARD J. TRESTER, EVA MARIE TRESTER and HENRY MAZEL,)	IN EQUITY NO. 4657
)	
Respondents.)	

DEMURRER

I

Now comes Henry Mazel, one of the respondents in this cause, by his attorney, and demurs to the bill of complaint filed in this cause and as grounds of such demurrer assigns, separately and severally, the following:

1. There is no equity in the bill of complaint.
2. No facts are alleged on which the relief sought can be granted.
3. No facts are alleged to show that the complainant has performed any services which entitle him to the lien claimed.
4. No facts are alleged to show that the complainant is entitled to claim a lien on the property described in the bill of complaint.
5. No facts are alleged to show that the alleged work done by the complainant was such that he was entitled to a lien therefor under the provisions of Title 33, Section 37 of the 1940 Code of Alabama.
6. No facts are alleged to show that the notice required by Title 33, Section 37 of the 1940 Code of Alabama was given to this respondent.
7. No facts are alleged to show that the complainant had any agreement or contract with this respondent or with his agent, architect, trustee, contractor or subcontractor.
8. No facts are alleged to show whether the real property described in the bill of complaint is located within any city, town or village.

9. The allegations of the bill of complaint are vague, indefinite and uncertain in that it does not allege that the land described therein is located within or without any city, town or village.

10. No facts are alleged to show that any building or improvements were erected by the complainant on the land described in the bill of complaint.

11. It affirmatively appears from the bill of complaint that no buildings or improvements were erected by the complainant on the lands described therein.

12. No facts are alleged to show that the complainant did any work in connection with the erection of any building or improvement on the land described in the bill of complaint.

13. No facts are alleged to show that the complainant performed any labor in connection with the erection of any building or improvement on the land described in the bill of complaint.

14. No facts are alleged to show that the complainant did any work or furnished any labor for improvements or structures on the land described in the bill of complaint.

II

Now comes Henry Mazel, one of the respondents in this cause, by his attorney, and demurs to that aspect of the bill of complaint in which the complainant is seeking to establish a lien on the property described in the bill of complaint, and as grounds of such demurrer assigns, separately and severally, grounds numbered 1 through 14, both inclusive, just as though the same were specifically rewritten here.

J. T. Blackburn
Attorney for respondent, Henry Mazel

FILED

APR 15 1960

ALICE L. DICK CLERK
REGISTER

DEMURRER

J. W. BAIN, d/b/a BAIN CON-
STRUCTION COMPANY,

Complainant,

VS.

RICHARD J. TRESTER, EVA MARIE
TRESTER and HENRY MAZEL,

Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY NO. 4657

FILED
APR 15 1960
ALICE L. DUCK, CLERK
REGISTER

J. W. BAIN, d/b/a BAIN CONSTRUCTION COMPANY,	X	
	X	
Complainant,	X	IN THE CIRCUIT COURT OF
	X	
Vs.	X	BALDWIN COUNTY, ALABAMA
	X	
RICHARD J. TRESTER, EVA MARIE TRESTER and HENRY MAZEL,	X	IN EQUITY
	X	
Respondents.	X	CASE NO. 4657

NOTICE OF APPEAL

Comes now J. W. Bain, d/b/a Bain Construction Company, Complainant in this cause, and appeals to the Supreme Court of Alabama from the Decree rendered in this cause on the 17th day of June, 1963, sustaining the Respondents' Plea in Abatement and dismissing this cause with prejudice because of the Complainant's refusal to plead further.

Dated this the 11th day of July, 1963.

J. W. BAIN, d/b/a BAIN CONSTRUCTION COMPANY

BY: *Phyllis J. Nesbit*
Attorney for Complainant

.

SECURITY FOR COSTS

We hereby acknowledge ourselves as security for the costs of this appeal.

Dated this the 11th day of July, 1963.

WILTERS, BRANTLEY & NESBIT

James J. Wilters
Robert M. Brantley
Phyllis J. Nesbit

Taken and approved on this the
17 day of July, 1963.

Walter J. Welch
Register of the Circuit Court of
Baldwin County, Alabama

FILED
JUL 18
CLERK
REGISTER

J. W. BAIN, d/b/a
BAIN CONSTRUCTION COMPANY

COMPLAINANT

VS

RICHARD J. TRESTER, EVA MARIE

TRESTER AND HENRY MAZEL

RESPONDENTS

4657
IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA,
IN EQUITY

TO THE HONORABLE HUBERT M. HALL, JUDGE OF THE CIRCUIT COURT OF BALDWIN
COUNTY, ALABAMA, SITTING IN EQUITY:

J. W. Bain, d/b/a Bain Construction Company presents this bill of
Complaint against Richard J. Trester, Eva Marie Trester and Henry Mazel
and thereupon your Complainant shows unto Your Honor and this Honorable
Court as follows:

1.

That your Complainant is over the age of 21 years and is a resident
of Baldwin County, Alabama; that the Respondents, Richard J. Trester,
Eva Marie Trester and Henry Mazel are over the age of 21 years and are
residents of Baldwin County, Alabama.

2.

That your Complainant and the Respondents, Richard J. Trester and
Eva Marie Trester, entered into a written agreement on to-wit the 20th
day of February, 1959, for the clearing of lands hereinafter described,
which included pushing stumps and scrub oaks, raking and leveling the
said lands and on that date your Complainant did commence the said work
and labor and that he did complete the contract on the following described
lands in Baldwin County, Alabama, to-wit:

North half of Southwest quarter of Section 12,
Township 6 South, Range 3 East;

That there is now due and unpaid a balance of \$881.25 with interest
thereon.

3.

The Complainant alleges that the above described property is the property of the Respondents, Richard J. Trester and Eva Marie Trester; that the said work or labor was done and performed on the said lands improving the same under and by virtue of the above mentioned contract with the said Richard J. Trester and Eva Marie Trester, the owners or proprietors thereof; that within six months after the said indebtedness had matured, on to-wit, the 18th day of June, 1959, Complainant did file in the office of the Judge of Probate of Baldwin County, Alabama, wherein said land is situated, a verified statement as required by law, a copy of which is attached hereto and made a part hereof and marked Exhibit "A"; wherefore, the Complainant claims a lien for said amount upon said land, buildings and improvements situated thereon.

That the above described tract of land is not in a city, town or village and that the above described lands include, but do not exceed, the area upon which the work and labor was performed by the Complainant.

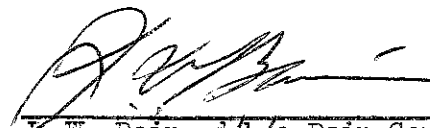
4.

Complainant further avers that on January 6, 1958, the Respondents, Richard J. Trester and Eva Marie Trester, executed a mortgage on the above described lands to Henry Mazel and that the said mortgage was recorded in the office of the Judge of Probate of Baldwin County, Alabama, on April 9, 1959, in Mortgage Book 314, pages 254-6, subsequent to the entering into of the contract above described and commencement of work by your Complainant and that the lien claimed by your Complainant on the above described property and improvements thereon is superior to the lien of the mortgage given by the Respondents, Richard J. Trester and Eva Marie Trester, to Henry Mazel.

PRAYER FOR PROCESS AND RELIEF

WHEREFORE, the premises considered, your Complainant prays that your Honor will by proper process make the said Richard J. Trester, Eva Marie Trester and Henry Mazel, party respondents to this Bill of Complainant requiring them to plead, answer or demur to the same within the time and under the penalties prescribed by law and the practice of this honorable court.

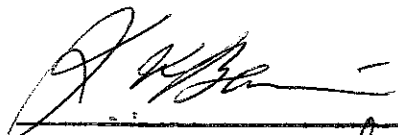
Your Complainant further prays that upon a final hearing hereof, Your Honor will ascertain and fix the indebtedness due from the Respondents, Richard J. Trester and Eva Marie Trester, to the complainant; that a lien on the above described property be fixed and established in the form and manner prescribed by law; that the court will decree that the lien of your Complainant is superior to the lien created by the mortgage from the Respondents, Richard J. Trester and Eva Marie Trester, to the Respondent Henry Mazel; and in the event the amount due to the Complainant is not paid within a reasonable time to be fixed by this court that the above described lands be ordered sold to satisfy the said lien; Your Complainant prays for such other, further, different or general relief to which in equity he may be entitled and as in duty bound he will ever pray. Your Complainant offers to do equity.


J. W. Bain, d/b/a Bain Construction Co.

STATE OF ALABAMA

BAIRDWIN C OUNTY

Before me, the undersigned authority, in and for said County, in said State, personally appeared J. W. Bain, who first by me being duly sworn, deposes and says: That he has read the foregoing bill of Complaint and that the statements contained therein are true and correct to the best of his knowledge.



Sworn to and subscribed before me on this the 22nd day of July, 1959.


Notary Public, Baldwin County, Ala.

FILED
JUL 23 1959
ALICE J. DUCK, Register

STATE OF ALABAMA

COUNTY OF BALDWIN

J. W. BAIN d/b/a BAIN CONSTRUCTION COMPANY files this statement in writing, verified by the oath of J. W. BAIN, who has personal knowledge of the facts herein set forth:

That said J. W. BAIN claims a lien upon the following property, situated in Baldwin County, Alabama, to wit:

The North half of the Southwest quarter, of Section 12,
Township 6 South, Range 3 East.

This lien is claimed, separately and severally, as to both the buildings and improvements thereon, and the said land.

That said lien is claimed to secure and indebtedness of \$881.25 with interest, from to wit 27th day of February, 1959, for pushing stumps, scrub oaks, rake and clearing the above lands.

The name of the owner or proprietor of the said property is
RICHARD J. TRESTER AND EVA MARIE TRESTER.

S/ J. W. Bain
Claimant.

Before me, HARRY J. WILTERS, JR., a notary public in and for the County of Baldwin, State of Alabama, personally appeared J. W. BAIN, who being duly sworn, doth depose and say: That he has personal knowledge of the facts set forth in the foregoing statement of lien, and that the same are true and correct to the best of his knowledge and belief.

S/ J. W. Bain
Affiant.

Subscribed and sworn to before me on this the 17th day of June, 1959, by said affiant.

(SEAL)

S/ Harry J. Wilters, Jr.
Notary Public, Baldwin County,

Alabama

STATE OF ALABAMA, BALDWIN COUNTY

Filed 6-18-59 2 P.M.

Recorded Deed Book 279 Page 271

S/ MC Stuart
Judge of Probate

G

FILED
JUL 23 1959
ALICE J. DUCK, Register

SUMMONS AND COMPLAINT

Moore Ptg. Co.

The State of Alabama, }

Baldwin County.

Circuit Court, Baldwin County

No. 4657

TERM, 19

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You Are Hereby Commanded to Summon RICHARD J. TRESTER, EVA MARIE TRESTER, &

HENRY MAZEL

to appear and plead, answer or demur, within thirty days from the service hereof, to the complaint filed in
the Circuit Court of Baldwin County, State of Alabama, at Bay Minette, against

RICHARD J. TRESTER, EVA MARIE TRESTER & HENRY MAZEL, Defendant

by J.W. BAIN, D/b/a BAIN CONSTRUCTION COMPANY, Plaintiff

Witness my hand this 23 day of JULY 1959

Alice J. Luck, Clerk

No. 4657 Page _____

The State of Alabama

Baldwin County

CIRCUIT COURT

J.W. BAIN, d/b/a BAIN

CONSTRUCTION COMPANY

Plaintiffs

vs.

RICHARD J. TRESTER, EVA MARIE

TRESTER AND HENRY MAZEL

Defendants

Summons and Complaint

Filed July 23, 1959

Alice J. Duck Clerk

Plaintiff's Attorney

Defendant's Attorney

Defendant lives at _____

Received In Office

7/23 1959

_____, Sheriff

I have executed this summons

this 11/15 1960

by leaving a copy with

Henry Mazel

Returned 15 day of Jan 1960

Not found in my county after diligent search and i
quiry. Richard Trester & Eva Trester

Taylor Wilkins, Sheriff

BY W.O. Garner Deputy Sheriff

Sheriff claims 60 miles at

Ten Cents per mile Total \$ 6.00

TAYLOR WILKINS, Sheriff

BY Garner DEPUTY SHERIFF

Taylor Wilkins Sheriff

W.O. Garner Deputy Sheriff

Silverhill

Defendants live just
out of Robertsville on
road to Silverhill