

1949

John H. Chase v. Kirby S. Dawson and Elinor W. Dawson : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

JOHN H. CHASE,

Plaintiff and Respondent

vs.

KIRBY S. DAWSON and ELINOR
W. DAWSON, his wife,

Defendants and Appellants

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CLERK, SUPREME COURT, UT

BRIEF OF RESPONDENT

RAY S. McCARTY

*Attorney for Plaintiff
and Respondent*

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IN THE SUPREME COURT of the STATE OF UTAH

JOHN H. CHASE,

Plaintiff and Respondent

vs.

KIRBY S. DAWSON and ELINOR
W. DAWSON, his wife,

Defendants and Appellants

Case No. 7363

BRIEF OF RESPONDENT

INTRODUCTORY STATEMENT

The respondent feels that the Statement of the Case of the appellants is vague, uncertain, and to a certain extent confusing. Also, the appellants, in their index, have set up the following points:

“Denial by the court of motion to strike from the complaint matter not alleged in the notice of lien.

“Overruling demurrer to complaint.

“Overruling objection to Exhibit A, the notice of lien sued upon.

“Making findings of fact not alleged in the notice of lien.

“Making findings of fact not alleged in the complaint or the notice of lien.

“That the judgment is against law.

and gave no page number which would enable the respondent or court to correlate definitely the points with the argument.

On page 1, they set out what they claim are the three fundamental questions in the case, as follows:

1. The sufficiency of the notice of claim of lien relied upon by the respondent.
2. The right of the claimant's assignee to change, amend, add to or enlarge such claim by allegations in his complaint.
3. To further change, amend, add to or enlarge such claim by either evidence, or the findings of fact, after the case is closed and submitted.”

So, the writer feels that it is absolutely necessary to examine this case and determine just exactly the point or points to be argued.

RESPONDENT'S STATEMENT OF THE CASE

On October 14, 1948, the plaintiff, as the assignee of one George O. Chase, filed his complaint in the Dis-

trict Court of Salt Lake County, State of Utah (R. 1-3), to foreclose a mechanic's lien on defendants' property. The complaint is set out in appellants' brief on pages 2 and 3. The defendants then demurred generally to plaintiff's complaint (R. 7), and filed their notice of intention to strike (R. 8) from Paragraph 2 of plaintiff's complaint that which is here italicized:

“That on or about the 21st day of October, 1947, at Salt Lake City, Utah, George O. Chase, doing business as the Chase Lumber and Hardware Company, entered into an oral agreement with one J. S. Livingston, *a contractor employed by the defendants*, whereby it was agreed that the said George O. Chase furnish materials *for a home for defendants* located on the land hereinafter described, and that the agreed price of \$208.93 would be paid for said materials.”

That on December 7, 1948, the Honorable Roald A. Hogenson, one of the judges of the District Court of Salt Lake County, State of Utah, entered his order overruling defendants' demurrer and denying their motion to strike (R. 10). The defendants, on December 21, 1948, filed their answer to plaintiff's complaint (R. 13). Their answer admitted that plaintiff and defendants were residents of Salt Lake County, Utah, and defendants owned the premises referred to in the complaint. They admitted the filing of a pretended notice of lien, but denied that the instrument or copy of the lien attached to the complaint was a true copy of the record filed by George O. Chase. For lack of information, they denied all other

allegations in the complaint and asked for \$25.00 attorney's fees.

On February 14, 1949, the pre-trial was had before the Honorable J. Allan Crockett, and the court at that time received in evidence the photostatic copy of the notice of lien, which is marked Exhibit "A."

The trial of the cause came on before the Honorable J. Allan Crockett on the 23rd day of February, 1949, at which time the defendants' attorney objected to the introduction of the photostatic copy of the lien upon the grounds as follows:

"MR. WIGHT: We will object to it on the grounds that it is incompetent, that it isn't the notice of lien copied and attached to the complaint, that it is wholly insufficient for the purpose of creating a lien, and, in particular, it doesn't state whether the claimant was the original or a sub-contractor, and, if a sub-contractor, the name of the original contractor with whom he made his contract.

"It doesn't state the nature of the materials furnished or to whom they were delivered or that they were to be used in the construction, alteration, addition to or repair of building, structure, or addition to a building, structure, or improvement upon the land owned by the defendants against which the lien is sought to be imprest; doesn't state the nature of the improvement nor the terms and conditions of the contract under which the materials were furnished.

“Now, if your Honor please, this is going to be the question in the case, and about the only question in the case.

“THE COURT: Well, now, let’s do this thing, shall we? Let’s get all the evidence in, then discuss the law of the case, shall we?

“MR WIGHT: I don’t know, so far as we are concerned, we’re not disputing the delivery of the materials to the place; we’re not disputing the fact that the—there was a notice of lien filed, and that the notice is the photostatic copy—that is, the photostatic copy is a true copy of the recorded notice, and, I take it, that you won’t dispute that the Dawsons paid Mr. Livingston in full for the house.” (R. 34-35)

That thereafter Exhibit “B,” being the delivery sheets of the materials used in defendants’ home, was introduced in evidence, and Exhibit “C,” the ledger sheet of George O. Chase for J. S. Livingston, was introduced in evidence, and Exhibit “D,” the delivery sheets of certain deliveries made by Chase to Livingston which were not claimed to be an obligation of the Dawsons. The defendants admitted the assignment of George O. Chase to John Chase (R. 38).

Later the following took place:

“MR McCARTY: Now, will you admit that the material was used in the house, was delivered up there?

“THE COURT: He did state, I think, you don’t dispute the delivery to the Dawsons?

“MR. WIGHT: We don’t dispute it, but we want the evidence to go in subject to the objection we have already made.

“MR. McCARTY: I understand that.

“THE COURT: You are not disputing it, and he represented it to be a fact, we will take it to be a fact that the materials referred to were delivered upon the Dawson house and used therein.

“MR. McCARTY: Yes; well, I guess that is our case.

“MR. WIGHT: We rest, your Honor please.

“MR. McCARTY: We rest, and I’ll excuse both of my witnesses and excuse my other witness.” (R. 39)

The court again stated to the defendants’ attorney that he wished to put it in the record that if the notice of lien, a copy of which is Exhibit “A,” is sufficient in law, the plaintiff is entitled to recover as prayed in the complaint. Defendants’ attorney stated he would not like to make a stipulation that way, he did not dispute the fact that the materials were delivered and that the notice of lien was filed in the form shown by Exhibit “A.” Defendants’ attorney did not come out directly for some time and say that the only issue in the case was the sufficiency of the lien, and finally the court stated as follows:

“THE COURT: So that, in all respects, except for the sufficiency of the lien, you are satisfied, and that—I will state it as I did before—and

I don't want to be unfair with you—if that is unfair with you, correct me—that you rest your defense solely upon the sufficiency of the lien?

“MR. WIGHT: Yes.

“THE COURT: And, if it is sufficient in law, the plaintiff should recover what he prayed for in his complaint?

“MR. WIGHT: I don't want to go that far.

“THE COURT: Well, all right.

“MR. WIGHT: I will stipulate that the—that we rest our defense solely upon the sufficiency of the lien.” (R. 42)

The court thereupon overruled defendants' objection to the admission of the lien, Exhibit “A,” in evidence and admitted the same in evidence. That thereafter, on the 30th day of March, 1949, the Honorable J. Allen Crockett entered judgment in favor of plaintiff and against the defendants as prayed. Findings of fact, conclusions of law and judgment were submitted to the court on the 5th day of April, 1949, by the plaintiff, and that thereafter the defendants filed their objections to the proposed findings of fact, conclusions of law and judgment (R. 22). Among the objections was that there was no evidence introduced in regard to attorney's fees. The hearing on the objections came up before the Honorable J. Allen Crockett on the 23rd day of April, 1949, at which time the court reopened on his own motion the case to allow evidence as to attorney's fees, at which time the plaintiff's attorney called some witnesses, but at

that time the defendants, through their counsel, stipulated that \$25.00 would be a reasonable attorney's fee for either counsel in the matter, and thereupon the court signed the findings of fact, conclusions of law and judgment.

POINTS TO BE ARGUED

The respondent feels that there is one sole point to be considered, that is:

WAS THE NOTICE OF LIEN, EXHIBIT "A," SUFFICIENT TO SATISFY THE STATUTE?

The respondent will break down his argument into two subdivisions:

a. The lien law is remedial, and substantial compliance therewith is sufficient.

b. The notice of lien, Exhibit "A," substantially complied with the statute.

ARGUMENT

A. THE LIEN LAW IS REMEDIAL, AND SUBSTANTIAL COMPLIANCE THEREWITH IS SUFFICIENT.

The mechanic's lien law proceeds upon the theory that the laborer and the materialman have an equitable right to follow their labor and materials into the building of which they have become a component part, and to have a lien on it because the building contains in it such

labor and material. The lien claimant is, of course, entitled to receive compensation for his labor and materials from those contractually obligated to him, a right which is in no way dependant upon a lien or mechanic's lien law, and the mechanic's lien law has in addition super-added a new security. As the lien is of purely statutory origin, the statute must be examined to determine both the right and mode by which it can be secured. While this is true, the lien is favored; the law relating thereto is remedial in character, and should be liberally construed with a view to effect its object and promote justice. The courts will not give the law a construction tending by its technicality to fritter away, impair or destroy the benign objects arrived at in its adoption.

The liberal construction is favored by the courts of most States, and the old rule of strict compliance with the statute is favored by only a few courts. The appellants have picked out a few of the strict compliance cases.

The notice of lien, as in this case, is usually prepared by an artisan or materialman, who is not skilled in the niceties of law or the use of technical phrases. The courts have realized this and have been loath to deny relief because of some slight imperfection, and the courts have regard to substance rather than form.

Volume 36 *American Jurisprudence*, page 91, Section 126, "Mechanic's Liens":

"In order to be sufficient, the lien notice must comply with the statutory provisions. How-

ever, the pertinent facts in such notice need not be set forth or stated with the definiteness of a pleading; a substantial compliance, in good faith, with the requirements of the statutes being in these respects sufficient.”

That is the general statement of the law, both by the text book writers and the courts.

The case of *Ford v. Springer Land Association*, 41 P. 541 (New Mexico, 1895), is one of the early western cases that held that the mechanic's lien law, in view of the equitable character of the statute, should be liberally construed, but cannot by construction be extended to cases not provided for by statute. The case also holds that the notice of claim of lien, being the foundation of the action, must contain all the essential requirements of the statute, and a failure or omission on the part of the person claiming the lien of any of the substantial requisites of the statute is fatal and will defeat the action. This case was appealed to the Supreme Court of the United States, and may be found in 168 U.S. 513, 18 Sup. Ct. 170, 42 U.S. (L. Ed.) 562. The Supreme Court in that case held that substantial compliance, in good faith, with the requirement of the mechanic's lien laws is sufficient, and the test of such compliance is to be found in the statute embracing such laws.

It was held in *Salt Lake Hardware Co. v. Chairman Min. etc. Co.*, 137 Fed. 632:

“It is true that the right to enforce a mechanic's lien depends upon a compliance with the

requirements of the statute. Technical accuracy, however, is not required. The courts hold that a substantial compliance is all that is essential.”

Bloom on *Laws of Mechanic's Liens*, on page 304, states:

“It is not required therefore that the claim shall contain a statement of all the facts essential to establish the lien; whether, for instance, the facts being truly stated, as required by the statute, the person in possession of the property or the person by whom the laborer was employed had authority to bind the owner, as agent, is a matter for allegation and proof at the trial.”

Sec. 371. “A substantial compliance with the statute as to the claim of lien is all that is required. It has been said that the provisions of the code relative thereto are to be liberally construed with a view to effect their objects and to promote justice and substance rather than form is to be regarded. In this connection the court said, ‘We are certainly not disposed to defeat the lien by a nice criticism of the language in which the lien is set forth.’ ”

Citing: *Wood v. Wiede*, 46 Cal. 637. *Malone v. Big Flat C. M. Co.*, 76 Cal. 578, 18 P. 772. *Castagnetto v. Coppertown M. & S. Co.*, 146 Cal. 329, 80 P. 74.

Trout v. Siegel, et al. (Calif., 1927), 262 P. 320, quotes with approval from *Wagner v. Hansen*, (Calif.) 37 P. 195:

“ ‘The purpose of the record and statement must be to inform the owner, in case of a con-

tractor and laborers rendering service under such contract, as to the extent and nature of a lienor's claim, to facilitate investigation as to its merits.' "

See also: *Drake Lumber Co. v. Lindquist, et al.* (Ore., July 2, 1946), 170 P. (2d) 712.

In the case of *Intercoastal Lumber Distributors v. Derian* (Pennsylvania, 1935), 178 Atl. 350, it is stated:

"Adherence to the terms of the statute is indispensable, but the rule must not be pushed into such niceties as serve but to perplex and embarrass a remedy intended to be simple and summary, without in fact adding anything to the security of the parties having an interest in the building sought to be encumbered. We must not be hyper-critical when scanning this species of lien and estimating its sufficiency. Such a practice must necessarily defeat a very large majority of them; a result not to be desired where they furnish sufficient data to enable the parties subject to them to ascertain all that is essential for them to know. It would be idle to suggest that the owner of this building, from an inspection of the paper filed, would not know the person alleged to be the contractor."

See also: 57 C.J.S., page 672.

Utah is committed to the same liberal construction. Justice Frick, in *Park City Meat Co. v. Comstock Silver Mining Co.*, 36 U. 145, 103 P. 254, states:

"The more modern decisions, however, are to the effect that mechanic's lien statutes should

receive a fair and reasonable, if not a liberal, construction, with a view to preserving their spirit and effectuating their purposes.”

Justice Frick again, in the case of *Eccles v. Martin*, 31 U. 241, 87 P. 713, quotes from 20 Am. & Eng. Ency. Law, on page 276, and says:

“A lien once acquired by labor performed on a building with the consent of the owner should not, however, be defeated by technicalities, when no rights of others are infringed, and no express command of the statute is disregarded.”

Another Utah case, *Elwell v. Morros*, 28 U. 278, 78 P. 605, states:

“The weight of authority is to the effect that the well-established rule that remedial provisions of the statutes are to be liberally construed applies to, and should be followed in, proceedings to foreclose mechanic’s liens.”

See also: *Rockel on Mechanic’s Liens*, page 258, Sec. 100, and page 284. *Brubaker v. Bennett*, 19 U. 401, 57 P. 170.

The case of *Morrison-Merrill v. Willard*, 17 U. 306, 53 P. 833, cited by appellants on page 12 of their brief, also holds that substantial compliance with the statute is all that is necessary.

There is no question whatsoever but that Utah has adopted the liberal construction of the lien law.

B. THE NOTICE OF LIEN, EXHIBIT "A," SUBSTANTIALLY COMPLIED WITH THE STATUTE.

To consider this properly, we must look to the statute and to the lien, Exhibit "A," itself.

Section 52-1-3, *Utah Code Annotated*, 1943:

"Contractors, subcontractors and all persons performing labor upon, or furnishing materials to be used in, the construction or alteration of, or addition to, or repair of, any building, structure or improvement upon land * * * shall have a lien upon the property upon or concerning which they have rendered service, performed labor or furnished materials, for the value of the service rendered, labor performed or materials furnished by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor or otherwise."

Section 52-1-7, *Utah Code Annotated*, 1943:

"Every original contractor within eighty days after the completion of his contract, and every person except the original contractor claiming the benefit of this chapter within sixty days after furnishing the last material or performing the last labor for any building, improvement or structure, or for any alteration, addition to or repair thereof, or performance of any labor in, or furnishing any materials for, any mine or mining claim, must file for record with the county recorder of the county in which the property, or some part thereof, is situated a claim in writing, containing a notice of intention to hold and claim a lien, and a statement of his demand after de-

ducting all just credits and offsets, with the name of the owner, if known, and also the name of the person by whom he was employed or to whom he furnished the material, with a statement of the terms, time given and conditions of his contract, specifying the time when the first and last labor was performed, or the first and last material was furnished, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person.”

The notice of lien, Exhibit “A,” is set out below. It appeared on a printed form. The portions filled in by the lien claimant are italicized.

NOTICE OF LIEN

TO WHOM IT MAY CONCERN:

Notice is hereby given that the undersigned, *George O. Chase, dba Chase Lumber and Hardware* doing business as and residing at *Salt Lake City* County of *Salt Lake* State of *Utah*, hereby claims and intends to hold and claim a lien upon that certain land and premises, owned and reputed to be owned by *Kirby S. Dawson and Elinor W. Dawson, his wife*, and situate, lying and being in *Salt Lake City*, County of *Salt Lake*, State of *Utah*, described as follows, to-wit: *1424 South 14th East Street, South ½ of Lot 23 and North ½ of Lot 24, Block 6, LIBERTY HEIGHTS* to secure the payment of the sum of *One Hundred Fifty Seven and 16/100* Dollars, owing to the undersigned for *material as a lumber and hardware dealer* in, on and about the *house* on said land.

That the said indebtedness accrued and the undersigned furnished said materials to *Kirby S. Dawson*, who was the owner and the reputed owner of said premises as aforesaid, under a *oral* contract made between the said *Kirby S. Livingston* and the undersigned on the *21st* day of *October, 1947*, by the terms of which the undersigned did agree to *deliver material to said premises* and the said *Kirby S. Dawson* did agree to pay the undersigned therefor as follows, to-wit: *Cash* and under which said contract the undersigned did *deliver* the first *material* on the *21st* day of *October, 1947* and did *deliver* the last *material* on the *24th* day of *October, 1947* and on and between said last mentioned days, did *deliver material* amounting to the sum of *Two Hundred Eight and 93/100* Dollars, which was the reasonable value thereof, and on which the following payments have been made to-wit: *\$51.77* leaving a balance owing to the undersigned of *\$157.16* Dollars after deducting all just credits and offsets, and for which demand the undersigned holds and claims a lien by virtue of the provisions of Chapter 1, of Title 52, of the Revised Statutes of Utah, 1933.

(s) GEORGE O. CHASE

(verified on reverse side)

The respondent claims, on page 9 of his brief, that the notice of lien omitted to state five essential averments:

1. The nature and amount of the material furnished by the claimant.
2. The use to which they were to be applied.

3. To whom they were delivered.

4. The terms, time given and conditions of the contract under which they were furnished.

5. That Livingston, with whom he made his contract, was acting as agent, contractor or otherwise authorized by appellants to make such contract in their behalf.

Taking them in order:

1. The notice of lien, Exhibit "A," states that it was for material as a lumber and hardware dealer. The appellants did not state wherein those words were insufficient. Does the lien have to set out with particularity the number of shingles furnished, as in this case, or the number of buckets of tar? The lien claimant furnished material as a hardware and lumber dealer, which went into the house on the property on which he claimed the lien. It was not incumbent on the lien claimant in his notice of lien to furnish an itemized list of each and every article that was delivered. On some construction jobs a lien would require hundreds of pages were such the case.

2. Appellants complain that we did not have in the notice of lien the use to which they were to be applied. I do not believe that there is a case, even in the States which hold strict compliance necessary, that goes so far that you have to state the use to which materials were to be applied. It is sufficient if they are *delivered* to the premises for that purpose, and the notice of lien shows that it was for material in and about the house on

said land. The proof, of course, in this case shows both by stipulation of counsel and also by the delivery sheets, Exhibit "B," that the material was delivered and accepted by the appellants, and it was admitted in evidence that the material was used in the house (R. 39). The notice of lien, of course, must be taken in its entirety, and the lien says that they are filing a lien to secure the payment of money owing to the lien claimant for material as a lumber and hardware dealer in and about the house on said land. Then it goes on to say that the indebtedness accrued and the lien claimant furnished materials to Kirby S. Dawson, who was the owner of said premises, under a contract made with Kirby S. Livingston, and that the lien claimant did deliver the material to said premises, and the appellant, Kirby S. Dawson, agreed to pay cash, and the notice of lien goes on to say when the first material and the last material were delivered by the lien claimant. Taking the lien in its entirety, it clearly shows that the material was delivered to the premises to be used in and about the house thereon, and the respondent respectfully contends that the hypercritical and baseless objections of appellants on this point should be disregarded.

3. The appellants complain because the notice of lien did not mention that the materials were delivered to a certain person. The notice of lien sets out that they furnished materials to the appellants and that the materials were delivered to the premises, and that the appellant, Kirby S. Dawson, agreed to pay for them. What could be clearer? Suppose under a contract of

this nature some one delivered the material to the premises and they were accepted by a stranger. Must the lien set out the stranger's name? Certainly not. In this case, the proof, Exhibit "B," showed that the materials were delivered to the appellants.

4. The appellants complain that the notice of lien did not set out the term, time given and conditions of the contract under which the materials were furnished. Then they quote an old case of *Hooper v. Flood*, 54 Cal. 218, wherein it is held that the statement that the terms of the contract "were and are cash" was insufficient. The case referred to is poorly reasoned, and has never been given consideration as a precedent. In Exhibit "A," the notice says that by the terms of which the undersigned did agree to deliver material to said premises and the said Kirby S. Dawson did agree to pay the undersigned therefor as follows, to-wit: "Cash." "Cash" is a common word, and the term generally means that the account shall be paid immediately upon delivery. It is the antonym of "credit." The case cited by appellants was definitely overruled in its definition of 'cash' by the case of *Parrish v. American Ry. Employees' Corp.*, (Dist. Ct. of Appeals, Calif., 1927), 256 P. 590:

" 'Cash' in its ordinary sense is an antonym of 'credit' as generally understood and defined by the courts."

Hartwig v. Rushing (Ore., 1919), 182 P. 177:

“Ordinarily the word ‘cash’ means money, but it is frequently used as a term meaning the opposite of credit.”

See also: Words and Phrases, Permanent Edition, Vol. 6, page 246, “Cash.”

5. The appellants further complain that it does not set out that Livingston was acting as agent, contractor or otherwise authorized by appellants to make a contract in their behalf. Considering Exhibit “A,” the notice of lien, in its entirety, it certainly does show that Livingston had the authority. He made the contract and Dawson agreed to pay for it. It would be ridiculous to assume that a man would agree to pay for something that he did not authorize. However, the law is also against appellants’ contention.

In the case of *Davis-Henderson Lumber Co. v. Gottschall et al.*, (Sup. Ct. Calif., 1889), 22 P. 860, on page 862, it says:

“There is nothing in the section or in any other that requires the materialman to state in his claim of lien what relationship the person to whom he furnished the materials bore to the owners.”

See also: *Castagnetto v. Coppertown M. & S. Co.*, 146 Cal. 329, 80 P. 74. *Ingersoll et al. v. Chaplin et al.*, (Calif., 1932) 15 P. (2) 790. *Drake Lumber Co. v. Lindquist et al.*, (Ore., July 2, 1946) 170 P. (2) 712.

Our statute does not require that authority to be set out in the lien. In this case, the notice of lien certainly furnished the appellants sufficient data to enable them to ascertain all that was essential for them to know. In this case from beginning to end the appellants have sought to escape their just liability by endeavoring to create trivial technicalities and by blandly stating that the notice of lien lacked certain elements which on inspection proved to be there.

On page 9 of appellants' brief (I hope the court has page 9 in its copies; it is lacking in one of the respondent's), the appellants quoted from Bloom's *Law of Mechanic's Liens*, section 411:

“Where a claim of lien is uncertain it will be construed against the claimant.”

Upon an examination of this section and the cases cited, it will be found that the case held that where a lien claimant claimed for materials or work furnished from *about* July 1st, he could not go prior to that date in his proof in the case. In other words, if in the instant case respondent had claimed *about* \$150.00 as the amount due, he could not have recovered a bit more than the \$150.00. This section does not mean that if there is an uncertainty in the claim for lien the lien will be declared invalid, but merely that the uncertainty will be decided as against the lien claimant. In fact, Exhibit “A” satis-

fied the authority cited and quoted by appellants on page 10 of their brief, *Jones on Liens*, 3d edition, section 1391:

“The form of the notice or claim is immaterial, provided it complies substantially with all the requirements of the statute. Everything required by the statute should be stated with reasonableness and certainty of language.”

Thus, it will be seen upon a careful scrutiny of Exhibit “A,” every technicality that appellants are depending upon to defeat respondent’s claim fades into nothingness. The notice of lien substantially complied with the statute in every respect.

CONCLUSION

Two district court judges held that Exhibit “A,” the notice of lien, substantially complied with the statute and was sufficient in law upon which to base respondent’s recovery. (R. 10 and 42) The appellants in this court have failed in their brief to point out in any way wherein the notice of lien was not in substantial compliance with the statute. Even the authorities cited by the appellants fail to sustain their position.

Therefore, respondent respectfully submits that the judgment of the lower court should be affirmed.

Respectfully submitted,

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