288.18 History: 1851 c. 96 s. 6; R. S. 1858 c. 155 s. 20; 1862 c. 336 s. 1; R. S. 1878 s. 3311; Stats. 1898 s. 3311; 1925 c. 4; Stats. 1925 s. 288.18; 1935 c. 483 s. 83; 1935 c. 551 s. 6; 1945 c. 446; 1967 c. 276 s. 39; 1969 c. 336 s. 176.

288.19 History: 1856 c. 120 s. 350; R. S. 1858 c. 160 s. 20; R. S. 1878 s. 3312; Stats. 1898 s. 3312; 1925 c. 4; Stats. 1925 s. 288.19; 1935 c. 483 s. 84; 1961 c. 495.

288.195 History: 1961 c. 495, 643; Stats. 1961 s. 288.195; 1967 c. 26.

288.20 History: R. S. 1878 s. 3313; Stats. 1898 s. 3313; 1925 c. 4; Stats. 1925 s. 288.20.

In an action brought to recover a penalty for the wilful obstruction of a highway, the state being plaintiff, judgment may properly be rendered against the proper county for the costs. State v. Smith, 52 W 134, 8 NW 870.

CHAPTER 289.

Liens.

289.01 History: R. S. 1849 c. 120 s. 1; 1855 c. 40 s. 1; R. S. 1858 c. 153 s. 1, 12; 1861 c. 215; 1871 c. 20; 1878 c. 335; R. S. 1878 s. 3314; 1881 c. 328; 1885 c. 349; 1887 c. 442, 466; 1889 c. 275, 399; Ann. Stats. 1889 s. 3314, 3314a; 1893 c. 256 s. 1; Stats. 1898 s. 3314; 1899 c. 222 s. 1; Supl. 1906 s. 3314; 1919 c. 484; 1925 c. 4; Stats. 1925 s. 289.01; 1935 c. 483 s. 86; 1943 c. 267, 322; 1943 c. 553 s. 38; 1949 c. 634 s. 24; 1963 c. 315 s. 2; 1967 c. 351; 1969 c. 285 s. 29.

Revisers' Note, 1898: Section 3314, Annotated Statutes 1889, as amended by section 1, chapter 256, Laws 1893, verbally changed, and adding many structures not specifically mentioned in the section as it now stands. This has been suggested in order to carry out the spirit of this legislation, and has been adopted in the statutes of New York on the same subject, passed in 1885, and found in the third volume of the ninth edition of the revised statutes of New York, page 2635. Many of these structures are probably provided for by the general language of the section. The provision in regard to the lien for manual labor on land was before the revision of 1878 contained in a section separate from that giving the building or mechanic's lien proper. The two classes of liens were properly kept separate, for the reason that one is, generally speaking, a skilled labor lien, and the other a lien for manual work done upon land. The two provisions remained separate until 1878, when the revisers, for the sake of condensation, put them together, at the cost of precision and clearness. A question arose as to whether the manual labor lien was intended to be general in its nature, or only to be a lien upon a walk, sidewalk or curbing. This question, however, was substantially set at rest by chapter 399, Laws 1889, extending the area of the property to which the lien should attach; but it has been thought best to restore the provision for this lien to its original separate position. It is also suggested that this manual labor lien should be limited to conform to the decision in the case of Bailey v. Hull, 11 Wis. 289, holding that the building of a country fence is manual labor done upon land, so as to require that the labor, be of a character to fix the land for use as land—as a portion of the earth's surface, as was held in that case, so as to exclude work of an unimportant or temporary character. It would seem that this lien should include roads, trestles, fitting land for building, manufacturing or other plants, and for connecting separate buildings with steam, sewer, light or water pipes, and should perhaps exclude unimportant and transient services, like the cutting of a lawn. The last provision of the section is changed so as to conform to its evident intent, as held by the supreme court in Cook v. Goodyear, 79 W 606. Section 3314a is embodied in this section.

Subsection (4) was written by the committee on revision, 1898, as was also the clause as to unrecorded mortgages. That body said in its report to the legislature: "The amendment at the end is suggested for the following reasons: As law now stands the owner may, if the principal contractor assigns his claim or his creditor garnishes the owner, be compelled to pay twice. If he voluntarily pays the contractor without inquiring whether subcontractors are paid, he has less ground for complaint, but should not be compelled to pay twice. Even though he takes a bond from the contractor against liens of subcontractors and employes, yet it will often be a great injustice to make the double payment compulsory. The amendment will not affect the rule of Mallory v. La Crosse A. Co. 80 W 170, 49 NW 1071, but will change the rule of Dorreston v. Krieg, 66 W 604, 29 NW 576. The other amendment as to unrecorded mortgages is recommended as just."

Legislative Council Note, 1967: [As to (1)] The present law refers to the liens involved in these sections as "contractors', subcontractors', materialmen's, and laborers' liens." The common term for the liens in conversation among lawyers and in the construction industry is "mechanics' liens," yet that term invites confusion with the lien of a garageman or auto mechanic, which lien is actually called a "mechanic's lien" in s. 289.41. The liens covered here are all really construction liens, all stemming in this bill from s. 289.01 (3), so the proposed name of the overall legislation seems appropriate.

[As to (2) (a)] This definition replaces the definition of "contractor" in present law, and differs from that definition in 3 ways: (1) Use of the phrase "prime contractor" makes more clear that only those who deal directly with the owner are included. (2) The distinction between prime contractors who contract to improve the land of someone else, and owners who do the general contracting for improvements on their own land, is recognized. Yet both are truly prime or general contractors and are so recognized in the definition. (3) Under present law, one who is normally a subcontractor in construction, such as a roofer, suddenly finds himself a "contractor" if the owner happens also to be the general contractor because in that case the roofer happens to be dealing directly with the owner. The proposed change would not make the roofer a prime contractor if he dealt with an

owner who was also the prime contractor under subd. 2 of the proposed definition; thus the roofer would retain a consistent status as subcontractor on all new construction. (When contracting directly with the owner to put a new roof on an existing building, however, the roofer would fit the "prime contractor" definition.)

On some large construction, the "general" contract and some of the major mechanical contracts (e.g., electrical, heating and sheet metal, plumbing) are separately bid. In these cases, the owner is not really the "general" contractor so as to fall under subd. 2 of the definition. Rather, each of the successful bidders has become the prime contractor for his part of the job.

[As to (2) (b)] This definition is new, and seemed desirable in view of the repeated use of the phrase "lien claimant" in various parts of the law.

[As to (2) (c)] This is a slight elaboration of the present s. 289.01 (1) (b). Both "improve" and "improvement" are used in the law, so both are included in the definition.

[As to (2) (d)] This definition replaces present s. 289.01 (1) (c) and (4), and makes substantial changes. Under present law, only an owner who expressly contracts for an improvement will find his interest subject to lien. By case law, such an owner has in some instances been held subject to the lien because of an express contract made by his agent. The overall result was that lien claimants would find their liens valuable or worthless, depending on the nature of the interest of the person with whom the improvement contract was made. Sometimes such a result may be required, in fairness to an unknowing owner, whose tenant (for example) may have an elaborate improvement constructed. But the new definition is designed to make explicit that the contract may be made personally or through an agent and that it may be express or implied. A rebuttable presumption that an agency relationship existed will apply where the contract was entered into by the owner's employe, spouse or co-tenant, but in all other cases (landlord-tenant or vendor-vendee, for example) the rebuttable presumption will be that no agency relationship existed.

This definition, like the present one, defines "owner" more narrowly than the word is understood in ordinary speech. An owner under the construction lien law must not only have an interest in the land, but must have the required connection with a contract to improve the land. Yet in a sense, the definition is also broader than in normal understanding; for example, a tenant who contracts for an improvement does have an interest in the land and would be an "owner" under the definition, so that his interest, at least, would be subject to the lien.

[As to (3)] This is a key section establishing the lien for all lien claimants and stating to what land the lien applies. It replaces present s. 289.01 (2) and (3). Note also that s. 289.02, under present law, actually establishes the lien for subcontractors, materialmen, and laborers. Under the proposed scheme, s. 289.01 (3) would be the basic section establishing lien rights for all claimants, and s. 289.02 would deal only with notice requirements and related matters.

This subsection, in stating to what interests the lien shall apply, ties in directly with the new definition of "owner" in s. 289.01 (2) (d).

In stating the land to which the lien applies, the present one-acre limitation in municipalities is dropped, as is the 40-acre limitation elsewhere. The lien is, however, restricted to contiguous land of the owner, and in a platted area, to the platted lot or lots on which the improvement is located. This expansion makes the present s. 289.01 (3) superfluous, so it has been dropped. The one-acre limit in municipalities was dropped because an increasing number of platted lots in suburban municipalities are larger than one acre. The 40-acre limit in other areas was dropped because of the very real difficulty for the lien claimant who works on an improvement on a large farm or other rural plot to determine on which 40-acre portion the work is done, with enough precision to frame an accurate legal description for the lien claim. Note that if a small lien claim purports to tie up an entire farm, the procedure in s. 289.08 (present s. 289.085) is a ready method for releasing the farm from the lien.

It is appropriate here to note that present s. 289.01 (2) (c) has been dropped. This gave a lien claimant who installs machinery which becomes a fixture a special right to remove the machinery under certain circumstances. Enactment of s. 409.313 in the commercial code has provided adequate procedures for such a claimant to preserve his right to remove the fixture, so the special provision in the present lien law is unnecessary.

[As to (4)] This provision replaces present s. 289.01 (2) (b). It is numbered s. 289.01 (4) because present s. 289.01 (4) is dropped as a result of the new language of s. 289.01 (2) (d). The provision establishes the date which will determine the priority of construction liens as against other liens claimed against the land involved. It elaborates, but does not substantially change, the present law. The 2nd sentence of the present subsection (s. 289.01 (2) (b)) is preserved intact, as is the exemption from lien priority of savings and loan mortgages and state department of veterans' affairs mortgages under ss. 215.21 (4) (a) and 235.70.

The principal addition is a clarification of the meaning of "visible commencement in place of the work of improvement" in the case of new construction, so that a lender need no longer fear that prior surveying, grading, demolition or other site preparation will render his mortgage subordinate to all construction lien claimants. Also, a sentence has been added to make clear that architects or those who work on site preparation do have lien rights, but have only the same priority as the later claimants.

[As to (5)] This provision is present s. 289.01 (5), still with the same number and unchanged except for editorial accommodation to the proposed new statutory scheme. [Bill No. 525-A]

Editor's Note: Subsec. (3) of 289.01, Stats. 1967, replaced subsec. (2) of 289.02, Stats. 1965, and the latter subsection was derived from

sec. 3315, R. S. 1878, and various amendatory statutes. Prior to the enactment of ch. 333, Laws 1889, which amended sec. 3315, R. S. 1878, that section provided that in actions by subcontractors to enforce liens "in no case shall the owner be compelled to pay a greater sum * * * than the price or sum stipulated in the original contract or agreement". In Hall v. Banks, 79 W 229, 48 NW 385, the supreme court declared that the effect of ch. 333 was to repeal the restriction and to make the owner absolutely liable to subcontractors for the amount of their claims, regardless of the contract price or the amount of the owner's indebtedness to the contractor. See also: Mallory v. La Crosse A. Co. 80 W 170, 49 NW 1071 and Wright v. Pohls, 83 W 560, 53 NW 848.

1. Generally.
2. Prime contractor.
3. Improvement.
4. Interest in land; owner; area.
5. Priority of lien.
6. Agreement of owner.

1. Generally.

Representations by parties who have a lien to one who is about to purchase the property subject thereto that the vendor owes them little or nothing, thereby inducing him to pay the balance of the purchase money, estop them from enforcing their lien as against him. Trowbridge v. Matthews, 28 W 656.

The action is equitable mainly because the procedure to enforce it is very similar to a suit to foreclose a mortgage, and provision is made for an equitable distribution of the proceeds of the sale among the several lien claimants. Spruhen v. Stout, 52 W 517, 9 NW 277.

A lien is not defeated by a conveyance of title to the land to a stranger after the making of a contract for erecting a building thereon and commencement thereof. Hewett v. Currier, 63 W 386, 23 NW 884.

A lien is not defeated by defendant's procuring a conveyance of the land to another when he was in possession under a contract of purchase and had paid the purchase price at the time the charge for materials was made. Crocker v. Currier, 65 W 662, 27 NW 825.

A contractor's lien cannot be enforced against the buildings and real estate of a municipal corporation. Platteville v. Bell, 66 W 326, 28 NW 404. See also Wilkinson v. Hoffman, 61 W 637, 21 NW 816.

The lien is not limited to the amount due the contractor at the time he gives notice of his lien, but extends to whatever may thereafter become due to him. Griswold v. Wright, 69 W 1, 31 NW 20.

Sec. 3314, R. S. 1878, giving a lien for labor performed in or about the erection of "any bridge", applies to railroad bridges, and the public policy of the state is to enforce such a lien. Purtell v. Chicago F. & B. Co. 74 W 132, 42 NW 265.

One who has completed a building to the extent to which its owners allowed him has a lien for the contract price, less the cost of finishing it. Charnley v. Hoenig, 74 W 163, 42 NW 220.

The right of a materialman to a lien is not affected by an agreement which gave the purchaser of the materials the right to pay for them in property. Kerrick v. Ruggles, 78 W 274, 47 NW 437.

The subcontractor's right to enforce his lien is not dependent upon his knowledge of his right thereto, nor upon the fact that the materials used in a building were sold and delivered in another state. Mallory v. La Crosse A. Co. 80 W 170, 49 NW 1071.

The statute does not give a lien upon the franchise of a waterworks company, nor provide that the franchise shall follow the plant on sale under a lien judgment; nor would such sale carry the franchise. Chapman V. M. Co. v. Oconto Water Co. 89 W 264, 60 NW 1004.

Lien statutes provide new remedies, are supplementary to the common law, and are to be fairly, even liberally, construed. Vilas v. McDonough Mfg. Co. 91 W 607, 65 NW 488.

Contractors who agree to perform conditions precedent to the right of payment cannot enforce a lien until they are performed. Forster L. Co. v. Atkinson, 94 W 578, 69 NW 347.

The lien of a subcontractor cannot be extended so as to cover work which was not included in the principal contract. Siebrecht v. Hogan, 99 W 437, 75 NW 71.

Where an owner of a well boring machine leases it to the contractor for the construction of a well, he is not entitled to a subcontractor's lien. McAuliffe v. Jorgenson, 107 W 132, 82 NW 706.

Departure from a contract defeats the lien. Houlahan v. Clark, 110 W 43, 85 NW 676.

Where a bank received from a subcontractor a building contract as collateral for a loan and, upon the death of the subcontractor, proceeded with the approval of the personal representative of the subcontractor, or principal contractor and the owner, to complete the contract, it is entitled to a lien. Ultra vires cannot be pleaded as a defense. Security Nat. Bank v. St. Croix P. Co. 117 W 211, 94 NW 74.

Where a lien has attached it is not destroyed by the destruction of the building. Halsey v. Waukesha S. Sanitarium, 125 W 311, 104 NW 94.

Where a subcontractor agreed to keep the land on which the work was situated free of liens by reason of the work or of any materials or things used, the surety on the contract who completed the work upon the death of the subcontractor was not entitled to a lien. Security Nat. Bank v. St. Croix P. Co. 126 W 370, 105 NW 914.

Where a lien is claimed for the amount due for labor, part of which is lienable and part not lienable, and there is no proof produced so that the one can be separated from the other with reasonable certainty, the entire claim for a lien must be denied. George v. Stauton-DeLong L. Co. 131 W 7, 110 NW 788.

The fact that the contractor did not complete his contract in such a manner as to satisfy the guaranty, so that he could not claim a lien for any amount in excess of that which had already been paid, does not prevent a subcontractor from obtaining a lien. Taylor v. Dall L. & Z. Co. 131 W 348, 111 NW 490.

Laborers and materialmen have no right to a lien upon the property of a school dis-

trict. R. Connor Co. v. Aetna I. Co. 136 W 13, 115 NW 811.

One to whom a lot was sold, by a vendee who had started to build a house thereon, is bound to ascertain whether there were liens on such house, and, if so, whether a covenant against incumbrances in the deed of the original vendor in fulfillment of the land contract applied to them. Olson v. Lindsay, 190 W 182, 208 NW 891.

One lien may be foreclosed upon one piece of land for work done on separate contracts. Fischer v. Meiroff, 192 W 482, 213 NW 283.

Under a contract for a completed building at a maximum price, to be built according to plans by the contractors from materials and labor furnished by them, the owner paying part as erection proceeded, and the balance on completion free from liens, the plaintiff, from whom the contractors purchased the millwork, is a subcontractor. Marks Brothers Co. v. Goossen, 197 W 562, 222 NW 818.

A materialman having a lienable claim against premises at the time of their conveyance could not, with knowledge of the transfer, keep his lien rights alive by furnishing, without the grantee's knowledge, additional material to the former owner under duty to complete the building. Capital City L. Co. v. Schroeder, 208 W 157, 242 NW 489.

A superintendent in charge of work under paving contracts under power of attorney executed by the contractor, at salary and 20% of net profits, was not performing "work and labor" within the lien statute. Didier v. Beloit, 210 W 270, 246 NW 409.

The principal contractor is responsible for the payment to the subcontractor but the owner's property secures the payment. The owner cannot assert against a subcontractor defenses he might have against the contractor. If the subcontractor fulfills his contract the contractor is liable and the lien can be foreclosed. H. & M. Heating Co. v. Andrae, 35 W (2d) 1, 150 NW (2d) 379.

The doctrine of unjust enrichment as it affects mechanic's lien foreclosures. Greenquist, 34 WBB, No. 1.

Wisconsin mechanics' lien statute. MacDonald et al., 1943 WLR 277.

2. Prime Contractor.

Where 3 persons contracted to erect a building and afterward divided the work between them they are principal contractors, and must be considered as acting for all, so that a person furnishing materials or performing labor would be a subcontractor. Harbeck v. Southwell, 18 W 418.

Where the owner promises the person who does work and furnishes materials, and he acts on the faith of such promise, the former is bound as an original promisor to pay therefor. Willer v. Bergenthal, 50 W 474, 7 NW 352.

One employed to work for a firm and continuing to work under the direction of one of the members may suppose himself engaged by them and have a lien on their building, notwithstanding part of his labor was for one of the firm. Spruhen v. Stout, 52 W 517, 9 NW 277.

If materials for a building are sold to the owner of the building and on his credit and at his request the bills therefor are made in the name of the contractor for convenience in checking the bills as the materials are delivered, the vendor is entitled to a lien as an original contractor. Wisconsin P. M. Co. v. Grams, 72 W 275, 39 NW 531.

Notwithstanding a contract for repairs on a house is made by the owner with an individual, if such individual subsequently becomes a member of a firm and the firm fully performs the contract with the owner's knowledge, and third parties deal with them as principal contractors, they are such although the owner refuses to change the contract by substituting the firm name for the individual name. Van Horn v. Van Dyke, 96 W 30, 70 NW 1067.

An architect who makes plans for a building is entitled to a lien if the construction of the building is commenced under such plans, even though the plans are abandoned after part of the excavation for the basement has been made. Fitzgerald v. Walsh, 107 W 92, 82 NW 717.

Where an owner of a lot engaged an architect to design a building to cover the entire lot, but, finding the cost prohibitive, erected it in units so constructed as to permit future additions, there was an incorporation of the services of the architect in the building, and for the value thereof, and for the value of his services the architect is entitled to a lien. Neumann v. Strandt, 195 W 610, 219 NW 348.

A building material dealer who furnishes materials for a building directly to the owner is a "contractor" and hence may file his claim for a lien within 6 months from the date of the last charge for materials so furnished; the "materialmen" referred to in 289.02 (1) and (2), and required by 289.06 to file claim for lien within 60 days, meaning persons who furnish materials to a contractor or subcontractor. Warnke v. Braasch, 233 W 398, 289 NW 598.

Construction of the house not having been begun, no lien for the architects' services in preparing plans and specifications could attach. Clark v. Smith, 234 W 138, 290 NW 592.

3. Improvement.

A materialman has a lien for materials sold with the understanding that they were to be used in erecting a building, although the owner made other use of them and procured materials for the building elsewhere. Esslinger v. Huebner, 22 W 632.

A draft-tube furnished with the intent to attach it to realty, but not so attached at the time of filing petition, should be considered a fixture between a materialman and contractors. Spruhen v. Stout, 52 W 517, 9 NW 277.

Under sec. 3314, R. S. 1878, one who furnishes the machinery for a new mill has a right to a lien upon the mill building and the freehold as one who has furnished materials for its construction. Vilas v. McDonough Mfg. Co. 91 W 607, 65 NW 488.

Shelving made to conform to the inside of a store and firmly attached to the walls supports a claim for a subcontractor's lien. Tables not being attached, no lien can be obtained therefor. Rinzel v. Stumpf, 116 W 294, 93 NW 36.

Screens for windows and doors which were manufactured for and fitted to a building are support to a lien. Fish Co. v. Young, 127 W 149, 106 NW 795.

Materials used for the construction of a cofferdam to aid in construction of a dam, which materials could not be used again for a similar purpose, had some slight value, were furnished in or about the permanent dam so there was a lien upon the same for such materials. Baker & Stewart Co. v. Marathon County, 146 W 12, 130 NW 866.

Lumber used for the wooden forms used in the construction of a concrete building, furnished by a subcontractor, was "for or in or about" the erection of such building, so far as such lumber was made useless for other purposes. Moritz v. Sands L. Co. 158 W 49, 146 NW 1120.

The lumber furnished by a subcontractor in concrete construction which did not become a part of any building, but remained suitable for the same and other purposes, was not the subject of a subcontractor's lien. Wiedenbeck-Dobelin Co. v. Mahoney, 160 W 641, 152 NW 479.

Where a contractor purchased materials for walls, but used them so improperly that the walls were condemned by the building inspector, the materialman had his lien; the contractor was the owner's agent and his default did not affect the right of the subcontractor. W. H. Pipkorn Co. v. Tratinik, 161 W 91, 152 NW 141.

No lien is allowed for fuel furnished a principal contractor to be used for operating machinery used in the construction of a railroad. It is not used "for or in or about" such construction. Carnegie F. Co. v. Interstate T. R. Co. 165 W 46, 160 NW 1046.

Razing and removal of part of a building and carrying away of debris was "removal of building." Findorff v. Fuller & Johnson Mfg. Co. 212 W 365, 248 NW 766.

Delivery of materials to an owner of real estate or his agent, either on the premises or otherwise, for use on or in a particular project for the improvement of the same, is sufficient to sustain a materialman's lien. Builder's Lumber Co. v. Stuart, 6 W (2d) 356, 94 NW (2d) 630.

4. Interest in Land; Owner; Area.

Though a judgment is erroneous the error is immaterial where the defendant had no interest in a portion of land, which being deducted would leave less than one acre affected by the lien. Crocker v. Currier, 65 W 662, 27 NW 825.

If the complaint is silent as to any outstanding title paramount to that of the defendant in the land on which a lien is claimed, such a title cannot be proven by way of defense. Cook v. Goodyear, 79 W 606, 48 NW 860.

Plaintiff is not bound to prove defendant's title to the lot on which a building is situated. Williams v. Lane, 87 W 152, 58 NW 77.

Where work is done and material furnished upon docks and other structures built by a riparian owner in front of his lot the lien attaches to the dredging, piling, etc., done for the purpose of making such erections, and also upon the title and interest of such riparian owner in and to the land and to the riparian rights appurtenant thereto. Williams v. Lane, 87 W 152, 58 NW 77.

The vendor of land in a contract which did not require the vendee to pay any money, but which provided that he should at once erect a building thereon, the title to which and to the land was to remain in the former until full payment was made, is the owner of the property. Edwards & M. L. Co. v. Mosher, 88 W 672, 60 NW 264.

A judgment for a lien may be given upon the 40-acre tract upon which the buildings were situated, and the defendant cannot claim that a portion of such subdivision should be taken and a portion of an adjoining 40 to make up the 40 acres, unless there are some equitable reasons why this should be done. Darling v. Neumeister, 99 W 426, 75 NW 175.

Materialmen and laborers have a lien on the roadbed, structures, and plant of a railroad company and its interest in the land used by it in the operation of its railroad as a continuous and single thing. (Statement in Pittsburg Laboratory v. Milwaukee E. R. & L. Co. 110 W 633, 86 NW 592, tending to limit the lien to the particular building, disapproved.) Wolmarth C. Co. v. Waupaca-Green Bay R. Co. 148 W 372, 134 NW 824.

A lease of premises for 49 years containing unusual provisions was such a lease as exempts a lessor from liability to lien claimants. Rohn v. Cook, 165 W 299, 162 NW 183.

Persons improving premises at the request of a lessee holding an option to purchase are entitled to a lien on the interest of lessee present or afterwards acquired. Owens v. Hughes, 188 W 215, 205 NW 812.

K who had commenced the erection of a dwelling house, sold the premises on land contract to H before completion of the building, retaining title until payment of the purchase price, and it was understood that K would continue the construction of the house. As regards materialmen, K was the owner of the property after the sale on land contract and continued the enterprise as owner, and materialmen were entitled to a lien. Evans-Lee Co. v. Hoton, 190 W 207, 208 NW 872.

A lien for the materials furnished to the residuary legatee to construct a house upon the land of the testatrix, attaches only to the estate or interest of the residuary legatee. Caldwell & Gates Co. v. Mennes, 190 W 551, 209 NW 588.

Where a defaulting purchaser in settlement of a land contract quitclaimed his interest to the vendor, who had no actual knowledge of intervening mechanic's liens, and there was no evidence of intention to merge estates, the presumption was that no merger was intended; hence the liens were limited to the purchaser's equitable estate. Milwaukee L. & F. Co. v. Grundt, 207 W 506, 242 NW 131.

5. Priority of Lien.

Where, after a contract for lumber to construct a dwelling and repair an old one, both on the same lot, the owner purchased an adjoining lot, moved the old house thereon and had it repaired and enlarged the lumber contract so as to build a barn upon the first lot,

the lien on each lot dated from commencement of work thereon, and the increased lien for lumber for the barn from commencement of the barn. Chapman v. Wadleigh, 33 W 267.

A mortgage executed in good faith to secure advances to be made to pay for labor performed upon a building and materials furnished therefor, which advances were made, although after the commencement of the building, if it is recorded before the commencement of the building, will take precedence of liens for labor and materials. Wisconsin P. M. Co. v. Schuda, 72 W 277, 39 NW 558.

One who furnishes materials and performs labor by filing his claim for a lien acquires a priority over another party who subsequently does the like acts on the same property and for the same person, without filing such a claim, but who instead takes a chattel mortgage of the apparatus and fixtures he furnishes. The mortgagee, in such case, is liable to the lienor for the value of the apparatus and fixtures covered by his mortgage and removed from the premises by him. Kendall M. Co. v. Rundle, 78 W 150, 47 NW 364.

Where a lien on the leasehold interest accrues before a mortgage is executed by the lessee to the lessor the mortgage lien is subordinate to that of the lienor on such interest. J. B. Alfree M. Co. v. Henry, 96 W 327, 71 NW 370.

A recorded second mortgage for purchase money executed by a purchaser to his vendor is not subordinate to a lien for improvements made by order of the purchaser with knowledge of the vendor. Peters v. Bossman, 184 W 254, 199 NW 65.

Where a defendant, holding a mortgage on 2 parcels of land, orally agreed with the mortgagor to release either parcel on payment of specified sums, and the plaintiff thereafter acquired a lien on one parcel, the plaintiff was not bound by such oral agreement which was unknown to him; and the defendant, with knowledge of the lien, in delivering to the mortgagor insurance money received for destruction of buildings on the parcel on which the plaintiff had no lien, made applicable the doctrine of marshaling of assets and limited the defendant's priority as though all the insurance money had been applied upon the mortgage. The oral agreement was of no greater force than an unrecorded mortgage, and the lien would be prior to it. Anderson Y. Co. v. Citizen's S. Bank, 187 W 60, 203 NW 921.

All materials furnished for a building already commenced are referable back for lien purposes to the time of the commencement of the building, and the lien, although arising from the furnishing of material subsequent to an incumbrance created after the building was commenced, takes precedence over such incumbrance. Evans-Lee Co. v. Hoton, 190 W 207, 208 NW 872.

A mortgagee who had a purchase money mortgage on lands, accepted a quitclaim deed from the owner with the intention of satisfying the mortgage, but unknown to him a lien was filed upon the premises subsequent to the mortgage in point of time but prior to the quitclaim deed. On foreclosure of the lien the mortgage was still entitled to precedence. Bahrs v. Kottke, 192 W 642, 212 NW 292.

As regards priority over a mortgage originating subsequent to the commencement of construction, the lien for labor and materials dated back to the commencement of construction. Prince v. Clubine Co. 203 W 504, 234 NW 699.

A mortgage taken after construction of an armory upon the premises had been commenced was subject to liens under 289.01 for construction of the armory. Fulton v. State A. & I. Board, 204 W 355, 236 NW 120.

Where the holder of title to real estate, allegedly the owner of a vendor's lien for purchase money, conveyed the property to enable the vendee's husband to obtain money to improve the property, such conveyance operated as a waiver of the vendor's lien, entitling the party who had advanced the improvement money to a prior lien on the property. Bullamore v. Baker, 222 W 418, 268 NW 214.

A mortgagee who, under an agreement that he was to have a first mortgage, had made a loan to a mortgagor to pay an existing first mortgage which was a prior lien to that held by a materialman on the same premises, was entitled to subrogation to the rights of the holder of the first mortgage that was paid with the loan. Home Owners' Loan Corp. v. Dougherty, 226 W 8, 275 NW 363.

A mortgage of corporate property made without authority cannot displace a lien which accrued on the property covered by it before the mortgage was executed, though it was antedated so as to be contemporaneous with the unauthorized mortgage, which was prior to the filing of the lien. National F. & P. Works Co. v. Oconto Water Co. 68 F 1006.

Priority as to fixtures furnished under conditional sales contract. 17 MLR 231.

6. Agreement of Owner.

One who erects a building on land of a wife under contract with her husband, but not as her agent, has no lien on her property unless she ratified the contract. Lauer v. Bandow, 43 W 556.

A person who allowed another to drill a well on his land at such other's expense but stated that he would pay nothing in connection with it, did not consent in such a manner as to allow for a lien. Clark v. North, 131 W 599, 111 NW 681; Reynolds v. Griswold, 152 W 144, 139 NW 727.

The interest of a wife, who was a joint owner with her husband in real estate, was subject to a lien if the wife consented thereto. Fischer v. Meiroff, 192 W 482, 213 NW 283.

Evidence disclosed that a contractor had constructed a breakwater on land during the absence of the owners, that the owners of the land had not contracted for the building of such breakwater, that the owners had never contemplated building that kind of a structure, did not desire to retain the breakwater, and had insisted that it be removed from the land, the owners did not inequitably retain the benefit of the breakwater; hence the contractor was not entitled to recovery. Dunnebacke Co. v. Pittman, 216 W 305, 257 NW 30.

In a lien foreclosure action by a contractor who made improvements for purchasers un-

der a land contract in the absence of an agreement with the vendor, and the vendor set up a land contract and that the purchasers were in default, the vendor was entitled to have his title quieted on his showing that the purchasers had no equity left in the property. Delap v. Parcell, 230 W 152, 283 NW 305.

Under 289.01, Stats. 1941, one cannot acquire a "contractor's" lien on the premises for materials furnished prior to the existence of such a contract. Fraser Lumber & Mfg. Co. v. Laeyendecker, 243 W 25, 9 NW (2d) 97.

In order to foreclose a contractor's lien there need not be a written agreement fixing the price of the work. In the absence of proof of an agreement as to a definite price to be paid for the construction of the building, and on failure of proof that the contractor agreed to perform on a cost-plus basis, the trial court properly allowed recovery on the basis of quantum meruit, since a promise to pay the reasonable value of such services was implied in the circumstances. Central Refrigeration, Inc. v. Monroe, 259 W 23, 47 NW (2d) 438.

In actions for judgments against the defendant for plumbing work and materials furnished by the plaintiff in dwellings on parcels of land owned by the defendant, and for a mechanic's lien, the evidence warranted findings and conclusions that the defendant and her son were engaged in a joint enterprise for developing, improving and selling such land, that the plaintiff as a contractor supplied labor and plumbing materials under agreements made with the defendant's son, and that the son was acting as the defendant's agent and within the scope of his authority, and that thereby there was an express agreement between the plaintiff and the defendant whereby the defendant became responsible for the payment of the plumbing work and materials installed on her premises, rendering such premises subject to a mechanic's lien. Bourdo v. Preston, 259 W 97, 47 NW (2d) 439.

In an action to foreclose a contractor's lien where the improvements were made at the instance of a purchaser, under a land contract, who subsequently surrendered the premises to the vendor because of inability to raise the balance of the purchase price, and there was no proof of intent to merge estates, and the vendor had not agreed to pay for the improvements, the contractor could have a foreclosure sale but only the equity which the purchaser had at the time of the surrender could be sold. The vendor's knowledge that the work of the intervening claimant was being done was immaterial. Else v. Cannon, 265 W 510, 62 NW (2d) 3.

A husband habitually permitted by his wife to attend to her business matters may be found to have authority to transact the same although neither husband nor wife by virtue of the relationship has power to act as agent for the other. The record herein supported a finding that a husband was agent of his wife and had authority to enter into a contract with plaintiff lien claimant whereby the latter furnished lumber and other materials for construction of a dwelling house on premises owned by the wife. Builder's Lumber Co. v. Stuart, 6 W (2d) 356, 94 NW (2d) 630.

A materialman's lien is dependent upon the existence of an express agreement between the owner and the prime contractor. The fact that the person in possession of the real estate is the son-in-law of the owner does not compel an inference that their relationship is that of principal and agent. Fullerton Lumber Co. v. Korth, 23 W (2d) 253, 127 NW (2d) 1.

Where the proof made it clear that the owner (the lessee's father-in-law) at all times stated he would not pay for improvements to realty and would permit construction thereof only if the lessee would pay for them, plaintiff failed to establish either advance authorization or subsequent ratification so as to constitute the requisite "express agreement" between owner and contractor contemplated by the statute. Fullerton Lumber Co. v. Korth, 37 W (2d) 531, 155 NW (2d) 662.

Enforcement of lien claim against an equitable interest. 38 MLR 46.

289.02 History: R. S. 1849 c. 120 s. 2, 3; R. S. 1858 c. 153 s. 2, 3; 1878 c. 335; R. S. 1878 s. 3315; 1885 c. 312; 1887 c. 535; 1889 c. 333; Ann. Stats. 1889 s. 3315; 1891 c. 321; Stats. 1898 s. 3315; 1913 c. 213; 1915 c. 549 s. 2; 1919 c. 484; 1925 c. 4; Stats. 1925 s. 289.02; 1931 c. 270; Stats. 1931 s. 289.02, 289.025; 1935 c. 483 s. 87; Stats. 1935 s. 289.02; 1943 c. 322; 1945 c. 33; 1955 c. 78; 1955 c. 696 s. 55; 1959 c. 191; 1967 c. 351.

Revisers' Note, 1878: Sections 2 and 3, chapter 153, R. S. 1858, combined and rewritten; changed so as to give subcontractor liens in all cases where principal contractor has it, upon giving notice, it being doubtful whether, as to bridges, etc., subcontractors have liens. The section, as written, also specifies more fully the contents of subcontractor's notice, and expressly provides that there shall be no lien in favor of a subcontractor of a subcontractor, which as decided by the supreme court, 16 W 68, and 18 W 418, does not exist under present law.

Legislative Council Note, 1967: Proposed s. 289.02, includes much of the matter covered by present s. 289.02, but with substantial changes. Present s. 289.02 (2), relating to filing of claim, is merged in proposed s. 289.06, and has been dropped. The first part of the section deals with notice requirements, first stating the exceptions to the notice requirements, then setting forth the requirements.

[As to (1) (a)] This exception simply states the present law, now found in s. 289.02 (3).

[As to (1) (b)] Under present law, a "contractor" as now defined in s. 289.01 (1) (a) is exempt from the notice requirements of s. 289.02. This exemption for certain types of prime contractors, such as architects and surveyors, would be continued in the proposed section. However, many prime contractors will have notice-giving responsibility under proposed s. 289.02 (2) (a), to which the above section refers, and this represents a substantial change from present law.

[As to (1) (c)] This proposal represents a major change from present law. It eliminates any notice requirement (of the sort

now found in s. 289.02) for other than relatively small construction. The purpose is to work toward earlier and more realistic notice on those smaller jobs where the owner may be inexperienced, unaware of the construction lien laws, and hence in possible danger of having to pay twice or lose his property. On larger construction, such unawareness will not be a factor, and lenders and owners can set up their own machinery for ascertaining who the potential lien claimants are.

[As to (1) (d)] This is a new provision, following up on the recognition in proposed s. 289.01 (2) (a) of the special situation in which the owner acts as his own general contractor. There is no sense in requiring such an owner-prime contractor to give notice to himself, or to some entity technically different because one or both entities are incorporated; hence the proposed provision. However, the notice requirements for subcontractors and materialmen (see proposed s. 289.02 (2) (b)) still apply in this situation, so they can make themselves known to owner and lender, unless they have contracted directly with the owner-prime contractor, in which case the exception in proposed s. 289.02 (1) (b) would apply.

[As to (2) (a)] This is a new provision, at the heart of the proposed new scheme of notice in s. 289.02. It establishes a required notice about the lien law to be given by the prime contractor to the owner as a part of his construction contract with the owner, if the contract is written, or by separate prompt service, if the construction contract is oral. The purpose is to give owners early and effective notice of the existence of the lien law, and to inform owners that they may be receiving notices from potential lien claimants. The proposed provision will prevent burying the required notice in "fine print," and it also sets forth recommended language for the notice.

Prime contractors, by definition, are those who contract directly with owners, so they are exempt from all notice requirements under proposed s. 289.02 (1) (b), except to the extent that they are covered by this provision (s. 289.02 (2) (a)). The prime contractor covered by this provision is the one who enters into a contract with the owner and who will use subcontractors or materialmen on the work of improvement. That is, if there will be potential other lien claimants as a result of the work the prime contractor is contracting to do, then he must give the notice here required.

[As to (2) (b)] This provision deals with the notice to be given by lien claimants other than prime contractors, in cases where notice is required because none of the exceptions in proposed s. 289.02 (1) can be applied. In this sense, the provision parallels present s. 289.02 (1), but with significant changes. The period within which the notice may be given is reduced from the present 120 days to 60 days after the claimant first furnishes labor or materials. The notice must now be furnished in 2 copies, and the owner is required to furnish a copy to his mortgage lender, if any. A recommended form of language for the notice is now proposed as a part of the statute.

[As to (2) (c)] This is a new provision, enforcing the notice requirement imposed on prime contractors by proposed s. 289.02 (2) (a), by denying a construction lien if the notice is not given.

[As to (2) (d)] This is a new provision, designed to further assure the giving of required notices by placing a duty on the mortgage lender to make reasonable inquiry as to whether notices have been given, and by authorizing the lender to withhold payout of loan proceeds unless or until the prime contractor has given any notice the law requires of him.

[As to (2) (e)] This is a restatement of provisions now found in s. 289.02 (1), plus a clarifying addition stating that failure of a materialman to receive the property description and owner's name and address to which the law entitles him shall not relieve the materialman from the requirement of notice set forth in proposed s. 289.02 (2) (b). The clarification is believed to be a correct statement of present law, but is important enough to have an explicit place in the statute itself.

[As to (3)] This is a new provision, designed to make it possible for a lien claimant who failed to give notice within 60 days as required by proposed s. 289.02 (2) (b), to give a late notice which will preserve future lien rights as to work done or materials furnished after the late notice is received. This would enable the claimant to avoid much of the harsh result of McCormick v. Kuhnly, 26 Wis. (2d) 193 (1965) and still participate in completion of the construction, a desirable result for all parties.

[As to (4)] See proposed s. 289.06. A preliminary warning notice, prior to actual filing, has been added. The above proposed s. 289.02 (4) is a new section designed to alert claimants to the existence of the s. 289.06 requirements, and to make clear that none of the exemptions or exceptions in s. 289.02 will relieve a claimant from compliance with s. 289.06.

[As to (5)] This provision is an expansion, without significant change, of present s. 289.02 (4). The provision that the misappropriation of funds is theft has been tied into s. 943.20, the relevant theft section in the criminal code. The responsibility of corporate officers, directors, or agents for theft if actually involved in the misappropriation is now made a part of the statute, consistent with case law announced in Weather-Tite Co. v. Lepper, 25 Wis. (2d) 70 (1964). That case also makes clear that any funds reaching the hands of any such individual can be traced to him and recovered for restoration to the "trust fund." The proposed provision adds another fund-tracing possibility: If a shareholder of the guilty corporation, not himself responsible for the misappropriation, nonetheless gets some of the misappropriated funds, he shall be subject to an ordinary civil liability to restore such funds to the trust fund.

[As to (6)] Except for minor editorial change, this is the present s. 289.02 (5).

[As to (7)] Except for minor editorial change, this is the present s. 289.02 (6).

[As to (8)] This is a new provision, designed to solve a problem faced by the laborer or mechanic who works on several jobs during a period for which his employer pays him only partial wages. As to which of the several improvements on which he worked shall he try to assert a lien? To which jobs shall he apply any wage payments received? The proposed provision establishes a formula, which can be varied by the written agreement of the laborer as, for example, by a lien waiver furnished by the laborer for one of the more recent jobs. [Bill 525-A]

1. Notice.
2. Theft by contractors.
3. Materials diverted.

1 Notice.

Editor's Note: Questions concerning the sufficiency of notices under statutory provisions in force during the period 1878-1967 were considered in the following cases (among others): Hausmann Bros. Mfg. Co. v. Kempfert, 93 W 587, 67 NW 1136; Security Nat. Bank v. St. Croix P. Co. 117 W 211, 94 NW 74; Laer L. Co. v. Auer, 123 W 178, 101 NW 425; Chandler L. Co. v. Fehlau, 137 W 204, 117 NW 1057; West Allis L. Co. v. Wiesenthal, 141 W 460, 124 NW 498; Interior W. Co. v. Jahn, 163 W 193, 157 NW 772; Carl Miller L. Co. v. Elfers, 164 W 215, 159 NW 814; Rohn v. Cook, 165 W 299, 162 NW 183; Neil & Co. v. Wisconsin T. Co. 170 W 298, 175 NW 89; Walton v. Dayton H. Co. 205 W 112, 236 NW 595; Sisters of Mercy v. Worden-Allen Co. 208 W 457, 243 NW 456; and A. Lentz Co. v. Dougherty, 218 W 493, 261 NW 218.

The owner, under an agreement that the contractor is to furnish materials and do the work, is not liable to another who furnishes work or materials until the notice required is given. Walker v. Newton, 53 W 336, 10 NW 436.

The object of the notice is to enable the owner to protect himself by withholding from the contractor the amount claimed. Such notice cannot be amended by changing the description of the property after the time for it has expired. Mark Paine L. Co. v. Douglas County I. Co. 94 W 322, 68 NW 1013.

A claim against a leasehold interest of a tenant cannot be amended to include the lessor's interest in the fee after the time for notice has expired. J. B. Alfree M. Co. v. Henry, 96 W 327, 71 NW 370.

Where a subcontractor furnished materials which were defective and was notified to replace the same, and the new materials were received at the point of delivery but were never used in the building, a notice more than 60 days after the first shipment of materials was ineffective. Brown & Haywood Co. v. Trane, 98 W 1, 73 NW 561.

A pastor of a church who transacted the entire business in regard to the remodeling of the building, and who superintended the work without objections from the trustees, is the agent of the church in the matter, so that valid service of the notice of a claim for a lien could be made upon him. Moody Co. v. Trustees of M. E. Church, 99 W 49, 74 NW 572.

Giving notice of a claim for a lien is a condition precedent, and performance of it must be alleged. Where it is alleged that notice was served, the action cannot be sustained by proof that the notice was filed. Charles Baumbach Co. v. Laube, 99 W 171, 74 NW 96.

The furnishing is not completed until the last delivery. Taylor v. Dall L. & Z. Co. 131 W 348, 111 NW 490.

Sec. 3315, 1898, does not require separate notice for each service or delivery, where all were so connected as to constitute substantially one transaction. Taylor v. Dall L. & Z. Co. 131 W 348, 111 NW 490.

The notice of a subcontractor's lien may be served on either of 2 corporations, where the building is being erected for one of them, and that one owns all of the capital stock of the other corporation which owns the land. Milwaukee B. S. Co. v. Illinois S. Co. 163 W 48, 157 NW 545.

The president of a corporation, owner of premises upon which construction work was done, was the owner's agent to receive the notice. Hirth v. Clybourn R. Co. 202 W 432, 232 NW 857.

A claim for lien was not fatally defective because it named the wrong corporation as the owner of the premises where ownership was not in dispute. Hirth v. Clybourn R. Co. 202 W 432, 232 NW 857.

A materialman could so apply payments on account as to leave only the more recent charges for labor and material unpaid, as respects the timeliness of his proceedings to perfect his lien. Bank of Baraboo v. Prothero, 215 W 552, 255 NW 126.

Failure to take timely protection of lien rights given by 289.02 (1), Stats. 1957, places subcontractors in a position where equity is not disposed to invent other relief. Visser v. Koenders, 6 W (2d) 535, 95 NW (2d) 363.

Where a contractor had been furnishing labor and materials to an owner and was paid, and then contracted to do more work for the same person, he was chargeable with constructive knowledge that the owner had sold the house in the meantime with agreement to finish construction; hence the contractor became a subcontractor and lost his claim for lien because of failure to give notice under 289.02 (1), Stats. 1957. Duitman v. Liebelt, 17 W (2d) 543, 117 NW (2d) 672.

A materialman who furnished materials to a contractor for 80 days and then refused to furnish more until paid, and, after payment, resumed deliveries after a lapse of 2 weeks, but gave no notice to owners until after 120 days from the first delivery but within 120 days from resumption of deliveries could not claim a lien. McCormick v. Kuhnly, 26 W (2d) 193, 131 NW (2d) 840.

A subcontractor who had no express contract with the owner and who did not file a lien notice cannot recover from the owner on a theory of unjust enrichment. Superior Plumbing Co. v. Tefs, 27 W (2d) 434, 134 NW (2d) 430.

2. Theft by Contractors.

See notes to sec. 1, art. I, on equality, and sec. 16, art. I, citing Pauly v. Keebler, 175 W 428, 185 NW 554.

The provision which makes it embezzlement

for a contractor to apply payments to his own use without first satisfying the liens is not limited to cases where a claim of lien has been filed, but it does not apply where no right of lien exists. Pauly v. Keebler, 175 W 428, 185 NW 554.

The provisions of 289.02 (3), Stats. 1933, are inapplicable to payments made to a principal contractor for public improvements, the latter being controlled by 289.53 (4). Theiler v. Consolidated I. & Ins. Co. 213 W 171, 250 NW 433.

Under 289.02 (4), Stats. 1957, it is a condition of creation of the trust that the money shall have been paid to the contractor by the owner, so that, where this has not been done when the contractor is adjudicated a bankrupt, there is no trust in favor of subcontractors as against right of trustee in bankruptcy to collect the money from the debtor-owner. The trust does not arise from general principles of equity but is the creature of statute and equity will not amend the statute by declaring that the statutory requirement in question is immaterial to the existence of the trust fund. Visser v. Koenders, 6 W (2d) 535, 95 NW (2d) 363.

An officer of a defunct corporation which had purchased building materials on open account without designation as to specific jobs, and which materials were sold for use in the improvement of homes pursuant to pre-existing sales agreements between the corporation and its customers, who applied the moneys received for corporate operating expenses rather than paying the supplier for the merchandise—was individually liable to the supplier for the amount of its claim, since he, having diverted trust funds in violation of the statute, was a converter thereof. Weather-Tite Co. v. Lepper, 25 W (2d) 70, 130 NW (2d) 198.

A trustee of a bankrupt corporation, the supplier of building materials to a home improvement corporation (also bankrupt), invoking 289.02 (4), Stats. 1963, possessed the necessary standing to sue officers of the latter for alleged conversion of funds due the bankrupt supplier without affirmatively establishing that he had qualified or accepted appointment as trustee or procured authority to sue, where documentary evidence of record reasonably indicated his trust capacity. Simonson v. McInvaille, 42 W (2d) 346, 166 NW (2d) 155.

A down payment to a contractor must be held in trust even though he has supplied no labor or materials. 53 Atty. Gen. 98.

3. Materials Diverted.

Where material is furnished to a contractor by a subcontractor and it neither enters into the structure nor reaches the control of the owner there is no lien. Francis & Nygren Co. v. King K. Co. 142 W 612, 126 NW 39.

The provisions penalizing the use of material in the construction of any building, other than the one contemplated in the contract of sale of the material, were inapplicable because the brick was not sold on credit, and the contract contained no representation as to where the brick was to be used. Stark v. Burnham Brothers Brick Co. 176 W 331, 186 NW 151.

289.03 History: 1903 c. 298; Supl. 1906 s. 3315a; 1915 c. 549 s. 3; 1925 c. 4; Stats. 1925 s. 289.03; 1967 c. 351.

Legislative Council Note, 1967: [As to (1)] This subsection is a restatement and elaboration of present s. 289.03, without change in substance. See, however, proposed ss. 289.03 (2) and 289.035.

[As to (2)] This provision is wholly new to Wisconsin, though similar "optional bonding" provisions are found in some other states. The idea is to eliminate the construction lien entirely in cases where payment bonds and a lien on unpaid proceeds give owner and lien claimants the same kind of protection they now have on public improvement work by virtue of the present provisions of ss. 289.16 and 289.53 (proposed ss. 289.14 and 289.15). If owner and prime contractor agree to the bonding alternative, and if it gives all other lien claimants adequate protection, no reason appears why the basic lien afforded by s. 289.01 should not be eliminated in such cases. [Bill 525-A]

289.035 History: 1967 c. 351; Stats. 1967 s. 289.035.

Legislative Council Note, 1967: [As to (1)] This provision follows the present s. 289.16 (1) (proposed s. 289.14 (1)), which establishes bonding requirements for public works and improvements. Changes have been made to adjust to the private nature of the works and contracts here covered. Also, the bond here required is a payment bond only, without the performance bond features required by s. 289.16. If an owner wants to negotiate with the prime contractor for a performance bond as well, he can do so, but such a bond does not seem necessary to protect potential lien claimants sufficiently so that elimination of the lien can be justified.

[As to (2)] This provision follows the procedure established by present s. 289.16 (2) for public contract cases.

[As to (3)] This provision is new, but seems necessary. In public contract cases under present s. 289.16, the potential lien claimant knows he will have no lien on the public land, but will have to look for payment to the bond under s. 289.16 and the contract proceeds under present s. 289.53. But with private contracts where the optional bonding provision is used, the subcontractor, materialman, or laborer does not necessarily know. He must have the right and opportunity to find out, so he will know whether or not he must perfect his lien under proposed ss. 289.02 and 289.06. [Bill 525-A]

289.036 History: 1967 c. 351; Stats. 1967 s. 289.036.

Legislative Council Note, 1967: This entire section (s. 289.036) is designed to parallel the present provisions of s. 289.53 as changed by these proposals; see proposed s. 289.15. It adds a lien on contract proceeds, to the extent unpaid when notice is received, to the rights under the payment bond in s. 289.035, just as present s. 289.53 supplements present s. 289.16. [Bill 525-A]

289.04 History: 1859 c. 113 s. 2, 3; R. S. 1878 s. 3316; Stats. 1898 s. 3316; 1925 c. 4; Stats. 1925 s. 289.04; 1935 c. 483 s. 88; 1967 c. 351.

Legislative Council Note, 1967: This is present s. 289.04, unchanged except for a

reference to the limitations stated in present (and proposed) s. 289.01 (5). [Bill 525-A]

Assignment of a right to a lien can be made only under the limitations of sec. 3316, Stats. 1898. Shearer v. Browne, 102 W 585, 78 NW 744.

289.05 History: 1859 c. 113 s. 5; R. S. 1878 s. 3317; Stats. 1898 s. 3317; 1925 c. 4; Stats. 1925 s. 289.05; 1935 c. 483 s. 89; 1967 c. 351.

Revisers' Note, 1878: Section 5, chapter 113, Laws 1859, rewritten and changed to conform to case of McCoy v. Quirk, 30 W 521.

Legislative Council Note, 1967: Sub. (2) is substantially identical to present s. 289.05, but sub. (1) is new. Waivers of lien are extensively used in the construction industry, but present statutes take almost no note of them. In view of the reliance placed on waivers by owners and lenders in making payouts, the proposed language declares waivers valid and binding and requires that any ambiguity in them be construed against the signer; but it also declares the right of a lien claimant to refuse to give a waiver unless paid in full, and makes clear that a waiver document waives lien rights only, and not contract rights. Thus if a materialman gives a waiver without receiving payment for the material to which the waiver relates, his lien rights are waived, but he still has a right to recover payment from the subcontractor (for example) to whom he contracted to sell the materials. [Bill 525-A]

The taking of a debtor's promissory note for the amount of the debt merely suspends the creditor's right of action on the original debt until the note becomes due; and sec. 5, ch. 113, Laws 1859, expressly provides that the taking of such a note by a mechanic or materialman shall not be deemed a waiver of his right to perfect his lien. White v. Dumpke, 45 W 454.

Waiver by a subcontractor of a lien for materials and discharge of the principal contractor from liability is a sufficient consideration for a promise by the owner of the building to pay for the materials. Griswald v. Wright, 61 W 195, 21 NW 44.

The right of a materialman to file a lien may be waived; but when the waiver is ambiguous, the doubt should be resolved against the waiver. Carl Miller L. Co. v. Meyer, 183 W 360, 196 NW 840.

To constitute waiver, conduct of parties inconsistent with the right to file a lien claim must manifest an intention to waive the right. Under the general rule, now adopted for this state, that a lien claimant may bring a personal action against the owner of the premises for the debt as a cumulative remedy without waiving the right to a lien, entry of judgment on a note given for materials and labor was not a release of the lien duly filed under the statute, nor an election to pursue an inconsistent remedy so as to prevent foreclosure. Roseliep v. Herro, 206 W 256, 239 NW 413.

289.06 History: R. S. 1849 c. 120 s. 4, 5; R. S. 1858 c. 153 s. 4, 5; 1859 c. 113; 1860 c. 207; 1874 c. 272; R. S. 1878 s. 3318, 3320; 1881 c. 287; 1882 c. 84; Ann. Stats. 1889 s. 3318; 1895 c. 109; Stats. 1898 s. 3318, 3320; 1915 c. 44, 494; 1915 c. 549 s. 3; 1915 c. 636 s. 8; 1925 c. 4; Stats. 1925 s. 289.06, 289.08; 1933 c. 75; 1935 c. 483 s. 90; 1943 c. 322; 1957 c. 559; 1959 c. 191; 1967 c. 351; Stats. 1967 s. 289.06.

Legislative Council Note, 1967: [As to (1)] This is substantially the present s. 289.06. Since all liens now arise from s. 289.01, the separate references to ss. 289.01 and 289.02 found in the present statute are dropped. Likewise, the distinction in filing deadlines in present s. 289.06 (120 days after furnishing last labor and materials for s. 289.02 claimants, 6 months for s. 289.01 claimants) has been dropped, and the 6 months' deadline for filing has been applied to all claimants. Note, however, the 30 days' warning notice of intent to file required by proposed s. 289.06 (2) would in effect give all claimants a practical deadline of 5 months after furnishing last labor and materials, halfway between the 2 deadlines in present law.

[As to (2)] This is a new provision, designed to give 30 days' warning to an owner before a lien claim is filed against him, so that he can have an opportunity to avoid the adverse effects on the title to his land and on his credit rating which the filing of a lien claim can cause. In the many situations covered by the exceptions in proposed s. 289.02 (1), the claimant will have given no previous notice of any kind. The proposal does require a claimant who is going to file a lien to take this preliminary notice-giving action at least 30 days in advance of the actual filing deadline.

[As to (3)] This is substantially the present s. 289.08, which relates to the contents of the claim for lien and thus seemed properly a part of s. 289.06. The proposed provision makes clear that the claim as filed must include a legal description of the land to which it relates. It also requires that copies of any required notices given be attached to the claim as filed, taking this from present s. 289.02 (2), which has been dropped. [Bill 525-A]

1. Filing claim and beginning action.
2. Contents of claim document.

1. Filing Claim and Beginning Action.

The fact that the owner has a counterclaim for breach of warranty and that, in settlement thereof, the contractor makes changes in the work without additional charge, does not extend the time. Berry v. Turner, 45 W 105.

An account for a portion of the materials supplied was dated March 9; other materials were purchased for the same building on March 10, on which date those charged for as of March 9 were shipped. A petition for a lien filed September 10 was in time. Kerrick v. Ruggles, 78 W 274, 47 NW 437.

A lien arises upon doing the work and is kept in force by filing a claim, although such filing is done after the debtor's death. Viles v. Green, 91 W 217, 64 NW 856.

Where an architect's compensation is a percentage of the total cost of a building and the last act required of him is to give a final certificate of satisfactory construction, his services continue until such certificate is given. Bentley v. Adams, 92 W 386, 66 NW 505.

Where a contract provided for the equip-

ment of a mill and, after the completion of the contract and its acceptance, new machinery was purchased for the purpose of securing greater power, such new machinery was furnished under a new contract and the claim for lien filed within 6 months after such machinery was furnished did not affect the former contract. Brown v. E. P. Allis Co. 98 W 120, 73 NW 656.

Where a contract was to terminate as soon as the building was inclosed unless the contractors were notified in writing to complete the work, the written notice might be waived and the waiver would be implied from continuance of the contractors without objection, and the time for filing notice of lien claim did not begin to run from the time of the inclosure. Hinkley v. Grafton Hall, 101 W 69, 76 NW 1093.

The claim is filed when presented to the clerk for filing, and retained by him as clerk. Lang v. Menasha P. Co. 119 W 1, 96 NW 393.

One claiming a mechanic's lien is bound to prosecute his foreclosure action in good faith and with reasonable diligence in order to preserve his lien against subsequent purchasers in good faith, for value, without notice of his claim. Glass v. Zachow, 156 W 21, 145 NW 236.

The commencement of an action in due time by a lien claimant gives the court jurisdiction to adjudicate the rights of all other claimants made parties, even though some of them were made parties after the expiration of the time allowed to them for commencing such an action. Rohn v. Cook, 165 W 299, 162 NW 183.

If the action in which the judgment is rendered be brought and the summons and complaint filed within the statutory period, all lien claimants, being by the statute necessary parties thereto either as plaintiffs or defendants, are brought within the statute and their rights saved. Erickson v. Patterson, 191 W 628, 211 NW 775.

The time for filing a claim for a lien was not extended by the fact that plaintiff's employe voluntarily did work which plaintiff was not required to do. Layne-Bowler C. Co. v. Peshtigo P. Co. 194 W 631, 217 NW 312.

That the last material furnished was paid for in cash did not make inapplicable 299.06 (1), Stats. 1925. Usiak v. Kubiak, 198 W 600, 225 NW 168.

The lien for material and labor not furnished as one transaction or under a continuing contract is limited to items furnished within the statutory period. Prince v. Clubine Co. 203 W 504, 234 NW 699.

As used in 289.01, 289.02 and 289.06, Stats. 1929, "date of last charge for labor or materials" is synonymous with "date of furnishing the last labor or the last materials." Estate of Mohr, 212 W 198, 249 NW 517.

The part of a contract for removal of part of a building and debris not divisible from part requiring construction of temporary partition, new wall, roof, etc., so as to require filing of a lien within 6 months from completion of the first part. Findorff v. Fuller & Johnson Mfg. Co. 212 W 365, 248 NW 766.

The dismissal of an action to enforce a lien because the complaint was not filed within the period prescribed by 289.06, Stats. 1931, is error where the facts alleged in the complaint would entitle the plaintiff, by virtue of 289.12, to a personal judgment against the property owner. Augustine v. Congregation of the Holy Rosary, 213 W 517, 252 NW 271.

A lienor, although it supposed at the commencement of the work that the husband of the woman constructing the building was a contractor and that it was a subcontractor, was nevertheless, on discovering that the husband was merely acting as the agent of the wife, entitled, as a contractor, to 6 months within which to file its claim. Union Trust Co. of Maryland v. Rodeman, 220 W 453, 264 NW 508.

Where the last charge for material delivered to a contractor was September 26 and the seller's lien claim filed December 5, the claim was not filed in time, notwithstanding the fact that the materialman had given a credit of material returned the middle of November, the sale contract having no provision for return of material. Carl Miller L. Co. v. Federal Home Dev. Co. 231 W 509, 286 NW 58.

A material dealer who furnishes materials for a building directly to the owner is a "contractor" and hence may file his claim for a lien within 6 months from the date of the last charge for materials furnished, Warnke v. Braasch, 233 W 398, 289 NW 598.

An instrument signed only by the owner, notifying a lumber dealer that the owner had deposited with a lender a stated amount of money to be paid to the dealer for lumber to be used in the construction of the owner's residence, and reciting that if the materials furnished were satisfactory to the owner he would pay to the dealer the value thereof up to the stated amount, constituted a contract between the owner and the dealer obligating the owner to pay, and entitled the dealer, as a "contractor," to a lien on the premises for the materials furnished subsequent to the signing of the instrument. Fraser L. & M. Co. v. Laeyendecker, 243 W 25, 9 NW (2d) 97.

2. Contents of Claim Document.

The description of the premises and building is essential; but it need not always be by metes and bounds. Brown v. La Crosse C. G. L. & C. Co. 16 W 555.

The petition of a subcontractor must show with whom original contract was made and that such person had an interest in the premises affected by the proceeding upon which a lien can be enforced or it is inadmissible in evidence. Bertheolet v. Parker, 43 W 551.

The signature of one of a firm is sufficient. Enough should appear to show that it was made and filed by authority of parties who desired to avail themselves of the lien. White v. Dumpke, 45 W 454.

When filed by a contractor a claim need not state that the person against whom demand is claimed has any interest in the premises. Moritz v. Splitt, 55 W 441, 13 NW 555.

Error in description may be corrected as against all who have not acquired vested rights. Huse v. Washburn, 59 W 414, 18 NW 341.

If the land on which the building is situated is correctly described the petition for a lien is good if the building is described as "a certain building." North v. La Flesh, 73 W 520, 41 NW 633.

It is immaterial that a petition states that materials were sold to husband and wife while the complaint shows that sale was to the former, and that the petition and complaint do not agree as to the use made of them. Petition is amendable at any time. North v. La Flesh, 73 W 520, 41 NW 633.

An error in the description of the premises may be corrected in the action to enforce the lien. Kerrick v. Ruggles, 78 W 274, 47 NW 437.

The description may be amended after expiration of the time for filing a claim if the claim filed is not a nullity and third persons' rights will not be affected. Mark Paine L. Co. v. Douglas County I. Co. 94 W 322, 68 NW 1013.

The name of the person with whom a written contract for construction was made and the fact that defendants had given notice in writing as required by sec. 3320, Stats. 1898, are material facts. Scott v. Christianson, 110 W 164, 85 NW 658.

Where the claim for a lien does not contain a description of any specific parcel of land, it is defective in a vital element and it does not support a judgment awarding a lien. Dusick v. Green, 118 W 240, 95 NW 144.

A mistake in the name of the owner to whom notice was given may be cured by amendment. Pipkorn Co. v. Evangelical Society, 144 W 501, 129 NW 516.

See note to 263.28, citing Appleton S. Bank v. Fuller Goodman Co. 213 W 662, 252 NW 281.

Permitting a lienor to amend its lien claim by adding an additional lot on which the building being constructed encroached was not an abuse of discretion. Union Trust Co. of Maryland v. Rodeman, 220 W 453, 264 NW 508.

289.07 History: 1870 c. 4 s. 1 to 4; R. S. 1878 s. 3319; Stats. 1898 s. 3319; 1925 c. 4; Stats. 1925 s. 289.07; 1967 c. 351.

Legislative Council Note, 1967: This is present s. 289.07, with 2 changes. The docket column calling for date of filing now also calls for entry of the time of filing, which is sometimes of critical importance. Secondly, the number of docket columns has been increased from 8 to 9, with the added column providing for a docket entry as to what copies of what notices were attached (as required by proposed s. 289.06 (3)) to the claim when filed, to prevent cases where a party claims the notice was with the claim when filed, but has since been improperly removed. [Bill 525-A]

Under sec. 3318, R. S. 1878, the right to a lien is secured when, within that time, a claim is delivered to and left with the clerk to be filed; and the claimant will not be prejudiced by the failure of the clerk to perform his duty. Goodman v. Baerlocher, 88 W 287, 60 NW 415.

289.08 History: 1953 c. 492; Stats. 1953 s. 289.085; 1967 c. 351; Stats. 1967 s. 289.08.

Legislative Council Note, 1967: This is the present s. 289.085, with relatively minor changes. The last clause of sub. (4) has been added, to make clear that once the procedure in this section has been carried out, the land involved is completely free of the lien and no longer involved in the proceedings. Sub. (5) has been added, to make clear what is to be done with the security put on deposit if the claimant who filed the lien does not foreclose it. The first clause of sub. (1) has been expanded so that not only the person against whom the lien is claimed, but also any other interested party, may file the security and thus free the land involved from the lien. [Bill 525-A]

289.09 History: R. S. 1849 c. 120 s. 8; R. S. 1858 c. 153 s. 8; R. S. 1878 s. 3321; 1881 c. 328 s. 2; Ann. Stats. 1889 s. 3321; 1893 c. 256 s. 2; Stats. 1898 s. 3321; 1925 c. 4; Stats. 1925 s. 289.09; 1935 c. 483 s. 91; 1967 c. 351.

Legislative Council Note, 1967: This is present s. 289.09, substantially unchanged. [Bill 525-A]

One who has furnished materials used in constructing a building and given notice to the owner may enforce a lien in an action against the owner alone. Carney v. La Crosse & M. R. Co. 15 W 503.

Where a petition is addressed to the county clerk instead of the clerk of circuit court it does not affect jurisdiction of an action to enforce the lien. Challoner v. Howard, 41 W 355.

A subsequent purchaser or incumbrancer is a proper party. Rice v. Hall, 41 W 453.

A subsequent lien creditor is a proper party. Willer v. Bergenthal, 50 W 474, 7 NW 352.

The owners in severalty of contiguous lots, contracting jointly for the erection of a building thereon, who subsequently promised to be responsible for materials furnished their contractor, are jointly liable in an action to enforce liens for materials furnished; and materialmen who had filed separate petitions for liens were proper parties plaintiff. Treat L. Co. v. Warner, 60 W 133, 18 NW 747.

An action to foreclose a lien must be conducted in strict accordance with the statute. Wilson v. Rudd, 70 W 98, 35 NW 321.

The presence of all lien claimants is not a condition precedent to the maintenance of a suit to enforce a lien by any one of them, and a complaint is not defective for failing to allege that plaintiffs were the only lien claimants. Frederickson v. Riebsam, 72 W 587, 40 NW 501.

One made a party to proceedings to foreclose a lien because he claims to have some lien on the premises cannot question the judgment if he has not in any way disclosed any lien or claim thereon, and is, so far as the record shows, without any interest in the subject matter of the suit, and has neither excepted to the judgment nor moved for a new trial. Shabanaw v. C. C. Thompson & Walkup Co. 80 W 621, 50 NW 781.

Though the judgment demanded does not affect the interest of the wife of the defendant in the premises or ask a personal judgment against her, she is a proper party to the action. Hausmann Bros. Mfg. Co. v. Kempfert, 93 W 587, 67 NW 1136.

Lien claimants who are parties but who have not appeared cannot object that their rights are lost and ignored by the judgment. Bartlett v. Clough, 94 W 196, 68 NW 875.

Where a mechanic's lien is foreclosed upon a homestead where the contract was made with the husband, the wife was not a necessary party defendant. Hunt v. McDonald, 124 W 82, 102 NW 318.

In an action to foreclose a lien the owner, the principal contractor and his surety, and

other lienors are all proper parties. Yawkey-Crowley L. Co. v. De Longe, 157 W 390, 147 NW 334.

Foreclosure of a mechanic's lien is an equitable action. Rustles v. Christensen, 207 W 326, 241 NW 635.

A conditional sale vendor of sprinkler equipment installed in a building, by filing a claim for a lien, foreclosing the lien, and obtaining a judgment, made an election of remedies which, under the uniform conditional sales act, precluded it from retaking the equipment; and by such election the vendor relinquished and passed title to the lessees and vendees named in the sales contract, and made the equipment irrevocably a part of the realty to which it was affixed. Viking A. S. Co. v. Thwaits, 215 W 225, 253 NW 398.

In an action to foreclose a mechanic's lien for materials and labor furnished in constructing a dwelling house for the defendants pursuant to an oral contract therefor, the plaintiff was not required to prove what interest the defendants had in the premises at the time of the making of the contract, where it appeared that they subsequently acquired an interest therein by virtue of a deed given to them by the plaintiff, since, under 289.12, Stats. 1949, the lien attached to such after-acquired interest. Callaway v. Evanson, 272 W 251, 75 NW (2d) 456.

Where the attorney for defendant judgment creditor, in an action to foreclose a mechanic's lien, did not prepare and serve an answer or demurrer, but did admit service of summons and complaint and served and filed a notice of retainer and appeared at the trial, the judgment creditor should have been permitted to offer proof as to its judgment being a valid judgment lien and to establish the priority of its lien. Builder's Lumber Co. v. Stuart, 6 W (2d) 356, 94 NW (2d) 630.

Foreclosure of lien actions under 289.09 are equitable proceedings; they are triable to the court without a jury; if a jury is impanelled, the verdict is advisory only. Sid Grinker Co. v. Craighead, 33 W (2d) 42, 146 NW (2d) 478.

Foreclosure of mechanics' lien. Montemayor, 1951 WLR 745.

289.10 History: R. S. 1849 c. 120 s. 10, 13; R. S. 1858 c. 153 s. 10, 13; 1873 c. 98; R. S. 1878 s. 3324; 1881 c. 328 s. 4; Ann. Stats. 1889 s. 3324; 1893 c. 256 s. 4; 1895 c. 299; Stats. 1898 s. 3324; 1925 c. 4; Stats. 1925 s. 289.12; 1935 c. 483 s. 94; 1967 c. 351; Stats. 1967 s. 289.10.

Revisor's Note, 1935: The amendment is to require the proceeds of sale be all brought into court with the report to abide the further order of the court. The sale should be confirmed before the money is disbursed. [Bill 75-S, s. 94]

Legislative Council Note, 1967: This is present s. 289.12, renumbered s. 289.10 for compactness of numbering within the Wisconsin construction lien law. [Bill 525-A]

Where a judgment gives a lien upon more than one acre of land in a village the trial court will be directed to ascertain a specific acre to which the lien should attach. Plaintiff may file a remitter of all except one acre where it has been stipulated that an acre was reasonable for the use of the mill situated thereon. McCoy v. Quick, 30 W 521.

An order for judgment for deficiency is proper under a prayer for general relief though not specially demanded in the complaint. Huse v. Washburn, 59 W 414, 18 NW 341.

A judgment beginning in the usual form of a personal judgment, not awarding execution, is construed to be an assessment of the sum due. Crocker v. Currier, 65 W 662, 27 NW 825.

The statute allowing discretion in costs in equitable actions applies to mechanic's lien actions. Boesen v. Peterson, 130 W 418, 110 NW 208.

See note to 289.06, on filing claim and beginning action, citing Augustine v. Congregation of the Holy Rosary, 213 W 517, 252 NW 271.

A subcontractor, suing to foreclose lien, was entitled to a money judgment against the contractor. A. Lentz Co. v. Dougherty, 218 W 493, 261 NW 218.

The fact that a judgment of foreclosure of mechanics' liens failed to direct "that the interest of the owners in the premises at the commencement of the work" be sold, and that the notice of sale failed to indicate that such "interest" would be sold, did not render the sale invalid, and the owners cannot complain of such omissions in the absence of a showing that they were prejudiced thereby. Anthony Grignano Co. v. Gooch, 259 W 138, 47 NW (2d) 895.

See note to 289.09, citing Callaway v. Evanson, 272 W 251, 75 NW (2d) 456.

289.11 History: R. S. 1878 s. 3325; Stats. 1898 s. 3325; 1925 s. 4; Stats. 1925 s. 289.13; 1935 c. 483 s. 95; 1967 c. 351; Stats. 1967 s. 289.11.

Legislative Council Note, 1967: This is present s. 289.13, renumbered s. 289.11. [Bill 525-A]

289.12 History: R. S. 1878 s. 3326; 1880 c. 187; Ann. Stats. 1889 s. 3326; Stats. 1898 s. 3326; 1925 c. 4; Stats. 1925 s. 289.14; 1935 c. 483 s. 96; 1967 c. 351; Stats. 1967 s. 289.12.

Revisor's Note, 1935: The procedure for sales of land on execution is suitable and adequate. The amendment adopts it in toto. The proceeds should not be distributed till the sale is confirmed. [Bill 75-S, s. 96]

Legislative Council Note, 1967: This is present s. 289.14, renumbered s. 289.12. [Bill 525-A]

No personal judgment goes except for deficiency to be ascertained by sale. Willer v. Bergenthal, 50 W 474, 7 NW 352.

A foreclosure and sale of a mechanic's lien which was prior to a mortgage but subsequent to the foreclosure sale under the mortgage, the interest being purchased by the mortgagee, operated to pass to the purchaser the inchoate right of dower in the wife of the mortgagor. Connecticut Mut. Life Ins. Co. v. Goldsmith, 131 W 116, 111 NW 208.

No right of redemption from a sale in proceedings to enforce a mechanic's lien exists unless such right is conferred or created by statute or is agreed to. A judgment of foreclosure of mechanic's lien should not provide for a 1-year redemption period as in the case of a mortgage. 289.14, Stats. 1947, provides that a sale on foreclosure of such a lien shall be without redemption; and the amendment of

289.09 in 1935 so as to provide that in the foreclosure of such a lien the provisions of ch. 278, for the foreclosure of real-estate mortgages shall control as far as applicable, was for the purpose of shortening and simplifying the procedure, and construed, as it must be, under the provisions of 370.01 (49), was not intended to change the law so as to allow a period of redemption in the foreclosure of mechanics' liens. City L. & S. Co. v. Fisher, 256 W 402, 41 NW (2d) 285.

On the objection of owners of property to the confirmation of a sale of the property had pursuant to a judgment of foreclosure of mechanics' liens, on the ground that the amount bid was so inadequate as to be unconscionable, the rejection of the offer of the owners to prove the reasonable value of the property was error which, together with certain other matters appearing, requires a rehearing on the motion to confirm the sale. Anthony Grignano Co. v. Gooch, 259 W 138, 47 NW (2d) 895.

289.13 History: R. S. 1849 c. 120 s. 6, 7; R. S. 1858 c. 153 s. 6, 7; R. S. 1878 s. 3327; Stats. 1898 s. 3327; 1925 c. 4; Stats. 1925 s. 289.15; 1935 c. 483 s. 97; 1943 c. 322; 1967 c. 351; Stats. 1967 s. 289.13.

Legislative Council Note, 1967: [As to (1)] This is present s. 289.15, with minor editorial change, renumbered s. 289.13 (1).

[As to (2)] This provision is new, designed to give quick relief when a misdescription of land in a filed lien claim causes embarrassment or title problems for the owner of the land described in the claim, but not in fact subject to the lien. [Bill 525-A]

289.14 History: 1899 c. 292 s. 1; Supl. 1906 s. 3327a; 1911 c. 663 s. 436; 1917 c. 388; 1923 c. 108 s. 146; 1925 c. 4; Stats. 1925 s. 289.16; 1931 c. 438; 1933 c. 83, 316; 1935 c. 483 s. 98; 1945 c. 505; 1949 c. 27; 1959 c. 55, 519; 1959 c. 660 s. 73; 1967 c. 351; Stats. 1967 s. 289.14.

Legislative Council Note, 1967: With very minor editorial change, this is present s. 289.16, renumbered s. 289.14. [Bill 525-A]

The bond required by sec. 3327a was intended as a remedy for persons furnishing materials for public buildings coextensive with the security furnished in other cases by the lien given by sec. 3315. Government buildings are not subject to mechanics' liens. Wisconsin B. Co. v. National S. Co. 164 W 585, 160 NW 1044.

Under sec. 3327a, where the sureties on the bond of a contractor for the construction of a county building subscribed to covenants for the protection of materialmen as required by the statute, the materialmen could enforce the contract made for their benefit. Webb v. Freng, 181 W 39, 194 NW 155.

After a contractor abandoned work on a schoolhouse and the school district had undertaken completion of the building, no sum could become due the contractor so as to justify, as against his surety, a payment upon the contractor's order until completion of the building made it appear there was a balance due upon the contract price. The right to have the building fund applied to the completion of the building after the contractor's default and not diverted to the payment of the contractor's obligations to general creditors is one which may be asserted by a surety. Joint School Dist. v. Baillie-Marsh, 181 W 202, 194 NW 171.

The fact that the penalty in the bond given to secure performance of a contract to build a schoolhouse is less than sec. 3327a requires does not prevent a recovery upon it to the extent of the penalty named. Price County v. Northwestern C. & S. Co. 184 W 279, 199 NW 60.

A contract and a bond given for the faithful performance thereof must be construed as one contract. Building Contractors' Limited Mut. L. Ins. Co. v. Southern Surety Co. 185 W 83, 200 NW 770.

Under sec. 3327a the surety is liable to subcontractors for material and labor furnished to a contractor, notwithstanding a specific clause to that effect was, by oversight or voluntary act of the parties, omitted from the cost-plus contract for the erection of a school building. Baumann v. West Allis, 187 W 506, 204 NW 907.

The surety in a contract between a school district and a construction contractor is not discharged by any acts of the contracting parties. Wisconsin F. & F. B. Co. v. Southern S. Co. 188 W 383, 206 NW 204.

The provisions of sec. 3327a become a part of a bond furnished pursuant to the statute. Maryland Cas. Co. v. Eagle River U. F. H. S. Dist. 188 W 520, 205 NW 926.

A bond given pursuant to sec. 3327a by a paid surety will be treated as a contract of insurance rather than a common-law surety contract, and if any breach on the part of the indemnified results in damage to the surety it will be compensated to the extent of the damage but not released. Maryland Cas. Co. v. Eagle River U. F. H. S. Dist. 188 W 520, 205 NW 926.

The fact that a bond was broader than required by statute does not extend the meaning of the word "materials," which is construed to include only lienable materials. Fidelity & D. Co. v. Milwaukee-Western F. Co. 191 W 499, 210 NW 713.

The contract and the bond must be construed together, and the fact that the surety instead of executing the bond in strict conformity to the language of the statute guaranteed performance of the contract by joining with the contractor in the execution of the contract, is not a material circumstance. The legal relationship in the 2 cases is identical. Fidelity & D. Co. v. Milwaukee-Western F. Co. 191 W 499, 210 NW 713.

Where a subcontractor gave the contractor a receipt for the amount due the former under his contract to enable the latter to effect a final settlement with the school board, the subcontractor, by an acknowledgment of payment, waived his claim against the surety on the bond of the principal contractor. Wisconsin E. S. Co. v. Fidelity & D. Co. 191 W 645, 211 NW 670.

289.16 (2), Stats. 1925, has no application to an action to recover damages for the tortious act of a contractor or subcontractor. Kolb v. Hayes, 194 W 40, 215 NW 578.

A sewer contractors' surety was not relieved from liability because the contractor assigned the contract to another without notice to the surety. Sheboygan v. Citizens S. Bank, 198 W 416, 224 NW 720.

The bond requirement is mandatory and a municipality entering into an improvement contract without requiring the contractor to give a bond for payment of materialmen is liable to the materialmen not paid by the contractor. 289.16 is not in conflict with 62.15, Stats. 1929. Cowin & Co. v. Merrill, 202 W 614, 233 NW 561.

Where a subcontractor on a public highway bridge, in its contract with the principal contractor, agreed to pay for all "rentals of equipment" required for the construction of the work to be performed by the subcontractor and to furnish a bond guaranteeing the performance of the contract, and furnished a bond conditioned upon the performance of the contract and payments for "materials, equipment, facilities, labor and services," the surety was liable to third parties for the rental of such equipment. Theodore J. Molzahn & Sons v. Maryland Cas. Co. 214 W 603, 254 NW 101.

One, not a subcontractor, who furnished and operated a truck for transportation of materials for a highway contractor at an agreed price per yard, had no lien, and hence the surety on the bond of the contractor was not liable therefor, within 289.16, Stats. 1929. (Muller v. S. J. Groves & Sons Co. 203 W 203, applied; Theiler v. Consoliated I. & Ins. Co. 213 W 171, distinguished.) White v. United States F. & G. Co. 216 W 173, 256 NW 694.

The surety on a contractor's bond was released from liability to a materialman by waiver of the lien given to the principal contractor by the materialman before payment of the debt, where the waiver induced payment to the principal contractor and destroyed the surety's right to subrogation. Weil-McLain Co. v. Maryland Cas. Co. 217 W 126, 258 NW 175.

The bond required by 289.16 is for the benefit of laborers and materialmen and is also for the benefit of the municipality to secure construction according to the contract; but the provision in (2) for bringing suit "within one year" is applicable only to laborers, materialmen and subcontractors, and hence a county could maintain an action on a bond after one year. Milwaukee County v. H. Neidner & Co. 220 W 185, 263 NW 468, 265 NW 226, 266 NW 238.

A principal contractor doing public work is not liable to a subcontractor of a subcontractor, merely because of that relationship, in the absence of an agreement to the contrary, for what may be due from the subcontractor to his subcontractor. Gilson Bros. Co. v. Worden-Allen Co. 220 W 347, 265 NW 217.

A city's failure to retain enough, out of checks and special improvement bonds delivered to a sewer contractor, to pay the amount which the contracter owed to the city for materials used in sewer construction, as the city was authorized to do, was prejudicial to the surety on the contractor's bond, so as to relieve the surety from liability for the contractor's failure to pay such amounts owing to the city, where the contractor was insolvent, and the proceeds of checks and of bonds were not used solely to pay lienable claims for labor or materials furnished in performance of the contract. Wauwatosa v. Volpano, 224 W 503, 272 NW 459.

Under a contractor's bond for city sewers, machines sold to the contractor 4 years before the sewer contract was made were not furnished for the sewer contract; and hence the seller had no cause of action against the surety for the use-value of the machines or for the purchase price. Harnischfeger Sales Corp. v. Kehrein Bros. 229 W 225, 281 NW 918.

The words "used" and "consumed" are declared to be synonymous and the meaning of "used" is defined in Osgood Co. v. Peterson Const. Co. 231 W 541, 286 NW 54.

The intent of 289.16 (1) is to make beneficiaries of the bond only the municipality making the contract and persons furnishing labor, materials and other items listed in the statute, and it is not intended to extend the benefit of such a bond to persons not specifically mentioned, such as persons having claims in tort against the contractor for property damage resulting from blasting operations of the contractor. Kniess v. American Surety Co. 239 W 261, 300 NW 913.

See note to 60.36, citing Smith v. Pershing, 10 W (2d) 352, 102 NW (2d) 765.

The University Building Corporation was not an agency of the state in contracting for the construction of housing units and was not engaged in a public improvement or work and was not a public board or body within the meaning of 289.16 (1), Stats. 1957, and this section did not apply so as to bring into play the one-year statute of limitations in (2). Blaser v. Don Ganser & Associates, Inc. 19 W (2d) 403, 120 NW (2d) 629.

Where a public contractor who has given the required bond fails to pay the laborers and materialmen, and the proper officers are notified by the surety not to pay the balance due to such contractor, but to hold it for the payment of claims for labor and material, and a general creditor makes claim to such fund under an assignment from such contractor, the money should not be paid to either claimant, but should be held for determination by the court of their respective claims. 1 Atty. Gen. 115.

The delivery of a surety bond constitutes the execution thereof; the surety cannot thereafter withdraw from a public contractor's bond or limit the liability. 7 Atty. Gen. 569.

On a purchase of machinery by the state, sec. 3327a does not apply. 9 Atty. Gen. 136.

When a contract so provides, the completed portions of highway work may be paid for without avoiding the bond given under sec. 3327a. 9 Atty. Gen. 460.

It is not within the discretionary authority of a state board to reject a bond offered by a contractor because the sureties are personal and not corporate, unless the requirement of corporate sureties was made known to the contractor before awarding him the contract. 12 Atty. Gen. 136.

289.16, Stats. 1945, does not require that contracts for professional services of architects and engineers be accompanied by a surety bond. 35 Atty. Gen. 357.

Extent of protection under the statutory bond. 20 MLR 161.

289.15 History: 1921 c. 289; Stats. 1921 s. 3347dd; 1923 c. 167; 1925 c. 4; Stats. 1925 s. 289.53; 1929 c. 229 s. 1; 1931 c. 438; 1933 c. 83, 316; 1935 c. 191; 1941 c. 288; 1943 c. 475; 1945

c. 543; 1961 c. 495; 1967 c. 351; Stats. 1967 s. 289.15.

Comment of Advisory Committee, 1945: Old 289.53 (4) is made a separate section (289.536). Old 289.53 is complete only as to state highway contracts. The highway commission is the only public authority named in old (3). It is now generalized to cover the subject. [Bill 403-S]

Legislative Council Note, 1967: This provision closely follows present s. 289.53, but with some procedural changes. It is renumbered s. 289.15, to immediately follow present s. 289.16, which is renumbered s. 289.14.

The other changes are designed to get somewhat more certainty and finality into the procedure. In sub. (2), a notice to the prime contractor involved is added. Then it is possible, in sub. (3), to assume the claim is admitted if the prime contractor to whom the notice was sent does not dispute it within 30 days. If there is a dispute, sub. (3) follows the procedure in present s. 289.53 (3). Sub. (4) differs from present s. 289.53 (4) in that if the total claims exceed the contract proceeds still available, the debtor would take the initiative, formulate a proposed distribution of the amount that is available, and then make a payout based on the proposal unless an interested party sues to challenge it. [Bill 525-A]

An allegation that the defaulting contractor disputed the claim is unnecessary to establish a "dispute" within the meaning of 3347dd (3), as to the time for bringing an action for the amount withheld by the county under 3347dd (1), the necessity of an action and the fact that the claim is not admitted showing a dispute. Rusk v. Bank of La Farge, 185 W 454, 201 NW 762.

The lienability of claims arising for work performed or materials furnished to a contractor engaged in highway construction is to be tested and determined upon the same standard as similar claims would be under the general mechanic's lien law. Southern Surety Co. v. Metropolitan S. Comm. 187 W 206, 201 NW 980, 204 NW 476; Southern Surety Co. v. Hotchkiss, 187 W 227, 201 NW 986.

A claim for a lien by materialmen filing a notice over 6 months after delivery of the last sewer certificate was only effective as to amount still due contractor at time notice was served. Citizens S. Bank v. Sheboygan, 198 W 416, 224 NW 720.

The lien for services or materials entering into public works under 289.53 is coextensive with the mechanic's lien given by 289.16. Such lien does not extend to a claim for the use of an engine rented to a highway subcontractor. Muller v. S. J. Groves & Sons Co. 203 W 203, 233 NW 88.

What 289.53 intends to make lienable is: (1) materials that are incorporated into the project such as concrete in the case of a highway, (2) materials which are consumed in making forms or producing energy for the operation such as lumber and oil and (3) the rental value or depreciation upon the job of machinery that is used but not used up in the project. In regard to machinery it must be furnished for employment for use upon the very job out of which have come the funds against which a lien is claimed. Osgood Co. v. Peterson Const. Co. 231 W 541, 286 NW 54.

The remedy under 289.53 (1) is not available to the supplier of a subcontractor of a contractor. Lehmann Tire & Supply v. Mashuda Constr. Co. 14 W (2d) 176, 109 NW (2d) 650.

Since 289.53 (1) provides a lien for workmen's compensation insurance premiums, other insurance premiums are excluded. Boehck Construction Equip. Corp. v. Voigt, 17 W (2d) 62, 115 NW (2d) 627, 117 NW (2d) 372.

Sec. 3347dd, Stats. 1921, does not cover a claim for damages due to a defect in the highway, and no moneys due a contractor should be withheld on account of a notice of such claim being made. 11 Atty. Gen. 186.

Food supplies furnished a subcontractor on a state highway project are not "materials" within meaning of the contract and the bond of the principal contractor or the lien laws; payment to the principal contractor cannot be withheld under sec. 3347dd on account of claims therefor. 11 Atty. Gen. 517.

An assignment to banks executed by the contractor, of sums to become due him from the county, may not be "accepted" by the highway commissioner or by the county treasurer. County officials are advised to refuse to pay out money withheld to either lien claimants or the bank until the court has settled the question of priority of claims. 12 Atty. Gen. 102.

The lien established by sec. 3347dd on public improvements is applicable to a contract for the construction of the Wisconsin Memorial Hospital. 12 Atty. Gen. 174.

The state highway commission officials have no power to "accept" an order of a contractor, on highway work, given in payment of a loan to the contractor, so as to create a liability of the state on such order; nor, it seems, does the contractor's bond cover the liability of the contractor based on such loan and order. Claims for liens filed under provisions of sec. 3347dd have precedence over such an order, but the rights of all claimants to the credit of the contractor should be determined in an equitable action in accordance with provisions of said section. 12 Atty. Gen. 188.

Where a contractor breaches a contract with a county for building a bridge, the county is not liable to lien claimants under sec. 3347dd, except for the amount finally found due the contractor, after completion of the work by the county and a deduction of the damages accruing to the county by reason of the breach. Such lien claimants, however, may have a remedy against the surety on the contractor's bond under sec. 3327a. 12 Atty. Gen. 248.

The highway commission should retain, from the amount of the contract price for constructing a highway, a sufficient amount to pay all claims filed with it under sec. 3347dd. 12 Atty. Gen. 313.

Failure to bring an equitable action and give notice thereof to enforce a claim filed with the state highway commission within the time prescribed by sec. 3347dd, as amended by ch. 167, Laws 1923, bars all rights of claimant under said section; the commission may thereafter pay to the contractor any sum withheld by reason of filing of such claim. 12 Atty. Gen. 379. Compare 11 Atty. Gen. 921.

Sec. 3347dd gives a lien only for materials used and consumed in performance of a contract; it should be construed as being broader than sec. 3315. 12 Atty. Gen. 438.

Failure to bring an equitable action and give notice thereof to enforce a claim filed within the time prescribed by sec. 3347dd (3) bars all rights of a claimant under said section. A contractor may thereafter be paid any sum withheld by reason of filing such claim. 13 Atty. Gen. 161.

Where a summons in an equitable action under sec. 3347dd (3) is placed in the hands of the sheriff for service and notice of bringing such action is mailed to the officer in whose hands moneys on which the lien is claimed within 3 months from giving of the lien notice, action is begun and notice is given in time; in any event, the officer should not pay out money in his hands except under final judgment of a court in such action. 14 Atty. Gen. 11.

Under 289.53 (1), notice of a materialman's claim for a lien on moneys due the principal contractor on a contract for public improvement must be filed prior to payment to the contractor. 24 Atty. Gen. 618.

289.155 History: 1945 c. 543; Stats. 1945 s. 289.535; 1947 c. 143, 472; 1961 c. 316, 495; 1965 c. 507 s. 5 (1), (4); 1967 c. 351; Stats. 1967 s. 289.155.

Comment of Advisory Committee, 1945: The provision in old 304.21 for sequestering funds due to public contractors twice mentions section 289.53 and the two sections are rather closely related. Section 289.53 deals with lienable claims, that is, claims due for materials or labor. It therefore seems advisable to bring these two provisions near together. A separate section to provide the remedy for ordinary judgment creditors against public contractors is created to be numbered 289.535.

Old 304.21 provides that if the judgment debtor files an affidavit that an appeal has been or will be taken from the judgment, payment shall not be made until final determination of the appeal. In order to speed up the procedure, that provision is omitted from new 267.22 and 289.535.

(1) To avoid confusion and to make clearer the priorities among claimants, it seems advisable to expressly declare the precedence among the classes under sections 267.22, 289.53 and 289.535. Claims under 289.53 are liens, strictly speaking. Proceedings under 267.22 and 289.535 are simply remedies afforded judgment creditors to reach moneys due to judgment debtors from public funds.

(2) Due process and equal protection clauses of the constitutions require notice to the judgment debtor when his property is being taken. McDonald v. State, 203 W 649, 656; State ex rel. Anderton v. Sommers, 242 W 484.

(3) The stay of payment is to give the debtor an opportunity to defend his rights.

(5) affords a safeguard against padding lien claims to the prejudice of the contractor's judgment creditors. (5) (b) is new. [Bill 403-S]

Legislative Council Note, 1967: Except for appropriate renumbering, this is present s. 289.535, renumbered s. 289.155 (and present s. 289.53 is renumbered s. 289.15). [Bill 525-A]

289.16 History: 1945 c. 543; Stats. 1945 s. 289.536; 1955 c. 696 s. 56; 1967 c. 351; Stats. 1967 s. 289.16.

Comment of Advisory Committee, 1945: 289.536 is from 298.53 (4). [289.53 (4)] This trust provision is applicable to construction contractors generally (289.02 (4)). [Bill 403-S]

Legislative Council Note, 1967: This is present s. 289.536, renumbered, with minor editorial change to bring it more closely parallel to s. 289.02 (5) (which in turn closely follows present s. 289.02 (4)). [Bill 525-A]

Since a trust cannot be created without a beneficiary, in the absence of unpaid claims due workmen or materialmen on account of work done or materials furnished to the contractor for public or county improvements, no trust arises, and the fund represented by county orders is free from the operation of the statute, and in the hands of the contractor has the same status that it would have had if this provision had not been enacted. Danischefsky v. Klein-Watson Co. 209 W 210, 244 NW 772.

The term "claim" as used in provisions of 289.53 (4) and 304.21 (1), Stats. 1933, dealing with the status of claims against moneys due to a contractor for public improvements, is more comprehensive than "lien", and includes nonlienable items so long as they are germane to performing such contract on the public work. Morris F. Fox & Co. v. State, 229 W 44, 281 NW 666.

Where a contractor assigned his municipal paving contract to a bank, which later delivered the contract to him and took trust receipts reciting that the contractor received the contract as the property of the bank and held it subject to the bank's order, and the city paid the retained percentage to the contractor, who deposited the amount thereof in the bank which satisfied the contractor's indebtedness from the amount so deposited, the bank received the fund not merely as a bank but as a trustee and was not relieved, by provision of the fiduciary act, from liability to an unpaid subcontractor or surety on the contractor's bond, as subrogee, for misappropriation of the trust fund. Murphy v. National Paving Co. 229 W 100, 281 NW 705.

A contract made with the central board of purchases of the city of Milwaukee to furnish sand and gravel to be used by the city itself in repair and maintenance work was merely a contract for the sale of materials to the city and was not a contract for a "public improvement," and hence did not bring persons furnishing materials and labor thereunder within the protection of 289.53 (4). Ozaukee S. & G. Co. v. Milwaukee, 243 W 38, 9 NW (2d) 99.

See note to 289.02, on notice, citing Visser v. Koenders, 6 W (2d) 535, 95 NW (2d) 363.

A second-degree subcontractor, that is, a supplier of a subcontractor of a prime or principal contractor, did not qualify for equitable relief against the prime contractor, who was not in privity with the second-degree subcontractor, and did not improperly divert any trust funds, but made payments to the subcontractor, and was not a party to the latter's default in his obligation to pay the second-degree subcontractor. Hribar Trucking, Inc. v. State, 22 W (2d) 431, 126 NW (2d) 52.

A supplier of a subcontractor is entitled to preferred status under this section even if there is no theft or misappropriation and even if the claim is not lienable under 289.53. In re Bossell, Van Vechten & Chapman, 30 W (2d) 215, 140 NW (2d) 255.

289.17 History: 1947 c. 138; Stats. 1947 s. 289.538; 1967 c. 351; Stats. 1967 s. 289.17.

Legislative Council Note, 1967: This is present s. 289.538, renumbered. [Bill 525-A]

289.18 History: 1860 c. 215; 1861 c. 186; 1862 c. 154 s. 1; 1865 c. 517 s. 1; 1866 c. 66; 1867 c. 100; 1870 c. 120; P. & L. 1872 c. 71; 1874 c. 17, 267; 1876 c. 32; 1877 c. 95; R. S. 1878 s. 3329; 1881 c. 330 s. 1; 1882 c. 319 s. 1; 1885 c. 469 s. 1; 1899 c. 413 s. 1, 16; Ann. Stats. 1889 s. 3329, 3341; 1891 c. 139 s. 1; 1895 c. 72; Stats. 1898 s. 3329; 1913 c. 241; 1919 c. 484; 1925 c. 4, 26; Stats. 1925 s. 289.18; 1935 c. 483 s. 100.

Where a lien is claimed for the amount due for labor, part of which is lienable and part not, and there is no proof produced so that one can be separated from the other with reasonable certainty, the entire claim for a lien must be denied. McGeorge v. Stanton-De Long L. Co. 131 W 7, 110 NW 788.

Loggers' liens are limited to securing wages for labor performed by individuals, and do not extend to secure contractors performing their contracts through employes. John v. Flanner Co. 211 W 424, 248 NW 436.

Where the state sells timber under contract providing for retention of title until said timber has been measured and paid for, employes of the purchaser may not obtain liens thereon under 289.18, Stats. 1941, until the timber has been counted and paid for and title thereto has passed from the state. 31 Atty. Gen. 370.

289.19 History: 1860 c. 215 s. 2; 1861 c. 186 s. 2, 17; 1862 c. 154 s. 2; R. S. 1878 s. 3331; 1880 c. 192; 1881 c. 330 s. 2; 1882 c. 319 s. 2; 1885 c. 192; 1885 c. 469 s. 3; 1889 c. 413 s. 2, 18; Ann. Stats. 1889 s. 3331; 1891 c. 139 s. 2; Stats. 1898 s. 3330; 1925 c. 4; Stats. 1925 s. 289.19; 1935 c. 483 s. 101; 1955 c. 366; 1963 c. 93.

289.20 History: 1860 c. 215 s. 4, 6, 8; 1861 c. 186 s. 3, 4, 6, 8, 21; 1862 c. 154 s. 4, 6, 8; 1869 c. 144 s. 1, 2; 1873 c. 139; R. S. 1878 s. 3332; 1880 c. 192; 1881 c. 330 s. 2; 1882 c. 319 s. 2; 1885 c. 192; 1889 c. 413 s. 3; 1889 c. 454; Ann. Stats. 1889 s. 3332; 1891 c. 139 s. 2, 3; Stats. 1898 s. 3331; 1925 c. 4; Stats. 1925 s. 289.20; 1935 c. 483 s. 102; 1961 c. 495; 1967 c. 276 ss. 39, 40; 1969 c. 87.

289.21 History: 1861 c. 186 s. 13; R. S. 1878 s. 3333; 1881 c. 330 s. 3; 1882 c. 319 s. 3; 1885 c. 469 s. 4; 1889 c. 413 s. 4; Ann. Stats. 1889 s. 3333; 1891 c. 139 s. 5; Stats. 1898 s. 3332; 1925 c. 4; Stats. 1925 s. 289.21; 1935 c. 483 s. 103; 1961 c. 614; 1967 c. 276 s. 39; 1969 c. 87.

289.24 History: 1931 c. 15 s. 2; Stats. 1931 s. 289.325; 1935 c. 483 s. 115; Stats. 1935 s. 289.24.

289.25 History: 1863 c. 169 s. 1 to 3; R. S. 1878 s. 3337; 1881 c. 141; Ann. Stats. 1889 s. 3337; Stats. 1898 s. 3337; 1925 c. 4; Stats. 1925 s. 289.25; 1935 c. 483 s. 107.

289.26 History: 1873 c. 74; R. S. 1878 s. 3338; Stats. 1898 s. 3338; 1925 c. 4; Stats. 1925 s. 289.26; 1935 c. 483 s. 108.

289.28 History: 1861 c. 186 s. 13; R. S. 1878 s. 3340; 1881 c. 330 s. 5; 1882 c. 319 s. 5; 1885 c. 469 s. 6; 1889 c. 413 s. 9; Ann. Stats. 1889 s. 3340; Stats. 1898 s. 3340; 1925 c. 4; Stats. 1925 s. 289.28; 1935 c. 483 s. 110.

289.29 History: 1882 c. 273; 1889 c. 413 s. 10; Ann. Stats. 1889 s. 3340a; Stats. 1898 s. 3340a; 1925 c. 4; Stats. 1925 s. 289.29; 1935 c. 483 s. 111; 1967 c. 276 s. 39; 1969 c. 87.

289.30 History: 1889 c. 413 s. 11, 12, 13; Ann. Stats. 1889 s. 3340b, 3340c, 3340d; Stats. 1898 s. 3340b; 1925 c. 4; Stats. 1925 s. 289.30; 1967 c. 276 ss. 39, 40; 1969 c. 87.

289.31 History: 1889 c. 413 s. 14, 15; Ann. Stats. 1889 s. 3340e, 3340f; Stats. 1898 s. 3341; 1925 c. 4; Stats. 1925 s. 289.31; 1935 c. 483 s. 113.

289.33 History: 1885 c. 225; Ann. Stats. 1889 s. 3331a; Stats. 1898 s. 3342a; 1925 c. 4; Stats. 1925 s. 289.33; 1935 c. 483 s. 116.

289.35 History: 1889 c. 448 s. 1; Ann. Stats. 1889 s. 3342b; Stats. 1898 s. 3342c; 1925 c. 4; Stats. 1925 s. 289.35.

Editor's Note: In connection with this section, see Davis v. Alvord, 94 US 545, which construed a territorial statute applicable in a suit to recover a judgment against defendant for labor performed upon a quartz mine and quartz mill in Montana Territory and to enforce a mechanic's and laborer's lien upon his interest in the premises.

289.36 History: 1889 c. 448 s. 2; Ann. Stats. 1889 s. 3342c; Stats. 1898 s. 3342d; 1925 c. 4; Stats. 1925 s. 289.36.

Editor's Note: In connection with this section, see Davis v. Alvord, 94 US 545, which construed a territorial statute applicable in a suit to recover a judgment against defendant for labor performed upon a quartz mine and quartz mill in Montana Territory and to enforce a mechanic's and laborer's lien upon his interest in the premises.

289.37 History: 1889 c. 448 s. 3; Ann. Stats. 1889 s. 3342d; Stats. 1898 s. 3342e; 1925 c. 4; Stats. 1925 s. 289.37.

289.38 History: 1889 c. 448 s. 4; Ann. Stats. 1889 s. 3342e; Stats. 1898 s. 3342f; 1924 c. 4; Stats. 1925 s. 289.38.

289.39 History: 1889 c. 448 s. 5; Ann. Stats. 1889 s. 3342f; Stats. 1898 s. 3342g; 1925 c. 4; Stats. 1925 s. 289.39.

289.40 History: 1915 c. 264; Stats. 1923 s. 3342m; 1925 c. 4; Stats. 1925 s. 289.40; 1935 c. 213; 1935 c. 483 s. 118; 1955 c. 366.

289.41 History: R. S. 1849 c. 120 s. 14; R. S. 1858 c. 153 s. 14; R. S. 1878 s. 3343; Stats. 1898 c. 3343; 1917 c. 266, 367; Stats. 1917 s. 3343, 3346t; 1925 c. 4; Stats. 1925 s. 289.41, 289.47; 1929 c. 275; 1931 c. 140; 1935 c. 483 s. 119, 123; Stats. 1935 s. 289.41; 1947 c. 284; 1957 c. 541; 1959 c. 451; 1963 c. 294; 1965 c. 36, 334; 1965 c. 625 s. 45; 1969 c. 113, 119; 1969 c. 331 s. 53.

Legislative Council Note, 1969: This amendment makes definite that security interests which are perfected as provided by law will be protected over the dollar amounts in s. 289.41 (1). The ambiguity of the present wording results from the word "filing" used in this section, when certain security interests can be perfected without the normal filing in the county.

Section 342.24 exempts motor vehicle security interests from filing in the county. However, these security interests are perfected by using department of transportation procedures.

In addition, s. 409.302 (1) (d) of the uniform commercial code allows perfection of a purchase money security interest in consumer goods having a purchase price not in excess of $250 without any form of filing. LRB-325 (Chap. 39, Laws 1969) would raise the amount in this section of the UCC to $500, thus bringing these security interests in potential conflict with s. 289.41 (1). [Bill 19-A]

An unconditional delivery to the owner of property on which a lien has accrued is a waiver of the lien, and, except in case of fraud or mistake, it cannot be restored by resuming possession. Sensenbrenner v. Mathews, 48 W 250, 3 NW 599.

The lien for repairs upon personal property is superior to the lien of a prior chattel mortgage. Jesse A. Smith A. Co. v. Kaestner, 164 W 205, 159 NW 738.

289.415 History: 1961 c. 356; Stats. 1961 s. 289.415; 1963 c. 158; 1965 c. 525; 1969 c. 500 s. 30 (3) (g).

Legislative Council Note, 1963: Language changed to conform to the terminology of the commercial code. [Bill 1-S]

289.42 History: 1917 c. 266 s. 2; Stats. 1917 s. 3343m; 1925 c. 4; Stats. 1925 s. 289.42; 1929 c. 275; 1935 c. 483 s. 120.

289.43 History: 1863 c. 89 s. 1, 3; 1871 c. 6; R. S. 1878 s. 3344; Stats. 1898 s. 3344; 1911 c. 394; 1913 c. 341; 1915 c. 233; 1925 c. 4; Stats. 1925 s. 289.43; 1931 c. 78; 1935 c. 169; 1935 c. 483 s. 121; 1935 c. 520 s. 10; 1937 c. 430.

An innkeeper has a lien upon baggage or goods brought to his house by a guest, even where such goods belong to a third party but are lawfully in possession of the guest. If they are relinquished without fraud the lien is lost and it will not revive if they come again into his possession; but it is otherwise if he is induced to part with his possession through fraud. Manning v. Hollenbeck, 27 W 202.

Ch. 89, Laws 1863, gave to a keeper of a boarding house a lien upon the baggage and effects of a boarder for the amount due for board, of the same character and extent as that which an innkeeper has at common law upon the goods of his guests who are travelers and wayfaring persons. Nichols v. Halliday, 27 W 406.

No lien exists upon the effects of a married woman living at a boarding house with her husband. Even though she agrees to charge her separate estate for the board bill such agreement would not confer the statutory lien, but would simply be an equitable lien or charge. Chickering-Chase Brothers Co. v. White, 127 W 83, 106 NW 797.

A garageman is not entitled to a lien for storage in the absence of proof that, in compliance with the requirements of the statute, he had posted a sign indicating his charges. West Allis I. L. Co. v. Stark, 197 W 363, 222 NW 310.

289.44 History: 1863 c. 91 s. 1, 2; R. S. 1878 s. 3345; Stats. 1898 s. 3345; 1925 c. 4; Stats. 1925 s. 289.44.

Sec. 3345, R. S. 1878, seems to be in confirmation of the common law. McGraf v. Rugee, 60 W 406, 19 NW 530.

289.45 History: 1863 c. 91 s. 3; R. S. 1878 s. 3346; Stats. 1898 s. 3346; 1925 c. 4; Stats. 1925 s. 289.45.

There is no presumption that a receipt for chattels is a warehouse receipt or that the receiptors were warehousemen; and the allegations and proof must establish these facts. In cases free from fraud the holder of a warehouse receipt is to be regarded as vendee and owner of the property for all purposes, and the warehouseman as his bailee. Shepardson v. Cary, 29 W 34.

The term "warehouse keeper's receipt", in ch. 91, Laws 1863, must be understood as applying to private warehouses, and not merely to a customhouse or bonded warehouses. Price v. Wisconsin M. & F. Ins. Co. 43 W 267.

Sec. 3, ch. 91, Laws 1863, being in derogation of the common law, must be strictly construed. Victor S. M. Co. v. Heller, 44 W 265.

289.46 History: 1915 c. 211; Stats. 1915 s. 3346m; 1925 c. 4; Stats. 1925 s. 289.46; 1935 c. 483 s. 122.

289.48 History: R. S. 1878 s. 3347; Stats. 1898 s. 3347; 1917 c. 566 s. 45; 1919 c. 679 s. 98; 1925 c. 4; Stats. 1925 s. 289.48; 1935 c. 483 s. 124; 1947 c. 284; 1963 c. 158; 1965 c. 252; 1969 c. 500 s. 30 (3) (g).

Sec. 3347, R. S. 1878, applies to all cases of common-law liens and was not repealed by sec. 1, ch. 319, Laws 1882, which extended the scope of sec. 3329. Arians v. Brickley, 65 W 26, 26 NW 188.

An action to foreclose a lien upon a pledge of more than $100 value is of an equitable nature and not triable by jury, although personal judgment goes against the pledgor. An execution should not be issued until after the sale of the pledge and then only on the order of the court for the deficiency, after applying the proceeds of the sale towards the payment of the amount of the lien. Wilson v. Johnson, 74 W 337, 43 NW 148.

A warehouseman engaged in the ordinary storage of goods for hire and not as a common carrier must proceed under sec. 3347, Stats. 1898, to foreclose its lien and if it does not do so, it is guilty of conversion of the goods. Devlin v. Wisconsin S. Co. 147 W 518, 133 NW 578.

See note to 171.04, citing Schacht v. Oriental S. & T. Co. 155 W 121, 143 NW 1058.

In an action for damages for alleged unlawful sale of cattle in the foreclosure of a lien claimed under 289.43 (3) it was the plaintiff's burden to prove that the sale was invalid. Umentum v. Arendt, 267 W 373, 66 NW (2d) 192.

289.49 History: 1887 c. 441; 1889 c. 468;

Ann. Stats. 1889 s. 3347a; 1891 c. 383; Stats. 1898 s. 3347a; 1915 c. 274; 1925 c. 4; Stats. 1925 s. 289.49; 1945 c. 87.

289.50 History: 1899 c. 220 s. 1; Supl. 1906 s. 3347b; 1919 c. 172; 1925 c. 4, 48; Stats. 1925 s. 289.50; 1927 c. 320; 1935 c. 483 s. 125; 1965 c. 334.

289.52 History: 1899 c. 220 s. 3; Supl. 1906 s. 3347d; 1919 c. 172; 1925 c. 4; Stats. 1925 s. 289.52.

289.54 History: 1905 c. 260 s. 1; Supl. 1906 s. 3347e; 1925 c. 4; Stats. 1925 s. 289.54; 1935 s. 483 s. 127; 1963 c. 105.

289.55 History: 1905 c. 260 s. 2; Supl. 1906 s. 3347f; 1925 c. 4; Stats. 1925 s. 289.55; 1935 c. 483 s. 127; 1963 c. 105.

289.56 History: 1905 c. 260 s. 3; Supl. 1906 s. 3347g; 1925 c. 4; Stats. 1925 s. 289.56; 1935 c. 483 s. 127; 1963 c. 105.

289.57 History: 1905 c. 260 s. 4; Supl. 1906 s. 3347h; 1925 c. 4; Stats. 1925 s. 289.57; 1935 c. 483 s. 127; 1963 c. 105; 1967 c. 276 ss. 39, 40; 1969 c. 87.

289.58 History: 1905 c. 260 s. 5; Supl. 1906 s. 3347i; 1925 c. 4; Stats. 1925 s. 289.58; 1935 c. 483 s. 127; 1963 c. 105; 1967 c. 276 s. 40; 1969 c. 87.

289.59 History: 1905 c. 260 s. 6; Supl. 1906 s. 3347j; 1915 c. 604 s. 44; 1925 c. 4; Stats. 1925 s. 289.59; 1935 c. 483 s. 127; 1963 c. 105.

289.61 History: 1905 c. 260 s. 8; Supl. 1906 s. 3347l; 1925 c. 4; Stats. 1925 s. 289.61; 1935 c. 483 s. 127; 1963 c. 105.

289.62 History: 1905 c. 260 s. 9; Supl. 1906 s. 3347m; 1925 c. 4; Stats. 1925 s. 289.62; 1935 c. 483 s. 127; 1963 c. 105.

289.63 History: 1905 c. 260 s. 10; Supl. 1906 s. 3347n; 1925 c. 4; Stats. 1925 s. 289.63; 1935 c. 483 s. 127; 1963 c. 105.

289.64 History: 1905 c. 260 s. 11; Supl. 1906 s. 3347o; 1925 c. 4; Stats. 1925 s. 289.64; 1935 c. 483 s. 127; 1963 c. 105.

289.65 History: 1905 c. 260 s. 12; Supl. 1906 s. 3347p; 1911 c. 663 s. 438; 1925 c. 4; Stats. 1925 s. 289.65; 1935 c. 483 s. 127; 1963 c. 105; 1967 c. 276 ss. 39, 40; 1969 c. 87.

289.66 History: 1905 c. 260 s. 13; Supl. 1906 s. 3347q; 1925 c. 4; Stats. 1925 s. 289.66; 1935 c. 483 s. 127; 1963 c. 105; 1967 c. 276 ss. 39, 40; 1969 c. 87.

289.70 History: 1935 c. 447; Stats. 1935 s. 289.70; 1937 c. 351; 1939 c. 159; 1943 c. 275 s. 63; 1947 c. 534; 1955 c. 553; 1957 c. 99; 1965 c. 60, 284; 1967 c. 351 s. 6.

See note to sec. 13, art. I, on taking private property for public use, citing Hall's Point Property Owners Asso. v. Zinda, 247 W 280, 19 NW (2d) 251.

289.70 does not limit the corporation to making an assessment against solely the lots or land owned by members of the corporation. Hall's Point Property Owners Asso. v. Zinda, 247 W 280, 19 NW (2d) 251.

A corporation under 289.70 cannot levy assessments for maintenance of after-acquired property against lot owners who purchased prior to the acquisition nor against lot owners who purchased later unless knowledge of the acquisition and acceptance of benefits is shown. Mere recording of the deed is not sufficient. Hunt v. Oakwood Hills Civic Asso. 19 W (2d) 113, 119 NW (2d) 466.

289.71 History: 1943 c. 358; Stats. 1943 s. 289.71; 1947 c. 204; 1969 c. 331.

289.80 History: 1961 c. 418; Stats. 1961 s. 289.80.

CHAPTER 290.

Liens Against Vessels.

290.01 History: R. S. 1849 c. 116 s. 1; R. S. 1858 c. 150 s. 1; 1869 c. 184 s. 1; 1872 c. 95 s. 1; R. S. 1878 s. 3348; Stats. 1898 s. 3348; 1925 c. 4; Stats. 1925 s. 290.01.

Under ch. 116, R. S. 1849, the question whether the boat proceeded against was within the statute was one of fact. Rand v. The Barge, 3 Pin. 363. See also Scow Boat v. Lynn, 1 Pin. 239.

The statute can give a lien only in case of claims arising within the state. It may be resorted to for enforcing claims accruing elsewhere where the person liable remains owner of the vessel at the time proceedings are begun against it. McRoberts v. Steamboat Henry Clay, 17 W 101.

Whether a steward is an agent depends on the general usage and authority of stewards in such cases. Ernst v. Steamboat Brooklyn, 22 W 649.

A contract to supply sails, etc., for a vessel in building is not a maritime contract, so as to fall within the admiralty jurisdiction of the federal courts. In admiralty causes arising upon the lakes state courts have concurrent jurisdiction over remedies given by state laws. Thorsen v. Schooner J. B. Martin, 26 W 488.

Sale of a boat or vessel by the owner, on execution against him, did not divest it of liability. Thorsen v. Schooner J. B. Martin, 26 W 488.

Where the owner and the parties furnishing the supplies were residents of this state and a city therein was the vessel's home port, the lien attached as soon as she entered it. Thorsen v. Schooner J. B. Martin, 26 W 488.

A proceeding against a vessel to enforce a contract for pilot's wages is not within the jurisdiction of state courts. Campbell v. Sherman, 35 W 103.

Maritime liens on domestic ships in home ports can be enforced in rem only by federal courts. Weston v. Morse, 40 W 455.

The remedy given by sec. 3348, Stats. 1898, is not exclusive, and a vessel may be seized upon writ of attachment in a proper case. Phillips v. Eggert, 133 W 318, 113 NW 686.

Sec. 3348, R. S. 1878, does not confer jurisdiction upon a court of admiralty of a proceeding in rem against a vessel for damage negligently caused to a municipal bridge. An admiralty court will take jurisdiction to enforce a lien given by local law only when the