287.38 History: R. S. 1849 c. 103 s. 41; R. S. 1858 c. 147 s. 41; R. S. 1878 s. 3289; Stats. 1898 s. 3289; 1925 c. 4; Stats. 1925 s. 287.38.

287.39 History: R. S. 1849 c. 103 s. 42; R. S. 1858 c. 147 s. 42; R. S. 1878 s. 3290; Stats. 1898 s. 3290; 1925 c. 4; Stats. 1925 s. 287.39.

287.40 History: R. S. 1849 c. 103 s. 43; R. S. 1858 c. 147 s. 43; R. S. 1878 s. 3291; Stats. 1898 s. 3291; 1925 c. 4; Stats. 1925 s. 287.40.

287.41 History: R. S. 1849 c. 103 s. 64 to 68; R. S. 1858 c. 147 s. 64 to 68; R. S. 1878 s. 3292; Stats. 1898 s. 3292; 1925 c. 4; Stats. 1925 s. 287.41.

287.42 History: R. S. 1849 c. 70 s. 57; R. S. 1858 c. 101 s. 59; R. S. 1878 s. 3293; Stats. 1898 s. 3293; 1925 c. 4; Stats. 1925 s. 287.42.

287.43 History: R. S. 1849 c. 69 s. 15; R. S. 1858 c. 100 s. 15; R. S. 1878 s. 3832; Stats. 1898 s. 3832; 1925 c. 4; Stats. 1925 s. 312.13; 1933 c. 190 s. 15; Stats. 1933 s. 287.43; 1969 c. 339.

Editor's Note: This section is repealed, effective April 1, 1971, by ch. 339, Laws 1969. See the editor's note printed ahead of ch. 851 for information as to the provision in the new probate code which replaces it.

An executor or administrator cannot maintain an action against a person claiming to be decedent's widow to bar her from claiming dower in the real estate on the ground of the invalidity of the alleged marriage. Such question, it seems, may be raised upon the application for license to sell the realty. Paige v. Fagan, 61 W 667, 21 NW 786.

No action can be maintained by an administrator under sec. 3832, Stats. 1898, unless it is shown that there would be a deficiency of assets in the estate to meet proper claims against it. Ecklor v. Wolcott, 115 W 19, 90 NW 1081.

Sec. 3832, Stats. 1898, contemplates only the redress of wrongs to creditors after the decease of a debtor. An action where the wrong complained of was one committed by a person against a decedent does not fall within the section. Borchert v. Borchert, 132 W 593, 113 NW 35.

An administrator may maintain an action to set aside property transferred in fraud of creditors for the purpose of satisfying claims which were not in existence at the time the conveyance sought to be set aside was made but which were in contemplation. (Language in Ecklor v. Wolcott, 115 W 19, 90 NW 1080, to the contrary, overruled.) Sawyer v. Metters, 133 W 350, 113 NW 682.

To warrant a recovery under 312.13, Stats. 1929, there must be a deficiency of assets and that deficiency must be established by an adjudication of the claims against the estate. The filing of claims does not establish a deficiency. Mann v. Grinwald, 203 W 27, 223 NW 582.

Proceedings brought by an administratrix appointed more than 4 years after the death of the decedent to recover land alleged to have been fraudulently conveyed and to subject the same to the payment of debts was barred by 315.01, Stats. 1929. School v. Adams, 206 W 174, 239 NW 452.

The mere fact that realty was sold and mortgaged through dummies to make the title more marketable or otherwise serve the convenience of the parties does not show fraud. In an administrator's or a creditor's action a conveyance may be set aside only if fraudulently made by a decedent with the intent to defeat or defraud his creditors. Massey v. Richmond, 208 W 239, 242 NW 507.

A question of fraud in a conveyance by a decedent is a question of fact for the trial court. Rosenberg v. Goodman, 185 F (2d) 235.

287.44 History: R. S. 1849 c. 69 s. 17; R. S. 1858 c. 100 s. 17; R. S. 1878 s. 3833; Stats. 1898 s. 3833; 1925 c. 4; Stats. 1925 s. 312.14; 1933 c. 190 s. 17; Stats. 1933 s. 287.44; 1969 c. 339.

Editor's Note: This section is repealed, effective April 1, 1971, by ch. 339, Laws 1969. See the editorial note printed ahead of ch. 851 for information as to the provision in the new probate code which replaces it.

CHAPTER 288.

Collection of Forfeitures.

288.01 History: R. S. 1849 c. 122 s. 9; R. S. 1858 c. 155 s. 1, 8; R. S. 1878 s. 3294; Stats. 1898 s. 3294; 1925 c. 4; Stats. 1925 s. 288.01; 1935 c. 483 s. 74.

Revisor's Note, 1935: "Other than a fine" is omitted and the wording changed so that a fine not coupled with imprisonment may be collected by civil action. A fine is in substance a forfeiture, if imprisonment in the alternative or in addition be not coupled with the fine. For violations of administrative statutes the civil action is often preferable to a criminal action. Payment of both fines and forfeitures may be compelled by imprisonment not exceeding six months. 353.25, 288.09. [Bill 75-S, s. 74]

A forfeiture incurred under the act to regulate and license the keeping of dogs (ch. 175, Laws 1860) was only enforceable by civil action. Carter v. Dow, 16 W 298; Ives v. Jefferson County, 18 W 167.

288.01, Stats. 1925, does not extend to penalties imposed for a violation of a municipal ordinance, forfeitures imposed by municipal ordinances being dealt with by 288.10. Milwaukee v. Johnson, 192 W 585, 213 NW 335.

288.02 History: R. S. 1849 c. 122 s. 2, 3, 5; R. S. 1858 c. 155 s. 2, 3, 5; R. S. 1878 s. 3295; Stats. 1898 s. 3295; 1925 c. 4; Stats. 1925 s. 288.02; 1935 c. 483 s. 75.

A complaint which assumes to state the specific facts creating the liability and concludes with the averment that the defendant thereupon became indebted, etc., is insufficient unless the facts specifically stated constitute a cause of action. State v. Egerer, 55 W 527, 13 NW 461.

In an action to recover a penalty for encroachment upon a highway an error in the complaint in referring to the section which imposes the penalty is immaterial where it alleges that the penalty became due on account of an encroachment upon a certain street in a certain village. State v. Schwin, 65 W 207, 26 NW 568.

A complaint is sufficient under sec. 3295, Stats. 1898, if it does not state the specific act relied upon. State v. Childs, 109 W 233, 85 NW 374.

An allegation that defendant as a member

of a board of review did intentionally omit, etc., sufficiently alleges that he acted in his official capacity. State v. Zillman, 121 W 472, 98 NW 543.

An action by the state to enforce forfeitures is a personal action, unless the statute shows a contrary intent. State v. Peterson, 201 W 20, 229 NW 48.

288.03 History: R. S. 1849 c. 122 s. 4; R. S. 1858 c. 155 s. 4; R. S. 1858 c. 160 s. 20; R. S. 1878 s. 3296; Stats. 1898 s. 3296; 1925 c. 4; Stats. 1925 s. 288.03; 1935 c. 483 s. 76.

288.04 History: R. S. 1878 s. 3297; Stats. 1898 s. 3297; 1925 c. 4; Stats. 1925 s. 288.04; 1935 c. 483 s. 77.

288.06 History: R. S. 1849 c. 122 s. 6; R. S. 1858 c. 155 s. 6; R. S. 1878 s. 3299; Stats. 1898 s. 3299; 1925 c. 4; Stats. 1925 s. 288.06.

288.08 History: 1870 c. 72 s. 9, 15; R. S. 1878 s. 3301; Stats. 1898 s. 3301; 1925 c. 4; Stats. 1925 s. 288.08; 1927 c. 473 s. 51; 1969 c. 336 s. 176.

288.09 History: R. S. 1878 s. 3302; Stats. 1898 s. 3302; 1907 c. 180; 1925 c. 4; Stats. 1925 s. 288.09; 1935 c. 483 s. 79; 1967 c. 276 s. 40; 1969 c. 87.

288.10 History: R. S. 1878 s. 3303; Stats. 1898 s. 3303; 1925 c. 4; Stats. 1925 s. 288.10; 1935 c. 483 s. 80.

An action brought to recover the penalty imposed by a county ordinance prohibiting fast driving on county highways is a civil action; and a judgment or sentence imposing imprisonment cannot be entered therein. The word "guilty" in a judgment in such an action does not import criminality any more than when it is used in an adjudication that a defendant is guilty of negligence in a personal injury action. Kuder v. State, 172 W 141, 178 NW 249.

See note to 288.01, citing Milwaukee v. Johnson, 192 W 585, 213 NW 335.

The circuit court has jurisdiction to entertain an action by a village to recover forfeitures exceeding $200 incurred by defendants' erection of a building within the fire district without first obtaining a proper permit. Prairie du Sac v. Kramer, 194 W 495, 217 NW 295.

Statutory provisions for revocation of the driver's license of any person convicted of violating a municipal ordinance prohibiting the operation of a motor vehicle while under the influence of intoxicating liquor do not have the effect of changing an action by a city to recover a forfeiture for violation of such an ordinance from a civil action to a criminal action. In actions to recover forfeitures for violations of municipal ordinances, the offenses are of the class which may be disposed of summarily in the municipal court, especially where the statute so provides, but a jury trial may be had where there is a statutory provision for one, and on appeal to circuit court there may be a jury trial unless waived. Oshkosh v. Lloyd, 255 W 601, 39 NW (2d) 772.

Municipal ordinances cannot create crimes or misdemeanors, and an action to recover a forfeiture for violation of an ordinance is thus a civil action. A conviction for violation of an ordinance of the city of Milwaukee, providing for a fine of not less than $100 nor more than $500, established the city's right to a judgment for money within the stated limits. The imposition of the maximum penalty of $500 permitted by a city ordinance was not error or abuse of discretion on the asserted ground that the defendant was a first offender, the ordinance containing no provision even suggesting that any favor should be extended to first offenders. Milwaukee v. Stanki, 262 W 607, 55 NW (2d) 916.

See note to sec. 2, art. I, citing Milwaukee v. Horvath, 31 W (2d) 490, 143 NW (2d) 446.

Punishment for a crime, whether by imprisonment or fine, is an end in itself and has for its object punishment and the deterrent effect, whereas forfeiture for an ordinance violation is not a criminal penalty and cannot be justified on the ground of punishing people. Forfeitures for ordinance violations cannot be so high as to serve as a revenue-producing measure; at least its primary purpose cannot be the raising of revenue in lieu of taxation. Madison v. McManus, 44 W (2d) 396, 171 NW (2d) 426.

288.105 History: 1959 c. 315; Stats. 1959 s. 288.105.

288.11 History: R. S. 1849 c. 122 s. 10, 11; R. S. 1858 c. 155 s. 9, 10; R. S. 1878 s. 3304; Stats. 1898 s. 3304; 1925 c. 4; Stats. 1925 s. 288.11; 1967 c. 276 s. 39.

288.12 History: R. S. 1849 c. 122 s. 12, 13; R. S. 1858 c. 155 s. 11, 12; R. S. 1878 s. 3305; Stats. 1898 s. 3305; 1925 c. 4; Stats. 1925 s. 288.12; 1967 c. 276 s. 39.

A district attorney in a county which has no municipal justice in any of its towns, cities or villages has a duty to commence and conduct actions for recovery of a forfeiture imposed by a town ordinance when requested by the town chairman. 57 Atty. Gen. 198.

288.13 History: R. S. 1849 c. 122 s. 14, 15; 1851 c. 96; 1854 c. 87; R. S. 1858 c. 155 s. 13, 14; R. S. 1878 s. 3306; Stats. 1898 s. 3306; 1921 c. 273; 1925 c. 4; Stats. 1925 s. 288.13; 1935 c. 483 s. 81; 1953 c. 31 s. 49; 1967 c. 276 s. 39.

288.13 and 288.17, Stats. 1951, do not apply to bail forfeitures in criminal cases under 354.42. 41 Atty. Gen. 166.

288.14 History: 1859 c. 121 s. 1 to 3, 5; 1867 c. 148 s. 1 to 3, 5; R. S. 1878 s. 3307; Stats. 1898 s. 3307; 1925 c. 4; Stats. 1925 s. 288.14; 1967 c. 276 s. 39.

288.15 History: 1859 c. 121 s. 4; 1867 c. 148 s. 4; R. S. 1878 s. 3308; Stats. 1898 s. 3308; 1925 c. 4; Stats. 1925 s. 288.15; 1967 c. 276 s. 39.

288.16 History: 1859 c. 121 s. 8; 1867 c. 148 s. 7; R. S. 1878 s. 3309; Stats. 1898 s. 3309; 1925 c. 4; Stats. 1925 s. 288.16.

288.17 History: 1859 c. 121 s. 6, 7; R. S. 1878 s. 3310; Stats. 1898 s. 3310; 1925 c. 4; Stats. 1925 s. 288.17; 1935 c. 483 s. 82.

Sec. 3310, R. S. 1878, applies only to forfeitures as distinguished from fines. State ex rel. Guenther v. Miles, 52 W 488, 9 NW 403.

See note to 288.13, citing 41 Atty. Gen. 166.

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