CHAPTER 289.

LIENS.

289.01 Contractors' liens. (1) DEFINITION. In this chapter unless the context or subject matter otherwise requires:

(a) "Contractor" means a person, other than a laborer, who enters into a contract with the owner of land to improve it or who takes over from a contractor his uncompleted contract; and includes an architect, professional engineer and surveyor employed by the owner.

(b) "Improvement" includes any building, structure, erection, fixture, demolition, alteration, excavation, filling, grading, tiling, planting, clearing, landscaping, built, erected, made or done on or to land for its permanent benefit. This enumeration is an extension of the meaning and scope of improvement.

(c) "Owner" means the owner of any interest in land who enters into a contract for the improvement thereof.

(2) EXTENT AND CHARACTER OF LIEN. (a) Every contractor who performs any work or procures its performance or furnishes any materials or plans or specifications for the improvement of land shall have a lien therefor upon the interest of the owner in such land. Such lien is limited to one acre, in municipalities, and to forty acres elsewhere, unless the improvement, as a unit or continuous thing, extends over or across larger areas in which case said limitation of area shall not apply.

(b) Such lien shall be prior to any lien which originates subsequent to the visible commencement in place of the work of improvement, except as otherwise provided by sections 215.15 and 235.70. The lien shall also be prior to any unrecorded mortgage given prior to the commencement of the improvement, but of which the lienor has no notice.

(c) In case the purchaser of machinery which becomes a fixture shall not own a sufficient interest in the premises to afford the vendor a lien thereon such vendor shall have a lien upon the machinery and in default of payment, may remove such machinery, leaving the premises or building in as good condition as before the machinery was placed in or on the same.

(3) STREET WORK. When made at the instance of a private owner any improvement for which a lien is given by this section shall consist of the grading, filling or leveling of land or the grading, graveling or making of any street, alley, roadway or gutter thereon upon more than one acre then the limitation as to area shall not apply but the contractor shall have a lien on all the land upon which said improvement is made, and he may make and file a single claim for lien on all of the same.

(4) EXPRESS AGREEMENT OF OWNER. This section does not give a lien upon the interest of any owner in land unless there is an express agreement between him and the contractor whereby such owner agrees to pay for or become responsible for the payment of the improvement.

(5) ASSIGNMENT OF LIEN, GARNISHMENT. An assignment of his claim or right to a lien or any part thereof by the contractor or garnishment by his creditor shall not operate to compel the owner to pay the assignee or creditor until the claims of subcontractors and employes under section 289.02 shall either have matured by notice or have expired. If claims under said section become liens the owner shall be compelled to pay such assignee or creditor only what may remain due in excess of such liens. [*1935 c. 483 s. 86; 1943 c. 267, 322; 1943 c. 553 s. 38*]

Cross Reference: See 235.70 re priority of federal savings and loan mortgages; and see 235.701 providing for the use of the proceeds of mortgages by the owner, contractor or subcontractor for the payment of claims, and providing that misuse of such funds is embezzlement.

Revisor's Note, 1935: 289.01 has been rewritten for the purpose of clarifying its language, rearranging its provisions and reducing the verbiage. The only change intended is to extend its provisions to cover tree planting generally. (Bill No. 75 S, s. 86)

Note: Investment association mortgages are given priority over all liens on the mortgaged premises and the buildings and improvements thereon which shall be filed subsequently to recording of such mortgages by 216.04. The same is true of mortgages given to building and loan associations under 215.15. Julien v. Model B. L. & I. Ass'n, 116 W 79, 92 NW 561.

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 by the state annuity and investment board as security for a loan to a military company after construction of an armory upon the mortgaged premises had been commenced was subject to mechanic's lien for construction of the armory. Fulton v. State A. and I. Board, 204 W 355, 236 NW 120.

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.

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.

Mechanic's lien laws are remedial and should be liberally construed to make legislative purpose effectual. Razing and removal of part of building and carrying away of debris held "removal of building." Findorff v. Fuller & Johnson Mfg. Co., 212 W 365, 248 NW 766.

A bank which advanced money under a definite agreement that it was to have security in the form of a first mortgage, part of which money was used to discharge an existing first mortgage, was entitled to be subrogated to the rights of such first mortgagee, to the extent that the money was used to discharge such existing first mortgage, as against a materialman who commenced to furnish labor and material prior to the execution of the bank's mortgage but subsequent to the execution of the formerly existing first mortgage. Bank of Baraboo v. Prothero, 215 W 552, 255 NW 126.

Evidence disclosing that a contractor had constructed a breakwater on property during the absence of the owners, that the owners of the property 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 property, is held to establish that the owners did not unjustly or 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.

Where the holder of title to certain real estate allegedly the owner of a vendor's lien for unpaid 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 alleged 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.

In a mechanic's lien foreclosure action by a contractor who made improvements for purchasers under 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 regardless of his cross-complaint seeking foreclosure of the land contract on his showing that the purchasers had no equity left in the property. Delap v. Parcell, 230 W 152, 283 NW 305.

A building material dealer who sells and furnishes materials for a building directly to the owner is a "contractor" within the meaning of 289.01 and hence may file his claim for a lien within six 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 those 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.

Under (4), providing that the section does not give a lien to a contractor unless there is an express agreement between the owner of the land and the contractor whereby the owner agrees to pay for or become responsible for the payment of the improvement, 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.

289.02 Subcontractors', materialmen's and laborers' liens. (1) NOTICE TO OWNER, TO MATERIALMEN. Every person, other than the contractor who furnishes labor or ma-

terials in any of the cases enumerated in section 289.01, shall have the lien and remedy provided by this chapter, if before or within 60 days after furnishing the first labor or materials he gives notice in writing to the owner either by personal service on the owner or his agent or by mailing a copy thereof addressed to such owner or his agent at his last known post-office address stating that he has been engaged to furnish labor or materials, describing the real estate upon which the same is to be furnished by legal description, mail address, or otherwise, so that the owner is not misled or deceived thereby, and further stating in effect that he is giving such notice pursuant to the Wisconsin mechanics' lien law and will claim a lien against such real estate in the event he is not paid by the contractor for such labor and materials. If the owner shall complain of any insufficiency of such notice the burden of proof shall be upon him to show that he has been misled or deceived by such insufficiency. In case there is more than one owner, giving such notice in the manner herein provided to any such owner, or his agent, shall be sufficient. Every contractor and subcontractor, at the time he purchases or contracts for any materials to be used in any of the cases enumerated in section 289.01, shall deliver to the materialman a description of the real estate upon which the materials are to be used and the name of the owner thereof and his agent, if any.

(2) REMEDY, LIEN CLAIM. Every person, other than the contractor, who furnishes any labor or materials in any of the cases enumerated in section 289.01, to preserve his lien shall within sixty days after the date of furnishing the last labor or the last materials file in the office of the clerk of the circuit court of the county in which said real estate is situated a copy of such notice and a claim for lien, setting forth that he has been employed by the contractor or a subcontractor to furnish, and has furnished, labor or materials, with a statement thereof, the amount owing therefor from such contractor or subcontractor, and that he claims the lien given by this chapter.

(3) EXEMPTION AS TO THIRTY-DAY NOTICE. The thirty-day notice herein required to be given to the owner by subsection (1) need not be given by any laborer or mechanic employed by any contractor or subcontractor.

(4) EMBEZZLEMENT BY CONTRACTORS. The proceeds of any mortgage on land, paid to any principal contractor or any subcontractor for improvements upon the mortgaged premises and all moneys paid to him by any owner for improvements, constitute a trust fund in the hands of any such contractor or subcontractor to the amount of all claims due and to become due or owing from such contractor or subcontractor for lienable labor and materials until all such claims shall have been paid; and the use of any of such moneys by any contractor or subcontractor for any other purpose until all claims, except those which are the subject of a bona fide dispute, shall have been paid in full, or pro rata in cases of a deficiency, is embezzlement of moneys so misappropriated.

(5) CONTRACTORS TO DEFEND LIEN ACTIONS. Where a lien shall be filed under this chapter by any person other than the contractor, he shall defend any action thereon at his own expense, and during the pendency of such action the owner may withhold from the contractor the amount for which such lien shall be filed and sufficient to defray the costs of said action; and in case of judgment against the owner he may deduct from any amount due to the contractor the amount of such judgment, and if the judgment exceeds the amount so due, the owner may recover the difference from the contractor.

(6) WRONGFUL USE OF MATERIALS. And any contractor or any person furnishing materials under him who shall purchase materials on credit and represent at the time of making the purchase that the same are to be used in a designated building or other improvement and shall thereafter use or cause to be used said materials in the construction of any improvement other than that designated, without the written consent of the seller, shall be punished by imprisonment in the county jail not more than three months or by a fine not exceeding $300. [*1935 c. 483 s. 87; 1943 c. 322*]

Note: A subcontractor's thirty-day notice need not be addressed to anyone; the landowner's president was the owner's agent to receive such notice; a claim for lien was not fatally defective because it named the wrong corporation as the owner of the premises where evidence of ownership was not in dispute and was admitted without objection. Hirth v. Clybourn R. Co., 202 W 432, 232 NW 857.

An owner is entitled to the lien notice within thirty days after furnishing of the first materials, notwithstanding the materialman claims a lien only for materials furnished within thirty days of the notice. Walton v. Dayton H. Co., 205 W 112, 236 NW 595.

Claims for labor and materials furnished by subcontractors not giving to the owner the notice required by (1), are not claims "chargeable against the principal contractor for which the owner might become liable" within the contract, so as to make the principal contractor's surety liable therefor. The owner is entitled to the statutory notice of subcontractor's lien within thirty days after performing the first work or furnishing the first materials, notwithstanding the services were not rendered under an entire contract. Architects were not agents of owners so as to make notice to them chargeable to the owner, within the statutory requirement of personal service on or letter to the "owner or his agent." Sisters of Mercy v. Worden-Allen Co., 208 W 457, 243 NW 456.

Superintendent in charge of work under paving contracts under power of attorney executed by contractor, at salary and twenty per cent of net profits, was not performing "work and labor" within mechanic's lien statute. Didier v. Beloit, 210 W 270, 246 NW 409.

The provisions of (4) relating generally to subcontractors' and laborers' liens for work, labor and material and making payments from the owner to the principal contractor a trust fund to be used to pay lienable claims only, are inapplicable to payments made to a principal contractor for public improvements, the latter being controlled by the provisions of 289.53 (4). Theiler v. Consolidated I. & Ins. Co., 213 W 171, 250 NW 433.

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 or his right to a lien. Bank of Baraboo v. Prothero, 215 W 552, 255 NW 126.

Subcontractor is not precluded from enforcing lien because notice to owner failed to describe lot with reasonable certainty, where contractor named in notice was building only one building for owner, and owner admitted that he knew that notice was supposed to refer to home that owner was building. Subcontractor, suing to foreclose lien, was entitled to money judgment against contractor. A. Lentz Co. v. Dougherty, 218 W 493, 261 NW 218.

See note to 289.01, citing Warnke v. Braasch, 233 W 398, 289 NW 598.

An architect, regularly employed by a consulting engineer on a salary, and preparing drawings and specifications, and called on to make decisions and interpretations thereof in furtherance of his employer's contract with an owner of premises to draft plans and perform certain work in the erection of buildings, does not furnish "labor," within 289.02 (1) and is not a "laborer," within 289.02 (3), hence is not entitled to a laborer's lien on the premises for his services. Marquis v. Peterson, 239 W 358, 1 NW (2d) 786.

289.025 [*1931 c. 270; renumbered 289.02 by 1935 c. 483 s. 87*]

289.03 Lien valid notwithstanding stipulation. The lien given by section 289.02 shall be valid, any stipulation contained in the contract between the owner and the principal contractor or between any other persons who may have a lien thereunder to the contrary notwithstanding.

289.04 Claims assignable; notice; prior payment. All claims for liens and right to recover therefor under this chapter are assignable. Notice in writing of such assignment may be served upon the owner of the property affected and all payments made by him before service of such notice shall discharge his debt to the amount paid. The assignee may file petitions for such liens and may bring an action in his own name to enforce the same. [*1935 c. 483 s. 88*]

289.05 Taking note not a waiver. A promissory note or other evidence of debt given for any lienable claim shall not discharge or defeat the lien unless expressly received as payment and so specified therein. [*1935 c. 483 s. 89*]

Revisor's Note, 1935: 289.05, 289.24 and 289.61 are duplicates. 289.05 is slightly amended and the others are repealed or withdrawn. (Bill No. 75 S, s. 89)

To constitute waiver, conduct of parties inconsistent with the right to file a lien 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 Filing claim and beginning action. No lien shall exist and no action to enforce the same shall be maintained unless within 60 days in all cases provided for in section 289.02 and within 6 months in all cases provided for in section 289.01 from the date of furnishing the last labor or materials a claim for such lien shall be filed in the office of the clerk of the circuit court of the county in which the lands affected thereby lie and such action be brought and summons and complaint filed within 2 years from the date of filing such claim for lien. [*1933 c. 75; 1935 c. 483 s. 90; 1943 c. 322*]

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

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

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

"The word 'charge' does not mean a mere bookkeeping entry as distinguished from the obligation which arises at the time materials are furnished or labor performed." As used in 289.01, 289.02 and 289.06, "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, 208, 249 NW 517.

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 Lumber Co. v. Federal Home Development Co., 231 W 509, 286 NW 58.

A building material dealer who sells and furnishes materials for a building directly to the owner is a "contractor" within the meaning of 289.01 and hence may file his claim for a lien within six months from the date of the last charge for materials so furnished; the "materialmen" referred to in 289.02 (1), (2), and required to file claim for lien within sixty days, meaning those persons who furnish materials to a contractor or a subcontractor. Warnke v. Braasch, 233 W 398, 289 NW 598.

An instrument between an owner of land and a lending agency, but signed only by the owner, notifying a lumber dealer that the owner had deposited with the lender a stated amount of money to be paid to the dealer for lumber and millwork 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 such a contract between the owner and the dealer as to obligate the

owner to pay, and to entitle the dealer, as a "contractor" under 289.01, Stats. 1941, to a lien on the premises for the purchase price of the materials furnished subsequent to the signing of the instrument, and hence to file a claim for lien therefor within the time provided for by 289.06, Stats. 1941. Fraser Lumber & Mfg. Co. v. Laeyendecker, 243 W 25, 9 NW (2d) 97.

289.07 Docket of liens. Every clerk of the circuit court shall keep a separate docket, to be entitled "lien docket," in which shall be entered the proper entries, under the appropriate headings herein specified, relative to each claim for lien filed with him, immediately upon its filing, opposite the names of the persons against whom the lien is claimed, which names shall be entered therein alphabetically, or an alphabetical index thereof shall be kept as judgment dockets are required by law to be kept. Each page of such docket shall be divided into eight columns, with written or printed headings to the respective columns, as follows:

Name of person against whom lien is claimed.	Name of claimant or assignee.	Attorney for claimant.	Last date of performance of labor or furnishing materials.	Date of filing petition.	Description of property.	Amount claimed.	Satisfaction.

Such docket shall be presumptive evidence of the correctness of the entries therein made.

289.08 Claim for lien. Such claim for lien shall contain a statement of the contract or demand upon which it is founded, the name of the person against whom the demand is claimed, the name of the claimant or assignee, the last date of the performance of labor or furnishing of materials, a description of the property affected thereby, a statement of the amount claimed and all other material facts in relation thereto. It shall be signed by the claimant or by his attorney, and need not be verified, and may be amended, in case of action brought, by order of the court as pleadings may be.

Note: For variance, see note to 263.28, citing Appleton S. Bank v. Fuller Goodman Co., 213 W 662, 252 NW 281.

Permitting a mechanics' 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.

289.09 Foreclosure of lien; procedure; parties. In the foreclosure of liens mentioned in sections 289.01 and 289.02, the provisions of chapter 278 for the foreclosure of real estate mortgages shall control as far as applicable unless otherwise provided in this chapter. All persons having filed claims for liens in the cases mentioned in said sections may join as plaintiffs; and if any do not join they may be made defendants. All persons having liens subsequent to the lien sought to be foreclosed, and all purchasers of the premises subsequent to such lien may be joined as defendants. In case any person who is a proper party is not a party to such action he may, at any time before judgment, be made a defendant, and any person who after the commencement of such action shall obtain a lien or become a purchaser, may, at any time before judgment, be made a defendant. [*1935 c. 483 s. 91*]

Note: Foreclosure of a mechanic's lien is 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 mechanic's lien, foreclosing the lien, and obtaining a judgment, made an election of remedies which, under 122.24 (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.

289.10, 289.11 [*Repealed by 1935 c. 483*]

289.12 Judgment. The judgment shall adjudge the amount due to each claimant who is a party to the action. It shall direct that the interest of the owner in the premises at the commencement of the work or furnishing the materials for which liens are given and which he has since acquired, or so much thereof as may be necessary, be sold to satisfy the judgment, and that the proceeds be brought into court with the report of sale to abide the order of the court. If the premises can be sold in parcels without injury to the parties the court may adjudge that the sale be so made. If the plaintiff fail to establish his lien upon the premises but does establish a right to recover for labor or materials he may have a judgment against the party liable. [*1935 c. 483 s. 94*]

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 No. 75 S, s. 94)

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

Under this section, only interest of owner at time of commencement of work which forms basis of mechanic's lien can be sold. Foreclosure judgment should be for sale of owner's equity as it existed at time of commencement of rendering of services—sale of equity rather than sale of property. 28 Atty. Gen. 230.

289.13 Distribution of proceeds of sale. The several claimants whose liens were established in the action shall be paid without priority among themselves; and if the sum realized at such sale shall be insufficient, after paying the costs of the action and the costs of making the sale, to pay the liens in full then they shall be paid pro rata. [*1935 c. 483 s. 95*]

289.14 Sale; notice and report; deficiency judgment; writ of assistance. (1) All sales under such judgments shall be noticed and conducted and reported in the manner provided for the sale of real estate upon execution and shall be absolute and without redemption; and the deed given thereon, in case such sale is confirmed, shall be effectual to pass to the purchaser all the interest in the premises directed to be sold.

(2) If any deficiency arise upon such sale in the payment of the sums adjudged to be due to any lien claimant the court, upon confirming such sale, may render judgment therefor if demanded in the pleadings against the defendant legally liable to pay the same, which judgment may be docketed and enforced in the same manner that ordinary judgments are. And the purchasers at such sale shall be entitled to a writ of assistance to obtain possession of the premises sold in the manner provided in section 272.63. [*1935 c. 483 s. 96*]

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 No. 75 S, s. 96)

289.15 Satisfaction of judgment or lien. Every lienor or the attorney who executed and filed a claim for lien on behalf of such lienor, who has received satisfaction or tender of such claim with the costs of any action brought thereon, shall, at the request of any person interested in the premises affected, and on payment of the costs of satisfying the same, execute and deliver the necessary satisfaction to such interested person; on filing such satisfaction with the clerk of the court he shall enter satisfaction of such claim on his lien docket. On failure to so execute and deliver such satisfaction or to satisfy such lien on the docket, the person so refusing shall be liable to pay to the person requiring such satisfaction a sum equal to one-half of the sum claimed in his claim for lien. [*1935 c. 483 s. 97; 1943 c. 322*]

289.16 Public works, form of contract, bond, remedy. (1) All contracts involving $100 or more for the performance of labor or furnishing materials when the same pertains to or is for or in or about any public improvement or public work of whatsoever kind shall contain a provision for the payment by the contractor of all claims for labor performed and materials furnished, used or consumed in making such public improvement or performing such public work, including, without limitation because of specific enumeration, fuel, lumber, building materials, machinery, vehicles, tractors, equipment, fixtures, apparatus, tools, appliances, supplies, electric energy, gasoline and other motor oil, lubricating oil, and greases, and the premiums for workmen's compensation insurance; and no such contract shall be made unless the contractor shall give a bond, the penalty of which shall not be less than the contract price, conditioned for the faithful performance of the contract, and the payment to every person entitled thereto of all the claims for labor performed, and materials furnished for or in or about or under such contract, to be used or consumed in making such public improvement or performing such public work as in such contract provided and as above specified, such bond in the case of the state to be approved by the governor, of a county by its district attorney, of a city or village by its mayor or president, of a town by its chairman, of a school district by the director or president and in case of any other public board or body by the presiding officer thereof. No assignment, modification, or change of the contract, or change in the work covered thereby, nor any extension of time for completion of the contract shall release the sureties on said bond.

(2) Any party in interest may, not later than one year after the completion of said contract, maintain an action in his own name against such contractor and the sureties upon such bond for the recovery of any damages he may have sustained by reason of the failure of said contractor to comply with said contract or with the contract between said contractor and subcontractors. If the amount realized on said bond be insufficient to satisfy all of the claims of the parties in full it shall be distributed among said parties pro rata.

(3) In an action by a county upon such bond all persons for whose protection it was given and who make claim thereunder may be joined in said action and the county highway commissioner may take assignments of all demands and claims for labor or material and enforce the same in said action for the benefit of the assignors, and the judgment may provide the manner in which such assignors shall be paid. [*1931 c. 438; 1933 c. 83, 316; 1935 c. 483 s. 98*]

Note: 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. This section is not in conflict with 62.15. Cowin & Co. v. Merrill, 202 W 614, 233 NW 561.

Prior to the amendment made by chapter 438, Laws 1931, there was no lien for premiums due for workmen's compensation insurance, and the highway contractor's surety is not liable for such premiums. Employers' M. L. Ins. Co. v. Grahl C. Co., 203 W 315, 234 NW 326.

Where a limitation of time is to be computed from a certain date the day of the date is excluded, and where the computation is from a certain event the day of the event is included. In computing the limitation of time in (2), authorizing the maintenance of an action upon a bond guaranteeing the performance of a contract for public works "within one year after the completion and acceptance" of the contract, the day on which the contract was completed and accepted must be included; hence, an action not commenced until April 30, 1930, where the contract was completed and accepted on April 30, 1929, was barred by the limitation in question. North Shore M. Co. v. Frank W. Blodgett, Inc., 213 W 70, 250 NW 841.

Application by the trial court of payments made by the highway contractor to the subcontractor, first, to the nonlienable unsecured claims for which the surety on the bond of the contractor was not liable, and then to the lienable claims for which the surety was liable, was proper, where the parties themselves had not theretofore made any application of the payments. Theiler v. Consolidated I. & Ins. Co., 213 W 171, 250 NW 433.

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 section 289.16, Stats. 1929. [Muller v. S. J. Groves & Sons Co., 203 W 203, applied; Theiler v. Consolidated I. & Ins. Co., 213 W 171, distinguished.] White v. United States F. & G. Co., 216 W 173, 256 NW 694.

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

The bond required by this section 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, in the absence of an agreement to the contrary, is not liable to a subcontractor of a subcontractor, merely because of that relationship for what may be due from the subcontractor to his subcontractor. Gilson Bros. Co. v. Worden-Allen Co., 220 W 347, 265 NW 217.

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

Under a contractor's bond for city sewers, machines sold to the contractor four 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 this case. Osgood Co. v. Peterson Const. Co., 231 W 541, 286 NW 54.

The intent of 289.16 (1), requiring a contractor to give a bond conditioned for the faithful performance of the contract and the payment to every person entitled thereto of all the claims for labor performed and materials furnished, is to make beneficiaries of such a bond only the municipality making the contract and persons furnishing work, 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.

289.17 [*Repealed by 1935 c. 483 s. 99*]

289.18 Log liens; priority. (1) Any person who shall, by himself or by his beast or machine or vehicle, perform any services in cutting, hauling, running, felling, piling, driving, rafting, booming, cribbing, towing, sawing, peeling or manufacturing logs, timber, stave bolts, heading, staves, pulp wood, cordwood, firewood, railroad ties, piling, telegraph poles, telephone poles, fence posts, paving timber, tan or other barks or in preparing wood for or manufacturing charcoal shall have a lien upon such material for the amount owing for such services, which lien shall take precedence of all other claims, liens or incumbrances thereon or sales thereof.

(2) The right of lien given by this section survives any change in the property through manufacture and the lienor has his lien upon the manufactured product as though his services had been performed directly thereon. [*1935 c. 483 s. 100*]

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

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

289.19 Petition for log lien; filing same. No demand for such services shall become a lien unless a petition therefor shall be signed and verified by the claimant or by some one in his behalf setting forth the nature of the demand, the amount claimed, a description of the property upon which such lien is claimed and that the petitioner claims a lien thereon. Such petition shall be filed in the office of the clerk of the circuit court of the county in which such services or some part thereof were performed within thirty days after the last day of performing continuous services, and such services shall be deemed continuous notwithstanding a change of ownership in the property on which such lien is claimed. The clerk shall receive twenty-five cents for filing the petition. [*1935 c. 483 s. 101*]

289.20 Action to enforce log lien; parties; costs; change of venue. (1) An action to enforce any lien mentioned in section 289.18 may be brought in the circuit court of the county where the petition is filed, when the amount claimed, exceeds one hundred dollars, or before any municipal court or justice of the peace having jurisdiction of the amount claimed in the county in which such petition is filed. Such claim shall cease to be a lien unless an action to foreclose it is commenced within four months after filing such petition. If the claim be not due at the time of filing such petition the time when the same will become due shall be stated therein, and in such case such claim shall not cease to be a lien until thirty days after the claim shall have become due and until four months after the filing of such petition.

(2) Where the property subject to such lien has been taken from the county where such work was done the lienor may bring an action to foreclose the lien in any county where said property may be found. In all foreclosure actions the person liable for such claim shall be made defendant and any other person claiming to own or have any interest in such property may be made a defendant, but shall not be liable for costs unless he defends the action. In actions appealed from municipal or justice court no change of venue shall be allowed except for prejudice of the judge or of the people. [*1935 c. 483 s. 102*]

289.21 Attachment, affidavit for; undertaking; service of writ. (1) The plaintiff in such action may have the remedy by attachment of the property upon which the lien is claimed as in personal actions; such attachment may be issued, served and returned and like proceedings had thereon including the release of any attached property as in personal actions. The affidavit for the attachment must state that the defendant who is personally liable is indebted to him in the sum named, above all set-offs, for services which entitle the plaintiff to a lien, describe the property on which it is claimed such services were performed and that the plaintiff has filed his petition for a lien pursuant to law; but no other fact need be stated therein. No undertaking upon such attachment or security for costs in actions hereunder before municipal courts or justices of the peace need be given unless upon application of some defendant showing by affidavit that he has a valid defense to the plaintiff's claim, and no order shall be made by any court or any judge thereof requiring an undertaking or security for costs except upon ten days' notice to the plaintiff.

(2) The writ of attachment shall direct the officer to attach the property described or so much thereof as shall be necessary to satisfy the sum claimed to be due and to hold the same subject to further proceedings in the action. The officer shall make return of his doings but it shall not be necessary for him to make an inventory or appraisal of the property attached; he shall pay any charges that may be due for booming or driving the property attached, and the amount paid shall be taxed as costs. Where personal service of the summons and writ of attachment cannot be made service shall be made as provided for service of summons on nonresidents or persons who cannot be found as in other actions. [*1935 c. 483 s. 103*]

289.22, 289.23 [*Repealed by 1935 c. 483*]

289.24 Lien for camp supplies. All persons furnishing supplies necessary for the performing of the labor and services upon any property mentioned in section 289.18, at the request of the person engaging such labor or services, shall have the right of lien therefor and may enforce the same by action as herein provided for the enforcement of liens upon logs and timber. [*1931 c. 15 s. 2; 1935 c. 483 s. 115*]

289.25 Lien for joint log driving. When logs or timber of different owners are so intermixed that they cannot be conveniently separated for driving and either owner neg-

lects to make the necessary provision for driving them any other owner may drive all such logs or timber to the destination and shall receive reasonable compensation for driving the logs of the owner so neglecting and shall have a lien for such compensation and may enforce the same as provided for the enforcement of liens upon logs or timber. [*1935 c. 483 s. 107*]

289.26 Lien of improvement companies. Every company whose charter authorizes it to collect tolls on logs, lumber or timber shall have a lien thereon, with the remedies herein given to enforce liens for labor and services in respect to logs or timber. [*1935 c. 483 s. 108*]

289.27 [*Repealed by 1935 c. 483 s. 109*]

289.28 Execution. In actions to enforce liens on property mentioned in section 289.18 the execution, in addition to the directions of ordinary executions upon judgments for money, shall direct that the property upon which a lien is found to exist or so much thereof as may be necessary for such purpose be sold to satisfy the judgment. [*1935 c. 483 s. 110*]

289.29 Who may become a party or appeal. In an action for the enforcement of a lien upon property mentioned in section 289.18 a person not a party may, at any time before sale of the property upon which a lien is claimed, become a party defendant by filing with the clerk of the court or with the justice of the peace where the action is pending an affidavit made by him or in his behalf that he is the owner of or of some interest in the property upon which a lien is claimed and verily believes that said claim for lien is invalid; upon filing such affidavit he may defend said action so far as a claim for a lien is concerned, and in case judgment has been previously rendered for a lien he may appeal within twenty days after the filing of such affidavit. Such right to file an affidavit or take an appeal shall not extend beyond one year from the rendition of the judgment. [*1935 c. 483 s. 111*]

289.30 Appeal by intervener and proceedings. Such appeal shall not stay execution unless the appellant files an undertaking, with two or more sureties, who shall each justify in a sum equal to double the amount of the judgment, conditioned that if the plaintiff establish his right to a lien on such property they will pay the amount of the judgment in his favor with costs; said undertaking shall be approved by the judge of the court to which the appeal is taken; and upon filing it all proceedings upon the judgment appealed from shall be stayed during the pendency of such appeal, and in case execution shall have been previously issued the same shall, upon presenting to the officer in whose custody it may be a certified copy of such affidavit and undertaking and certificate of the justice or clerk of the court that an appeal has been perfected, be returned, and all property in which appellant shall claim an interest that may have been levied upon shall be released from such levy. If upon the trial in the appellate court the plaintiff shall recover judgment of lien upon such property such judgment may be entered against the appellant and his sureties; but if the plaintiff does not establish his right to a lien the appellant shall recover judgment for costs. When the judgment to be appealed from is rendered in justice's court and by reason of the death of the justice who rendered it or any other cause the affidavit and undertaking cannot be presented to him they may, with notice of appeal and affidavit upon appeal, be filed with the clerk of the court to which such appeal is taken within the time aforesaid.

289.31 Cook's lien. The person who prepares or serves the food for men while they are performing lienable services upon any property mentioned in section 289.18, at the request of their employer shall have the right of lien therefor the same as those men. [*1935 c. 483 s. 113*]

289.32 [*1931 c. 15 s. 1; repealed by 1935 c. 483 s. 114*]

289.325 [*1931 c. 15 s. 2; renumbered section 289.24 by 1935 c. 483 s. 115*]

289.33 Liens for log driving on Chippewa river. [*Not printed; 1935 c. 483 s. 116; see 1933 Stats.*]

289.34 [*Repealed by 1935 c. 483 s. 117*]

289.35 Mining liens. Any person who shall perform any labor or services for any person or corporation engaged in or organized for the purpose of mining, smelting or manufacturing iron, copper, silver or other ores or minerals, and any bona fide holder of any draft, time check or order for the payment of money due for any such labor, issued or drawn by any such person or corporation, shall have a lien for the wages due him for the amount due on such draft, check or order upon all the personal property connected with such mining, smelting or manufacturing industry belonging to such person or corporation, including the ores or products of such mine or manufactory, together with the machinery and other personal property used in the operation of such mine or manufactory and all

the interest of such person or corporation in any real estate belonging thereto and connected with such business, which said lien shall take precedence of all other debts, judgments, decrees, liens or mortgages against such person or corporation, except liens accruing for taxes, fines or penalties, subject to the exceptions and limitations hereinafter set forth.

289.36 Extent of lien; filing claim. Such lien shall extend only to the amount of the interest in the real property held by such employer or employers, and in case of his or their death or insolvency, or of the sale or transfer of such works, mines, manufactories or business, or his or their interest therein by execution or otherwise, all moneys that may be due for wages to any miner, mechanic or laborer shall be a lien upon all said property and shall be preferred and first paid out of the proceeds of the sale thereof; provided, that no such claim shall be a lien upon any real estate unless it shall be filed in the office of the clerk of the circuit court of the county in which the real estate upon which a lien is claimed is situated within sixty days after the claim, draft, time check or order is due and payable in the manner claims for mechanics' liens are required to be filed.

289.37 Satisfaction of lien. If an attachment, execution or similar writ shall be issued against any person or corporation engaged in such business as is within section 289.35, any miner, laborer, mechanic or other person who is entitled to claim a lien thereon may give notice in writing of such claim and the amount thereof, verified by affidavit, to the officer holding any such writ at any time before the actual sale of the property affected thereby, and such officer shall retain out of the proceeds of such sale a sufficient sum to satisfy all such claims, which sum shall be held by him, subject to such order as the court may make.

289.38 Effect of mortgage. No mortgage or other instrument by which a lien is created shall operate to impair or postpone the lien and preference given and secured to the wages and moneys mentioned in section 289.35; provided, that no lien of any mortgage or judgment entered before such labor is performed shall be affected or impaired by such lien.

289.39 Foreclosure of lien. The liens and preferences given by sections 289.35 to 289.38 may be foreclosed in the same manner as mechanics' liens, and all provisions of these statutes relating to the foreclosure thereof shall apply to the foreclosure of the liens so given, so far as such provisions are applicable.

289.40 Liens for labor in quarry. (1) Any person who shall perform any labor for an employer not the owner of the real estate, engaged in quarrying, crushing, cutting or otherwise preparing stone for use or for manufacturing lime and any bona fide holder of any draft, time check or order for the payment of money due for any such labor issued by such employer, shall have a lien for the wages owing to him and for the amount due on such draft, check or order upon the personal property connected with such industry owned by such employer, including his interest in the product of such quarry or factory and his machinery and other personal property used in the operation of such quarry or factory, and all his interest in any lease of the real estate connected with such business, which lien shall take precedence of all other debts, judgments, decrees, liens or mortgages against such employer, except taxes, fines or penalties and mortgages or judgments recorded or entered before such labor is performed.

(2) Such wages shall become a lien upon the property and material mentioned in this section upon filing with the clerk of the circuit court of the county in which such labor is performed within sixty days after the first of such services shall be rendered, a petition signed by the claimant and verified by him or by some one in his behalf under oath, setting forth the nature of the debt for which the lien is claimed, the amount claimed, a description of the property upon which such lien is claimed and that the petitioner claims a lien thereon pursuant to law. The clerk shall receive twenty-five cents for filing the petition.

(3) The provisions of sections 289.20 and 289.21 shall govern the foreclosure of the liens here given so far as such provisions are applicable. [*1935 c. 213, 483 s. 118*]

289.41 Mechanic's liens. (1) Every mechanic and every keeper of a garage or shop, and every employer of a mechanic who shall transport, make, alter, repair or do any work on personal property at the request of the owner or legal possessor thereof, shall have a lien thereon for his just and reasonable charges therefor, including any parts, accessories, materials or supplies furnished in connection therewith and may retain possession of such property until such charges are paid. The lien given by this section for all such charges in excess of seventy-five dollars shall be subject to the lien of any chattel mortgage upon said property, or the right of any person in whom title to said property is reserved under a conditional sales contract, if the chattel mortgage or conditional sales contract was filed as required by law prior to the commencement of the work for which a lien is claimed

unless such work was done with the express consent of the holder of such mortgage or of such title under such conditional sales contract.

(2) Every keeper of a garage or repair shop who alters, repairs or does any work on any detached accessory, fitting or part of an automobile, truck, motor cycle or similar motor vehicle or bicycle at the request of the owner or legal possessor thereof, shall have a lien upon and may retain possession of any such accessory, fitting or part until the charges for such alteration, repairing or other work have been paid. If the detached article becomes attached to such motor vehicle or bicycle while in the possession of the keeper, he shall have a lien against the same, as provided in subsection (1). [*1935 c. 483 s. 119, 123*]

Revisor's Note, 1935: These liens are enforced under 289.48. (Bill No. 75 S, s. 119, 123)

289.42 **Obtaining mechanic's services by misrepresentation of interest in personal property.** Any person who, for the purpose of inducing any mechanic, or keeper of a garage or shop, or the employer of a mechanic to transport, make, alter, repair or do any work on any personal property, makes any misrepresentation as to the nature or extent of his interest in said property or as to any lien upon said property shall be punished by a fine of not more than two hundred dollars or by imprisonment not more than six months or both such fine and imprisonment. [*1935 c. 483 s. 120*]

289.43 **Liens of keepers of hotels, livery stables, garages and pastures.** (1) As used in this section:

(a) "Boarding house" includes a house or building where regular meals are generally furnished or served to three or more persons at a stipulated amount for definite periods of one month or less.

(b) "Lodging house" includes any house or building or part thereof where rooms or lodgings are generally rented to three or more persons received or lodged for hire, or any part thereof is let in which to sleep at stipulated rentals for definite periods of one month or less, whether any or all such rooms or lodgings are let or used for light housekeeping or not, provided that so called duplex flats or apartment houses actually divided into residential units shall not be considered a lodging house.

(2) Every keeper of an inn, hotel, boarding house or lodging house shall have a lien upon and may retain the possession of all the baggage and other effects brought into his place by any guest, boarder or lodger, whether the same is his property or under his control, or the property of any other person liable for such board and lodging for the proper charges owing such keeper for board, lodging and other accommodation furnished to or for such guest, boarder or lodger, and for all moneys loaned to him, not exceeding fifty dollars, and for extras furnished at the written request signed by him, until such charges are paid, and any execution or attachment levied upon such baggage or effects shall be subject to such lien and the costs of satisfying it. But the lien given by this section does not cover charges for malt, spirituous, ardent or intoxicating liquors nor the papers of any soldier, sailor or marine that are derived from and evidence of military or naval service or adjusted compensation, compensation, pension, citation medal or badge.

(3) Every keeper of a garage, livery or boarding stable, and every person pasturing or keeping any carriages, automobiles, harness or animals, and every person or corporation, municipal or private, owning any airport, hangar or aircraft service station and leasing hangar space for aircraft, shall have a lien thereon and may retain the possession thereof for the amount due him for the keep, support, storage or repair and care thereof until paid. But no garage keeper shall exercise the lien upon any automobile unless there shall be posted in some conspicuous place in his garage a card, stating the charges for storing automobiles, easily readable at a distance of fifteen feet. [*1931 c. 78; 1935 c. 169; 1935 c. 483 s. 121; 1935 c. 520 s. 10; 1937 c. 430*]

Revisor's Note, 1935: For enforcing such lien see 289.48. (Bill No. 75 S, s. 121)

289.44 **Liens of consignees.** Every consignee of property shall have a lien thereon for any money advanced or negotiable security given by him to or for the use of the person in whose name the shipment of such property is made, and for any money or negotiable security received by such person for his use unless he shall, before advancing any such money, or giving such security, or before it is so received for his use, have notice that such person is not the actual owner thereof.

289.45 **Liens of factors, brokers, etc.** Every factor, broker or other agent intrusted by the owner with the possession of any bill of lading, customhouse permit, warehouse receipt or other evidence of the title to personal property, or with the possession of personal property for the purpose of sale or as security for any advances made or liability by him incurred in reference to such property, shall have a lien upon such personal property for all such advances, liability incurred or commissions or other moneys due him for services as such factor, broker or agent, and may retain the possession of such property until such advances, commissions or moneys are paid or such liability is discharged.

289.46 Jeweler's lien. Every jeweler, watchmaker or silversmith who shall do any work on any article at the request of the owner or legal possessor of such property, shall have a lien upon and may retain the possession of such article until the charges for alteration, repair or other work have been paid. [*1935 c. 483 s. 122*]

Revisor's Note, 1935: For enforcement of lien see 289.48. (Bill No. 75 S, s. 122)

289.47 [*1931 c. 140; renumbered section 289.41 (2) by 1935 c. 483 s. 123*]

289.48 How such liens enforced. Every person given a lien by sections 289.41 to 289.47, or as bailee for hire, carrier, warehouseman or pawnee or otherwise, by the common law, may, in case the claim remain unpaid for three months and the value of the property affected thereby does not exceed one hundred dollars, sell such property at public auction and apply the proceeds of such sale to the claim and the expenses of such sale. Notice in writing, of the time and place of such sale and of the amount claimed to be due shall be given to the owner of such property personally or by leaving the same at his place of abode, if a resident of this state, and if not, by publication thereof once in each week, for three weeks successively, next before the time of sale in some newspaper published in the county in which such lien accrues, if there be one, and if not, by posting such notice in three public places in such county. If such property exceed in value one hundred dollars, then such lien may be enforced against the same by action. [*1935 c. 483 s. 124*]

289.49 Lien of owner of breeding animal. (1) Every owner of a stallion or jackass kept and used for breeding purposes shall have a lien upon any dam served and upon any colt gotten by such stallion or jackass for the sum stipulated to be paid for the service thereof, and may seize and take possession of said dam and colt or either without process at any time before the colt is one year old, in case the price agreed upon for such service remains unpaid, and sell the same at public auction upon ten days' notice, to be posted in at least three public places in the town where the service was rendered, and apply the proceeds of such sale to the payment of the amount due for such service and the expenses of such seizure and sale, returning the residue, if any, to the party entitled thereto; provided, no such lien shall be effectual for any purpose as against an innocent purchaser of such colt or the dam thereof for value unless such owner having a claim for the service of such stallion or jackass shall file with the clerk of the city, village or town where the owner of the mare served resides a statement showing that such service has been rendered and the amount due therefor.

(2) Any person who sells, disposes of or gives a mortgage upon any dam which to his knowledge has been served by a stallion or jackass, the fee for which service has not been paid, without giving written information to the purchaser or mortgagee of the fact of such service, shall be guilty of a misdemeanor and upon conviction shall be fined not more than ten dollars or by confinement in the county jail not to exceed sixty days.

289.50 Lien for threshing, husking, baling; enforcement. (1) Every person who threshes grain, cuts, shreds, husks or shells corn or bales hay or straw by machine for another shall have a lien upon the same for the value of his services to the extent the person contracting for such services has an interest therein, from the date of the commencement of such service; and in case such services remain unpaid, he may take possession of so much of such grain, corn, hay or straw as shall be necessary to pay for such services and the expenses of enforcing such lien, for the purpose of foreclosing said lien at any time within six months from the last charge for such services, and sell the same at public auction, upon notice of not less than ten nor more than fifteen days from the date of such seizure.

(2) Notice of such sale shall be given personally and by posting in at least three public places in the town where the debtor resides, and also in the town where such sale is to be made; and if such debtor is a nonresident of the state, in the town where such grain, corn, hay or straw, or some part thereof, was threshed, cut, husked, shelled or baled, and apply the proceeds of such sale to the payment of such service, together with the expenses of such seizure and sale, returning the residue to the party entitled thereto.

(3) The lien created by this section shall be preferred to all other liens and incumbrances, but does not apply to an innocent purchaser for value unless such lien be filed as a chattel mortgage within fifteen days from the date of the completion of such service. [*1935 c. 483 s. 125*]

289.51 [*Repealed by 1933 c. 159 s. 31*]

289.52 Costs and expenses. The costs and expenses of seizure and sale aforesaid shall be: Seizing grain, corn, hay or straw, fifty cents; posting up each notice, twelve cents; serving each notice of sale, twenty-five cents; for every copy of such notice delivered on request, twelve cents; for each mile actually traveled, going and returning to serve any notice; or to give or to post up notices of sale, ten cents; for conducting such sale, fifty cents; for collecting and paying over all sums upon such sale, five per cent; but in no case shall the whole percentage exceed ten dollars, and all necessary expenses incurred in taking

possession of any grain, corn, hay or straw and preserving the same as shall be just and reasonable.

289.53 Public improvements; lien on contractors; duty of officials; trust funds. (1) Any person, firm or corporation furnishing any materials, to be used or consumed in making such public improvement or performing such public work, including without limitation because of specific enumeration, fuel, lumber, building materials, machinery, vehicles, tractors, equipment, fixtures, apparatus, tools, appliances, supplies, electrical energy, gasoline and other motor oil, lubricating oil, and greases, apparatus, fixtures, machinery or labor, including the premiums for workmen's compensation insurance and the contributions for unemployment compensation, to any contractors for public improvements in this state, except in cities of the first class, however organized, shall have a lien on the money, or bonds, or warrants due or to become due such contractor for such improvements; providing, such person, firm or corporation shall, before the payment is made to such contractor, notify the officials of the state, county, township, city or municipality, whose duty it is to pay such contractor, of his claim by written notice. It shall be the duty of such officer so notified to withhold a sufficient amount to pay such claim until it is admitted or established as provided in subsection (3) of this section and thereupon to pay the amount thereof to such person and such payment shall be a credit on the contract price to be paid such contractor. Any officer violating the duty hereby imposed upon him shall be liable on his official bond to the person serving such notice for the damages resulting from such violation which may be recovered in an action at law in any court of competent jurisdiction. There shall be no preference between the persons serving such notice, but all shall be paid pro rata in proportion to the amount under their respective contracts.

(2) Whenever practicable, service of the notice provided for in subsection (1) shall be made both upon the clerk and treasurer of the municipality. In case any portion of the money due the contractor is payable by the state of Wisconsin notice of aforesaid may be served by registered mail upon the department, board or commission having jurisdiction over the work.

(3) In any case where the contractor shall dispute the claim of the laborers or materialmen the right to a lien and to the moneys in the hands of the officer shall be determined by equitable action brought by either the lien claimant or the contractor in the circuit court of the proper county; provided, that if such action is not brought within 3 months from the time of serving the notice or notices required by subsection (1), and notice of bringing such action filed with the officers with whom the claim is filed, such rights shall be barred; and provided further that in the case of highway or bridge construction or maintenance contracts in connection with which the total of the claims of persons, firms or corporations making claim to all or any part of the balance of money due the contractor from the state of Wisconsin is greater than such balance due the contractor, the rights of such persons, firms or corporations shall be determined by an equitable action brought by either the lien claimant or the contractor in the circuit court for the proper county, in which action the state may be made a party defendant, although no costs shall be taxed against the state. Such actions shall be commenced only when the state highway commission shall have been given notice of such claim or claims prior to final payment in accordance with the terms of the contract, and all persons, firms or corporations making claims to the state highway commission to all or any part of such money shall be made parties in such action. In the case of highway or bridge construction or maintenance contracts, any action commenced in accordance with any part of this section by a person, firm or corporation making claim to any money due the contractor from the state of Wisconsin shall be commenced within 3 months after acceptance of the work by the state highway commission except as hereinafter provided; and within 10 days after the filing of a certified copy or transcript of judgment in any action so commenced with the state highway commission, the money shall be paid by said commission to the clerk of said court to be distributed in accordance with the judgment. After payment of the money to the clerk of the court, any and all liability on the part of the state to any person, firm or corporation making claim to all or any part of such money shall cease. In the event no action is commenced within the time hereinbefore provided, the state highway commission may determine who is entitled to said money and notify all claimants and the contractor in writing as to its determination in said matter. Unless an action is then commenced by a dissatisfied claimant or claimants or by the contractor, in the manner hereinbefore provided, within 20 days after mailing of said notice, the state highway commission may pay out the money in accordance with its decision in the matter, and the liability of the state to any person, firm or corporation making claim to all or any part of such money shall thereupon cease. As to contracts completed and accepted prior to July 2, 1935, the 3 months' period for which provision is herein made shall commence on said date. As to

judgments of which notice of entry has been made to the state highway commission as herein provided prior to July 2, 1935, the 10-day period for which provision is herein made shall commence on said date. This subsection shall supersede any prior legislation inconsistent herewith.

(4) All moneys, bonds or warrants paid to, or to become due to any principal contractor or subcontractor for public improvements shall be and constitute a trust fund in the hands of such principal contractor or subcontractor; the using of such moneys by such principal contractor or subcontractor for any purpose other than the payment of all claims on such public improvement so far as such moneys will pay the same is hereby declared to be an embezzlement of said moneys punishable as provided by law in case of embezzlement. [*1931 c. 438; 1933 c. 83, 316; 1935 c. 191; 1941 c. 288; 1943 c. 475*]

Note: The lien for services or materials entering into public works 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. Wohlust, 203 W 203, 233 NW 88.

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 had (4) not been enacted. Danischefsky v. Klein-Watson Co., 209 W 210, 244 NW 772.

See note to 289.02, citing Theiler v. Consolidated I. & Ins. Co., 213 W 171, 250 NW 433.

Under 289.53 (4) and 304.21 (1) the term "claim" is more comprehensive than "lien" and includes nonlienable items so long as they are germane to performing the public work upon contracts. Morris F. Fox & Co. v. State, 229 W 44, 281 NW 666.

Where a contractor assigned his municipal paving contract to the 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 under subsection (4) 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.

What this statute 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.

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" within, and hence did not bring persons furnishing materials and labor thereunder within the protection of, the provision in 289.53 (4). Ozaukee Sand and Gravel Co. v. Milwaukee, 243 W 38, 9 NW (2d) 99.

Construction of hospital at the Wisconsin veteran's home is public improvement. 19 Atty Gen. 136.

Under (1) notice of materialman's claim for lien on moneys due principal contractor on contract for public improvement must be filed prior to payment to contractor. It need not be filed within time mentioned in 289.02. 24 Atty. Gen. 618.

289.54 to 289.66 Blacksmith's lien. [*Not printed; 1935 c. 483 s. 127; see 1933 Stats.*]

289.70 Maintenance liens. (1) Any corporation organized under the laws of this state as a nonprofit, membership corporation for the purpose of maintaining, improving, policing or preserving properties in which its members shall have common rights of usage and enjoyment, including, without limitation because of specific enumeration, private (not public) parks, plazas, roads, paths, highways, piers, docks, playgrounds, tennis courts, beaches, water pumping plant and connecting pipes or sewer plant and connecting pipes, shall have the power to prepare and annually submit to its membership a budget of the expenditures which it proposes to make for the ensuing year. Such budget shall include the expenses of maintaining the necessary organization of the corporation including salaries to officers, fees paid for auditing the books of the corporation and for necessary legal services and counsel fees to the governing board thereof.

(2) Upon the adoption and approval of the annual budget by a majority of the membership, at a regular meeting or adjournment thereof, the governing board of such corporation shall be empowered to levy an assessment not in excess of five mills on each dollar of assessed valuation to be known as a maintenance assessment against all of the lots, the ownership of which entitles the owner thereof to the use and enjoyment of the properties controlled by such corporation, provided, however, that the limitation of five mills on each dollar of assessed valuation shall not apply in any case in which the property owners or their predecessors in title have, by written contract, or by the terms of their deeds of conveyance, assumed and agreed to pay the costs of maintaining those properties in which the owners have common rights of usage and enjoyment. The assessments so levied shall be equal in amount against all of such lots and shall be levied at the same time once in each year, upon all lots. The governing board shall apportion the cost of operating water or sewer plants and facilities thereof and separate such costs from the other expenses of the budget and shall include the expenses of water and sewer plant

maintenance only in the levy against those lots which may be improved with a dwelling house on the date when the levy is ordered, and no portion of such cost shall be assessed the vacant lots or the owners thereof.

(3) The governing board of such corporation shall declare the assessments so levied due and payable at any time after thirty days from the date of such levy and the secretary or other officer shall notify the owner of every lot so assessed of the action taken by the board, the amount of the assessment of each lot owned by him and the date such assessment becomes due and payable. Such notice shall be mailed to him at his last known post-office address by the secretary by United States mail, with postage prepaid.

(4) In the event that the assessment levied against any lot remains unpaid for a period of sixty days from the date of the levy, then the governing board of such corporation may, in its discretion, file a claim for a maintenance lien against such lot at any time within six months from the date of the levy, such claim to be filed in the office of the clerk of the circuit court of the county in which the lands affected thereby lie. Such claim for lien shall contain a reference to the resolution authorizing such levy and date thereof, the name of the claimant or assignee, the name of the person against whom the assessment is levied, a description of the property affected thereby and a statement of the amount claimed. It shall be signed by the claimant or by its attorney, and need not be verified, and may be amended, in case of action brought, by order of court, as pleadings may be.

(5) Every clerk of the circuit court shall keep a separate docket, to be entitled "maintenance lien docket," in which shall be entered the proper entries, under the appropriate headings herein specified, relative to each claim for lien filed with him, immediately upon its filing, opposite the names of the persons against whom the lien is claimed, which names shall be entered therein alphabetically, or an alphabetical index thereof shall be kept as judgment dockets are required by law to be kept. Each page of such docket shall be divided into eight columns, with written or printed headings to the respective columns, as follows:

Name of person against whom lien is claimed.	Name of claimant or assignee.	Attorney for claimant.	Date of levy of assessment.	Date of filing petition.	Description of property.	Amount claimed.	Satisfaction.
.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....

Such docket shall be presumptive evidence of the correctness of the entries therein made.

(6) When the corporation, described in subsection (1) shall have so filed its claim for lien upon a lot it may foreclose the same by action in the circuit court or any county court having jurisdiction thereof, and the provisions of sections 289.09, 289.12, 289.13, 289.14 and 289.15 shall apply to proceedings undertaken for the enforcement and collection of maintenance liens as herein described. [*1935 c. 447; 1937 c. 351; 1939 c. 159; 1943 c. 275 s. 63*]

Note: Provision for levy of assessments among members of nonprofit corporation having common right in usage of certain maintenances for which such assessments are used is valid. 24 Atty. Gen. 497.

289.71 Disposition of articles left for dry cleaning. (1) Any garment, clothing, wearing apparel or household goods remaining in the possession of a person, firm, partnership or corporation, on which cleaning, pressing, glazing or dyeing has been done or upon which alteration or repairs have been made, or on which materials or supplies have been used or furnished, for a period of 6 months or more, may be sold to pay the reasonable or agreed charges and the cost of notifying the owner, after giving notice of said sale as specified in subsection (3) to such owner. Property that is to be placed in storage after any of the services or labors mentioned herein are performed shall not be affected by the provisions of this subsection.

(2) All garments, clothing, wearing apparel or household goods placed in storage, or on which any of the services or labors mentioned in the preceding section have been performed and then placed in storage by agreement and remaining in the possession of a person, firm, partnership or corporation without the reasonable or agreed charges having been paid for a period of more than 18 months, may be sold to pay said charges after giving notice of said sale as specified in subsection (3) to such owner, provided that

where property was delivered to be cleaned, pressed, glazed or dyed, and left for storage in addition to having such work done, it shall not be so sold unless at the time of delivery the owner was given a receipt for such property containing a statement that the property will be sold when such 18 months have elapsed unless called for within such 18 months' period. Persons, firms, partnerships or corporations operating as warehouses or warehousemen shall not be affected by this subsection.

(3) The mailing of a registered letter, with a return address marked thereon, addressed to the owner at their address given at the time of the delivery of the article or articles to a person, firm, partnership or corporation rendering any of the services or labors as set out in this section, stating the time and place of sale, shall constitute notice. Said notice shall be posted or mailed at least 30 days before the date of sale. The costs of posting or mailing said letter shall be added to the charges.

(4) The person, firm, partnership or corporation to whom the charges are payable, shall, from the proceeds of sale, deduct the charges due plus the costs of notifying the owner and shall hold the overplus, if any, subject to the order of the owner and shall immediately thereafter mail to the owner thereof at his address, if known, a notice of the sale, the amount of overplus, if any, due him, and at any time within 12 months, upon demand by the owner, pay to the owner said sums of overplus in his hands.

(5) All persons, firms, partnerships or corporations taking advantage of this section must keep posted in a prominent place in their receiving office or offices at all times 2 notices which shall read as follows: "All articles cleaned, pressed, glazed, laundered, washed, altered or repaired and not called for in 6 months will be sold to pay charges". "All articles stored by agreement and charges not having been paid for 18 months will be sold to pay charges". [*1943 c. 358*]