CHAPTER 289.

LIENS.

SUBCHAPTER I.

CONSTRUCTION LIENS.

289.01 Construction liens.
289.02 Notice required to preserve lien rights; exceptions; saving clause; obligations of contractors.
289.03 Lien valid unless waived by claimant personally, or unless payment bond furnished.
289.035 Form of contract; payment bond; remedy.
289.036 Contracts with payment bond; lien; notice; duty of owner and lender.
289.04 Claims assignable; notice; prior payment.
289.05 Waivers of lien.
289.06 Filing claim and beginning action; notice required before filing; contents of claim document.
289.07 Docket of liens.
289.08 Release of lien; undertaking.
289.09 Foreclosure of lien; procedure; parties.
289.10 Judgment.
289.11 Distribution of proceeds of sale.
289.12 Sale; notice and report; deficiency judgment; writ of assistance.
289.13 Satisfaction of judgment or lien; correction of errors.
289.14 Public works, form of contract, bond, remedy.
289.15 Public improvements; lien on contractor; duty of officials.
289.155 Judgment creditors, attachment of funds due to public contractors.
289.16 Theft by contractors.
289.17 Release of funds on filing bond.

SUBCHAPTER II.

OTHER LIENS.

289.18 Log liens; priority.
289.19 Petition for log lien; filing same.
289.20 Action to enforce log lien; parties; costs; change of venue.
289.21 Attachment, affidavit for; undertaking; service of writ.
289.24 Lien for camp supplies.
289.25 Lien for joint log driving.
289.26 Lien of improvement companies.
289.28 Execution.
289.29 Who may become a party or appeal
289.30 Appeal by intervener and proceedings.
289.31 Cook's lien.
289.33 Liens for log driving on Chippewa river.

MINING LIENS, ETC.

289.35 Mining liens.
289.36 Extent of lien; filing claim.
289.37 Satisfaction of lien.
289.38 Effect of mortgage.
289.39 Foreclosure of lien.
289.40 Liens for labor in quarry.

MECHANIC'S LIENS, ETC.

289.41 Mechanic's liens.
289.415 Liens on motor vehicles for towing and storage.
289.42 Obtaining mechanic's services by misrepresentation of interest in personal property.
289.43 Liens of keepers of hotels, livery stables, garages and pastures.
289.44 Liens of consignees.
289.45 Liens of factors, brokers, etc.
289.46 Jeweler's lien.
289.48 How such liens enforced.

BREEDING ANIMAL, THRESHING LIENS, ETC.

289.49 Lien of owner of breeding animals or methods.
289.50 Lien for threshing, husking, baling; enforcement.
289.52 Costs and expenses.

HORSESHOER'S LIEN

289.54 Horseshoer's lien.
289.55 Petition.
289.56 Additional claims.
289.57 Actions to enforce lien.
289.58 Attachment; affidavit; undertaking; writ; publication.
289.59 Assignment.
289.60 Return.
289.61 Promissory note.
289.62 Liability on sale, etc.
289.63 Pleading.
289.64 Findings; costs; execution; release; judgment.
289.65 Intervention; appeal.
289.66 Undertaking by intervenor; procedure.

MAINTENANCE LIENS

289.70 Maintenance liens.

DISPOSITION OF UNCLAIMED ARTICLES

289.71 Disposition of articles left for laundering, dry cleaning, repair, storage.

HOSPITAL LIENS

289.80 Hospital liens.

SUBCHAPTER I.

CONSTRUCTION LIENS.

289.01 Construction liens. (1) NAME OF LAW. This chapter may be referred to as the construction lien law.

(2) DEFINITIONS. In this subchapter unless the context or subject matter requires otherwise:

(a) "Prime contractor" means:

1. A person, other than a laborer, but including an architect, professional engineer, or surveyor employed by the owner, who enters into a contract with an owner of land who is not himself the prime contractor as defined in subd. 2 to improve the land, or who takes over from a prime contractor his uncompleted contract; or

2. An owner of land who acts as his own general contractor in improving such land.

(b) "Lien claimant" means any person who claims a lien under this section pursuant to a contract for improvement of land entered into by an owner of the land.

(c) "Improve" or "improvement" includes any building, structure, erection, fixture, demolition, alteration, excavation, filling, grading, tiling, planting, clearing or landscaping which is built, erected, made or done on or to land for its permanent benefit. This enumeration is intended as an extension rather than a limitation of the normal meaning and scope of "improve" and "improvement."

(d) "Owner" means the owner of any interest in land who, personally or through an agent, enters into a contract, express or implied, for the improvement of the land. Agency will be presumed, in the absence of clear and convicing evidence to the contrary, between employer and employe, between spouses, between joint tenants and among tenants in common, but there shall be a similar presumption against agency in all other cases.

(3) EXTENT AND CHARACTER OF LIEN. Every person who performs any work or procures its performance or furnishes any labor or materials or plans or specifications for the improvement of land, and who complies with s. 289.02, shall have a lien therefor on all interests in the land belonging to its owners. The lien extends to all contiguous land of the owner, but if the improvement is located wholly on one or more platted lots belonging to the owner, the lien applies only to the lots on which the improvement is located.

(4) PRIORITY OF CONSTRUCTION LIEN. The lien provided in sub. (3) 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 ss. 215.21 (4) (a) and 235.70. When new construction is the principal improvement involved, commencement is deemed to occur no earlier than the beginning of substantial excavation for the foundations, footings or base of the new construction, except where the new construction is to be added to a substantial existing structure, in which case the commencement is the time of the beginning of substantial excavation or the time of the beginning of substantial preparation of the existing structure to receive the added new construction, whichever is earlier. The lien also shall be prior to any unrecorded mortgage given prior to the commencement of the work of improvement, if the lien claimant has no actual notice of the mortgage before the commencement. Lien claimants who perform work or procure its performance or furnish any labor or materials or plans or specifications for an improvement prior to the visible commencement of the work of improvement shall have lien rights, but shall have only the priority accorded to other lien claimants.

(5) ASSIGNMENT OF LIEN, GARNISHMENT. An assignment of his claim or right to a lien or any part thereof by a prime contractor, or garnishment by his creditor, shall not operate to compel the owner to pay the assignee or creditor until the lien claims of subcontractors, materialmen and laborers under this subchapter either have been paid in full, have matured by notice and filing or have expired. If such claims become liens, the owner shall be compelled to pay such assignee or creditor only what remains due in excess of such liens.

History: 1967 c. 351.

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

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

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

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

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

[As to (2) (d)] This definition replaces present s. 289.01 (1) (c) and (4), and makes substantial changes. Under present law, only an owner who expressly contracts for an improvement will find his interest subject to lien. By case law, such an owner has in some instances been held subject to the lien

because of an express contract made by his agent. The overall result was that lien claimants would find their liens valuable or worthless, depending on the nature of the interest of the person with whom the improvement contract was made. Sometimes such a result may be required, in fairness to an unknowing owner, whose tenant (for example) may have an elaborate improvement constructed. But the new definition is designed to make explicit that the contract may be made personally or through an agent and that it may be express or implied. A rebuttable presumption that an agency relationship existed will apply where the contract was entered into by the owner's employe, spouse or co-tenant, but in all other cases (landlord-tenant or vendor-vendee, for example) the rebuttable presumption will be that no agency relationship existed.

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

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

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

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

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

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

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

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

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

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

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

289.02 Notice required to preserve lien rights; exceptions; saving clause; obligations of contractors. (1) EXCEPTIONS TO NOTICE REQUIREMENT. The notice required to be given by lien claimants under sub. (2) shall not be required to be given in the following cases only:

(a) By any laborer or mechanic employed by any prime contractor or subcontractor.

(b) By any lien claimant who has contracted directly with the owner for the work or materials furnished, unless the claimant is a prime contractor subject to the notice requirement of sub. (2) (a).

(c) By any lien claimant furnishing labor or materials for an improvement in any case where more than 4 family living units are to be provided or added by such work of improvement, if the improvement is wholly residential in character, or in any case where more than 10,000 total usable square feet of floor space is to be provided or added by such work of improvement, if the improvement is partly or wholly nonresidential in character.

(d) By any prime contractor who is himself an owner of the land to be improved, by any corporate prime contractor of which an owner of the land is an officer or controlling shareholder, by any prime contractor who is an officer or controlling shareholder of a corporation which is an owner of the land or by any corporate prime contractor managed or controlled by substantially the same persons who manage or control a corporation which is an owner of the land.

(2) NOTICE TO OWNER, LENDER AND MATERIALMAN. (a) Every prime contractor who enters into a contract with the owner for a work of improvement on the owner's land and who has contracted or will contract with any subcontractors or materialmen to provide labor or materials for the work of improvement shall include in any written contract with the owner the notice required by this paragraph, and shall provide the owner with a copy of the written contract. If no written contract for the work of improvement is entered into, the notice shall be prepared separately and served personally or by registered mail on the owner or his authorized agent within 10 days after the first labor or materials are furnished for the improvement by or pursuant to the authority of the prime contractor. The notice, whether included in a written contract or separately given, shall be in at least 8-point bold type, if printed, or in capital letters, if typewritten. It shall be in substantially the following language: "As required by the Wisconsin construction lien law, builder hereby notifies owner that persons or companies furnishing labor or materials for the construction on owner's land may have lien rights on owner's land and buildings if not paid. Those entitled to lien rights, in addition to the undersigned builder, are those who contract directly with the owner or those who give the owner notice within 60 days after they first furnish labor or materials for the construction. Accordingly, owner probably will receive notices from those who furnish labor or materials for the construction, and should give a copy of each notice received to his mortgage lender, if any. Builder agrees to co-operate with the owner and his lender, if any, to see that all potential lien claimants are duly paid."

(b) Every person other than a prime contractor who furnishes labor or materials for an improvement shall have the lien and remedy under this subchapter only if within 60 days after furnishing the first labor or materials he gives notice in writing, in 2 signed copies, to the owner either by personal service on the owner or his authorized agent or by registered mail with return receipt requested to the owner or his authorized agent at his last-known post-office address. The owner or his agent shall provide a copy of the notice received, within 10 days after receipt, to any mortgage lender who is furnishing or is to furnish funds for construction of the improvement to which the notice relates. The notice to the owner shall be in substantially the following language, with blanks accurately filled in: "As a part of your construction contract, your contractor or builder has already advised you that those who furnish labor or materials for the work will be notifying you. The undersigned first furnished labor or materials on .... (give date) for the improvement now under construction on your real estate at .... (give legal description, street address or other clear description). Please give your mortgage lender the extra copy of this notice within 10 days after you receive this, so your lender, too, will know that the undersigned is included in the job."

(c) If any prime contractor required to give the notice prescribed in par. (a) fails to give notice as required, he shall not have the lien and remedy provided by this subchapter.

(d) Every mortgage lender making an improvement or construction loan shall make reasonable inquiry of the owner as to whether any notices required by this subsection have been given. A lender is not required to pay out any loan proceeds unless or until the prime contractor has given any notice required of him by this subsection.

(e) If the owner or lender complains of any insufficiency of any notice, the burden of proof is upon him to show that he has been misled or deceived by the insufficiency. If there is more than one owner, giving the notice required to any one owner or his authorized agent is sufficient. In addition, every prime contractor and subcontractor, at the time he purchases or contracts for any materials to be used in any of the cases enumerated in s. 289.01, shall upon request deliver to the materialman a description of the real estate upon which the materials are to be used and the name and post-office address of the owner and his authorized agent, if any. Failure to receive such description and name and address does not relieve a materialman who asserts a lien from the requirement that he has given timely notice.

(3) FAILURE TO GIVE NOTICE; SAVING CLAUSE. Any lien claimant, other than the prime contractor, who fails to give a notice as required by sub. (2) (b) shall have no lien on the land or improvement to which the failure relates. Any claimant who serves a late but otherwise proper notice personally or by registered mail on the owner or his authorized agent shall have the lien provided by s. 289.01 for any labor or materials

furnished after the late notice is actually received by the owner. The burden of proving that labor or materials for which a lien is claimed were furnished after that date is on the lien claimant.

(4) NOTICE AND FILING REQUIREMENTS IN S. 289.06 UNAFFECTED. Nothing in this section shall be construed to relieve any lien claimant of the notice and filing requirements under s. 289.06.

(5) THEFT BY CONTRACTORS. The proceeds of any mortgage on land paid to any prime contractor or any subcontractor for improvements upon the mortgaged premises, and all moneys paid to any prime contractor or subcontractor by any owner for improvements, constitute a trust fund in the hands of the prime contractor or subcontractor to the amount of all claims due or to become due or owing from the prime contractor or subcontractor for labor and materials used for the improvements, until all the claims have been paid. The use of any such moneys by any prime contractor or subcontractor for any other purpose until all claims, except those which are the subject of a bona fide dispute and then only to the extent of the amount actually in dispute, have been paid in full or pro rata in cases of a deficiency, is theft of moneys so misappropriated and shall be punished under s. 943.20. If the prime contractor or subcontractor is a corporation, such misappropriation also shall be deemed theft by any officers, directors or agents of the corporation responsible for the misappropriation. Any of such misappropriated moneys which have been received as salary, dividend, loan repayment, capital distribution or otherwise by any shareholder of the corporation not responsible for the misappropriation shall be a civil liability of the shareholder and may be recovered from him and restored to the trust fund specified in this subsection by action brought by any interested party for that purpose.

(6) PRIME CONTRACTORS TO DEFEND LIEN ACTIONS. Where a lien is filed under this subchapter by any person other than the prime contractor, the prime contractor shall defend any action thereon at his own expense, and during the pendency of the action the owner may withhold from the prime contractor the amount for which the lien was filed and sufficient to defray the costs of the action. In case of judgment against the owner, he may deduct from any amount due to the prime contractor the amount of the judgment and if the judgment exceeds the amount due, the owner may recover the difference from the prime contractor.

(7) WRONGFUL USE OF MATERIALS. Any prime contractor or any subcontractor furnishing materials under him who purchases materials on credit and represents at the time of making the purchase that the materials are to be used in a designated building or other improvement and thereafter uses or causes them to be used in the construction of any improvement other than that designated, without the written consent of the seller, may be fined not more than $300 or imprisoned not more than 3 months.

(8) WAGE PAYMENTS TO LABORER APPLY TO EARLIER WORK. In any situation where a laborer or mechanic employed by any prime contractor or subcontractor has wage payments due and has worked on more than one improvement for the employer during the period for which the wages are due, and a payment of less than all wages due is made, the payment is deemed to apply to the unpaid work in chronological sequence starting with the earliest unpaid time, unless the laborer agrees in writing that the payment shall be applied in a different way.

History: 1967 c. 351.

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

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

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

[As to (1) (c)] This proposal represents a major change from present law. It eliminates any notice requirement (of the sort now found in s. 289.02) for other than relatively small construction. The purpose is to work toward earlier and more realistic notice on those smaller jobs where the owner may be inexperienced, unaware of the construction lien laws, and hence in possible danger of having to pay twice or lose his property. On larger construction, such unawareness will not be a factor, and lenders and owners can set up their own machinery for ascertaining who the potential lien claimants are.

[As to (1) (d)] This is a new provision, following up on the recognition in proposed s. 289.01 (2) (a) of the special situation in which the owner acts as his own general contractor. There is no sense in requiring such an owner-prime contractor to give notice to himself, or to some entity technically different because one or both entities are incorporated; hence the proposed provision. However, the notice requirements for

subcontractors and materialmen (see proposed s. 289.02 (2) (b)) still apply in this situation, so they can make themselves known to owner and lender, unless they have contracted directly with the owner-prime contractor, in which case the exception in proposed s. 289.02 (1) (b) would apply.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

289.03 Lien valid unless waived by claimant personally, or unless payment bond furnished. (1) NO AGREEMENT BY OTHER THAN CLAIMANT MAY INVALIDATE LIEN. Subject to s. 289.05, a lien claimant may waive the lien given by s. 289.01 by a writing signed by him, but no action by nor agreement between any other persons shall invalidate

the lien, other than payment in full to the claimant for the labor or materials to which the lien claim relates.

(2) PAYMENT BOND MAY ELIMINATE LIEN RIGHTS. In any case where the prime contractor, pursuant to agreement with the owner, has furnished a payment bond under s. 289.035, all liens provided by s. 289.01 do not exist, ss. 289.02 (1) to (4) and 289.06 do not apply and all claimants shall follow the requirements and procedures specified in ss. 289.035 and 289.036.

History: 1967 c. 351.

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

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

289.035 Form of contract; payment bond; remedy. (1) To eliminate lien rights as provided in s. 289.03 (2), the contract between the owner and the prime contractor for the construction of the improvement shall contain a provision for the payment by the prime contractor of all claims for labor performed and materials or plans or specifications furnished, used or consumed in making such improvement and performing the work of improvement. The contract shall not be effective to eliminate lien rights unless the prime contractor gives a bond issued by a surety company licensed to do business in this state. The bond shall carry a penalty for unpaid claims of not less than the contract price, and shall be conditioned for the payment to every person entitled thereto of all the claims for labor performed, and materials furnished under the contract and subsequent amendments thereto, to be used or consumed in making the improvement or performing the work of improvement as provided in the contract and subsequent amendments thereto. The bond shall be approved by the owner and by any mortgage lender furnishing funds for the construction of the improvement. No assignment, modification or change in the contract, or change in the work covered thereby, or any extension of time for completion of the contract shall release the sureties on the bond.

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

(3) In any case in which the improvement contract and bond have been prepared and executed pursuant to sub. (1) upon inquiry by any subcontractor, materialman, laborer or mechanic furnishing labor or materials for said improvement, the prime contractor and the owner shall so advise the person making the inquiry and shall give the person reasonable opportunity to inspect and examine the contract and bond.

History: 1967 c. 351.

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

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

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

289.036 Contracts with payment bond; lien; notice; duty of owner and lender. (1) In any case in which an improvement is constructed or to be constructed pursuant to a contract and payment bond under s. 289.035, any person furnishing labor or materials or plans or specifications to be used or consumed in making the improvement, to any prime contractor or subcontractor shall have a lien on the money or other payment due or to become due the prime contractor or subcontractor therefor, if the

lienor, before payment is made to the prime contractor or subcontractor, gives written notice of his claim by registered mail with return receipt requested to the owner or his authorized agent and to any mortgage lender furnishing funds for the construction of the improvement. Upon receipt of the notice, the owner and lender shall assure that a sufficient amount is withheld to pay the claim and, when it is admitted by the prime contractor or subcontractor involved or established under sub. (3), shall pay the claim and charge it to the prime contractor or subcontractor as appropriate. Any owner or lender violating this duty shall be liable to the claimant for the damages resulting from the violation. There shall be no preference among lienors serving such notices.

(2) A copy of the notice provided in sub. (1) also shall be served by the lienor, within 7 days after service of the notice upon the owner and lender, upon the prime contractor or subcontractor by registered mail with return receipt requested.

(3) If the prime contractor or subcontractor does not dispute the claim within 30 days after service on him of written notice under sub. (2), by registered mail with return receipt requested to the owner and lender, the amount claimed shall be paid over to the claimant on demand and charged to the prime contractor or subcontractor pursuant to sub. (1). If the prime contractor or subcontractor disputes the claim, the right to a lien and to the moneys in question shall be determined in an action brought by the claimant or the prime contractor or subcontractor. If the action is not brought within 3 months from the time the notice required by sub. (1) is served, the lien rights under this section are barred.

(4) (a) When the total lien claims exceed the sum due the prime contractor or subcontractor concerned and where the prime contractor or subcontractor has not disputed the amounts of the claims filed, the owner with the concurrence of the lender shall determine on a prorata basis who is entitled to the amount being withheld and shall notify all claimants and the prime contractor or subcontractor in writing of the determination. Unless an action is commenced by a claimant or by the prime contractor or subcontractor within 20 days after the mailing of said notice, the money shall be paid out in accordance with the determination and the liability of the owner and lender to any claimant shall cease.

(b) If any action is commenced, all claimants, the owner and the lender shall be made parties. Such action shall be brought within 6 months after completion of the work of improvement or within the time limit prescribed by par. (a), whichever is earlier.

(c) Within 10 days after the filing of a certified copy of the judgment in any such action with the owner and lender, the money due the prime contractor or subcontractor shall be paid to the clerk of court to be distributed in accordance with the judgment.

History: 1967 c. 351.

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

289.04 Claims assignable; notice; prior payment. All claims for liens and right to recover therefor under this subchapter 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, subject to the limitations in s. 289.01 (5).

History: 1967 c. 351.

Legislative Council Note, 1967: This is present s. 289.04, unchanged except for a reference to the limitations stated in present (and proposed) s. 289.01 (5). (Bill 525-A)

289.05 Waivers of lien. (1) Any document signed by a lien claimant or potential claimant and purporting to be a waiver of construction lien rights under this subchapter, is valid and binding as a waiver whether or not consideration was paid therefor and whether the document was signed before or after the labor or material was furnished or contracted for. Any ambiguity in such document shall be construed against the person signing it. Any waiver document shall be deemed to waive all lien rights of the signer for all labor and materials furnished or to be furnished by the claimant at any time for the improvement to which the waiver relates, except to the extent that the document specifically and expressly limits the waiver to apply to a particular portion of such labor and materials. A lien claimant or potential lien claimant of whom a waiver is requested is entitled to refuse to furnish a waiver unless paid in full for the work or material to which the waiver relates. A waiver furnished is a waiver of lien rights only, and not of any contract rights of the claimant otherwise existing.

(2) A promissory note or other evidence of debt given for any lienable claim shall not be deemed a waiver of lien rights unless the note or other instrument is received as payment and expressly declares that receipt therof is a waiver of lien rights.

History: 1967 c. 351.

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

289.06 Filing claim and beginning action; notice required before filing; contents of claim document. (1) No lien under s. 289.01 shall exist and no action to enforce the same shall be maintained unless within 6 months from the date the lien claimant furnished the last labor or materials a claim for such lien is filed in the office of the clerk of circuit court of the county in which the lands affected thereby lie, and unless within 2 years from the date of filing a claim for lien an action is brought and summons and complaint filed therein. Such claim for lien may be filed and docketed, and action brought, notwithstanding the death of the owner of the property affected thereby or of the person with whom the original contract was made, with like effect as if he were then living.

(2) No lien claim may be filed or action brought thereon unless, at least 30 days before timely filing of the lien claim, the lien claimant serves on the owner, personally or by registered mail with return receipt requested, a written notice of intent to file a lien claim. The notice is required to be given whether or not the claimant has been required to and has given a previous notice pursuant to s. 289.02. Such notice shall briefly describe the nature of the claim, its amount and the land and improvement to which it relates.

(3) Such a claim for lien shall have attached thereto a copy of any notice given in compliance with s. 289.02 and a copy of the notice given in compliance with sub. (2), and 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 and any assignee, the last date of the performance of any labor or the furnishing of any materials, a legal description of the property against which the lien is claimed, a statement of the amount claimed and all other material facts in relation thereto. Such claim document shall be signed by the claimant or by his attorney, need not be verified, and in case of action brought, may be amended, as pleadings are.

History: 1967 c. 351.

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

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

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

289.07 Docket of liens. (1) Every clerk of the circuit court shall keep a separate docket, entitled "lien docket," in which shall be entered, immediately upon its filing, the proper entries under the appropriate headings specified in this subsection, relative to each claim for lien filed with him, opposite the names of the persons against whom the lien is claimed. The names shall be entered alphabetically, or an alphabetical index shall be kept as judgment dockets are required by law to be kept. Each page of the docket shall be divided into 9 columns, with headings in the following sequence to the respective columns, as follows:

(a) Name of person against whom lien is claimed.

(b) Name of claimant or assignee.
(c) Attorney for claimant.
(d) Last date of performance of labor or furnishing materials.
(e) Description of copies of notices attached to claim when filed.
(f) Date and time of filing claim.
(g) Description of property.
(h) Amount claimed.
(i) Satisfaction.

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

History: 1967 c. 351.

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

289.08 Release of lien; undertaking. (1) The person against whom a lien is claimed or any other interested party may file with the clerk of court in whose office the claim for lien is filed an undertaking executed by 2 or more sufficient sureties to the effect that the person against whom the lien is claimed shall pay the amount of the claim and all costs and damages which may be awarded against him on account of the lien or in lieu thereof deposit with the clerk of the court a sum of money, certified check or negotiable government bonds in par value equal to 125% of the claim for lien. The court in which any action to foreclose the lien may be brought shall determine any question of sufficiency of the sureties if exception is taken thereto by the lien claimant within 10 days after notice of the filing of such undertaking or deposit or other security and may upon notice and upon motion of any party, order any sum of money deposited to be invested. The depositor shall be entitled to any income from the investments, certified check or negotiable U. S. government bonds deposited and the clerk shall pay the income to the depositor without order when received or, in the case of coupons, as the income becomes due.

(2) If an undertaking is furnished, it shall be accompanied by the affidavits of the sureties in which each states that he is worth, over and above all his debts and liabilities in property within this state not exempt from execution, an amount in the aggregate equal to 125% or more of the amount of the claim for lien.

(3) The person against whom the lien is claimed or other interested party depositing the security shall cause to be served upon the lien claimant a notice of the filing of the undertaking or deposit of other security and, if an undertaking, a copy thereof, which notice shall state where and when the undertaking was filed or the security was deposited.

(4) Any action brought after the furnishing of security or pending at the time of the furnishing thereof in accordance with this section shall proceed as if no security had been furnished, except that after the time within which exceptions may be taken to the security, or pursuant to order of the court upon any exception so taken, the clerk shall satisfy the claim for lien of record and discharge any lis pendens filed, and except that the lien thereupon shall attach to the security and the amount adjudged due in the proceeding for foreclosure thereof shall be satisfied out of the security, and the property described in the lien claim shall thenceforth be entirely free of the lien and shall in no way be involved in subsequent proceedings.

(5) If no action to foreclose the lien is brought within the time specified by s. 289.06 (1), the clerk of circuit court in whose office the undertaking or other security was filed or deposited shall on request, and without notice, return the undertaking or security to the party filing or depositing it.

History: 1967 c. 351.

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

289.09 Foreclosure of lien; procedure; parties. In the foreclosure of liens mentioned in s. 289.01, ch. 278 shall control as far as applicable unless otherwise provided in this subchapter. All persons having filed claims for liens under s. 289.01 may join

as plaintiffs, and if any do not join they may be made defendants. All persons having liens subsequent to such lien may be joined as defendants. If any person who is a proper party is not a party to the action he may, at any time before judgment, be made a defendant, and any person who after the commencement of the action obtains a lien or becomes a purchaser may, at any time before judgment, be made a defendant.

History: 1967 c. 351.

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

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

289.10 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 is 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 fails 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.

History: 1967 c. 351.

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

289.11 Distribution of proceeds of sale. The several claimants whose liens were established in the action shall be paid without priority among themselves. If the sum realized at the sale under s. 289.10 is insufficient after paying the costs of the action and the costs of making the sale to pay the liens in full they shall be paid pro rata.

History: 1967 c. 351.

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

289.12 Sale; notice and report; deficiency judgment; writ of assistance. (1) All sales under judgments in accordance with s. 289.10 shall be noticed, conducted and reported in the manner provided for the sale of real estate upon execution and shall be absolute and without redemption. In case such sale is confirmed, the deed given thereon shall be effectual to pass to the purchaser all that interest in the premises which is directed to be sold.

(2) If any deficiency arises upon the 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. The purchasers at such sale shall be entitled to a writ of assistance under s. 272.63 to obtain possession of the premises sold.

History: 1967 c. 351.

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

289.13 Satisfaction of judgment or lien; correction of errors. (1) Every lien claimant, or the attorney who executed and filed a claim for lien on his behalf, 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 the satisfaction with the clerk of circuit court, the clerk shall enter satisfaction of the claim on his lien docket. Failure to execute and deliver the satisfaction or to satisfy the lien on the docket shall render the person so refusing liable to pay to the person requiring the satisfaction a sum equal to one-half of the sum claimed in his claim for lien.

(2) Every lien claimant, or the attorney who executed and filed a claim for lien on his behalf, who has received from any person interested in the premises described in the claim a written statement that the premises described in the claim are not in fact the premises on which the claimant furnished the work or materials to which the claim relates together with a written demand that the claim be satisfied of record shall, if in fact the statement of such person about the mistaken description is true, promptly satisfy the lien claim of record at the lien claimant's expense. Failure to satisfy the lien claim of record within a reasonable time, if in fact the statement asserting the mistaken description is true, shall render the person so failing liable to pay to the person demanding the satisfaction a sum equal to one-half of the sum claimed in the claim for lien.

History: 1967 c. 351.

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

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

289.14 Public works, form of contract, bond, remedy. (1) All contracts with the state involving $2,500 or more and all other contracts involving $500 or more for the performance of labor or furnishing materials when the same pertains to any public improvement or public work shall contain a provision for the payment by the prime contractor of all claims for labor performed and materials furnished, used or consumed in making the public improvement or performing the 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, motor oil, lubricating oil, greases, premiums for workmen's compensation insurance and contributions for unemployment compensation. A contract shall not be made unless the prime contractor gives a bond issued by a surety company licensed to do business in this state. The bond shall carry a penalty of not less than the contract price, and shall be 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 under the contract, to be used or consumed in making the public improvement or performing the public work as provided in the contract and as above specified. The bond shall be approved in the case of the state by the governor, of a county by its district attorney, of a city by its mayor, of a village by its president, of a town by its chairman, of a school district by the director or president and 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, or any extension of time for the completion of the contract shall release the sureties on the bond. Neither the invitation for bids, nor the person having power to approve the prime contractor's bond, shall require that such bond be furnished by a specified surety company or through a specified agent or broker.

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

(3) In an action by a county upon the bond all persons for whose protection it was given and who make claim thereunder may be joined in the action. The county highway commissioner may take assignments of all demands and claims for labor or material and enforce the same in the action for the benefit of the assignors, and the judgment may provide the manner in which the assignors shall be paid.

History: 1967 c. 351.

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

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

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

289.15 Public improvements; lien on contractor; duty of officials. (1) Any person furnishing labor or materials to be used or consumed in making public improvements or performing public work, including fuel, lumber, machinery, vehicles, tractors, equipment, fixtures, apparatus, tools, appliances, supplies, electrical energy, gasoline, motor oil, lubricating oil, greases, premiums for workmen's compensation insurance and contributions for unemployment compensation, to any prime contractor, except in cities of the 1st class, shall have a lien on the money or bonds or warrants due or to become due the prime contractor therefor, if the lienor, before payment is made to the prime contractor, gives written notice to the debtor state, county, town or municipality of his claim. The debtor shall withhold a sufficient amount to pay the claim and, when it is admitted by the prime contractor or established under sub. (3), shall pay the claim and charge it to the prime contractor. Any officer violating the duty hereby imposed shall be liable on his official bond to the claimant for the damages resulting from the violation. There shall be no preference between the lienors serving the notices.

(2) Service of the notice under sub. (1) shall be made by registered mail upon the clerk of the municipality or in his absence upon the treasurer. If any of the money

due the prime contractor is payable by the state, service of the notice under sub. (1) shall be served by registered mail upon the state department, board or commission having jurisdiction over the work. A copy of the notice shall be served concurrently by registered mail upon the prime contractor.

(3) If a valid lien exists under sub. (1) and the prime contractor does not dispute the claim within 30 days after service on him of the notice provided in sub. (2), by written notice to the debtor state, county, town or municipality, the amount claimed shall be paid over to the claimant on demand and charged to the prime contractor pursuant to sub. (1). If the prime contractor disputes the claim, the right to a lien and to the moneys in question shall be determined in an action brought by the claimant or the prime contractor. If the action is not brought within 3 months from the time the notice required by sub. (1) is served, and notice of bringing the action filed with the officer with whom the claim is filed, the lien rights are barred.

(4) (a) When the total of the lien claims exceeds the sum due the prime contractor and where the prime contractor has not disputed the amounts of the claims filed, the debtor state, county, town or municipality, through the officer, board, department or commission with whom the claims are filed, shall determine who is entitled to the money and shall notify all claimants and the prime contractor in writing of the determination. Unless an action is commenced by a claimant or by the prime contractor within 20 days after the mailing of the notice, the money shall be paid out in accordance with the determination and the liability of the state, county, town or municipality to any lien claimant shall cease.

(b) If an action is commenced, all claimants shall be made parties and the action shall be commenced within 3 months after acceptance of the work by the proper public authority except as otherwise herein provided.

(c) Within 10 days after the filing of a certified copy of judgment in any such action with the officers with whom the notice authorized by sub. (1) is filed, the money due the prime contractor shall be paid to the clerk of court to be distributed in accordance with the judgment.

History: 1967 c. 351.

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

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

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

Since (1) provides a lien for workmen's compensation insurance premiums, other insurance premiums are excluded. See also annotation of this case under 66.29. Boehck Construction Equipment Corp. v. Voigt, 17 W (2d) 62, 115 NW (2d) 627, 117 NW (2d) 372.

289.155 Judgment creditors, attachment of funds due to public contractors. (1) LIMITATIONS. This section does not apply to cases covered by s. 267.23. Demands covered by s. 289.15 have priority over judgments filed under this section. The remedies afforded by s. 289.15 and by this section are complementary.

(2) CERTIFIED COPIES OF JUDGMENTS FILED. In this section, "municipality" includes city, village, county, town, school district and any quasi municipal corporation. When the state or any municipality is indebted to any contractor, the owner of a judgment against him may attach the debt by filing a certified copy of his judgment in the manner and subject to the conditions and limitations provided by this section. If the debt is owed by the state upon a contract for public improvements, the certified copy shall be filed with the officer, board, department or commission having jurisdiction over the work. Otherwise, the copy shall be filed with the department of administration. If the debt is owed by a municipality, the copy shall be filed with the municipal clerk or corresponding officer. The judgment creditor shall promptly notify the judgment debtor of the filing, within the time and as provided by s. 267.07 for service upon the defendant.

(3) PAYMENT TO JUDGMENT CREDITOR; EXCEPTION. Except as to contractors on public works, the proper officers of the state or municipality shall pay the judgment out of moneys due the contractor or which become due to him, but no payment shall be made until 30 days after the creditor has filed with such officers proof that the contractor had been notified of the filing of a copy of the judgment against him.

(4) SAME; FUNDS DUE PUBLIC CONTRACTORS. When the state or a municipality is indebted to a contractor for public improvements, payment shall not be made to the

judgment creditor until 3 months after final completion and acceptance of the public work and then only out of moneys due the contractor in excess of unpaid lienable claims having priority under s. 289.15.

(5) ADJUSTMENT OF LIEN CLAIMS. (a) For the purpose of administering this section, sworn statements of the contractor setting forth the unpaid lien claims filed or fileable under s. 289.15 may be accepted by the proper officer, board, department or commission, unless the judgment creditor or other interested person gives written notice that an action is pending to determine whether specified lien claims were incurred in performing the public work and the amount thereof, or to determine priorities in which event payments shall await the result of the action.

(b) Within 10 days after filing the certified copy of the judgment under sub. (2), the contractor shall file the sworn statement in duplicate, with the proper officer, board, department or commission, who shall immediately furnish the judgment creditor with one of the statements. The judgment creditor shall have 10 days from the receipt thereof in which to serve the notice of pendency of the court action.

(6) PAYMENTS TO JUDGMENT CREDITOR. After the expiration of the 3-month period, the moneys due the contractor in excess of unpaid lienable expenses and claims incurred in performing the public work shall be paid to the judgment creditor, but not exceeding the amount due on his judgment.

(7) PRIORITY OF JUDGMENTS OVER ASSIGNMENTS. Any judgment filed under this section has priority over an assignment made by the contractor after the commencement of the action in which the judgment was obtained.

History: 1967 c. 351.

Legislative Council Note, 1967: Except s. 289.53 is renumbered s. 289.15). (Bill for appropriate renumbering, this is present 525-A) s. 289.535, renumbered s. 289.155 (and present s. 289.536, renumbered, with minor editorial change to bring it more closely parallel to s. 289.02 (5) (which in turn closely follows present s. 289.02 (4)). (Bill 525-A)

289.16 Theft by contractors. All moneys, bonds or warrants paid or to become due, to any prime contractor or subcontractor for public improvements are a trust fund in his hands; and the use of the moneys by him for any purpose other than the payment of claims on such public improvement, before the claims have been satisfied, constitutes theft and is punishable under s. 943.20.

History: 1967 c. 351.

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

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

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

289.17 Release of funds on filing bond. At any time after the service of a notice of lien claim or filing of judgment or pending the determination of any action commenced thereunder, the contractor shall be entitled to the release of any moneys due him under the contract upon filing a bond, executed by a surety company duly authorized to transact business in this state, with the public authority having jurisdiction over the work, guaranteeing that the contractor will pay any judgment of the court rendered in favor of the lien claimant and all judgments filed. Such bond shall be in an amount sufficient to insure payment of the lien claims and judgments, and shall be approved as to form and amount by the public authority.

History: 1967 c. 351.

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

SUBCHAPTER II.
OTHER LIENS.

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 shall take precedence of all other claims, liens or encumbrances 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.

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 someone in his behalf setting forth the nature of the demand, the amount claimed, a description of the property upon which the lien is claimed and that the petitioner claims a lien thereon. The petition shall be filed in the office of the clerk of the circuit court of the county in which the services or some part thereof were performed within 3 months after the last day of performing continuous services, and the services shall be deemed continuous notwithstanding a change of ownership in the property on which the lien is claimed. The clerk shall receive $1 for filing the petition.

History: 1963 c. 93.

289.20 Action to enforce log lien; parties; costs; change of venue. (1) An action to enforce any lien mentioned in s. 289.18 may be brought in the circuit court of the county where the petition is filed, when the amount claimed exceeds $100, or before any county court or municipal justice 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 4 months after filing such petition. If the claim is 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 30 days after the claim has become due and until 4 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 court no change of venue shall be allowed except for prejudice of the judge or of the people.

History: 1961 c. 495; 1967 c. 276 ss. 39, 40.

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 county courts or municipal justices 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 10 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.

History: 1961 c. 614; 1967 c. 276 s. 39.

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.

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 neglects 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.

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.

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.

289.29 Who may become a party or appeal. In an action for the enforcement of a lien upon property mentioned in s. 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 municipal justice 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 20 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.

History: 1967 c. 276 s. 39.

289.30 Appeal by intervener and proceedings. Such appeal shall not stay execution unless the appellant files an undertaking, with 2 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 municipal 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 municipal court and by reason of the death of the municipal 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.

History: 1967 c. 276 ss. 39, 40.

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.

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

MINING LIENS, ETC.

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 60 days after the first of the services shall be rendered, a petition signed by the claimant and verified by him or by someone 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 the lien is claimed and that the petitioner claims a lien thereon pursuant to law. The clerk shall receive $1 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.

MECHANIC'S LIENS, ETC.

289.41 Mechanic's liens. (1) Every mechanic and every keeper of a garage or shop, and every employer of a mechanic who transports, makes, alters, repairs or does 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 $300, except that for trucks, $600, road tractors, trailers and semitrailers, $1,000, and road machinery including mobile cranes and trench hoes, $2,500, shall be subject to the lien of any security interest in said property which was perfected by filing 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 security interest.

(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).

History: 1963 c. 294; 1965 c. 36, 334, 625 s. 45.

Cross Reference: See 289.48 (2) for method of enforcing a mechanics' lien.

289.415 Liens on motor vehicles for towing and storage. (1) Every motor carrier holding a permit to perform vehicle towing services, every licensed motor vehicle salvage dealer and every licensed motor vehicle dealer who performs vehicle towing services or stores a motor vehicle when such towing or storage is performed at the direction of a traffic officer or the owner of the vehicle, shall, if the vehicle is not claimed as provided herein, have a lien on such vehicle for reasonable towing and storage charges, and may retain possession of such property until such charges are paid. If such vehicle is subject to a lien by virtue of a duly filed financing statement, such towing lien shall have priority only to the extent of $15. If the value of the vehicle exceeds $100, the lien may be enforced under s. 289.48 (2). If the value of the vehicle does not exceed $100, as determined by 2 independent written appraisals by qualified garages or repair shops, the lien may be enforced by sale or junking substantially as provided in sub. (2).

(2) At least 20 days prior to sale or junking, notice thereof shall be given by registered mail to the person shown to be the owner of the vehicle in the records of the motor vehicle department and to any person who has a lien on such vehicle pursuant to any duly filed financing statement, stating that unless the vehicle is claimed by the owner or his agent within said 20 days the vehicle will be exposed for sale or junked, as the case may be. If the proceeds of the sale exceed the charges, the balance shall be paid to the holder of the senior lien under a duly filed financing statement, and if none, then to the owner as shown in the records of the motor vehicle department.

(3) In this section "financing statement" includes a chattel mortgage or conditional sales contract entered into prior to July 1, 1965.

History: 1961 c. 356; 1963 c. 158; 1965 c. 525.

Legislative Council Note, 1963: Language changed to conform to the terminology of the commercial code. (Bill No. 1-S)

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.

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 15 feet.

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.

289.48 **How such liens enforced.** (1) Every person given a lien by sections 289.43 to 289.46, except 289.43 (3), or as bailee for hire, carrier, warehouseman or pawnee or otherwise, by common law, may, in case the claim remain unpaid for 3 months and the value of the property affected thereby does not exceed $100, 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 the 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, in the county in which such lien accrues, as a class 3 notice, under ch. 985. If such property exceeds in value $100, then such lien may be enforced against the same by action.

(2) Every person given a lien by ss. 289.41 and 289.43 (3) may in case the claim remains unpaid for 2 months after the debt is incurred enforce such lien by sale of the property substantially in conformity with ss. 409.501 to 409.507 and the lien claimant shall have the rights and duties of a secured party thereunder. When such sections are applied to the enforcement of such lien the word debtor or equivalent when used therein shall be deemed to refer to the owner of the property and any other person having an interest shown by instrument filed as required by law or shown in the records of the motor vehicle department, and the word indebtedness or equivalent shall include all claims upon which such lien is based.

History: 1963 c. 158; 1965 c. 252.

BREEDING ANIMAL, THRESHING LIENS, ETC.

289.49 **Lien of owner of breeding animal or methods.** (1) Every owner of a stallion or jackass, or bull, or semen therefrom, kept and used for breeding purposes shall have a lien upon any dam served and upon any offspring gotten by such animal, or by means of such artificial insemination for the sum stipulated to be paid for the service thereof, and may seize and take possession of such dam and offspring or either without process at any time before the offspring is one year old, in case the price agreed upon for such service remains unpaid, and sell the same at public auction upon 10 days' notice, to be posted in at least 3 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 or mortgagee of such offspring or the dam thereof for value unless such owner having a claim for the service shall file with the register of deeds of the county where the owner of the dam 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 so served, 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 $10 or by confinement in the county jail not to exceed 60 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 encumbrances, but does not apply to an innocent purchaser for value unless such lien is filed in the office of the register of deeds of the county where the services were performed within 15 days from the date of the completion of such service.

History: 1965 c. 334.

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.

HORSESHOER'S LIEN

289.54 Horseshoer's lien. Any person who shoes any horse or other animal shall have a lien upon the animal for the amount due or to become due for his services, which lien shall take precedence of all other claims, liens or incumbrances thereon made or filed after the performance of the service.

History: 1963 c. 105.

289.55 Petition. No debt for such services shall become a lien upon the animals shod unless a petition is signed and verified by the claimant or by someone in his behalf, setting forth the nature of the debt, the amount claimed to be due, a description of the animal upon which such lien is claimed and an averment that the petitioner claims a lien thereon pursuant to law. The petition shall be filed in the office of the clerk of the circuit court of the county in which the owner of the animal resides within 6 months after the performance of the services. The services shall be deemed continuous notwithstanding a change of ownership of the animal. The clerk with whom the petition is filed shall be paid $1 for filing the same.

History: 1963 c. 105.

289.56 Additional claims. Any person may file successive liens upon the same animal for charges for shoeing the same, and he may include in any one claim of lien his charges for any number of times of shoeing such animal; but no lien shall be had for any shoeing of any animal done more than 6 months prior to the filing of the notice of lien.

History: 1963 c. 105.

289.57 Actions to enforce lien. (1) Actions to enforce the lien may be brought before any county court or municipal justice having jurisdiction of the amount claimed in the county in which the petition is filed. Actions may be commenced to enforce and foreclose the lien immediately after the filing of the petition if the amount owing for the services is then due. The claim for services shall cease to be a lien on the animal described in the petition unless an action to foreclose the lien is commenced within 4 months after the filing of the petition.

(2) If the claim is not due at the time of filing the petition the time when the same will become due shall be stated therein, and in such case the claim shall not cease to be a lien on the animal described in the petition until 30 days after the claim has become due; but the claim shall continue a lien upon the animal so described in all cases for 4 months after the filing of the petition.

(3) Where the animal has been taken from the county where the work was done, the person in whose favor the lien exists may bring an action to foreclose it in any county where the animal may be found. In all foreclosure actions the person liable for the payment of the claim shall be made the party defendant. Any person claiming any interest in the animal may be also made a defendant, but shall not be held personally liable for any costs unless he defends the action. In actions appealed from county or municipal court no change of venue shall be allowed for prejudice of the judge or of the people.

History: 1963 c. 105; 1967 c. 276 ss. 39, 40.

289.58 Attachment; affidavit; undertaking; writ; publication. (1) The plaintiff in an action in county or municipal court may attach the animal upon which the lien is claimed as in personal actions. The attachment may be issued, served and returned and like proceeding had thereon, including the release of any attached animal, upon giving an undertaking in such sum as may be fixed by the court or judge for the payment of the amount which may be finally determined to be a lien on the animal. The affidavit for the attachment must state that the defendant who is personally liable is indebted to plaintiff in the sum named, above all setoffs, for services performed which entitle the plaintiff to a lien, describe the animal on which it is claimed the 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.

(2) No undertaking upon such attachment or security for costs in actions hereunder before county or municipal courts 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 circuit court or any judge thereof requiring the giving of an undertaking or security for costs except upon 10 days' notice to the plaintiff. The writ of attachment shall direct the officer to whom it is issued to attach the animals described or so many thereof as is necessary to satisfy the sum claimed to be due thereon and to hold the same subject to further proceedings in the action.

(3) The officer executing the writ shall make return thereon, but it shall not be necessary for him to make and serve an inventory or appraisal of the animals.

History: 1963 c. 105; 1967 c. 276 s. 40.

289.59 Assignment. When more than one person has a claim for a lien upon the same animal any person having such claim may have assigned to him in writing the claim of the other, subject to the setoffs to said claim against the original owner, and may file a petition for his own lien and for the claims for liens so assigned to him and bring an action to enforce the same in his own name; but such petition shall allege such assignment.

History: 1963 c. 105.

289.60 Return. The attachment issued by any municipal justice shall be returned as an ordinary summons and shall be approximately in the same form as prescribed in s. 304.04.

History: 1963 c. 105.

289.61 Promissory note. The taking of a promissory note or other evidence of debt for any such services shall not discharge the lien unless expressly received in payment therefor and so specified.

History: 1963 c. 105.

289.62 Liability on sale, etc. If any animal on which a lien is claimed is transported out of this state, secreted, killed, sold or incumbered during the pendency of the claim therefor, the owner of the animal and every purchaser thereof or person acquiring any interest therein during the pendency of the claim shall be liable to the lien claimant for the amount which may be adjudged to be due him, which amount may be recovered against any such person in a personal action; provided, the petition for a lien is filed in accordance with law and an action to foreclose the same is begun within the time limited therefor.

History: 1963 c. 105.

289.63 Pleading. The complaint in any action to enforce a lien given upon animals shall in addition to ordinary allegations in actions upon contracts allege the filing

of the petition for a lien as hereinbefore provided, and such allegation shall be taken to be true unless expressly denied by the defendant or by someone in his behalf in an affidavit or verified answer, and shall contain a description of the animal upon which a lien is claimed, and if any part of the claim has been assigned to the plaintiff that part shall be alleged.

History: 1963 c. 105.

289.64 Findings; costs; execution; release; judgment. The court or jury which tries any action hereunder shall find the sum due the plaintiff, that the same is due for the services performed or some part of them as alleged in the complaint, and that the same is a lien upon the animals or some of them described therein, and the judgment shall be in accordance with the findings. Costs shall be taxed and allowed as in personal actions, including an attorney's fee of 10 per cent of the claim, but in no case shall such fee exceed $10. The execution, in addition to the directions and commands of ordinary executions upon judgments for money, shall direct that the animals upon which the lien is found to exist or so many thereof as may be necessary for such purpose be sold to satisfy said judgment, costs and attorney's fee, including the costs of sale. If the court or jury find that the amount due the plaintiff is not a lien upon any animal it shall be released from the attachment if it has been attached. The plaintiff shall, in such case, have judgment for the amount so found due, with costs, as in ordinary civil actions, but he shall not recover the costs of executing such attachment.

History: 1963 c. 105.

289.65 Intervention; appeal. In any action for the enforcement of a lien upon any animal mentioned in s. 289.54 any person not a party thereto may, before an actual sale of the animal upon which a lien is claimed, become a party defendant by filing with the clerk of the court where such action is pending, or with the municipal justice in actions pending in a municipal court, an affidavit made by such person or in his behalf to the effect that he is the owner of or of some interest in the animal upon which a lien is claimed and verily believes that the claim for lien is unjust and 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 20 days after the filing of such affidavit but his right to file an affidavit or take an appeal shall not extend beyond one year from the date of the rendition of the judgment.

History: 1963 c. 105; 1967 c. 276 ss. 39, 40.

289.66 Undertaking by intervenor; procedure. (1) Such appeal shall not stay execution unless the appellant files an undertaking, with 2 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 the animal they will pay the amount of the judgment in his favor with costs; the 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 has been 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 animals in which appellant claims an interest that may have been levied upon shall be released from such levy.

(2) If upon the trial in the appellate court the plaintiff recovers judgment of a lien upon such animals the 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 appealed from is rendered in municipal court and by reason of the death of the muncipal 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.

History: 1963 c. 105; 1967 c. 276 ss. 39, 40.

MAINTENANCE LIENS

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) (a) 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 may levy an assessment not in excess of 8 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, but the limitation of 8 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.

(b) The assessment so levied shall be either equal in rate against the assessed value of each lot or equal in amount against each lot, at the option of the governing board as it directs each year, except as provided in par. (c), and shall be levied at the same time once in each year upon all lots. Assessed value shall include the value of the land comprising the lot and the improvements thereon.

(c) 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 against the vacant lots or the owners thereof. In computing the cost of operating water or sewer line facilities thereof, reasonable reserves may be set up for depreciation of facilities.

(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) The clerk of circuit court shall docket each claim for a maintenance lien in a lien docket immediately after the claim is filed in the same manner that other liens are docketed. The date of levy of assessment will appear on the docket instead of the last date of performance of labor or furnishing materials.

(6) When the corporation, described in sub. (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 ss. 289.09, 289.10, 289.11, 289.12 and 289.13 shall apply to proceedings undertaken for the enforcement and collection of maintenance liens as herein described.

History: 1965 c. 60, 284; 1967 c. 351 s. 6.

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

DISPOSITION OF UNCLAIMED ARTICLES

289.71 Disposition of articles left for laundering, dry cleaning, repair, storage. (1) Any garment, clothing, wearing apparel or household goods remaining in the possession of a person, firm, partnership or corporation, on which laundering, 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."

HOSPITAL LIENS

289.80 Hospital liens. (1) Every corporation, association or other organization operating as a charitable institution and maintaining a hospital in this state shall have a lien for services rendered, by way of treatment, care or maintenance, to any person who has sustained personal injuries as a result of the negligence, wrongful act or any tort of any other person.

(2) Such lien shall attach to any and all rights of action, suits, claims, demands and upon any judgment, award or determination, and upon the proceeds of any settlement which such injured person, or his legal representatives might have against any such other person for damages on account of such injuries, for the amount of the reasonable and necessary charges of such hospital.

(3) No such lien shall be effective unless a written notice containing the name and address of the injured person, the date and location of the event causing such injuries, the name and location of the hospital, and if ascertainable by reasonable diligence, the names and addresses of the persons alleged to be liable for damages sustained by such injured person, shall be filed in the office of the clerk of circuit court in the county in which such injuries have occurred, or in the county in which such hospital is located, or in the county in which suit for recovery of such damages is pending, prior to the payment of any moneys to such injured person or his legal representatives, but in no event later than 30 days after discharge of such injured person from the hospital.

(a) The clerk of circuit court in every county shall, at the expense of the county, provide a suitable, well-bound book, to be called "the hospital lien docket", in which he shall enter the name of the injured person, the date of the event causing the injury and the name of the hospital or other institution making the claim. The said clerk shall make a proper index of the same in the name of the injured person and shall receive 25 cents for filing each such claim.

(b) Within 10 days after filing of the notice of lien, the hospital shall send by registered mail or serve personally a copy of such notice with the date of filing thereof to or upon the injured person and the person alleged to be liable for damages sustained by such injured person, if ascertained by reasonable diligence. If such hospital fails to give notice if the name and address of the person injured or the person allegedly liable for the injury are known or should be known, the lien shall be void.

(c) The hospital shall also serve a copy of such notice, as provided in par. (b), to any insurance carrier which has insured such person alleged to be liable for the injury against such liability, if the name and address may be ascertained by reasonable diligence.

(4) After filing and service of the notice of lien, no release of any judgment, claim or demand by the injured person shall be valid as against such lien, and the person making any payment to such injured person or his legal representatives as compensation for the injuries sustained shall, for a period of one year from the date of such payment, remain liable to the hospital for the amount of such lien.

(5) Such lien shall not in any way prejudice or interfere with any lien or contract which may be made by such injured person or his legal representatives with any attorney or attorneys for legal services rendered with respect to the claim of the injured person or his legal representatives against the person alleged to be liable for such injury. Said lien shall also be subservient to actual taxable court costs, and actual disbursements made by the attorney in prosecuting the court action.

(6) No hospital shall be entitled to any lien hereunder if the person injured is eligible for compensation under any workmen's compensation act.

History: 1961 c. 418.