

## CHAPTER 291.

## UNLAWFUL DETAINER.

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**291.01 Proceedings to remove tenant, etc., holding over.** In the following cases any tenant or lessee at will, or by sufferance, or for any part of a year, or for one or more years of any real property, including a specific or undivided portion of a house or other dwelling, and the assigns, undertenants or legal representatives of such tenant or lessee may be removed therefrom in the manner prescribed in this chapter, except that nothing herein contained shall affect the provisions of section 234.19:

(1) When such person holds possession after the expiration of the term by lapse of time or after such tenancy at will or sufferance has been terminated by either party in the manner provided in sections 234.03 and 234.04, and without the permission of the landlord.

(2) When such person holds over without such permission after any default in the payment of rent pursuant to the agreement under which he holds and at least 3 days' notice in writing, requiring in the alternative the payment of the rent or the possession of the premises, has been served in behalf of the person entitled to such rent on the person in possession of the premises in the manner provided in sections 262.08 and 262.09 for the service of a summons, and such notice may be served by the lessor or any person in his behalf. In case the tenant of the demised premises cannot be found, nor any usual place of abode of said tenant and member of his family of suitable age and discretion upon whom to make such service, then such notice may be served on a person residing on the demised premises, if there be one, and if not then such notice may be served by affixing same in a conspicuous part of the premises, where it may be conveniently read for at least 10 days before an action is brought for the removal of such tenant under this section.

(3) When such person holds over without such permission, contrary to any other conditions or covenants of the agreement under which he holds, after at least 3 days' notice requiring the delivery of the possession of the premises has been served, as above required, on the person holding such possession. [1943 c. 113]

**Note:** The law does not compel a man to do that which is impossible. A tenant holding over because removal from leased premises was prevented by striking employes and their picketers was not unlawful so as to justify recovery of treble damages by landlords. *Feiges v. Racine Dry Goods Co.*, 231 W 270, 285 NW 799.

Where an action of unlawful detainer had been dismissed on the merits the landlords could not recover treble damages for alleged unlawful holding over by the tenant. *Feiges v. Racine Dry Goods Co.*, 231 W 284, 285 NW 805.

A notice terminating a lease because of breaches thereof, and demanding "immediate" possession of the premises, instead of demanding that the tenant deliver possession at the expiration of 3 days, was sufficient to support an action of unlawful detainer commenced more than 3 days after the service of such notice. *Baraboo Nat. Bank v. Corcoran*, 243 W 386, 10 NW (2d) 112.

**291.02 Removal after foreclosure and of renter.** In the following cases any person who holds possession of real property after demand of the possession thereof has been made, and the assigns, tenants or representatives of such person may be removed in like manner:

(1) When the property has been duly sold upon the foreclosure of a mortgage under the provisions of chapter 297, which was executed by such person or any person under whom he claims by title subsequent to the date of the recording of such mortgage, and the title under such foreclosure has been duly perfected.

A complaint in an action for unlawful detainer need not allege in the exact words of the statute that the tenant is holding over without permission, but is sufficient if it shows in substance that the holding over is without permission of the landlord. [*Conley v. Conley*, 78 W 665, overruled so far as in conflict therewith.] *Rupp v. Board of Directors*, 244 W 244, 12 NW (2d) 26.

An action for unlawful detainer is summary. *State ex rel. Milwaukee E. T. Corp. v. River Realty Co.* 248 W 539, 22 NW (2d) 593.

Ch. 291, authorizing actions for unlawful detainer, applies only to cases involving the conventional relation of landlord and tenant in which the tenant cannot dispute the landlord's title or his own tenancy, and does not apply to a case of vendee against vendor. *Chartier v. Simon*, 250 W 639, 27 NW (2d) 751.

(2) When such person occupies or holds the property under an agreement with the owner to occupy and cultivate the same upon shares or for a share of the crops and the time fixed in the agreement for such occupancy has expired.

**291.03 Forcible entry, etc., forbidden.** No person shall make any entry into real property but in cases where entry is given by law, and in such cases not with strong hand nor with a multitude of people, but only in a peaceable manner. Any person who shall make such unlawful or forcible entry and detain the same, or who, having peaceably entered upon any property, forcibly holds the possession thereof, may be removed therefrom and fined in the manner provided in this chapter.

**Note:** As the law provides ample redress for the recovery of the possession of property, whether real or personal, and for the recovery of damages for injury sustained by the unlawful withholding of such possession by another, the owner who is not in possession, although lawfully entitled thereto, has no right to attempt to take possession by force; and the law will not justify his resorting to violence and the breach of the public peace in attempting to do so. *State v. Carroll*, 239 W 625, 2 NW (2d) 211.

**291.04 Limitation of section 291.01.** Section 291.01 shall not extend to any person who has or shall have continued in possession three years after the termination of the time for which the premises were demised or let to him or those under whom he claims, or to any person who continues in possession three years, quietly and peaceably by disseisin.

**291.05 Proceedings, how taken.** The party complaining shall proceed by action before a justice of the county, or if the premises be within a city, then before a justice of such city, and shall file a complaint in writing signed by him, his agent or attorney, giving therein a description of the premises of which possession is claimed, stating the facts which authorize the removal of the person in possession, naming him, and praying for his removal. The justice shall thereupon issue a summons, directed to the sheriff or any constable of the county, commanding him to summon the person against whom such complaint shall have been made to appear before him on a day and place in such summons named, which shall not be less than three nor more than ten days from the day of issuing the same. Such summons shall be in the form usually issued by justices of the peace in civil actions and shall, in addition, state that the complaint has been filed.

**Note:** A complaint in an action for unlawful detainer, alleging that the plaintiff caused the 30 days' notice to be served, but not alleging or otherwise showing the date of the commencement or the termination of the rent month, was insufficient to state a cause of action, in view of the rule that when there is a month-to-month tenancy the 30 days' notice must terminate at the end of the rent month and not before. When the jurisdiction of the justice in unlawful detainer is challenged in certiorari proceedings, the jurisdictional facts must appear in the complaint. *Hartnup v. Fields*, 247 W 473, 19 NW (2d) 878.

The court will apply the same liberal rules in construing complaints in actions for unlawful detainer that it applies in construing pleadings in other actions. *State ex rel. Milwaukee E. T. Corp. v. River Realty Co.* 248 W 589, 22 NW (2d) 593.

**291.06 Summons, how served.** (1) Such summons shall be served in the manner provided in sections 262.08 and 262.09 at least 6 days before the return date thereof. In case the tenant of the demised premises cannot be found, nor any usual place of abode of such tenant and member of his family of suitable age and discretion upon whom to make such service, then such summons may be served on a person residing on the demised premises.

(2) In case the tenant of the demised premises cannot be found, nor any usual place of abode of such tenant and member of his family of suitable age and discretion upon whom to make such service, and there is no person residing on the demised premises, then the officer having the summons for service shall make return of such facts on said summons on or before the return day mentioned therein, and if the defendant does not appear before said justice within the hour after the summons is made returnable, then the justice shall enter an order in his docket requiring the plaintiff to publish in a newspaper to be designated by said justice, if there be one printed in the county, and if there be none, then to post up, at least 10 days before the adjourned day, in 3 of the most public places therein, a notice to the defendant that a complaint in writing has been filed with said justice for the removal of said defendant from the premises, describing them, and that a summons has been issued thereon as provided by section 291.05, and that unless he appear before said justice at a time and place mentioned in said order and notice, not less than 14 nor more than 30 days from the date of said order, judgment will be rendered against him as prayed for in the complaint in said action; and the justice shall thereupon continue the cause to the time and place mentioned in said order. Such notice shall be published at least once in each week for 2 successive weeks before the day to which the action has been adjourned, proof of such publication or posting to be filed with said justice at or before said adjourned day. [1935 c. 213; 1947 c. 473]

**291.07 Proceedings and pleadings.** After the return of the summons served as above provided, and at the time and place named therein, if the defendant appear he may answer the complaint; and all matters in excuse, justification or avoidance of the allega-

tions of the complaint must be answered specially; and thereupon the justice shall proceed to hear and determine the action unless he shall adjourn the trial as provided in section 291.08; but either party may demand a trial by jury. The proceedings in such action shall be the same as in other civil actions in a justice's court except as in this chapter otherwise specially provided.

**291.08 Adjournment and undertaking.** The justice may, in his discretion, adjourn any such trial, but not beyond six days after the return day of the summons unless all the parties thereto agree to a longer adjournment; but in all cases brought against any person named in section 291.01, if the defendant, his agent or attorney shall make the oath required by section 301.40, and give an undertaking, with one or more sureties, to be approved by the justice, to the effect that the defendant will pay to the plaintiff all rent which may accrue to him during the pendency of such action upon the real estate described in the complaint and all costs and damages which the plaintiff may recover against him in such action, the said justice shall adjourn said cause for such reasonable time as may appear necessary, not exceeding ninety days from the return day of the summons.

**Note:** The refusal of the trial court to grant a second adjournment in an action for unlawful detainer, to enable the defendant to take an adverse examination, was not prejudicial error, especially where the defendant did not furnish the affidavit or undertaking required for a second adjournment. *March v. Voorsanger*, 248 W 225, 21 NW (2d) 275.

**291.09 Judgment; fine; execution.** (1) If upon the trial of any such action the justice or jury shall find the defendant or any of several defendants guilty of the allegations in the complaint the justice shall thereupon enter judgment for the plaintiff to have restitution of the premises, and tax the costs for the plaintiff, and when the action is brought under the provisions of section 291.03 shall impose a fine, not exceeding one hundred dollars, against such defendant, as under all the circumstances he may deem just. Such justice shall issue execution in favor of the plaintiff for such costs as in other actions in tort, and also issue a writ of restitution.

(2) If any fine be imposed upon a defendant the justice may commit the person against whom it is imposed to the common jail of the county until such fine be paid or, in his discretion, direct the amount thereof to be collected upon the execution issued in favor of the plaintiff in such action, or upon a separate execution, so issued for the collection of such fine only, and in such case the officer having the execution shall pay the amount of such fine, when collected, to the justice for the use of the school fund.

(3) If the justice or jury shall find that the defendant is not guilty as aforesaid such justice shall enter judgment for the defendant and tax the costs against the plaintiff, and issue execution therefor. The justice shall tax, as a part of the costs to the prevailing party, ten dollars attorney fees, whenever an attorney of a court of record has appeared in such action on behalf of such party.

**291.10 Treble damages.** If the plaintiff shall recover in any action brought under the provisions of this chapter, except when brought for the nonpayment of rent, he shall be entitled to recover treble damages, with costs of suit, against the person found guilty, in a separate action, for any injury he shall have sustained by reason of any unlawful or forcible entry or detainer, or for holding any unlawful possession of the premises by such defendant.

**291.11 Appeal; stay of proceedings.** If either party shall feel aggrieved by the judgment rendered in such action he may appeal within ten days to the circuit court or other court having jurisdiction of such appeal as in other cases tried before justices of the peace; but no such appeal by a defendant shall stay proceedings on such judgment unless the appellant shall, within said ten days, execute and file with the justice his undertaking to the plaintiff, with two or more sureties, to be approved by the justice, to the effect that the appellant will pay all costs of such appeal which may be awarded against him, and abide the order of the court therein, and pay all rent and other damages justly accruing to the plaintiff during the pendency of such appeal. Upon taking such appeal and filing such undertaking all further proceedings in the case shall be thereby stayed and the appellate court shall thereafter issue all needful writs and processes to carry out any judgment which may be rendered thereon in such appellate court.

**291.12 Stay of proceedings on certiorari.** No proceedings by certiorari to such justice shall stay proceedings on a judgment rendered against the defendant in such action unless the defendant shall, at the time of the service of such writ, execute and file with the justice his undertaking to the plaintiff, with two or more sureties, to be approved by the justice, to the effect that the defendant will pay all costs of such proceedings on certiorari which shall be awarded against him, and abide the order of the court therein, and pay all rent and other damages justly accruing to the plaintiff during the pendency of such proceedings. Upon the issuance of such writ and filing of such undertaking all further proceedings in the case shall be thereby stayed.

291.13 Proceedings if writ of restitution issued. If a writ of restitution shall have been issued previous to the taking of any appeal, by which proceedings are stayed, the justice shall forthwith give the appellant a certificate of the allowance of such appeal, and upon the service of such certificate upon the officer having such writ the said officer shall forthwith cease all further proceedings thereon; and if such writ shall not have been completely executed the defendant shall remain in possession of the premises until the appeal shall be determined.

291.14 Trial on appeal. In all cases of appeal from a judgment in an action brought under this chapter a new trial shall be had in the appellate court, and the case shall be tried in the same manner as cases originally brought there, and such court shall not dismiss or quash the proceedings for want of form only.

291.15 Stay of proceedings by tenant. When a final judgment shall be rendered in favor of the plaintiff in any such action, brought against a person for holding over after default in the payment of rent, either in justice's court or in the appellate court, he may stay all proceedings on such judgment by paying all rent due at the date of the judgment and the costs of the action or by filing with the justice, or after judgment in the appellate court, with the clerk, his undertaking to the plaintiff, with such sureties as such justice or clerk shall approve, to the effect that he will pay such rent and costs within ten days; at the expiration of which time a writ of restitution may issue unless he produce to the justice or clerk satisfactory evidence of such payment.

291.16 Form of verdict. (1) The verdict of the jury or the finding of the court in favor of the plaintiff in an action under the provisions of this chapter shall be substantially in the following form:

At a court held at . . . ., on the . . . . day of . . . ., 19. . ., before . . . . . . . ., a justice of the peace in and for the county of . . . ., in an action between . . . . . . . ., plaintiff, and . . . . . . . ., defendant, the jury (or if the action be tried without a jury, the court) find that the facts alleged in the complaint are true and that the said . . . . . . . ., defendant, is guilty thereof, and the said . . . . . . . ., plaintiff, ought to have restitution of the premises therein described without delay.

(2) If the verdict or finding be for the defendant it shall be sufficient to find the defendant not guilty.

291.17 Form of writ of restitution. A writ of restitution may be substantially in the following form:

STATE OF WISCONSIN, } ss.  
County of . . . . }

THE STATE OF WISCONSIN, to the sheriff or any constable of the county aforesaid:

Whereas, . . . . . . . ., plaintiff, of . . . ., in an action for an unlawful or forcible entry and detainer (or for an unlawful detainer, as the case may be), at a court held at . . . ., in the county aforesaid, on the . . . . day of . . . ., 19. . ., before . . . . . . . ., a justice of the peace in and for the county aforesaid, by consideration of the court recovered a judgment against . . . . . . . ., of . . . ., to have restitution of (here describe the premises as in the complaint):

Therefore, you are hereby commanded that, taking with you the force of the county, if necessary, you cause the said . . . . . . . . to be immediately removed from the aforesaid premises and the said . . . . . . . . to have peaceable restitution of the same. You are also hereby commanded that of the goods and chattels of the said . . . . . . . . within said county you cause to be levied, and the same disposed of according to law, to be paid to the said . . . . . . . . the sum of . . . ., being the costs taxed against the said . . . . . . . ., for the said . . . . . . . ., at the court aforesaid, together with twenty-five cents for this writ, and also the sum of . . . . dollars, adjudged as aforesaid, to be returned to the undersigned, and thereof, together with this writ, make due return within thirty days from the date hereof, according to law.

Dated at . . . ., this . . . . day of . . . ., 19. . .

. . . . . . . ., Justice.