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1969 Assembly Bill 654

Date published:
January 21, 1970

CHAPTER 284, LAWS OF 1969

AN ACT to repeal 234.01 to 234.20 and chapter 291; to renumber 234.21 to 234.25 and 299.16 (3); to renumber and amend 299.30 (4); to amend 59.42 (9) (b), 75.12 (2), 299.04 (2), 299.05 (3), 299.06 (1), 299.11 (1) (d), 299.12 (3), 299.16 (2), 299.21 (3) (a), 299.25 (6) and (10) (b), 299.27 (1) and 710.01 and 710.03, as renumbered; to repeal and recreate 299.01 (1); and to create 299.16 (3) and (4) (c), 299.30 (3), 299.40 to 299.45, chapter 704 and 710.10 of the statutes, relating to a revision of the law of landlord and tenant.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 59.42 (9) (b) of the statutes is amended to read:

59.42 (9) (b) For returning to the circuit court the case file, and any transcript or agreed statement, and statement as to a law question only, pursuant to s. 299.30 ~~(3)~~ *(4)*, 50 cents.

SECTION 2. 75.12 (2) of the statutes is amended to read:

75.12 (2) Such notice shall state the name of the owner and holder of the tax sale certificate, and the date thereof, the description of the lands involved, the amount for which the lands were sold and that such amount will bear interest as provided by law, and shall give notice that after the expiration of 3 months from the date of service of such notice a tax deed will be applied for. ~~Every notice served upon an occupant shall contain a statement of the language of section 234.18.~~ A notice of application for a tax deed shall not be served earlier than 88 days prior to the earliest date on which the holder of a tax certificate is by its terms entitled to a deed. The owner and holder of such tax sale certificate may

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include in said notice all the certificates he holds upon the same tract of land which are eligible for application for tax deed.

SECTION 3. 234.01 to 234.20 of the statutes are repealed.

COMMENT: The 1967 law of landlord and tenant.

SECTION 4. 234.21 of the statutes is renumbered 818.05.

COMMENT: Actions between cotenants for rent.

SECTION 5. 234.22, 234.23 and 234.24 of the statutes are renumbered 710.01, 710.02 and 710.03, respectively, and 710.01 and 710.03, as renumbered, are amended to read:

710.01 Subject to the limitations of ~~section 234.23~~ *s. 710.02* an alien may acquire and hold lands or any right thereto or interest therein by purchase, devise or descent, and he may convey, mortgage and devise the same; and if he shall die intestate the same shall descend to his heirs; and in all cases such lands shall be held, conveyed, mortgaged or devised or shall descend in like manner and with like effect as if such alien were a native citizen of the state or of the United States.

710.03 The title to any lands conveyed before ~~the third day of May, one thousand eight hundred and eighty-seven~~ *May 3, 1887,* or any lands which nonresident aliens may hold under ~~section 234.23~~ *s. 710.02* conveyed since that date, shall not be questioned nor in any manner affected by reason of the alienage of any person from or through whom such title may have been derived.

COMMENT: These 3 sections relate to alien landowners.

SECTION 6. 234.25 of the statutes is renumbered 710.07.

COMMENT: Conveyances by life tenant.

SECTION 7. Chapter 291 of the statutes is repealed.

COMMENT: Ss. 291.01 (1) and 291.02 are restated in s. 710.10; s. 291.01 (2) and (3) are covered by s. 710.10. The balance of the chapter is concerned with unlawful detainer procedure in justice court; this jurisdiction is being taken from justice court by Chapter 87, Laws of 1969.

SECTION 8. 299.01 (1) of the statutes is repealed and recreated to read:

299.01 (1) EVICTION ACTIONS. Actions for eviction as defined in s. 299.40 regardless of the amount of rent claimed therein.

SECTION 10. 299.04 (2) of the statutes is amended to read:

299.04 (2) Except as otherwise provided in this chapter, ~~or where inconsistent with the provisions of ch. 291,~~ the forms specified in Title XXV shall be used.

SECTION 11. 299.05 (3) of the statutes is amended to read:

299.05 (3) Every summons shall specify a return date and time. *Except in eviction actions,* the return date shall be not less than 8 days nor more than 17 days from the issue date, and service shall be made not less than 8 days prior to the return date. *In eviction actions the return date shall be not less than 5 days nor more than 17 days from the issue date, and service shall be made not less than 5 days prior to the return date.* The clerk shall set the day and hour at which the summons is returnable.

SECTION 12. 299.06 (1) of the statutes is amended to read:

299.06 (1) *Except as provided in s. 299.41 with respect to complaints in eviction actions,* pleadings may be oral or written and need not be verified under s. 263.24 unless verification is expressly required by another statute. Any county court may by order or rule require written pleadings in a particular or all cases, and may require by order or rule that the same be verified.

SECTION 13. 299.11 (1) (d) of the statutes is amended to read:

299.11 (1) (d) In actions for ~~unlawful detainer~~ *eviction,* replevin or

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to enforce a lien on personal property, the county in which the real property is located or personal property is customarily kept.

SECTION 14. 299.12 (3) of the statutes is amended to read:

299.12 (3) *Except in eviction actions,* service may be made by mail by leaving the original and necessary copies of the summons with the clerk of court, together with 50 cents for each defendant to cover the expense of mailing, except that a municipality need not advance the mailing fee, but shall be exempt from payment of such fee until the defendant pays costs pursuant to s. 299.25. The court may by rule require the use of registered or certified mail with return receipt requested, in which event the fee prescribed shall be $1.50 for each defendant. The clerk shall mail a copy to each defendant at his last known address as specified in the summons. Service of the summons is considered completed when it is mailed, unless the envelope enclosing the summons has been returned unopened to the clerk prior to the return date. All mailing of summonses shall be done in envelopes upon which the clerk's return address appears, with a request to return to that address. Service by mail to obtain a personal judgment shall be limited to the county where the action is commenced.

SECTION 15. 299.16 (2) of the statutes is amended to read:

299.16 (2) When the defendant has not been served pursuant to s. 299.12 (1) and (2) and does not make a general appearance and the court has jurisdiction over the res, service may be made on the defendant by publication. If service is to be made by publication, the proceeding shall be adjourned to a day certain by the court, and a notice in substantial conformity with ~~sub. (3)~~ *sub. (4)* shall be published as a class 3 notice, under ch. 985.

SECTION 16. 299.16 (3) of the statutes is renumbered 299.16 (4).

SECTION 17. 299.16 (3) and (4) (c) of the statutes are created to read:

299.16 (3) ADJOURNMENT, POSTING AND MAILING IN EVICTION ACTIONS. In eviction actions, when the defendant has not been served pursuant to s. 299.12 (1) and (2) and does not make a general appearance, service may be made as follows:

(a) If the summons is returned more than 7 days prior to the return date with proof that the defendant cannot be served within the state under s. 299.12 (1) and (2), the plaintiff may affix a copy of the summons and complaint onto some part of the premises where it may be conveniently read for at least 7 days prior to the return date. At least 5 days prior to the return date an additional copy of the summons and complaint shall also be mailed to the defendant at his last known address, even if it is the premises which are the subject of the action.

(b) In all other cases where the summons and complaint are returned with proof that the defendant cannot be served within the state under s. 299.12 (1) and (2), the court shall, on the return date, adjourn the case to a day certain not less than 7 days from the return date, and the plaintiff shall affix a notice in substantial conformity with sub. (4) (c) onto some part of the premises where it may be conveniently read until such adjourned date. At least 5 days prior to the return date, an additional copy of said notice, together with a copy of the summons and complaint, shall be mailed to the defendant at his last known address, even if it is the premises which are the subject of the action.

(c) Before judgment is entered after service is made under this section, the plaintiff shall file proof of compliance with this section.

(4) (c) Notice in Eviction.

STATE OF WISCONSIN COUNTY COURT .... COUNTY

To:

Take notice that an eviction action has been commenced against you

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to recover the possession of the following described premises ______, of which I, the plaintiff, am entitled to possession, but which you have unlawfully detained from me.

Unless you appear and defend on the ______ day of ______, 19___, at ______ o'clock ___M., in the county court of ______ county, located in the courthouse in the city of ______, before the Honorable ______, a Judge of said court, or before any judge to whom the action may be assigned, judgment may be rendered against you for the restitution of said premises and for costs.

Dated: ______, 19___

______ Plaintiff
by ______ His Attorney

SECTION 18. 299.21 (3) (a) of the statutes is amended to read:

299.21 (3) (a) Any party may, upon payment of the fees specified in par. (b), file a written demand for trial by jury ~~at the time of joining issue or within 20 days thereafter~~. Such demand shall specify whether trial is to be by a jury of 6 or 12. If no party demands a trial by a jury of 12, the right to trial by a jury of 12 is waived forever. *In eviction actions, such demand shall be filed at or before the time of joinder of issue; in all other actions within 20 days thereafter.*

SECTION 19. 299.25 (6) of the statutes is amended to read:

299.25 (6) SERVICE FEES AND OTHER CHARGES. Lawful fees or charges paid to the sheriff, constable or other person for serving the summons or any other document, *and charges paid to the sheriff in connection with the execution of any writ of restitution.*

SECTION 20. 299.25 (10) (b) of the statutes is amended to read:

299.25 (10) (b) In an action of replevin and attachment the value of the property recovered shall govern the amount of the attorney's fees taxable. In an action of ~~unlawful detainer the attorney's fees taxable shall be fixed by the court~~ *eviction the attorney's fees taxable shall be $10 plus such sum as is taxable under par. (a) on account of the recovery of damages.*

SECTION 21. 299.27 (1) of the statutes is amended to read:

299.27 (1) *Except in eviction actions,* a party who appears on the return date shall be given, on request, an adjournment of at least 7 days, or such longer period as the court grants. *In eviction actions, no adjournments shall be granted except for cause shown under sub. (2) and (3), unless with the consent of the plaintiff.*

SECTION 22. 299.30 (3) of the statutes is renumbered 299.30 (4) and amended to read:

299.30 (4) Within 20 days ~~(10 days in unlawful detainers)~~ after the date of mailing of notice of entry of judgment, as appears in the case docket, any appeal other than one specified in ~~sub.~~ *subs.* (2) *and (3)* may be taken to the circuit court by any party to an action or proceeding from any final judgment by filing a notice of appeal signed by appellant or his attorney with the clerk of the court which tried the case under this chapter, and by serving a copy of the notice of appeal on all parties bound by the judgment who appeared in the action or their attorneys. Execution may be stayed under ch. 274~~, except that in unlawful detainers, the security provisions of ss. 291.11 and 291.13 shall apply~~. Within 40 days after notice of appeal is filed the appellant shall file with the clerk of court either a transcript of the reporter's notes of the trial or an agreed statement on appeal, or a statement that his appeal can be supported by the case file without the transcript. The appellant shall pay the costs of preparing the transcript.

SECTION 23. 299.30 (3) of the statutes is created to read:

299.30 (3) EVICTION ACTIONS. (a) *Manner of appeal; undertaking to*

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stay proceedings on judgment. In all eviction actions except those tried to a jury of 12 and governed by sub. (2), appeal shall be to the circuit court under the procedure specified in sub. (4), but the time for service and filing of the notice of appeal is limited to 10 days after mailing of notice of entry of judgment. No such appeal by a defendant shall stay proceedings on such judgment unless the appellant serves and files with the notice of appeal an undertaking to the plaintiff, in an amount and with surety or sureties approved by the county judge who ordered the entry of judgment, to the effect that the appellant will pay all costs and disbursements of such appeal which may be taxed against him, obey the order of the appellate court upon such appeal, and pay all rent and other damages accruing to the plaintiff during the pendency of the appeal.

(b) *Stay of proceedings.* Upon the service and filing of such approved undertaking, all further proceedings in enforcement of the judgment appealed from shall be stayed pending the determination of the appeal. Upon service by the appellant of a copy of the notice of appeal and approved undertaking upon the sheriff holding an issued but unexecuted writ of restriction or of execution, the sheriff shall promptly cease all further proceedings thereon pending the determination of such appeal.

SECTION 24. 299.40 to 299.45 of the statutes are created to read:

299.40 EVICTION ACTIONS. (1) WHEN COMMENCED. A civil action of eviction may be commenced by a person entitled to the possession of real property to remove therefrom any person who is not entitled to either the possession or occupancy of such real property.

(2) JOINDER OF OTHER CLAIMS. The plaintiff may join with his claim for restitution of the premises any other claim against the defendant arising out of his possession or occupancy of the premises.

(3) EXCEPTION. Nothing in this section shall affect the provision of ss. 704.09 (4) and 704.19.

299.41 COMPLAINT IN EVICTION ACTIONS. The complaint must be in writing, subscribed and verified by the plaintiff or his attorney in accordance with ss. 263.24 and 263.25. The complaint must identify the parties and the real property which is the subject of the action and state the facts which authorize the removal of the defendant. The description of real property is sufficient whether or not it is specific if it reasonably identifies what is described, and a description by street name and number is sufficient. If the complaint relates only to a portion of described real estate, such portion shall be identified. If a cause of action in addition to the claim for restitution is joined under s. 299.40 (2), the same shall be separately stated. The prayer shall be for the removal of the defendant or his property, or both, and, if an additional cause of action is joined for the other, relief sought by the plaintiff.

299.42 SERVICE AND FILING IN EVICTION ACTIONS. The complaint shall be served with the summons when service is had under s. 299.12 (1) and (2).

299.43 DEFENDANT'S PLEADING IN EVICTION ACTIONS. The defendant may plead to the complaint orally or in writing, except that if the plaintiff's title is put in issue by the defendant, his answer shall be in writing subscribed and verifed in the same manner as the complaint. Within the limitation of s. 299.02 the defendant may counterclaim provided that in construing s. 299.02 as applied to eviction actions, any claim related to the rented property shall be considered as arising out of the transaction or occurrence which is the subject matter of the plaintiff's claim.

299.44 ORDER FOR JUDGMENT: WRIT OF RESTITUTION. (1) ORDER FOR JUDGMENT. In an eviction action, if the court finds that the plaintiff is entitled to possession, the order for judgment shall be for the restitution

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of the premises to the plaintiff and, if an additional cause of action is joined under s. 299.40 (2) and plaintiff prevails thereon, for such other relief as the court orders. Judgment shall be entered accordingly as provided in s. 299.24.

(2) WRIT OF RESTITUTION. At the time of ordering judgment for the restitution of premises, the court shall order that a writ of restitution be issued, and the writ may be delivered to the sheriff for execution in accordance with s. 299.45. No writ shall be executed if received by the sheriff more than 30 days after its issuance.

(3) STAY OF WRIT OF RESTITUTION. At the time of ordering judgment, upon application of the defendant with notice to the plaintiff, the court may, in cases where it determines hardship to exist, stay the issuance of the writ by a period not to exceed 30 days from the date of the order for judgment. Any such stay shall be conditioned upon the defendant paying all rent or other charges due and unpaid at the entry of judgment and upon the defendant paying the reasonable value of the occupancy of the premises, including reasonable charges, during the period of the stay upon such terms and at such times as the court directs. The court may further require the defendant, as a condition of such stay, to give a bond in such amount and with such sureties as the court directs, conditioned upon his faithful performance of the conditions of the stay. Upon the failure of the defendant to perform any of the conditions of the stay, the plaintiff may file an affidavit executed by himself or his attorney, stating the facts of such default, and the writ of restitution may forthwith be issued.

(4) WRIT OF RESTITUTION: FORM AND CONTENTS. The writ of restitution shall be in the name of the court, sealed with its seal, signed by its clerk, directed to the sheriff of the county in which the real property is located, and in substantially the following form:

(Venue and caption)

THE STATE OF WISCONSIN to the Sheriff of .... County:

The plaintiff, ..., of .... recovered a judgment against the defendant, ..., of ...., in an eviction action in the County Court of .... County, on the ..... day of ...., 19......, to have restitution of the following described premises:

.... (description as in complaint), located in .... County, Wisconsin.

YOU ARE HEREBY COMMANDED to immediately remove the defendant, ..., from the said premises and to restore the plaintiff, ..., to the possession thereof. You are further commanded to remove from said premises all personal property not the property of the plaintiff, and to store and dispose of the same according to law, and to make due return of this writ within ten days.

Witness the Honorable ...., Judge of the said County Court, this .... day of ...., 19......

.... Clerk

299.45 EXECUTION OF WRIT OF RESTITUTION. (1) WHEN EXECUTED. Upon delivery of a writ of restitution to the sheriff, and after payment to him of the fee required by s. 59.28 (24), the sheriff shall execute the writ. The sheriff may require that prior to the execution of any writ of restitution the plaintiff deposit a reasonable sum representing the probable cost of removing the defendant's property chargeable to the plaintiff under s. 59.28 (24) and (25) and of the services of deputies under s. 59.28 (24). In case of dispute as to the amount of such required deposit, the amount thereof shall be determined by the court under s. 59.28 (25).

(2) HOW EXECUTED; DUTIES OF SHERIFF. The sheriff shall execute the writ in the manner following:

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(a) He shall remove from the premises described in the writ the person of the defendant and all other persons found upon the premises claiming under the defendant, using such reasonable force as is necessary.

(b) He shall remove from the premises described in the writ, using such reasonable force as may be necessary, all personal property found therein not the property of the plaintiff.

(c) He shall exercise ordinary care in the removal of all persons and property from the premises and in the handling and storage of all property removed therefrom.

(3) MANNER OF REMOVAL AND DISPOSITION OF REMOVED GOODS. (a) In accomplishing the removal of property from the premises described in the writ, the sheriff is authorized to engage the services of a mover or trucker.

(b) Except as provided in par. (c), the property removed from such premises shall be taken to some place of safekeeping within the county selected by the sheriff. Within 3 days of the removal of the goods, the sheriff shall mail a notice to the defendant as specified in sub. (4) stating the place where the goods are kept and shall deliver to the defendant any receipt or other document required to obtain possession of the goods. Warehouse or other similar receipts issued with respect to goods stored by the sheriff under this subsection shall be taken in the name of the defendant. All expenses incurred for storage and other like charges after delivery by the sheriff to a place of safekeeping shall be the responsibility of the defendant, and any person accepting goods from the sheriff for storage under this subsection shall have all of the rights and remedies accorded by law against the defendant personally and against the property stored for the collection of such charges, including the lien of a warehouseman under s. 407.209. Risk of damages to or loss of such property shall be borne by the defendant after delivery by the sheriff to the place of safekeeping.

(c) When, in the exercise of ordinary care, the sheriff determines that property removed from premises described in the writ is without monetary value, he may deliver or cause the same to be delivered to some appropriate place established for the collection, storage and disposal of refuse. In such case he shall notify the defendant as specified in sub. (4) of the place to which the goods have been delivered within 3 days of the removal of the goods. The exercise of ordinary care by the sheriff under this subsection does not include searching apparently valueless property for hidden or secreted articles of value.

(d) All of the rights and duties of the sheriff under this section may be exercised by or delegated to any of his deputies.

(4) MANNER OF GIVING NOTICE TO DEFENDANT. All notices required by sub. (3) to be given to the defendant by the sheriff shall be in writing and shall be personally served upon the defendant or mailed to him at his last known address, even if such address be the premises which are the subject of the eviction action.

(5) RETURN OF WRIT: TAXATION OF ADDITIONAL COSTS. (a) Within 10 days of the receipt of the writ, the sheriff shall execute the writ and perform all of the duties required by this section and return the same to the court with his statement of the expenses and charges incurred in the execution of the writ and paid by the plaintiff.

(b) Upon receipt of the returned writ and statement from the sheriff, the clerk shall tax and insert in the judgment as prescribed by s. 299.25 the additional costs incurred by the plaintiff.

SECTION 25. Chapter 704 of the statutes is created to read:

CHAPTER 704

LANDLORD AND TENANT.

704.01 DEFINITIONS. In this chapter, unless the context indicates

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otherwise:

(1) "Lease" means an agreement, whether oral or written, for transfer of possession of real property, or both real and personal property, for a definite period of time. A lease is for a definite period of time if it has a fixed commencement date and a fixed expiration date or if the commencement and expiration can be ascertained by reference to some event, such as completion of a building. A lease is included within this chapter even though it may also be treated as a conveyance under ch. 706. An agreement for transfer of possession of only personal property is not a lease.

(2) "Premises" mean the property covered by the lease, including not only the realty and fixtures, but also any personal property furnished with the realty.

(3) "Tenancy" includes a tenancy under a lease, a periodic tenancy or a tenancy at will.

(4) "Periodic tenant" means a tenant who holds possession without a valid lease and pays rent on a periodic basis. It includes a tenant from day-to-day, week-to-week, month-to-month, year-to-year or other recurring interval of time, the period being determined by the intent of the parties under the circumstances, with the interval between rent-paying dates normally evidencing that intent.

(5) "Tenant at will" means any tenant holding with the permission of his landlord without a valid lease and under circumstances not involving periodic payment of rent; but a person holding possession of real property under a contract of purchase or an employment contract is not a tenant under this chapter.

704.03 REQUIREMENT OF WRITING FOR RENTAL AGREEMENTS AND TERMINATION. (1) ORIGINAL AGREEMENT. A lease for more than a year, or a contract to make such a lease, is not enforceable unless it meets the requirements of s. 706.02 and in addition sets forth the amount of rent or other consideration, the time of commencement and expiration of the lease and a reasonably definite description of the premises, or unless a writing signed by the landlord and the tenant sets forth the amount of rent or other consideration, the duration of the lease and a reasonably definite description of the premises and the commencement date is established by entry of the tenant into possession under the writing. Sections 704.05 and 704.07 govern as to matters within the scope of such sections and not provided for in such written lease or contract.

(2) ENTRY UNDER UNENFORCEABLE LEASE. If a tenant enters into possession under a lease for more than one year which does not meet the requirements of sub. (1), and the tenant pays rent on a periodic basis, he becomes a periodic tenant. If the premises in such case are used for residential purposes and the rent is payable monthly, he becomes a month-to-month tenant; but if the use is agricultural or nonresidential, the tenant becomes a year-to-year tenant without regard to the rent-payment periods. Except for duration of the tenancy and matters within the scope of ss. 704.05 and 704.07, the tenancy is governed by the terms and conditions agreed upon. Notice as provided in s. 704.19 is necessary to terminate such a periodic tenancy.

(3) ASSIGNMENT. An assignment by the tenant of a leasehold interest which has an unexpired period of more than one year is not enforceable against the assignor unless the assignment is in writing reasonably identifying the lease and signed by the assignor; and any agreement to assume the obligations of the original lease which has an unexpired period of more than one year is not enforceable unless in writing signed by the assignee.

(4) TERMINATION OF WRITTEN LEASE PRIOR TO NORMAL EXPIRATION DATE. An agreement to terminate a tenancy more than one year prior to

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the expiration date specified in a valid written lease is not enforceable unless it is in writing signed by both parties. Any other agreement between the landlord and tenant to terminate a lease prior to its normal expiration date, or to terminate a periodic tenancy or tenancy at will without the statutory notice required by s. 704.19 may be either oral or written. Nothing herein prevents surrender by operation of law.

(5) PROOF. In any case where a lease or agreement is not in writing signed by both parties but is enforceable under this section, the lease or agreement must be proved by clear and convincing evidence.

COMMENT: This section constitutes a Statute of Frauds so far as leases are concerned. It, therefore, replaces s. 240.06 as to leases. The section incorporates the basic Statute of Frauds section, which is s. 706.02 and has further requirements particularly applicable to leases. The present statute requires a writing signed only by the landlord. However, the modern lease is as much a contract as it is a conveyance of an interest in land. Moreover, even under statutes requiring only the signature of the landlord, many courts require conduct on the part of the tenant indicating acceptance of the lease. The proposed statute actually embodies present practice, since written leases normally provide for signature by both parties. The change in the law will, therefore, not disrupt practices, but will accord with normal expectations.

Sub. (1) incorporates s. 706.02; requires in addition that the lease contain a statement of the amount of rent, the date when the lease commences and its duration or termination date, and a sufficiently definite description of the premises; it also sets forth requirements for a "minimum" lease. Most leases will, in fact, contain elaborate provisions dealing with other aspects of the leasing arrangement. However, where the parties have made a written agreement which they intend to be binding even though it does not spell out any more than the minimum terms of a lease, the statute recognizes such a lease as valid. The statute would also apply to a contract to make a lease. If, however, the parties sign a preliminary agreement which contemplates additional negotiations on important matters, there is in fact no contract because there has not yet been a full meeting of the minds. On the other hand, the parties may have made a complete agreement, leaving such matters as duty to repair to be settled by normal rules of law. As to any such matters not covered by a properly signed written agreement, ss. 704.05 and 704.07 will govern.

It should be recalled that under s. 704.01 on Definitions, a lease for one year with a provision for automatic renewal or extension is nevertheless considered to be a lease for a year; hence, such an arrangement may be oral. Likewise an agreement for a year-to-year tenancy may be oral.

Sub. (2) deals with entry under a lease for more than one year which is either oral or in writing signed only by one of the parties. A similar problem exists under present Statute of Frauds and most courts treat the tenant as a periodic tenant. This is the present Wisconsin law.

There is a problem under the case law as to whether a tenant becomes a year-to-year tenant or month-to-month, if he pays rent monthly. Theoretically, the rent-paying interval determines this at common law. The proposed statute follows the pattern in s. 704.23 dealing with the nature of a periodic tenancy where a tenant holds over after his lease expires. If a tenant under a lease agreement, which does not comply with the requirements under sub. (1), pays rent monthly on premises used for residential purposes, he becomes a month-to-month tenant. If the premises are used for agricultural or commercial, in-

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dustrial or other nonresidential purposes, the tenant holds on a year-to-year basis without regard to the rent-paying interval. The reason for this distinction is that agricultural and commercial premises are customarily rented on at least an annual basis. On the other hand, residential premises can easily be rented monthly, and neither the landlord nor the tenant needs the protection of more than the 28 day notice provided in s. 704.19.

Sub. (3) deals with the assignment of leases. It follows the same pattern as present s. 240.06. If the interest being assigned is more than one year, this subsection requires that the assignment be in writing in order that it be enforced against the assignor. Oral assignment of an interest of more than one year would be binding against the assignee if he went into possession. Thus the landlord could sue the assignee for rent or breach of any conveyance running with the land, on the basis of privity of estate. The landlord could sue the assignee in contract on the basis of an agreement to assume the obligations of the original lease only if the assignee had signed an assumption agreement.

Sub. (4) deals with the situation where a landlord and tenant agree to terminate a valid written lease prior to its normal termination date. If the lease has more than one year to run, both parties must agree in writing to the termination. If the parties have made an oral agreement in such a case and the tenant moves out in reliance on the oral agreement, there would then be a surrender by operation of law, which under the last sentence of this subsection would be effective. If the lease has less than one year to run, the parties may terminate the lease by an oral agreement just as they may create a lease for a year or less by oral agreement.

Sub. (5) states the burden of proof required in cases where the parties have not both signed a written agreement, but their agreement is valid under this section. For example, clear and convincing evidence would be required to prove an oral lease for one year or less, or to bind an assignor who assigns a lease with an unexpired term of one year or less, or to terminate such a lease.

704.05 RIGHTS AND DUTIES OF LANDLORD AND TENANT IN ABSENCE OF WRITTEN AGREEMENT TO CONTRARY. (1) WHEN SECTION APPLICABLE. So far as applicable, this section governs the rights

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and duties of the landlord and tenant in the absence of any inconsistent provision in writing signed by both the landlord and the tenant. This section applies to any tenancy.

(2) POSSESSION OF TENANT AND ACCESS BY LANDLORD. Until the expiration date specified in the lease, or the termination of a periodic tenancy or tenancy at will, and so long as the tenant is not in default, the tenant has the right to exclusive possession of the premises, except as hereafter provided. The landlord may upon advance notice and at reasonable times inspect the premises, make repairs and show the premises to prospective tenants or purchasers; and if the tenant is absent from the premises and the landlord reasonably believes that entry is necessary to preserve or protect the premises, the landlord may enter without notice and with such force as appears necessary.

(3) USE OF PREMISES, ADDITIONS OR ALTERATIONS BY TENANT. The tenant can make no physical changes in the nature of the premises, including decorating, removing, altering or adding to the structures thereon, without prior consent of the landlord. The tenant cannot use the premises for any unlawful purpose nor in such manner as to interfere unreasonably with use by another occupant of the same building or group of buildings.

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(4) TENANT'S FIXTURES. At the termination of the tenancy, the tenant may remove any fixtures installed by him if he either restores the premises to their condition prior to the installation or pays to the landlord the cost of such restoration. Where such fixtures were installed to replace similar fixtures which were part of the premises at the time of the commencement of the tenancy, and the original fixtures cannot be restored the tenant may remove fixtures installed by him only if he replaces them with fixtures at least comparable in condition and value to the original fixtures. The tenant's right to remove fixtures is not lost by an extension or renewal of a lease without reservation of such right to remove. This subsection applies to any fixtures added by the tenant for his convenience as well as those added for purposes of trade, agriculture or business; but this subsection does not govern the rights of parties other than the landlord and tenant.

(5) STORAGE OR DISPOSITION OF PERSONALTY LEFT BY TENANT. (a) *Storage, sale or disposition of personalty less than $100 in value.* If a tenant removes from the premises and leaves personal property of an apparent total value of less than $100, the landlord may:

1. Store such personalty, with or without notice to the tenant, on or off the premises, with a lien on the personalty for actual cost of removal and storage or, if stored by the landlord, for the reasonable value of storage;

2. Give the tenant notice, personally or by ordinary mail addressed to the tenant at his last known address, of the landlord's intent to dispose of the personalty by sale or other appropriate means if the property is not repossessed by the tenant within 5 days of such personal service or 8 days of the date of mailing. If the tenant fails to repossess within the time specified, the landlord may proceed to dispose of such property by private or public sale or any other appropriate means. The landlord may deduct from the proceeds of sale any costs of sale and any storage charges if he has first stored the personalty under subd. 1, and send the balance of the proceeds to the tenant by registered mail addressed to his last known address; if such proceeds are returned to the landlord and are not claimed within 6 months after the date on which the tenant vacated the premises, the proceeds belong to the landlord.

(b) *Storage of personalty $100 or more in value.* If a tenant removes from the premises and leaves personal property of an apparent total value of $100 or more, the landlord may store such personal property, with or without notice to the tenant, on or off the premises; in such case the landlord has a lien on the property for the actual cost of removal and storage or, if stored by the landlord, for the reasonable value of such storage. This lien can be foreclosed by sale of the property substantially in conformity with s. 409.504, and the landlord shall have the rights and duties of a secured party thereunder. When s. 409.504 is applied to the enforcement of this lien, the word debtor or equivalent, when used therein, shall be deemed to refer to the tenant and any other person having an interest shown by instrument filed as required by law or shown in the records of the department of transportation, and the word "indebtedness" or equivalent shall include all claims of the landlord for removal, storage, disposition, arranging for the sale and reasonable attorney's fees and legal expenses.

(c) *Rights of third persons.* The landlord's lien and power to dispose as provided by this subsection apply to any property left on the premises by the tenant, whether owned by him or by others. Such lien has priority over any ownership or security interest and the power to dispose under this subsection applies notwithstanding rights of others existing under any claim of ownership or security interest. If the landlord proceeds under par. (a) 2, notice of intended disposition need be given only to the

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tenant; if the landlord proceeds under par. (b), notice of intended disposition shall be given as required by s. 409.504. In either event, the tenant or any secured party shall have the right to redeem the property at any time before the landlord has disposed of it or entered into a contract for its disposition by payment of the landlord's charges for removal, storage, disposition, arranging for the sale and reasonable attorney's fees and legal expenses.

(d) The remedies of this subsection are not exclusive and shall not prevent the landlord from resorting to any other available judicial procedure.

COMMENT: This section is intended to govern the rights and duties of a landlord and tenant whenever there is no inconsistent provision in writing signed by both the parties. In this respect it supplements s. 704.03 requiring a writing signed by both. If there is a written lease signed by both and the lease contains a provision dealing with any of the matters covered in subs. (2) to (5), it becomes an issue for the court to determine whether the lease provision is inconsistent with the provision in this section or whether the statute controls.

This section does not deal with all of the rights and duties of a landlord and tenant, but only with selected problems. See also s. 704.07. In general, the policy stated in this section is to balance fairly the interests of both the landlord and the tenant. Some of the present rules of law in this regard are based on historic notions of the lease as a conveyance rather than a contract. Some of the provisions of this section are patterned on clauses used in modern leases. Others are codifications of the present law and have been included to call attention of the landlord and tenant to the legal consequences of their arrangement. Together with s. 704.07 on repair, the section is a partial statutory lease where the parties have no formal agreement on these matters. It is also hoped that draftsmen of written leases will use the statutory provisions as a standard of fairness in preparing form or individual leases.

Sub. (2) states the normal rule that the tenant has a right to exclusive possession of the premises, but qualifies that right in certain situations. Thus a landlord is given the right to enter the premises for certain purposes if he gives the tenant advance notice and enters at a reasonable time. For example, if a landlord wishes to inspect the premises he would have to notify the tenant in advance and determine a time when his inspection would not unduly inconvenience the tenant. The same procedure would be followed if the landlord wished to enter in order to make repairs or show the premises to a prospective tenant or purchaser. In one limited situation the landlord is given a right to enter without advance notice. This is the case where the tenant is absent from the premises and the landlord believes that entry is necessary to protect the premises. For example, if the tenant is out of town during the winter for a long period and the landlord believes that the heating system may have failed with possible danger of water-pipe freezing, the landlord may enter if such a belief is reasonable under the circumstances. If the landlord uses force in such a situation, he cannot be sued for trespass, but would be liable to the tenant for any damages to the tenant's property caused by his entry.

Sub. (3) is not a change in the present law, but states familiar principles. The judicial doctrine of waste already prevents the tenant from making physical changes in the nature of the property. Under this subsection the tenant must obtain prior consent of the landlord for decorating or altering the premises, but such consent may be either oral or written. The requirement that the tenant use the premises only for lawful purposes is a familiar one. The requirement that the tenant

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cannot use the premises so as to interfere with other tenants of the same building or other buildings owned by the same landlord is frequently found in leases and has been implied by the Wisconsin Supreme Court in *Bruckner v. Helfaer*, 197 Wis. 582, 222 N.W. 790 (1929).

Sub. (4) probably states the present Wisconsin law on tenant fixtures. The policy of the law is to permit a tenant to remove fixtures in order to encourage installation of commercial fixtures and also because the contrary rule would result in a windfall to the landlord. The tenant has the right to remove such fixtures provided that he either restores the premises to their original condition or pays the cost of restoration. The second sentence, on replacement fixtures, is a statement of the rule in *Auto Acceptance & Loan Corporation v. Kelm*, 18 Wis. 2d 178, 118 N.W. 2d 175 (1962). That the right to remove such fixtures is not lost by an extension or renewal of a lease, see *Second National Bank v. Merrill*, 69 Wis. 501, 34 N.W. 514 (1887); *Shields v. Hansen*, 201 Wis. 349, 230 N.W. 51 (1930). If fixtures installed by a tenant are subject to a security interest, the rights of the holder of the security interest may be governed by other rules of law than those stated in this section.

Sub. (5) is new. It is intended to provide a simple remedy for the landlord faced with personal property left on the premises by a tenant either at the end of his lease or when he moves out during a lease. In many cases the property left behind has little value and has in fact been abandoned by the tenant. However, abandonment as a judicial concept requires proof and finding of intent to abandon. The landlord who disposes of such goods at present runs the risk that he will be sued by the tenant for conversion and that a jury may place a high value on the apparently worthless goods. Moreover, there is no statutory authority to even store such goods. Under the proposed subsection, if the property has an apparent value of less than $100, the landlord has a choice of proceeding either by storing the goods or disposing of them after notice to the tenant. Disposition may be made by private or public sale, or if the goods are not saleable, by giving them to a charitable organization or simply having them removed as trash. The statute provides protection for the tenant where the property is being disposed of by giving him an opportunity to repossess after notice. If the landlord elects to store the property, he may do so either with or without notice to the tenant. The landlord may himself store the property or arrange with a public warehouse for storage. If the property apparently is worth a hundred dollars or more, the landlord may only store the property. In such case his lien for storage must be foreclosed in the manner provided in s. 409.504. Note that where the property is less than $100 and the landlord first stores the property, the landlord can enforce his lien by refusing to deliver possession to the tenant until he pays the lien and by sale under par. (a) 2.

In some of these cases where personal property is left on the premises, the property has substantial value and is abandoned by the tenant because he cannot meet payments under a security agreement. If this section is to be effective, the landlord must be able to proceed and even cut off the interests of the secured party. If the value of the property exceeds $100, and the secured party has filed notice of his security interest, this section requires the landlord to give notice to such a party. If the value of the property is less than $100, notice to secured parties is not required. In this respect, the section treats property having a value of less than $100 in the same manner as the Uniform Commercial Code treats parties having a security interest in consumer goods.

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Only sub. (5) provides definite remedies. The other sections state rights and duties and leave to the courts the task of implementing those duties with appropriate remedies.

704.07 REPAIRS: UNTENANTABILITY. (1) APPLICATION OF SECTION. This section applies to any tenancy if there is no contrary provision in writing signed by both parties. Nothing in this section is intended to affect rights and duties arising under other provisions of the statutes.

(2) DUTY OF LANDLORD. (a) Unless the repair was made necessary by the negligence or improper use of the premises by the tenant, the landlord is under duty to:

1. Keep in reasonable state of repair portions of the premises over which he maintains control;

2. Keep in a reasonable state of repair all equipment under his control necessary to supply services which he has expressly or impliedly agreed to furnish to the tenant, such as heat, water, elevator or air-conditioning;

3. Make all necessary structural repairs;

4. Repair or replace any plumbing, electrical wiring, machinery or equipment furnished with the premises and no longer in reasonable working condition, except as provided in sub. (3) (b).

(b) If the premises are part of a building, other parts of which are occupied by one or more other tenants, negligence or improper use by one tenant does not relieve the landlord from his duty as to the other tenants to make repairs as provided in par. (a).

(c) If the premises are damaged by fire, water or other casualty, not the result of the negligence or intentional act of the landlord, this subsection is inapplicable and either sub. (3) or (4) governs.

(3) DUTY OF TENANT. (a) If the premises are damaged by the negligence or improper use of the premises by the tenant, the tenant must repair the damage and restore the appearance of the premises by redecorating. However, the landlord may elect to undertake the repair or redecoration, and in such case the tenant must reimburse the landlord for the reasonable cost thereof; the cost to the landlord is presumed reasonable unless proved otherwise by the tenant.

(b) The tenant is also under a duty to keep plumbing, electrical wiring, machinery and equipment furnished with the premises in reasonable working order if repair can be made at cost which is minor in relation to the rent.

(4) UNTENANTABILITY BECAUSE OF DAMAGE BY FIRE, WATER OR OTHER CASUALTY, OR HAZARD TO HEALTH. If the premise becomes untenantable because of damage by fire, water or other casualty or because of any condition hazardous to health, the tenant may remove from the premises unless the landlord proceeds promptly to repair or rebuild or eliminate the health hazard; or the tenant may remove if the inconvenience to the tenant by reason of the nature and period of repair, rebuilding or elimination would impose undue hardship on him. If the landlord proceeds to repair or rebuild the premises or eliminate the hazard to health, and the tenant remains in possession, rent abates to the extent the tenant is deprived of the full normal use of the premises. If the tenant justifiably moves out under this subsection, the tenant is not liable for rent after the premises become untenantable and the landlord must repay any rent paid in advance apportioned to the period after the premises become untenantable. This subsection is inapplicable if the damage or condition is caused by negligence or improper use by the tenant.

COMMENT: Except for sub. (4), this section is new. In the absence of statute a landlord has no duty to keep leased premises in repair; and the tenant has a limited duty to make what are called "tenantable"

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repairs as necessary to prevent waste. Most leases today contain some kind of provision regarding repairs. Many informal tenancies, however, operate under the common law rule. The purpose of this section is to allocate a duty of repair between the landlord and the tenant in a fair manner. This section does not operate if there is a contrary provision in a lease signed by both parties; in this respect it is similar to s. 704.05. Whether a provision in a lease is "contrary" or should be construed to be consistent with this section is a problem of construction for the court. Since the policy of the statute is to impose a greater duty on the landlord, generally worded clauses in a lease should not be construed to override the statute. Thus, although at common law a provision that the tenant shall return the premises in as good condition as at the beginning of the lease would be construed to require the tenant to make repairs and even rebuild the premises if destroyed by fire, such a clause should not be held contrary to this section.

The second sentence of sub. (1) merely preserves the law under special statutes such as the safe place statute.

Sub. (2) imposes on the landlord the duty to make certain types of repairs. It does not apply if the need for the repair was caused by misuse of the premises by the tenant, which would fall under sub. (3) or if the premises are damaged by fire or other casualty within sub. (4). Under this subsection the landlord is expected to make types of repairs of major proportions, which it is not reasonable to expect a tenant to make.

Sub. (3) deals with the duty of the tenant to make repairs. Regardless of the scope of the repair, a tenant must repair any damage caused by his negligence or improper use of the premises. This is similar to the common law duty of a tenant not to commit intentional or ameliorating waste. In addition, the tenant is expected to make minor repairs of certain types, since he is in possession of the premises. Thus, if water faucets need washers or the sink is stopped up, the tenant would have to take care of such a matter. If, on the other hand, an air-conditioning unit furnished with the premises needed a new compressor, it would be the duty of the landlord to take care of such a repair because the cost would be substantial.

The statutory language refers to negligence or improper use of the premises "by the tenant". However, under normal rules of agency, the tenant may be charged with acts of his agents. Under certain circumstances he would also be responsible if the improper use of the premises were by his own family and even by invited guests. Thus, if a tenant knew his guests were wrecking a rented apartment, he would be under a duty to repair under this section. It has been left to the courts to spell out the roles under which acts of third persons may legally be treated as acts "of the tenant".

Sub. (4) replaces present s. 234.17. The latter section was borrowed from New York 1903; it has never been amended. At common law the tenant bore the risk of a fire or any other casualty loss. Hence, if a leased building were destroyed by fire, the tenant would remain liable for rent. Such a rule was too harsh, and many states including New York and Wisconsin changed the rule by statute. Sub. (4) makes minor changes in the present statute in order to give further protection to the tenant. This section applies only if the premises are rendered "untenantable" by reason of the casualty. Whether a loss makes the premises untenantable is a question of fact in a given case. The statute is designed to afford greater flexibility where the premises can be repaired. In such a case the landlord may promptly repair, and the tenant is protected by an abatement of the rent for the period of repair. However, if there would be undue hardship on the

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tenant, as where he has to move out during the repair and sign a lease of other premises, then he may still move out under this subsection. Under this new statute the tenant is not liable for rent from the time of the damage to the premises and is entitled to recover rent paid in advance. The present statute has no such provision, and its New York prototype was interpreted not to provide for any rebate on the rent until amended to provide specifically for this. Sub. (4) does not apply if there is a contrary provision in the lease (see sub. (1)) or if the damage is caused by negligence or improper use by the tenant. Thus, if a fire is caused by a tortious act of the tenant, he would remain liable for rent under his lease and would also have a duty under tort law to pay for the damage.

704.09 TRANSFERABILITY: EFFECT OF ASSIGNMENT OR TRANSFER: REMEDIES. (1) TRANSFERABILITY OF INTEREST OF TENANT OR LANDLORD. A tenant under a tenancy at will or any periodic tenancy less than year-to-year may not assign or sublease except with the agreement or consent of the landlord. The interest of any other tenant or the interest of any landlord may be transferred except as the lease expressly restricts power to transfer. A lease restriction on transfer is construed to apply only to voluntary transfer unless there is an express restriction on transfer by operation of law.

(2) EFFECT OF TRANSFER ON LIABILITY OF TRANSFEROR. In the absence of an express release or a contrary provision in the lease, transfer or consent to transfer does not relieve the transferring party of his contractual obligations under the lease, except in the special situation governed by s. 704.23 (5).

(3) COVENANTS WHICH APPLY TO TRANSFEREE. All covenants and provisions in a lease which are not either expressly or by necessary implication personal to the original parties are enforceable by or against the successors in interest of any party to the lease. However, a successor in interest is liable in damages, or entitled to recover damages, only for a breach which occurs during the period when such successor holds his interest, unless he has by contract assumed greater liability; a personal representative may also recover damages for a breach for which his decedent could have recovered.

(4) SAME PROCEDURAL REMEDIES. The remedies available between the original landlord and tenant are also available to or against any successor in interest to either party.

(5) CONSENT AS AFFECTING SUBSEQUENT TRANSFERS. If a lease restricts transfer, consent to a transfer or waiver of a breach of the restriction is not a consent or waiver as to any subsequent transfers.

COMMENT: Sub. (4) is intended to preserve the rules embodied in present ss. 234.14 and 234.15. In all other aspects this section is new. However, in many respects the new portions of the statute do not change the law but restate the rules which courts would apply. It was thought desirable to restate these rules in statutory form with the minor changes indicated hereafter.

The entire section is intended to govern transfer of part of the premises as well as of the whole premises.

Sub. (1) deals with power to transfer. At common law tenancies at will were personal and hence nontransferable. On the other hand all leasehold interests (terms for fixed periods) were transferable unless the lease restricted transfer; as a practical matter most leases prohibit transfer by the tenant, either by way of assignment or by sublease, by an express clause requiring consent of the lessor. Periodic tenancies (week-to-week, month-to-month, or year-to-year) have some of the characteristics of tenancies at will, of which periodic tenancies

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were an historic offshoot, but for transfer purposes have been treated like terms for years and hence transferable. The proposed statute would treat week-to-week tenancies and month-to-month tenancies (and any other periodic tenancy less than year-to-year) like tenancies at will; hence these would be nontransferable in the absence of agreement. In all other cases the tenant has power to assign or sublet unless the lease provides otherwise; this would include year-to-year tenancies which are substantial enough to be treated like leases for a term and often are created by written lease. The lessor or landlord may likewise transfer in any case; rarely will the leasing agreement restrict his power, but it may do so if the parties agree.

The 3rd sentence of sub. (1) states present law in Wisconsin and elsewhere. *Zwietusch v. Luehring*, 156 Wis. 96, 144 N.W. 257 (1914); *Liquidation of Citizens S. & T. Co.*, 171 Wis. 601, 177 N.W. 905 (1920).

Sub. (2) states the present law and serves to remind parties of the general rule that an assignment does not relieve the transferring party of his contractual obligations. Thus if a tenant assigns the lease, he remains liable on contract if the assignee defaults. This is true even if the landlord consents to the assignment and accepts rent from the new tenant. If the original tenant wishes to free himself from further liability, he should get an express release as provided in the statute. He would be released, however, if the landlord entered into a new lease with the assignee since this would constitute a novation.

Sub. (3) states historical rules in modern language. The assignee (either of the tenant's interest or of the landlord's interest) is liable on the ancient theory of privity of estate but only on covenants which "run with the land". The latter requirement has caused much litigation. By stating the rule in terms of liability on all covenants except those "either expressly or by necessary implication personal to the original parties" a modern court will have a freer hand in carrying out the intent of all parties concerned with the assignment, than under the ancient rules expressed in *Spencer's Case*, 5 Coke 16a (1583) and its judicial sequels.

Sub. (4) restates in simplified form the substance of present ss. 704.14 and 704.15. Those sections were originally remedial only, although they have occasionally been erroneously cited by courts for substantive propositions. The sections trace to the Statute of 32 Henry VIII c. 34 (1540) and were designed to allow the assignee to have the same remedies as the original parties to the lease; primarily this was to permit the grantee of the reversion to exercise rights of reentry, which were nonassignable at common law.

Sub. (5) is new, adopting a rule opposite to the famous Rule in *Dumpor's Case*, 4 Coke 119 (1603). That case held that when a lessor consents to one assignment, he waives or extinguishes a provision in the lease against assignment without his consent; hence subsequent assignments may be made without his consent. See 7 Wis. L. Rev. 51 (1931). This rule has been strongly criticized. Professor Powell in his treatise states that "most American jurisdictions have indicated that this rule is too contrary to common sense to justify its acceptance". 2 Powell, *Real Property* p. 312 n. 84. Landlords having competent legal advise meet the problem by inserting in the original lease a provision that one consent does not license additional assignments or by insisting as a condition to the assignment that the assignee covenant not to make further assignments without consent. The rule therefore operates only as a trap for the unwary. Since Wisconsin has not passed on this issue and the Supreme Court might well reject the rule in Dumpor's case and reach the same result as the proposed subsection, no change in the law is involved.

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704.11 LIEN OF LANDLORD. Except as provided in ss. 289.43 and 704.05 (5) or by express agreement of the parties, the landlord has no right to a lien on the property of the tenant; the common-law right of a landlord to distrain for rent is abolished.

COMMENT: The proposed section makes no change in the present law. The section replaces present s. 234.01.

At common law the landlord had a right to seize all chattels on the premises, including those belonging to third parties, and to hold them until the tenant paid his rent. Later he was given a power of sale by statute. This right, called distress, was for many years the primary method of collecting rent. Although the right still exists in some states, it has been abolished by statute in many states while in still others the landlord has been given a statutory lien in place of his right to distrain. The present Wisconsin statute was enacted in 1866 to override the holding of the Wisconsin Supreme Court in *Colburn v. Harvey*, 18 Wis. 147 (1864) that the right of distress existed in this state as part of the common law.

The reference to s. 289.43 is to distinguish the lien of the boarding or lodging house owner. There appears to be no need to create a statutory lien in other situations, present remedies for recovery of rent being adequate. Subject to the provisions of the Uniform Commercial Code, the parties are free to create a lien by express agreement.

704.13 ACTS OF TENANT NOT TO AFFECT RIGHTS OF LANDLORD. No act of a tenant in acknowledging as landlord a person other than his original landlord or the latter's successors in interest can prejudice the right of the original landlord or his successors to possession of the premises.

COMMENT: This section replaces present s. 234.02 on "attornment to a stranger", which is almost an exact copy of a 1738 English statute, 11 George II c. 19 s. 11. The proposed statute would modernize the language without change in substance. It would seem clear, even in the absence of such a statute, that a tenant cannot prejudice his landlord by acknowledging a third person as his new landlord.

Aside from a statute, a tenant is estopped from denying his landlord's title either in a suit by the landlord to recover possession or in a suit for rent, unless of course the tenant has been evicted by the third person under a paramount title established by a court. See *Amer. Law of Property* s. 3.65.

704.15 REQUIREMENT THAT LANDLORD NOTIFY TENANT OF AUTOMATIC RENEWAL CLAUSE. A provision in a lease of residential property that the lease shall be automatically renewed or extended for a specified period unless the tenant or either party gives notice to the contrary prior to the end of the lease is not enforceable against the tenant unless the lessor, at least 15 days but not more than 30 days prior to the time specified for the giving of such notice to him, gives to the tenant written notice in the same manner as specified in s. 704.21 calling the attention of the tenant to the existence of the provision in the lease for automatic renewal or extension.

COMMENT: This section is new. Some of the printed forms in use in Wisconsin provide for automatic renewal unless written notice is given a certain number of days in advance of the expiration date. Where the period for advance notice is more than 30 days, the clause is likely to be a trap for the tenant. The landlord is usually aware of the notice requirement since he drafts the lease, whereas typically the tenant of residential property does not realize the significance of the clause or forgets about the notice requirement long before his lease is to expire. Other states have already adopted legislation to prevent this abuse;

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see N.Y. General Obligations Law s. 5-905.

The statute applies only to residential property, not to commercial leases where both lessor and lessee want and need the protection of automatic renewal and are familiar with longer notice provisions. Under this section the tenant may enforce against his landlord an automatic renewal clause in a residential lease; only the tenant is protected by the statute and only the landlord must give notice alerting the tenant to the presence of the renewal or extention clause. This is because most residential leases are drafted by landlords, and landlords are more aware of their legal rights. The additional notice is not an unreasonable burden on landlords.

704.17 NOTICE TERMINATING TENANCIES FOR FAILURE TO PAY RENT OR OTHER BREACH BY TENANT. (1) MONTH-TO-MONTH AND WEEK-TO-WEEK TENANCIES. (a) If a month-to-month tenant or a week-to-week tenant fails to pay rent when due, his tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and if the tenant fails to pay accordingly. A month-to-month tenancy is terminated if the landlord, while the tenant is in default in payment of rent, gives the tenant notice requiring him to vacate on or before a date at least 14 days after the giving of the notice.

(b) If a month-to-month tenant commits waste or breaches any covenant or condition of his agreement (other than for payment of rent), the tenancy can be terminated if the landlord gives the tenant notice requiring him to vacate on or before a date at least 14 days after the giving of the notice.

(2) TENANCIES UNDER A LEASE FOR ONE YEAR OR LESS, AND YEAR-TO-YEAR TENANCIES. (a) If a tenant under a lease for a term of one year or less, or a year-to-year tenant, fails to pay any instalment of rent when due, his tenancy is terminated if the landlord gives the tenant notice requiring him to pay rent or vacate on or before a date at least 5 days after the giving of the notice and if the tenant fails to pay accordingly. If a tenant has been given such a notice and has paid his rent on or before the specified date, or been permitted by the landlord to remain in possession contrary to such notice, and if within one year of any prior default in payment of rent for which notice was given the tenant fails to pay a subsequent instalment of rent on time, his tenancy is terminated if the landlord, while the tenant is in default in payment of rent, gives the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.

(b) If such a tenant commits waste or breaches any covenant or condition of his lease (other than for payment of rent), his tenancy is terminated if the landlord gives the tenant a notice requiring the tenant to remedy the default or vacate the premises on or before a date at least 5 days after the giving of the notice, and if the tenant fails to comply with such notice. A tenant is deemed to be complying with the notice if promptly upon receipt of such notice he takes reasonable steps to remedy the default and proceeds with reasonable diligence, or if damages are adequate protection for the landlord and the tenant makes a bona fide and reasonable offer to pay the landlord all damages for his breach. If within one year from the giving of any such notice, the tenant again commits waste or breaches the same or any other covenant or condition of his lease (other than for payment of rent), his tenancy is terminated if the landlord, prior to the tenant's remedying the waste or breach, gives the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.

(3) LEASE FOR MORE THAN ONE YEAR. If a tenant under a lease for more than one year fails to pay rent when due, or commits waste, or breaches any other covenant or condition of his lease, the tenancy is

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terminated if the landlord gives the tenant notice requiring him to pay the rent, repair the waste, or otherwise comply with the lease on or before a date at least 30 days after the giving of the notice, and if the tenant fails to comply with the notice. A tenant is deemed to be complying with the notice if promptly upon receipt of such notice he takes reasonable steps to remedy the default and proceeds with reasonable diligence, or if damages are adequate protection for the landlord and the tenant makes a bona fide and reasonable offer to pay the landlord all damages for his breach; but in case of failure to pay rent, all rent due must be paid on or before the date specified in the notice.

(4) FORM OF NOTICE AND MANNER OF GIVING. Notice must be in writing and given as specified in s. 704.21. If so given, the tenant is not entitled to possession or occupancy of the premises after the date of termination specified in the notice.

(5) CONTRARY PROVISION IN THE LEASE. Provisions in the lease or rental agreement for termination contrary to this section are invalid except in leases for more than one year.

COMMENT: This section replaces present ss. 291.01 (2) and (3), 234.19, and the last sentence of s. 234.03. The section is intended to change the law by differentiating between the kinds of tenancies, with greater protection for the tenant with a long-term lease. The present notice requirements apply alike to all kinds of tenancies. Moreover, the present 3 day notice to a tenant to pay or vacate is illusory; the tenant can pay up at any time during the unlawful detainer proceedings and stay the proceedings. A tenant under a long-term lease may repeatedly fall behind in payment of rent, with great inconvenience to the lessor; only if the lease provides special remedies, such as acceleration of rent or a power to terminate the lease for default in rent, is the lessor given any legal recourse. On the other hand, the present 3 day notice for breach of conditions other than nonpayment of rent affords the tenant no protection in any situation; he has no power to remedy his default in such a case, even though the landlord has suffered no real damage, unless a court will invoke equitable relief against forfeiture (a highly uncertain relief in light of the clear statutory language of the present statute).

Sub. (1) applies to month-to-month and week-to-week tenancies. Month-to-month tenancies can in any case be terminated by 28 days' notice under proposed s. 704.19, and week-to-week by a week's notice under the same section. However, a defaulting tenant ought to be entitled to less notice. This subsection would allow his removal if he is given a 5 day notice to pay rent and he fails to pay; after the 5 day period, he has no right to pay up and stay proceedings under the proposed revision of the eviction statutes. The present 3 day notice in s. 291.01 (2) has been increased to 5 days for 2 reasons: the tenant will no longer be able to cure default after the notice period, and a 3 day notice given on Friday may leave a tenant with no time to arrange financing because of the weekend closing of financial institutions. The subsection also retains the present 14 day notice from s. 234.03; this will enable a landlord to evict a defaulting tenant without giving him a chance to cure the default by paying rent, but on the other hand the landlord need not wait another full month in order to terminate under s. 704.19. The 14 day period is a reasonable compromise, affording the tenant reasonable time to find new quarters and yet not delaying the landlord unduly. The same period of 14 days is utilized in par. (b) dealing with breach of other convenants or conditions in the lease. The 14-day notice need not end with the end of the rent-paying period as the 28 day notice under s. 704.19 must.

Sub. (2) deals with leases for a year or less and with year-to-

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year tenancies. Again the 5 day notice to pay or vacate is the basic weapon of the landlord for default in rent. If such a notice is given and the tenant succeeds in remaining in possession, either by paying rent on time or because of waiver by the landlord, a subsequent default in rent can be the occasion of a 14-day notice by the landlord with no opportunity to cure the default. Under present law a tenant can repeatedly default in rent and not be removed, simply because he pays up the rent late. The power to terminate after a second default is copies from the statutes of other states.

Sub. (3) deals with leases for terms longer than one year. Most of these leases will be for substantial periods, such as 10 years or longer. In the long-term lease the tenant should be provided with protection against loss of his lease by reason of a single breach, even if intentional. Accordingly here the landlord must give the tenant a 30 day notice to comply with the lease. If the tenant fails to comply within that period, he may be removed from the premises by legal process. In the long-term lease, where both parties are usually represented by legal counsel in the drafting of the lease, sub. (5) permits the parties to negate the statutory provisions by express agreement. Sub. (3) will, therefore, govern only if the lease does not provide otherwise.

In sub. (3), if a tenant fails to pay an instalment of rent when due, and the lease contains an acceleration clause empowering the landlord to declare the rent for the entire balance of the lease as due and payable, must the tenant pay the entire balance or only the instalment on which he has defaulted? Even aside from any judicial declaration that the acceleration clause is void as a penalty, it is the intent of this section that the tenant need pay only the instalment on which he has defaulted, plus, of course, any regular instalment falling due during the 30 day notice period.

704.19 NOTICE NECESSARY TO TERMINATE PERIODIC TENANCIES AND TENANCIES AT WILL. (1) SCOPE OF SECTION. The following types of tenancies, however created, are subject to this section:

(a) A periodic tenancy, whether a tenancy from year-to-year, from month-to-month, or for any other periodic basis according to which rent is regularly payable; and

(b) A tenancy at will.

(2) REQUIREMENT OF NOTICE. Such a tenancy can be terminated by either the landlord or the tenant only by giving to the other party written notice complying with this section, unless a) the parties have agreed expressly upon another method of termination and such agreement is established by clear and convincing proof, b) termination has been effected by a surrender of the premises, or c) sub. (6) applies. A periodic tenancy can be terminated by notice under this section only at the end of a rental period; in the case of a tenancy from year-to-year the end of the rental period is the end of the rental year even though rent is payable on a more frequent basis. Nothing in this section prevents termination of a tenancy for nonpayment of rent or breach of any other condition of the tenancy, as provided in s. 704.17.

(3) LENGTH OF NOTICE. At least 28 days' notice must be given except in the collowing cases: If rent is payable on a basis less than monthly, notice at least equal to the rent-paying period is sufficient; all agricultural tenancies from year-to-year require at least 90 days' notice.

(4) CONTENTS OF NOTICE. Notice must be in writing, formal or informal, and substantially inform the other party to the landlord-tenant relation of the intent to terminate the tenancy and the date of termination. A notice is not invalid because of errors in the notice which do not mislead, including omission of the name of one of several landlords or tenants.

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(5) EFFECT OF INACCURATE TERMINATION DATE IN NOTICE. If a notice provides that a periodic tenancy is to terminate on the first day of a succeeding rental period rather than the last day of a rental period, and the notice was given in sufficient time to terminate the tenancy at the end of the rental period, the notice is valid; if the notice was given by the tenant, the landlord may require him to remove on the last day of the rental period, but if the notice was given by the landlord the tenant may remove on the last day specified in the notice. If a notice specified any other inaccurate termination date, because it does not allow the length of time required under sub. (3) or because it does not correspond to the end of a rental period in the case of a periodic tenancy, the notice is valid but not effective until the first date which could have been properly specified in such notice subsequent to the date specified in the notice, but the party to whom the notice is given may elect to treat the date specified in the notice as the legally effective date. If a notice by a tenant fails to specify any termination date, the notice is valid but not effective until the first date which could have been properly specified in such notice as of the date the notice is given.

(6) TENANT MOVING OUT WITHOUT NOTICE. If any periodic tenant vacates the premises without notice to the landlord and fails to pay rent when due for any period, such tenancy is terminated as of the first date on which it would have terminated had the landlord been given proper notice on the day he learns of such removal.

(7) WHEN NOTICE GIVEN. Notice is given on the day specified below, which is counted as the first day of the notice period:

(a) The day of giving or leaving under s. 704.21 (1) (a) and (2) (a) and (b);

(b) The day of leaving or affixing a copy or the date of mailing, whichever is later, under s. 704.21 (1) (b) and (c);

(c) The 2nd day after the day of mailing if the mail is addressed to a point within the state, and the 5th day after the day of mailing in all other cases, under s. 704.21 (1) (d) and (2) (c);

(d) The day of service under s. 704.21 (1) (e) and (2) (d).

(e) The day of actual receipt by the other party under s. 704.21 (5).

(8) EFFECT OF NOTICE. If a notice is given as required by this section, the tenant is not entitled to possession or occupancy of the premises after the date of termination as specified in the notice.

COMMENT: This section replaces present s. 234.03 and makes substantial changes in the law. Like present s. 234.03 it governs periodic tenancies and tenancies at will. The wording "however created" makes the statute embrace all kinds of such tenancies, regardless of method of creation; periodic tenancies may arise because of a rental arrangement with no fixed term, an entry by a tenant under a lease void under the statute of frauds or other statute followed by payment of rent on a regular basis, or by a tenant holding over under s. 704.23 after his lease expires. The present statute may be subject to judicial interpretation that some year-to-year tenancies are not included (see *Brown v. Dayser*, 60 Wis. 1, 18 N.W. 523 (1884), which was followed by an amendment to present s. 234.03); the proposed statute, therefore, expressly embraces year-to-year tenancies as well as all other periodic tenancies.

The present statute requires a 30 day notice and by judicial interpretation the day on which notice is given may not be included in computing the period. This has led to some confusion, particularly among persons unfamiliar with the law. Thus if rent is payable on the first day of the month, a landlord or tenant cannot terminate the tenancy at

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the end of the month under the present statute by giving notice on the first if the month has less than 31 days (February, April, June, September and November). The proposed statute makes 2 changes in the notice period: one is a reduction of the basic period to 28 days with the day of giving notice counted as part of the period, and the other is to require a 90 day notice to terminate agricultural tenancies from year-to-year. The 28 day period is based on the shortest month, February. The change in the agricultural situation is because a 28 day notice is clearly inadequate, both for the tenant and the landlord; arrangements for change in farm tenancies, which customarily turn over on March 1, have to be made well before the end of the calendar year. Under the proposed statute a farm tenant whose tenancy began on March 1 would have to give notice on or before December 1; similarly the landlord would have to give a notice on or before that date to terminate the tenant's rights.

Subs. (4) and (5) of the proposed statute are new and intended to prevent a technical approach to the notice problem; they follow the same policy behind proposed s. 704.21 on giving of notice, that the notice to terminate tenancies is utilized by lay persons often with no legal training and the technical judicial approach of analogizing this notice to service of process should be changed. Hence if a tenant addresses the notice to a landlord, the fact that the landlord and his wife have legal title in both their names should not invalidate the notice. Similarly if property is rented from month-to-month, with rent payable on the first day of the month, the tenancy technically ends on the last day of the month, and a notice terminating the tenancy "on September 1" is invalid under present law. Again, under present law a notice to terminate the same tenancy on "September 15" would be invalid even though given more than 30 days before that date; and it is not clear whether the notice would be completely invalid or effective at the end of September. (Wisconsin has not passed on this question and other states are split.) It is desirable to clear up these uncertainties and to remove the technical approach to landlord-tenant notices. Under the proposed statute, the first notice ("on September 1"), if given 28 days before, is valid; if given by the tenant, the landlord may require the tenant to move out on August 31; if given by the landlord, the tenant could move out on September 1. In the second situation ("on September 15") the notice would be effective as of the first permissible subsequent date. Thus, even if the notice were given as late as September 3, it would be effective on September 30; if, however, the notice were given by the landlord to the tenant, the tenant could treat the tenancy as ended on September 15 (and vice versa if the notice is given by the tenant). This approach prevents the party to whom notice is given from being misled and at the same time gives him the full protection of the statutory period if he wants it.

Although sub. (4) provides that the notice must inform the other party of "the termination date", this is obviously qualified by the last sentence of sub. (5) validating a notice by the tenant specifying no termination date. In this latter limited situation sub. (4) only sets a standard, but is not mandatory. Thus, if a tenant writes his landlord "I have moved out" or "I am ending my tenancy by this notice", such a notice would be valid as of the first date which could validly have been specified in a notice complying fully with this section. A notice by a tenant that "I plan to move out the end of the current month" should be considered as stating a termination date, the last day of the month; similarly a notice by a landlord "that your tenancy is terminated as of the end of the month" would conform to the requirement of sub. (4).

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Sub. (6) deals with a special problem. Suppose a tenant moves out and quits paying rent. The landlord obviously knows this in most cases. The tenant's liability for further rent may continue on the grounds that his tenancy continues to run, no proper notice having been given and the landlord not having accepted a surrender of the premises. Some courts in this situation treat knowledge as equivalent to notice and premise rent only for the period that the landlord could have recovered if proper notice had been given him in writing at the time he knew the tenant had moved out with intent to end the tenancy. This is the basis for the same rule stated in sub. (6).

Sub. (7) is intended to change the present rules for computation of the notice period. Our Supreme Court has utilized present s. 990.001 (4) (a) as relevant to computing notice periods, although it has not carried this analogy to its full logic where Sundays and legal holidays are involved. Most lay persons would assume that you could count the day on which the notice is given as part of the notice period, and the proposed statute would validate that view. Moreover, where notice is served by mail, the present s. 269.36 requires the addition of 5 days to the normal statutory period. Sub. (7) (c) would follow the normal time for transmitting mail, with allowance for no delivery on Sunday; normally mail posted by 5 p.m. will be delivered to any point within the state on the following day. Hence for the common situation of mailing, only 2 days is added to the normal period of 28 (or 90) days.

704.21 MANNER OF GIVING NOTICE. (1) NOTICE BY LANDLORD. Notice by the landlord or a person in his behalf must be given under this chapter by one of the following methods:

(a) By giving a copy of the notice personally to the tenant or by leaving a copy at his usual place of abode in the presence of some competent member of his family at least 14 years of age, who is informed of the contents of the notice;

(b) By leaving a copy with any competent person apparently in charge of the rented premises or occupying the premises or a part thereof, and by mailing a copy by regular or other mail to the tenant's last-known address;

(c) If notice cannot be given under par. (a) or (b) with reasonable diligence, by affixing a copy of the notice in a conspicuous place on the rented premises where it can be conveniently read and by mailing a copy by regular or other mail to the tenant's last-known address;

(d) By mailing a copy of the notice by registered or certified mail to the tenant at his last-known address;

(e) By serving the tenant as prescribed in s. 262.06 for the service of a summons.

(2) NOTICE BY TENANT. Notice by the tenant or a person in his behalf must be given under this chapter by one of the following methods:

(a) By giving a copy of the notice personally to the landlord or to any person who has been receiving rent or managing the property as the landlord's agent, or by leaving a copy at the landlord's usual place of abode in the presence of some competent member of his family at least 14 years of age, who is informed of the contents of the notice;

(b) By giving a copy of the notice personally to a competent person apparently in charge of the landlord's regular place of business or the place where the rent is payable;

(c) By mailing a copy by registered or certified mail to the landlord at his last-known address or to the person who has been receiving rent or managing the property as the landlord's agent at his last-known address;

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(d) By serving the landlord as prescribed in s. 262.06 for the service of a summons.

(3) CORPORATION OR PARTNERSHIP. If notice is to be given to a corporation notice may be given by any method provided in sub. (1) or (2) except that notice under sub. (1) (a) or (2) (a) may be given only to an officer, director, registered agent or managing agent, or left with an employe in the office of such officer or agent during regular business hours. If notice is to be given to a partnership, notice may be given by any method in sub. (1) or (2) except that notice under sub. (1) (a) or (2) (a) may be given only to a general partner or managing agent of the partnership, or left with an employe in the office of such partner or agent during regular business hours, or left at the usual place of abode of a general partner in the presence of some competent member of his family at least 14 years of age, who is informed of the contents of the notice.

(4) NOTICE TO ONE OF SEVERAL PARTIES. If there are 2 or more landlords or 2 or more cotenants of the same premises, notice given to one is deemed to be given to the others also.

(5) EFFECT OF ACTUAL RECEIPT OF NOTICE. If notice is not properly given by one of the methods specified in this section, but is actually received by the other party, the notice is deemed to be properly given; but the burden is upon the party alleging actual receipt to prove the fact by clear and convincing evidence.

COMMENT: This section replaces present s. 234.04 and makes 2 basic changes in the statute:

(1) It makes express provision for the giving of notice by the tenant. Present s. 234.04 (1) expressly applies where service is being made "by the lessor or any person in his behalf". This apparently is due to legislative oversight. S. 234.03 requiring notice by either party was borrowed from Michigan and Massachusetts in 1849, but s. 234.04 dealing with service of notice was borrowed from New York in 1858 and the New York statute was phrased only in terms of notice by the landlord because under New York law no notice had to be given by the tenant.

(2) The present statute is phrased in terms of "service" of notice and is tied to "service of a summons" under s. 262.06, with substitute methods of posting or service by registered mail. The proposed statute is designed to eliminate the "technical" approach to giving notice. It is inappropriate to treat notice to terminate informal tenancies with the same strictness attendant upon commencement of suit by an attorney. This is particularly so as applied to notice by the tenant, who should not have to resort to legal advice in order to end a simple month-to-month tenancy. Suppose, for example, a tenant sends his notice by regular mail and the landlord receives the notice. Under present law this method of service is invalid. The proposed statute provides for a variety of methods of giving notice, all designed to assure that the other party actually gets the notice. The proposed statute is not a radical departure; most states have never attempted by legislation to spell out the manner of giving notice. The proposed statute is phrased in terms of "giving" rather than "serving" notice. However, it is possible under the proposed change to utilize formal service procedures if the parties so wish, and attorneys handling such matters will probably prefer the more technical approach.

Since the emphasis is on actually getting notice to the other party, sub. (5) provides that if notice is not given in any of the approved ways, but is in fact received by the proper person, the notice is treated as properly given. In such a case the receipt may involve a circuitous route, and hence the time of receipt is treated as the day the notice is given under proposed s. 704.19 (7) (e).

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704.23 REMOVAL OF TENANT ON TERMINATION OF TENANCY. If a tenant remains in possession without consent of his landlord after termination of his tenancy, the landlord may in every case proceed in any manner permitted by law to remove the tenant and recover damages for such holding over.

COMMENT: This section makes it clear that a tenant who does not vacate after getting a Notice of Termination can be removed. Removal may be under ch. 299 or 813.

704.25 EFFECT OF HOLDING OVER AFTER EXPIRATION OF LEASE; REMOVAL OF TENANT. (1) REMOVAL AND RECOVERY OF DAMAGES. If a tenant holds over after expiration of a lease, the landlord may in every case proceed in any manner permitted by law to remove the tenant and recover damages for such holding over.

(2) CREATION OF PERIODIC TENANCY BY HOLDING OVER. (a) *Non-residential leases for a year or longer.* If premises are leased for a year or longer primarily for other than private residential purposes, and the tenant holds over after expiration of the lease, the landlord may elect to hold the tenant on a year-to-year basis.

(b) *All other leases.* If premises are leased for less than a year for any use, or if leased for any period primarily for private residential purposes, and the tenant holds over after expiration of the lease, the landlord may elect to hold the tenant on a month-to-month basis; but if such lease provides for a weekly or daily rent, the landlord may hold the tenant only on the periodic basis on which rent is computed.

(c) *When election takes place.* Acceptance of rent for any period after expiration of a lease or other conduct manifesting the landlord's intent to allow the tenant to remain in possession after the expiration date constitutes an election by the landlord under this section unless the landlord has already commenced proceedings to remove the tenant.

(3) TERMS OF TENANCY CREATED BY HOLDING OVER. A periodic tenancy arising under this section is upon the same terms and conditions as those of the original lease except that any right of the tenant to renew or extend the lease, or to purchase the premises, or any restriction on the power of the landlord to sell without first offering to sell the premises to the tenant, does not carry over to such a tenancy.

(4) EFFECT OF CONTRARY AGREEMENT. This section governs except as the parties agree otherwise either by the terms of the lease itself or by an agreement at any subsequent time.

(5) HOLDOVER BY ASSIGNEE OR SUBTENANT. If an assignee or subtenant holds over after the expiration of the lease, the landlord may either elect to hold the assignee or subtenant as a periodic tenant under sub. (2) (but not the original tenant unless he participated in the holding over) or remove any person in possession and recover damages from the assignee or subtenant or from the original tenant, except that the landlord may not recover damages from the original tenant if the landlord has been accepting rent directly from the assignee or subtenant.

(6) NOTICE TERMINATING A TENANCY CREATED BY HOLDING OVER. Any tenancy created pursuant to this section is terminable under s. 704.19.

COMMENT: This section replaces present s. 234.07 and makes a substantial change in the law. Some of the provisions are new, codifying case law.

The principal change is in the present rule that any tenant holding over after a lease for a year or more becomes a year-to-year tenant. Under the proposed statute that rule is still true for commercial, agricultural or any other nonresidential purposes; but it does not apply to the ordinary apartment lease or lease of a house for residential purposes. Where a commercial or agricultural tenant holds over, such

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premises are normally rented only on a yearly basis, and it is appropriate to hold the tenant on a year-to-year basis. However, a tenant under an apartment lease, paying rent on a monthly basis, does not realize he can be held for another year if he stays in after his lease expires; moreover, the landlord can usually rent the premises at any time of the year on a monthly basis. Sub. (4) permits the parties to make a different agreement in any case.

Sub. (3) continues the present law with a single exception. Normally all the terms and conditions of the original lease carry over and govern the holder tenancy. However, it seems inappropriate to apply that rule to options to extend or to purchase the premises and the like. Hence the proposed subsection would change the rule of *Last v. Puehler*, 19 Wis. 2d 291, 120 N.W. 2d 120 (1963), which interpreted the present statutory language to embrace all terms and conditions including options and rights of first refusal. Under the proposed wording such clauses would expire with the original lease.

Sub. (5) is new. It probably states the present law. Where the original tenant assigns or sublets, he remains liable on the original lease. What effect does a holding over by the assignee or subtenant have on the original tenant? Unless he participates in the holding over somehow, he ought not to have his liability continued beyond the term of the original lease. Nor should he be liable for damages if the assignee or subtenant wrongfully holds over and the landlord has been accepting rent directly from the assignee or subtenant. He would be liable for any damages, however, if a subtenant of his did not move out at the end of the term where the subtenant was not paying rent to the landlord, but to the original tenant; since the sublease should expire before the end of the original term anyway, the original tenant ought to be sure that his subtenants do move out on time and to this extent he is charged with their acts.

Sub. (6) conforms this section to the notice section, proposed s. 704.19. The holdover tenancy would be terminated normally by a 28 day notice at the end of the period (the year if year-to-year, the month if month-to-month) or 90 days in the case of the agricultural tenancy from year-to-year.

704.27 DAMAGES FOR FAILURE OF TENANT TO VACATE AT END OF LEASE OR AFTER NOTICE. If a tenant remains in possession without consent of his landlord after expiration of a lease or termination of a tenancy by notice given by either the landlord or the tenant, or after termination by valid agreement of the parties, the landlord may recover from the tenant damages suffered by the landlord because of the failure of the tenant to vacate within the time required. In absence of proof of greater damages, the landlord may recover as minimum damages twice the rental value apportioned on a daily basis for the time the tenant remains in possession. As used in this section, rental value means the amount for which the premises might reasonably have been rented, but not less than the amount actually paid or payable by the tenant for the prior rental period, and includes the money equivalent of any obligations undertaken by the tenant as part of the rental agreement, such as payment of taxes, insurance and repairs.

COMMENT: This section replaces present ss. 234.05 and 234.06, which provide a penalty of double rent in certain cases. The present statutes were copied from the Statute of 11 Geo. II, c. 19 s. 18 (1738) and the English Landlord and Tenant Act of 1730, 4 Geo. II, c. 28 s. 1 respectively. At the time of the English enactments there was no summary remedy for removal of a tenant and these statutes provided a penalty in order to induce the tenant to remove according to proper notice. With the advent of effective summary procedures for removal of a

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tenant, there is less need to retain penalty provisions. Although most states have retained the old statutory penal provisions, the New York section corresponding to present s. 234.06 was repealed in 1920 and California repealed both of its corresponding sections in 1961.

The proposed statute allows recovery of twice rental value only as a means of establishing minimum damages. In many cases the landlord cannot as a practical matter prove loss of a rental opportunity and is burdened with the cost and inconvenience of a lawsuit to recover his damages and in some cases a second lawsuit to recover possession. The proposed statute limits the double recovery, however, to a daily apportionment of the rent. The landlord cannot under the proposed statute recover both special damages and double the rental value, as under present s. 234.06.

704.29 RECOVERY OF RENT AND DAMAGES BY LANDLORD: MITIGATION. (1) SCOPE OF SECTION. If a tenant unjustifiably removes from the premises prior to the effective date for termination of his tenancy and defaults in payment of rent, or if the tenant is removed for failure to pay rent or any other breach of a lease, the landlord can recover rent and damages except amounts which he could mitigate in accordance with this section, unless he has expressly agreed to accept a surrender of the premises and end the tenant's liability. Except as the context may indicate otherwise, this section applies to the liability of a tenant under a lease, a periodic tenant, or an assignee of either.

(2) MEASURE OF RECOVERY. In any claim against a tenant for rent and damages, or for either, the amount of recovery is reduced by the net rent obtainable by reasonable efforts to rerent the premises. Reasonable efforts mean those steps which the landlord would have taken to rent the premises if they had been vacated in due course, provided that such steps are in accordance with local rental practice for similar properties. In the absence of proof that greater net rent is obtainable by reasonable efforts to rerent the premises, the tenant is credited with rent actually received under a rerental agreement minus expenses incurred as a reasonable incident of acts under sub. (4), including a fair proportion of any cost of remodeling or other capital improvements. In any case the landlord can recover, in addition to rent and other elements of damage, all reasonable expenses of listing and advertising incurred in rerenting and attempting to rerent (except as taken into account in computing the net rent under the preceding sentence). If the landlord has used the premises as part of reasonable efforts to rerent, under sub. (4) (c), the tenant is credited with the reasonable value of the use of the premises, which is presumed to be equal to the rent recoverable from the defendant unless the landlord proves otherwise. If the landlord has other similar premises for rent and receives an offer from a prospective tenant not obtained by the defendant, it is reasonable for the landlord to rent the other premises for his own account in preference to those vacated by the defaulting tenant.

(3) BURDEN OF PROOF. The landlord must allege and prove that he has made efforts to comply with this section. The tenant has the burden of proving that the efforts of the landlord were not reasonable, that the landlord's refusal of any offer to rent the premises or a part thereof was not reasonable, that any terms and conditions upon which the landlord has in fact rerented were not reasonable, and that any temporary use by the landlord was not part of reasonable efforts to mitigate in accordance with sub. (4) (c); the tenant also has the burden of proving the amount that could have been obtained by reasonable efforts to mitigate by rerenting.

(4) ACTS PRIVILEGED IN MITIGATION OF RENT OR DAMAGES. The following acts by the landlord do not defeat his right to recover rent and damages and do not constitute an acceptance of surrender of the premises:

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(a) Entry, with or without notice, for the purpose of inspecting, preserving, repairing, remodeling and showing the premises;

(b) Rerenting the premises or a part thereof, with or without notice, with rent applied against the damages caused by the original tenant and in reduction of rent accruing under the original lease;

(c) Use of the premises by the landlord until such time as rerenting at a reasonable rent is practical, not to exceed one year, if the landlord gives prompt written notice to the tenant that the landlord is using the premises pursuant to this section and that he will credit the tenant with the reasonable value of the use of the premises to the landlord for such a period;

(d) Any other act which is reasonably subject to interpretation as being in mitigation of rent or damages and which does not unequivocally demonstrate an intent to release the defaulting tenant.

COMMENT: This section is new but reflects the policy laid down by the Wisconsin Supreme Court in a series of cases. The section deals with the right of the landlord to recover damages in case of removal of the tenant from the premises, either voluntarily or as a result of legal action by the landlord, and provides the measure of damages in such cases.

At common law in many states if a tenant abandons the premises, a landlord is under no obligation to mitigate his damages. He may leave the premises vacant and recover the entire rent as it accrues for the balance of the lease. In so doing he may refuse reasonable offers from other persons to rerent the premises and may even, if the lease prohibits assignment, refuse to let the tenant assign his lease to the new tenant willing to rent. In many jurisdictions the landlord may even jeopardize his chances to recover from the first tenant if he does accept an offer to rerent, the courts characterizing his acts as an "acceptance of surrender" ending the lease. The same rule applied if the landlord, faced with a tenant who refused to pay rent, brought an action to evict the tenant; the landlord by removing the tenant had elected to end the lease and thereby terminated the tenant's liability for further rent. Such a theory of course ignored the fact that the landlord was forced to act by the tenant's prior breach and that the landlord should be entitled to reasonable damages. Most leases attempt to deal with this problem but do not always provide a complete remedy so far as the landlord is concerned or a fair measure of recovery so far as the tenant is concerned.

The Wisconsin Supreme Court is one of the growing number of modern courts which have announced that the landlord has an obligation to rerent when the tenant breaches the lease; this is merely an application of the fundamental damage rule that a party must use reasonable efforts to minimize his loss, whether in contract or in tort. *Selts Investment Co. v. Promoters, etc.*, 197 Wis. 476, 222 N.W. 812 (1929); *Strauss v. Turck*, 197 Wis. 586, 222 N.W. 811 (1929); *Patton v. Milwaukee Commercial Bank*, 222 Wis. 167, 268 N.W. 124 (1936). Nevertheless the scope of the doctrine remains vague, and the case law dealing with acts which the landlord may take in mitigating damages is confused by tension with the old doctrine of surrender. It is therefore important to clarify both aspects of the law by statutory enactment, rather than leaving further development to slow and costly litigation. It is important that both parties to a lease know what the legal consequences of breach may be.

Sub. (1) states the scope of the section. It applies both where the tenant simply abandons the premises and where he is removed for nonpayment of rent or breach of a lease. It applies to a periodic ten-

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ancy as well as a lease for a definite term. In making the section applicable against an assignee, the statute changes the present Wisconsin law; see *Lincoln Fireproof Warehouse Co. v. Greusel*, 199 Wis., 428, 224 N.W. 98, 227 N.W. 6 (1929) (holding that a landlord who rerented when an assignee abandoned the premises lost his right against the assignee because "privity of estate" was ended). The section has not application to 2 kinds of situations: (1) A tenant may be forced to move out by wrongful acts of his landlord amounting to what the law calls "constructive eviction"; the tenant in such case has removed but not "unjustifiably" within the meaning of the first sentence. (2) A tenant may move out with the express consent of his landlord; this is a true agreement to accept a surrender of the premises and the tenant has no further liability.

Sub. (2) expresses the formula for arriving at damages. It expressly recognizes recovery of damages rather than merely accrued rent, and in this regard acknowledges that a rental agreement is a contract and that damages for anticipatory breach are properly recoverable. The statute makes clear that the landlord can recover reasonable expenses incurred in trying to minimize damages, such as cost of advertising. When the landlord has actually rerented the premises, the first tenant is credited with the actual rent received from the new tenant; however, the tenant may be able to prove that the landlord could by reasonable efforts have obtained a greater sum, in which the damages will be reduced by the greater sum. What is "reasonable" within the meaning of this section must in light of the particular circumstances be assessed in commercial terms; hence the statute refers to "local rental practice for similar properties". Thus, in some commercial office buildings it is not considered good practice to advertise in newspapers; accordingly the landlord would not have to advertise as a reasonable effort to rerent.

Sub. (3) deals with burden of proof and apportions the burden fairly between landlord and tenant.

Sub. (4) delineates the acts which a landlord is privileged to do in case of breach by the tenant. It makes some change in the present Wisconsin law. Thus under the statute a landlord may rerent without first notifying the tenant; there appears to be little purpose served by giving notice to a tenant who has already moved out and quit paying rent or been removed for breach. The basic theory of this subsection is that the landlord should be able to act to protect the property and to be free to take whatever steps appear to him to be appropriate to mitigate damages without getting trapped by the old concept that in so doing he has accepted a surrender of the premises.

704.31 REMEDY ON DEFAULT IN LONG TERMS; IMPROVEMENTS. (1) If there is a default in the conditions in any lease or a breach of the covenants thereof and such lease provides for a term of 30 years or more and requires the tenant to erect or construct improvements or buildings upon the land demised at his own cost and exceeding in value the sum of $50,000, and such improvements have been made and the landlord desires to terminate the lease and recover possession of the property described therein freed from all liens, claims or demands of such lessee, the landlord may, in case of any breach or default, commence an action against the tenant and all persons claiming under him to recover the possession of the premises leased and proceed in all respects as if the action was brought under the statute to foreclose a mortgage upon real estate, except that no sale of the premises shall be ordered.

(2) The judgment shall determine the breach or default complained of, fix the amount due the landlord at such time, and state the several amounts to become due within one year from the entry thereof, and pro-

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vide that unless the amount adjudged to be due from the tenant, with interest thereon as provided in the lease or by law, shall be paid to the landlord within one year from the entry thereof and the tenant shall, within such period, fully comply with the judgment requiring him to make good any default in the conditions of the lease, that said tenant and those claiming under him shall be forever barred and foreclosed of any title or interest in the premises described in the lease and that in default of payment thereof within such year the tenant shall be personally liable for the amount thereof. During said year ensuing the date of the entry of such judgment the possession of the demised premises shall remain in the tenant and he shall receive the rents, issues and profits thereof; but if he fails to comply with the terms of the judgment and the same is not fully satisfied, and refuses to surrender the possession of the demised premises at the expiration of said year, the landlord shall be entitled to a writ of assistance or execution to be issued and executed as provided by law.

704.40 REMEDIES AVAILABLE WHEN TENANCY DEPENDENT UPON LIFE OF ANOTHER TERMINATES. (1) Any person occupying premises as tenant of the owner of a life estate or any person owning an estate for the life of another, upon cessation of the measuring life, is liable to the owner of the reversion or remainder for the reasonable rental value of the premises for any period the occupant remains in possession after termination of the life estate. Rental value as used in this section has the same meaning as rental value defined in s. 704.27.

(2) The owner of the reversion or remainder can remove the occupant in any lawful manner including eviction proceedings under ch. 299 as follows:

(a) If the occupant has no lease for a term, upon terminating his tenancy by giving notice as provided in s. 704.19;

(b) If the occupant is in possession under a lease for a term, upon termination of the lease or one year after written notice to the occupant given in the manner provided by s. 704.21 whichever occurs first, except that a farm tenancy can be terminated only at the end of a rental year.

(3) The occupant must promptly after written demand give information as to the nature of his possession. If he fails to do so, the reversioner or remainderman may treat the occupant as a tenant from month-to-month.

COMMENT: This section replaces present s. 234.06 as applied to holders of life estates and changes the law. The problem dealt with arises where the owner of a life estate leases property to a tenant and the life estate is terminated by cessation of the measuring life. Theoretically the tenant has no right to continue in possession; he is not the tenant of the reversioner or remainderman. On the one hand the tenant can be removed without any notice; yet the reversioner or remainderman has no right to commence unlawful detainer proceedings under present law because of the absence of a landlord-tenant relation between the parties. The proposed statute would remedy this in several respects. In the first place it would make the tenant liable for rental value if he remains in possession after the life estate terminates. Secondly, it gives the tenant a right to notice before he can be summarily removed. Thirdly, it does afford to the reversioner or remainderman the right to evict the tenant summarily by eviction proceedings if he gives the required notice.

Thus, for example, suppose A, owning an estate for his own life, leases to B a farm on a year-to-year basis starting on March 1. Several years later A dies in June. C is remainderman. C can collect a proportion of the annual rent (from A's death to the ensuing March 1). C cannot evict B except by giving him 90 days notice prior to

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March 1; if he does give such notice, he can evict B on March 1 of the following year.

If the owner of the life estate, A, had leased to B for 5 years by written lease, and the life estate ends during the first year after execution of the lease, the remainderman C can hold B for rental value after A's death, but can only remove B by first giving him a year's notice. While at first look this seems to infringe the rights of the remainderman, there are analogies in the trust field for allowing a lease beyond the life of the trust; and the tenant is the person whom the statute seeks to protect. The tenant may not know that the person in possession, with whom he deals for the lease, only owns a life estate; nor does he have any way of anticipating the length of the measuring life. Finally, in practice most reversioners and remainderman do not want immediate factual possession of the land.

Rental value may be more than the rent stipulated in the lease. Hence the reversioner or remainderman is protected by ability to recover the current market value; but he can recover the rent under the lease as a minimum (see s. 234.25).

The lessee from the owner of a life estate takes a risk in prepaying rent. If the life estate ends, the lessee may also be liable to the reversioner or remainderman for rental value for the period after the life estate ceases; the lessee should be able to recover a corresponding portion of the prepaid rent.

If a tenant refuses to inform the reversioner or remainderman of the nature of his possession, after written demand, he can be treated as a month-to-month tenant and removed by 28 days notice.

SECTION 26. 710.10 of the statutes is created to read:

710.10 REMOVAL OF POSSESSOR OF PROPERTY. In the following cases any person who holds possession of property, or the representatives or assigns of such person may be removed under ch. 299 or 813:

(1) A person holding in violation of s. 704.17 (4), or of s. 704.19 (8).

(2) A tenant at sufferance holding without permission.

(3) A possessor of property which has been sold upon foreclosure of a mortgage under ss. 816.51 to 816.73, if his rights were extinguished by the foreclosure.

(4) A person who occupies or holds property under an agreement with the owner to occupy and cultivate it upon shares and the time fixed in the agreement for such occupancy has expired.

COMMENT: From ss. 291.01 and 291.02.

SECTION 27. In the list of program responsibility statutes specified for the department of justice under section 15.251, the reference "234.23" is deleted and "710.02", as renumbered, is inserted.

SECTION 28. This act shall take effect July 1, 1971.

Approved December 2, 1969.