Landlord Tenant: 1971 Revision of Eviction Practice in Wisconsin

Robert F. Boden

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr
Part of the Law Commons

Repository Citation

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
1971 REVISION OF EVICTION PRACTICE IN WISCONSIN

ROBERT F. BODEN*

INTRODUCTION

For the most of the decade of the 1960's, the State Bar of Wisconsin was engaged in a monumental research and law revision project to update the real property statutes of Wisconsin. Part of this project involved the revision of practice and procedure in the eviction of tenants from real property. The work on this phase of the project was undertaken by the Landlord-Tenant Study Committee of the State Bar beginning in the summer of 1964. The author of this article was the Research Reporter to the Study Committee. A draft of a new eviction procedure was approved by the Study Committee after many meetings and many amendments in 1967. This portion of the total revision of real property law was then integrated into the entire project which, in due course, was presented by the State Bar to the 1969 Legislature. That portion of the project concerned with landlord and tenants which included the revision of eviction procedure was passed by the Wisconsin Legislature as Chapter 284 of the Laws of 1969, to be effective July 1, 1971. The new eviction procedure constituted a rather substantial departure from the old unlawful detainer procedure which had previously obtained in Wisconsin and which was largely unchanged since adopted in 1849.

BASIC PLAN FOR REWRITING EVICTION PROCEDURE

Three possible alternatives presented themselves as available in a rewriting of eviction procedure. They were:

1. A revision of Chapter 291 on unlawful detainer to accommodate it to modern day practice, particularly in its application to courts of record, the basic law having been written for justice court practice in 1849.1

2. An incorporation of eviction procedure into Chapter 299 of the Statutes, the Small Claims Act resulting from court reorganization effective January 1, 1962.2

3. The writing of an entirely new procedure as part of the Statutes on landlord and tenant unrelated to any other procedure and specifically covering eviction cases.

The second alternative was chosen for many reasons, not all of them related to the law of landlord and tenant. These are:

*Dean and Professor of Law, Marquette University; member of the Wisconsin Bar; Research Reporter for the State Bar Revision of Eviction Procedure, 1964-68.

1 Wis. Rev. Stats. 1849, c. 117, sec. 1, et seq.
2 Wis. Laws 1961, ch. 519.
1. Chapter 291 in its present form is geared to justice court practice. There does not seem to be any reason for attempting simply to patch it up. The law presently governing unlawful detainer, discussed below, is just such an attempt and has produced more confusion than anything else. Secondly, our Chapter 291 traces itself back to an essentially criminal statute in England, and the feeling of the Study Committee was that a clear break should be made now definitely establishing the action for eviction as a civil action. Any revision of Chapter 291 would probably not accomplish this purpose.

2. Chapter 299 is an attempt to provide as summary a proceeding as is reasonable in small claims cases in county courts. It is adaptable to any proceeding where the issues to be litigated are not usually complex and where a more summary type proceeding is indicated. Chapter 299 therefore provides a procedure reasonably adaptable to eviction practice.

3. The writing of a special procedure to cover one particular type of case is probably inadvisable in view of the general trend to simplify practice and to make it more uniform, particularly when a procedure such as that in Chapter 299 is readily available and adaptable to cases of this type.

For these reasons it was determined to work eviction procedure into Chapter 299 as a complete alternative to Chapter 291 in cases involving the removal from real property of persons not entitled to the possession or occupancy thereof.¹

In addition, the committee studied an extension of eviction practice to cover the situation where a tenant has vacated premises leaving personal property behind which the landlord is desirous of removing from the premises, but decided not to incorporate a special procedure on this subject in Chapter 299.

The basic plan, therefore, involved amendment of existing provisions of Chapter 299 where needed to improve eviction practice, and the creation of additional sections necessary to a complete eviction procedure within Chapter 299, together with those provisions felt necessary to adequately spell out the procedures which were not previously codified in statutory form.

Exclusive Nature of the Remedy. The study committee considered and rejected a proposal that the procedure set forth in Chapter 299 should be the exclusive remedy available to a plaintiff seeking to remove both the person and the property of a tenant from real property for any of the causes stated in the statute. This was meant to give the plaintiff an option to proceed under Chapter 299 in county court or under old Chapter 291, unlawful detainer, in justice court. However, while the revision was pending before State Bar committees and the Legislature,

the constitutional office of justice of the peace was abolished, the jurisdiction of municipal justices was limited to ordinance violations, and Chapter 291 was repealed. Thus, by indirection, Chapter 299 in effect provides an exclusive remedy for the removal of a tenant. But Chapter 299 eviction procedure is not the exclusive remedy in the case of proceedings to remove only the property of a tenant who has vacated, because an action at law for damages for any rent due, coupled with an attachment of the property under § 266.03(1)(a) (where possible) is preserved. Ejectment also remains.

A Bird's-Eye View of Chapter 299. To understand the procedure proposed for eviction cases, it is necessary to appreciate the general organization of and theory behind Chapter 299. The Chapter governs procedure in county court in what is known as "small claims type actions." Wis. Stats., § 299.01. These include money demands up to and including $500.00, replevins up to $500.00, forfeiture actions, and, until the revision, unlawful detainer. Chapter 299 is not a complete procedure in and of itself for the handling of these actions. Section 299.04(1) provides that "except as otherwise provided in Chapter 299 the general rules of practice and procedure in Title XXIV and Title XXV shall apply to actions and proceedings under this chapter." Therefore, Chapter 299 is a list of exceptions to the application of normal circuit court procedure in actions within its purview. These exceptions, for the most part, are those designed to make the disposition of small claim type actions more summary in nature than would be the case if circuit court rules applied. Therefore, the tack that was taken in the revision of eviction procedure was to spell out those additional exceptions to circuit court practice made necessary by the type of action under consideration.

STATUS OF THE PRIOR LAW

The prior law on unlawful detainer will not be treated in detail, because the revision is so complete a departure that little need be said except to point out that there were many serious conflicts in the prior law which needed clarification.

Chapter 291 was a procedure unto itself insofar as proceedings in justice court were concerned. However, when an unlawful detainer case was brought in county court, difficulties were encountered in the attempt made in the 1961 court reorganization to make Chapter 299 procedure applicable in small claims actions. The basic difficulty arose from the

---

6 Wis. Laws 1969, ch. 284, sec. 7.
7 Wis. Stat. § 299.01 (1969).
8 Id.
fact that § 299.01(1) provided that the procedure of Chapter 299 should be used in county court in all “unlawful detainer actions under Chapter 291.” At the same time, § 291.05 was amended to provide that if an unlawful detainer complaint is filed in county court “the provisions of Chapter 299 with respect to pleadings and practice shall apply.” This did not present a difficulty where Chapter 299 contained an express provision on pleading and practice inconsistent with Chapter 291. It did present a problem where Chapter 299 was silent on the proper procedure. At first blush one might think that the procedure of Chapter 291 would be applicable in such instances. However, § 299.04 provided, as previously noted, that where Chapter 299 was silent the rules of practice and procedure in Title XXV should apply to actions under Chapter 299. Unfortunately, Chapter 291 was not within Title XXV of the Statutes (so-called circuit court procedure), but was within Title XXVII. The provisions in Title XXV are the regular “circuit court” rule of pleading and practice and the special procedural rules applicable in actions of ejectment which are governed by Chapter 275. Putting ejectment rules into unlawful detainer actions under Chapter 299 will produce all sorts of surprising results. For example, Chapter 299 being silent on whether a claim for rent can be joined in an unlawful detainer action made it entirely possible that such joinder was authorized under the provisions of § 275.10. All of this is noted merely to emphasize the need that existed for a revision.

Secondly, in a commentary on the prior law, it should be noted that the statutes left the mechanics of the execution of a writ of restitution and the manner of storage and disposal of the tenant’s property pretty much to the imagination of each of the seventy-two sheriffs of the State, governed only by a very few cases which have been decided on the subject. The form of writ of restitution in old § 291.17 (made specifically applicable to 299 practice by § 299.04(2)) merely required the sheriff to give restitution of the premises to the plaintiff and dispose of the defendant’s property according to the law. The rest is left up to the sheriff. The reporter found a rather efficient and workable system established for the most part by custom and usage by the Sheriff of Milwaukee County which formed the basis of the new sections on execution of the writ of restitution.

**Discussion of the New Eviction Practice and Procedure**

Certain fundamental changes in practice and procedure were adopted by the 1969 Legislature in bringing eviction practice under Chapter 299 which run throughout all of the sections in the new statutes. The changes are to be effective July 1, 1971. Before considering specific sections it is thought advisable to comment on these general changes.

---

10 Wis. Laws 1961, ch. 519, creating ch. 299.
11 Id.
Change of Name to “Eviction Action.” The terminology “unlawful detainer” has been scrapped in favor of the term “eviction action.” This is done to completely divorce this procedure from the old unlawful detainer practice with its overtones of criminal involvement. It is also considered that this term will more accurately describe the type of proceeding with which we are concerned.

The Inclusion of Rent Claims in Eviction Actions. The new procedure authorizes the joinder of a claim for unpaid rent with the claim for restitution in an eviction action, and new 299.01(1) makes it clear that the amount of the rent claim is immaterial insofar as the application of Chapter 299 practice is concerned (i.e., no $500.00 limit). In present day circumstances, and with trial before a competent court of record and not before a justice of the peace, there does not seem to be any reason why a rent claim cannot be included as a second cause of action in an eviction case. New York has allowed such a joinder since 1924.12 Massachusetts has authorized the practice since 1960, and Illinois also allows such a joinder.13

Of course, a judgment for rent may not be entered in the absence of personal service on the defendant, and this is taken care of by § 299.16(1).

Acceleration of Handling in Eviction Cases. Many of the suggested changes speed up the time within which acts are to be performed or proceedings taken, to make those times even shorter than under existing Chapter 299 practice. This is in line with the general feeling that eviction proceedings should be as summary as possible because there is so seldom an issue for trial. This procedure actually represents a compromise between a preservation of the present system and a totally summary procedure undertaken, for example, by affidavit and order to show cause. The latter procedure was rejected by the study committee for the reason, referred to above, that it was felt that eviction practice should be worked into the framework of Chapter 299 with a minimum of change, and to guarantee maximum fairness to the tenant.

Abolition of Opportunities for Delay. To expedite eviction actions as much as possible the revision rejects certain built-in opportunities for delay found in Chapter 291. A minimum adjournment procedure is recommended in the suggested revision of § 299.27 to replace entirely the adjournment possibilities presented by § 291.08 under which certain defendants could adjourn the action on the return for as long as ninety days. Eliminated also is the opportunity presented to the defendant, under § 291.15 to stay proceedings after judgment by posting bond, paying rent, etc. Substituted are provisions in proposed § 299.44(3)

---

13 Mass. Stat., ch. 239, s. 3 (Supp. 1970); Ill. Stat., ch. 57, s. 5 (Supp. 1971).
which would authorize a stay of the writ of restitution under certain circumstances, but only in the discretion of the court.

Appeal Procedure. The recommended changes preclude the possibility of trial *de novo* on appeal.

We turn now to a discussion of the specific changes in the statute to incorporate eviction practice fully into Chapter 299. The reader at this point is referred to Chapter 299 as published in the 1969 Wisconsin Statutes, and what follows will constitute a running commentary on the changes which are incorporated therein, to be effective July 1, 1971.

Amendments to Present Provisions in Chapter 299

§ 299.01 (1) Eviction Actions. This section removes reference to unlawful detainer from Chapter 291 and Chapter 299, describes the newly created action for eviction defined in the special sections on eviction, and makes clear that Chapter 299 practice applies to all eviction actions regardless of the amount claimed as damages for rent due. It is felt that 299 practice should control regardless of the money damages sought, because this ancillary matter can be adequately determined under 299 procedure no matter how many dollars are involved.

*Cross Ref.:* 299.40, infra.

§ 299.04(2) Forms. The amendment eliminates reference to Chapter 291. The only forms involved are of the verdict (old § 291.16) and of the writ of restitution (old § 291.17), both adequately covered by new provisions in Section 299.44 or by Title XXV.

§ 299.05(3) Return Date. The amendment speeds up the return date of eviction actions in an attempt to accomplish the objectives of making procedure in these cases as summary as reasonable. This actually represents a middle ground as compared to a proposal advanced in the study committee that in some eviction cases at least, restitution be accomplished on affidavit and order to show cause.

The study committee felt that the same practical effect could be accomplished by a speed-up of the return date as would be accomplished by a resort to a different practice. While conceivably an order to show cause might be returnable less than five days after its issuance, it is highly probable that most county judges would give at least five days notice to the defendant. This manner of speeding up the return day accomplishes the result with a minimum of departure from the standard practice of Chapter 299.

§ 299.06 Pleadings. This amendment merely conforms this section to the requirement of a written complaint set forth in new § 299.41, *infra*. The necessity for written complaint in eviction is discussed under that section.

*Cross Ref.:* § 299.41, *infra.*
§ 299.11 Venue. This merely amends to conform to the new name to be given actions to remove tenants.

§ 299.12 Service of Summons. This section eliminates the use of mail service in eviction actions for several reasons. 1) It is believed that the defendant about to be dispossessed should have more formal notice of the action. 2) With return date and service time shortened in § 299.05(3) and with the necessity of a return of process unserved to trigger the posting procedure of § 299.16, infra, it was felt that too much time might elapse in the return of the unopened summons by the post office to the clerk and his communication with the plaintiff's attorney to permit the prompt posting the plaintiff desires. 3) There is more certainty in the sheriff's return "not found" to authorize the posting procedure. Sub. (5) above refers to the non-resident motorist statute and is not relevant in eviction cases.

§ 299.16(3) Adjournment, Posting and Mailing in Eviction Actions. Eviction actions are removed from the general publication rules of Chapter 299. § 299.16(3) applies only to eviction actions and provides a quicker and cheaper method of obtaining judgment where the defendant is not served personally than can be had in ordinary cases of service by publication under Chapter 299. It also speeds up the former procedure in Chapter 291, where in old § 291.06 a fourteen to thirty day adjournment was required and the notice had to be published twice.

No constitutional question of notice sufficient to satisfy the requirement of due process under the 14th Amendment should be presented by the new procedure, even though it does not involve publication. In the first place, where service other than personal is had, the judgment is limited to restitution of the premises. In Mulliken v. Meyer the Supreme Court of the United States said:

Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice (McDonald v. Mabee, 243 U.S. 90) implicit in due process are satisfied.

Such decisions as Mullane v. Central Hanover Bank and Trust Co., make it quite clear that the fundamental consideration in passing upon the sufficiency of notice is whether the notice is reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to defend. Service by mail and posting are actually superior in this respect to immediate notice by publication.

15 311 U.S. 457 (1940).
17 121 Wis. 127, 281, 99 N.W. 909 (1904).
§ 299.21(3). Trials; Jury Demand. The only change adopted with reference to trial by jury in its application to eviction actions is a restriction on the time within which a jury demand may be made. Under Chapter 299 practice, trials are to the court in the absence of a jury demand. Under § 299.21 a jury must be demanded on the return day or within 20 days of joinder of issue. To discourage jury trials in eviction cases the amendment to § 299.21(3) (a) requires the making of a jury demand at or before the time of the joinder of issue in all eviction cases. Practically, this means that the defendant would have to demand a jury on the return date or trial would be to the court.

Consideration was given to the abolition of jury trials in eviction cases, but it appears that such is not constitutionally possible. Article 1, § 5 of the Wisconsin Constitution provides:

The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law.

It appears that, however denominated, an action to remove a tenant from real property is an action at law. In Harrigan v. Gilchrist, our court said, at page 281:

A statutory action may or may not be an action at law according as the statutory incidents conform to one or the other from a common law standpoint. . . . The only right of trial by jury guaranteed by the constitution is the right as enjoyed at the time the constitution was adopted. There is no such right as regards a statutory action unless such action is coupled with statutory incidents indicating that it is strictly legal in character, or the remedy of trial by jury is expressly given by the statute.

Thus it appears that whether a statutory action such as unlawful detainer is or is not triable by a jury is to be determined, in the absence of express statutory provision therefor, with reference to whether its general characteristics are those of an action at law or of a suit in equity. The statutory action of unlawful detainer has generally been held to be an action at law. "While not a common law action, but rather a remedy in derogation of the common law, it (unlawful detainer) is an action at law relating to real property sounding in tort." Our court has pointed out that unlawful detainer actions are legal in nature. Of course, there are authorities for the proposition that an unlawful detainer action is a purely statutory remedy. However, though statutory, it appears to be the type of action "coupled with statutory incidents indicating that it is strictly legal in character," which is the test laid down in

1971
the Harrigan case. One of the incidents not mentioned in the cases is the fact that the judgment is not self-executing, requiring a writ of restitution to carry into effect the judgment of the court.

Whether or not an unlawful detainer action is an action at law within the constitutional provision, it appears that a jury trial in a statutory summary proceeding to remove a tenant is guaranteed by Article 1, § 5 on the second ground mentioned above, namely, that the right to trial by jury in such cases existed at the time of the adoption of the constitution in 1848 and must "remain inviolate."

The action for unlawful detainer has existed in Wisconsin in almost the same form since 1839.21 Section (3) of the "Act to Prevent Forcible Entries and Detainers" provided for trial by jury in a statutory unlawful detainer procedure not unlike present Chapter 291. In fact, the statute required the justice, at the same time that he issued the summons to the defendant, to "issue a percept to the sheriff or any of the said constables, commanding him to cause to come before him twelve discreet men of lawful age..." to serve as the jury. The Wisconsin Supreme Court has considered the meaning of the constitutional provision that the right of jury trial shall remain inviolate. In Stockhausen v. Oehler,22 the court said at page 282:

Our constitution provides that the right of trial by jury shall remain inviolate. And this court has held that that provision means the right of jury trial as it existed in the territory of Wisconsin at the time of the adoption of the constitution.

Again, in LaBowe v. Balthazor,23 the court quoted with approval from Norval v. Rice24 where the court held that the term "remain inviolate" means that trial by jury shall be available in every case subsequent to the constitution where it was available prior to its adoption under territorial law and "according to the course of the common law," as guaranteed in Article 2 of the Northwest Ordinance of 1787.

Because of the grave constitutional question presented, and because the whole question is probably largely academic when we consider the number of jury demands that will be made, the revision preserves trial by jury subject to the restrictive demand procedure.

§ 299.25(10)(b) Costs. This amendment merely provides that in eviction cases where a money judgment for damages is also sought, costs will be awarded measured by the amount of the money judgment. In all other eviction actions costs are set at $10.00.

§ 299.27 Adjournments. Under 299 practice, the defendant is entitled to one adjournment of right for at least seven days, with the possibility of other adjournments for cause shown. The eviction amend-

---

22 185 Wis. 277, 201 N.W. 823 (1925).
23 180 Wis. 419, 193 N.W. 244 (1923).
24 2 Wis. 22 (1853).
ment to § 299.27(1) precludes adjournment except for cause shown unless with the consent of the plaintiff; this, again, to prevent delay. By comparison with old Chapter 291 where, in § 291.08, adjournments were in the discretion of the court, cause must now be shown to obtain an adjournment. It is felt that in eviction cases, where there is seldom a triable issue, the defendant should be required to obtain the plaintiff's consent or show cause to secure an adjournment.

§ 299.30 Appeals. There is no substantial departure from current appeal practice in this section, although it has been substantially rewritten for clarity. A separate section, new § 299.30(3), was written to cover appeals in eviction actions not tried to a jury of twelve. It preserves the 10-day limit on appeal now found both in Chapters 291 and 299. The procedure for staying a writ of restitution pending an appeal found in (3)(b) was borrowed from § 291.11 and 291.13, with, however, modernization and broadening of language to include any writ of execution issued on a combined possession-money judgment, as well as the writ of restitution. The manner of stopping the execution of an already issued writ, either of restitution or execution, is simplified by requiring only the service on the sheriff of the notice of appeal and undertaking approved by the court.

Old 299.30(3) is renumbered sub. (4), and reference to eviction actions is removed therefrom. Procedure of sub. (4), of course, controls eviction appeals except for the time limitation, and preserves the rule of review on the record in eviction cases tried under Chapter 299, excluding the possibility of trial de novo as is had in appeals from justice court under § 291.14.

Newly Created Provisions of Chapter 299

§ 299.40 General Provisions on Eviction. Sub. (1) makes it clear that an eviction action is a civil action to remove the person and property of a person not entitled to the possession or occupancy of real property.

Section 299.40(2) is the provision permitting joinder of rent claims discussed above. Sub. (3) makes it clear that eviction procedure cannot be invoked until the notice requirements of Chapter 704 have been complied with, if they are applicable.

§ 299.41 Complaint in Eviction Actions. Oral pleading is allowed generally under Chapter 299 unless prohibited locally by court rule. Most county courts in populous areas have by court rule required written pleadings. This new section requires a written and verified complaint statewide in all eviction cases.

It was determined that a written statement of the cause of action was necessary in eviction cases for several reasons. A written complaint

permits a far speedier determination on the return day than is possible if the court must take oral pleadings in each case. The eviction remedy can be extremely drastic, and it is felt that the plaintiff should be required to state under oath that grounds for eviction exist. The requirement of a writing describing the property tends to avoid error in the issuance of writs of restitution.

A question arose as to whether an affidavit would be preferable to a complaint. Actually, there is little more involved in the drawing of a complaint than in the drafting of an affidavit. A complaint with a prayer for relief tends to give a better notice to the defendant of the object of the action. Further, the use of a complaint rather than an affidavit tends to keep the practice under Chapter 299 as uniform as possible.

The section further prescribes the content of the complaint in terms generally taken from § 291.05. However, any questions as to whether the property must be described by legal description is eliminated by the provisions, borrowed from the Uniform Commercial Code, that any description of real estate "is sufficient whether or not it is specific if it reasonably identifies what is described," with the addition that a description by street name and number is sufficient. It should be noted that § 299.44(4) provides that the writ of restitution describe the property in the same manner as described in the complaint. The study committee felt that a reasonable description less formal than a legal description would be sufficient in both instances.

§ 299.42 Service and Filing in Eviction Actions. This section requires that the complaint be served with the summons in cases where personal service is had. Where service is had by posting and mailing, the matter is covered by § 299.16(3).

No time limit for filing the summons and complaint is specified, and therefore the general practice under Chapter 299 and Title XXV will govern.

§ 299.43 Defendant's Pleading in Eviction Actions. There seems to be no necessity for written pleadings by the defendant, and this section permits oral pleading. The section is silent as to when the defendant pleads in an eviction action and is deliberately so, because the time of pleading may vary depending upon how service is accomplished. It was felt that there would be no misunderstanding of the time of pleading because the matter is adequately covered by § 299.20, which provides that "on the return date of the summons or any adjourned date thereof the defendant may answer, demur, or otherwise plead to the complaint."

This section authorizes the defendant to put at issue any of the allegations of the plaintiff's complaint, including title, thus putting to rest the old doctrine that in unlawful detainer actions the question of title does not arise and cannot be put in issue by the pleadings.26 This re-

26 See Newton v. Leary, 64 Wis. 190, 25 N.W. 39 (1885).
striction arose from the old concept that the summary action of unlawful detainer should be available only to try the right to possession and not the right to title. Whether this limitation was caused by, or the effect of, the denial of jurisdiction to justices of the peace to try title, the matter is at this moment immaterial. Of course, right to possession is the ultimate issue in an eviction action, but where the resolution of that issue necessitates the trial of title, there is no reason, when the action is filed in a competent court of record, to limit the issues triable upon some historical notion that the judge should be presumed incompetent to determine certain matters which may be material to the result.

§ 299.44 Order for Judgment and Writ of Restitution. Section 299.44(1) relating to the order for judgment is self-explanatory. The writ of restitution provisions require a more detailed explanation.

The basic practice is lifted from old Chapter 291. However, the great difficulty with Chapter 291 is its vagueness in describing the details of the procedure. This defect is sought to be cured by the provisions of this and the next section. The recommended procedure is based to a large extent upon the practice which has evolved over the years in the office of the Sheriff of Milwaukee County. It is felt that the procedure recommended is readily adaptable state-wide. Some of the restrictions written into this and the next section are derived from abuses observed over the years by veteran employees of the Milwaukee Sheriff’s Office and deputy sheriffs assigned to restitution cases.

Section 299.44(2) provides that the court order the issuance of a writ of restitution at the time of ordering the entry of judgment. Judgment is entered under Chapter 299 by the ministerial act of the clerk immediately following the order for judgment from the court. The writ of restitution may then normally issue on the same day as the case is determined. This procedure rejects the concept that there should be a delay in time between the entry of judgment and the authorization of a writ. It reflects the policy determination of the study committee that the stay proceedings in sub. (3) adequately take care of this matter and that an automatic holding back of the writ for any period of time would be inadvisable and an unnecessary restriction upon the plaintiff.

Sub. (2) also contains the important restriction that the writ may be executed only if delivered to the sheriff within 30 days after entry of judgment. This restriction results from an abuse noted by the sheriff’s department with respect to the issuance of writs of restitution on dormant unlawful detainer judgments. Heretofore the plaintiff might enter judgment, and even collect rent thereafter, issuing a writ of restitution after the 30-day period.

27 Gates v. Winslow, 1 Wis. 650 (1853).
28 The author, as Research Reporter, is grateful to Mr. Al Lynch of the Milwaukee County Sheriff’s Department who drew upon 44 years of experience in restitution cases for many of the suggestions incorporated in these sections.
many months later when the defendant defaults on some rental obliga-
tion not the subject of the action.

Section 299.44(3) relates to stays of the writ of restitution. Some
review of the existing law is necessary, although it is doubtful whether
any provision in old Chapter 291 on this subject applied, after the effec-
tive date of Chapter 299 in 1962, to an unlawful detainer action under
Chapter 299. Section 291.08 authorizes, in effect, a stay before judgment
of up to 90 days by posting an undertaking and thereby accomplishing
adjournment of the action. This practice is abolished in the revision,
and the stricter adjournment rules of Section 299.27 are adopted. Old
\$ 291.15 authorizes a stay of proceedings after judgment if the defen-
dant pays all of the rent due or posts a bond. This section permits the
entire proceeding to be frustrated and is, in practice, simply a method
by which a slow-paying tenant can remain in premises. Sub. (3) of
\$ 299.44 is the replacement of this section.

There are two possible alternatives in approaching this matter. One
might be to prohibit stays of the writ of restitution so that its issuance
upon entry of judgment could not be prevented; such a rule would be
coupled with the requirement that the eviction action could not be com-
mented for a period of time subsequent to the accrual of action, for
example, 30 days, after the default in the payment of rent on account of
which the three-day notice is served. This would give the tenant an
opportunity to find another place to live and accomplish his moving. It
would eliminate any discretion in the court to weigh the equities after
judgment, and to decide in each particular case whether a stay was
warranted and for what period of time. The study committee found
some support among attorneys for a procedure of this type, but it
appears that, while this procedure would make for uniformity and
certainty, giving the tenant an “equity of redemption” in a certain sense,
the practical effect of such a rule would be to provide license for slow-
paying and defaulting tenants. The tenant would know in every case that
he had 10, or 20 or 30 days grace before the landlord could commence
an action against him, and the three-day notice would become in effect
a 13, or 23, or 33 day notice.

The other alternative is expressed in Sub. (3). The action may pro-
cceed quickly to judgment, and then the court has the power to entertain
a motion to stay the writ of restitution to alleviate hardship in particular
cases. The condition attached to the stay, namely payment of rent due
and to become due, is essentially the same as that expressed in \$ 291.15.

The subsection also provides for a procedure in the event that the
conditions of the stay are breached.

Sub. (4) provides a form for the writ of restitution which is sub-
stantially the form of the present writ found in \$ 291.17, with moderni-
zation of language and adaptation to county court practice.
The author originally felt that it might be advisable to provide, in addition, for a combined writ of restitution and of execution for use in actions where a combined possession-rent judgment was recovered. The utility of such a writ would principally be in permitting the orderly return of an unsatisfied execution for the purpose of invoking other creditors remedies to collect the money judgment. However, the sheriff's office in Milwaukee thought that such a form would be inadvisable because of the confusion that it would cause to deputy sheriffs. The author did not, therefore, recommend such a procedure to the study committee. In any event, the plaintiff with a possession-rent judgment is entitled to a regular writ of execution under Chapter 272 which could be executed along with the writ of restitution.

§ 299.45 Execution of Writ of Restitution. Sub. (1) makes it clear that the sheriff has no discretion to withhold execution of the writ when his fee is paid. However, it authorizes him to require a deposit to cover expenses of removal, codifying a long-standing practice of the Milwaukee County Sheriff. Also codified is the Milwaukee practice of requiring a deposit to prepay the services of the deputies in accomplishing the removal under § 59.28(24). No attempt is made in the statute to specify the amount of the deposit because circumstances vary so widely, even within a given county. Section 59.28(25) presently provides a method for settling disputes between the sheriff and the plaintiff by submitting the question to the judge. Presumably these are settled summarily, and no attempt is made in this section to amplify the provisions of § 59.28(25).

Sub. (2) attempts to describe how the sheriff should go about executing the writ of restitution. Chapter 291 is presently silent in this point, and the case law is meager. The court held in Andrea v. Thatcher30 that an officer to whom a writ of restitution was issued, who within an hour of the entry of judgment ejected the defendant and his family and their property into the street, negligently or willfully damaging the property of the defendant and without giving the defendant any time to remove his family, was liable to the defendant for punitive damages. In Gaertner v. Bues31 the court held that the sheriff must use ordinary care in the execution of a writ of restitution. This standard has been adopted in § 299.45(2). The sheriff is required to use ordinary care in the removal of persons and property from the premises and in the handling and storage of property removed, but he is authorized to use such reasonable force as may be necessary in accomplishing the removal.

Section 299.45(3) attempts to detail the manner of removal and the disposition of removed goods. Great difficulty was encountered in the

30 24 Wis. 471 (1869).
31 109 Wis. 165, 85 N.W. 388 (1901).
drafting of this section because of the degree of flexibility which sheriffs insist is necessary in order to efficiently handle restitution cases.

The sheriff is not normally equipped with the vehicles or manpower necessary to accomplish the removal, and so he must be authorized to hire a mover or trucker to accomplish the job. Sub. (3)(a) gives him this authority. The discretion of the sheriff as to whom the mover or trucker should be cannot be restricted, for example, to licensed contract carriers. The study committee was advised that some of the moving jobs undertaken by sheriffs in the state involve moving goods which are so contaminated, dirty, and undesirable that great difficulty is encountered in finding someone who will move them. It is, therefore, necessary that the sheriff be authorized to find whomever he can to move the goods. The only restriction imposed upon him in this statute is that he exercise ordinary care in making the selection.

Many of the comments set forth above in discussing (3)(a) would apply to (3)(b), and constitute the reason for the very general language. The only requirement placed upon the sheriff is that he exercise ordinary care in causing the defendant’s property to be taken to “some place of safekeeping within the county.” He cannot be restricted to such places as licensed warehouses because much of what is removed is not acceptable by them. Therefore, he simply has to scout around until he can find a place to store the goods. The balance of Sub. (3)(b) is largely self-explanatory. Risk of loss and responsibility for storage charges passes to the defendant after delivery of the goods to the place of safekeeping, substantially codifying Gaertner v. Bues.\textsuperscript{32} The sheriff’s obligation to notify the defendant of the whereabouts of his property is discussed below.

Sub. (3)(c) codifies a practice of the Milwaukee County Sheriff which the department considers essential to an efficient administration of eviction laws. About 600 writs of restitution are issued in Milwaukee County annually. In about 88 per cent of these cases the tenants move voluntarily upon notification by the sheriff that a writ has been issued. In the other 12 per cent of the cases the sheriff is forced to physically remove the defendant and his property from the premises. The usual experience of the Milwaukee County Sheriff’s office is that in many of these cases the property found on the premises upon execution of the writ has no value. Under these circumstances no warehouse can be found which will accept the goods because the warehouse can never expect to recoup its storage charges upon foreclosure of a warehouseman’s lien. Further, the sheriff’s “informal” places of storage, other than junk yards, will not accept such property. The study committee was advised that some sheriffs will leave such property on the public way in front of the premises involved, simply abandoning it.

\textsuperscript{32} Id.
This seems to be less advisable a procedure than that followed by the Milwaukee County Sheriff of removing such property to junk yards, which is the procedure authorized by sub. (3)(c). The difficulty with this subsection is that the sheriff has cast upon him the burden of determining whether the property has any value. In theory such a procedure might be criticized, but in practice it is occurring every day in the execution of writs of restitution, and this subsection merely recognizes the existing practice. The sheriff, of course, is bound to exercise ordinary care in making the determination. A provision considered important by the Milwaukee sheriff's office is found in the last sentence of the subsection, which excuses him, in the exercise of such care, from searching apparently valueless property for hidden or secreted articles of value. Attention is directed to the fact that under this draft the sheriff would be authorized to remove to junk yards property without monetary value, even though it might have sentimental value to the defendant. The notice provision of the subsection is discussed below.

Consideration was given to a possibility that worthless goods removed from premises to the public street be considered a public nuisance abatable as such, but it appears that so many complications of procedure would result from such an approach that this section would become unworkable.

The study committee rejected a proposal to codify a practice of the Milwaukee County sheriff which his office stated was commonly resorted to in unlawful detainer cases. The defendant being evicted finds a new place to live, and when the sheriff arrives to execute the writ he is faced with the request to move the property to the new place of abode of the defendant. The sheriff's office felt that removal under such circumstances to a warehouse or other place where the defendant may redeem the property, then carting it to his new residence, often did work an unnecessary hardship and in fact could be penal in character. Therefore, the Milwaukee County Sheriff honored such requests provided that the moving expense does not exceed the amount chargeable to the plaintiff for removal to the warehouse or other place of safekeeping. If the cost of removal to the defendant's new premises exceeded such cost, the excess was chargeable to the defendant and had to be prepaid by him if the mover declined the extension of credit. This practice actually inures to the benefit of the sheriff because it eliminates his exposure to a negligence claim in the selection of a depository for the goods. In rejecting a specific section on this procedure, the committee did not condemn or abolish the practice because the sheriff, under § 299.45(3)(b), can determine the new residence to be a place of safekeeping if it is within the county.

Sub. (3)(e) makes it clear that deputy sheriffs may perform the functions of the sheriff under the section.
Section 299.45(4) governs the manner in which the defendant is notified of the whereabouts of his property, and the only practical type of notice, by mail to last known address even if it is the premises from which he was evicted, is adopted.

**Conclusion**

The revision of Wisconsin eviction procedure was intended to update and modernize that procedure, to locate it entirely within Chapter 299 of the statutes, to resolve conflicts arising out of the court reorganization law, and to write a procedure where previously it was necessary to rely upon custom and usage. The new procedure protects the rights of tenants and at the same time protects the interest of the landlords in that opportunities to delay eviction are substantially reduced. For the first time in Wisconsin, the statute defines the rights and duties of tenants with regard to property removed from the premises. Hopefully the statute will produce a workable and efficient procedure for handling of eviction cases after its effective date—July 1, 1971.