

## CHAPTER 301.

## COMMENCEMENT OF ACTIONS, PLEADINGS AND PROCEEDINGS.

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**301.01 Action, how commenced.** Actions may be instituted before a justice either by the voluntary appearance of the parties or by service of summons or warrant.

**301.02 Justice court process; summons in blank, filing.** (1) All process issued by a justice or by an attorney shall run in the name of the "State of Wisconsin," be dated on the day it is issued, be signed by the justice or by the attorney, and shall be directed to the sheriff or any constable of the county. The process shall contain the names of the plaintiff and defendant, the name of the justice and the county where he resides, the place where returnable and the return date and hour.

(2) Justices may sign any summons in blank and deliver it to any licensed attorney, to be issued by the attorney, and upon the filing of such summons with the justice who signed it, the justice shall forthwith docket the case and his docket entries shall have the same effect as if made at the time of issuing the summons. No summons so issued shall be valid unless the attorney indorses thereon his name or the name of his firm in substantially the following form: Issued by A. B., plaintiff's attorney.

(3) A summons shall be filed with the justice before whom returnable at least 24 hours before the return time specified therein. If not so filed within said time the summons thereby becomes void as to the plaintiff but the defendant may file his copy of the summons and shall be entitled to judgment of dismissal and costs. In case the summons is issued and signed by an attorney subsection (2) shall apply to filing, docketing and effect of such summons.

**301.03 Summons first process.** Except in actions begun by warrant, the first process in actions shall be a summons in the form provided by section 301.17, returnable not less than 6 nor more than 15 days from its date.

**301.05 Summons returnable in three days.** A justice shall issue a summons returnable in 3 days where he is satisfied from the affidavit of the plaintiff or other competent person that the plaintiff has a cause of action upon contract against the defendant and that he is a nonresident of the county or is about to remove from the county with intent not to return thereto to reside, or is about to remove, convey or dispose of his property fraudulently so that the plaintiff will be in danger of losing his demand unless the summons be granted. No attorney shall issue a summons under this section.

**301.06 Action by or against town.** An action by or against any town or town officer in his official capacity shall be commenced in some other town in the county except that an action may be commenced by a town for violation of a town ordinance before a justice in such town.

**301.07 Fictitious and partnership names of defendants.** When the name of any defendant is not known to the plaintiff, an action may be commenced against him by a fictitious name; but the justice may amend the proceedings according to the truth of the matter and shall thereafter proceed as if the defendant had been sued by his right name. In an action against a partnership, when the names of the partners are not known to the plaintiff or the person who makes affidavit on his behalf, the action may be commenced in the partnership name and all proceedings therein shall be in that name until the names of the partners are known, when they may be substituted for the partnership name.

**301.08 Summons, how served on individuals.** A summons, except when issued against a corporation, shall be served by delivering a copy thereof to the defendant, if he be found, and if not found, by leaving a copy thereof at his usual place of abode in the presence of some one of the family of suitable age and discretion, who shall be informed of its contents, at least six days before the time of the appearance therein mentioned; a summons returnable in three days must be served personally, and not less than two days before the time of the appearance therein mentioned.

**301.09 Service on corporations.** Unless otherwise provided by law, actions against corporations shall be commenced by summons, which shall be served within the county by leaving a copy thereof with any officer, agent or person upon whom a circuit court summons against such corporation may be served, at least 6 days before the return day thereof; and such service shall have the same effect as personal service upon a natural person.

**301.10 Warrant, when to issue.** The plaintiff is entitled to a warrant to arrest the body of the defendant upon filing with the justice an affidavit, made by him or in his behalf, showing to the satisfaction of the justice either:

(1) That the plaintiff has a demand against the defendant for money collected by him as a public officer;

(2) That the plaintiff has a demand against the defendant for damages arising from the misconduct or neglect of the defendant in any professional employment or public office;

(3) That the defendant has committed a trespass or other wrong, specifying the nature thereof, to the damage of the plaintiff; or

(4) That the defendant has incurred a penalty or forfeiture by the violation of some law, specifying the same, for which the plaintiff has a right to prosecute. The affidavit shall state the facts within the knowledge of the affiant, constituting the grounds for a warrant.

An affidavit filed with the police justice of the peace of a city for a warrant for the arrest of a person on a charge of violating an ordinance against drunken driving, and thereby instituting proceedings for the recovery of a forfeiture, which affidavit was made by "Officer" E. S. and referred to him as the "complainant," and did not state whom or what he represented nor that he made the affidavit on behalf of the city which, in the subsequent proceedings, appeared as plaintiff, did not satisfy the re-

quirement that such an affidavit be made by the plaintiff or in his behalf; hence the police justice thereby acquired no jurisdiction over the subject matter of the action and the proceedings based on the defective affidavit were void for lack of such jurisdiction, requiring reversal of the judgment of conviction. (*Wiley v. C. Aultman & Co.* 53 W 560, and other cases, followed; *State v. Nergaard*, 124 W 414, distinguished.) *South Milwaukee v. Schantzen*, 258 W 41, 44 NW (2d) 628.

**301.11 Contents of warrant.** The warrant shall command the sheriff or constable to take the body of the defendant and bring him forthwith before the justice to answer the plaintiff, and shall require the officer to notify the plaintiff immediately of the arrest.

**301.12 Warrant, how served.** The warrant shall be served by arresting the defendant and taking him before the justice who issued it; but if, on the return thereof, he is absent or unable to try the action the officer shall forthwith take the defendant to the nearest justice of the county, who shall proceed as if the warrant had been issued by him.

**301.13 Detention of defendant.** When a defendant is brought before a justice on a warrant he shall be detained by the officer for 12 hours, and no longer, unless within that time he has been released by the direction of the justice, or the trial of the action has been commenced or has been delayed at the instance of the defendant.

**301.14 Return of service.** Every officer serving any process authorized by Title XXVIII shall return thereon in writing the time and manner of service and sign his name and add his official title.

**301.15 Penalty for neglect to serve or for false return.** If any officer, without showing good cause therefor, fails to execute any process delivered to him and make due return thereof, or makes a false return, he shall, for every such offense, pay to the party injured \$10 and all damages the party sustained by reason thereof.

301.17 Summons. A summons may be in substantially the following form:

State of Wisconsin, } In Justice Court
.... County. } Before ...., Justice of the Peace

The State of Wisconsin, to the sheriff or any constable of said county:

You are hereby commanded to summon A. B., if found within this county, to appear before .... a justice of the peace in said county, at his office at .... (location of office) on the .... day of ....., 19.., at .... o'clock in the ....noon, to answer to C. D., plaintiff, to his damage \$200 or under.

Dated ....., 19...

...., Justice of the Peace.
(or Attorney at Law, with office at ....)

301.19 Civil Warrant. A warrant may be in substantially the following form:

State of Wisconsin, } In Justice Court
.... County. } Before ...., Justice of the Peace

The State of Wisconsin, to the sheriff or any constable of said county:

You are hereby commanded to take the body of A. B., if found within your county, and bring him forthwith before the undersigned, justice of the peace in said county, at his office at .... (location of office), to answer to C. D., plaintiff, to his damage \$200 or under; and you are commanded to give due notice thereof to the plaintiff.

Dated ....., 19...

...., Justice of the Peace.

301.20 Appearance of parties. Sections 260.13 to 260.17 apply to actions in justice court. Any party, except a minor, may appear by an attorney, agent or in person and conduct or defend any action. A party authorized to appear by attorney or agent may appoint any person such agent, and his authority may be written or verbal and shall, in all cases, when required by the justice, be proved by the agent himself or by other competent testimony unless admitted by the opposite party.

301.21 Minor to sue by next friend. An action instituted by a minor shall be dismissed (on motion of the defendant) unless a next friend for him is appointed. Whenever requested the justice shall appoint some suitable person, consenting thereto in writing, named by the plaintiff to act as his next friend in the action. The appointee shall be responsible for the costs therein.

301.22 Guardian for minor defendant. Except for proceedings to recover forfeitures for violations of county or municipal ordinances enacted in conformity with section 85.84, after the service and return of civil process against any minor the action shall not be further prosecuted until a guardian for him has been appointed. Upon the request of a defendant the justice shall appoint some person, consenting thereto in writing, to be guardian of the defendant in the action; and if the defendant does not appear on the return day of the process or if he neglects or refuses to nominate such guardian the justice may, at the request of the plaintiff, appoint any suitable person as guardian. The guardian shall not be liable for costs.

History: 1951 c. 259.

301.23 Consent of next friend and of guardian. Substantially the following forms may be used under sections 301.21 and 301.22:

.... County

I hereby consent to be the next friend of A. B., a minor, in an action against C. D., and hereby promise to pay C. D. such costs as he recovers against A. B. in said action.

(signed) John Styles.

John Styles is accordingly appointed.

...., Justice of the Peace.

A. B. } In Justice Court
v. } Before ...., Justice of the Peace
C. D. }
.... County

I consent to be guardian of C. D., a minor, the defendant in the above entitled action. (signed) John Styles.

John Styles is accordingly appointed.

...., Justice of the Peace.

Dated ....., 19...

**301.24 Removal for prejudice of justice.** If the defendant, on the return day of the process and before any proceedings are had on his part, makes oath that, from prejudice, he believes the justice will not decide impartially in the action and pays to the justice 75 cents for making a copy of his docket and transmitting the papers, then the justice shall immediately transmit all the papers in the action to the nearest justice in the same county who can be found, who shall proceed in the action as if the said action had been commenced before him. This section shall not extend to a second removal.

**History:** 1951 c. 247 s. 55.

**301.245 Removal to other court.** In counties having a population of less than 500,000, and in which a small claims court or a civil, municipal, superior or county court empowered to exercise civil jurisdiction has been established, the defendant in any action brought in justice court may, on the return day of the process, transfer the cause to the small claims court or to such civil, municipal, superior or county court of said county. Upon receipt of such a request, accompanied by a fee of 75 cents, the justice shall forthwith transmit all the papers in such cause to the clerk of said court of said county.

An action commenced before a justice of the peace, removed to a county court having a justice court branch, proceeds as if originally commenced in that branch and not as an action commenced under the limited circuit court jurisdiction of such county court. **39 Atty. Gen. 263.** When case is removed from justice court to county court with extra civil jurisdiction the clerk of circuit court must collect the suit tax and clerk's \$2 advance fee upon filing the papers. **39 Atty. Gen. 613.**

**301.25 Effect of trial after change of venue.** After the parties have tried the action upon the merits, before any justice to whom the papers have been transmitted, the judgment therein shall not be invalid for any irregularity in the proceedings for removal.

**301.26 If justice material witness or of kin to party.** If, previous to joining issue in any action, either party, his agent or attorney makes affidavit that the justice before whom the action is pending is a material witness, without whose testimony he cannot safely proceed to trial, or if it appears that the justice is near of kin to either party, the justice shall transmit the action and all papers therein to some other justice of the county, who shall thereupon proceed as if the action had been commenced before him.

**301.27 Original and garnishee actions stay together.** A garnishment action and the original action are always in the same court. If the venue of either is changed, the other action (by operation of law) is also changed and all the papers go with it. The justice to whom the actions are moved shall proceed as though the actions had been commenced before him.

**301.28 Proceedings if title to land is in question.** The defendant may in his verified answer allege facts showing that the title to lands will come in question.

**301.30 Cause to be removed to circuit court.** Upon filing such verified answer the justice shall immediately make an entry thereof in his docket and cease further proceedings in the action; he shall collect from the plaintiff \$1 for state suit tax and \$2 clerk's fees and certify and return to the circuit court a transcript of his docket relating to the action, and all process and other papers therein, and pay to the clerk of said court said state tax and clerk's fees.

**301.31 Jurisdiction of circuit court.** Upon filing the proceedings and papers in the office of the clerk of the court, the circuit court shall proceed therein to judgment and execution the same as if the action had been originally commenced therein.

**301.32 Justice's office to be open, when.** At the hour named for the return thereof, in any process issued by a justice, or issued and signed by an attorney, and at the hour to which any action is adjourned, the justice shall be present and have his office open. The justice shall call the action for trial at the hour specified in the process or by the adjournment. A party who does not appear when the action is called is in default.

**301.33 Process returnable on Saturday, continuance.** When a process against a defendant who habitually observes Saturday instead of Sunday as a day of rest, is returnable on Saturday, he shall be entitled to have the action continued to the Monday following at the same hour, upon filing with the justice, at or before the return of the process, an affidavit stating that he habitually observes Saturday instead of Sunday as a day of rest; and he shall be entitled to all his rights on the adjournment day the same as if it were the return day of the process.

**301.34 Join issue before adjournment.** The parties shall plead before an adjournment shall be granted unless they consent to an adjournment without joining issue, except as provided in sections 301.33 and 301.38.

**301.35 Rules of pleading and procedure.** The following rules of pleading and procedure shall be observed in justice court:

- (1) The pleadings are the plaintiff's complaint and the defendant's answer.
- (2) The pleadings may be oral or written; if oral, the substance shall be entered by the justice in his docket; if written, they shall be filed by him and a reference to them made in the docket.
- (3) The complaint shall state, in a plain and direct manner, the facts constituting the cause of action.
- (4) The answer may contain a denial of the complaint or of any part thereof and also state, in a plain and direct manner, facts constituting a defense or counterclaim. The counterclaim must be a claim which is within the jurisdiction of a justice court. The pendency of an action commenced by an ordinary summons shall not be pleaded in abatement of an action commenced by summons returnable in 3 days or by warrant.
- (5) Pleadings must be such as to enable a person of common understanding to know what is intended.
- (6) Either party may demur to a pleading or any part thereof where it is not sufficiently explicit to enable him to understand it, or it contains no cause of action or defense although it be taken as true.
- (7) If the justice deems the objection well founded he shall order the pleading to be amended, and if the party refuses to amend, the defective pleading or part thereof shall be disregarded.
- (8) In an action or defense founded upon an account or instrument for the payment of money only, it shall be sufficient for a party to deliver the account or instrument to the justice and to state that there is due from the adverse party a specified sum which he claims to recover or set off.
- (9) A variance between the proof on the trial and the allegation in a pleading shall be disregarded unless the justice is satisfied that the adverse party has been misled to his prejudice thereby.
- (10) The pleadings may be amended at any time before or during the trial when such amendment will promote justice. A defendant who fails to appear on the return day of the process may be permitted to answer on the adjourned day before trial. If an amendment is made after joining issue or an answer put in after adjournment and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of the amendment or answer, an adjournment shall be granted. The justice may also require, as a condition of an amendment, the payment of costs to the adverse party, to be taxed by the justice; but no amendment shall be allowed over objection after a witness is sworn on a trial if an adjournment thereby will be made necessary.
- (11) The justice may, at the joining of issue, require either party, at the request of the other, at that or some other specified time, to exhibit his account or demand or state the nature thereof so far as may be in his power, and in case of his default preclude him from giving evidence of such parts thereof as have not been so exhibited or stated.
- (12) When the defendant is served with the summons other than by publication or appears, and the plaintiff files a written complaint claiming upon account, and verified as prescribed for verification of pleadings in a court of record, that the defendant is indebted to the plaintiff upon the account alleged in the complaint, in a specified amount, when the same became due, and what payments have been made and when made, if any, and the true balance due, with a copy of the account affixed, shall be evidence of the facts therein stated.

**301.36 Offer of judgment; trial against codefendants.** At any time before trial, any defendant may offer in writing to permit the plaintiff to take judgment against him for the sum, damages or things stated in said offer, with costs. Before trial the plaintiff may accept the offer in writing. The offer and acceptance shall be filed with the justice and thereupon he shall enter judgment accordingly. The entry of judgment shall not prejudice the right of the plaintiff to proceed to trial and judgment against any other defendant.

**301.37 Proceedings if offer of judgment refused.** If the plaintiff does not accept the offer of judgment it shall not be considered upon the trial; but if the plaintiff fails to recover a more favorable judgment than he would have done by accepting the offer he shall not recover costs made after the offer, but shall pay costs thereafter made.

**301.38 Adjournment, defendant not appearing.** At the time of the return if the defendant does not appear, the justice shall, upon the application of the plaintiff, adjourn the action for such time as he requests, not exceeding 90 days.

**301.39 First adjournment when parties appear.** At the time of the return of the process or of joining issue without process the justice may adjourn the action not exceeding 3 days and shall, upon application of either party, adjourn it for such time as may be requested, not exceeding one week; but if sufficient cause is shown on oath by either party

the justice shall grant an adjournment for a longer time, but not exceeding 90 days. No adjournment of an action commenced by summons or warrant of attachment returnable in 3 days, when the defendant appears, shall be granted on motion of the plaintiff unless he shows cause therefor as provided in section 301.40.

**301.40 Second adjournment.** No adjournment after the first shall be allowed upon the application of a party unless such party shall satisfy the justice by his own oath or the oath of some other person that he cannot safely proceed to trial for want of some material witness or testimony (naming such witness or testimony), that he has used due diligence to obtain the same (setting forth what diligence has been used), and that he believes if an adjournment be allowed he will be able to procure such testimony or witness in time to be used upon the trial.

**301.41 Adjournment, return for what time; effect of, legal holiday.** Every adjournment for cause shall be for such reasonable time, not exceeding in all 90 days (unless by consent of parties a longer time is agreed upon) from the return day of the process as will enable the party to procure such testimony or witness and shall be at the cost of the moving party, unless otherwise ordered by the justice; and the justice shall tax the fees of all witnesses who are in attendance for the adverse party, except as provided in section 307.02 (2). If any process is returnable on or any adjournment is made to a legal holiday the cause shall stand adjourned until the next secular day, when it shall be proceeded with as if the return or adjournment had been made to that day.

**301.42 Adjournment if defendant under arrest.** If an action commenced by warrant for arrest is adjourned by the consent of both parties or on the application of the plaintiff, the defendant shall be discharged; but if the action is adjourned upon the application of the defendant he shall continue during the time of the adjournment in the custody of the officer unless he gives an undertaking executed in his behalf by a surety approved by the justice to secure the plaintiff's demand and costs, conditioned that if judgment is given against him and execution is issued against his person he will render himself up on such execution before the return day thereof or in default thereof that he or his surety will pay the judgment but not exceeding \$200.

**301.44 Action on undertaking.** In any action brought upon such undertaking the plaintiff shall not recover unless he shows that an execution upon the judgment issued within 6 days after its entry against the person of the defendant, and that the return shows he could not be found.