

CHAPTER 301.

COMMENCEMENT OF ACTIONS, PLEADINGS AND PROCEEDINGS.

301.01	Action, how commenced.	301.25	Effect of appearance and trial.
301.02	Justice courts; summons in blank, filing.	301.26	If justice material witness.
301.03	Summons first process.	301.27	Garnishee proceedings follow action.
301.04	Several defendants in one summons.	301.28	Proceedings if title to land in question.
301.05	Summons returnable in three days.	301.29	Bond to be tendered, or justice to proceed.
301.06	Action by or against town.	301.30	Cause to be removed to circuit.
301.07	Fictitious and partnership names of defendants.	301.31	Jurisdiction of circuit court.
301.08	Summons, how served on individuals.	301.32	Justice's office to be open, when.
301.09	Service on corporations.	301.33	Continuance if process returnable on Saturday.
301.10	Warrant, when to issue.	301.34	Joinder of issue.
301.11	Contents of warrant.	301.35	Rules of pleading and proceeding.
301.12	Warrant, how served.	301.36	Offer of judgment; trial of action against codefendants.
301.13	Detention of defendant.	301.37	Proceedings if offer refused.
301.14	Return of service.	301.38	Adjournment if defendant does not appear.
301.15	Penalty for neglect to serve or for false return.	301.39	First adjournment when parties appear.
301.17	Summons.	301.40	Second adjournment.
301.18	Form where several sued individually.	301.41	Adjournment, return for what time; effect of, legal holiday.
301.19	Warrant.	301.42	Adjournment if defendant under arrest.
301.20	Appearance of parties.	301.43	First recognizance good.
301.21	Infant to sue by next friend.	301.44	Action on recognizance.
301.22	Guardian for infant defendant.		
301.23	Consent of next friend and of guardian.		
301.24	Removal for prejudice.		

301.01 Action, how commenced. Actions may be instituted before a justice of the peace either by the voluntary appearance of the parties or by the process of summons, signed by such justice or by a person licensed to practice as an attorney in a court of record in this state, together with the address of his office, or by warrant signed by such justice. [1935 c. 273]

301.02 Justice courts; summons in blank, filing. (1) All process issued by a justice of the peace 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 of the peace issuing the same or by such attorney, may be under seal or without seal and shall be directed to the sheriff or any constable of the proper county. Said process shall contain the names of the parties plaintiff and defendant, the name of the town, village or city and the county where the justice of the peace resides, and the day, hour, month and year of the return thereof, and if a summons is issued by an attorney such process shall contain the name of the justice of the peace to whom returnable together with the address where returnable.

(2) Justices of the peace may sign in blank any summons and deliver the same to any attorney duly authorized to practice law in Wisconsin, to be issued by such attorney as occasion may require, and upon the filing of such summons at any time before the same is returnable with the justice of the peace having so signed the same, such justice shall forthwith docket the case and his docket entries shall have the same legal force and effect as if made at the time of issuing such summons; provided, that no summons, so issued by any attorney, under the provisions of this section, shall be valid unless said attorney shall indorse thereon his name or the name of the firm of which he is a member, which indorsement shall be substantially in the following form: Issued by A. B., plaintiff's attorney.

(3) Whenever any summons shall be signed in blank by the justice and be issued by the attorney to whom delivered, or whenever any summons shall be issued and signed by an attorney, such summons shall be filed with the justice before whom returnable at least seventy-two hours before the time specified therein as the time of the return thereof, and upon failure to do so the action shall stand dismissed, without costs and in case the summons is issued and signed by an attorney the provisions of subsection (2) of this section shall be applicable with reference to filing, docketing and legal force and effect of such summons. [1935 c. 273]

301.03 Summons first process. In all cases not otherwise specially provided for the first process in actions shall be by summons commanding the officer to summon the defendant to appear before such justice at the time and place expressed in such summons, not less than six nor more than fifteen days from the date thereof, to answer unto the plaintiff.

301.04 Several defendants in one summons. A summons may be issued in favor of the same plaintiff against any number of defendants, and on the return thereof the plain-

tiff may proceed against each defendant severally, and the costs of such summons shall be apportioned among the several defendants.

301.05 Summons returnable in three days. A justice of the peace shall issue a summons returnable in three days in every case where he is satisfied from the facts and circumstances stated in an affidavit of the plaintiff or other competent witness that the plaintiff has a subsisting and unsatisfied cause of action upon a contract, express or implied, against the defendant and that the defendant is a nonresident of the county or he is about to remove from the county with intent not to return thereto to reside, or that the defendant is about fraudulently to remove, convey or dispose of his property so that the plaintiff will be in danger of losing his debt or demand unless such summons be granted. An attorney shall not be permitted to sign any summons provided for in this section. [1935 c. 273]

301.06 Action by or against town. When any action in a justice's court shall be commenced by or against any town or town officer in his official capacity the same shall be commenced before a justice of the peace elected in some other town in the county, except that in towns located in counties having a population of five hundred thousand or more action may be commenced by a town for violation of a town ordinance before a justice of the peace elected in such town. [1939 c. 529]

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 by summons or warrant by a fictitious name, and it shall not be abated for that cause; but the justice may amend the proceedings according to the truth of the matter and shall thereafter proceed therein in the like manner as if the defendant had been sued by his right name. In an action against a partnership, when the names of the several members thereof are not known to the plaintiff or the person who makes the required affidavit on his behalf, an action may be commenced by summons or warrant in the partnership name and all proceedings therein shall be in such name until the names of the several partners are known, when they may be amended by substituting such names, and all subsequent proceedings shall be in their names.

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. Actions in justice's court against municipal or other corporations shall be commenced by summons, except where otherwise provided by law, which shall be served by leaving a copy thereof with any officer or officers, agent or person upon whom the summons in an action commenced in the circuit court against such corporation is required by law to be served, at least six days before the return day thereof, except that in an action against a railroad or express corporation, in addition to the officers above referred to, it may be served upon any agent of the corporation who has charge of an express office or a depot or station on the line of the railroad owned or occupied by the defendant; and upon perfecting such service and a legal return thereof being made it shall be held to have the same effect as a personal service upon a natural person, and like proceedings may be had in such action as in cases against such persons.

301.10 Warrant, when to issue. The plaintiff shall be entitled to a warrant to arrest the body of the defendant upon filing with the justice an affidavit, made by him or some one 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;

(4) That the defendant has incurred a penalty or forfeiture by the violation of some law, specifying the same, for which the plaintiff filing such affidavit has a right to prosecute in the name of the state or otherwise. Such affidavits shall state the facts and circumstances within the knowledge of the person making the same, constituting the grounds of the application, so that the justice may the better judge of the necessity and propriety of issuing such warrant.

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

301.12 Warrant, how served. A warrant shall be served by arresting the defendant and taking him before the justice who issued the same; but if such justice be, on the return thereof, absent or unable to try the cause the officer shall forthwith take the defendant to the nearest justice of the same town, who shall take cognizance of the cause and proceed therein as if the warrant had been issued by himself.

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

301.14 Return of service. Every officer or person serving any process authorized by this title shall return thereon in writing the time and manner of service and sign his name and add, if an officer, his official title.

301.15 Penalty for neglect to serve or for false return. If any officer, without showing good cause therefor, fail to execute any process delivered to him and make due return thereof, or make false return, such officer, for every such offense, shall pay to the party injured ten dollars and all damages such party may have sustained by reason thereof.

301.16 [*Repealed by 1927 c. 501 s. 1*]

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

.... County, }
Town of } ss.

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

You are hereby commanded to summon A. B., if he shall be found within this county, to appear before the undersigned, (or before J. P.), one of the justices of the peace in and for said county, at my (his) office in said town, at (P. O. address, with street and number, if any), on the day of, A. D. 19.., at o'clock in the noon, to answer to C. D., plaintiff, to his damage two hundred dollars or under. Hereof fail not at your peril.

Given under my hand at, this day of, 19...

J. P., Justice of the Peace, (or A. L.,
Attorney at Law, with office at)

[1935 c. 273]

301.18 Form where several sued individually. When several defendants are intended to be sued individually the following form may be used:

.... County, }
Town of } ss.

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

You are hereby commanded to summon A. B., C. D., E. F., etc., severally and individually, each for himself, to appear before the undersigned, (or before J. P.), one of the justices of the peace in and for said county, at my (his) office in said town, at (P. O. address, with street and number, if any), on the day of, A. D. 19.., at o'clock in the noon, then and there, severally and individually, each for himself, to answer unto O. P., plaintiff, to his damage two hundred dollars or under. Hereof fail not at your peril.

Given under my hand at, this day of, 19...

J. P., Justice of the Peace, (or A. L.,
Attorney at Law, with office at)

[1935 c. 273]

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

.... County, }
Town of } ss.

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 to be found within your county, and him bring forthwith before the undersigned, one of the justices of the peace in and for said county, at my office in said town, to answer unto C. D., plaintiff, to his damage two hundred dollars or under; and you are commanded to give due notice thereof to the plaintiff. Hereof fail not at your peril.

Given under my hand at, this day of, 19...

J. P., Justice of the Peace.

301.20 Appearance of parties. Sections 260.13 to 260.17 shall apply to actions in justice's court. Any plaintiff or defendant, except persons under twenty-one years of age, 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 Infant to sue by next friend. No action shall be instituted by an infant plaintiff unless a next friend for such infant shall have been appointed, but every action so commenced shall be dismissed. Whenever requested the justice shall appoint some suitable person, who shall consent thereunto in writing, to be named by such plaintiff to act as his next friend in such action, who shall be responsible for the costs therein.

301.22 Guardian for infant defendant. After the service and return of civil process against any infant defendant the action shall not be further prosecuted until a guardian for such defendant shall have been appointed. Upon the request of a defendant the justice shall appoint some person who will consent thereto in writing to be guardian of the defendant in defense of the action; and if the defendant shall not appear on the return day of the process or if he neglect or refuse to nominate such guardian the justice may, at the request of the plaintiff, appoint any discreet person as such guardian; and the consent of such guardian shall be filed with the justice, but he shall not be liable for any costs in the action.

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

... County, ss.

I hereby consent to be the next friend of A. B., an infant, in an action against C. D., and hereby, for value received, promise and agree with the said C. D. to pay him such costs as he shall recover against the said A. B. by judgment in said action.

JOHN STYLES.

Dated, etc.

The said John Styles is accordingly appointed.

Dated, etc.

J. P., Justice of the Peace.

Justice's Court.

C. D.

ads.

A. B.

} Before J. P., Esq., justice of the peace.

... County, ss.

I consent to be guardian of C. D., an infant, the defendant in the above entitled cause.

JOHN STYLES.

Dated, etc.

The said John Styles is accordingly appointed.

Dated, etc.

J. P., Justice of the Peace.

301.24 Removal for prejudice. (1) In all cases if the defendant shall, on the return day of the process and before any proceedings are had on his part, make oath that, from prejudice or other cause, he believes such justice will not decide impartially in the matter and shall pay to the justice seventy-five cents for making a copy of his docket and transmitting the papers in the case, then such justice shall immediately transmit all the papers in the case to the nearest justice of the peace in the same county; in case said nearest justice cannot be found or is unable to act from any cause, then the said papers in said case may be transmitted to the next nearest justice of the peace of the same county who can be found qualified by law to try a cause between the parties in such action, who shall proceed to hear, try, and determine the same in the same manner as it would have been lawful for the justice before whom the said action was commenced to have done, provided that in cities of the first class in counties having a population of two hundred and fifty thousand according to the last state or national census, and where a municipal court with civil jurisdiction of said county has been established, then said justice in said city shall immediately transmit all the papers in the case to said municipal court of such county which shall proceed to hear, try, and determine the case with the same power, authority, and jurisdiction as if said action had been commenced in said court.

(2) The provisions of this section shall not extend to any second removal.

301.25 Effect of appearance and trial. After the parties have appeared and tried the case upon the merits, before any justice to whom the papers have been transmitted, the judgment rendered therein shall not be held invalid for any insufficiency of the oath or affidavit for, or irregularity in, the proceedings for removal.

301.26 If justice material witness. If, previous to joining issue in any action, either party, his agent or attorney shall make affidavit that the justice before whom the same is pending is a material witness for such party, without whose testimony he cannot safely proceed to trial, or if it shall appear that the justice is near of kin to either party then and in such case the said justice shall transmit said action and all papers appertaining to the same to some other justice of the same county, who may thereupon proceed to hear, try and determine the same in the same manner as it would have been lawful for the justice before whom the said action was commenced to have done.

301.27 Garnishee proceedings follow action. When a suit in which any person shall have been summoned as garnishee shall be removed under the provisions of either of the

preceding sections the garnishee suit and all proceedings therein shall be removed to the same justice to whom the original suit is removed. And whenever a suit commenced by garnishee summons shall for any cause be removed to another justice the suit in which such garnishee summons was issued shall also be removed to the same justice. In all such cases the justice shall transmit the papers in both suits as provided in the preceding sections, and the justice to whom the same may be removed shall proceed to hear, try and determine the same in all respects as though the same had been commenced before him.

301.28 Proceedings if title to land in question. In every action where the title to lands shall in any wise come in question the defendant, at the time when he is required to join issue, and not after, may in his answer state facts showing that the title to lands will come in question, which answer must be in writing, signed by the defendant or his attorney, and delivered to the justice, who shall file the same among the papers in the case.

301.29 Bond to be tendered, or justice to proceed. At the time of tendering such answer the defendant, with at least one sufficient surety, to be approved by the justice, shall enter into a bond to the plaintiff, in the penal sum of two hundred dollars, conditioned, if such plaintiff shall prosecute his said action in the circuit court and if judgment be rendered against the defendant on his answer setting up title in any such court, he will pay the amount of such judgment with the costs. If such bond be not delivered the justice shall proceed with the case and the defendant shall be precluded in his defense from all evidence drawing in question the title to land.

301.30 Cause to be removed to circuit. Upon filing the answer and bond the justice shall immediately make an entry thereof in his docket and cease all further proceedings in the case; he shall collect from the plaintiff one dollar for state tax on suit and certify and return to the circuit court of the county a transcript of all the entries made in his docket relating to the action, together with all process and other papers therein, and pay to the clerk of said court said state tax in the same manner and within the same time as upon an appeal.

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 become possessed of the cause and proceed therein to final judgment and execution the same as if said action had been originally commenced therein, and the costs shall abide the event of the action.

301.32 Justice's office to be open, when. At the hour named for the return thereof, in any process issued by a justice of the peace, or issued and signed by an attorney, and at the hour to which any case shall be adjourned, such justice shall be present and have his office open for the transaction of business. Upon the return of process duly served and upon the day to which any case shall be adjourned the justice shall call the case for trial at the hour specified in such process or by such adjournment, but he shall wait one hour after the time so specified for the appearance of both parties unless they sooner appear. [1935 c. 273]

301.33 Continuance if process returnable on Saturday. Whenever civil process shall be issued against any person who habitually observes and keeps the seventh day of the week, instead of the first, as a day of rest, and such process shall be made returnable on Saturday, such defendant shall be entitled to have the cause continued to the Monday following at the same hour, upon filing with such justice, at or before the return of the process, an affidavit in writing stating that he habitually keeps and observes the seventh day of the week, instead of the first, as a day of rest; and such defendant shall be entitled to all his rights on such adjournment day of the same as if it were the return day of such process.

301.34 Joinder of issue. The parties shall in all cases join an issue in law or in fact before an application for adjournment shall be granted by the justice unless they consent to an adjournment without such issue being made, except as provided in sections 301.33 and 301.38.

301.35 Rules of pleading and proceeding. The following rules of pleading and proceeding shall be observed in the courts of justices of the peace:

(1) The pleadings in these cases are (1) the complaint of the plaintiff, (2) the answer of the defendant.

(2) The pleadings may be oral or in writing; if oral, the substance shall be entered by the justice in his docket; if in writing, 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 notice, in a plain and direct manner, of any facts constituting a defense or counterclaim. The counterclaim must consist of one of the causes of action mentioned in section 263.14. The pendency of an action commenced by an ordinary summons shall not be pleaded in abatement of an action commenced by summons returnable in three days or by warrant.

(5) Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended.

(6) Either party may demur to a pleading of his adversary 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 court deem the objection well founded it shall order the pleading to be amended, and if the party refuse to amend the defective pleading shall be disregarded.

(8) In case a defendant does not appear and answer the plaintiff cannot recover without proving his case, except in cases provided by law.

(9) 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 court and to state that there is due him from the adverse party a specified sum which he claims to recover or set off.

(10) A variance between the proof on the trial and the allegation in a pleading shall be disregarded as immaterial unless the court shall be satisfied that the adverse party has been misled to his prejudice thereby.

(11) The pleadings may be amended at any time before trial or during the trial when by such amendment substantial justice will be promoted. Any defendant who shall have failed to appear on the return day of the process against him, if the action shall have been adjourned by the plaintiff, may be permitted to answer on such adjourned day if he shall then appear and request so to do before trial. If an amendment be made after the joining of the issue or an answer put in after adjournment and it be made to appear to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment shall be granted. The court may also, in its discretion, require, as a condition of an amendment, the payment of costs to the adverse party, to be fixed by the court; but no amendment shall be allowed after a witness is sworn on a trial when an adjournment thereby will be made necessary.

(12) The court 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 shall not have been so exhibited or stated.

(13) In any action in a justice's court, in which the defendant shall be personally served with the summons or shall appear, when the plaintiff shall file a written complaint, claiming an indebtedness upon account, verified in the manner prescribed for verification of pleadings in a court of record, an affidavit of the plaintiff or of his agent, acquainted with the facts, stating the names of the parties plaintiff and defendant, that the defendant is indebted to the plaintiff upon the account alleged in the complaint, in a specified amount, when the same became due, what set-offs should be allowed, 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 received as presumptive evidence of the facts therein stated. When made without the state such affidavit must be certified as prescribed in section 326.01. [*Supreme Court Order, effective Jan. 1, 1935; Supreme Court Order, effective Jan. 1, 1937*]

301.36 Offer of judgment; trial of action against codefendants. At or before the time of joining issue or on any day to which the case may be adjourned, in any action, 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; if the plaintiff accept such offer he shall make such acceptance in writing, and such offer and acceptance shall be filed with the justice and thereupon, if the justice shall be satisfied that the action was brought in good faith and without collusion of the parties thereto, for the ascertainment of which he may examine them and witnesses on oath, he shall enter judgment accordingly. The entry of such judgment shall not prejudice the right of the plaintiff to proceed to trial and judgment against any other defendant in said action.

301.37 Proceedings if offer refused. If the plaintiff do not accept such offer it shall be deemed withdrawn and shall not be considered in any manner or for any purpose by the justice or jury before whom the action is tried; but if the plaintiff fail to recover a more favorable judgment than he would have done by accepting the offer he shall not recover costs made after the making such offer, but shall pay costs so made to the defendant.

301.38 Adjournment if defendant does not appear. On the return day of the process, in all cases where the defendant does not appear, the justice shall, upon the application of the plaintiff, without requiring cause to be shown, adjourn the case for such time as may be required, not exceeding one week; but if such sufficient cause be shown on oath by plaintiff, his agent or attorney the justice shall grant an adjournment for a longer time than one week, not exceeding ninety days.

301.39 First adjournment when parties appear. At the time of the return of either a summons or warrant of attachment or of joining issue without process the justice may, in his discretion, without the consent of either party, adjourn the cause not exceeding three

days and shall, upon application of either party, without requiring cause to be shown, for such time as may be required, not exceeding one week; but if sufficient cause be shown on oath by either party the justice shall grant an adjournment for a longer time, but not exceeding ninety days. No adjournment of an action commenced by summons or warrant of attachment returnable in three days, when the defendant appears, shall be granted by the justice on motion of the plaintiff unless he shall show 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 shall be for such reasonable time, not exceeding in all ninety days, unless by consent of parties a longer time be agreed upon, from the day of the return of the process as will enable the party to procure such testimony or witness and shall be at the cost of the party applying therefor, unless otherwise ordered by the justice, and shall be paid by the party applying therefor; and the justice shall tax the fees of all witnesses who are in attendance for the adverse party, except as provided in subsection (2) of section 307.02. If any process shall be returnable on or any adjournment shall be made to a day which is or may be a legal holiday the cause shall stand adjourned until the next following secular day, when it shall be proceeded with as if the return or adjournment had been made to said day. [1931 c. 130]

301.42 Adjournment if defendant under arrest. If a cause commenced by warrant to arrest the body be adjourned by the consent of both parties or on the application of the plaintiff the defendant shall be discharged from custody; but if such cause be adjourned upon the application of the defendant he shall continue during the time of such adjournment in the custody of the officer unless he shall enter into recognizance before the justice, with such security as the justice shall approve, in a penalty sufficient to secure the plaintiff's demand and costs, conditioned that if judgment be given against him in the action and execution be 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 security will pay the judgment so recovered.

301.43 First recognizance good. If any such recognizance shall have been given upon any prior adjournment it shall not be necessary to enter into any recognizance upon a subsequent adjournment unless such recognizance be required by the justice or by the bail of the defendant in such prior recognizance.

301.44 Action on recognizance. In any action brought upon such recognizance the plaintiff shall not be entitled to recover unless he show an execution upon the judgment obtained in the action in which such adjournment was had, duly issued within six days after the time when the same could have issued against the person of the defendant, and a return thereon that such defendant could not be found.