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. [*R. S. 1849 c. 88 s. 14; R. S. 1858 c. 120 s. 14; R. S. 1878 s. 3593; Stats. 1898 s. 3593; Stats. 1925 s. 301.01; 1935 c. 273; 1945 c. 441*]

Note: Voluntary appearance. See notes to 262.17.

It is the fact of service of the summons, not the proof of such service, that gives jurisdiction. Even after attack by certiorari the return may be amended to show the fact. De Laval S. Co. v. Hofberger, 161 W 344, 154 NW 387.

Jurisdiction over defendants who were served with process or who appeared is not lost by rendering a default judgment against one who was not served and who did not appear. French v. Ferguson, 77 W 121, 45 NW 817.

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 signed in blank by the justice and issued by the attorney, or issued and signed by an attorney, shall be filed with the justice before whom returnable at least 24 hours before the return time specified therein. In case the summons is issued and signed by an attorney subsection (2) shall apply to filing, docketing and effect of such summons. [*R. S. 1849 c. 88 s. 15; R. S. 1858 c. 120 s. 15, 235; R. S. 1878 s. 3594; 1887 c. 196, 372; Ann. Stats. 1889 s. 3569, 3594; Stats. 1898 s. 3594; 1903 c. 20 s. 1; Supl. 1906 s. 3594; 1907 c. 116; Stats. 1925 s. 301.02; 1935 c. 273; 1945 c. 441*]

Comment of Advisory Committee, 1945: (1) is amended by requiring every process to contain the name of the justice and the place to which it is returnable and by omitting the requirement that the town, village or city where the justice resides be given. (3) is amended by reducing from 72 to 24 the hours (before return time) within which a summons issued by an attorney must be filed. That is sufficient notice to the justice, and he is the only one who needs notification of the action. The provision that failure to file automatically dismisses the action without costs is struck out because it seems overly harsh and because the parties may wish to try the action and because the failure to file the process is the officer's fault. (Bill 193-S)

Note: This statute is mandatory and all of its provisions must be complied with to give jurisdiction. Johnson v. Turnell, 113 W 468, 89 NW 515.

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. [*R. S. 1849 c. 88 s. 16; R. S. 1858 c. 120 s. 16; R. S. 1878 s. 3595; Stats. 1898 s. 3595; Stats. 1925 s. 301.03; 1945 c. 441*]

Note: In computing time the day of the service should be excluded and that of the return included. Young v. Krueger, 92 W 361, 66 NW 355.

Summons returnable to a village in a town named is good. Barnum v. Fitzpatrick, 11 W 81.

It is necessary that the hour and place be designated. Roberts v. Warren, 3 W 736.

[*301.04 repealed by 1945 c. 441*]

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. [*R. S. 1849 c. 88 s. 19; R. S. 1858 c. 120 s. 22; R. S. 1878 s. 3597; Stats. 1898 s. 3597; Stats. 1925 s. 301.05; 1935 c. 273; 1945 c. 441*]

Comment of Advisory Committee, 1945: The last sentence is amended to state the intent clearly. (Bill 193-S)

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. [*R. S. 1849 c. 88 s. 164; R. S. 1858 c. 120 s. 19; 1871 c. 146; R. S. 1878 s. 3598; Stats 1898 s. 3598; Stats. 1925 s. 301.06; 1939 c. 529; 1945 c. 441, 461*]

Note: In an action commenced before a justice not elected in a town adjoining, that justice has no jurisdiction of the defendant, but that was waived by appearance. Hohl v. Westford, 33 W 323.

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. [*R. S. 1849 c. 88 s. 18; R. S. 1858 c. 120 s. 21; R. S. 1878 s. 3599; 1883 c. 249 s. 2; Ann. Stats. 1889 s. 3599; 1893 c. 134; Stats. 1898 s. 3599; Stats. 1925 s. 301.07; 1945 c. 441*]

Note: To authorize the use of fictitious names the plaintiff or all the plaintiffs, if there is more than one, must be ignorant of defendant's true name. Mecklem v. Blake, 19 W 397.

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. [*R. S. 1849 c. 88 s. 24; R. S. 1858 c. 120 s. 27; R. S. 1878 s. 3600; Stats. 1898 s. 3600; Stats. 1925 s. 301.08; 1927 c. 82; 1945 c. 441*]

Revisers' Note, 1878: "Same as section 27, chapter 120, R. S. 1858, with the words 'except when issued against a corporation' inserted. This should be so as the next section provides how it shall be served when a corporation is defendant."

Note: See note to section 304.24, citing De Laval S. Co. v. Hofberger, 161 W 344, 154 NW 387.

A return certifying that at a designated time and place the within summons was served on the defendants J. K. and H. K., by reading the same to J. K., and delivering to and leaving with him a true copy thereof for each of them, at their usual place of abode, and that H. K. could not be found, shows a good service on J. K. and probably on H. K. Young v. Krueger, 92 W 361, 66 NW 355.

A general appearance waives defective service. Ruthe v. Green Bay & M. R. Co., 37 W 344.

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. [*R. S. 1849 c. 88 s. 162, 165; R. S. 1858 c. 120 s. 18, 20; 1870 c. 34; 1871 c. 71; 1872 c. 119 s. 42; R. S. 1878 s. 3601; Stats. 1898 s. 3601; Stats. 1925 s. 301.09; 1945 c. 441*]

Comment of Advisory Committee, 1945: Only licensed attorneys may practice in justice court; State ex rel. Junior Bar Ass'n v. Rice, 236 W 38. Therefore the practice in justice court and courts of record should be the same so far as that is practicable. It is practical to have the requirement for service of summons on a corporation identical in all courts. Of course the justice court summons must be served within the county, whereas the circuit court summons goes throughout the state. The exception as to railroad and express companies is struck out. It is unnecessary and ambiguous. 262.09 is complete and modern. The present circuit court rule took effect July 1, 1942. "Within the county" is inserted after "shall be served." (Bill 193-S)

Revisers' Note, 1878: "In place of sections 18 and 20, chapter 120, R. S. 1858, as amended by chapter 34, Laws 1870, and chapter 71, Laws 1871, and part of section 42, chapter 119, Laws 1872; provides that the summons may be served upon the same officers or persons that a summons in a circuit court may be served, except that when the action is against a railroad or express corporation, it may be served as provided in section 18, chapter 120, R. S. 1858."

Note: Summons against railroad company may be served on any station or depot agent of the company as well in a suit for services as any other. Ruthe v. Green Bay & M. R. Co., 37 W 344.

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. *[R. S. 1849 c. 88 s. 20-22; R. S. 1858 c. 120 s. 23-25; R. S. 1878 s. 3602; Stats. 1898 s. 3602; Stats. 1925 s. 301.10; 1945 c. 441]*

Note: A warrant, regular upon its face, is a protection to one not a party to the action who had no knowledge concerning it outside the warrant. Mudrock v. Killips, 65 W 622, 28 NW 66.

If the affidavit required to be made before the warrant issues is radically defective the justice has no authority to issue it, and it is void as to the party at whose request it is issued and is no ground of defense to him in an action for assault and battery committed in an attempt to execute it. Mudrock v. Killips, 65 W 622, 28 NW 66.

Warrant is proper process in action to recover penalty for keeping unlicensed dog, and error in issuing criminal instead of civil warrant will not deprive justice of jurisdiction. Carter v. Dow, 16 W 298.

Statute makes no distinction between voluntary or involuntary trespass or trespass committed personally or by animals. Harrison v. Brown, 5 W 27.

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. *[R. S. 1849 c. 88 s. 25; R. S. 1858 c. 120 s. 28; R. S. 1878 s. 3603; Stats. 1898 s. 3603; Stats. 1925 s. 301.11; 1945 c. 441]*

Comment of Advisory Committee, 1945: The defendant can be kept in custody only 12 hours and the notice to the plaintiff should be given at once if it is to be of any use. (Bill 193-S)

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. *[R. S. 1849 c. 88 s. 26; R. S. 1858 c. 120 s. 29; R. S. 1878 s. 3604; Stats. 1898 s. 3604; Stats. 1925 s. 301.12; 1945 c. 441]*

Comment of Advisory Committee, 1945: It often happens that there is no other justice in the same town—the nearest justice of the county is substituted for nearest in the town. (Bill 193-S)

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. *[R. S. 1849 c. 88 s. 27; R. S. 1858 c. 120 s. 30; R. S. 1878 s. 3605; Stats. 1898 s. 3605; Stats. 1925 s. 301.13; 1945 c. 441]*

Note: This section has no application to a conviction for assault and battery. Supervisors of Manitowoc County v. Sullivan, 51 W 115, 8 NW 12.

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. *[R. S. 1849 c. 88 s. 28; R. S. 1858 c. 120 s. 31; R. S. 1878 s. 3606; Stats. 1898 s. 3606; 1925 c. 86; Stats. 1925 s. 301.14; 1945 c. 441]*

Note: Officer may be permitted to amend his return before or after judgment according to the facts. Bacon v. Bassett, 19 W 45; Wheeler v. Smith, 18 W 651.

In absence of return or appearance of the parties justice has no authority to proceed and judgment so rendered is void, and acts of justice in rendering, and of all others in enforcing it, are wrongful. Selby v. Platts, 3 Pin. 170.

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. [*R. S. 1849 c. 88 s. 29; R. S. 1858 c. 120 s. 32; R. S. 1878 s. 3607; Stats. 1898 s. 3607; Stats. 1925 s. 301.15; 1945 c. 441*]

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

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 ....)

[*R. S. 1849 c. 88 s. 31; R. S. 1858 c. 120 s. 35; R. S. 1878 s. 3609; Stats. 1898 s. 3609; 1925 c. 86; Stats. 1925 s. 301.17; 1927 c. 501 s. 2; 1935 c. 273; 1945 c. 441*]

Note: Where a justice resides in a village embracing territory in two counties, the venue may be laid in both. Starkweather v. Sawyer, 63 W 297, 23 NW 566.

If infant sues summons should describe plaintiff as "an infant who sues by A. B., who is appointed by the court to prosecute for him." But irregularity in omitting such words may be corrected after appearance; it is merely a technical defect. Wheeler v. Smith, 18 W 651.

Summons returnable to village in town, both named therein, sufficient. Barnum v. Fitzpatrick, 11 W 81.

It is necessary that the hour and place be designated. Roberts v. Warren, 3 W 736.

[*301.18 repealed by 1945 c. 441*]

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.

[*R. S. 1849 c. 88 s. 33; R. S. 1858 c. 120 s. 37; R. S. 1878 s. 3611; Stats. 1898 s. 3611; Stats. 1925 s. 301.19; 1945 c. 441*]

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 or in person and conduct or defend any action. [*R. S. 1849 c. 88 s. 34, 40; R. S. 1858 c. 120 s. 38, 44; R. S. 1878 s. 3612; 1879 c. 194 s. 2 sub. 27; Ann. Stats. 1889 s. 3612; Stats. 1898 s. 3612; Stats. 1925 s. 301.20; 1945 c. 441*]

Comment of Advisory Committee, 1945: The amendment follows the general rule for appearance in courts of record. If the agent must be an attorney, the language should be changed. "A lay person * * * may not appear in a representative capacity before a justice of the peace." State ex rel. Junior Ass'n of Milwaukee Bar v. Rice, 236 W 38. (Bill 193-S)

Note: "A lay person * * * may not appear in a representative capacity before a justice of the peace." (Syllabus) State ex rel. Junior Bar Ass'n v. Rice, 236 W 38, 294 NW 550.

Where defendant appears and moves to amend the return of the service so as to conform to the facts, the motion amounted to a general appearance even though the defendant stated that he appeared specially to object to the jurisdiction. Bestor v. Inter County Fair, 135 W 339, 115 NW 809.

Taking appeal from judgment is appearance sufficient to constitute waiver of service. Ruthe v. Green Bay & M. R. Co., 37 W 344.

Appearance, plea and submission waives objection to want of service of process and gives jurisdiction of the person. Woodruff v. Sanders, 18 W 161.

Statement in return of justice that parties appeared means that there was a general appearance. Cron v. Krones, 17 W 401.

Where agent or attorney appears and prosecutes or defends it is presumed to be done on sufficient authority. Shroudenbeck v. Phoenix F. Ins. Co., 15 W 632.

See note to 256.30, citing 34 Atty. Gen. 155.

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. [*R. S. 1849 c. 88 s. 35; R. S. 1858 c. 120 s. 39; R. S. 1878 s. 3613; Stats. 1898 s. 3613; Stats. 1925 s. 301.21; 1945 c. 441*]

Comment of Advisory Committee, 1945: 301.21 is amended so that the action may continue if a next friend is appointed, even though it was begun by a minor in person and without a next friend. Prosecution to judgment by a minor without a friend is not a jurisdictional error. 301.21 must be read in connection with 269.43. Redlin v. Wagner, 160 W 447. (Bill 193-S)

Note: The prosecution to judgment of an action by a minor without the appointment of a "next friend" is not a jurisdictional error. Its mandatory language must be read in connection with the provision of 269.43, that nothing shall be deemed material "which shall not affect the substantial rights of the adverse party." Redlin v. Wagner, 160 W 447, 152 NW 160.

See Wheeler v. Smith, 18 W 651.

301.22 Guardian for minor defendant. 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. [*R. S. 1849 c. 88 s. 36; R. S. 1858 c. 120 s. 40; R. S. 1878 s. 3614; Stats. 1898 s. 3614; Stats. 1925 s. 301.22; 1945 c. 441*]

Comment of Advisory Committee, 1945: The requirement for filing the guardian's consent is struck out. The consent should be written on the docket. "Suitable" has been substituted for "discreet". That probably does not change the meaning. (Bill 193-S)

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

.... 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...

[*R. S. 1849 c. 88 s. 37; R. S. 1858 c. 120 s. 41; R. S. 1878 s. 3615; Stats. 1898 s. 3615; Stats. 1925 s. 301.23; 1945 c 441*]

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. In cities of the first class the justice shall immediately transmit all the papers in the case to the municipal court of the county, which shall proceed the same as if the action had been commenced in said court. This section shall not extend to a second removal. [*R. S. 1849 c. 88 s. 46; R. S. 1858 c. 120 s. 47; R. S. 1878 s. 3616; 1883 c. 197; Ann. Stats. 1889 s. 3616; Stats. 1898 s. 3616; 1911 c. 424; Stats. 1925 s. 301.24; 1945 c. 441*]

Comment of Advisory Committee, 1945: The affidavit of prejudice is changed to agree with the affidavit required for change of venue in circuit court; sec. 261.08. "Or other cause" has often operated as a trap for the unwary. (Bill 193-S)

Revisers' Note, 1878: "Section 47, chapter 120, R. S. 1858, amended to require the return to be made to the nearest justice in the same county."

Note: Sufficiency of an affidavit of prejudice discussed and illustrated. An adjournment by a justice in order to inform himself as to the validity of such an affidavit, in view of the provision of 301.39 authorizing an adjournment for not more than three days without the consent of either party, does not deprive him of jurisdiction. Blumme v. Tierney, 182 W 511, 196 NW 867.

If the transcript of the docket returned by the justice upon certiorari shows that only part of the defendants made application for the removal of the cause and that a removal was denied for that reason, no loss of jurisdiction will result notwithstanding the return also shows a written demand for removal on behalf of all the defendants. State ex rel. Cameron v. Roberts, 87 W 292, 58 NW 409.

An affidavit which states that the affiant believes that "from prejudice or other cause" the justice will not decide impartially is insufficient. Hager v. Falk, 82 W 644, 52 NW 432.

If the name of justice to whom cause has been removed has not been inserted in the papers such justice may allow the justice from whom the cause was removed to insert his name. Starkweather v. Sawyer, 63 W 297, 23 NW 566.

The application should be denied unless all the defendants or the plaintiffs who are actually interested in the controversy and have appeared in the action unite in it. Jaenbeck v. Hewitt, 61 W 96, 20 NW 372.

If the conditions prescribed are complied with the cause must be removed or the justice loses jurisdiction if there is no further appearance. Hellriegel v. Truman, 60 W 253, 19 NW 79.

The cause should be removed though the oath is made by only part of the defendants if all of them join in the motion for removal. The rule established for removal from the circuit courts applies to justices' courts, the language of the statutes being alike. Hellriegel v. Truman, 60 W 253, 19 NW 79.

In garnishee proceedings, where process is issued in aid of execution upon judgment previously rendered by same justice or his predecessor, execution defendant has no right to have proceedings removed on account of prejudice of justice. Garland v. McKittrick, 52 W 261, 9 NW 160.

If tender is not regarded as proper justice should immediately state his objection and give an opportunity for a proper tender. Jenkins v. Morning, 38 W 197.

Affidavit is not required, only an oath. Where oath is reduced to writing, signed and filed as affidavit it is sufficient to authorize removal though deficient as affidavit for lack of a venue. Burns v. Doyle, 28 W 460.

If a cause has been removed and the parties proceed before the justice to whom it was sent without objections they cannot, after the trial, object that he was not the nearest justice. Cox v. Groshong, 1 Pin. 307.

301.245 Removal to small claims court. In counties having a population of more than 125,000 and less than 500,000, and in which a small claims court has been established, the defendant in any action brought in justice court, may, on the return day of the process and before any other proceedings are had on his part, make oral or written request to transfer the cause to the small claims 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 the small claims court of said county. [*1945 c. 423*]

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. [*1903 c. 118 s. 2; Supl. 1906 s. 3616a; Stats. 1925 s. 301.25; 1945 c. 441*]

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. [*R. S. 1849 c. 88 s. 47; R. S. 1858 c. 120 s. 48; R. S. 1878 s. 3617; Stats. 1898 s. 3617; Stats. 1925 s. 301.26; 1945 c. 441*]

Note: Parties who appear before the justice to whom cause has been removed and proceed to trial waive lack of jurisdiction arising from the insufficiency of the affidavit for removal. Magmer v. Renk, 65 W 364, 27 NW 26.

As used in this section "kin" includes relations by blood and marriage and a justice is disqualified from trying a cause to which his son-in-law is a party. Elderkin v. Wiswall, 61 W 498, 21 NW 541.

The application for a change must be made by all the parties (plaintiffs or defendants) who are actually interested in the controversy and who have appeared in the action. Jaenbeck v. Hewitt, 61 W 96, 20 NW 372.

Where justice is disqualified because he is near of kin it is not necessary that such fact should be made to appear before joining issue. Justice, knowing fact, should act on his own knowledge and transmit cause to some other justice; not knowing the fact until after issue joined he should decline to proceed and remove the case. Hibbard v. Odell, 16 W 633.

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. [*1858 c. 58 s. 3; R. S. 1858 p. 704 s. 3; R. S. 1878 s. 3618; Stats. 1898 s. 3618; Stats. 1925 s. 301.27; 1945 c. 441*]

Comment of Advisory Committee, 1945: 301.27 is simplified but the meaning is not changed, except it may be somewhat generalized—the first sentence in old 301.27 saying "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" etc. (Bill 193-S)

Note: Venue cannot be changed where the principal suit had been decided before commencement of garnishee action. Garland v. McKittrick, 52 W 261, 9 NW 160.

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. [*R. S. 1849 c. 88 s. 52; R. S. 1858 c. 120 s. 51; R. S. 1878 s. 3619; Stats. 1898 s. 3619; Stats. 1925 s. 301.28; 1945 c. 441*]

Comment of Advisory Committee, 1945: "Delivered to the justice, who shall file" etc. need not be expressed; it is implied. Furthermore 301.35 (2) provides that "The pleadings * * * if in writing * * * shall be filed." 301.28 is amended to require that the answer be verified if it states that the title to land is involved, and 301.29 is repealed. The latter section requires the defendant to give a bond if he wishes to raise the jurisdictional question of title. The defendant did not ask to be sued and should not be penalized for defending his title to land. The law should be satisfied by a sworn answer which raises such issue. (Bill 193-S)

Note: Action to recover share of proceeds of the sale of land to a third person involves the title to land, where the defend-

ant denies the land belonged to the plaintiff but admits the sale to the third person. Richer v. Carlson, 136 W 353, 117 NW 815.

Where complaint alleged ownership and possession of lands by plaintiff and trespass of the defendant, and the answer denied such trespass because the true line between the land of the parties was such as to locate the alleged trespass on defendant's land, the title to land was involved and case properly removed. Reilly v. Howe, 101 W 108, 76 NW 1114.

The title is not in question and cannot arise in an action for forcible entry and unlawful detainer. Menominee R. L. Co. v. Philbrook, 78 W 142, 47 NW 188; Newton v. Leary, 64 W 190, 25 NW 39.

In an action for the conversion of timber the complaint alleged that the title to the land from which the timber was cut was in plaintiff's brother, who gave him license to cut. The answer denied this and alleged that defendant held the title. The question of the title was in issue. Huddleston v. Johnson, 71 W 336, 37 NW 407.

A right of way is an interest in land and the existence thereof cannot be tried in justice court. Lowitz v. Leverentz, 57 W 596, 15 NW 842.

Denial of allegations that plaintiff was owner and in possession puts title in issue. Lipsky v. Borgmann, 52 W 256, 9 NW 158.

It seems that action for damages for fraud in sale of land does not involve title. Bird v. Kleiner, 41 W 134. Demurrer to complaint on ground that it sets up title does not raise the question. Stoppenbach v. Zohrlaut, 21 W 385. Nor general denial, where plaintiff unnecessarily sets forth nature of his title in action of trespass. Watry v. Hiltgen, 16 W 516. Nor merely setting up facts showing that plaintiff may seek to prove his case by proof of title. Ohse v. Bruss, 45 W 442, disapproving Rogan v. Perry, 6 W 194.

Title is involved in action for trespass by cutting timber if defendant claims timber under deed. Strasson v. Montgomery, 32 W 52.

Dispute between adjoining owners as to title to division fence involves title. Murray v. Van Derlyn, 24 W 67.

Question of title to land is not raised by an answer in replevin for animal that it had been taken up on a highway. Miles v. Chamberlain, 17 W 446.

Answer in action for obstructing highway that the locus in quo was defendant's freehold raises question of title. State v. Doane, 14 W 483.

[301.29 repealed by 1945 c. 441]

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. *[R. S. 1849 c. 88 s. 55; R. S. 1858 c. 120 s. 54; 1866 c. 8 s. 1; R. S. 1878 s. 3621; Stats. 1898 s. 3621; Stats. 1925 s. 301.30; 1945 c. 441]*

Comment of Advisory Committee, 1945: The answer is to be verified under 301.28 as amended. The clerk's fees should be paid as well as the state suit tax. The plaintiff should have begun his action in the circuit court. And if he had he would be obliged to prepay $3. (Bill 193-S)

Note: See note to 301.31, citing Kimball v. Adams, 52 W 554, 9 NW 170.

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. *[R. S. 1849 c. 88 s. 56; R. S. 1858 c. 120 s. 55; R. S. 1878 s. 3622; Stats. 1898 s. 3622; Stats. 1925 s. 301.31; 1945 c. 441]*

Note: When the papers have been filed the circuit court is possessed of the cause under this section although justice did not certify the papers and docket entries in accordance with 301.30. Kimball v. Adams, 52 W 554, 9 NW 170.

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. *[R. S. 1849 c. 88 s. 41; R. S. 1858 c. 120 s. 45; 1875 c. 172; R. S. 1878 s. 3623; Stats. 1898 s. 3623; Stats. 1925 s. 301.32; 1935 c. 273; 1945 c. 441]*

Comment of Advisory Committee, 1945: In other courts, high and low, a party must answer when the bell tolls the hour. That is true in quasi-judicial and in administrative tribunals. This ancient justice court rule is a survival; it wastes much valuable time, and does no good. Again the rule is often disregarded in this: the case is called and the justice goes about his other affairs for an hour and is absent from his office. What would be the effect if the defendant came to the office while the justice was away and finding no one home went his way? Carter v. Wyatt, 43 W 570. (Bill 193-S)

Note: If action is called at different place from that named in summons jurisdiction is lost if objection is not waived. Newcomb v. Trempealeau, 24 W 459.

If the justice has no office his residence may be regarded as such. Roberts v. Warren, 3 W 736.

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. *[1851 c. 328 s. 1; R. S. 1858 c. 120 s. 34; R. S. 1878 s. 3624; Stats. 1898 s. 3624; Stats. 1925 s. 301.33; 1945 c. 441]*

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. [*R. S. 1849 c. 88 s. 51; R. S. 1858 c. 120 s. 49; R. S. 1878 s. 3625; Stats. 1898 s. 3625; Stats. 1925 s. 301.34; 1945 c. 441*]

Note: When defendant asks for adjournment without first requiring issue to be made up he will not afterwards be permitted to object to such adjournment as error. Roberts v. Warren, 3 W 736.

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.

(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 justice and to state that there is due 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 unless the justice is satisfied that the adverse party has been misled to his prejudice thereby.

(11) 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.

(12) 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.

(13) 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, 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 evidence of the facts therein stated. [*R. S. 1849 c. 88 s. 23; 1856 c. 120 s. 10; R. S. 1858 c. 120 s. 26, 46; 1876 c. 88; R. S. 1878 s. 3626, 4099; 1882 c. 197; Ann. Stats. 1889 s. 3626, 4099; Stats. 1898 s. 3626, 4099; 1915 c. 148; Stats. 1925 s. 301.35; Supreme Court Order, effective Jan. 1, 1935; Supreme Court Order, effective Jan. 1, 1937; 1945 c. 441*]

Comment of Advisory Committee, 1945: The addition to (4) is now the law. Counterclaim in excess of jurisdiction was properly struck out. Martin v. Eastman, 109 W 286. The provision for counterclaim should be complete in itself. Hence the reference to 263.14 is struck out and the rule fully stated here.

(8) There seems to be neither meaning nor purpose to "except in cases provided by law." (8) is struck out.

"Substantial" in (11) is not needed. All

justice is substantial. It needs no qualifier. The preamble to the U. S. Constitution says it is to "establish justice," not "substantial justice." The last clause of (11) is amended to make it less mandatory.

(13) is amended to eliminate the separate affidavit. No reason is seen why (13) should not apply where there is substituted service as well as where the summons is personally served. It is broadened to apply where the defendant is served other than by publication. The certification required by the last sentence is a useless technicality which is struck out. (Bill 193-S)

Revisers' Note, 1878: "Section 46, chapter 120, R. S. 1858, adding to the fourth subdivision the provisions of section 26, chapter 120, Revised Statutes 1858, amending subdivision (11) so as to authorize a defendant who has not appeared on the return day to appear and put in his answer on the day to which the plaintiff may have adjourned the case, if the case be adjourned at his request. Provision for amendment on appeal is omitted as tending only to limit what is the power of a court on appeal."

Note: A contract to pay $120 for a specified consideration, is an "instrument for the payment of money, only" within subsection (9), although it contains other distinct promises. Jelinek v. Boer, 153 W 426, 141 NW 241.

A complaint to recover for a violation of fish and game laws need not state that it was made on behalf of the state. State v. Nergaard, 124 W 414, 102 NW 899.

A set off need not be pleaded as a counterclaim. Bacher v. Gray, 112 W 487, 88 NW 307.

Where a defendant accepts an amendment and consents to the adjournment, the justice does not lose jurisdiction. State ex rel. Posbrig v. Daubner, 111 W 671, 87 NW 802.

Where a counterclaim is interposed for an amount in excess of the jurisdiction of a justice, it does not oust the justice of jurisdiction, and was properly stricken out. Martin v. Eastman, 109 W 286, 85 NW 359.

In an action for a balance due upon account for goods sold an amendment may be made to the complaint, after the submission of the cause but before judgment, striking out the allegation of an account stated, so that the complaint will correspond with the proofs. Hibbard v. Peek, 75 W 619, 44 NW 641.

Objection to the sufficiency of a complaint may be taken for the first time on appeal by demurrer ore tenus. Martin v. Atkinson, 64 W 493, 25 NW 655.

An action for breach of contract fails unless the complaint alleges a contract and states its substance or makes a clear statement of facts upon which a contract can be predicated. Martin v. Atkinson, 64 W 493, 25 NW 655.

A complaint consisting of an account made out as a "bill rendered" for threshing grain, with averments that plaintiffs are partners and that defendant is indebted to them as such in the amount of the bill and interest, and a prayer for judgment, is a model complaint. Davies v. Skinner, 58 W 638, 17 NW 427.

A complaint alleging that defendant is indebted to plaintiff in a sum named "for money had and received" on a specified day "at his request and that no part thereof has been paid," and which demands judgment, is good. Mullenback v. Batz, 49 W 499, 5 NW 942.

Allegation that defendants are indebted for a stove lent them, etc., which they refused to return, states a cause of action on contract. Slutts v. Chafee, 48 W 617, 4 NW 763.

Complaint is sufficient if it states cause of action so that a person of common understanding would have no difficulty in knowing what is intended. Hall v. Chicago, M. & St. P. R. Co., 48 W 317, 4 NW 325.

In an attachment action an entry in the docket stated that plaintiff, on the return day of the writ, "introduced the affidavit on which the warrant of attachment was issued as the complaint in the case." This had the same effect as if the affidavit had been copied into the docket as the complaint, and it was sufficient as an oral complaint at least. Ruthe v. Green Bay & M. R. Co., 37 W 344.

When complaint is insufficient court may compel amendment. Dehnel v. Komrow, 37 W 336.

Defective oral complaint is cured by verdict. Parish v. Gilmore, 33 W 608.

Error in refusing compulsory nonsuit is cured where the evidence necessary to sustain the action is subsequently supplied. Hamlin v. Haight, 32 W 237.

Complaint alleging cause of action to be for balance due on sale and delivery of wheat sold to defendant, etc., sufficient to admit proof of mistake made by parties in settling for wheat delivered to the defendant. Davis v. McKay, 18 W 477.

In action for unlawful detainer it is sufficient if complaint follows language of statute. Jarvis v. Hamilton, 16 W 574.

Where plaintiff exhibited two notes, described by dates and amounts in docket, they became the complaint and stated cause of action. Swineford v. Pomeroy, 16 W 553.

Allegation for breach of warranty that plaintiff exchanged certain property with defendant for a horse which he expressly warranted to be, etc., shows that warranty was made at time and in consideration of exchange. Curtis v. Moore, 15 W 134.

Where defendant gave notice of set-off for notes given by plaintiff, there being no demurrer or request that notes be exhibited, they might be given in evidence. Connors v. Taylor, 13 W 230.

Where parties resort to written formal pleadings the ordinary rules of pleading will be applied. Fobes v. School Dist., 10 W 117.

Verbal statement, if it discloses cause of action, is all that is required. Almost everything formal may be disregarded unless objected to. Meyer v. Prairie du Chien, 9 W 233.

In suit on written instrument filed with justice it is sufficient to state the breaches orally without regard to technical precision. Lester v. French, 6 W 580.

In action for work and labor filing bill of particulars is sufficient. Berkley v. Johnson, 4 W 215.

In actions in form ex delicto plaintiff must allege that he has sustained some damage by the act or omission of defendant and set out nature of act of which he complains. Phillips v. Bridges, 3 W 270.

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. [*1877 c. 285 s. 1, 2; R. S. 1878 s. 3627; 1893 c. 39; Stats. 1898 s. 3627; 1899 c. 351 s. 41; Stats. 1925 s. 301.36; 1929 c. 27; 1945 c. 441*]

Comment of Advisory Committee, 1945: * * * The circuit court rule is 269.02. It has no strings on it. Whether acceptance must be instanter is not decided. Cass v. Haskins, 154 W 472. 269.02 says acceptance must be before trial. Hence 301.36 is amended to expressly so provide. (Bill 193-S)

Revisers' Note, 1878: "Sections 1 and 2, chapter 285, Laws 1877, combined, and adding a provision that if one defendant makes an offer of judgment, which is accepted and there be other defendants, the plaintiff may proceed to trial against such other defendants."

Note: See note to 301.37, citing Pahl v. Komorowski, 168 W 553, 170 NW 950.

An offer which does not include the costs accrued up to the time it is made is insufficient to entitle the defendant to the costs which subsequently accrue. Warden v. Sweeney, 86 W 161, 56 NW 647.

An answer orally made, if entered in the docket, is such an offer in writing as satisfies the statute. An offer that "defendant tenders judgment for six cents and costs up to today" is sufficient. Williams v. Ready, 72 W 408, 39 NW 779.

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. [*1877 c. 285 s. 3; R. S. 1878 s. 3628; Stats. 1898 s. 3628; Stats. 1925 s. 301.37; 1945 c. 441*]

Note: If the plaintiff declines an offer of judgment, and fails to recover a judgment more favorable than the one offered, he must pay the costs incurred after the offer in the trial court and in the circuit court on appeal; and the fact that the trial on appeal was de novo does not affect such liability. Pahl v. Komorowski, 168 W 553, 170 NW 950.

After defendant filed an offer of judgment the case was adjourned. On the adjourned day plaintiff demanded a jury trial. Held, that this was a refusal of the offer and that the offer was not thereafter open to acceptance. Cass v. Haskins, 154 W 472, 143 NW 162.

A judgment recovered on appeal, June 11, 1883, for $68.87, with interest from October 27, 1879, aggregating $86.89, is less favorable than a judgment in justice's court for $80, offered February 21, 1880. Kellogg v. Pierce, 60 W 342, 18 NW 848.

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. [*1854 c. 27 s. 1; R. S. 1858 c. 120 s. 50; R. S. 1878 s. 3629; Stats. 1898 s. 3629; Stats. 1925 s. 301.38; 1945 c. 441*]

Comment of Advisory Committee, 1945: * * * The docket need not show that adjournment was for cause, or what cause. State ex rel. Dearborn v. Merrick, 101 W 162. What is meant by "such time as may be required?" "Such time as he [the plaintiff] requests" is substituted therefor. (Bill 193-S)

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. [*R. S. 1849 c. 88 s. 61, 62; R. S. 1858 c. 120 s. 60, 61; R. S. 1878 s. 3630; Stats. 1898 s. 3630; Stats. 1925 s. 301.39; 1945 c. 441*]

Note: See note to 301.24, citing Blumme v. Tierney, 182 W 511, 196 NW 867.

After a justice has entered judgment against a garnishee he cannot reopen the case and adjourn the action. McCormick H. M. Co. v. James, 84 W 600, 54 NW 1088.

Clerical error in entry of adjournment will not divest justice of jurisdiction. Taylor v. Wilkinson, 22 W 40.

Where defendant asks for adjournment without requiring issue to be joined he can not object to it as error. Roberts v. Warren, 3 W 736.

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. [*R. S. 1849 c. 88 s. 63; R. S. 1858 c. 120 s. 62; R. S. 1878 s. 3631; Stats. 1898 s. 3631; Stats. 1925 s. 301.40; 1945 c. 441*]

Note: In the absence of any docket entry of the cause for a second adjournment it must be presumed that it was for sufficient cause. De Laval S. Co. v. Hofberger, 161 W 344, 154 NW 387.

This section does not apply to a case where a second adjournment is rendered necessary by the formation of an issue after the first adjournment. It is governed by 301.35 (11). Field v. Heckman, 118 W 461, 95 NW 377.

Where the docket entry shows that the fourth adjournment was taken on request of plaintiff "for the reason that his lawyer could not be present," the justice lost jurisdiction. Holz v. Rediske, 116 W 353, 92 NW 1105.

Where justice has lost jurisdiction by adjournment and one of the parties was brought into court by attachment, an entry on the justice docket which states that the party appears and asks that the case be continued and that it was continued by consent of the parties, shows that jurisdiction was regained by voluntary appearance. Holz v. Rediske, 116 W 353, 92 NW 1105.

A second adjournment in the absence of and without the consent of defendant and without compliance herewith is not authorized because of the "sickness of the court." 300.20 governs in that event. Gallager v. Serfling, 92 W 544, 66 NW 692.

After two adjournments for cause, on the last adjourned day the defendant refusing to appear, a juror was excused to attend the funeral of a brother. The cause was again adjourned without an affidavit. The justice lost jurisdiction. State v. Gust, 70 W 631, 35 NW 559.

For an affidavit held to comply with this section, see Stromberg v. Esterly, 62 W 632, 22 NW 864.

If a second adjournment is granted upon motion, without the consent of the other party and without the oath required, the justice loses jurisdiction. Grace v. Mitchell, 31 W 533.

Where record is silent it will be presumed that consent was given or that proper oath was made. Bazier v. Lasch, 28 W 268.

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. [*R. S. 1849 c. 88 s. 64; R. S. 1858 c. 120 s. 63; R. S. 1878 s. 3632; Stats. 1898 s. 3632; Stats. 1925 s. 301.41; 1931 c. 130; 1945 c. 441*]

Comment of Advisory Committee, 1945: As a general rule parties are entitled to one adjournment as a matter of right; and should be required to pay costs only where the adjournment is "for cause." (Bill 193-S)

Note: Adjournment for more than ninety days works discontinuance. After such adjournment, and in absence of parties, justice cannot change adjournment so as to bring it within 90 days. Judgment taken at time to which adjournment so changed, in defendant's absence, is null. Mahr v. Young, 13 W 634.

The right to object on the ground that the cause was adjourned for more than ninety days is waived by appearing in the appellate court and obtaining a continuance. Caughey v. Vance, 3 Pin. 275.

If the record as a whole shows that the cause was not adjourned for more than ninety days it will be so held, notwithstanding the contrary appears from the justice's amended return. Caughey v. Vance, 3 Pin. 275.

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. [*R. S. 1849 c. 88 s. 65, 66; R. S. 1858 c. 120 s. 64, 65; R. S. 1878 s. 3633; Stats. 1898 s. 3633; Stats. 1925 s. 301.42; 1945 c. 441*]

Comment of Advisory Committee, 1945: 301.42 speaks of "security." The word should be "surety." 301.43 speaks of the "bail" and seems to mean the "security" mentioned in 301.42.

The drafting rule which says that a statute should always use the same language to express the same meaning is violated many times in the justice court chapters in those provisions which require a party to give security. The security is interchangeably called a bond or an undertaking, and sometimes it is called a recognizance. Sometimes the security must be "executed by" a party with security or with surety or sureties, approved by the justice; sometimes it is executed "on behalf of" the party by a surety or sureties.

A party to an action is bound by the orders and judgment. His signature to a bond adds nothing to the security. He is already bound. In appeals to the supreme court, the rule says that "The appeal undertaking must be executed on the part of the appellant by at least 2 sureties," etc.; 274.11 (3).

For clarity, uniformity and certainty, substantially the following form has been used in stating the ordinary requirements for security in justice practice: "The appellant (or party or defendant or plaintiff) shall give an undertaking, executed in his behalf by a surety approved by the justice."

Sometimes the security is limited, i.e., to $200 (301.29) or double the value of the property (304.08) or four times the value (306.11). Sometimes, as in 301.42, no specific limit is fixed. It is difficult, if not impossible, to get a surety bond where no limit is specified. A $200 limit is inserted in 301.42 and some other justice court sections where no limit is now established and $400 is substituted for "double the value" etc. That is in harmony with existing limits and with the court's jurisdiction as to amount recoverable. (Bill 193-S)

[*301.43 repealed by 1945 c. 441*]

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. [*R. S. 1849 c. 88 s. 68; R. S. 1858 c. 120 s. 67; R. S. 1878 s. 3635; Stats. 1898 s. 3635; Stats. 1925 s. 301.44; 1945 c. 441*]