CHAPTER 251.

SUPREME COURT.

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251.01 Terms of justices. The term of office of each of the justices of the supreme court, when elected for a full term, shall commence on the first Monday of January next succeeding their election.

251.02 Clerk of supreme court. The said justices shall appoint a clerk of the supreme court who shall hold his office at their pleasure. Such clerk, before entering upon the discharge of his duties, shall take and subscribe the constitutional oath of office, and file the same, duly certified, in the office of the secretary of state.

251.03 Deputy clerk. The clerk of the supreme court may appoint a deputy clerk, at his own expense, to aid him in the performance of his duties, who shall perform the duties of said clerk in case of his absence or inability to act.

251.04 Employes. (1) Each justice of the supreme court may appoint a secretary to render such assistance in the performance of his duty as may be required, and may remove the person so appointed at pleasure and appoint another in the place of the one so removed.

(2) Each justice shall certify such appointment to the director of budget and accounts, with the date of the commencement of such service, and shall also notify him of the termination of the service.

(3) Such justices may appoint a messenger for said court.

(4) The chief justice or one of said justices shall certify the appointment of such messenger to the director of budget and accounts, with the date of the commencement of such service, and shall also notify him of the termination of such service.

(5) The compensation of such secretaries and messengers shall be paid on warrants drawn by the director of budget and accounts. The trustees of the state library may appoint one or more janitors for service in and about the library and rooms of the justices of the supreme court. Such appointments and the compensation fixed shall be certified to the director of budget and accounts by the chief justice and paid as aforesaid.

(6) The justices may employ not to exceed 2 attorneys at law to assist them as law examiners and to perform such other duties as they may require. Each such attorney shall be admitted to practice as an attorney in all courts of this state and shall have at least 5 years' experience in the practice of law in the state of Wisconsin. The salary of each such attorney shall not exceed $5,000 per annum. [*1947 c. 9, 571*]

251.05 Crier; marshal. Such justices may also appoint a crier for said court, who shall attend the terms thereof and perform all the duties required of him by law or by said court, or by the justices thereof. The compensation of the crier shall be audited upon the written allowance of the chief justice or, in case of his absence or sickness, of one of the justices, and paid out of the state treasury. And such justices may further appoint a marshal and assign to him such duties in and about the judicial rooms as they may see fit, including the duties of crier when there is no person holding such position who is competent to act.

251.06 Terms of court. There shall be held in the supreme court room at Madison one session of the supreme court in each year, to be called the August term, which shall commence on the second Tuesday in August. [*1943 c. 571*]

251.07 Adjournments; no quorum. The justice or justices present, less than a quorum, in the absence of the other justices, may adjourn the court to a day in the same term; and in the absence of all the justices such adjournment may be made to a day appointed in an order signed by three or more of the justices and filed with the clerk; and in case of the absence of all the justices and their failure to make such an order the clerk may adjourn the court from day to day for six days; and if the court shall not be opened for six days and all matters pending therein shall stand continued until the next term and no action or matter shall abate or be discontinued.

251.08 Appellate jurisdiction. The supreme court shall have and exercise an appellate jurisdiction only, except when otherwise specially provided by law or the constitution, which shall extend to all matters of appeal, error or complaint from the decisions or judgments of any of the circuit courts, county courts or other courts of record and shall extend to all questions of law which may arise in said courts upon a motion for a new trial, in arrest of judgment, or in cases reserved by said courts.

Note: Insofar as the judgment entered subsequent to the mandate of the supreme court, did not conform to the mandate, the remedy of the aggrieved party was by mandamus and not by appeal. Falk v. Rosa, 204 W 518, 235 NW 925.

251.09 Discretionary reversal. In any action or proceeding brought to the supreme court by appeal or writ of error, if it shall appear to that court from the record, that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the supreme court may in its discretion reverse the judgment or order appealed from, regardless of the question whether proper motions, objections, or exceptions appear in the record or not, and may also, in case of reversal, direct the entry of the proper judgment or remit the case to the trial court for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with the statutes governing legal procedure, as shall be deemed necessary to accomplish the ends of justice.

Cross Reference: For reversible error, see 274.37.

Note: The supreme court may order a new trial when it has grave doubt as to the justice of the conviction, or when it seems probable that justice has miscarried. Parke v. State, 204 W 44, 235 NW 775.

The supreme court exercises the statutory power to reverse a judgment for probable miscarriage of justice with some reluctance and great caution, but in this case it felt justified in reversing the judgment. Jacobsen v. State, 205 W 304, 237 NW 142.

Failure to require the jury to determine whether the vendor was enriched because of his wrongful refusal to perform an oral agreement entitled the vendor to a new trial in the interest of justice. Bendix v. Ross, 205 W 581, 238 NW 381.

If the plaintiff is entitled to the full amount claimed or nothing, a judgment for a lesser sum is improper. The verdict in this case raises a doubt as to whether the issue was decided upon the evidence, and while there was no motion for a new trial by either party it appears probable that justice has not been done and a new trial therefore is ordered. General D. & S. Corp. v. Bolens, 205 W 664, 238 NW 814.

The record disclosing that the trial required the examination of a long account which, in view of the complicated and confused state of the financial transactions involved, it was impossible for the jury to do with sufficient certainty to afford the basis for judicial judment, and it appearing probable that justice has miscarried, discretionary reversal for a new trial on defendant's appeal was ordered. Volk v. Flatz, 206 W 270, 239 NW 424.

Errors in submission of questions, refusal of requested instructions, and questionable qualification of a juror to sit on the trial, are held to leave such grave doubts as to the justice of the verdict for plaintiff as to warrant discretionary reversal for a new trial. Maahs v. Schultz, 207 W 624, 242 NW 195.

In an action for damages where plaintiff's automobile passing truck on a curve collided with defendant's truck, which skidded on wet pavement into plaintiff's car when defendant approaching from opposite direction applied his brakes to avoid collision, the verdict for plaintiff required reversal for a new trial in the interests of justice, because of absence of evidence establishing the distance between a knoll and the place of collision, which, in view of 85.16 (5) restricting passing on curves and grades, is of controlling importance on the issues of negligence and contributory negligence. Schuyler v. Kernan, 209 W 236, 244 NW 575.

Where the evidence sustained the judgment rendered for the plaintiff against the defendant manufacturer for the amount of the down payment on a truck, but the evidence did not sustain that portion of the judgment for the defendant agent as to the amount of commission to which he was entitled on his cross-complaint against the defendant manufacturer, and the issue as to the amount of the commission was not fully tried, and the record does not afford a satisfactory basis for a finding on that subject to a reasonable certainty, it is necessary and proper to reverse that portion of the judgment providing for the recovery of commission, and to remand the cause for a retrial solely of the issue as to the amount of the commission. Walter v. Four Wheel Drive A. Co., 213 W 559, 252 NW 346.

When such grave doubt exists regarding the guilt of a defendant as to induce the belief that justice has probably miscarried, the supreme court may reverse the judgment for a new trial. State v. Fricke, 215 W 661, 255 NW 724.

A counterclaim of the property owners for damages should be dismissed without prejudice on appeal from a judgment allowing the contractor to recover, where the trial court gave little consideration to the counterclaim and did not dismiss or specifically deal with it, and the effect of the judgment rendered, which was reversed, was to deny recovery on the counterclaim. Dunnebacke Co. v. Pittman, 216 W 305, 257 NW 30.

In action by guest for injuries sustained in collision of automobiles, where finding that negligence of motorist with whom host collided was not a cause of collision was so grossly perverse as to make it probable that jury was influenced in its findings as to negligence of host, new trial was required. Mauermann v. Dixon, 217 W 29, 258 NW 352.

Supreme court's power to order new trial under statute when miscarriage of justice seems probable is exercised cautiously, especially in absence of motion to review. Evidence that motorist, who collided with highway workers' truck which had swung across

road preliminary to dumping dirt, knew of highway operations in vicinity, and was following truck too closely, warranted jury's attributing to motorist 90 per cent of negligence producing collision, and hence was insufficient to justify new trial in absence of motion to review. Hayes v. Roffers, 217 W 252, 258 NW 785.

Supreme court, reversing judgment defective only in respect to amount of damages, could order new trial on question of damages alone, unless defendant within twenty days consented to entry of judgment in an amount which supreme court determined was highest possible amount which jury from evidence and law applicable and under proper instructions could find, since plaintiff's right to a jury trial would not be invaded. Malliet v. Super Products Co., 218 W 145, 259 NW 106.

In action in which defendant's liability was clearly established on trial and in which plaintiff was entitled to judgment notwithstanding verdict, order granting new trial was reversed with directions to enter judgment in favor of plaintiff. Guardianship of Meyer, 218 W 381, 261 NW 211.

New trial in bastardy action was granted in exercise of supreme court's discretion under circumstances disclosing that justice had probably miscarried. Hughes v. State, 219 W 9, 261 NW 670.

On appeal from judgment disallowing claim against decedent's estate for price of corporate stock, claimant was entitled to new trial on ground that question of existence of valid contract obligating claimant to deliver stock was not litigated in trial court. Estate of Leedom, 218 W 534, 259 NW 721, 261 NW 683.

Under evidence in divorce action, wherein sister of defendant husband was also made defendant, finding that certain stock in building and loan association, orginally issued in name of defendant husband, belonged to sister, is held to require a reversal of judgment for probable miscarriage of justice and new trial to determine ownership of stock and whether it was transferred for purpose of concealing its ownership in fraud of plaintiff. Bujko v. Bujko, 219 W 565, 263 NW 581.

The "record" referred to in this section is the record returned from the court below, and does not include affidavits filed in the supreme court. Milwaukee County v. H. Neidner & Co., 220 W 185, 263 NW 468, 265 NW 226, 266 NW 238.

On reconsideration of the case on motion for rehearing, the judgment of conviction is reversed and a new trial ordered in the interest of justice because of doubt of the defendant's connection with the bank robbery involved. Newbern v. State, 222 W 291, 260 NW 236, 268 NW 871.

The supreme court has power to order a new trial on a proposition not raised below, when it appears that the real issue has not been tried or that it is probable that justice has not been done. Krudwig v. Koepke, 223 W 244, 270 NW 79.

On appeal from judgment on verdict against garage owner in action arising out of automobile collision, wherein garage employe's testimony, though sufficient to make jury case on issue of whether garage was liable for his negligence, was contrary to several credible witnesses and to his own written statement, damages awarded were excessive, and prejudicial instruction was given, new trial will be awarded in interest of justice. Anderson v. Seelow, 224 W 230, 271 NW 844.

Where trial court erroneously granted judgment, notwithstanding verdict, under the evidence, and should, at most, merely have ordered a new trial in the interest of justice, so that the real controversy could be fully tried, supreme court would reverse judgment and remit record to trial court for that purpose. Koscuik v. Sherf, 224 W 217, 272 NW 8.

A verdict which found a motorist negligent for driving on the left side of the road, and yet attributed sixty percent of the negligence which caused the accident to the motorist driving on the right side of the road, was perverse, and required a new trial. Schworer v. Einberger, 232 W 210, 286 NW 14.

Where there is no direct evidence of how an accident occurred, and the circumstances are clearly as consistent with the theory that it may be ascribed to a cause not actionable as to a cause that is actionable, it is not within the proper province of a jury to guess where the truth lies and make that the foundation for a verdict. The case having been fully and well tried and there being no likelihood that the cause of the accident in question could be removed from the field of conjecture on a retrial, the supreme court declines to reverse a judgment of dismissal on the merits and order a new trial. Dahl v. Charles A. Krause Milling Co., 234 W 231, 289 NW 626.

While the evidence presented an issue for the jury as to whether the defendant was the father of the child, the circumstances under which the alleged acts took place, coupled with the fact that the complaining witness, although having the opportunity to do so, never accused the defendant until she swore to the complaint several months after she knew of her condition, are deemed so inherently improbable as to require, when considered in connection with the errors in the instructions to the jury, a reversal of the judgment in the interest of justice and the granting of a new trial. State v. Van Patten, 236 W 186, 294 NW 560.

In a prosecution for embezzlement a new trial in the interest of justice was ordered where the transactions on which the prosecution was based were so stale that it was a serious question whether the statute of limitations would not have been a good defense if litigated on the trial, and where the slipshod and irregular method of transacting and recording the business of the school district rendered the proof unsatisfactory. State v. Burns, 236 W 593, 296 NW 85.

The supreme court will not order a new trial in the interest of justice because of the severity of a sentence that is within the discretion of the trial court to impose. State v. Sullivan, 241 W 276, 5 NW (2d) 798.

In this case, wherein the jury found that the defendant driver of an automobile was causally negligent as to management and control and as to driving on the wrong side of the road, and found that the plaintiff driver was not negligent in either respect although the physical facts in evidence indicated that the left front of his automobile was over the center line of the road when the two cars collided while approaching from opposite directions, the judgment for the plaintiff is reversed, under authority of 251.09, and the cause remanded for a new trial in the interest of justice. Prideaux v. Milwaukee Automobile Ins. Co. 246 W 390, 17 NW (2d) 350.

Where negligence in starting a fire was not in issue but there was a jury question whether the fire was negligently started and nothing in the instructions from which the jury would understand that that question was not a matter of controversy, and a question was submitted asking whether the defendant in "starting and managing" the fire was negligent, etc., and there was a strong probability that the jury, answering "No," was misled into thinking that they had two issues to resolve and must agree to an affirmative answer to both or else answer the question "No," the judgment is reversed in the interest of justice. Vlasak v. Gifford, 248 W 328, 21 NW (2d) 648.

Although the buyer was not entitled to recoupment for breach of warranty where he had not given the required notice of claim, the supreme court, on reversing a judgment allowing recoupment and dismissing the seller's complaint, cannot in justice direct the entry of judgment for the seller for the unpaid portion of the contract price of the goods, where it appears that there are issues, insufficiently pleaded and proved, as to the amount recoverable by the seller, but the court will remand the cause with directions to require the pleadings so amended as to raise the issues triable and

to order a new trial of those issues. Simonz v. Brockman, 249 W 50, 23 NW (2d) 464, 24 NW (2d) 409.

The disparity in the quantum of causal negligence chargeable to each driver as found by the jury, 75 per cent to the plaintiff and 25 to the defendant, is considered such as to require a reversal of the judgment for a new trial on the ground that justice has probably miscarried. O'Leary v. Buhrow, 249 W 559, 25 NW (2d) 449.

A judgment entered for the plaintiff on a special verdict as amended by the trial court by improperly changing the jury's findings unfavorable to the plaintiff, which would have barred his recovery, must be reversed. The case was remitted for a new trial in the interest of justice. Leisch v. Tigerton Lumber Co. 250 W 463, 27 NW (2d) 367.

The real controversy was not fully tried and justice may have miscarried on the issue raised by the counterclaim, requiring the reversal of the judgment and the granting of a new trial. Pukall v. McCandless, 250 W 468, 27 NW (2d) 485.

251.10 Original writs; writs in vacation. In addition to the writs mentioned in section 3 of article 7 of the constitution the supreme court shall have power to issue writs of prohibition, supersedeas, procedendo and all other writs and process not specially provided by statute which may be necessary to enforce the due administration of right and justice throughout the state; and any justice of said court in vacation shall, on good cause shown, have power to allow writs of error, supersedeas and certiorari, and also to grant injunctional orders.

Note: The question of the constitutionality of section 326.06 presented a question of such grave character as to warrant an original action in the supreme court. State ex rel. Drew v. Shaughnessy, 212 W 322, 249 NW 522.

Where the trial court, in an action for injuries sustained in an automobile collision, had sustained a plea in abatement and dismissed the action as to the defendant insurer, the court was without jurisdiction over such defendant after reversal of a judgment rendered against the defendant insured and was without right to set the case down for trial against the insurer. State ex rel. Central Surety & Ins. Corp. v. Belden, 222 W 631, 269 NW 315.

Certiorari is a proper remedy to review an order of the circuit court for the issuance of an execution on a condition which the court was without authority to impose. State ex rel. Rasmussen v. Circuit Court, 222 W 628, 269 NW 265.

If the trial court was without jurisdiction to enter the order in question, its action can be reviewed by certiorari or by writ of prohibition. Lang v. State ex rel. Bunzel, 227 W 276, 278 NW 467.

Under the provision in 251.10 that any justice of the supreme court in vacation shall, on good cause shown, have power to allow writs of error, supersedeas, etc., the practice in the supreme court is that applications made thereunder for stays of proceedings pending appeal shall be made to the chief justice, and in his absence to the justice who has been longest a continuous member of the court, who is present and available. The granting of stays of proceedings in civil cases pending appeal is regulated by 274.17 to 274.30 and the supreme court has power to grant a stay thereunder, and in a proper case a stay may also be granted by a justice as provided in 251.10; notice of the motion or application is required, and, although a formal notice is not required where application is made to a justice such a notice should be given as will enable the opposite party to appear and oppose the application if deemed desirable. For details of practice on applications to the supreme court to appoint counsel for indigent dependents and for stays see "Per Curiam" in this case. State v. Tyler, 238 W 589, 300 NW 754.

Certiorari was a proper remedy to obtain a review in the supreme court of an order determining that the venue of an action remained in the circuit court for the county in which the action was brought. State ex. rel. Birnamwood Oil Co. v. Shaughnessy, 243 W 306, 10 NW (2d) 292.

251.11 Supreme court; judgments; rules; printed case. (1) The supreme court shall be vested with all power and authority necessary for carrying into complete execution all its judgments and determinations in the matters aforesaid and for the exercise of its jurisdiction as the supreme judicial tribunal of the state, agreeably to the usages and principles of law; and to make, annul, amend, or modify the rules of practice therein from time to time as it shall see fit, not inconsistent with the constitution and laws.

(2) The supreme court may by rule provide that no party in any action or proceeding before the supreme court shall be required to prepare and furnish any printed case or other printed abridgment of the record or of the proceedings theretofore had.

251.12 Issues of fact and assessments of damages. Whenever an issue of fact shall be joined or an assessment of damages by a jury be necessary in any action commenced in the supreme court the court may, in its discretion, send the same to some circuit court and it shall be there determined in the same manner as other issues of fact are tried or assessments made, and return be made thereof as directed by the supreme court; or such court may order a jury of twelve men, qualified to act as jurors in the circuit courts, to try such issue of fact or make such assessment of damages in the supreme court. In either case the supreme court may order a special verdict to be found and returned.

251.13 Jury, how obtained. If a jury be ordered to try an issue or to assess damages in the supreme court it shall be obtained as follows: The court shall direct the sheriff or some disinterested person present to write down thirty-six names of persons required for the jury who are qualified by law to serve as jurors in the circuit courts and not of kin to either party or in any manner interested in the cause; such officer or person shall be first sworn by the court to select such names without partiality to either party; the list being made the parties shall alternately strike out a name until the names of twelve jurors only are left, and if either refuse or neglect to strike out on his part the court or clerk may strike in his stead; a venire, containing the names of the jurors thus selected and directed to such sheriff as the court shall designate, shall be issued to such sheriff, who shall forthwith pro-

ceed to summon the jury therein named. If any such jurors shall not be found, or fail to appear according to the summons, or be discharged by the court upon any legal objection or for other cause the court shall direct the sheriff to summon a sufficient number of talesmen to supply the deficiency. The court shall have the same power to punish any juror who shall refuse or neglect to appear in obedience to the summons as is conferred upon the circuit court.

251.14 Decisions to be written; part of record; certified to United States court; printed for justices. The supreme court shall give their decisions in all cases in writing, which shall be filed with the other papers in the case; and such decisions and all decisions and opinions delivered by the court or any justice thereof in relation to any action or proceeding pending in said court shall remain in the office of the clerk. Every written opinion or decision of the supreme court which shall have been filed with the clerk shall constitute and be held a part of the record in the action or proceeding in which it shall have been given and filed and shall be certified therewith to any court of the United States to which such action or proceeding or the record thereof may be in any manner certified or removed. The state printer shall print for the use of the justices so many of such decisions and opinions, and at such times, as shall be directed by them.

Note: In determining questions necessary to a decision on appeal, the supreme court cannot profitably set forth in the opinion of the court in every case all of the contentions of counsel on both sides with the evidence tending to support them and reply to all of the arguments made. Fronczek v. Sink, 235 W 398, 291 NW 850, 293 NW 153.

251.15 Disposal of manuscripts. (1) The justices of the supreme court are hereby authorized and empowered to make such order or orders respecting the destruction or disposal of the large accumulation of manuscript and typewritten opinions of the supreme court as such justices shall see fit.

(2) The director of purchases shall carry such order or orders into effect. [*1931 c. 45*]

251.16 Opinion to be sent to trial court on reversal. Whenever the judgment or determination of any inferior court shall be reversed, in whole or in part, by the supreme court or an action or proceeding is remanded to the court below for a new trial or for further proceedings the clerk of the supreme court shall transmit to the clerk of the court below, with the remittitur, a certified copy of the opinion of the supreme court therein; and his fees therefor shall be taxed and allowed with his other fees in the case.

251.17 Proceedings in criminal cases on reversal. Whenever any judgment in a criminal action shall be removed by a writ of error to the supreme court and such court shall reverse such judgment because of any defect, illegality or irregularity in the proceedings in such case subsequent to the rendition of the verdict of the jury therein it shall be competent for the supreme court either to pronounce the proper judgment or to remit the record to the court below in order that such court may pronounce the proper judgment.

Note: Where the complaint charges a crime outside the jurisdiction of the municipal court, the supreme court on reversing a judgment of conviction will order the dismissal of the complaint. Miller v. State, 226 W 149, 275 NW 894.

The supreme court will not impose a sentence deemed by it proper where the sentence imposed by the trial court is more severe than the supreme court itself would have imposed if it had been the trial court. State v. Sullivan, 241 W 276, 5 NW (2d) 798.

251.18 Rules of pleading and practice. The supreme court of the state of Wisconsin shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of Wisconsin, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant. Such rules shall not become effective until sixty days after their adoption by said court. All such rules shall be printed by the state printer and paid for out of the state treasury, and the court shall direct the same to be distributed as it may deem proper. All statutes relating to pleading, practice and procedure shall have force and effect only as rules of court and shall remain in effect unless and until modified or suspended by rules promulgated pursuant hereto. No rule modifying or suspending such statutory rules shall be adopted until the court has held a public hearing with reference thereto, notice of which shall be given by publication for four successive weeks in the official state paper, the expense of such publication to be paid out of the state treasury. Nothing in this section shall abridge the right of the legislature to enact, modify or repeal statutes or rules relating to pleading, practice or procedure. The attorney-general of Wisconsin, the revisor of statutes, the chairmen of the judiciary committees of the senate and of the assembly, a member of the board of circuit judges, and a member of the board of county judges, selected by those boards annually, the president of the Wisconsin state bar association and three members of the said bar association, elected by said association annually, shall constitute an advisory committee whose duty it shall be to observe and to study the administration of justice in the courts of Wisconsin and to advise the supreme court from time to time as to changes in rules of pleading, practice and procedure which will, in its judgment, simplify procedure

and promote the speedy determination of litigation upon its merits. The members of said committee shall receive no compensation, but shall be reimbursed out of the state treasury for expenses necessarily and actually incurred by them in attending meetings of said committee outside the county of their residence.

Note: This section is valid. The power to regulate court procedure at the time of the adoption of our constitution, was essentially a judicial power. There is no constitutional objection to the legislature's delegation of power to the supreme court to regulate judicial procedure in the court. In re Constitutionality of Section 251.18, 204 W 501, 236 NW 717.

The court, at least when there is no conflicting legislation, has equal power with the legislature to improve practice and procedure, and should not hesitate to do so in the interest of justice and law enforcement. Spoo v. State, 219 W 285, 262 NW 696.

Changes in rules of evidence may be made applicable to pending cases. Estate of Sletto, 224 W 178, 272 NW 42.

A court rule, not limited by its terms to actions at law, must be applied in equity actions also. Rosecky v. Tomaszewski, 226 W 438, 274 NW 259.

Appeals are statutory in their origin and confer a right which did not exist theretofore, hence cannot be dealt with by the supreme court under its rule-making power. Benton v. Institute of Posturology, Inc., 243 W 514, 11 NW (2d) 133.

In exercising its rule-making power in relation to pleading, practice, and procedure in judicial proceedings, it is the purpose of the supreme court to limit itself strictly to procedural matters, and to consider those matters with the sole purpose of insuring that our procedural law may not be incumbered by useless or unfair rules which complicate and confuse the trial of cases or add to the expense of litigation. Petition of Doar, 248 W 113, 21 NW (2d) 1.

Ch. 190, laws of 1933, was not an ordinary revisor's bill but was a revision made by the committee on rules of pleading, practice and procedure created by 251.18, and hence the legislature is presumed to have intentionally made such changes relating to contingent claims under the nonclaim statute, 313.08, as the act purported to make, and the enacted provisions must be applied according to that intent. Estate of Bocher, 249 W 9, 23 NW (2d) 615.

The principle that statutes changing procedural rules will be applied to pending cases, although enacted after the decision of the trial judge, is applicable to rules of court changing procedural rules, which are statutory in form. Estate of Delmady, 250 W 389, 27 NW (2d) 497.

251.19 Attorney-general may have cases printed. In all state cases to be argued in the supreme court by the attorney-general he may, in his discretion, require to be printed by the state printer, when necessary, copies of or abstracts from the record and his arguments and brief, and in any criminal case, the case and brief or briefs of any poor and indigent defendant; and the account therefor shall be paid out of the state treasury and charged to the appropriation created by subsection (2) of section 20.08 of the statutes for the attorney-general. [*1935 c. 535*]

Note: A claim of an attorney, appointed to prosecute a writ of error in the supreme court for an indigent defendant, for the expense of printing a case and brief, did not constitute a proper claim against either the state or the county. John v. Municipal Court of Milwaukee County, 220 W 334, 264 NW 829.

251.20 Seal. The supreme court shall have a seal and may direct and from time to time alter the inscription and devices thereon; and the director of purchases shall procure such seal as may be ordered. The seal of the court now in use shall be the seal thereof until another shall be provided hereunder.

251.21 Duties of clerk. It shall be the duty of the clerk of the supreme court:

(1) To have and keep the custody of the seal of the court and all books, records and papers thereof, and of all writs, proceedings and papers in any action therein.

(2) To receive and safely keep and pay over or deliver, according to law or the order of the court, all moneys or property deposited or placed in his possession as such clerk.

(3) To furnish to any person requiring the same certified copies of the papers, records, opinions and decisions in his office, upon receiving his fees therefor.

(4) To furnish to the reporter copies of all opinions required by him at a fee not to exceed six cents per folio.

(5) To issue writs and process to persons entitled to the same by law or the rules and practice of the court.

(6) To make a calendar of cases for argument at such time and in such manner and form as the court shall direct.

(7) To give certificates to attorneys on their admission to practice in the court, on receiving his fees therefor; but the fee for a certificate of admission of any graduate of the law department of the University of Wisconsin shall not exceed one dollar.

(8) To perform all other duties required by law or the rules and practice of the court or which may be directed by the court.

251.22 Fees and per diem of clerk. The supreme court shall fix such fees for the services of the clerk as to the court shall seem proper, except when otherwise provided by law. The clerk shall also receive from the state, in addition to his fees, five dollars per day during the actual sessions of the court. The amount for per diem and for all fees allowed by law to the clerk of the supreme court in criminal and state cases accompanied by an itemized bill of costs in each case, shall, on being fixed and allowed by the justices of the court or a majority of them, be paid semiannually in the months of June and December out of the state treasury.

251.23 Costs in supreme court. (1) DISCRETIONARY ITEMS. In the supreme court, excepting criminal actions, costs shall be in the discretion of the court. In any civil action or proceeding brought to the court by appeal or writ of error, the prevailing party shall recover costs unless the court shall otherwise order, and such costs, unless fixed at a lower sum by the court, shall be as follows: The fees of the clerk, twenty-five dollars attorney's fees, the fees of the clerk below for transmitting and certifying the record, including the sum paid for necessary copies of the minutes of the reporter procured for record preparatory to an appeal, settling the bill of exceptions and the sum paid for printing cases and briefs not exceeding one dollar per page and in all not exceeding one hundred and fifty pages.

(2) MOTIONS FOR REHEARING. When a motion for a rehearing is denied the prevailing party may be allowed attorney's fees not exceeding twenty-five dollars, as the court shall direct, the clerk's fees and necessary disbursements which shall be taxed and inserted in the judgment; when such motion is granted the same costs may be allowed and shall abide the event of the action.

(3) DAMAGES; COSTS DOUBLED. The court may adjudge to the defendant in error or respondent on appeal in any civil action, on affirmance, damages for his delay in addition to interest, not exceeding ten per cent on the amount of the judgment affirmed; and may also in its discretion award to him double costs.

(4) NOTICE OF TAXATION. The clerk shall tax and insert in the judgment, on the application of the prevailing party, upon four days' notice to the other, the costs, together with the damages allowed, if any. The disbursements shall be stated in detail and verified by affidavit filed.

(5) EXECUTION FOR COSTS. On request of the party entitled thereto the clerk shall issue execution for costs taxed and damages allowed, directed to the sheriff of any county designated by such party; and the sheriff shall levy and collect the same and pay over to said clerk his costs and the remainder to the party entitled thereto, and shall return the execution with his doings thereon to the said clerk within ninety days from its date. If such execution be returned satisfied the clerk shall enter satisfaction of the judgment. Alias executions may in like manner be issued from time to time until such judgment be collected. [*1935 c. 541 s. 208, 209, 210, 211, 212*]

Cross Reference: See 204.11 as to recovery of premium on suretyship obligation given by a fiduciary.

Note: Double costs were imposed on the defendant under this section in Gentilli v. Brennan, 202 W 465, 233 NW 98.

Cases tried as one must be treated on appeal as one for purposes of taxation of costs. Wisconsin Creameries, Inc., v. Johnson, 208 W 444, 243 NW 498.

On the affirmance of a judgment on appeal, the respondents are entitled to an award of double costs, where the appellant, without any apparent excuse, failed to serve its printed case and brief within the time allowed by the rules of the supreme court, but the respondents are not entitled to an award of damages, where the appellant succeeded in having its brief printed in time for use when the case was reached in due course for oral argument, and where it does not appear that the respondents suffered any damage as the result of the delay in question. Kniess v. Jefferson Construction Co., 236 W 624, 296 NW 72.

Where the plaintiff improperly sets out in his complaint many evidentiary facts as if they were grounds for separate cause of action, and thereby in effect requires the trial court in disposing of a demurrer, and the supreme court on appeal, to determine whether a cause of action of any kind is stated, the plaintiff will not be allowed costs in the supreme court although he is the prevailing party. Krueger v. Hansen, 238 W 638, 300 NW 474.

It appearing that an appeal from the civil court to the circuit court and an appeal to the supreme court were frivolous and taken for purposes of delay, the judgment appealed from is affirmed with double costs. Grossman v. Kuehn, 241 W 55, 4 NW (2d) 124.

Where the inclusion in the respondent's brief of a copy of letters of guardianship, and also of an argument based thereon, was improper because the letters were no part of the complaint or the record herein, and caused the appellants to print a reply brief which otherwise would not have been necessary, the respondent, prevailing party, is denied costs for the printing of his brief. Gleixner v. Schulkewitz, 244 W 169, 11 NW (2d) 500.

In this case, the guardian is entitled to expenses and attorney fees, to be fixed by the trial court, for the retrial had following the guardian's successful appeal from a judgment relating to his compensation; but the guardian is not entitled to costs on appeal on his unsuccessful appeal from the judgment rendered on the retrial, such costs going with the result on appeal. Guardianship of Messer, 246 W 426, 17 NW (2d) 559.

RULES OF PRACTICE IN THE SUPREME COURT.

[Adopted June 10, 1942, effective July 1, 1942, as amended]

Revisor's Note: The rules of the supreme court governing practice in that court are printed here at the end of chapter 251, entitled "Supreme Court" because those rules have the force of law, are in constant use and should be easily available. The court's numbering and headings are retained, but for convenience in indexing and for reference, these rules are given additional numbers (in brackets) in harmony with the decimal numbering system used in the statutes. The court's comments on these revised rules are printed immediately after the rules.

The supreme court rules in force in 1930 are printed in the Wisconsin Annotations, beginning at page 1797, with extensive notes. Those notes are not repeated. Only later notes (continuation of annotations) are inserted here.

CHAPTER I.

RECORD AND RETURN.

[251.251] Rule 1. Every record and transcript thereof, filed with the clerk of the supreme court, shall be arranged as follows:

(1) Summons or other process.

(2) Proof of service.

(3) Complaint, petition, relation, or affidavit initiating the proceeding, with the date of service.

(4) Answer or demurrer, with date of service.

(5) Reply, demurrer, election to take issue, with date of service.

(6) Orders material to the appeal, and papers upon which they are based.

(7) The verdict, findings of the court or referee, with orders based thereon, and opinion of the court, if any.

(8) Final determination.

(9) Any order made after judgment, material to the appeal, and the papers upon which the same is based.

(10) Bill of exceptions. Each exhibit shall have on it the name of the plaintiff and defendant and each photograph attached to or returned with the bill of exceptions shall have in addition either upon its face or upon its reverse side or upon a slip attached to it, a statement giving the page of the record where the photograph is referred to, a statement of the position of the camera, distance from the object photographed, the direction in which the camera was pointed and such further information as may be appropriate.

(11) Writ of error or notice of appeal, with the bond or undertaking.

(12) Certificate of the clerk to the return. Such record or transcript shall be consecutively paged on the left-hand margin.

Note: On a writ of error to review a judgment discharging a convicted defendant from custody on a writ of habeas corpus, the only record to be returned to the supreme court is the record made in the habeas corpus proceeding, and the supreme court can only consider that record. Kushman v. State ex rel. Panzer, 240 W 134, 2 NW (2d) 862.

[251.252] Rule 2. The record or transcript shall not be accompanied by any paper, other than those specified, or which is not part of the record proper.

[251.253] Rule 3. The return to any writ of error or certiorari shall be by certified copy of the record unless the trial court shall order the original papers to be returned.

[251.2531] Rule 3a. (Adopted April 1, 1944) When the questions presented for decision by an appeal can be determined without an examination of all the pleadings, evidence and proceedings in the court below, in lieu of a record and transcript thereof as required by Rule 1, the parties may prepare and sign a statement of the case showing how the questions for decision arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions involved by the supreme court. The statement shall include a copy of the judgment or order appealed from, a copy of the notice of appeal with undertaking (or evidence of deposit or waiver of undertaking), filing date and a concise statement of the points to be relied upon by the appellant. If the statement conforms to the truth, it together with such additions as the court may consider necessary fully to present the questions raised by the appeal shall be approved by the trial court and shall then be certified to the supreme court as the record on appeal.

[251.254] Rule 4. (As amended April 1, 1944) The appellant or plaintiff in error shall cause the proper return to be made to and filed in this court within 20 days after perfecting the appeal or filing the writ.

Note: The state is entitled to dismissal of the appeal of a defendant where he not only failed to cause the proper return to be made within 20 days after perfecting his appeal as required by Supreme Court Rule 4, but also requested the clerk of the trial court not to make return and because of which request no return was made for nearly a year; and where no statement of errors relied on, nor copy of defendant's brief, was served as required by Supreme Court Rule 27. State v. Engel, 208 W 600, 243 NW 223.

The appeal in this case is dismissed conditionally for inexcusable violation of the rule of the supreme court requiring the appellant to cause the proper return to be made to such court within 20 days after perfecting the appeal. Will of Krause, 240 W 72, 2 NW (2d) 733.

Where notice of appeal in separate actions for assault and battery, tried together, was served as one notice of appeal, entitled as in the one action, and the notice of appeal was part of the record in that action, but no notice of appeal was included in the record in the other action, and there were certain other irregularities in respect to perfecting the appeals, and no return was caused to be made to the supreme court within the period required by Supreme Court

Rule 4, the appeals in both actions are dismissed on the ground of appellants' failure in respect to such rule. Gaber v. Balsiger, 243 W 314, 10 NW (2d) 290.

A motion to dismiss on appeal for failure to file the record in the supreme court within 20 days after perfecting the appeal, as required by Supreme Court Rule 4, is denied, where the return was delayed to obtain a substitution of parties and to have the proper parties before this court, and the delay was unavoidable and in no way prejudiced the respondents. Estate of Delmady, 250 W 389, 27 NW (2d) 497.

[251.255] Rule 5. In case of a defective return, either party may, upon motion, have an order for a further return.

Note: A state bank may not sell or assign its permit to establish and maintain a receiving and paying station to another state bank with approval of the banking commission or otherwise. A bank to which a charter has just been issued may not take over the assets and assume the deposit liability of a receiving and paying station already located in its community by agreement with the parent bank and with approval of the banking commission. 34 Atty. Gen. 287.

CHAPTER II.

BRIEFS AND APPENDICES.

[251.26] Rule 6. In calendar causes the appellant or plaintiff in error shall print a brief and appendix in conformity with the following rules:

(1) The front flyleaves of every brief shall contain an index including a synopsis or brief resume of the argument with page references followed by a list of all statutes, cases and other authorities referred to, the cases alphabetically arranged, together with references to the pages where the statutes, cases and other authorities are cited. (For illustration see 200 Wis. 530.)

(2) The brief shall be entitled in the cause, and following the title there shall be a statement whether an order or judgment is appealed from, the name of the trial court and the name of the trial judge, the date of the commencement of the action and the date when the judgment or order appealed from was entered. On the following page the question or questions involved on appeal or writ of error shall be stated briefly without detail or discussion, without names, dates, amounts or particulars of any kind. Following each question there shall be a statement indicating whether the question was affirmed, negatived, qualified or unanswered by the court below. If a qualified answer was given to the question the appellant or plaintiff in error shall indicate briefly the nature of the qualification or if the question was not answered and the record shows the reason for such failure, the reason shall be stated briefly in each instance without quoting the court below. The questions and statements in their entirety should ordinarily not exceed 20 lines and should rarely exceed one page and no other matter shall appear on the page with the statement. (In substance the question or questions should contain the type of matter found in the syllabus to a case. The question or questions should state what is to be decided,—the syllabus states what has been decided.)

(3) After the statement of the questions involved, the facts shall be stated in a clear and concise manner eliminating all immaterial details. Reference shall be made to the page of the appendix for each statement of fact made in the brief as to which there is a possibility of dispute. If reference is made to the record, the page of the record shall be given. When a question raised upon appeal involves a statute so much thereof as is necessary to a decision of the case shall be printed at length.

(4) The statement of facts shall be followed by argument in support of the position of the appellant or plaintiff in error with citations of authority.

(5) (As amended April 1, 1944) In addition to the brief, the appellant or plaintiff in error shall print an appendix or in lieu of it the statement of the case (Rule 3a). The appendix shall contain:

(a) The opinion or decision of the trial court.

(b) Such part and only such part of the pleadings, findings, verdict, judgment or order sought to be reviewed as may be material in the consideration on appeal of the questions stated.

(c) (As amended April 1, 1944) An abridgment of the bill of exceptions or record as the case may be but only so much thereof as is necessary and material to a consideration of the questions involved. The abridgment of the testimony shall be in narrative form with marginal page references to the record. Asterisks or other appropriate means shall be used to indicate omissions in the instructions of the court or in the testimony of witnesses. The names of the witnesses whose testimony is referred to shall be given and shall be properly indexed at the end of the appendix.

(d) All exhibits whether printed or not shall be indexed at the end of the appendix, with reference to the page of the record and if printed in the appendix, the page of the appendix where the same may be found. The nature of the contents of the exhibit shall be briefly stated in the index.

(e) The brief and appendix shall be bound together unless the appendix exceeds 100 pages, in which case it may be bound as a separate volume.

Note: For comment and suggestions by the court on the preparation of briefs under the new practice rules, see 242 W vi; also Wis. Law Review, Jan. 1943, p. 5.

The evidence which the appellant wishes the court to consider should be printed in the appendix, not in the brief without printing it in the appendix, and what is printed should not be taken from its context and mere excerpts printed. The provision in Supreme Court Rule 6 (5) (c), that the appellant shall print in his appendix "an abridgment of such part of the bill of exceptions as the appellant . . . desires the court to read in support of his position," intends that the appellant shall print so much of the record as is necessary for consideration of the questions raised by him, and that he shall print so much of the evidence as is material to a consideration of such questions, and not only that part of the bill of exceptions which is favorable to him. Eckhardt v. Industrial Comm., 242 W 325, 7 NW (2d) 841.

Because of failure to conform to the rule as to stating the questions involved, and because of the unnecessary length of its briefs, the prevailing party in this case is not allowed costs for the printing of its original brief, and is allowed costs only for the printing of a part of its reply brief. Phelps v. Wisconsin Telephone Co. 244 W 57, 11 NW (2d) 667.

The requirements in Supreme Court Rule 6 (5) (c), (d), that the appellant's brief shall contain an appendix printing an abridgment of such portion of the bill of exceptions as the appellant desires the court to read in support of his position, that the abridgment shall be in narrative form with marginal page references to the record, and that appropriate means shall be used to indicate omissions in the testimony, contemplate that such matters will be stated in the order or sequence in which they appear in the bill of exceptions, and are not satisfied by selecting and printing in piecemeal manner and in immediate connection with each contention asserted by the appellant merely those portions of the bill of exceptions which he considers favorable to the particular contention. Klitzke v. Ebert, 244 W 225, 12 NW (2d) 144.

Questions not briefed or argued on appeal will not be considered or decided. Public S. E. Union v. Wisconsin E. R. Board, 246 W 190, 16 NW (2d) 823.

[251.261] **Rule 7.** The brief of the respondent shall contain:

(1) Upon the front flyleaf an index including a synopsis or brief resume of the argument followed by a list of all statutes, cases and other authorities referred to, the cases alphabetically arranged, together with references to the pages where the statutes, cases and other authorities are cited. (For illustration see 200 Wis. 538.)

(2) The title to the cause following which there shall be a statement of the questions involved so far as the respondent disagrees with the statement of the questions involved made by the appellant or plaintiff in error.

(3) A statement of such facts and only such facts as are necessary to correct or amplify the statement of facts made by the appellant or plaintiff in error in his brief. Reference shall be made to the page of the appendix or to the record for each statement of fact made. The propositions and argument of the appellant or plaintiff in error shall be replied to so far as practicable in the order in which such propositions or argument are presented in the brief of the appellant or plaintiff in error. Additional propositions may be advanced when necessary to a complete presentation of respondent's position.

(4) (As amended April 1, 1944) A supplemental appendix containing an abridgment of such portions of the bill of exceptions or record as the case may be which the respondent deems necessary and material to a consideration of the questions involved and which have not been printed in the appendix of the appellant or plaintiff in error. As to form and substance the supplemental appendix shall conform to Rule 6 (5) (c).

(5) Such exhibits or parts of exhibits not printed by the appellant or plaintiff in error as respondent may desire to bring to the attention of the court. These shall be indexed, the page of the record where they are described given and the nature of the contents of the exhibit shall be briefly stated in the index at the end of the appendix.

(6) Ordinarily the brief and supplemental appendix shall be bound in one volume. If the supplemental appendix exceeds 100 pages it may be bound as a separate volume.

[251.262] **Rule 8.** The appellant or plaintiff in error may file a reply brief and set forth in an additional appendix thereto such parts of the record or such exhibits as he may wish the court to read in view of the parts printed by the respondent in the supplemental appendix to his brief.

[251.263] **Rule 9.** Reference to the appendix printed by the appellant or plaintiff in error may be indicated by A-Ap. p. 2. The appendix printed by the respondent may be referred to as A-R. p. 2.

[251.264] **Rule 10.** Costs will be allowed of course only for the printing of briefs which do not exceed 50 pages exclusive of the appendix. Costs for printing pages of a brief in excess of 50 pages will be allowed only upon special permission of the court, application for which shall appear on the flyleaf of the brief or following the index. Where it satisfactorily appears that the rules relating to the preparation and printing of a brief, including the appendix, have been flagrantly disregarded or there is an absence of a good-faith attempt to comply therewith the court may in its discretion deny to or impose costs against the offending party or strike his brief from the files.

Note: The appellant's motion to strike the respondent's brief for stating facts not of record and basing argument on those facts is denied in this case, where the appellant's brief is equally faulty, but no costs are allowed the respondent for printing his brief and supplemental appendix, on the affirmance of the judgment appealed from. Diehl v. Heimann, 248 W 17, 20 NW (2d) 556.

[251.265] **Rule 11.** (As amended April 1, 1944) Briefs, appendices and statements of the case shall be printed plainly with black ink in type not smaller than 10 point nor larger than 12 point and leaded with a 2 point lead, on eggshell paper, properly paged at the top, with the printed portion of a page 7 inches long and 3 and one-half inches wide centered in a page trimmed to a size 7 inches wide by 9 inches long and saddle-stitched when practicable, bound in a paper or cloth cover, having the title and calendar number of the case and designation of the brief printed in appropriate type on the outside, and shall be signed by counsel presenting the same. If special permission is given to file typewritten memorandum or reply briefs, they must conform to the size page above stated, viz.—7 by 9 inches.

CHAPTER III.

Service of Papers.

[251.27] **Rule 14.** Service of all papers may be made by mail, postage prepaid, properly addressed to the person to be served; 2 days being allowed for transmission where the route is wholly by railroad and an additional day for every 50 miles other than by railroad.

[251.271] **Rule 15.** Every notice of a motion shall be served on the opposite party at least 8 days before the making of the motion.

[251.272] **Rule 16.** (As amended April 1, 1944) Within 10 days after the commencement of the August term, the clerk shall prepare and cause to be printed a calendar of the causes then on the calendar, arranging all civil causes in the order of their filing, and arranging all criminal causes in their order at the foot. During the term he shall when directed by the court prepare and print a list of the causes subsequently filed.

Not less than 60 days before any case shall be set for argument the clerk shall send to every attorney appearing in a case a warning notice that his case is subject to call for argument on and after a stated date. Not less than 30 days before the time set for argument of cases on an assignment, the clerk shall send to each attorney appearing in any case on the assignment a list of such cases stating the day on which each case will be called for argument. As soon as practicable after the first day of the term, the clerk shall send to each attorney appearing in any case on the calendar, a list of all cases appearing thereon, and thereafter when printed, lists of the cases subsequently filed.

[251.273] **Rule 17.** (As amended September 17, 1942.) Not less than 40 days before the time set for argument, the appellant or plaintiff in error shall serve 3 copies of his brief and appendix upon the opposite party. Not less than 20 days before the time set for argument the opposite party shall serve upon the appellant or the plaintiff in error 3 copies of his brief and supplemental appendix, if any. Not less than 10 days before the calling of the case for argument the appellant or plaintiff in error may serve a reply brief and additional appendix, if any, upon the opposite party. No brief shall be served or received except as provided unless permission be first granted. Twenty copies of each brief and each appendix, together with proof of service thereof, shall be filed not later than 5 days before the time set for argument.

[251.274] **Rule 18.** (Adopted April 1, 1944) In criminal cases except where the state is appellant, service of brief and appendix of appellant or plaintiff in error shall be upon the attorney-general. Briefs and appendices in criminal cases, including service thereof, shall be governed by the rules that apply to civil cases except that appendices may be dispensed with by stipulation of the parties or by order of the court.

[251.276] **Rule 20.** Any cause on the state calendar may be put on any assignment by consent or when either party has given 10 days' written notice to the other party before the assignment has been ordered made up.

[251.277] **Rule 21.** The time prescribed by these rules for any act, except for the making of a motion for a rehearing, may be enlarged by the court for cause, on motion.

CHAPTER IV.

Calendar and Assignments.

[251.28] **Rule 22.** (As amended April 1, 1944) All causes in which the record shall have been filed on and after April 1 in each year and prior to April 1 in the succeeding year, are assigned to the August calendar of the current year in the order in which the records are filed in the office of the clerk of the court. Any cause may be placed upon the current calendar or advanced for hearing at any time in which it is shown that

the interests of the state, the people at large, or of any municipality are affected, or an important constitutional question is seriously raised, or an extraordinary exigency is involved, and it is further shown that delay would be prejudicial to the accomplishment of justice.

[251.281] **Rule 23.** (As amended April 1, 1944) Actions and proceedings brought under the original jurisdiction of this court shall be heard when and as directed by the court.

[251.282] **Rule 24.** [*Repealed April 1, 1944*]

[251.283] **Rule 25.** When a cause on the state calendar shall have been submitted by one party, the adverse party may have it put at the foot of any assignment.

[251.284] **Rule 26.** (As amended April 1, 1944) Cases on the calendar not reached for argument during the term shall stand continued and be considered as at the head of the next calendar.

[251.285] **Rule 27.** [*Repealed April 1, 1944*]

[251.286] **Rule 28.** The calendar causes shall be assigned for argument at such time and in such order as the court may direct.

CHAPTER V.

Submission of Causes.

[251.30] **Rule 30.** Causes may be submitted on either or both sides on printed briefs and appendices, seasonably served and filed, but the court may, in its discretion, require oral arguments.

[251.31] **Rule 31.** If neither side of a cause is submitted or presented when reached for argument, it will be dismissed or continued, in the discretion of the court.

[251.32] **Rule 32.** When a cause is submitted or presented by counsel for appellant or plaintiff in error, but not by the opposing party, the judgment or order appealed from may be reversed as of course, without argument.

Note: An order setting aside a verdict so far as it found that a deceased motorist was not negligent, and granting a new trial on issues raised by a cross complaint, is reversed under Supreme Court Rule 32, where the appellants were present when the cause was called for argument, and the respondents were not present and had not filed briefs. Long v. Wallmow, 226 W 660, 277 NW 704.

An order denying a motion for a new trial in an action for divorce is reversed under Supreme Court Rule 32 for failure of the respondent to submit or present the cause. Polak v. Polak, 249 W 361, 25 NW (2d) 595.

[251.33] **Rule 33.** When a cause is submitted or presented by counsel for the respondent or defendant in error, but not by the opposing party, the judgment or order appealed from will be affirmed as of course, without argument.

[251.34] **Rule 34.** In opening the oral argument appellant shall briefly state the nature of the action, the result in the court below, and the points upon which reversal is sought. No counsel shall read in extenso from briefs or written argument, nor testimony from the record. Decisions relied upon may be stated in substance but not read.

Unless otherwise specifically ordered oral arguments in civil cases will be limited as follows: Where the amount involved exclusive of costs exceeds $5,000, the appellant may have one hour and fifteen minutes and the respondent, one hour. In all other contested matters each side may have one-half hour.

[251.35] **Rule 35.** In felony cases, two counsel may be heard for not exceeding two hours on each side. In all other criminal cases, but one counsel may be heard on each side for not exceeding one hour, unless otherwise specially ordered.

[251.36] **Rule 36.** On each day of a session of the court cases are subject to call as specified in the notice of call for argument. All cases not called on the day for which they are set will be called in their order on succeeding days.

CHAPTER VI.

Motions.

[251.37] **Rule 37.** Every motion for a rehearing shall be filed within 20 days after the decision, and the clerk shall retain the papers till the expiration of such period, unless all parties interested consent to sooner remit the same.

Note: A motion to strike the motion of one party for vacation of a changed mandate, entered upon denial of a motion of the other party for a rehearing, is granted, because the motion for vacation of the changed mandate was in effect a motion for rehearing made upon denial of a motion for rehearing; because the motion for vacation of the changed mandate was also in effect a motion for a rehearing upon the original decision in the case and was not filed within the time limited by rule of court for filing motions for rehearing; and because, under 274.35 (2), the supreme court had lost jurisdiction of the case by reason of the lapse of 20 days after the denial of the motion of the other party for a rehearing. Milwaukee County v. H. Neidner & Co., 220 W 185, 263 NW 468, 265 NW 226, 266 NW 238.

[251.38] **Rule 38.** The papers in any cause wherein a motion for a rehearing is made shall be retained until the motion shall have been disposed of.

[251.39] **Rule 39.** A motion for a rehearing shall not be argued orally, but shall be submitted on printed arguments, of which 20 copies shall be furnished to the clerk.

[251.40] **Rule 40.** The printed arguments in support of the motion shall be served and filed within 30 days after the decision, and in default thereof the motion shall be deemed to have been waived.

[251.41] **Rule 41.** The printed arguments in opposition to the motion shall be served and filed within 40 days after the decision, at which date the motion shall be deemed to have been submitted.

[251.42] **Rule 42.** No motion as to any final determination made by the court, except a motion to correct mistakes in the record of this court, will be heard unless made within 20 days after such determination.

[251.43] **Rule 43.** Motions will be heard before the call of the calendar on Tuesdays and Fridays during the sessions of the court. Motions noticed for a day when the court shall not be in session will be heard on the first motion day thereafter.

[251.431] **Rule 43a.** In divorce actions pending in this court, on appeal perfected after July 1, 1910, no allowances for suit money, counsel fees or disbursements in this court, nor for temporary alimony or maintenance of the wife or children during the pendency of the appeal will be made in this court.

Such allowances, if made at all, shall be made by the proper trial court upon motion made and decided after the entry of the order or judgment appealed from and prior to the return of the record to this court, provided, that if such allowance be ordered before the appeal is taken such order shall be conditioned upon the taking of the appeal and shall be without effect unless and until the appeal be perfected.

Note: The supreme court will not make an allowance of attorney fees to the wife for services in the supreme court, where the wife's attorneys made no application to the trial court as required by Supreme Court Rule 43a, and their only excuse for their failure to do so was that they believed such application would be denied. Gray v. Gray, 232 W 400, 287 NW 708.

CHAPTER VII.

COSTS AND PENALTIES.

[251.44] **Rule 44.** No costs shall be taxed for printing briefs and appendices unless affirmative proof is made that they were served and filed within the time prescribed by the rules. (See also Rule 10 and sec. 251.23 Stats.)

[251.45] **Rule 45.** No costs of printing shall be allowed for any brief containing a manifest miscitation of authority or a palpably misleading quotation from any opinion or textbook, not corrected by the author before submission of the cause.

[251.46] **Rule 46.** (As amended April 1, 1944) When the brief is not served within the time and in the manner required by these rules, the opposite party if not in default, shall be entitled to a continuance for such time as the court may determine with costs in the discretion of the court or the court may direct the cause to stand for argument and charge the penalty named to the defaulting party by denying costs to that amount in case such party prevails and by adding it to the other costs if such party does not prevail.

Note: The failure of the appellant to serve his printed case and briefs within the time prescribed by Supreme Court Rules 16 and 18 (1941), constituting gross violation of such rules, entitles the respondent to have a continuance and costs, as provided by Rule 46 (1941). Horn v. Snow White Laundry & D. C. Co., 240 W 312, 3 NW (2d) 380.

The granting of a motion to dismiss an appeal for failure of the appellant to file his appendix and brief within the proper time, is not a matter of right to the movant but of discretion of the court. The only right the movant has is to a continuance if he demands it and to costs if the court sees fit to impose them. [Supreme Court Rule 46] Nowakowski v. Novotny, 245 W 161, 13 NW (2d) 523.

[251.47] **Rule 47.** Where a party fails to procure and file the proper return, the opposing party may move to dismiss the writ or the appeal, with taxable costs, including attorney's fees of $25.

In case such motion be made during a recess of the court the chief justice may make the proper order or judgment thereon with the same effect as if made by the court in session.

[251.48] **Rule 48.** When a proper return shall have been filed before the final determination of a motion to dismiss for want of such return, the motion may be denied upon payment of costs by the opposite party, in the discretion of the court, not exceeding $25.

[251.49] **Rule 49.** When a supplemental return is ordered upon application of a party, and the defect in the original return is attributable to the fault of the opposing party, the court may, in its discretion, order costs to be paid to the moving party, not exceeding $25; payment to be enforced as directed.

[251.50] **Rule 50.** No costs shall be taxed for printing any brief containing matter disrespectful to this court, or the trial court, or to opposing counsel; and the court will not consider such a brief, and of its own motion will strike it from the files.

[251.51] **Rule 51.** If an attorney, in addressing the court, indulges in language disrespectful to this court, or to the trial court, or to the opposing counsel or party, he will be prohibited from further addressing the court in the cause, without prejudice to any other proceeding to inflict punishment for such misconduct.

[251.52] **Rule 52.** When a motion for a rehearing, or a motion in the nature of a motion for a rehearing, is denied, costs will be allowed to the prevailing party, consisting of clerk's fees, necessary disbursements, and an attorney's fee, to be fixed in view of the facts and circumstances of each case, but not to exceed the sum of $25.

[251.53] **Rule 53.** When it shall be necessary on a motion for a rehearing to examine any question not theretofore presented in the briefs, or to examine further any question theretofore presented, and the motion be denied, the attorney's fee of the prevailing party shall not exceed $10, unless a question of more than ordinary difficulty be presented.

CHAPTER VIII.

MISCELLANEOUS.

[251.54] **Rule 54.** Attorneys and guardians ad litem, appointed by the court below, will be deemed to continue in service until the contrary appears.

[251.55] **Rule 55.** All causes which have been pending in this court for two years, wherein no record has been filed, may be dismissed without notice, upon payment of the clerk's fees.

[251.56] **Rule 56.** Except in state cases no record shall be filed unless $10 is deposited with the clerk, to be applied on his fees, which deposit shall be recovered from the opposing party if appellant prevails and be credited to him on the judgment if the opposing party prevails.

[251.57] **Rule 57.** The appellant shall have the right to open and close the argument in all cases, whether legal or equitable.

[251.58] **Rule 58.** When a judgment is reversed, the cause, if tried by the court, will ordinarily be remanded for final judgment, and if tried before a jury, for a new trial; but if it appear in a jury cause that there has been a full trial and that justice will be best subserved by the direction of a judgment, the cause will be remanded for final disposition according to the right of the matter, whether such judgment will have the formal verdict of a jury as a basis therefor or not.

[251.59] **Rule 59.** Upon a continuance for favor, the opposing party shall be entitled to costs, not exceeding $25, unless such continuance shall have been made necessary through the fault of such party, in which case such party may be denied costs, and costs may be imposed on him, in the court's discretion, for the benefit of the moving party, not exceeding $25.

[251.60] **Rule 60.** For infraction of any of the rules of this court, for which no penalty is expressly provided, the offending party may be mulcted in costs, in the court's discretion, for the benefit of the opposing party.

[251.61] **Rule 61.** If through mistake, inadvertence or excusable neglect the appeal shall not have been perfected, or the bill of exceptions be not properly certified so as to permit a decision of the questions presented for review, the appellant will be given reasonable opportunity to correct the error, on such terms as may be just.

[251.62] **Rule 62.** [*Repealed April 1, 1944*]

[251.63] **Rule 63.** All maps, exhibits or models constructed or intended for the mere purpose of illustrating the issues in any action or proceeding pending in this court shall be placed free of expense in the custody of its clerk prior to the case being set down for argument and, without expense to such clerk, taken away within 30 days after expiration of the time for retention of the record in this court and in default thereof the same shall be turned over to the officer of the court for destruction, or other permanent disposition.

[251.64] **Rule 64.** In cases where the order or judgment is affirmed, opinions will not hereafter be written unless the questions involved be deemed by this court of such

special importance or difficulty as to demand treatment of an opinion. A table of the cases affirmed without opinion, containing the titles, statement of the nature of each, the courts from which they came, dates there and here decided, and names of respective counsel, shall be printed in the Reports.

Note: When the evidence supports the findings, and this is the only question involved on the appeal, the supreme court does not ordinarily file an opinion. Jacobson v. Bryan, 244 W 359, 12 NW (2d) 789.

[251.65] **Rule 65.** Applications by attorneys of other states for admission to this court, together with the proofs entitling them to admission, must be filed with the clerk at least 60 days before they are acted upon. Each applicant for admission to the bar pursuant to the provisions of section 256.28 (3) shall at the time of filing his application, deposit with the clerk of the supreme court currency, draft, cashier's check or certified check in the sum of $25 payable to bearer, to cover the expenses of such investigation as may be necessary to satisfy the court that he is of good moral character and has been engaged in the actual practice of the law in the state or territory from which he comes for the required period. Such portion of the deposit as is not used for the purpose stated will be returned to the applicant.

Application blanks will be furnished by the clerk upon request.

[251.66] **Rule 66.** The foregoing rules shall take effect on the first day of July, 1942, except that counsel appearing in cases on the August, 1942 calendar may at their option in the preparation of those cases conform to the rules as they were prior to the revision. In cases appearing on the January, 1943 calendar and subsequent calendars, all briefs and appendices shall be prepared in conformity with these rules.

On and after July 1, 1942, all formal rules of practice in this court heretofore adopted shall cease to be in force but rules of practice established in the decisions of the court not inconsistent with these rules shall remain in force as heretofore.

SUPREME COURT COMMENT ON ITS 1942 REVISED RULES

OBJECT OF REVISION.

By the revision of the rules of practice, it is sought to achieve two main objectives: (1) To reduce the amount of printing required on appeal, and (2) to improve the presentation of the facts and the law to the court by modifications of the brief.

The revision of the rules is an adaptation to our practice of the rules which have been in force in the United States circuit court of appeals for the fourth circuit for some years where both of the objects stated have been attained. The cost of printing in that circuit for one term was reduced by two-thirds. It is not supposed that so great a saving can be made in the printing of appeals in this court. However, there is no doubt that a very substantial saving can be made at the beginning, and that with a better understanding and a little practice under the revised rules, the amount of saving can be materially increased.

In the preparation of briefs the facts are usually stated with too much detail. All that an appellate court needs are the broad general facts. A mass of detail hinders, rather than helps the appellate judge to grasp the situation to which it is sought to apply the law. Too often the facts are stated as they would be argued to a jury. The quantum of fact material which the appellate court needs to have before it is quite different from the amount of detailed facts which may properly be presented to a jury.

Many briefs contain an overcitation of authority. In the average case the decisions of the state of Wisconsin should be referred to first. Citations of encyclopedias and treatises are helpful, but long extracts from these or from opinions should not be printed. With few exceptions the principal use made of an encyclopedia or treatise is to get a list of cases supporting the proposition under consideration. A great deal of useful material is found in law journal articles.

FORM OF BRIEF.

Briefs will be in the same form as heretofore with one or two exceptions which will be noted later. The index, the synopsis, the arrangement of cited cases, and other authorities will be the same as under the former rules. The principal difference will be that references in support of statements of fact will be to the appendix and not to a "case."

Immediately after the title of the case the revised rules require the writer to state whether an order or judgment is appealed from, the names of the trial court and of the trial judge, the date of the commencement of the action, and the date when the judgment or order appealed from was entered. Under the former rules the names of the trial court and the trial judge were stated in the case (old Rule 6). Ordinarily, the title and this statement will appear upon the first page of the brief.

QUESTIONS INVOLVED.

On the page following the foregoing statement the appellant is required to state the question or questions which are presented for decision. This provision does away with the former rule which required the appellant to make an assignment of errors. Under the former rule there were often 10, 15,—sometimes 30 or 40 assignments of error which counsel proceeded to argue under three or four or five heads. These heads are now denominated "questions involved." An appellant must hereafter, as heretofore, point out the respects in which he claims the trial court erred, but this is done by a statement of the questions involved and the argument made in support of appellant's position.

Many lawyers have followed the practice of stating the questions involved, an excellent example of which is to be found in Whitman v. Wisconsin Department of Taxation, 240 W 564, 4 NW (2d) 180, decided June 1, 1942. Counsel in that case stated the questions as follows:

"1. Does the receipt of the 755 shares of the common (conversion) stock of the J. C. Penney Company by James R. Whitman, petitioner, constitute taxable income to the petitioner, or is it part of a nontaxable exchange?

"2. Is the difference between the fair market value at the time of the purchase, and the cash price paid by the petitioner to the J. C. Penney Company for shares of common (expansion) stock purchased by the taxpayer during 1927-1935, inclusive, additional compensation and taxable to him under section 71.02 (2) (c), Wisconsin statutes, or was said stock a tax-free distribution to him as part of and pursuant to a plan of reorganization within the provisions of section 71.02 (2) (i), Wisconsin statutes?

"3. Is there any credible evidence in the finding of the board of tax appeals valuing the common stock of the J. C. Penney Company in 1929 at $300, or is the valuation placed on it by the circuit court of $340 per share the proper value?

"4. Is the average cost basis the proper basis for computing the gain or loss upon the sale of J. C. Penney Company stock by the taxpayer during the years 1927-1935, both inclusive (many of the transactions being open market transactions only with the certificates of stock never issued to the petitioner?)"

The statement of the questions involved in this case informed the court in accordance with the revised rule of what was before it for decision. The questions are stated without argument or details with the exception of the matter which we have included in parentheses. The inclusion of this matter violates the rule. It is not a part of the question but is a fact stated by way of argument. To have the questions properly stated is a substantial aid to the court in the consideration of the case whether on oral argument or upon briefs.

The following questions do not comply with the rule:

"Did the court err in its instructions to the jury?"

"Did the court err in admitting evidence over the objection of appellant?"

These questions give the court no clue to the questions really involved and are merely an assignment of error reduced to the form of a question.

Compliance with the rule will require the writer of the brief to present his material upon appeal in a more orderly and logical way than is often done. Many briefs disclose no effort on the part of the writer to make an analysis of the case which will disclose to the writer as well as the judge the questions really at issue. The appellate judge is left to ascertain these questions as best he can. As a consequence, there are in such a brief many useless citations of authority upon collateral questions, which may or may not be necessary to a decision. Such a practice leads to the inclusion of much immaterial matter. A proper statement of the questions involved will constitute a summary of the argument made by the appellant in his brief which need not be repeated at the end of the brief.

The respondent is not required to make a statement of the questions involved but is required to answer the propositions and arguments of the appellant or plaintiff in error so far as practicable in the order in which such propositions or arguments are advanced in the brief of the appellant. Some fear has been expressed that this will prevent the respondent from making the most favorable presentation of his side of the case. That fear is probably based upon past experience under the former rules. When the appellant's brief is required to be in logical form, presented by way of propositions, rather than by assignments of error, the respondent is in a much more favorable position to present his reply to appellant's brief than under the former rule. However, it is true that in some cases it may not be practicable to comply with the rule strictly, in which case the respondent may set up additional questions when that is necessary to a complete presentation of his side of the case. These questions should conform to the requirements of Rule 6 (2) as to form and content.

THE APPENDIX.

The most radical departure from the former rules made by the revision is the requirement that the appellant shall print an appendix, thus doing away with the printing of what has heretofore been known as "the case." If the spirit of former Rule 6 which required printing of so much of the record as was necessary to present the questions for decision had been followed by counsel in the preparation of cases, an amendment would not have been as necessary. However, over the years a practice has grown up of printing practically everything found in the return made by the clerk of the trial court, including notices of trial, summons, subpœnas, depositions and many other documents having no bearing upon the determination of the appeal. Many of the facts in a case are undisputed. It is sufficient to state those facts in the briefs. It is not necessary to print in the appendix the testimony as to such facts. The court will scan appendices rather closely to see that they comply with this rule.

While the court will, until the rule is fully understood, be lenient in the enforcement of penalties, nevertheless in cases where there is not a good-faith attempt to comply with the rule, the penalty will be imposed. The court is itself somewhat responsible for the condition which obtained under the former rules because it did not require compliance therewith.

The requirement that the abridgment be in narrative form was also a requirement of the former rules. Under the former rule, as well as under the revised rule, where it is impossible to reduce the testimony of witnesses to the narrative form, it may be given by question and answer. One who has had experience in the preparation of cases knows that oftentimes it is difficult, if not impossible, to convey the meaning contained in the record by an abridgment in narrative form. The same application will be made of the revised rule as was made of the former rule. Attention is called to the fact that marginal reference must be made to the page of record where the testimony abridged is to be found.

SERVICE OF BRIEFS.

Under former Rule 16 the appellant or plaintiff in error was required to serve his case upon the opposite party at least 40 days before the time set for argument. Under the revised rule he is required to serve his brief, including the appendix, 40 days before the time set for argument. Experience under the former rule demonstrated that in a great many cases the respondent was at a disadvantage. He had only 10 days after the service of the appellant's brief in which to prepare and serve his brief. Under the revised rule he has 20 days in which to prepare and serve his brief. In the event that the appellant wishes to serve a reply brief he has 10 days in which to prepare and serve it, instead of 5 days under the former rule. Counsel should not assume that under the revised rule they may serve their briefs late and be excused for the reason that the respondent has more time in which to prepare and serve his brief. Some counsel take advantage of the situation because they know that opposite counsel will not insist upon a compliance with the rule. For that reason, the court will feel obliged upon its own motion to give consideration to infractions of this kind. What is desired is a proper and timely presentation of the case. Each party now has the necessary time in which to make preparation for the service and filing of his brief.

WARNING NOTICE.

Under the revised rule, the clerk of the supreme court is required, 60 days before any case set for argument, to send a warning notice to each attorney appearing in the case, likely to be called for argument on the next assignment. This notice will state that his case is subject to be called on and after a stated date. For example, the clerk will send out a notice, 60 days before September 14, 1942, that certain cases which will be listed, will be subject to call for argument on and after the 14th day of September, 1942. The clerk cannot, 60 days before the day set for argument, notify counsel on which particular day his case will be heard, this for the reason that experience shows that many cases are continued, settled and dismissed for one reason or another. Under such circumstances, it is impossible for the clerk to tell 60 days ahead of time what cases will be called for argument on a particular date. He can and will notify counsel that his case will be subject to call after a day certain. Thirty days before the case is set for argument counsel will receive a notice of the day on which his case will be heard. This will be the usual postal card notice.

As heretofore, the clerk will also send to each counsel a copy of the calendar containing a list of all cases for the current term. Due to the fact that appeals may be filed up to the first day of August for the August term and the first day of January for the January term, the calendar cannot be sent out 60 days in advance of the day set for the argument of the cases on the September assignment or the February assignment. For that reason the clerk will make up a partial calendar in order to comply with the rule and that will be sent to counsel 60 days prior to the time when his case may be called for argument. This rule should be of some advantage to counsel. Counsel will have 20 days after receipt of the "warning notice" to prepare his brief and serve it. Under the former rules he was obliged to guess at the time when he would be required to serve his case. By the giving of the 60-day notice, time for serving the brief and appendix is made certain, thus giving him ample opportunity to comply with the rule.

Attention is called to the fact that briefs must be filed with the clerk 5 days prior to the day set for argument. The former rule required that briefs be filed at least 24 hours before a cause was set for argument. Under the former rules this oftentimes inconvenienced counsel with the result that in many instances the rule was not complied with. Under the present rule, the respondent has 15 days in which to file briefs after they are served. Failure to comply with this rule will not be excused except for substantial reasons.

If briefs are filed 5 days in advance of the time set for argument members of the court will have an opportunity to examine the briefs on each side. While this may not be done in every case, experience shows that it is very helpful for some member of the court to examine briefs of parties before oral argument is had. For this reason briefs are required to be filed within the time prescribed.

It is also to be noted that briefs and appendices are to be printed on eggshell paper. This means plain, white, unglazed paper. "Eggshell" is a technical term in the paper trade and does not include glazed paper. Briefs printed upon paper highly glazed are difficult to read and make an unnecessary tax upon the vision of the reader.

COSTS.

Rule 10 and Chapter 7 relate to the imposition of costs and penalties. They are self-explanatory and reference is made to them here merely for the purpose of directing attention to the fact that they have been changed.

It will be noted that under Rule 66 counsel may in the preparation of cases for the August term [1942], at their option, comply with the revised rules or the former rules. This provision is made because in a number of causes the printed case has already been prepared and printed. Some cases are now being prepared for the September assignment in accordance with the revised rules.

MECHANICAL PROBLEMS.

Correspondence with printing establishments in Richmond, Virginia, where the revision has been in effect for some years, indicates that there is no difficulty from a mechanical standpoint in preparing the brief and appendix. The appendix is first paged and printed. That enables the writer of the brief to refer to the appendix in the same way that he would have referred to a "case." It is suggested that it would be a desirable practice to commence the paging of the brief with 1 and continue to 100; that the first page of the appendix be 101 and the paging continued. If that system were followed the reader would always know whether a reference was to a brief or to an appendix. There are comparatively few cases where a brief of more than 100 pages is required. In such cases the paging of the appendix might begin at 201. After the brief is prepared and printed, the brief and appendix should, as the rule requires, be bound in one volume unless the appendix exceeds 100 pages in length.

Inquiries in regard to the interpretation and application of the rules addressed to the clerk of the court will receive prompt attention.