Legislative Council Note, 1959: As to (1): Restatement of present law except for the inclusion of the family court commissioner. (Bill 151-A)

247.38 History: R. S. 1849 c. 79 s. 31; R. S. 1858 c. 111 s. 31; R. S. 1878 s. 2375; Stats. 1898 s. 2375; 1917 c. 619; 1925 c. 4; Stats. 1925 s. 247.38; 1959 c. 345.

247.39 History: 1959 c. 595 s. 72; Stats. 1959 s. 247.39; 1963 c. 429.

Legislative Council Note, 1959: Present s. 249.39 relating to cohabitation after divorce is repealed. (See note to s. 247.37 (3)) Proposed s. 249.39 incorporates supreme court rule 43a (s. 251.431) which provides that alimony or allowances pending appeal to the supreme court shall be decided upon motion in the trial court. (Bill 151-A)

CHAPTER 248.

Actions Abolished.

Legislative Council Note, 1959: The entire chapter is new. It abolishes the common law action for breach of promise (s. 248.01). Existing causes of action may be filed for 6 months after the effective date of the proposed law (s. 248.04). Thereafter such filing is unlawful (s. 248.03). Contracts arising from claims due to breach of promise are declared void as being contrary to public policy (s. 248.05). However, recovery of property procured by false representations of intention to marry is permitted. (s. 248.06) The chapter provides penalties (s. 248.07) and is to be liberally construed. (s. 248.08)

The action for breach of promise encourages marriages that should not take place and its abolishment is in keeping with the philosophy that legislation should be designed to promote stability in marriage. As a remedy which permits monetary recovery the action sanctions conduct that borders on extortion. An action for deceit may be brought where there has been intentional misrepresentation resulting in monetary loss. (s. 248.06) (Bill 151-A)

Editor's Note: Citations of reports of illustrative cases are as follows: Giese v. Schultz, 69 W 521, 34 NW 913; Salchert v. Reinig, 135 W 194, 115 NW 132; Hanson v. Johnson, 141 W 550, 124 NW 506; Falkner v. Schultz, 160 W 594, 150 NW 424; and Klitzke v. Davis, 172 W 425, 179 NW 586.

248.01 History: 1959 c. 595 s. 73; Stats. 1959 s. 248.01.

Abolition of breach-of-promise actions in Wisconsin. Ninneman and Walther, 43 MLR 341.

248.02 History: 1959 c. 595 s. 73; Stats. 1959 s. 248.02.

248.03 History: 1959 c. 595 s. 73; Stats. 1959 s. 248.03.

248.04 History: 1959 c. 595 s. 73; Stats. 1959 s. 248.04.

248.05 History: 1959 c. 595 s. 73; Stats. 1959 s. 248.05.

248.06 History: 1959 c. 595 s. 73; Stats. 1959 s. 248.06.

248.07 History: 1959 c. 595 s. 73; Stats. 1959 s. 248.07.

248.08 History: 1959 c. 595 s. 73; Stats. 1959 s. 248.08.

CHAPTER 250.

Court of Impeachment.

250.01 History: 1853 c. 22 s. 1; R. S. 1858 c. 114 s. 1; R. S. 1878 s. 2395; Stats. 1898 s. 2395; 1925 c. 4; Stats. 1925 s. 250.01.

Revisers' Note, 1878: Section 1, chapter 114, R. S. 1858, amended so as to be limited to the case of the senate acting as a court. Provisions for administration of oaths, etc., in the senate, as the legislative body is made in the chapter on the legislature.

250.02 History: 1853 c. 22 s. 2; R. S. 1858 c. 114 s. 2; R. S. 1878 s. 2396; Stats. 1898 s. 2396; 1925 c. 4; Stats. 1925 s. 250.02.

Revisers' Note, 1878: Section 2, chapter 114, R. S. 1858, verbally amended in last clause. * * *

CHAPTER 251.

Supreme Court.

251.01 History: 1875 c. 218 s. 5; R. S. 1878 s. 2397; Stats. 1898 s. 2397; 1919 c. 362 s. 31; 1925 c. 4; Stats. 1925 s. 251.01; 1953 c. 606.

251.02 History: 1852 c. 395 s. 5; R. S. 1858 s. 1044; R. S. 1878 s. 2399; Stats. 1898 s. 2399; 1925 c. 4; Stats. 1925 s. 251.02.

251.03 History: 1917 c. 353; Stats. 1917 s. 2399a; 1925 c. 4; Stats. 1925 s. 251.03; 1955 c. 204 s. 70a.

251.035 History: 1959 c. 516; 1959 c. 659 s. 73, 74; Stats. 1959 s. 251.035.

Comment of Interim Committee on State Publications, 1959: Old 35.71 renumbered 251.035 (1). Old 35.72 is renumbered 251.035 (2). Old 35.73 is renumbered 251.035 (3) with a minor verbal change. These sections do not belong in ch. 35. [Bill 617-S]

251.04 History: 1876 c. 284; R. S. 1878 s. 2400; 1885 c. 182; Ann. Stats. 1889 s. 2400; 1895 c. 187; 1897 c. 241; Stats. 1898 s. 2400; 1907 c. 466 s. 3; 1911 c. 580; 1911 c. 664 s. 128; 1913 c. 772 s. 117, 118; 1925 c. 4; Stats. 1925 s. 251.04; 1929 c. 482 s. 9; 1947 c. 9 s. 31; 1947 c. 571; 1959 c. 659 s. 79; 1959 c. 691; 1965 c. 240; 1969 c. 154.

251.05 History: 1868 c. 147; R. S. 1878 s. 2401; Stats. 1898 s. 2401; 1911 c. 107; 1913 c. 722 s. 117; 1925 c. 4; Stats. 1925 s. 251.05.

251.055 History: 1951 c. 319 s. 220; Stats. 1951 s. 251.055.

251.06 History: 1875 c. 218 s. 1; R. S. 1878 s. 2402; Stats. 1898 s. 2402; 1925 c. 4; Stats. 1925 s. 251.06; 1943 c. 571.

251.07 History: 1853 c. 105 s. 1; R. S. 1858 c. 115 s. 2; 1875 c. 218 s. 2; R. S. 1878 s. 2404;

Stats. 1898 s. 2404; 1925 c. 4; Stats. 1925 s. 251.07.

251.08 History: R. S. 1849 c. 82 s. 6; R. S. 1858 c. 115 s. 6; R. S. 1878 s. 2405; Stats. 1898 s. 2405; 1925 c. 4; Stats. 1925 s. 251.08; 1961 c. 495.

On judicial power generally see notes to sec. 2, art. VII; on jurisdiction of the supreme court (appellate jurisdiction) see notes to sec. 3, art. VII; on general provisions concerning courts of record see notes to various sections of ch. 256; and on writs of error and appeals see notes to various sections of ch. 274.

When not granted by statute appeals do not lie. Mitchell v. Kennedy, 1 W 511.

A stipulation that a cause should be argued before one justice, that he should make the decision, which should be entered as the decree of the court, is binding. Jurisdiction of the supreme court attaches at the time the court from which the appeal is taken loses it. Walker v. Rogan, 1 W 597.

An appeal removes the subject matter thereof and all matters connected therewith to the supreme court and is thenceforth within its control. Waterman v. Raymond, 5 W 185.

In matters committed to the legislature the supreme court has no appellate jurisdiction or supervisory powers over it. In re Falvey v. Kilbourn, 7 W 630.

Under the chancery practice the effect of an appeal from a final decree in equity was the continuation of the same cause. Racine v. Barnes, 6 W 472; Durkee v. Stringham, 8 W 1.

The legislature may provide for removal of all causes from county to circuit courts for review before they can be brought to the supreme court. Harrison v. Doyle, 11 W 283.

The supreme court has jurisdiction of an appeal from a judgment of the circuit court although that court was without jurisdiction and will reverse the judgment and remand to the trial court with directions for a dismissal there. Spaulding v. Milwaukee, L. S. & W. R. Co. 57 W 304, 14 NW 368, 15 NW 482.

On the refusal of a trial court to stay the execution of an order appointing a receiver, pending an appeal, the supreme court will grant such stay if the appeal is taken in good faith and reasonable security is given. Janesville v. Janesville W. Co. 89 W 159, 61 NW 770.

In the absence of a statute, an authorized appeal stays proceedings to be reviewed. Hedberg v. Dettling, 198 W 342, 224 NW 109.

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.

Exercise of appellate jurisdiction by the supreme court in a criminal case is circumscribed by the limitations imposed by 251.08, Stats. 1965; under that section a criminal appeal or writ of error may be taken only from a final judgment or an order in the nature of a final judgment rendered in a court of law. (State ex rel. Arthur v. Proctor, 255 W 355, cited.) State v. Koopman, 34 W (2d) 204, 148 NW (2d) 671.

The general rule relating to the effect of an appeal on the jurisdiction of the trial and appellate court is that in the absence of a contrary statute an appeal duly perfected divests the trial court of jurisdiction of the subject matter of the appeal and transfers it to the appellate court where it remains until the appellate proceeding terminates and the trial court regains jurisdiction. State ex rel. Freeman Printing Co. v. Luebke, 36 W (2d) 298, 152 NW (2d) 861.

251.09 History: 1913 c. 214; Stats. 1913 s. 2405m; 1925 c. 4; Stats. 1925 s. 251.09.

Editor's Note: Whether a reversal of the judgment is "necessary to accomplish the ends of justice" depends upon the facts in each case as disclosed by the appeal record. In no 2 cases are the facts alike. The decisions afford no pattern or formula by which the lower courts or attorneys can determine when the supreme court will render a "discretionary reversal". It is not feasible to attempt in the annotations to state the facts in detail in each decided case. The following is a list of illustrative cases in which the supreme court has exercised "its discretion" to reverse the judgment or order appealed from: Knudson v. George, 157 W 520, 147 NW 1003; Foote v. Foote, 159 W 179, 149 NW 738; Peterson v. Lemke, 159 W 353, 150 NW 481; Graber v. Duluth S. S. & A. R. Co. 159 W 414, 150 NW 489; Will of Porter, 178 W 556, 190 NW 473; Estate of Hoehl, 181 W 190, 193 NW 514; Paladino v. State, 187 W 605, 205 NW 320; Koss v. A. Geo. Schulz Co. 195 W 243, 218 NW 175; Mathiesen v. State, 195 W 364, 218 NW 184; State v. Hintz, 200 W 636, 229 NW 54; Jacobson v. State, 205 W 304, 237 NW 142; General D. & S. Corp. v. Bolens, 205 W 664, 238 NW 814; Volk v. Flatz, 206 W 270, 239 NW 424; Maahs v. Schultz, 207 W 624, 242 NW 195; Schuyler v. Kernan, 209 W 236, 244 NW 575; State v. Fricke, 215 W 661, 255 NW 724; Dunnebacke Co. v. Pittman, 216 W 305, 257 NW 30; Mauerhann v. Dixon, 217 W 29, 258 NW 352; Guardianship of Meyer, 218 W 381, 261 NW 211; Hughes v. State, 219 W 9, 261 NW 670; Bujko v. Bujko, 219 W 565, 263 NW 581; Newbern v. State, 222 W 291, 260 NW 236, 268 NW 871; Anderson v. Seelow, 224 W 230, 271 NW 844; State v. Richter, 232 W 142, 286 NW 533; State v. Van Patten, 236 W 186, 294 NW 560; State v. Burns, 236 W 593, 296 NW 85; Prideaux v. Milwaukee Auto. Ins. Co. 246 W 390, 17 NW (2d) 350; Vlasak v. Gifford, 248 W 328, 21 NW (2d) 648; O'Leary v. Buhrow, 249 W 559, 25 NW (2d) 449; Pukall v. McCandless, 250 W 468, 27 NW (2d) 485; Edwards v. Edwards, 270 W 48, 70 NW (2d) 22, 71 NW (2d) 366; Schroeder v. Stampfel, 270 W 608, 72 NW (2d) 343; Northland B. Co. v. Farmers Mut. Auto. Ins. Co. 3 W (2d) 326, 88 NW (2d) 363; Weggeman v. Seven-Up Bottling Co. 5 W (2d) 503, 93 NW (2d) 467; Korleski v. Lane, 10 W (2d) 163, 102 NW (2d) 234; Podoll v. Smith, 11 W (2d) 583, 106 NW (2d) 332; Chapman v. Keofe, 37 W (2d) 315, 155 NW (2d) 13; Logan v. State, 43 W (2d) 128, 168 NW (2d) 171.

1. Civil actions and proceedings.
2. Criminal actions.

1. Civil Actions and Proceedings.

The supreme court can not vest inferior courts with powers not conferred upon them

by the constitution or the statutes. Defiance M. Works v. Gill, 170 W 477, 175 NW 940.

An erroneous judgment entered without trying the real controversy will be remanded for a new trial. Rowell v. Rhadans, 171 W 86, 175 NW 937.

251.09, Stats. 1925, must be so construed as not to deprive parties of the right to trial by jury and neither court has the power to do more than give the parties the option to waive their constitutional rights or submit to a new trial in cases where the damages are excessive or inadequate. Campbell v. Sutliff, 193 W 370, 214 NW 374.

A new trial will not be awarded because a possible issue in the case was not litigated, where the complaining party, after deliberation, elected to stand on his pleading unamended. Crombie v. Immel C. Co. 196 W 319, 220 NW 186.

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.

Where the evidence sustained the judgment 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 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 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.

See note to 895.045, on comparison of negligence, citing Hammer v. Minneapolis, St. P. & S.S.M.R. Co. 216 W 7, 255 NW 124.

The supreme court's power to order a new trial when miscarriage of justice seems probable is exercised cautiously, especially in the absence of a motion to review. Evidence that a motorist, who collided with a highway workers' truck which had swung across a road preliminary to dumping dirt, knew of highway operations in the vicinty, and was following the truck too closely, warranted the jury's attributing to the motorist 90% of negligence producing the collision, and hence was insufficient to justify a new trial. Hayes v. Roffers, 217 W 252, 258 NW 785.

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

The "record" referred to in 251.09 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.

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.

Where the trial court erroneously granted judgment, notwithstanding the 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, the supreme court reversed the judgment. 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 60% 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, the jury is not to guess where the truth lies. The case having been well tried and there being no likelihood that the cause of the accident could be removed from the field of conjecture the supreme court declined to reverse a judgment of dismissal on the merits. Dahl v. Charles A. Krause Milling Co. 234 W 231, 289 NW 626.

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. The court remanded the cause with directions to require the pleadings amended to raise the issues triable and a new trial of those issues. Simonz v. Brockman, 249 W 50, 23 NW (2d) 464, 24 NW (2d) 409.

A judgment 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. Leisch v. Tigerton Lumber Co. 250 W 463, 27 NW (2d) 367.

Where a will was denied probate because one of the subscribing witnesses who was attorney for the proponent and who had refused to testify, the supreme court orders a new trial and that the testimony of such subscribing witness be taken. Will of Baksic, 253 W 446, 34 NW (2d) 841.

Where the special verdict required a determination by a court as to what judgment should be entered, and such determination could be made only on a consideration of the evidence received on the trial, and the trial judge and the court reporter were killed in an accident before the entry of any judgment, and no bill of exceptions could be settled, a judgment entered by a succeeding judge is reversed and the cause remanded for a new trial in the interest of justice. Pacific Nat. Fire Ins. Co. v. Irmiger, 254 W 207, 36 NW (2d) 89.

Where it clearly appeared that the settlement in question, which the plaintiff unsuc-

cessfully sought to have set aside on the ground of fraud, proceeded on a mistaken basis as to the legal rights of the parties under their contract to operate the defendant's farm on shares, the supreme court reverses the judgment and remands the cause for a determination to be made on the correct basis, although no effort was made to impeach the settlement for mistake on appeal. Benz v. Zobel, 255 W 542, 39 NW (2d) 713.

In actions for personal injuries, partisan conduct of the trial judge in taking over the examination of the plaintiffs' witnesses, commenting on and interpreting their testimony, and assisting continuously in developing the plaintiffs' case requires in the interest of justice that judgments against the defendant be reversed and the causes remanded for a new trial. Reuling v. Chicago, St. P. M. & O. R. Co. 257 W 485, 44 NW (2d) 253.

Where, through no fault of counsel, the trial court failed to decide the plaintiff's motion for changes in some of the jury's answers or for a new trial within the 60-day period prescribed by 270.49 (1), and the court consequently entered judgment on the special verdict as rendered, and there were inconsistencies and conflicts in the jury's answers, calling for due consideration and an appropriate and timely judicial determination of the issues raised by the motion, the supreme court, acting under its discretionary power may reverse the judgment and remand the cause for a new trial. Brown v. Erb, 258 W 444, 46 NW (2d) 329.

Where a different special verdict and instructions might have presented the real issue in this case better than the special verdict submitted and the instructions given, but the plaintiff's uncorroborated testimony was so thoroughly impeached in material matters that no conscientious jury could decide the issue in his favor, the supreme court will not exercise its discretionary power to reverse the judgment and order a new trial. Ernst v. Ernst, 259 W 495, 49 NW (2d) 427.

Although, generally, the supreme court will not consider an assignment of error which is presented therein for the first time, the court has the unquestioned power to consider the entire record and to dispose of questions of law clearly presented therein. Estate of Zeimet, 259 W 619, 49 NW (2d) 824.

In an action by the seller to recover on a note for the balance of the purchase price of equipment furnished, wherein the buyers were entitled to damages for breach of warranty, but there was a failure of proper proof as to the amount of damages claimed by them on their counterclaim, the interests of justice require a retrial of such phase of the case. Pressure Cast Products Corp. v. Page, 261 W 197, 52 NW (2d) 898.

A judgment is not to be reversed merely because on second thought it appears that counsel did not try the case perfectly, and it will require a very clear showing of resulting injustice to move the supreme court to exercise its discretionary powers of reversal and permit the client to try the case again with the same or other counsel. Estate of Schaefer, 261 W 431, 53 NW (2d) 427.

In an action to recover for damage to the plaintiff's automobile, where the facts gave rise to an almost irresistible inference that the defendant's employe-driver either did not keep a proper lookout or else failed to exercise proper management and control, but the special verdict inquired only as to his negligence as to lookout, and the trial court ruled after the verdict that the evidence was insufficient to sustain a finding of negligence as to lookout, the case is a proper one for the supreme court to exercise its power of discretionary reversal and of granting a new trial on the ground that the real controversy has not been fully tried, although no objection was made to the form of the special verdict. Minkel v. Bibbey, 263 W 90, 56 NW (2d) 844.

In an action against an automobile liability insurer to recover for injuries sustained in a collision with the car of the named insured, which had been taken by her son to his army camp with her consent, and which was being driven by a third person with the son's permission, wherein the defendant denied coverage, and the real question was whether such third person was driving with the permission of the named insured or "with the permission of an adult member of such assured's household," the trial court erred in overruling the plaintiff's offer of proof of material facts bearing thereon, requiring that a judgment dismissing the complaint be reversed for a new trial on the ground that the real controversy had not been fully tried. Raymond v. Century Ind. Co. 264 W 429, 59 NW (2d) 459.

Where the petitioner, because of a jurisdictional dispute, had no hearing on his claim filed against the estate, an order of the county court dismissing the claim is reversed under the discretionary powers of the supreme court with directions that the claim be reinstated and held in abeyance pending the outcome of the petitioner's suit in the circuit court. Estate of Landauer, 264 W 456, 59 NW (2d) 676.

Improper remarks, questions, and comments of counsel for the plaintiffs in the presence of the jury are deemed insufficient to require the ordering of a new trial in the interest of justice as requested by the appealing defendant insurer. Timm v. Rahn, 265 W 280, 61 NW (2d) 232.

Where, in an action against an insurer to recover on a fire insurance policy covering an automobile, it appeared that the real controversy had not been fully tried under the pleadings a judgment for the insurer is reversed and the cause is remanded for a new trial. Lowe v. Cheese Makers Mut. Cas. Co. 265 W 365, 61 NW (2d) 317.

See note to 274.35, citing Leonard v. Employers Mut. Liability Ins. Co. 265 W 464, 62 NW (2d) 10.

See note to 274.35, citing Olson v. Milwaukee Auto. Ins. Co. 266 W 106, 62 NW (2d) 549, 63 NW (2d) 740.

Where there was no direct evidence in support of the jury's finding, but there was no other evidence which the jury was bound to believe, the supreme court would be required to indulge in much speculation of its own to hold that the fault lay with the defendant's driver rather than with the plaintiff's intestate, and the court declines in the circumstances to exercise its discretionary power to

order a new trial in the interest of justice on its own motion. Starry v. E. W. Wylie Co. 267 W 258, 64 NW (2d) 833.

Even though the order for a new trial is defective as not setting forth reasons in detail, the court will not reverse if a miscarriage of justice would result. Guptill v. Roemer, 269 W 12, 68 NW (2d) 579, 69 NW (2d) 571.

Where there was no finding on an admitted liability for damages, the case will be returned for a new trial on that question alone, even though not properly raised in the trial court or on appeal. Grinley v. Eau Galle, 274 W 177, 79 NW (2d) 797.

See note to 270.21, on specific instructions, citing Vanderhei v. Carlson, 275 W 300, 81 NW (2d) 742.

Where no bill of exceptions was settled or returned, and the memorandum decision of the trial court contained no findings of fact, the supreme court cannot decide the case on the merits, but will reverse the judgment and order a new trial pursuant to its discretionary powers. L. Rosenheimer Malt & Grain Co. v. Kewaskum, 1 W (2d) 558, 85 NW (2d) 336.

The supreme court will not determine that the wife is entitled to no consideration on her appeal because of alleged wilful contempt on her part in failing to comply with the commands of the judgment appealed from and a subsequent order of the trial court, in view of the harshness of such a penalty on the wife and the state of the record on such contempt issue, but this will not prevent counsel for the husband from raising such contempt issue before the trial court on remand of the record. Schafer v. Schafer, 3 W (2d) 166, 87 NW (2d) 803.

See note to 895.045, on comparison of negligence, citing Bannach v. State Farm Mut. Auto. Ins. Co. 4 W (2d) 194, 90 NW (2d) 121.

See note to 238.07, citing Estate of Hulett, 6 W (2d) 20, 94 NW (2d) 127.

The discretionary reversal power is not intended to bring before the court issues which should have been raised by appeal from the judgment involving such issues, but presupposes a timely appeal from a judgment involving the issues, and it should not be the basis of abrogating or rendering inoperative the time within which an appeal must be taken under 274.01. Graff v. Roop, 7 W (2d) 603, 97 NW (2d) 393.

Where an order granting a new trial in the interests of justice was defective for not setting forth the reasons in detail or incorporating a memorandum, the supreme court will not order a new trial under its discretionary power unless a miscarriage of justice would be probable. Cary v. Klabunde, 12 W (2d) 267, 107 NW (2d) 142.

"The awarding of inadequate damages is not in itself grounds for ordering a new trial where a jury has answered other questions in the verdict so as to find no liability on the part of the party charged with negligence. * * * Nevertheless, when the finding of no liability is against the great weight of the evidence, the added element of inadequate damages may have significance in determining whether a new trial should be ordered in the interest of justice." Mainz v. Lund, 18 W (2d) 633, 645, 119 NW (2d) 334, 341.

Under 251.09 the exercise of this discretionary power is not dependent on whether the aggrieved party protected his rights by objection or motion in the trial court. Kuzel v. State Farm Mut. Auto. Ins. Co. 20 W (2d) 558, 123 NW (2d) 470.

The discretionary power of the supreme court to order a new trial in the interest of justice in an appeal properly before it is subject to no time limitation. Dunlavy v. Dairyland Mut. Ins. Co. 21 W (2d) 105, 124 NW (2d) 73.

The court cannot reverse, under its discretionary power, a circuit court's dismissal of an appeal where the circuit court had no jurisdiction because the appeal to it was not timely taken. Monahan v. Dept. of Taxation, 22 W (2d) 164, 125 NW (2d) 331.

Discretionary reversal in the interest of justice is not warranted where the defendant did not proceed to defend the summary judgment motion or to take it seriously in view of its pending plea in abatement, which the defendant did not proceed to bring on for hearing promptly. Poehling v. La Crosse P. S. Co. 24 W (2d) 239, 128 NW (2d) 419.

The supreme court would not exercise its discretion in granting a new trial in the interest of justice on the ground that the great weight of the evidence indicated defendant was negligent as to the speed of operation of his automobile, where it could not be said that defendant's testimony with respect thereto as related to the physical facts was inherently incredible, such evidence being sufficiently probative, and no complaint being made as to the adequacy of the jury damage award. Nieman v. American Family Mut. Ins. Co. 38 W (2d) 62, 155 NW (2d) 809.

Where credibility is the primary factor involved, there is every reason to resolve that a trial court judge's determination that a damage verdict is supported by the evidence will be set aside only when there is an evident abuse of discretion. Hunter v. Kuether, 38 W (2d) 140, 156 NW (2d) 353.

The supreme court will not exercise its discretionary power to order a new trial in the interest of justice unless it is convinced that there has been a probable miscarriage of justice—viewing the case as a whole. Cornwell v. Rohrer, 38 W (2d) 252, 156 NW (2d) 373.

While it would be within the discretion of the supreme court under 251.09, Stats. 1967, to grant a new trial in regard to proportion of negligence or the question of causation, exercise of such discretion is not warranted where, viewing the case as a whole, the supreme court is satisfied that justice is served that sustaining the trial court's determination to set aside the verdict, there being no showing that there had been a probable miscarriage of justice. Kinsman v. Panek, 40 W (2d) 408, 162 NW (2d) 27.

In an action for personal injuries sustained in a midwinter head-on collision between 2 automobiles traveling at approximately the same speed and approaching a curve on a narrow town road from opposite directions (the view of both being obscured by a snowbank inside the curve) there was no warrant for granting plaintiff a new trial in the interest of justice under 251.09, the evidence supporting

the jury findings of plaintiff's contributory negligence and the apportionment, and the damage award being neither inadequate nor indicative of perversity. Jensen v. Rural Mut. Ins. Co. 41 W (2d) 36, 163 NW (2d) 158.

Reversal in the interest of justice will be ordered only when the supreme court is convinced that there has been a probable miscarriage of justice, in viewing the case as a whole. Lautenschlager v. Hamburg, 41 W (2d) 623, 165 NW (2d) 129.

A new trial in the interest of justice was not warranted because of alleged error in instructions where raised for the first time on appeal or because of receipt of testimony claimed inadmissible which could not have carried sufficient weight to adversely affect the jury findings. Crotty v. Bright, 42 W (2d) 440, 167 NW (2d) 201.

While the supreme court, in the exercise of its discretion, can under the provisions of 251.09 order a new trial whenever it deems that there has been a miscarriage of justice, that power is sparingly exercised, and will be used only in hardship cases to prevent a miscarriage of justice. The rule applied in civil actions is that before the supreme court will exercise its discretionary power it must be convinced that there has been a miscarriage of justice, which means the evidence and the law must be such that the plaintiff probably should have won and should therefore be given another chance. Jonas v. Northeastern Mut. Fire Ins. Co. 44 W (2d) 347, 171 NW (2d) 185.

Findings of fact and conclusions of law, based on a purported arbitration award, which were patently inconsistent alone necessitated reversal by clearly demonstrating the probability that justice had miscarried. Bostonian Homes, Inc. v. Struck, 44 W (2d) 553, 171 NW (2d) 320.

Inadequacies in the record, as well as indication that the homeowners' claims against the contractor had not had a fair hearing either by the trial court or in the attempted arbitration, made it manifest that material issues had not been tried, necessitating remand for a new trial under 251.09, Bostonian Homes, Inc. v. Struck, 44 W (2d) 553, 171 NW (2d) 320.

2. Criminal Actions.

A convict has a right to demand the judgment of the supreme court and of the trial court as to whether his guilt has been proved; and where the evidence as to the identity of the real criminal is unsatisfactory, and it is alleged that there is newly-discovered evidence on that question, and the supreme court cannot say that all the evidence was before the jury nor, upon the record, that justice has been done, a new trial will be ordered. Hamilton v. State, 171 W 203, 176 NW 773.

Where a defendant conducting his own defense was apparently unaware of the rule that a motion for a new trial must be made before judgment, the supreme court will consider the case on a writ of error upon its own merits, even though the motion for a new trial was not made until immediately after judgment. Stecher v. State, 202 W 25, 231 NW 168.

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 power to reverse a judgment for probable miscarriage of justice with reluctance and great caution. Jacobsen v. State, 205 W 304, 237 NW 142.

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. State v. Sullivan, 241 W 276, 5 NW (2d) 798.

The supreme court cannot ordinarily interfere with a sentence imposed by the trial court where the sentence is within the limits of the penalty prescribed by statute. State v. Garnett, 243 W 615, 11 NW (2d) 166.

Although the question of the trial court's error in failing to advise the defendant of her right to counsel was not raised in the trial court, the supreme court, deeming that justice demands that it exercise its discretionary powers under 251.09, reverses the judgment of conviction and remands the cause for a new trial. State v. Greco, 271 W 54, 72 NW (2d) 661.

There was no warrant for the exercise of discretionary power under 251.09, Stats. 1963, where the record disclosed that both upon arraignment and prior to imposition of sentence defendant informed the court that he did not desire to retain an attorney, and the proceedings after judgment revealed that in connection with 3 previous felony convictions accused had been fully advised of his right to counsel as well as his right to a court-appointed attorney, if indigent, and that on one occasion he executed an affidavit of indigency, and following conviction of the current offenses claimed he had appeared without counsel in order to save the county money. Van Voorhis v. State, 26 W (2d) 217, 131 NW (2d) 833.

In order for the supreme court to exercise its discretionary power under 251.09, Stats. 1965, it should clearly appear from the record that for some reason it is probable that there has been a miscarriage of justice; and for such a probability to exist the court would have to be convinced that the defendant should not have been found guilty and that justice demands that the defendant be given another trial. Lock v. State, 31 W (2d) 110, 142 NW (2d) 183. See also: Woodhull v. State, 43 W (2d) 202, 168 NW (2d) 281; and Hundhauser v. State, 44 W (2d) 447, 171 NW (2d) 397.

Where the affidavits relied upon by the defendant as establishing alibi (although not entitled to consideration because outside the record on appeal) in no way established defendant's alibi defense, there was no miscarriage of justice warranting the exercise by the supreme court of its discretionary reversal power with respect to defendant's conviction. Guilbeau v. State, 31 W (2d) 338, 142 NW (2d) 834.

Discretionary reversal of conviction by the supreme court under 251.09, Stats. 1967, is a power exercised with great reluctance and great caution, and only in the event of probable miscarriage of justice. Where, as here, no grave doubt as to the sufficiency of the evidence was engendered (but the proof com-

pellingly established defendant's guilt), it could not be validly maintained that a new trial was warranted. Jones v. State, 37 W (2d) 56, 154 NW (2d) 278, 155 NW (2d) 571.

The discretionary authority provided by 251.09, Stats. 1967, for granting a new trial in the interest of justice is to be used with caution, and in a criminal case cannot be invoked where defendant is convicted of an offense of which he is admittedly guilty. State v. Mathis, 39 W (2d) 453, 159 NW (2d) 729.

In order for the supreme court to exercise its discretionary authority under 251.09, Stats. 1967, in ordering a new trial in the interest of justice, it must clearly appear that for some reason it is probable there has been a miscarriage of justice, which contemplates that the supreme court is convinced that the defendant should not have been found guilty and that justice demands that the defendant be given another trial. Zillmer v. State, 39 W (2d) 607, 159 NW (2d) 669.

A new trial in the interest of justice is granted by the supreme court, in its discretion, only in those instances where it clearly appears from the record that there has been a probable miscarriage of justice. The mere possibility of a contrary result in a new trial is not sufficient; there must be a showing of probable miscarriage of justice and probability of acquittal. Strait v. State, 41 W (2d) 552, 164 NW (2d) 505.

Alleged errors do not constitute a basis for a new trial where it cannot be concluded that, considered together, the defendant would probably have been acquitted if they had not been committed. Berg v. State, 41 W (2d) 729, 165 NW (2d) 189.

A new trial in the interest of justice would not be ordered because of alleged error in the trial court's failing to *sua sponte* instruct the jury it should find the defendant not guilty if it believed defendant thought he had permission of the owner to operate a vehicle, it appearing that such an instruction was merely a corollary of explicit instructions which the trial court had given to the same effect. State v. Robbins, 43 W (2d) 478, 168 NW (2d) 544.

In a prosecution under 944.01, Stats. 1967, where the only question was that of identity, and the record revealed that the victim had a sufficient opportunity to observe her assailant, that she identified the defendant without equivocation, and that the jury believed her, as did the able and experienced trial judge who presided, a new trial in the interest of justice was not warranted. State v. Richardson, 44 W (2d) 75, 170 NW (2d) 775.

A motion for a reversal in the interest of justice may, in the discretion of the supreme court, be considered for the first time on appeal, but such discretion will be exercised only if there is an apparent miscarriage of justice, and if it appears that a retrial under optimum circumstances will produce a different result. State v. Escobedo, 44 W (2d) 85, 170 NW (2d) 709.

A new trial in the interest of justice was not warranted because of defendant's claim of inadequacy of the record (because of defects in transcription), where aside from failure to follow the amendment procedure prescribed by statute he did not assert that the condition of the record contributed to an error in the jury's verdict, and it was obvious that the condition of the record had nothing to do with it. Roney v. State, 44 W (2d) 522, 171 NW (2d) 400.

251.10 History: R. S. 1849 c. 82 s. 5, 7; R. S. 1858 c. 115 s. 5, 7; R. S. 1878 s. 2406; Stats. 1898 s. 2406; 1925 c. 4; Stats. 1925 s. 251.10.

On jurisdiction of the supreme court (general superintending control over inferior courts) see notes to sec. 3, art. VII; and on general provisions concerning courts of record see notes to various sections of ch. 256.

A writ may be allowed by a justice of the supreme court in vacation. In re Booth, 3 W 157.

The power given by statute to any judge of the supreme court to grant writs of injunction relates to injunctions in cases brought up by appeal or writ of error. Neither the court nor any judge thereof has any general power to issue such writs in cases pending and undetermined in any other court. Cooper v. Mineral Point, 34 W 181.

The practice in the supreme court is that applications 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; such notice of the motion or application should be given as will enable the opposite party to oppose the application. (For details of practice on applications to the supreme court to appoint counsel for indigent defendants and for stays see "Per Curiam" in this case.) State v. Tyler, 238 W 589, 300 NW 754.

251.11 History: R. S. 1849 c. 82 s. 4, 7; R. S. 1858 c. 115 s. 4, 7; 1875 c. 218; R. S. 1878 s. 2407; Stats. 1898 s. 2407; 1909 c. 238; 1925 c. 4; Stats. 1925 s. 251.11.

Rules prescribed by the supreme court for the regulation of its own practice and for the practice of circuit courts are binding upon all courts, officers and parties. Judgments of the supreme court are law until overruled or otherwise annulled and all inferior courts, officers and persons are required to obey them. Attorney-General ex rel. Cushing v. Lum, 2 W 507.

Judgments of the supreme court on appeals cannot be reviewed after the term at which they are rendered unless by motion for rehearing made within the rule, and brought to a hearing within the term at which they are made. Pringle v. Dunn, 39 W 435; Everett v. Gores, 92 W 527, 66 NW 616.

251.12 History: 1854 c. 38 s. 1; R. S. 1858 c. 115 s. 8; 1875 c. 218 s. 3; R. S. 1878 s. 2408; Stats. 1898 s. 2408; 1925 c. 4; Stats. 1925 s. 251.12; Sup. Ct. Order, 262 W vi.

Comment of Judicial Council, 1952: Since the court retains its inherent power to impanel a jury it loses none of its power to try issues of fact or to assess damages. It is given com-

plete discretion as to how these things shall be done. [Re Order effective May 1, 1953]

In an action of quo warranto brought in the supreme court, involving the functions of a high judicial office and requiring a speedy determination, where the issues of fact are few and simple, a jury may be called to determine those issues. State ex rel. Attorney General v. Messmore, 14 W 115.

251.14 History: R. S. 1849 c. 82 s. 9; R. S. 1858 c. 115 s. 11, 12; 1870 c. 23 s. 1; R. S. 1878 s. 2410; Stats. 1898 s. 2410; 1925 c. 4; Stats. 1925 s. 251.14.

251.16 History: 1859 c. 133 s. 1, 2; 1860 c. 264 s. 7; R. S. 1878 s. 2411; Stats. 1898 s. 2411; 1925 c. 4; Stats. 1925 s. 251.16.

251.17 History: 1860 c. 364 s. 1; R. S. 1878 s. 2412; Stats. 1898 s. 2412; 1925 c. 4; Stats. 1925 s. 251.17.

See note to sec. 8, art. I, on double jeopardy, citing McDonald v. State, 79 W 651, 48 NW 863.

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. State v. Sullivan, 241 W 276, 5 NW (2d) 798.

251.18 History: R. S. 1858 c. 115 s. 4; R. S. 1858 c. 117 s. 40; 1864 c. 115 s. 1, 2; R. S. 1878 s. 2413; Stats. 1898 s. 2413; 1925 c. 4; Stats. 1925 s. 251.18; 1929 c. 404 s. 2; 1951 c. 319 s. 250a; 1951 c. 392; 1953 c. 61 s. 129; 1965 c. 252; Sup. Ct. Order, 35 W (2d) v.

On judicial power generally see notes to sec. 2, art. VII.

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. Rosecky v. Tomaszewski, 225 W 438, 274 NW 259.

Appeals are statutory 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 the supreme court limits itself strictly to procedural matters, and considers 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 1933, was not a 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.

See note to 227.08, citing State ex rel. Thompson v. Nash, 27 W (2d) 183, 133 NW (2d) 769.

251.181 History: 1951 c. 392; Stats. 1951 s. 251.181; 1953 c. 162; 1957 c. 610; 1961 c. 643 s. 3d; 1963 c. 407; 1967 c. 247; 1967 c. 291 s. 14; 1969 c. 154, 276.

251.182 History: 1959 c. 315; Stats. 1959 s. 251.182; 1961 c. 261.

251.183 History: 1959 c. 315; Stats. 1959 s. 251.183; 1969 c. 154.

251.1835 History: Sup. Ct. Order, 22 W (2d) v; Stats. 1963 s. 251.1835.

251.19 History: R. S. 1878 s. 2414; Stats. 1898 s. 2414; 1913 c. 772 s. 6; 1925 c. 4; Stats. 1925 s. 251.19; 1935 c. 535; 1963 c. 544; 1965 c. 433 s. 121; 1967 c. 43; 1967 c. 291 s. 14; 1969 c. 55 s. 113; 1969 c. 276.

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, is not a legal claim against either the state or the county. John v. Municipal Court, 220 W 334, 264 NW 829.

251.20 History: R. S. 1878 s. 2415; Stats. 1898 s. 2415; 1913 c. 772 s. 117; 1925 c. 4; Stats. 1925 s. 251.20; 1961 c. 316.

251.21 History: 1852 c. 395 s. 5; R. S. 1858 c. 115 s. 12, 13; 1873 c. 181; 1876 c. 19; R. S. 1878 s. 2416; Stats. 1898 s. 2416; 1925 c. 4; Stats. 1925 s. 251.21; 1927 c. 193; 1955 c. 652.

251.22 History: 1850 c. 181 s. 2; 1857 c. 10 s. 2; R. S. 1858 c. 133 s. 8, 9; 1873 c. 125; R. S. 1878 s. 2417; Stats. 1898 s. 2417; 1913 c. 772 s. 117; 1917 c. 14 s. 102; 1925 c. 4; Stats. 1925 s. 251.22; 1955 c. 204 s. 1; 1955 c. 610; 1967 c. 291 s. 14.

251.23 History: R. S. 1849 c. 104 s. 5; 1854 c. 52 s. 1, 2; 1856 c. 120 s. 212; R. S. 1858 c. 115 s. 14, 15; R. S. 1858 c. 133 s. 40; R. S. 1858 c. 139 s. 29; 1860 c. 264 s. 36, 37; 1866 c. 129 s. 1; 1874 c. 30; R. S. 1878 s. 2949 to 2953; Stats. 1898 s. 2949 to 2953; 1905 c. 365 s. 1; Supl. 1906 s. 2949; 1913 c. 741; 1915 c. 219 s. 7; 1917 c. 223; 1925 c. 4; Stats. 1925 s. 271.35 to 271.39; 1935 c. 541 s. 208 to 212; Stats. 1935 s. 251.23; 1951 c. 69; Sup. Ct. Order, 17 W (2d) xvii; Sup. Ct. Order, 24 W (2d) v.

Revisers' Note, 1878 (to sec. 2949, R. S. 1878): Section 36, chapter 264, Laws 1860, and part of section 40, chapter 133, R. S. 1858, combined and amended so as to authorize the supreme court to award the costs in its discretion in cases where the judgment in the court below is reversed only in part or modified, and also authorizing the court, in

case of reversal, when a new trial is ordered, to direct that the costs shall abide the event of the action. This amendment is required in order to enable the supreme court to do justice to the parties in that court. As the law has stood, that court had no discretion in the matter, but was bound in all cases to award costs to the prevailing party, which in many cases wrought great injustice. It also authorizes the taxation as disbursements in the supreme court, the costs of the phonographer's minutes when necessarily obtained to make bill of exceptions. This seems but just, as it is now almost impossible to settle a bill of exceptions without obtaining such minutes.

Revisers' Note, 1878 (to sec. 2950, R. S. 1878): Section 1, chapter 129, Laws 1866, as amended by chapter 30, Laws 1874, rewritten and amended so as to limit the attorney's fees on a motion for a rehearing to $25; this being the highest fee allowed on an appeal, there seems to be an injustice in permitting the court to award a larger fee against the party moving for a rehearing. It is believed that the fee of $25 will be a sufficient guaranty that such motions will not be made wantonly.

Revisers' Note, 1878 (to sec. 2951, R. S. 1878): Section 37, chapter 264, Laws 1860, combined with section 29, chapter 139, R. S. 1858, and limiting the damages which may be allowed on affirmance of a judgment to not exceeding 10 percent over and above the interest, and submitting the question of such damages in all cases to the discretion of the court.

Revisers' Note, 1878 (to sec. 2952, R. S. 1878): Section 14, chapter 114, R. S. 1858, rewritten so as to require a notice of taxation of costs to be given, and conforming the practice to that in the circuit court.

Taxation of costs will not be reviewed unless objections are first taken before the clerk. Akerly v. Vilas, 23 W 628.

Where the order or judgment of the trial court is modified or partially reversed the appellant is the prevailing party except in special cases. Noonan v. Orton, 31 W 265.

Motion for rehearing, made after court has lost jurisdiction, cannot be entertained nor denied with costs. Pierce v. Kelly, 39 W 568.

Plaintiff appealed from the whole judgment, part of which was in his favor, and on affirming it as to that part and reversing it as to the remainder, costs were awarded appellant. Sherry v. Schraage, 48 W 93, 4 NW 117.

Where several actions to enforce liens are consolidated and the judgment determining the rights of the claimants is affirmed on the appeal of the opposing party, such claimants together constitute the prevailing party and but one attorney's fee can be taxed. Allis v. Meadow Spring D. Co. 67 W 16, 30 NW 300.

When the judgment is affirmed in part and reversed in part, no costs will be allowed to either party. Duncan v. Erickson, 82 W 128, 51 NW 1140.

Appeals from a judgment and from several orders, all included in one notice of appeal, are considered as a single appeal in taxing costs. Nash v. Meggett, 89 W 486, 61 NW 283.

The supreme court has the power to review the clerk's taxation of costs. Baker v. Madison, 62 W 137, 22 NW 141; Crouse v. C. & N. W. Ry. Co. 102 W 196, 78 NW 446.

In an action by a wife against a husband where he prevails in the supreme court, costs are taxed in his favor. Johnson v. Johnson, 107 W 186, 83 NW 291.

In the probate or construction of wills, the rule is that where the contestant has acted in good faith and questions of law or fact are worthy of consideration, costs taxed against him should be paid out of the estate. In re Will of Healy, 108 W 632, 84 NW 835.

When defendants severally appeal, and succeed, the appellants united in interest constitute but one prevailing party, though they may have separate appeals. Harrigan v. Gilchrist, 121 W 127, 99 NW 909.

Where a complaint alleged that the plaintiff was the owner in fee and in possession of certain premises, an appeal from an order overruling a demurrer is frivolous where the only contention was that the complaint did not sufficiently allege that the plaintiff had an estate in possession, and double attorneys' fees were taxable. Sprague v. Maxcy, 122 W 502, 100 NW 832.

Only one transcript of the reporter's minutes can be taxed. Buehler v. Staudenmeyer, 146 W 25, 130 NW 955.

The discretion to award double costs will not always be exercised upon affirming an order overruling a demurrer that was clearly not well grounded. Luich v. Great N. R. Co. 152 W 414, 140 NW 33.

Double costs were refused to a respondent where affirmance was ordered for the reason that the same issues had been tried out by the same parties in a former action. Scheneck v. Sterling E. & C. Co. 155 W 219, 144 NW 290.

"The defendants having joined in answering the complaint, and the cause having been treated, all the way through, as one, in which the defendants were united in interest, all being represented by the same attorneys, and the cause submitted to this court on one printed case, and one brief on each side, all defendants will be treated as forming one party for the purpose of taxing costs in this court, though defendants separately appealed, one-sixth of the total taxed to be awarded against each defendant, as in the court below." Milwaukee S. T. & D. Co. v. American Cent. Ins. Co. 164 W 298, 303, 159 NW 938, 940..

Double costs were awarded against a party who appealed from an order overruling his demurrer to the complaint, but who did not serve or file any printed case or brief. State ex rel. Owen v. McIntosh, 165 W 596, 162 NW 670.

A contestant of a will who acted in good faith in taking an appeal on grounds worthy of consideration was relieved from the payment of costs. Will of Bilty, 171 W 20, 176 NW 220.

The good faith of both parties in litigation to procure a construction of a testamentary trust being unquestionable, costs to both will be allowed out of the trust estate. State H. Society v. Foster, 172 W 155, 177 NW 16.

The court awarded double costs because the appeal was taken for delay. State ex rel. Harvey v. Plankinton A. Co. 182 W 20, 195 NW 904.

The appellant is not entitled to recover costs solely because he prevailed on an incidental question of practice. Borkowski v. Langen, 183 W 481, 198 NW 389.

Double costs were imposed on the appellants, for the reasons stated in the opinion. 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 Cr., Inc. v. Johnson, 208 W 444, 243 NW 498.

Except as expressly authorized by statute, costs cannot be recovered against the state. Sandberg v. State, 113 W 578, 89 NW 504; Frederick v. State, 198 W 399, 224 NW 110; State v. Gether Co. 203 W 311, 234 NW 331; Estate of Sleto, 224 W 178, 272 NW 42.

On the affirmance of a judgment on appeal, the respondents are entitled to double costs, where the appellant, without any apparent excuse, failed to serve its printed case and brief within the time allowed by the rules, but the respondents are not entitled to damages, where the appellant succeeded in having its brief printed in time for use when the case was reached for argument, and where it does not appear that the respondents suffered any damage as the result of the delay. 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 although he is the prevailing party. Krueger v. Hansen, 238 W 638, 300 NW 474.

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

"The recovery of costs is wholly dependent upon statutory provision. In a single action in which the interests of all defendants are identical, the fact that defendants appear and answer through separate attorneys, who participate in defense of the action, does not entitle the prevailing parties to separately tax attorney fees." Rheingans v. Hepfler, 243 W 126, 134, 9 NW (2d) 585, 589.

Where the respondent's brief included 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.

The guardian was 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.

The defendant's appeal from an order overruling his demurrer to a complaint for breach of a contract of employment, which complaint amounted to no more than an assertion that the defendant was indebted to the plaintiff for services rendered prior to the plaintiff's dismissal under a contract of employment terminable at will, will not be deemed frivolous and for the sole purpose of delay so as to subject the defendant to double costs. Nelson v. La Crosse Trailer Corp. 254 W 414, 37 NW (2d) 63.

In reversing a judgment for the defendant, but remanding the cause for a new trial because of gross and inexcusable misconduct of the plaintiff's attorney in argument to the jury, the supreme court, in the exercise of its discretion under 251.23 (1), directed that no costs be recovered by either party on this appeal. Blank v. National Cas. Co. 262 W 150, 54 NW (2d) 185.

Where the defendants failed to assert in the trial court and in their original argument on appeal their contentions made on rehearing requiring modification of the judgment, the costs usually allowed to the prevailing party on an appeal will not be allowed to them. Plainse v. Engle, 262 W 506, 56 NW (2d) 89.

Where there was no appeal from a judgment dismissing the complaint as against a certain party, nor motion for review in respect to the same, but such party filed a brief and presented oral argument in direct opposition to the position taken by appellant appealing from the judgment in other respects, such appellant, prevailing thereon, is entitled to tax costs against such party, as well as against certain other parties. Wisconsin Nat. Gas Co. v. Employers Mut. L. Ins. Co. 263 W 633, 58 NW (2d) 424.

Where an appellant is unsuccessful on the principal issue presented on appeal, but does obtain a modification of some benefit of the judgment appealed from on a secondary issue, and the major portions of the appellant's brief and appendix are devoted to such principal issue, it would be inequitable to permit him to tax the printing of such portions of the brief and appendix as costs on the appeal. Morris v. Resnick, 268 W 410, 67 NW (2d) 848.

Where an appeal from the fixing of attorney's fees in an estate appears frivolous, double costs are assessed under 251.23 (3). Estate of Bair, 272 W 14, 74 NW (2d) 639.

The rule that costs may not be taxed against the state, unless authorized by statute, is equally applicable to state administrative agencies. Frankenthal v. Wisconsin R. E. Brokers' Board, 3 W (2d) 249, 89 NW (2d) 825.

A lawful premium necessarily paid to a surety corporation for executing an undertaking, in order to stay execution of a judgment on appeal to the supreme court, is a proper item of costs in this court. Where, from affidavits of attorneys for each party filed for the clerk's consideration, it sufficiently appears that the plaintiff's attorney informed the defendants' attorney that execution would be issued if an appeal were taken,

this is an adequate showing of the appealing defendants' need for an undertaking to stay execution. Giemza v. Allied American Mut. Fire Ins. Co. 10 W (2d) 555, 103 NW (2d) 538.

Silence as to costs amounts to an imposition of costs in the exercise of the court's discretion. Rice Lake Cr. Co. v. Industrial Comm. 17 W (2d) 177, 115 NW (2d) 756.

Where the supreme court's discretion to impose costs in actions for review under chs. 102 and 108, Stats. 1961, is to be exercised, it is contemplated that the court will make an express direction. Rice Lake Cr. Co. v. Industrial Comm. 17 W (2d) 177, 115 NW (2d) 756.

RULES OF PRACTICE IN THE SUPREME COURT.

[Adopted May 1, 1963, effective September 1, 1963]

Editor's Note, 1963: The rules of the supreme court prior to the 1963 revision are printed in the 1961 Statutes and amendments prior to 1963 are indicated there. For the court's comments on the 1942 revision, see Wis. Annotations, 1960, preceding 251.251. The supreme court rules in force in 1930 are printed in Wis. Annotations, 1930, beginning at page 1797, with extensive notes. The 1963 revision renumbered all the rules and made other changes. These rules were effective September 1, 1963. The change made by the court in 274.01 is effective for all appeals and writs of error taken from orders and judgments entered on and after January 1, 1964. The following table shows the relationship between the old and the new rules and indicates where changes were made:

CONVERSION TABLE

Old Rule		*New Rule*	
(251.251)	1.	251.25	
(251.252)	2.	251.26	
(251.253)	3.	251.27	
(251.2531)	3a.	251.28	
(251.254)	4.	251.29	
(251.255)	5.	251.30	
(251.26)	6.	251.34	
(251.261)	7.	251.35	
(251.262)	8.	251.36	
(251.263)	9.	251.37	
(251.264)	10.	251.38	
(251.265)	11.	251.39	
(251.27)	14.	251.42	
(251.271)	15.	None	
(251.272)	16.	251.49	
(251.273)	17.	251.43	
(251.274)	18.	251.44	
(251.276)	20.	None	
(251.277)	21.	251.45	
(251.28)	22.	251.48	
(251.281)	23.	251.50	
(251.283)	25.	None	
(251.284)	26.	251.51	
(251.286)	28.	251.52	
(251.30)	30.	251.55	
(251.31)	31.	251.56	
(251.32)	32.	251.57	
(251.33)	33.	251.58	
(251.34)	34.	251.59	
(251.35)	35.	251.60	
(251.36)	36.	251.61	
(251.37)	37.	251.65	
(251.38)	38.	251.66	
(251.39)	39.	251.67	
(251.40)	40.	251.68	
(251.41)	41.	251.69	
(251.42)	42.	251.70	
(251.43)	43.	251.71	
(251.431)	43a.	251.72	
(251.44)	44.	251.75	
(251.45)	45.	251.76	
(251.46)	46.	251.77	
(251.47)	47.	251.78	
(251.48)	48.	251.79	
(251.49)	49.	251.80	
(251.50)	50.	251.81	
(251.51)	51.	251.82	
(251.52)	52.	251.83	
(251.53)	53.	251.84	
(251.54)	54.	251.88	
(251.55)	55.	251.89	
(251.56)	56.	251.90	
(251.57)	57.	251.60	
(251.58)	58.	251.91	
(251.59)	59.	None	
(251.60)	60.	251.85	
(251.61)	61.	251.31	
(251.63)	63.	251.92	
(251.64)	64.	251.93	
(251.65)	65.	251.94	
(251.651)	65a.	256.28	(3a)
(251.66)	66.	None	

Editor's Note, 1969: Amendments (including repeals) of the rules of practice adopted by the supreme court in 1963 have been effected by the following orders: Sup. Ct. Order effective January 1, 1965, 24 W (2d) v-vi; Sup. Ct. Order effective August 20, 1965, 27 W (2d) v-vi; Sup. Ct. Order effective January 1, 1969, 37 W (2d) vii-x; and Sup. Ct. Order effective July 1, 1969, 41 W (2d) vii.

Rule 251.25 History: Sup. Ct. Order, 17 W (2d) v; 1963 Stats. s. Rule 251.25; Sup. Ct. Order, 24 W (2d) v; Sup. Ct. Order, 37 W (2d) vii.

On return on appeal see notes to 274.13.

Where the record on appeal in an action tried by referee pursuant to 270.34, Stats. 1965, contained no transcript of the reporter's notes (pursuant to stipulation of the parties) there was nothing before the supreme court that would justify it in going beyond or contrary to the trial court's findings. Debelak Bros., Inc. v. Mills, 38 W (2d) 373, 157 NW (2d) 644.

Rule 251.26 History: Sup. Ct. Order, 17 W (2d) vi; Stats. 1963 s. Rule 251.26; Sup. Ct. Order, 37 W (2d) viii.

Rule 251.27 History: Sup. Ct. Order, 17 W (2d) vi; Stats. 1963 s. Rule 251.27.

Rule 251.28 History: Sup. Ct. Order, 17 W (2d) vi; Stats. 1963 s. Rule 251.28.

Where an action comes to the supreme court under 251.28, upon an agreed statement of the case, the review is limited to the issues as they appear in such statement. Ginkowski v. Ginkowski, 28 W (2d) 530, 137 NW (2d) 403.

Rule 251.29 History: Sup. Ct. Order, 17 W (2d) vii; Stats. 1963 s. Rule 251.29.

The state is entitled to dismissal of the appeal of a defendant where he failed to cause the proper return to be made within 20 days after perfecting his appeal as required by Rule 4, and requested the trial court clerk not to make return and for that reason 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 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 return to be made 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 made to the supreme court within the period required by 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 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.

Where it appeared that the return to the supreme court was not made in the instant case until February 11, 1952, and that the admission of service of the notice of appeal was dated December 14, 1951, but that such admission of service was actually signed on February 8, 1952, a motion to dismiss the appeal for alleged failure to make such return within the 20 days required is denied. Hirsch v. Smith, 262 W 75, 53 NW (2d) 769.

Where it appeared that settlement negotiations were in progress and that the appellants delayed the return of the record to the supreme court until after the time required by Rule 4 because such return would be unnecessary if a settlement were reached, and the respondent did not assert that he had been prejudiced by such delay, dismissal of the appeal for failure to comply with the rule is denied. Blaisdell v. Allstate Ins. Co. 1 W (2d) 19, 82 NW (2d) 886.

The supreme court is free to ignore a bill of exceptions not on file at the time of argument. Meyer v. Fronimades, 2 W (2d) 89, 86 NW (2d) 25.

An appellant or plaintiff in error is responsible for a proper filing of the record and transcript, and cannot charge error on appeal to inadequacies or deficiencies therein where he has failed to pursue the procedure in the trial court for amending the record (if necessary) and seeing that only an accurate and complete record is approved. Roney v. State, 44 W (2d) 522, 171 NW (2d) 400.

Rule 251.30 History: Sup. Ct. Order, 17 W (2d) vii; Stats. 1963 s. Rule 251.30.

Rule 251.31 History: Sup. Ct. Order, 17 W (2d) vii; Stats. 1963 s. Rule 251.31.

Rule 251.34 History: Sup. Ct. Order, 17 W (2d) vii; Stats. 1963 s. Rule 251.34; Sup. Ct. Order, 37 W (2d) viii.

The evidence which the appellant wishes the court to consider should be printed in the appendix, and what is printed should not be taken from its context and mere excerpts printed. The provision in Rule 6 (5) (c) 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 all of the evidence material to a consideration of such questions, not only that part which is favorable to him. Eckhardt v. Industrial Comm. 242 W 325, 7 NW (2d) 841.

Because of failure to state the questions involved, and because of the unnecessary length of its briefs, the prevailing party is not allowed costs for printing its original brief, and is allowed only part of the costs for printing its reply brief. Phelps v. Wisconsin Tel. Co. 244 W 57, 11 NW (2d) 667.

Rule 6 (5) (c) and (d) is not satisfied by 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.

Where the appellants' counsel has not supplied either an appendix as provided by Rule 6 or a statement of the case as provided by Rule 3a, the supreme court assumes that the record supports the trial court's findings of fact. Peterson Cutting Die Co. v. Bach Sales Co. 269 W 113, 68 NW (2d) 804. See also Boyle v. Ind. Comm. 8 W (2d) 601, 99 NW (2d) 702.

It places a completely unwarranted burden on the supreme court to decide an appeal presented on a brief where record references are erroneous, no appendix references are given, and the appendix is a mutilation, among other things, of the transcript of testimony and the lower court's decision; nor is the burden lessened by the inclusion in the record of counsels' arguments to the jury where no exception has been taken thereto. Meyer v. Fronimades, 2 W (2d) 89, 86 NW (2d) 25.

In actions involving the construction of insurance policies or other written instruments, it will be helpful to the supreme court if the instrument to be construed is either set out in full or a copy attached to the appendix; if such instrument is too long to be set out verbatim in the appendix, then the paragraph or paragraphs containing the words to be construed should be set out in full; the abridgment of such paragraphs is permissible and is sometimes desirable in the brief. Friedman v. Insurance Co. of North America, 4 W (2d) 641, 91 NW (2d) 328.

An insufficient appendix, or none at all, deprives opposing counsel and the supreme court of a much-needed aid in their consideration of the appellant's contentions, and the entire omission of an appendix in the instant case calls for the deprivation of the costs to which the appellant would otherwise be entitled. Reserve Supply Co. v. Viner, 9 W (2d) 530, 101 NW (2d) 663.

An appealing plaintiff's appendix, which failed to print any part of the complaint, did not comply with Rule 6 (5) (b), and a recital in the appellant's brief, that a specified paragraph of the complaint stated the gist of the action, was not a compliance with the rule. Meyer v. Briggs, 18 W (2d) 628, 119 NW (2d) 354.

On an appeal by a husband from a judgment of absolute divorce granted to the wife, where the appendix contained the memoran-

dum opinion of the trial court, but the appellant's counsel failed to comply with Rule 6 (5) (c), in the preparation of a brief and appendix, the supreme court will assume that the record supports the trial court's findings of fact. (Peterson Cutting Die Co. v. Back Sales Co. 269 W 113, and Boyle v. Industrial Comm. 8 W (2d) 601, applied). Lindahl v. Lindahl, 19 W (2d) 379, 120 NW (2d) 142, 121 NW (2d) 286.

The practice of setting forth in the appendix to the appellant's brief verbatim testimony rather than recording an abridgment thereof in narrative form contravenes 251.34 (5) (e). Withers v. Tucker, 28 W (2d) 82, 135 NW (2d) 776; State v. Givens, 28 W (2d) 109, 135 NW (2d) 780.

251.35 (4), permitting the respondent to file a supplemental appendix, does not relieve the appellant from his obligation under 251.34 (5) to incorporate in his appendix a fair abridgment of the material evidence on both sides of the disputed questions. (Nothem v. Berenschot, 3 W (2d) 585, 89 NW (2d) 289, applied). Martinson v. Brooks Equip. Leasing, Inc. 36 W (2d) 209, 152 NW (2d) 849.

Double costs are assessable against appellants who, raising various issues, neglected to comply with 251.34 (5) (e), Stats. 1967, by not including an abridgment of all the significant parts of the transcript germane thereto, forcing the respondents to print a supplemental appendix remedying such deficiency. Dutcher v. Phoenix Ins. Co. 37 W (2d) 591, 155 NW (2d) 609.

Double costs are assessable against a party whose appellate appendix was burdened with repeated instances of complete questions and answers in violation of 251.34 (5) (c), Stats. 1967, and whose brief contained a number of statements not supported by the record and a statement of facts replete with minutiae which added little to the disposition of a confusing appeal. Lisowski v. Chenenoff, 37 W (2d) 610, 155 NW (2d) 619.

251.34 (5) imposes on appellate counsel the duty of furnishing an appendix, conforming to the rule, to alleviate the appellate workload of the court and to obviate the necessity of searching each record to discover whether appellant should prevail. Berlinski v. Telisky, 39 W (2d) 191, 159 NW (2d) 925.

Rule 251.35 History: Sup. Ct. Order, 17 W (2d) ix; Stats. 1963 s. Rule 251.35.

Where the appellant does not make an adequate statement of facts in his brief, the respondent should make a statement of the material facts in his brief although not required by rule to do so. State v. Kuick, 252 W 595, 32 NW (2d) 344.

Where no brief was filed by the respondents on an appeal from an order of the circuit court, the supreme court might reverse for that reason alone, but the presumption in favor of an order of the circuit court is such that the supreme court prefers to consider the appeal on the merits. Gillard v. Aaberg, 5 W (2d) 216, 92 NW (2d) 856.

Some aspects of appellate practice before the Wisconsin supreme court. Currie, 1955 WLR 554.

Confidential chat on the craft of briefing. Levitan, 1957 WLR 59.

Some words that don't belong in briefs. Levitan, 1960 WLR 421.

Rule 251.36 History: Sup. Ct. Order, 17 W (2d) ix; Stats. 1963 s. Rule 251.36; Sup. Ct. Order, 37 W (2d) viii.

Rule 251.37 History: Sup. Ct. Order, 17 W (2d) ix; Stats. 1963 s. Rule 251.37.

Rule 251.38 History: Sup. Ct. Order, 17 W (2d) ix; Stats. 1963 s. Rule 251.38; Sup. Ct. Order, 24 W (2d) vi; Sup. Ct. Order, 37 W (2d) ix.

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

"In all future matters if on the hearing of the appeal it appears that the brief and appendix do not substantially comply with the rules, this court will in its discretion deny appellant costs should he be the prevailing party, and allow respondent double costs should the respondent prevail." Henschel v. Rural Mut. Cas. Ins. Co. 2 W (2d) 466, 466-467, 86 NW (2d) 633, 634.

The appellant having failed, in the preparation of the appendix, to make a fair presentation of the evidence adverse to his contentions, double costs are allowed to the successful respondent, who printed a supplemental appendix. Nothem v. Berenschot, 3 W (2d) 585, 89 NW (2d) 289.

Because the appellant's appendix does not give a fair presentation of the evidence and is otherwise inadequate double costs are allowed to the plaintiff-respondent who printed a supplemental appendix. Seifert v. Milwaukee & S. T. Corp. 4 W (2d) 623, 91 NW (2d) 236.

Recording in the appendix to appellant's brief verbatim testimony (also omitting material evidence favorable to respondents) rather than setting forth an abridgment of the testimony in narrative form as required by 251.34 (5) constituted a substantial infraction of the rule (as did making a reference to an exhibit without stating that the court had excluded the same) which warranted imposition of double costs. Withers v. Tucker, 28 W (2d) 82, 135 NW (2d) 776.

The appellant having failed in his brief and appendix to comply with 251.34 (5), in that his appendix did not include any of the trial court's findings of fact and conclusions of law and failed to provide any part of a lengthy trial transcript or an abridgment thereof, double costs are allowed to the successful respondent who printed a supplemental appendix, including the findings of fact and an abridgment of the testimony. Martinson v. Brooks Equip. Leasing, Inc. 36 W (2d) 209, 152 NW (2d) 849.

Additional costs or penalties for failure to adhere to rules relating to preparation of a brief or an inclusion by an appellant of an appendix are imposed under 251.38 (2), Stats. 1967, only where the rules have been flag-

rantly disregarded or where there is an absence of a good faith attempt to comply therewith. Olbert v. Ede, 38 W (2d) 240, 156 NW (2d) 422.

Rule 251.39 History: Sup. Ct. Order, 17 W (2d) x; Stats. 1963 s. Rule 251.39.

Rule 251.40 History: Sup. Ct. Order, 24 W (2d) vi; Stats. 1965 s. Rule 251.40.

Rule 251.42 History: Sup. Ct. Order, 17 W (2d) x; Stats. 1963 s. Rule 251.42.

Rule 251.43 History: Sup. Ct. Order, 17 W (2d) x; Stats. 1963 s. Rule 251.43; Sup. Ct. Order, 24 W (2d) vi.

See note to 251.75, citing Sawdey v. Schwenk, 2 W (2d) 532, 87 NW (2d) 500.

Rule 251.44 History: Sup. Ct. Order, 17 W (2d) xi; Stats. 1963 s. Rule 251.44.

While this rule permits the parties in a criminal case to dispense with appendices by stipulation, unless the statement of facts is prepared in sufficient detail to serve as a reasonably helpful summary or guide to the transcript of testimony, an unwarranted burden is imposed upon the court on review. Welsher v. State, 28 W (2d) 160, 135 NW (2d) 849.

Where, in a case of first-degree murder, the appendix was omitted and the factual statements in the briefs by both sides were not only grossly inadequate but failed to tie the facts set forth therein with the relevant portions of the record, there was a misuse of the exception as to appendices. State v. Harroll, 40 W (2d) 536, 162 NW (2d) 590.

Rule 251.45 History: Sup. Ct. Order, 17 W (2d) xi; Stats. 1963 s. Rule 251.45; Sup. Ct. Order, 37 W (2d) ix.

Rule 251.48 History: Sup. Ct. Order, 17 W (2d) xi; Stats. 1963 s. Rule 251.48.

Rule 251.49 History: Sup. Ct. Order, 17 W (2d) xi; Stats. 1963 s. Rule 251.49; Sup. Ct. Order, 27 W (2d) v.

Rule 251.50 History: Sup. Ct. Order, 17 W (2d) xi; Stats. 1963 s. Rule 251.50.

Rule 251.51 History: Sup. Ct. Order, 17 W (2d) xii; Stats. 1963 s. Rule 251.51; Sup. Ct. Order, 37 W (2d) ix.

Rule 251.52 History: Sup. Ct. Order, 17 W (2d) xii; Stats. 1963 s. Rule 251.52.

Rule 251.55 History: Sup. Ct. Order, 17 W (2d) xii; Stats. 1963 s. Rule 251.55.

Rule 251.56 History: Sup. Ct. Order, 17 W (2d) xii; Stats. 1963 s. Rule 251.56.

Rule 251.57 History: Sup. Ct. Order, 17 W (2d) xii; Stats. 1963 s. Rule 251.57.

Judgment is reversed as of course for failure of defendant in error to appear. Butts v. Fenelon, 38 W 664.

A respondent who has given notice as required by sec. 3049a, Stats. 1919, of the particulars as to which he will ask the supreme court to review, reserve or modify the order or judgment appealed from by the appellant, may appear in the supreme court and, failing the appellant to appear, may ask for the relief mentioned in his notice as of course upon the merits and without argument. Dempsey v. National Surety Co. 173 W 296, 181 NW 218.

An order setting aside a verdict and granting a new trial on issues raised by a cross complaint was reversed under Rule 32, because 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 Rule 32 for failure of the respondent to submit or present the cause. Polak v. Polak, 249 W 361, 25 NW (2d) 595.

Where no brief was filed by respondents on an appeal from an order of the circuit court, the supreme court may reverse for that reason alone under rules 32 and 35. Gillard v. Aaberg, 5 W (2d) 216, 92 NW (2d) 856.

The supreme court will not exercise its discretionary power to reverse because of the husband's failure to submit a brief or appear for oral argument, where it was reliably informed that he was out of the state without funds either to travel to Wisconsin to appear in person or to hire counsel. Gauer v. Gauer, 34 W (2d) 451, 149 NW (2d) 533.

Where respondent on appeal neither filed a brief nor appeared when the case was called for argument (having theretofore informed the supreme court of his lack of desire and personal inability to respond to the appeal), the supreme court in the exercise of its discretionary power under 251.57, Stats. 1967, reverses the judgment appealed from as of course. Industrial Credit Co. v. Dienger, 38 W (2d) 328, 156 NW (2d) 479. See also: IFC Collateral Corp. v. Layton Park B. & L. Asso. 39 W (2d) 90, 158 NW (2d) 386; and Herzog v. Karns, 39 W (2d) 290, 159 NW (2d) 47.

Reversal under 251.57, Stats. 1967, because claimant failed to file a brief, would not be ordered where it could be attributed to ambiguity in the order dismissing a prior premature appeal. Estate of Pfaff, 41 W (2d) 159, 163 NW (2d) 140.

Rule 251.59 History: Sup. Ct. Order, 17 W (2d) xii; Stats. 1963 s. Rule 251.59.

A question as to inconsistency of the special verdict, not raised by the defendant's motion for a new trial, and not mentioned in the defendant's brief on appeal but only on the oral argument, was not raised timely and is not before the supreme court on the appeal. Kuecker v. Paasch, 260 W 520, 51 NW (2d) 516.

Rule 251.60 History: Sup. Ct. Order, 17 W (2d) xii; Stats. 1963 s. Rule 251.60; Sup. Ct. Order, 37 W (2d) ix.

Rule 251.61 History: Sup. Ct. Order, 17 W (2d) xiii; Stats. 1963 s. Rule 251.61.

Rule 251.65 History: Sup. Ct. Order, 17 W (2d) xiii; Stats. 1963 s. Rule 251.65.

The court will not grant a rehearing merely for the purpose of deciding questions discussed, but not necessary to sustain the decision. A motion for rehearing will not be

granted on rulings made in deciding cases if it is conceded that the judgment must stand for other reasons. Tallman v. Ely, 8 W 218.

After expiration of the time within which a motion for rehearing may be made and papers in the cause have been remitted an order cannot be granted extending the time for filing such motion. Ogilvie v. Richardson, 14 W 157.

If the arguments on rehearing are not filed within the time permitted the motion fails and no motion to dismiss is necessary. Dierolff v. Winterfield, 26 W 175.

A second motion for a rehearing cannot be made after a first one is denied, but may be after a first motion has been allowed, and rehearing had. Fallass v. Pierce, 30 W 443.

On July 2, 1875, special rules were adopted by which the briefs on a motion for rehearing were required to be printed. Thereafter the court declined to receive written briefs offered without leave or explanation. Collart v. Fisk, 38 W 238, 244.

Even when the record is not actually remitted the statute takes away the jurisdiction of the supreme court over appeals after 60 days from the judgment on them unless the record is retained by order of the court under the statute. Pringle v. Dunn, 39 W 435.

After the remittitur the supreme court loses jurisdiction and the court below regains it, and the supreme court cannot entertain a motion to require the circuit court to return the record in order to enable a party to move for a rehearing. Pierce v. Kelly, 39 W 568.

On a motion for a rehearing only the return and arguments founded thereon can be considered. Bonin v. Green Bay & M. R. Co. 43 W 210; Kalckhoff v. Zoehrlaut, 43 W 373.

Where the proper order remanding the case is not made, through an error appearing upon the record, no motion for rehearing is necessary. The error will be corrected on the attention of the court being called to it. Canfield v. Bayfield County, 74 W 60, 41 NW 437, 42 NW 100.

A statement by counsel of the existence of an additional defense is sufficient, and may be made on a motion for a rehearing. That being done, though such motion is denied, the court may modify a judgment which it has directed the trial court to enter so as to authorize the latter, in its discretion, to allow an amendment to the pleadings and grant a new trial. Weld v. Johnson Mfg. Co. 84 W 537, 54 NW 335 and 998.

If the record is retained beyond the time permitted by rule, a motion in the nature of a motion for a rehearing will not be denied for want of jurisdiction, especially if the record is held by order of the court. Patten Paper Co. (Limited) v. Green Bay & M. C. Co. 93 W 283, 66 NW 601, 67 NW 432.

Where a rehearing is asked for in order to obtain a direction that the costs be paid out of the estate, the motion will be considered as relating to costs only. Jones v. Roberts, 96 W 427, 70 NW 685, 71 NW 883.

Where on appeal a cause has been decided, a rehearing will not be granted as to questions already considered unless it is rendered necessary by a change of the views of one or more of the justices participating in the matter at first. The addition of another judge to the court does not change this rule. Cook v. Minneapolis, St. P. & S. S. M. R. Co. 125 W 528, 103 NW 1097; Francisco v. Hatch, 124 W 220, 102 NW 1135; Jacobs v. Queen Ins. Co. 123 W 608, 101 NW 1090.

"If counsel conclude that a question for any cause has been overlooked or not adequately presented, and a re-presentation of the case in that regard may, with reasonable probability, change the result, they should perform the duty to their clients and the court to make the motion to that end." Pietsch v. Milbrath, 123 W 647, 662, 101 NW 388, 102 NW 342, 343.

Sec. 3071, Stats. 1898, does not require that the record be retained for 60 days but it may be remitted after 30 days in accordance with this rule. Ott v. Boring, 131 W 472, 110 NW 824, 111 NW 833.

When a motion for a rehearing is granted, the mandate upon the rehearing should declare whether the original judgment is affirmed, vacated, or modified. Kieckhefer Box Co. v. John Strange Paper Co. 180 W 367, 193 NW 487.

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, was 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 the rule and because, under 274.35 (2), the supreme court had lost jurisdiction of the case by 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.

The supreme court will not entertain a motion for rehearing to review action taken on a motion for rehearing. Blau v. Milwaukee, 232 W 197, 287 NW 594.

Rule 251.66 History: Sup. Ct. Order, 17 W (2d) xiii; Stats. 1963 s. Rule 251.66.

When the record and judgment have been regularly remitted they cannot be recalled for a rehearing. Hopkins v. Gilman, 23 W 512.

Rule 251.67 History: Sup. Ct. Order, 17 W (2d) xiii; Stats. 1963 s. Rule 251.67; Sup. Ct. Order, 27 W (2d) v; Sup. Ct. Order, 37 W (2d) ix.

Rule 251.68 History: Sup. Ct. Order, 17 W (2d) xiii; Stats. 1963 s. Rule 251.68.

Where arguments in support of motion for rehearing are not filed within the time permitted by rule such motion fails. Dierolff v. Winterfield, 26 W 175.

Rule 251.69 History: Sup. Ct. Order, 17 W (2d) xiii; Stats. 1963 s. Rule 251.69.

Rule 251.70 History: Sup. Ct. Order, 17 W (2d) xiii; Stats. 1963 s. Rule 251.70.

Rule 251.71 History: Sup. Ct. Order, 17 W (2d) xiii; Stats. 1963 s. Rule 251.71.

Where a rule requires affidavits, papers or records whereon a motion is founded to be served upon the attorney for the opposite

party with notice of the motion it is not sufficient to refer in general terms to certain records and papers as the foundation of the motion. The rule is imperative and the courts will refuse to sustain a motion not complying with it. Copies of the records, etc., should be served with notice of motion. Corwith v. State Bank, 8 W 376.

The rule requiring affidavits to be served does not apply to affidavits showing service of summons and failure to answer, and the filing of notice of lis pendens required to be filed in support of a motion for judgment. Smith v. Hoyt, 14 W 252.

Objections to irregularities in practice must be made in the supreme court before the argument on the merits has been opened. Davis & Rankin B. & M. Co. v. Riverside B. & C. Co. 84 W 262, 54 NW 506.

Rule 43 includes motions in the nature of a motion for rehearing, and such motions must be made within the time permitted by rule, even though the record may be retained in the court for a longer time. This rule is qualified by Rule 21, allowing extension of time upon a proper showing. Ott v. Boring, 131 W 472, 111 NW 833.

Rule 251.72 History: Sup. Ct. Order, 17 W (2d) xiv; Stats. 1963 s. Rule 251.72; Sup. Ct. Order, 37 W (2d) ix.

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 Rule 43a, and their only excuse for failure to do so was that they believed such application would be denied. Gray v. Gray, 232 W 400, 287 NW 708.

An order requiring the husband, pending his appeal from a judgment of divorce, to pay to the wife the sum of $75 a month as a temporary allowance, not to be deducted from the final amount to be awarded to the wife for a division of property in lieu of alimony, was within the discretion of the trial court. Barrock v. Barrock, 257 W 565, 44 NW (2d) 527.

An order of the trial court for the allowance of attorney fees and costs on appeal which did not specify the amount allowed but ordered a later determination of it did not comply with Rule 43a. Leach v. Leach, 266 W 223, 63 NW (2d) 73.

An order denying an application that the divorced husband be required to pay the costs and reasonable attorney fees to be incurred by the divorced wife in prosecuting her appeal is affirmed since it would not have been an abuse of discretion if such order had been based on the ground that the wife possessed sufficient means of her own to enable her to prosecute the appeal, instead of being based on a different and untenable ground. Peck v. Peck, 272 W 466, 76 NW (2d) 316.

One of the considerations in making an allowance for expenses on appeal is whether reasonable ground exists to support a belief that the appeal will be successful. Greenlee v. Greenlee, 23 W (2d) 669, 127 NW (2d) 737.

Rule 251.73 History: Sup. Ct. Order, 37 W (2d) ix; Stats. 1969 s. Rule 251.73.

Rule 251.75 History: Sup. Ct. Order, 17 W (2d) xiv; Stats. 1963 s. Rule 251.75.

Costs are not allowed for printing a case in violation of a supreme court rule. Meyst v. Frederickson, 146 W 85, 130 NW 960.

An appellant who printed his case by question and answer instead of in narrative form, and who printed much of the record that was not necessary to any question raised, was not allowed costs for the printing of the case. Will of Shanks, 172 W 621, 179 NW 747.

Although the appellants would ordinarily be entitled to full costs on the appeal because of having secured substantial relief as the result thereof, they will not be allowed costs for printing their briefs and appendix where they did not serve the same within the time required by the rules. Sawdey v. Schwenk, 2 W (2d) 532, 87 NW (2d) 500.

Rule 251.76 History: Sup. Ct. Order, 17 W (2d) xiv; Stats. 1963 s. Rule 251.76.

Rule 251.77 History: Sup. Ct. Order, 17 W (2d) xiv; Stats. 1963 s. Rule 251.77.

A second argument of the case was ordered by the court; counsel for the respondent did not appear; and the court, on motion of appellant's counsel, without hearing him on the merits and without deciding what would be the effect of a mere reversal under the rule, directed a reversal with the same effect as if the appeal had been heard and all the questions raised by appellant decided in his favor on the merits. Hughes v. Libby, 42 W 639.

A penalty under this rule is imposed for failure to serve case and brief in time. State ex rel. Thompson v. Welbes, 129 W 639, 109 NW 564.

Where respondent's brief was not served in time and the appellant moved for a continuance on that ground, but the court instead dismissed the appeal because the order appealed from was not appealable, costs were denied to the respondent. Motowski v. People's Dentists, 183 W 477, 198 NW 465.

If the applicant fails to serve his printed case and the briefs within the time prescribed by Rule 16 the respondent may have a continuance and costs, as provided by Rule 46. 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 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. Nowakowski v. Novotny, 245 W 161, 13 NW (2d) 523.

Rule 251.79 History: Sup. Ct. Order, 17 W (2d) xv; Stats. 1963 s. Rule 251.79.

Rule 251.80 History: Sup. Ct. Order, 17 W (2d) xv; Stats. 1963 s. Rule 251.80.

Rule 251.81 History: Sup. Ct. Order, 17 W (2d) xv; Stats. 1963 s. 251.81.

Where a brief charged the opposing counsel with having made wilful misstatements and alluded to him by his surname several times, and the brief was understood to have been made by one of the parties, but the name of their counsel was appended thereto, the court declined to receive the brief and no expenses incurred thereby were allowed to be taxed as

costs. Coldwell v. Sanderson, 69 W 52, 28 NW 232, 33 NW 591.

A brief containing many statements of an alleged fact contrary to the court's finding without any reference to the record to substantiate them and many statements disrespectful to opposite counsel and abusive of the opposite parties violates a rule of the court. Gates v. Parmly, 113 W 147, 87 NW 1096.

A rule of the court requires counsel in their briefs and arguments to be respectful to the trial court. The brief for the appellant is in violation of that rule. Eureka Steam Heating Co. v. Sloteman, 69 W 398, 34 NW 387; Keller v. Town of Gilman, 93 W 9, 66 NW 800; Stoll v. Pearl, 122 W 619, 99 NW 906; Lynch v. Ryan, 132 W 271, 111 NW 707; Casper v. Kalt-Zimmers Mfg. Co. 159 W 517, 149 NW 754.

Rule 251.82 History: Sup. Ct. Order, 17 W (2d) xv; Stats. 1963 s. Rule 251.82.

Rule 251.83 History: Sup. Ct. Order, 17 W (2d) xv; Stats. 1963 s. Rule 251.83.

Rule 251.84 History: Sup. Ct. Order, 17 W (2d) xv; Stats. 1963 s. Rule 251.84.

Rule 251.85 History: Sup. Ct. Order, 17 W (2d) xv; Stats. 1963 s. Rule 251.85.

Double costs are awarded an opposing party for numerous violations of rules on appeal. National Farmers Union P. & Cas. Co. v. Maca, 26 W (2d) 399, 132 NW (2d) 517.

Rule 251.88 History: Sup. Ct. Order, 17 W (2d) xv; Stats. 1963 s. Rule 251.88.

On the duties of a guardian ad litem see Tyson v. Tyson, 94 W 225, 68 NW 1015.

Rule 251.89 History: Sup. Ct. Order, 17 W (2d) xv; Stats. 1963 s. Rule 251.89; Sup. Ct. Order, 37 W (2d) x.

Rule 251.90 History: Sup. Ct. Order, 17 W (2d) xv; Stats. 1963 s. Rule 251.90.

Rule 251.91 History: Sup. Ct. Order, 17 W (2d) xvi; Stats. 1963 s. Rule 251.91.

Rule 251.92 History: Sup. Ct. Order, 17 W (2d) xvi; Stats. 1963 s. Rule 251.92.

Rule 251.93 History: Sup. Ct. Order, 17 W (2d) xvi; Stats. 1963 s. Rule 251.93.

Rule 251.94 History: Sup. Ct. Order, 17 W (2d) xvii; Stats. 1963 s. Rule 251.94; Sup. Ct. Order, 41 W (2d) vii.

CHAPTER 252.

Circuit Courts.

252.01 History: R. S. 1878 s. 2418; Stats. 1898 s. 2418; 1903 c. 407 s. 1, 2; Supl. 1906 s. 2418, 2418a; 1913 c. 592, 705; Stats. 1913 s. 113.01; 1915 c. 6; 1917 c. 566 s. 40; 1919 c. 362 s. 31; Stats. 1923 s. 252.01; 1925 c. 5, 12; 1925 c. 454 s. 12; 1935 c. 213; 1951 c. 257, 402; 1953 c. 327, 606.

Revisers' Note, 1878: Section 3, judiciary act of June 29, 1848, so far as applicable.

252.015 History: Stats. 1911 s. 2423e; 1913 c. 592 s. 8; Stats. 1913 s. 113.07 (2); Stats. 1923 s. 252.07 (2); 1953 c. 327 s. 6; Stats. 1953 s. 252.015; 1957 c. 531; 1959 c. 16, 315, 427; 1959 c. 660 s. 67, 68; 1961 c. 33; 1963 c. 399; 1965 c. 256; 1967 c. 275.

The fact that 2 other circuit judges sat with the presiding judge of one branch of the circuit court at his request in investigating charges did not prevent such tribunal from being a judicial body with jurisdiction to punish a witness for contempt, where the proceeding was conducted by the presiding judge, who took entire responsibility for the judgment. Rubin v. State, 194 W 207, 216 NW 513.

252.016 History: Stats. 1913 s. 113.07 (3), (4), 113.075; 1915 c. 604 s. 7; Stats. 1915 s. 113.07 (3), (4); 1923 c. 248; Stats. 1923 s. 252.07 (3), (4), (5); 1933 c. 428; 1933 c. 432 s. 2, 3; Spl. S. 1933 c. 9; 1949 c. 6 s. 5 to 8; 1951 c. 247 s. 48; 1953 c. 327 s. 7 to 12; Stats. 1953 s. 252.016; 1959 c. 407; 1959 c. 595 s. 74; 1965 c. 256; 1967 c. 275; 1969 c. 352.

252.017 History: 1969 c. 352; Stats. 1969 s. 252.017.

252.02 History: 1959 c. 315, 660, 685; Stats. 1959 s. 252.017; 1961 c. 33, 495; 1961 c. 642 s. 7m; 1967 c. 275; 1969 c. 352; Stats. 1969 s. 252.02.

252.03 History: 1848 p. 21 s. 5, 9; R. S. 1849 c. 83 s. 6; R. S. 1858 c. 116 s. 4, 5; R. S. 1878 s. 2420; Stats. 1898 s. 2420; 1913 c. 592 s. 3; Stats. 1913 s. 113.03; Stats. 1923 s. 252.03; 1961 c. 495.

Revisers' Note, 1878: This section undertakes to state in a general way the jurisdiction and authority of the circuit courts, from sections 5 and 9, act of 1848, and sections 4 and 5, chapter 116, R. S. 1858. It is only requisite that these powers be stated with sufficient comprehensiveness. The constitution grants their jurisdiction, which cannot probably be increased, though it may be limited by statute.

On judicial power generally see notes to sec. 2, art. VII; on jurisdiction of circuit courts see notes to sec. 8 art. VII; and on general provisions concerning courts of record see notes to various sections of ch. 256.

In criminal as in civil actions, an appeal confers no jurisdiction upon the appellate court, where the lower court had no jurisdiction of the subject-matter of an action. Klaise v. State, 27 W 462.

Circuit courts have jurisdiction of proceedings in rem against boats under ch. 116, R. S. 1849. Steamboat Sultana v. Chapman, 5 W 454. See also Steamboat Galena v. Beals, 5 W 91.

Where a party brings an action in a state court and replevies property from the possession of an officer of a federal court whose jurisdiction over it first attached, the former tribunal has jurisdiction to inquire into the validity of its own proceedings and to enforce a redelivery of the property to the officer from whom it was taken. Booth v. Ableman, 16 W 460.

In an action of which a justice had jurisdiction a circuit court may allow an amendment of complaint so as to demand greater