CHAPTER 251.

SUPREME COURT.

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

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

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

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

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

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

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

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

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

251.06 Terms of court. There shall be held in the supreme court room at Madison two sessions of the supreme court in each year, to be called the January and August terms. The January term shall commence on the Tuesday next preceding the second Wednesday in January and the August term on the second Tuesday in August.

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

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

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

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

Note: For reversible error, see 274.37.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Meyer, 218 W 381, 261 NW 211.

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

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

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

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

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

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

On appeal from judgment on verdict against garage owner in action arising out of automobile collision, wherein garage employe's testimony, though sufficient to make jury case on issue of whether garage was liable for his negligence, was contrary to several credible witnesses and to his own written statement, damages awarded were excessive, and prejudicial instruction was given, new trial will be awarded in interest of justice. Anderson v. Seelow, 244 W 230, 271 NW 844.

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

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

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

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

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

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

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

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

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

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

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

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

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

251.13 Jury, how obtained. If a jury be ordered to try an issue or to assess damages in the supreme court it shall be obtained as follows: The court shall direct the sheriff or some disinterested person present to write down thirty-six names of persons required for the jury who are qualified by law to serve as jurors in the circuit courts and not of kin to either party or in any manner interested in the cause; such officer or person shall be first sworn by the court to select such names without partiality to either party; the list being made the parties shall alternately strike out a name until the names of twelve jurors only are left, and if either refuse or neglect to strike out on his part the court or clerk may strike in his stead; a venire, containing the names of the jurors thus selected and directed to such sheriff as the court shall designate, shall be issued to such sheriff, who shall forthwith proceed to summon the jury therein named. If any such jurors shall not be found, or fail to appear according to the summons, or be discharged by the court upon any legal objection or for other cause the court shall direct the sheriff to summon a sufficient number of talesmen to supply the deficiency. The court shall have the same power to punish any juror who shall refuse or neglect to appear in obedience to the summons as is conferred upon the circuit court.

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

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

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

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

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

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

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

251.18 Rules of pleading and practice. The supreme court of the state of Wisconsin shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of Wisconsin, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant. Such rules shall not become effective until sixty days after their adoption by said court. All such rules shall be printed by the state printer and paid for out of the state treasury, and the court shall direct the same to be distributed as it may deem proper. All statutes re-

lating to pleading, practice and procedure shall have force and effect only as rules of court and shall remain in effect unless and until modified or suspended by rules promulgated pursuant hereto. No rule modifying or suspending such statutory rules shall be adopted until the court has held a public hearing with reference thereto, notice of which shall be given by publication for four successive weeks in the official state paper, the expense of such publication to be paid out of the state treasury. Nothing in this section shall abridge the right of the legislature to enact, modify or repeal statutes or rules relating to pleading, practice or procedure. The attorney-general of Wisconsin, the revisor of statutes, the chairmen of the judiciary committees of the senate and of the assembly, a member of the board of circuit judges, and a member of the board of county judges, selected by those boards annually, the president of the Wisconsin state bar association and three members of the said bar association, elected by said association annually, shall constitute an advisory committee whose duty it shall be to observe and to study the administration of justice in the courts of Wisconsin and to advise the supreme court from time to time as to changes in rules of pleading, practice and procedure which will, in its judgment, simplify procedure and promote the speedy determination of litigation upon its merits. The members of said committee shall receive no compensation, but shall be reimbursed out of the state treasury for expenses necessarily and actually incurred by them in attending meetings of said committee outside the county of their residence.

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

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

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

A court rule, not limited by its terms to actions at law, must be applied in equity actions also. Rosecky v. Tomaszewski, 225 W 438, 274 NW 259.

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

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

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

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

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

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

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

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

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

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

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

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

251.22 Fees and per diem of clerk. The supreme court shall fix such fees for the services of the clerk as to the court shall seem proper, except when otherwise provided by law. The clerk shall also receive from the state, in addition to his fees, five dollars per day during the actual sessions of the court. The amount for per diem and for all fees allowed by law to the clerk of the supreme court in criminal and state cases accompanied by an

itemized bill of costs in each case, shall, on being fixed and allowed by the justices of the court or a majority of them, be paid semiannually in the months of June and December out of the state treasury.

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

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

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

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

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

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

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

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

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

SUPREME COURT RULES.

Note.—The rules prescribed by the supreme court governing practice in that court are printed here at the end of the chapter entitled "Supreme Court" because those rules have the force of law, are in constant use and should be easily available. For convenience in indexing and for reference these rules have been given additional numbers, which numbers are in harmony with the decimal numbering system used in the statutes. The numbering and the headings and subheadings heretofore used are retained. The new numbers are bracketed.

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

CHAPTER I.

RECORD AND RETURN.

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

(1) Summons or other process.
(2) Proof of service.
(3) Complaint, petition, relation, or affidavit initiating the proceeding, with the date of service.
(4) Answer or demurrer, with date of service.
(5) Reply, demurrer or election to take issue, with date of service.

(6) Orders material to the appeal, and papers upon which they are based.
(7) The verdict, findings of the court or referee, with orders based thereon, and opinion of the court, if any.
(8) Final determination.
(9) Any order made after judgment, material to the appeal, and the papers upon which the same is based.
(10) (As amended July 1, 1941.) Bill of exceptions. Each exhibit shall have on it the name of plaintiff and defendant and each photograph attached to or returned with the bill of exceptions shall have in addition either upon its face or upon its reverse side or upon a slip attached to it, a statement giving the page of the record and case where the photograph is referred to, a statement of the position of the camera, distance from the object photograph, the direction in which the camera was pointed and such further information as may be appropriate.
(11) Writ of error or notice of appeal, with the bond or undertaking.
(12) Certificate of the clerk to the return.

Such record or transcript shall be consecutively paged on the left-hand margin.

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

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

[251.254] **Rule 4.** The appellant or plaintiff in error shall cause the proper return to be made to this court within twenty days after filing of the writ or perfecting the appeal.

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

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

CHAPTER II.

Cases and Briefs.

[251.26] **Rule 6.** (As amended August 9, 1921.) In calendar causes appellant or plaintiff in error shall print a case containing an abridgment of the record in narrative form so far as necessary to present the questions for decision and the opinion of the trial court, if any, stating at the beginning whether a judgment, an order, or both, are sought to be reviewed, and giving the name of the trial court and the name of the judge who presided at the trial. The case shall be paged and shall mention each paper not printed or abridged, with an appropriate reference to the page of the record where it is to be found.

[251.261] **Rule 7.** (As amended August 9, 1921.) Each case of more than twenty pages shall have a printed index alphabetically arranged referring to each paper in the case and briefly indicating the nature or contents of the same, including exhibits, the names of the witnesses of each party arranged separately and alphabetically, and the pages of the direct, cross, or redirect examination.

[251.262] **Rule 8.** If the printed case, as served, is incomplete or inaccurate, the opposing party may, within ten days after receiving the same, serve on the attorney for the appellant or plaintiff in error a supplemental case, making the necessary corrections, with an appropriate index and references to the record.

[251.263] **Rule 9.** (As amended January 9, 1923.) In calendar causes each party shall print a brief giving references to the pages of the record and printed case for each statement and proposition based on the record. When a statute is involved in a question raised on appeal, so much thereof as is necessary to a decision of the case shall be printed at length. Every brief shall contain on its front fly leaves a synopsis or brief resume of the argument, with page references, followed by a list of all statutes and cases referred to, the latter alphabetically arranged, together with references to pages where the statutes and cases are cited.

Note: Where a party prevailing in the supreme court fails to print on the fly leaf of his brief a synopsis or brief resume as required by Rule 9, no costs can be taxed by him for printing his brief, Rule 44. Hilgendorf v. Schuman, 232 W 625, 288 NW 184.

[251.264] **Rule 10.** (As amended August 9, 1921.) The brief of appellant or plaintiff in error shall contain a concise statement of the nature of the action and the issues involved, the result of the trial in the court below, the errors relied upon, the leading facts or conclusions which the evidence tends to prove, the principles of law applicable and the authorities in support thereof, giving the names of both plaintiff and defendant, number, name, and page of report each time the case is cited.

[251.265] **Rule 11.** (As amended August 9, 1921.) The brief of the respondent or defendant in error may also state the leading facts or conclusions which the evidence tends to prove, and the principles of law in support of the same, with authorities, cited as required in Rule 10.

[251.266] **Rule 12.** Discussions of facts in briefs shall be as brief as practicable; references shall be made to the pages of the printed case where the evidence relied on may be found.

[251.267] **Rule 13.** (As amended August 9, 1921.) Cases and briefs shall be printed plainly with black ink in type not smaller than ten point nor larger than twelve point and leaded with a two-point lead, on white paper, properly paged at the top, with a printed page seven inches long and three and one-half inches wide centered in a page trimmed to a size seven inches wide by nine inches long and saddle-stitched when practicable, bound in a paper or cloth cover, having the title of the cause and designation of the brief printed in appropriate type on the outside, and shall be signed by counsel presenting the same. If special permission is given to file type-written memorandum or reply briefs, they must conform to the size page above stated, viz., seven by nine inches.

CHAPTER III.

SERVICE OF PAPERS.

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

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

[251.272] **Rule 16.** (As amended November 9, 1931.) Three copies of the printed case shall be served by the appellant or plaintiff in error on the opposite party, at least forty days before the time set for the argument. No costs shall be taxed for printing case unless affirmative proof that it was served within the time required by this rule be filed with the clerk of this court.

[251.273] **Rule 17.** At least twenty days before the time set for argument of the first assignment of cases on any calendar, the clerk shall send to every attorney appearing in the causes on the calendar for the term a list of such causes as arranged on the calendar.

[251.274] **Rule 18.** (As amended November 9, 1931.) The brief of the appellant or plaintiff in error shall be served on the opposing party at least fifteen days, and that of the respondent or defendant in error at least five days, before the calling of the cause for argument. Each party may serve and submit a supplemental brief on the argument, confined strictly to matter of reply; and no brief shall be served or received except as provided, unless permission be granted. No costs shall be taxed for printing brief unless affirmative proof that it was served within the time required by this rule be filed with the clerk of this court.

[251.275] **Rule 19.** (As amended September 26, 1928.) At least twenty-four hours before a cause is called for argument the plaintiff in error or appellant shall file with the clerk twenty copies of the printed case and each party twenty copies of his brief.

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

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

CHAPTER IV.

CALENDAR AND ASSIGNMENTS.

[251.28] **Rule 22.** (As amended August 9, 1921.) On the August calendar shall be placed all causes in which the record shall have been filed before August first, and on the January calendar all causes in which the record shall have been filed before January first. Any case may be placed upon the calendar or advanced for hearing at any time in which it is shown that the interests of the state, the people at large, or of any municipality are affected, or an important constitutional question is seriously raised, or an extraordinary exigency is involved, and it is further shown that delay would be prejudicial to the accomplishment of justice. No appeal shall be placed upon the calendar unless the requirements of this rule be complied with, except as provided in Rule 62.

[251.281] **Rule 23.** (As amended January 11, 1913.) Actions and proceedings brought under the original jurisdiction of this court, commenced prior to either of the dates fixed for the filing of records in the last preceding section, shall be placed upon the proper calendar.

[251.282] **Rule 24.** (As amended June 16, 1927.) Within ten days after each of the dates named in Rule 22 for the filing of records, the clerk shall prepare and cause to be printed a calendar, arranging all civil causes in the order of their filing, and arranging the criminal causes in their order at the foot.

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

[251.284] **Rule 26.** Cases on the calendar not reached for argument during any term shall stand continued and be considered as at the head of the next calendar.

[251.285] **Rule 27.** In all criminal cases the plaintiff in error, at least twenty days before the case is called for argument, shall serve upon the attorney-general a statement of the errors relied upon and a copy of his brief; and the attorney-general shall serve his brief on the attorney for the plaintiff in error at least five days before such argument.

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

[251.29] **Rule 29.** Not less than twenty causes shall be placed on each assignment, and the clerk shall as soon as practicable after an assignment shall have been made up, transmit a copy thereof to each attorney or firm of attorneys appearing therein.

CHAPTER V.

Submission of Causes.

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

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

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

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

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

[251.34] **Rule 34.** (As amended January 9, 1923, and July 1, 1941.) In opening the oral argument appellant shall briefly state the nature of the action, the result in the court below, and the points upon which reversal is sought. No counsel shall read in extenso from briefs or written argument, nor testimony from case or record. Decisions relied upon may be stated in substance but not read.

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

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

[251.36] **Rule 36.** (As amended January 13, 1923.) On each day of a session of the court cases are subject to call as specified in the notice of call for argument. All cases not called on the day for which they are set will be called in their order on succeeding days.

CHAPTER VI.

Motions.

[251.37] **Rule 37.** (As amended June 29, 1933.) Every motion for a rehearing shall be filed within twenty days after the decision, and the clerk shall retain the papers till the expiration of such period, unless all parties interested consent to sooner remit the same.

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

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

[251.39] **Rule 39.** (As amended January 11, 1913.) A motion for a rehearing shall not be argued orally, but shall be submitted on printed arguments, of which twenty copies shall be furnished to the clerk.

[251.40] **Rule 40.** (As amended June 29, 1933.) The printed arguments in support of the motion shall be served and filed within thirty days after the decision, and in default thereof the motion shall be deemed to have been waived.

[251.41] **Rule 41.** (As amended June 29, 1933.) The printed arguments in opposition to the motion shall be served and filed within forty days after the decision, at which date the motion shall be deemed to have been submitted.

[251.42] **Rule 42.** (As amended June 29, 1933.) No motion as to any final determination made by the court, except a motion to correct mistakes in the record of this court, will be heard unless made within twenty days after such determination.

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

[251.431] **Rule 43a.** (Adopted April 26, 1910.) In divorce actions pending in this court, on appeal perfected after July 1, 1910, no allowances for suit money, counsel fees or disbursements in this court, nor for temporary alimony or maintenance of the wife or children during the pendency of the appeal will be made in this court. Such allowances, if made at all, shall be made by the proper trial court upon motion made and decided after the entry of the order or judgment appealed from and prior to the return of the record to this court, provided, that if such allowance be ordered before the appeal is taken such order shall be conditioned upon the taking of the appeal and shall be without effect unless and until the appeal be perfected.

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

CHAPTER VII.

Costs and Penalties.

[251.44] **Rule 44.** No costs shall be taxed for printing any case, supplemental case, or brief unless these rules shall have been complied with.

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

[251.46] **Rule 46.** When either case or brief is not served within the time and in the manner required by these rules the opposite party, if not in default, shall be entitled to a continuance for the term with twenty-five dollars costs, or the court may direct the cause to stand for argument and charge the penalty named to the defaulting party, by denying costs to that amount in case such party prevails, and adding it to the other costs if such party does not prevail.

[251.47] **Rule 47.** (As amended October 2, 1917.) When a party fails to procure and file the proper return, the opposing party may move to dismiss the writ or the appeal, with taxable costs, including attorney's fees of twenty-five dollars. In case such motion be made during a recess of the court the chief justice may make the proper order or judgment thereon with the same effect as if made by the court in session.

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

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

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

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

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

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

CHAPTER VIII.

MISCELLANEOUS.

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

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

[251.56] **Rule 56.** (As amended Jan. 1, 1940). Except in state cases no record shall be filed unless ten dollars is deposited with the clerk, to be applied on his fees, which deposit shall be recovered from the opposing party if appellant prevails and be credited to him on the judgment if the opposing party prevails.

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

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

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

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

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

[251.62] **Rule 62.** (As amended January 11, 1913.) Where, through mistake, inadvertence, or excusable neglect the return upon appeal in any cause shall not be filed within the time limited by Rule 22, the court may, upon motion noticed for hearing on the first day of the term, place the cause on the calendar, on such terms as may be just.

[251.63] **Rule 63.** (Adopted May 2, 1911.) All maps, exhibits, or models constructed or intended for the mere purpose of illustrating the issues in any action or proceeding pending in this court shall be placed free of expense in the custody of its clerk prior to the case being set down for argument and, without expense to such clerk, taken away within thirty days after expiration of the time for retention of the record in this court, and in default thereof the same shall be turned over to the officer of the court for destruction, or other permanent disposition.

[251.64] **Rule 64.** (As amended October 10, 1927.) In cases where the order or judgment is affirmed, opinions will not hereafter be written unless the questions involved be deemed by this court of such special importance or difficulty as to demand treatment in an opinion. A table of the cases affirmed without opinion, containing the titles, statement of the nature of each, the courts from which they came, dates there and here decided, and names of respective counsel, shall be printed in the Reports.

[251.65] **Rule 65.** (As amended July 1, 1941.) Applications by attorneys of other states for admission to this court, together with the proofs entitling them to admission, must be filed with the clerk at least sixty days before they are acted upon. Each applicant for admission to the bar pursuant to the provisions of section 256.28 (3) shall at the time of filing his application, deposit with the clerk of the supreme court currency, draft, cashier's check or certified check in the sum of twenty-five dollars payable to bearer, to cover the expenses of such investigation as may be necessary to satisfy the court that he is of good moral character and has been engaged in the actual practice of the law in the state or territory from which he comes for the required period. Such portion of the deposit as is not used for the purpose stated will be returned to the applicant.

Application blanks will be furnished by the clerk upon request.