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Procedure: Recent Changes in the Rules of Appellate Practice and Procedure

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RECENT DECISIONS

Procedure: Recent Changes in the Rules of Appellate Practice and Procedure—The Supreme Court of Wisconsin has the authority pursuant to section 251.11 of the Wisconsin Statutes ". . . 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." It has the further authority pursuant to section 251.18 to promulgate rules in order to ". . . regulate pleading, practice and procedure in judicial proceedings in all courts for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits." The Wisconsin Supreme Court has recently exercised this authority in regard to appellate practice.[1] The purpose of this article is to point out the major changes made by the court and to comment on their effect.

Section 270.43, authorizing a bill of exceptions, has been repealed, and now the term "bill of exceptions" is of historical interest only. The common law required counsel to take express exception to adverse rulings and orders of the trial court before those rulings and orders could be grounds for review. The exceptions were then embodied in a "bill of exceptions" and sent up to the appellate court as part of the record. Today, the term has lost its meaning, for "exceptions are deemed to be taken to all adverse rulings and orders made in the course of the trial."[2] Indeed, "no express exceptions shall be made."[3] So, the term "bill of exceptions" has been replaced by the term "transcript of the reporter's notes."

Former section 270.44 was amended and renumbered as section 274.117[4] and entitled *Approval of Transcript.*[5] Section 274.117 permits the submission of either a partial or total transcript of the testimony. Prior to this enactment counsel was required to submit a total transcript in all cases, unless the parties stipulated otherwise.[6] The partial transcript is defined in section 274.118 as follows:

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[1] 20 Wis. 2d vii. The rules were promulgated to take effect on September 1, 1963, except the amendment to section 274.01, effective January 1, 1964.

[2] WIS. STAT. §270.39 (1961).

[3] *Ibid.*

[4] WIS. STAT. §§270.44, 270.47, 270.48 (1961) relating to settlement of the bill of exceptions, time for service of the bill of exceptions, and settlement of the bill of exceptions after death of incapacity of the trial judge have been transferred from chapter 270 on *Issues, Trials, and Judgments* to chapter 274 on *Appeals.*

[5] The practice of securing "approval of the transcript" remains the same as the old practice of "settling the bill of exceptions." However, under the new practice the approval of the trial judge is limited to the transcript, which no longer includes the exhibits.

[6] WIS. STAT. §270.44 (1961): "Any party may propose a bill of exceptions. Unless the parties stipulate otherwise, it shall include all the evidence with the testimony set forth by question and answer. . . ."

> (1) (a) A partial transcript may be approved if the appellant serves a statement of the questions he will raise on appeal, a list of the relevant exhibits and those parts of the transcript relevant to the questions stated briefly in the form required by section (Rule) 251.34 (2).
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> (b) If a party adverse to the appellant claims that portions of the transcript or exhibits relevant to the questions have been omitted, he may move to require the appellant to include such portions of the transcript or additional exhibits. If the judge grants the motion the appellant shall pay the cost of compliance with the order.
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> (2) If a party adverse to the appellant desires a review of rulings adverse to him pursuant to section 274.12 he shall serve on the parties adverse to him questions he will raise, such additional portions of the transcript and a list of additional exhibits he wishes to add to the appeal record and the provisions of sub. (1) shall then be followed. Such additions shall be paid for by the party raising the additional questions.

The savings inherent in such a feature become readily apparent when only a partial transcript is needed. In this case a complete transcript merely adds unnecessary cost to the appeal.

Section 274.04, dealing with the time within which an appeal may be taken from an order, has been repealed and section 274.01 amended to read:

> (1) Except as otherwise provided the time within which a writ of error may be issued or an appeal taken to obtain a review by the supreme court of any judgment or order in any civil action is limited to *3 months from service of notice of entry of such judgment or order* or, if no notice is served, to six months from date of entry. . . . (Emphasi added.)

Consequently, judgments and orders are placed on the same footing, and appeal taken from judgments, as well as orders, is limited to three months from service of notice of entry thereof. Under prior law, the ninety day limitatoin imposed by section 274.04,[7] which had qualified section 274.01, applied to the time for taking appeal from orders only, whereas the time for taking appeal from judgments remained six months from the date of entry under section 274.01.

Of particular importance is the manner in which the new procedure relates the service of the proposed transcript of the reporter's notes to the service of notice of appeal. Previously, section 270.47 provided for service of the proposed bill of exceptions within ninety days after service of notice of entry of the judgment or order. Section 270.47 was repealed and the practice thereunder amended by section 274.115 to read as follows: "Service of a proposed transcript of reporter's notes, by

[7] WIS. STAT. §274.04 (1961): "The time within which an appeal may be taken directly from an order is further limited to 90 days from the date of the service by either party upon the other of notice of the entry of the order."

either party, must be made within 3 months after service of *notice of appeal.*" (Emphasis added.) This change will give the appellant much needed time within which to have the transcript prepared by the reporter for service, and it will also obviate the customary requests for extensions, which, if not seasonable, might prove fatal to an appeal. Indeed, as long as a party needs the transcript for appeal, it is only logical to relate the time of its service to service of notice of appeal.

The transcript of the reporter's notes, which is included as part of the appeal record by section 251.25 (13), no longer includes exhibits. Section 251.25 (10), which replaced section 251.251 (10), provides that when an exhibit is material to the appeal, it must be included in the appeal record. Under the old practice the bill of exceptions, *including* exhibits, had to be filed in the supreme court ten days after it was settled,[8] but under the new practice and section 251.29, the exhibits, which are no longer a part of the transcript, need not be filed until ten days before oral argument. This will permit the attorney greater access to the exhibits during the preparation of his brief.

The former section 251.251 (10)[9] was in effect a trap for attorneys who found themselves faced with an appeal. Such a situation was created because the rule of evidence governing the introduction of photographs at the trial did not correspond with the strict requirements the supreme court placed on photographs intended to be included in the appeal record. To have a photograph admitted into evidence, it must be identified by a competent witness as a true and correct representation of the scene portrayed.[10] But in order to include the same photograph in his exhibits on appeal, the attorney was subjected to the detailed and unrealistic requirements of section 251.251 (10). The result was that a photograph could be allowed "in," but not "up." The creation of section 270.209[11] is a more realistic approach to the situation, leaving such detailed requirements to the discretion of the trial court.

These appear to be the major changes in appellate practice under the new provisions. In addition the court has granted more liberal costs

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[8] WIS. STAT. §251.254 (1961) is repealed and the practice thereunder amended by WIS. STAT. §251.29 (effective Sept. 1, 1963).

[9] WIS. STAT. §251.251 (10) (1961): "*Bill of Exceptions.* Each exhibit shall have on it the name of the plaintiff and defendant and each photograph attached to or returned with the bill of exceptions shall have in addition either upon its face or upon its reverse side or upon a slip attached to it, a statement giving the page of the record where the photograph is referred to, a statement of the position of the camera, distance from the object photographed, the direction in which the camera was pointed and such further information as may be appropriate."

[10] MCCORMICK, EVIDENCE §181 (1954).

[11] WIS. STAT. §270.209 (effective Sept. 1, 1963): "*Unless deemed impracticable by the trial judge,* each photograph received in evidence shall have either upon its face or upon its reverse side or upon a slip attached to it a statement of the position of the camera, the distance from the object photographed, the direction in which the camera was pointed and such further information as may be appropriate." (Emphasis added.)

and attorney's fees, modernized the terminology, and purged the procedure of unneeded provisions so as to promote the "speedy determination of litigation on its merits."[12]

DONALD J. BAUHS

Procedure: The Probable Cause Requirement of a Criminal Complaint in Federal Court—In *United States v. Greenberg*,[1] a prosecution for income tax evasion was overturned on the ground that a proper complaint had not been filed within the time allowed by the statute of limitations. The complaint contained only the affidavit of the Internal Revenue Agent. In it the affiant stated that:

> . . . he had conducted an investigation of the federal income tax liability of Hyman Greenberg for the calendar year 1955 and other years; by examination of the said taxpayer's records; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of the said taxpayer's financial condition.[2]

The complaint also stated that based on this investigation, complainant had personal knowledge that defendant had wilfully attempted to evade and defeat a large part of his income tax. It also contained the dollar amount of income shown on defendant's tax return and the figure which represented defendant's alleged actual income.

The Government's argument was based on two main contentions: (1) that since a summons rather than a warrant was issued on the complaint, it was not necessary to show probable cause, and (2) that even if probable cause were found to be a requirement, it had in fact been shown.

The court disposed of the claim that probable cause need not be shown when only a summons is sought. It reasoned that, as far as defendant was concerned, it made little difference whether a warrant or summons issued, since if he failed to respond to the summons a warrant would issue. In addition the court noted that the specific language of Rule 4(a)[3] of the Federal Rules of Criminal Procedure did not impose a distinction in the requirements for securing a summons or a warrant.

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[12] WIS. STAT. §251.18 (1961).

[1] United States v. Greenberg, 320 F. 2d 467 (9th Cir. 1963).

[2] *Id.* at 468.

[3] Rule 4 (a): *"Issuance.* If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue."