CHAPTER 274.

WRITS OF ERROR AND APPEALS.

274.01 Supreme court; writs of error and appeals; when taken. (1) Except as otherwise specially 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 or special proceeding in a court of record is limited to 6 months from the date of the entry of such judgment or order, but if the person against whom a judgment is rendered is, at the time of the rendition thereof, either a minor or insane, or imprisoned on a criminal sentence, the time during which such disability shall continue, not exceeding 10 years, shall not be reckoned a part of said 6 months; said 6 months shall begin to run immediately from the entry of such judgment or order.

(2) When a party to an action or special proceeding dies during the period allowed for appeal to the supreme court from an order or the judgment therein, the time for such appeal by or against his executor or administrator and for the service of appeal papers by or upon his executor or administrator shall continue at least 4 months after his death. If no executor or administrator of his estate qualifies within 60 days after his death, any appellant may have an administrator of said estate appointed as provided by section 311.02. [*1935 c. 541 s. 277; 1943 c. 261, 505; 1943 c. 553 s. 37*]

Note: Prior to the creation of 274.01 (2) by ch. 261, Laws 1943, the death of a party adverse to the appellant did not extend the time for appeal and the supreme court could not extend the time. Stevens v. Jacobs, 226 W 198, 275 NW 555, 276 NW 638.

The right of appeal is purely statutory. Old Port Brewing Corporation v. C. W. Fischer F. Co., 228 W 62, 279 NW 613.

For the distinction between an appeal and an action to review see note to 49.11, citing Milwaukee County v. Industrial Commission, 228 W 94, 279 NW 655.

The supreme court, being a court of review, cannot, on the stipulation of the parties to an appeal, consider the right of one of the parties to subrogation, where that issue has never been tried in the court below. The statutes authorize appeals to the supreme court only from orders and judgments. Home Owners' Loan Corp. v. Papara, 235 W 184, 292 NW 281.

A pronouncement by the circuit court, in a decision on an appeal from the civil court of Milwaukee county, that the judgment of the civil court be reversed and that judgment be entered dismissing the plaintiff's complaint with costs, and again embodied in a formal instrument signed and entered the following day, constituted a final determination of the rights of the parties and thereby the judicial act was completed, and hence was a "judgment," not an "order," so that the plaintiff was entitled to appeal therefrom to the supreme court at any time within six months from the date of the entry thereof. Neither a provision, in a formal instrument signed by the circuit court reversing the judgment of the civil court and dismissing the plaintiff's complaint, which directed the return of the record to the civil court, nor the return of the record to the civil court and the attempted entry of judgment in that court, could operate to defeat the plaintiff's right to have the record brought up for review under his timely served notice of appeal from the judgment of the circuit court to the supreme court. Zbikowski v. Straz, 236 W 161, 294 NW 541.

Sections 274.01, 274.11 (1) do not authorize appeals from mere recitals, findings, conclusions of law, or directions or orders for judgment. Thoenig v. Adams, 236 W 319, 294 NW 826.

This section has no application to writs of error or appeals in criminal cases. State v. Dingman, 237 W 584, 297 NW 367.

An erroneous order vacating the judgment was effective for the purpose until it was reversed and the judgment reinstated, and the time during which the judgment was vacated was not counted in computing the time for taking an appeal from the judgment, but the time began to run from the date of entry of the judgment and not from the date of its reinstatement. Volland v. McGee, 238 W 227, 298 NW 602.

On a record showing that the trial court further considered a matter on receiving the plaintiff's brief after signing a judgment dated December 16, 1940, and concluded on January 3, 1941, to enter the judgment as originally drawn, that the defendant's notice of entry of judgment stated that judgment was entered on January 3, 1941, and that the trial court after hearing of the plaintiff's motion entered an order providing that the date of the judgment be corrected to read January 3, 1941, and to stand entered as so corrected, the correct date of the entry of judgment is held to be January 3, 1941. Randall v. Beidle, 239 W 285, 1 NW (2d) 71.

In view of definitions in 270.53, Stats. 1941, a "special proceeding," such as a proceeding for the vacation of a plat, terminates by order and not by judgment, at least in respect to the time within which an appeal may be taken under 274.01 and 274.04, Stats. 1941, although 236.18 authorizes a "judgment" in a vacation proceeding. In re Henry S. Cooper, Inc., 240 W 377, 2 NW (2d) 866.

Where no appeal is taken from an order or judgment within the time limited therefor, mere error in the order or judgment cannot be reached by appealing from an order denying a motion to set it aside. Kellogg-Citizens Nat. Bank v. Francois, 240 W 432, 3 NW (2d) 686.

The right to appeal is not a common-law right, and does not exist in the absence of statute providing for an appeal. In re Fish, 246 W 474, 17 NW (2d) 558.

274.02 Dismissal of writs of error and appeals; not a bar. No discontinuance or dismissal of a writ of error or an appeal shall preclude the party from suing out another writ or taking another appeal within the time limited by law. [*1935 c. 541 s. 278*]

274.03 [*Repealed by 1935 c. 541 s. 279*]

274.04 Appeals from orders. The time within which an appeal may be taken directly from an order is further limited to ninety days from the date of the service by either party upon the other of notice of the entry of the order. [*1935 c. 541 s. 280*]

Note: For time for appeal from order in assignment proceedings, see 128.15.

The time for appeal from the county court to the supreme court is determined by 324.04 and not by 274.04. In re Bowler's Will, 228 W 527, 280 NW 684.

274.05 Writs of error. Writs of error may issue of course out of the supreme court at any time to review the order or judgment of any court discharging or remanding a person brought up by writ of habeas corpus and to review final judgments in actions triable by jury. The proceedings and judgment upon such writs shall be according to the course of the common law and the rules and practice of the supreme court, except as modified by this chapter. [*1935 c. 541 s. 281*]

Note: A writ of error will not lie to review an order setting aside a verdict and granting a new trial in a bastardy action. State ex rel. Zimmerman v. Euclide, 227 W 279, 278 NW 535.

In general, a writ of error lies after final judgment, or after an order in the nature of a final judgment, rendered in a court of law, to correct some supposed mistake which is apparent on the face of the record. Martin v. State, 236 W 571, 295 NW 681.

Under 274.05 a writ of error may be issued out of the supreme court to review a judgment discharging a prisoner, convicted of a criminal offense, from custody on a writ of habeas corpus, and the officer in whose custody the prisoner was, suing out the writ of error, is entitled to a review of such judgment as an aggrieved party; and the state is entitled to be heard on such review as a party in interest, whether the writ of error should be issued in the name of the state or in the name of the officer in whose custody the prisoner was, and whether the state may properly sue out the writ in its own name or not. Drewniak v. State ex rel. Jacquest, 239 W 475, 1 NW (2d) 899.

The supreme court had jurisdiction of the cause on a writ of error sued out by a sheriff to review a judgment of the circuit court, discharging a convicted defendant from custody on a writ of habeas corpus, regardless of whether a formal notice of writ of error or citation or process was given to the defendant, where the writ of error was filed with the clerk of the circuit court, and his return was duly filed in the supreme court, and the defendant was notified that the writ had been obtained and was on file, was served with the sheriff's brief, received a copy of the supreme court calendar and an assignment card showing the date on which the case would be heard, and made a general appearance in the supreme court in response to the writ. Kushman v. State ex rel. Panzer, 240 W 134, 2 NW (2d) 862.

274.06 Undertaking on writ of error. No writ of error shall be effectual for any purpose unless the plaintiff in error shall, at or before the time of filing the return thereof, file in the office of the clerk of the supreme court an undertaking executed on his part to the defendant in error, by at least two sureties, in the sum of at least two hundred and fifty dollars, conditioned that the plaintiff in error will pay all costs and damages which may be awarded against him on the writ of error, or shall deposit that sum of money with such clerk to abide the event of such writ, or file the undertaking mentioned in section 274.07 unless such undertaking or deposit be waived in writing by the defendant in error. The sureties shall justify their responsibility in the same manner as to an undertaking on appeal. [*1939 c. 66*]

274.07 Undertaking to stay execution. No writ of error shall operate to stay or supersede the execution in any civil action unless the plaintiff in error or some person in his behalf shall give undertaking to the defendant in error, in double the amount of the judgment of the court below, with one or more sufficient sureties, conditioned that the plaintiff in error shall prosecute his action to effect, and pay all costs and damages which may be awarded against him therein, and in case the judgment of the court below is affirmed will pay the amount thereof with costs, unless such undertaking be waived, in writing, by

defendant in error. The sufficiency of such undertaking or sureties thereto shall be determined in any case by any justice or the clerk of the supreme court. [*1939 c. 66*]

Note: Where appeal bond was filed and appeal was never perfected, surety on appeal bond is not liable to obligees named in the bond. Baumgartner v. New Amsterdam C. Co., 218 W 442, 261 NW 15.

274.08 Undertaking to be filed; its operation. The undertaking mentioned in section 274.07, if any is given, shall be filed in the office of the clerk of the supreme court for the use of the defendant, and no execution shall be issued thereafter upon the judgment complained of during the pendency of the writ of error, and if execution shall have been already issued the clerk shall make and sign a certificate of the issuing of the writ of error and the filing of the undertaking, and after notice of such certificate to the officer holding the execution all further proceedings thereon shall be stayed. [*1939 c. 66*]

274.09 Appeals to supreme court, where allowed. (1) Appeals to the supreme court may be taken from the circuit courts unless expressly denied and also from the county courts except where express provision is made for an appeal to the circuit court and from any court of record having civil jurisdiction when no other court of appeal is provided. Appeals may be taken from interlocutory judgments.

(2) Said right of appeal applies to final orders and judgments rendered upon appeals from or reviews of the proceedings of tribunals, boards and commissions, and to final judgments and orders whether rendered in actions or in special proceedings without regard to whether the action or proceeding involves new or old rights, remedies or proceedings and whether or not the right to appeal is given by the statute which creates the right, remedy or proceeding. [*1935 c. 541 s. 282; 1943 c. 505*]

Cross Reference: For appellee's review of order or judgment on notice and motion, see 274.12.

Revisor's Note, 1935: The last sentence of old (1) is superfluous. 274.01 provides for appeal from "any judgment." The amendment "unless expressly denied" is to change the rule followed in the majority opinion in Petition of Long, 176 W 361. Justice Eschweiler said the majority was wrong and he was right. That rule should be repealed or it should be written into the statute. As matters now stand it is a well concealed trap. Baxter v. Sleeman, 196 W 562. (Bill No. 50 S, s. 282)

Note: Judgment awarding defendants damages for an improvidently issued temporary injunction was in nature of "an interlocutory judgment" which became "final" upon insertion of the amount of damages, as to the time within which an appeal must be taken. Muscoda B. Co. v. Worden-Allen Co., 207 W 22, 239 NW 649, 240 NW 802.

An order overruling a plea in abatement is not appealable; but an adjudication properly entered as an interlocutory judgment is appealable. Cooper v. Commercial C. Ins. Co., 209 W 314, 245 NW 154.

A motion to dismiss an appeal from the circuit court to the supreme court of an action, commenced in the civil court of Milwaukee county and affirmed by the circuit court, on the ground that the controversy was moot because the defendant had given a bond on appealing from the civil court to the circuit court to pay the judgment if it should be affirmed by the circuit court, was denied, because the bond meant only that the defendant would pay if an affirmance by the circuit court should stand as the final judgment in the litigation, and the bond was not an appeal bond, but was given to stay execution. Jefferson Gardens, Inc. v. Terzan, 216 W 230, 257 NW 154.

See note to 270.49, citing State ex rel. Mahnke v. Kablitz, 217 W 231, 258 NW 840.

Where a guardian's voluntary payment of a judgment against incompetent's estate was made without consulting the incompetent, his adult daughter, or his attorney, and without application for authority to waive estate's right to appeal from judgment, and it was neither agreed between the parties nor intended by guardian that there was to be any waiver of incompetent's right to appeal, the record did not warrant dismissal of appeal from judgment. Guardianship of Sather, 219 W 172, 262 NW 717.

In protecting the estate against liabilities the legality of which is seriously challenged, a receiver may appeal as a "party aggrieved" from an order in the suit, when authorized to appeal by the court of appointment. Delaware v. Gray, 221 W 584, 267 NW 310.

Where appeal was not timely as to interlocutory judgment, which settled all matters complained of by appellant, but timely as to final judgment, there was nothing for supreme court to review. Richter v. Standard Mfg. Co., 224 W 121, 271 NW 14, 914.

No appeal lies from judgment entered in circuit court in compliance with mandate of supreme court. Richter v. Standard Mfg. Co., 224 W 121, 271 NW 914.

The opinion of supreme court, on appeal from order overruling demurrer to complaint, that the complaint was sufficient, constituted authoritative construction of statute (62.13 (9) (10)) and established law of the case, binding on parties and court on subsequent appeal. Horlick v. Swoboda, 225 W 162, 273 NW 534.

An interlocutory judgment must be appealed from just as any judgment and if the appeal is not taken within the time limited it cannot be reviewed upon appeal from the final judgment. The party aggrieved by an interlocutory judgment cannot by moving to modify or to set it aside after the time for appeal has expired indirectly make reviewable the merits of an interlocutory judgment. Kickapoo Development Corporation v. Kickapoo Orchard Co., 231 W 458, 285 NW 354.

In general, an order made on stipulation of all the parties to an action is not appealable, since no one is aggrieved, and the only ground for review of a stipulated settlement would be that some party was misled by fraud or false representations, which ground would have to be set up in motion papers to set aside the order approving the settlement. Buchberger v. Mosser, 236 W 70, 294 NW 492.

If a judgment entered on remittitur follows the mandate of the supreme court, it is the judgment of that court and cannot be appealed from. Barlow & Seelig Mfg. Co. v. Patch, 236 W 223, 295 NW 39.

Parties to an action which was dismissed could not appeal from a mere recital in the judgment of dismissal to the effect that the issues in the case, and the case, had become moot, but, if aggrieved, should have appealed from the judgment itself. Thoenig v. Adams, 236 W 319, 294 NW 826.

A party may not appeal from a judgment in his favor. Estate of Bryngelson, 237 W 7, 296 NW 63.

On an appeal to review the proceedings and determination of a board of election canvassers in recount proceedings under 6.66, a mere finding of the circuit court as to the total ballots canvassed, the number marked

or blank, and the number of votes for each candidate, not ripened into a judgment or a final order, is not appealable. Ollmann v. Kowalewski, 238 W 243, 298 NW 619.

A plaintiff, as to whom judgment for damages in the amount awarded by the jury was entered in her favor on her own motion, cannot appeal from the judgment, although her alternative motion for a new trial on the ground of inadequacy of the damages awarded was denied, since she received one of the forms of relief asked for, and in such circumstances neither can she, as a respondent, have a review as to the adequacy of the damages on appeals taken by other parties not questioning either her right to or the amount of the damages. Fox v. Kaminsky, 239 W 559, 2 NW (2d) 199.

See note to 270.54, citing Estate of Pardee, 240 W 19, 1 NW (2d) 803.

The decisions interpreting this section are in conflict. It appears from the quotations below that In re Burke, 229 W 545, held that ch. 541, laws of 1935, changed the rule in Petition of Long, 176 W 361; but the exact contrary was held in In re Farmers Exchange Bank, 242 W 574. However, the Burke case was not cited in the later decision. Perhaps this question became moot by the enactment of ch. 505, laws of 1943.

"Under sec. 274.09, Stats., as amended by ch. 541, Laws of 1935, giving the right of appeal to the supreme court from final orders and judgments rendered on appeals to review the proceedings of tribunals, boards, and commissions, 'without regard to whether those proceedings involve new remedies or old ones,' a judgment of the circuit court on an appeal from a determination of a board of election canvassers under sec. 6.66 is appealable to the supreme court." (Syllabus) In re Burke, 229 W 545, 282 NW 598.

"6. The amendment of sub. (1) of sec. 274.09, Stats., by ch. 541, Laws of 1935, a revision bill, by inserting the words 'unless expressly denied' and thus providing that appeals to the supreme court may be taken from the circuit courts 'unless expressly denied' and also from the county courts except, etc., and from any court of record having civil jurisdiction when, etc., did not work a change in the meaning of such subsection, but such subsection continues to relate to courts from which and courts to which authorized appeals may be taken rather than to grant the right to appeal in general terms, the right to appeal being granted by secs. 274.10, 274.11, 274.33, specifying the judgments and orders from which appeals may be taken.

"7. In respect to the question of appealability to the supreme court under sub. (2) of sec. 274.09, Stats. [1941] there is a substantial difference between a proceeding before the banking commission of which it has jurisdiction and which is being reviewed in the circuit court by action or on appeal, and a proceeding in the circuit court in relation to the liquidation of a segregated trust under sec. 220.08 (19) where the commission merely appears as a party." (Syllabus) In re Farmers Exchange Bank, 242 W 574, 8 NW (2d) 535.

An agreement to waive one's right of appeal from a judgment, after taking an appeal, should be clearly established and not made out by way of inference. Dillon v. Dillon, 244 W 122, 11 NW (2d) 628.

The legislature, by ch. 505, laws of 1943, expressly granted the right of appeal from final orders made in special proceedings "without regard to whether" such proceedings involve new or old rights, remedies or proceedings, and whether the right of appeal is given by the statute creating the remedy. In re Farmers & Traders Bank, 244 W 576, 12 NW (2d) 925.

A statute creating a right of appeal where one did not before exist does not apply to judgments entered before its enactment, since a judgment creates vested rights, which cannot be taken away by a statute. In re Farmers & Traders Bank, 244 W 576, 12 NW (2d) 925.

A defendant, by proposing certain findings and conclusions, in accord with the trial judge's decision, and sustaining the judgment entered against the defendant, but with the reservation that the defendant does not in any way admit that the evidence in the case supports such proposed findings, is not precluded from attacking the judgment on his appeal therefrom. Berk v. Milwaukee Automobile Ins. Co. 245 W 597, 15 NW (2d) 834.

Where the mortgagor's sons (advancing money to make payments and having an understanding with the mortgagor that they would become the owners of the property when the payments were completed) never assumed or agreed to pay the obligation, and the title to the property remained in the mortgagor and he was the only party obligated by the note and mortgage, the mortgagor was not merely a nominal party defendant nor the sons the actual parties in interest in a second foreclosure action, and the sons, not parties to such action and not intervening therein although aware of the institution thereof, were not entitled to have the judgment vacated nor to appeal from an order denying their motion to vacate. Home Owners' Loan Corp. v. Mascari, 247 W 190, 19 NW (2d) 283.

The right of appeal, irrespective of statute, is not in every party to a judgment, but is confined to parties aggrieved in some appreciable manner thereby. In a legal sense a party is "aggrieved" by a judgment whenever it operates on his rights of property or bears directly on his interest; and an "aggrieved party", within the meaning of a statute governing appeals, is one having an interest recognized by law in the subject matter which is injuriously affected by the judgment. As a general rule, a receiver cannot appeal from an order of court distributing the estate in his hands, or merely determining the relative rights of creditors, and not involving an increase or diminution of the assets as a whole. In re Fidelity Assur. Asso. 247 W 619, 20 NW (2d) 638.

Objection to the admission of testimony as to the financial worth of the defendants in an action for damages for assault and battery cannot be raised for the first time on appeal. Depner v. Thompson, 247 W 633, 20 NW (2d) 576.

In many situations the term "final judgment" refers to that judgment in the lower court which terminates proceedings there, but the term "final" is frequently used in connection with the word "judgment" to distinguish from interlocutory orders or judgments in the same court, and the term "final judgment" also describes determinations effective to conclude further proceedings in the same case by an appeal or otherwise. Northwestern Wis. Elect. Co. v. Public Service Comm. 248 W 479, 22 NW (2d) 472, 23 NW (2d) 459.

A designated "order" in partition, ordering the premises sold clear and free of a lease, is an interlocutory judgment, which, although not the final act of the court in the suit, is appealable under this section. Wolfrom v. Anderson, 249 W 433, 24 NW (2d) 881.

Where plaintiffs, appealing from judgments awarding them overtime wages in certain amounts and containing no clause denying them overtime wages, accepted payment of and satisfied their respective judgments, they thereby waived their right to have the judgments reversed or modified, and hence their appeals will be dismissed. Uebelacher v. Plankinton Packing Co. 251 W 87, 28 NW (2d) 311.

274.10 Writ of error not essential, parties defined. Any judgment within section 274.09 or any order defined in section 274.33 may be reviewed before the supreme court upon an appeal by any party aggrieved. The party appealing is called the appellant, the other the appellee. [*1935 c. 541 s. 283*]

Note: The commissioners of agriculture and markets were not "parties aggrieved," by a judgment denying a writ of mandamus to compel them to issue a license under 129.14 to the proprietors of a carnival and could not appeal. Section 274.12 is a privilege extended to respondent where the supreme court has acquired jurisdiction, but it does not operate to give the court jurisdiction where appellant is not entitled to appeal. Clark v. Hill, 208 W 575, 243 NW 502.

It appearing of record that the appealing administrator in his official capacity had no right of appeal, the supreme court will dismiss the appeal on its own motion. Estate of Bryngelson, 237 W 7, 296 NW 63.

See note to 324.01, citing Estate of Krause, 240 W 502, 3 NW (2d) 696.

The executor of a will, whose duty it is to carry out the provisions of the will, is an "aggrieved party" within the appeal statute if in his reasonable view the determination appealed from will not carry out those provisions. Estate of Satow, 240 W 622, 4 NW (2d) 147.

274.11 Appeal, how taken and perfected; notice; costs. (1) An appeal is taken by serving a notice of appeal signed by the appellant or his attorney on each adverse party who appeared in the action or proceeding, and on the clerk of the court in which the judgment or order appealed from is entered, stating whether the appeal is from the whole or from a part thereof, and if from a part only, specifying the part appealed from. On appeals from a judgment the appellant shall also serve the notice of appeal upon all parties bound with him by the judgment who have appeared in the action.

(2) An appeal may embrace two or more orders and may include or omit the judgment. In such case the notice of appeal shall designate with reasonable certainty the orders appealed from, or the part of them or either of them, or of the judgment appealed from. But one undertaking shall be required on such appeals, which shall be in the terms prescribed by subsection (3), except where the conditions thereof may be fixed by the court or judge, in which case the undertaking shall conform to the order made or directions given. If the appellant shall succeed, in whole or in part, he shall be allowed costs unless the supreme court determines otherwise. An appeal shall be deemed perfected on the service of the undertaking for costs, or the deposit of money instead, or the waiver thereof. When service of such notice and undertaking cannot be made within this state the court may prescribe a mode of serving the same.

(3) The appeal undertaking must be executed on the part of the appellant by at least two sureties, to the effect that he will pay all costs and damages which may be awarded against him on the appeal, not exceeding two hundred and fifty dollars. [*1935 c. 541 s. 284, 286; 1939 c. 66; Supreme Court Order, effective July 1, 1945*]

Cross Reference: As to perfecting a defective appeal, see 274.32.

Comment of Advisory Committee: See Comment of Advisory Committee under 274.12.

Note: As to the sufficiency of the bond required by 324.04, see note to that section, citing In re Sveen's Estate, 202 W 573, 232 NW 549.

Where person possesses substantial interest adverse to judgment, he may appeal, though name does not appear in litigation. Police officer, to whom judgment debtor paid bribe, brought into action in supplementary proceedings, and who was directed to pay over money to receiver, held "real party in interest" having right to appeal. Paradise v. Ridenour, 211 W 42, 247 NW 472.

A timely appeal by an adverse party in an action by a trustee in bankruptcy and another would not be dismissed as to the trustee, who was personally served with a copy of the notice of appeal, although the trustee had been discharged before the service of such notice, where the trustee was thereafter reappointed on his own motion. Beat v. Mickelson, 220 W 158, 264 NW 504.

The supreme court may grant to an appellant who served a notice of appeal within the time for appeal and who filed an appeal bond with the clerk of court but who never served it on the respondent permission to serve the appeal bond on the respondent after the time for appeal has expired. Wenzel & Henoch Construction Co. v. Wauwatosa, 226 W 10, 275 NW 552.

The words "adverse party" (as used in 274.11 (1), Stats. 1937) include every party whose interest on the face of the judgment is adverse to the appellant and the notice of appeal must be served on every one of the adverse parties to confer jurisdiction on the supreme court. Where the plaintiff attempted to appeal from a judgment in favor of several defendants, one of whom died shortly after the judgment was entered, service of the notice of appeal on the decedent or on his executor was necessary. [Extension of time for appeal where one party dies is provided for by 274.01 (2), created by 1943 c. 261.] Stevens v. Jacobs, 226 W 198, 275 NW 555, 276 NW 638.

The purchaser of real estate at a receiver's sale is a necessary party to an appeal from an order confirming the sale. (274.11 (1), Stats. 1937) Haas v. Moloch Foundry & Mch. Co., 231 W 529, 286 NW 62.

Where a notice of appeal was timely served but the required undertaking was not furnished, and there was no waiver of the required undertaking, the respondent's motion to dismiss the appeal is granted. Goerlinger v. Juetten, 237 W 543, 297 NW 361.

On an appeal from a judgment disallowing a creditor's claim against a testator's estate, beneficiaries under the will were not "adverse parties," within 274.11 (1), Stats. 1941, on whom notice of appeal was required to be served to render the appeal effective, but service of notice of appeal on the executors was sufficient, particularly where the value of the decedent's personal property, of which the executors were for the time being the legal owners to the exclusion of creditors, heirs, legatees, and others beneficially interested in the estate in general, was adequate to pay all claims, and the claim in issue, if allowed, would be paid out of that property. Will of Krause, 240 W 72, 2 NW (2d) 733.

Where a claimant appealed from the order which construed the will and disallowed his claim, legatees whose legacies would be defeated if the claim were allowed were adverse parties, within 274.11 (1), Stats. 1941, and unless served with notice of appeal the attempted appeal was ineffective for any purpose. Estate of Pitcher, 240 W 356, 2 NW (2d) 729.

In the usual proceeding in matters in probate, the executor or administrator represents all parties adverse to the claimant, and notice of appeal served on him is a sufficient notice to "the adverse party" within the meaning of 274.11 (1), Stats. 1941. Will of Hughes, 241 W 257, 5 NW (2d) 791.

On an appeal by the executor and beneficiaries named in an instrument from a judgment of the county court denying probate of the instrument as a will, and thereby

determining that the decedent had died intestate, each one of the decedent's heirs at law, not a beneficiary under the instrument, was an "adverse party," within 274.11 (1), Stats. 1941, on whom notice of appeal was required to be served to render such appeal effective. Will of Steindorf, 242 W 89, 7 NW (2d) 597.

In 274.11 (1), Stats. 1941, "adverse party" includes every party whose interest on the face of the judgment is adverse to the interest of the appellant, and the notice must be served on every party whose interest is adverse to the interest of the appellant or the supreme court is without jurisdiction of the appeal. Miller v. Miller, 243 W 144, 9 NW (2d) 635.

Where an appeal is dismissed, the undertaking for costs, or the deposit of money in lieu thereof, falls with it, so that on a second appeal a new undertaking or deposit must be given. Pick v. Pick, 245 W 496, 15 NW (2d) 850.

Under (1), the notice of appeal must be served on every party whose interest is adverse to the interest of the appellant. Estate of Sweeney, 247 W 376, 19 NW (2d) 849.

Where a notice of appeal is insufficient to give the supreme court jurisdiction of the appeal, the court cannot amend the notice so as to make it sufficient, but once a sufficient notice of appeal is served within the period provided by statute, so as to give the court jurisdiction, the court then has jurisdction to correct the appeal in other respects as provided in 269.51 (1). Kitchenmaster v. Mutual Automobile Ins. Co. 248 W 335, 21 NW (2d) 727.

Failure to serve on an adverse party on whom it is necessary to serve a notice of appeal requires that the order appealed from be dismissed as to all parties. Will of Kaebisch, 249 W 629, 26 NW (2d) 268.

An administrator with the will annexed was not an adverse party on whom it was necessary, under (1), to serve a notice of appeal from a judgment admitting the will to probate and appointing such administrator, since he was not a party to the proceedings which culminated in the judgment; but such administrator was an adverse party on whom it was necessary to serve a notice of appeal from an order denying a motion to reopen the case, since he had qualified and duly entered his appearance for the estate in the proceedings on the motion. Will of Kaebisch, 249 W 629, 26 NW (2d) 268.

With reference to the rule-making power of the supreme court to regulate pleading, practice and procedure in judicial proceedings, pursuant to 251.18, "practice" means those legal rules which direct the course of proceeding to bring parties into court and the course of the court after they are brought in. Amending 274.11 (1), by order of the supreme court, so as to require that notice of appeal be served only on all adverse parties "who appeared in the action or proceeding," did not establish a rule of substantive law, but involved merely a matter of procedural detail which was within the power of the supreme court to regulate under its rule-making power. Estate of Delmady, 250 W 389, 27 NW (2d) 497.

274.12 All parties bound by appeal; additional parties; review on behalf of appellee. Every party, other than the appellee, who is served with a notice of appeal shall within 30 days after such service, unless the time be extended by the trial court for cause shown, take and perfect his own appeal or be deemed to have waived his right to appeal. The supreme court may by order at any time bring in additional parties upon their application or upon application of one of the original parties to the appeal, and in such case the parties so brought in shall be given an opportunity to be heard before final judgment is pronounced. In any case the appellee may have a review of the rulings of which he complains, by serving upon the appellant any time before the case is set down for hearing in the supreme court, a notice stating in what respect he asks for a reversal or modification of the judgment or order appealed from. Where a review is sought of a judgment by motion in the supreme court, the trial court or the presiding judge thereof may stay execution of that part of the judgment sought to be reviewed as in case of an appeal. [*Supreme Court Order, effective July 1, 1945*]

Comment of Advisory Committee: In the statutes of 1943, the rule for service of notice of appeal is split. Part of the rule is in 274.11 and part is in 274.12. The former says that the appellant shall serve "on the adverse party." The latter says the appellant "shall serve his notice of appeal on all parties who are bound * * * by the judgment." A more logical arrangement places both parts of the rule in one section. Accordingly, that part of this service rule which is in 274.12 is now transferred to 274.11 (1). That removes the possible danger of overlooking the second half of the rule. The rule for service on parties who are not adverse is changed as to parties in default. If such a party did not appear in the trial court, he need not be served with notice of appeal. That change was suggested by the court in 243 W 514, 517.

Section 274.12 is comparatively new. It was created by ch. 219, laws of 1915 and numbered section 3049*a*, Stats. 1915. Its scope and meaning have been determined by court construction. The act of 1915 simply prescribed a rule of procedure. It gave no right of appeal and took none away. The persons who had a right to appeal before the act was passed still had that right. Courts which had appellate jurisdiction prior to the act still had it unchanged. The right of appeal is and was given by 274.10, and the court to which the appeal is addressed is specified in 274.09. The statutory time allowed for appeal is fixed by 274.01 and 274.03.

Owen, J., in American Wrecking Co. v. McManus, 174 W 300, 316, said (after quoting from Gertz v. Milwaukee E. R. & L. Co., 153 W 475): "There can be no doubt that sec. 3049*a* is a legislative embodiment of the rule there announced [in the Gertz case], and that the section was enacted for the purpose of establishing a legislative rule which would prevent 'successive appeals from a judgment * * *.' As construed in the *per curiam* opinion [174 W 310], the statute would not reach the situation before the court in *Gertz v. Milwaukee E. R. & L. Co., supra*, and we are now convinced that the statute was enacted for the purpose of reaching not only the situation there presented, but for the purpose of requiring all appeals from the same judgment to be taken speedily * * *. We therefore construe sec. 3049*a* [274.12] as requiring any person appealing from a judgment to serve his notice of appeal upon all who are bound by the judgment, and those so served must perfect their appeal within 30 days or be deemed to have waived it."

Figuratively speaking, the court read out of the letter of the statute the words which limited its application to "parties who are bound with him [the appellant] by the judgment"; and read into the statute a meaning which would "reserve to the court its jurisdictional power asserted in the *Gertz Case*" (p. 317) Under a familiar rule, that construction is as much a part of 274.12 as it would be had the legislature literally written that meaning into it.

The Gertz case was against two railroads to recover for personal injuries. The judgment was in favor of Gertz against the Milwaukee company, and against Gertz and in

favor of the Chicago company. Gertz promptly appealed from the judgment in favor of the Chicago company. The part of the judgment which exonerated the Chicago company was actually adverse to the Milwaukee company, but the Milwaukee company took no steps to challenge the judgment in that respect. The Milwaukee company simply appealed from the part which awarded damages against it. Gertz thereupon insisted that if the Milwaukee company intended to challenge the judgment it should join in the plaintiff's appeal or take such course as would enable the court to decide the whole matter and close the litigation by a single judgment. The Milwaukee company contended that it could appeal at any time within the year fixed by statute for taking an appeal, claiming its right to appeal within the year was absolute and could not be shortened by court order. The supreme court held to the contrary. It ordered the Milwaukee company to submit to the court within 60 days any objections it had to the judgment. In disposing of this question the court said [153 W 475]: "* * * It seemed plain that the practice contended for by such company would, if approved, render possible several successive appeals to this court from one judgment and very prejudicial delay. * * * To allow the practice proposed would result in an abuse of the court's jurisdiction, which cannot be tolerated. * * * The court possesses inherent authority to regulate the use of its jurisdiction so as to prevent such hindrances. To that end it will conclusively presume, in a case of this sort, that any party affected by the judgment or order who shall have had due notice of the proceedings and does not appropriately challenge such judgment or order, has elected to waive the right to do so and will so dispose of the appeal as to preclude any further application to this court in respect to such judgment other than by the ordinary motion for a rehearing. In this particular case the matter submitted will be held to give the *Milwaukee Electric Railway & Light Company* reasonable time to enable it to properly present its objections to the judgment—taking an appeal in due form, if necessary, and having the same duly certified to this court, in which case such appeal will be placed on the calendar for hearing and disposition with the appeal already submitted. Sixty days from the entry of this order is allowed for that purpose.' "

The court regulated appellate procedure in that instance. The Milwaukee company had a year, according to statute, in which to appeal, yet, unless it appealed in 60 days, it thereby waived its right. The court markedly shortened the time limit for appeals. "The situation arising under the provisions of sec. 3049*a*, therefore, is rather in the nature of a default than a statutory bar." (174 W 317)

Hence we concluded that the court has *inherent power* over appellate procedure. The right to appeal is jurisdictional and the exercise of that right is procedural.

The Supreme court has repeatedly suggested that 274.12 be amended: In Stevens v. Jacobs, 226 W 198, the court suggested that the legislature provide that the death of a party would extend the time for appeal sufficiently to permit the appointment of an administrator or executor, thus saving the right of appeal. That has been done (ch. 261, laws of 1943, amending 274.01 (2) and 311.02 (4)).

In Benton v. Institute of Posturology, 243 W 514, the appeal was dismissed because appellant had failed to serve notice on a party who was "bound with him by the judgment." The court suggested that the statute should be amended and said that it was a "matter for the legislature" (p. 517).

The suggestion was to limit the required service of notice of appeal by the appellant to parties who had appeared in the action.

When this subject was under consideration by the advisory committee the question was raised whether the matter was within the rule-making power of the supreme court. After study and discussion the committee concluded that the matter was procedural; that it did not go to the jurisdiction of the court or to the right of appeal. That conclusion was largely based upon the Gertz case; the McManus case; Rules 72 to 76 of the Rules of Civil Procedure for the District Courts of the United States; and an article by Judge Clark on "Powers of Supreme Court to make Rules of Appellate Procedure" (1936), 49 Harvard Law Review 1303. [Re Order effective July 1, 1945]

Note: In granting a new trial on the ground that certain issues were not sustained by the evidence, the court should not require a relitigation of other issues which are determined by the evidence. Eggert v. Kullman, 204 W 60, 234 NW 349.

The supreme court will not review an assignment of error by a respondent in absence of service of the notice required for a review, reversal, or modification of any part of the judgment appealed from. Wisconsin-Michigan P. Co. v. Tax Commission, 207 W 547, 242 NW 352.

Neither plaintiff nor certain defendants having appealed, plaintiff's notice of review served on attorneys for appealing defendants, was insufficient to bring such nonappealing defendants before the court; nor could the record be amended to effectuate such notice of review against them where the court was required to treat the actions as joined. (274.12, Stats. 1931) Wisconsin Creameries, Inc., v. Johnson, 208 W 444, 243 NW 498.

On an appeal by the plaintiff, the defendant is not entitled to question the sufficiency of the evidence to sustain the jury's finding that the defendant was negligent, where the defendant served no notice to review. Noll v. Nugent, 214 W 204, 252 NW 574.

On an appeal from an order granting a new trial, the respondent may file a notice to review and have a review of other orders of which he complains, including rulings denying his motions for a directed verdict or for judgment notwithstanding the verdict, even though the new trial was granted on his motion. Julius v. First Nat. Bank, 216 W 120, 256 NW 792; Burns v. Weyker, 218 W 363, 261 NW 244.

The respondents on an appeal to the supreme court could not attack jury findings where they did not move for a review of such findings and give notice of motion. Kaczmarski v. F. Rosenberg E. Co., 216 W 553, 257 NW 598.

On appeal by state from judgment denying lien for unpaid gasoline taxes, in action in which other parties claimed lien against property of oil company, such company may not by motion to review attack those parts of judgment in which state is not interested, where no appeal was taken by company. Hilam, Inc. v. Petersen Oil Co., 217 W 86, 258 NW 365.

In absence of motion to review on defendant's appeal from order granting plaintiff new trial, court would not review denial of plaintiff's motions based on contentions that evidence did not sustain findings and that damages were inadequate. Hayes v. Roffers, 217 W 252, 258 NW 785.

Where there was no motion to review by respondent, trial court's findings, evidence could not be reviewed. Vinograd v. Travelers' Protection Ass'n, 217 W 316, 258 NW 787.

Appeal of defendant, failing to serve notice thereof within 30 days after being served with notice of appeal by codefendant, or failing to serve such notice on codefendant, if latter served no notice of appeal on former, must be dismissed as waived in former case or ineffectual in latter case under 274.12, Stats. 1933. Joachim v. Wisconsin D. Clinic, 219 W 35, 261 NW 745.

Where an appeal to challenge a judgment or order is not taken when the situation requires it, the right of appeal will be deemed to have been waived. Where the supreme court had held on an appeal by one defendant that the plaintiff could not recover against such defendant, and it was determined that the failure of the plaintiff to appeal from that portion of the judgment dismissing the complaint as to a second cause of action stated in the alternative against another defendant foreclosed the plaintiff's

right to further proceedings thereon, and the mandate consequently provided for dismissal of the plaintiff's complaint, such other defendant after remand of the record is entitled to dismissal of the complaint. State ex rel. Roberts Co. v. Breidenbach, 222 W 136, 266 NW 909.

A respondent on appeal, without filing a motion for review, is entitled to a review of the evidence to uphold the judgment on a ground that the trial court did not consider, since this section applies only to rulings on the trial which were adverse to the respondent and of which he complains. Koetting v. Conroy, 223 W 550, 271 NW 369.

Employe held not entitled to review of industrial commission's award where he had brought no action to set aside award, did not appeal from judgment affirming award, or serve any notice to review judgment until after case had been set for hearing in supreme court. (274.12, Stats. 1935) Milwaukee News Co. v. Industrial Commission, 224 W 130, 271 NW 78.

Plaintiff who elected to remit pecuniary damages awarded in death action, in excess of specified sum, was bound by election and not entitled to preserve right to assert that option granted was erroneous. Duss v. Friess, 225 W 406, 273 NW 547.

Where a defendant served on an impleaded defendant a notice of appeal from a judgment rendered against both of them, the impleaded defendant, by failing to take an appeal within thirty days after such service, waived the right to appeal, since a party bound by a judgment with a party who appeals therefrom is not a respondent or an adverse party, but if brought up on appeal at all is an appellant, and he cannot, as was attempted in this case, array himself with the respondent and accomplish the equivalent of an appeal through a motion to review. Stammer v. Katzmiller, 226 W 348, 276 NW 629.

A plaintiff who took judgment for the amount awarded him by the jury as damages for assault, instead of moving for a new trial after the denial of his motions to change the jury's answers relating to certain items of damages, and for judgment accordingly is not entitled to a review of the award of damages on the defendant's appeal. Krudwig v. Koepke, 227 W 1, 277 NW 670.

An appellee cannot obtain a review of an order enlarging the time for appeal and for settling the bill of exceptions by a mere motion. The proceedings for enlargement are no part of the order appealed from. In re Richardson's Estate, 229 W 426, 282 NW 585.

An appeal by one defendant only, without any service of his notice of appeal on his codefendant jointly bound with him by the judgment appealed from, or on a representative of her estate, does not confer jurisdiction on the supreme court, and must be dismissed, notwithstanding the defendant may have taken the appeal in good faith and might have obtained (because the codefendant had died and the surviving defendant as joint tenant had succeeded to her interest) but failed to obtain, an order below excluding the codefendant as a defendant and directing that the action continue in the name of the surviving defendant. (274.12, Stats. 1937) Cedar Point Ass'n v. Lenney, 232 W 434, 287 NW 686.

The term "party" as used in this section means a party or, in the event of the death of a party before service of the notice of appeal, the privies or the personal representative of the deceased party. A party desiring to appeal to the supreme court must, in order to perfect his appeal in the event that a party on whom service of the notice of appeal is required dies before such service is made, procure the appointment of a special administrator on whom service may be made, if no executor or administrator has been otherwise appointed. (274.11 (1), 274.12, 311.06, Stats. 1939. Bond v. Breeding, 234 W 14, 290 NW 185.

Residuary legatees, properly made parties to proceedings in the county court for construction of a will creating a trust, should have been made parties to an appeal taken from a judgment postponing a determination as to whom the corpus of the trust should be distributed until the death of a life beneficiary, where the residuary legatees were interested in such distribution adversely to the party taking the appeal. (274.12, Stats. 1939) Will of Levy, 234 W 31, 289 NW 666, 290 NW 613.

On an appeal by the plaintiff in a case wherein the defendant made no request for findings on its counterclaim and the trial court made no disposition of the counterclaim in the findings or in the judgment, the matter of the counterclaim could not be disposed of on the appeal on the defendant's motion to review under this section, but the defendant, to preserve its rights, should have requested findings and judgment and then appealed if the counterclaim was disallowed. Matz v. Ibach, 235 W 45, 291 NW 377.

On an appeal from an order setting aside a judgment and also setting aside the verdict and granting a new trial, where the order was void as to setting aside the verdict and granting a new trial, but was merely erroneous as to setting aside the judgment, the supreme court, on reversing the order, could also direct that the judgment set aside be reinstated, the effect of the reinstatement being to leave the record as it stood prior to the time the erroneous order was entered. [Lingelbach v. Carriveau, 211 W 653, distinguished.] Volland v. McGee, 236 W 358, 294 NW 497, 295 NW 635.

On the plaintiff's appeal from a judgment dismissing the complaint, the correctness of a ruling of the trial court, denying the defendant's motion to change from "Yes" to "No" answers to questions of the special verdict dealing with the defendant's negligence, is not before the supreme court in the absence of a motion to review. Geier v. Scandrett, 236 W 444, 295 NW 704.

On an appeal by the defendants from that part of a judgment which dismissed their cross complaint for contribution against the insurer of an interpleaded defendant, the insurer, as a respondent and adverse party, was entitled, on a motion, to a review of a ruling of the trial court denying the insurer's motion to change the jury's findings as to negligence of the interpleaded defendant insured, a review of such ruling being essential to determining whether there was liability for contribution on the part of the insurer. Ledvina v. Ebert, 237 W 358, 296 NW 110.

Although an interpleaded defendant was not adversely interested in that part of a judgment from which the defendants appealed, and therefore could not have a review of other parts of the judgment on a motion to review, he was "bound by the same judgment," and as a party so bound it was incumbent on him by 274.12, Stats. 1939, to take his own appeal within the prescribed period of 30 days after the service of the defendants' notice of appeal or be deemed to have waived his right to appeal, and after his right to appeal had been so waived, it could no longer be exercised by him nor restored by the trial court. Ledvina v. Ebert, 237 W 358, 296 NW 110.

The executors served notice of appeal to the supreme court on Dec. 31. The Colton children served notice of appeal on Feb. 27. The county court, on March 8, ordered an extension of their time to appeal to March 18. The executors moved for dismissal of the children's appeal because no cause for extension of the time was shown and because the extension was granted after 30 days, from the date of the executors' appeal, had expired. The motion was granted. (274.12, Stats. 1939) Estate of Porter, 238 W 181, 298 NW 624.

The provision in 274.12, requiring that a party, appealing from a "judgment" which binds other parties shall serve his notice of appeal on all parties who are bound with him by the judgment, does not apply to an "order," and in the case of an "order" a party appealing therefrom is required by 274.11 (1), Stats. 1939, to serve his notice of appeal only on the "adverse party" and on the clerk of the court. Newlander v.

Riverview Realty Co., 238 W 211, 298 NW 603.

Where there is no assignment of error by the appellant in relation to the trial court's findings of fact, and no notice for a review under this section served on the appellant by the respondent, the respondent's contentions asserting error in the findings cannot be entertained by the supreme court on the appeal. Olson v. Superior, 240 W 108, 2 NW (2d) 718.

The disallowance of a disbursement paid as a condition of amending the complaint and having a new trial is affirmed in the absence of a motion to review by the respondent on appeal. Morse Chain Co. v. T. W. Meiklejohn, Inc., 241 W 45, 4 NW (2d) 162.

In the absence of filing a motion to review, the respondent on an appeal from a judgment in his favor, but granting him a reduced amount of damages because of the jury's finding that he was contributorily negligent in a certain respect, is not entitled to a review of such finding. Witkowski v. Menasha, 242 W 151, 7 NW (2d) 612.

An appeal by one defendant only must be dismissed where he fails to serve his notice of appeal on a codefendant jointly bound with him by the judgment appealed from, as required by 274.12, Stats. 1941, although such codefendant did not appear in the action, and might not have had grounds for taking an appeal himself. The power of the supreme court, under 274.12, to bring in "additional parties" to an appeal does not extend to bringing in one who was a party defendant in the action below. Benton v. Institute of Posturology, Inc., 243 W 514, 11 NW (2d) 133.

On the defendant's appeal from only that part of an order overruling his demurrer to a first cause of action, the plaintiff, on giving the notice, may have a review of that part of the order sustaining a demurrer to the second cause of action, it being the intent of the statute to allow all disputed questions or rulings to be heard before the supreme court on one appeal when proper notice thereof has been given the opposing party and the issues are reasonably related, whether or not the appellant has included in his notice of appeal every part of the order or judgment involved. Jones v. Pittsburgh Plate Glass Co. 246 W 462, 17 NW (2d) 562.

Error asserted on behalf of respondents on an appeal cannot be reviewed in the absence of service of a notice for that purpose under this section. Guardianship of Kueschel, 247 W 253, 19 NW (2d) 178.

Where the appellants did not serve the notice of appeal on all adverse parties, nor on all parties bound with the appellants by the judgment, including nonappearing parties, the appeal was ineffective, in view of 274.11 (1), 274.12, Stats. 1943, and the supreme court acquired no jurisdiction by virtue of the appeal. Estate of Sweeney, 247 W 376, 19 NW (2d) 849.

The purpose of this section, in granting to a respondent the privilege of having a review of rulings of which he complains by serving a motion for review, is to enable a party who is adversely interested on an appeal to secure a review of alleged errors prejudicially affecting him. In re Fidelity Assur. Asso. 247 W 619, 20 NW (2d) 638.

An appellant insurer, which failed to direct the attention of the trial court to a matter of contribution in any of the proceedings culminating in the entry of a judgment without provision for contribution, cannot assign error and have the judgment reviewed in this respect. Haase v. Employers Mut. Liability Ins. Co. 250 W 422, 27 NW (2d) 468.

274.13 Return on appeal. Upon an appeal being perfected the clerk of the court from which it is taken shall, at the expense of the appellant, forthwith transmit to the supreme court, if the appeal is from a judgment, the judgment roll; if it is from an order or orders he shall transmit the order or orders appealed from and the original papers used by each party on the application therefor, and if it is from the judgment and one or more orders he shall transmit the judgment roll and such papers. The court may, however, in each case, direct copies to be sent in lieu of the originals. The clerk shall also, in all cases, transmit to the supreme court the notice of appeal and the undertaking given thereon, and annex to the papers so transmitted a certificate under his hand and the seal of the court from which the appeal is taken, certifying that they are the original papers or copies as the case may be, and that they are transmitted pursuant to such appeal. No further certificate or attestation shall be necessary.

Note: A reference in an order to the affidavit and document upon which the order is based, there being no oral testimony, makes them part of the record, and obviates the need of a bill of exceptions. Barneveld State Bank v. Ronge, 228 W 293, 280 NW 295.

274.14 Appeal; deposit in lieu of undertaking; waiver. (1) When the appellant is required to give undertaking he may, in lieu thereof, and with like legal effect, deposit with the clerk of the trial court (who shall give a receipt therefor), a sum of money, certified check, or United States government bonds at their par value, approved by the court and at least equal to the amount for which such undertaking is required and serve notice of making such deposit. Such deposit shall be held to answer the event of the appeal upon the terms prescribed for the undertaking in lieu of which the same is deposited. Any such undertaking and deposit may be waived in writing by the respondent and such waiver shall have the same effect as the giving of the undertaking would have had.

(2) Upon notice and upon motion of any party, the court in which the judgment or order appealed from is entered may in its discretion order such sum of money to be invested or such United States government bonds or certified check to be held for safe-keeping by the clerk, in such manner as it shall determine or the parties may stipulate. The appellant shall be entitled to any interest, earnings, dividends, bond coupons, profit or income upon or from the money or certified check, investments or United States government bonds, and the clerk shall pay or deliver the same to the appellant without an order of the court, as and when received, or in the case of coupons when they become due and payable. *[1935 c. 389; 1935 c. 520 s. 9; 1935 c. 541 s. 285; 1939 c. 66]*

274.15 *[Renumbered section 274.11 (3) by 1935 c. 541 s. 286]*

274.16 Undertaking in supreme court, when not required. The undertaking required by section 274.06 on the issuance of a writ of error and by section 274.11 on an ap-

peal shall not be required if the trial judge shall certify that the cause or proceeding necessarily involves the decision of some question of law of such doubt and difficulty as to require a decision by the supreme court or if such judge or any other circuit judge shall certify that the party desiring the writ or to appeal is unable to furnish such undertaking; but such certificate shall be made only upon notice to the parties interested. Such certificates shall be filed with the clerk of the court and be returned with the record to the supreme court with the writ of error or the appeal. [*1935 c. 541 s. 287; 1939 c. 66*]

274.17 Undertaking to stay execution on money judgment. If the appeal be from a judgment directing the payment of money it shall not stay the execution of the judgment unless an undertaking be executed on the part of the appellant, by at least two sureties, to the effect that if the judgment appealed from or any part thereof be affirmed the appellant will pay the amount directed to be paid by the judgment or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal.

Note: An execution on a money judgment could be stayed by appellants as a matter of right only by executing an undertaking; the provisions of 274.11 (2), (3), as to deeming an appeal perfected on the service of a bond for costs, or the deposit of money instead, or the waiver thereof, and the provisions of 274.14 for alternatives by deposit or waiver in situations where an appellant "is required to give bond," having no application and not being importable by construction into 274.17. Wilhelm v. Hack, 234 W 213, 290 NW 642.

274.18 Same, if delivery of documents, etc., ordered. If the judgment appealed from direct the assignment or delivery of documents or personal property the execution of the judgment shall not be delayed by the appeal unless the things required to be assigned or delivered be brought into court or placed in the custody of such officer or receiver as the court or presiding judge thereof shall appoint, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, in such sum as the court or presiding judge thereof shall direct, to the effect that the appellant will obey the order of the appellate court on the appeal.

274.19 Same, if conveyance directed. If the judgment appealed from direct the execution of a conveyance or other instrument the execution of the judgment shall not be stayed by the appeal unless the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

274.20 Stay undertaking if sale or delivery of property directed. If the judgment appealed from direct the sale or delivery of real property execution shall not be stayed unless an undertaking be executed on the part of the appellant, by at least two sureties, in such sum as the court or the presiding judge shall direct, to the effect that, during the possession of such property by the appellant, he will not commit or suffer to be committed any waste thereon; and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment. [*1935 c. 541 s. 288; 1939 c. 66*]

274.21 Stay undertaking as to judgments of foreclosure. If the judgment appealed from direct the sale of mortgaged premises the execution thereof shall not be stayed by the appeal unless an undertaking be executed on the part of the appellant, by at least two sureties, conditioned for the payment of any deficiency which may arise on such sale, not exceeding such sum as shall be fixed by the court or the presiding judge thereof, to be specified in the undertaking, and all costs and damages which may be awarded to the respondent on such appeal. [*1935 c. 541 s. 289; 1939 c. 66*]

274.22 Same, as to judgment abating nuisance. If the judgment appealed from direct the abatement or restrain the continuance of a nuisance, either public or private, the execution of the judgment shall not be stayed by the appeal unless an undertaking be entered into on the part of the appellant, by at least two sureties, in such sum as the court or the presiding judge thereof shall direct, to the effect that the appellant will pay all damages which the opposite party may sustain by the continuance of such nuisance.

274.23 Same, as to other judgments. If the judgment appealed from direct the doing or not doing of any other particular act or thing, and no express provision is made by statute in regard to the undertaking to be given on appeal therefrom, the execution thereof shall not be stayed by an appeal therefrom unless an undertaking be entered into on the part of the appellant, in such sum as the court or the presiding judge thereof shall direct, and by at least two sureties, to the effect that the appellant will pay all damages which the opposite party may have sustained by the doing or not doing the particular act or thing directed to be done or not done by the judgment appealed from, and to such further effect as such court or judge shall in discretion direct.

Note: The failure of the trial court to require that the undertaking, given by the defendants on their appeal from a judgment enjoining them from further violation of a milk regulatory order of the plaintiff department of agriculture, should provide

for the recovery of any losses sustained by third parties, which would mean other milk dealers, was not an abuse of discretion under this section. State ex rel. Department of Agriculture v. Marriott, 235 W 468, 293 NW 154.

Under this section the stay provided for therein on the giving of the prescribed undertaking stays nothing but the "execution" of the judgment, and, since the only part of a prohibitory judgment requiring "execution" is that part which awards costs, the undertaking does not operate to suspend a prohibitory judgment, except as to costs, in the absence of an order specially so directing. The clause providing that the undertaking may be "to such further effect" as the court shall in discretion direct, confers on trial courts broad equitable powers to preserve the status quo of the subject matter involved in mandatory judgments pending appeal, and a judgment which is strictly prohibitory may be wholly or conditionally stayed in the discretion of the trial court by special order to that effect. Carpenter Baking Co. v. Bakery S. D. Local Union, 237 W 24, 296 NW 118.

274.24 Same, on appeals from orders. When the appeal is from an order the execution or performance thereof or obedience thereto shall not be delayed except upon compliance with such conditions as the court or the presiding judge thereof shall direct, and when so required an undertaking shall be executed on the part of the appellant, by at least two sureties, in such sum and to such effect as the court or the presiding judge thereof shall direct; such effect shall be directed in accordance with the nature of the order appealed from, corresponding to the foregoing provisions in respect to appeals from judgments, where applicable, and such provision shall be made in all cases as shall properly protect the respondent; and no appeal from an intermediate order before judgment shall stay proceedings unless the court or the presiding judge thereof shall, in his discretion, so specially order.

Note: The circuit court—during the pendency of an appeal from an order sustaining a demurrer to a complaint and ordering judgment thereon in an action to enjoin the enforcement of a money judgment obtained against the appellants in a prior action—had jurisdiction to enter judgment dismissing the complaint, in the absence of an order staying the proceedings, and in the absence of compliance with or appeal from an order for a stay if the appellants should furnish an undertaking. Nickoll v. North Avenue State Bank, 236 W 588, 295 NW 715.

274.25 Same, on appeals from attachments, injunctions. When a party shall give immediate notice of appeal from an order vacating or modifying a writ of attachment or from an order denying, dissolving or modifying an injunction he may, within three days thereafter, serve an undertaking, executed on his part by at least two sureties, in such sum as the court or the presiding judge thereof shall direct, to the effect that if the order appealed from or any part thereof be affirmed the appellant will pay all costs and damages which may be awarded against him on the appeal and all which the adverse party may sustain by reason of the continuance of the attachment or the granting or continuance of the injunction, as the case may be. Upon the giving of such undertaking such court or judge shall order the attachment to be continued, and, in his discretion, may order the injunction asked to be allowed or that before granted to be continued until the decision of the appeal unless the respondent shall, at any time pending the appeal, give an undertaking, with sufficient surety in a sum to be fixed by such court or judge, to abide and perform any final judgment that shall be rendered in favor of such appellant in the action; but may at any time subsequently vacate such order if the appeal be not diligently prosecuted.

274.26 When no undertaking required on appeal; security. When the state, or any state officer, or state board, in a purely official capacity, or any town, county, school district or municipal corporation within the state shall take an appeal, service of the notice of appeal shall perfect the appeal and stay the execution or performance of the judgment or order appealed from, and no undertaking need be given. But the appellate court or tribunal may, on motion, require security to be given in such form and manner as it shall prescribe as a condition of the further prosecution of the appeal. [*1935 c. 541 s. 290; 1939 c. 66*]

Note: Statute requiring application to public service commission for rehearing before suing to set aside order thereof, held inapplicable to peremptory order suspending security broker's license immediately. Statute providing that service of notice of appeal by state board shall stay execution of order appealed from is inapplicable to merely prohibitive orders, such as order staying public service commission's suspension of security broker's license. Halsey, Stuart & Co. v. Public Service Commission, 212 W 184, 248 NW 458.

In an action under the corrupt practice act brought upon the relation of a private party to exclude a candidate from office and have the office declared vacant, no bond is necessary to perfect an appeal to the supreme court. State ex rel. Orvis v. Evans, 229 W 304, 282 NW 14.

On an appeal by the state from an order staying the execution of a judgment enjoining the defendants from further violation of a milk regulatory order, pending the determination of the defendants' appeal from such judgment, this section providing, in the case of an appeal by the state, or by a state board in a purely official capacity, that service of the notice of appeal shall perfect the appeal and stay the execution of the judgment or order appealed from, did not affect the stay of the judgment in question. State ex. rel. Department of Agriculture v. Marriott, 235 W 468, 293 NW 154.

On the entry of a judgment holding a statute invalid and dismissing an action by the state to enjoin the defendant from violating the statute, the action "terminated" and a preliminary injunction which had been issued against the defendant "until further order" ceased to be in force, so that it was error for the trial court to punish the defendant for an act committed in violation of the terms of the preliminary injunction

after the entry of the judgment, although the state had taken an appeal from the judgment. State v. Neveau, 236 W 414, 295 NW 718.

The state being the real party in interest in a habeas corpus proceeding growing out of a criminal prosecution, no undertaking need be given on a writ of error sued out by a sheriff to review a judgment discharging a convicted defendant from custody on a writ of habeas corpus. Kushman v. State ex rel. Panzer, 240 W 134, 2 NW (2d) 862.

This section is applicable to an appeal by members of a town board from a judgment granting a writ of mandamus directing them to attend meetings of an apportionment board, so that such appeal is not dismissible for failure to furnish a bond. State ex rel. Madison v. Walsh, 247 W 317, 19 NW (2d) 299.

274.27 Appeals, proceeding if sureties insolvent. The supreme court, upon satisfactory proof that any of the sureties to any undertaking given under this chapter has become insolvent or that his circumstances have so changed that there is reason to fear that the undertaking is insufficient security, may require the appellant to file and serve a new undertaking, with such surety and within such time as shall be prescribed, and that in default thereof the appeal shall be dismissed or the stay of proceedings vacated. [*1935 c. 541 s. 291; 1939 c. 66*]

274.28 Undertakings, how executed; stay of proceedings. The undertakings required by this chapter may be in one instrument or several, at the option of the appellant; the original must be filed with the notice of appeal, and a copy, showing the residence of the sureties, must be served with the notice of appeal. When the sum or effect of any undertaking is required under the foregoing provisions to be fixed by the court or judge, at least twenty-four hours' notice of the application therefor shall be given the adverse party. When the court or the judge thereof from which the appeal is taken or desired to be taken shall neglect or refuse to make any order or direction, not wholly discretionary, necessary to enable the appellant to stay proceedings upon an appeal the supreme court or one of the justices thereof shall make such order or direction.

Note: In view of 274.28, the supreme court or a justice may stay proceedings in a civil case pending appeal only when the trial court or the judge thereof neglects or refuses to make any order, not wholly discretionary, necessary to enable the appellant to stay proceedings on an appeal. See note to this case under 251.10. State v. Tyler, 233 W 589, 300 NW 754.

274.29 Sureties on undertakings to justify; may be excepted to. An undertaking upon an appeal shall be of no effect unless it shall be accompanied by the affidavit of the sureties, in which each surety shall state that he is worth a certain sum mentioned in such affidavit, over and above all his debts and liabilities, in property within this state not by law exempt from execution, and which sums so sworn to shall, in the aggregate, be double the amount specified in said undertaking. The respondent may except to the sufficiency of the sureties within twenty days after service of a copy of the undertaking, and unless they or other sureties justify in the manner prescribed in sections 264.17, 264.18 and 264.19, within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification shall be upon a notice of not less than five days.

274.30 Judgment stayed when appeal perfected. Whenever an appeal shall have been perfected and the proper undertaking given or other act done, prescribed by this chapter, to stay the execution or performance of the judgment or order appealed from, all further proceedings thereon shall be thereby stayed accordingly, except that the court below may proceed upon any other matter included in the action, not affected by the judgment or order appealed from, and except that the court or presiding judge thereof may order perishable property, held under the judgment or order appealed from, to be sold, and the proceeds paid into court to abide the event.

274.31 Affirmance; reference to ascertain damages; breach of undertaking; judgment against sureties. (1) When the damages to be paid by the appellant, on affirmance of the judgment or order appealed from, pursuant to any undertaking are not fixed by the supreme court, the trial court may, after the remittitur is filed, assess or order a reference to ascertain such damages, the expense of which shall be included and recoverable with such damages and failure for thirty days to pay the same shall be a breach of the undertaking. A neglect for thirty days after the affirmance on appeal of a money judgment, to pay as directed on such affirmance, shall be a breach of the appeal undertaking.

(2) The dismissal of an appeal or writ of error, unless the court shall otherwise order, shall render the sureties upon any undertaking given under this chapter liable in the same manner and to the same extent as if the judgment or order had been affirmed. Where the supreme court shall give judgment against the appellant or the plaintiff in error upon a money judgment and either party shall have given an undertaking in the court below such judgment shall be entered in such court, on the remittitur being filed, against the appellant or the plaintiff in error and his sureties jointly; but it shall not be collected of the sureties if the officer to whom an execution is directed can find sufficient property of the principal to satisfy the same, and the execution shall so direct. [*1935 c. 541 s. 292; 1939 c. 66*]

274.32 Amendments. When a party shall in good faith give notice of appeal and shall omit, through mistake or accident, to do any other act necessary to perfect the appeal or make it effectual or to stay proceedings, the court from which the appeal is taken or the presiding judge thereof, or the supreme court or one of the justices thereof, may permit an amendment or the proper act to be done, on such terms as may be just.

Note: Where the trial court, at the time of determining the merits of a claim against the receiver, had authorized the receiver to take an appeal to the supreme court, but the order was not entered in the minutes, and the receiver, after the appeal was taken, had made proper application for completion of the record so as to show that an appeal was authorized, and the application had been granted, the appeal is held to have been duly authorized by the trial court. Delaware v. Gray, 221 W 584, 267 NW 310.

See note to 269.51, citing Guardianship of Moyer, 221 W 610, 267 NW 280.

As to the power of the supreme court to extend the time to perfect an appeal by serving the appeal bond, see note to 274.11 citing Wenzel & Henoch Construction Co. v. Wauwatosa, 226 W 10, 275 NW 552.

Where an appeal was taken in due time and through mistake an undertaking was filed instead of a bond for costs required by a former statute, the court permitted the appellant to file a bond and denied the motion to dismiss the appeal. Ladegaard v. Connell, 229 W 36, 281 NW 656.

See note to section 269.51, citing Estate of Pitcher, 240 W 356, 2 NW (2d) 729.

On a motion to dismiss an appeal for appellants' failure to serve an undertaking for costs or make a deposit of money in lieu thereof, there being no showing of "excusable neglect" which would warrant granting an extension of time under Supreme Court Rule 61 [251.61] or 274.32, the appeal is dismissed. Pick v. Pick, 245 W 496, 15 NW (2d) 850.

274.33 Appealable orders. The following orders when made by the court may be appealed to the supreme court:

(1) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken.

(2) A final order affecting a substantial right made in special proceedings, without regard to whether the proceedings involve new or old rights, remedies or proceedings and whether or not the right to appeal is given by the statute which created the right, remedy or proceedings, or made upon a summary application in an action after judgment.

(3) When an order grants, refuses, continues or modifies a provisional remedy or grants, refuses, modifies or dissolves an injunction, or sets aside or dismisses a writ of attachment, grants a new trial or sustains or overrules a demurrer or denies an application for summary judgment, but no order of the circuit court shall be considered appealable which simply reverses or affirms an order of the civil court of Milwaukee county, unless the order of the civil court grants, refuses, continues, modifies or dissolves a provisional remedy or injunction.

(4) Orders made by the court vacating or refusing to set aside orders made at chambers, where an appeal might have been taken in case the order so made at chambers had been made by the court in the first instance. For the purpose of appealing from an order either party may require the order to be entered by the clerk of record. [*1935 c. 39; 1935 c. 541 s. 293; 1943 c. 505*]

Note: An order denying an application to expunge from the court record derogatory matters in a grand jury report is appealable as a final order affecting a substantial right made in a special proceeding. Williams v. Shaughnessy, 202 W 537, 232 NW 861.

An order vacating a previous order which dismissed an action for want of prosecution within five years is not appealable, and an attempt at appeal confers no jurisdiction upon the supreme court. Hanson v. Custer, 203 W 55, 233 NW 642.

As to the effect of failure to appeal from an order overruling a demurrer, see note to section 253.03, citing Connell v. Connell, 203 W 545, 234 NW 894.

An order setting aside a default judgment is reviewable when the case reaches the supreme court on appeal from the final judgment. Kelm v. Kelm, 204 W 301, 235 NW 787.

An order vacating a judgment of divorce by default is not appealable. Kelm v. Kelm, 204 W 301, 235 NW 787.

An order under 32.04 appointing commissioners in condemnation proceedings is not appealable. Manns v. Marinette & Menominee P. Co., 205 W 349, 238 NW 624.

An order overruling a plea in abatement is not appealable. An order sustaining the plea is appealable. Cottrill v. Pinkerton, 206 W 218, 239 NW 442.

An appeal does not lie from findings of fact, conclusions of law or decision in a controversy over heirship in county court, but only from the final judgment assigning the estate. Estate of Lewis, 207 W 155, 240 NW 818.

An order denying a motion to require plaintiffs to show cause why they should not be restrained, during the pendency of another action, from enforcing their judgment was not appealable, since it involved a mere stay in procedural process. Grinwald v. Mayer, 207 W 416, 241 NW 375.

In mandamus, where the petitioner asks for the protection of a right clearly his which can in no other way be assured him and where extraordinary hardship is sure to follow its denial, there being no appeal from the order of the lower court denying the right, the policy of the supreme court is to exercise its superintending power so as to afford relief to one who may be thus injured. State ex rel. Firemen's Fund Ins. Co. v. Hoppmann, 207 W 481, 240 NW 884, 242 NW 133.

A party cannot appeal from an order granting a new trial on his motion, although he requested such relief in the alternative. Larson v. Hanson, 207 W 485, 242 NW 184.

Chapter 197, Stats., provides a complete scheme of condemnation of public utilities by municipalities, one of the intermediate steps in the process being denominated an "action in the circuit court" for an adjudication as to the necessity of the taking in which the verdict of a jury is required upon the issue of necessity; but it is not provided nor contemplated that a judgment shall follow the verdict, and, regardless of whether the proceeding falls within the definition of a special proceeding within (2), no appeal lies from the verdict. A motion for a new trial in such a proceeding upon the ground of misconduct affecting the jury and their

verdict is construed as in effect invoking such supervisory power of the court, and an order denying the relief is held appealable as a final order affecting a substantial right made in a special proceeding, within (2). Bangor v. Hussa C. & P. Co., 208 W 191, 242 NW 565.

An order dissolving an attachment of county warrants given a contractor for work done for the county is appealable as an order refusing or modifying a provisional remedy. Danischefsky v. Klein-Watson Co., 209 W 210, 244 NW 772.

An order overruling a plea in abatement is not appealable; but an adjudication properly entered as an interlocutory judgment is appealable. Cooper v. Commercial C. Ins. Co., 209 W 314, 245 NW 154.

Order denying application of defendant to bring in additional defendant allegedly liable over to defendant held unappealable, even if such person was necessary party. On appeal from unappealable order the court acquires no jurisdiction for any purpose except to dismiss appeal. Jones v. United States F. & G. Co., 210 W 6, 245 NW 650.

Order denying motion to vacate previous order amending summons to bring in additional defendants held not "final order," and, therefore, was not appealable. Riedel v. Preston, 211 W 149, 246 NW 569.

Order after verdict and before judgment, denying new trial is not appealable. Steneman v. Breyfogle, 211 W 5, 247 NW 337.

Order denying claim of the intervener to office carpet, in sequestration proceedings brought by the judgment creditor wherein receiver was appointed, is an "appealable order." Hartberg v. American F. S. Co., 212 W 104, 249 NW 48.

A motion to strike the answer as sham, and attacking the answer as a whole, had the effect of challenging the sufficiency of the answer to constitute a defense. An order granting such a motion may be reviewed by the supreme court, since it is in effect an order sustaining a demurrer. Slama v. Dehmel, 216 W 224, 257 NW 163.

Order overruling plaintiff's motion to strike answer as frivolous held not appealable, in absence of showing either in motion or order that motion was based on some statutory ground for demurrer because of which it was in legal effect as order overruling a demurrer. First Wisconsin Nat. Bank v. Carpenter, 218 W 30, 259 NW 836.

Order overruling defendant's motion for judgment dismissing complaint and for judgment for defendant on counterclaim held not appealable, being merely a motion for judgment on pleadings. Direct Service Oil Co. v. Wisconsin I & C. Co., 218 W 426, 261 NW 215.

An order of the county court of Wood county, denying a defendant's motion for dismissal of an appeal from justice court, is not appealable; such order not preventing a judgment from which an appeal may be taken. Wendt v. Dick, 219 W 230, 262 NW 576.

Order denying change of venue, not being an appealable order, can be brought before supreme court for review only by mandamus. Wisconsin Co-op. M. Pool v. Saylesville C. Mfg. Co., 219 W 350, 263 NW 197.

See note to 263.17, citing Paraffine Companies v. Kipp, 219 W 419, 263 NW 84.

Purchasers of the equity of redemption of property sold on foreclosure, who had stipulated in the trial court that they had no objection to an order extending the period of redemption, were not entitled to a review on their appeal therefrom. An order in a foreclosure action, authorizing the receiver of a bankrupt mortgagor to execute an agreement extending a lease of the mortgaged premises, is not appealable since merely administrative. A. J. Straus Paying Agency v. Terminal W. Co., 220 W 85, 264 NW 249.

An order denying a defendant's motion for a judgment of dismissal and granting the plaintiffs' motion to set for trial an alleged fraud issue which was not stated as a separate cause of action in the complaint, is not appealable as an order determining the action and preventing a judgment from which an appeal might be taken. Manas v. Central Surety & Ins. Corp., 221 W 381, 266 NW 780.

An order vacating a judgment dismissing an action for failure to file security for costs within the time prescribed, and permitting the filing of security and reinstating the action for further proceedings, is not appealable. The supreme court has no jurisdiction to pass on the merits of an order that is not appealable. McKey v. Egeland, 222 W 490, 269 NW 245.

An order in receivership proceedings reviewing and confirming a prior order allowing claims, from which prior order no appeal was taken, is not appealable. In re Norcor Mfg. Co., 223 W 463, 271 NW 2.

An order granting motion for summary judgment is not appealable, since an order for judgment does not prevent a judgment. Witzko v. Koenig, 224 W 674, 272 NW 864.

The refusal of a court to suppress an adverse examination is not an appealable order. Petition of Phelan, 225 W 314, 274 NW 411.

An order granting an extension of the period of redemption from a judgment of foreclosure of a real estate mortgage is a final order affecting a substantial right made after judgment and therefore is appealable. Brown v. Loewenbach, 225 W 425, 274 NW 434.

An order is not final if it does not end the controversy to which it relates and thus preclude any further steps therein. An order denying the petition of a bondholder to intervene in an action for the foreclosure of a mortgage by the trustees for the holders of bonds secured by the mortgage was not appealable as a final order where the order was made without prejudice to the right of the bondholder to file a subsequent petition for intervention. A. J. Straus Paying Agcy. v. Caswell Bldg. Co., 227 W 353, 277 NW 648.

An appeal from a nonappealable order confers no jurisdiction on the court and the court in such case can only dismiss the appeal. An order granting a new trial unless the plaintiff or the defendant consented to a judgment less than the verdict, under which the defendant so consented, was not appealable, since the order was not the same as an order granting a new trial, which would be appealable. Baker v. Onsrud, 227 W 450, 278 NW 870.

An order striking portions of a counterclaim as irrelevant and redundant is not appealable. First Wisconsin Nat. Bank v. Pierce, 227 W 581, 278 NW 451.

An order vacating a default judgment is not an order granting a new trial and hence is not appealable. Old Port Brewing Corporation v. C. W. Fischer F. Co., 228 W 62, 279 NW 613.

An order which denied a motion made after judgment and which provided that the order was denied "without prejudice to the right of the court to determine the effect of said instruments and the respective rights created by them in event the same ever come before the court" was not a final order and was therefore not appealable. Pessin v. Fox Head Waukesha Corp., 230 W 277, 282 NW 582.

An order refusing to suppress an adverse examination is not an appealable order and an order limiting the scope of an adverse examination is not an appealable order since such orders merely regulate the procedure on the examination and do not operate on the provisional remedy which the adverse examination constitutes. An order denying the defendant's motion to compel the plaintiff to answer certain questions on an adverse examination is not appealable. Hyslop v. Hyslop, 234 W 430, 291 NW 337.

An order denying a motion to quash an alternative writ of mandamus is in effect an order overruling a demurrer to the petition, and as such is appealable. Estate of Maurer, 234 W 601, 291 NW 764.

See note to 274.01, citing Zbikowski v. Straz, 236 W 161, 294 NW 541.

An order of the circuit court, reversing an order of the civil court and remanding the record with directions to reinstate an order of a court commissioner for the se-

questration of certain property of a judgment debtor in supplementary proceedings in aid of execution, is appealable as a "final order" affecting a substantial right made on a summary application in an action after judgment. Milwaukee A. Schools of Beauty Culture v. Patti, 237 W 277, 296 NW 616.

An order merely fixing the time and place of a mortgage foreclosure sale, entered after judgment of foreclosure, is not appealable as a "final order," but an order confirming the sale is appealable as a "final order." Fronhaefer v. Richter, 237 W 282, 296 NW 588.

Where there is no right of appeal, the supreme court lacks jurisdiction to consider the merits even though the parties consent to give the court jurisdiction or fail to object to the appealability, and the court in such case can only dismiss the appeal. Fronhaefer v. Richter, 237 W 282, 296 NW 588.

An order suppressing the taking of an adverse examination noticed under 326.12 is appealable as an order refusing a provisional remedy. [Milwaukee Corrugating Co. v. Flagge, 170 W 492, and other cases, distinguished.] Estate of Briese, 238 W 6, 298 NW 57.

An order directing that a mortgage trustee, who had bid in the mortgaged property at the foreclosure sale, be authorized to enter into a contract for the sale of the premises, was an order after judgment in a proceeding at the foot of the judgment and was therefore an appealable order, so that bondholders, who appeared at the hearing on the application for the order but who did not appeal therefrom, were bound thereby. Newlander v. Riverview Realty Co., 238 W 211, 298 NW 603.

Where a landowner took an unauthorized appeal to the circuit court from the county judge's determination denying his petition for the appointment of commissioners to assess compensation for land taken by the county, but the parties submitted the entire matter to the circuit court as an action on an agreed case and thereunder the landowner was entitled to compensation and to have a jury selected to pass on the amount of compensation, the circuit court's adjudication affirming the county judge's erroneous determination dismissing the petition was appealable as in effect an order affecting a substantial right, made in an action, and preventing a judgment from which an appeal might be taken. Olen v. Waupaca County, 238 W 442, 300 NW 178.

An appeal from orders of the county court authorizing executors to continue to carry on the business of the testator to a certain date, and directing an accounting by the executors of their receipts, is dismissed on the ground that such orders are merely directory orders made in the course of probate proceedings, and as such are not within the classifications designated as appealable orders by the provisions in this section. Will of Krause, 240 W 68, 2 NW (2d) 732.

In an action by a party to a trust indenture against the trustee and others, an order confirming a ruling of a court commissioner requiring a defendant as a witness on an adverse examination under 326.12 to produce a list of names and addresses of bondholders in the course of his examination for use as an instrument of evidence in connection with matters then to be examined into before the commissioner on points on which discovery had been duly stated to be desired, was not an order for the inspection of a document under 269.57 (1) so as to be appealable under 274.33 (3) as an order granting a provisional remedy. McGeoch Bldg. Co. v. Dick & Reuteman Co., 241 W 267, 5 NW (2d) 804.

An order, appointing a third arbitrator under an arbitration agreement of an employer and a union which provided that the circuit court should do so in case of inability of the first 2 arbitrators to agree on a third, entered pursuant to an order to show cause signed by the circuit judge and returnable before the circuit judge, is not appealable, the proceeding in which the order appealed from was entered not being a proceeding in court, and the circuit court having no jurisdiction. On an appeal from a nonappealable order, the supreme court has no jurisdiction except to dismiss the appeal. Fox River P. Co. v. International Brotherhood, 242 W 113, 7 NW (2d) 413.

An order entered in a pretrial conference had under 269.65 and specifying the issues for trial in an action is not an appealable order. Klitzke v. Herm, 242 W 456, 8 NW (2d) 400.

"A proceeding wherein the circuit court, pursuant to an order to show cause why the account of the trustees of a segregated trust should not be approved, exercises the jurisdiction conferred on it by 220.08 (19), is a 'special proceeding,' and not an 'action,' and hence should be terminated by an order and not by a judgment." [Syllabus] But still the order is not appealable under 274.33 (2) [Stats. 1941], although it "affects a substantial right" because "an appeal is not given by the law creating the procedure." In re Farmers Exchange Bank, 242 W 574, 8 NW (2d) 535.

An order denying motions of an insurance company to dismiss, as "moot," actions pending against it to enforce orders of the commissioner of insurance denying the company a license to do business in Wisconsin for certain license years, is not an appealable order. Duel v. State Farm Mut. Automobile Ins. Co., 243 W 172, 9 NW (2d) 593.

An order denying a motion for change of venue for prejudice of the trial judge and an order granting a motion to have the complaint made more definite and certain and extending the time to plead are not appealable orders. Chris Schroeder & Sons Co. v. Lincoln County, 244 W 178, 11 NW (2d) 665.

A decision of the trial court in contempt proceedings, to the effect that the record will be that contempt is established but sentence will be suspended, is not appealable as a judgment or final order. Waukesha Roxo Co. v. Gehrz, 244 W 201, 12 NW (2d) 41.

A statute creating a right of appeal where one did not before exist does not apply to judgments entered before its enactment, since a judgment creates vested rights, which cannot be taken away by a statute. In re Farmers & Traders Bank, 244 W 576, 12 NW (2d) 925.

An order for nonsuit in an action in replevin is not an appealable order. Era Club, Inc., v. Rupp, 244 W 587, 13 NW (2d) 88.

An order requiring amendment of a complaint so as separately to state several causes of action is merely an order to make the pleadings more definite and certain, and is not appealable. Central Urban Co. v. Milwaukee, 245 W 576, 15 NW (2d) 859.

Where a document filed by the trial court merely ordered the modification of a divorce judgment so as to increase the wife's allowance for support money prospectively, and the document included an opinion which dealt with the power of the court to make the order retroactive but which was at best a mere conclusion of law making no disposition of the matter, the document was not an appealable "order" denying the wife's application to have the increased allowance made retroactive. Dawley v. Dawley, 246 W 306, 16 NW (2d) 827.

An order denying a motion to strike portions of a petition for a writ of mandamus is not appealable; and an order denying a motion to amend a motion to quash an alternative writ of mandamus, by pleading additional statutes of limitation, is not appealable as a final order, where the trial court directed that the facts might be set up in the return. State ex rel. Koch v. Retirement Board, 247 W 334, 19 NW (2d) 187.

An order vacating a judgment entered after a trial on the merits and granting a new trial is an appealable order. Goodman v. Wisconsin Electric Power Co. 248 W 52, 20 NW (2d) 553.

An order of the circuit court for Milwaukee county, properly reversing a judgment of the civil court and remanding the cause to the trial court to take further evidence and to make findings of fact and conclusions of law in accordance with the re-

quirements of this section, remanded the cause to enable the trial court to complete the trial, and not for a new trial, and is not appealable as a "final order." Mayerhoff v. Roxy Theatre Corp. 248 W 322, 21 NW (2d) 733.

An order confirming a sale in partition clear and free of a lease, an order disallowing the lessee's claim under the lease, and an order denying a motion to set aside the confirmation of the sale, all entered after an interlocutory judgment ordering the sale, are appealable as orders finally disposing of the lessee's claim and preventing another judgment from which an appeal might be taken. Wolfrom v. Anderson, 249 W 433, 24 NW (2d) 881.

While an appeal may be taken from a discretionary order, the matter will be reviewed solely to determine whether there was an abuse of discretion; if there was no abuse the appeal will be dismissed, but if there was an abuse the order will be reversed. This practice, although anomalous, has been followed for a great many years and will be adhered to. Earlier cases cited. Hartwig v. Harvey, 250 W 478, 27 NW (2d) 363.

274.34 Appeals, intermediate orders may be reviewed. Upon an appeal from a judgment, and upon a writ of error, the supreme court may review any intermediate order which involves the merits and necessarily affects the judgment, appearing upon the record. [*1935 c. 541 s. 294*]

Note: On appeal from the judgment the supreme court may review an order overruling a demurrer to the complaint. Schlecht v. Anderson, 202 W 305, 232 NW 566.

Although there was no appeal from an order sustaining a demurrer, such determination was reviewable where it involved the merits and necessarily affected the judgment upon an appeal from the judgment. Milwaukee County v. Milwaukee W. F. Co., 204 W 107, 235 NW 545.

Though an order opening a cognovit judgment is not appealable, that part of such an order imposing attorney's fees and costs without regard to their reasonableness as a condition of opening, and likewise that part permitting the plaintiff to issue execution or to proceed as if the order had not been entered, amounts to a virtual denial of relief, and is therefore appealable. Commercial C. Ins. Co. v. Frost, 206 W 178, 239 NW 454.

An order under 313.03 extending the time for filing claims against an estate is not an appealable order. Estate of Benesch, 206 W 582, 240 NW 127.

An order overruling a demurrer is an intermediate order involving the merits and necessarily affecting the judgment and may be reviewed on appeal from judgment. On appeal from judgment for plaintiffs upon complaint defectively stating a good cause of action, where there is no bill of exceptions, court will presume that defects in complaint have been remedied. Complaint on illegal contract or one contrary to public policy and wholly void is incapable of amendment or aider by evidence so as to permit judgment on complaint. Van de Yacht v. Town of Holland, 217 W 455, 259 NW 604.

An appeal from a judgment does not bring up for review an order made subsequently. In re Stanley's Will, 228 W 530, 280 NW 685.

On an appeal from a judgment, the supreme court may review an interlocutory or intermediate order which involves the merits and necessarily affects the judgment, but the right of appeal from such an order ceases on final judgment, and a separate appeal from such an order does not lie thereafter, hence must be dismissed where the judgment is not appealed from. Leibowitz v. Leibowitz, 245 W 218, 14 NW (2d) 2.

An unappealed determination of the county court, made in proceedings on a petition under 310.11, and construing a will as requiring the executors to offer the testator's business to a named person at the price established by the inventory in the estate, is not reviewable as an "interlocutory order" on the executors' appeal from an order, made in subsequent proceedings on a petition of such named person, and commanding the executors to sell the business at such inventory price. Estate of Bosse, 246 W 252, 16 NW (2d) 832.

274.35 Reversal, affirmance or modification of judgment; how remitted, clerk's fees. (1) Upon an appeal from a judgment or order or upon a writ of error the supreme court may reverse, affirm or modify the judgment or order, and as to any or all of the parties; and may order a new trial; and if the appeal is from a part of a judgment or order may reverse, affirm or modify as to the part appealed from. In all cases the supreme court shall remit its judgment or decision to the court below and thereupon the court below shall proceed in accordance therewith.

(2) The clerk of the supreme court shall remit to such court the papers transmitted to the supreme court on the appeal or writ of error, together with the judgment or decision of the supreme court thereon, within sixty days after the same is made, unless there is a motion for a rehearing. In case a motion for a rehearing is denied the papers shall be transmitted within twenty days after such denial.

(3) The clerk of the supreme court shall, except when the order or judgment is affirmed, also transmit with the papers so returned by him a certified copy of the opinion of the supreme court, and his fees for such copy shall be taxed with his other fees in the case. [*1935 c. 541 s. 295*]

Note: The supreme court does not retry cases on appeal, but is limited to examination of the record to ascertain whether the judgment is affected by prejudicial error; and in determining whether a verdict is sustained by the evidence, only the evidence tending to sustain it is considered. Felix v. Soderberg, 207 W 76, 240 NW 836.

In the absence of a motion for a rehearing, the supreme court loses jurisdiction of a case after sixty days from judgment or decision, notwithstanding the record is physically present in the clerk's office; and it also loses jurisdiction after twenty days from denying a motion for a rehearing, although on denying the motion it reversed its original mandate. Tomberlin v. Chicago, St. P., M. & O. R. Co., 208 W 30, 243 NW 208.

Where judgment has been entered in trial court in accordance with supreme court's mandate, appeal therefrom will be dismissed. Tomberlin v. Chicago, St. P., M. & O. R. Co., 211 W 144, 246 NW 571, 248 NW 121.

Where on a motion for judgment notwithstanding the verdict, for a new trial and to reduce the damages, the trial court granted the motion for judgment, but did not pass upon the motion to reduce the damages, on reversal the cause will be remanded to enable the court to pass on that motion. Chevinskas v. Wilcox, 212 W 554, 250 NW 381.

The proper remedy in cases where it is contended that the trial court has not entered judgment on remittitur in accordance with the mandate of the supreme court is by mandamus and not by appeal. Miswald-Wilde Co. v. Armory Realty Co., 213 W 354, 251 NW 450.

Where the supreme court directs a new trial of the issue of contribution between the defendant and the interpleaded defendant, it is not necessary to direct a new trial on the issue of the liability of the defendant when a new trial could only result in a directed verdict against him and a reassessment of damages, and neither the defendant nor the interpleaded defendant claimed that the verdict was excessive. Zurn v. Whatley, 213 W 365, 252 NW 435.

Where the right to reformation of the policy was not raised by the pleadings nor tried, but the findings of the trial court and the undisputed evidence as to the intention of the parties warranted reformation, the case was not remanded with instructions to permit the allegation and trial of such issue but was determined by the supreme court as if reformation was had. Fountain v. Importers and Exporters Ins. Co., 214 W 556, 252 NW 569.

See note to 251.41, citing Milwaukee County v. H. Neidner & Co., 220 W 185, 263 NW 468, 265 NW 226, 266 NW 238.

If a judgment entered on remittitur does not follow the mandate of the supreme court, the remedy of the aggrieved party is not by appeal, but by an original action in mandamus invoking the supervisory power of the supreme court to compel the lower court to follow the mandate. Barlow & Seelig Mfg. Co. v. Patch, 236 W 223, 295 NW 39.

Where the judge on the first trial of an action, involving a counterclaim for breach of contract, assessed damages thereon, but a different judge on a second trial, involving a counterclaim for fraud in inducing the contract, assessed greater damages, and neither judge regarded the assessment as required or material because of adjudging no recovery on the counterclaim, the supreme court, on adjudging recovery and reversing the judgment entered on the second trial, remanded the cause for a new trial in the interest of justice on the question of damages on the counterclaim, although the plaintiff's motion in the supreme court to review the assessment of damages was not timely filed. Morse Chain Co. v. T. W. Meiklejohn, Inc. 237 W 383, 296 NW 106.

A judgment of a trial court, when affirmed by the supreme court, becomes in legal effect the judgment of the supreme court, and the trial court has no power to vacate or set it aside. Hoan v. Journal Co., 241 W 483, 6 NW (2d) 185.

Where the only cause of action which the plaintiff sought to have tried and determined in the trial court was one for treble damages under 196.64, based on alleged reckless and wilful conduct of the defendant's employe, and not on negligence, and hence not permitting the defendant to present the defense of contributory negligence, the plaintiff, on an appeal from a judgment of dismissal, is not entitled to a determination that in any event he should recover actual damages on the basis of ordinary negligence. Chrome Plating Co. v. Wisconsin Electric Power Co., 241 W 554, 6 NW (2d) 692.

The reversal of the judgment and the ordering of a new trial in this case on the appeal of a defendant, found guilty of negligence below, requires a retrial also of the appealing defendant's claim under his cross complaint for contribution and for property damage against the other defendant bound by the same judgment, and of the other defendant's negligence, there being a jury question thereon, although the other defendant did not take an appeal but only filed a motion to review the findings that he was negligent. Gibson v. Streeter, 241 W 600, 6 NW (2d) 662.

The rule, that findings of the trial court cannot be set aside on appeal unless against the great weight and clear preponderance of the evidence, does not apply to the interpretation of a will or other written instrument in the light of circumstances as to which there is no dispute, a question of law and not of fact being presented in such case. [Will of Mitchell, 157 W 327, so far as to the contrary, overruled.] Will of Mechler, 246 W 45, 16 NW (2d) 373.

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.

A finding of the trial court, that an oral contract to devise or bequeath property was not made, will not be overthrown on appeal unless contrary to the clear preponderance of the evidence. Will of West, 246 W 199, 16 NW (2d) 806.

After 60 days from the entry of its judgment in an appeal case, in the absence of a pending motion for rehearing, the supreme court has no jurisdiction to reopen the case to consider a question arising under the U. S. constitution not presented when the case was argued; and this rule applies where the judgment has been affirmed by the U. S. supreme court, although it would not apply if the judgment had been vacated. State Farm Mut. Automobile Ins. Co. v. Duel, 247 W 121, 19 NW (2d) 315.

Where the conclusions of the trial court on the evidence are not against the great weight and clear preponderance of the evidence, the court's findings cannot be disturbed on appeal. Adolph Coors Co. v. Pursel, 250 W 174, 26 NW (2d) 550.

A ruling of the supreme court on a first appeal, on a review taken deliberately and considerately after a full examination of all cases cited by an appealing party, and determining that the evidence presented a jury question as to the negligence of such party in an automobile collision, was the law of the case on a second appeal involving the same material facts. Pierner v. Mann, 251 W 143, 28 NW (2d) 309.

274.36 Remittitur if new trial ordered; when trial to be had; duty of plaintiff. In every case in error or on appeal in which the supreme court shall order a new trial or further proceedings in the court below, the record shall be transmitted to such court and proceeding had thereon within one year from the date of such order in the supreme court, or in default thereof the action shall be dismissed, unless, upon good cause shown, the court shall otherwise order. It shall be the duty of the losing party in any action or proceeding when a judgment or order in his favor in the court below is reversed by the supreme court on the appeal of the opposing party to pay the clerk's fees on such reversal, procure the record in said cause to be remitted to the trial court and bring the cause to trial within one year after such reversal, unless the same be continued for cause, and if he fail so to do, his action shall be dismissed.

Cross Reference: For disposition after remittitur of pending motion for new trial, see 270.49 (1).

Opinion of supreme court to be sent to trial court in case of reversal, see 251.16.

Note: Where the charge to the jury was confusing and misleading on the element of damages and the verdict awarded excessive damages the error was prejudicial. Dunham v. Wisconsin Gas & Electric Co., 228 W 250, 280 NW 291.

On the entry of judgment on remittitur, the only question which can be reviewed by the supreme court is whether the judgment entered is in accordance with the mandate, and if the trial court does not follow the

mandate in entering the judgment, the remedy of the party aggrieved is not by an appeal but solely by mandamus invoking the supervisory power of the supreme court to compel the trial court to follow the mandate. Litzen v. Eggert, 238 W 121, 297 NW 382.

274.37 Judgments; application to reverse or set aside; new trial; reversible errors. No judgment shall be reversed or set aside or new trial granted in any action or proceeding, civil or criminal, on the ground of misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure the new trial.

Cross Reference: For discretionary reversal by supreme court in interest of justice, see 251.09.

Note: The cross-examination of the owner of an automobile driven by his nephew at the time of the collision which insinuated that a greater premium was paid on liability policy to protect others driving the car was prejudicial error, because the statute requires such a provision in all policies. Christiansen v. Aetna C. & S. Co., 204 W 323, 236 NW 109.

Where no substantial rights of an accused are affected by the trial or preliminary proceedings, the conviction must be affirmed. Stetson v. State, 204 W 250, 235 NW 539.

Tactics of trial lawyers in making insinuation or exposing the fact that a defendant is insured, either on the voir dire examination of jurors without reason or suspicion that any juror has stock or is insured in the insurance company named, or in the examination of witnesses, is disapproved and trial courts are admonished to discourage such practice by strongly denouncing it whenever it is indulged in without good reason and to so handle the matter as to prevent as far as possible resulting prejudice. Walker v. Pomush, 206 W 45, 238 NW 859.

Improper references by the district attorney to prior convictions of which defendant had previously informed the court was not prejudicial error, where defendant subsequently took the stand and the court instructed the jury that the prior convictions could not be considered except so far as they tended to affect his credibility as a witness. Ford v. State, 206 W 138, 238 NW 865.

In a prosecution for keeping a house of ill fame, evidence obtained on an unlawful search should have been suppressed, and its reception is prejudicial, even though there was other competent evidence probably sufficient to support the verdict of guilty. Bach v. State, 206 W 143, 238 NW 816.

Improper statements of plaintiff's counsel in argument, relating to insurance, and "that there is no compensation for pain and suffering," etc., are not prejudicial in view of vigorous admonition and instructions of the trial court. Sweet v. Underwriters C. Co., 206 W 447, 240 NW 199.

Omission to give accused's requested instructions on lesser degrees of homicide was not prejudicial error, there being no reasonable ground under the evidence upon which conviction other than for murder could be sustained. Sweda v. State, 206 W 617, 240 NW 369.

For reversible error for refusal to submit a question in the special verdict, see note to 270.27, citing Liberty T. Co. v. La Salle F. Ins. Co., 206 W 639, 238 NW 399.

A question as to whether the manufacturer failed to exercise ordinary care with respect to microscopic inspection of the tube which exploded was prejudicially erroneous, as assuming a broader duty than the evidence called for, the evidence showing merely an obligation to establish fitness of a heat or quantity of steel for making tubes by a suitable number of microscopic tests. Marsh W. P. Co. v. Babcock & Wilcox Co., 207 W 209, 240 NW 392.

Where the issue on which the case was determined in the trial court was not litigated, reversal for a new trial is required. George M. Danke Co. v. Marten, 207 W 290, 241 NW 359.

The erroneous reception of evidence is ground for reversal only when it prejudices the objecting party. Chippewa Falls H. Co. v. Employers L. A. Corp., 208 W 86, 241 NW 880.

The supreme court should not reverse a judgment for error unless it appears from examination of the entire record that the error complained of has affected the substantial rights of the party seeking reversal. Vaningan v. Mueller, 208 W 527, 243 NW 419.

Remarks of counsel for plaintiff insurer in argument with reference to the prior case were highly improper, but not so prejudicial as to require reversal, since the verdict did not award damages, which might have reflected the result of such remarks. Standard A. Ins. Co. v. Runquist, 209 W 97, 244 NW 757.

In consolidated actions for injuries brought against a bus driver and his insurance carrier, it was prejudicial error to overrule the insurer's plea in abatement based on a "no-action clause." Polzin v. Wachtl, 209 W 289, 245 NW 182.

Failure to have reporter present so as to comply with jury's request to have evidence read, held reversible error. Knipfer v. Shaw, 210 W 617, 246 NW 329.

Exclusion of evidence as to whether decedent's car was in gear at time of collision was harmless where findings of decedent's contributory negligence other than failure to stop at arterial highway were ample to support verdict. Goetz v. Herzog, 210 W 494, 246 NW 573.

Cross-examination of defendant in rape trial as to his wife's commencement of divorce proceedings after his arrest, held prejudicial error, in absence of corroboration of prosecutrix' testimony. Cleveland v. State, 211 W 565, 248 NW 408.

Uniting action for false arrest against defendant and action, based on another false arrest, against defendant and another, held reversible error, where resulting in serious confusion of issues and apportionment of damages between defendants for joint tort. Jordan v. Koerth, 212 W 109, 248 NW 918.

Where a husband suing for loss of services of his wife had discharged his cause of action against tortfeasors by a secret settlement with one of them, which was not disclosed by the pleadings, nor brought to the attention of the court until after the trial, such defect in the pleadings, as well as the concealment from the court of the real issues at stake, requires reversal of a judgment for the husband and dismissal of the action. Trampe v. Wisconsin Telephone Co., 214 W 210, 252 NW 675.

Mention by the trial court of the fact that the driver of the car, who was one of the defendants, did not appear at the trial, and discussion as to the reasons for his absence, were not prejudicial to him. Philip v. Schlager, 214 W 370, 253 NW 394.

A valid judgment may be entered upon a general verdict of guilty under an information containing both a good and a bad count; the presumption being that the verdict was based upon the good count. Hobbins v. State, 214 W 496, 253 NW 570.

In an action against a gas company for damages to a building from an explosion resulting when a contractor in digging a trench along an alley for a village severed a gas service pipe leading into the building, the exclusion of evidence offered by the plaintiffs of the prior breaking of other gas service pipes by the contractor is held prej-

udicial error, where the complaint alleged that the gas company was negligent in failing to have a man at hand to turn off the gas in the event that a main or pipe broke in the course of the work. Strohmaier v. Wisconsin G. & E. Co., 214 W 564, 253 NW 798.

On an appeal from a judgment entered on a verdict for the plaintiff, the supreme court will consider the complaint amended to accord with the facts found, if the complaint as framed was insufficient to support them, where it is not claimed that immaterial or irrelevant evidence was admitted on the trial. Madison Trust Co. v. Helleckson, 216 W 443, 257 NW 691.

See note to 355.23, citing Koehler v. State, 218 W 75, 260 NW 421.

Remarks of counsel in argument to jury during trial of action for damages in automobile collision case in attempt to persuade jury to disregard evidence and relieve plaintiff's agent, who was an impleaded defendant without insurance and who was driving truck in which plaintiff was riding at time of collision, from negligence and to place fault on insurer of other defendant held to require new trial. Georgeson v. Nielsen, 218 W 180, 260 NW 461.

Inaccuracy in the form of judgment providing that the county recover from a building contractor for defective installation, and that on payment by the building contractor or its surety such contractor or surety should recover from an impleaded tile contractor "by subrogation," was not prejudicial to the tile contractor, although the basis of recovery by the building contractor against the tile contractor was not subrogation, but breach by the tile contractor of its contract with the building contractor. Milwaukee County v. H. Neidner & Co., 220 W 185, 263 NW 468, 265 NW 226, 266 NW 238.

Remarks of plaintiff's counsel with respect to defendant's witnesses, "I don't suppose you would contend she was dancing around, either," "Not much of an expert—only one needle removed from the spine," and remarks to opposing counsel's objection, "You aren't talking to yourself again, are you?" although improper, were not such as to require setting aside a verdict in favor of the plaintiff. Becker v. Luick, 220 W 481, 264 NW 242.

The exclusion of evidence, the purpose and effect of which is not disclosed to the court, is not reversible error. Langer v. Chicago, M., St. P. & P. R. Co., 220 W 571, 265 NW 851.

A remark of the trial court, "It was the intention of all of them," in ruling on a motion to strike out an answer of an alleged accomplice to a question whetner it was "your intention" to hold up a tavern when the automobile "in which you were riding" stopped thereat, constituted prejudicial error, in view of conflicting evidence as to whether all of the occupants of such automobile, including the defendant, so intended. In a prosecution under 340.39 for assault and robbery while armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed, an instruction that the defendant was guilty if he helped plan the holdup and knew of guns in the automobile during the ride of the conspirators to the tavern where the holdup took place, without requiring a finding of intent, if resisted, to kill or maim the person robbed, constituted prejudicial error as incomplete and misleading. Argument of the district attorney to the jury "Why don't the attorney for" the defendant "call Blackie" (meaning an alleged accomplice). "We can't call him because we can't make him testify. He has constitutional rights," was improper as possibly causing the jury to believe that the defendant could compel such accomplice to testify, although the first sentence was permissible comment. State v. Johnson, 221 W 444, 267 NW 14.

A ruling made with the defendant's consent cannot be assigned as error. The failure of the trial court to instruct the jury to disregard a newspaper article concerning the defendant's original plea of guilty which the trial court had refused to accept, was not error, where the instruction was not given because both the court and counsel for the defendant were of the opinion that it might be more damaging to the defendant to draw attention to the article than to disregard it. State v. Christiansen, 222 W 132, 267 NW 6.

The denial of a motion for a new trial for alleged misconduct of a juror was not error where, among other things, conflicting affidavits were filed by jurors concerning the matter, and it did not appear that the alleged error had affected any substantial right of the party seeking the new trial. Kidder v. Kidder, 222 W 183, 268 NW 221.

Argument of counsel for plaintiffs as to whether jurors in the position of the plaintiff widow would have a husband taken away on the payment of $15,000 was improper, but not sufficiently prejudicial to necessitate a reversal. McCaffrey v. Minneapolis, St. P. & S. S. M. R. Co., 222 W 311, 267 NW 326, 268 NW 872.

Permitting counsel in argument to the jury to read portions of a deposition that in fact were not received in evidence was error, and the error was not avoided by the trial judge's stating, on objection being made to the reading, that he did not remember whether the portions read were in evidence, and leaving the question of their receipt in evidence to the jury. Krudwig v. Koepke, 223 W 244, 270 NW 79.

In the absence of evidence as to what a deceased automobile guest did to discharge those obligations which rest on every guest in an automobile to look out for his own safety, the presumption existed that the deceased guest took reasonable precautions for his safety, and the refusal of the trial court to give an instruction to that effect was error. Smith v. Green Bay, 223 W 427, 271 NW 28.

Denying a party his right to close the case is reversible error. United States F. & G. Co. v. Waukesha L. & S. Co., 226 W 502, 277 NW 121.

Where the issue had to be determined either by believing the plaintiff or the cashier of the defendant bank as to how the certificate of deposit was left at the bank, the persistence of plaintiff's counsel in making unsupported insinuations that the cashier was dishonest was prejudicial error for which a mistrial should have been declared. Horgen v. Chaseburg State Bank, 227 W 510, 279 NW 33.

Compelling a defendant to go to trial on counts of an indictment which did not charge an offense and admitting evidence upon such counts, required a reversal of the judgment and sentence upon the defective counts. Liskowitz v. State, 229 W 636, 282 NW 103.

The admission of plaintiff's testimony given at a former trial was reversible error as violating the rule that former testimony is admissible only if the witness will never be able to attend the trial. Markowitz v. Milwaukee Electric Ry. & Light Co., 230 W 312, 284 NW 31.

In an action to vacate the award of compensation, the exclusion of evidence that the industrial commissioners, in reviewing the examiners' findings and orders, did not read the transcript or the stenographic notes of the testimony taken, was prejudicial error requiring a reversal of the judgment. Madison Airport Co. v. Industrial Commission, 231 W 147, 285 NW 757.

Although mandamus was not the proper form of action in the circumstances, the circuit court had jurisdiction of the subject matter and, on a trial on the merits, accorded to all interested parties with their consent, and consented to by the defendants without a ruling on their motion to quash, the court could determine the issue raised by the pleadings and could determine that the money due from the county was due to the relator's judgment debtor, without being required, on appeal, to dismiss the action merely because mandamus was not the proper form of action, but the appropriate form of relief in such case was a judgment for the relator's recovery of the money from the defendant county, not an order for a peremptory writ of mandamus commanding the defendant county clerk to pay the money to the relator. State ex rel.

Adams County Bank v. Kurth, 233 W 60, 288 NW 810.

In an action against the proprietor of a bowling alley for injuries sustained by a patron in slipping on water on the runway, wherein the underlying question was not whether the defendant was negligent in permitting a cuspidor with water in it to stand on the runway, but whether the defendant negligently maintained the cuspidor with an excessive amount of water in it, error of the trial court in proceeding on an erroneous theory of liability under the evidence and failing to clearly place the underlying question before the jury, where the evidence did not establish liability on other grounds, required the reversal of a judgment against the defendant, and a new trial. Reiher v. Mandernack, 234 W 568, 291 NW 758.

Where there is sufficient evidence properly before the court, trying a case without a jury, to sustain the court's findings, the fact that evidence was improperly received will usually not be considered reversible error, and the presumption is that the trial court did not rely on the evidence improperly admitted; and this rule applies with greater force where the objection is to the form of the questions and where the substance of the matter admitted is perfectly proper. Taugher v. Hardware Mut. Cas. Co., 235 W 55, 292 NW 277.

Error of the trial court in ruling that commissioners in condemnation proceedings were incompetent to testify as witnesses on the trial had pursuant to an appeal from the award was prejudicial in view of the amount of the jury's assessment and conflicts in the evidence where the ruling in question prevented the condemnor from introducing additional testimony which apparently would have supported its claims on the controverted subject of value. In re Hefty, 236 W 60, 294 NW 518.

For prejudicial error of instruction as to right of way at highway intersection see note to 85.18, citing Beer v. Strauf, 236 W 597, 296 NW 68.

Argument of plaintiff's counsel to the jury, strongly intimating that defendant's automobile liability insurer always rushed an adjuster to the scene of the accident to get statements from witnesses, and implying that the general practice of this insurer was characterized by unfairness in adjusting claims was improper because there was no evidence in the record to support the argument, and it was prejudicial where the trial court made no ruling on objection of defendant's counsel, the jury found the defendant negligent on the basis of testimony of plaintiff's witnesses which was under attack on the trial as conflicting with statements made before trial, and the damages awarded were grossly excessive. Plautz v. Kubasta, 237 W 198, 295 NW 667.

While a defendant in a criminal case has the right on appeal or writ of error to demand the deliberate opinion and judgment of the supreme court on the question whether his guilt was sufficiently proven, nevertheless a verdict of guilty cannot be disturbed if there is credible evidence which in any reasonable view supports it. Garrity v. State, 238 W 253, 298 NW 577.

An erroneous instruction that the place where the plaintiff's and the defendant's automobiles collided was in a "residence district," to which a maximum permissible speed of 20 miles per hour would apply and that therefore the jury must find the plaintiff negligent as to speed if it should find that he was driving more than 20 miles per hour just prior to the accident, was prejudicial. Volland v. McGee, 238 W 598, 300 NW 506.

A judgment that is correct must be affirmed on appeal regardless of the grounds of the decision laid by the trial judge. McClutchey v. Milwaukee County, 239 W 139, 300 NW 224, 917.

Where the trial court committed merely procedural error in proceeding by way of summary judgment, in that the case was not one then within the summary judgment statute, and where, if the judgment were reversed for such procedural error, the motion for summary judgment could properly be renewed in the trial court because the statute had since been so amended as to include such a case, and the same judgment would be rendered and could again be appealed from, and the parties had submitted the matter to the trial court without objection to the procedure, such procedural error is deemed not prejudicial and not to require reversal, and the matter is disposed of by the supreme court on the merits. Prey v. Allard, 239 W 151, 300 NW 13.

Prejudice is not to be presumed from error, but must appear, and a party complaining of error must not only show that it was committed but also that it operated to his prejudice. Kalb v. Luce, 239 W 256, 1 NW (2d) 176.

An instruction that the maximum recovery of damages by a wife for the loss of society of her husband under the wrongful death statute, 331.04 (2), is $2,500, although improper as suggesting permissible allowance of the maximum, is not prejudicial if the assessment of the jury is proper, measured by the correct standard. Eberdt v. Muller, 240 W 341, 2 NW (2d) 367.

Where the plaintiff claimed that his second injury was a natural consequence of the first injury, and this was the main issue as to the extent of the defendant's liability for his admitted negligence in relation to the first injury, an instruction to the jury which by its wording placed the burden on the defendant to establish that the second injury was not a natural consequence of the first injury was reversible error, where the trial court, although later giving instructions properly setting forth the law governing the case, did not specifically or necessarily withdraw or qualify the instruction in question. O'Donnell v. Kraut, 242 W 268, 7 NW (2d) 889.

Unless it is made to appear that the county court before which an estate is being administered cannot afford as adequate, complete and efficient a remedy as the circuit court, the circuit court should not assume jurisdiction to construe a will, and to do so will be treated as reversible error. Razall v. Razall, 243 W 15, 9 NW (2d) 72.

In an action for the death of a motorist struck by the defendant's automobile while pouring gasoline into the tank of his stalled car, wherein the jury found the defendant causally negligent in respect to control and lookout, an instruction that it is the duty of a driver to take all reasonable care and precaution to avoid collision with any other traveler or vehicle, and to that end to so limit his rate of speed and so control the movement of his vehicle that he is not likely to endanger "and does not endanger the property, life, or limb of any person," was erroneous as imposing on the defendant the absolute duty not to injure or endanger any person, and was prejudicial as virtually requiring the jury to find the defendant negligent. Lembke v. Farmers Mut. Automobile Ins. Co. 243 W 531, 11 NW (2d) 169.

The decision of the trial court is not to be set aside unless the supreme court is certain that the decision was clearly wrong. Estate of Langer, 243 W 561, 11 NW (2d) 185.

Under the evidence in this case, the trial court's granting of a directed verdict for the defendants was so clearly erroneous as to require reversal of the judgment entered thereon. Fjelstad v. Walsh, 244 W 295, 12 NW (2d) 51.

To warrant the reversal of a judgment on the ground of improper admission of evidence, it must appear from all the evidence that the error complained of affected the "substantial rights" of the party complaining thereof. Jacobson v. Bryan, 244 W 359, 12 NW (2d) 789.

Under the evidence, there was a jury question whether the host discharged his duty as host in respect to management and control; and submitting questions merely requiring the jury to find whether the host was negligent in respect to having his car under proper control, without submitting a question whether this negligence constituted a failure on the host's part conscientiously to exercise such skill and judgment as he

had or any question eliciting a finding as to the host's violation of the host-guest relationship, constituted error prejudicial to the host, who had made proper requests to submit questions calculated to present the issue accurately to the jury. Culver v. Webb, 244 W 478, 12 NW (2d) 731.

Failure to follow 247.18 (2), although error, is not prejudicial in this case, where the defendant was present in court when the divorce action was heard, and he did not deny the truth of the plaintiff's testimony, especially that as to residence, which he specifically admitted in his answer and affirmatively alleged in his counterclaim. [Sec. 274.37, Stats.] Swenson v. Swenson, 245 W 124, 13 NW (2d) 531.

The defect in the verdict being one of substance, the supreme court will reverse the judgment rendered on the verdict and order a new trial although the defendants failed to object to the form of the verdict. Martin v. Ebert, 245 W 341, 13 NW (2d) 907.

In a prosecution under 348.09 the refusal to admit in evidence a certain slip of paper found in the defendant's pinball machine, and the admission of the defendant's city license for the pinball machine, are deemed not prejudicial to the state. State v. Jaskie, 245 W 398, 14 NW (2d) 148.

Where the defendant's violation of the injunction was a criminal contempt, and the fine imposed was one appropriate to the imposition of punishment for criminal contempt, and error, if any, in the contempt proceedings went only to matters of pleading or procedure, not affecting any substantial right of the defendant, the judgment is affirmed under the commands of this section. Bowles v. Davidson, 246 W 242, 16 NW (2d) 802.

A refusal to admit competent evidence is reversible error only when such refusal is prejudicial to the rights of the party and could be expected to affect the result of the case. Will of Ehlke, 246 W 654, 18 NW (2d) 490.

Where the parties, after their children came of age, appeared in a contempt proceeding in the circuit court, which as a court of general jurisdiction had power to entertain a separate and independent action by the divorced wife to recover arrearages in support money for the children, accumulated during their minority, and the parties had a full trial on the merits, and the court merely granted a money judgment for the arrearages and did not punish or threaten the defendant with contempt, the error committed by entertaining the contempt proceeding was neither jurisdictional nor prejudicial, and such judgment will not be disturbed. Halmu v. Halmu, 247 W 124, 19 NW (2d) 317.

The insistence of the defendant's counsel in sounding the defendant's warning horn, in the presence of the jury, was not prejudicial error. Biersach v. Wolf River Paper & Fiber Co. 247 W 536, 20 NW (2d) 658.

In reviewing the findings of a trial court either in a civil or a criminal case tried without a jury, it will be presumed that improper evidence taken under objection was given no weight in reaching a final conclusion, unless the contrary appears; and the admission of improper evidence will be regarded as harmless unless it clearly appears that the findings would probably have been different if the improper evidence had not been admitted. Herbert A. Nieman & Co. v. Holton & Hunkel G. Co. 248 W 324, 21 NW (2d) 637.

If a witness makes the claim of privilege against self-incrimination and the claim is improperly disallowed, it is not reversible error. State ex rel. Kennon v. Hanley, 249 W 399, 25 NW (2d) 683.

Where the issue of reformation had been fully tried and there was no defense to the claim of reformation, denying the defendants a new trial, on granting the plaintiff's motion to amend his complaint for specific performance to ask also for reformation of the description in the land contract, was not prejudicial. Kuester v. Rowlands, 250 W 277, 26 NW (2d) 639.

A summary judgment, dismissing a complaint conceived as stating an action in equity, cannot be sustained merely because the complaint fails to state a cause of action in equity, but the supreme court in such case must consider whether the complaint states a cause of action at law and, if it does, must consider whether, on the whole record made on the motion for a summary judgment, a jury question is raised, and then, if no such question is raised, the judgment must be sustained. Oosterwyk v. Bucholtz, 250 W 521, 27 NW (2d) 361.

Where the issues on appeal from a judgment for the plaintiff was as to the comparative negligence of the parties, and it is held that as a matter of law the plaintiff's causal negligence was at least as great as the defendant's causal negligence, the judgment is reversed, and a new trial ordered on the defendant's counterclaim and cross complaint to determine how much, if any, the plaintiff's causal negligence exceeded the defendant's causal negligence. Poole v. Houck, 250 W 651, 27 NW (2d) 705.