CHAPTER 817

WRITS OF ERROR AND APPEALS

817.01 Supreme court; writs of error and appeals; when taken. (1) Except as otherwise provided the time within which a writ of error may be issued or an appeal taken to obtain a review by the supreme court of any judgment or order in any civil action or special proceeding in a court of record is limited to 3 months from service of notice of entry of such judgment or order or, if no notice is served, to 6 months from date of entry. 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 except as to writs of error or appeals taken in actions authorized by ss. 75.39 to 75.50, not exceeding 10 years, shall not be reckoned as a part of said 3 or 6 months.

(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 2 months after his death, any appellant may have an administrator of said estate appointed as provided by s. 856.07 (2).

History: Sup. Ct. Order, 67 W (2d) 761.

Cross References: See 251.25 to 251.94 for rules of practice in supreme court.

Exceptions to the general rule limiting time for appeal will be found in the following sections: 48.47, 48.911, 66.014 (7), 66.021 (10), 88.09, 102.25, 111.07 (7), 227.21, 227.26, 247.37, 289.29, 879.27. There may be other exceptions.

817.02 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.

History: Sup. Ct. Order, 67 W (2d) 761.

817.05 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. But no writ of error shall issue or appeal lie to review an order or judgment on habeas corpus remanding to custody a prisoner committed for trial pursuant to s. 970.03 unless allowed by one of the justices of the supreme court upon a finding that the writ or appeal is not sought for dilatory purposes, after reasonable notice of application for the writ or for leave to appeal and opportunity to be heard to the attorney general and the district attorney of the county involved.

History: Sup. Ct. Order, 67 W (2d) 761.

Orders denying motions for a new trial, for leave to withdraw a plea of guilty or nolo contendere, and for reduction in sentence are orders in the nature of final judgments and as such are reviewable by writ of error; hence an order denying postconviction motions by defendant to withdraw his guilty pleas to possession and sale of marijuana and to review his sentence was reviewable by writ of error. Shavie v. State, 49 W (2d) 379, 182 NW (2d) 505.

817.06 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 2 sureties, in the sum of at least $250, 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 s. 817.07 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.

History: Sup. Ct. Order, 67 W (2d) 761, 781.

817.07 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.

History: Sup. Ct. Order, 67 W (2d) 761.

817.08 Undertaking to be filed; its operation. The undertaking mentioned in s. 817.07, 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.

History: Sup. Ct. Order, 67 W (2d) 761, 781.

817.09 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.

History: Sup. Ct. Order, 67 W (2d) 761.

Cross References: For respondent's review of order or judgment on notice and motion, see 817.12.

For the types of orders which are appealable, see 817.33.

Defendant has no right to raise the constitutionality of a statute for the first time on appeal and the court will not even consider it in the interests of justice where factual issues are involved. State v. Weidner, 47 W (2d) 321, 177 NW (2d) 69.

The supreme court will not entertain review as a matter of right of asserted errors where no post-trial motions with respect to the issues raised have been made prior to appeal, absent indication that there has been a miscarriage of justice or that the evidence adduced at trial and the applicable law clearly dictate that the appellant should have prevailed in the court below. Petroski v. Eaton Yale & Towne, Inc. 47 W (2d) 617, 178 NW (2d) 53.

A proceeding in county court to suspend a driver's license for refusal to submit to an intoxication test is a special proceeding and must be appealed directly to the supreme court. When an appeal is taken first to the circuit court, the circuit court has no jurisdiction and no appeal will lie to the supreme court. State v. Jakubowski, 61 W (2d) 220, 212 NW (2d) 155.

817.10 Writ of error not essential, parties defined. Any judgment within s. 817.09 or any order defined in s. 817.33 may be reviewed before the supreme court upon an appeal by any party aggrieved. A party first appealing is the appellant. All others are respondents.

History: Sup. Ct. Order, 67 W (2d) 761, 781.

817.11 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 party adverse to him upon the appeal who appeared in the action or proceeding, and by filing a notice of appeal with the clerk of the court in which the judgment or order appealed from is entered. The notice shall state whether the appeal is from the whole of the judgment or order or from a part thereof, and if from a part only, shall specify the part appealed from. On appeals from a judgment the appellant shall serve the notice of appeal upon all parties bound by the judgment who have appeared in the action. All notices of appeal shall contain the

names and addresses of counsel, if known, for all parties upon whom service is required.

(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 $250.

(4) The right of appeal shall exist from the time of the entry of the appealable order or judgment and in cases of appeal the supreme court shall have jurisdiction over the subject matter of the action from that time. The procedural requirements of subs. (1), (2) and (3) and of this chapter shall relate only to the jurisdiction of the court over the parties to the appeal.

History: Sup. Ct. Order, 67 W (2d) 761.

Cross References: As to filing an undertaking guaranteed by a surety company instead of by individual sureties, see 204.07. As to perfecting a defective appeal, see 817.32.

Service of the notice of appeal may be made on defendant's trial counsel. Schnabl v. Ford Motor Co. 54 W (2d) 345, 195 NW (2d) 602, 198 NW (2d) 161.

No appeal lies from an oral order dismissing a paternity action when the only record is a transcript of the proceeding which has been filed in the clerk's office. State ex rel. Hildebrand v. Kegu, 59 W (2d) 215, 207 NW (2d) 658.

See note to 269.51, citing Scheid v. State, 60 W (2d) 575, 211 NW (2d) 458.

Oral pronouncement by the trial court denying defendant's motion for a new trial is not an appealable order. Dumer v. State, 64 W (2d) 590, 219 NW (2d) 592.

Where respondents raised the issue of appealability for the first time in their written brief, submitting it and arguing the case on the merits before moving to dismiss the appeal, respondents waived objection and the supreme court had jurisdiction to hear the appeal. Hargrove v. Peterson, 65 W (2d) 118, 221 NW (2d) 875.

Where an appeal is taken from a matter not appealable but an appealable order is subsequently entered in a county court, the circuit court has subject matter jurisdiction over the appealable order or judgment from the time of entry under (4). Walford v. Bartsch, 65 W (2d) 254, 222 NW (2d) 633.

The statute applies to criminal as well as civil cases. That part of Scheid which holds that the supreme court loses subject matter jurisdiction when the filing or serving of a notice of appeal is not within the time fixed by statute is overruled. State v. Van Duyse, 66 W (2d) 286, 224 NW (2d) 603.

An oral pronouncement from the bench, although included in the transcript and minutes and effective as between the parties and trial court, is nevertheless not appealable to the supreme court until it is reduced to writing—that an order is only appealable from the time of its entry. State v. Powell, 70 W (2d) 220, 234 NW (2d) 345.

817.115 Time for service of transcript. Service of a proposed transcript of reporter's notes, by either party, must be made within 3 months after service of notice of appeal. The time for such service may be extended by the trial court for good cause shown.

History: Sup. Ct. Order, 55 W (2d) ix; Sup. Ct. Order, 67 W (2d) 761.

817.117 Approval of transcript. Any party may procure a transcript of the reporter's notes. Unless (a) the parties stipulate otherwise, or (b) a partial transcript is approved as provided in s. 817.118, the transcript shall include all the testimony set forth by question and answer and the oral proceedings had on the trial and the oral rulings and decisions of the court or referee not otherwise reduced to writing and filed with the clerk. A copy of the transcript shall be served on each adverse party who has appeared but, if there are adverse parties united in interest, then upon such as the trial judge designates, and the appellant shall give notice of such service to each of the other adverse parties united in interest. Within 20 days after service, any party may serve proposed amendments upon all other parties. If no proposed amendments are served within 20 days after service of the transcript, the transcript shall be deemed approved and shall be filed with the clerk of the trial court within 10 days thereafter with proof of service of the transcript and an affidavit that no proposed amendments have been served. If proposed amendments are served and accepted within 20 days after service of the amendments, the proposed transcript as so amended shall be submitted for approval to the trial judge. If proposed amendments are served and not accepted within the time for acceptance, the party procuring the transcript shall, within 10 days after expiration of the time for acceptance, notice the approval of the transcript for hearing.

History: Sup. Ct. Order, 50 W (2d) vii; Sup. Ct. Order, 67 W (2d) 761, 781.

Comment of Judicial Council, 1971: Present s. 274.117 leaves a hiatus in time between service of the transcript and its approval. The time for service is limited, but there is considerable lag between service and approval. This proposal establishes time limits for approval of the transcript. [Re Order effective July 1, 1971]

817.118 Approval of partial transcript. (1) (a) A partial transcript may be approved if the appellant serves a statement of the questions he will raise on appeal, a list of the relevant exhibits and those parts of the transcript relevant to the questions stated. The questions shall be stated briefly in the form required by section (Rule) 251.34 (2).

(b) If a party adverse to the appellant claims that portions of the transcript or exhibits relevant to the questions have been omitted, he may move to require the appellant to include such portions of the transcript or additional exhibits. If the judge grants the motion the appellant shall pay the cost of compliance with the order.

(2) If a party adverse to the appellant desires a review of rulings adverse to him pursuant to s. 817.12 he shall serve on the parties adverse to him questions he will raise, such additional portions of the transcript and a list of additional exhibits he wishes to add to the appeal record and the provisions of sub. (1) shall then be followed. Such additions shall be paid for by the party raising the additional questions.

History: Sup. Ct. Order, 67 W (2d) 761, 781.

817.119 Approval of transcript when trial judge not available; new trial. (1) If the trial judge dies, removes from the state, or becomes incapacitated to act, the transcript may be approved by stipulation of the parties.

(2) If the parties cannot agree on the approval of the transcript, the presiding judge of the court shall approve such transcript and he may take testimony and determine any dispute relative to the proceedings had on the trial. He may, upon notice, extend the time for approving the transcript the same as the trial judge might have done.

(3) Either party may move for a new trial if the motion is made at the first term of court succeeding the death or disability of the trial judge, and is accompanied by his affidavit that the application is made in good faith and not for the purpose of delay. The judge may grant the motion if, in his discretion, he determines a proper transcript cannot be approved. The new trial shall be conditioned on the moving party paying the costs taxed in the judgment.

History: Sup. Ct. Order, 67 W (2d) 761.

817.12 All parties bound by appeal; additional parties; review on behalf of respondent. (1) A respondent adverse to the appellant upon the latter's appeal may have a review of any rulings prejudicial to him by serving upon the appellant at any time before the case is set for hearing in the supreme court a notice stating in what respect he asks for a reversal or modification of the judgment or order or portion thereof appealed from.

(2) A respondent may without serving the notice of review mentioned in subsection (1) have a review of any error, the correction of which would merely support the judgment or order appealed from.

(3) If a respondent who is not adverse to the appellant on his appeal fails to appeal within 30 days after service upon him of notice of appeal or within the extended time therefor allowed by the trial court for cause shown and within the time allowed for appeal by the statute, he thereby waives his right of appeal.

(4) When any respondent desires to review an order, judgment or portion thereof not appealed from, he shall within 30 days after service on him of notice of appeal take and perfect his appeal or be deemed to have waived his right so to appeal.

(5) If a party required by subsection (3) or (4) to take an appeal to save his rights does appeal, he shall be subject in all respects to the same requirements that he would be if he were the original appellant and the rights of those served with his notice of appeal, to review rulings of the trial court by which they consider themselves aggrieved, shall be determined as though he were the original appellant.

(6) The supreme court may order additional parties brought in upon their application or on that of any party to the appeal.

History: Sup. Ct. Order, 67 W (2d) 761.

A party challenging part of a judgment, but not adverse to the claim of appellant may not do so by asking for a review; he is required to cross-appeal. Coraci v. Noack, 61 W (2d) 183, 212 NW (2d) 164.

The validity of a prenuptial agreement was not properly before the supreme court on appeal where respondent, who attempted to raise the issue, failed to file either a motion to review or a cross appeal. Estate of Luedtke, 65 W (2d) 387, 222 NW (2d) 643.

817.13 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, the appeal record containing the items specified in Supreme Court Rule 251.25. The court may, in each case, direct copies to be sent in lieu of the originals.

History: Sup. Ct. Order, 67 W (2d) 761.

817.14 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 U.S. government bonds at their par value, or bank certificates of deposit at their face 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 U.S. government bonds or certified check or bank certificates of deposit, to be held for safekeeping 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 U.S. 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.

(3) The clerk of the trial court shall notify the payor bank of any bank certificates of deposit held by the court pursuant to subs. (1) and (2).

History: Sup. Ct. Order, 67 W (2d) 761.

817.16 Undertaking in supreme court, when not required. The undertaking required by s. 817.06 on the issuance of a writ of error and by s. 817.11 on an appeal 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.

History: Sup. Ct. Order, 67 W (2d) 761, 781.

817.17 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.

History: Sup. Ct. Order, 67 W (2d) 761.

817.18 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.

History: Sup. Ct. Order, 67 W (2d) 761.

817.19 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.

History: Sup. Ct. Order, 67 W (2d) 761.

817.20 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.

History: Sup. Ct. Order, 67 W (2d) 761.

817.21 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.

History: Sup. Ct. Order, 67 W (2d) 761.

817.22 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.

History: Sup. Ct. Order, 67 W (2d) 761.

817.23 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.

History: Sup. Ct. Order, 67 W (2d) 761.

817.24 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.

History: Sup. Ct. Order, 67 W (2d) 761.

The term "intermediate order" as used in this section, refers not to nonappealable orders in the modern sense of the phrase—but to prejudgment appealable orders such as an order overruling a demurrer. State ex rel. Van Dyke Ford, Inc. v. Cane, 70 W (2d) 777, 235 NW (2d) 672.

817.25 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.

History: Sup. Ct. Order, 67 W (2d) 761.

817.26 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, or school district, vocational, technical and adult education district or municipal corporation or any municipal officer, or municipal board, in a purely official capacity 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 prescribes as a condition of the further prosecution of the appeal.

History: 1971 c. 51, 154, 211; Sup. Ct. Order, 67 W (2d) 761.

This section does not stay a court order reinstating probation status of a prisoner. State ex rel. H&SS Dept. v. Circuit Court, 57 W (2d) 329, 204 NW (2d) 217.

817.27 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.

History: Sup. Ct. Order, 67 W (2d) 761.

817.28 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.

History: Sup. Ct. Order, 67 W (2d) 761

817.29 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 20 days after service of a copy of the undertaking, and unless they or other sureties justify in the manner prescribed in ss. 809.17, 809.18 and 809.19, within 10 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 5 days.

History: Sup. Ct. Order, 67 W (2d) 761, 781.

817.30 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.

History: Sup. Ct. Order, 67 W (2d) 761

817.31 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.

History: Sup. Ct. Order, 67 W (2d) 761

817.32 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.

History: Sup. Ct. Order, 67 W (2d) 761

817.33 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:

(a) 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 statutes which created the right, remedy or proceedings, or

(b) Made upon a summary application in an action after judgment.

(3) When an order:

(a) Grants, refuses, continues or modifies a provisional remedy;

(b) Grants, refuses, modifies or dissolves an injunction;

(c) Sets aside or dismisses a writ of attachment;

(d) Grants a new trial;

(e) Grants or overrules a motion to dismiss under s. 802.06 (2) or a motion for judgment on the pleadings based on total insufficiency of pleaded defenses under s. 802.06 (3) or a motion to strike based on the insufficiency of one or more pleaded defenses under s. 802.06 (6);

(f) Decides a question of jurisdiction;

(g) Grants or denies a motion for stay of proceeding under s. 801.63; or

(h) Denies a motion for summary judgment.

(3m) A party on whose motion a new trial has been ordered may nevertheless appeal from such order for the purpose of reviewing a denial of his motion after verdict for judgment notwithstanding the verdict or to change answers in the verdict.

(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.

History: Sup. Ct. Order, 67 W (2d) 761.

Judicial Council Committee's Note, 1974: Because of the proposed abolition of the demurrer in s. 802.01, references thereto are replaced by references to the functionally equivalent motions to dismiss, to strike and for judgment on the pleadings under s. 802.06. No change in the substance of s. 274.33 is intended. The last clause is deleted because it was declared a nullity in Wisth v. Mitchell, 52 W (2d) 584 (1971). [Re Order effective Jan. 1, 1976]

Appeal did not lie from the judgment which granted defendants the nonsuit which they sought and secured, based on the ground that the action was not dismissed on its merits and plaintiff permitted to plead over, for a motion for nonsuit is viewed essentially as a demurrer to the evidence, and sustaining such a motion with leave to plead over leaves the merits of the action still to be tried. Heritage Mut. Ins. Co. v. Thoma, 45 W (2d) 580, 173 NW (2d) 717.

274.33 (2), Stats. 1969, governs the appealability of an order in probate proceedings. An order approving a stipulation of the parties as to sale of property to a distributee pursuant to a purchase option in the will was not a final order and the appeal would lie only after the order confirming the sale. Estate of Hillery, 46 W (2d) 689, 176 NW (2d) 376.

An order denying a motion to set aside a probation revocation order is appealable. Dobs v. State, 47 W (2d) 20, 176 NW (2d) 289.

While an order limiting the scope of a discovery examination is not an appealable order, appeal will lie from an order which in effect denies the discovery (a provisional remedy). Wilkins v. Durand, 47 W (2d) 527, 177 NW (2d) 892.

Before an order granting or denying a motion to strike as sham, frivolous, or redundant may be considered equivalent to a demurrer and the order entered thereon appealable, 3 essential elements comprising the test must be present: (1) The motion must be one to strike the entire answer or reply, or the whole of one or more defenses separately stated therein; (2) it must accept as true for its purpose all the allegations of fact in the defense attacked and not supported by affidavits tending to establish facts different from or in addition to those alleged; and (3) the only issue raised by the motion must be one of law, i.e., whether the defense attacked states a defense. Buckman v. E. H. Schaefer & Asso., Inc. 50 W (2d) 755, 185 NW (2d) 328.

An order denying a motion for production of hospital records is appealable under sub. (3); an order denying a penalty for refusal to produce records is appealable under sub. (2) (a); an order allowing a witness to correct a deposition before signing it is not appealable. Fanshaw v. Medical Protective Asso. 52 W (2d) 234, 190 NW (2d) 155.

The last clause of sub. (3) which prohibits certain appeals is a nullity. Wisth v. Mitchell, 52 W (2d) 584, 190 NW (2d) 879.

An order requiring payment of insurance proceeds into court is not appealable under sub. (1). It does not decide a question of jurisdiction where that issue was not raised at the trial level. Malkowski v. Malkowski, 52 W (2d) 731, 190 NW (2d) 924.

An order granting or denying a motion for review of a prior order or judgment is not appealable unless the motion for review presented issues other than those determined by the order or judgment. Ver Hagen v. Gibbons, 55 W (2d) 21, 197 NW (2d) 752.

Orders denying a stay of proceedings and denying a motion for a bill of particulars are not appealable under (3). Campfire Land Co. v. Jolin, 55 W (2d) 229, 198 NW (2d) 593.

An order granting a motion to strike part of an answer is not appealable as the equivalent of a demurrer when based on affidavits in addition to the answer. Gauger v. Ludwig, 56 W (2d) 492, 202 NW (2d) 233.

An order reversing a judgment of a county court dismissing an action without prejudice, which remanded the case for trial is not appealable. Milwaukee v. Cohen, 57 W (2d) 38, 203 NW (2d) 633.

An appeal will lie from an order for medical examination changed at the request of the plaintiff to require the presence of his attorney since this is a modification of a provisional remedy. Whanger v. American Family Mut. Ins. Co. 58 W (2d) 461, 207 NW (2d) 74.

An order allowing an alternative writ of mandamus is not an appealable order. A denial of a motion to quash a petition for a writ of mandamus on the ground that the court lacked jurisdiction would be appealable, but the right is waived when action is taken in response to the writ. Gratzek v. Real Estate Examining Board, 58 W (2d) 534, 206 NW (2d) 611.

An order quashing the part of a subpoena which requires the production of records is not appealable. Buchen v. Wis. Tobacco Co. 59 W (2d) 461, 208 NW (2d) 373.

An order which refuses modification or vacation of a previous order is not appealable. Gallagher v. Schernecker, 60 W (2d) 143, 208 NW (2d) 437.

An order refusing to compel an answer to written interrogatories is not appealable. Chudnow Construction Corp. v. Commercial Disc. 60 W (2d) 429, 210 NW (2d) 721.

An order relating to venue is not appealable. Grage v. Wis. Area Health and Welfare Fund, 60 W (2d) 761.

Where a juvenile judge determined that a statute was unconstitutional and therefore the court had no jurisdiction, this was an appealable order under (3). In re Interest of F.R.W. (a minor), 61 W (2d) 193, 212 NW (2d) 130.

The order liquidating damages is not an appealable order. Aspenleiter v. William Beaudoin & Sons, Inc. 64 W (2d) 390, 219 NW (2d) 310.

An order denying extension of time in which the widow could elect to take under the will is not only nonappealable because it was made ex parte at chambers after a telephone call to the judge, but it is also a nullity because it could only be made on notice by the court in session. Estate of Rehfuss, 65 W (2d) 409, 222 NW (2d) 409.

An order denying the motion of a person not a party to the action to intervene is appealable under (2) because the order is a final order affecting a substantial right as to him. Becker v. Becker, 66 W (2d) 731, 225 NW (2d) 884.

The test as to whether a judicial document issued in response to a motion constitutes an order or merely a trial court opinion is whether the court contemplates any further formal order with respect to the motion. Barneveld State Bank v. Petersen, 68 W (2d) 26, 227 NW (2d) 690.

Although an order appointing a special administrator is nonappealable, so that an estate is not left without an administrator to administer it, an order removing a special administrator is not subject to the same consideration, and because such order denies the administrator's right to administer the estate and receive compensation therefor, it affects a substantial right, is final, and, being made in special proceedings, is appealable. Estate of White, 69 W (2d) 649, 231 NW (2d) 194.

817.34 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.

History: Sup. Ct. Order, 67 W (2d) 761.

This section does not permit review of intermediate orders on appeal from the final order unless the intermediate orders are nonappealable. United States v. Burczyk, 54 W (2d) 67, 194 NW (2d) 608.

Although plaintiff could have appealed from an order sustaining defendant's demurrer, the order can be reviewed on an appeal from the judgment. Sawejka v. Morgan, 56 W (2d) 70, 201 NW (2d) 528.

An order requiring a party to pay jury fees because new matter introduced the day before a trial required a continuance is not reviewable on appeal from the judgment because it does not involve the merits. Smith v. St. Paul Fire & Marine Ins. Co. 56 W (2d) 752, 203 NW (2d) 34.

817.35 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.

History: Sup. Ct. Order, 67 W (2d) 761.

817.36 Further proceedings in trial court. When the record and remittitur are received in the trial court:

(1) If the trial judge is ordered to take specific action, he shall do so as soon as possible.

(2) If a new trial is ordered, the clerk of the trial court, upon receipt of the remitted record, shall place the matter on the trial calendar.

(3) If action or proceedings other than those mentioned in subs. (1) or (2) is ordered, any party may, within one year after receipt of the remitted record by the clerk of the trial court, make appropriate motion for further proceedings. If further proceedings are not so initiated, the action shall be dismissed except that an extension of the one-year period may be granted, on notice, by the trial court, if the order for extension is entered during the one-year period.

History: Sup. Ct. Order, 50 W (2d) vii; Sup. Ct. Order, 67 W (2d) 761.

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

For disposition after remittitur of pending motion for new trial, see 805.15.

Comment of Judicial Council, 1971: This is an attempt to clear up an ambiguity in the present language. The existing section was recommended by the Judicial Council in its report to the court of August 3, 1964. [Re Order effective July 1, 1971]

817.37 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.

History: Sup. Ct. Order, 67 W (2d) 761.

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