CHAPTER 358.

APPEALS, NEW TRIALS AND EXCEPTIONS IN CRIMINAL CASES.

358.01 Appeal from justice's court. Every person convicted before a justice of the peace of any offense may appeal from the sentence to the circuit court then next to be held in the same county, and such appellant shall be committed to abide the sentence of said justice until he shall recognize to the state of Wisconsin in such reasonable sum, with such sureties as said justice shall require, with condition to appear at the court appealed to and there to prosecute his appeal and to abide the sentence of the court thereon and in the meantime to keep the peace and be of good behavior.

Note: A motion in arrest of judgment lies only after verdict and before judgment. After judgment a defendant seeking review must resort to the remedies given either by the common law or by statute. State v. Slowe, 230 W 406, 284 NW 4.

A defendant may appeal to circuit court after he has been convicted in justice court and paid his fine and costs therein. 33 Atty. Gen. 70.

358.02 Duty of justice. The justice, on such appeal, shall make a copy of the conviction and other proceedings in the case and transmit the same, together with the recognizance, if any shall be taken, to the clerk of the court appealed to; and the fees of the justice therefor shall be paid from the county treasury in like manner as other costs in criminal prosecutions are paid.

358.03 Fees not to be advanced. The appellant shall not be required to advance any fees in claiming his appeal nor in prosecuting the same; but, if convicted in the circuit court or if sentenced for failing to prosecute his appeal, he may be required, as part of his sentence, to pay the whole or any part of the costs of prosecuting.

358.04 Failure to prosecute. If the appellant shall fail to enter and prosecute his appeal he shall be defaulted on his recognizance, if any was taken, and the circuit court may award sentence against him for the offense whereof he was convicted in like manner as if he had been convicted thereof in that court; and, if he is not then in custody, process may be issued to bring him into court to receive sentence. If upon any trial in the circuit court the defendant shall be convicted and any fine assessed judgment shall be rendered for such fine and for the costs in both courts against the defendant and his sureties.

358.05 Forfeiture, how paid. Whenever, upon action brought upon any recognizance to prosecute an appeal, the penalty thereof shall be adjudged to be forfeited or when, by leave of the court, such penalty shall have been paid to the county treasurer or to the clerk of the court, without an action or before judgment shall be given in manner by law provided, if by law any forfeiture shall accrue to any person by reason of the offense of which the appellant was convicted the court may award to him such sum as he may be entitled to out of such forfeiture.

358.06 New trial; service of affidavits; writ of error. (1) The circuit court may, at the term in which the trial of any indictment or information shall be had or within one year thereafter, and in either case before or after judgment, on the petition or motion in writing of the defendant, grant a new trial for any cause for which by law a new trial may be granted or when it shall appear to the court that justice has not been done, and on such terms and conditions as the court may direct. Such petition or motion shall be signed by the defendant or his attorney and shall set forth specifically the grounds upon which the defendant will rely for a new trial, and the same shall be filed with the clerk of the court of the county in which the action was tried at least twenty days before the argument of such motion; but the court may by order fix a shorter time.

(2) If the defendant desires to use any affidavits upon such motion copies of the same shall be served upon the district attorney at least twenty days before the argument of the motion, or such shorter time as the court may by order designate. When an application for a new trial under this section shall be refused a writ of error shall, on the application

of the defendant, be issued from the supreme court to bring such matter before it; and upon such writ the supreme court shall have the power to review the order refusing to grant a new trial and render such judgment thereon as it may deem proper.

Note: Failure of the district attorney to hold an inquest is not cause for reversal of a conviction of manslaughter. A defendant is not entitled to a new trial based on newly-discovered evidence, where all the circumstances to which it related were carefully gone into upon the trial. State v. Doran, 213 W 130, 250 NW 771.

The provisions of this section relating to a writ of error are not applicable to a basstardy proceeding because these provisions are confined to criminal actions. 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.

358.065 Effect of granting new trial. When a new trial is granted, such new trial shall proceed in all respects as if no former trial had been had. On the new trial the defendant may be convicted of any offense charged in the indictment or information irrespective of the verdict or finding on the former trial. The former verdict or finding shall not be used or referred to in evidence or argument on the new trial. [*1941 c. 306*]

358.07 Exceptions; stay of proceedings. Any person who shall be convicted of an offense before the circuit court, being aggrieved by any opinion, direction or judgment of the court in any matter of law, may allege exceptions to such opinion, direction or judgment, which exceptions being reduced to writing in a summary mode and presented to the court at any time before the end of the term, and if found conformable to the truth of the case, shall be allowed and signed by the judge, and thereupon all further proceedings in that court shall be stayed, unless it shall clearly appear to the judge that such exceptions are frivolous, immaterial or intended only for delay; and in that case judgment may be entered and sentence awarded in such manner as the judge may deem reasonable notwithstanding the allowance of such exceptions.

358.08 Reporting case to supreme court. If upon the trial of any person who shall be convicted in said circuit court any question of law shall arise which, in the opinion of the judge, shall be so important or so doubtful as to require the decision of the supreme court he shall, if the defendant desire it or consent thereto, report the case so far as may be necessary to present the question of law arising therein, and thereupon all proceedings in that court shall be stayed.

Note: Where there had been no conviction of the defendant, the trial judge was without authority to report the case to the supreme court for the certification of questions, and the supreme court is without jurisdiction to determine the questions submitted. State v. Kaiser, 214 W 44, 252 NW 273.

In order to constitute a "conviction" so as to authorize the certification of a question of law to the supreme court there must be either a verdict of guilty by a jury or a finding of guilty by the trial judge after waiver of a jury trial. If a question certified to the supreme court involves an issue with respect to the intent of the defendant, the question is one of fact, and is not within this section or the jurisdiction of the supreme court. State v. Konkol, 221 W 184, 266 NW 174.

See note to 59.47, citing 28 Atty. Gen. 86.

358.09 Recognizance. Any person not being accused of an offense punishable by imprisonment for life, who shall file exceptions or for whose benefit a report shall be made by the judge as is provided in sections 358.07 and 358.08, may recognize to the state of Wisconsin in such sum as the judge shall order with sufficient sureties, for his personal appearance at the supreme court at the then next term thereof, and to enter and prosecute his exceptions with effect, and abide the sentence thereon, and in the meantime keep the peace and be of good behavior.

358.10 Commitment; writ of error. If any person so filing exceptions or desiring a report to be made by the judge shall not so recognize he shall be committed to prison to await the decision of the supreme court, and in that case the clerk of the court in which the conviction was had shall file a certified copy of the record and proceedings in the case in the supreme court, and the court shall have cognizance thereof, and consider and decide the questions of law, and shall render such judgment and award such sentence or make such order thereon as law and justice shall require; and if a new trial is ordered the cause shall be remanded to said circuit court for such new trial, but the proceedings here prescribed shall not deprive any party of his writ of error for any error or defect appearing of record.

358.11 Writ of error; bill of exceptions; new trial; bail. Writs of error in criminal cases may issue and bills of exception may be served, noticed and settled in the manner and within the time, and motions for new trial may be made upon the same grounds, provided by law in civil cases, but no writ of error upon a judgment of conviction for an offense punishable by imprisonment for life shall issue unless allowed by one of the justices of the supreme court upon notice given to the attorney-general; and no writ of error in any criminal case shall stay or delay the execution of the judgment unless it shall be allowed by one of the justices of the supreme court, with an express order for such stay of

proceedings; in which case such justice of the supreme court may, at the same time, make such order as the case may require for the custody of the plaintiff in error or for letting him to bail, or such plaintiff in error may, upon a habeas corpus, procure his enlargement by giving bail if entitled thereto.

Note: A writ of error does not lie to review an order denying a motion to enjoin the clerk of the circuit court from issuing certificates of commitment and to enjoin the sheriff from imprisoning or interfering with the liberties of defendants, sought on the ground that their respective terms of imprisonment had already expired by reason of allegedly illegal stays of execution of sentence, the order in question not being in the nature of a final judgment, and the defendants having an adequate remedy by habeas corpus to restore any rights taken from them. Martin v. State, 236 W 571, 295 NW 681.

358.13 prevails over 358.11 so far as in conflict therewith. State v. Dingman, 237 W 584, 297 NW 367.

When a proper remedy is afforded by appeal or ordinary writ of error, the writ of error coram nobis will not lie. The merits of the original controversy are not in issue in coram nobis proceedings. An alleged error of fact which justifies granting a writ of error coram nobis must be such as would have prevented conviction, not merely new evidence which might have caused a different result. The writ of error coram nobis will not be granted on the ground that the conviction was obtained by perjured or mistaken testimony. State v. Dingman, 239 W 188, 300 NW 244.

358.12 State may appeal. A writ of error may be taken by and on behalf of the state in criminal cases:

(1) From an order or judgment quashing, setting aside, or sustaining a demurrer to any indictment or information, or any count thereof.

(2) From an order or judgment sustaining a plea in abatement or a special plea in bar made or rendered, before jeopardy has attached.

(3) From any final order or judgment, adverse to the state, made or rendered before jeopardy has attached.

(4) From an order granting a new trial.

(5) From an order in arrest of judgment.

(6) From an order or judgment of conviction upon a record containing rulings adverse to the state, in every case where the defendant prosecutes a writ of error. In every such case the whole record shall be carried before the supreme court and the case treated and presented as in cases of cross appeals in civil actions, and all questions of law thus presented shall be decided by the supreme court.

(7) From a judgment and sentence of a trial court rendering a sentence not authorized by law.

(8) From rulings and decisions adverse to the state upon all questions of law arising on the trial, with the permission of the presiding judge, in the same manner and to the same effect as if taken by the defendant. [*1941 c. 306*]

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

Jeopardy does not attach on preliminary examination. Defendant is not in "jeopardy" until jury has been duly impaneled and charged with his deliverance. but conviction or acquittal by any competent tribunal satisfies requirement of jeopardy. Pepin v. State ex rel. Chambers, 217 W 568, 259 NW 410.

Under 358.12 (3) and (6), Stats. 1937, the state cannot appeal nor can it prosecute a writ of error from a final judgment in a criminal case after jeopardy has attached, unless the defendant has first prosecuted a writ of error. State ex rel. Steffes v. Risjord, 228 W 535, 280 NW 680.

A writ of error may be taken by the state from a judgment granting the defendant's motion (made after a plea of not guilty but preliminary to trial) to suppress the evidence and discharging the defendant from custody. State v. Hunter, 235 W 188, 292 NW 609.

Where the state seeks to sue out a writ of error after the trial court has set aside a verdict of guilty, application for permission to sue out the writ should be made to the trial judge at the time the judgment of acquittal is rendered, so that the judge may then determine whether he will grant permission to have the case reviewed, and so that, if such permission is granted, the defendant may be permitted to furnish bail or be retained in custody, and in this manner the jurisdiction of the court over the defendant be retained. State v. Witte, 243 W 423, 10 NW (2d) 117.

Under 358.12 (8) there can be no appeal by the state from either a judgment of acquittal and discharge of a defendant, or from a subsequent order denying permission for the state to appeal from the judgment, unless such permission is first granted in each instance by the trial court. State v. McNitt, 244 W 1, 11 NW (2d) 671.

An order, made after trial in a prosecution tried to the court for violations of the game laws, and granting the defendants' motion to suppress certain evidence on grounds of illegal search and seizure, is not appealable by the state. State v. Flanagan, 248 W 406, 21 NW (2d) 638.

A ruling of the trial court, in a prosecution under 85.81 (3), setting aside a verdict of guilty and discharging the defendant on grounds of insufficiency of the evidence to establish that the defendant was in a drunken condition, which ruling necessarily involved the consideration of questions of fact as to the credibility, weight, and effect of conflicting testimony, was a ruling on questions of fact, not on "questions of law," hence is not reviewable within 358.12 (8), by a writ of error taken by the state. State v. Nall, 248 W 584, 22 NW (2d) 520.

A ruling on evidence in a criminal case is not in itself appealable by the state under (8). Where there is a reasonable doubt as to the correctness of a ruling on important evidence in a criminal case and the court permits the state to appeal, the proper procedure for the state is to enter the order of permission prior to or contemporaneous with the entry of a final judgment of acquittal, and to avoid discharge of the defendant pending the appeal, thereby avoiding constitutional objections to double jeopardy and at the same time furnishing the supreme court with subject matter that is appealable. State v. Flanagan, 249 W 521, 25 NW (2d) 111.

358.13 Appeals in criminal cases. In all cases in which a writ of error is authorized by law to be issued by the supreme court to review any judgment or order in a criminal

case, the party entitled to obtain such writ, in lieu thereof, may take an appeal from such judgment or order to the supreme court to obtain such review, by serving notice of appeal and procuring return to be made in the manner provided by law in civil cases. 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 criminal case is limited to one year from the date of entry of such judgment or order.

Note: Copies of affidavits made by the complaining witnesses in a criminal prosecution after the trial and more than a year prior to the hearing of an appeal, and an affidavit of defense counsel based on facts known by him nearly a year prior to such hearing, not presented to the trial court and not coming to the supreme court under the certificate of the clerk of the trial court, are not available for any purpose on the appeal. Schroeder v. State. 222 W 251, 267 NW 899.

Bastardy proceedings are reviewable by appeal. Lang v. State ex rel. Bunzel, 227 W 276, 278 NW 467.

358.13 prevails over 358.11 so far as in conflict therewith, 358.13 being the later enactment. State v. Dingman, 237 W 584, 297 NW 367.

358.14 Stay of execution in criminal cases. When a person not convicted of an offense punishable by imprisonment for life, shall take an appeal or procure a writ of error, the trial court at any time before the record is filed in the supreme court, or a justice of the supreme court thereafter, shall have power by express order to stay execution of the judgment pending such appeal or writ of error in case such trial court or justice shall certify that upon the record there is reasonable doubt that the judgment should stand. No stay shall be granted except upon reasonable prior notice to the prosecuting attorney or attorney-general. In case such stay is granted the accused shall recognize to the state of Wisconsin in such sum as the court or justice ordering such stay shall determine, with sufficient sureties, for his appearance in the supreme court at the current or next term thereof, to prosecute his appeal or writ of error with effect, and to abide the sentence thereon, and in the meantime, keep the peace and be of good behavior.

Note: No stay of execution in a criminal case pending appeal or writ of error may be granted in the supreme court except on reasonable notice to the prosecuting attorney or the attorney-general, and, unless he appears or waives notice, the application will not be granted until the proper notice is given; nor unless the record is already filed in such court at the time the application is made. State v. Tyler, 238 W 589, 300 NW 754.

The effect of 358.14, providing for a stay of execution in criminal cases to enable a writ of error to be procured or an appeal to be taken, 57.01 et seq., providing for suspension of sentence and stay of execution and the placing of convicted persons on probation or parole, and 359.07, providing that every sentence shall commence on the day thereof but that any time elapsing thereafter while the case is pending in the supreme court shall not be computed as any part of the term of such sentence, is by necessary implication to restrict and limit the power of the court in respect to granting a stay of execution of a sentence. Drewniak v. State ex rel. Jacquest, 239 W 475, 1 NW (2d) 899.